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Termination of the Bank-Customer Relationship: Lessons from Minister of Finance v Oakbay Investments

by

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Declaration

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Summary

By April 2016, most, if not all of South Africa's banking institutions had shut its doors to Oakbay Investments, together with thirteen other companies,[1] all with close ties to the now notorious and politically linked Gupta family group of companies.

The account closures incited a legal and political "war", which included court intervention by the erstwhile Minister of Finance Pravin Gordhan, asking for declaratory relief, stating that the Government, least of all the Minister of Finance, could not interfere with the decision of the country's major banks, in so far as they no longer wanted to do business with the Guptas.[2]

Underpinning the "Bank versus Gupta war", is the bank-client or bank-customer relationship. In this dissertation, I will explore the legal foundations of this relationship, and whether the bank can terminate this relationship unilaterally. What are the considerations of the bank, and ultimately what are the consequences for undesirable customers in the banking marketplace?

[1] Oakbay Resources and Energy Ltd, Shiva Uranium (Pty) Ltd, Tegeta Exploration and Resources (Pty) Ltd, JIC Mining Services (Pty) Ltd, Blackedge Exploration (Pty) Ltd, TNA Media(Pty) Ltd, The New Age, Africa News Network (Pty) Ltd, VR Laser Services (Pty) Ltd, Islandsite Investments One Hundred and Eighty (Pty) Ltd, Confident Concept (Pty)Ltd, Jet Airways (India) Ltd, Sahara Computers (Pty) Ltd.
[2] *Minister of Finance v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments (Pty) Ltd and Others v The Director of the Financial Intelligence Centre* (2018) 4 All SA 150 (GP).

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Chapter 1:
Introduction

In December 2015, Barclays Plc's Absa Bank gave notice to Oakbay Investments, together with thirteen other companies[3] (the "Oakbay respondents"), all with close ties to the politically linked Gupta family, that it intended on closing their banking accounts.[4] The relationship was terminated in February 2016. By April 2016 Standard Bank Group, Nedbank Group and FirstRand's First National Bank had shut its doors to the notorious group of companies, followed by the Bank of China and the Bank of Baroda.

The account closures incited a legal and political war, which included court intervention by then Minister of Finance Pravin Gordhan (the "Minister"), seeking declaratory relief, stating that a third party, least of all the Minister of Finance, is not obliged nor empowered to interfere with the decision of the country's major banks, in so far as they no longer wanted to do business with a customer.[5]

Underpinning the conflict between the banks and Oak bay, is the bank-client or bank-customer relationship. In this mini-dissertation, I will briefly explore the legal foundations of this relationship, and question whether the bank can terminate this relationship unilaterally? Can the relationship be legitimately intruded upon or influenced by a third party? What considerations should influence the bank's choice to terminate the relationship, and ultimately what are the consequences for undesirable customers in the banking marketplace?

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[3] Oakbay Resources and Energy Ltd, Shiva Uranium (Pty) Ltd, Tegeta Exploration and Resources (Pty) Ltd, JIC Mining Services (Pty) Ltd, Blackedge Exploration (Pty) Ltd, TNA Media (Pty) Ltd, The New Age, Africa News Network (Pty) Ltd, VR Laser Services (Pty) Ltd, Islandsite Investments One Hundred and Eighty (Pty) Ltd, Confident Concept (Pty) Ltd, Jet Airways (India) Ltd, Sahara Computers (Pty) Ltd.

[4] "*Absa Cites Reasons to Cut Tie with the Guptas"* available at http://ewn.co.za/2016/12/23/absa-cites-reasons-to-cut-ties-with-the-guptas [accessed on 6 May 2017].

[5] *Minister of Finance v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments (Pty) Ltd and Others v The Director of the Financial Intelligence Centre* (2018) 4 All SA 150 (GP).

Chapter 2:
General Principles of the Bank-Customer Relationship

It is trite that the bank-customer relationship is one based on contract.[6] For a contract to be valid and binding in South Africa, the following requirements must be met:

- Legal Capacity: The parties must have the legal capacity to contract[7];
- Offer and acceptance: For an offer to be valid, it must be definite, complete, clear and certain. For valid acceptance, it must be unconditional; unequivocal; consciously accepted by the person to whom it was addressed; and compliant with any formalities set by law or the offeror.
- Certainty: The agreement must have certain and definite terms. Our courts will not readily uphold a contract which is vague. Further, there must be consensus between the contracting parties as to the terms therein.
- Formalities: Certain contracts require certain formalities. For example, a contract of instalment sale of immovable property must be in writing[8]; so too ante nuptial marriage contracts must be reduced to writing so as to be enforceable against third parties[9].
- Possible: the contractual obligations must be possible of performance. One cannot contract to do something that is impossible.
- Lawful: The agreement must be lawful and not against public policy. Like impossibility, there can be no valid contract to do something illegal.

A bank is a distinct legal person, with the ability to own property, acquire rights and incur obligations. The bank may also sue or be sued in its own name.

When a person (for convenience we will assume that this person is juristic) makes an application to open an account at a bank, it offers to enter into a contract

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[6] Ramdhin in Sharrock, R *The Law of Banking and Payment in South Africa* (2016) 115. Moorcroft in *Banking Law and Practice* (2015) 15.
[7] Heaton in Cronje, DSP and Heaton, J The South African Law of Persons (5 ed) (2017) 38
[8] The Alienation of Land Act 68 of 1981 ("the Act") is applicable to land purchased for residential purposes and it regulates instalment sale agreements ("the agreement") whereby the property is sold against payment by the purchaser to the seller in two or more instalments over a period exceeding one year. The Act places the onus of recording the agreement with the Registrar of Deeds at the instance of the seller.
[9] As per Section s 87 of the Deeds Registries Act 47 of 1937

with the bank. The bank accepts the offer when it opens this account, and so the duties and obligations of the contractual relationship come into existence,[10] for as long as the account is operational.

2.1 Rights and duties of the parties

Malan, Pretorius and Du Toit[11] submit that the contract between a bank and its customer is one of *mandatum*, and despite academic discussion[12] around the granularities of the construct, it is accepted that the contract is consensual and that to a large extent the *naturalia* of the law of mandate apply.

Subject to the Financial Intelligence Center Act[13] ("FICA"), Consumer Protection Act[14] ("CPA") and the National Credit Act[15] ("NCA"), which impose certain statutory restrictions in respect of prohibition on certain individuals, duration, form and intention, the parties are free to conclude terms as they wish, and with whom they wish.

The customer is obliged to:[16]

- Pay its over drawings or credit, together with interest and bank charges;
- exercise reasonable care when drawing or issuing the bank payment instructions;
- notify the bank if the customer is aware of any forgery; and
- reimburse and indemnify the bank.

Reciprocally, a typical mandate obliges the bank to:[17]

- Keep or maintain the customer's accounts with the bank;
- honour payment instructions;
- receive and collect payments on the customer's behalf; and

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[10] *Ladbroke v Todd* (1914) 30 TLR 433, 434.
[11] Malan,FR , JT Pretorius & SF du Toit in *Malan on Bills of Exchange, Cheques and Promissory Notes* 5th Ed (2009) 326.
[12] Ramdhin 115-119 Joubert el at (eds) in *The Law of South Africa* 2nd Ed (2003) vol 2 part 1 403. Moorcroft in *Banking Law and Practice* (2015) iss 11 at 15-2ff.
[13] Act 38 of 2001, as amended.
[14] Act 68 of 2008.
[15] Act 34 of 2005.
[16] Ramdhin 140.
[17] Ramdhin 126-127.

- furnish the customer with statements of account.

In performing its contractual obligations, the bank owes its customers, amongst other things, a duty of secrecy,[18] a duty to exercise reasonable care and skill,[19] and a duty to act in good faith.

2.2 Interference by third parties

The relationship between a bank and its client is a legal contract between two consenting parties. If a third party, either as an agent or acting with bias towards a party to the contract, brings duress to bear on the contract, the contract can be rescinded.[20]

2.3 Is a member of parliament or a cabinet minister an ordinary third party?

The law of contract is not concerned with the political status of the third party, unless such third party has a statutory right impressed upon it to intervene. Members of Parliament and Cabinet Ministers alike, are creatures of statute, and their powers are limited to those bestowed upon them by the enabling legislation. Section 1(c) of the Constitution of the Republic of South Africa, 1996 articulates the sanctity of the "rule of law" in our democracy, of which the principle of legality is paramount. In *Fedsure Life*,[21] the Constitutional Court confirmed that an organ of state has no other power than that conferred by law.

Save to the extent authorised by law, and only in the exercise of its powers in good faith, and for the purposes for which it is intended, a Cabinet Minister or MP[22] for that matter, cannot merely intervene in a contractual relationship between private parties. Usurping these powers would attract a strict legal sanction by our courts, and would be patently *ultra-vires*. Not only is third party interference hampered by the bank's duty of secrecy, and its inability to share information regarding its customers

[18] Ramdhin 135.
[19] Ramdhin 133.
[20] *Broodryk v Smuts* [1942] TPD 47 53.
[21] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC).
[22] Member of Parliament.

with any other entity except the Registrar of Banks (and certain other statutory bodies), interference by persons wielding political power is also hamstrung by the limited statutory nature of the Minister's or Parliamentarian's powers.

This does not mean that the law and the *boni mores* of society do not fetter the relationship between a bank and its client. In fact, much regulation and direction has been forthcoming from the global banking authorities and is binding on the conduct of banking institutions within the Republic of South Africa. Examples of such global directions are discussed in chapter 3 below.

2.4 Termination of the relationship

The bank-customer relationship, being a contractual bond, may terminate via agreement or consent, notice of termination, death or dissolution of one of the parties, sequestration, insanity of the customer, and the natural effluxion of time.

The duration and termination of an agreement is primarily determined by establishing whether there are any explicit contractual grounds, including voluntary termination on which the parties can depend on. These grounds typically lie in the cancellation clause or *lex commissoria*. In *GPC Developments*,[23] the Court noted that:

> "the phrase (lex commissoria) denotes, primarily, a term which permits a contracting party to resile from an agreement on the ground of delay, but that it has also acquired a wider and more general meaning, viz, a stipulation conferring the right to cancel an agreement on the basis of any recognized form of breach."

The Supreme Court of Appeal ("SCA") has provided guidance where a contract is silent as to its duration and termination procedure. In *Plaaskem*,[24] the SCA deliberated over whether the written contract could be interpreted as containing a tacit or implied term to the effect that the contract was terminable by either party on reasonable written notice. The parties to the matter were at loggerheads after written notice of termination of a contract was rejected by the receiving party as the contract did not contain a tacit term that it could be terminated on reasonable notice. The Court pointed out that language, the intention of the parties, the nature of the relationship and the surrounding circumstances of the agreement, were cardinal factors to be

[23] *GPC Developments CC and Others v Uys and Another* 2017 4 All SA 14 (WCC).
[24] *Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd* 2014 (5) SA 287 (SCA).

considered[25]. Where the intention of the parties is not to remain in a contractual relationship with each other *ad infinitum*, it stands to reason that the contract includes a tacit, alternatively implied, term to the effect that the contract was terminable on reasonable notice[26].

In practice, it is not uncommon for a customer to relinquish his account with a bank immediately, thereby terminating the agreement. One could walk into any bank branch in the Republic, or open up one's cell-phone banking application as is the case in the modern era, and intentionally and willingly withdraw one's funds thus unilaterally terminating the relationship instantly, provided there are no outstanding financial liabilities or obligations. Banking services are fundamental to modern life and our existence in the economy, but the contract between a specific bank and its customer is not an eternal bond. It is the service of banking, not the precise bank that is fundamental to the customer. Even if there is no cancellation clause, it therefore cannot be implied that the intention of the parties to the bank-customer relationship is to be bound in perpetuity.

Section 14(2) of the CPA addresses cancellation of a fixed-term contract[27] prior to expiry or effluxion of the duration thereof. This provision allows the consumer to cancel a contract by giving the supplier "20 business days' notice in writing or other recorded manner and form". A procedural necessity of the cancellation is that cancellation must be in writing or a recorded form. It is submitted that this provision is reciprocal. Further, section 14(3)(a) of the CPA espouses that despite cancellation of a contract, a consumer is liable for all outstanding amounts owed in terms of that agreement. For example if a bank cancels a customer's credit relationship, the customer remains liable for all amounts outstanding on the credit agreement, as at date of termination.

The inherent duty of good faith towards its client, or to-be erstwhile client, encumbers a bank (who wishes to terminate its relationship with a customer) with the responsibility and obligation to afford the customer reasonable notice.[28] What is

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[25] Ibid 24.
[26] Ibid 26.
[27] Applicable to agreements where the term of the contract is determined or fixed, such as credit card or revolving loan agreements.
[28] *Penderis and Gutman NNO v Liquidators, Short Term Business, AA Mutual Insurance Association Ltd* 1992 (4) SA 836 (A).

reasonable must be discerned from the facts of the case.[29] The duty to provide the customer with reasonable notice is also reflected in the voluntary Code of Banking Practice. The Code, though only applicable to the major banks' personal and small business customers, sets out that a conforming banking institution will:

> "provide you with at least 20 business days (or 5 business days in the case of credit agreements) notice before the implementation of changes in the Terms and Conditions, fees and charges, the discontinuation of products and / or services and the relocation of premises."[30]

The Code further sets out the instances in which the bank may elect to terminate the relationship *sans* notice:

- If the bank is compelled to do so by law (or by international best practice);
- if the account has been dormant for a significant period of time; or
- if the bank has reasons to believe that your account is being used for any illegal purposes.

The right to termination under reasonable notice has been enshrined by our courts, as will be unpacked further below. When the relationship is terminated, so too are the rights and duties of both parties. The bank, however, remains bound to keep confidential certain information of its erstwhile customer.[31]

[29] *Prosperity Ltd v Lloyds Bank Limited* (1923) 39 TLR 372 at para 373.
[30] The Banking Association of South Africa – Code of Banking Practice. Clause 3.1 (Effective 1 January 2012).
[31] *Tournier v National Provincial & Union Bank of England* (1924) 1 KB 461 at 473.

Chapter 3:
Global and Domestic Regulation

Crystallized by the American led "War-on-Terror", much regulation and direction has been focused on operational regulations to eradicate money laundering and combatting the financing of terrorism. These regulations and guidelines place a stringent compliance obligation on global banking institutions, which obligations have a direct bearing on the bank-customer relationship, and potentially the termination of such a relationship.

3.1 Know Your Customer ("KYC")

The Basel Committee on Banking Supervision ("the Committee") or the Committee on Banking Regulations and Supervisory Practices, as it was initially termed, was formed by the Group of Ten ("G10") countries[32] in 1974, with the intention of creating improved standards of banking supervision and co-operation, thereby enhancing financial stability. Publishing its first international standard for bank regulation in 1975, the Basel Committee has since maintained the yard stick for capital adequacy in its Basel I, Basel II and, most recently, Basel III publications. Its membership too has been bolstered from the G10 in 1974 to its present assembly of 45 institutions from 28 jurisdictions.[33]

The Committee advocates[34] robust KYC policies and procedures in order to protect the safety and soundness of banks and the integrity of the banking system as a whole. The principle of "Know-Your-Customer" or KYC is the process of having banks verify that customers are who they say they are, confirm that they are not on any prohibited lists and assessing their risk factors. It makes sense that if the bank knows who it is doing business with, it is able to manage this relationship appropriately.

The Basel Committee offers guidance on customer due diligence and anti-money laundering efforts in three fundamental working papers, namely:

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[32] Comprised of the central banks of Belgium, Canada, France, Italy, Japan, the Netherlands, the United Kingdom, the United States of America, Germany and Sweden.
[33] " History of the Basel Committee" available at https://www.bis.org/bcbs/history.htm. [Accessed on 19 February 2019].
[34] In its *Consultative Document: Customer due diligence for banks*. Issued for comment in January 2001.

(1) *The Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering* (1988) which stipulates several basic principles, encouraging banks to identify customers, refuse suspicious transactions and cooperate with law enforcement agencies.

(2) *The 1997 Core Principles for Effective Banking Supervision* states that, as part of a sound internal control environment, banks should have adequate policies, practices and procedures in place that "promote high ethical and professional standards in the financial sector and prevent the bank from being used, intentionally or unintentionally, by criminal elements". Accountable nations are also encouraged to adopt the relevant recommendations of the Financial Action Task Force ("FATF"), relating to customer identification and record-keeping, reporting suspicious transactions, and measures to deal with countries with insufficient or no anti-money laundering measures.

(3) *The 1999 Core Principles Methodology* further elaborates the Core Principles by listing a number of essential and additional criteria.

Pivotal to the global KYC effort is policies and procedures for customer acceptance, customer identification, on-going monitoring of high risk accounts and risk management. Identification of the needs of the client, and thereby the level of attention required by the bank to be placed on the customer is an important distinguishing factor in managing the bank's risk. Factors which may signal greater risk to the bank are customers engaging in, *inter alia,* arms trading, funding of contentious political regimes, or clients who are exposed to relationships with persons of political influence.

It is not sufficient for a bank to know the identity of its customer, but in the modern banking era it becomes crucial that a bank understands its customer's behaviour and ordinary or routine dealings. Dealings outside of the ordinary must receive particular scrutiny, and the bank is obliged to ensure that these dealings fall within its moral or value driven risk appetite and mandate, as well as comply with regulatory restrictions. If a client is deemed high-risk, then his accounts and transactional behaviour must be placed under more stringent observation. Suspicious inflows and outflows of funds

must accordingly be reported to the relevant authorities as soon as is reasonably possible. A weak ineffective KYC regime within a banking institution brings with it inherent reputational, operational and legal risk.

3.2 Politically Exposed Persons

In its 2001 paper titled *Customer Due Diligence for Banks*[35] the Committee introduced the concept of "Politically Exposed Person" as a distinct category of individuals who expose a bank to extraordinary reputational and legal risks. For the purpose of this paper, the definitions set out in the Glossary to the Financial Action Task Force ("FATF") Recommendations are relevant. The FATF Glossary definition of "politically exposed person" (or PEP) is aligned to the UN's definition of "persons with prominent public functions",[36] and the definition encompasses the Committee's usage. In particular, the definitions assist us to categorize and understand the scope of the term:

- Foreign PEP's: individuals who are or have been entrusted with prominent public functions by a foreign country, for example heads of state or government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, and important political party officials.
- Domestic PEP's: individuals who are or have been entrusted domestically with prominent public functions, for example heads of state or government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, and important political party officials.
- International organisation PEP's: persons who are or have been entrusted with a prominent function by an international organisation, which refers to members of senior management or individuals who have been entrusted with equivalent functions, namely directors, deputy directors and members of the board or equivalent functions.
- Family members: individuals who are related to a PEP either directly (consanguinity) or through marriage or similar (civil) forms of partnership.

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[35] Basel Committee on Banking Supervision, "*Customer Due Diligence for Banks*," (Bank for International Settlements, October 2001) 40-44.
[36] as defined in UN Convention Against Corruption, 2003 Article 52.

- Close associates: individuals who are closely connected to a PEP, either socially or professionally.

The distinction between foreign and domestic PEPs is in practice superfluous, as banks and other accountable institutions are encouraged to manage the relationship with either a foreign or domestic PEP in exactly the same manner. PEPs are flagged as high-risk, and all engagements are closely scrutinized for suspicious transactional behaviour as well as monitoring for adverse news which may impact the relationship. As explained further below, South Africa chose to deviate from the Basel parameters of high risk politically influential or exposed persons in the enactment of its domestic regulations to have a broader scope.

Furthermore, the Basel Committee[37] advises that business relationships with individuals holding important public positions and with persons or companies clearly related to them, may expose a bank to significant reputational and/or legal risks if these persons are corrupt and are engaging in corrupt activities. While corrupt PEPs may only account for a minute fraction of the entire universe of PEPs, a single corrupt PEP's behaviour can have a disproportionate and devastating impact on a country and sometimes an entire geographical region. Decisions to enter into business relationships with these persons should be taken at a very senior management level, and banks should be particularly attentive with respect to monitoring such accounts. In no uncertain terms, the Committee warns that:

> "It is incompatible with the fit and proper conduct of banking operations to accept or maintain a relationship if the bank knows or must assume that the funds derive from corruption or misuse of public assets."[38]

The Committee recommends that bank officials who know or should have known the source of funds in a transaction stem from corrupt or nefarious means, and despite this knowledge continue unabated to deal for profit with the tainted funds, could be charged with money laundering in their personal capacity.[39]

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[37] In its *Consultative Document: Customer due diligence for banks*. Issued for comment in January 2001.
[38] Ibid.
[39] Basel Committee on Banking Supervision, "*Customer Due Diligence for Banks*," (Bank for International Settlements, October 2001) 10.

3.3 Financial Action Task Force

The Financial Action Task Force ("FATF") is a multi-governmental organization, borne out of the G7's[40] initiative to combat money laundering activities. It monitors global compliance with anti-money laundering ("AML") regulations through peer review and mutual evaluations.[41] The FATF Recommendations are recognised as the global anti-money laundering ("AML") and counter-terrorist financing ("CFT") standard. Jurisdictions who are non-compliant or whose AML measures are weak are blacklisted. The blacklist, although carrying no formal sanction, has financial consequences for a country, as it may be seen as unfavourable to invest in, or to do business with.

South Africa is a member of the FATF and subscribes to the mutual evaluation system via its regional body, the Eastern and Southern Africa Anti-Money Laundering Group ("ESAAMLG"). The ESAAMLG comprises of 18 African neighbours, namely Angola, Botswana, Swaziland (Eswatini), Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, South Africa, Tanzania, Uganda, Zambia and Zimbabwe.[42]

In 1990 the forty FATF requirements[43] were adopted by the FATF's decision making body, the FATF Plenary, and was aimed at member governments and financial institutions. In 2003, FATF introduced, in a revision of the existing principles, a plethora of measures designed to identify higher risk individuals and to better monitor their transactions,[44] which revisions were guided by the Basel Customer Due Diligence requirements. Spurred by this, the United Nations Convention against Corruption ("UNCAC") called for enhanced scrutiny of accounts held by PEPs in article 52(1) and (2) as a means to prevent and detect the transfer of the proceeds of crime. In 2006, the FATF stated that the lack of rule of law and measures to prevent and combat

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[40] Governmental group consisting of Canada, France, Germany, Italy, Japan, the United Kingdom and the United States of America.

[41] Financial Action Task Force webpage, available at http://www.fatf-gafi.org/about [accessed on 25th May 2019].

[42] ESAAMLG webpage, available at https://www.esaamlg.org/index.php/countries [accessed on 25th May 2019].

[43] *"International Standards on combating money laundering and the financing of terrorism and proliferation*: *The FATF Recommendations*" updated in June 2019.

[44] Ibid. Recommendation 6, with the related requirements of customer due diligence in Recommendation 5.

corruption may significantly impair the implementation of an effective anti-money laundering and combating the financing of terrorism (AML/CFT) framework[45].

Revised as recently as June 2019, the Forty Recommendations establish a comprehensive framework against money laundering and have been accepted world-wide as the most robust initiative for combatting money laundering. Notable requirements include:

- Scope of the criminal offence of money laundering (Recommendations 1, 2);
- Provisional measures and confiscation (Recommendation 3);
- Measures to be taken by Financial Institutions and Non-Financial Businesses and Professions to prevent Money Laundering and Terrorist Financing (Recommendation 4);
- Customer due diligence and record-keeping (Recommendations 5 - 12);
- Reporting of suspicious transactions and compliance (Recommendations 13-16);
- Other measures to deter money laundering and terrorist financing (Recommendations 17-20);
- Measures to be taken with respect to countries that do not or insufficiently comply with the FATF Recommendations (Recommendations 21, 22);
- Regulation and supervision (Recommendations 23-25);
- Competent authorities, their powers and resources and other measures necessary in systems for combating Money Laundering and Terrorist Financing (Recommendations 26-32);
- Transparency of legal persons and arrangements (Recommendations 33, 34);
- International Co-operation (Recommendation 35);
- Mutual legal assistance and extradition (Recommendations 36-39); and
- Other forms of co-operation (Recommendation 40).

[45] FATF Annual Report 2005-2006. Published 23 June 2006. 7.

The 2003 and 2019 revisions build on and enhance the theme of:

- customer due diligence and the categories of customers or transactions that pose a potentially higher risk;
- the transparency of corporate vehicles and identification of the beneficial owners with a particular emphasis on bearer shares and trusts; and
- the role of non-financial businesses and professions in money laundering.

Thus, read together with the Basel Committee's recommendations for Banks, the FATF recommendations require member nations, *inter alia*, to place an obligation on banks, financial institutions as well as non-financial institutions and professionals (accountants and lawyers) in their countries to:

1. Understand with whom they are dealing and accordingly monitor and evaluate the transactions which these individuals/entities are engaged in[46];
2. report suspicious and/or unusual transactions[47]; and
3. distance itself from funds derived from corruption or misuse of public assets[48].

In 2008, South Africa was evaluated, as per the conditions of its membership to the ESAAMLG. The mutual evaluation was based on the laws, regulations and other materials supplied by South Africa, and information obtained by the evaluation team during its onsite visit to South Africa from 4 to 15 August 2008.[49]

Serious crimes were identified as common-place in the Republic, including drug-trafficking, fraud, theft, corruption, racketeering, smuggling, poaching, economic/investment frauds and pyramid schemes, with "increasing numbers of sophisticated and large-scale economic crimes and crimes through criminal syndicates".[50] The mutual evaluation found that the Republic was non-compliant, *inter*

[46] Financial Intelligence Centre Guidance Note 4 on Suspicious Transaction Reporting.
[47] Ibid.
[48] FATF Annual Report 2005-2006. Published 23 June 2006. 7.
[49] ESAAMLG Mutual Evaluation Report – Anti-Money Laundering and Combatting of Financing of Terrorism. South Africa. 26 February 2009.
[50] ESAAMLG Mutual Evaluation Report – Anti-Money Laundering and Combatting of Financing of Terrorism. South Africa. 26 February 2009 at page 6.

alia, with PEP identification and did not give special attention to relationships and transactions by clients from high-risk countries, or countries which are not aligned to FATF's mandate.

The report, and the negative impact arising therefrom, impelled National Treasury into enacting more stringent protocols for the management of risk, and in particular, the handling of PEPs.

3.4 The Financial Intelligence Centre Act

The Financial Intelligence Centre Act[51] ("FICA") is a component of the essential legislation recommended by FATF, and allows the Republic to conform to global standards (as espoused by the Basel Committee and FATF) in the fight against money laundering and the offences that are funded by these activities. The legislation was a thrust by the Treasury to conform more stringently to FATF recommendations and international best practice.

FICA repealed section 7 of the Prevention of Organised Crime Act and from 3 February 2003, the duty to report suspicious and unusual transactions and activities is governed by section 29 of FICA. The FIC Amendment Act,[52] which came into operation on 2 October 2017, contains further oversight and regulatory provisions that must be adhered to by parties to the bank-customer relationship.

The Act is based on three basic principles of money laundering detection and investigation, namely that:

- Participants in the financial system must know with whom they are doing business;
- the trail of transactions through the financial system must be preserved; and
- suspicious, unusual and potential money laundering transactions must be brought to the attention of the Financial Intelligence Centre ("the Centre") and the investigating authorities.

The Act includes requirements for accountable institutions to establish and verify the identities of their customers, to keep certain records, to report certain information and

[51] Act 38 of 2001, as amended.
[52] Act 1 of 2017.

to implement measures that will assist them in complying with the Act. These requirements introduce an all-encompassing deviation from the Basel concept of PEPs into our domestic legislation as “Prominent-Influential-Persons” or PIPs, which notion extends the scope of a bank’s due-diligence to regional and provincial leaders, tribal chiefs and influencers.

The bank may not establish a business relationship with a customer, nor conclude a transaction, without adhering to the purports of FICA. FICA requires the bank to keep certain records pertaining to its customers for a minimum period of five years. The bank is required to present information about its customers to the Centre on demand, as well as hold senior staff members personally accountable for any breaches in regulatory compliance. Most importantly section 29, read with chapter 4 of the Money Laundering and Terrorist Financing Control Regulations of FICA, requires a person who carries on a business or is in charge of or manages a business or who is employed by a business to report suspicious and unusual transactions to the Centre in the prescribed manner. The bank must ensure compliance with FICA through rigorous monitoring and reporting procedures, or face harsh regulatory fines and potentially a lock-out from the banking system by their domestic and global peers.

Thus, a bank must know who it is doing business with as well as pay close enough attention to the dealings of its customers, and in the face of this responsibility is liable for harsh regulatory sanctions for continuing business with a customer who is dealing unlawfully. PIPs are to be diligently monitored and their associations and transactions are to be routinely scrutinized by the bank.

3.5 The Banks Act

The enabling legislation of the business of a bank in South Africa is the Banks Act.[53] The Act places stringent statutory controls on the business operations of a bank, and obliges, via directives issued by the Registrar, the Board of Directors to ensure that an adequate and responsible measure of corporate governance is prevalent,[54] which governance incorporates effective risk management. A Board of Directors who fails to maintain an effective risk management programme is in breach of its corporate governance objectives and can be held responsible for liabilities incurred as a result

[53] Act 94 of 1990.
[54] Banks Act Directive 4/2018.

thereof.[55] The Act empowers the South African Reserve Bank to regulate the conduct of the banking institution,[56] and accordingly ensures that the bank adheres to international standards of best practice in governance.[57]

3.6 Reputational risk

In addition to the legal and operational risk exposure, banking institutions are increasingly self-aware of reputational risk. The shift post the global financial crisis of 2008 has been towards accountability, and in particular, accountability of financial institutions. Doing business with, and or profiting from dishonest activities, or even seeming to do so, attracts public outrage as well as regulatory scrutiny.

The reputation of a bank lies in maintaining the confidence of depositors, creditors and the domestic and foreign marketplace. Reputational risk is the potential that adverse publicity or perception regarding a bank's business practices and associations, whether truthful or not, will cause a loss of confidence in the integrity of the institution.[58] Banks are particularly susceptible to reputational risk because they are conduits for illegal activities perpetrated by their customers. They need to protect themselves by means of continuous vigilance through robust regulatory compliance regimes.

Operational risk can be defined as the risk of direct or indirect loss resulting from inadequate or failed internal processes, people and systems or from external events.[59] Most operational risks in this context relate to inadequacy in the execution of banks' regulatory programmes, ineffective controls and failure to practise thorough due diligence. A public perception, whether grounded in fact or not, that a bank is not able to manage its operational risk can have substantial adverse effect on the business of the bank.[60] Legal risk is the possibility that strenuous litigation and under-developed

[55] Section 6 (e).
[56] Section 4 (6) and 4 (7).
[57] Section 4.
[58] Deloitte Reputation Risk Survey Report (2015). Available at https://www2.deloitte.com/content/dam/Deloitte/za/Documents/risk/NEWReputationRiskSurveyReport_25FEB.pdf. [Accessed on 24th May 2019].
[59] Ibid.
[60] In its *Consultative Document: Operational Risk for banks*. Issued for comment in January 2001. Available at https://www.bis.org/publ/bcbsca07.pdf. [Accessed on 19 August 2019].

contracts can adversely affect the operations or condition of a bank[61]. Banks may be sued or incur judicial admonishment due to the failure to observe mandatory KYC standards or from the failure to practise due diligence. Regulators may impose fines, the courts may impose criminal liability and global authorities may levy sanctions for breach. Due diligence and understanding who you are doing business with and the parameters for this relationship assist a bank to navigate away from these negative impacts. A negative reputation can impact revenue and brand value by as much as 41 percent.[62] In a fiercely competitive global and domestic market, a 41 percent drop in revenue is a death knell for banks in the modern economic climate.

An obstacle to the immediate termination of a bank account is, however, present in the practical operation of the closure of fixed term credit loan agreements and the operation of section 62 of the National Credit Act. The point is moot, but the contractual terms of car instalment sales and home mortgage agreements, as an example, are binding on both parties for the fixed period of the agreement. A bank in this situation is obliged to afford the client notice on these accounts that extend until the maturity of the agreement or until default, and may reduce the granting of further credit to nil, until the term has expired or the customer has defaulted (thus triggering a right of cancellation). The bank is compelled contractually to endure the duration of the agreement and the customer is obliged to ensure that he services the repayments through a different bank or alternatively via manual cash-deposits. The almost preposterous situation of a mortgage being serviced by monthly cash-deposits raises the question of “suspicious-transaction-reporting” as envisaged by FICA. Made more so complicated if the bank is aware that the source of funds is potentially tainted, and is thereby furthering the commissioning of an offence, in principle by allowing the customer to launder his funds through asset finance.

Even if the customer is not proven guilty of squandering public funds or money laundering, the reputational risk to the bank is dangerously prevalent.

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[61] Deloitte Reputation Risk Survey Report (2015). Available at https://www2.deloitte.com/content/dam/Deloitte/za/Documents/risk/NEWReputationRiskSurveyReport_25FEB.pdf. [Accessed on 24th May 2019].
[62] Ibid.

3.7 The duty of secrecy

The duty to maintain secrecy and confidentiality is not only contained in our common law, but is also entrenched in the Constitution, in the customer's right to privacy.[63] The banking community, via the voluntary Code of Banking Practice,[64] recognizes in section 6.1 of the Code that its conforming members will treat customer personal information as private and confidential, and is duty bound to ensure that personal information is not disclosed to anyone, including subsidiaries and related companies.

The duty is not absolute, and may be relaxed in circumstances where:[65]

- Disclosure is compelled by law;
- the bank owes a duty to the public to make disclosure;
- interests of the bank require disclosure; or
- the disclosure is made with the consent of the customer.

The bank's duty of confidentiality is impacted where its regulatory obligations compel disclosure. FICA requires any and all suspicious transactions and dealings to be disclosed, in terms of section 29. The disclosures must be made to the Registrar of Banks. However, there is no statutory obligation on the bank to make a disclosure to Parliament or for that matter to the Minister of Finance.

[63] The Constitution, section 14.
[64] The Banking Association of South Africa – Code of Banking Practice. Para 6.1. (Effective 1 January 2012).
[65] *Tournier v National Provincial & Union Bank of England* [1924] 1 KB 461 at 473.

Chapter 4
Impact of our Courts on the relationship

4.1 *Hlongwane v Absa Bank Ltd*

In November 2012, Absa Bank gave notice to seven entities associated with South African businessman and politician, Fana Hlongwane, that it would be closing their business accounts.[66] Being concerned about the loss of its banking facilities, the seven entities applied to the North Gauteng High Court, to request reasons for the bank's decision to terminate the relationship. In its order,[67] the Court found that the decision by the bank was contractual and commercial in nature. Mr Hlongwane was dubbed a PEP, thereby rendering him, and the entities to which he was linked, a risk to the commercial enterprise and reputation of the banks that held his accounts.

Counsel for Mr Hlongwane however relied on the judgment of the North Gauteng High Court which heard the interim application of Mr Bredenkamp, (which application was overturned in the Supreme Court and is now referred to as the *Bredenkamp*[68] judgement – discussed in more detail below), to argue that the bank required good cause to unilaterally terminate the relationship.

The Court found[69] that it did not make commercial sense for the bank to carry any of Mr Hlongwane's entities as a client. The cost of monitoring of their transactions, as well as the risk of damages to the bank or personal liability in the event of breach of AML protocols, overshadowed the fees that could potentially be earned by retaining them. Further, it was the bank's prerogative whom it wanted to engage with in business, and it was not required to give reasons or justifications for the termination of the relationship. The bank-customer contract contained a tacit right of termination, which the bank and initiated and with the only requirement being that the bank must provide the customer with sufficient notice of the termination. In Mr Hlongwane's case, the court found that this requirement was addressed, and accordingly dismissed the application.

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[66] *Hlongwane v Absa Bank Ltd* (75782/13) [ZAGPPHC] 928 (10 November 2016).
[67] Ibid 29-30.
[68] *Bredenkamp v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA).
[69] *Hlongwane v Absa Bank Ltd* (75782/13) [ZAGPPHC] 928 (10 November 2016) 29-30.

4.2 *Bredenkamp v Standard Bank Ltd*

In the *Bredenkamp*[70] matter, which is the seminal judgement on the topic, the Supreme Court of Appeal dismissed an appeal by one John Arnold Bredenkamp, an international businessman, flagged as a PEP, who was seeking interdictory relief against Standard Bank from closing the accounts of his group of companies, *inter alia* Breco International Ltd, Hamilton Place Trust and International Cigarette Manufacture (Pty) Ltd.

In the court *a quo*, it was revealed that Mr Bredenkamp, a PEP, had been flagged by an American financial regulator for suspicious behaviour. Upon being made aware of this listing, Standard Bank sought to enforce its rights to terminate the relationship. The High Court, as the court of first instance*,* granted an interim interdict, preventing Standard Bank from terminating the accounts despite the explicit cancellation clause or *lex commissoria*, and in its judgment referred to the decision in the *Barkhuizen*[71] case, which dealt with a prescriptive clause in an insurance contract that was contested as being *contra* the values of the Constitution and accordingly unconstitutional.

In applying the guidelines as set out in *Barkhuizen* to determine the fairness of the cancellation clause, Jajbhay J noted that "the four large banks in South Africa operate within the framework of an oligopoly in which the four banks dominate the market for banking services".[72] A decision to terminate the bank-customer relationship has the domino effect in practice of having all the major banks follow suit. Effectively, a decision of a single bank to terminate the relationship could lead to an expulsion from the South African banking sector and thus the economy. Indeed, this reality was later faced by the Oakbay respondents between 2015 and 2017 – as discussed below in more detail.

On the return date, the interim order was set aside, and a final order was granted which permitted the account terminations to proceed unhindered. Being a man of considerable financial means, Mr Bredenkamp escalated his frustrations to the Supreme Court of Appeal. It was accepted by the Supreme Court of Appeal that the bank had, in terms of its contract with the appellants and in terms of the common law,

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[70] *Bredenkamp v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA).
[71] *Barkhuizen v Napier* 2007 5 SA 323 (CC).
[72] *Bredenkamp and Others v Standard Bank of SA Ltd and Another* (09/7907) [2009] Interim Order at Para 60.

the right to close the accounts with reasonable notice, and that the termination clause was thus fair and permissible. The termination was upheld and the appeal was dismissed. Bredenkamp's leave to appeal to the Constitutional Court was also dismissed.

4.3 *Oregon Trust v Breadica*[73]

In the court of first instance in this matter,[74] the Trust sought to evict its tenants on a strict interpretation of the lease agreements. The Tenants had failed to abide by the terms of renewal and the lease agreements were cancelled. The entities approached the Western Cape High Court for relief on the basis that a strict interpretation of the contract and the right of cancellation would be unfair and prejudicial to the tenants and thereby unconscionable. In its judgment, the Court explained as follows:[75]

> "We must accept that the courts cannot resolve every case that excites the sympathies of judges, or lays hold upon the judicial mind as raising issues of unfairness, in favour of the party the judges perceive to have been unfairly treated. It is the nature of law and the judicial process that it is required to draw lines and define boundaries and sometimes cases that fall on the wrong side of the line will be of such a nature as to excite the sympathy of the judges. They are, after all, human. Sometimes, but only occasionally, they will prompt a reconsideration of existing law and some development. But if the court makes this the determinative factor it fails to discharge an obligation that lies at the heart of the rule of law. A rule of law based solely on the exercise of judicial discretion and a sense of reasonableness and fairness may be no rule at all."

This insight resounds with *Bredenkamp*, where Harms DP explained:

> "A constitutional principle that tends to be overlooked, when generalized resort to constitutional values is made, is the principle of legality. Making rules of law discretionary or subject to value judgments may be destructive of the rule of law."[76]

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[73] *Oregon Trust v BEADICA 231 CC* [2019] ZASCA 29.
[74] *Beadica 231 CC & others v Trustees, Oregon Trust & another (*2018) (1) SA 549 (WCC).
[75] *Beadica 231 CC & others v Trustees, Oregon Trust & another (*2018) (1) SA 549 (WCC) at para 41.
[76] *Bredenkamp & others v Standard Bank of South Africa Ltd* (2010) ZASCA 75; 2010 (4) SA 468 (SCA) 39.

4.4 *A B v Pridwin Preparatory School*

This recent judgment of the SCA[77] succinctly sets out the principles governing private contracts and public policy as follows:

> "The relationship between private contracts and their control by the courts through the instrument of public policy, underpinned by the Constitution, is now clearly established. It is unnecessary to rehash all the learning from our courts on this topic. It suffices to set out the most important principles to be gleaned from them:
> (i) Public policy demands that contracts freely and consciously entered into must be honoured;
> (ii) A court will declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy;
> (iii) Where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;
> (iv) The party who attacks the contract or its enforcement bears the onus to establish the facts;
> (v) A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds;
> (vi) A court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose."

4.5 *Minister of Finance v Oakbay*

In the *Oakbay*[78] matter, the Court was tasked to consider three concurrent applications, with the Minister's declaratory application forming one of the three motions before it. The Gupta family, who owned and controlled the Oakbay group of companies, have strong links to the Zuma family (which household patriarch was the President of the Republic at the time of the application) and this relationship rendered them PEPs. However, in contrast to Mr Bredenkamp, they had not been listed or flagged by any foreign or domestic watch-dogs for sanctions. After on-going monitoring and deliberation, the various banks had made a unilateral decision to terminate its ties with the Gupta family and their companies. The family attempted to

[77] *A B v Pridwin Preparatory School* (2018) 14 ZASCA 150; 2019 (1) SA 327 (SCA) at para 27.
[78] *Minister of Finance v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments (Pty) Ltd and Others v The Director of the Financial Intelligence Centre* (2018) 4 All SA 150 (GP).

apply pressure to the Minister[79] and on the banks' regulators to interject and overturn the banks' decision. Significantly, the call for the Minister of Finance to intervene was publicly echoed by other members of the Cabinet,[80] who pursued intervention via an inter-ministerial committee. The Minister of Finance did not oblige this committee and further did not give any weight to its authority. Of concern to the Oakbay group and the inter-ministerial committee was the negative impact of the decision on its commercial operations, and that the lock-out from the banking sector would effectively signal the end of the road for their businesses and staff.[81]

The declaratory application sought to cement the position that a third party could not interject in the bank-customer relationship,[82] and that a bank could not be subdued into maintaining the relationship.[83] The Minister asked of the Court to declare that he had no power to intervene, but the Court could not conclude as to how such an order could be useful or necessary for the Minister. He had already distanced himself from the dispute and there was no legislative obligation for him to intervene in the matter.[84] Perhaps, in light of the political climate at the time, the Minister was seeking to shield himself from the pressures of his political affiliates, or even to be transparent with the public as to his role in the debacle.

Subsequent to the filing of the Minister's founding affidavit, the South African Reserve Bank, the Financial Intelligence Centre and the Registrar of Banks made submissions to the Court.[85] The former and the latter had both been approached by the Oakbay respondents to intervene. Despite the objectivity of the submissions as well as them acceding to abide by the decision of the Court, the view placed in front of the Court by the three regulators supported the position of the Minister.[86] This was not a show of political support, but rather support for the rule of law.

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[79] *Minister of Finance v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments (Pty) Ltd and Others v The Director of the Financial Intelligence Centre* (2018) 4 All SA 150 (GP) Founding Affidavit of Pravin J Gordhan. 19.
[80] *Minister of Finance v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments (Pty) Ltd and Others v The Director of the Financial Intelligence Centre* (2018) 4 All SA 150 (GP) 13.
[81] Ibid 13.
[82] Ibid 2.
[83] *Minister of Finance v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments (Pty) Ltd and Others v The Director of the Financial Intelligence Centre* (2018) 4 All SA 150 (GP). Founding Affidavit of Pravin J Gordhan 12-15.
[84] *Minister of Finance v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments (Pty) Ltd and Others v The Director of the Financial Intelligence Centre* (2018) 4 All SA 150 (GP) 14.
[85] Ibid 9.
[86] Ibid 9.

The erstwhile Finance Minister revealed in his papers that R7 billion in "suspicious and unusual" transactions involving members of the Gupta family and the Oakbay respondents had been reported to the Financial Intelligence Centre[87]. This evidence would subsequently be struck off the record[88], through an interlocutory application, but its existence indicated the tact in the approach undertaken by the Minister's legal counsel. They could not rely on data from the banks directly, as the duty of secrecy and confidentiality could not be legitimately bypassed. The bank was not compelled to disclose to the Minister why it chose to close the accounts, nor were they required to provide him with information regarding their customers. It was only the regulatory data compiled by the FIC that he was privy to.

The bank litigants, comprising of ABSA Bank Limited, First National Bank Limited, Standard Bank and Nedbank Limited, also provided arguments in support of the relief sought by the Minister[89]. In making the decision to terminate their relationship with Oakbay Investments and other Gupta related entities, the banks publicly cited suspicious transactions, as well as the contractual relationship between the parties.[90] Emphasis was placed on their obligation to comply with domestic and international standards of best practices and to maintain a good reputation[91]. With the global clampdown on money laundering, banks have become the watchdogs or gatekeepers of our economy. They are the conduits and enablers of the flow of money domestically and internationally, and rightfully so have inherited the duty to ensure that suspicious transactions and activities are pointed out. They are also subject to a fickle marketplace, and negative publicity has a remarked impact on their business. The decision to terminate the relationship was not grounded solely in the suspicion of tainted transactions, but was also weighed against the reputational risk of banking the

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[87] *Minister of Finance v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments (Pty) Ltd and Others v The Director of the Financial Intelligence Centre* (2018) 4 All SA 150 (GP) Founding Affidavit of Pravin J Gordhan.

[88] *Minister of Finance v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments (Pty) Ltd and Others v The Director of the Financial Intelligence Centre* (2018) 4 All SA 150 (GP) paras 31-42.

[89] Ibid 8.

[90] "*Why Standard Bank closed Oakbays Accounts*" available at http://www.fin24.com/Companies/Financial-Services/why-standard-bank-closed-oakbays-accounts-20161215 [accessed on 6th May 2017]; "*FirstRand closed Gupta Accounts on Money Laundering Fears*" available at http://ewn.co.za/2016/12/05/rand-report-firstrand-closed-gupta-accounts-on-money-laundering-fears [accessed on 6th May 2017]; "*Absa Cites Reasons to Cut Tie with the Guptas*" available at http://ewn.co.za/2016/12/23/absa-cites-reasons-to-cut-ties-with-the-guptas [accessed on 6 May 2017].

[91] *Minister of Finance v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments (Pty) Ltd and Others v The Director of the Financial Intelligence Centre* (2018) 4 All SA 150 (GP) para 1.

Oakbay respondents and was enabled by the contractual right to severe this relationship within the strictures of providing reasonable notice. It is not contested that Absa Bank gave the Gupta companies ample notice of their intention to unilaterally terminate their relationship, as early as December 2015, and only terminated the relationship sometime about February 2016.[92] The ample opportunity afforded to the entities is enshrined in the principle that the relationship can be terminated, provided the Bank extends a reasonable notice period[93].

After the closure of the Gupta accounts, Reserve Bank Deputy Governor Kuben Naidoo was quoted as saying in Parliament that "[t]he law did not allow banks to close accounts simply on the basis of suspicions", and that the Gupta accounts had been terminated after a few months' notice. This indicates that the Gupta accounts had been flagged for potentially mischievous conduct and the decision to terminate the accounts came after much deliberation and investigation into the commercial and regulatory impact of the closure. The Minister himself would go on to admit that, despite his understanding of the banks' regulatory obligations, and after numerous calls for assistance in the matter by the respondents[94], he had investigated the impact of the closures as well as the extent of his ministerial reach, but had to concede to the contractual right of the bank to choose its clients and to protect itself from risk.[95] The Minister thus resolved to observe rather than participate in the saga.

The Court found that the Minister failed to request an interrogation of the banks' *bona fides* and rather resigned himself strictly to the matter of his capacity to intervene.[96] The latter was question that he had received legal advice on, and correctly applied before approaching the Court. Without a determination on the impropriety of the decision to terminate, the banks' reliance on contract is deemed fair and justifiable in the context of the risks posed to their enterprise, including legal risk, reputational risk and regulatory risk. The right of a bank to terminate accounts on reasonable notice, as set out in *Bredenkamp*, was not disputed by any of the respondents. More

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[92] Ibid 12.
[93] *Bredenkamp v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA).
[94] *Minister of Finance v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments (Pty) Ltd and Others v The Director of the Financial Intelligence Centre* (2018) 4 All SA 150 (GP) Founding Affidavit of Pravin J Gordhan. 17.
[95] *Minister of Finance v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments (Pty) Ltd and Others v The Director of the Financial Intelligence Centre* (2018) 4 All SA 150 (GP) 66.
[96] Ibid 70.

so, it was not disputed that the Minister had no legal basis to intervene.[97] In the absence of a dispute or confusion as to the position, the Court had no obligation to intervene in a trite matter, and thus the Minister's application was dismissed.[98] On the face of it, one could assume that the dismissal was a rejection of the Minister's averments, but rather the Court concurred with the Minister when it found that it need not pronounce on a matter of fact. The case entrenches the principle that the relationship between the banks and its customer is a private one, and the termination of the relationship, no matter the considerations of fairness or ubuntu, could not be fettered politically.

To do their jobs effectively, the banks as gatekeepers to the economy, must be free of political interference, least of all Government intervention in the running of their business, thus ensuring objectivity and accountability.[99] These watchers must be brazen and free from fear, to point a finger at all who transgress their regulatory and value-based protocols, even their most wealthy or politically connected customers. In doing so, the banks deter criminality, and boost confidence in their own trustworthiness. It is inherently bad for business for the banks to operate under a cloud of bad publicity and potentially be implicit in unethical business practices.

[97] Ibid 55.
[98] Ibid 67.
[99] Ibid 69.

Chapter 5:
Conclusion

Ultimately, banks, like any other profit-driven-enterprise in a free-market economy, may utilize their discretion to do business with whomever they choose. Freedom of contract is trite in our common law, and the banks, under stringent regulatory scrutiny were justified in closing the Gupta accounts on reasonable notice. Neither our politicians nor our courts could be swayed to intervene in the termination of the relationship, where the reasons for termination indicate a suspicion of cloudy dealings.

Banking holds with it access into an economy[100], and its services have become a pivotal piece of formal enterprise, without which, a business cannot survive. How would one receive payments, uphold contractual obligations, comply with tax-obligations to the South African Revenue Service or pay wages to staff without the use of a bank? It would be practically inefficient and glaringly unsafe for a corporation to operate on a cash only basis. An innocent entity, victimised by a powerful banking institution, could have its back broken in a matter of weeks, under the guise of regulatory protocols or commercial considerations. Without formal banking services, an undesirable entity dies an unnatural death, out in the cold of the banked economy. The Oakbay respondents, however, where subject to months of scrutiny and investigation, and termination was based on the banks' *bona fide* perceptions of the risk and a valid right of cancellation. Mere months after the multi-million rand corporate Oakbay respondents were denied banking services, they were forced to close their doors.

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[100] Bredenkamp and Others v Standard Bank of South Africa Ltd and Another (09/7907) [2009] ZAGPJHC 30; 2009 (6) SA 277 (GSJ) (31 July 2009) 33.

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