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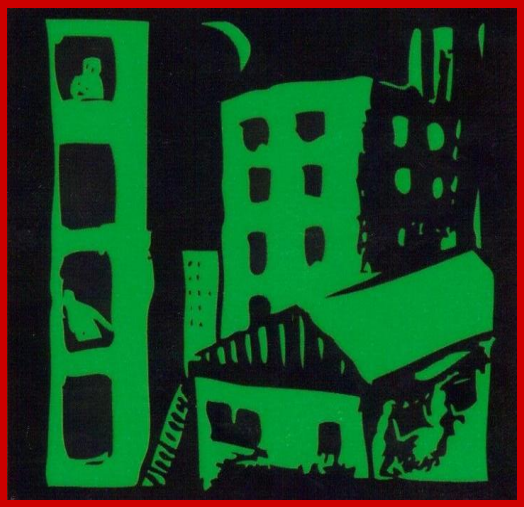

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Access to information to establish discriminatory bank practices in unilateral termination of bank account cases: *Ndudane and Others v Financial Intelligence Centre* 2024 (5) SA 549 (WCC)

MAPHUTI D TUBA

Associate Professor, Department of Mercantile Law, College of Law, University of South Africa, Pretoria, South Africa

https://orcid.org/0000-0001-6703-0480

ABSTRACT

There are different legal ways in which a litigant can access information held by other persons, state organs and regulatory bodies, one of which, for example, is by means of the Financial Intelligence Centre (FIC). Another is by accessing such information in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA), which was promulgated in terms of section 32(2) of the Constitution of the Republic of

South Africa of 1996. Alternatively, the litigant may invoke rule 35 of the Uniform Rules of Court to discover documents during legal proceedings. In certain instances, legislation may provide measures on how to access certain information that relates to the regulatory scope. An example of such legislation is the Financial Intelligence Centre Act 32 of 2001 (FICA), which regulates access to information reported to the FIC as a regulatory body to prevent financial crime. Litigants, however, often experience challenges in putting their case within the provisions of FICA or in determining other legal avenues to access the relevant information. The decision of the Western Cape Division of the High Court in Ndudane and Others v Financial Intelligence *dealt with access to information in terms of sections 40(1)(e) and 41(d) and (e) of FICA. This case note examines how the court interpreted and applied these sections, other relevant pieces of legislation, and the Constitution as avenues for accessing information. More importantly, it critically analyses the impact of this decision on continuing cases of termination of bank accounts and how bank customers may use the relevant legislative provisions to access information to establish reasons for the termination, including discrimination by banks as a ground for termination. The discussion identifies one potential development raised in this case in relation to cases of termination of bank accounts. The development relates to how fairness was cited as a ground to access information relating to the termination of bank accounts. Therefore, the discussion also determines the correctness of applying fairness as an ground or defence for the termination of bank accounts.*

Keywords: access to information; Financial Intelligence Centre Act 32 of 2001; termination of a bank account; Promotion of Access to Information Act 2 of 2000

1 INTRODUCTION

The Western Cape High Court decision in *Ndudane and Others v Financial Intelligence Centre* ("*Ndudane v FIC*" or "*Ndudane*")[1] adjudicated on the thorny issue of whether bank customers may access information held by the Financial Intelligence Centre (FIC), a body constituted in terms of the Financial Intelligence Centre Act (FICA).[2] This information was sourced in order to be used in an investigation of alleged discriminatory practices by banks in terminating customers' bank accounts. The decision of the Supreme Court of Appeal (SCA) in *Bredenkamp v Standard Bank of SA Ltd*[3] remains an authority for the position that banks have the right to terminate relationships with their customers based on reasonable notice if a relationship poses potential reputational or business risks.[4] The position remains unchallenged and is fully

[1] 2024 (5) SA 549 (WCC).

[2] 32 of 2001.

[3] 2010 (4) SA 468 (SCA) ("*Bredenkamp*").

[4] *Bredenkamp* (2010) at para 27; Schulze WG "The bank's right to cancel the contract between it and its customer unilaterally: *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA)" (2011) 32(1) *Obiter* 211; Ngidi M "The termination of the bank-client relationship in South African banking law" (2020) 53(1) *De Jure Law* 54; Letsoalo L "Navigating reputational risks: Cautionary considerations for South African banks in the unilateral termination of bank-customer relationships" (2024) 27(1) *Potchefstroom Electronic Law Journal* 1; Pesci A & Koekemoer MM "The FSCA Conduct Standard for Banks and the termination of the bank-client relationship: Some thoughts" (2025) 46(2) *Obiter* 258 at 264. See further Commission of Inquiry into State Capture *Judicial Commission of Inquiry into Allegations of State*

endorsed by courts and authors, who state that banks are not required to provide reasons for such terminations.[5] The termination of the contracts may be challenged only if it violates public policy or constitutional values.[6] However, recent policy and legal developments have raised some qualifications to the position in *Bredenkamp*.

Notably, the Commission of Inquiry into State Capture questioned the position in *Bredenkamp* that the bank is not obliged to hear the client's side of the story before terminating the relationship, finding this not "in line with the kind of society that our Constitutional democracy envisaged".[7] Furthermore, in the recent decision in *Survé v Nedbank Limited*, the court opined that "*Bredenkamp* should not be used uncritically or applied mechanically to all bank-client relationships".[8] When the decision in *Survé v Nedbank* was taken on appeal, the SCA adjudicated on the case by the appellant bank customers seeking to prevent the bank from closing their accounts. The appellants questioned the banks' reasons for relying on reputational risks as the main reason for such termination. The SCA also had to determine whether a customer, in this instance, must provide *prima facie* evidence to establish concrete reasons to challenge the

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Capture, Corruption and Fraud in the Public Sector Including Organs of State Report vol 6: part 1 (n.d.) available at https://www.statecapture.org.za/site/information/reports (accessed 13 September 2024) at para 794 ("Zondo Commission"); *Survé v Nedbank* (698/2022) 2022 ZAWCHC 19 (14 February 2022) at para 60, where the court held that "the SCA's judgment in *Bredenkamp* looms large, as it does in most matters involving the termination of a banking relationship". See also *Survé* (2024) at para 8. See further Schulze WG & Eiselen S "The unilateral termination by a bank of the bank-client agreement between it and its client: *Survé v Nedbank Limited* (698/2022) 2022 ZAWCHC 19 (14 February 2022)" (2022) 4 *Tydskrif vir die Suid-Afrikaanse Reg* 828 at 832, who argue that the correctness of the decision in the *Bredenkamp* case is beyond reproach despite the latest obiter comment in *Nedbank v Survé* that the *Bredenkamp* decision should not be read uncritically. See further *Goldstar Finance (Pty) Ltd and Others v Capitec Bank (Pty) Ltd* [2024] 1 All SA 727 (WCC) at para 90, where the court held that "[i]t makes no sense to allow termination on reasonable notice if good cause is required on top of that. It may be that cancellation on short notice, even with immediate effect, would be justified in some circumstances but that does not detract from the general right of termination on reasonable notice, when a contract is of indefinite operation." See also *Mega Works Trading Enterprise 200 (Pty) Ltd and Another v FirstRand Bank Limited* (CIV APP FB 23/22) [2023] ZANWHC 58 (23 May 2023) at para 24, where the court, while still holding *Bredenkamp* case as an authority, highlighted how Harms DP's quote at para 64 "begged the question whether the bank had (in terms of the relief sought) good cause to close the accounts".

[5] *Annex Distribution (Pty) Ltd and Others v Bank of Baroda* 2018 (1) SA 562 (GP), *Minister of Finance v Oakbay Investment Pty (Ltd)* 2018 (3) SA 515 (GP); *Talhado Fishing Enterprises (Pty) Ltd v FirstRand Bank Ltd t/a First National Bank* (1104/2022) [2022] ZAECPEHC 14 (19 July 2022); Schulze (2011); Ngidi (2020); Letsoalo (2024).

[6] *Bredenkamp* (2010) at paras 50–51. On public policy and contract, see *Barkhuizen v Napier* 2007 (5) SA 323 (CC). In *Bredenkamp*, the applicant questioned the termination of a bank account on constitutional grounds, specifically that it was against public policy and unfair. The SCA accepted the need, generally following the *Barkhuizen* case, to establish the facts upon which an attack for a contractual term on public policy grounds is based. The SCA did not find any interpretation of the *Barkhuizen* case to mean that fairness is an overarching requirement for striking off contractual terms on constitutional grounds. See further Ngidi (2020) at 61–63; Pesci & Koekemoer (2025) at 264.

[7] Zondo Commission at paras 263–264.

[8] (698/2022) [2022] ZAWCHC 19 (14 February 2022).

grounds for such disclosure. The decision in *Nedbank v Survé* highlights the challenge of accessing information held by third parties that bank customers may use to establish such reasons.[9]

This case note discusses the decision in *Ndudane v FIC*, in which bank customers applied for an order to access information from the FIC. The information was sought to establish whether banks had followed discriminatory practices in closing customers' accounts, thereby questioning reputational risk as the primary reason for such disclosure. The note analyses this decision in relation to whether and how customers may access information held by third parties (in this case, the FIC) and the legal basis and grounds for accessing the information. It focuses on important issues that customers aggrieved by the decision of banks to terminate banking relationships should consider when applying to access information held by third parties such as the FIC.

The note briefly discusses the relevance and application of the subsidiarity principle, which the Constitutional Court invoked in this case to determine whether the applicants could rely directly on constitutional provisions and bypass the appropriate legislative measures, such as the Promotion of Access to Information Act (PAIA).[10] It also examines whether applicants must establish a nexus between the information in question and its evidentiary value in the main application during an interlocutory stage relating simply to accessing such information. The discussion considers the general impact of the decision on the current jurisprudence on unilateral termination of bank-customer relationships by banks and the willingness of the courts to listen to customers' objections regarding banks' reliance on reputational risk as the main ground for unilateral termination of bank accounts. The note begins with a brief discussion of the right of access to information and the subsidiarity principle.

2 BACKGROUND TO THE CASE

2.1 The right of access to information

A detailed discussion of the right of access to information falls outside the scope of this article, but a brief background on it and how it is given effect legislatively is necessary. The right is protected in terms of section 32 of the Constitution, which protects the right of everyone to access information held by the state or by another person.[11] In relation to the right afforded to a private person, such information may be accessed only if it is required in order to exercise or protect any rights.[12] Section 32(2) empowers the legislature to enact national legislation that will "give effect" to this right. PAIA is the primary legislation enacted to give effect to section 32, by regulating access

[9] See Schulze & Eiselen (2022) at 828.

[10] Act 2 of 2000.

[11] See section 32(1)(a) and (b) of the Constitution of the Republic of South Africa, 1996.

[12] See section 32(1)(*b*) of the Constitution.

to information held by either private or public bodies.[13] Importantly, section 11 of PAIA generally provides for access to records in the possession of public bodies, which are institutions that exercise public powers or perform public functions in terms of any legislation.[14] In addition to PAIA, there are other pieces of legislation that directly and indirectly give effect to section 32 of the Constitution.[15] FICA is a significant piece of legislation in relation to access to information, albeit that it was not enacted primarily to "give effect" to section 32.[16] As the discussion of the sections of FICA below shows, FICA relates to access to and the collection of personal financial information in regard to the prevention of money laundering.[17]

2.2 The subsidiarity principle

The application of specific legislation and the constitutional right (including competing pieces of legislation) to a specific right often raises a question of whether parties should invoke the relevant provisions of the Constitution or resort to the specific legislation that gives effect to the constitutional right. This raises the application of the principle of subsidiarity.[18] Generally, the principle is that "the adjudication of substantive issues is determined with reference to more particular, rather than more general, constitutional norms".[19] When applied to disputes relating to constitutional rights, it provides that a

[13] Other provisions in the Constitution that mandate the enactment of legislation to "give effect" to substantive rights are sections 9(4), 25(9), 32(2), and 33(3). See the preamble and section 9 of PAIA. See Part 2 (access to records of public bodies) and Part 3 (access to records of private bodies).

[14] See section 1, which defines "public body" and private bodies. The definition of a "private body" specifically excludes a "public body", as defined by the Act..

[15] See National Archives and Records Service of South Africa Act 43 of 1996. In particular, see section 3(a) on the object of the Act to make archived records accessible and section 12, stating that access to public records in the custody of the National Archives should be made accessible "[s]ubject to any other Act of Parliament which deals with access to public records". See also the Protection of Personal Information Act 4 of 2013, in particular section 2 on the Act's purpose to balance the right to privacy with the right of access to information, referring specifically to PAIA; and section 23, on access to information by the data subject, Electronic Communications and Transactions Act 25 of 2002, with the purpose "to promote universal access to electronic communications and transactions and the use of electronic transactions" (Preamble). See also sections 2 and 6 on universal access.

[16] The Preamble of FICA refers to "the sharing of information by the Centre and supervisory bodies" as one of the purposes of the Act and the amendment of PAIA. However, it does not specifically state that the "giving of effect" to section 32 of the Constitution is one of its purposes.

[17] See 4.2 below.

[18] For a multifaceted account of the principle, see Sibanda S "Beneath it all lies the principle of subsidiarity: The principle of subsidiarity in the African and European regional human rights systems" (2007) 40(3) *Comparative and International Law Journal of Southern Africa* 425; Du Plessis L "'Subsidiarity': What's in the name for constitutional interpretation and adjudication?" (2006) 2 *Stellenbosch Law Review* 207; Visser CJ "Adjudicative subsidiarity, the 'horizontality simpliciter' approach and personality rights: Outlining an integrated and constitutional reading strategy to the law of personality" (2022) 55(1) *De Jure Law Journal* 124; Vause WG "The subsidiarity principle in European Union Law – American federalism compared" (1997) 27(1) *Case Western Journal of International Law* 61.

[19] *South African Human Rights Commission on Behalf of South African Jewish Board of Deputies v Masuku* (2022) 4 SA 1 (CC) at 101. This follows the approach to constitutional litigation laid down by Kentridge AJ

litigant or the court cannot sidestep an Act of Parliament that has been enacted to give expression to a constitutional right, if that Act exists.[20] It refutes a direct invocation of the relevant provision of the Constitution in resolving the dispute relating to the right.[21] Applied in relation to the right of access to information, "the starting point is not the Constitution, but PAIA, since Parliament enacted it expressly to give effect to the constitutional obligation in section 32(2)".[22] In these instances, the right in the Constitution plays only a subsidiary or supporting role.[23]

Problems arise when the subsidiary principle is sought to be applied to legislation that does not specifically give effect to a particular constitutional right. The subsidiarity principle has been applied in relation to what has been called an "effect-giving statute", namely specific legislation enacted by Parliament to give effect to a constitutional right.[24] Where this is the case, disputes are resolved based on the interpretation of the relevant legislation and whether the Constitution should be subsidiary to the effect of legislation. The Constitutional Court is developing jurisprudence that leans towards the application of the subsidiarity principle in cases where the court has to battle with the application of this principle in cases where the legislation giving rise to the alleged right is not one of the effect-giving statutes.[25] As Basson correctly observes, the Constitutional Court seems to agree that the principle

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in *S v Mhlungu* (1995) 3 SA 867) (CC) at para 59, where the Constitutional Court held that "as a general principle … where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed".

[20] *Masuku* (2022) at paras 34 and 95.

[21] *Masuku* (2022) at paras 34 and 95.

[22] *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC) at para 44.

[23] *My Vote Counts* (2016) at para 53.

[24] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) at paras 22–26; *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC); Klare K "Legal subsidiarity & constitutional rights: A reply to AJ van der Walt" (2008) 1(1) *Constitutional Court Review* 129 at 138.

[25] *AD and Another v DW* 2008 (3) SA 183 (CC). See also, applied in relation to inter-country adoption, article 17 of the United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally. See further *Women's Legal Centre Trust v President of the Republic of South Africa* 2022 (5) SA 323 (CC), dealing with the Marriage Act 21 of 1961 and the Divorce Act 70 of 1979 as relevant legislation to protect against persisting non-recognition of marriages solemnised in accordance with the tenets of *Sharia* law (Muslim marriages); *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* 2023 (4) SA 325 (CC), where the court referred to Murcott M & Van der Westhuizen W "The ebb and flow of the application of the principle of subsidiarity: Critical reflections on *Motau* and *My Vote*" (2015) 7(1) *Constitutional Court Review* 43 at 61–64's assertion that the principle must apply even in instances involving legislation that does not give effect to a constitutional right or is not in any other way the result of a constitutional injunction.

"extends beyond mandatory 'effect giving' legislation to include other legislative enactments".[26]

2.3 The Mpati Commission and media outcry

The issues in the *Ndudane* case arose from a history of litigation challenging the termination of bank-customer relationships and the closure of bank accounts of companies that fell under the Sekunjalo Group of companies. Such closures were largely based on the *Report of the Judicial Commission of Inquiry into Allegations of Impropriety at the Public Investment Corporation*[27] ("Mpati Commission Report"). This report outlined questionable relationships between some banks and the Chairperson of Sekunjalo Group, Dr Iqbal Survé, and the Public Investment Corporation (PIC). It also reported the PIC's interactions with, and questionable investments in (close to ZAR 5 billion), the Sekunjalo Group.[28] Banks (ABSA Bank Ltd, FirstRand Bank Ltd, Investec Bank Ltd, Nedbank Limited, and Standard Bank Ltd) began to review their relationships with the Sekunjalo Group and eventually terminated these with various companies in the group. The reasons cited for the terminations included the serious nature of the allegations against the applicants, the litigation in which some companies in the group had been involved, and the adverse inferences and statements made in the Commission's report.[29] This resulted in several cases before the courts in which the applicants unsuccessfully tried to interdict banks from closing their accounts.[30]

2.4 Establishing *prima facie* evidence of discrimination in *Survé* and *Nedbank*

The litigation in which the applicants challenged the closure of their bank accounts was based on alleged discrimination on the grounds of race. This began in the Western Cape High Court in *Survé v Nedbank*, a matter which was eventually appealed to the SCA *in Nedbank v Survé.* The main complaint against the banks was that the decision to close the applicants' accounts constituted conduct amounting to unfair discrimination based on race.[31] The basis of the applicants' allegation was that banks had not similarly closed

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[26] See Basson BG "Towards transformative subsidiarity principles under the constitutional non-discrimination right and Equality Act" (2024) 14 *Constitutional Court Review* 367 at 372.

[27] Judicial Commission of Inquiry into Allegations of Impropriety at the Public Investment Corporation (n.d.) available at https://www.treasury.gov.za/Report%20of%20the%20PIC%20Commission.pdf (accessed 9 September 2024).

[28] Mpati Commission Report at paras 92–197. See a detailed discussion of the issues in *Ayo Technology Solutions Limited v Access Bank South Africa Limited* (12629/2022) [2022] ZAWCHC 218 (13 October 2022) at paras 1–25, ("*Ayo v Access Bank*"). The report generated significant adverse media attention for Survé and the Sekunjalo Group ("the applicants"). See Maeko T "Ayo report: CFO acted in the PIC's interests" (5 June 2020) *Mail & Guardian* available at https://mg.co.za/business/2020-06-05-ayo-report-cfo-acted-in-the-pics-interests/ (accessed 9 September 2024); Independent Media Investigations Unit "Mpati Commission Report a 'grave injustice' to Sekunjalo" (18 March 2022) *Independent Online* available at https://www.iol.co.za/news/mpati-commission-report-a-grave-injustice-to-sekunjalo-cc63f2a0-73af-4851-97f9-f6d26ee99f11 (accessed 09 September 2024).

[29] See *Nedbank Limited and Another v Survé and Others* [2024] 1 All SA 615 (SCA) at para 9.

[30] See *Ayo* (2022), *Survé* (2022), and *Survé* (2024).

[31] *Survé* (2024) at para 7.

the accounts of companies such as the Steinhoff Group, EOH Limited (EOH), and Tongaat Hulett Limited despite their having been found guilty of fraud and other offences. The applicants compared the treatment of these companies with the way in which the Sekunjalo Group had been treated and found no basis for the banks to close their accounts. The reasons for the lack of such a basis were that "no actual findings of financial misconduct had been made against the Sekunjalo Group".[32] In support of the allegation, they also asserted that the other companies were "white dominant businesses" that had not been punished by Nedbank in the same manner as the Sekunjalo Group.[33] In the applicants' view, it was "difficult not to infer that there is racial discrimination at play".[34] For their part, the banks emphasised the reputational and business risks they would face if they continued their relationship with the applicants.[35]

In *Nedbank v Survé,* the substantive issue before the SCA, as with the court *a quo*, was whether the applicants had made a *prima facie* case that Nedbank discriminated unfairly against them based on the ground of race when closing their accounts.[36] The SCA found that the applicants' view or perception that they had been discriminated against based on race was not sufficient to establish a *prima facie* case[37] and that they were required to adduce facts that could satisfy the court that the inference of unfair racial discrimination they sought to draw from the facts was plausible. More specifically, they had to establish that (a) other companies were "white companies", whereas theirs were "black companies"; (b) that these two groups were similarly situated in all other respects apart from race; and (c) that the reason for this differential treatment was the race of the companies.[38] The SCA, in conclusion, found that the applicant's case was based solely on an assumption of racial discrimination. It found that the evidence presented was insufficient to establish even a *prima facie* case that Nedbank had treated the respondents differently as black customers rather than white customers. This was insufficient to sustain a *prima facie* attestation of unfair racial discrimination.[39]

Reading the decision in *Nedbank v Survé* closely leaves one with many questions. For instance, what form of evidence would the complainants have had to adduce before the court to prove a *prima facie* case of unfair discrimination based on race? In addition, it may be asked if any such information that could be used to prove discrimination is readily accessible from any person or the banks themselves. The approach by the

[32] *Survé* (2024) at para 21.

[33] *Survé* (2022) at para 16.

[34] *Survé* (2024) at para 21.

[35] *Survé* (2022) at para 19.

[36] *Survé* (2024) at para 19.

[37] *Survé* (2024) at para 22.

[38] *Survé* (2024) at para 23.

[39] *Survé* (2024) at paras 22–29.

applicants in *Ndudane* also raised the question of whether the complainants could access the relevant information from third-party regulatory bodies such as the FIC. It is pertinent to highlight that the connection between the applicants in *Ndudane v FIC* and *Nedbank v Survé* is not easily established from the description of the parties and the facts in either of the court decisions. Such a connection may be discerned from a piece of information sought by the applicants in the *Ndudane* case in relation to the Sekunjalo Group and the other entities, such as EOH, KPMG, Steinhoff, and Tongaat Hullet, as discussed below.[40] Notably, the court's rejection of the appeal led to the application to access the relevant information from the FIC in the *Ndudane* case.

3 FACTS AND ISSUES IN *NDUDANE V FIC*

3.1 The facts

The facts in *the Ndudane* case were similar to those in *Nedbank v Survé*, especially in regard to the ground upon which the discrimination claim was based. The *Ndudane* case was an interlocutory application for access to information from the FIC about suspicious transaction reports made by banks about various companies. The essence of the applicants' request for the information was to compare the information submitted to the FIC with similar information submitted by certain financial institutions pertaining to the applicants' and other bank customers' affairs for the purpose of suspicious transaction reporting.[41] The relevant information was to be used as evidence against the banks to establish grounds for discrimination against the applicants. The application was brought by one Siphokazi Ndudane — as the sole director of the second applicant company, TCQ Fisheries Management Group (Pty) Ltd — together with two natural persons and another company ("the applicants").

Like the applicants in *Nedbank v Survé*, the banks (ABSA, Investec, and FNB) terminated their relationships on a number of grounds. These include the potential reputational and business risks that the relationships would allegedly create for them. Other grounds were that the profile of the third applicant did not fit with their internal policies and that the banks were required to adhere to their commitment to comply with local and international anti-bribery laws.[42] Other grounds concerned risk appetite and the fact that some of the applicants had instituted court proceedings against certain of the banks.[43] In order to access the information held by the FIC, the applicants argued that this information would provide evidence to support their main application challenging the termination of their bank accounts based on alleged discrimination against them by the banks in question.[44]

3.2 The main issue

[40] *Ndudane* (2024) at paras 2; *Survé* (2022) at para 16.

[41] *Ndudane* (2024) at para 1.

[42] *Ndudane* (2024) at para 19.

[43] *Ndudane* (2024) at para 5.

[44] *Ndudane* (2024) at para 9.

The main issue before the court was whether the applicants were entitled to access the relevant information held by the FIC in terms of sections 40(1)(e) and 41(d) and (e) of FICA.[45] Section 40(1)(e) obliges the FIC to make information reported to it available to a person who is entitled to receive such information "in terms of an order of court". Section 41(d) and (e) prohibit the disclosure of any information obtained from the FIC except "for the purpose of legal proceedings" or "in terms of an order of court".

4 ARGUMENTS BEFORE THE COURT

4.1 Applicants' submissions

The applicants approached the court to obtain specific information from the FIC. This information included all reports of suspicious transactions made to the FIC by all the banks involved. They (the applicants) also applied to access similar reports made to the FIC by the banks in relation to entities in the Sekunjalo Group, as well as similar reports to the FIC by the banks in relation to EOH, KPMG, Steinhoff, and Tongaat Hullet.[46] The basis for requesting this information was that it would serve as evidence to prove that the banks discriminated against the applicants in terminating their bank accounts. Such discrimination allegedly arose from the banks, during the determination of risk appetite, treating them in a manner which was unequal when compared with other individuals and organisations surrounded by negative publicity.[47]

The applicants argued, furthermore, that despite publicised evidence of money laundering, mass looting, and siphoning of state funds out of identified state entities and institutions by these multinational entities (meaning EOH, KPMG, et al.), the banks did not take any action against them.[48] The applicants questioned the motives, uniformity, and consistency of the banks and FIC in taking drastic measures against them as compared to these other entities.[49] They argued that the banks were using FICA as an excuse to discriminate and harass specific categories of customers, including them.[50] The applicants supported their case for access to information by relying on several constitutional provisions that would be violated if the relevant information could not be made available. Put differently, they invoked specific constitutional rights that would be violated by the termination of their bank accounts to justify the importance of accessing information from the FIC.[51]

The basis of the applicants' argument was that the effect of the termination of their accounts – in regard to which a complaint was heard in the Equality Court (where the

[45] *Ndudane* (2024) at para 1.

[46] *Ndudane* (2024) at para 2.

[47] *Ndudane* (2024) at para 6.

[48] *Ndudane* (2024) at para 6.

[49] *Ndudane* (2024) at para 6.

[50] *Ndudane* (2024) at para 6.

[51] *Ndudane* (2024) at para 6.

dispute had been initiated) – would leave many of them without access to financial services, such as bank accounts, and would violate a number of rights in the Constitution. The specific rights were those to freedom of trade, occupation, and profession, housing, health care, food, water, social security, education, equality, and dignity.[52] The applicants took issue with the banks' compliance with FICA, arguing that what the banks were required to do in relation to anti-money laundering laws was monitor and report suspicious, unusual, and cash transactions above the regulated threshold.[53] They held that, instead, the banks, in trying to comply with FICA and related legislation, had acted *ultra vires* by assuming the role of a law enforcement agency and a court of law in investigating, judging, and punishing customers by unbanking them.[54] The applicants argued too that the banks had relied on innuendo and suspicion of involvement in criminal activities.[55]

In closing their arguments, the applicants maintained that the impact of the closure of the accounts was a ground on which they should be allowed access to information held by the FIC. They argued that such closure could be catastrophic, as no serious business could operate without bank accounts.[56] Their argument was, therefore, that the information they needed to access from the FIC would help them to determine whether the banks had complied with FICA before they terminated the bank accounts and ascertain what grounds were proffered by the banks for such termination. The basis of this argument was that the termination of the bank accounts was contrary to the principles of fairness, justice, and racial equality.[57]

4.2 Respondents' submissions

The FIC raised a number of objections to the application for access to the information of the identified entities from the relevant banks. It argued that the applicants did not set out the factual or legal basis for entitlement to the information. Furthermore, it argued that they had no legal rights to such information and that the application was merely a fishing expedition [58] Furthermore, the FIC relied on the principle of subsidiarity, as outlined above.[59] It argued that this principle prevented the applicants from relying on the constitutional right of access to information without first complying with the provisions of PAIA.[60] The FIC also disputed the applicants' reliance on sections 40(1)(e) and 41(d) and (e) of FICA to access the information. In particular, it disputed the argument that these sections permit any person to apply for a court order to receive the information. It argued that FICA did not permit the FIC to provide sensitive information

[52] See sections 9, 10, 21, 26, 27, and 29 of the Constitution. See also *Ndudane* (2024) at para 7.

[53] See sections 28 and 29 of FICA. See also *Ndudane* (2024) at para 7.

[54] *Ndudane* (2024) at para 7.

[55] *Ndudane* (2024) at para 7.

[56] *Ndudane* (2024) at para 7.

[57] *Ndudane* (2024) at para 8.

[58] *Ndudane* (2024) at para 3.

[59] See 2.2 above.

[60] See *Ndudane* (2024) at para 3.

related to state security and that the requested information contained personal detail on individuals or entities. In the FIC's view, this information could not be provided all at once (*holus bonus*) to applicants in civil proceedings to enable them to attempt to find evidence to support their complaints.[61]

The FIC also responded to the allegation that the information would show that the banks had discriminated against the applicants in deciding to terminate their accounts based on reputational risk in comparison with other entities. It argued that that was a question that had to be directed to the banks, who "should speak for themselves", as the FIC itself had no knowledge of why the banks terminated the accounts.[62] In its view, the applicants' argument was not supported by any evidence and amounted to "a form of discovery which was not known in our law"; as such, it constituted an abuse of process.[63]

The FIC thus advanced an argument that also impacts on the interpretation of the relevant sections of FICA and the issue of whether accessing the relevant information was a form of discovery not recognised by South African law. It argued that the applicants sought to access the information "for the purpose of litigation, after the commencement of that litigation".[64] In its view, access to this information is governed by the Uniform Rules of Court and seemingly not PAIA.[65] Another important argument which the FIC made was that the applicants were seeking to obtain information from it as a third party without alleging unlawful conduct against it (the FIC).[66]

5 COMMENTS ON THE DECISION OF THE COURT

The decision in *Ndudane v FIC* reflects how the court granted an order accepting all submissions by the applicants and, therefore, rejecting all submissions by the respondents. The following discussion comments on the reasons for the decision and how such reasons could inform the future application and interpretation of the relevant provisions of FICA. The reasons and the decision are also important for dealing with a critical question raised in cases relating to the unilateral termination of bank accounts. This question is whether and how bank customers faced with terminating their bank relationships can access evidence to establish that such termination was based on reasons other than possible reputational and business risks that may be posed to the financial system.

5.1 Whether non-disclosure violates the Constitution

[61] *Ndudane* (2024) at para 4.

[62] *Ndudane* (2024) at para 9.

[63] *Ndudane* (2024) at para 9.

[64] *Ndudane* (2024) at para 3.

[65] GoN R48, G. 999 came into effect on 15 January 1965 (as becomes clear in 5.3 below, referring to rules on discovery in terms of Uniform Rule 35). See *Ndudane* (2024) at para 3.

[66] *Ndudane* (2024) at para 9.

On the point of the applicants' reliance on specific human rights provisions in the Constitution to prevent the closure of bank accounts, the court agreed that non-disclosure of the relevant information could possibly violate constitutional rights. However, it did not pronounce on whether such non-disclosure would violate all of the rights referred to: it focused on the right to equality. Looking at the possible violation of the entrenched right to equality, the court indicated that this right would be rendered "emaciated and hollow" if constitutional institutions such as the FIC could not provide information to promote equality.[67] In arriving at this conclusion, the court considered the significance of accessing the information based on a number of factors that impact customers' human rights and in the light of the need to ensure the legitimacy and integrity of the financial system. It held that, in the absence of any indication that accessing such information threatens state security or destabilises the national financial system, courts must ensure that the disclosure of information is not exploited to promote the superiority of the applicants by relying on their race or "on [their] political ideology and allegiance".[68] The court balanced non-disclosure against allowing disclosure. It stated that ordering non-disclosure would enable racism and white superiority to continue in major national banks. In contrast, disclosure would impose a responsibility on the FIC to promote equality, particularly for those disadvantaged by a lack of access to the relevant information.[69]

It should be noted that the court in the *Ndudane* case was not called on to entertain the issue of whether the termination of the applicants' bank accounts violated the substantive human rights provisions in the Constitution. Put differently, the court was not dealing with whether the termination of the bank accounts violated specific human rights such as the right to equality and the prevention of unfair discrimination. The applicants invoked the relevant human rights provisions as a legal and procedural basis[70] or a yardstick upon which to access the relevant information. The case was an interlocutory application. Therefore, the court could only determine the human rights impact that denying access to information would have on the applicants to protect the relevant rights in the main legal proceeding. The court's reference to the possibility of rendering the right to equality "emaciated and hollow" if constitutional institutions such as the FIC were not allowed to provide access to information should not be interpreted as allowing courts dealing with access to information held by the FIC to consider if any human rights protection *is* (instead of would be) affected by the denial of such access. Where such rights are invoked by the parties in an interlocutory application, such as in this case, an important consideration by the court is to pronounce not the actual violation of such rights but only the potential for such violation through the denial of access to the information. The *Ndudane* case is, therefore, not an authority attesting that specific human rights are violated by the termination of the applicant's bank accounts. Instead, it is an authority that courts, faced with allegations of a potential violation of

[67] *Ndudane* (2024) at para 18

[68] *Ndudane* (2024) at para 18.

[69] *Ndudane* (2024) at para 18.

[70] See the discussion of other legal bases in 5.3 below.

any human right, should consider granting access to such information if it will assist in proving the violation of the right concerned.

5.2 Whether the application was baseless and merely a fishing expedition

The court was also asked to address the allegation that the application for access to the information was merely a fishing expedition without any justified reason. It needed to answer the assertion that there was no nexus between the termination of the banking relationships and the information the applicant sought to access from the FIC.[71] The court here needed to determine whether the information would justify the termination of the applicants' accounts based on reputational risks, as alleged, and whether the banks discriminated against the applicants in doing so.

The court, therefore, had to determine if there was a nexus between the application to access the relevant information in this application and the termination of bank accounts based on the alleged unfair discrimination. It rejected the argument that the application for accessing the information was baseless and a fishing expedition.[72] The court focused on the role the information would play in the applicants' main application to establish the alleged discrimination by the banks in closing the applicants' accounts. Importantly, it focused on how the banks applied the relevant regulation relating to the reporting of the information and the extent to which the information was used in a discriminatory manner.[73] It also considered the reputational risk that the bank might be exposed to if it contravened the relevant statutory requirements.

The court agreed with the applicants that the banks elected to terminate the applicants' services arbitrarily and that measures in FICA did not include such arbitrary termination.[74] Furthermore, the court also considered that the banks terminated the applicants' bank relationships based on reputational and business risks. However, no such termination was effected against other companies that, in comparison, posed a serious risk to these financial institutions and the national financial systems, as they were found guilty of fraud and corruption.[75] It concluded that the information would help to determine whether banks discriminated against the applicants or consistently adopted their risk management programmes as required by FICA and international regulatory standards.[76]

Determining whether the court was correct in finding that the application was not a fishing expedition is a daunting task. Notably, the information sought in this

[71] *Ndudane* (2024) at para 19.

[72] *Ndudane* (2024) at para 16.

[73] *Ndudane* (2024) at para 13.

[74] *Ndudane* (2024) at para 14.

[75] *Ndudane* (2024) at paras 15 and 16.

[76] *Ndudane* (2024) at para 16.

interlocutory proceeding was meant to be used as evidence in the main proceeding to establish the alleged discrimination in relation to the termination of the banking relationships. As indicated above, the court's acceptance that the information would help to determine whether banks discriminated against the applicants is merely an indication that the relevant court dealing with discrimination would determine whether there was *prima facie* evidence of discrimination based on the information. It should thus not be taken to mean that the court established discrimination against the applicants in the termination of their accounts as compared to other companies.

A lesson from this case on this point is that the applicants needed to establish the reason and the basis upon which such information could be accessed. In cases relating to applications to access information from a third party for establishing the ground for the termination of bank accounts, the applicant must merely establish *prima facie* that the information sourced would serve to establish the main reasons for such termination. The court was, therefore, correct in indicating that the application to access the information was neither baseless nor a fishing expedition. Applicants were not required to establish the prospect of success in using the information to establish grounds of discrimination but merely a *prima facie* case that the information would achieve this.

5.3 Whether the applicants have a legal basis and right to access information?

In regard to whether the applicants had a legal basis and a right, this question required the court to consider whether the applicants were able to legally justify such access to information (that is, explain why they should access it) and whether the law established any right to such access. The court also addressed the question of whether the information was sourced for the purpose of litigation after the commencement of that litigation, as it related to the application of PAIA. In addition, this question relates to the main issue of whether the relevant provisions of FICA were the appropriate procedural avenue by which to access the information.

In addition to referring to the alleged violation of human rights (as discussed above),[77] the court referred to the constitutional right of access to information[78] and sections 40 and 41 of FICA as the legal bases upon which the applicants should be entitled to the information. As regards section 32 of the Constitution, it is not clear from the judgment whether the applicants specifically relied on this section. Leaving aside for a moment the reliance on the provisions of FICA, the court refuted the FIC's reliance on the principles of subsidiarity, stating that the applicants should have relied on the provisions of PAIA.[79] The court, in disposing of this argument, referred to *Minister of Finance v Oakbay Investment Pty (Ltd)*("*Oakbay*").[80] In the *Oakbay* case, the court was similarly dealing with an application to access information held by the FIC in terms of section 40(1)(e) of FICA. It held that, to the extent that the application was based on

[77] See 4.1 above.

[78] Section 32(1) of the Constitution.

[79] *Ndudane* (2024) at para 11.

[80] 2018 (3) SA 515 (GP).

FICA and not directly on section 32 of the Constitution, it was not unreasonable. The reason which the court in the *Oakbay* case advanced was that the application to access information in terms of FICA "is intended to enforce the entrenched constitutional right of access to information".[81] Relying on the *Oakbay* case, the court in *Ndudane v FIC* interpreted the relevant provisions of FICA as, in effect, circumventing the principle of subsidiarity. It held that

> the constitutionally entrenched right to equality will be emaciated and hollow if constitutional institutions, *upon request*, may not supply information on any measures relating to the achievement of equality, including, where appropriate, compliance with legislation.[82]

The court in *Ndudane* concluded that, as this information was protected by statute from disclosure, sections 40 and 41 of FICA are an available avenue for the discovery of the information.[83] The court seemed to be saying that circumventing the subsidiarity principle by legislation such as FICA was justified in this case by requiring the FIC, as a constitutional institution, to make information available upon request in compliance with the relevant legislation. This, therefore, may mean that parties may base their claim to access information held by the FIC by directly invoking the provisions for access to this information in terms of FICA (or any legislation). This would be achieved without violating the principle of subsidiarity. Notably, FICA is not mandatory "effect-giving legislation" that was promulgated expressly in order to give effect to section 32 of the Constitution. Heed should be paid to the court's assertion that access to information under FICA "is intended to enforce an entrenched constitutional right, namely, the right of access to information", as highlighted above.[84] As noted by Basson, this is arguably a stamp of approval on the ensuing Constitutional Court jurisprudence which applied the subsidiarity principle to other legislative enactments that are not mandatory "effect-giving statutes".[85]

In this regard, the court correctly addressed two important considerations that may affect similar applications for access to information from third parties such as the FIC. One is to establish the legal basis (or source) upon which such information is accessed; the second relates to whether such a legal source violates the principle of subsidiarity. As is clear from the facts and the applicant's arguments, FICA's provisions were invoked as procedural measures to access this protected information from the FIC. The applicants needed to invoke any legal basis (the Constitution or legislative measures) as the main reason that they wanted to access the information. Invoking constitutional provisions such as sections 9, 10, 21, 26, 27, 29, and 32 would definitely

[81] *Oakbay* (2018) at paras 48-49.

[82] *Ndudane* (2024) at para 18 (emphasis added).

[83] *Ndudane* (2024) at para 13.

[84] See 2.1 above.

[85] See 2.2 above.

raise an issue with the principle of subsidiarity. In the context of this case, PAIA and FICA provide equally for the right of access to such information, although only PAIA directly gives effect to the constitutional right in section 32(1) of the Constitution. The court, in this context, correctly relied on the *Oakbay* decision, which, in effect, allows for circumventing the principle of subsidiarity where this will be for protecting specified constitutional provisions, such as the right to equality and other human rights.

Once again, it is clear that the *Oakbay* and *Ndudane* cases are contributing to jurisprudence on access to information from statutory third parties. The position from these cases is that constitutional rights may form the legal basis for accessing such information even if such a right is given effect in terms of legislation without violating the principle of subsidiarity. What is important for litigants is to identify the relevant legislation that procedurally compels a particular institution to provide information, as is the case with the FIC in terms of FICA in this case.

The court also had to answer the jurisdictional defence by the FIC that the information in question was for the purpose of litigation "after the commencement of that litigation". The effect of that argument was that access to the relevant information was not governed by the Promotion of Equality and Prevention of Unfair Discrimination Act[86] (PEPUDA) and that the Equality Court has no jurisdiction.[87] The court rejected this argument. Its reason was that the Equality Court, in terms of section 21(5) of PEPUDA, has the power to deal with interlocutory orders within the vested ancillary powers that are incidental to performing its powers.

In answering this question, the court considered if the purpose of the interlocutory application would be achieved through the discovery process under rule 35 of the Uniform Rules of Court or by using the provisions of PEPUDA.[88] It reasoned that neither avenue would have assisted the applicants, as the general provisions of section 41 of FICA prohibit access to information held by the FIC. Such information would be accessible only if such access were for the purpose of a legal proceeding or in terms of a court order (which are exceptions to the general provisions in terms of section 41(d) and (e) of FICA). The applicants needed this interlocutory proceeding in order to access the information.[89]

Leaving aside the application of PEDUDA and the jurisdiction of the Equality Court (which are not relevant to this discussion), the court arguably interpreted the application of the FICA provisions correctly in regard to the other avenues that may be used to access information from the FIC. Generally, any information that may be used as evidence in legal proceedings is sourced in terms of the relevant provisions dealing with discovery.[90] Adopting this avenue would, as the court established, have been impossible,

[86] 4 of 2000.

[87] *Ndudane* (2024) at para 4.

[88] *Ndudane* (2024) at para 10.

[89] *Ndudane* (2024) at para 10.

[90] See rule 23 of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa, GN R740 in GG 33487 of 23 August 2010, and rule 35 of the Uniform Rules Court.

since the FIC would have invoked the provisions of section 41(1) that require information to be accessed in terms of a court order. This leaves the question of whether any relevant legislative avenue would have assisted.

The court's reference to the reliance on PAIA rather than FICA raises another important issue with regard to access to information held by statutory bodies. It may be asked whether PAIA (or any legislation that provides access to information) would have been applied in this case to access information from the FIC or the banks. With regard to the application of PAIA, it is not clear what the argument was in relation to this Act. PAIA is a general legislative instrument meant to support the constitutional right of access to information in terms of section 32.[91] It is quite clear that PAIA is generally a procedural avenue by which to access information from a public entity such as the FIC. However, PAIA's application is restricted by its own wording and excludes any provision in other legislation that restricts disclosure of records or which is materially inconsistent with its objective.[92] It is also undisputed that sections 40 and 41 of FICA are not inconsistent with PAIA, as they generally allow for access to information.

Furthermore, section 7 of PAIA provides generally that this Act does not apply to records required for criminal or civil proceedings "after the commencement of proceedings". This argument was disposed of by the argument above with regard to the interlocutory nature of the proceeding before it. Notably, PAIA does not apply to the disclosure of a record which is requested for the purpose of criminal or civil proceedings "if the production of or access to that record … is provided for in any other law".[93] It is, therefore, quite clear that accessing the information from the FIC in terms of PAIA would have been barred by the argument that FICA provides a specific procedure for accessing the information from the FIC. While PAIA might be the necessary avenue for accessing information held by a public or private body, the court was correct in concluding that it was not the applicable legislation for accessing the information in this case.

With regard to whether sections 40(1)(e) and 41(1)(d) and (e) are the source and basis for applicants to access the relevant information, the reasons for the court's decision in this respect were dealt with together with section 32 of the Constitution as the source of the application. The court's position was that both section 32 of the Constitution and sections 40(1)(e), read with 41(d) and (e) of FICA, were the source for accessing the relevant information from the FIC.[94] The court established that the FIC did not dispute that FICA and "an act other than PAIA" may provide for an entitlement to such information and be enforced by the court.[95] It interpreted these provisions of FICA

[91] See the preamble to PAIA.

[92] Section 5 of PAIA.

[93] Section 7 of PAIA.

[94] *Ndudane* (2024) at para 11.

[95] *Ndudane* (2024) at para 13.

and concluded that the FIC could disclose the relevant information "for purposes of legal proceedings or in terms of an order of court".[96]

The court's sentiment on this point is that, unless the relevant information relates to state security or is privileged, any person may have access to the information for the purpose of legal proceedings or in terms of a court order.[97] The court indicated that the applicants correctly brought the application within the FICA. It also noted the difficulty in bringing this application through other avenues, such as the discovery of records in legal proceedings or accessing the information under other legislation, such as PAIA or PEPUDA. It held that having to wait for discovery or access via any of these pieces of legislation would be of no consequence, as the applicants would have met the general protection of section 41 without a legal proceeding or an order of the court. As the information was statutorily protected, "a person in the position of the applicants could only access it if it was armed with a court order, through which it would be entitled to that access".[98]

A closer look at the provisions of section 41 of FICA and the court's reasoning is warranted for the sake of the future interpretation and application of this section. Two instances in which access to the information is possible under section 41 became the ground for the application: "for the purpose of legal proceedings" or "in terms of an order of court". Arguably, the court's remark that "the applicants could only access it if it was armed with a court order" seems to have focused on the second ground. The reference to the phrase "for the purpose of legal proceedings" arguably refers to where access is sought without obtaining a court order, provided that the person accessing the information can establish that the information should be provided "for the purpose of legal proceedings". While the applicant would not have accessed the information without a court order, the court's reasoning should not be interpreted to mean that access to information in terms of section 41(1)(d) and (e) requires an application to the court to access such information. As the subsections are divided by "or", it is clear that, for the purpose of proceedings, access to information in terms of section 41 does not necessarily require that the applicant be always "armed with the court order".

5.4 Implications for jurisprudence on unilateral termination of bank accounts

In paragraph 21, the court (per Thulare J) concluded as follows:

> I find that the applicants have established their right to the information sought. Fairness and equity, and our constitutional values of openness and transparency, favours [sic] that the applicants be granted access to the reports which the respondent banks provided to the FIC as regards reputational and business risk as well as anti-bribery legal and regulatory framework. This is part of the portfolio of evidence that is material to determine whether the applicants were unfairly discriminated against, as they allege. The disclosure of this confidential information held by the FIC will help in the proper determination of the issues in the main application.

[96] *Ndudane* (2024) at para 11.

[97] *Ndudane* (2024) at para 14.

[98] *Ndudane* (2024) at para 10.

It should be reiterated that this was an interlocutory application to access the relevant information for the purpose of the proceedings in the contemplated main application in future. There are ongoing proceedings in the Equality Court challenging the alleged discriminatory practices relating to the termination of the applicants' bank accounts. Furthermore, the applicants' leave to appeal to the Constitutional Court against the decision of the SCA in *Nedbank v Survé* was declared unsuccessful on 4 September 2024.[99] Had the court accepted leave and eventually heard the main application, this would have allowed the applicants to use the information obtained from this application as evidence to establish a *prima facie* case of discrimination by banks when they terminated the applicants' accounts. Since the decision of the SCA in *Bredenkamp,* the decisions of banks and their reliance on reputational and business risks have not been successfully challenged to prevent and reverse unilateral terminations of bank accounts. The reliance on claims of discrimination to challenge such termination is but one of the reasons that this decision sets a benchmark for future cases to consider other grounds for challenging the reliance on reputational risk, as established in *Bredenkamp*. In the absence of any decision that has dealt with the main grounds for challenging the unilateral termination of accounts, the decision in *Ndudane v FIC* remains a step in a judicial journey to disregarding the use of *Bredenkamp* "uncritically or applied mechanically to any and all bank-client relationships", as held in *Survé v Nedbank*.[100] It should be clear that any party aggrieved by the decision of a bank to effect discriminatory termination of their bank relationship may utilise the decision in *Ndudane* case as a starting-point to gather evidence to establish such discrimination (or any ground) as a ground for termination.

Another factor to be considered when reading the court's pronouncement relating to the role of the constitutional values of openness and transparency on access to information held by the FIC is the reference to fairness as a guiding principle for allowing access and the possible interpretation that may be given to unilateral termination cases. The *Bredenkamp* case remains an authority as to the idea that the fairness of the contract that governs bank-customer relationships "is not an overarching principle".[101] The case also remains an authority that fairness should not be a guiding principle when courts determine cases dealing with unilateral termination of bank accounts on the basis of reputational risks posed to the bank.[102] While there is a need to consider the fairness of account terminations, the decision in the *Ndudane* case should not be interpreted as an authority enabling invocation of the fairness principle in cases

[99] Cohen T "ConCourt turns down Sekunjalo appeal application against Nedbank" (5 September 2024) *Daily Maverick* available at https://www.dailymaverick.co.za/article/2024-09-05-concert-turns-down-sekunjalo-appeal-bid-against-nedbank/ (accessed 17 October 2024). Access to any written judgment on the matter is not readily available.

[100] See 1 above.

[101] *Bredenkamp* (2010) paras 30 and 51, referring to the judgment of *Barkhuizen*

[102] *Bredenkamp* (2010) paras 30 and 51.

of unilateral termination of bank accounts until the *Bredenkamp* decision is reversed by the upper court.[103]

6 CONCLUSION

Ndudane v FIC was merely an interlocutory application case, one which, as expected, was procedural in nature and did not deal with substantive issues. As a result, the discussion of the case focused on how the court addressed the relevant questions concerning access to information held by FIC. The discussion, therefore, is based on the unique facts that guided the reasons for the decision. More importantly, the discussion also considered the impact of the court's decision on future cases concerning access to information held by FIC. Although the decision was made in the lower court and, therefore, had little authoritative value, it is significant and will be used as a case to challenge banks' reasons for unilaterally terminating bank-customer relationships. As this application was sought from the FIC, the proper distinction between the exceptions in section 41(1)(d) and (e) relating to whether access to information can be sought only in terms of a court order is important. The decision is also important in highlighting that applicants for access to such information must clearly outline the factual and legal bases thereof – this includes specifying any rights in terms of which such information is accessed.

It is clear that, considering the possibility of violating the right to information in section 32, applicants may rely on other relevant provisions of the Constitution as a legal basis to access information without violating the principle of subsidiarity. This is the position particularly where there are legislative measures that have an effect on the right to information. Unless a legislative measure specifically deals with access to a particular type of information, it is clear from this decision that such information may be sought in terms of the general provisions of PAIA. Where any specific legislation, such as FICA, provides for access to a specific type of information, applicants must rely on this legislative measure and not on PAIA. The decision in this case also establishes that parties may rely on legislative measures that provide for access to information even if that legislation is not directly "effect-giving" in regard to section 32 of the Constitution. However, until a similar matter is dealt with in the superior courts, the *Ndudane* case remains significant for allowing access to information to establish discriminatory bank practices in cases relating to the unilateral termination of bank accounts.

[103] See Kamlana U "Key note address: Commissioner of the Financial Sector Conduct Authority (FSCA), at the Banking Association of South Africa (BASA)'s Banking On Ethics Conference" (17 April 2024) available at https://www.fsca.co.za/News%20Documents/FSCA%20Commissioner%27s%20keynote%20address%20at%20the%20BASA%20banking%20on%20ethics%20conference.pdf (accessed 13 September 2024), where the Commissioner of the Financial Sector Conduct Authority questioned banks' arbitrary closure of bank accounts and how they simply rely "on reputational risks without providing concrete and consistent reasons applied to prevent what might appear as arbitrary account closures".

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