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The constitutional exercise of the right of a bank to cancel its contract with a customer on notice: Revisiting Bredenkamp v Standard Bank of South Africa (SCA)

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The constitutional exercise of the right of a bank to cancel its contract with a customer on notice: Revisiting *Bredenkamp v Standard Bank of South Africa* (SCA).

by

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Submitted in partial fulfilment of the requirements for the degree of

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Date: 24 OCTOBER 2023

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DECLARATION

I, 0716472J (Student number, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

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Abstract:

The enforcement of a valid clause in a contract when determining public policy considerations is the subject of this study. This research report investigates the application of the public policy test for determining the enforceability of a valid contractual clause as established in *Barkhuizen.*[1]

After *Bredenkamp,*[2] important legal developments arose in this area of law. In this report, the three *Bredenkamp* judgments are analysed. This discourse shows that *Beadica*[3] provides clarity on fairness and reasonableness in contracts, but the clarity lacks practicality on how courts should determine cases that raise contractual disputes between the parties. *Survé*[4] and *Oakbay*[5] are discussed to examine the bank's enforcement of its termination clause and the resultant effect on the client.

This research report provides recommendations regarding the approach courts should take when considering the circumstances of the strict (unfair) enforcement of valid contractual clauses.

It argues that a more practical guide, and assessment on a case-by-case basis, is prudent for judges when considering the strict (unfair) enforcement of a valid clause. The suggestions ought to allow for a more consistent analysis of the enforcement of contracts and its clauses in South African contract law.

[1] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) ('*Barkhuizen*').
[2] *Bredenkamp v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA) ('*Bredenkamp* appeal case').
[3] *Beadica 231 cc and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC) ('*Beadica*').
[4] *Survé v Nedbank Limited* 2022 SAWCHC 19 (WCHC) ('*Survé* WC'); *Survé Nedbank Limited* (WCHC) unreported case no EC02/2022 of 17 June 2022 ('*Survé* EC'); *Survé v Nedbank Limited* unreported case no IR153Dec21 of 16 December 2022 ('*Survé* CT'); *Mercantile Bank, a Division of Capitec Limited v Survé* unreported case no 206/CAC/Oct22/208/CAC/Oct22/210/CAC/Oct22 CT ('*Survé* CT Appeal'), collectively referred to as ('*Survé* judgments').
[5] *Miniter of Finance v Oakbay Investments (Pty) Ltd and others*; *Oakbay Investments (Pty) Ltd and others v Director of the Financial Intelligence Centre* 2017 (4) SA 150 (GP) ('*Oakbay*').

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I INTRODUCTION

A central principle of the South African legal system is fairness, which is the basis of contract law. Prior to the Constitution,[6] courts generally upheld the concept of sanctity of and freedom to contract.[7] However, courts sometimes recognised that they had the power to reject enforcing contracts that conflicted with public policy.[8] There was not much development then, that would allow courts to refuse to enforce contracts that were legally binding even if they were against public policy.[9]

Public policy was recognised as a tool to determine if a clause was enforceable, and the focus at the time was on the objective validity of the contract considering public policy and not the validity of its enforcement in particular circumstances.[10] Courts had a strict approach when enforcing contracts, even if their enforcement may have been unfair.[11] Public policy was tested objectively.

Before the enactment of the Constitution, when considering public policy, the general attitude was that, in most cases, i) the freedom of contract and the concept of *pacta sunt servanda* are more important than the fairness of the contract itself.[12] This is because, in most cases, ii) the parties will only enter a contract voluntarily and if they think it is in their own best interests, parties are free to bargain with each other, therefore the contract should or would result in being fair to both parties, and that iii) each person ought to look out for their own interests, and the courts were not duty bound to protect individuals against their own bad choices.[13]

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[6] Constitution of the Republic of South Africa, 1996. 'The cornerstone values of contract law are freedom of contract and good faith.' – found at Deeksha Bhana, Minette Nortje & Elsje Bonthuys *Student's Guide to the Law of Contract 5 ed* (2022) 8.
[7] *Beadica* supra note 3 para 30. This case discussed *inter alia* that Fairness and good faith echo the constitutional values of ubuntu.
[8] Ibid para 12; and Tsukudu Kenyatta Moroeng *Making Sense of Barkhuizen 2: An Investigation into the Public Policy Defence of 'Unfair Enforcement' in South African Law, with Reference to the Law on Covenants in Restraint of Trade* (published LLM thesis, Rhodes University, 2021) at 13 – 14.
[9] Ibid at 15.
[10] Ibid at 15.
[11] Ibid.
[12] *Beadica* supra note 3 paras 20; 30; 35 & 87.
[13] Ibid paras 89; 90; 112; 119 & 187.

The resultant effect was that unfairness could only lead to illegality if the clause of the contract or the entire contract was grossly unfair and exploitative as per the doctrine of unconscionability.[14] Unfairness within contracts was secondary to *pacta sunt servanda*.

Considering the above, there is still no general rule that emphasises that contracts must be objectively fair. Just because a judge subjectively finds a term of a contract to be 'unfair' does not automatically deem the term to be against public policy. The law of contract in South Africa does not support the concept of independent or free-floating contracts.[15] A clause or contract can be considered unfair if it is regarded by a judge as being against public policy.[16]

Since the enactment of the Constitution, the rights enshrined in the Bill of Rights ('BOR') have been an important source in determining what is fair and reasonable. Objectively, unfairness is merely a factor to be considered when courts consider if a contract or its terms are against public policy.[17] In *Barkhuizen,* the Constitutional Court ('CC') set out a two-stage enquiry to determine whether the clause in question was against public policy: i) is the clause that is under consideration reasonable in itself; and ii) if the clause is reasonable, would its enforcement be reasonable under the circumstances.[18]

The first leg of the enquiry requires two considerations to be weighed up, the first being the public interest[19] and the second being that parties enter contracts freely and voluntarily and therefore terms and obligations agreed to ought to be complied with.[20]

The second consideration is the principle of *pacta sunt servanda* (parties are bound to the terms of the agreement they concluded).[21] The principle *pacta sunt servanda* is an important principle in contract law, as it gives effect to freedom and dignity which are values enshrined in our Constitution.[22] As observed in *Barkhuizen* '[a]ll law, including the common law of contract,

[14] *Beadica* supra note 3 paras 26, 125 and 183; and *Barkhuizen* supra note 1 paras 159 and 183.
[15] Ibid para 29.
[16] *Bredenkamp* appeal case supra note 2 paras 51-52.
[17] *Brisley v Drostsky* 2002 (4) SA 1 (SCA) ('*Brisley*') paras 4-5- this case addressed that Freedom of contract is premised on the foundations of the Constitution and the values such as freedom and dignity; and *Afrox Healthcare BPK V Strydom 2002* (6) SA 21 (SCA) ('*Afrox*') paras 8-10.
[18] *Barkhuizen* supra note 1 paras 56-58.
[19] Ibid para 57.
[20] Ibid.
[21] D Bhana 'Contract Law and the Constitution: *Bredenkamp v Standard Bank of South Africa Ltd (SCA)*' (2014) 29 *SAPL* 509 – 521, 513.
[22] *Barkhuizen* supra note 1 para 15.

is now subject to constitutional control…The application of the principle *pacta sunt servanda* is, therefore, subject to constitutional control.'[23]

Prior to the introduction of the subjective leg in the public policy test in *Barkhuizen*, the common law test for illegality was objective.[24] There were concerns that a subjective test would lead to unjust and unpredictable results, for example where different individuals would have a different result. It was argued that 'making rules of law discretionary or subject to value judgments may be destructive of the rule of law'.[25]

This research report aims to focus on the application of the second subjective leg of *Barkhuizen* in relation to contractual clauses permitting a bank to terminate a bank-client relationship by unilateral notice.

(a) *Rationale for a focus on bank terminations by unilateral notice*

Over the last few years, there has been an influx of matters that have necessitated and resulted in the closure of bank accounts held by individuals or entities that are subject to State Capture, allegations of money laundering, fraud, or illicit activity.[26] The *Bredenkamp* appeal case remains the leading jurisprudence on the bank's right to terminate a bank-client relationship unilaterally with or without reasons. After the *Bredenkamp* appeal case, cases such as *Oakbay*[27] and more recently, the three *Survé* judgments[28], have raised issues and debates around a bank's right to exercise termination and closure of accounts, as well as the factors to be considered.

Banks are integral to daily commerce within our economy. Cash is no longer king. For business autonomy and transactions, a bank-client relationship is a necessity for daily commerce and the growth of our economy. Hence, there are certain contracts, such as the bank-client relationship, that 'have become an important part of the contract landscape in the modern economy.'[29]

[23] Ibid.
[24] *Barkhuizen* supra note 1 paras 154, 169 and 178; and Bhana op cit note 21 at 516-517.
[25] *Bredenkamp* appeal supra note 2 para 39.
[26] *Oakbay* supra note 5; and *Survé* judgments supra note 4.
[27] *Oakbay* supra note 5.
[28] *Survé* judgments supra note 4.
[29] Schulze, WG and Eiselen, SIEG 'Regspraak: The unilateral termination by a bank of the bank-client agreement between it and its client' (2022) 4 *TSAR* 828 - 838.

Like insurance companies, bank's contracts are typically standardised agreements that do not give clients much room for negotiation. They also tend to leave it to the client to decide whether they want to conclude the contract. In some cases, unequal bargaining power can emerge due to these contractual terms. Our Constitution and its core values has developed the notions of fairness and reasonableness, with the duty to develop the common law,[30] application of legislative obligations locally and internationally as well as the importance of combating money laundering, fraud, corruption, and further illicit activities.[31]

The question to be considered is in what circumstances banks may lawfully terminate bank accounts of customers without being in contravention of public policy. When a bank decides to terminate its relationship with a client due to allegations of illegal activity, it is faced with the dilemma of whether it is justified.[32]

This research report will interrogate the bank's right to unilaterally terminate a bank-client relationship and will establish whether such termination is fair and reasonable under the developments of the Constitution and jurisprudence since *Bredenkamp*.

The judgments in *Beadica, Survé, Oakbay* and *Bredenkamp* will be scrutinised in further detail, to determine the prejudice, and potential prejudice, suffered by both parties. According to the *Bredenkamp* appeal, the bank's rationale for terminating a client's relationship is based on the risk of business and reputational harm, the client's exposure to discrimination, and restrictions on business activity.[33]

I will discuss and consider if the bank's conduct of terminating bank-client relationships at its discretion based on reputational risk, and under basic contract law in the private sphere, is warranted. I will further discuss and determine if a bank's decision to terminate is legally valid. Its basis to do so will be examined against the provisions of FICA[34] and other constitutional principles.

[30] *Beadica* supra note 3 para 35; and *Barkhuizen* supra note 1 para 35.
[31] *Oakbay* supra note 5; and *Survé* judgments supra note 4.
[32] *Bredenkamp* appeal case supra note 2 paras 61 and 65.
[33] Ibid 18.
[34] The Financial Intelligence Centre Act 38 of 2001 as amended by the Financial Intelligence Amendment Act 1 of 2017 ('FICA' or Financial Intelligence Centre ('FIC').

II THE THREE JUDGMENTS IN *BREDENKAMP*

A bank is entitled to terminate a relationship with notice, or without notice.[35] Clauses allowing a bank to unilaterally terminate were not regarded as being against public policy pre-constitutionally. *Bredenkamp* concerned the bank's exercise to terminate the bank-client relationship unilaterally. *Bredenkamp* conceded that the unilateral termination clause was not objectively against public policy.[36] The core issue was whether enforcement was against public policy in the circumstances of the case, in accordance with the subjective leg of the *Barkhuizen* case.[37]

Barkhuizen held that courts can refuse to enforce a legal clause that is contrary to public policy if it is based on the values and principles of the Constitution.[38] To determine whether a legal clause should be enforced, the CC said that a party must provide adequate reasons as to why it should not be enforced.[39] *Barkhuizen* established the rules that allow courts to test the validity of such clauses.[40]

There was initially a lot of doubt about the scope of the second leg of *Barkhuizen*. Some cases considered subjective fairness as a requirement for the enforcement of the Constitution, while the SCA noted that it only became relevant if the interests of the public were involved.[41] At the time of the *Bredenkamp* judgments this issue had not been resolved. However, all three *Bredenkamp* judgments applied the second subjective leg, *albeit* only obiter in the case of the *Bredenkamp* appeal case, as the SCA regarded the subjective leg of *Barkhuizen* as being legally irrelevant to the *Bredenkamp* case.[42]

The scope of the subjective leg was controversial at the time of the *Bredenkamp* judgments. While the interim and main judgments of *Bredenkamp* regarded the subjective leg as always applicable, the SCA was of the view that it only applied when '…public policy consideration found in the Constitution or elsewhere is implicated'.[43]

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[35] *Breedenkamp v Standard Bank of SA Ltd* 2009 (5) SA 304 (GSJ) ('*Bredenkamp* Interim') paras 25 and 27.
[36] *Bredenkamp* appeal case supra note 2 para 65.
[37] Ibid paras 1 and 49.
[38] *Barkhuizen* supra note 1 para 178.
[39] Ibid para 58.
[40] Ibid para 15.
[41] *Beadica* supra note 3 para 38; and *Barkhuizen* supra note 1 para 56.
[42] *Bredenkamp* appeal case supra note 2 para 26.
[43] Ibid para 50.

Bredenkamp requested the court to determine if the clause of the contract with Standard Bank ('SB') that allowed for unilateral termination by the bank was in contravention of any constitutional values.[44] There were three reasons for the termination of the bank-client relationship: i) the listing by the American Department of Treasury's Office of Foreign Assets Control ('OFAC') of *Bredenkamp* and other applicants (the listing was that OFAC suspected that *Bredenkamp* was involved in illicit activities); ii) the reputational risk that SB could be exposed to, should it continue its relationship with Bredenkamp; and iii) business risks for SB should it persist with banking facilities with Bredenkamp and his associated entities, due to his listing as a specially designated national ('SDN').[45]

The three *Bredenkamp* judgments will be discussed below and the application of the subjective leg to the facts of the case will be canvased.

(a) Bredenkamp *Interim*

The factors the court considered was the unequal bargaining power between the parties under standard form contracts.[46] The banks position within society.[47] Fairness for the termination of the bank-client relationship, giving effect to a termination without cause,[48] and the irrationality of decision making.[49] Jajbhay J held that the termination by SB was unreasonable and accordingly the relief sought by *Bredenkamp* was granted.[50]

Given the relationship with *Bredenkamp* and the impact of the termination of the bank accounts, a reasonable expectation would have been that SB should have exhausted other remedies.[51] Other remedies would have been to not consider the international listings, and to monitor the accounts, pending the various appeals.[52] Jajbhay J pointed out that because the *Bredenkamp* case was a South African case, the OFAC blacklisting was not directly relevant.[53] It was held

[44] *Breedenkamp v Standard Bank of South Africa Ltd* 2009 6 SA 277 (GSJ) ('*Bredenkamp* Final') para 14.
[45] Ibid paras 5-9.
[46] *Bredenkamp* Interim supra note 35 para 62.
[47] Ibid para 60.
[48] Ibid paras 61 – 62.
[49] Ibid paras 59-68.
[50] Ibid para 71.
[51] Ibid para 64.
[52] Ibid.
[53] Ibid para 70.

that the exercise of the enforcement of the termination clause was drastic in the circumstances.[54]

The effect of the termination of the bank-client relationship regardless of the reason '…creates a black mark against the customer's name.'[55] The impact on the client is that it would be difficult to obtain other bank accounts.[56] Jajbhay J held that the four major banks in South Africa dominate the country's banking industry. This oligopoly structure allows them to control the market for their services.[57] The banks 'exploited their power by imposing standard form contracts on customers'.[58] *Bredenkamp* accordingly had no choice in the matter, and it was likely that the other banks would follow suit and impose the same terms.[59] 'In effect, therefore, the closure of an account operates to put the customer on an informal "blacklist"'.[60] Especially when the reason for a closure was due to reputational risk.[61] It was accepted by SB that the termination of the accounts would have the effect of a client being blacklisted, but argued that '…the applicants in this case were authors of their own misfortune since they brought themselves into disrepute.'[62] The applicants contention was that the OFAC and other listings were subject to appeal and 'until they are decided, the stigmatisation of the applicants by their 'blacklisting' is, to say the very least, premature.'[63]

The court held that the termination of SB was oppressive due to the applicants being unable to obtain alternative banking arrangements.[64] Having a clause in a contract that allows for closure of bank accounts without good cause, or no cause at all is deemed to be unfair and oppressive.[65] Accordingly the common law should be developed to restrict parties in a stronger bargaining position or standing in society from exercising such clauses.[66] The court considered the arguments presented by *Bredenkamp* and agreed that he had a *prima facie* case for an interdict.

[54] Ibid paras 64-65.
[55] Ibid para 65.
[56] Ibid.
[57] Ibid para 60.
[58] Ibid paras 61 and 62.
[59] Ibid para 61.
[60] Ibid para 65.
[61] Ibid.
[62] Ibid 66.
[63] Ibid.
[64] Ibid para 67.
[65] Ibid para 68.
[66] Ibid.

The court held that it is the court's duty to uphold the Constitution and develop the common law.[67]

The court noted that it would be impossible for a person to start or operate a business without having access to banking services.[68] Under the interim judgment the assumption was that due to the termination clause forming part of a standard form contract there was no room for negotiation.[69] It was clear from the facts that *Bredenkamp* was never given the chance to negotiate the terms of his contract. He was instead subjected to these conditions after most of his bank accounts had been opened.[70]

The most significant issue was the unequal bargaining power between the parties[71], as well as the possibility of impairing the client's personal dignity due to the lack of banking facilities.[72] Jajbhay J held that the banks have the power to exploit and impose standard form contracts on clients, which provides for the bank to unilaterally amend terms and conditions at its discretion. Such power could be utilised in an oppressive manner.[73]

The court held that the clause was imposed by SB due to its superior bargaining position, and that it deprived *Bredenkamp* of banking facilities. It also found that SB's harm did not justify termination.[74] It was further held that a clause in a contract that allows the bank to close a client's account without good cause is unfair, as it allows it to do so without following reasonable considerations.[75] SB was in a superior bargaining position, and its unilateral enforcement of a contractual clause, would be deemed to regard the enforcement of the clause as being unconstitutional.[76]

The banks decision to terminate was because of the OFAC and EU listings, and the outcomes of the pending appeals could not be predicted under the interim proceedings.[77] The concern by SB of the listings ought to be placed in context, SB within South Africa was not obligated to

[67] Ibid para 46.
[68] Ibid para 59.
[69] Ibid para 26.
[70] Ibid para 26.
[71] Ibid para 57.
[72] Ibid para54.
[73] Ibid para 62.
[74] Minette Nortje 'Unfair Contractual Terms – Effect of the Constitution – *Breedenkamp v Standard Bank of South Africa Ltd* 2009 4 SA 304 (GSJ) and 2009 6 SA 277 (GSJ)' (2010) 73 *THRHR* 518.
[75] *Bredenkamp* Interim supra note 35 para 48.
[76] Ibid and Nortje op cit note 74 at 518.
[77] *Bredenkamp* Interim supra note 35 para 69.

be observant of the listing's requirements.[78] *Bredenkamp* was also not within the jurisdiction of the listings.

> 'The people who are liable to be sanctioned are those nationals of the jurisdiction who deal with the applicants in breach of the listing requirements. If they deal knowingly with the applicants, they must bear the consequences; and if they deal unwittingly with them, then the bank's solution is simply to notify them that the transaction constitutes a regulatory contravention.'[79]

It was held that SB's decision to terminate was unreasonable and '…the exercise of power that it entails is one that, is consistent with the constitutional mandate recognised in *Barkhuizen*.'[80] Accordingly in the circumstances, it was held that it should not be permitted to be exercised.[81]

The focus of the interim judgment was the second question of *Barkhuizen*: whether the enforcement of the term is reasonable in the circumstances (subjective test).[82]

(b) Bredenkamp *Final*

Bredenkamp Final considered: the bargaining position of the parties;[83] fairness under the Constitution;[84] the unilateral termination of the contract and the effect of the termination.[85] Contrary to *Bredenkamp* Interim, the final judgment determined that the contract's clauses were not changed. The bank's decision to terminate its relationship with *Bredenkamp* was justified due to the harm it suffered.[86]

The parties had concluded a standard form contract. It would seem *prima facie* that due to the nature of the contract the parties were in an unequal bargaining position.[87] The general terms and conditions provided that the bank can at any time amend the terms of the contract on written notice.[88] If the recipient of the notice did not agree it could cancel the contract or negotiate

[78] Ibid para 70.
[79] Ibid.
[80] Ibid para 71.
[81] Ibid.
[82] Ibid paras 63; 66 and 71.
[83] *Bredenkamp* Final supra note 44 paras 21 – 30.
[84] Ibid paras 31- 33.
[85] Ibid paras 34-46.
[86] Ibid para 66.
[87] Ibid para 22.
[88] Ibid.

other terms.[89] The contention by the applicant was that SB's 'bargaining position prior to the contract being concluded was such that the bank had the power to impose terms upon it.'[90]

The court held that there was no evidence before it that this was the case.[91] There was also no evidence that banks refuse to consider the needs of their clients when making decisions.[92] It is common knowledge that different clients attract different risk profiles and accordingly attract different terms that are not public knowledge.[93] *Bredenkamp's* profession, and wealth status was common cause. Due to *Bredenkamp's* status and interest in various entities, the inference made was that he concluded many contracts as a businessman and was regarded as being familiar with the standard form contracts with financial institutions.[94] *Bredenkamp* 'is no shrinking lily.'[95] Lamont J emphasised that the conduct between the parties was '…innocuous, both as to the position of the parties at the time the contract was concluded and as to the content of the contract.'[96] It was held further that the parties were skilled negotiators, therefore the constitutional validity of the clause and the enforceability of same must be considered within this context.[97] 'These facts do not show that the applicant was at a bargaining disadvantage or in a position of inequality.'[98] Accordingly the court held that the contract was concluded and agreed to by 'parties who were equals.'[99] The contract between the parties was an established bank-client relationship, that provided SB and the client with the reciprocal right to terminate the contract on reasonable notice.[100]

The issue of fairness was the target of the constitutional attack. It was argued that the implementation of SB's procedures violated the standards and notion of fairness that were established by the Constitution.[101] The bank must place emphasis on its clients and their reputation and integrity within society. The banks must have regard to local and international positioning of their clients.[102] *Bredenkamp* contended that 'it is fair that it has a bank

[89] Ibid.
[90] Ibid para 23. The Banks Act 94 of 1990 provides that banks can freely impose terms on their clients.
[91] Ibid para 24.
[92] Ibid.
[93] Ibid.
[94] Ibid.
[95] Ibid para 25.
[96] Ibid para 28.
[97] Ibid.
[98] Ibid para 26.
[99] Ibid para 27.
[100] Ibid para 29.
[101] Ibid para 31.
[102] Ibid para 32.

account.'[103] Furthermore that the termination of the bank-client relationship will render the applicants 'unbanked', which then restricts its right to trade and other business activities.[104] *Bredenkamp* failed to show that the unilateral cancellation of the contract would render him 'unbanked'.[105] Lamont J held that the unilateral cancellation did not render the applicants 'unbanked' and that under the circumstances there was no limitation by the Constitution on the termination of the bank-client relationship.[106]

Turning to the bank's reasons for termination, the court found that it would be unfair for the relationship to continue, due to the reputational harm and business risk that the bank could face if the relationship continued. 'It would significantly invade rights of freedom of contract. It would cause it an indignity in that it would be forced to accept a position it finds repugnant.'[107] The court concluded the listing by OFAC of *Bredenkamp*, entitled SB to reassess *Bredenkamp's* accounts. Therefore, the bank was entitled to act responsibly and reasonably, which included the termination of the relationship.[108]

The main contention was around the subjective part of the test, which was whether in the circumstances of the case, the bank's exercise of the termination clause had offended the Constitution.[109] Public policy must be considered in line with the provisions of the BOR.[110] Lamont J when determining fairness of the enforcement of the clause in line with constitutional values, set out in *Barkhuizen* considered i) if the clause is reasonable, and if the enforcement of the clause is reasonable under the circumstances. ii) In addition, public policy encourages parties to conduct themselves in a certain manner. Public policy further considers notions of fairness, reasonableness, and justice.[111] The court rejected Jajbhay J's reasoning provided when granting the interim relief. The court further confirmed that SB's unilateral termination of the bank-client relationship was not against public policy.[112] The legal issue to be determined was

[103] Ibid para 33.
[104] Ibid para 33.
[105] Ibid paras 35 – 44 and 45.
[106] Ibid para 46.
[107] Ibid para 67.
[108] Ibid para 55.
[109] Ibid paras 12 – 14.
[110] Ibid para 29.
[111] Ibid para 16.
[112] Ibid paras 64, 67-68.

whether in the circumstances, the exercise of the bank cancelling the bank-client relationship offended constitutional values.[113]

(c) Bredenkamp *appeal case*

Bredenkamp then appealed the final judgment. The SCA held that '[t]he case is about fairness as an over-arching principle, and nothing more.'[114] The right of a bank to terminate the bank-client relationship was presented to the CC as a constitutional issue due to the principles set out in *Barkhuizen*[115] One of the fundamental principles that sets a contract's constitutional validity is fairness. This concept applies to both the enforcement and the terms of the contract, in other words '...even if a contract is fair and valid, its enforcement must also be fair in order to survive constitutional scrutiny.'[116]

The interim judgment found that the termination was unfair, the final judgment found otherwise, and the SCA aligned itself for the most part with Lamont J.[117]

The applicants case was their need to have access to banking facilities locally and internationally. The termination of their account was serious, and they would be required to disclose the termination of their account to any other banks they approch to conclude a relationship with.[118] There are a few leading banks in South Africa, and once they are provided with the reason for SB's closure, they would not be inclined to conclude agreements nor give access to their banking facilities, leaving the applicants 'unbanked'.[119] 'The appellants' argument is in many respects circuitous, self-destructive and, in any event, without merit.'[120] The applicants accepted that SB was entitled to terminate without any cause but sought an order declaring that SB may terminate on good cause only.[121]

The court held that to oblige SB to not terminate the relationship based on the possibility that other banks may not accept the applicant's business seemed unfair toward SB.[122] The applicants failed to identify a constitutional infringement or public policy consideration to give effect to

[113] Ibid para 14.
[114] *Bredenkamp* appeal case supra note 2 para 30.
[115] Ibid para 1.
[116] Ibid.
[117] Ibid para 54.
[118] Ibid para 55.
[119] Ibid.
[120] Ibid para 56.
[121] Ibid.
[122] Ibid para 60.

the relief sought.[123] The SCA found that the termination was not contrary to constitutional principles.[124] Therefore, the clause was fully enforceable. It held that *Barkhuizen* did not establish a general fairness standard in the law of contract.[125]

Bredenkamp appeal case precedented that banks are entitled to terminate bank-client relationships unilaterally if it is exposed to reputational harm or business risk.[126] Banks are profit driven and any negative impact on profit warrants it making a business decision. Therefore, banks can rely on cancellation clauses, in the aforesaid circumstances.[127]

In dismissing the appeal, the SCA highlighted that if there is a limitation of constitutional values it is limited by the clauses of a contract, or by the enforcement of those clauses, it must be determined whether the limitation is reasonable and fair.[128]

III SUBSEQUENT CASE LAW AND LEGAL DEVELOPMENTS

After the decision in the *Bredenkamp* appeal case, there were important legal developments in this area of the law. The first is the CC judgment in *Beadica.* Since *Bredenkamp* the SCA has consistently stated that good faith, fairness, and reasonableness are not self-serving grounds that a court can rely on when it refuses to enforce contractual terms.[129]

(a) *Beadica*

Beadica attended to clarify the law of contractual fairness, which has been contested between the CC and the SCA. A critical question is whether *Bredenkamp's* interpretation of the *Barkhuizen* principle is correct. Before the *Beadica* decision, the court did not consider *Bredenkamp's* interpretation of the law.[130] Contrary to the *Bredenkamp* appeal case, *Beadica* stated that the second subjective test of *Barkhuizen* is always applicable[131] and fairness is part of public policy.[132] There is agreement between the CC and the SCA:

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[123] Ibid.
[124] Ibid para 64.
[125] Ibid paras 50 – 53.
[126] Ibid para 64.
[127] Ibid paras 18, 55 and 63-65.
[128] *Beadica* supra note 3 para 41.
[129] Ibid para 42.
[130] Leo Boonzaier 'Contractual Fairness at the Cross Roads' vol 11, Constitutional Court Review 2021 at 27.
[131] *Beadica* supra note 3 para 16.
[132] Ibid paras 31, 34 and 42.

> "…that abstract values do not provide a free-standing basis upon which a court may interfere in contractual relationships. As mentioned, they perform creative, informative and controlling functions."[133]

In the future, subjective fairness may be regarded as a more significant factor when it comes to assessing public policies. However, this notion should be weighed up alongside other factors in the evaluation of the public policy test.[134]

(b) *Oakbay*

In December 2015, ABSA Bank Limited ('ABSA'), gave notice to terminate its banking relationship with the *Oakbay* Group, when the notice was received the entities accepted ABSA's decision without any contention. After the termination by ABSA, the other three major banks, took the same action as ABSA, which resulted in the *Oakbay* Group being 'unbanked'.[135] 'The Oakbay Group has not challenged the appropriateness or legality of the closure of its accounts by the banks.'[136]

The case concerned an application by the Minister for a declaratory order that the Minister is not by law empowered or obliged to intervene in a bank-client relationship.[137] There is no legislation that allows for a Minster to intervene in a contractual private banker-client dispute. The Constitution also does not bestow such powers.[138] The dispute between the parties was private in nature, the implications held for the economy and *Oakbay* were insignificant, the declaratory application was dismissed.[139] Parties to a bank-client relationship are governed by contractual law, their contractual disputes remain private and between them as the interested parties to the contract.[140]

With global issues and concerns around money laundering, and the release of the Public Protectors State Capture Report ('Public Protectors Report')[141], financial institutions were and continue to be on high alert in respect of any suspicious activity. The termination of the accounts was not based on tainted and suspicious activity and transactions only. Reputational

[133] Ibid para 79.
[134] Ibid para 90.
[135] *Oakbay* supra note 5 para 12.
[136] Ibid.
[137] Ibid para 2.
[138] Ibid para 55.
[139] Ibid para 69 and 84.
[140] Ibid paras 36, 55 and 69.
[141] Report No: 6 of 2016/2017

risk of the continued banking relationship was also heavily considered. The subtitle of the Public Protectors report reads:

> 'Report on an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and Directors of State-Owned Enterprises result in improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses.'[142]

The report received a lot of media attention, and the decisions taken by the banks emanated from the report, and ongoing negative publicity.[143] The closure of bank accounts, had a significant impact on conducting business in South Africa, and the estimated unemployment risk, affecting over 50 000 people.[144] The termination of the *Oakbay* accounts, was because of suspicious transactions, reported to the FIC by the banks, regarding associated individuals and entities of the group.[145] One of the 72 transactions was for the sum of R1.3 billion.[146]. The statements from the Public Protectors Report in respect of certain transactions was relied on by the Minister.[147] The termination was more based on the banks reputational risk and business harm, and this was weighed as being more important than the potential unemployment of 50 000 employees.

ABSA maintained that it gave Oakbay ample notice of its intention to terminate the bank-client relationship.[148] The *Oakbay* group held that the allegations contained in the Public Protectors Report, were hearsay evidence.[149] On reasonable grounds and notice the bank may terminate the relationship at its discretion, ensuring that the basis for termination is not contrary to public policy and the Constitution.[150]

[142] *Oakbay* supra note 5 para 32.
[143] Ibid.
[144] Ibid para 13.
[145] Ibid para 31.
[146] Ibid.
[147] Ibid para 32; and the subtitle of the Public Protectors Report.
[148] Ibid para 12.
[149] Ibid para 35.
[150] Ibid para 56.

(c) *Survé*

In *Survé* [151], Nedbank sent letters of termination based on several factors, one specifically worth mentioning, for these purposes is '[t]he serious nature of the allegations levelled against Dr Iqbal Survé, the Sekunjalo Group and related parties and the ongoing and increased adverse media which (regardless of the substantive merits thereof or lack thereof) pose significant reputational risks and association risks to Nedbank.'[152]

Survé launched three applications one to the Western Cape High Court, one to the Equality Court, and one to the Competition Tribunal. Each case will be discussed briefly below.[153]

(i) Survé *WC*

'On 15 November 2021, Nedbank decided to terminate the bank accounts of thirty-three of the applicants and gave them notice of such termination.'[154]

'The contents of the Mpati Report were relied on by some of the major banks in South Africa to terminate the banking facilities of some of the entities in the Sekunjalo Group…'[155] The applicants' contention was that they were racially discriminated against, and that the reputational risk concerns raised by Nedbank against the Sekunjalo group was not the same as that used in respect of 'white' companies.[156] It was further contended that, 'Nedbank's reliance on inaccurate and false media reports as the basis for terminating and denying the applicants' banking facilities, constitutes harassment and unfair discrimination...'[157] The applicants further challenged 'the right of Nedbank, and various other banks, to unilaterally terminate their banking facilities where such termination would result in unemployment of thousands of people and impinge on the applicants' and their employees' constitutional right to trade freely in their field of choice, as set out in section 22 of the Constitution.'[158] .

[151] *Survé* WC supra note 4 para 5.
[152] Ibid.
[153] *Survé judgments* supra note 4.
[154] *Survé* WC supra note 4 para 3.
[155] Ibid para 14.
[156] Ibid paras 17-18.
[157] Ibid para 18.
[158] Ibid para 19.

The respondents submitted that the applicants' application was:

> 'devoid of any merit, be it on procedural grounds or on the substantive merits. According to Nedbank, they are entitled to regulate and manage their reputational risk and they have the right to terminate any banking relationships based on their contractual arrangement with each of the applicants.'[159]

The *Bredenkamp* appeal case was relied on for this proposition.

The terms of the contract provided that the bank-client relationship may be terminated on reasonable notice or from a specific period. If there is suspected fraud, no notice is required.[160] The applicants being clients of Nedbank have a contractual relationship with the bank and their accounts are governed by the terms and conditions that they agreed to when they concluded the contract.[161] The respondents contended that Sekunjalo Group was subject to unlawful and improper conduct, over several years. The findings against the group in the Mpati report were damning.[162] Findings such as manipulation, board members not being independent, disregard for PIC procedures, and untoward relationships between Dr Survé and Dr Matjila are some of the findings that Nedbank relied on when terminating its relationship with the group.[163] Nedbank maintained that the allegations created significant reputational risk for Nedbank.[164] Based on this risk '…Nedbank decided to terminate the accounts on reasonable notice after engaging with them in good faith over a period of time.'[165] The Applicants were of the view that the notice received was unreasonable and rendered it impossible for them to make alternative arrangements timeously.[166] Nedbank took the position that adequate notice was provided, and that any allegations pertaining to the effect of the closure of the bank accounts on the groups business and their employees was an unnecessary exaggeration.[167]

Due to the applicants having the matter pending at the Equality Court ('EC'), and Competition Tribunal ('CT') the court did not have jurisdiction to deal with the matter.[168] However the court noted that there was nothing prohibiting the applicants from challenging Nedbank's

[159] Ibid para 24.
[160] Ibid para 26.
[161] Ibid para 25.
[162] Ibid para 27.
[163] Ibid.
[164] Ibid para 28.
[165] Ibid para 29.
[166] Ibid para 34.
[167] Ibid pars 34 and 35.
[168] Ibid paras 41-43.

enforcement of the termination clause on contractual principles. The relationship between the applicants and respondents was contractual in nature. As such, the *Bredenkamp* appeal case '...looms large, as it does in most matters involving the termination of a banking relationship.'[169] 'However, in my view, *Bredenkamp* should not be used uncritically or applied mechanically to any and all bank-client relationships.'[170] 'A careful balancing exercise ought to be undertaken in order to determine whether a contractual term, or its enforcement, would be contrary to public policy.'[171]

(ii) Survé *EC*

The applicants launched proceedings in the EC under sections 18,[172] 9,[173] and 10[174] of the Constitution,[175] for an interim interdict. The group submitted that the issuing of termination notices by Nedbank amounts to 'racial discrimination and contravenes, in particular, section 7 of the Equality Act.'[176] The group further submitted that other companies who had negative press and findings, were not subjected to the same termination.[177] Survé submitted that 'it employs around 8 500 people and has a long-standing business relationship with Nedbank.'[178]

The termination by Nedbank was largely premised on the Mpati Commission findings. The groups complaint was that the resultant effect of the Mpati Commission report was that the leadings banks 'engaged in systematic and a collaborative effort to terminate services to the group and close their bank accounts.'[179] Nedbank contended that the group could have reviewed the report's findings however, the group was of the opinion that the report had found no 'adverse findings'[180] against it, hence there was no basis to review.

Further to the groups submission that Nedbank's exercise of the termination notices 'amounts to racial discrimination.'[181] 'The Group also alleged that this conduct amounted to

[169] Ibid para 60.

[170] Ibid para 60.
[171] *Beadica* supra note 3 para 71.
[172] Right of freedom of association.
[173] Right not to be discriminated against based on *inter alia* race.
[174] Right to human dignity.
[175] *Survé* WC supra note 4 para 20.
[176] *Survé* EC supra note 4 para 21.
[177] Ibid.
[178] Ibid para 9.
[179] Ibid para 16.
[180] Ibid para 18.
[181] Ibid para 21.

harassment.'[182] The group compared Nedbank's actions towards other companies that were subjected to negative press, and held the view that Nedbank and the other banks 'demonstrated a discriminatory attitude…'[183] In response to these allegations, Nedbank stated that it was not racist.[184] Nedbank further held that these allegations were 'utterly devoid of merit and entirely unsubstantiated by facts.'[185] Nedbank maintained that it exercised its rights to terminate the bank-client relationship on reasonable notice based on a commercial decision regarding mitigation of reputational risk.[186] Allegations of harassment were similarly placed in dispute.[187] It was maintained that the allegations were significant and caused reputational risk.[188]

Nedbank placed reliance on the *Bredenkamp* appeal case. It maintained that all its contracts with the group 'have clauses which granted it the right to terminate the agreements on reasonable notice.'[189] Nedbank further stated that it tried to engage with the group on the negative publicity, and the group 'failed to furnish reasonable explanations for the questionable transactions it has queried.'[190]

The court held that 'the applicant has established a *prima facie* case that it ha[d] been unfairly discriminated against…'[191] The court held that there were no alternative remedies available to the applicants, in terms of third-party payment providers, approaching other banks (without the risk of potential negative influence), and the use of an attorney's trust account.[192] The EC was satisfied that a proper case was made for an interim order. The respondents were prohibited from closing bank accounts held by the group, pending final determination of the proceedings of the Main EC Application and should bank accounts have already been closed at the time of the order, the respondents were ordered to reopen same.[193]

[182] Ibid.
[183] Ibid.
[184] Ibid para 23.
[185] Ibid.
[186] Ibid.
[187] Ibid.
[188] Ibid para 26.
[189] Ibid para 42.
[190] Ibid.
[191] Ibid para 54.
[192] Ibid paras 64 – 67.
[193] Ibid paras 68 and sub-paragraphs thereto.

(iii) Survé *CT*

The applicants lodged a complaint to the CT against Nedbank and eight other major South African banks.[194] The applicants assert that the dominant players in the financial services industry are the banks that are part of the antitrust complaint. They state that these banks have colluded to prevent certain Sekunjalo entities from conducting business by terminating their existing facilities and denying them access to such facilities.[195] 'In terms of the harm to competition the Applicants argue that their case is that without access to banking and payment services, they would cease to trade,…'[196] The applicants required the CT to interrogate if the conduct by Nedbank is an abuse of dominance[197]; and if they are potentially abusing market power to 'suppress the Sekunjalo Group businesses by refusing to provide access to essential services.'[198]

Survé CT records that Nedbank *et al* on their own version state that the termination of the bank-client relationship and closure of accounts was because of negative press and the Mpati Commission report, Ayo pending PIC litigation and the *Bredenkamp* appeal case.[199] According to the respondents, the decisions to terminate or suspend the accounts of the applicants were influenced by the reputational risk that they were exposed to due to the allegations of impropriety and misconduct made against them by the Mpati Commission.[200] It was found that on the face of it, the applicants did establish that the respondent banks have 'engaged in a concerted practice involving the termination of the Applicants accounts and refusal to supply banking services (outrightly or constructively) to the Applicants amounting to a restricted horizontal practice…'[201] The respondent banks were either ordered to reinstate or restore bank accounts and all services, and interdicted from closing certain bank accounts.[202] However, the findings of the CT were overturned on appeal.[203]

The three *Survé* judgments raise various arguments on the potential prejudice suffered by the client if the bank-client relationship is terminated, resulting in closure of bank accounts. *Survé*

[194] Ibid para 21.
[195] Ibid para 22.
[196] *Survé* CT supra note 4 para 9.
[197] *Survé* WC supra note 4 para 23.1.
[198] Ibid 23.2.
[199] *Survé* CT supra note 4 para 94.
[200] Ibid para 13.
[201] Ibid para 224.
[202] Ibid paras 1.1 – 1.9 of the order of the judgment.
[203] Ibid preamble of judgment.

WC echoed that the closure on reasonable notice is important. In *Survé* EC, it held that if discrimination is found, the termination of the bank-client relationship cannot be accepted on racial grounds. *Survé* CT found that if there is an abuse of dominance in the market, the termination cannot persist, however the appeal court held a different view. These are some of the grounds that can be considered when determining if the termination of the bank-client relationship is valid and not contrary to public policy and constitutional values.

IV DISCUSSION AND CRITIQUE

Bredenkamp remains the authority in most matters regarding the cancellation of a bank-client relationship.[204] However, the principles in *Bredenkamp* cannot be applied as a one size fits all in respect of the termination of all bank-client relationships. The circumstances of each case must be considered. The subjective leg of *Barkhuizen* is applied to determine the enforcement and the effect of the termination. It is not enough to have a contractual right to terminate a bank-client relationship in terms of *Barkhuizen* and now *Beadica*. It must be fair in the circumstances of the case for the bank to exercise its right.

The different factors that should be considered during the subjective leg of the test are discussed below.

(a) *Reasons for termination*

As we can see in recent matters that are within the public domain, most if not all the parties subject to termination of their bank accounts, are individuals and entities that are subject to or may be subject to prosecution, either in terms of preservation and restrain orders or criminal charges, with allegations of wrongdoing being in the press or reports.[205] The banks' contention seems to be that due to this prosecution, the termination of the bank-client relationship is imperative to mitigate reputational risk, and the exposure that it faces because of alleged unlawful conduct of the client.[206]

The leading banks in South Africa have exercised their rights to terminate bank-client relationships, under a specific process, governed by policies, circumstances surrounding the

[204] *Survé* CT supra note 4 para 337.
[205] *Oakbay* supra note 5 para 32.
[206] *Survé* WC supra note 4 paras 6.1; 6.2; 6.7; 17 and 24.

basis for termination or refusal to onboard a client.[207] Contractual agreements provide termination clauses, and the circumstances that give effect to exercising the terminations. When banks terminate the bank-client relationship is must be done on reasonable notice, and with reasons for the decision.[208] Exceptions that may come to play under the reasonable notice period or lack of reasons, may be under circumstances where the bank is obliged to terminate the relationship based on legislation, illicit activity or illegal activity conducted through the banking products, or obligations regarding internal reporting to relevant authorities.[209] Banks are required to be compliant with statue and regulations locally and internationally, as pointed out by Lamont J in *Bredenkamp* Final.[210]

What is quite glaring from the cases mentioned above is that banks are not obliged to be duty bound to maintain a bank-client relationship. Legislation locally and internationally requires the bank to uphold and protect the banking sector, and its regulations, the reputation, standards, and dignity thereof.[211] Therefore, it is fair to state that where the interests of the client conflicts with the banking industry regulations and standard practice, it is likely that the protection of the banking sector will prevail.

I do not agree with this notion, especially when one considers the ripple effect on the economy, unemployment and right to access banking facilities. Our Constitution is premised on equity, fairness, and dignity. The right to a fair trial, and to be regarded as being innocent until proven guilty is also of importance and in line with our Constitution.[212] The termination of a bank account based on just press releases, hearsay evidence, mere public perception, or allegations does not seem just and fair in our open and democratic society.

In terms of the bank-client relationship, legislation has developed and changed. It imposes a higher onus on banks in conducting their relationships. There are two pieces of legislation in South Africa that dealt with the combatting of money laundering i) the Prevention of Organised

[207] *Survé* CT supra note 4 paras 18 – 30.
[208] *Bredenkamp* appeal case supra note 2 paras 12 -22.
[209] *Survé* CT supra note 4 paras 18.4; and 20 – 28.
[210] *Bredenkamp* Final supra note 54 para 32.
[211] *Survé* CT supra note 4 paras 18.4; and 20 – 28; *Bredenkamp* appeal case supra note 2 para 19; and *Oakbay* case supra note 5 paras 31; 38 and 72.
[212] Constitution op cit note 6 s 34.

Crime[213] ('POCA'); and ii) FICA. The objectives of FICA are to combat money laundering, the financing of terrorist activities and to identify the proceeds of unlawful activity.[214]

The right to terminate a bank-client relationship is recognised by the Code of Good Banking Practice, which records that a termination must follow reasonable prior notice (generally).[215] *Bredenkamp* confirmed that a bank must give reasonable notice in other cases in compliance with the said code.[216] In *Bredenkamp* the bank's reasons were clear, and the action taken was because of *Bredenkamp's* listings internationally, that would cause reputational harm and business risk to SB.[217] With *Oakbay* and *Survé* the termination was because of negative press, the Public Protectors Report, and the Mpati Report. Nonetheless, in all these instances the client's suffered some degree of harm due to the closure of their bank accounts and the termination of the bank-client relationship.

(b) *The harm to the client because of the closure*

The effect of the termination has a ripple effect on the economy, starting from the bottom up. The employees face the risk of unemployment. These employees will not get a salary and as a result will default on their own credit obligations. This vicious cycle is endless and relentless. This is evidenced by, *Oakbay* where all four of the leading banks terminated their bank-client relationships unilaterally, resulting in the company being bank less.

The banks need to maintain regulation with its bank-client relationships that are in the public interest. The bank had to take steps to ensure that it was not at risk of reputational harm or business risk. However, the impact on the loss of employment and the increase on the high employment rate within our country are not issues that can be sidelined. The circumstances and the prejudice surrounding both parties must be weighed up against Constitutional values such as freedom of trade, and freedom of use of property cannot be overlooked.

[213] Act 121 of 1998.
[214] T Matshebela 'The right to freeze a bank account' (2015) 15 *Without Prejudice* 78-80 78.
[215] *Bredenkamp* appeal case supra note 2 para 64.
[216] *Bredenkamp* Final supra note 54 para 8.
[217] Ibid para 66.

The Sekunjalo Group of companies maintained that the banks' termination clause was unconstitutional.[218] The basis of their complaint with the CT and the EC was based on discrimation against them for being of colour[219], as well as anticompetitive practices.[220]

The commercial impact on *Oakbay* was different to that of *Bredenkamp,* in that the commercial impact on Bredenkamp was that it would deem him to become 'unbanked' and not continue business.[221] For *Oakbay* the economic prejudice was far greater, in that significant staff component were at risk of retrenchment if there was not access to *Oakbay's* banking products. When South African unemployment has and continues to be such an issue, the risk of such a high unemployment rate because of termination of one entity's bank accounts, raises concern.[222]

What is evident from the case law outlined in this research report is that if one of the leading four banks terminates a bank-client relationship, the other banks will quite likely not enter a relationship with that client. This notion has been seen in cases such as *Oakbay*, where other banks did not want to enter a relationship with it, as well as *Survé*. However, since *Bredenkamp* there are approximately seventy banks' individuals can bank with, and there is also access to third party payment providers. Thus, it can be argued by the banks that the possibility of being 'unbanked' seems to be quite impossible.[223]

(c)*Procedural fairness and notice periods*

There is no stipulated or specific notice period recorded in respect of the intention by the bank to terminate the contract. The reasonableness of the notice period would have to be determined case-by-case in respect of the various circumstance surrounding the client.[224] Factors to be considered for the client are, *inter alia*, the prejudice that will be suffered by the employees, the economy, customer deliverables, business trading, and monthly credit obligations. For the bank it would be the business risk and reputational harm, but this must be weighed up against

[218] *Survé* WC supra note 4 para 18.
[219] Ibid para 16.
[220] Ibid para 22.
[221] R Vivian & N Spearman 'Why there needs to be judicial oversight of bank account closures' https://theconversation.com/why-there-needs-to-be-judicial-oversight-of-bank-account-closures-58003 (accessed on 26 July 2023).
[222] *Survé* WC supra note 4 para 19.
[223] Ibid para 35.
[224] Ibidpara 34.

the client's circumstances.[225] The *Bredenkamp* appeal case 'reiterated the trite principle of common law that a contract of an indefinite duration, including a contract between a bank and a client, may be terminated on reasonable notice.'[226] When there is a contractual clause empowering the bank to terminate the bank-client relationship it is 'not constitutionally objectionable.'[227] If the bank is exposed to reputational risk or business harm, it can terminate on notice and without reasons.[228]

I opine that what is deemed to be 'ample' or 'reasonable 'notice' is subjective in line with the bank's interests and not in consideration of the client's interest. The period of 'reasonable notice' must be considered under the circumstances of each case. The client's obligations, responsibilities, staff component, and daily business transactions must be discussed between the parties, and consensus must be reached on what 'reasonable notice' would be in the respective circumstances. For example, a month's notice is unreasonable for 50 000 employees to seek alternative employment, the payout of severance packages, and to put measures in place to ensure they do not breach their monthly credit obligations.

(d) Bargaining powers

When one determines the bargaining power of the respective parties, factors the courts should consider are socio-economic circumstances and the educational level of the parties.[229] There accordingly cannot be a one-size fits all approach to all customers in a bank-client relationship. What can be seen from the cases discussed above is that the banks' clients do not have the leverage to alter the market's decision-making process. This is evident from the banks' decision to terminate certain services in scenarios wherein the unbanked clients would be left behind.[230] Fairness must be assessed when one looks at the reality of the unequal bargaining power between the parties, under a standard form contract, as well as the impact the bank closure has on the employees of the company, the reputation of the company and the restriction of access to banking services that are paramount to daily commerce. Given the history of our democracy, and the values of fairness and reasonableness enshrined in our Constitution, all clients of the bank should be treated with the same standard of fairness and reasonableness.

[225] *Bredenkamp* appeal case supra note 2 paras 17-19; and 61-65.
[226] *Survé* CT supra note 4 para 18.1.
[227] Ibid para 18.2.
[228] Ibid paras 18.3 – 18.4.
[229] *Barkhuizen* supra note 1 para 95; *Beadica* supra note 3 para 219 and *Bredenkamp* Final supra note 44 para 25.
[230] *Survé* CT supra note 4 para 160.1.3.

When assessing the said factors, public policy considerations should be weighed up in each scenario. If the bank is not at direct risk for loss of profit and financial harm, should it just exercise its rights to terminate the contract based on it being exposed to negative reputational risk? Surely, the closure needs to be considered against the larger adverse impact it will have on the client, and its employees that run the risk of unemployment, because of the closure. There is a need for a balancing act to take place when applying public policy considerations to determine the enforcement of a valid clause. To strictly enforce valid clauses without this consideration could have a detrimental effect on the party subject to the enforcement.

Banks are regulated and must ensure that the transactions that its facilities provide for, are treated with integrity and in accordance with the relevant statutes. The termination of the bank accounts cannot be based on what is in the public domain. Facts supporting the evidence must be fully ventilated.

When the banks decide to terminate a relationship, do they have a full understanding of their client's exposure, restrictions and negative impact that emanates from the termination? Surely this should be a starting point to consider before taking the decision to terminate, and perhaps by doing this the parties could agree to what would be 'reasonable' and 'fair' notice under the specific circumstances.

V CONCLUSION

What is clear from this discourse is that banks can exercise their discretion and have the power to decide who it banks. Freedom of contract is trite in South African common law.[231] Due to changes in the regulatory framework and banks being governed locally and internationally, reasons surrounding the termination of a bank-client relationship differs. In most of the cases mentioned above, the banks did have justification in terminating the accounts on reasonable notice.[232] When the bank will suffer reputational harm and business risk, the exercise of the right seems warranted. But termination cannot be applied only in circumstances where there is a public perception of illicit activity that then results in the bank totally disassociating from the client. Banks are integral to the survival of business; it is impossible for business to trade without access to banking services. 'An innocent entity, victimised by a powerful banking

[231] *Beadica* supra note 3 para 30.
[232] *Survé* CT supra note 4 paras 18 and 18.1 – 18.4.

institution, could have its back broken in a matter of weeks, under the guise of regulatory protocols or commercial considerations.'[233]

Oakbay, *Beadica* and *Survé* show us that strict enforcement cannot be applied in all circumstances and prejudice must be weighed up. The notions of fairness and reasonableness are important considerations to be canvassed and assessed when just enforcing the valid clause. A practical guide would be identification of the public, and the individual interest of the party being affected by the strict enforcement of the clause, and the relevant community. Constitutional values such as fairness, reasonableness, good faith, and the spirit of ubuntu ought to be considered. Factors in respect of each case should be weighed up, with a balancing exercise that ensures the relevant factors are weighed up respectively. Accordingly, our courts ought to apply public policy considerations, on a case-by-case basis, to provide for a more practical analysis of the enforcement of contacts and their clauses, within South Africa.

[233] Naidoo A *Termination of the Bank-Customer Relationship: Lessons from Minister of Finance v Oakbay Investments* (published thesis, University of Pretoria), 2019 at 28.

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