THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 164/2021

In the matter between:

NEDBANK LIMITED **APPELLANT**

and

HOUTBOSPLAAS (PTY) LTD **FIRST RESPONDENT**

TBS ALPHA BELEGGINGS (PTY) LTD **SECOND RESPONDENT**

Neutral citation: *Nedbank Limited v Houtbosplaas (Pty) Ltd and Another* (Case no 164/2021) [2022] ZASCA 69 (19 May 2022)

Coram: PETSE DP and ZONDI and GORVEN JJA and TSOKA and MAKAULA AJJA

Heard: 08 March 2022

Delivered: 19 May 2022

Summary: Banking law – banker and client – summary closure of bank accounts by client – exercise of contractual right by client to do so – trusts that held shares in companies which were the bank's clients refusing to provide their trust deeds requested by bank ostensibly for verification of the companies under

Financial Intelligence Centre Act 38 of 2001 (FICA) – bank refusing to give effect to client's instruction on grounds that accounts restricted – ss 21 and 22 of FICA read with regulations promulgated in terms of s 77(1) thereof – bank's refusal to execute client's instructions unlawful.

Mora interest – client's claim therefor – claim for *mora* interest following the bank's refusal to close accounts upon client's summary termination of banker and client contractual relationship upheld.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mothle J, sitting as court of first instance): judgment reported *sub nom Houtbosplaas (Pty) Ltd v Nedbank Ltd* 2020 (4) SA 560 (GP).

The appeal is dismissed with costs.

JUDGMENT

Petse DP (Zondi and Gorven JJA and Tsoka and Makaula AJJA concurring):

Introduction

[1] This appeal is about two companies, namely Houtbosplaas (Pty) Ltd (Houtbosplaas) and TBS Alpha Beleggings (Pty) Ltd (TBS Alpha), suing their erstwhile bank, Nedbank Limited (Nedbank), for damages (ie *mora* interest) for failing to give immediate effect to their instructions. The gravamen of the complaint by Houtbosplaas and TBS Alpha is that Nedbank refused to close their bank accounts pursuant to their written instructions of 20 January 2017 to Nedbank to do so upon termination of the parties' customer and banker contractual relationship.

[2] The appeal concerns, primarily, the right of a customer of a bank to summarily terminate its customer and banker contractual relationship[1] and close the customer's account. Allied to the primary issue is the question whether Houtbosplaas and TBS Alpha have a right of recourse against Nedbank for *mora* interest as a consequence of Nedbank's failure to pay over the funds held in their respective accounts to a nominated Bank within a reasonable time of having been requested to do so by its customers.

The facts

[3] Houtbosplaas and TBS Alpha are both limited liability private companies incorporated during 1973 and 1978 respectively in accordance with the company laws of this country. Before the dispute giving rise to the current litigation arose, both Houtbosplaas and TBS Alpha had held several banking accounts with Nedbank for decades. Retired Judge van Dijkhorst is and has been the sole director of Houtbosplaas and TBS Alpha since their incorporation.

[4] During October 2017 Houtbosplaas and TBS Alpha, as applicants, instituted motion proceedings against Nedbank in the Gauteng Division of the High Court, Pretoria (the high court) in which they sought the following relief:

'1.1 Judgment against [Nedbank] in favour of [Houtbosplaas Pty Ltd] for payment of the amount of R66 814,68;

1.2 Interest on the amount of R66 814,68 at the rate of 10,25% per annum from 8 July 2017 to date of final payment;

2.1 Judgment against the [Nedbank] in favour of the [TBS Alpha Beleggings (Pty) Ltd] for payment of the amount of R114 288,63;

[1] The contractual relationship between a bank and its customers was described as '. . . an inherently and conspicuously complex collection of juristic relationships. . . .' by Moseneke AJ in *Standard Bank of SA Ltd v ABSA Bank Ltd and Another* [1995] All SA 535 (T); 1995 (2) SA 740 (T) at 746G-747E.

2.2 Interest on the amount of R114 288,63 at the rate of 10,25% from 8 July 2017 to date of final payment;

3 Costs of the suit on the scale as between attorney-and-own-client;

. . .'

[5] The following is briefly what precipitated the litigation. As already mentioned above, Houtbosplaas and TBS Alpha were incorporated in 1973 and 1978 respectively. Retired Judge van Dijkhorst holds one preference share[2] in each of the companies. In addition, four trusts formed in 1978 and 1980 and named after his four daughters each hold one preference and ordinary shares in the two companies. Retired Judge van Dijkhorst is the sole trustee of the four

[2] In so far as the right of preference shareholders are concerned, the companies' memoranda of incorporation, in article 2.1, provide as follows:

'Shares

(1) The company is authorised to issue no more than:

1,800 ordinary no par value shares, each of which entitles the holder to–

. . .

2,200 Preference no par value shares,

each of which have the following rights–

Preference Shares are entitled to, and their rights to dividends are limited to a preferred dividend of a percentage of the nominal value, which percentage will be determined by the company upon the issuing of the shares. These preference shares are noncumulative.

The holders of preference shares shall not upon liquidation of the company be entitled to receive anything by way of distribution, with the exception of the nominal value of the shares and any unpaid dividends accruing to the shares.

It is expressly determined that the rights and conditions of the preference shares are not subject to amendments by the company.

The holders of preference shares will not be entitled to cast their vote when voted upon for a resolution that may have the result that a determination is made concerning the property of the company for their own benefit or for the benefit of their estates. Without derogating from the generality of the aforegoing, they are specifically not entitled or authorized to vote for a resolution that may have the effect of:

Accruing any of the property of the company for themselves or dispose thereof as they deem fit.

The amendment or cancellation of any rights relating to any class of shares, including the authority to redeem preference shares, if they by the exercise of such authority award to themselves any benefit in respect of the assets or profits of the company.

The provisions of this paragraph shall not have the effect of excluding the right of the preference shareholders to vote on any resolution relating to the compensation of directors or other matters within the normal scope of the powers of the company.'

trusts and represents them – and himself – at shareholders' meetings of the companies. For convenience, I shall henceforth refer to Judge van Dijkhorst as the companies' representative or trustee as the context dictates.

[6] During 2016 Nedbank requested the companies' representative to provide certain information in respect of the companies ostensibly pursuant to the provisions of the Financial Intelligence Centre Act (FICA).[3] In particular, Nedbank required that it be provided with copies of the trust deeds of the four trusts together with copies of the letters issued by the Master of the High Court appointing the companies' representative as the sole trustee of the four trusts. Begrudgingly, the auditors of the companies, on instructions from the companies' representative, provided the trust deeds of only three of the four trusts. The companies' representative was reluctant to provide a copy of the outstanding trust deed, asserting that Nedbank's request therefor constituted an unjustifiable intrusion into the trusts' right to privacy. Nevertheless, on 2 December 2016 he was only prepared to show the trust deed to Nedbank's representatives, a Mr Moolman and Ms de Kock, for inspection and examination. He was also prepared for them to photograph the trust deed but they declined this offer. However, he steadfastly refused to allow Nedbank's representatives to remove the trust deed from his home.

[7] Nedbank's standpoint was that each of the four trusts held 25% of the issued shares in the two companies. Accordingly, Nedbank contended that the companies were obliged under FICA to provide the requested documentation. On the contrary, Houtbosplaas and TBS Alpha asserted that according to their

[3] Financial Intelligence Centre Act 38 of 2001.

memoranda of incorporation each one of the trusts holds less than 25% of the issued shares in the two companies and, more specifically, they each hold 22% of the issued shares. The entrenched opposing views held by the parties as to the trusts' shareholding in the two companies resulted in an impasse. In exasperation, on 20 January 2017, the companies' representative, acting on behalf of the companies, gave written notice to Nedbank to close the companies' bank accounts and transfer all funds held in those accounts to ABSA Bank to be credited to various accounts, details of which were provided.

[8] In response, on 8 February 2017, Nedbank advised the companies that it would not comply with the request to close the accounts and transfer the funds to ABSA Bank because the companies had failed to comply with Nedbank's request and, as a result, the accounts were restricted in accordance with the prescripts of FICA. For their part, the trusts asserted that they were not Nedbank's clients and were consequently under no statutory obligation to provide the trust documents required by Nedbank. On 11 February 2017 the companies turned to the Banking Ombudsman, soliciting the latter's assistance in order to resolve the impasse. This, too, failed to yield the desired outcome.

[9] Ultimately, and on 7 June 2017, the companies relented and provided the outstanding documentation, namely the copy of the trust deed of the Hettie van Dijkhorst Trust, to Nedbank. On 7 July 2017 Nedbank finally closed the companies' accounts and transferred all of the funds held in those accounts to ABSA Bank as previously requested by the companies on 20 January 2017. Aggrieved by what the companies' representative viewed as Nedbank's unjustifiable and unlawful conduct, Houtbosplaas and TBS Alpha instituted legal proceedings against Nedbank for the relief set forth in paragraph 4 above.

Nedbank resisted the claim, contending, in essence, that it had acted perfectly within its rights in discharge of its statutory obligations as required by FICA.

[10] At the hearing of the matter, on 8 October 2019, the parties formulated seven questions for determination by the high court. These were:

'2.1 Whether the restriction/freezing of the Applicants' accounts by Nedbank was lawful, when considering the provisions of the Financial Intelligence Centre Act 38 of 2001 ("FICA").

2.2 Whether the restriction/freezing of the Applicants' accounts by Nedbank was lawful, in the light of the fact that the Applicants terminated Nedbank's mandate on 20 January 2017.

2.3 What should Nedbank's approach be to the Trust's privacy?

2.4 How are the voting rights of the shareholders of the Applicants determined and is Nedbank's interpretation of Regulation 7(*f*)(ii) correct?

2.5 Is the closure of the Applicants' accounts a transaction as envisaged in FICA?

2.6 Whether the Applicants are entitled to their claims against Nedbank in terms of prayers 1, 2 and 3 of the Notice of Motion dated 2 October 2017. Alternatively, what is the correct remedy that this Honourable Court should grant?

2.7 Whether the Applicants are entitled to a punitive order for costs against Nedbank.'

[11] The matter came before Mothle J who granted the relief sought by Houtbosplaas and TBS Alpha as prayed in their notice of motion. In reaching his conclusion, the learned Judge reasoned as follows:

> 'In terms of Regulation 7 of the published Regulations, an accountable institution must obtain *from the natural person* acting or purporting to act on behalf of a close corporation or the company with which it establishing a business relationship or concluding a single transaction:
>
> "*(f) In the case of a company–*
>
> *(ii) The full names, date of birth, identity number, ...*

concerning the natural or legal person, partnership or trust holding 25% or more of the voting rights at the general meeting of the company concerned;"

In essence, the provisions of FICA read with the Regulations, in particular Regulation 7(f)(ii), obligates the Nedbank to obtain particulars of trusts holding 25% or more of the voting rights at the general meeting of the company concerned, in this case both the Applicants.

. . .

The Memorandum of Incorporation ("MOI") of the two applicant companies is identical in its description of voting rights in a general meeting. Article 2.1 of the MOI deals with shares and the rights of shareholders that accrue therefrom. In particular, the voting rights accorded to the preference shares are restricted as they concern *"a resolution that may have the result that a determination is made concerning the property of the company for their own benefit or for the benefit of the estate."* However, the restriction *"shall not have the effect of excluding the right of the preference shareholders to vote on any resolution relating to the compensation of directors or other matters within the normal scope of the powers of the company."*

The Applicants' counsel submits that in determining the voting rights exercised by each trust shareholder in a general meeting, one has to include the preferential shares held by such trust and in essence, each trust will in fact have 22% of the voting rights. Consequently, Nedbank erred in invoking the provisions of Regulation 7(f)(ii), to demand the trust deeds of the shareholders to the Applicants. I agree with this submission and in my view on this point alone, Nedbank's interpretation of Regulation 7(*f*)(ii) in relation to the applicants was incorrect. Nedbank was therefore not lawfully entitled to demand the trust deeds of the trust's shareholders of the applicants.

On this point alone, Nedbank ignored or misinterpreted the provisions of the MOI of the two companies and thus acted unlawfully in imposing the restrictions of access to the accounts. Nedbank is therefore liable for payment of the loss of mora interest.

> There is another matter. Nedbank seems to hold the view that its customers with which it has a business relationship are obligated by FICA to provide verification documents to it on demand. I could not find anywhere in the provisions of FICA, that apart from demanding new customers to submit identification documents, Nedbank, or any financial institution for that matter, can demand from their existing account holders, and enforce that demand for submission of identity documents for verification, by restricting access to their accounts. On the contrary, Section 21B(4) enjoins the bank to establish the address of *the Master of the High Court* where a trust is registered, if applicable. It seems to me that by not specifically providing that the financial institutions should obtain identification only from the customers, FICA has left room for these financial institutions to access other sources from which such documents and/or information could be obtained, such as the office of the Companies and Intellectual Property Commission ("CIPC"), the office of the Master of the High Court in respect of trusts and the personal identity documents of individuals and partners to a partnership from the Department of Home Affairs.'[4]

[12] In short, the high court found in favour of Houtbosplaas and TBS Alpha on two bases. First, it held that each one of the four trusts did not exercise 25% of the voting rights at general meetings of the companies, that is Houtbosplaas and TBS Alpha. Second, it concluded that clients of a bank were under no statutory obligation under FICA to provide documents to a bank for verification purposes upon request to do so by such bank. Thereafter, the high court refused Nedbank's application for leave to appeal which was subsequently granted by this Court on petition to it.

[13] Although the allegations and counter-allegations made in the affidavits of the protagonists are wide-ranging in scope, the issue that is at the core of this

[4] Emphases from the high court judgment.

appeal falls within a narrow compass. Ultimately, the issue revolves around the sole question whether Nedbank was entitled, under FICA, to certified copies of the trust deeds of the four trusts of which Judge van Dijkhorst was the sole trustee. In this regard, it bears mentioning that it is common cause between the parties that the trusts were not Nedbank's clients[5] and therefore held no bank accounts with Nedbank.

[14] In the event that the question posed in the preceding paragraph is answered in the negative, a secondary issue will arise, namely, whether Houtbosplaas and TBS Alpha are entitled to damages by way of *mora* interest because they were deprived of the use of their funds, withheld by Nedbank in the face of unequivocal instructions by the two companies to release the funds, for some five months. The calculations reflected in the notice of motion in this regard were not challenged.

The statutory framework

[15] In paragraph 6 of this judgment reference is made to FICA. FICA was enacted in order to, amongst other things, '. . . combat money laundering activities and the financing of terrorist and related activities; to impose certain duties on institutions and other persons who might be used for money laundering . . . to provide for a risk based approach to client identification and verification . . . to provide for the registration of accountable and reporting institutions; to provide for the roles and responsibilities of supervisory bodies. . . .'[6]

[5] FICA defines a 'client', in relation to an accountable institution, as 'a person who has entered into business relationship or a single transaction with an accountable institution.'
[6] See the Preamble.

[16] Section 2 established the Financial Intelligence Centre (the Centre) which is a juristic person.[7] Section 3 provides that '[t]he principal objective of the Centre is to assist in the identification of the proceeds of unlawful activities [and] combating of money laundering activities and the financing of terrorist and related activities. . .'. Section 20A provides that '[a]n accountable institution may not establish a business relationship or conclude a single transaction with an anonymous client or a client with an apparent false or fictitious name'.[8]

[17] Section 21 provides for identification of clients and other persons. It states that:

'(1) When an accountable institution engages with a prospective client to enter into a single transaction or to establish a business relationship, the institution must, in the course of concluding that single transaction or establishing that business relationship and in accordance with its Risk Management and Compliance Programme-

(a) establish and verify the identity of the client;

(b) if the client is acting on behalf of another person, establish and verify-

(i) the identity of that other person; and

(ii) the client's authority to establish the business relationship or to conclude the single transaction on behalf of that other person; and

(c) if another person is acting on behalf of the client, establish and verify-

(i) the identity of that other person; and

(ii) that other person's authority to act on behalf of the client.

(2) If an accountable institution had established a business relationship with a client before this Act took effect, the accountable institution may not conclude a transaction in the

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[7] Section 2 reads:

'**Establishment**

(1) A Financial Intelligence Centre is hereby established as an institution outside the public service but within the public administration as envisaged in section 195 of the Constitution.

(2) The Centre is a juristic person.'

[8] An 'accountable institution' is defined with reference to Schedule I of FICA which contains a list of natural and juristic persons who are described in Schedule I and are regarded as accountable institutions in terms of FICA.

course of that business relationship, unless the accountable institution has taken the prescribed steps-

(a) to establish and verity the identity of the client;

(b) if another person acted on behalf of the client in establishing the business relationship, to establish and verify-

(i) the identity of that other person; and

(ii) that other person's authority to act on behalf of the client;

(c) if the client acted on behalf of another person in establishing the business relationship, to establish and verify-

(i) the identity of that other person; and

(ii) the client's authority to act on behalf of that other person; and

(d) to trace all accounts at that accountable institution that are involved in transactions concluded in the course of that business relationship.'

[18] Section 21C deals with ongoing due diligence which accountable institutions are required to conduct from time to time. It reads:

'An accountable institution must, in accordance with its Risk Management and Compliance Programme, conduct ongoing due diligence in respect of a business relationship, which includes-

(a) monitoring of transactions undertaken throughout the course of the relationship, including, where necessary-

(i) the source of funds, to ensure that the transactions are consistent with the accountable institution's knowledge of the client and the client's business and risk profile; and

(ii) the background and purpose of all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent business or lawful purpose; and

(b) keeping information obtained for the purpose of establishing and verifying the identities of clients pursuant to sections 21, 21A and 21B of this Act, up to date.'

[19] Reference should also be made to s 22 which imposes obligations on accountable institutions to keep customer due diligence records. It states that:

'(1) When an accountable institution is required to obtain information pertaining to a client or prospective client pursuant to sections 21 to 21H the institution must keep a record of that information.

(2) Without limiting subsection (1), the records must-

(a) include copies of, or references to, information provided to or obtained by the accountable institution to verify a person's identity; and

(b) in the case of a business relationship, reflect the information obtained by the accountable institution under section 21A concerning-

(i) the nature of the business relationship;

(ii) the intended purpose of the business relationship; and

(iii) the source of the funds which the prospective client is expected to use in concluding transactions in the course of the business relationship.'

[20] Section 77(1) authorises the Minister of Finance to 'make, repeal and amend regulations concerning any matter that may be prescribed in terms of [FICA], and any ancillary or incidental administrative or procedural matter which is necessary to prescribe for the proper implementation or administration of [FICA]'. Of particular relevance for present purposes is regulation 7*(f)*(ii).[9] Regulation 7 deals with information concerning, inter alia, South African companies. It sets out in detail the information that '[a]n accountable institution must obtain from the natural person acting or purporting to act on behalf of a South African company with which it is establishing a business relationship or concluding a single transaction. . . '. Regulation 7*(f)*(ii) states that in the case of a company the following information is required, namely:

[9] The Regulations were promulgated in Government Gazette no 24176 of 20 December 2002.

'the full names, date of birth, identity number, referred to in regulation 3 (1) (a), (b) and (c), full names, date of birth and name of the country, referred to in regulation 5 (1) (a), (b) and (c), registered name, registration number, registered address, trade name and business address referred to in regulation 7 (a), (b), (c), (d) and (e), names, numbers and addresses referred to in regulation 9 (a), (b), and (c), name, address and legal form referred to in regulation 11 (a), (b) and (c), name referred to in regulation 13 (a) or name and number referred to in regulation 15 (a), as may be applicable, concerning the natural or legal person, partnership or trust holding 25% or more of the voting rights at a general meeting of the company concerned.'

[21] There is at least one crucial point that can be made about the introductory part of regulation 7. It is this: an accountable institution is authorised and obliged to obtain certain information from the natural person acting or purporting to act, *inter alia*, on behalf of a South African company – in this instance Houtbosplaas and TBS Alpha – with which it (that is, the accountable institution) is establishing a business relationship[10] or concluding a single transaction.[11]

[22] Of relevance for present purposes is regulation 7*(f)*(ii) to which reference has been made in paragraph 20 above. As will have been observed from paragraph 20 above, regulation 7*(f)*(ii), in turn, makes reference to regulation 15. However, in order for the provisions of regulation 7*(f)*(ii) to be triggered, the trust involved must '. . . [hold] 25% or more of the voting rights at a general meeting of the company concerned' but not otherwise.

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[10] In terms of FICA 'business relationship' means an arrangement between a client and an accountable institution for the purpose of concluding transactions on a regular basis'.

[11] A 'single transaction' is, in turn, defined to mean 'a transaction-

(a) other than a transaction concluded in the course of a business relationship; and

(b) where the value of the transaction is not less than the amount prescribed, except in the case of section 20A.'

[23] In this Court counsel for Nedbank submitted that the high court erred in its conclusion because it overlooked a cardinal fact, namely that in terms of the memoranda of incorporation of the companies concerned preference shareholders were not eligible to vote in relation to certain matters at general meetings of the companies. Bearing this consideration in mind, it was argued that, with respect to those matters the four trusts would each exercise 25% of the voting rights. Insofar as the high court's second finding is concerned, counsel contended that the high court had regard to the amended version of s 21(2) of FICA that was not of application,[12] ignoring the pre-amended version that was in operation at the relevant time.

[24] Before its amendment, s 21(2) read as follows:

'If an accountable institution had established a business relationship with a client before this Act took effect, the accountable institution may not conclude a transaction in the course of that business relationship, unless the accountable institution has taken the prescribed steps–

(a) to establish and verify the identity of the client;

. . .'

[25] There are at least two notable features of s 21(2) that immediately attract the attention of the reader. Even on a cursory reading of the provisions of s 21(2) it becomes readily manifest that it applied to existing clients of a bank who had already established a business relationship like the two companies in this case. The other feature is that an accountable institution '. . . may not conclude a transaction[13] in the course of that business relationship. . .' save where the

[12] The amended version was introduced in terms of s 82(2)*(b)*of Act 38 of 2001 with effect from 30 June 2004.
[13] Section 1 of FICA defined a 'transaction' to mean 'a transaction concluded between a client and an accountable institution in accordance with the type of the business carried on by that institution'. This definition was deleted by s 1(5) of Act 1 of 2017.

institution – Nedbank in this case – '. . . has taken steps. . . ', inter alia, 'to establish and verify the identity of the client.'

[26] Section 21(2) of FICA, already quoted in paragraph 17 above, provides for the retention by an accountable institution of records relating to the verification of any person in terms of s 21(1) or (2). For present purposes, the most crucial requirement of s 21(2) relates to the conclusion of a transaction with a client – in this instance Houtbosplaas and TBS Alpha – whether it is a single transaction or one concluded in the course of a business relationship between an accountable institution and a client.

[27] For the sake of completeness, it is useful to also make reference to s 21(1) of FICA. Section 21(1) deals with situations where an accountable institution engages with a prospective client with a view to entering into a single transaction or to establish a business relationship. In that event, the section imposes an obligation on such accountable institution in the course of concluding that single transaction[14] or establishing the business relationship to, amongst other things, establish and verify the identity of the client. An accountable institution does this in accordance with its risk management and compliance programme.[15]

[28] It bears mentioning that in January 2012 the Centre, acting in terms of s 4 of FICA, issued a public notice headed 'Public Compliance Communication No 11' to all accountable institutions to, amongst other things, regulate the closure

[14] A 'single transaction' is defined as 'a transaction other than a transaction concluded in the course of a business relationship' whose value is not less than the amount prescribed.
[15] Risk management and compliance programme is provided for in s 42(1) of FICA.

of a client's account held with an accountable institution. For present purposes, the relevant part is clause 4[16] thereof. The material features of this clause are:

(a) The closing of an account is an action terminating a business relationship which is regarded as inherently linked to the existence of a business relationship.

(b) Therefore the closing of an account is regarded as a provision of account-based services to a client in the course of a business relationship.

(c) The closing of a client's account and the transferring of the remaining balance to the client constitutes a transaction.

(d) In conducting such a transaction an accountable institution must comply with statutory and regulatory prescripts.

[29] As already mentioned above, the high court held that Nedbank was not justified in law to require a copy of the Hettie van Dijkhorst trust deed. The underlying reasoning of the high court on this score was that none of the trusts, including the Hettie van Dijkhorst trust in particular, exercised 25% voting rights at the companies' general meetings. Further, the high court held that nowhere does FICA require bank clients to provide verification documents to a bank when requested to do so. In criticising the high court's findings, counsel for Nedbank contended that the high court failed to take cognisance of the fact

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[16] Clause 4, which is headed 'Closing of an account amounts to a transaction.' It reads:

'4.1 A transaction is defined in the FIC Act as a transaction concluded between a client and an accountable institution in accordance with the type of business carried on by that institution.

4.2 The closing of an account is an action which terminates a business relationship. This is inherently linked to the existence of a business relationship and is performed in the course of that business relationship.

4.3 Hence the termination of a business relationship in accordance with the nature of an accountable institution's business, such as the closing of an account by an accountable institution which provides account-based services to its clients, amounts to a transaction in the course of that business relationship.

4.4 It is the Centre's view that the closing of a client's account by an accountable institution and the transferring of the remaining balance to the client amounts to the conclusion of a transaction with a client in the course of a business relationship.

4.5 An accountable institution may not conduct a transaction in the course of a business relationship unless it has complied with Part 1 and Part 2 of Chapter 3 of the FIC Act as well as the relevant Regulations.'

that with respect to certain matters holders of preference shares were, in terms of the companies' memoranda of incorporation, not eligible to vote at general meetings. Therefore, it was argued that each one of the four trusts would, in such circumstances, exercise 25% of the voting rights.

[30] In the second place, it was submitted that in reaching its conclusion the high court relied on the wrong version of FICA, that is the post-amendment version, whereas it was the pre- amendment version which was relevant at the material time.

[31] It was further contended that the memoranda of incorporation of Houtbosplaas and TBS Alpha provide, in article 2 thereof, amongst other things, that holders of preference shares shall not be eligible to vote in relation to resolutions concerning the property of the companies that may have the effect of conferring a benefit on preference shareholders or their estates. Nor are preference shareholders permitted to vote with respect to the amendment or cancellation of any rights relating to any class of shares, including the redemption of preference shares, if preference shareholders would thereby derive a benefit from the assets or profits of the company. Accordingly, so the argument went, each one of the four trusts would hold all the ordinary shares in the companies in equal proportions. Thus, the four trusts individually met the minimum threshold prescribed in terms of regulation 7*(f)*(ii).

[32] It is not in dispute that of the nine issued shares in the companies, one preference share is held by the trustee, and each of the four trusts holds one preference share as well as one ordinary share in each of the two companies. This then raises the question whether in relation to matters that preference

shareholders are not eligible to vote each trust therefore exercises 25% of the voting rights at general meetings of the companies when matters falling within the ambit of article 2.1 of the memoranda of incorporation are to be decided.

[33] Nedbank accepts that in respect of all other matters, each one of the trusts falls below the 25% threshold prescribed in terms of regulation 7*(f)*(ii). However, Nedbank contended that in relation to matters that preference shareholders are precluded from exercising voting rights, the trusts will separately exercise 25% voting rights thereby bringing them squarely within the purview of regulation 7*(f)*(ii). Building on this thesis, Nedbank argued that for as long as the companies' representative refused to provide a copy of the Hettie van Dijkhorst trust deed it was duty-bound not to give effect to the instruction to close the accounts and transfer the balances held in those accounts to ABSA Bank. Had it closed the accounts and transferred the balances to ABSA Bank, Nedbank argued, the manifest purpose and objects of FICA which are to identify the proceeds of unlawful activities, combat money laundering and financing of terrorist and related activities would, as a result, have been undermined.

[34] The contentions advanced by counsel for Nedbank as to the import of article 2.1 of the two companies' memoranda of incorporation renders it necessary to ascertain the correct construction of the provisions of this article. It is trite that a memorandum of incorporation is the founding document of a company and, as such, the sole governing document that regulates the rights, duties and responsibilities of the shareholders and directors of the company.[17]

[17] See, in this regard, Cassim et al *Contemporary Company Law* 2ed (2011) at 122.

[35] The law relating to the interpretation of documents (whether statute or contract) is now well-settled. The logical point of departure in construing a document is the language of the document itself, interpreted in the light of its context and purpose which is a unitary exercise.[18] These interpretive precepts, aptly described as '. . .the triad of the text, context and purpose. . .' in *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*,[19] were said to be '. . .the relationship between the words used, the concepts expressed by [the] words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined'.[20] The position is no different when it comes to the interpretation of a company's memorandum of incorporation.[21]

[36] Bearing those principles of interpretation in mind, I now turn to consider the question whether each one of the four trusts exercises 25% of the voting rights in circumstances where the preference shareholders are precluded from voting by virtue of article 2.1 of the memoranda of incorporation of Houtbosplaas and TBS Alpha.

[37] Reduced to its bare essentials and properly analysed, the nub of Nedbank's case is that each one of the four trusts exercises 25% voting rights

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[18] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18. See also: *S v Zuma and Others* 1995 (2) SA 642 (CC) para 18; *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) para 18.
[19] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 25.
[20] Ibid.
[21] *Marrok Plase (Pty) Ltd v Advance Seed Co (Pty) Ltd* [1975] 3 All SA 412 (A); 1975 3 SA 403 (A) at 414-415; *South African Mutual Life Assurance Society v Anglo-Transvaal Collieries Ltd* [1977] 4 All SA 203 (A); 1977 (3) SA 642 (A) at 656A.

whenever the provisions of article 2.1 of the memoranda of incorporation dictate that the voting rights of preference shareholders must be discounted. From Nedbank's perspective, if this is indeed the position, it will follow axiomatically that it was entitled to the copies of the deeds of trust of the four trusts and in particular the Hettie van Dijkhorst trust in terms of s 21(2) of FICA read with regulation 7*(f)*(ii). However, if not, the appeal would, as correctly accepted by counsel for Nedbank, fall to be dismissed. I shall return to these contentions shortly.

[38] I interpose here to observe that FICA creates a raft of offences in respect of contraventions of certain of its provisions, and prescribes severe penalties for some of the contraventions.[22] In this regard, it is necessary to mention that the Centre bears the responsibility, *inter alia*, to supervise and enforce compliance with FICA,[23] and is authorised in terms of s 26[24] through its representatives to have access to any records kept by or on behalf of an accountable institution.

[39] Reverting to the issue of what is at the core of this case, the outcome of this appeal, in my view, hinges on the proper interpretation of s 21(2) of FICA – as it read at the material time – and the provisions of article 2.1 of the two companies' memoranda of incorporation upon which Nedbank heavily relied. I proceed to address these in turn below.

[40] Section 21(2) of FICA presents no controversy. It is clear and unambiguous. Although s 21(2) has already been quoted in paragraph 24 above,

[22] See, for example, in this regard, ss 46, 47, 48, 49, 50, 51, 51A, 52, 53, 54, 55, 56, 57, 58, 59, 60 and 61-66.
[23] See, in this regard, s 4*(g)*.
[24] See ss 22 and 24.

it is convenient to quote it again here. At the relevant time, s 21(2) read as follows:

'If an accountable institution had established a business relationship with a client before this Act took effect, the accountable institution may not conclude a transaction in the course of that business relationship, unless the accountable institution has taken the prescribed steps–

(b) to establish and verify the identity of the client;

. . .'

[41] As regards the proper construction of s 21(2) in the light of its apparent purpose, I have already made the point (in paragraph 25 above) that it applied to existing clients of an accountable institution who had already established a business relationship before FICA took effect. Its spotlight was thus cast on ensuring that an accountable institution – Nedbank in this instance – establish and verify the identity of the client, to be understood as a reference to Houtbosplaas and TBS Alpha in the context of the facts of this case, before concluding a transaction in the course of that business relationship. Accordingly, s 21(2) required that at the inception of FICA Nedbank must comply with FICA's prescripts before concluding any further transaction in the course of that relationship. Once this had happened, there would be no need nor basis for Nedbank to verify the companies in respect of each and every transaction to be concluded in the course of the parties' existing business relationship. This much was rightly conceded by counsel for Nedbank during argument. Further, it was conceded on behalf of Nedbank in argument that there was no evidence that FICA was not complied with at its inception. Having regard to the object, scope and purpose of FICA, I am driven to the conclusion that s 21(2), properly construed consistently with its manifest purpose, did not, on the facts of this case, apply at the time when Nedbank sought to invoke it.

[42] Regulation 7(*f*)(ii) does not avail Nedbank either. The reason for this is not far to seek. Regulation 7, as are regulations 2 to 18, is located in chapter I of the regulations. Regulation 2(2) provides, by way of a prelude to regulation 7, that when an accountable institution establishes and verifies the identity of, inter alia, a legal person, such institution must do so in accordance with regulations 2 to 18, whichever is of application. In this instance it is regulation 7 that would, in the normal course, have been of application. However, the introductory part of regulation 7 makes it plain that it applies only in instances where an accountable institution is 'establishing a business relationship or concluding a single transaction'. In this case it is not in dispute that when FICA took effect on 1 February 2002, both companies had long before then established business relationships with Nedbank. Thus, regulation 7(*f*)(ii) finds no application where, as here, a business relationship was already in existence when FICA took effect. Moreover, in terms of s 1 of FICA a single transaction is defined as one concluded otherwise than in the course of a business relationship. Accordingly, Nedbank's reliance on regulation 7(*f*)(ii) is misplaced.

[43] Turning to the provisions of article 2.1 of the companies' memoranda of incorporation, there was a great deal of debate before us in relation to the question whether each one of the four trusts exercised 25% voting rights in circumstances where preference shareholders are not eligible to vote. Accordingly, I consider it not only prudent but also necessary that this issue, too, should be addressed.

[44] Article 2.1 was referenced earlier in paragraph 5 of this judgment. However, it is convenient to quote its provisions again. They read as follows:

'Shares

(1) The company is authorised to issue no more than:

1,800 ordinary no par value shares, each of which entitles the holder to–

. . .

2,200 Preference no par value shares, each of which have the following rights–

Preference Shares are entitled to, and their rights to dividends are limited to a preferred dividend of a percentage of the nominal value, which percentage will be determined by the company upon the issuing of the shares. These preference shares are non-cumulative.

The holders of preference shares shall not upon liquidation of the company be entitled to receive anything by way of distribution, with the exception of the nominal value of the shares and any unpaid dividends accruing to the shares.

It is expressly determined that the rights and conditions of the preference shares are not subject to amendments by the company.

The holders of preference shares will not be entitled to cast their vote when voted upon for a resolution that may have the result that a determination is made concerning the property of the company for their own benefit or for the benefit of their estates. Without derogating from the generality of the aforegoing, they are specifically not entitled or authorized to vote for a resolution that may have the effect of:

Accruing any of the property of the company for themselves or dispose thereof as they deem fit.

The amendment or cancellation of any rights relating to any class of shares, including the authority to redeem preference shares, if they by the exercise of such authority award to themselves any benefit in respect of the assets or profits of the company.

> The provisions of this paragraph shall not have the effect of excluding the right of the preference shareholders to vote on any resolution relating to the compensation of directors or other matters within the normal scope of the powers of the company.'

[45] The last sub-paragraph of article 2.1 quoted in the preceding paragraph is instructive. It provides that the provisions of this paragraph (ie paragraph 2.1) '. . . shall not have the effect of excluding the right of the preference shareholders to vote on any . . . or other matters within the normal scope of the powers of the company'. This is important. To my mind this can only mean one thing, namely that preference shareholders have every right to vote at general meetings of the companies concerned – just like ordinary shareholders – on any matters within the normal scope of the powers of Houtbosplaas and TBS Alpha. And, in the context of the facts of this case, one of the normal scope of the powers of Houtbosplaas and TBS Alpha was to establish a business relationship or conclude a single transaction with an accountable institution, ie Nedbank. In the ordinary course, such a business relationship would entail opening, conducting and closing a bank account. It is common cause between the protagonists that Houtbosplaas and TBS Alpha had more than three decades ago both opened and conducted business accounts with Nedbank long before the enactment of FICA. When a dispute between the disputants arose, resulting in an impasse, the companies' representative wrote to Nedbank on 20 January 2017 summarily terminating the business relationship. As already mentioned above, Nedbank was requested to immediately close the accounts and transfer the amounts held in those accounts to ABSA Bank. Again, there is no dispute that Nedbank gave effect to those instructions only on 20 July 2017, after some five months of having been instructed to do so.

[46] Before us, counsel for Nedbank sought to overcome the obstacles on his path and was thus driven to contend that article 2.1 of the memoranda of incorporation should be interpreted expansively. In elaboration, counsel submitted that having regard to the laudable objectives of FICA, a broader approach in the interpretive exercise was to be preferred over a restrictive one in order to give effect to and promote FICA's objectives. The foundation for counsel's proposition was that the fact that in few instances the trusts would exercise 25% voting rights overall sufficed. Accordingly, so the argument went, the fact that in innumerable other instances this would not be the case and that the trusts would exercise less than 25% voting rights was of no consequence.

[47] Counsel's argument cannot be sustained. The answer to counsel's contentions is to be found in the terms of the last sub-paragraph of article 2.1 of the memoranda of incorporation itself. The truth of the matter is that one is here, in essence, dealing with a question of interpretation, namely the proper meaning to be ascribed to the words contained in the concluding sub-paragraph of article 2.1. In my view, the provisions of the relevant sub-paragraph are clear and unambiguous. They enjoin us to give effect to what they explicitly say, that is:

'The provisions of this paragraph [ie 2.1] shall not have the effect of excluding the right of the preference shareholders to vote on. . . *matters within the normal scope of the powers of the company*.' (Emphasis added.)

Thus, to construe them as counsel for Nedbank would have it, would subvert the well-established tenets of interpretation of documents and undermine the underlying purpose that the relevant sub-paragraph – in the light of its text and context – was designed to serve. And as Wallis JA pertinently observed in *Commissioner for the South African Revenue Service v United Manganese of*

Kalahari (Pty) Ltd[25] '. . . context is as important in construing statutes as it is in construing contracts or other documents . . . .'

[48] In sum, preference shareholders are precluded from exercising their voting rights only in relation to matters concerning the assets or profits of the companies that will benefit them or their estates either financially or materially. Other than that, their voting rights are untrammelled.

[49] The conclusion to which I have come with reference to the interpretive questions renders it unnecessary to consider the issue of whether closing a bank account constitutes 'a single transaction' as contemplated in s 21(1) of FICA. I, therefore, advisedly refrain from answering that question which will be left open for another day.

[50] I now turn to consider the secondary issue, namely, whether Houtbosplaas and TBS Alpha are entitled to *mora* interest in the various sums claimed by them in this litigation.[26] It is not in dispute that on 20 January 2017 Nedbank was given written instructions to close the various accounts opened in the names of Houtbosplaas and TBS Alpha and transfer the funds in those accounts to ABSA Bank. Before delving into the secondary issue, I propose dealing first, albeit briefly, with the law relating to claims for *mora* interest. More than six decades ago this court recognised in *Linton v Corser*[27] that: '[Today] interest is the life-blood of finance, and there is no reason to distinguish between interest *ex contractu* and interest *ex mora*'.

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[25] *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* [2020] ZASCA 16; 2020 (4) SA 428 (SCA) para 17.
[26] Houtbosplaas claimed R66 814.68 and TBS Alpha claimed R114 288.63.
[27] *Linton v Corser* [1952] 4 All SA 9 (A), 1952 (3) SA 685 (A) at 695G.

[51] What Fagan JA said in *Union Government v Jackson and Others*[28] concerning *mora* interest is instructive. The learned Judge stated the position thus:

'The other approach is that of dealing with the liability to pay interest as a consequential or accessory or ancillary obligation (the three adjectives are used as interchangeable words in the judgments in *West Rand Estates Ltd v New Zealand Insurance Co. Ltd.*, 1926 AD 173 at pp. 177, 193), automatically attaching to some principal obligation by operation of law. The best illustration of this type is the liability for interest a *tempore morae* falling on a debtor who fails to pay the sum owing by him on the due date. Here the Court does not make an assessment; it does not weigh the pros and cons in order to exercise an equitable judgment as to whether, and to what extent, the interest bearing potentialities of money are to be taken into account in computing its award. The only issue is whether the legal liability exists or not; if it does, the rest is merely a matter of mathematical calculation: the legal rate of interest on a definite sum from a definite date until date of payment. The award of interest by the Provincial Division clearly falls under the second of the two compartments of my classification.'[29]

[52] It is by now recognised without question that a party who has been deprived of the use of his or her capital for a period of time has suffered a loss and does not need to establish special proof of his or her damages. This was reiterated by this court in *Bellairs v Hodnett and Another*[30] as follows:

'. . .[U]nder modern conditions a debtor who is tardy in the due payment of a monetary obligation will almost invariably deprive his creditor of the productive use of the money and thereby cause him loss. It is for this loss that the award of *mora* interest seeks to compensate the creditor.[31]

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[28] *Union Government v Jackson and Others* [1956] 2 All SA 330 (A), 1956 (2) SA 398 (A) at 411F-412.
[29] Ibid at 412A.
[30] *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A).
[31] Ibid at 1145D-G.

[53] The sole question to decide insofar as the respondents' claim for *mora* interest is concerned is whether there was any lawful justification for Nedbank to restrict the accounts for the reasons upon which Nedbank relied. In this regard it will be recalled that Nedbank had refused to close the accounts and transfer all of the moneys held in those accounts to ABSA Bank pursuant to the written instructions by the companies' representative. In insisting on being provided with copies of the trust deeds, Nedbank asserted that the four trusts each exercise 25% of the voting rights at general meetings of the companies in every instance where the holders of preference shares are precluded from voting.

[54] However, Nedbank accepted that in relation to matters on which both the preference and ordinary shareholders may vote, each trust would then exercise 2/9th of the votes at general meetings. Consequently, the threshold of 25% prescribed in terms of regulation 7*(f)*(ii) would not be met and, thus, regulation 7*(f)*(ii) would find no application. On this score, the high court, whilst cognisant of the fact that the rights of the preference shareholders were restricted under certain circumstances in terms of the companies' memoranda of incorporation, nevertheless held that the voting rights of the trusts fell below the prescribed threshold and in actual fact constituted 22%. This conclusion led the high court to find that regulation 7*(f)*(ii) was not triggered.

[55] On the facts of this case, and viewed from the perspective of Nedbank, the thrust of its case was that it was justified in restricting the accounts and thus withhold the funds held in those accounts until the trusts complied with its request to provide the requisite documents. This was so, it was contended on Nedbank's behalf, because the companies' representative had refused to provide the outstanding document, namely the trust deed in respect of the Hettie van

Dijkhorst trust. Had it not restricted the accounts and, instead, released the funds, Nedbank argued, it would have exposed itself to criminal sanctions for 'entering into any transaction with the companies, including closing their accounts in contravention of the provisions of FICA'. As pointed out above, Nedbank was mistaken in its view of the matter. Contrary to what Nedbank understood to be the position, the true factual state of affairs is that in terms of article 2.1 of the companies' memoranda of incorporation – properly construed – none of the four trusts exercised 25% of the voting rights at general meetings of the companies.

[56] In these circumstances both Houtbosplaas and TBS Alpha were rightfully entitled to judgment in the amounts claimed, representing *mora* interest calculated from 20 January 2017 (ie the date of demand), to 10 July 2017 (ie the date on which effect was given to their instruction to close the accounts and pay over the various funds held in those accounts to ABSA Bank).

[57] The conclusion reached above addresses both the question whether with the exclusion of preference shareholders at general meetings of the companies, the four trusts, as holders of ordinary shares only, exercise 25% voting rights at general meetings and the question whether Nedbank was in law justified to insist on being provided with copies of the various trust deeds in circumstances where none of the trusts was Nedbank's client. Both questions have been answered against Nedbank. Thus, in all the circumstances, there is no basis for concluding that Nedbank was justified in refusing to give effect to its erstwhile clients' instructions to close the relevant bank accounts. In so doing Nedbank acted in breach of its obligations. That being so, the appeal should therefore fail.

[58] In the result the following order is made:

The appeal is dismissed with costs.

X M PETSE

DEPUTY PRESIDENT

SUPREME COURT OF APPEAL

APPEARANCES

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