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**THE BANK'S DUTY OF CONFIDENTIALITY AND SECRECY WITH REFERENCE
TO MONEY LAUNDERING AND TERROR FINANCING LEGISLATION IN
SOUTH AFRICA**

by

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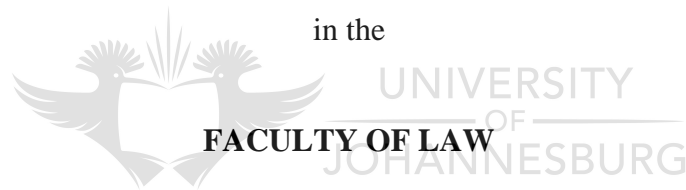
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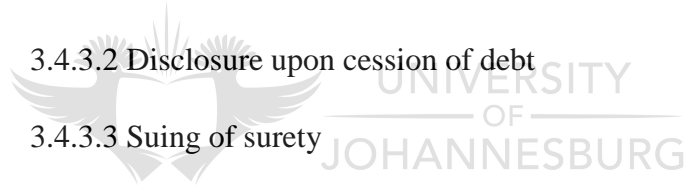
Thank you all, "forever and sincerely".

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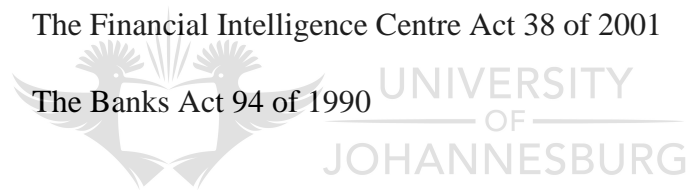
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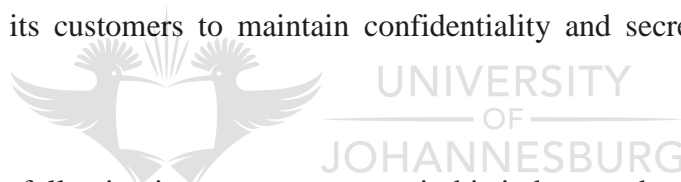
CHAPTER 1

INTRODUCTION

1.1 Introduction

“[F]or considerations of public policy the relationship between a bank and its client must be of a confidential nature. Equally – for considerations of public policy – this duty is subject to being overridden by a greater public interest... ”¹

In the modern day economic climate corporate entities and individuals are unable to function in society without the services that are provided to them by banks. Both corporate entities and individuals are faced with a double-edged sword: in order to utilise the services that they require and that are provided by banks, they have to entrust their confidential information to the banks. Banks are unable to perform their services without them coming into possession of their customers’ confidential information. It is no surprise then, that there is a need for a duty by a bank towards its customers to maintain confidentiality and secrecy in respect of its customer’s affairs.²



Banks L J made the following important statement in his judgment that was handed down in the famous case *Tournier v National Provincial and Union Bank of England*:³

"The case of the banker and his customer appears to me to be one in which the confidential relationship between the parties is very marked. **The credit of a customer depends very largely upon the strict observance of that confidence.**" (Emphasis added).

One may ask, why the concern? The following quotation from an American case is poignant in answering this question and shows that one's bank account goes to the heart of who a person is and the core of how a corporation functions:

"In a sense a person is defined by the checks he writes. By examining them the agents get to know his doctors, lawyers, creditors, political allies, social connections,

¹ *Firstrand Bank Ltd v Chaucer Publications (Pty) Ltd* 2008 JOL 21236 (C) 1 12.

² Faul "Teoretiese fundering van die bankgeheimnis in die Suid-Afrikaanse reg" 1986 *TSAR* 180 180.

³ 1924 1 KB 461 474.

religious affiliation, educational interests, the papers and magazines he reads and so on ad infinitum. ... the banking transactions of an individual give a fairly accurate account of his religion, ideology, opinion and interests... ."4

As such, it is not a dramatic conclusion to reach that the duty of banking confidentiality and secrecy protects not only a client's financial privacy but also his privacy as a whole⁵ as so much information can be obtained in respect of a person by the mere consideration of his bank accounts and the financial transactions he enters into.

This dissertation considers the development of the duty in English law and how this development had a direct impact of the development in South African law. In this respect the duty of confidentiality and secrecy was first recognised in South African law in the case of *Abrahams v Burns*.⁶ Thereafter it was acknowledged and explained in a number of other South African decisions, including *Cambanis Buildings (Pty) Ltd v Gal*,⁷ *GS George Consultants and Investments (Pty) Ltd v Datasys (Pty) Limited*⁸ and *Densam (Pty) Ltd v Cywilnat*⁹ and is accepted as part of South African law, even although there is no legislation that specifically gives recognition to the duty.

Thereafter the nature of the duty and the scope thereof is considered. The duty of confidentiality and secrecy cannot be absolute of course and is subject to several exceptions. These exceptions exist out of necessity to protect society, the bank and in some instances the customer himself. In some of these instances it is to protect society from criminal activity. Of great concern nowadays is the crime of money laundering as it allows perpetrators of organised crime to conceal their ill-gotten gains. Also of concern to the international community is the financing of terrorism.

The legislatures attempt to put in place measures to combat the crime of money laundering and the financing of terrorism is contained in various pieces of legislation, namely the Banks Act¹⁰ read with its regulations, the Prevention of Organised Crime Act¹¹ read with its

⁴ *California Bankers Association v Schultz* 416 US 1974 21 85.

⁵ Faul (n 2) 180.

⁶ 1914 CPD 452.

⁷ 1983 2 SA 128 (N).

⁸ 1988 3 SA 726 (W).

⁹ 1991 1 SA 100 (A).

¹⁰ 94 of 1990.

¹¹ 121 of 1998.

regulations, the Financial Intelligence Centre Act¹² read with its regulations, and the Protection of Constitutional Democracy Against Terrorism and Related Activities Act.¹³

The purpose of this legislation has been to introduce measures to combat organised crime, money-laundering and terrorist and related activities that impose obligations on accountable institutions such as banks to take action to address the risks that are associated with these forms of criminal activity and to protect the bank from being used to launder money. The failure to comply with the money laundering control and anti-terrorism legislation has serious consequences for the bank and its employees.

The measures that have been put in place by the legislation, however, conflict to a large extent with a bank's duty of confidentiality and secrecy towards its customers, as they are obligated in terms thereof to report certain transactions and provide certain information that is required by the legislation. This impacts on a bank's duty of confidentiality and secrecy towards its customers.

The focus of this dissertation is thus the consideration of the duty of a bank to maintain confidentiality and secrecy of its customers' affairs on the one hand, and the duties of disclosure that have been placed on a bank in terms of anti-money laundering and anti-terrorism legislation on the other.

1.2 Terminology

A brief discussion of the terminology I have chosen to use in this dissertation follows.

The legal literature that was considered for purposes of this dissertation referred in some instances to the "duty of banking secrecy" and in some instances to the "duty of confidentiality" whilst in some instances to a "duty of confidentiality and secrecy".

The duty of banking secrecy appears to be terminology that was used when the principle first developed in case law. Later on reference was made to the duty of confidentiality. The terminology however refers to the same concept.

¹² 38 of 2001.

¹³ 33 of 2004.

In an article written relatively recently by Schulze¹⁴ he refers to “confidentiality and secrecy”. In keeping with this more modern approach and in order to standardise references in this dissertation, I refer to the duty as one of confidentiality and secrecy.



¹⁴ Schulze “Confidentiality and secrecy in the bank – client relationship” 2007 *JBL* 122.

CHAPTER 2

ORIGIN AND RECOGNITION OF THE DUTY OF BANKING CONFIDENTIALITY AND SECRECY AS PART OF SOUTH AFRICAN LAW

2.1 Introduction

It is accepted as trite law that a bank owes to its customers a duty of confidentiality and secrecy in respect of its customers' affairs.¹⁵ This was not always the case. This chapter considers the development of a bank's duty of confidentiality and secrecy from merely a moral duty into a legal duty and further how it became recognised as part of South African law.

2.2 Development in English law

In the past our courts placed great importance on decisions that were made by English courts in respect of the field of banking law. In this respect, where South African law had been silent or not developed on a point in banking law, our courts did not hesitate to apply English law, as South African law was considered to be identical to English law in most matters that relate to banking law:¹⁶

"The law of South Africa is identical with English law in most matters that belong properly to banking. Where the one does not borrow from the other, both are derived from the Law of Merchant, a body of rules which grew out of the customs of merchants brought together especially by the great fairs or markets of the middle ages ... Not only the merchant, however, but the banker, took part in the formation of the Law Merchant ... It is thus but natural that the English and the Roman-Dutch systems should have much in common in this department of law."¹⁷

As with other areas in banking law, the duty of confidentiality and secrecy owed by a bank to its customer also formed part of South African law as a result of English law. Accordingly, consideration is given to the development of the duty in English law in the paragraphs below.

¹⁵ Schulze "Big sister is watching you: banking confidentiality and secrecy is under siege" 2001 *SA Merc LJ* 601 601.

¹⁶ Smith "The banker's duty of secrecy" 1979 *MBL* 24 24.

¹⁷ Somerset Bell "The Law of Banking in South Africa" 1904 *SALJ* 355 355.

2.2.1. *Foster v The Bank of London*

The first known English case in which the duty was considered was in 1862 in *Foster v The Bank of London*¹⁸ in which a court upheld the claim of a Plaintiff against his bank for disclosing the state of his account to one of his creditors.¹⁹ In this case the Honourable Erle CJ held that whether there was such a duty was a question of fact that the jury had to determine.²⁰ The jury said they were of the opinion that a banker had a duty not to disclose the state of his customer's account.²¹ Erle CJ held that as he was not aware of any law against the jury's approach he had to find in favour of the Plaintiff.²²

2.2.2 *Hardy v Veasey*

However, in 1868 in the English case of *Hardy v Veasey*²³ the Court of Exchequer in England implied that the observation of secrecy by a bank of its customer's affairs, although expected at the time, was a moral duty as opposed to a legal duty.²⁴

A customer instituted action against his bank for having disclosed the state of his account to a third party without a justifiable cause to do so. The bank manager communicated with a money-lender in an attempt to assist the plaintiff to obtain money to meet amounts of cheques he had drawn and during the course of such communication informed the money-lender of the state of the plaintiff's account.

In the court *a quo* the jury was requested to answer the following question by the judge: whether it was reasonable and proper for the bank to have made such a disclosure under the circumstances in which the disclosure had been made.

The court held that the question had been correctly left to the jury to decide. In order to reach this conclusion the court assumed the existence of a legal duty on a banker not to disclose his customer's account except on a reasonable and proper occasion.²⁵

¹⁸ 3 F & F 214.

¹⁹ 217.

²⁰ *ibid.*

²¹ *ibid.*

²² 3 F & F 214 217.

²³ 1868 3 LR Ex 107.

²⁴ 111.

The Honourable Kelly J said that they had not been called upon to decide whether a legal duty was imposed on bankers to keep secret the state of their customers' accounts. He declined to express an opinion in respect thereof and said the following:

"No doubt cases have been presented to us which have somewhat contrary tendency, but it is not pretended that the negative has ever been decided by a superior court of law; and though it may be thought that such a duty is rather moral than legal, I should hesitate much before setting aside the opinion expressed ... in ... *Foster v Bank of London*."²⁶

The Honourable Martin J said that it was "one thing to be under a moral duty to do a thing, another to be bound by a contract."²⁷

The Court of Exchequer did not have to decide whether there was such a duty as the jury had found that the bank had acted reasonable and proper in the circumstances.²⁸

2.2.3 *Tournier v National Provincial and Union Bank of England*

Thereafter there was no litigation for half a century in England and Cranston suggests that the absence of litigation during this period is evidence of the notion that was held by bankers that bankers would reasonably act upon the trust that was placed on them and as such there was no need for a legal duty as opposed to merely a moral one which was in operation at the time. Further he suggests that this approach was in harmony with common sense and was the common *status quo* of the time.²⁹

It was on 17 December 1923 in the case of *Tournier v National Provincial and Union Bank of England*³⁰ when English law for the first time recognised that the observation of secrecy by a bank was indeed a legal duty as opposed to merely a moral duty and it became part of English law.

The facts of this well-known case are as follows. The plaintiff was a customer of a branch of the National Provincial and Union Bank of England. His account became overdrawn by a

²⁵ 112.

²⁶ 111.

²⁷ 112.

²⁸ 113.

²⁹ Cranston *Principles of banking law* (2002) 168.

³⁰ (n 3).

small amount and he reached an agreement with the bank in respect of repayment of the overdraft. At the same time the plaintiff was to commence employment with a new employer. Subsequent to the agreement with the bank the plaintiff failed to make payments in terms of the agreement he had reached with the bank. The acting manager contacted the plaintiff's potential employer and informed him that the plaintiff's account had become overdrawn, that he had failed to adhere to the payment agreement, cheques that were passing through the branch in respect of his account were for "*betting men*" and the bank thought that he was betting heavily. The Plaintiff was not employed by his potential employer. The plaintiff complained that these statements were defamatory and that they had constituted a breach of the duty that was owed to him by the bank. The innuendo pleaded by the plaintiff was that as a result of what the bank had said the plaintiff was undesirable to have as an employee.

The plaintiff pleaded in its statement of claim that the bank was pledged to secrecy in respect of the plaintiff's account and business and all matters that were incidental thereto without exception. He argued further that it was an implied term of the contract between the plaintiff and the bank that they would not disclose to anyone the plaintiff's business with the bank or matters that arose from his business with the bank or the nature or state of his account or any transactions relating to it. The court of appeal ruled that the judge of the court a quo was correct in its ruling against an absolute duty without exception.³¹ Bankes LJ further held that the duty of a banker to his customer not to disclose his affairs was a legal duty arising out of contract. Further, the duty was not absolute but was qualified.³²

Further Bankes LJ said that it was not possible to frame an exhaustive definition of the duty. The most that could be done was to classify the exceptions and to indicate its limits. He went on in the judgment to set out the exceptions and the limits of the contractual duty of secrecy.³³ He made the remark that there was no authority on the point. In principle he said that the exceptions could be classified under four heads:

- 1 where disclosure would be under compulsion by law;
- 2 where there is a duty to the public to disclose;
- 3 where the interests of the bank require disclosure; and

³¹ 479.

³² 471, 475.

³³ 473.

4 where the disclosure is made by the express or implied consent of the customer.

Thereafter Bankes LJ set out to determine the limits of the duty. In this respect he said that he did not believe that the duty would cease when the customer closed his account and that information that was gained whilst the account was open remained confidential unless it fell under the exceptions under the four heads set out above³⁴. In addition he said that the duty was not confined to the state of the account but to information that was derived from the account as well.³⁵ Further, Bankes LJ held that the duty extended to information relating to the customer and his affairs that was derived not only from the customer's account but from other sources as well.³⁶ Accordingly a bank would be liable for any disclosure of that information which may have caused damage to the plaintiff unless the bank could categorise such disclosure of the information under one of the exceptions.

The other members of the bench, Scrutton LJ and Atkins LJ, both ruled that the duty was an implied term of the contract between a bank and its customer and further that it was a qualified duty and not absolute one.³⁷

For the first time the duty was clearly recognised as a legal duty in English law.

The *Tournier* case had a direct influence on the foreign jurisdictions of Australia and Canada, where the basis of the duty arose from the principles laid out in the case.³⁸

How the duty became recognised in South African law is set out below.

³⁴ 473.

³⁵ 473.

³⁶ 473.

³⁷ 479, 480, 481, 484.

³⁸ *Campbell International Banking Secrecy* (1992) 3, 8.

2.3 Recognition in South African law

2.3.1 *Abrahams v Burns*

The first time that a South African court was called upon to consider whether there was an duty on a banker not to disclose his customers' accounts was in the case of *Abrahams v Burns*.³⁹ This case was actually decided ten years before the *Tournier* case.

The author Nigel Willis acknowledged this development in South African law:⁴⁰ "the duty of secrecy on the part of a banker was recognized in an old case decided in the Cape Provincial Division – *Abrahams v Burns*." He refers to the following passage from the judgment written by the learned Searle J:

"The ... rule is that banker will be liable for any actual damage sustained by his customer in consequence of an unreasonable disclosure to a third party of the state of his account. This seems certainly as far as one is warranted in saying that the English law goes; indeed, doubt has been cast by some judges on the principle, and it has been stated that the obligation not to disclose is a moral rather than a legal one. I incline to view that the rule which would now be adopted according to the authorities, in English Courts, is that a banker would be liable if he, without sufficient reason, disclosed the state of a customer's account to a third party and damage resulted."⁴¹

The Honourable Searle J was of course correct in his speculation that the English courts would hold a banker liable for disclosing the state of his customer's accounts as is evident from the *Tournier* decision years later. The facts of the *Abrahams* case and the decision that was reached are set out below.

The plaintiff who was an attorney instituted proceedings for damages against the defendant who was an acting bank manager. The plaintiff was acting for a client in respect of a compromise between his client and his creditors. The attorney agreed to advance his client an amount of £60 to enable him to pay a certain instalment to his creditors. However, at the time the plaintiff did not have sufficient funds and the defendant agreed that the bank would advance to the plaintiff £60 on certain security that would be deposited by the plaintiff. The

³⁹ (n 6).

⁴⁰ Willis *Banking in South African Law* (1981) 39.

⁴¹ 476.

plaintiff proceeded to draw a cheque for £60 which the bank cashed. The plaintiff in the presence of a third party thereafter proceeded to tender to the defendant who was also acting on behalf of the plaintiff's client's creditors, the full outstanding amount of £150. The plaintiff alleged that the defendant thereafter spoke the false, scandalous and defamatory words, "D---rn it, you have deceived me in getting this money for Dick". The plaintiff claimed that these words meant to imply that the plaintiff had acted dishonourably and had made false statements, or had dishonourably concealed from the defendant information which was the plaintiff's duty to communicate to the defendant and that the plaintiff was a dishonourable person. The plaintiff claimed damages as a result of these words. The plaintiff further claimed that the defendant, by uttering those words, had wrongfully and unlawfully in contravention of his duty and obligation disclosed the condition of the plaintiff's account with the bank without the plaintiff's consent to the third party who was not entitled to know same. By reason of this wrongful and unlawful disclosure of the state of his account by the bank he had sustained damages.

The defendant raised the following defences: that there was no obligation on a banker not to disclose his customer's accounts; that if there was such an obligation the bank itself was to be sued in breach of contract; and that the defendant was merely an agent and that it was a breach of contract that should in actual fact be relied upon.⁴²

In respect of the first defence the Honourable Searle J said that he had not been referred to any South African case law or Roman-Dutch authority directly applicable by the parties.⁴³

Searle J found that at the time the rule that was being adopted by the English courts was that a banker would be held liable if he, without sufficient reason, disclosed the state of a customer's account to a third party and his customer suffered damages as a result.⁴⁴ Searle J, however, further held that it was unnecessary to consider what the law was on this point. He moved on to the next defence, namely that the bank, and not the defendant, ought to have been sued upon the allegations made, and that the only action that could have been brought was one for breach of contract.

⁴² 456. The Defendant raised two additional defences which are not relevant for the purposes of this dissertation.

⁴³ 456.

⁴⁴ 456.

In respect of this defence Searle J held that if a messenger of the bank were to disclose the account to a third person the plaintiff would be at liberty to sue him in delict.⁴⁵ The court, however, held that the words complained of did not disclose or divulge the state of the plaintiff's account as alleged.⁴⁶

2.3.2 *Cambanis Buildings (Pty) Limited v Gal*

After the *Abrahams* case⁴⁷ South African law remained silent on the point of the duty of confidentiality and secrecy until the decision of *Cambanis Buildings (Pty) Limited v Gal*⁴⁸ handed down decades later.

The respondent to an ejectment application contended that there was a possibility of collusion between the bank and the applicant in accomplishing non-payment of the rental amount that had been deposited by the respondent to the applicant based on amongst other contentions⁴⁹ the absence of an explanation by the bank manager of the reason therefore, even though the bank informed the applicant of the said failure. In this respect Steenkamp J held that:

"the reason for the bank manager not disclosing the reason why the bank had failed to transfer the money when he made the affidavit on behalf of the applicant is obvious. The bank is duty bound not to disclose any information in connection with its clients. The duty of secrecy on the part of a banker is recognised by our courts."⁵⁰

2.3.3 *GS George Consultants and Investments (Pty) Ltd and Others v Datasys (Pty) Limited*

In the case of *GS George Consultants and Investments (Pty) Ltd and Others v Datasys (Pty) Ltd*⁵¹ it was reaffirmed that the duty of confidentiality and secrecy was a part of South African law.

Three applicants in the matter pledged shares that were held in a public company to a bank as security for the payment of their indebtedness to the bank. This was done by means of deeds

⁴⁵ 457.

⁴⁶ 457.

⁴⁷ (n 6).

⁴⁸ (n 7).

⁴⁹ which are not relevant for the purpose of this dissertation.

⁵⁰ 137F.

⁵¹ (n 8).

of cession and pledge in a standard form document that had been provided by the bank. The shares that were pledged constituted a part of the bank's security for payment of claims against the applicants. The bank subsequently ceded all of its rights to the respondent. The subject-matter of the cession was the bank's claims for payment of the amounts due against the applicants and the bank's rights arising out of the pledge of shares made in terms of those deeds.

The respondent thereafter issued summons against the applicants claiming payment of the ceded debts. These actions were defended by the applicants. The respondent, due to a delay in obtaining a judgment, took the attitude that it was entitled to realise the pledged shares. It did so by virtue of its interpretation of the deeds of cession and pledge. The applicants accordingly brought an urgent application to prevent the respondent from selling the shares pending the outcome of the actions issued by the respondent against the applicants.

The court, amongst other enquiries, had to decide whether the applicants had shown *prima facie* the existence of a right that would be infringed if the respondent proceeded to dispose of the shares. This required the court to determine whether the applicants had showed that their monetary debts to the bank were not capable of being ceded by the bank.

In this respect it was argued on behalf of the applicants that the contractual relationship of a banker and its customer must include the usual implied term that the bank would keep its knowledge of its customer's affairs confidential.

It was argued that it was not possible for a bank to cede its claim against one of its customers to a third party without disclosing the existence and nature of such a claim to the proposed cessionary. Such a disclosure would constitute a breach of the banker's duty of confidence and a breach of contract with its customer. The conclusion reached by counsel for the applicants was that the banker's claims against its customers were, as a consequence, not capable of cession.

Stegman J held that once it had been shown that a banker had contracted to allow a customer to operate a current account with him the ordinary incidents of such a contract were imparted

as a matter of law.⁵² He further remarked that at that stage the precise content of the ordinary contract between a banker and his customer had not yet been stated definitely.⁵³

Stegman J further remarked⁵⁴ that the banker's contractual duty to preserve the confidentiality of his knowledge of his customer's business had been recognised in English law for a long time, and, furthermore, had received some acknowledgement in South African law in the cases of *Abrahams*⁵⁵ and *Cambanis Buildings*⁵⁶.

Stegman J confirmed that the contract between a bank and its customer is *sui generis*. This, however, did not exclude the proposition that the contract was fundamentally one of *mutuum* with numerous superadded factors including the banker's duty of secrecy.⁵⁷

He held that for practical purposes it was sufficient to recognise the inevitability of a banker having access to information about its customers' businesses which each customer may wish to conceal from his commercial competitors.⁵⁸ Further Stegman J held that it was sufficient to recognise that if a banker was to provide his customer with financial assistance he would have to make enquiries in respect of his customer's financial affairs and be entrusted with information in respect of his customer's financial affairs, which, if disclosed to the wrong persons or disclosed at the wrong time, could result in the customer suffering harm.⁵⁹

Stegman J concluded that as such there had always been a need for the existence of a provision precluding bankers from revealing what they learned about their customers' affairs.⁶⁰ As a result the existence of the tacit or implied term of secrecy in the contract between a banker and customer had been recognised for a long time.⁶¹ He found that the contract of a banker and a customer obliged the banker to guard information relating to his customers' business with the banker as confidential subject to various exceptions.⁶²

⁵² 734 I.

⁵³ 734 I.

⁵⁴ 735 D.

⁵⁵ (n 6).

⁵⁶ (n 7).

⁵⁷ 736 D.

⁵⁸ 736 D.

⁵⁹ 736 D.

⁶⁰ 736 F.

⁶¹ 735 F.

⁶² 736 G.

The court, however, went even further and held that such a duty of secrecy imported the element of *delectus personae* into the contract and that as such the bankers' claims against his customers were not capable of being ceded without the consent of the customer.⁶³

2.3.4 *Densam (Pty) Ltd v Cywilnat (Pty) Ltd*

A further case in the development of the duty of confidentiality and secrecy is that of *Densam (Pty) Ltd v Cywilnat (Pty) Ltd*.⁶⁴ The then Appellate Division accepted for purposes of reaching its decision (but without actually deciding the point) that a banker owes its customer a duty of confidentiality or secrecy and that the bank in the matter was contractually obliged to its customer to maintain confidentiality and secrecy about its customer's affairs in accordance with the *Tournier* decision⁶⁵ and applied the principles that had been laid down in that case.⁶⁶

2.3.5 *FirstRand Bank v Chaucer Publications (Pty) Ltd and another*

In the matter of *FirstRand Bank v Chaucer Publications (Pty) Ltd and another*⁶⁷ Traverso DJP acknowledged that the confidential nature of the relationship between a bank and its customer had been recognised in *Abrahams*⁶⁸ and *GS George Consultants*.⁶⁹⁷⁰ Furthermore, it had been recognised by several authors and there were a number of statutory provisions based on the assumption that bankers owed a duty of confidentiality to its clients. One was section 87 (2) of the Banks Act.⁷¹⁷² The learned Judge accordingly held that "for considerations of public policy the relationship between a bank and its client must be of a confidential nature. Equally – for considerations of public policy – this duty is subject to being overridden by a greater public interest."⁷³

⁶³ 737 F

⁶⁴ (n 9).

⁶⁵ (n 3).

⁶⁶ 110 B – C.

⁶⁷ (n 1).

⁶⁸ (n 6).

⁶⁹ (n 8).

⁷⁰ 11.

⁷¹ 94 of 1990.

⁷² 12.

⁷³ the *Firststrand* case (n 1) 12.

From the above case law it can be concluded that the duty of a bank to maintain confidentiality and secrecy towards its customer is recognised in the common law.

2.4 Legislative recognition

The applicable legislation to a bank's duty of confidentiality and secrecy generally proceeds from the assumption that a bank is under a duty to maintain confidentiality and secrecy of its customer's affairs without setting out the basis of such a duty.⁷⁴ Examples of such legislation are:

- 1 Section 236 (4) of the Criminal Procedure Act 51 of 1977;
- 2 Section 31 of the Civil Proceedings Evidence Act 25 of 1965;
- 3 Section 78 (13) of the Attorneys Act 53 of 1979;
- 4 Section 33 of the South African Reserve Bank Act 90 of 1989;
- 5 Section 74A of the Income Tax Act 58 of 1962;
- 6 Section 87 (2) of the Banks Act 94 of 1990;
- 7 Section 68 of the National Credit Act 34 of 2005; and
- 8 Section 64 and 65 of the Promotion of Access to Information Act 2 of 2000.

In terms of Section 236 (4) of the Criminal Procedure Act 51 of 1977 a bank cannot be compelled to produce books of account, which would be any ledger, daybook or cash book at criminal proceedings without a court ordering it to do so. A similar provision is applicable in respect of civil proceedings and is contained in the Civil Proceedings Evidence Act 25 of 1965. Section 78 (13) of the Attorneys Act 53 of 1979 compels a bank to provide the council of the law society with a certificate which indicates the balance of an attorneys trust, savings or any other interest bearing account if such a certificate is requested by the council. Section 33 of the South African Reserve Bank Act 90 of 1989 prevents the disclosure of information relating to the affairs of the bank, a shareholder or customer of the bank by any of the directors, officials or employees of the bank. Section 68 National Credit Act 34 of 2005 provides that any person who receives, compiles, retains or reports any confidential information pertaining to a consumer or a prospective consumer must protect the confidentiality of that information.

⁷⁴ Malan, Pretorius and Du Toit *Malan on Bills of Exchange, Cheques and Promissory Notes* (2009) 310, 311.

Although, currently, there is no legislation that places the duty of confidentiality and secrecy on a bank, the Protection of Personal Information Act 4 of 2013 has been assented to on 19 November 2013, and will commence once proclaimed. This act has provisions in it that will impact on a bank's duty of confidentiality and secrecy towards its customer and is dealt with further in chapter four of this dissertation.

In both Canada and Australia, as in South Africa and England, there are many legislative provisions that require disclosure.⁷⁵

The Cayman Islands is an example of an offshore jurisdiction where banking confidentiality and secrecy is governed by both statute and decided case law.⁷⁶ They are regarded as being “committed to strict bank secrecy, outside of a limited suspicious transaction reporting and international cooperation regime.”⁷⁷

2.5 *The constitutional recognition of the right to privacy*

Given that the Constitution⁷⁸ is the supreme law of the Republic⁷⁹ the constitutional and the common-law right to privacy of persons, both natural and juristic, must be considered.

The right to privacy is recognised in the common law as an independent personality right considered by the courts to be part of the concept of *dignitas*. A breach of the right to privacy is considered as an *iniuria*. It occurs in circumstances where:

- 1 there is an unlawful intrusion on someone's personal privacy; or
- 2 there is an unlawful disclosure of private facts about someone.⁸⁰

The unlawfulness is judged in light of the contemporary *boni mores* as well as the general sense of justice of the community as determined by the court.⁸¹

⁷⁵ Campbell (n 38) 122.

⁷⁶ Campbell (n 38) 148.

⁷⁷ Advisory notice 14 issued by the United States Department of the Treasury Financial Crimes Enforcement Network: http://www.fincen.gov/news_room/rp/advisory/pdf/advis14.pdf (12-1-2015).

⁷⁸ Constitution of the Republic of South Africa, 1996.

⁷⁹ s 2.

⁸⁰ Currie and De Waal *The bill of rights handbook* (2005) 316.

Examples of the breach of privacy in the common law include:

- 1 entry into a person's private residence;
- 2 the reading of a person's private documents;
- 3 listening to private conversations between persons;
- 4 the following of a person;
- 5 disclosing of private facts acquired by means of a wrongful act of intrusion; and
- 6 the disclosure of facts in breach of a confidential relationship.⁸²

The last example, namely the disclosure of facts in breach of a confidential relationship is relevant for purposes of the bank's duty of confidentiality and secrecy towards its customer.

The determination as to whether an invasion of privacy has taken place essentially involves an enquiry into whether the invasion is unlawful. The presence of a ground of justification such as statutory authority means that an invasion of privacy is not wrongful.⁸³

Section 14 of Constitution of the Republic of South Africa provides that:

"Everyone has the right to privacy, which shall include the right not to have –

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed."

There are two parts to the right to privacy as set out in the Constitution. The first guarantees a general right to privacy and the second protection against specific infringements. Under the Constitution a two-stage approach must be taken to determine whether there has been a violation of the right to privacy namely: and assessment of the scope of the right to determine whether the right has been infringed by law or conduct; and, thereafter, if the right was infringed, whether the infringement was justifiable under the limitation clause.

⁸¹ *ibid.*

⁸² *ibid.*

⁸³ Currie and De Waal (n 80) 317.

Accordingly a customer's duty to have his information kept confidential and secret does not only stem from the common law but is now entrenched in the Constitution under the customer's right to privacy and the investigation into whether the bank has breached its duty to the customer will include the application of the Constitution.

2.6 Recognition by the banking community

The Code of Banking Practice is a code to which all banks that are members of the Banking Association of South Africa abide by. Although it is not legally binding on banks, it does provide the standards of conduct that the banks have agreed to observe. It provides as follows in respect of the duty of confidentiality and secrecy:

“6.1 Confidentiality and Privacy

We will treat all your personal information as private and confidential, and, as a general rule, we will not disclose any personal information about you or your accounts, including to other companies in our Group (even when you are no longer a customer) unless under the following specific circumstances:

- i. when we are compelled by law to disclose the information;
- ii. when we have a legal duty to the public to disclose the information;
- iii. when we have to protect our interests by disclosing the information (for example, to prevent fraud). However we will not use this as a reason for disclosing information about you or your accounts (including your name and address) to anyone else;
- iv. when you have asked us or if we have your consent to disclose the information;
- v. when your account is in default and you have not made satisfactory arrangements with us for the repayment of the debt, or
- vi. Your cheque has been “referred to drawer”, in which case the information may be placed on a cheque verification service.”⁸⁴

Accordingly the banking community has given recognition of the duty to maintain confidentiality and secrecy in respect of a customer's affairs.

⁸⁴ The code of banking practice 2012 <http://www.banking.org.za/docs/default-source/default-document-library/code-of-banking-practice-2012.pdf?sfvrsn=10> (19-1-2015).

CHAPTER 3

NATURE AND SCOPE OF THE DUTY OF BANKING CONFIDENTIALITY AND SECRECY AND EXCEPTIONS THERETO

3.1 *Introduction*

The focus of this chapter is to consider the nature of the duty of banking confidentiality and secrecy and where the duty stems from in consequence of the bank and customer relationship. It also considers the scope of the duty. Finally, the exceptions to a bank's duty of confidentiality and secrecy are dealt with.

3.2 *Nature of the duty of banking confidentiality and secrecy*

The right to banking confidentiality and secrecy by a customer of a bank can be defined as the claim to confidentiality and secrecy by a customer against his bank in respect of his personal, financial and any other information.⁸⁵

As set out in Chapter 2, it is accepted that the duty of banking confidentiality and secrecy is founded on contract, and the protection of privacy based on the common law and the Constitution and is evidenced through various statutory provisions.⁸⁶

This was not always the case. For a long period of time there was debate as to where the duty of a bank to maintain confidentiality and secrecy arose from. This was a direct result of the difficulty of defining what the relationship between a bank and its customer was in terms of South African law. Accordingly the nature of the relationship between a bank and its customer is considered in so far as it impacted on determining the nature of a bank's duty of confidentiality or secrecy.

3.2.1 Contract

A bank's duty to keep its customer's information confidential and secret is considered to be an express or implied term⁸⁷ of the contract that is entered into between the bank and its

⁸⁵ Faul (n 2) 180.

⁸⁶ Malan, Pretorius and Du Toit (n 74) 310.

customer.⁸⁸ Accordingly the duty generally has a contractual foundation.⁸⁹ It is said to be one of the *naturalia* that arises from the contract between a bank and its customer.⁹⁰ This is also the case in the Canadian and Australian legal systems.⁹¹

In *Abrahams v Burns*⁹² the learned Searle J made the following *obiter dictum*:

"The rule ... is that a banker will be liable for any actual damage sustained by his customer in consequence of an unreasonable disclosure to a third party of the state of his account... I incline to the view that the rule which would now be adopted according to the authorities, in English Courts, is that a banker would be liable if he, without sufficient reason, disclosed the state of a customer's account to a third party and damage resulted."⁹³

The words "actual damage" and "damage resulted" in the above quotation have led to the conclusion that the basis of liability for a breach of the duty of banking confidentiality and secrecy is not as a result of the insult or the wounded feelings of the customer (based on the *actio iniurium*) but rather on breach of contract.⁹⁴

However, as Malan correctly points out,⁹⁵ it cannot be based on contract alone as a bank may not reveal information concerning a prospective customer, a past customer and members of the public. This creates difficulty with the theory that the duty arises from contract. Malan does not explain what the basis of the duty is as against persons who have not entered into a contract with a bank.

Malan is of the view that the duty of banking confidentiality and secrecy is not peculiar and is similar to the duty of confidentiality and secrecy that rests on other professionals.⁹⁶ This could provide some assistance as to why the duty extends beyond that of the bank-customer contract. An attorney who consults with a potential client is obliged in terms of attorney-client privilege to keep the discussions that were held during the consultation confidential. Further,

⁸⁷ Schulze (n 15) 602 and the *GS George Consultants* case (n 8) 736F–G.

⁸⁸ Malan, Pretorius and Du Toit (n 74) 311.

⁸⁹ Malan, Pretorius and Du Toit (n 74) 311; Smith (n 16) 25 – 26; the *Tournier* case (n 3) 474, 481, 484; the *Abrahams* case (n 6) 456; and the *GS George Consultants* case (n 8) 736 – 737.

⁹⁰ Schulze (n 15) 601 – 602.

⁹¹ Campbell (n 38) 4, 119.

⁹² (n 6).

⁹³ 456.

⁹⁴ Willis (n 40) 39.

⁹⁵ Malan, Pretorius and Du Toit (n 74) 311.

⁹⁶ *ibid.*

after a client is no longer a client of the attorney, the attorney must still maintain the privilege. It is said that the privilege is that of the client and not of the attorney. In *Firststrand Bank Limited v Chaucer Publications (Pty) Limited and another*⁹⁷ Traverso DJP held that the privilege not to have the details of its dealings with the bank disclosed belonged to the client and only the client could invoke this privilege and insist that the bank maintain confidentiality.⁹⁸ It would seem then that the bank's duty of confidentiality and secrecy to its client may have a similar nature to that of an attorney towards his client.

Malan is of the view that the contract entered into between its customer and the bank can be classified as one of mandate. Malan also suggests that as a result of this classification, a bank's duty of confidentiality and secrecy can be categorised as an example of (and arises from) a mandatory's duty to perform his mandate in good faith.⁹⁹

The Honourable Stegman J considered this possibility in his judgment in *GS George Consultants* case.¹⁰⁰ His starting point was that once it had been established that a bank-customer contract had been entered into, the *naturalia* of such a contract would be imported into it as a matter of law or they would represent the tacit consensus of the parties to the contract.

It would appear upon reading of the judgment that the inference Stegman J was making was that the obligation of a bank to maintain its duty of confidentiality and secrecy was imported into the bank-customer contract as a matter of law, alternatively it would represent the tacit consensus of the parties to the contract.

He then went on to explain that the banker's contractual obligation to preserve the confidentiality of the knowledge he had obtained in respect of his customer's business had been recognised in English law for a long time and that the duty of confidentiality and secrecy had received some acknowledgement in South Africa in the *Abrahams*¹⁰¹ and *Cambanis Buildings*¹⁰² cases.¹⁰³

⁹⁷(n 1).

⁹⁸ The *Firststrand* case (n 1) 13.

⁹⁹ Malan, Pretorius and Du Toit (n 74) 311.

¹⁰⁰ (n 8) 734 H – 736 F.

¹⁰¹ (n 6).

¹⁰² (n 7).

¹⁰³ 735 D.

He considered various works of authors to arrive at a conclusion on the matter. Stegman J considered the work of Malan and De Beer, *Wisselreg en Tjekreg*, and concluded that the learned authors had said that the contractual relationship between a bank and its customer was based on the contract of *mandatum* as a result of which the banker undertakes to discharge his duties in good faith and this would be the source of the banker's duty of confidentiality and secrecy.¹⁰⁴

He thereafter referred to the work of Willis, *Banking in South African law*, in which the author concluded that the contract between a banker and its customer most closely resembled the common law contract of *mutuum*.¹⁰⁵

He referred, in addition, to the work of Cowen, *The Law of Negotiable Instruments in South Africa 4th ed*, where he noted that the learned authors had criticised the suggestion that the contract was fundamentally one of *mutuum* on various grounds.¹⁰⁶ One such ground was that it did not explain the banker's duty of secrecy.¹⁰⁷ The learned authors concluded that the contract that was entered into between the banker and its customer was *sui generis*.¹⁰⁸

Stegman J concluded that it need not be doubted that the contract was *sui generis*. This, however, did not exclude the proposition that it was fundamentally a contract of *mutuum* with numerous superadded features one of which was that of the banker's duty of secrecy. He concluded that there was no reason why the banker's duty of secrecy should be found in another type of contract to that of the bank-customer contract.¹⁰⁹

The above approach in the *GS George Consultants* case was criticised in an article written by Faul¹¹⁰ in which she says that one cannot agree with the unmotivated view of Stegman in respect of the nature of the bank and customer contract, especially in respect of the aspect of banking secrecy.¹¹¹

¹⁰⁴ the *GS George Consultants* case (n 8) 735 E – G.

¹⁰⁵ 735 G – I.

¹⁰⁶ 736 B – D.

¹⁰⁷ 736 C.

¹⁰⁸ 736 C.

¹⁰⁹ 736 D.

¹¹⁰ *Die Bankgeheimnis: Aard van bank- en klientverhouding* 1989 TSAR 145.

¹¹¹ 148.

Faul commences her article by exploring the origin of modern banking law when a client would deposit their possessions for safekeeping into a goldsmith's trust. This was a contract of *depositum*. However the moment the goldsmith was able to use the goods deposited with him for his own use it lost its character as a contract of *depositum*.

She considered the fact that in English law the nature of the contract between a bank and its customer has developed into a contract on its own and in which the "debtor-creditor" relationship continues to exist but operating within this contractual relationship. Faul goes on to say that the bank-customer relationship in South Africa is based on contract as a consequence of the position in English law.¹¹²

Faul states that the relationship between a bank and a cheque or current account holder is that of *mandatum*. Further Faul states that a contract of loan such as that of a fixed deposit cannot be brought under a contract of *mandatum*. In addition she says that while transmissions or savings accounts contain elements of *mandatum* they are also essentially contracts of loan.¹¹³ Furthermore she states that the duty of confidentiality and secrecy of a mandatory arises from the obligation of the mandatory to act in good faith without *dolus* or fraud. The rules of good faith require that a bank in the absence of a justification must not disclose confidential information about its client.¹¹⁴

She concludes that in order to classify the bank-customer contract one has to distinguish between the different types of accounts that a customer may have with a bank. She distinguishes between a cheque account, a fixed deposit account, a savings account and transmission account. She thereafter comes to the following conclusions: in respect of the current account, the contract between a banker and his customer is one of *mandatum* and that the duty of secrecy is a *naturalia* of this type of contract; a fixed deposit is a contract of loan; the transmission or savings account, while it contains elements of *mandatum*, is also essentially a contract of loan.

Where the contract cannot be explained in terms of *mandatum* Faul is of the view that the duty of confidentiality and secrecy between the bank and its customer can be regarded as a

¹¹² *ibid.*

¹¹³ 149.

¹¹⁴ 150.

tacit term that is implied by the facts or by usage.¹¹⁵ Her conclusion on the matter is that the Honourable Stegman J could not conclude that the contract between a bank and its customer was *sui generis* without justification and that he should have distinguished between the different accounts.¹¹⁶

As was explained by Itzikowitz¹¹⁷ the distinguishing of different accounts does not take the matter any further and no single category of contract in Roman or Roman – Dutch law can explain the bank – customer relationship. Further (and I agree with her) there is no merit in classifying the relationship in this way. As she correctly points out the value of making a classification would be the ease with which the *naturalia* of the contract can thereafter be determined. However, one is able to find solutions to questions such as when a contract ends and whether there must be notice by treating the contract as *sui generis* and containing elements that are implied by custom or by the prevailing legal practice.

Smith, however, very early on, formulated a satisfactory approach to the banker and customer relationship after having categorised it as a contract *sui generis*:¹¹⁸

"Basically the relationship is that of debtor and creditor. Who is the debtor and who is the creditor depends, of course, on the state of the customer's account. If the customer's account is in credit then the banker is the debtor; if the customer's account is overdrawn then it follows that the customer is the debtor. Adjunct to the basic relationship are certain obligations which, to my mind, not only distinguish the relationship from the ordinary debtor-creditor relationship but actually elevate it to a *sui generis* category.

A bank owes the following obligations to his customer:

- (a) He must pay all a customer's cheques properly drawn on him provided that there are sufficient funds in the account to meet the cheque or that overdraft facilities have been arranged. No such obligation exists between debtor and creditor.
- (b) He must collect the proceeds of cheques and other orders paid to the credit of the customer's account. An ordinary debtor has no such obligation.

¹¹⁵ *ibid.*

¹¹⁶ 148.

¹¹⁷ "The Banker's duty of secrecy" 1989 *BL* 255 256.

¹¹⁸ (n 16) 25.

- (c) He is under a duty of secrecy regarding his customer's affairs. No such duty exists between an ordinary debtor and creditor.
- (d) He must give reasonable notice to his customer before terminating the relationship.

A customer, in turn, is under the following obligations to his banker:

- (a) He must demand payment (usually by way of a properly drawn cheque) before the debt becomes legally payable.
- (b) He must draw his cheque with care and in such a way as to avoid fraudulent alteration.
- (c) He must pay a reasonable fee for services rendered to him by the banker."

In conclusion it is my submission that it can be accepted that the contract between a bank and its customer is *sui generis* and that the bank's duty of confidentiality and secrecy is one of the elements of that relationship that elevates it to *sui generis* status.

In the Austrian and Canadian legal systems, the principle of "Equity" (which does not form part of South African law) provides the duty of protecting confidentiality in those situations that arise independently of the bank-customer contract.¹¹⁹

3.3 Scope of the duty of confidentiality and secrecy

3.3.1 Scope

The extent of the duty of confidentiality and secrecy upon the bank is very broad. The bank is obliged to keep all information concerning a customer confidential and secret, including:

1. That the customer was previously a customer of the bank.¹²⁰
2. The customer is in fact a current customer of the bank.¹²¹
3. Information that was gained during the operation of a customer's account remains confidential and secret despite the closing of the account.¹²²

¹¹⁹ Campbell (n 38) 4, 171.

¹²⁰ the *Tournier* case (n 3) 473.

¹²¹ Malan, Pretorius and Du Toit (n 74) 311.

¹²² the *Tournier* case (n 3) 473, 485.

However, in the *Firststrand Bank Limited* case¹²³ the Traverso DJP held that she did not believe "that the publication of the fact that a person is a client of a specific bank, can ever infringe the right of privacy of either the bank or the client, as envisaged in Section 14 of the Constitution."¹²⁴

I agree with Schulze¹²⁵ that there are many valid reasons why a customer would prefer that the bank that he has chosen to bank with, or his use of certain financial products of a particular bank, remain confidential and secret. An example that he sets out is that employees of a bank may prefer to use the products of another bank.

In the circumstances and with the respect to Traverso DJP the publication of the fact that a person is a client of a specific bank would most certainly be an infringement of that person's right to privacy and certainly would be a breach of the bank's duty of confidentiality and secrecy if it was done by the bank.

4. A bank may not reveal information that pertains to a prospective customer.¹²⁶
5. The duty to maintain confidentiality and secrecy is not confined to the actual state of the account of the customer and extends to information that is derived from the account itself.¹²⁷ In this respect it must extend to all the transactions that go through the customer's account and to any securities given in respect of the account.¹²⁸
6. Furthermore, the duty includes information in reference to the customer and his affairs which is derived not from the customer's account itself but from other sources if the occasion from which the information was obtained arose out of the banking relations of the bank and its customer as in the *Tournier* case.¹²⁹
7. The application of the duty goes even further according to Malan who states that banks are obliged to keep all information that is confidential secret whether it relates to a

¹²³ (n 1).

¹²⁴ 17.

¹²⁵ (n 14) 126.

¹²⁶ Malan, Pretorius and Du Toit (n 74) 311.

¹²⁷ the *Tournier* case (n 3) 473, 485.

¹²⁸ the *Tournier* case (n 3) 485.

¹²⁹ Schulze (n 14) 122.

customer or to anyone else.¹³⁰ This would mean that a bank is under a duty to respect the privacy of not only its customers but also that of other members of the public. This would include juristic persons as well since they have a right to privacy comparable to that of a natural person.¹³¹

3.3.2 Duty of a bank to safeguard confidentiality and secrecy by launching court proceedings

In the *Firststrand Bank* case the following was said:

"although the duty not to disclose rests with the bank, the privilege not to have the details of its dealings with the bank disclosed belongs with the client. It is therefore the client alone who can invoke this privilege and insist that the bank keeps the information about its dealings with the client confidential." ¹³²

As a consequence it was held that the bank had no *locus standi* to bring the application to interdict the respondents from publishing the identities of clients of the bank and the names of their trusts stated in the clients' lists that a magazine intended to publish.

Schulze is of the view that the duties of the bank as mandator may include the protection of confidentiality of the affairs of the customer as mandator.¹³³ In such an instance the bank would have the necessary *locus standi* to act as the bank attempted to do in the *Firststrand Bank* case. With due respect this suggested tacit obligation (as referred to by Schulze) appears to be too broad. It would place banks in a position where they could become liable should they not protect or attempt to protect their customer's confidential information that third parties wish to publish.

Schulze suggests a further alternative, namely that the parties to the bank-customer relationship agree expressly on the inclusion of a term in their agreement that the bank would have the right and a duty to defend the client's right to privacy through legal proceedings.¹³⁴ This is certainly more desirable than his first assertion and I submit that it would allow the bank to determine whether it wanted to have the right only, or the duty as well. A bank would

¹³⁰ Malan, Pretorius and Du Toit (n 74) 311 – 312.

¹³¹ Malan, Pretorius and Du Toit (n 74) 311 – 312 n 127.

¹³² (n 1) 13.

¹³³ (n 14) 125.

¹³⁴ *ibid.*

be well advised merely to agree to the right to do so if it so chooses, in order to avoid being held liable by the client should it fail to protect the right.

3.3.3 Duty against bank only or bank employees too?

It is the bank's duty to maintain the confidentiality and secrecy of its customer's affairs and ultimately the bank would be responsible for a breach of the duty. In the *Abrahams* case¹³⁵ the court held that whilst the customer would have an action for damages against the bank it would not exclude him from having an action in delict personally against an official of the bank for making a disclosure of such information:

"assuming that plaintiff would have an action for breach of contract against the bank, I do not see why that should exclude him from having an action of tort personally against the defendant; suppose the defendant, acting without authority, made such a disclosure, I do not see why he should not be liable in tort...".¹³⁶

Naturally in order to succeed with a claim in delict against an official of a bank for disclosure of confidential information the customer would have to prove that the official disclosed the information negligently or intentionally (and all the other elements of delictual liability).

3.3.4 *Delectus personae*?

In the *GS George Consultants* case the court had to decide whether the duty of confidentiality and secrecy that is owed by a bank to its customer would affect the question whether the bank's claim against its customer was legally capable of being ceded.¹³⁷

Stegman J held that whenever parties conclude a contract in terms of which one of the parties would owe the other party a duty to maintain confidentiality and secrecy of information, the character of that contract and the performance of that obligation is so personal in nature that the element described as *delectus personae* would be present in the contract.¹³⁸

¹³⁵ (n 6).

¹³⁶ 457.

¹³⁷ (n 8) 735C – H.

¹³⁸ 737 E.

He went on to say that it would be unthinkable that a person would entrust both confidential information to his banker on terms which obliged that banker to guard the privacy thereof, and at the same time remain indifferent to the person that is entrusted with that duty of confidentiality and secrecy.¹³⁹

The court conceded that a person who entrusted confidential information to a bank could not be ignorant of the fact that it would not only be the particular bank official to whom the information was entrusted that would have access to such information, and that many other officials who have access in the ordinary course of the bank's business. He stated, however, that this consideration did not exclude the element of *delectus personae*. Stegman J said that on the contrary the element of *delectus personae* was extended to the bank as a corporate entity and that the bank was obliged to ensure that all its employees would observe the duty of confidentiality and secrecy.¹⁴⁰

Having established the right of a customer to have his information held by a bank to be maintained as confidential and secret and having regard to the fact that it is well established that rights under a contract involving a *delectus personae* were not legally capable of being ceded, Stegman J held that in the absence of an agreement to the contrary, the contract of a bank and its customer obliged the bank to guard information relating to its customer's business as confidential, and that such a duty of confidentiality and secrecy imported the element of *delectus personae* into the contract and as a result the bank's monetary claims against his customer could not be ceded without the consent of its customer.¹⁴¹

For the same reasons Stegman J also held that the bank's rights in respect of the contracts of cession and pledge that had been signed by its customer in favour of the bank were also subject to the bank's duty of confidentiality and secrecy and could not be ceded.¹⁴²

In *Sasfin v Beukes*¹⁴³ the judges who prepared the minority judgement expressed their doubts as to the correctness of the above judgment. However, they did not give a definite opinion in

¹³⁹ 737A.

¹⁴⁰ 737 C.

¹⁴¹ 737 F.

¹⁴² the *GS George Consultants* case (n 8) 739D.

¹⁴³ 1989 1 SA 1 (A).

this respect.¹⁴⁴ The court did, however, clearly express its dissent from the interpretation of *delectus personae* in the *GS George Consultants* case¹⁴⁵ and stated that:

"Dit is natuurlik erkende reg dat hoewel vorderingsregte in die reël vryelik oordraagbaar is, dit nie die geval is nie indien 'n sessie van so 'n reg 'n wesentlik ander verpligting vir die skuldenaar sal meebring, of, anders gestel, indien die skuldverhouding na aard 'n *delectus personae* behels."¹⁴⁶

Accordingly, although the bank's right to a claim against its customer could be ceded this would not be the case where the cession created a different obligation for the customer. Further, a cession by a bank of its claims does not involve a *delectus personae*. Moreover, a bank could affect such a cession without disclosing any confidential information.¹⁴⁷

Scott is of the view that there would be no justification for a rule prohibiting a bank from ceding its rights against its customers. She states that the object of such a cession could be described without revealing any confidential information regarding the relationship between the banker and its client. She suggests a very simplistic approach in this respect: "A (the banker) hereby cedes to B (the cessionary) his claim for Rx which originated from an obligation between A and C (customer) created on (date) at (place)". She submits that by doing so no confidential information is disclosed.¹⁴⁸

This, of course, does not deal with the argument that the bank has a duty to keep secret the very fact that a person is a customer of the bank in the first place. In this respect Scott suggests that the bank is entitled to rely on one of the exceptions to the duty of confidentiality and secrecy¹⁴⁹ (which are discussed below).¹⁵⁰

In *Densam (Pty) Ltd v Cywilnat (Pty) Ltd*¹⁵¹ Botha JA come to the decision that the statement by Stegman J that the duty of secrecy which a bank owes to its client imports the element of *delectus personae* into the contract between a bank and its customer was wrong in law.¹⁵²

¹⁴⁴ Scott "Can a banker cede his claims against his customer" 1989 *SA Merc LJ* 248 248 and the *Densam* case (n 9) 113A.

¹⁴⁵ Scott (n 144) 248.

¹⁴⁶ the *Sasfin* case (n 143) 31 G-H.

¹⁴⁷ the *Sasfin* case (n 143) 32I.

¹⁴⁸ (n 144) 249.

¹⁴⁹ (n 144) 248.

¹⁵⁰ par 3.4.

¹⁵¹ (n 9).

¹⁵² 111F.

In this respect Botha JA noted that Stegman J had based his view on *delectus personae* only on the banker's obligation to maintain confidentiality and not on the nature of the customer's obligation to pay the amount of the bank's claim, which Botha JA found to be contrary to principle and authority.¹⁵³ In this respect Botha JA stated that the question as to whether a claim could not be ceded because the contract in question involved a *delectus personae*, was in actual fact to be answered with reference to the nature of the debtor's obligation to the cedent.¹⁵⁴ He concluded on the facts of the case before him that the customer's obligation to the bank was to pay the amount of the overdraft and that it would make no difference to him if the bank or the cessionary enforced payment.¹⁵⁵ In the circumstances the claim of the bank against its customer was capable of being ceded.

In the circumstances it can be concluded that the duty of confidentiality and secrecy does not import an element of *delectus personae* into the contract between a bank and its customer.

Botha JA found in addition that the remarks of van Heerden JA in the *Sasfin* case discussed above applied with equal force to the contractual relationship between a bank and its customer.¹⁵⁶



3.4. Exceptions to a bank's duty of confidentiality and secrecy

A bank's duty of confidentiality and secrecy is not absolute. There are circumstances where a bank will be relieved of its duty, and furthermore circumstances in which it will be compelled to disclose the confidential information that it has in its possession that pertains to a customer. These circumstances can be referred to as grounds of justification¹⁵⁷ for the bank disclosing confidential information and are the exceptions to a bank's duty of confidentiality and secrecy.

In the *Tournier* case¹⁵⁸ these grounds were classified under four heads:

¹⁵³ 112A.

¹⁵⁴ the *Densam* case (n 9) 112 A – D.

¹⁵⁵ 112 H.

¹⁵⁶ the *GS George Consultants* case (n 8) 736 F – G.

¹⁵⁷ Willis (n 40) 41.

¹⁵⁸ (n 3) 473.

1. Where disclosure is under compulsion by law, also referred to as legal coercion (court ordered or statutory);¹⁵⁹
2. Where there is a duty to the public to disclose (also referred to as public interest);¹⁶⁰
3. Where the interests of a bank require disclosure; and
4. Where the disclosure is made by the express or implied consent of the customer.

Each of these exceptions are considered below.

3.4.1 Where disclosure is under compulsion by law

It had been held in an English case¹⁶¹ that where disclosure is required by the compulsion of law such disclosure should only be done on the clearest of grounds and it must be completely justified as such disclosure is "a very serious interference with the liberty of the subject". The author Willis suggests that our courts should adopt a similar approach.¹⁶²

This exception will arise when a bank is compelled to provide evidence in a court of a law.¹⁶³

There are a number of statutory provisions in South African law that can be seen as falling under the category of disclosure being under the compulsion by law.¹⁶⁴ Examples of such statutory provisions are: Section 236 (4) of the Criminal Procedure Act 51 of 1977; Section 31 of the Civil Proceedings of Evidence Act 25 of 1965; Section 78 (13) of Attorneys Act 53 of 1979; Section 74A of the Income Tax Act 58 of 1962; and Section 65 (2) of the Income Tax Act 58 of 1962.

Section 7 of the POCA creates a duty on banks and their employees to report suspicious transactions which override the bank's common law duty of confidentiality and secrecy to its customer.¹⁶⁵ Further legislation that may impact on the duty includes the Financial Intelligence Centre Act 38 of 2001, the Financial Advisory and Intermediary Services Act 37

¹⁵⁹Faul (n 2) 187.

¹⁶⁰ibid 187.

¹⁶¹*Williams and others v Summerfield* 1972 2 QB 513 518G-519D.

¹⁶²Willis (n 40) 41.

¹⁶³Smith (n 16) 27.

¹⁶⁴Schulze (n 15) 603; Malan, Pretorius and Du Toit (n 74) 310.

¹⁶⁵Schulze (n 15) 605.

of 2002 and the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004.¹⁶⁶

There are also a number of examples in English law where banks are obliged to disclose information under the compulsion of law.¹⁶⁷ Bankes LJ used as an example the duty to obey an order under the Bankers' Books Evidence Act.¹⁶⁸

It is said that in Italy, where banking secrecy is considered an "integrated legal custom", legislative exceptions have eroded the duty to such an extent that banking confidentiality is no longer in existence.¹⁶⁹

3.4.2 Where there is a duty to the public to disclose

Bankes LJ said the following in respect of this duty:¹⁷⁰

"Many instances of the second class might be given. They may be summed up in the language of Lord Finlay in *Weld-Blundell v. Stephens (I)*, where he speaks of cases where a higher duty than the private duty is involved, as where 'danger to the State or public duty may supersede the duty of the agent to his principle.'"

Essentially this exception or ground of justification to a banker's duty of confidentiality and secrecy would arise in circumstances where there would be danger to the state or where a public duty may supersede the duty of the bank to its customer.¹⁷¹

Examples are: (1) if a bank is aware of an account that belongs to a revolutionary body; (2) if a client is suspected of treason; and (3) an account is used for trading with the enemy. These grounds of justification have been raised especially in respect of crime prevention.¹⁷²

¹⁶⁶Schulze (n 14) 122.

¹⁶⁷Schulze (n 15) 603.

¹⁶⁸the *Tournier* case (n 3) 473. Further examples in the English law are: court orders for disclosures during the pre-trial process; witness summons; writs of sequestration; garnishee orders; cross border disclosures; disclosures to investigators; the Police and Criminal Evidence Act 1984 (c 160); The Companies Act 1985 (c 6); The Criminal Justice Act 1987 (c 38); The Banking Act 1987 (c 22); The Financial Services Act 1986 (c 60); Taxation statutes including the Taxes Management Act 1970 (c 9); The Income and Corporation Taxes Act 1988 (c 1); The Insolvency Act 1986 (c 45); numerous money – laundering statutes, including ss 50, 52 and 53 of the Drug Trafficking Act 1994 (c 37); and The Proceeds of Crime Act 1995 (c 11).

¹⁶⁹ Campbell (n 38) 388.

¹⁷⁰the *Tournier* case (n 3) 473.

¹⁷¹Schulze (n 15) 602.

3.4.3 Where the interests of the bank require disclosure

There are circumstances where it is in the interest of the bank to disclose confidential information pertaining to its customer. The following circumstances are considered as justified:

3.4.3.1 Writ of execution

In respect of this exception *Bankes LJ* provided an example of a bank issuing a writ claiming payment of an overdraft with the amount of the overdraft being apparent on the face of the writ.¹⁷³ In the circumstances where a bank issues proceedings against a customer for an amount that is owed by the customer to the bank and the amount and the nature of the debt is set in court documents that initiate the proceedings, this disclosure would fall under the ground of justification that it is within the interests of the bank to make disclosure as the bank is claiming a repayment of a debt that is owed to it.

3.4.3.2 Disclosure upon cession of debt



In the *G S George Consultants*¹⁷⁴ case the Honourable Stegman J held that in the case before him there was no suggestion of any circumstance which may have relieved the bank of its duty of confidentiality and secrecy to its customer.¹⁷⁵ However in *Cywilnat v Densam* it was held that the court had erred in finding that there were no circumstances present which justified the court in relieving the bank of its duty of confidentiality and secrecy.¹⁷⁶ In this respect the court referred to the *Tournier* case¹⁷⁷ and the exceptions set out above, and determined that the applicable exception or ground of justification was that the bank had an interest in disclosing the existence of such a claim to the cessionary where it wanted to dispose of its claim.¹⁷⁸

¹⁷²Faul (n 2) 188.

¹⁷³the *Tournier* case (n 3) 473.

¹⁷⁴(n 8).

¹⁷⁵ 736H.

¹⁷⁶1989 3 SA 59 (W) 60A.

¹⁷⁷(n 3).

¹⁷⁸(n 132) 60A-C.

In the *Densam* case Botha JA held that "in my view, generally speaking, it is reasonable and proper for a bank to further its own interests in regard to 'collecting an overdraft' by ceding its claim to a third party".¹⁷⁹ Botha JA accordingly agreed with the views expressed by Goldstein J. He conceded, however, that it would be conceivable for a bank to cede its claim for an ulterior purpose that was unrelated to the furthering of its own interests. In this respect he stated that the mere fact that a bank had ceded its claim would raise a *prima facie* inference, provided that nothing pointed to the contrary, that the bank had decided to dispose of its claim in order to liquidate and realise its interests in that claim.¹⁸⁰

Accordingly, where a bank discloses information such as the name of a customer when disposing of its personal rights through cession, such a disclosure would be treated as falling under this exception, as the interests of the bank require such a disclosure.¹⁸¹

3.4.3.3 Suing of surety

A further exception is where a bank sues a surety and the state of the initial debtor's account must be revealed.¹⁸²



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3.4.3.4 Where the disclosure is made by the express or implied consent of the customer

Should the customer give express or implied consent authorising the bank to make disclosure, the bank will not be bound by the duty of confidentiality and secrecy. In this respect Bankes LJ gave an example of where a customer authorises a reference to his banker.¹⁸³ This would be where a customer gives permission to his bank to give a reference to a third party, for example where the customer is applying for credit facilities.¹⁸⁴

The Honourable Atkin LJ also said that it appeared to him that the practice of bankers sharing information amongst each other as to the affairs of their respective customers, if justified, would be upon the basis of an implied consent of the customer.¹⁸⁵ There is, however, a danger

¹⁷⁹(n 9) 100.

¹⁸⁰111 B – D.

¹⁸¹Scott (n 144) 249.

¹⁸²Smith (n 16) 27.

¹⁸³the *Tournier* case (n 3) 473.

¹⁸⁴Schulze (n 15) 603.

¹⁸⁵the *Tournier* case (n 3) 486; and Smith (n 16) 27.

in the practice as, although a bank may be able to prove the existence of this practice or usage, it may not be able to prove that it is understood to be accepted by the general public.¹⁸⁶

As a matter of practice a customer's consent is implied where disclosure is made to a surety enquiring on the status of the initial debtor's account.¹⁸⁷

3.4.3.5 Banker's references – an exception to the bank's duty of confidentiality and secrecy?

Further consideration is given to what was stated above in respect of banker's references. It is known that banks and other financial institutions provide credit and other confidential information to third parties under certain circumstances.¹⁸⁸

Although the practice of one bank giving information to another bank about a customer is rarely with the client's knowledge it has become an entrenched banking practice.¹⁸⁹ Whether this violation of the duty of confidentiality and secrecy by a bank who has given credit information to another bank is justified is an additional question. If it is justifiable, then the further question is whether it should not be controlled by legislation or by regulation.¹⁹⁰

As pointed out by Willis,¹⁹¹ the practice of banks giving references amongst themselves as to the likely creditworthiness of a customer is sound and vital to the efficient lending of money in the economy. He is, however, of the view that principles of equity would require that the references should only be given with the knowledge, alternatively with the implied consent, of the customer. Where a bank is not entitled to provide a banker's reference it must decline to give such a reference.¹⁹²

In the *Tournier* case Atkin L J said that while he did not have the desire to "express any final opinion on the practice of bankers to give one another information as to the affairs of their

¹⁸⁶Smith (n 16) 27.

¹⁸⁷the *Tournier* case (n 3) 473.

¹⁸⁸Faul (n 2) 188.

¹⁸⁹Faul (n 2) 188 – 189.

¹⁹⁰ibid.

¹⁹¹(n 40) 40.

¹⁹²*Standard Chartered Bank of Canada v Nedperm Bank Limited* 1994 4 SA 747 (A) 762 J – 763 A.

respective customers, except to say” that it appeared to him that “it must be upon the basis of the implied consent of the customer.”¹⁹³

Credit information is provided in the interests of the community. This general interest of the community has to be weighed against a customer's interest in the bank maintaining banking confidentiality and secrecy. It could therefore be argued on this basis that credit information is given under justifiable circumstances and that there is no breach of the duty of banking secrecy and confidentiality if justified interests are being protected as a result thereof. The justified interest in this respect is the provision of credit provided in a healthy economy.¹⁹⁴ The giving of credit information as a banking practice is known; however there is little information available in respect thereof as it is usually done in strict confidence.¹⁹⁵ The question is whether this commercial practice can be recognised as a legal rule through custom. However, the mere fact that the custom of banks to provide references exists, and that they apply it, does not mean that banking clients are aware of the practice and that they have consented to it. Further, the mere fact that banks give credit information and that there are justified interests in this respect, is not satisfactory. A client is often not even aware that credit information is being given about him. It is therefore uncertain whether banks have a ground of justification. The giving of credit information cannot be regarded as a custom or as a ground of justification.¹⁹⁶ Faul is of the opinion¹⁹⁷ that policy considerations determine that the providing of credit information is necessary for a healthy credit industry. However, policy considerations are not sufficient justification, and she suggests that legislation is required.

The National Credit Act¹⁹⁸ provides that any person who in terms of the Act receives, compiles, retains or reports any confidential information pertaining to a consumer or prospective consumer, must protect the confidentiality of that information and in particular must use that information only for a purpose permitted or required in terms of the Act, other national legislation or applicable provincial legislation. Further, that person must report or release that information only to the consumer or prospective consumer or to another person to the extent permitted or required by the Act, other national legislation or applicable provincial legislation, or as directed by the instructions of the consumer or prospective consumer or an

¹⁹³the *Tournier* case (n 3) 486.

¹⁹⁴Faul (n 2) 192.

¹⁹⁵ibid.

¹⁹⁶ibid.

¹⁹⁷Faul (n 2) 194.

¹⁹⁸ 34 of 2005.

order of a court or the Tribunal.¹⁹⁹ Accordingly, where a bank is also a credit provider, the bank would be bound to protect the confidentiality of any information that it has received from its customer in terms of the National Credit Act and may only breach that confidentiality in terms of the provisions of the Act.



¹⁹⁹ s 68.

CHAPTER 4

PROTECTION OF THE RIGHT TO BANKING CONFIDENTIALITY AND SECRECY

4.1 *Introduction*

Should a bank breach its duty of banking confidentiality and secrecy the customer may protect this right in terms of the common law, either on the basis of the law of contract, specifically breach of contract, alternatively on the law of delict.

Willis is of the view that the basis of liability would be that of contract and not delict: "the basis of liability is not the insult or wounded feelings of the customer – i.e. no *actio injuriarum* lies. The basis of liability appears to be breach of contract as in the case of wrongful dishonour of cheques."²⁰⁰

However, as has been set out,²⁰¹ a bank's duty to maintain secrecy operates prior to the existence of the contract and continues to operate after the contract has been terminated. Accordingly the customer would not be able to rely on the breach of contract in circumstances where no contract came into existence or the contract has been terminated. In these circumstances the customer would have to rely on a delict having been committed by the bank.

Accordingly the customer's right to banking confidentiality and secrecy is protected through remedies of a contractual and a delictual nature. Furthermore, protection is also acknowledged in legislation which is set out below.

4.2. *Delictual remedy*

The basis in a delictual action where a breach of confidentiality and secrecy has taken place would be the violation of personality rights, more specifically the right to privacy.²⁰² The

²⁰⁰(n 26) 40.

²⁰¹chapter 3 par 3.3.

²⁰²Faul (n 2) 181.

protection is present where there is no contractual agreement such as before and after the bank-customer client has come into existence.²⁰³

It can be assumed that in accordance with the *boni mores* and legal policy that a legal duty is placed on a bank to maintain banking confidentiality and secrecy about a customer's financial position and not to disclose it to third parties. If a bank acts inconsistently with this its conduct would be unlawful leading potentially to delictual liability.²⁰⁴

4.2.1 Defects of the delictual remedy

The requirement of fault in delictual liability can in certain instances be problematic for a customer. Banks are not held strictly liable for the breach of the duty and in the circumstances a customer has to prove fault on the part of the bank. In practice a customer will have no access or insight into the internal organisation of the bank and it will be difficult for the customer to prove intent or negligence on the part of the bank. The bank on the other hand is in a strong position to dispute *prima facie* allegations of fault through evidence of its internal organisation and would be in a position to disprove with relative ease that it acted with intent or negligence.²⁰⁵

Should a customer be instituting action in terms of the *actio iniurium*, there are two elements that the customer would have to be successful in proving in order to be successful with his or her claim: wrongfulness and the intention to cause harm. Should a client rely on the *actio legis Aquiliae* the client would be able to rely on the negligence of the bank in which case he would have to prove that the bank did not act as a reasonable bank should have in exercising its duty of confidentiality and secrecy.²⁰⁶

Faul has suggested that given that a client would have difficulty in establishing fault the incorporation of the notion of strict liability into the law for the breach of a bank's duty of confidentiality and secrecy should be given consideration.²⁰⁷ She, however, acknowledges

²⁰³ibid.

²⁰⁴ibid.

²⁰⁵Faul (n 2) 181-182.

²⁰⁶Faul (n 2) 182.

²⁰⁷ibid.

that this would be difficult in our law given that the law is conservative and that fault is a traditional requirement to found delictual liability.²⁰⁸

4.3 *Contractual remedy*

If a bank breaches its duty of confidentiality and secrecy it would have committed a breach of contract and a customer would then be in a position to claim damages on this basis.²⁰⁹ Further, unlike in the case of the delictual remedy, a client would not be required to prove fault on the part of the bank²¹⁰ but merely that the breach occurred.

4.3.1 Defects of the contractual remedy

The bank's duty of confidentiality and secrecy based on contract generally exists for the duration of the contract.²¹¹

As set out above,²¹² however, a bank is obligated to maintain its duty of secrecy and confidentiality before it enters into the contract with the client and after the contract has terminated. Faul, in the circumstances, concludes that contractual liability does not present a basis for the protection of the duty of confidentiality and secrecy prior to the conclusion of the contract and thereafter.²¹³

4.4 *Statutory protection*

Banking secrecy and confidentiality is acknowledged directly or indirectly in South African legislation. The legislation, however, does not provide the basis of the duty of banking confidentiality and secrecy or the boundaries thereof as explained above.²¹⁴ Further, legislation that deals with banking confidentiality and secrecy also does not offer comprehensive protection to the right of banking confidentiality and secrecy.²¹⁵

²⁰⁸ibid.

²⁰⁹ibid.

²¹⁰Faul (n 2) 183.

²¹¹ibid.

²¹²chapter 3 par 3.3.

²¹³Faul (n 2) 183.

²¹⁴chapter 2 par 3.

²¹⁵Faul (n 2) 184.

Faul is of the opinion that as far as the content and scope of banking confidentiality and secrecy is concerned, legislation is not necessary and that the South African common law adequately provides for the protection of banking confidentiality and secrecy.²¹⁶

I tend to agree that legislation would be unnecessary as it has been accepted and acknowledged that the duty of confidentiality and secrecy rests on banks towards their clients. However, the recent promulgation of the Protection of Personal Information Act²¹⁷ (POPI) will impact on a bank's duty of confidentiality and secrecy towards its customers and, although the legislation has not commenced as yet, the extent of its impact is set out in the paragraphs below.

4.4.1 Protection of Personal Information Act 4 of 2013

The purpose of the POPI Act is to “give effect to the constitutional right to privacy, by safeguarding personal information when processed by a responsible party, subject to justifiable limitations ... to regulate the manner in which personal information may be processed.”²¹⁸

A “responsible party” is defined as a public or private body or any other person which alone or in conjunction with others determines the purpose of and the means for processing personal information²¹⁹ and would include a bank.

The processing of information is defined as:

- “any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including-
- (a) the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use;
 - (b) dissemination by means of transmission, distribution or making available in any other form; or
 - (c) merging, linking, as well as restriction, distribution, erasure or destruction of information”.²²⁰

²¹⁶ibid.

²¹⁷ 4 of 2013.

²¹⁸ s 2 (a) and (b).

²¹⁹ s 1.

²²⁰ ibid.

From the above definition it is clear that the collection by a bank of its customer's information and the sharing of such information would fall under the definition of processing of information.

Personal information is defined as “information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person”.²²¹ The definition thereafter sets out various kinds of information that would be regarded as personal which includes race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language, information relating to the education or the medical, financial criminal or employment history of a person, and contact information to mention some of what is considered as personal information. The list is not exhaustive.

From the definition, it is clear that the POPI Act is applicable to natural and juristic persons and would include information that banks usually hold in respect of their customers.

The Act applies to personal information that is processed by the responsible party by entering the information into a record and the responsible party is domiciled in South Africa or where not domiciled in South Africa the record is compiled in South Africa.²²² The Act does not apply to the processing of personal information in the course of a purely personal or household activity, that has been de-identified to the extent that it cannot be re-identified again, by or on behalf of a public body which involves national security or the purpose of which is the prevention, detection, including assistance in the identification of the proceeds of unlawful activities and the combating of money laundering activities to the extent that adequate safeguards have been established in legislation for the protection of such personal information or relating to the judicial functions of a court referred to in section 166 of the Constitution.²²³

The POPI Act sets out what is considered to be the lawful processing of personal information in Section 4 of the Act. Certain rights are given to data subjects in Section 5 of the Act.

²²¹ *ibid.*

²²² s 3(1).

²²³ s 6.

Personal information must be processed lawfully and in a reasonable manner that does not infringe the privacy of the data subject.²²⁴ Generally, save for a few exceptions, consent is required for information to be processed.²²⁵ Generally records of personal information must not be retained any longer than is necessary for achieving the purpose for which the information was collected or subsequently processed.²²⁶ Further processing of personal information must be compatible with the purpose for which it was collected.²²⁷

A responsible party must secure the integrity and confidentiality of the personal information that it holds in its possession or that is under its control.²²⁸ This accordingly places an obligation on a bank to protect the confidentiality of its customer's personal information. A responsible person must take steps to prevent the loss of or damage to or unauthorised destruction of personal information and the unlawful access to or processing of personal information.²²⁹ This places a duty on banks to safeguard their customer's personal information.

In terms of Section 20 of the Act an “operator or anyone processing personal information on behalf of a responsible party or an operator, must-

- (a) process such information only with the knowledge or authorisation of the responsible party; and
- (b) treat the personal information which comes to their knowledge as confidential and must not disclose it,

unless required by law or in the course of the proper performance of their duties.”

This section clearly places a duty on an operator, which is defined as “a person who processes personal information for a responsible party in terms of a contract or mandate, without coming under the direct authority of that party” with a duty to maintain a data subject's personal information as confidential and secret. Accordingly, if a bank employs the services of an operator to process personal information of its customer, the bank would have to ensure that the operator maintains the confidentiality and secrecy of its client's personal information.

²²⁴ s 9.

²²⁵ s 11.

²²⁶ s 14.

²²⁷ s 15.

²²⁸ s 19 (1).

²²⁹ s 2 (a) and (b).

The Act also restricts the transfer of personal information about a subject to a third party who is in a foreign country.²³⁰



²³⁰ s 72.

CHAPTER 5

MONEY LAUNDERING AND THE FINANCING OF TERRORISM

5.1 *Introduction to money laundering and the financing of terrorism*

5.1.1 Defining money laundering and the financing of terrorism

The activities that are labelled as "money laundering" are activities that have been associated with criminals for ages. For centuries criminals have been taking steps to hide and / or disguise the proceeds that they obtained as a result of their criminal activity in order to avoid incarceration and possible forfeiture of the proceeds.²³¹

The term "money laundering" itself is rumoured to have arisen from the use of Laundromats as front businesses by American gangs in the 1920s and 1930s.²³²

Money laundering is any activity that obscures the illicit nature, existence, location or application of the proceeds of a criminal activity.²³³ It is the manipulation of illegally acquired wealth in order to obscure its original source. It entails disguising money that was obtained through criminal activity in order that the money appears to have been obtained legally. This is done by a single transaction or a series of transactions.²³⁴

Section 1 (1) of the Financial Intelligence Centre Act²³⁵ defines money laundering as “an activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds”.

In the international sphere the financing of terrorism is the unlawful and wilful provision or collection of funds with the intention that they are used, alternatively with the knowledge that

²³¹ De Koker *South African money laundering and terror financing law* (1999) 1 - 3.

²³² De Koker (n 231) 1-4.

²³³ *ibid.*

²³⁴ Kruger *Organised crime and proceeds of crime law in South Africa* (2013) 51.

²³⁵ 38 of 2001.

they are to be used, either in whole or in part for an act that is regarded by the United Nations as a terrorist act.²³⁶

Terrorists and the financiers of terrorists use means similar to those that are used by money launderers to hide their money flows in order that they may remain anonymous.²³⁷

The distinction between money laundering and terrorism finance lies in the application of the property. Money laundering is in respect of property that is tainted as a result of its criminal source whilst financing of terrorism is in respect of property that is tainted as a result of its future intended application.²³⁸ Accordingly the term "reverse laundering" can also be used in respect of the funds that are used to finance terrorism.²³⁹

5.1.2 Money laundering in practice

A simple example of how stolen money can be laundered is where the criminal purchases a valuable item in one city and sells the same item in another city.²⁴⁰ However criminals that have more funds "to wash" and criminal organisations that generate large sums of illicit funds will require more complex money laundering schemes which could utilise shell companies and a web of international financial transactions.²⁴¹

There are generally three stages to a money laundering transaction: the placement stage, the layering stage, and the integration stage.²⁴² Not all money laundering schemes necessarily have all of these stages.

During the placement stage the proceeds of the criminal activity enter into the financial system. A criminal will move the money to another location and split a large amount into smaller amounts in order to deposit it into separate accounts. This is known as "smurfing" or "structuring".²⁴³

²³⁶ De Koker (n 231) 1- 4; article 2 *United nations convention for the Suppression of Financing of Terrorism* (2000).

²³⁷ De Koker (n 231) 1-4.

²³⁸ *ibid.*

²³⁹ De Koker (n 231) 1-4 – 1-5.

²⁴⁰ De Koker (n 231) 1-5.

²⁴¹ *ibid.*

²⁴² De Koker (n 231) 1-6.

²⁴³ *ibid.*

Layering is then used to separate the illicit proceeds from their criminal source with the aim of hiding the trail of the money. Examples are: drawing of money from one account and splitting it into other bank accounts at other banks; the quick purchase and sale of property; and depositing money into trust accounts of attorneys and having them repay it, alternatively, paying it to another person.²⁴⁴

Integration occurs when the original amount less the costs of laundering the funds is placed under the control of the criminal again under the guise of the amount being legitimate business funds.²⁴⁵

5.2. The development of money laundering and anti-terrorism legislation in both our jurisdiction and in other jurisdictions

5.2.1 The development globally

In the last two decades of the 20th century money-laundering control became a major strategy used to combat crime and terrorism.²⁴⁶ International concern about the cross-border funding of terrorism increased in the 1990s. The international community agreed that measures should be put in place to prevent the financing of terror. These measures included client identification, record-keeping and reporting of suspicious transactions.²⁴⁷

The aftermath of the terror events of “9/11” in America resulted in money laundering control measures becoming linked to measures to prevent the financing of terrorism. This control regime is generally referred to as the "Anti-Money Laundering / Combating of Financing of Terrorism" or "AML/CFT" regime.²⁴⁸

The use of financial institutions in the worldwide economy to launder money and finance terrorist activity became a significant problem that caused alarm in the international

²⁴⁴ *ibid.*

²⁴⁵ *ibid.*

²⁴⁶ De Koker (n 231) 1-3.

²⁴⁷ *ibid.*

²⁴⁸ *ibid.*

community. Worldwide and in South Africa stricter laws and increased penalties for money-laundering and terrorism-related activities emerged.²⁴⁹

A series of international conventions set the basis for the expansion of anti-money laundering legislation internationally.²⁵⁰ These conventions were: the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism; the 2000 United Nations Convention Against Transnational Organized Crime; the 2003 United Nations Convention Against Corruption. In addition there were a number of regional instruments and international industry standards that contributed to the development.²⁵¹ Further United Nations resolutions and some United States national laws all contributed to what is now the current international money laundering control framework.²⁵²

5.2.2 The development of South African law

The first legislation that contained provisions addressing money laundering was the Drugs and Drug Trafficking Act 140 of 1992. The application of the Act was limited only to the proceeds of specific drug-related offences.²⁵³

Thereafter the Proceeds of Crime Act 76 of 1996 was enacted which broadened the scope of the money laundering provisions to include proceeds generated by any type of criminal activity.²⁵⁴

Thereafter the Prevention of Organised Crime Act 121 of 1998 (the POCA) was enacted and it came into effect on 21 January 1999. The Financial Intelligence Centre Act 38 of 2001 followed and came into effect on 3 December 2001. It contains wider more far-reaching provisions than previous legislation and includes the creation of control duties for accountable institutions and increased compliance duties placed on other institutions including banks.²⁵⁵

²⁴⁹ Moorcroft *Banking law and practice* (2009) 11-1.

²⁵⁰ De Koker (n 231) 1-10.

²⁵¹ De Koker (n 231) 1-11.

²⁵² *ibid.*

²⁵³ De Koker (n 231) 2-3.

²⁵⁴ *ibid.*

²⁵⁵ *ibid.*

The POCA also repealed the Proceeds of Crime Act 76 of 1996 and the money laundering provisions of the Drugs and Drug Trafficking Act 140 of 1992 and it contains the provisions dealing specifically with money laundering.²⁵⁶

The Promotion of Constitutional Democracy Against Terrorism and Related Activities Act 33 of 2004 (POCDATARA) was adopted by the South African legislature in 2004 and came into effect on 20 May 2005 to address the financing of terrorist activities. It contains measures that are intended to prevent and combat terrorist and related activities and further to prevent and combat the financing of such activities.²⁵⁷ The legislation created new offences in respect of the financing of terrorism activity and broadened the scope of control duties on businesses to include the combating of financing of terrorism.²⁵⁸

5.3. Money laundering legislation

There are various pieces of legislation currently in place that govern aspects of money laundering in South Africa. A brief overview of the relevant provisions of this legislation is set out below.



5.3.1 The Prevention of Organised Crime Act 121 of 1998

This Act is applicable to proceeds that have been obtained from unlawful activity. “Proceeds” is defined in the Act as:

“any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived”²⁵⁹

It is apparent that “proceeds” is very wide. It includes property, services, advantages, benefits or rewards obtained as a result of unlawful activity.

²⁵⁶Schulze (n 15) 603.

²⁵⁷ Kruger (n 235) 155.

²⁵⁸ De Koker (n 231) 2-3.

²⁵⁹ s 1(1).

Unlawful activity is defined as “any conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of the Act and whether such conduct occurred in the Republic or elsewhere.”²⁶⁰

Accordingly any proceeds that are obtained from unlawful activity will be subject to the provisions of the Act which apply retrospectively even though the Act itself is not retroactive.²⁶¹

In terms of Section 4 of the Act a person commits a money-laundering offence if:

“Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and—

(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or

(b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person, which has or is likely to have the effect—

(i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof;

(ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere—

(aa) to avoid prosecution; or

(bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence, shall be guilty of an offence.”

In terms of the above there must be some form of agreement, arrangement or transaction that will have the effect of concealing the nature of and dealings with the property or that assists a person who committed an offence to avoid being prosecuted or that removes or diminishes property that was acquired by the commission of an offence.²⁶²

In terms of Section 5 of the Act it is an offence to help anyone launder the proceeds of unlawful activities and in terms of Section 6 of the Act it is an offence to acquire, use or possess the proceeds of unlawful activities.

²⁶⁰ *ibid.*

²⁶¹ Moorcroft (n 250) 8-2.

²⁶² Kruger (n 235) 53.

5.3.2 The Financial Intelligence Centre Act 38 of 2001

The Financial Intelligence Centre Act²⁶³ (FICA) works alongside the Prevention of Organised Crime Act²⁶⁴ and provides the framework for the fight against money laundering.²⁶⁵

The FICA is applicable to accountable institutions, supervisory bodies, reporting institutions and persons who carry on business.²⁶⁶ Banks and other financial institutions are considered as accountable institutions²⁶⁷ in terms of Schedule 1 of the FICA. FICA requires that accountable institutions know who and what their customers are²⁶⁸ and they are obliged to identify and verify new and existing customers, keep records of each of their customer's identities and to keep records of the nature of the transactions, the parties to the transactions and the amounts that are involved.²⁶⁹

Further in terms of FICA accountable institutions are also required to formulate and implement internal rules,²⁷⁰ train their employees and monitor compliance²⁷¹ with the Act.²⁷²

The Financial Intelligence Centre (FIC) was established in terms of Section 2 of FICA. In terms of the Act it has been tasked with identifying proceeds that originate from unlawful activities; the combating of money laundering; the disclosure of information to authorities and the exchange of information with bodies similar to the FIC in other countries.²⁷³ In order to perform its functions the FIC is required to process, analyse and interpret information; inform and co-operate with investigating and other authorities and give guidance.²⁷⁴

²⁶³ 38 of 2001.

²⁶⁴ 121 of 1998.

²⁶⁵ Moorcroft (n 250) 8-3.

²⁶⁶ *ibid.*

²⁶⁷ *ibid.*

²⁶⁸ *ibid.*

²⁶⁹ *ibid.*

²⁷⁰ s 42.

²⁷¹ s 43.

²⁷² Moorcroft (n 250) 8-3.

²⁷³ Moorcroft (n 250) 8-3, and s 3.

²⁷⁴ Moorcroft (n 250) 8-3.

5.3.3 The Banks Act 94 of 1990

In terms of the Banks Act a bank as part of its risk management framework has to establish an independent compliance function which is headed by a compliance officer.²⁷⁵

A bank also has to implement and maintain policies and procedures that guard against it being used for purposes of market abuse and financial fraud which includes insider trading, market manipulation and money laundering.²⁷⁶

In terms of the regulations to the Act a bank is also obliged to report any reportable offence in writing to the Registrar within 30 days of it becoming aware of the offence having taken place.²⁷⁷ One of the reportable offences listed is any money-laundering activity in which the bank was involved and which was not identified in a timely manner and was not reported as required by law including in terms of the relevant requirement contained in FICA.²⁷⁸

The policies and procedures that are put in place by a bank must enable the bank to “maintain high ethical standards in all its business transactions”²⁷⁹ and must facilitate the reporting of suspicious customers and transactions.²⁸⁰ Further a bank has a duty to maintain and keep records and a clear audit trail.²⁸¹

²⁷⁵ Moorcroft (n 250) 8-9, and s 60A (2) and (3).

²⁷⁶ Moorcroft (n 250) 8-9.

²⁷⁷ reg 47 (2) of GN R3 in GG 30629 of 1 January 2008.

²⁷⁸ reg 47 (3) of GN R3 in GG 30629 of 1 January 2008.

²⁷⁹ reg 50 (2) d of GN R3 in GG 30629 of 1 January 2008.

²⁸⁰ reg 50 (2) (g) of GN R3 in GG 30629 of 1 January 2008.

²⁸¹ *ibid.*

CHAPTER 6

THE DUTIES PLACED ON INSTITUTIONS, MORE SPECIFICALLY ON BANKS BY MONEY LAUNDERING AND ANTI-TERRORISM LEGISLATION

6.1 *General compliance*

A two-stage approach to counter money-laundering was adopted in the Financial Intelligence Centre Act²⁸² (FICA). This was done by:

- 1 imposing a duty on what could be considered by criminals as possible havens for laundered money to keep records and report suspicious conduct; and
- 2 the creation of offences as a result of non-compliance.

In this respect FICA created a host of general money-laundering compliance obligations:

- 1 All businesses as well as all persons who manage and / or are employed by a business have a duty to report suspicious and unusual transactions;²⁸³
- 2 Certain transactions that involve an amount of cash in excess of a prescribed amount must be reported by reporting institutions;²⁸⁴ and
- 3 International travellers that intend to convey more than a prescribed amount of cash must file a report of such an intention.²⁸⁵

Accountable institutions which include banks by definition (as an accountable institution in FICA includes a person who carries on the "business of a bank" as defined in the Banks Act 94 of 1990) also have the following duties:²⁸⁶

- 1 to identify their clients and to verify their identities;
- 2 to keep a record of specified information;
- 3 to appoint a compliance officer;
- 4 to draft internal rules and to train employees on their obligations; and

²⁸² 38 of 2001.

²⁸³ s 1 and schedule 3.

²⁸⁴ s 28.

²⁸⁵ s 30.

²⁸⁶ De Koker (n 231) 6-3.

- 5 to report electronic transfers of money in excess of a prescribed amount that are transferred in and out of South Africa.

6.2 *The duty to report transactions*

Accountable institutions are obliged to report the following to the Financial Intelligence Centre (FIC):

- 1 cash transactions above a prescribed limit;²⁸⁷
- 2 property associated with terrorist and related activities;²⁸⁸
- 3 the conveyance of cash in and out of the country in excess of prescribed amounts;²⁸⁹
- 4 international electronic transfers;²⁹⁰ and
- 5 suspicious and unusual transactions²⁹¹

The duty of accountable institutions to report is considered in the paragraphs below.

6.2.1 Suspicious and unusual transactions under FICA

The duty to report suspicious and unusual transactions is regulated by section 29 of FICA. It provides that any person who carries on a business, who manages or is in charge of a business or who is employed by a business, and who knows or ought reasonably to have known or suspected certain facts, must report the grounds for the knowledge or suspicion and prescribed particulars regarding the transaction to the FIC within a prescribed period after he acquired the knowledge or formed the suspicion.

Examples of facts referred to in the section may relate to:

- 1 The business receiving or about to receive the proceeds of unlawful activities or property that is connected to an offence that relates to the financing of terrorist and related activities.

²⁸⁷ s 28.

²⁸⁸ s 28A.

²⁸⁹ s 30.

²⁹⁰ s 31.

²⁹¹ s 29 (1) and (2).

- 2 A transaction or series of transactions to which the business is a party that:
 - 2.1 is facilitated or is likely to facilitate the transfer of proceeds of unlawful activities or to property related to an offence in respect of the financing of terrorist and related activities;
 - 2.2 does not have an apparent business or lawful purpose;
 - 2.3 is conducted in such a way that it is to avoid giving rise to a duty to report under FICA;
 - 2.4 may be relevant to the investigation of an attempted evasion or evasion of a duty to pay any tax, duty or levy; or
 - 2.5 relates to an offence in respect of the financing of terrorist and related activities; and
- 3 The business has been used or will be used for money-laundering purposes or to facilitate the commission of an offence in respect of financing of terrorist and related activities.²⁹²

In terms of Section 29 (2) of FICA where enquiries have been made about a transaction, even if the transaction was not subsequently concluded, those enquiries must also be reported. This would be necessary where the person who must file the report knows or suspects that the transaction that was enquired about could have resulted in the consequences set out above if the transaction had indeed been concluded.

In terms of section 52(2) of FICA a person commits an offence should he or she negligently fail to file the required report if he or she reasonably ought to have known or suspected that a fact existed which resulted in an obligation to file a report under section 29. In this respect knowledge includes both actual knowledge and wilful blindness, and suspicion must be given its normal meaning.²⁹³ However a suspicion that is not founded on a clearly definable ground is not reportable in terms of section 29.²⁹⁴

²⁹² De Koker (n 231) 7-11 – 7-12.

²⁹³ De Koker (n 231) 7-14.

²⁹⁴ *ibid.*

Section 29 (1) requires that a reporter must report both the grounds for knowledge and suspicion as well as certain prescribed particulars concerning the transaction (series of transactions). Such grounds must reasonably support a suspicion.²⁹⁵

FICA requires in terms of sections 29 and 52(2) that a report has to be filed if a person:

- 1 knows that a transaction must be reported in terms of section 29; or
- 2 he has grounds upon which another person with his same expertise and background would reasonably form such a belief or suspicion.

The facts that a person ought reasonably to have known or suspected and the conclusions that should have been drawn are those facts that would have been reached by a reasonably diligent and vigilant person having both:

- 1 the general knowledge, skill, training and experience that is reasonably expected of a person in the position of that particular person; along with
- 2 the general knowledge, skill, training and experience that he in actual fact has.²⁹⁶

De Koker provides the following examples of facts which may give rise to a suspicion of possible money laundering:

- 1 When a person provides information that is vague or contradictory.
- 2 A customer that has no record of employment or involvement in a business (past or present) but engages in large transactions on a frequent basis.
- 3 A customer that is reluctant to provide details about his business or funds source or those details are ill-defined.
- 4 A customer who uses a financial institution located far from his home or work.
- 5 A customer who is does not want to disclose other bank or business relationships.
- 6 A customer operating different accounts at different branches of the same financial institution.
- 7 A customer that enters into transactions that out of the ordinary for that particular customer given the portfolio of the client.

²⁹⁵ *ibid.*

²⁹⁶ De Koker (n 231) 7-15.

- 8 The transactions entered into by the client do not appear to have a legitimate business purpose.
- 9 A customer that makes large or frequent deposits of cash and which do not seem appropriate when considering the profile of the client.
- 10 A corporate customer who makes deposits or withdrawals in cash more than in other forms.
- 11 A customer that makes several deposits on the same day at different branches of the same financial institution.
- 12 A customer who is known to be an economic criminal.

De Koker suggests the following facts relating to transactions that may, depending on the circumstances, be relevant:

- 1 Where a transaction involves an unusually large amount of cash if one considers the profile of the client;
- 2 When funds are deposited into several related accounts that are then moved into one account or disbursed to a common recipient or recipients.
- 3 The purchasing of securities which are held on behalf of a customer and the transaction does not suite the profile of the customer.
- 4 The purchasing or selling of securities without a clear purpose.
- 5 Exchanging of small bills for large bills frequently.
- 6 Transactions involving frequent deposits and withdrawals of large amounts of currency without an apparent reason.
- 7 The payment of commissions or agent's fees that are excessive to what is normally payable.
- 8 The purchasing of commodities at prices that are significantly above or below market prices.
- 9 The intensive use of an account that had previously been inactive for no apparent legitimate personal or business reason.
- 10 The repayment of a debt that is long past due with no plausible explanation.
- 11 Regularly buying securities and selling them for little profit or even at a loss.

- 12 Trust accounts that show substantial cash deposits into them and then the immediate withdrawals thereof.²⁹⁷

Failure to file the report in terms of section 29 is an offence and has the penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding R10 million rand.²⁹⁸ and in terms of Regulation 29 of Money Laundering and Terrorist Financing Control Regulations it is an offence to fail to send a report under section 29 of FICA to the FIC within the prescribed period.

Regulation 27 of the Money laundering and terrorist financing control regulations prescribe the contents of the internal rules of an accountable institution in respect of reporting suspicious and unusual transactions. In this respect the internal rules of an accountable institution have to:

- 1 set out the necessary processes and working methods that will cause suspicious and unusual transactions to be reported without undue delay;
- 2 set out the necessary processes and working methods to enable staff to recognise potentially suspicious and unusual transactions or series of transactions;
- 3 set out the responsibility of the management of the institution in respect of compliance with FICA, the Money Laundering and Terrorist Financing Control Regulations and the internal rules;
- 4 allocate responsibilities and accountability in order to ensure that the staff duties that concern the reporting of suspicious and unusual transactions are complied with;
- 5 provide which disciplinary steps will be taken against relevant staff members for non-compliance with FICA, the Money Laundering and Terrorist Financing Control Regulations and the internal rules; and
- 6 they have to take into account any guidance notes that concern the reporting of suspicious or unusual transactions which are applicable to the institution.²⁹⁹

²⁹⁷ De Koker (n 231) 7-17 – 7-18.

²⁹⁸ s 68(1).

²⁹⁹ De Koker (n 231) 9-8 – 9-9.

It is an offence in terms of Regulation 29 of Money Laundering and Terrorist Financing Control Regulations to fail to develop internal rules in accordance with regulation 27 as set out above.

6.2.2 Duty to report threshold transactions under FICA

In addition to the duty to report suspicious transactions FICA creates obligations to report transactions with cash which are above stipulated thresholds and the conveyance and electronic transfers into or out of South Africa.

Section 1 defines "Cash" as "coin and paper money of South Africa or of another country that is designated as legal tender and that circulates as, and is customarily used and accepted as, a medium of exchange in the country of issue; and travellers' cheques."

In terms of Section 28 an accountable institution has to report to the FIC within the prescribed period and manner if an amount of cash in excess of the prescribed amount in a transaction is paid to the customer or someone acting on the customer's behalf by the institution or is received by the institution from the customer or someone acting on the customer's behalf or from a person on whose behalf the customer is acting.

The manner in which the report has to be filed is prescribed³⁰⁰ and the institution that filed the report can be requested by the FIC to file additional information.³⁰¹ Persons that comply with this requirement are protected against criminal and civil liability if they acted in good faith.³⁰² Further they are relieved of any duty of confidentiality (except attorney-client privilege).³⁰³

The failure, however, to act in accordance with the provision is an offence and will result in a penalty which is imprisonment for a maximum period of 15 years or a fine not exceeding R10 million.³⁰⁴

³⁰⁰ s 32 (1).

³⁰¹ s 32 (2).

³⁰² s 38.

³⁰³ s 37.

³⁰⁴ s 51 and 68.

Section 30 sets out the provisions relating to the conveyance of cash to or from South Africa. In terms of this provision a person who wants to convey cash across the South African border in excess of prescribed amount must report certain particulars regarding the conveyance to the person authorised by the minister for that purpose. The manner in which these particulars must be filed and the required particulars to be furnished are prescribed in the Act.³⁰⁵

Section 31 sets out the provisions relating to electronic transfers of money to or from South Africa. In terms of the section an accountable institution that sends money in excess of a prescribed amount out of South Africa via electronic transfer; or receives such a sum from outside South Africa on behalf of or on the instruction of another person through electronic transfer must file a report with the FIC after such a transfer has occurred. The Act prescribes the period within which the report has to be filed, the particulars to be reported and the manner in which it has to be filed.³⁰⁶ An accountable institution or reporting institution that files such a report may be requested to provide additional information.³⁰⁷ Persons who comply with this obligation are protected against criminal and civil liability provided they have acted in good faith.³⁰⁸ In addition they are relieved of any duty of confidentiality that may prevent compliance with this obligation except for the attorney-client privilege which is protected.³⁰⁹ The failure to file a report is an offence that may result in a penalty of imprisonment for a maximum of 15 years or a fine not exceeding R10 million.

6.2.3 Duty to report property that is linked to terrorist activity

Section 28A sets out the duty to report property that is linked to terrorist activity under FICA and was inserted into FICA by the Protection of Constitutional Democracy against related Activities Act³¹⁰ (POCDATARA). In terms of the section accountable institutions are required to file a report with the FIC when they discover that they are in possession or in control of property that is linked to terrorism. In terms thereof an accountable institution that has in its possession or under its control property that is owned or controlled by or on behalf of, or at the direction of any entity which has committed, or attempted to commit, or facilitated the commission of a specified offence as defined in POCDATARA (including

³⁰⁵ s 30 (1) and 32 (1).

³⁰⁶ s 31 and 32 (1).

³⁰⁷ s 32.

³⁰⁸ s 38.

³⁰⁹ s 37 and De Koker (n 231) 7-43 – 7-44.

³¹⁰ 33 of 2004.

terrorist financing), or a specific entity identified in a notice issued by the President under section 25 of POCDATARA, must report that fact and the prescribed particulars to the FIC. The director of the FIC may direct an accountable institution which has made such a report to advise whether it is still in possession or control of the property in respect of which the report had been made at such intervals as determined and that it reports any change in the possession or control of that property.

In terms of regulation 24(1) of the Money Laundering and Terrorist Finance Control Regulations the initial report must be sent to the FIC as soon as possible, but not later than 5 business days after it was established that the institution has property that must be reported in terms of section 28A of FICA by a natural person who is an accountable institution or who is in charge of, manages or is employed by an accountable institution.

These reports must be filed in the format prescribed by the FIC and there is provision for them to be sent to the FIC electronically.³¹¹ Regulation 22A sets out the particulars that must be provided when these reports are filed. In terms thereof the report must contain details of the reporter, the property that is involved, the controller and persons who have an interest in the property.

Section 28A does not compel an accountable institution to determine whether it controls relevant property or to search for links with terrorist property or names of suspected terrorists in its client database. However, De Koker submits that a well-governed business that manages its legal and reputational risks will apply due diligence measures and screen their clients and accounts against information that is publicly available for terrorists and terrorist groups. Screening would assist businesses to avoid liability in terms of POCDATARA especially if in a given context a decision not to screen clients would amount to wilful blindness or negligent ignorance. It will be especially difficult to counter allegations of negligent ignorance or wilful blindness if a business fails to screen clients where such screening is standard practice for similar businesses.³¹²

It is not only property that is linked to persons listed in terms of section 25 of POCDATARA that has to be reported. The provision also extends to any other person who has committed or

³¹¹ regulation 22 of the Money Laundering and Terrorist Financing Control Regulations.

³¹² De Koker (n 231) 7-44 - 7-45.

attempted to commit or facilitated the commission of a "specific offence". A business should consider not only possible links with persons that are on the UN list but it should also consider whether it has property that is linked to any person who involves himself in terrorism as defined in POCDATARA. These persons would include rebel groups and warlords in specific countries, members of right-wing groups aiming to overthrow the government by violent means and prominent terrorist groups in other countries not listed on the UN list.³¹³

In terms of regulation 24 (1) of the Money Laundering and Terrorist Financing Control Regulations the initial report must be sent to the FIC as soon as possible, but no later than 5 business days after it was established that the accountable institution had property that must be reported in terms of section 28A of FICA by a natural person who is an accountable institution or who is in charge of, manages, or is employed by an accountable institution. The report must be filed in the format prescribed by the FIC and sent to the FIC electronically. The particulars that must be provided when these reports are filed are prescribed in regulation 22A.³¹⁴

6.2.4 Duty of persons to file report if in position of authority

Section 34 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA) places an obligation to file a report on a person that holds a position of authority.

The following persons, amongst others, are listed in section 34 as persons that hold positions of authority: any person who has been appointed as chief executive officer or an equivalent officer of any agency, authority, board, commission, committee, corporation, council, department, entity, financial institution, foundation, fund, institute, service, or any other institution or organisation, whether established by legislation, contract or any other legal means.

Included in the list above is an executive manager of any bank or other financial institution.³¹⁵

The relevant portion of section 34 reads as follows:

³¹³ *ibid.*

³¹⁴ De Koker (n 231) 7-46.

³¹⁵ De Koker (n 231) 7-49 – 7-50.

"(1) any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed – (a) an offence under Part 1, 2, 3, or 4, or section 20 or 21 (in so far as it related to the aforementioned offences) of Chapter 2; or (b) the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100 000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official."

The failure to file the report is an offence of which the maximum penalty is a fine or imprisonment for a period not exceeding 10 years.³¹⁶

The above PRECCA reporting obligation and the obligation to file a report in terms of section 29 of FICA may overlap. The example used by De Koker in this respect is if a director of an estate agency company suspects that a customer may be laundering proceeds of crime by the purchase of a property the director has an obligation to file a report in terms of section 29 of FICA. If, given the customer's profile, the director also suspects that the crime that may have given rise to the proceeds is one of the offences that are listed in section 34 (1) of PRECCA the director must then also file a report in terms of section 34 of PRECCA or cause it to be filed. De Koker is of the view that the overlap is unfortunate. In this respect persons who file reports in terms of FICA enjoy extensive legal protection and their identities are protected and they may not be compelled to testify. This legal protection is, however, not extended to persons who file a report in terms of PRECCA. Their protection (and the danger of a person being forewarned about a potential section 29 report) is dependent on whether strict confidentiality is maintained by the public officials involved such as the police officials and prosecutors.³¹⁷

6.2.5 Duty to report where there is a suspicion in terms of POCDATARA

Section 12 of POCDATARA introduced an obligation to report certain offences linked to terrorist activity including the financing of terrorism. The Act furthermore amended section 29 of FICA by broadening its scope to include transactions that are linked to terrorist and terrorist related activity. Further, as set out above, POCDATARA also inserted section 28A into FICA in terms of which an accountable institution must file a report with the FIC if it discovers that it possesses or controls property that is linked to terrorism.

³¹⁶ s 26 (1) (b).

³¹⁷ De Koker (n 231) 7-52.

In terms of section 12(1) of POCDATARA a person has a duty to file a report when he has a reason to suspect that any other person intends to commit or has already committed an offence referred to in Chapter 2 of POCDATARA, or, alternatively, is aware of the presence at any place of a person who is so suspected of intending to commit or having committed such an offence.

In respect of the first leg of section 12(1) a person has to file a report if he has reason to suspect that another person is or was involved in an offence under Chapter 2 of POCDATARA.

The Chapter 2 offences include the offence of terrorism as well as the Convention offences. The latter category of offences includes the financing of terrorism offences in terms of section 4. Accordingly an employee of a business that suspects a client to have been engaged in a transaction to finance terrorism would have a duty to file a report in terms of section 29 of FICA. In addition he would also have a duty to file a report in terms of section 12. These two duties will not always overlap as section 12 is broader than section 29 in certain respects. A section 29 report must be filed where the business itself is in some way involved in the reportable transaction. For instance this would be where the business was a party to the reportable transaction or if it was abused for laundering or terrorist financing purposes. Section 12 on the other hand does not require that the reporter or the business be involved in transactions. Therefore if a bank has reason to suspect that a client is engaging in such activities a section 12 report has to be filed even although the client may not have abused its relationship with the bank to commit any of those activities.³¹⁸

A person / business has a duty to file a report under the second leg of section 12(1) when he is aware of the location of any person that is suspected of intending to commit or having committed an offence under Chapter 2 of POCDATARA. In this respect if a financial institution suspects that a client is engaging in terrorism or in the financing thereof its customer due diligence procedures should ensure that it will have the residential and possibly other addresses of the client. Depending on the particular circumstances it is possible that the business may have grounds to believe that the client is actually present at his residential or

³¹⁸ De Koker (n 231) 7-52 – 7-53.

business address. Further, in certain cases, the institution may have grounds to believe that the client intends to return to the premises of the business to complete a transaction. De Koker submits that in cases such as those the business and / or the relevant employees have a duty to file a section 12 report.³¹⁹

6.2.6 Filing of a report

The reporting procedures and requirements with which a financial institution must comply are set out in the regulations to FICA. In terms thereof a report must be sent as soon as possible but within 15 business days of the relevant person becoming aware of a fact concerning a transaction.³²⁰ The FIC may however approve the late filing.³²¹ There is a "batch reporting tool" available to businesses that have to file a large number of reports (such as banks). Regulation 22 requires an internet-based reporting portal provided by the FIC (or such other method that has been developed by the centre for that purpose and that has been made available to a person who wishes to file a report.)

The following prescribed information has to be included in the report:

- 1 the person or entity that is filing the report;
- 2 the transaction or series of transactions that are being reported;
- 3 any account that was involved in the transaction;
- 4 the person conducting the transaction or the entity on whose behalf it is conducted;
- 5 the representative (if there is one) who has conducted the transaction on behalf of another;
- 6 general information regarding the transaction containing a full description of the suspicious or unusual transaction or series of transactions as well as the reason why it is deemed to be suspicious or unusual;³²²
- 7 the action that the natural or legal person who is filing the report or other entity on whose behalf the report is made has taken has to be set out; and
- 8 the documentary proof is available.

³¹⁹ De Koker (n 231) 7-53- 7-54.

³²⁰ reg 24.

³²¹ reg 24(3).

³²² reg 23.

A report must be filed in accordance with the prescribed manner.³²³

6.3 Record-keeping and compliance management obligations

Section 22 of FICA compels an accountable institution to keep records of the following information:

- 1 the identity of the customer;
- 2 if the customer is acting on behalf of another person then the identity of the person on whose behalf the customer is acting as well as the other person's authority to act on behalf of the customer;
- 3 the manner in which the identity of the persons above was established and the name of the person who obtained that information as well as any information regarding authority (where applicable) on behalf of the institution;
- 4 the nature of that business relationship or transaction;
- 5 in the case of a transaction the amount involved and the parties to the transaction;
- 6 all accounts that are involved in transactions concluded by that accountable institution in the course of the business relationship and a single transaction; and
- 7 any document or copy of a document that was obtained by the accountable institution to verify a person's identity in terms of section 21 of FICA.

The accountable institution has to keep the records that relate to the establishment of a business relationship for at least five years from the date on which the business relationship has been terminated.

Records that relate to a single transaction that was concluded must be kept for at least five years from the date on which that transaction was concluded. FICA allows that these records be kept in electronic form.³²⁴

In terms of section 26 of FICA an authorised representative of the FIC has access (during ordinary working hours) to any records that are kept by or on behalf of an accountable

³²³ s 32 (1) of FICA.

³²⁴ De Koker (n 231) 9-3 - 9-4.

institution and may examine, make extracts from or copies of such records.³²⁵ Except in the case of records to which the public is entitled to have access the authorised representative can only gain access to the records by virtue of a warrant issued in chambers by a magistrate or regional magistrate or judge.³²⁶ Such a warrant may only be issued if it appears to the judge, magistrate or regional magistrate from information that is on oath or affirmation that there are reasonable grounds to believe that those records may assist the FIC to identify the proceeds of unlawful activities or to combat money laundering activities. A warrant issued in terms of section 26 may contain such conditions regarding access to the relevant records as the judge, magistrate or regional magistrate deems appropriate.³²⁷ The accountable institution concerned must without delay provide the authorised representative of the FIC with all reasonable assistance necessary to enable him to exercise this right of access to the records. The failure to render such assistance is considered an offence.³²⁸

6.4 Information that must be provided

Sections 27 and 35 of FICA also create mechanisms in terms of which an accountable institution can be compelled to provide information to the FIC. In this respect if an authorised representative of the FIC requests an accountable institution to advise whether a specified person is or has been a client of the accountable institution, or if a specified person is acting or has acted on behalf of any client of the accountable institution, or a client of the accountable institution is acting or has acted for a specified person, the accountable institution must inform the FIC accordingly.³²⁹

In terms of section 35 a monitoring order may be issued ordering that an accountable institution disclose certain information relating to a specified person, account or facility. The failure to do so will result in a fine of R10 million or imprisonment for a maximum of 15 years³³⁰ plus there may be money seized and forfeited to the state upon conviction.³³¹

³²⁵ s 26 (1).

³²⁶ s 26(2).

³²⁷ s 26 (4).

³²⁸ s 49.

³²⁹ s 27.

³³⁰ s 54 and S 68 (1).

³³¹ s 70.

In terms of Section 32 (2) and (3) of FICA those persons who file reports in terms of sections 28, 29 and 31 are compelled to provide such additional information regarding the report and the grounds for the report as may reasonably be required in order for the FIC to perform their functions.



CHAPTER 7

CONCLUSION: THE EFFECT OF THE DUTIES OF REPORTING AND PROVIDING OF INFORMATION PLACED ON FINANCIAL INSTITUTIONS ON THE DUTY OF CONFIDENTIALITY AND SECRECY

Section 37 of FICA provides as follows:

“no duty of secrecy or confidentiality or any other restriction on the disclosure of information, whether imposed by legislation or arising from the common law or agreement, affects compliance by an accountable institution, supervisory body, reporting institution, the South African Revenue Service or any other person with a provision of this Part.”

Accordingly in terms of Section 37 of FICA the obligations to report and disclose information override any duty of confidentiality or secrecy owed to the bank’s customer whether such a duty is imposed by law or is by agreement.³³²

In terms of Section 38 of FICA criminal or civil action cannot be instituted against a natural or legal person (or against persons acting on their behalf) who complied in good faith with the obligations set out in Chapter 3 of FICA. This protection is broad and would include protection against civil action that may be based on a breach of the duty of confidentiality and secrecy by a bank.³³³

As set out in chapter 3 of this dissertation there are exceptions to a bank’s duty of confidentiality and secrecy. The reporting and information-providing obligations that have been set out in chapter 7 are examples of statutory provisions that limit the right to confidentiality and secrecy. They could be said to fall under two exceptions, namely where disclosure is required under compulsion by law and where there is a duty to the public to disclose.

Accordingly a bank who owes a client a duty of confidentiality and secrecy will not breach that duty should it file a report in terms of FICA. The proviso to this, however, is that in order

³³² Moorcroft (n 250) 8-7; s 37(1) and (2).

³³³ De Koker (n 231) 7-40; and s 38 of FICA.

to enjoy the protection provided by FICA the bank must file the report in strict accordance therewith.

For example, where a suspicious and unusual transaction is reported the report must meet the requirements of section 29 and it must be based on one of the grounds that are set out in section 29. Should the report fall outside of section 29 it will not be protected under sections 37 and 38 of FICA and it may then constitute a breach of the duty of confidentiality and secrecy. This also applies to any of the other reporting provisions of Chapter 3 (Part 3) of FICA.

FICA accordingly overrides the duty of confidentiality and secrecy in South African law. No duty of confidentiality and secrecy or any other statutory or common law restriction on the disclosure of information affects the duty of a financial institution to file a report in terms of FICA as required or to allow access to information in terms of Chapter 3 (Part 3) of FICA.³³⁴

From the above it is apparent that whilst a bank has a duty of confidentiality and secrecy towards its customer this duty is subject to the provisions of FICA.

In the circumstances it can be concluded that the information that customers have provided to their banks is protected by the duty of confidentiality and secrecy subject to the common law exceptions as have been extended by the anti-money-laundering and anti-terrorism legislation.

Even although the duty of banking confidentiality and secrecy has been limited substantially by the anti-money-laundering and anti-terrorism legislation, it cannot be said that there is no longer such a duty, as in Italy. South Africa, however, unlike the Cayman Islands, is in line with the international community with its reporting of suspicious transactions and regime of international cooperation.

³³⁴ De Koker (n 231) 7-19.

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