



Will your reputation harm your contract with a bank?

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1 Introduction

In terms of US law there is a term referred to as “specially designated national.”¹ A specially designated national is an individual (or it could be a company) who are owned and controlled by countries targeted with sanctions by the US. This means a specially designated national’s assets will be blocked and subject to seizure thereof and individuals and companies are barred not to conduct business with them.

In South African law, we do not have substance linked to the definition of a ‘specially designated national’, but this has however, not prohibited South African courts to make use of the definition. This was seen in *Bredenkamp & Others v Standard Bank of SA*.²

John Bredenkamp was a successful business tycoon who was suspected of illicit business activities regarding numerous accusations. Due to these accusations, or rumours if you prefer, Standard Bank decided to unilaterally cancel its contract with Bredenkamp.

This brings an issue that can be questioned in two-fold. Firstly, do banks have enough “power” to unilaterally cancel a contract with a client and secondly, if a bank decides to cancel a contract based on a client’s reputation, can that be considered fair?

2 *Bredenkamp & Others v Standard Bank of SA*

In 2008 Bredenkamp was listed as a ‘specially designated national’ in the United States. After this listing Standard Bank decided to unilaterally terminate their contract with

¹ Bhana, Deeksha. “Contract Law and the Constitution : *Bredenkamp v Standard Bank of South Africa Ltd (SCA) : Case Note.*” *Southern African public law* 29.2 (2014): 508–521.

² 2010 4 SA 468 (SCA).

Bredenkamp. If a South African individual gets listed as a specially designated national, it has no bearing on South African law. It is a concept of law in the United States, and individuals and companies will be held accountable to law if they conduct business with such an individual.

Even though South Africa has no laws regulating the business undertakings of such an individual with others, Standard Bank still decided to terminate their contracts with Bredenkamp. Legally speaking, Standard Bank had no basis to do this.³ Standard Bank decided to cancel their relations with Bredenkamp as they felt they were running the risk to harm their reputation in terms of domestic and international onlookers.⁴

In the court a quo, it was found that banks do have rights to terminate contracts unilaterally, resulting in Bredenkamp appealing the case. Bredenkamp argued by relying on the *Barkhuizen*-test. The test is compiled out of two parts. Firstly, the contractual term must be objectively reasonable in terms of the South African Constitution and secondly, the test must also be subjectively reasonable in light of the circumstances between the parties.⁵

It can be argued that it is reasonable of a bank to terminate its contracts with a client if it can be objectively determined that the said bank's reputation may be harmed if it has a relationship with a fraudulent individual. Banks must operate *ubberimae fidei* (in the utmost good faith) as expected and required from them.

In Bredenkamp, the issue was not that the clause itself pertaining to a bank cancelling its contract with a client is objectively unreasonable, the issue was in the manner the bank executed the cancellation.⁶ There was argued that the manner in which the bank enforced their cancellation was subjectively unreasonable because this manner would ultimately harm his credibility in the banking industry.⁷

The Supreme Court of Appeal ultimately found that Mr. Bredenkamp's arguments lacked solid constitutional evidence as to the harm he objectively suffered. There needs to be objective arguments as to the weighing up of factors to consider whether a contractual term is fair or not when dealing with a subjective enquiry.

In conclusion, one can interpret that banks do have enough 'power' to unilaterally cancel their contracts with a client if the said client can harm the banks reputation. As seen within

³ Bhana, Deeksha. "Contract Law and the Constitution : Bredenkamp v Standard Bank of South Africa Ltd (SCA) : Case Note." *Southern African public law* 29.2 (2014): 508–521.

⁴ Bhana, Deeksha. "Contract Law and the Constitution : Bredenkamp v Standard Bank of South Africa Ltd (SCA) : Case Note." *Southern African public law* 29.2 (2014): 508–521.

⁵ Bhana, Deeksha. "Contract Law and the Constitution : Bredenkamp v Standard Bank of South Africa Ltd (SCA) : Case Note." *Southern African public law* 29.2 (2014): 508–521.

⁶ Bhana, Deeksha. "Contract Law and the Constitution : Bredenkamp v Standard Bank of South Africa Ltd (SCA) : Case Note." *Southern African public law* 29.2 (2014): 508–521.

⁷ Bhana, Deeksha. "Contract Law and the Constitution : Bredenkamp v Standard Bank of South Africa Ltd (SCA) : Case Note." *Southern African public law* 29.2 (2014): 508–521.

the case of Bredenkamp, whether this cancellation is 'fair' remains an objective test considering a weighing up of factors.

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