



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.:
IR153DEC21/EXT072AUG23

In the interim relief application between:

**Sekunjalo Investment Holdings (Pty) Ltd And
34 Others**

First to Thirty-Fifth Applicants

And

Nedbank Limited

First Respondent

The Standard Bank of South Africa Limited

Second Respondent

FirstRand Group Limited

Third Respondent

Absa Bank Limited

Fourth Respondent

Mercantile Group Limited

Fifth Respondent

Sasfin Bank Limited

Sixth Respondent

Bidvest Bank Limited

Seventh Respondent

Access Bank Limited

Eighth Respondent

The Competition Commission

Ninth Respondent

Panel : M Mazwai (Presiding Member)
: A Wessels (Tribunal Member)
: S Goga (Tribunal Member)

Heard on : 5 October 2023
Date of last submission: 13 October 2023
Order issued on : 18 December 2023
Reasons issued on : 18 December 2023

REASONS FOR DECISION AND ORDER

INTRODUCTION

1. This matter concerns an application in terms of section 49C(5)¹ of the Competition Act ("**the Act**") for an extension of an interim relief order of the Competition Tribunal ("**Tribunal**"). The applicants, Sekunjalo Investment Holdings Limited ("**SIH**") and 34 other applicants² ("collectively referred to as "**Sekunjalo**"), seek an extension of an interim relief order granted by the Tribunal against Nedbank Limited ("**Nedbank**"), The Standard Bank of South Africa Limited ("**Standard Bank**"), FirstRand Group Limited ("**FirstRand**"), Absa Bank Limited ("**ABSA**"), Mercantile Group Limited ("**Mercantile Bank**"), Sasfin Bank Limited ("**Sasfin**"), Bidvest Bank Limited ("**Bidvest**"), and Access Bank Limited ("**Access Bank**") (collectively referred to as the "**respondent banks**"). The Competition Commission ("**Commission**") was cited for its interest in the matter and no relief was sought against the Commission.
2. Sekunjalo seeks the following order:

¹ Section 49C(5) of the Act provides that the Tribunal, on good cause shown, may extend the interim order for a further period not exceeding six months.

² "Sekunjalo" refers to a group of companies that SIH has direct, indirect or associated interest in, and is not a legal entity.

“that the interim order granted on 16 September 2022, which was extended on 9 February 2023 in terms of Section 49C(5) of the Competition Act, 89 of 1998, as amended, which extension order operated with effect from 16 March 2023 until 16 September 2023, be further extended for a period of six months, or the conclusion of the investigation by the Commission of the complaint filed by the applicants, whichever is the earlier.”³

3. Five of the eight respondent banks opposed the extension application.⁴ They are Nedbank, Standard Bank, FirstRand, Mercantile Bank, and Access Bank.
4. We have decided to dismiss the application for the reasons set out below.

BACKGROUND

5. At the heart of this application is a dispute between Sekunjalo and the respondent banks for access by Sekunjalo to banking, payment and related services.
6. Sekunjalo filed a complaint with the Commission on 15 December 2021 alleging that the respondent banks engaged in prohibited practices in refusing to provide it with banking services.

³ Amended Notice of Motion dated 8 September 2023

⁴ Bidvest, ABSA and Sasfin did not oppose the application.

7. On 22 December 2021, Sekunjalo filed an application for interim relief with the Tribunal in terms of section 49C of the Act.⁵
8. On 16 September 2022, the Tribunal granted an interim relief order in favour of Sekunjalo⁶ against the respondent banks⁷ after finding *inter alia* that there was a *prima facie* case of a concerted practice by the respondent banks in contravention of section 4(1)(b) of the Act and an abuse of dominance in contravention of sections 8(1)(c) and (d)(ii). The interim relief order (granted on 16 September 2022) was for a six-month period (ending 16 March 2023).
9. On 9 February 2023, the interim order was extended to operate with effect from 16 March 2023 until 16 September 2023.
10. In the Tribunal's interim relief order, Nedbank, ABSA, FirstRand, Sasfin and Access Bank were ordered to reopen certain bank accounts (on the same terms and conditions as existed before they had been closed), and Standard Bank, Mercantile Bank and Bidvest were interdicted from closing certain bank accounts of Sekunjalo, for a period of six months from the date of the order, or the conclusion of the investigation by the Commission into a complaint filed by Sekunjalo,⁸ whichever is the earlier.

⁵ The application for interim relief was heard on 7 March 2022.

⁶ The Tribunal granted an interim order in favour of most of the applicants.

⁷ Investec Bank Limited ("Investec Bank") was also cited as a respondent to the original interim relief application. However, the Tribunal dismissed the application against Investec Bank on the basis that the relevant bank accounts with Investec were used for personal banking purposes only and not used to participate in any market.

⁸ Complaint under Commission case number 2021Dec0031.

11. In October 2022, Mercantile Bank,⁹ Standard Bank,¹⁰ and Access Bank¹¹ (collectively referred to as the “**appellant banks**”) appealed the Tribunal’s decision to grant interim relief to the Competition Appeal Court (“**CAC**”). Sekunjalo opposed the appeal and review applications. On 17 July 2023, the CAC set aside the Tribunal’s decision.
12. On 6 December 2022, and prior to the decision of the CAC in the appeal and review proceedings, Sekunjalo filed an application with the Tribunal in terms of section 49C(5) for an extension of the interim order by a further period of six months.
13. The respondent banks did not oppose this application and on 9 February 2023, the Tribunal granted an order extending the interim relief order for a further period pending (1) the conclusion of the Commission’s investigation into the complaint; or (2) a further period of six months (being 16 September 2023), whichever occurs first.
14. Subsequent to the Tribunal extending the duration of the interim relief, on 17 July 2023, the CAC delivered its judgment, upholding the appeals of the appellant banks and setting aside the Tribunal’s order. In its judgment, the CAC, *inter alia*, held that there was no basis for finding that *prima facie* the appellant banks had contravened the Act.

⁹ On 4 October 2022, under case number 206/CAC/Oct22 in respect of the appeal, and under on 6 October 2022, under case number 208/CAC/Oct22 in respect of the review.

¹⁰ On 7 October 2022, under case number 209/CAC/Oct22.

¹¹ On 11 October 2022, under case number 210/CAC/Oct22.

15. On 7 August 2023, Sekunjalo filed an application for leave to appeal the CAC judgment and order with the Constitutional Court.¹² At the time that this matter was heard, the appellant banks had filed answering affidavits and we understand that the application for leave to appeal was still to be heard.
16. Sekunjalo filed an application for an extension with the Tribunal on 17 August 2023, in which it sought a further extension of the Tribunal's interim order - initially until the end of December 2023, at the time being the expected date of conclusion of the investigation by the Commission into the complaint.
17. However, the Commission indicated that it needed more time to finalize its investigation and on 4 September 2023, Sekunjalo agreed to extend the Commission's period of investigation until 16 December 2024.
18. On 7 September 2023, given that the extended interim relief order would be lapsing on 16 September 2023, Sekunjalo sought an urgent hearing date for the extension application.¹³
19. On 8 September 2023, Sekunjalo filed an amended notice of motion in which it sought a further extension of the interim order for a period of six months, or the conclusion of the investigation by the Commission of the complaint, being 16 December 2024, whichever is earlier. This was precipitated by the extension of

¹² Under case number CCT217/23.

¹³ Letter from Refiloe Mokoena Attorneys dated 7 September 2023.

the investigation period by the Commission from December 2023 to December 2024. This, in turn, prompted Nedbank to belatedly file opposing papers late as Nedbank had initially not intended to oppose the extension application.¹⁴

20. On 13 September 2023, the Tribunal convened an urgent pre-hearing to regulate further proceedings and to set a timetable for filing. The matter was not ripe for hearing and the earliest the matter could be heard was on 5 October 2023.
21. Before dealing with the extension application, we deal with two interlocutory applications brought by FirstRand and Nedbank respectively.
22. On 20 September 2023, FirstRand brought an application for leave to admit a supplementary answering affidavit in response to alleged new allegations made by Sekunjalo that it would be prejudiced by a lack of access to banking facilities. Given our decision to dismiss the extension application (for the reasons set out below), we do not deal any further with FirstRand's application for leave to admit its supplementary affidavit.
23. On 26 September 2023, Nedbank brought an application to condone the late filing of its answering affidavit. As explained, Nedbank initially had no intention to oppose the extension application. Nedbank explained that it filed its answer

¹⁴ Nedbank is already subject to an interim interdict granted by the Equality Court on 17 June 2022 which prevents it from closing the bank accounts of entities within Sekunjalo. According to Nedbank, it is bound by the interim interdict pending an appeal against the Equality Court judgment until at least December 2023. Therefore, Nedbank decided not to oppose the extension application. However, the period now sought in this extension application was extended to December 2024.

late, primarily because of Sekunjalo's amended notice of motion, which seeks to extend the interim order initially sought from December 2023 to December 2024.

24. Section 58(1)(c) read with rule 54 of the Tribunal Rules, empowers the Tribunal to condone the late filing of a document.
25. We are satisfied with Nedbank's explanation for the late filing of its answering affidavit. Further, Sekunjalo filed a replying affidavit to Nedbank's answering affidavit. It is therefore not evident that Sekunjalo would suffer any prejudice from Nedbank's late filing of its answer. In the circumstances, Nedbank's late filing of its answering affidavit is condoned.

THE EXTENSION APPLICATION

26. The extension application was brought in terms of section 49C(5) of the Act.
27. Section 49C(5) of the Act provides as follows:

"if an interim order has been granted, and a hearing into that matter has not been concluded within six months after the date of that order, the Competition Tribunal, on good cause shown, may extend the interim relief order for a further period not exceeding six months"

28. In the recent judgment of *eMedia Investments Proprietary Limited v Multichoice and others*¹⁵ the CAC confirmed that section 49C(5) of the Act permits the Tribunal to extend an interim relief order more than once. Relying on this judgment, Sekunjalo seeks a second further extension of the interim relief order.

29. Sekunjalo submits that there is good cause to extend the interim relief order and that the balance of convenience favours the granting of the extension application.

30. This is because:¹⁶

30.1. The Tribunal's interim order was extended until 16 September 2023. When Standard Bank, Access Bank and Mercantile Bank noted appeals and filed reviews in the CAC in October 2022, this suspended the operation of the Tribunal's interim order and the countdown period towards the lapsing of the Tribunal's interim order was therefore interrupted or suspended. The Tribunal's interim order will therefore according to Sekunjalo only lapse on 21 January 2024 (not on 16 September 2023 as per the Tribunal's interim order).¹⁷

¹⁵ 248/CAC/JUL23.

¹⁶ Sekunjalo's heads of argument, p 4.

¹⁷ Sekunjalo's heads of argument at para 83.

- 30.2. The purpose of the Act would be frustrated if the interim relief order is not granted in circumstances where the Commission is still investigating the Sekunjalo Group's complaint. The Commission has, by agreement with Sekunjalo, extended its investigation period until December 2024. If the Tribunal does not extend the interim order, a complaint referral to the Tribunal would be academic since a subsequent decision of the Tribunal in favour of Sekunjalo would come too late to forestall Sekunjalo's permanent exit from the affected markets. It is therefore in the interests of justice to grant the extension.
- 30.3. The extension application engages Sekunjalo's constitutional rights.¹⁸ Sekunjalo alleges that its constitutional rights will be infringed because FirstRand and Standard Bank continue to provide banking services to companies implicated in serious allegations of misconduct and corruption and therefore a refusal to extend the interim relief order will breach Sekunjalo's right to equal protection and benefit of the law,¹⁹ its employees' rights to choose their trade, occupation and profession freely,²⁰ and will have an indirect impact on its employees' rights to healthcare, food and water as guaranteed by the Constitution;²¹ and

¹⁸ Section 22 of the Constitution.

¹⁸ Section 27 of the Constitution.

¹⁹ Section 9(1) of the Constitution.

²⁰ Section 22 of the Constitution.

²¹ Section 27 of the Constitution.

- 30.4. Sekunjalo will not be able to participate in the mainstream economy without access to banking services.
31. The respondent banks disagreed with Sekunjalo's argument. They argued that:
- 31.1. The interim relief order which Sekunjalo seeks to extend, has been set aside by the CAC;
- 31.2. The interim relief order lapsed on 16 September 2023²². The Tribunal does not have the power to extend an order that has lapsed. We were referred to the matter of *Ex parte Minister of Social Development*²³ where even the Constitutional Court decided that it has no power to extend an order of invalidity that has already lapsed;²⁴ and
- 31.3. Even if the Tribunal could competently extend an interim relief order that has been set aside, Sekunjalo failed to show good cause justifying an extension.

²² As indicated, the hearing of the extension application was held on 5 October 2023. At the pre-hearing on 7 September 2023, the matter was not ripe for hearing and the respondents were not willing to provide an undertaking to maintain the *status quo* pending the hearing of the extension application.

²³ 2006 (4) SA 309 (CC).

²⁴ Access Bank's heads of argument with reference to *Ex parte Minister of Social Development and Others* 2006 (4) SA 309 (CC) para 38.

ANALYSIS

32. The first question to be determined is whether the Tribunal may extend interim relief in circumstances where the CAC overturned and set aside the Tribunal's decision to grant interim relief, and where the CAC's decision is being appealed to the Constitutional Court.
33. Sekunjalo relied on the common law position, enunciated in section 18(1) of the Superior Courts Act 10 of 2013 ("**Superior Courts Act**"), which states that the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.²⁵
34. Sekunjalo submits that the Tribunal is not bound by the CAC's decision and that the lodging of its application for leave to appeal to the Constitutional Court "*suspended the operation of the CAC order*", and thereby resurrected the interim interdict of the Tribunal. In support of this contention, it places reliance on *South Cape Corporation*²⁶, *Sakeliga*²⁷, and *Uitzig*.²⁸

²⁶ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) (SA) 534 (A) pp 544-545.

²⁷ *Minister of Finance v Sakeliga NPC (previously known as Afribusiness NPC) and Others* (CCT 62/22) [2022] ZACC 17; 2022 (4) SA 401 (CC); 2023 (2) BCLR 171 (CC) (30 May 2022).

²⁸ *Uitzig Secondary School Governing Body and Another v MEC for Education, Western Cape* 2020 (4) SA 618 (WCC).

35. Sekunjalo further contends that, section 18(1) of the Superior Courts Act suspends not only the operation and execution of the CAC order but also the CAC's decision including its reasons. This is because a decision without reasons is arbitrary and therefore unsustainable, and a decision that has no rational connection to the reasons given for it, is irrational and therefore unsustainable.
36. Consequently, Sekunjalo submits that the CAC's decisions including are also suspended and are not binding on the Tribunal because they involve ongoing litigation between the same parties to the appeal and on the same points of law that are challenged.²⁹ Sekunjalo submits that the decision in respect of the *lis* between it and the respondent banks is suspended. It cannot be relied upon, carried out or given effect to in respect of the parties to the *lis*, until the appeal process is finalized.
37. Sekunjalo argues also that the doctrine of *stare decisis* (relied on by the respondent banks) is not concerned with legal principles or findings of law that are the subject of ongoing litigation or appeal between the same parties to the litigation or appeal. They argue that if the Tribunal considers the legal principles or conclusions reached by the CAC in its decision as binding on it, this would be tantamount to giving effect to (operationalizing and executing) the CAC's decision without the respondent banks applying to the court or CAC in terms of section 18(1) of the Superior Courts Act.³⁰ They contend that if the respondent

²⁹ Sekunjalo's supplementary note, para 10.

³⁰ Sekunjalo's supplementary note, paras 22 and 23.

banks wanted the Tribunal to consider the reasons of the CAC as binding, they should have applied for the operationalisation of the decision in terms of section 18(1) of the Superior Courts Act. Since the respondent banks have not done so, they cannot seek the operationalisation of the decision by relying on the doctrine of precedent (*stare decisis*).³¹

38. The respondent banks on the other hand rely on the principle of *stare decisis*. They submit that *stare decisis* is concerned not with the execution of orders in individual disputes, but with the general binding status of legal principles enunciated by a higher court. *Stare decisis* operates as follows: when a decision on a legal principle has been delivered by a superior court (such as the CAC) it must be followed by all courts of equal and inferior status, until such time as that judgment has been overruled or modified by a higher court or by legislative authority.³²

39. Standard Bank submitted that section 18(1) of the Superior Courts Act does not affect the operation of *stare decisis* because it deals with the execution of court orders, not with *stare decisis*.³³ Accordingly, the respondent banks contend that the Tribunal may not overturn the decision of the CAC since it is a higher court and the principle of *stare decisis* binds the Tribunal on findings of law made in the CAC's decision.

³¹ Sekunjalo Supplementary Affidavit, para 23.

³² *Firststrand Bank Ltd v Kona* 2015 5 SA 237 (SCA) at paras 21-22.

³³ The Respondent Banks agreed that Standard Bank would address the Tribunal on behalf of the Respondent Banks, on whether the Tribunal was bound by the reasoning and decision of the CAC. We therefore refer to Standard Banks arguments in this regard.

Our assessment

40. It bears mention at the outset that this is an extension application of interim relief which the Tribunal granted in terms of section 49C of the Act, and which the CAC subsequently set aside on the basis that there was no *prima facie* evidence of a prohibited practice. It is not an application for interim relief under section 49C.
41. As indicated, an application for an extension of an interim order is made in terms of section 49C(5) and may be granted “on good cause shown”. While considerations under section 49C are instructive, in our view an extension hearing is not a fresh hearing of the merits of interim relief but the factors in section 49C are nevertheless relevant when considering whether the Tribunal should, on good cause shown, extend the interim relief order for a further period.
42. The issue in dispute in this case in essence is whether the *ratio decidendi* and legal principles as articulated in the CAC decision of 17 July 2023 (which overturned the Tribunal's order) are binding on the Tribunal given the appeal that is pending in the Constitutional Court.

43. It is common cause that, save in exceptional cases, the lodging of an appeal (or application for leave to appeal) suspends the operation of an order and precludes the successful party from executing on that order until the appeal has been finally determined.³⁴
44. It is also common cause that as a general principle, the decisions of a higher court are binding on lower courts and the Tribunal.³⁵
45. As indicated, Sekunjalo contends that section 18(1) of the Superior Courts Act not only suspends the operation and execution of the CAC's decision but also its reasons, and therefore the CAC's decision is not binding under the *stare decisis* doctrine given the *lis* between the parties in the Constitutional Court. The respondent banks on the other hand argue that the cases that Sekunjalo relies on all deal with questions relating to the operation and enforcement of orders *inter partes* pending an appeal, and not with questions of *stare decisis*.
46. It is important to note certain key differences between the principles relating to the enforceability of court orders pending appeals and *stare decisis*. The first is that the principles relating to enforceability of orders are concerned with the operation and enforceability of court orders whilst *stare decisis* relates to the binding effect of legal principles in a judgment. Second, the principles relating to enforceability of orders concern themselves with the rights of litigants whilst *stare decisis* is concerned with decision making by judges. Third, the principles

³⁴ See section 18(1) of the Superior Courts Act.

³⁵ Sekunjalo's supplementary note, paras 9, 13 and 14.

relating to the enforceability of orders concern themselves with the rights of the specific parties to the dispute giving rise to the order whilst *stare decisis* operates at a general level — it seeks consistency in decision making across the judiciary.

47. In our view, while it is correct that section 18(1) of the Superior Courts Act suspends the operation and execution of a judgment, it does not apply to the binding nature of the legal principles that flow from the judgment nor does it revive the Tribunal's interim relief decision. This is based on the trite principles of *stare decisis*, in terms of which *inter alia* courts, tribunals and judges must follow decisions on points of law of higher courts unless they are satisfied that those decisions are clearly wrong. Further, in our view, the principle of *stare decisis* should not lightly be departed from as it would upset judicial hierarchy, and this is likely to result in legal chaos.
48. The Constitutional Court has stated the following regarding the principle of *stare decisis*:

“... respect for precedent, which requires courts to follow the decisions of coordinate and higher courts, lies at the heart of judicial practice. This is because it is intrinsically functional to the rule of law, which in turn is foundational to the Constitution. Why intrinsic? Because without precedent, certainty, predictability and coherence would dissipate. The courts would operate without map or navigation, vulnerable to whim and

fancy. Law would not rule."³⁶

"...Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos."³⁷ (Own emphasis)

49. In its judgment, the CAC found that there was no *prima facie* evidence of a prohibited practice by the respondent banks.³⁸ This is the legal principle in the CAC's decision to which we are bound since we must follow decisions on points of law of the CAC. On our reading of the CAC's decision this finding in law is applicable to all the respondent banks regardless of whether or not they appealed because according to the CAC there is no *prima facie* evidence of all the respondent banks colluding or abusing their dominance.³⁹
50. It is worth noting that interim relief orders in the context of competition law affect markets and competition in markets in the public interest, rather than private interests. Consequently, while the suspension or execution of an order in a private *lis* between parties only affects the parties to the dispute, an interim relief order under section 49C affects parties beyond the *lis*, it affects markets and the state of competition in markets. Therefore, when the CAC has made a

³⁶ *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC) at para 21.

³⁷ *Camps Bay Rate Payers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) at para 28; See also *Buffalo City Metro Muni v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) at para 65; *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC) at paras 58 –62; *Ex parte Minister of Safety and Security and Others: In re S v Walters and Another* 2002 (4) SA 613 (CC) at para 57.

³⁸ CAC judgment at paras 44, 65 and 67.

³⁹ CAC judgment at paras 34 and 65.

finding in law on a competition issue, it has an impact in markets beyond the parties. In private disputes, the suspension or execution of a decision - usually affect only the parties to the litigation, whilst a finding by the CAC has application beyond the parties and has an impact in markets and competition in markets. This is all the more reason to defer to the principle of *stare decisis* since *stare decisis* does not concern itself with the enforceability of court orders *inter partes*. It is a doctrine of precedent designed to ensure consistency in legal decision-making across all courts.

51. Section 18(1) of the Superior Courts Act in these circumstances therefore does not revive the Tribunal's interim relief decision. For this reason, this extension application must fail.
52. Given our finding that the appeal of the CAC's decision by Sekunjalo to the Constitutional Court does not suspend the legal principles in the CAC decision and therefore does not revive the Tribunal's interim relief decision, we do not need to consider the remaining issues in dispute, i.e. whether the Tribunal's interim order has indeed expired; if an expired interim order can be extended by the Tribunal; and if Sekunjalo has shown good cause to justify the extension.
53. For the reasons set out above, the Tribunal in its discretion declines to grant the extension application as sought by Sekunjalo.

CONCLUSION

54. In the circumstances, the application for extension is dismissed.

ORDER

Having heard the parties in the above matters, the Competition Tribunal orders as follows:

1. The application for the extension of the interim relief order is dismissed.
2. Each party must bear its own costs.



Ms Mondo Mazwai

18 December 2023

Date

Concurring: Mr Andreas Wessels and Ms Shaista Goga

Tribunal Case Managers: Ofentse Motshudi and Sinethemba Mbeki

For the Applicants: Adv NH Maenetje SC (Heads of argument only), Adv V Ngalwana SC and Adv K Monareng instructed by Ms R Mokoena of Mokena Attorneys

For Nedbank: Adv A Cachalia instructed by Mr A Moosajee of ENSafrica Attorneys

For Standard Bank:	Adv M Chaskalson SC and Adv P Ngcongo instructed by Ms J Meijer of Herbert Smith Freehills Attorneys
For FirstRand:	Adv J Wilson SC and Adv P Bosman instructed by Mr M Griffins of Norton Rose Fulbright Attorneys
For Mercantile Bank:	Adv M Engelbrecht SC instructed by Mr G Cloete of Werksmans Attorneys
For Access Bank:	Adv A Botha SC and Adv Tsakane Marolen instructed by Ms V Vurgarellis of Lawtons Africa Inc. Attorneys

