THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

18 AUGUST 2017

CASE NUMBER: 80978/2016

In the matter between:

MINISTER OF FINANCE	APPLICANT
and	
OAKBAY INVESTMENTS (PTY) LTD	1ST RESPONDENT
OAKBAY RESOURES AND ENERGY LTD	2NDRESPONDENT
SIVA URANIUM (PTY) LTD	3RD RESPONDENT
TEGETA EXPLORATION & RESOURCES (PTY) LTD	4TH RESPONDENT
WESTDOWN INVESTMENTS (PTY) LTD	5TH RESPONDENT
BLACKEDGE EXPLORATION (PTY) LTD	6TH RESPONDENT
TNA MEDIA (PTY) LTD	7TH RESPONDENT

THE NEW AGE	8TH RESPONDENT
INFINIY MEDIA (PTY) LTD	9TH RESPONDENT
VR LASER SERVICES (PTY) LTD	10TH RESPONDENT
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD	11TH RESPONDENT
CONFIDENT CONCEPTS (PTY) LTD	12TH RESPONDENT
SAHARA COMPUTERS (PTY) LTD	14TH RESPONDENT
ABSA BANK LTD	15TH RESPONDENT
FIRST NATIONAL BANK LTD	16TH RESPONDENT
THE STANDARD BANK OF SOUTH AFRICA LIMITED	17TH RESPONDENT
NEDBANK LIMITED	18TH RESPONDENT
GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK	19TH RESPONDENT
REGISTRAR OF BANKS	20TH RESPONDENT
DIRECTOR OF FINANCIAL INTELLIGENCE CENTRE	21TH RESPONDENT

CASE NUMBER: 92027/2016

And in the matter between:

OAKBAY INVESTMENTS (PTY) LTD	1ST APPLICANT

OAKBAY RESOURES AND ENERGY LTD	2ND APPLICANT
SIVA URANIUM (PTY) LTD	3RD APPLICANT
TEGETA EXPLORATION & RESOURCES (PTY) LTD	4TH APPLICANT
BLACKEDGE EXPLORATION (PTY) LTD	5TH APPLICANT
TNA MEDIA (PTY) LTD	6TH APPLICANT
VR LASER SERVICES (PTY) LTD	7TH APPLICANT
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD	8TH APPLICANT
CONFIDENT CONCEPTS (PTY) LTD	9TH APPLICANT
SAHARA COMPUTERS (PTY) LTD	10TH APPLICANT
AND	
THE DIRECTOR OF THE FINANCIAL INTELLINGENCE CENTRE	RESPONDENT

JUDGMENT

THE COURT

INTRODUCTION

[1] Before this court are two main applications and a parallel application. One judgment is prepared in respect of all the applications. After this court heard argument, it made rulings in respect of several interlocutory issues that arose between the parties and reserved costs in respect thereof. Reasons for these rulings are also set out in this judgment.

[2] The first main application (the application for declaratory relief) is brought by the Minister of Finance ('the Minister') in the public interest, against Oakbay Investments (Pty) Ltd and its associated entities, (collectively referred to as the 'Oakbay Group'). The Minister seeks declaratory relief that he is not by law empowered or obliged to intervene in the relationship between the first to seventh, ninth to twelfth and fourteenth respondents on the one hand and the fifteenth to eighteenth respondents respectively on the other hand, regarding the closing of the bank accounts held by the former with the latter.

[3] The seventeenth respondent, Standard Bank South Africa Limited ('Standard Bank') seeks, in a parallel application brought in the application for declaratory relief, declaratory relief couched in broader terms. The latter application is referred to as the application for extended relief.

[4] The second main application, brought by several entities who are part of the Oakbay Group against the Director of the Financial Intelligence Centre ('the Director of the FIC'), is for an order compelling the Director of the FIC to disclose to the applicants certain information relating to reports made to the FIC by the applicants' erstwhile bankers. This application is premised on section 40 (1) (e) of the Financial

Intelligence Centre Act 38 of 2001('FIC Act')[1]. This application is referred to as the FIC application.

[5] The judgment is structured as follows: firstly, a detailed description of the parties is set out, followed by a brief exposition of background facts. Then the reasons for the rulings made in respect of the interlocutory issues are set out. Thereafter, the FIC application, the application for declaratory relief and the application for extended relief are dealt with sequentially.

THE PARTIES

[6] Pravin Jamnadas Gordhan ('Mr. Gordhan') was the incumbent Minister of Finance and the head of the National Treasury of South Africa at the time of launching and hearing of the applications. He was appointed into that position in December 2015, having previously served in the same position from 2009 to 2014. This court takes judicial notice of the fact that on or about 30 March 2017, the day after the court reserved judgment, the President of the Republic of South Africa, the Honourable Mr. Jacob Gedleyihlekisa Zuma ('the President'), announced changes in the National Executive, and as consequence of these, Mr. Gordhan ceased to be the Minister of Finance. He was replaced in that portfolio by the Honourable Mr. Malusi Gigaba. Mr. Gordhan had brought the application for declaratory relief in his official capacity.

[1] **40 Access to information held by Centre**
(1) No person is entitled to information held by the Centre, except-
…
(e) in terms of an order of a court;

[7] Initially, there were twenty-one respondents in the application for declaratory relief. They fall into the following categories: fourteen entities that are part of the Oakbay Group, four major South African banks and three banking regulatory bodies. Initially, the respondents in the Oakbay Group were: Oakbay Investments (Pty) Ltd, Oakbay Resources and Energy (Pty) Ltd, Shiva Uranium (Pty) Ltd, Tegeta Exploration and Resources (Pty) Ltd, Westdown Investments (Pty) Ltd (initially cited as JIC Mining Services (Pty) Ltd), Blackedge Exploration (Pty) Ltd, TNA Media (Pty) Ltd, The New Age, Infinity Media (Pty) Ltd (initially cited as Africa News Agency Network (Pty) Ltd), VR Laser Services (Pty) Ltd, Islandsite Investments One Hundred and Eighty (Pty) Ltd, Confident Concepts (Pty) Ltd, Jet Airways (India) Ltd (Incorporated in India) and Sahara Computers (Pty) Ltd. Individual reference to these entities is by their names. After the Oakbay Group objected to their misjoinder in its answering affidavit, the Minister deleted the citation of The New Age and Jet Airways and all subsequent references to these parties in his papers. As a result, nineteen respondents remain in the application. Twelve respondents remain in the Oakbay Group. Going forward, reference to the Oakbay Group is to these twelve respondents. They initially collectively opposed the application for declaratory relief. Subsequently, VR Laser and Sahara Computers severed themselves from the opposition by the Oakbay Group and respectively filed supplementary opposing papers. Collectively the ten respondents in the Oakbay Group excluding VR Laser and Sahara Computers are referred to as the Oakbay respondents.

[8] The bank respondents are ABSA Bank Limited, First National Bank Limited, Standard Bank and Nedbank Limited. They are collectively referred to as ‘the banks’. Individual reference to these respondents is by their names. They all support the

relief sought by the Minister. They have all filed affidavits placing additional material before the Court relating to the international banking regulatory framework, its domestication into South African law as well the risk that the banks face if they fail to act within the relevant international regulations and South African law. They also set out reasons why they support the relief that the Minister seeks. Counsel for the banks stated upfront that the banks do not seek a cost order against any party. They undertook to pay their own legal costs.

[9] The banking regulatory respondents are the Governor of the South African Reserve Bank ('the Governor'), the Registrar of Banks ('the Registrar') and the Director of the FIC. They too filed answering affidavits to the application for declaratory relief, placing additional material before the Court which they consider relevant to the determination of the relief sought by the Minister. Although they state that they will abide by the decision of the Court, the material they have placed before the Court supports the relief sought by the Minister. They did not answer to the application for extended relief.

[10] In the FIC application, the applicants are all the companies in the Oakbay Group with the exception of Westdown Investments (Pty) Ltd and Infinity Media (Pty) Ltd. Collectively, these entities are referred to as the Oakbay applicants. The only respondent is the Director of the FIC. The Minister, the banks as well as the two other banking regulatory respondents, namely the Governor and the Registrar are not party to the FIC application.

BACKGROUND FACTS

[11] In most cases, an application for declaratory relief involves the determination of a question of law. Facts bear relevance only to the extent that they assist the court to exercise its discretion judiciously to grant or refuse the application. The facts as set out in the papers filed between the parties are quiet prolixus; as a result, the papers filed are voluminous. They fall slightly short of 2000 folios. Given the succinct question of law that stands to be determined, as well as the rulings that this Court made in respect of the interlocutory issues that arose, no purpose would be served by delving deeply into the facts as set out in the papers.

[12] The pertinent background facts are largely common cause. In December 2015, ABSA gave notice to entities in the Oakbay Group to whom it provided banking services, to terminate their contractual relationship and to close their bank accounts. At the time, the relevant entities accepted this decision without any contestation. Subsequently, the other three banks took similar decisions, effectively unbanking the Oakbay Group. All the banks gave the Oakbay Group notice of termination of their banking relationship prior to closing their bank accounts. The Oakbay Group has not challenged the appropriateness or legality of the closure of its accounts by the banks.

[13] In April 2016, Mr. Howa, the then Chief Executive Officer of Oakbay Investments addressed a letter to Mr. Gordhan regarding the closure of the bank accounts of various entities in the Oakbay Group and the crisis it was thrust into as a result. In the letter, the Oakbay Group brought to Mr. Gordhan’s attention the dire

implications of the actions of the banks to its continued business operations in South Africa, and the job losses that would result if the Oakbay Group was not able to continue to conduct business operations in South Africa. The Oakbay Group appealed to the Minister for 'any assistance that he might give' to prevent job losses. Mr. Howa estimated the job losses at 4,000 to 8,000 affecting over 50,000 individuals. Mr. Howa addressed similar letters to the Governor and the Registrar.

[14] Subsequently, Mr. Gordhan met with Mr. Howa and several executives of the Oakbay Group. They also exchanged several correspondence. Mr. Gordhan informed Mr. Howa that there is no legal basis for his intervention in the dispute between the banks and the Oakbay Group. The Governor responded in similar terms to Mr. Howa, informing him that he and the Registrar lack the legal authority to instruct a bank to serve or not to serve a particular client. All these officials advised Mr. Howa to seek recourse to the Banking Ombud or the Courts. Mr. Howa did not heed this advice. Instead, he addressed further correspondence to these officials pleading for their assistance. The Minister launched the declaratory application in October 2016.

[15] It should be noted that before the hearing of the application, the Deputy Judge President convened a judicial case management meeting with the parties' legal representatives to discuss a time schedule for the filing of further affidavits, the heads of argument and to arrange a suitable date of hearing of the applications. A formal directive dated 22 December 2016 was sent to the parties, setting out timeframes for the filing of further papers. Some of the parties filed supplementary affidavits and supplementary heads of argument even though the Deputy Judge

President's directive did not authorize the filing of the said documents. This Court considered it expedient to accept the supplementary affidavits and supplementary heads of argument being satisfied that none of the parties would be prejudiced by the Court's acceptance of the said documents.

INTERLOCUTORY ISSUES

[16] When the proceedings commenced on 28 March 2017 this Court dealt with four interlocutory issues and gave rulings in respect thereof, namely:

16.1 the position of the interested party, President Zuma;

16.2 an application by Sahara Computers for condonation for the late filing of a notice in terms of rule 7 of the Uniform Rules of Court and an application to compel the Minister to comply with the notice in terms of rule 7;

16.3 two applications by the Oakbay Group to strike out certain material from the Minister's founding and replying affidavits and an application by the Minister to strike out certain material from the Oakbay respondents' answering affidavits.

[17] The Court refused to hear submissions from counsel for the interested party on the basis that President Zuma is not a party to these proceedings. It dismissed the two applications by Sahara Computers and granted all the applications to strike out. Reasons for these rulings are set out below.

THE POSITION OF THE INTERESTED PARTY

[18] When Standard Bank filed its answering affidavit to the application for declaratory relief it attached a notice of motion for the extended relief. Anticipating that the Zuma, who was not cited as a party in the application for declaratory relief may be interested in participating in these proceedings because of the extended relief that Standard Bank seeks, after filing its answering affidavit, Standard Bank caused its answering affidavit and the Minister's notice of motion to be delivered to the office of the President. Standard Bank did not apply for the President to be joined as a party to these proceedings. In its letter to the President, Standard Bank brought the application for extended relief to the attention of the President and invited him to join the proceedings if he had an interest in participating. Subsequently, Standard Bank also sent to the President the directives issued by the Deputy Judge President on 22 December 2016. To that letter, Standard Bank also attached the notice of motion in the FIC application.

[19] On 7 February 2017, the State Attorney addressed a letter to the attorneys for Standard Bank, objecting to the irregular procedure pursued by Standard Bank to invite the President to participate in these proceedings. The State Attorney also advised Standard Bank's attorneys that the President would not intervene in proceedings in which he is not joined as a party, on invitation by Standard Bank contrary to the Court rules. On 16 February 2017, Standard Bank filed a supplementary affidavit, apprising the Court of its interactions with the office of the President regarding the invitation it extended to him to join the application for declaratory relief. On 8 March 2017, Standard Bank informed the State Attorney that

it did not intend to introduce the President as a party to these proceedings. In subsequent correspondence exchanged between these parties, Standard Bank informed the State Attorney that it was persisting with the application for extended relief notwithstanding, that the President had not been joined.

[20] A day before the applications were heard, the State Attorney filed an affidavit entitled “Affidavit on behalf of interested party (President of the Republic of South Africa)”, objecting to the irregular manner in which Standard Bank sought to invite him to participate in these proceedings. Pre-empting an argument by Standard Bank that because the President did not join the proceedings due to lack of interest, his non-participation in the application for extended relief should not be a bar to the granting of that application, the State Attorney also briefed senior and junior counsel to appear on behalf of the President at the hearing. The State Attorney sought costs against Standard Bank, including the costs of two counsel, occasioned by the irregular step it took against the President as described above. The State Attorney also sought the striking from the roll of Standard Bank’s application with costs due to the non-joinder of the President.

[21] The Court had no legal basis to hear the President’s counsel under these circumstances. As a non-party to the proceedings, the Court considered that the President had no standing before the Court. Therefore legally, he lacked any basis to file papers or to address the Court. It was on this basis that this Court informed the President’s counsel that it cannot entertain his submissions.

[22] Standard Bank's contention that the President has communicated his disinterest in joining the proceedings is dealt more fully further below in the context of the application for extended relief.

THE APPLICATION FOR CONDONATION FOR THE LATE FILING OF THE NOTICE IN TERMS OF RULE 7 AND THE APPLICATION TO COMPEL COMPLIANCE WITH RULE 7

[23] On 17 March 2017, Sahara Computers served the Minister with a notice in terms of rule 7, calling on the Minister to satisfy the Court that the State Attorney is properly authorized to act for the Minister in the application for declaratory relief.

[24] The rule 7 notice was foreshadowed by a notice of substitution of attorneys for Sahara Computers, filed on 16 March 2017. Until then, Sahara Computers was represented in these proceedings by Van der Merwe Attorneys, who represented all the respondents in the Oakbay Group. The Minister responded with a rule 30 notice and a letter served on Sahara Computers objecting to, amongst others, the late filing of the rule 7 notice and the late filing of supplementary heads of argument by Sahara Computers. On 27 March 2017, Sahara Computers filed a condonation application for the late filing of the rule 7 notice. It also sought an application compelling the Minister to comply with the rule 7 notice. In the event that it succeeds in this application, Sahara Computers sought a personal order for costs against the Minister on a punitive scale. In the event of these applications being dismissed, the Minister sought a cost order against Sahara Computers on a punitive scale.

[25] The nub of Sahara Computers' reason for filing the rule 7 notice is that when organs of state instruct private attorneys to act on their behalf, or request the State Attorney to act in their interest, the organ of state takes a decision authorizing the private attorney or State Attorney as the case may be, to act on its behalf. Sahara Computers' contention further goes, if the Minister took such a decision in this case, then the Minister ought to file it. If it was not taken, then the State Attorney is acting *mero motu* and therefore unauthorized to act for the Minister.

[26] The Court records that in terms of rule 7(5), where the State Attorney is acting under his authority in terms of the State Attorney Act 56 of 1957, he shall not be required to file a power of attorney in terms of rule 7(1). The scope of authority of the State Attorney is set out in section 3 of the State Attorney Act. This section provides that the State Attorney performs on behalf of the government, work that is by law, practice or custom performed by attorneys. The Minister brought this application in his official capacity. He personally deposed to the founding and replying affidavits. There can be no doubt as to his participation in his official capacity in these proceedings. It was in any event in that official capacity that the Oakbay Group had sought his intervention in its dispute with the banks. Therefore his initiation of this litigation could not have been in any other capacity.

[27] It therefore follows that in these proceedings, the State Attorney is acting for the Minister within its scope of his duties in terms of section 3 of the State Attorney Act. Sahara Computers' request, flies in the face of rule 7(5). Any suggestion that the State Attorney is acting *mero motu* and that he is not authorized to act for the Minister is misconceived and is devoid of any legal basis.

[28] Sahara Computers has been party to these proceedings from the beginning. The notice of motion in respect of the declaratory application was served on Sahara Computers in October 2016. Van der Merwe Attorneys filed an answering affidavit on behalf of the Oakbay Group in January 2017. At that stage, the Oakbay Group mounted a collective opposition to the application for declaratory relief. This is evidenced by round robin resolutions pre-dating the answering affidavit, signed by the directors of various entities in the Oakbay Group including Sahara Computers.

[29] In terms of a directive issued on 22 December 2016 by the Deputy Judge President, the filing of affidavits closed on 27 January 2017, the date by which the Minister had to file his replying affidavit. All parties were due to file their practice notes and heads of argument by 24 February 2017. Until then, Sahara Computers had no difficulty with the State Attorney's representation of the Minister. The late substitution of its attorneys is not a good reason for the late filing of the rule 7 notice, which in any case, as demonstrated above, is in the circumstances of this case, incompetent.

[30] The rule 7 notice is clearly vexatious. It was filed extremely late, approximately five months after the application was launched and less than ten days before the application was to be heard. Sahara Computers failed to give a reasonable explanation for its late filing. The rule 7 notice took this Court completely by surprise. This Court found it extremely inconvenient to be unjustifiably burdened with further papers adding to the already voluminous papers filed in these proceedings. The dismissal of Sahara Computers' condonation application is

confirmed. The Minister is awarded costs on a punitive scale, against Sahara Computers in respect of the condonation application and the application to compel compliance with the rule 7 notice.

APPLICATIONS TO STRIKE OUT BY THE OAKBAY GROUP AND THE MINISTER

[31] The first application to strike out brought by the Oakbay respondents and Sahara Computers, sought paragraphs 19 and 27 as well as Annexures P1 and P2 to the Minister's founding affidavit struck out. Paragraph 19 deals with the adverse impact persistent requests by the Oakbay Group to the Minister to intervene in the dispute between the Oakbay Group and the banks will have on the banking regulatory environment. Paragraph 27 introduces Annexures P1 and P2 into evidence. Annexure P1 is a letter the Director of the FIC addressed to the Minister dated 4 August 2016, under cover of which he sent the Minister Annexure P2. Annexure P2 is a certificate issued at the Minister's request by the Director of FIC in terms of section 39[2] of the FIC Act, setting out 72 suspicious transactions reports (STRs)[3] reported to the FIC by the banks against several entities in the Oakbay Group and several associated individuals. In paragraph 27, the Minister draws an adverse inference from Annexure P2 against the Oakbay Group, using one

[2] **39 Admissibility as evidence of reports made to the Centre**
A certificate issued by an official of the Centre that information specified in the certificate was reported or sent to the Centre in terms of section 28, 29, 30(2) or 31 is, subject to section 38(3), on its mere production in a matter before a court admissible as evidence of any fact contained in it of which direct oral evidence would be admissible.

[3] This is a report made to the FIC in terms of section 29 of the FIC Act by an accountable institution, reporting institution and/or any other person in respect of a financial transaction they have encountered that is potentially linked to money laundering or terrorist financing.

transaction for R1, 3 billion set out in Annexure P2 as a suspicious transaction, to justify drawing such an inference.

[32] The Oakbay respondents and Sahara Computers filed a second application to strike out paragraphs 18, 24 and 27 of the Minister's replying affidavit. In paragraph 18, the Minister reiterates his views on the adverse impact persistent requests by the Oakbay Group to the Minister to intervene in the dispute between the Oakbay Group and the banks will have on the banking regulatory environment. He also reiterates his concerns regarding the R1, 3 billion transaction, allegedly earmarked for mining rehabilitation and the potential adverse impact on the fiscus if these funds are not utilized appropriately. He draws support from statements the Public Protector made in the State of Capture Report[4] in respect of this transaction. This report hardly requires any further description. The report was the subject of extensive media attention after the Public Protector released it in November 2016. The subtitle of the report, describes the report as:

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

[33] The Minister annexed the relevant excerpt from the State of Capture Report to his replying affidavit. He also defended his *bona fides* in seeking and filing Annexures P1 and P2. Paragraphs 24 and 27 deal with a finding contained in the State of Capture Report that the Oakbay Group and certain individuals associated to it influence the appointment of members of Cabinet.

[4] Report No: 6 of 2016/2017

[34] The Minister also applied for the striking out of several words and phrases from the affidavits filed by the Oakbay respondents, deposed to by its incumbent Chief Executive Officer, Ronica Ragavan, and Ajay Kumar Gupta, one of the individuals presented in the papers filed in these proceedings as associated to the Oakbay Group. The relevant words and phrases are clearly set out in the Minister's Notice of Opposition and Strike Out dated 16 February 2017. To avoid prolixity they are not set out in this judgment. The relevant words and/or phrases accuse the Minister of dishonesty and of using material from the State of Capture Report to cloud issues, provoke media interest and to perpetuate an ongoing political benefit from the State of Capture Report.

[35] The interlocutory applications to strike out were all brought on the basis that the material sought to be struck out is scandalous, vexatious or irrelevant. In relation to some of the allegations contained in the State of Capture Report, the Oakbay respondents and Sahara Computers further contend that this material constitutes hearsay evidence. Rule 23(2) regulate applications to strike out. In terms of this rule, a party may apply for striking out where a pleading contains averments which are scandalous, vexatious or irrelevant. This rule allows the Court to strike out the said allegations if it is satisfied that the applicant will be prejudiced in the conduct of his/her claim or defense.

[36] The interlocutory applications to strike out were precipitated by the approach the Minister opted to follow in respect of the application for declaratory relief. He states in his founding affidavit, and reiterates in his replying affidavit, that after he became aware from media reports of the dispute between the Oakbay Group and

the banks, and after he received direct representations from Mr. Howa asking him to intervene in that dispute, he became concerned about the Oakbay Group's allegations of impropriety by the banks and its potential impact on South Africa's financial stability. He was also concerned about the many job losses which the Oakbay Group presented as eminent. He considered these allegations to be in the public interest. For that reason, he explored legal means of addressing these issues. He sought legal advice twice and was informed in unequivocal terms, that there is no legal basis for him to intervene in what is a contractual dispute between private entities. He was also alerted of the risk that his involvement might attract from a banking regulatory perspective.

[37] He requested the Director of FIC to furnish him with a certificate in terms of section 39 of FIC Act relating to the reports made against Oakbay Group and associated individuals.

[38] The section 39 certificate lists 72 STRs sent to the FIC by the banks in terms of section 29 of the FIC Act against several companies who are part of the Oakbay Group and associated individuals. The suspicious transaction reports cast a cloud of impropriety on the part of Oakbay Group and associated individuals. They are prejudicial to them because they are not privy to the information that form the basis of those reports and as such, do not have the information they require to rebut the allegations that arise from these reports or to repel the cloud of impropriety the reports cast on them. The Oakbay applicants launched the FIC application in a bid to secure this information.

[39] Whether the allegations of impropriety on the part of the Oakbay Group are founded or unfounded has no place in these proceedings given the succinct legal question to be determined. By filing the section 39 certificate, the Minister forced the Oakbay Group to its defense. In defending itself, the Oakbay Group set out in its answering and subsequent affidavits that it filed, background facts to its woes with the banks and the Minister, questioned the Minister's *bona fides* and cast political aspersions on him. They commissioned a forensic analysis of the STRs. The forensic report finds that most STRs are inadequate to match them to the Oakbay Group and that those that can be matched are appropriate and lawful. As a result, a dispute of fact which is incapable of resolution on the papers arose on issues that bear no relevance to the application for declaratory relief.

[40] Furthermore, allegations contained in the State of Capture Report are irrelevant to the legal question to be determined and threaten to derail these proceedings. It was also inappropriate to introduce such allegations in these proceedings because the State of Capture Report is *sub judice*.

[41] To the extent that allegations and counter allegations of impropriety made by the parties against each other are irrelevant to the crisp legal issue to be determined, this Court granted all the applications to strike out, being satisfied that none of the parties would suffer any prejudice as a result of the granting of the applications.

[42] Based on the reasons for granting both applications, it is appropriate that the Minister pays the costs of the Oakbay Group in respect of the three applications to strike out.

THE FIC APPLICATION

[43] In their replying affidavit to the FIC application, the Oakbay applicants conditioned that application on the granting of their applications to strike out, and tendered to withdraw the application in the event that the Court grants the applications to strike out.

[44] Upon the granting of the applications to strike out, counsel for the Oakbay applicants consequently withdrew the application. Save for the issue of legal costs consequent upon the withdrawal of the FIC application, the Director of the FIC consented to the withdrawal of the application.

[45] On the question of costs, the FIC application presents a unique set of facts. The general principle, set out in Rule 41[5] of the Uniform Rules of Court is that a party who withdraws an application should tender costs. However, justice would not be served by ordering the Oakbay applicants to pay the costs of the Director of the FIC. The Minister put the Oakbay applicants in a precarious position when he filed the section 39 FIC Act certificate in the application for declaratory relief. This is what rendered the FIC application necessary from the perspective of the Oakbay applicants.

[5] **41 Withdrawal, settlement, discontinuance, postponement and abandonment**
(1) (a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the taxing master shall tax such costs on the request of the other party.

[46] The Oakbay applicants were not unreasonable in launching the FIC application as contended by the Director of the FIC. Section 41(1) (e) of the FIC Act, on which the FIC application is premised, provides the scope for the FIC to make available to any person information held by the FIC in terms of a Court order. When they succeeded in purging the relevant material from the papers, the Oakbay applicants resorted not to persist with the FIC application because they no longer considered it necessary to present evidence in these proceedings to dispel the cloud of impropriety placed over them by the filing of the section 39 certificate by the Minister.

[47] The Oakbay applicants did not join the Minister to the FIC application. Therefore there is no basis for granting a cost order against him.

[48] The circumstances under which the FIC application was brought falls within the scope of the principles set out in *Biowatch Trust v Registrar, Genetic Resources and Others*[6], the seminal Constitutional Court judgment on costs where an organ of state is sued for constitutional or statutory obligations. There was a live dispute between the Director of the FIC and the Oakbay applicants in respect of information the latter sought to access from the former. The FIC contended that the Oakbay applicants were not entitled to it. Hence it did not agree to their request. The Oakbay applicants contended that they were entitled to the information. Under these circumstances, section 41(1) (e) of the FIC Act provides the only mechanism by which the Oakbay applicants may obtain the information. For that reason, the

[6] 2009 (6) SA 232 (CC).

Oakbay applicants did not bring the FIC application to vex the FIC. There is also no suggestion that the application was driven by malice.

[49] Although the FIC application is based on the FIC Act and not on the Constitution, to the extent that the application relates to access to information, it is intended to enforce an entrenched constitutional right, namely, the right of access to information. The application also relates to the exercise of statutory duties by an organ of state. The conduct of the Oakbay applicants in bringing the FIC application was therefore not unreasonable. On the authority of *Biowatch*, departure from the general principle in rule 41 is justified in the circumstances of this case, especially when regard is had to the reasonableness of the conduct of the Oakbay applicants in launching the FIC application.

[50] This Court finds that fairness and justice will be better served by not granting a cost order in respect of the FIC application.

THE APPLICATION FOR DECLARATORY RELIEF

[51] The basis for the relief that the Minister seeks is section 21(1) (c) of the Superior Courts Act 10 of 2013. It provides:

> ***"Persons over whom and matters in relation to which Divisions have jurisdiction***
> ***21.*** *(1) A Division has jurisdiction over all persons residing in or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognizance, and has the power –*
>
> *(c) in its discretion, and at the instances of any interested person, to enquire into and determine any existing, future, or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."*
> [Emphasis added]

[52] The exercise of the Court's jurisdiction in terms of section 21(1) (c) follows a two-legged enquiry. (See *Durban City Council v Association of Building Societies*[7] and confirmed in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*[8]):

> [52.1] the Court must first be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation; and if so,
>
> [52.2] the Court must decide whether the case is a proper one for the exercise of its discretion.

[53] The first leg of the enquiry involves establishing the existence of the necessary condition precedent for the exercise of the Court's discretion. An applicant for the declaratory relief satisfies this requirement if he succeeds in establishing that he has an interest in an existing, future or contingent right or obligation. Only if the Court is satisfied accordingly, does it proceed to the second leg of the enquiry.

[54] In *casu,* the first stage of the enquiry relates to whether the Minister is authorized or obliged by law to intervene in the dispute between the Oakbay Group and the banks. This legal question has been previously determined by the Courts. The first answer to this question lies in the constitutional principle of legality. In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*[9], the Constitutional Court espoused the principle that organs and officials of state are creatures of statute. Unlike natural persons who

---

[7] 1942 AD 27 at 32.
[8] 2005 (6) SA 205 (SCA) at para 15 to 17.
[9] 1999 (1) SA 374 (CC).

may commit any act, the only requirement being that the act ought to be legal, organs and officials of state are not empowered to commit any act. They are only empowered to act to the extent that their powers are defined and conferred by the constitution and/ or by statute. Any conduct by an organ or official of state beyond their constitutional and/ or statutory powers violates the principle of legality.

[55] There is no statute that empowers a member of the National Executive such as the Minister, to intervene in a private bank-client dispute. Neither does the Constitution confer such powers.

[56] The second answer to this question finds expression in the dictum by the Supreme Court of Appeal in *Bredenkamp and another v Standard Bank of SA Ltd*[10] where the Court found that the relationship between the bank and its client is contractual in nature. The bank may terminate the relationship in its discretion, on reasonable notice to the client, provided the reasons for terminating the account do not violate public policy or constitutional values.

[57] The legal question before this Court is as stipulated above. To that extent no controversy lies between the parties. None of the parties have requested this Court to determine the propriety or impropriety of the decision by the respondent banks to terminate their bank-client relationship with entities in the Oakbay Group. In the premises, the applicant has successfully established the existence of the necessary condition precedent for the exercise of the Court's discretion.

---

[10] 2010 (4) SA 468 (SCA). See also *Hlongwane and Others v ABSA Bank Limited and Another* (75782/13) [ZAGPPHC] 928 (10 November 2016).

[58] The parties have advanced opposing contentions in respect of the second leg of the enquiry. The applicant and the banks contend for an exercise of the Court's discretion in favour of the Minister. The Oakbay Group contends otherwise.

[59] *Herbstein and van Winsen*[11] extrapolate from decided cases factors Courts have taken into account to determine whether judicial discretion should be exercised positively or negatively in an application for declaratory relief. These include:

[59.1] the existence or absence of a dispute;

[59.2] the utility of the declaratory relief and whether if granted, it will settle the question in issue between the parties;

[59.3] whether a tangible and justifiable advantage in relation to the applicant's position appears to flow from the grant of the order sought;

[59.4] considerations of public policy, justice and convenience;

[59.5] the practical significance of the order;[12] and

[59.6] the availability of other remedies.

[60] The above factors are considered below in no particular order. When applying the above factors to the present application, this Court is not persuaded that the circumstances of the present application warrant the granting of the declaratory relief sought.

[61] *Ex Parte Nell*[13] settled the law regarding the existence of a live dispute as a requirement for the granting of a declaratory order by abrogating this requirement.

---

[11] See Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa Volumes 1 5th Ed, 2009 Ch43-p1438-1440.

[12] See *Shoba v OC, Temporary Police Camp, Wagendrift Dam 1995* (4) SA 1 (A) 14F-G.

[13] 1963 (1) SA 754 (A).

However, *Ex Parte Nell* did not render declaratory orders justified in all cases where there is no live dispute. The dictum on this requirement in *Ex Parte Nell* is not without qualification. There the Court went further and stated that '… *though the absence of a dispute may, depending on the circumstances cause the court to refuse to exercise its jurisdiction in a particular case.*'[14] The following extract from that judgment reflects the reason why the Court granted the declaratory relief even though there was no live dispute between the parties:

> *"The need for such an order can pre-eminently arise where the person concerned wished to arrange his affairs in a manner which could affect other interested parties and where an uncertain legal position could be contested by all or one of them. It is more practical, and the interests of all are better served, if the legal question can be laid before a court even without there being an already existing dispute."* [Emphasis added].

[62] Therefore post *Ex Parte Nell*, the absence of a live dispute remains a factor to be considered where the legal position to be determined is uncertain. As stated previously, the legal position regarding the question the Minister seeks determined has been decided previously. The Oakbay Group does not contest this. Unlike the scenario in *Ex Parte Nell*, there is no uncertainty between the parties regarding its terms or its application. To the extent that in *Ex Parte Nell* the Court dealt with 'an uncertain legal position which could be contested', that case is distinguishable from the present one.

[63] The absence of a controversy in *casu*, regarding the relevant legal position cannot be ignored. In the circumstances of this case, the Court considers the absence of legal uncertainty to be a significant factor in determining the direction in which the Court ought to exercise its discretion. This factor carries other ramifications that have a bearing on the exercise of the Court's discretion. The Court

[14] At 759H-760B

does not provide legal advice to the parties. Courts therefore, consider it inappropriate for any party to come to Court for the confirmation of a legal question which is common cause between the parties.

[64] Lack of controversy on the legal question the Minister sought determined also brings into question the utility of the declaratory relief, its practical effect and the advantage the applicant will enjoy if the declaratory relief is granted.[15]

[65] Given the legal constraints the Minister faced in respect of the Oakbay Group's dispute with the banks, a stern response to Mr. Howa and his company, which he seemed to have communicated during the meeting of 24 May 2016, should have marked the end of his involvement. Even the Oakbay Group's allegations of impropriety by the banks or allegations of eminent job losses should not have spurred him to further action as he clearly lacked the legal basis to get involved.

[66] Despite the legal advice that his counsel gave him, the Minister embarked on a number of steps. Together with a number of senior officials in the National Treasury, he met with Mr. Howa on 24 May 2016. During that meeting, the Minister informed Mr. Howa that he lacked the legal basis to intervene and that there were legal impediments to banks discussing client-related matters with him or any third party. He directed Mr. Howa to seek a resolution of the Oakbay Group's dispute with the banks through the Courts. Despite the position that the Minister took, Mr. Howa persisted in his request to the Minister to intervene, appealing to him to serve the national purpose to save jobs.

---

[15] See *Shoba v OC, Temporary Police Camp, Wagendrift Dam 1995* (4) SA (A) 14F-G.

[67] On 26 July 2016, the Minister wrote to the Director of the FIC (copying the Governor of the Reserve Bank and the Registrar of Banks), seeking to be advised whether the banks had reported any suspicious transactions against any entity in the Oakbay Group and associated individuals. It was in response to this letter that the Director of the FIC issued the certificate referred to in paragraph 31 above. The Minister stated in his letter to the Director of the FIC that at that point he was considering the merits of obtaining a definite ruling on whether:

"(a) the Minister of Finance (or the Governor of the Reserve Bank or Registrar of Banks) has the power in law to intervene with the banks concerned regarding their closure of the Oakbay accounts held with them, and
"(b) a basis exist in fact for the contention that the relevant banks terminated the accounts in question for a reason unrelated to their statutory duties not to have any dealings with any entity if a reasonable diligent and vigilant person would suspect that such dealings could directly or indirectly make that bank a party or accessory to contraventions of the relevant laws…"

[68] When he finally launched the declaratory application, the Minister decided not to pursue the question set out in (b). He fails to take this Court into his confidence regarding why he only elected to pursue an order that addresses the question set out in paragraph (a) of his letter to the Director of the FIC. Notwithstanding that he remained constrained by the law to intervene, the FIC certificate would have been more relevant for the question in (b), which he, for undisclosed reasons, opted not to pursue.

[69] The dispute between the Oakbay Group and the banks remained private regardless of the implications it held for the Oakbay Group, the banks or the South African economy. His resort to address the letter - referred to above - to the Director of the FIC is incongruent with the legal advice he had received and accepted. The question set out in (a) above, had already been answered by his counsel when he

gave him legal advice. The question in (b) should have been the concern of the Oakbay Group or the banks and/ or the banking regulatory bodies and not him.

[70] In addition, there is incongruence between the relief the Minister seeks, the reasons for seeking it, as well as the evidence he advanced to support the granting of the declaratory order. That the Minister opted to abandon his intention to enquire into the propriety of the banks and opted for the declaratory order without laying bare his reasons for doing so, leaves the question about the utility of the declaratory relief hanging.

[71] The Minister, the banking regulatory respondents and the banks cite public interest considerations because of what they allege is the risk any political interference, actual or perceived, with the operation of the banks would pose to South Africa's financial stability. On the version of the Minister, the response by the regulatory respondents and the banks to Mr. Howa is one that avoids any inference of actual or perceived complicity in political interference with the operation of the banks. They were firm in their response to Mr. Howa. Despite initially entertaining Mr. Howa's requests out of concern for job losses and possible improper conduct by the banks, the Minister eventually took a firm stance and resisted Mr. Howa's invitation to intervene. The banks also resisted whatever pressure they faced to reverse their decision to terminate their relationship with the Oakbay Group.

[72] The banks do not complain of any actual or perceived interference by the Minister, with their operations. In their answering papers, they defended their decision to close the bank accounts of entities in the Oakbay Group, alleging that

they did so in compliance with their obligations in terms of the FIC Act. They explained the prejudice they would suffer if they failed to adhere to international best practice and standards and if they did not protect their reputation. They also asserted their right to choose the clients with whom to have a relationship. They were prudent to disassociate from any conduct that would disturb the financial stability of the country. Their conduct ought to boost rather than harm confidence in the South African banking system.

[73] Perhaps the only issue that could have been of concern to the Minister and to the banks, regarding possible uncertainty on the legal question the Minister sought answered in the application, relates to the alleged establishment of the Inter-Ministerial Committee (IMC) comprising of the Minister of Labour and the Minister of Mineral Resources and its attempts to, contrary to the law, interfere in the dispute between the banks and the Oakbay Group.

[74] Counsel for VR Laser objected to this evidence in respect of the IMC being considered because it was not introduced by the Minister. There is no legal basis to this objection. The authorities relied on by VR Laser are not of assistance to it. On the authority in *Mogale City Municipality v Fidelity Security Services (Pty) Ltd*[16]*,* the Oakbay Group did not object to this evidence in terms of rule 30. In two applications to strike out that it brought, it did not request that this evidence be struck out. Having filed its answering affidavit after the banks filed theirs; it had an opportunity to answer thereto. Therefore it does not stand to suffer prejudice if the Court considers it.

[16] 2015 (5) SA 590 (SCA).

[75] It is not necessary to dwell deep into the alleged activities of the so called IMC as nothing turns on this aspect of the case. The Minister contends that the IMC was not approved by Cabinet at its meeting of 13 April 2016; and he never attended any of its meetings. The banks allege that they individually received requests to meet with the IMC. Two of the banks, FNB and ABSA declined an invitation to meet with the IMC whilst Nedbank and Standard Bank accepted such invitations and met with the IMC. At their respective meetings with the IMC, the closure of the bank accounts of the affected entities was discussed. Any prospect of political interference in the client–bank relationship between the banks and the Oakbay Group was dispelled, when, according to Nedbank, the Presidency distanced itself from a press statement issued by the Minister of Mineral Resources in respect of the activities of the IMC and recommendations made by Cabinet to the President pursuant thereto.

[76] The Minister remained certain of the legal position regarding his powers; hence he refused to participate in the IMC. His version is that he did not recognize it and was steadfast in his refusal to participate in the IMC. The banks were also firm in their refusal to entertain any request by the IMC to review their decision to close the Oakbay Group's bank accounts. If they were concerned about the inappropriate inroads, if any, that the IMC was trying to make into their private relationship with the Oakbay Group, they could have approached the Court to interdict that conduct against the Ministers comprising the IMC.

[77] The absence of uncertainty regarding the legal question to be answered by way of declaratory relief does not detract from the fact that declaratory relief is a

discretionary remedy. The Court is not obliged to grant it, particularly because there is no uncertainty on the relevant legal question.

[78] In *JT Publishing (Pty) Ltd & Another v Minister of Safety & Security*[17] the Constitutional Court held as follows:

> "*I interpose that enquiry because a declaratory order is a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer. A corollary is the judicial policy governing the discretion thus vested in the Courts, a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones. I see no reason why this new Court of ours should not adhere in turn to a rule that sounds so sensible. Its provenance lies in the intrinsic character and object of the remedy, after all, rather than some jurisdictional concept peculiar to the work of the Supreme Court or otherwise foreign to that performed here*."

[79] The public policy considerations that the Minister, the banks and the banking regulatory respondents contend are relevant to persuade this Court to grant the declaratory relief sought, were in the circumstances of this case, abated by the steadfast refusal by the Minister and the banking regulatory respondents to intervene in the dispute between the Oakbay Group and the banks and by the refusal of the banks to review their decision to close the bank accounts of the Oakbay Group.

[80] It is therefore unclear what advantage the Minister, as the only applicant in the application for declaratory relief will enjoy from the declaratory relief if granted. Its practical effect is also unclear. If granted, the declaratory relief will only serve to confirm what all the parties are aware of and in agreement with, in so far as the law is concerned.

---

[17] 1997 (3) SA 514 CC. Approved in *Director- General Department of Home Affairs and Another v Mukhamadiva* 2014 (3) BCLR 306 (CC).

[81] The Oakbay Group conceded both in its papers and in argument by its counsel to the legal position that the Minister sought confirmed by way of a declaratory order. We note with concern, though, that while the Oakbay Group knows and has conceded the legal position regarding the powers and functions of the Minister, they not only persisted in their requests to him for assistance, Mr. Puckrin, counsel for the Oakbay respondents, in argument submitted that he would not consider similar requests to the Minister in the future to be impermissible.

[82] It is the duty of the Minister, as a member of the National Executive to obey, respect and uphold the law in the exercise of his executive functions. It is not appropriate for a member of the National Executive to draw the judiciary into the exercise of his executive functions as evinced in this application. To grant the Minister the declaratory relief would allow the judiciary to stray into the exercise of executive functions where the circumstances do not warrant its involvement.

[83] We hold the strong view that this application was clearly unnecessary in the circumstances of this case. Such circumstances do not warrant that the Court exercises its discretion to grant the declaratory relief by pronouncing itself on an undisputed legal question, which has previously been confirmed in judgments.

[84] In the premises, the application for declaratory relief stands to be dismissed.

[85] This Court finds no reason why costs should not follow the course in favour of all the respondents who are part of the Oakbay Group. As already mentioned the

banks supported the Minister and undertook to carry their own legal costs. The banking regulatory respondents decided to abide by the decision of the Court and did not request costs against the Minister. Therefore no cost order is made in respect of these respondents.

EXTENDED RELIEF SOUGHT BY STANDARD BANK

[86] Standard Bank stands in a peculiar position in these proceedings. Although it was cited as a respondent and filed an answering affidavit in support of the relief sought by the Minister, it went further by seeking extended relief. To its answering affidavit, Standard Bank attached a notice of motion seeking an order in the following terms:

> *"It is declared that no member of the National Executive of Government, including the President and all Members of the Cabinet, acting of their own accord or for and/ or on behalf of Cabinet, is empowered to intervene in any manner whatsoever in any decision taken by the 17th Respondent to terminate its banking relationships with Oakbay Investments Proprietary Limited and its associated entities."*

[87] Standard Bank's notice of motion is defective for failure to comply with Rule 6(2) and (5).[18] It is unclear who the respondents to this application are as the application fails to cite them. It was served on all the parties to the application for the declaratory relief. This Court has doubt as to whether a parallel application may be brought in this manner. However, this Court does not deem it necessary to rule on the procedural impediments set out above. Firstly because the Oakbay Group assumed the position of respondents and filed an answer to this application, thereby waiving their right to object to it in terms of rule 30 of the Uniform Rules of Court.

[16] Rule 6 (2) When relief is claimed against any person, or where it is necessary or proper to give any person notice of such application, the notice of motion must be addressed to both the registrar and such person, otherwise it must be addressed to the registrar only. Rule 6(5) deals with *inter alia*, the timeframes within which the respondent ought to file opposing papers.
.

Secondly, none of the other parties objected to Standard Bank's notice of motion. This approach is consistent to that followed by the SCA in *Mogale City Municipality*[19] where the SCA held that procedural defects are not fatal to an application when not objected to in terms of the Court rules.

[88] The Minister did not oppose this application. Neither did the other respondents.

[89] Given the extent of the relief it seeks, Standard Bank faces a more serious and fatal impediment in its failure to join the President and members of the National Executive. Mr. Maleka, counsel for Standard Bank, argued on the one hand that the non-joinder of the President should not be an impediment to the granting of the extended relief because he - the President - expressed disinterest in the proceedings. On the other hand Mr. Maleka also argued that the application for extended relief should be granted because it will only be binding on the Oakbay Group and not the President and members of National Executive. He may have introduced the latter contention to overcome the non-joinder impediment. The latter contention, not only begs the question why Standard Bank saw it fit to bring these proceedings to the President's attention; the two contentions advanced in the same application render Standard Bank's case incongruent.

[90] Mr. Maleka sought to rely on the SCA decision in *Gordon v Department of Health: KwaZulu-Natal*[20] where the SCA held that non-joinder of an applicant for a job is not fatal in an application where the person who was not appointed did not

[19] See fn. 14 above.
[20] 2008 (6) SA 522 (SCA).

seek to challenge the employer's decision. In *Gordon*, the SCA per Mlambo JA (as he then was) stated:

> *"The issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject matter, which may be affected prejudicially by the judgement of the court in the proceedings concerned…"*[21]

[91] The SCA further found that the order or judgment of the Court is relevant to the question whether a party has a direct and substantial interest in the subject matter of the proceedings, citing the following dictum from *Amalgamated Engineering Union v Minister of Labour*[22]*:* [Emphasis added]

> *"the question of joinder should … not depend on the nature of the subject matter… but … on the manner in which, and the extent to which, the court's order may affect the interests of third parties…"* This has been found to mean that if the order or *"judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests"* of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined."[23]

[92] When applying the above principle to the facts in *Gordon*, the SCA found that the non-joinder of the successful job applicant was not fatal to the proceedings. It is not that finding as contended by Mr. Maleka that has to be tested against the facts of this case, but the legal principle on which the SCA relied to reach that finding. When applied to the facts of this case, the legal principle applied in *Gordon* leads to a different finding. In *Gordon*, the relief sought did not interfere with the interests of the party who was not joined. The converse is applicable *in casu.* Therefore, *Gordon* does not lend assistance to Standard Bank.

---

[21] At paragraph 9.
[22] 1949 (3) SA 637 (A).
[23] At paragraph 11.

[93] A declaratory order is never granted in the abstract. If couched in abstract terms, an application for a declaration order never succeeds. A declaratory order determines an existing, future or contingent right. Inherent in the concept of a right is the responsibility to act or not to act in a particular manner, and the corresponding obligation to promote, respect or fulfill the right in question. Rights do not exist in the abstract. Also inherent in the concept of a right, is a bearer of a right and a person against whom it avails.[24]

[94] The manner in which the prayer for extended relief is formulated, will, if that relief is granted, subject the President and members of the National Executive to the right Standard Bank seeks determined. It is against them that, if granted, the extended relief will prevail. No other comprehension arises from the formulation of the prayer for extended relief. On that formulation, the extended relief will not bind the Oakbay Group as contended on behalf of Standard Bank. Section 84 and 85 of the Constitution enumerates the powers and functions of the President and members of the National Executive. The use of the words 'in any manner whatsoever' may potentially cause the extended relief to collide with their constitutional functions and powers. To the extent that the extended relief may impinge on these constitutional powers and functions it cannot be sustained and carried into effect without necessarily causing prejudice to the interests of the President and members of the National Executive.

[95] This Court finds that the President and members of the National Executive are necessary parties with a substantial interest in the outcome of the application for extended relief. Therefore, their non-joinder is fatal to Standard Bank's application.

---

[24] See *Family Benefit Friendly Society v Commissioner for Inland Revenue* 1995 (4) SA 120 (T) at 125-126. Also see *Ex Parte Nell* 1963 (1) SA 754 (A) at 760.

[96] In the premises, Standard Bank's application stands to be dismissed. This Court finds no reason why in respect of this application, costs should not follow the result in favour of the Oakbay Group.

[97] The position of the President is peculiar in that he is not party to the proceedings. As alluded earlier, argument on his behalf was not permitted. In the papers filed on the President's behalf, the State Attorney sought costs against Standard Bank, occasioned by the irregular procedure it took against him. Since the President did not apply to be joined as a party, there is no legal basis to award costs in favour of a non-party.

[98] In the circumstances the following order is made:

ORDER

A. APPLICATIONS TO STRIKE OUT BY THE OAKBAY GROUP AND THE MINISTER

1. The applications to strike out by the Oakbay Group (the first to the seventh, the ninth to the twelfth and the fourteenth respondent) and the Minister of Finance are granted.
2. The Minister of Finance shall bear the costs of the parties to these applications. Such costs shall include the costs of two counsel where so employed.

B. THE APPLICATION TO COMPEL COMPLIANCE WITH RULE 7 OF THE UNIFORM RULES OF COURT AND THE APPLICATION FOR CONDONATION FOR THE LATE FILING OF THE NOTICE IN TERMS OF RULE 7

3. The application by the 14th respondent, Sahara Computers (Pty) Ltd, for condonation for the late filing of the notice in terms of rule 7 and the application to compel compliance with rule 7 is dismissed.
4. Sahara Computers (Pty) Ltd is ordered to pay the costs of the Minister of Finance in respect of these applications on the attorney client scale. Such costs shall include the costs of two counsel where so employed.

C. THE APPLICATION BY OAKBAY INVESTMENTS AND 11 OTHERS V THE DIRECTOR OF THE FINANCE INTELIGENCE CENTRE

5. No costs order is granted in relation to this application.

D. APPLICATION FOR DECLARATORY RELIEF
MINISTER OF FINANCE V OAKBAY INVESTMENTS LTD AND 19 OTHERS

6. The application by the Minister of Finance for declaratory relief is dismissed.

7. The Minister of Finance shall bear the costs of the Oakbay Group. Such costs to include the costs of two counsel, where so employed.
8. All the other respondents shall bear their own costs.

E. APPLICATION FOR EXTENDED RELIEF
MINISTER OF FINANCE V OAKBAY INVESTMENTS LTD AND 19 OTHERS

9. The application for extended relief by Standard Bank of South Africa Limited is dismissed with costs in favour of the Oakbay Group. Such costs shall include the costs of two counsel where so employed.
10. The Minister of Finance, ABSA Bank Ltd, First National Bank Ltd, Nedbank Ltd, the Governor of the Reserve Bank, the Registrar of the Reserve Bank and the Director of the Financial Intelligence Centre shall each bear their own costs.

_____

D MLAMBO

JUDGE PRESIDENT,

GAUTENG DIVISION OF THE HIGH COURT

I agree

_____

A LEDWABA

DEPUTY JUDGE PRESIDENT,

GAUTENG DIVISION OF THE HIGH COURT

I agree

_____

L T MODIBA

JUDGE OF THE HIGH COURT

APPEARENCES:

CASE NUMBER 80978/2016

In the matter between:

MINISTER OF FINANCE V OAKBAY INVESTMENTS (PTY) LTD AND 20 OTHERS

Counsel for the applicant:	JJ Gauntlett SC
	FB Pelser
Instructed by:	The State Attorney
Counsel for the 1st to 9th and	
11th to 13th respondent:	C Puckrin SC
	S Pudifin-Jones
	F Van der Merwe
Instructed by:	Van Der Merwe & Associates
Counsel for the 10th respondent:	J Blou SC
	S Stein SC
	L Zikalala
Instructed by:	Stein Scop Attorneys Inc.
Counsel for the 14th respondent:	AR Bhana SC
	KW Luderittz SC
	K Prehimid
Instructed by:	Stein Scop Attorneys Inc.

Counsel for the 15th respondent:	D Unterhalter SC
	S Budlender
	N Ferreira
	A Msimang
Instructed by:	Edward Nathan Sonnerberg
Counsel for the 16th respondent:	AE Bham SC
	L Sisilana
Instructed by:	Norton Rose Fulbright South Africa Inc.
Counsel for the 17th respondent:	V Maleka SC
	T Ngcukaitobi
Instructed by:	Bowman Gilfillan
Counsel for the 18th respondent:	APH Cockrell SC
	M Stubbs
Instructed by:	Baker Mackenzie
Counsel for the 19th & 20th respondents:	W Trengove SC
	K Hofmeyer
	L Luthuli
Instructed by:	Werksmans Attorneys
Counsel for the 21th respondent:	MM le Roux
Instructed by:	MacRobert Attorneys

CASE NUMBER 92027/2016

And in the matter between:

OAKBAY INVESTMENTS (PTY) LTD AND 11 OTHERS V THE DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE

Counsel for the 1st to 6th and	
8th to 9th applicant:	C Puckrin SC
	S Pudifin-Jones
	F Van der Merwe
Instructed by:	Van Der Merwe & Associates
Counsel for the 7th Applicant:	J Blou SC
	S Stein SC
	L Zikalala
Instructed by:	Stein Scop Attorneys Inc.
Counsel for the 10th Applicant:	AR Bana SC
	KW Luderittz SC
	K Prehimid
Instructed by:	Stein Scop Attorneys Inc.
Counsel for the respondent:	MM le Roux
Instructed by:	MacRobert Inc.

Date of hearing: 28 and 29 March 2017

Date of judgement: 18 August 2017