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The right to terminate a banking relationship unilaterally

by

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Submitted in partial fulfilment of the requirements for the degree
Master of Laws (Banking Law)

In the Faculty of Law,
University of Pretoria

November 2018

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Declaration

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Summary

In recent times it has come to the attention of the public that a bank can terminate a bank-client relationship unilaterally based on reasons or no-reasons at all. The public's attention was drawn to this by the controversial closure of the *Oakbay's* accounts by the prominent banks in South Africa. This was not the first time that such a closure of bank accounts occurred in South Africa and the locus classicus in this regard is *Bredenkamp v Standard Bank*. In this matter the Supreme Court of Appeal was bestowed the task to determine the constitutionality of the cancellation clause found in a standard form contract that allowed a bank to terminate its relationship with a client. In order to determine the constitutionality of the clause the court applied the constitutionality test as set out in *Barkhuizen v Napier*, whereafter it was found that the cancellation was just.

This dissertation will therefore investigate whether a bank can unilaterally decide to proceed with the termination of the bank-client relationship. It will be argued that a bank may proceed to do so, but a further investigation is required to determine the reasons why the bank might proceed to terminate a bank-client relationship unilaterally and the rationale thereof. Consideration will be given to the enactment of the Financial Intelligence Centre Amendment Act, the development of the common law under the Constitution, and international best practice that have been developed to combat the financing of terrorism and money laundering. The latter may impose a duty on a bank under certain circumstances to terminate the bank-client relationship unilaterally.

Acknowledgements

First and foremost I would like to thank my supervisor Prof Reghard Brits of the University of Pretoria for his guidance from the start of the process when I was considering the topic during my undergrad studies. Prof Brits allowed me to draft the paper and explore different perspectives as I deemed fit, however always steering me in a direction that I remain to the point and relevant to my topic. Thank you for the University of Pretoria and the Mercantile Law department for always inspiring us to be more than just legal practitioners.

My parents and my wife were the pillar of support during the late nights and weekends when I was conducting my research and writing this dissertation. I truly understand the value of support of others and that there is not a thing like a self-made man. Thank you for all the support in completing this dissertation. Thank you.

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1. Introduction

Banks are a central feature of any functional country's economy and it can be argued that banks fulfil a public purpose to assist with the growth of the country's economy. In South Africa the formal banking sector is mostly privatised and thus privately own. The main objective of any such private company is naturally to maximise the profits for the shareholders of that company. South Africa is also regarded by many as the gateway to Africa that enables foreign investors access to the second largest market on the continent.

The present constitutional paradigm dictates that the conduct of a person is judged against the constitutional values of human dignity, equality and freedom.¹ Can the possibility therefore exist that a bank may unilaterally terminate a relationship with its client without impeaching constitutional values? The aim of this dissertation is to establish the fairness and reasonableness of such conduct in light of the constitutional developments with reference to the duty to develop the common law, international statutory obligations subscribed to as well as the purposes of legislation specifically aimed at combatting money laundering and/or the financing of terrorism.

This dissertation will further investigate whether a bank can use its own discretion to cancel or suspend a bank-client relationship where such termination may not directly fall within the domain of legislation and is based on reputational risk and within the pillars of private contract law. The latter cancellation is often based on the reputational damage that a bank will supposedly suffer when the bank-client relationship is continued to be endure as a consequence of the possibility that the specific client may be the future subject of the prosecuting authorities. This termination of the bank-client relationship is then usually aimed at mitigating the risks pertaining to a client and the fact that the consensus between the parties has unilaterally shattered due to the purported unlawful conduct of that client.

There are two main grounds on which banks can terminate a bank-client relationship: "*economic grounds*" and "*non-economic grounds*". The crisp question to investigate is whether a bank can unilaterally terminate a bank-client relationship based on non-economic reasons, read together with the Financial Intelligence Centre Act 38 of 2001 as amended by the Financial Intelligence Centre Amendment Act 1 of

¹ Section 7(1) of the Constitution of South Africa 1996 (herein after "The Constitution").

2017 (hereafter referred to as “FICA”). The *locus classicus* to examine the effects of a unilateral termination arose from the litigation between Bredenkamp and Standard Bank. The question of law dealt with in these cases was the validity of the unilateral termination by Standard Bank as well as of the cancellation clause in the standard form contract.

Therefore, the main objective of this dissertation is to investigate the precedent set by *Bredenkamp v Standard Bank*² with regard to how banks can unilaterally terminate the bank-client relationship. Consideration shall be given to FICA and the constitutional values as set out in the Constitution.

2. *Bredenkamp v Standard Bank*

2.1 Background facts

The matter made its first³ appearance in the Johannesburg South Gauteng Division, as it was called at that time, on an urgent basis due to a dispute that arose from the bank’s decision not to continue with the bank-client relationship and the subsequent termination thereof. The court was tasked to determine under the prevailing circumstances whether the clause that the bank relied on to terminate the bank-customer relationship offended any constitutional values as found in the Constitution. The applicants in the first instance requested relief in form of a rule-nisi on an urgent basis.

The applicants in the interim case were: *John Arnold Bredenkamp*, (the first applicant), *Breco International Ltd* (the second applicant), *Hamilton Place Trust* (the third applicant) and the *International Cigarette Manufacture (Pty) Ltd* (the fourth applicant). The respondents were *The Standard Bank of South Africa* and the *Minister of Finance*. For purposes of the present discussion, the applicants can be regarded

² *Bredenkamp and Others v Standard Bank of South Africa Ltd and Another* 2009 (5) SA 304 (GSJ); *Bredenkamp and Others v Standard Bank of South Africa and Another* 2009 (6) SA 277 (GSJ); *Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA).

³ *Bredenkamp and Others v Standard Bank of South Africa Ltd and Another* 2009 (5) SA 304 (GSJ) (the “interim application”).

as be the same person, irrespective of that their legal personalities differs. This is due to the interest the first applicant ("*Bredenkamp*") holds in the other entities.⁴

Bredenkamp was a businessman of note and conducted business as an international commodities trader.⁵ On 25 November 2008 the American Department of Treasury's Office of Foreign Assets Control (herein after "*TOFAC*") listed Bredenkamp as a "*pecially designated national*" (herein after "*SDN*").⁶ When a person is listed as a SDN, such a person may not conclude business with any American citizen or entity and is subjected to trade sanctions imposed and enforced by TOFAC.⁷ Standard Bank became aware of this listing the following day. TOFAC suspected Bredenkamp of being involved in⁸:

"Illicit business activities including tobacco trading, arms trafficking, oil distribution, diamond extraction and of being a confidant and financial backer of Zimbabwe's controversial head of state, president Robert Mugabe".

Further allegations came to light against Bredenkamp, which included that Bredenkamp had a notoriety attached to him in that he had been involved in a variety of activities, including but not limited to the defiance of sanctions imposed on Rhodesia and those imposed during the apartheid regime.⁹ These activities included illicit arms dealings, flouting exchange control laws, evading taxes in Zimbabwe and defrauding SARS in South Africa.¹⁰ It must be noted that the bank entered into a bank-client the relationship with Bredenkamp prior to the enactment of FICA. Shortly after the listing by TOFAC, Standard Bank unilaterally terminated the accounts of Bredenkamp and his related entities. The reasons advanced by the bank included the following:

- The implications that may follow for the bank's investors and customers, for maintaining a relationship with Bredenkamp in these circumstance may induce

⁴ WG Schulze "The banks right to cancel the contract between it and its customer unilaterally" (2011) 32 *Obiter* 211-223, 211.

⁵ *Bredenkamp - interim* par 4.

⁶ WG Schulze (2011) 211.

⁷ "Specially designated list (SDN) <https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx> (accessed on 2nd of July 2016).

⁸ WG Schulze (2011) 212.

⁹ *Bredenkamp v Standard Bank of South Africa Ltd* 2009 6 SA 277 (GSJ) (herein after ("*Bredenkamp-main*") par 6 (In this passing it must be observed that "*Bredenkamp*" was spelt incorrectly in the main and interim application when the matter was reported, however the supreme court of appeal spelt Bredenkamp correctly).

¹⁰ *Bredenkamp-main* par 6.

a belief in domestic and/or international institutions that the bank is maintaining an account that is suspected of harbouring funds that were obtained by unethical or unlawful means; and

- that the suspicion of maintaining such a client's account may damage the bank's reputation in the eyes of *inter alia* the regulatory bodies, financial institutions and members of the public.¹¹

The bank decided that the reasons set out above necessitated that the bank-client relationship should be terminated. This cancellation was communicated with Bredenkamp verbally and in writing on the 8 of December 2008.¹² In order to accommodate Bredenkamp, the bank allowed Bredenkamp a time period of 30 days to make the necessary arrangements to transfer his business elsewhere, which period was later further extended by the bank.¹³ Subsequent to the extension of the time period, the European Union also listed Bredenkamp on a list similar to (and with similar effects as) the TOFAC list.¹⁴

Standard Bank unilaterally cancelled the bank-client relationship based on a clause contained in the agreement between the parties, express or tacit, that Standard Bank is entitled to terminate the agreement for good, bad or no cause at all (hereinafter "*lex commissoria*").¹⁵ The reasons for the termination were largely based on the TOFAC listing of Bredenkamp and the business risk and reputational damage that Standard Bank would suffer due to their association with a person listed as a SDN.¹⁶

2.2 Bredenkamp v Standard Bank: interim application

Bredenkamp applied for an interim interdict¹⁷ to prevent the bank from closing his accounts. Bredenkamp argued that the closure was merely based on the perceptions of the bank with regard to his associations with certain persons of political nature and was not based on the facts.¹⁸ In the interim application Jabjhay J confirmed

¹¹ *Bredenkamp-main* par 7.

¹² *Bredenkamp-main* par 8.

¹³ *Ibid.*

¹⁴ *Ibid* 12.

¹⁵ *Bredenkamp-main* par 9.

¹⁶ WG Schulze (2011) 211.

¹⁷ *Bredenkamp v Standard Bank of South Africa* 2009 3 All SA 339 (GSJ).

¹⁸ WG Schulze (2011) 212.

Bredenkamp's argument that the termination was merely based on perceptions, rather than facts.¹⁹ Jabjhay J held that the termination by Standard Bank was unreasonable and granted the relief sought by Bredenkamp.²⁰

In Jabjhay J's judgment regarding the application for interim relief, it was held that contractual relations are regulated by the common law but are not immune from the Constitution of the Republic of South Africa.²¹ There is a duty on South African courts to develop the common law and therefore a clause can be scrutinised to ensure that it complies with the Constitution.²²

The court *a quo* referred to the decision in *Barkhuizen v Napier*,²³ which dealt with a time limiting clause in an insurance contract that was contested as being unconstitutional. In applying the guidelines as set out in the *Barkhuizen* case to determine the fairness of the cancellation clause, Jabjhay J made a concerning observation in terms of the banking regulation in South Africa: "the four large banks in South Africa operate within the framework of an oligopoly in which the four banks dominate the market for banking services".²⁴ The significance of the latter statement is that if one bank terminates their relationship with a client, the other banks will most probably follow the same practice. This phenomenon was observed more recently, and as also discussed further below in this dissertation, when Oakbay's accounts were closed and Oakbay could not find a bank in South Africa willing to accept their mandate.

The court further held that banks are able to exploit clients by imposing standard form contracts on clients, which include a clause to terminate the mandate contract without good cause.²⁵ The court reasoned that Standard Bank had multiple alternative remedies available to remedy the situation before they had to consider the detrimental consequences of closing Bredenkamp's accounts.²⁶ It was for this reason that the Court found that the closing of Bredenkamp's accounts was not reasonable; nor was

¹⁹ WG Schulze (2011) 212.

²⁰ *Ibid.*

²¹ *Bredenkamp-interim* par 48.

²² S 173 of the Constitution.

²³ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) (hereinafter "*Barkhuizen*").

²⁴ *Bredenkamp-interim* par 60.

²⁵ *Bredenkamp-interim* par 62.

²⁶ *Bredenkamp-interim* par 64.

the conduct of Standard Bank in line with the guidelines set out in *Barkhuizen v Napier*.²⁷

The reasoning applied by Jabjhay J to allow Bredenkamp's interim interdict to restrain Standard Bank from closing the accounts, is deemed to be controversial and not convincing.²⁸ The latter statement merits some comment. In the main application (discussed below) the court held that no evidence was presented to the court that could have indicated that Bredenkamp was unable to obtain a bank account at any other bank after the termination by Standard Bank.²⁹ Bredenkamp also failed to produce evidence that a bank is in a position to impose terms on its customers.³⁰ The bank will in general not deviate from using its standard-form contracts, especially when the bank deals with the general population, who do not have substantial bargaining power.³¹ Although it is trite that there may be standard-terms which are generally applied to certain categories of the market, no evidence exists that these terms are invariably imposed on the clients.³² In the view held by Lamont J, the court faulted in the interim application, as an inference cannot be drawn from the mere fact of silence on the issue that a bank will never variate and differentiate between customers.³³

2.3 The main application in the Bredenkamp case and the Constitutionality of the *Lex commissoria*

It should be no surprise that the *Bredenkamp*-saga did not end after Jabjhay J allowed the interdict. It was rather expected that the judgment delivered by Jabjhay J would be contested on the return date. In *Bredenkamp v Standard Bank* (the main application)³⁴ the court rejected Jabjhay's J reasoning and instead confirmed that a bank has the right to terminate the bank-client relationship unilaterally.³⁵ It was held

²⁷ *Bredenkamp-interim* par 68, 71.

²⁸ WG Schulze (2011) 213.

²⁹ *Bredenkamp-main* 45, 46.

³⁰ WG Schulze (2011) 214.

³¹ *Bredenkamp-main* 24.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Supra* fn8.

³⁵ *Bredenkamp-main* par 64, 67, 68.

that it is trite that the *lex commissoria*, which was present, could survive the scrutiny in the first leg of the inquiry set out in *Barkhuizen v Napier*.³⁶

There is a duty on South African courts to develop the common law and therefore a clause can be scrutinised to ensure that it complies with the Constitution.³⁷ This power is conferred on the High Court by the inherent jurisdiction it has and in appropriate cases the High Court must develop the common law taking in account the interests of justice.³⁸ Where certain aspects of law are regulated or determined by statute, the High Court is under a duty to interpret and apply legislative enactments in a manner that promotes the spirit, purport and objects of the Bill of Rights.³⁹ However this duty does not extend to a free-for-all interpretation whereby the High Court can apply construction that does violence to the language used by the legislature and thus it cannot, of its own accord, construe the application of the legislation to achieve certain constitutional values.⁴⁰ By engaging in the latter conduct the High Court will essentially fulfil the position of the legislator by assuming the duties of the legislator. This could fundamentally impeach the principle of the separation of powers. It is important to keep in mind that the Constitution provides for the reading in and reading down of legislation and that such power is not absolute and will only apply in certain circumstances.⁴¹

Lamont J in this regard considered how the termination was implemented by Standard Bank to determine the fairness of the clause. Both parties accepted that the exercising of a volition that offended constitutional principles could not be permitted.⁴² The test was set out in *Barkhuizen v Napier* and entailed a two-stage inquiry:

- Is the clause considered reasonable?
- If so, will the clause, if implemented in the circumstance in question, be reasonable?

The first question involves the weighing-up of two considerations, namely the convictions of the public opinion and the principle that parties should comply with their

³⁶ *Bredenkamp-main* par 12.

³⁷ S 173 of the Constitution.

³⁸ S 39(2) and 173 of the Constitution.

³⁹ S 39(2) of the Constitution.

⁴⁰ *Phaladi v Lamara and Another; Moshesha v Lamara and Others* 2018 (3) SA 265 (WCC) par 8.

⁴¹ S 172 of the Constitution.

⁴² *Bredenkamp-main* par 13.

contractual obligations that has been freely and voluntarily entered into.⁴³ The latter is known as the principle of *pacta sunt servanda* (meaning a party is bound by the agreement entered into).⁴⁴ This is an important principle because it gives effect to the constitutional values of freedom and dignity. A party is afforded the self-autonomy to contract to his detriment in accordance with one's own affairs. This is the underlying principle of freedom and attaches to a person's *dignitas*.⁴⁵ It is however a trite principle of the South African law that, irrespective of *pacta sunt servanda*, a person has the right to seek judicial redress where the effect of a clause may infringe on constitutional values in certain circumstances.

If the first question can be affirmed in the positive, the second leg of the inquiry should naturally flow. The second leg requires a determination whether it was unreasonable to insist on compliance or the exercising of the right in the prevailing circumstances. As in most civil litigation, the duty is on the prejudiced party to indicate that the effect of the implementation and/or the failure thereof is against public policy in the particular circumstances, against the *prima facie* acceptance of the clause being considered reasonable.⁴⁶ In order to determine the constitutionality of the clause, the clause should be considered in objective terms. If the determination on face value is consistent with public policy, a further question will then arise whether the terms in the prevailing circumstances are parallel to public policy.⁴⁷

It has become a more common occurrence in litigation that the common law is investigated whether it complies with the values as set out in the Bill of Rights.⁴⁸ Therefore any clause that finds its origin in the common law that is found to be inconsistent with the Constitution should be null and void.⁴⁹ The common law has been developing for centuries in South Africa. The common law of contract is no exception and should be developed by the courts to bring it in line with the values that underlie the Constitution, which is a constitutional mandate imposed on superior courts.⁵⁰ This sentiment was echoed in the judgment of *Barkhuizen v Napier*. It was argued in

⁴³ *Barkhuizen* par 57.

⁴⁴ D Bhana "Contract Law and the Constitution: *Bredenkamp v Standard Bank of South Africa Ltd (SCA)*" (2014) 29 SAPL 509 – 521, 513.

⁴⁵ *Barkhuizen* par 57.

⁴⁶ *Barkhuizen* par 58.

⁴⁷ *Ibid.*

⁴⁸ S 7 of the Constitution.

⁴⁹ D Bhana (2014) 514.

⁵⁰ *Barkhuizen* par 35.

Barkhuizen v Napier that the proper approach to a constitutional challenge of a contractual term is to determine whether the specific clause is contrary to public policy under the prevailing circumstances. Public policy will find its origin in the rights as set out in the Bill of Rights.⁵¹ The interplay of the approach followed will allow the court to keep to a script when cognisance is given to the principle of *pacta sunt servanda* on the one hand, while also allowing the court to decline the enforcement of a clause that is in conflict constitutional values.⁵² Therefore, although parties have the right to freedom of contract, the court recognises the need to ensure that simple justice occurs between the parties.⁵³

The above process as set out and relied on is an important process to consider, as this will be the standard against which any clause will be tested. It is important to note that, during the main application before Lamont J, the contentious issues and the facts of the matter were no longer the same as when the matter was heard before Jabjhay J.

It was common cause that Bredenkamp's entities and *persona* was of note. Bredenkamp was an international commodities trader and it was reported that Bredenkamp was the seventy-sixth richest man in England during 1996.⁵⁴ The court inferred that it would be very likely that Bredenkamp was familiar with the terms and conditions as set out in the standard form of contract utilised by banks and had most probably entered into several such contracts.⁵⁵ The court commented that, given regard to Bredenkamp's *persona* and the evidence before the Court, there were no circumstances present that was indicative of an unequal bargaining position between the parties.⁵⁶ Bredenkamp was not a layman in terms of how banks operate. As stated by Lamont J, Bredenkamp was no shrinking lily.⁵⁷ It was held furthermore that there was no evidence before the court that suggested that banks could impose terms that are detrimental to their clients.⁵⁸ Banks cannot operate in isolation and impose terms on clients to create a situation of *take it or leave it*. It is trite that banks have an array

⁵¹ *Barkhuizen* par 30.

⁵² *Barkhuizen* par 30.

⁵³ *Barkhuizen* par 27.

⁵⁴ WG Schulze (2011) 214.

⁵⁵ WG Schulze (2011) 214.

⁵⁶ *Bredenkamp-main* par 24.

⁵⁷ *Bredenkamp-main* par 25.

⁵⁸ *Bredenkamp-main* par 24.

of different customers with different needs, and that a bank will most probably negotiate in all instances to some extent.⁵⁹

The constitutional attack that was relied on was based on the fairness of the clause; it has been an established principle that cancellation clauses are acceptable.⁶⁰ Banks operate in a global economy and there is a duty on banks to adhere to national and international legislation.⁶¹ The impact of dealings with certain persons or entities should not merely be considered within the borders of the country in which the bank operates, but also with reference to how these dealings affect the international community.

The reasoning of Lamont J was to the effect that when banks deal with an international entity, they will give consideration to international legislation.⁶² This consideration will be relevant to the extent that the dealings will affect the bank and other international bodies, including international regulators, as one can consider the fact that an obligation might exist on banks to ensure a sound and prudent world economy, and in more recent times to combat the financing of terrorism and organised crimes. Lamont J held that banks are obliged by provisions of the Banks Act 94 of 1990 to submit to the supervision and control of the Registrar of Banks.⁶³ Therefore, not only do banks have an obligation towards their clients, but they also have legislative obligations to adhere to. Banks must, amongst others, also comply with FICA.⁶⁴ FICA requires that banks must take various steps to observe and report on the business dealings of their clients in aid of combating money laundering and the financing of terrorism.⁶⁵ Should a bank fail and/or neglect to comply, various sanctions can be imposed.⁶⁶

It was due to the above reasoning that Standard Bank terminated the contract between itself and Bredenkamp. The TOFAC listing and the nature of the business that Bredenkamp conducted paired with his reputation, regardless of whether there

⁵⁹ *Bredenkamp-main* par 24.

⁶⁰ *National Westminster Bank Limited v Halesowen Presswork and Assemblies Limited* (1972) 1 All ER 641 (HL) 662.

⁶¹ L De Koker "Client identification and money laundering control: Perspectives on the Financial Intelligence Centre Act 38 of 2001" 2004 TSAR 715- 746 715.

⁶² *Bredenkamp-main* par 53.

⁶³ *Bredenkamp-main* par 49.

⁶⁴ Financial Intelligence Centre Act 38 of 2001.

⁶⁵ Preamble of the FICA.

⁶⁶ *Bredenkamp-main* par 50.

was any truthfulness therein, constituted a risk for Standard Bank. The effect of the listing remains a risk whether or not Mr Bredenkamp at that time took steps to remove his name from the listing. Lamont J summarised the consequences of the listing as follow:

“The consequence of the listings remains even though these steps have been taken. The listings presently exist and are being enforced. The effect of the listings is so wide ranging that it includes an obligation on affected banks to not even deal with their own customers hence the reference to the frozen bank account. By reason of the international relationship and the existence of activities and accounts in affected jurisdictions the bank is at risk not only of direct sanctions and their consequences but of losing relationships it has. This can happen irrespective of the rights and wrongs of the listings and irrespective of the appeals made by the applicant.”⁶⁷

Economically it would make sense if a bank in these circumstances decides to terminate the bank-client relationship. The potential that a client may be dealing unlawfully creates a supervising burden on the bank in two manners: the bank must scrutinise the dealings of such a person in terms of FICA and it bears the risk that sanctions might follow if the business relationship is continued. It was for this reason that the court found that the bank’s right to terminate the contract was constitutionally fair and just. It must be noted that if a bank is not allowed to terminate contracts with clients, the possibility follows that a bank is compelled to continue the relationship, which will result in financial and reputational risks on a local and international level. Banks will be forced in a position that is detrimental to their business and reputation.⁶⁸ The court further held that there was no evidence that termination would lead to Bredenkamp becoming “unbanked” as referred to in the interim application discussed above.⁶⁹

In light of the above, the terms contained in the contract entered into and between the bank and Bredenkamp represented the product of knowledge of persons who knew what they were doing, and under those circumstances the reliance to exercise the volition to terminate the relationship falls within the ambit of the test as set out in *Barkhuizen v Napier*.⁷⁰

⁶⁷ *Bredenkamp-main* par 55.

⁶⁸ *Bredenkamp-main* par 67.

⁶⁹ *Bredenkamp-main* par 66.

⁷⁰ *Bredenkamp-main* par 28.

2.4 The Supreme Court of Appeal judgment and further crystallisation of the *Barkhuizen v Napier* principles

Considering Bredenkamp's financial means, the judgment that was delivered by Lamont J in favour of Standard Bank was taken on appeal.⁷¹ The appeal dealt mainly with the application of *Barkhuizen v Napier* to the facts before the court that came to light during the main application and the importance of the test as set out in *Barkhuizen v Napier*.

On appeal, Bredenkamp accepted the common law position that a party may terminate an indefinite contractual relationship by providing reasonable notice, and that the express term of the standard contract between Standard Bank and Bredenkamp was fair and reasonable in terms of the first-leg of the test as set out in *Barkhuizen*.⁷² However, Bredenkamp relied on the principles set out in *Barkhuizen v Napier* in an attempt to succeed with the appeal. Bredenkamp's counsel argued that fairness is a core value of the Constitution and therefore a requirement of any legislation in the Republic.⁷³ The appeal was based on the argument advanced by Bredenkamp that any conduct that is unfair (including conduct allowed by legislation) might be in conflict with the Constitution and should be void.⁷⁴ Bredenkamp however suggested that the development of the common law was not needed and any argument to that effect would be inappropriate.⁷⁵ The issue with this concession as made by Bredenkamp is essentially that, to argue that the implicated clause was not fair, an underlying constitutional right had to be impinged, which would require a development of the common law in accordance with the Bill of Rights.

In the appeal case it was necessary for the court to first consider the principle of *pacta sunt servanda* due to the issues raised by Bredenkamp. The court was not opposed to the principle, but it acknowledged that the principle cannot operate where a contract is immoral and would offend public policy. With regard to the above-established test in *Barkhuizen v Napier*, The Supreme Court of Appeal held that the

⁷¹ *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) (hereinafter "*Bredenkamp*-appeal").

⁷² *Bredenkamp*-appeal editor summary on LexisNexis.

⁷³ *Bredenkamp*-appeal editor summary on LexisNexis.

⁷⁴ *Ibid.*

⁷⁵ *Bredenkamp*-appeal par 61.

test could not be applied where a term that may be deemed to be unfair did not impinge any public policy.

The court essentially dismissed the appeal and Harms DP *inter alia* held as follows:

- The right to terminate the contract did not affect any constitutionally recognised value of Bredenkamp, including but not limited to constitutional democracy, dignity and freedom, or the right to equality.⁷⁶ It can therefore be concluded that the conduct of Standard Bank was in all circumstances fair and in line with the Constitution.
- Our courts have always been fully prepared to declare contracts invalid based on an assessment of public policy. In order to determine whether an agreement is contrary to public policy requires an investigation into the competing values of the public.⁷⁷
- Fairness is not an inherent requirement to exercise a contractual right.⁷⁸
- It would not be fair to impose on a bank the obligation to retain a client merely because other banks are likely to reject the mandate of that client. There was, accordingly, in the words of Moseneke DCJ no “unjustified invasion of a right expressly or otherwise conferred by the highest law in our land”.⁷⁹
- In the main application it was contested by Bredenkamp that the bank made a moral decision to terminate the contract, but the court found that it was a business decision made by the bank to protect its reputation.
- The bank did not publicise the closure of Bredenkamp’s accounts or the reasons for its decision and therefore could in the strict sense not be regarded as the cause that Bredenkamp became “unbanked”.⁸⁰

Another question that the court also had to consider was whether Standard Bank had sufficient good cause to terminate the contract. It was common cause that there was

⁷⁶ *ibid* par 30.

⁷⁷ *ibid* par 38.

⁷⁸ *ibid* par 53.

⁷⁹ *ibid* par 60.

⁸⁰ *ibid* par 64.

a valid *lex commissoria* in the contract, permitting the bank to terminate the relationship.⁸¹ It is so that the Bank fulfils a particular position in society, as it may seem that a bank is a public institution to the benefit of the public. However, a bank remains a private entity that is profit driven and therefore is required to make decisions that are not necessarily fair, but nonetheless constitutional. Standard Bank was aware of the consequences that will follow if they continued their relationship with Bredenkamp. It was confronted with the perceived facts and the listings. Standard Bank applied its mind to the matter on a senior level and terminated the contract with Bredenkamp. The termination was based on their *bona fide* perceptions of the risk and a valid cancellation clause. Bredenkamp was afforded the opportunity to take his business elsewhere, as Standard Bank did not publicise the closure of the reasons thereof, which is in line with the rule that its confidentiality duty continues after the termination of the relationship.⁸²

The above places banks in a position to rely on a cancellation clause and it confirms that there is no duty to endure a damaging bank-client relationship. As stated above, a bank is profit driven and as the bank-client relationship is financially feasible, the bank will service the client, unless such relationship attracts attention. It must also be noted that the former cases were adjudicated before the proposed amendments to FICA was presented to Parliament.

The *Bredenkamp* case brought some clarity for banks in that it confirmed that they can terminate contracts unilateral on good cause, with the emphasis on good cause. Banks are also in a position where they do not have to endure contractual relationships that are perceived by the bank as a risk and damaging. If the relief granted by Jabjhay J in the interim application was found to be correct, banks would arguably face business risks, and the possibility exists of sanctions and damage to their reputation.

⁸¹ WG Schulze (2011) 216.

⁸² *Ibid* 216.

3. The Guptas-saga in brief

Recently the four biggest banks in South Africa terminated their banking relationships with the Gupta-family owned company *Oakbay Resources and Investments*.⁸³ The termination was based on non-economic grounds and the reasons for the termination by the four banks have not been officially disclosed in the public domain.

The difference between the *Bredenkamp* case and the recent Gupta-saga must be dissected. As previously discussed, *Bredenkamp* was listed as a SDN, which on its own was a very strong ground to terminate the contract given regard to the reputational and business risks that could have followed for the bank otherwise.

The Guptas were however never listed by TOFAC as SDNs; nor are they on any similar list. It is common cause, as set out by Lamont J, that banks cannot operate in isolation and therefore must adhere to multiple legislative procedures nationally and internationally.⁸⁴ There were also differences between the two scenarios on a commercial ground. In the *Bredenkamp* cases the court concluded that the commercial implications were not of such a significant nature that *Bredenkamp* would become “unbanked” and not continue its business.⁸⁵ This was not the same situation as with that of the Guptas’ *Oakbay Investment and Resources*. After the termination of their accounts, Oakbay released a statement to the media that 7500 of its workers faced retrenchment if Oakbay did not have access to any banking facilities. However, at that stage Oakbay did not disclose why the banks terminated their accounts, this was never publicised.⁸⁶ This was a concerning statement at that stage, as South Africa’s employment rate for the period of June 2016 was at a staggering rate of 26.6%.⁸⁷ An argument for public policy considerations may be made that a bank cannot merely close accounts for non-economic reasons where it may suffer no financial harm, and thus only on a perceived reputational risk that a client may have.

⁸³Oakbay Resources and Investments is JSE listed Company, that is affiliated with the Gupta family, which is believed to have an influential relationship with persons of political importance including the President of South Africa.

⁸⁴ *Bredenkamp-main* par 32.

⁸⁵ R Vivian & N Spearman “Why there needs to be judicial oversight of bank account closures” <https://theconversation.com/why-there-needs-to-be-judicial-oversight-of-bank-account-closures-58003> (accessed on 27th of August 2016).

⁸⁶ *Ibid* (accessed on the 27th of August 2017).

⁸⁷ “South Africa unemployment rate 2000-2016” <http://www.tradingeconomics.com/south-africa/unemployment-rate> (accessed on 1st of September 2016).

It can be further argued that when the contract was concluded, the bank ought to have known with whom it was contracting and the risks associated therewith. If a bank is afforded this immunity without judicial oversight, it may be detrimental to the public sector and the employees who are employed by the employer whose accounts will be closed. An unintended consequence of the latter is that the employees will be placed in a position whereby they may not receive their salary and default on their obligations towards third parties.

The biggest question relating to the Gupta-saga is why all four of the largest banks in South Africa decided to terminate all the accounts associated with Oakbay unilaterally? Indeed, it is possible in this case that the banks might have relied on other grounds that were not as *prima facie* obvious as in the Bredenkamp matter. In retrospect one can argue that Standard Bank in the *Bredenkamp* cases did not need to do much, as the listing by the United States Treasury and the European Union was sufficient in the circumstance to terminate the contractual relationship unilaterally. It is trite that banks are subject to strict regulations and hence the reasons for the closing of Oakbay's accounts were never officially publicised, which is in accordance with the duty of a bank to keep all information pertaining to their previous and existing clients private. It must be noted, however, that there were trite speculations that certain members of the Gupta family and the President of the Republic of South Africa at that time, President Jacob Gedleyihlekisa Zuma, were known to each other on a personal level. It is further public knowledge that the President's son, Duduzane Zuma, was a director at Oakbay. Could the banks regard this association as a possible risk that will evidently lead to financial and/or reputational damages? What was further worrisome is that Oakbay requested the Minister of Finance to approach the banks in an attempt to provide the Minister with reasons for the closures, and there were other ministers that publicly supported such a call.

These questions place the banks in a very peculiar position, as the bank-customer relationship is regulated by private law, while public policy dictates that certain legislative functions can be imposed on this contractual relationship. In a sense this requires that the state should ensure that checks and balances are in place to regulate this private contractual relationship in the public interest.

4. Finance Intelligence Centre Act: implications

To truly understand the conduct of the banks and why the banks might have terminated contracts in the past and present, one must consider the implications of FICA, which came into effect on 1 July 2003. South Africa has two main acts that mainly deal with the combatting of money laundering, namely the Prevention of Organised Crime Act 121 of 1998 (“POCA”) and FICA.⁸⁸ For purposes of this dissertation only FICA will be discussed, since it has the closest relation to the bank’s relationship with its clients.

FICA places a very strenuous duty on any accountable and reporting institution to report transactions and to identify the persons with whom they transact.⁸⁹ In the aforementioned cases it was clear that the banks were under legislative obligations to consider the business relationships with their clients. The failure by banks to observe certain legislation nationally and internationally in these cases could lead to prejudicial legislative consequences, including but not limited to sanctions and criminal liability.

The objectives of FICA are to identify the proceeds of unlawful activity, and to combat money laundering and the financing of terrorist activities.⁹⁰ FICA imposes certain duties on reportable institutions and accountable institutions. In terms of section 1 of FICA, an accountable institution is any institution that carries on the “business of a bank” in terms of the Banks Act (hereafter an accountable institution will mean banks, as only banks will be discussed for purposes of this dissertation).⁹¹

One of the main obligations that FICA imposes on banks is that of identifying their customers – referred to as “*Know-your-Customer*” (hereafter referred to as “KYC”).⁹² KYC was introduced in an attempt to ensure that banks understood, and not merely know, their clients’ business and dealings.

The international community committed itself to a number of international instruments to combat money laundering.⁹³ This effort was broadened after the terrorist attacks on the United States on 11 September 2001.⁹⁴ It was clear that the international scheme of money laundering had to be re-evaluated to include the

⁸⁸ L De koker (2004) 717.

⁸⁹ Chapter 3 of FICA.

⁹⁰ T Matshebela “The right to freeze a bank account” (2015) 15 *Without Prejudice* 78-80 78.

⁹¹ S 1 of FICA read together with schedule 1; Banks Act 94 of 1990.

⁹² S 21 of FICA.

⁹³ L De koker (2004) 716.

⁹⁴ *Ibid*

financing of terrorism.⁹⁵ To ensure that the international community can align their goals and objectives to combat money laundering and the financing of terrorism, standards were developed and ascribed to by the member states.⁹⁶ In this respect, the total “forty plus eight” recommendations were developed by the Financial Action Task Force (“FAFT”) an intergovernmental body.⁹⁷

South Africa joined the FATF in 2003. The FATF was established to focus on essentially the same objectives as FICA, which is the combating of financing of terrorism and money laundering.⁹⁸ In order to achieve the latter, the FATF is responsible to set standards and write policies that provide for a minimum framework that must be complied with.⁹⁹ These policies and standards are known as recommendations and are not considered as international law by which countries are bound. The enforcement of the recommendations is done by peer political pressure and economic pressure.¹⁰⁰ The non-compliance of these standards can impact the economy of a country, as there may be soft sanctions imposed due to the failure to comply.¹⁰¹ One of the recommendations mirrors the KYC policy that was enacted in the Financial Intelligence Centre Amendment Act.¹⁰²

It is established and recommended that the best KYC policy and/or internal rules require that a bank must obtain the following information of the client and verify them:¹⁰³

1. The name of the client;
2. the permanent address;
3. date and place of birth;
4. nationality;
5. occupation, public position held and/or the name of the employer;

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ D Millard, V Vergano “Hung Out To Dry? Attorney- Client Confidentiality And The Reporting Duties Imposed By The Financial Intelligence Centre Act 38 Of 2001” (2013) 34 *Orbiter* 389 – 427, 412.

⁹⁹ D Millard, V Vergano (2013) 412

¹⁰⁰ *Ibid.*

¹⁰¹ L De Koker (2004) 716

¹⁰² Section 21 FICA.

¹⁰³ Basel committee on Bank supervision General Guide to Account opening and Customer identification (Feb 2003).

6. identity number; and
7. type of account and the nature of the banking relationship.

This list will assist the bank in profiling clients and to build a certain pattern of what is to be expected in the normal course of transacting. De Koker uses the example of a student that registers with a bank, but later receives ridiculous amounts of deposits into his or her account. These transactions will therefore deviate from the profile of a student and ought to be flagged by the bank's system. The bank can then do further investigations on the matter and report the transactions if necessary.¹⁰⁴

FICA requires that banks must report certain unusual transactions and suspicious transactions to the Financial Intelligence Centre (FIC). Not only must banks verify and identify their client, but there is also an obligation to keep relevant records, report specific transactions, and to have an internal compliance and risk policy in place.¹⁰⁵

In terms of section 21 of FICA, banks may not conduct any business relationship with any client unless the bank has taken the prescribed steps as set out in this section. These steps include the following:

- “(a) to establish and verify the identity of the client;
- (b) if the client is acting on behalf of another person, to establish and verify -
 - (i) the identity of that other person; and
 - (ii) the client's authority to establish the business relationship or to conclude the single transaction on behalf of that other person; and
- (c) if another person is acting on behalf of the client, to establish and verify -
 - (i) the identity of that other person; and
 - (ii) that other person's authority to act on behalf of the client”.¹⁰⁶

Where a bank entered into the business relationship prior to the commencement of the Act, the bank may not proceed with any transaction until the bank has identified their client in terms of FICA and accordingly conducted the necessary due diligence on each client.¹⁰⁷ The identification and verification of clients is a crucial procedural step to prevent money laundering and to stop the proceeds of unlawful activities from being funnelled and laundered through banks. If this process is done in a diligent

¹⁰⁴ L De Koker (2004) 722.

¹⁰⁵ L De Koker (2004) 717.

¹⁰⁶ S 21(1) of FICA.

¹⁰⁷ S 21(2) of FICA.

manner by the bank, the banks could prevent money laundering as the process becomes troublesome for individuals to continue their unlawful activities.¹⁰⁸

Banks are required in terms of FICA to formulate and implement internal rules. These rules must be in line with the requirements of FICA and clients should adhere to these rules during the tenure of the bank-client relationship.¹⁰⁹ Essentially, these rules can be regarded as an internal risk policy that highlights potential clients that will require reporting to the FIC more often than others. These rules must contain *inter alia* the following:

- “(1) An accountable institution must formulate and implement internal rules concerning -
 - (a) the establishment and verification of the identity of persons whom the institution must identify in terms of Part 1 of this Chapter;
 - (b) the information of which record must be kept in terms of Part 2 of this Chapter;
 - (c) the manner in which and place at which such records must be kept;
 - (d) the steps to be taken to determine when a transaction is reportable to ensure the institution complies with its duties under this Act; and
 - (e) such other matters as may be prescribed.
- (2) Internal rules must comply with the prescribed requirements.”¹¹⁰

A bank is further required to provide training to its employees to ensure that the transactions that they conclude are in accordance with the internal rules that are formulated to ensure compliance with FICA.¹¹¹ The compliance officer is *inter alia* responsible to ensure that the employees of the bank comply with FICA and the internal rules.¹¹² The internal rules must comply with the requirements as prescribed by FICA and the regulations. Each employee of the bank who may be involved in transactions as identified by FICA must be aware of the internal rules of the bank.¹¹³

FICA introduced a risk-based approach to verifying certain particulars of a client. A risk-based approach is accepted and followed in many countries to combat money laundering and the financing of terrorism.¹¹⁴ Essentially, a risk-based approach entails that the bank must perform due diligence with respect to each client and to align such

¹⁰⁸ Financial Services Board “*Fais newsletter*” 2008 June p5.

¹⁰⁹ S 42 of FICA.

¹¹⁰ S 42 of FICA.

¹¹¹ D Millard, V Vergano (2013) 397.

¹¹² *Ibid.*

¹¹³ S 42(3) of FICA.

¹¹⁴ L de Koker (2004) 720.

due diligence with the level of risk that each individual client poses to the banking system. The risk parameter will refer to the abilities or capabilities of clients and will depend on whether certain clients could be inclined or involved in activities that are related to money laundering and/or financing of terrorist activities. In developing the risk policy and internal rules as set out in section 42 of FICA, a bank must develop a methodology to assess the different risk classes of clients and determine how different procedures of due diligence should apply to them.¹¹⁵ This approach allows banks to focus on high-risk bank-client relationships as opposed devoting time and attention to low-risk bank-client relationships.

If one considers the risk-approach policy and KYC, it is evident that banks will be able to implement a system where banks can determine the risks that a client poses and whether the bank will proceed with certain business relationships. This clearly manifested in Bredenkamp's dispute, as Standard Bank was not willing to accept the risks associated with Bredenkamp.

The problem that initially existed with the risk-based approach is that the approach was not very flexible; nor was there detailed guidelines set out in the original Act to help banks in determining the risk policy. This called for intervention from the legislator to amend the current Act to bring it more in line with international legislation and standards. The amendments were tabled in 2015 and focused on the risk-based approach with respect to the identification and monitoring of clients. FICA was therefore eventually amended by the Financial Intelligence Centre Amendment Act 1 of 2017. The amendments allow for a more flexible approach by banks to implement their risk and KYC policies.

The new additions to the Act provide better guidelines for banks in determining their risk policies. The Amendment Act introduced enhanced due diligence, adding the definition of "Prominent Influential Persons" (hereafter referred to as "PIPs"), which relates to the international term "Political Exposed Persons" (hereafter referred to as "PEPs"). A PIP is defined as an individual who holds, including an acting position in the Republic that is a prominent public function.¹¹⁶ This definition refers to any person, who holds a position in public office or any office that is of public importance, and includes their close associates and family. Persons with high profile positions in the

¹¹⁵ *Ibid* 723.

¹¹⁶ S 1(1) of FICA.

Republic will be regarded as PIPs and enhanced due diligence will have to apply for a certain period after a PIP leaves office.¹¹⁷ It must be noted that in terms of the definition, the President of the Republic is the first person mentioned in the definition of PIPs.¹¹⁸

When a bank has the intention to enter into a business relationship with a person, whether it is a single or multiple transactions, and that person is a PIP, the Bank must act in accordance with its risk policy and compliance program. The latter transaction is subjected to approval of senior management to establish the bank-client relationship; the bank must take reasonable steps to establish the person's source of wealth and financial means; and the business relationship must be subjected to ongoing due diligence.¹¹⁹ These bank-client relationships are subjected to ongoing due diligence, and therefore a bank must in terms of their risk policy and compliance program conduct ongoing due diligence. Due diligence in terms of FICA includes the monitoring of the account throughout the bank-client relationship to ensure that the bank's knowledge of the client remains consistent with its risk policy determination and risk profile. Banks must also keep information obtained in terms of KYC updated and verified throughout the business relationship.¹²⁰

On the basis of proper due diligence and KYC, the bank can limit the risk of money laundering and the financing of terrorist activities. By gathering this information, a bank can appreciate transactions that seem out of the ordinary to the customer profile and risk, and then report that transaction to the Financial Intelligence Centre.

5. Contract of mandate: implications for the bank-customer relationship

The contractual relationship between the bank and their customer is founded on the contract of mandate. However, this relationship between the bank and client is unlike any other and is considered as a *sui generis* (unique in its sort), because to identify

¹¹⁷ J George "First major revision of FICA legislation since 2001" (2015) *Practice Management* 9 at 9.

¹¹⁸ S 1(1)(i) of FICA.

¹¹⁹ S 21D(a)-(c) of FICA.

¹²⁰ S 21H(a) & (b) of FICA.

the exact type of contract is a daunting task.¹²¹ Instead, the relationship is regarded as a multi-faceted one, where the origin of the contract does not necessarily fit unerringly into a specific category of contracts as recognised by Roman law or Roman Dutch law.¹²²

In contemporary times, a bank-client contractual relationship can create various obligations between the parties. Banks no longer hold a position whereby they are only deposit taking institutions, since they also provide various other services, including but not limited to cell phone contracts, credit, life insurance and even estate planning.

The basic principle of the contract of mandate can be defined as the client being a lender of money to the bank, and in return for this loan, the client receives interest on the amount.¹²³ The bank then undertakes to repay this amount on the client's demand and to perform other banking services.¹²⁴ It is trite that a contract of mandate must satisfy all the general requirements of contract law to be valid and enforceable, and therefore the general principles of contract law ought to apply to these transactions.¹²⁵ If consideration is given to the latter statement, it is clear that the contract is no different than any other in the sense of the applicable contract law requirements. Banks can or should therefore be able to cancel these contracts in accordance of the general principles of contract law.¹²⁶

A contract between the bank and its client relies on the consensus of two parties: the client to lend money and the bank to repay the money on the request and instance of the client. It would be no surprise then that the contract can be terminated in the same manner as any other consensual contract.¹²⁷ One of the main principles of contract law is that a contract cannot continue against the will of either party.¹²⁸ It is a general principle that a party to a contract exercises his or her autonomy on a voluntary and informed basis, unless one party can show that it was induced into entering into

¹²¹ K Wagner & AA Ismail " Blurred lines: the unilateral termination of banking facilities" (2018) 18 *Without Prejudice* 32 – 33, 32.

¹²² *Ibid* 32.

¹²³ WG Schulze (2011) 217.

¹²⁴ WG Schulze (2011) 218.

¹²⁵ *Ibid* 218.

¹²⁶WG Schulze (2011) 218.

¹²⁷ FR Malan, JT Pretorius & SF du Toit *Bills of Exchange, Cheques and Promissory notes* 3 ed (2009) para 214.

¹²⁸ WG Schulze (2011) 218.

the contract without the necessary *aminus contrahendi*.¹²⁹ The latter statement therefore warrants that the parties were aware of the terms and conditions and consented thereto when entering into the contract. It will then follow that there was nothing sinister that might have induced the other party to enter into the contract. This argument is further strengthened by the fact that the customer approached the bank to enter into contractual relationship and thus exercised an election to contract with the bank on specific terms and conditions.

This principle of voluntarily consensus is also applicable to a contract of mandate. The mandatary may terminate the mandate for good cause, as there is consensus regarding the terms of the contract, and therefore in the present case banks can terminate for good cause as well. The mandatary will not have a claim if such termination was based on good cause or does not impinge a constitutional value.¹³⁰ The only problem that might be faced is in a situation where no reason was provided by the mandatary for the termination, which will be discussed below.

As stated already, the contract can be cancelled unilaterally when the mandatary terminates this relationship on good cause. Good cause in this instance may refer to any breach of contract as defined in the contract of mandate or as recognised by the general principles of contract law, but it may also include reasons based on the internal risk policy as discussed above. If the mandate contract does not have a *lex commissoria*, the bank may only terminate the contract on the basis that the breach thereof is serious.¹³¹ A serious breach will constitute conduct that will relate to a material and essential term of the mandate. For instance, the true identity of the parties (in an effort to combat money laundering) will be an essential term for a bank. One of the duties of a contract of mandate is that the mandatary may not cause damage to the other party.¹³² Where a customer conducts his business in such a manner that it poses operational and business risks to the bank, this will constitute a ground for termination for the mandatary, because the latter can justify the termination in view of the fact that the mandatary is acting in conflict with his duty.¹³³ This was basically the situation in the case of Bredenkamp where the listing (regardless of

¹²⁹ D Bhana (2014) 514.

¹³⁰ WG Schulze (2011) 220.

¹³¹ S van der Merwe, LF van Huysteen, MFB Reinecke & GF Lubbe *Contract General Principles* 3 ed (2007) 357.

¹³² WG Schulze (2011) 220.

¹³³ *Ibid.*

whether or not it was factually correct) caused reputational damage to the bank, and Bredenkamp was thus in conflict with his duty not to cause damage to the bank.¹³⁴

Banks do not only have a contractual entitlement in South Africa, but also a legal obligation to determine carefully whom they contract with. This is a duty that exists in perpetuity, as a bank is required to protect its reputation and mitigate damages. The discussion above regarding the duties imposed by FICA also supports this point.

An important principle of fair and just practice requires that a bank give notice of the termination to the client prior to the termination, to ensure that the client is afforded opportunity to make alternative arrangements. This aspect is discussed below.

6. A sufficient notice period for termination

The right to terminate a relationship is recognised by the Code of Good Banking Practice and provides that such termination must generally follow a reasonable prior notice.¹³⁵ However in certain circumstance the termination may proceed without any prior notice. These situations include when a bank is compelled by law or international best practice to close a bank account; when a customer has not used a specific account for a long time; and when there are reasons to believe that the account is used for illegal purposes.¹³⁶ The court also confirmed in *Bredenkamp v Standard Bank* that banks must give a reasonable notice of termination in line with the Code of Good Banking Practices.¹³⁷

The law does not provide for a clear and set notice period for the intention to terminate a contract, and each case should be considered in the context of the different circumstances. These circumstances include the character of the account and any special conditions and/or facts that ought to be considered by the bank.¹³⁸ The Ombudsman for Banking Services has confirmed that the reasonable termination period is dependent on the circumstance of each case and therefore a separate inquiry should be conducted. Under the applicable law in the United Kingdom, the banks must provide for a notice period of not less than 30 days, which is aimed to afford the client

¹³⁴ *Bredenkamp-appeal* par 64.

¹³⁵ Cl 7.3.2 of the Code of Good Banking Practice 2012 (“the Code”).

¹³⁶ *Ibid* cl 7.3.3.

¹³⁷ *Bredenkamp-main* par 8.

¹³⁸ *Prosperity Ltd v Lloyds Bank Ltd* (1923) 39 TLR 372.

sufficient time to change from banks and, if applicable, change debit orders as well.¹³⁹ Given consideration to the latter, a reasonable period in terms of the South African banking context will be anything from one to two months, depending on the circumstances of each case.¹⁴⁰ This will ensure that the client will not become “unbanked” temporarily, unless there is compelling reasons for leaving the client “unbanked” on a permanent base. Failure to provide the client with reasonable prior notice to terminate the relationship does not affect the right to terminate the relationship. The termination is merely delayed until the client is provided with a reasonable notice period, where after the bank may proceed to terminate the relationship unilaterally.¹⁴¹

The termination notice does not necessarily have to stipulate the reason for the termination. This aspect is discussed below.

7. Duty to disclose the reasons for the termination, and the principal of confidentiality

One of the main issues in the Gupta saga was the disclosure of the reasons for the termination. This is a very important factor that has to be considered, as the relationship is regulated by private law. It is so that natural justice should occur between contracting parties and therefore *prima facie* it will be fair and just that the aggrieved party is aware of the reasons for the closure. This chapter will therefore consider the principal of confidentiality in the bank-client relationship as it relates to the reasons for closing the bank account.

South African administrative law imposes a duty on an organ of state to provide reasons for conduct when exercising public power, which is an essential principle included in section 33(2) of the Constitution.¹⁴² An organ of state bears the meaning assigned to it in section 239 of the Constitution. Section 239 of the Constitution provides for the following:

“ ‘organ of state’ means—

¹³⁹ M Hapgood *Paget’s Law of Banking* 13ed (2007) 153.

¹⁴⁰ Ombudsman for Banking *Bulletin no.3* (15 August 2012) 4.

¹⁴¹ J Moorcroft & ML Vessio *Banking Law and Practice* 1ed (2015) 15.

¹⁴² S 5(1) of the Promotion of Administrative Justice Act 3 of 2000.

- (a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution—
 - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer”.

It is clear that the above definition is not applicable to a commercial private bank exercising its powers. Accordingly, there is no obligation imposed on banks to provide reasons for the closure in the general terms of banking law. In terms of the Banking Code a bank must merely give the customer reasonable notice prior to the closure, as discussed above.¹⁴³ The bank-client relationship is guarded by the principle of confidentiality, which entails that a bank must honour the confidentiality of its clients' information, similar to that of an attorney-and-client privilege. This privilege is so far reaching that a bank may not disclose to A that the reasons for the closing his account was due to A's transacting with B if such transaction may, for instance, place the bank at risk if the account is continued to be serviced by the bank.

It is for this reason that it is an implied term of the mandate contract that the bank is under a duty not to disclose confidential information. This right was first recognised by South African courts in the case of *Abrahams v Burns*.¹⁴⁴ However, there are exceptional circumstances where banks may disclose information and when the duty of confidentiality therefore does not have to be observed. These exceptions are as follows:

- When disclosure is required in terms of the law;
- when the *boni mores* requires such disclosure;
- when disclosure is in the interest of the bank; or
- when the disclosure is made with the consent of a client.¹⁴⁵

Only on the instance and request of a client, may the bank invoke the confidentiality duty imposed on them, and it may only disclose the dealings with the general public if

¹⁴³ CI 7.3.2 of the Code.

¹⁴⁴ *Abrahams v Burns* 1914 CPD 453 456.

¹⁴⁵ CI 6.1 of the Code.

the client waived such right.¹⁴⁶ The termination of the business relationship does not terminate the bank's duty to protect and to maintain the (former) client's confidentiality.¹⁴⁷

FICA excludes the duty of secrecy, confidentially or any other restriction on the disclosure of information to the extent that such a duty of restriction affects the compliance by banks of their duties under FICA. The Act primarily requires that certain information must be reported to the FIC or a person who is designated by the Minister.¹⁴⁸ The primary reason for the exclusion of the duty of secrecy is to enable the FIC to combat money laundering and/or the financing of terrorism.

On face value this may seem like a breach of the constitutional right to privacy as found in section 14 of the Constitution. It should nevertheless be noted that section 36 of the Constitution provides for the limiting of any constitutional rights as set out hereunder:

- “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

Section 36 therefore opens the door for the limitation of a constitutional right under the specific circumstances of a case. For instance, the limitation can be justified due to the objectives of FICA. The importance of the limitation to waive such duty can be argued to be beneficial to the public, as terrorism and money laundering are threats to a democratic society and there are probably no other means that would be less restrictive to obtain such an objective.

In the Gupta saga, the CEO of Oakbay requested the Minister of Finance to approach the banks to request access to the reasons for the closure of the bank

¹⁴⁶ *Firststrand Bank Ltd v Chaucer Publications (Pty) Ltd* 2008 2 SA 592 (C) par 18.

¹⁴⁷ CI 6.1 of the Code.

¹⁴⁸ S 69 of FICA.

accounts.¹⁴⁹ Although it has been established that banks have a duty to report certain information to the FIC, there is no rule of law that requires or authorises a bank to report such information to the executive authority. Except for duties towards the FIC, banks only have a duty to report certain information to the Registrar of Banks.¹⁵⁰

However, it is noteworthy that the Banks Act does permit the registrar to disclose information to a third party. In this regard section 89 of the Banks Act provides as follows:

- “(1) Notwithstanding the provisions of section 33(1) of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), the Registrar may furnish information acquired by him or her as contemplated in that section -
 - (a) to any person charged with the performance of a function under any law, provided the Registrar is satisfied that possession of such information by that person is essential for the proper performance of such function by that person; or
 - (b) to an authority in a country other than the Republic for the purpose of enabling such authority to perform functions, corresponding to those of the Registrar under this Act, in respect of a bank carrying on business in such other country: Provided that the Registrar is satisfied that the recipient of the information so provided is willing and able to keep the information confidential within the confines of the laws applicable to the recipient.
- (2) The Authority must inform the Minister and the Governor of the South African Reserve Bank of any matter that in the opinion of the Authority may pose significant risk to the banking sector, the economy, financial stability or financial markets more generally.”

It is clear from the above section that a legal duty or provision must exist in order for the registrar to disclose such information. The mere request by any executive member or cabinet member is not legally sound basis to request such information. Section 89(2) provides for specific circumstances where a minister may be provided with information from the authority.¹⁵¹ These circumstances relate only to situations where there are concerns regarding the soundness of the banking sector as a whole, and does not appear to include information regarding the reasons for why a bank chose to terminate its relationship with a client.

¹⁴⁹ *Minister of Finance v Oakbay Investments (Pty) Ltd and others; Oakbay Investments (Pty) Ltd and others v Director of the Financial Intelligence Centre* [2017] 4 All SA 150 (GP) par 18

¹⁵⁰ S 7 of the Banks Act 94 of 1990.

¹⁵¹ S 89 of The Banks Act 94 of 1990.

Our legislation further allows for a bank to justify the breach of confidentiality in the following circumstances:

- Section 236(4) of the Criminal Procedure Act 51 of 1977, where the account in question is the subject of criminal proceedings;
- section 31 of the Civil Proceedings Evidence Act 25 of 1965, which provides that no bank shall be compelled to produce any of its ledgers, day-books, cash books or other account books in any civil proceedings, unless a presiding officer directs so;
- section 87(2)(a) of the Legal Practitioners Act 28 of 2014, which mainly deals with attorneys' trust accounts information that must, on request, be disclosed to the council, board or through its nominee;
- section 33 of the South Africa Reserve Bank Act 90 of 1989, which mainly deals with information of the SARB itself and therefore is not applicable to contracts concluded by the public;
- section 37 of the Financial Intelligence Centre Act 38 of 2002;
- sections 64(1) and 65 of the Promotion of Access to Information Act 2 of 2000, which deals with where a third party requests information from an institution. The main issue is that the institution providing the information must refuse access to that information if the institution considers that the release of that information may be a breach of confidentiality, which would naturally include bank-customer confidentiality.¹⁵²

As seen above, there are limited circumstances where the reasons for the closure of a bank account can be obtained on the basis of a statutory rule. If the statutory exceptions do not apply, a bank must observe the common law contractual duty (as supported by section 14 of the Constitution (privacy)) to protect the client's confidential information and dealings.¹⁵³

¹⁵² Section 65 of the Promotion of Access to Information Act 2 of 2000.

¹⁵³ *CF Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO and others* [2000] JOL 7338 (CC) paras 15-18.

The principle of legality, which is a founding value of the Constitution,¹⁵⁴ provides that an organ of state is only empowered by the law conferred onto the organ, and may not exceed its authority.¹⁵⁵ It is clear that any conduct by the Minister to interfere with the bank-client relationship is not authorised by law and is thus unlawful. This is a clear indication of how strict the duty not to disclose confidential information is.

In the normal course of contracts, where one party elects to unilaterally terminate the relationship, such a party does not have to inform the other contracting party of the reasons for the cancellation. The reason for exercising a contractual right is usually irrelevant.¹⁵⁶ However, in the interest of confidence in the banking sector, it is advised that banks disclose only to their clients the reasons for termination if the statutory exceptions allow for such a disclosure. These reasons can accompany the notice for termination, essentially affording the client the opportunity, if possible, to rectify the situation. This methodology will follow the same principle as breach of contract, but when a criminal activity has been committed, it can be argued that such a breach cannot be remedied. Moreover, should a bank disclose information (such as that the third party, with whom the client is transacting, is allegedly involved in illicit activities) to the client, the bank might open the door for litigation based on the breach of its duty to keep information confidential, especially where the third party is also a client of the bank.

8. Conclusion

In order to ensure that a just process is followed, a bank should consider the following when it wants to terminate a relationship with one of its customers:

The *lex commissoria* should be an express term of the contract as opposed to being an implied term.¹⁵⁷ The attention of the client should be specifically drawn to the *lex commissoria*, as in the case of indemnity clauses in the Consumer Protection Act 68 of 2008.¹⁵⁸ If the circumstances permit, a bank should inform the client of the

¹⁵⁴ S 1(e) of the Constitution.

¹⁵⁵ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) par 56.

¹⁵⁶ WG Schulze (2011) 221.

¹⁵⁷ WG Schulze (2011) 220.

¹⁵⁸ S 49 of the Consumer Protection Act 68 of 2008 deals with terms and conditions that in the ordinary course of business the customer may not be aware of but has adverse consequences on the customer.

reasons of the closure, save where legislation does not allow such a disclosure.¹⁵⁹ This will not only be deemed *prima facie* fair but may assist a client. The termination should follow a sufficient notice period to assist the client to obtain new banking facilities.¹⁶⁰ This contention is made not necessarily to assist the client but rather the employees of the client, who may suffer detrimental consequences of the closure of their employer's bank accounts. Finally, a bank should apply its mind before crossing the Rubicon to terminate the bank-client relationship.¹⁶¹ For instance, a bank should never close bank account on the basis that would qualify as discrimination.¹⁶² In general a bank should also consider whether the termination may impinge any constitutional right of the affected client.

From the above, if consideration is given to the Constitution, FICA and the principals of the common law, it is clear that a bank can terminate a bank-client relationship under various circumstances. The judgments in the main application and the appeal in the *Bredenkamp* cases clearly manifest that the contract of mandate can be terminated where there were potential business risks for the bank. As indicated, these decisions were handed down prior to the enactment of the Financial Intelligence Centre Amendment Act, which now provides even stronger support for a bank's right to terminate a bank-client relationship unilaterally due to the due diligence duties imposed on banks. If a bank is not afforded this right, the bank will be left to endure an untenable bank-client relationship, which will not only be detrimental for the bank, but which can also influence the confidence of the public in the banking sector.

If one applies the precedent set in *Bredenkamp* and the provisions of FICA, it is evident that the termination of Oakbay's banking accounts is probably just and lawful. Although the focus was whether the law of contract allows the termination, one must not forget the internal risk policy of a bank, as required by FICA. Furthermore, case law is clear that the mandatary can unilaterally terminate a mandate contract with good cause. It is also established a person who exercises a contractual right does not necessarily have to provide reasons for the exercising of their volition.

¹⁵⁹ WG Schulze (2011) 221.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid* 222.

The key aspect of both *Bredenkamp* and the Gupta saga was that, if the bank continued the bank-client relationship, irrespective of whether or not they were in contravention of any law at that stage, the banks would have suffered damage in different forms. The termination was based on the internal risk policy developed by the bank in order to align with national and international legislation. Banks are institutions that aim to generate profit and they do not necessarily exist for the primary reason to provide services to the general public without a profit objective. It is highly unlikely that a bank will terminate a bank-client relationship just because it can or for alternative motives rooted in bad faith. A bank should not be compelled to risk the possibility of dealing with persons that can cause reputational damage and must rightfully be permitted to terminate the bank-client relationships when it makes sense to do so. A sound and sober banking industry and the freedom of banks not to endure illicit relationships can ensure that foreign investment will uplift the country.

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