competitiontribunal
SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: IR128DEC24

In the interim relief application between:

Sekunjalo Investment Holdings (Pty) Ltd and 27 others	First to twenty-eight 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
The Competition Commission	Fifth Respondent

Panel	:	M Mazwai (Presiding Member)
	:	A Wessels (Tribunal Member)
	:	I Valodia (Tribunal Member)
Heard on	:	17 December 2024
Last date of submission	:	08 January 2025
Order issued on	:	09 January 2025
Reasons issued on	:	04 February 2026

REASONS FOR DECISION

INTRODUCTION

1. This is an application for interim relief brought in terms of section 49C of the Competition Act, 89 of 1998, as amended (the "Act"). The applicants, Sekunjalo Investment Holdings Limited and 27 other applicants[1] ("collectively referred to

[1] These are entities within the Sekunjalo Group of companies.

as "Sekunjalo") sought an interim order against Nedbank Limited ("Nedbank") on the basis that Nedbank and other banks[2] ("the Banks") were engaged in a concerted practice in contravention of section 4(1)(a) of the Act. Sekunjalo contended that a refusal by the Banks to supply it with banking and related services amounted to a concerted practice that contravenes section 4(1)(a) of the Act.

2. Sekunjalo sought an interim order directing Nedbank to reinstate/restore Sekunjalo's bank accounts, including all related banking services on the same terms and conditions as existed prior to the closure / termination of the accounts.

3. Standard Bank of South Africa Limited ("Standard Bank"), First Rand Group ("First Rand"), ABSA Bank Limited ("ABSA") and the Competition Commission ("Commission") are cited as respondents in these proceedings. No relief is sought against these respondents, and they did not take part in the proceedings.

4. Nedbank opposed the application. The Commission limited its participation in the proceedings to filing an explanatory affidavit, as discussed below.

5. On 09 January 2025, the Tribunal decided to dismiss Sekunjalo's application with reasons to follow. What follows are the reasons.

[2] Including Nedbank, these banks are Standard Bank limited, FirstRand Group Limited, ABSA Bank Limited, Mercantile Bank Limited, SASFIN Bank Limited, Bidvest Bank Limited, and Access Bank Limited.

BACKGROUND

6. On 17 December 2021, Sekunjalo filed a complaint of an alleged prohibited practice, including under section 4(1)(a) of the Act, with the Commission against Nedbank and others.

7. On 21 December 2021, Sekunjalo also filed an application for interim relief in terms of section 49(C) of the Act with the Tribunal. This was granted by the Tribunal but was later overturned by the Competition Appeal Court ("CAC"). Sekunjalo sought leave to appeal the CAC decision to the Constitutional Court, which leave was dismissed (in or around February 2024).

8. According to Sekunjalo, after the Constitutional Court refused its application for leave to appeal, it waited for the Commission to complete its investigation (to apply for interim relief again).

9. At the time of hearing the application, the Commission had not yet referred the complaint. However, Sekunjalo had been informed – following its enquiry with the Commission on 19 November 2024, that the Commission had found that the decision by the Banks to terminate and/or refuse to open bank accounts for Sekunjalo constituted a prohibited practice in terms of the Act.

10. Parallel to the complaint filed with the Commission, Sekunjalo had also filed an application in the Equality Court to interdict Nedbank from terminating the banking relationship between it and Sekunjalo pending final determination of proceedings in the Equality Court, which was granted by the Equality Court.

11. Nedbank applied for leave to appeal the Equality Court's decision, which was refused by the Equality Court. Nedbank appealed to the Supreme Court of

Appeal ("SCA") which upheld Nedbank's application. Sekunjalo sought to appeal the SCA decision and applied for leave to appeal in the Constitutional Court, which the Constitutional Court dismissed on 04 September 2025.

12. On 5 September 2024, following the Constitutional Court's order dismissing Sekunalo's leave to appeal (thereby confirming the impending termination of Sekunjalo's accounts). Sekunjalo, requested Nedbank to provide it with a 90-day notice period to enable Sekunjalo to make alternative arrangements for their banking requirements.

13. On 13 September 2024, Nedbank acceded to Sekunjalo's request. This meant that Nedbank would close Sekunjalo's bank accounts on 3 December 2024.

14. In October 2024, Nedbank, reiterating the 90-day notice period, formally notified Sekunjalo of its decision to terminate its banking relationship with Sekunjalo, and reminded Sekunjalo that its bank accounts would be closed on 3 December 2024.

15. On 8 November 2024, the Commission informed Nedbank that it had found that the decision by the Banks to terminate and/or refuse to open bank accounts for Sekunjalo constituted a concerted practice in contravention of section 4(1) (a) of the Act, and invited Nedbank to make written submissions on any technological, efficiency and pro-competitive gains that outweigh the effects of the concerted practice, by 15 November 2024.

16. On 14 November 2024, Nedbank wrote to the Commission and requested an extension to file its written submissions by 5 December 2024, which request was granted by the Commission. Nedbank also requested the Commission to

provide it with an outline of the facts that the Commission relied on for its conclusion that Nedbank engaged in a prohibited concerted practice.

17. On 18 November 2024, the Commission wrote to Nedbank and set out what it said are the facts that it relied on to reach its conclusion that Nedbank is a party to a prohibited concerted practice. We deal with the relevant parts of this letter below.

18. The Commission also informed Nedbank that it had engaged senior counsel to prepare a complaint referral against the Banks and requested Nedbank not to close Sekunjalo's bank accounts pending the finalisation of the complaint referral.

19. In the same letter, the Commission withdrew the extension it had given to Nedbank (until 5 December 2024) to file its written submissions and requested Nedbank to file its written submissions by 22 November 2024 in light of the imminent termination date of the Sekunjalo bank accounts on 3 December 2024.

20. On 19 November 2024 (as earlier mentioned), the Commission informed Sekunjalo that it had concluded its investigation and found that the decision by the Banks to terminate and/or refuse to open bank accounts for Sekunjalo constituted a prohibited concerted practice by firms in a horizontal relationship which has the effect of substantially preventing, or lessening competition in markets where Sekunjalo is active, in contravention of section 4(1)(a) of the Act.

21. On the deadline date of 22 November 2024, Nedbank wrote to the Commission, indicating its refusal to halt the closure of Sekunjalo's bank accounts and

accusing the Commission of imposing an unreasonable shortened time period for Nedbank to file its written submissions. Nedbank also accused the Commission of failing to provide the facts that it relied on to conclude that Nedbank is a party to a prohibited concerted practice (as requested by Nedbank in its letter to the Commission on 14 November 2025 referred to above).

22. On 29 November 2024, Nedbank wrote to the Commission and reiterated that it did not agree with the Commission's *prima facie* findings, and requested the Commission to reconsider its decision to refer a complaint against the Banks to the Tribunal for prosecution.

23. On 29 November 2024, Sekunjalo approached the Tribunal on an urgent basis for interim relief.

24. The application was brought in two parts: (i) Part A sought an "interim interim" order that prevented Nedbank from closing Sekunjalo's accounts pending the finalisation of the interim relief application; and (ii) Part B sought an interim relief order under section 49C of the Act.

25. On 02 December 2024, the Tribunal informed the parties that it was available to hear Sekunjalo's urgent application on 12 December 2024 and requested Nedbank to keep Sekunjalo's bank accounts open pending the finalisation of the interim relief application (to be heard on 12 December 2024).

26. Nedbank indicated that it was not willing to keep Sekunjalo's bank accounts open and indicated that its legal team was not available for a hearing on 12 December 2024.

27. Following this, Sekunjalo requested the Tribunal to convene an urgent pre-hearing and direct Nedbank not to close its bank accounts. This however was not feasible because Nedbank was not available.

28. On 04 December 2024, the Tribunal issued a directive for an expedited hearing of part A and B of the application by Sekunjalo and, *inter alia*, directed that the application would be heard on 17 December 2024; being the first date where all the parties would be available.

29. In the interim, the Tribunal requested the parties to make submissions on whether a single member sitting alone in a pre-hearing may issue a directive to Nedbank not to close Sekunjalo's bank accounts, pending the hearing of Sekunjalo's application.

30. On 05 December 2024, the Tribunal convened a pre-hearing where the parties made their submissions in this regard.

31. After considering the parties' submissions at the pre-hearing, on 12 December 2024, the Chairperson decided, in the circumstances of this case that regardless of whether a single member has the power to issue the directive sought by Sekunjalo, that:

31.1. The matter would be heard by a full panel on 17 December 2025; and

31.2. In terms of section 31(5) of the Act, the Chairperson had determined in her discretion that the relief sought by Sekunjalo in Part A of its application could not be determined by the Chairperson or a member sitting alone as contemplated in section 31(5). Further, in the discretion of the Chairperson, given the history of litigation in various forums, the

relief sought by Sekunjalo in Part A of its application warranted being heard by a panel comprised of three members.

32. Sekunjalo then filed an application for leave to amend its notice of motion where it now sought an order directing Nedbank to re-open/reinstate and/or restore its bank accounts on the same terms and conditions that existed prior to the closure of the bank accounts (the initial notice of motion sought an order preventing Nedbank from closing the accounts). This application (for leave to amend the notice of motion) was not opposed by Nedbank.

The requirements for interim relief: Section 49C

33. Section 49C(2)(b)[3] of the Act provides that the Tribunal may grant interim relief if "*it is reasonable and just to do so*". In deciding whether or not to grant interim relief, the Tribunal must have regard to three factors:

33.1. *prima facie* evidence of a prohibited practice, even if open to some doubt;[4]

33.2. the need to prevent serious or irreparable harm to the Applicant; and

33.3. the balance of convenience.

34. The Tribunal's approach has been to assess these elements holistically by weighing the requirements against each other.[5] In other words, these

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[3] Section 49C(2)(b) states that the Tribunal: "*may grant an interim order if it is reasonable and just to do so, having regard to the following factors: (i) The evidence relating to the alleged prohibited practice; (ii) the need to prevent serious or irreparable damage to the applicant; and (iii) the balance of convenience.*

[4] Business Connexion (Pty) Ltd v Vexall (Pty) Ltd and Another (182/CAC/Mar20) [2020] ZACAC 4; [2020] 2 CPLR 490 (CAC) (15 July 2020), para 27.

[5] Natal Wholesale Chemists v Astra Pharmaceutical Distributors [2001] ZACT 7 (12 March 2001); York Timbers Ltd v South African Forestry Company (15/IR/Feb01) para 13; CC v Passenger Rail Agency of South Africa (017616) para 16.

requirements are not considered separately or in isolation, but in conjunction with one another in order to determine whether the Tribunal should exercise its discretion in favour of granting interim relief.

35. We note that the requirement to show *prima facie* evidence of a prohibited practice (although open to some doubt) is peremptory.[6] Thus, upon an applicant demonstrating *prima facie* evidence of a prohibited practice, the Tribunal will consider the two other factors (i) the need to prevent serious or irreparable harm to the Applicant; and (ii) the balance of convenience. An application that does not meet the requirement of a *prima facie* prohibited practice does not pass muster for the granting of interim relief.

Section 4(1)(a)

36. As already mentioned, Sekunjalo alleged that Nedbank is a party to a concerted practice in contravention of Section 4(1)(a) of the Act.

37. Section 4(1)(a) provides:

"An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if —

(a) it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can

[6] eMedia Investments Proprietary Limited and other v MultiChoice SA Holdings Proprietary Limited and others IR107Oct23 at para 56; The Bulb Man (SA) Proprietary Limited v Hadeco Proprietary Limited Case No:81/IR/APR06 at para 18; and York Timber Limited v SA Forestry Company Limited (15/IR/Feb01) [2001] ZACT 19 (9 May 2001) para 13 and 22.

prove that any technological, efficiency or other procompetitive gain resulting from it outweighs that effect; …

38. Therefore, in order to sustain an allegation under section 4(1)(a), Sekunjalo must *prima facie* prove that:

38.1. Nedbank is a party to an agreement or a concerted practice.

38.2. The agreement or concerted practice was entered into between or engaged in by Nedbank and one or more of its competitors (firms in a horizontal relationship).

38.3. The agreement or concerted practice has the effect of substantially preventing or lessening competition.

38.4. There are no technological, efficiency or other procompetitive gains that outweigh the ani-competitive effect of the alleged decision or concerted practice.

The parties' submissions

39. Sekunjalo submitted that it is common cause that the Banks are in a horizontal relationship because they are competitors in the provision of banking services.[7] Relying on the Commission's letters (and subsequently the Commission's explanatory affidavit filed in this matter – which we deal with later) Sekunjalo submitted that the Banks, including Nedbank, are parties to a concerted practice in contravention of section 4(1)(a) of the Act.

[7] Sekunjalo AA, p. 28 of the consolidated pleadings bundle para 101 – 102.

40. Sekunjalo relied on two extracts in letters from the Commission dated 18 and 19 November 2025, as *prima facie* evidence of a concerted practice. [8] The Commission's letter to Nedbank dated 18 November 2024 states:[9]

> *"Your client, Nedbank, has, together with eight other South African Banks decided to terminate and/or refuse to open bank accounts for the Sekunjalo Group of companies. Sekunjalo is made up of over 200 entities. Sekunjalo will be forced to exit the market where they are active as a direct result of your client's and the other Banks' decision to terminate and/or refuse to open bank accounts. The decision of your client, Nedbank, together with similar 10 decisions by the other Banks to terminate and/or refuse to open bank accounts for the Sekunjalo constitutes a prohibited concerted practice by firms in a horizontal relationship which has the effect of lessening competition in market."*

41. A similar formulation is found in the Commission's letter to Sekunjalo dated 19 November 2024:

> *"The investigation found that the Banks took a decision to terminate and/or refuse to open bank accounts for the Sekunjalo Group of companies ("Sekunjalo"). Sekunjalo will be forced to exit the market where they are active as a direct result of the Bank's decision to terminate and/or refuse to open bank accounts for them. The investigation also found that the decision by the Banks to terminate and/or refuse to open bank accounts for Sekunjalo constitutes a prohibited concerted practice by firms in a horizontal relationship which has the effect of lessening competition in markets where Sekunjalo is active in contravention of section 4(1)(a) of the*

[8] Transcript, p. 36 – 37.
[9] Dated 18 November 2024.

Act. The investigation further found that the exit of Sekunjalo Group in the market will have substantially negative effects on public interest,"

42. Sekunjalo further submitted that as a result of the concerted practice by the Banks, and specifically Nedbank, it is denied access to banking services by approximately 90 - 100% of the banking services market.[10]

43. It further submitted that without bank accounts, it cannot compete effectively in the various markets, this will lead to a distortion of competition in the markets in which it (Sekunjalo) is active because it is likely to exit the various markets[11]. Furthermore, the alleged concerted practice undermines its ability to participate and expand within the markets where it is active, and is unable to acquire new technologies, businesses and its businesses are exposed to operational disruptions.[12]

44. Furthermore, Sekunjalo argued that the alternatives to banking and related facilities provided by banks were more expensive.

45. Nedbank argued that there were numerous obstacles standing in the way of the grant of the interim relief sought in the present instance.

45.1. First, there is the fact that the Tribunal is bound by the evaluation of the CAC in *Mercantile Bank* in the first interim relief application. Without new evidence of an agreement or concertation, the Tribunal cannot

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[10] Sekunjalo's HOA, p. 27 of the consolidated heads of argument bundle, para 80.
[11] These markets include (i) the fishing; (ii) e-commerce; (iii) information and communication technology; (iv) media and publishing; (v) travel and tourism; and (vi) financial services and investment markets.
[12] *Ibid.*

simply, in the face of the CAC judgment, reach the conclusion that Nedbank has been party to an agreement or concerted conduct.

45.2. Second, Sekunjalo has simply not pleaded any facts to sustain a case, even a *prima facie* case, that Nedbank has engaged in a prohibited practice. Nedbank argued that Sekunjalo relied on an assertion by the Commission (that it has found the Banks to have engaged in a concerted practice in contravention of section 4(1)(a) of the Act), in circumstances where:

45.2.1. The Commission itself is still taking advice on the prospects of success of advancing such a case; and

45.2.2. Despite the Commission taking the opportunity to file an explanatory affidavit in these proceedings, the Commission has not taken the Tribunal into its confidence and revealed the basis for any allegation of concertation.

46. Nedbank denied that Sekunjalo demonstrated *prima facie* evidence of a prohibited practice – whether in the letters or explanatory affidavit (mentioned above) since neither discloses the material facts that the Commission relies on for its conclusions.

47. Nedbank submitted that an application for interim relief is self-standing. It is therefore incumbent on Sekunjalo to make out a *prima facie* case based on evidence and not merely rely on the Commission's say-so in its letters and explanatory affidavit.

48. It submitted that its decision to terminate its banking relationship with Sekunjalo was a unilateral decision based on reputational, commercial and legal risks it would face if it were to continue its banking relationship with Sekunjalo. Nedbank submitted that its reasons included: (i) negative reporting concerning Sekunjalo; and (ii) a report by the Commission of inquiry into the Public Investment Corporation that reflected negatively on Sekunjalo.

49. Nedbank further denied that Sekunjalo did not have alternative banking services as it claimed, pointing out that Sekunjalo had managed to source alternative banking services for 25 of the 28 bank accounts previously held with Nedbank.[13]

50. In response, Sekunjalo denied that it had alternatives. It submitted in respect of accounts held with Standard Bank (and any other bank) that they were not real alternatives since Standard Bank continues to provide Sekunjalo with banking services because of an Equality Court order, which is currently on appeal in the SCA.

51. Sekunjalo argued that if the Equality Court's order is overturned by the SCA, Standard Bank will have the right to close the accounts that Sekunjalo has with it and the number of Sekunjalo entities without banking services will increase by nine additional entities, thereby foreclosing these entities in the markets in which they operate.[14]

Our analysis

[13] There was a dispute at the hearing concerning how many of Sekunjalo's entities still did not have bank accounts following Nedbank's 90-day notice period after the Constitutional Court judgement This remained unresolved at the hearing.

[14] Sekunjalo RA, p. 1049 of the consolidated pleadings hearing bundle, para 8 – 9.

The letters

52. As indicated Sekunjalo relies on two letters from the Commission dated 18 and 19 November 2024; as a well as a subsequent explanatory affidavit filed by the Commission in these proceedings, to allege a prohibited concerted practice by the Banks in contravention of section 4(1)(a) of the Act.

53. Section 1 of the Act defines a concerted practice as *"...co-operative, or co-ordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an* agreement".

54. In *Netstar*, the CAC stated that "*A concerted practice arises from the conduct of the parties and does not amount to an agreement. ...care must be taken not to confuse independent conduct with interdependent conduct. It suffices for present purposes to say that the emphasis is on the conduct of the parties".*

55. The Tribunal set out its approach in determining whether a *prima facie* case has been established in *York Timbers*,[15] as follows:

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

[15] York Timber Limited v SA Forestry Company Limited (15/IR/Feb01) [2001] ZACT 19 (9 May 2001), at para 64.

facts establish the existence of a prohibited practice at the hearing of the complaint referral."

56. In *eMedia*[16], the CAC has further enunciated the approach to disputes of fact in interim relief proceedings. It stated that "*there will inevitably be disputes of fact but that does not prevent the Tribunal from taking a robust approach nor is it necessary to await the outcome of an investigation in due course. The finality of an investigation is perhaps best utilised when considering final relief."*[17]

57. During the hearing, when asked what facts Sekunjalo relies on as evidence of a concerted practice (from the letters of 18 and 19 November respectively), Counsel for Sekunjalo referred to the above cited passages (paragraphs 40 and 41 above), indicating that the paragraphs are a combination of a (legal) conclusion and a factual basis.[18] He indicated that it is common cause on the facts of the case that the Banks have closed the bank accounts or are refusing to have a relationship with Sekunjalo.[19]

58. Counsel for Sekunjalo further sought to distinguish the *prima facie* evidence required while the Commission is still investigating the complaint and when the Commission has referred the complaint to the Tribunal. He submitted that where the Commission is still investigating the complaint, a complainant has an obligation to produce *prima facie* evidence of the prohibited practice. However,

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[16] eMedia Investments Proprietary Limited South Africa v Multichoice Proprietary Limited and Another (201/CAC/JUN22) [2022] ZACAC 9; [2022] 2 CPLR 23 (CAC) (1 August 2022).
[17] Para 81.
[18] Transcript, p. 37, lines 1 – 20.
[19] Transcript, p.15 lines 9-14.

where the Commission has finalised its investigation, a complainant is entitled to rely on the Commission's findings.[20]

59. In our view nothing turns on this distinction. This is because regardless of whether an application for interim relief is brought before or after the Commission has referred a complaint to the Tribunal, the Act still enjoins an applicant to provide the Tribunal with *prima facie* proof of a prohibited practice.

60. In *eMedia*,[21] we had occasion to consider the weight that ought to be attached to decisions of the Commission to refer or not refer complaints to the Tribunal for prosecution. There, we found that while a decision by the Commission, being the body tasked by the Act to undertake investigations, not to refer (or to refer) is a factor that must be considered, the Tribunal is not bound by the Commission's decision.

61. In this instance, at the time of hearing the application for interim relief, the Commission had not referred the complaint to the Tribunal. Secondly, The Commission's intention to refer does not, in and of itself, constitute *prima facie* evidence of a prohibited practice. It cannot be tested on its merits.

62. In our view, the difficulty with the Commission's letters is that they lack the particularity required in a complaint referral in terms of section 50(1)[22] read with rule 15(2)[23] of the Tribunal Rules, which provides that a complaint referral must

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[20] Transcript p. 39 – 41.

[21] eMedia Investments Proprietary Limited v MultiChoice Proprietary Limited and another, Case No. IR194Mar22/EXT061Jul23, at paras 28 - 31.

[22] Section 50 (1) states that: *(1) At any time after initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal.*

[23] Rule 15 (2) states that: "*Subject to Rule 24 (1), a Complaint Referral must be supported by an affidavit setting out in numbered paragraphs -*
(a) a concise statement of the grounds of the complaint; and

be supported by an affidavit setting out a concise statement of the alleged prohibited practice; and the material facts or points of law relied on by the Commission, (in the form of pleadings). The letters are communications with the parties during the Commission's investigation indicating the Commission's alleged findings.

63. They are conclusions drawn by the Commission after its investigation without any particularity that demonstrates how the alleged concertation occurred.

64. In *Mercantile Bank,* the CAC held that unlike section 4(1)(b), section 4(1)(a) does not itemise practices which are presumed anti-competitive. [24] The CAC further held that *"The onus in section 4(1)(a) requires the party alleging it to make out why the practice is anticompetitive before the respondent is required to rely on the pro-competitive proviso."*[25]

65. Sekunjalo alleged that the Banks are in a horizontal relationship. However, it provided no facts or allegations in the Commission's letters (which it relies on) explaining why the Banks would co-ordinate to achieve an anti-competitive outcome in unrelated markets in which they (the Banks) operate. The CAC previously found that the actions of the Banks could not be explained under any theory of competitive harm since the Banks are not competitors of Sekunjalo.

66. Sekunjalo has not brought any new facts explaining the competition theory of harm from the actions of the Banks. It simply relies without more on the fact that

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(b) *the material facts or the points of law relevant to the complaint and relied on by the Commission or complainant, as the case may be."*

[24] (i) Directly or indirectly fixing a purchase or selling price or any other trading condition; (ii) dividing markets by allocating customers, suppliers, territories or specific types of goods or services; and (iii) and tendering collusively.

[25] *Mercantile Bank*, para 41.

the Commission has informed it and Nedbank of a prohibited practice (as set out in the above-mentioned letters).

67. Absent substantiation by the Commission in its letters, we are of the view that the letters fall short of what is required to sustain a *prima facie* concerted prohibited practice under section 4(1)(a) for interim relief purposes.

68. We now turn to the Commission's explanatory affidavit.

The Commission's explanatory affidavit.

69. Sekunjalo also relied on the Commission's explanatory affidavit filed in these proceedings stating its intention to refer a complaint against the Banks as evidence that demonstrates *prima facie* proof of a prohibited practice.[26]

70. The highwater mark of Sekunjalo's case, and referred to by Sekunjalo's counsel during the hearing is paragraph 9 of the Commission's explanatory affidavit which states that: [27]

"9. The Commission has reached a prima facie view on the complaint, and engaged the services of senior counsel to advise on the prospects of success in prosecuting the matter"[28]

71. We were not told the basis of the Commission's *prima facie* view, nor were we told how the Banks coordinated, nor how this affects any competitive relationship between the Banks and Sekunjalo.

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[26] Sekunjalo AA, p. 20 of the consolidated hearing bundle, para 58.
[27] Transcript. p. 12, line 6 – 22.
[28] Commission's EA, p. 249 of the consolidated hearing bundle, para 9.

72. In *Mercantile bank,* the CAC found that Sekunjalo did not demonstrate why the Banks would seek to coordinate to achieve an anti-competitive outcome against Sekunjalo in markets unrelated to the Banks' activities. It found:

> "58. *Again, it must be repeated that the appellant banks are not competitors of their customers or attempting to leverage their alleged dominance into any market in which their customers compete. Thus, the actions on the present record cannot be explained under any competition theory of harm. None has been offered and no facts were alleged to sustain such a case in law. Instead, the only explanation for the conduct is the one offered by the banks - the refusal to supply was a response to the regulatory climate they faced in respect of serving these customers, post the Mpati Commission report."*[29]

73. Sekunjalo sought to argue that we are not bound by the CAC's decision.

74. It argued that the Act must be interpreted through a constitutional lens. It submitted that the CAC's approach in adopting the "enhancement of market power" approach as it did in *Mercantile Bank* against the express pronouncement of the Constitutional Court in *Mediclinic*[30] is not countenanced or envisaged in the Act.

75. It argued that this *"enhancement of market power"* theory of harm as adopted by the CAC is an economic approach which is only appropriate in cases where there is some competition between the parties. This economic approach (that

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[29] Mercantile Bank, para 58.

[30] Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another [2021] ZACC 35; 2022 (5) BCLR 532 (CC); 2022 (4) SA 323 (CC); [2023] CPLR 2 (CC), para 53 - 54.

requires a motive for the conduct) to the Act is unsuited to cases where the parties are not competitors. In this latter case, a constitutionally compliant approach (without enquiring into the motive) is required.

76. Nedbank argued that by virtue of the principle of *stare decisis,* the CAC's judgement and order in *Mercantile Bank* are binding on the Tribunal - even if they were wrong - until they are set aside by a higher court. It further argued that while decisions on questions of fact are typically not binding, where a court finds that certain facts give rise to certain legal consequences, matters that raise facts that are substantially similar will be bound by that decision.

77. We have already found that Sekunjalo has not advanced any new facts, and that it simply relies without more on the fact that the Commission has informed it and Nedbank of its view that the Banks are engaged in a prohibited practice.

78. In our view, Sekunjalo's present application for interim relief raises the same facts that were considered and decided on by the CAC in Mercantile Bank. The Constitutional Court has affirmed and held that deviating from the principle of *stare decisis* invites legal chaos.[31] Accordingly, until such time that the CAC's decision in *Mercantile Bank* is set aside, we remain bound by the points of law that emanate from that decision.

79. Counsel for Nedbank pointed out that in its letter of 18 November 2024, the Commission advised Nedbank that it *"had already briefed senior counsel (our*

[31] Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another 2011 (4) SA 42 (CC) at para 28.

emphasis) to prepare referral documents to be filed with the Competition Tribunal in this matter in due course".[32]

80. However, in its explanatory affidavit, before us the Commission now states, that it "*has reached a prima facie view and has engaged senior counsel to advise on the prospects of success in prosecuting the matter" (our emphasis).*

81. In response, Counsel for Sekunjalo argued that the change in stance is of no moment. He argued that seeking advice on prospects of success does not nullify the Commission's decision to refer a complaint.[33] He argued that:

> *"...It happens often that a decision is reached and then prospects of success or an advice on prospects of success is sought from counsel. Non constat that by seeking advice on prospects of success you are thereby nullifying a decision you have already taken."*

82. In our view, nothing in the explanatory affidavit takes the matter any further. We have already found that the Commission's explanatory affidavit lacks specific facts and evidence that demonstrate that Nedbank communicated, co-operated, co-ordinated (directly or indirectly) with other banks and that such co-ordination has resulted in a substantial prevention or lessening of competition.

Reliance on its own pleadings

83. At the hearing, Counsel for Sekunjalo further argued that despite its reliance on the letters as well as the explanatory affidavit, its own pleadings disclose

[32] Annexure CC3 to the Commission's explanatory affidavit, p. 259, para 6.
[33] Transcript, p. 9 – 10.

evidence of a contravention of section 4(1)(a) of the Act.[34] We were specifically referred to the following parts (which we summarise) of Sekunjalo's pleadings:

83.1. Page 27 of Sekunjalo's founding affidavit, paragraph 94 – 96. These paragraphs refer to market shares as they relate to the Banks in South Africa and seek to establish dominance by the Banks.[35]

83.2. Page 46 of Sekunjalo's founding affidavit, paragraphs 188 and 189. These paragraphs refer to market shares as they relate to banks in South Africa.[36] Further on in the affidavit, Sekunjalo alleges that it will not have access to banking facilities unless the Tribunal interdicts Nedbank from closing Sekunjalo's bank accounts because the bank accounts were kept open as a result of an Equality Court order which has now been overturned by the SCA, and leave to appeal was denied by the Constitutional Court.[37] Therefore the bank accounts can be kept open by the Tribunal on competition grounds.

83.3. Page 48 of Sekunjalo's founding affidavit, paragraph 202. Sekunjalo alleged that without banking facilities, it would be forced to operate its businesses on a cash-flow basis, which it alleged was untenable to operate businesses.[38]

83.4. Page 1057, paragraph 35 – 39. Here, Sekunjalo recounts that it submitted a complaint to the Commission as well as a brief description

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[34] Transcript. p. 13.
[35] Sekunjalo's AA, p. 27 of the consolidated pleadings bundle, para 94 – 96.
[36] Sekunjalo's AA, p. 46 of the consolidated pleadings hearing bundle, para 188 – 189.
[37] Sekunjalo's AA, p. 46 of the consolidated pleadings hearing bundle, para 190.
[38] Sekunjalo's AA, p. 48 of the consolidated pleadings hearing bundle, para 202.

of when each bank that it had an account with, issued Sekunjalo with termination letters.[39]

84. In our view, the pleadings do not advance Sekunjalo's application. They raise the same issues i.e. that the Banks are dominant in the provision of banking services and that they each closed Sekunjalo's bank accounts (in a concerted practice), which has the effect of substantially preventing and lessening competition in the markets in which the Sekunjalo entities operate.

85. Nothing in paragraph 86 above contain any new facts or evidence that *prima facie* demonstrate co-ordination between the Banks, and therefore, we find that Sekunjalo has failed to demonstrate *prima facie* evidence of a prohibited practice in its pleadings.

86. In this case, Sekunjalo has not explained why the Banks would have any incentive to produce anti-competitive effects in downstream markets in which they do not operate, a finding by the CAC that is binding on us.

87. The Tribunal is bound by the evaluation of the CAC in Sekunjalo's first interim relief application. While *eMedia* enjoins us to take a robust approach when faced with disputes of fact, as we have already found, Sekunjalo has failed to demonstrate, even on a robust approach, new facts and/or evidence that Nedbank and any other Bank *prima facie* engaged in a concerted prohibited practice. For this reason, its application must fail.

88. Given the lack of *prima facie* evidence of a prohibited concerted practice under section 4(1)(a), we need not consider the need to prevent irreparable harm to

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[39] Sekunjalo's RA, p. 1057 of the consolidated pleadings hearing bundle, para 35 – 39.

Sekunjalo and the balance of convenience under section 49C(2)(b) (ii) and (iii) respectively.

CONCLUSION

89. In the circumstances, the application for interim relief was dismissed.

Ms Mondo Mazwai

04 February 2026

Date

Concurring: Mr Andreas Wessels and Prof. Imraan Valodia

Tribunal Case Managers:	Ofentse Motshudi and Sinethemba Mbeki
For the Applicants:	Adv Vuyani Ngalwana SC and Adv Katlego Monareng Instructed by Refiloe Mokoena of Mokoena Attorneys
For Nedbank:	Adv Greta Engelbrecht SC and Adv Ziyaad Minty Instructed by Aslam Moosajee of ENSafrica Attorneys