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A Bank's Duty of Secrecy towards its Customers and Consequences in the case of Breach

by

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Summary

This mini-dissertation concerns the obligation of banks in maintaining the affairs of its clients confidential and the consequences in case of breach of this duty. It is noteworthy to highlight that the relationship between the bank and its customer is based on a contract which is contested in nature and comprises of various legal duties and customs, including relevant banking practices and common law principles. The duty of secrecy or confidentiality of the bank towards its customers is arguably the essence of bank-customer relationship. Therefore, the bank owes its customer a duty of secrecy and the customer has a legitimate expectation towards the bank in ensuring that its affairs are kept confidential.

There is a practical need for a bank to maintain secrecy regarding its customer and his affairs and thus the duty of secrecy may be justified by considerations of public policy. However, there are certain exceptions prescribed by the law when such duty of confidentiality does not apply. Besides these exceptions, there are also circumstances when a bank is requested to disclose certain information regarding its customer's account to a third party.

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Chapter 1:
Introduction

1.1 Background information

For years the law in South Africa has recognised the bank's duty to keep its customers' affairs confidential.[1] Although the relationship between the bank and its customers has existed for decades, the enactment of legislation in South Africa in the last decade materially diminished the extent to which bankers are able to protect and safeguard this duty.[2] This has, in turn, created concerns for persons whose privacy and confidentiality rights may be infringed in the process of disclosing personal information.[3] Furthermore, the lack of definition of this relationship by legislation poses challenges for the courts and contributes to the lack of regulation, since the interpretation is left to the courts.[4] This study seeks to discuss the relationship between the bank and its customer, more importantly on the duty of secrecy that is imposed on the banks and the extent in which this duty can be maintained. This study will also consider the consequences in circumstances where the banks breach this duty.

The bank and customer relationship is based on contract and the nature of this contract comprises of various legal duties, obligations and customs including relevant banking practices and common law principles.[5] The bank and its customer relationship is mostly referred to as *sui generis* in nature.[6] In *Absa Bank Limited v Hamley*,[7] the Supreme Court of Appeal described the relationship as follows:

> "The relationship between a bank and its customer is unique and involves a debtor and creditor relationship. The relationship is contractual and may involve several agreements, generally, require the bank to perform certain for the customer…"

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[1] JD Mujuzi Bank "Secrecy: Implementing the Relevant Provisions of the United Nations Convention against Corruption in South Africa" in B Martins & R Koen Law and Justice at the Dawn of the 21st Century: Essays in Honour of Lovell Derek Fernandez (2016) 117.
[2] R Ismail "Legislative Erosion of the Banker – Client Confidentiality relationship" (2008) *Codicillus* 3.
[3] Ismail (2008) 3.
[4] MA Mthembu "Marriage of convenience: Bank-Customer relationship in the age of the internet: A South African Perspective" (2014) *Journal of International Commercial Law and Technology* 22.
[5] R Sharrock *The law of banking and payment in South Africa* (2016) 115.
[6] Sharrock (2016) 115.
[7] 2014 (2) SA 448 (SCA) para 25.

The most notable characteristic of a relationship between a bank and a customer is that of a mandate, in terms of which the bank agrees to conduct one or more banking services on behalf of the customer.[8] As a result of this mandate, a duty of secrecy is owed to the customer at all material times.[9]

In principle, a natural element of the contract between a bank and it customer is secrecy.[10] This duty requires that the bank must treat any transaction pertaining to its customer and his affairs as secret.[11] This means that the bank owes an implied duty to its customer not to divulge information about its customers to third parties.[12] Therefore, the bank must in all circumstances maintain the secrecy of all information that it gathers from the customer regarding his or her account with the bank.[13]

However, the landmark case of *Tournier*[14] established the common law duty of secrecy. In that case, it was held that the bank breached its duty of confidentiality by the disclosure of certain information. The court held further that "disclosure of confidential information is prohibited, provided such disclosure falls within the scope of one of the recognised exceptions".[15]

In essence, as was held in the *Tournier* case, this duty is not absolute as there are circumstances when a bank can be required to disclose certain information regarding its customer's account to a third party.[16] These circumstances include where:[17]

a) the law compels the bank to disclose such information;
b) there is a duty to the public to do the disclosure;
c) it is in the interests of the bank to publish such affairs; and
d) if consent has been obtained from the customer for disclosure.

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[8] CJ Nagel & JT Pretorius "The bank and customer relationship, combination of accounts and set-off" (2016) *THRHR* 661.
[9] Sharrock (2016) 135.
[10] H Schulze "Confidentiality and secrecy in the bank-client relationship: Banker's duty or client's privilege?" (2007) *Juta's Business Law* 122.
[11] Sharrock (2016) 136.
[12] P Havenga and MK Havenga General Principles of Commercial Law (2007) 377.
[13] Sharrock (2016) 136.
[14] *Tournier v National Provincial & Union Bank of England* [1924] 1 KB (Tournier).
[15] *Tournier v National Provincial & Union Bank of England* [1924] 1 461 KB.
[16] R Islam "Bankers reference and the banks duty of confidentiality under common law reappraised" (2016) Jahangirnagar University Journal of Law.
[17] Sharrock (2016) 136.

Like any contract, this relationship is regulated by various aspects of law.[18] This research seeks to explore the bank and customer relationship and the duties that arise out of this relationship, in particular, the bank's duty of secrecy. The research will also investigate the South African position relating to the bank-customer duty of confidentiality as well as the laws governing this relationship in South Africa. A comparative study will also be undertaken with regard to Malaysia to determine its position and regulations regarding the duty of secrecy. Although not very popular, Malaysia was chosen as a comparative study because, unlike South Africa, Malaysia has codified the duty of confidentiality, thereby creating greater clarity on the expectations on banks as well as avoiding unnecessary lawsuits against banks for breaching such duty.

1.2 Chapter layout

The research paper will be structured into five chapters in order to give a comprehensive analysis of the bank-customer relationship.

Chapter one is the current introductory chapter giving a brief background on the relationship between banks and their customers, stating the problem and outlining the objectives of this research. Chapter two will provide a historical background of the bank and customer relationship, the purpose for the existence of the relationship, as well the ways in which the relationship can be terminated and the implications thereof.

Chapter three will explore the position of banks regarding their duty of confidentiality in South Africa and the applicable law governing this duty. Chapter four is a comparative chapter and will investigate the Malaysian position with regard to the bank's duty of confidentiality. The chapter will also consider the law governing the duty of confidentiality in Malaysian banking law as well as the lessons that could be drawn from Malaysia. Chapter five is a conclusion and recommendations chapter.

[18] HC Schoeman et al *An introduction to South African Banking and Credit Law* (2013) 3.

Chapter 2:
The nature of a bank-customer relationship

2.1 Introduction

As indicated in chapter one, the bank-customer relationship is based on a contract. This is a complex one and involves various types of contracts depending on the nature of the service(s) that the bank offers to its customers.[19] Broadly defined, the term "customer" has been used widely and includes an individual who conducts business with the bank and does so during its normal cause of business, irrespective of whether or not such an individual has a bank account.[20] However, it may be generally accepted that the relationship between the bank and its customer commences with the opening and operating of a bank account.[21]

The purpose of this chapter is to examine the bank-customer relationship in the light of the duties of the bank to their customers. The chapter will look at different types of relationships that exits between the bank and its customers, how these relationships are formed as well as how they are terminated.

2.2 Formation of the bank-customer relationship

The bank-customer relationship ensues when a bank agrees to open an account on behalf of a person and accepts him or her as its customer.[22] The bank is required to exercise reasonable care in opening a bank account for a prospective customer.[23] The contract is normally concluded by way of offer and acceptance.[24] The potential customer makes an offer by completing and submitting an application form to open an account and the bank may then either accept or reject this offer.[25] Through the mere fact of opening a bank account, the bank indicates acceptance of an offer and once

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[19] Sharrock (2016) 115.
[20] *Ibid.*
[21] Section 1 of the Banks Act 94 of 1990 defines the main business of a bank to include the acceptance of deposits from members of the public.
[22] RL Miller & GA Jentz *Cengage Advantage Books: Fundamentals of Business Law Excepted Cases* (2009) 400.
[23] *KwaMashu Baker Ltd v Standard Bank of South Africa Ltd* 1995 (1) SA 377 (D) 395-396.
[24] The banks right of contractual freedom was recognised in *Bredenkamp v Standard Bank "*2010 (4) SA 468 (SCA)", which affirmed the bank right to close the account of the customer with whom it no longer wants to do business with.
[25] Sharrock (2016) 115.

the bank communicates the acceptance of the offer, and the contracts comes into operation.[26]

In *Energy Measurements (Pty) Ltd v First National Bank of South Africa*,[27] it was held that the bank must comply with the obligations imposed on it by Financial Intelligence Centre Act 38 of 2001 (FICA). A failure to exercise reasonable care in opening of the account could have some serious repercussions:

a) failure to comply with the obligations imposed by FICA is an offence in terms of the Act; and
b) a collecting bank which opens a bank account negligently can be liable to the rightful owner of the cheque.

2.3 General elements of the bank-customer relationship

2.3.1 Loan

In its basic form, the contract between the bank and its customer is that of a loan.[28] Whenever the customer makes a deposit into their bank accounts, they essentially provide a loan to the bank which then becomes due and repayable upon demand.[29] Thus this bank and customer relationship concerning a current account has been described as one of debtor and creditor.[30] The customer will be the creditor and the bank becomes the debtor when an account reflects a credit balance.[31] However, the roles of the parties are likely to be reversed: if the account becomes in credit, bank becomes the creditor and the customer will be the debtor.[32] Every payment made by the bank against an overdraft is essentially a loan given to the customer, and every deposit into the overdrawn account serves to reduce or discharge his indebtedness to the bank.[33]

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[26] *Ibid*.
[27] *First National Bank of South Africa v Energy Measurements (Pty) Ltd* 2001 (3) SA 132 (W) 158-160.
[28] Schoeman *et al* (2013) 3.
[29] *Ibid.*
[30] The fundamental characteristics of the traditional debtor-creditor relationship was first highlighted by the House of Lords in *Foley v Hill* (1848) 2 HLC 28, 9 ER 1002 whereby Lord Cottenham stated that "money, when paid into a bank, ceases altogether to be the money of the principal; it is then the money of the banker, who is bound to return an equivalent by a similar sum to that deposited with when he is asked for it…".
[31] Sharrock (2016) 116.
[32] *Ibid*.
[33] *Ibid*.

Essentially, the money that is paid or deposited into the customer's bank account will belong to the bank.[34] This means that the bank does not hold the money as an agent or trustee for the customer to but holds it as its own and its allowed to use it for its own businesses.[35] The customer acquires a personal right to payment of the amount standing to the credit of his account.[36] The customer may exercise this right either by withdrawing the money or by instructing the bank to make payment to third party.[37]

There are certain implications imposed by the fact that money deposited into the customer's account becomes that of the bank. The implications include:[38]

a) The payment is to be made by the bank, meaning that the bank is paying out of its money rather than of its customer. Therefore, it will further reimburse itself by debiting the customer's account.
b) Should the bank make payment in respect to a cheque in instances where it was not entitled to debit the customer account, the bank will have to institute proceedings to recover the amount paid from person who received payment.
c) All the funds will be part of its insolvent estate should the bank be liquidated, and the customer only has a concurrent claim for payment of funds owing to it.

2.3.2 Mandate

Apart from the basis of the bank-customer relationship being one of a debtor and creditor, the relationship also incorporates a mandate.[39] In terms of the contract of mandate, the customer is the mandator and the bank is the mandatory.[40] In this mandate agreement, bank undertakes to conduct one or more of its banking services on behalf of the customer.[41] The *naturalia* of the contract of mandate apply to some extent but the exception is that the bank is not obliged to account for the use to which

[34] *Ibid.*
[35] *Ibid.*
[36] *Ibid*.
[37] *Ibid.*
[38] Sharrock (2016) 118.
[39] Sharrock (2016) 119.
[40] Schoeman (2013) 4.
[41] *Ibid.*

it puts its customer's money and it is not obliged to keep its funds separate from those of its customer.[42]

In the case of *Di Guilio v First National Bank of South Africa*,[43] it was held that the contract of mandate between the parties is not affected by whether the customer's account is in credit or is overdrawn; in both instances the bank acts as mandatory in carrying out its customer's instructions.[44]

2.4 Types of bank-customer relationship

2.4.1 Debtor and creditor

The moment a customer opens an account with the bank, the bank becomes the debtor and the customer becomes the creditor.[45] This means that when a customer deposits money into its account and it reflects a positive balance, the bank becomes the debtor over the money deposited.[46] In *Duba* v *Ketsikili*,[47] the court stated that:

> "money paid into the credit of the customer of the bank without special instructions as to how the money is to be dealt with, becomes in law a debt due by the bank to the customer with a super-added obligation on the part of the bank if the account is in credit to pay it out upon cheques drawn by the customer."

The bank becomes the debtor and the customer the creditor in cases where the account reflects a credit balance.[48] This is because when a customer pays in money into his or her account, the bank automatically owes that money to the customer and must be payable upon demand either through a cheque or withdrawal slip.[49]

2.4.2 Principal and agent

The bank would act as an agent of his customer as he performs a variety of functions for the convenience of its customer.[50]

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[42] Sharrock (2016) 119.
[43] *Di Guilio v First National Bank of South Africa* 2002 (6) SA 281 (C).
[44] *Di Guilio v First National Bank of South Africa* 2002 (6) SA 281 (C) paras 17 – 20.
[45] J Sethi and N Bhatia *Elements of Banking and Insurance* (2012) 10.
[46] Sharrock (2016)
[47] 1924 EDL 332 341.
[48] KG Muhammad *An Appraisal of the relationship between banker and customer in Nigeria* (2015) *European Journal of Business and Management* 233.
[49] *Ibid*.
[50] P Gupta "A comparative analysis of customer satisfaction in nationalised and private banks in Madhya Pradesh 2001 – 2010" (2015) 85.

2.4.3 Mortgagee and mortgagor

The relationship between a mortgagor and mortgagee is established when the bank provides the customer with a credit facility and such is provided against the security of immovable property.[51]

2.4.4 Trustee and beneficiary

The trustee would hold the money or assets in the trust and performs certain functions on behalf of the trustees.[52] If the customer deposits securities or valuables with the banker for safe custody, the banker becomes a trustee of his customer.[53] The customer is the beneficiary, so the ownership remains with the customer.[54]

2.4.5 Pledgor and Pledgee

The pledger and pledgee relationship is established when the bank provides a credit facility to its customer against a security (mainly, collateral of movable property).[55]

2.4.6 Contractual relationship

The bank and customer relationship has evolved and also there's an improvement of the contractual relationship.[56]

2.5 Termination of the bank-customer relationship

As observed, the bank-customer relationship is based on the contract between them.[57] For this reason, the relationship can be terminated by any one of them.[58] The following are the grounds in terms of which the relationship can be terminated.

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[51] AM Sheham "Banker Customer relationship 2009/2010" 8.
[52] P Gupta "A comparative analysis of customer satisfaction in nationalised and private banks in Madhya Pradesh 2001 – 2010*"* (2015) 84.
[53] *Ibid*.
[54] *Ibid*.
[55] AM Sheham "Banker Customer relationship 2009/2010" 9.
[56] *Foley v Hill* (1848) 2 HLC 28; 9 ER 1002.
[57] S Padmalatha *Management of Banking and Financial Services, 2/E* (2011) 93.
[58] Padmalatha (2011) 93.

2.5.1 Termination by agreement

An agreement may be reached by the parties to expressly or tacitly terminate their contract, and as such putting an end to their relationship.[59] When the relationship between the bank and its customer comes to an end by mutual consent, any balance owing to the customer must be paid to him or her and any existing overdrafts cleared.[60]

2.5.2 Notice of termination

The customer may summarily terminate his contract with the bank by notifying it to this effect[61] and the same power is also conferred on the bank provided that it allows the customer a sufficient time of notice.[62] The length of the notice period would depend on the character of the account and the circumstances surrounding the case.[63]

However, in modern days, the bank may unilaterally terminate the contract by including a cancellation clause in the agreement.[64] In this regard, the bank can terminate its relationship with its customer under the following circumstances:[65]

a) When the customer directs the customer in writing to close his or her deposit and other accounts with the bank;
b) when the account has not been operating for a long time and the customer is not traceable despite the bank's efforts;
c) when the bank no longer finds the customer's dealings satisfactory;
d) when the bank is informed of the customer's death;
e) when the bank receives notice of the customer's insanity;
f) when the bank receives a garnishee order from the court; and
g) when the customer is insolvent or goes into liquidation.

In *Bredenkamp v Standard Bank Ltd*,[66] the applicants applied for an order from restraining the bank from terminating the bank-customer relationship by cancelling the

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[59] Sharrock (2016) 162-163.
[60] EJ Otu *The Law of Banking in Nigeria: Principles, Statutes and Guidelines* (2019) 93.
[61] In *Standard Bank of South Africa Ltd v Bredenkamp* 2009 (6) SA 227 (GSJ) paragraph 29, "in the of deposit account, the customer is normally required to give the bank an agreed period of notice before closing the account".
[62] Sharrock (2016) 163.
[63] Otu (2019) 94.
[64] Sharrock (2016) 163.
[65] Padmalatha (2011) 93.
[66] *Bredenkamp v Standard Bank of South Africa Ltd* 2009 (5) SA 304 (GSJ).

contract between them. The contract in question contained a clause entitling the bank to cancel them. The court granted the interim interdict and outlined that the conduct of the bank was unnecessary to close the accounts.[67]

On the return date, it was held that Standard bank was required to cancel the contracts and the bank's conduct in exercising the right was constitutionally fair. On appeal,[68] the Supreme Court of Appeal pointed out that the customer had a legally binding contract with the bank and that the contract gave it the opportunity to cancel. The bank's termination was done in a *bona fide* manner and it gave the appellants time to take their business elsewhere. Therefore, the appeal was dismissed with costs.

2.5.3 Termination by law

2.5.3.1 Dissolution or death of the customer

The death of a consumer terminates any authority he has given to his bank to act for him.[69] Notice of death should be confirmed by producing the death certificate to the bank.[70] Upon notice of death, the customer's account must be stopped and no further payments should be allowed.[71]

2.5.3.2 Mental incapacity of the customer

In terms of the principle created by *Yonge v Tonybee*,[72] the mental disability of the customer should automatically terminate the relationship between the bank and the customer. However, it remains debatable whether the customer's lack of contractual capacity as a result of being mentally incapacitated should lead to the termination of the bank-customer relationship.[73]

2.5.3.3 Sequestration of the customer

It is debatable that the bank and customer relationship does not terminate automatically by insolvency but may restrict the bank's ability to perform its mandate towards its customer in certain instances. The bank may be able to receive payments

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[67] *Ibid*.
[68] *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA).
[69] Otu (2019) 94.
[70] Otu (2019) 95.
[71] *Ibid*.
[72] *Yonge v Tonybee* (1910) 1 K.B. 215.
[73] Sharrock (2016) 165.

on behalf of the customer but once it receives a notice of the customer's sequestration, it may not be able to act on payments instructions given by him. The insolvent customer is divested of his right to dispose of money standing to the credit of his account, which *ex lege* passes initially to the Master of the High Court and subsequently to the trustee.[74]

2.5.3.4 *Dissolution of the bank*

The bank-customer relationship terminates upon dissolution of the bank.[75] This will be the case if the bank is wound up either by an order of court or voluntarily.[76]

2.6 Consequences of termination

When the relationship between the bank and its customer terminates, the credit balance in the customer's account becomes repayable. If the account of the customer is in debit, the bank may institute legal proceedings against the customer to recover any debit balance that exists in respect of that account.[77]

The termination of the relationship ends the duties that the bank owed to its customer, such as the duty to collect cheques and honour payments to a third party. However, the duty of secrecy should be maintained beyond the existence of the bank-customer relationship.[78]

2.7 Conclusion

In this chapter, I discussed the relationship between the bank and customers. The chapter revealed that the bank-customer relationship is a contractual one and accordingly, the normal terms of an agreement apply in the formation of the relationship between bank and its customer. Like all contracts, the relationship begins when an offer is made and accepted.

The chapter also showed that there are different types of contracts that can exist between a bank and its customer and as such, the contracts are treated differently. The chapter further established that the relationship, like any other contractual

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[74] Sharrock (2016) 164.
[75] Sharrock (2016) 165.
[76] *Ibid.*
[77] Sharrock (2016) 166.
[78] *Ibid*.

relationship, can be terminated by both parties to the agreement. However, there are circumstances where the bank is allowed to unilaterally terminate the relationship. The chapter also indicated that the bank-customer relationship goes beyond the termination of the contract between them, especially when it comes to the duty of secrecy – which is discussed in greater detail in the next chapter.

Chapter 3:
The bank's duty of secrecy or confidentiality in South Africa

3.1 Introduction

One of the most sacred duties of a bank as a financial institution is the duty of secrecy or duty of confidentiality.[79] In this chapter I will look at this duty in greater detail. The chapter will consider the legal position in South Africa with regard to the bank's duty of secrecy or confidentiality. The words "confidentiality" and "secrecy" will be used interchangeably in this chapter. In addition to discussion the duty of secrecy, the chapter also considers the recognised exceptions to this duty. This chapter will further look at the consequences that stems from the breach of the duty of confidentiality. In order to give a clear image of both the exceptions and the consequences, case law illustrating both concepts will be discussed.

3.2 The South African legal position on the duty of secrecy

The South African courts dealt with the issue of the legal duty of confidentiality owed by the banks to its customers for the first time in *Abrahams v Burns.*[80] In this case, the South African court had to decide on the existence of the duty of confidentiality by the bank towards its customer. The facts of the case are briefly set out as follows.

A damages claim was instituted by the plaintiff against the defendant who was the acting bank manager at the time. The plaintiff was an attorney acting on behalf of his client and had agreed to advance some loan amount to his client in order to settle a debt against his creditors. The defendant agreed to advance a certain amount of money to the plaintiff, as the plaintiff did not have the funds to pay the client. The defendant advised that the bank would agree provided that the amount requested would be paid into the plaintiff's account as security.

In the presence of a third party, the plaintiff tendered to the defendant, who was at the time acting on behalf of the creditors of the plaintiff's client, a full outstanding

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[79] JD Mujuzi "Bank Secrecy: implementing the relevant provisions of the United Nations Convention against Corruption in South Africa" (2016) Law and Justice at the dawn of the 21st Century Essays in Honour of Lovell Derek Fernandez University of the Western Cape 118.
[80] 1914 CPD 452.

amount. While in the presence of the third party, the defendant made certain allegations or remarks that were said to be false, scandalous and defamatory. The plaintiff was of the view that the remarks meant that he acted dishonestly and made false statement indicating that the plaintiff was a dishonourable person. The plaintiff's claim for damages arose from the remarks made. This claim was as a result of the words uttered by the defendant in the presence of a third party and unlawfully breached the duty and obligation to keep the plaintiff affairs relating to his bank account confidential. The plaintiff allegedly sustained damages as a result of the unlawful disclosure of the affairs of his account to a third party.

The court found that the rule adopted was that if the bank disclosed the state of the customer's account in the presence of a third party and the customer has suffered damage, the bank would be liable. This rule was adopted by the English courts. The court further held that it was not necessary to consider the law at this point in time and the bank ought to have been sued for breach of contract for the allegations made. The court finally found that the remarks made did not disclose the state of affairs of the customer's account.

As a result of the decision in *Abrahams*,[81] the duty of confidentiality and secrecy was reaffirmed to be part of our South African law in the case of *GS George Consultants and Investments (Pty) Ltd and Others v Datasys (Pty) Ltd*.[82] As the court explained, "a bank is liable to its customer for any loss suffered as a result of an unwarranted disclosure by the bank of the customer's affairs to a third party. Since then, the South African courts have recognised that the bank's duty to confidentiality has long existed in English law and has since been acknowledged in South African law".[83]

There are various sources of law in South Africa in respect to the bank's duty of secrecy.[84] In general, the duty of secrecy is derived from common law, legislation, international law as well as contract.[85] The following section discusses these various sources of South African law regarding the duty of secrecy.

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[81] *Ibid.*
[82] *GS George Consultants and Investments (Pty) Ltd and Others v Datasys (Pty) Ltd [1983] 1 All SA* (NC).
[83] *GS George Consultants and Investments (Pty) Ltd and Others v Datasys (Pty) Ltd* [1983] 1 All SA 383 (NC).
[84] HLJ Van Rensburg *Aspects of the Banker Liability: Disclosure and other duties of the bankers towards its customers and sureties* (Unpublished LLD thesis, University of South Africa 2001) 376.
[85] Van Rensburg (2001) 376.

3.2.1 Legislative duty of secrecy

3.2.1.1 The Constitution of 1996

The bank's duty of secrecy is supported by the constitutional right embedded in section 14 of the South African Constitution of 1996.[86] Section 14 of the Constitution provides that every person has the right to privacy.[87] The issue of privacy is so crucial that even if it had not been contained in the Constitution, it would have come to the protection of the customer as a product of policy considerations.[88] Although the Constitution gives every person the right to privacy, it does so in a broad sense without specific reference to the relationship. However, it is arguable that it includes the customer's right to be protected under his or her bank's duty of security.

3.2.1.2 The Code of Banking Practice 2012

Apart from the Constitution, the South African Code of Banking Practice 2012 (the Code) also makes provision for the duty of confidentiality. Generally, the Code sets out the minimum standards for the services of the bank in relation to its products.[89] Although it is not binding, the Code has been established, inter alia, to promote good banking practices by setting the minimum standards for banks when dealing with customers; to increase transparency so that customers can have a better understanding of what they can reasonably expect of the products and services; to promote an open and fair relationship between the bank and its customers; as well as to foster confidence in the banking sector.[90]

The Code requires banks to treat all its customers' personal information as private and confidential.[91] In particular, the Code prohibits banks from disclosing any personal information about their customers unless:[92]

a) they are required to do so by law;
b) they have a legal duty to the public to disclose the information;
c) they have to protect their interests by disclosing the information;

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[86] Constitution of the Republic of South Africa, 1996.
[87] Section 14 of the Constitution Act 108 of 1996.
[88] Van Rensburg (2001) 104.
[89] The preamble of the Code of Banking Practice (2012)
[90] The Code of Banking Practice (2012) 4.
[91] The Code of Banking Practice (2012) 9.
[92] *Ibid*.

d) they have obtained the customer's consent to disclose the information;
e) the customer's account is in default and the customer has not made satisfactory arrangements with the bank for repayment; or
f) the customer's cheque has been "referred to drawer", in which case the information may be placed on a cheque verification service.

3.2.1.3 The Protection of Personal Information Act 2013

The Protection of Personal Information Act[93] (the POPI Act) also provides for the right to the protection of personal information. More specifically, the POPI Act gives effect to the right to privacy enshrined in the Constitution and acknowledges that the right to privacy includes a "right to protection against unlawful collection, retention, dissemination and use of personal information".[94] The POPI Act defines personal information as "information relating to an identifiable person, living, natural person including but not limited to information relating to the education or the medical, financial, criminal or employment history of the person".[95]

The overarching purpose for the enactment of the POPI Act is to give effect to the constitutional right of privacy by safeguarding personal information.[96] In this regard, it is submitted that the inclusion of "financial" information as part of the definition of personal information places an obligation on the banks to honour the duty of secrecy. In the event of the absence of other provisions creating the duty of secrecy, the POPI Act creates such duties between certain receivers of information (including banks) and the person whose personal information is in the bank's possession. However, the POPI Act also contains certain exceptions.[97]

In particular, the POPI Act seeks to protect personal information being processed by responsible parties and by governing the manner in which it may be processed.[98] To ensure compliance with the provisions of the POPI Act and enforceability of the

[93] The Protection of Personal Information Act 4 of 2013.
[94] The Preamble of the Protection of Personal Information Act 4 of 2013.
[95] Section 1 of the Protection of Personal Information Act 4 of 2013.
[96] Section 2 of the POPI Act 2013.
[97] AT Kandeh, RA. Botha & LA Futcher "Enforcement of the Protection of Personal Information (POPI) Act: Perspective of data management professionals" (2018) 20 *South African Journal of Information Management* 3.
[98] Sharrock (2016) 300.

rights protected by it, the POPI Act established measures, including the establishment of the Information Regulator.[99]

The POPI Act requires "responsible parties to secure the integrity and confidentiality of personal information in their possession or under their control by taking appropriate, reasonable, technical and organisational measures to prevent loss or damage of personal information and unlawful access to personal information".[100] In terms of the POPI Act, the required measures to be taken include, *inter alia*:[101]

a) "identifying of all reasonable foreseeable internal and external risks to personal information in the responsible person's possession;
b) establishing and maintaining of appropriate safeguards against risks identified;
c) verifying that the safeguards are effectively implemented on a regular basis; and
d) ensuring that the safeguards are continually updated in response to new risks or deficiencies in previously implemented safeguards".[102]

3.2.1.4 The Land and Agricultural Development Bank Act 2002

Another statute that gives rise to the secrecy duty is the Land and Agricultural Development Bank Act 2002 (LADBA).[103] This Act provides that subject to the Constitution and the Promotion of Access to Information Act,[104] no person may in any way disclose any information submitted by any person in connection with any application for any agricultural financial service rendered or offered by the Bank; or publish any information obtained therein.[105] This Act further creates a sanction for the failure to obey the aforementioned provision by stating that such person shall be guilty of an offense.[106] It is clear from the provisions of this Act that the bank has a duty towards its customer to observe the duty of secrecy. The exceptions envisaged in this Act shall be dealt with further below in this chapter.

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[99] *Ibid*.
[100] Section 19(1) of the Protection of Information Act 2013 (POPI Act).
[101] Section 19(2) of the POPI *Act* 2013.
[102] *Ibid*.
[103] The Land and Agricultural Development Bank Act 15 of 2002.
[104] The Promotion of Access to Information Act 2 of 2000 (PAIA).
[105] Section 43(1) of the Land and Agricultural Development Bank Act 15 of 2002.
[106] Section 4(2) of the Land and Agricultural Development Bank Act 15 of 2002.

3.2.1.5 The South African Reserve Bank 1989

The South African Reserve Bank Act 1989[107] (the SARB Act) also makes provision for the bank's duty of secrecy. According to the SARB Act, "no director, officer or employee of the bank shall disclose to any person […] any information relating to the affairs of the Bank; a shareholder of the Bank; or a client of the Bank, acquired in the performance of his or her duties or the exercise of his or her functions".[108]

The SARB Act, like the other statutes discussed above, gives rise to the duty of secrecy and also makes exceptions to this duty of secrecy.[109] This duty is not placed on the bank but rather on employees of the bank who are responsible for the functioning of the bank.[110]

Where a statute states that a bank is bound to share confidential information or to commit a justified breach of the duty of secrecy, it can be implied that such provision recognises that the Bank has a duty of secrecy regardless of where such duty stems from.

3.2.1.6 Financial Intelligence Centre Act 2001

The Financial Intelligence Centre Act 2001[111] (the FIC Act) gives implied recognition to the duty of secrecy. The FIC Act has the crucial purpose of preventing and combating money laundering activities.[112]

In terms of the FIC Act "no duty of secrecy or confidentiality or any other restrictions 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".[113] Therefore, this provision gives recognition to the duty of secrecy.[114]

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[107] South African Reserve Bank Act 90 of 1989.
[108] Section 33 of the SARB Act.
[109] H Schulze "Confidentiality and secrecy in the bank-client relationship" (2007) 15 *JBL* 122-126 122.
[110] *Ibid.*
[111] Financial Intelligence Centre Act 38 of 2001.
[112] Section 3(1)(b).
[113] Section 37(1) of the FIC Act.
[114] As above.

3.3 International law

Chapter 14 of the Constitution of 1996 deals with the application of international law.[115] Therefore, if South Africa is party to an international agreement, it is bound by such agreement subject to the provisions of the Constitution. The most relevant international agreement that recognises bank secrecy is the United Nations Convention Against Corruption.

By virtue of South Africa being party to the treaty, it has given strength to our existing recognition of duty of secrecy. This was recognised in the case *S v Shaik and Others*.[116] This further means that South Africa is bound by the terms of the UN Convention and the courts recognised the validity of and obligations under this agreement.[117]

Article 40 of the Convention provides that "each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws".[118]

This provision assumes the general existence of bank secrecy on an international level. In fact, this provision sought to override that duty under certain circumstances. Another relevant provision in this regard is article 31(7), which provides that "for the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy".[119]

The final provision that gives recognition to this duty under the UN Convention against Corruption is article 46(8). This article provides that state parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.[120] The above provisions simply seek to ensure that should any party to the treaty require confidential information about a citizen of South Africa, such information

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[115] Section 233 of the Constitution.
[116] *S v Shaik and Other*s 2008 (2) SA 208 (CC).
[117] *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC).
[118] UN Convention against Corruption.
[119] *Ibid*.
[120] *Ibid.*

will be provided as South Africa is duty bound by the terms of the UN Convention against Corruption.

3.4 Exceptions to the duty of secrecy

The exceptions to the duty of confidentiality were dealt with in the landmark case of *Tournier v National Provincial and Union Bank of England*.[121]

This case law clarified English law on the banker's duty of secrecy or confidentiality. It provided that there is an implied contractual term between banks and their customers that the bank will not disclose confidential information to any third party without express or implied consent to do so. The duty is subject to exceptions where the bank may disclose confidential information.

In this case, Tournier had an overdraft facility with the National Provincial and Union Bank of England and had arrangements to make payments in respect of the overdraft. However, after three instalments he stopped to make any further payments. Tournier became the payee of a cheque drawn by Woldingham Traders Ltd and instead of depositing the cheque in his account with the defendant bank, he endorsed the cheque to a customer of the London City and Midland Bank. The defendant bank came to know about the cheque by the mere fact that Woldingham was its customer. The bank manager inquired about the identity of their customer and discovered that the endorsee was a bookmaker, a person who accepts and pays off bets. The manager then called the employers of Tournier and had conversations with two of the directors. It was alleged that the manager informed them that Tournier was having dealings with a bookmaker and as a result of the discussion, the employer refused to renew Tournier's contract of employment.[122]

Legal proceedings were instituted by Tournier for defamation and breach of contract. The court held that a bank owes its customer a legal duty of confidentiality not to disclose information to any third party, and any breach of this duty could give rise to liability in damages. This duty arises between the bank and its customer upon the opening of the customers bank account and continues beyond the time when the account is closed.

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[121] *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 250 JICLT, Vol 7 Issue 3 (2012).
[122] *Ibid*.

The court laid down a number of exceptions to the duty of secrecy and provided that such a duty may be breached where the bank is compelled by law to disclose, instances where it would be in the public interest to disclose, where it would be in the interest of the bank to disclose and the customer express or implied consent is obtained for such disclosure.

The important qualification is that the bank has no choice but to disclose information where such disclosure is compelled by law. It is therefore important to highlight that a bank may disclose confidential information relating to a customer to a third party where it is required to do so by one or more exceptions developed in the *Tournier* case. It is also indicated in the judgment that the bank has the burden of proof for deriving the disclosure to one of these qualifications.[123] The exceptions as detailed in the *Tournier* case[124] are discussed below.

3.4.1 Where disclosure is compelled by law

As mentioned above, the duty of secrecy is not absolute. In fact, South Africa has a number of statutes containing provisions that override the duty of secrecy, such as the Financial Intelligence Centre Act 38 of 2001,[125] the Bills of Exchange Act 34 of 1964 (as amended), the Prevention and Combating of Corrupt Activities Act 12 of 2004, and the Protection of Constitutional Democracy against Terrorist and related Activities Act 33 of 2004.[126]

As shown in the *Tournier* case, the bank is also obliged to furnish information pertaining to its customer if a court order requires it to do so. In South Africa, those instances are included, for example, the Drugs and Drug Trafficking Act 1992,[127] which requires an official of the financial institution to disclose to the South African Police Service (SAPS) any suspicious transaction or acquisition of property by the financial institution during the course and scope of its business if the official reasonably believes

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[123] *Ibid*.
[124] *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 250 JICLT, Vol 7 Issue 3 (2012).
[125] Section 37(1) of Act 38 of 2001 provides that 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 and the South African Revenue Service.
[126] Act 33 of 2004. In terms of section 12, any person who has reason to suspect that another person intends to commit or has committed certain offences referred to in the Act, or is aware of the presence of such a person, is obliged to report this suspicion or presence to any police officer.
[127] Drugs and Drug Trafficking Act 140 of 1992.

that such property was acquired through proceeds of drug related crime. The Act places an obligation on the employee or official of the financial institution to report this and to ensure that related information is provided to the authorities.[128]

3.4.2 Where there is a duty to disclose to the public

The duty of secrecy that the bank owes to its customer may be overridden by the public interest, for instance where the consumer uses his bank account for fraudulent purposes.[129] In *FirstRand Bank Limited v Chaucer Publications (Pty) Ltd and Another*,[130] the court stated that, "in terms of public policy, the bank has a duty not to disclose information exchanged between it and its customer to third parties unless otherwise required to in light of a greater public interest. However, the court emphasised that it is up to the customer to invoke this privilege and insist that the bank keeps the information confidential".[131]

3.4.3 Where the disclosure is in the interest of the bank

The duty of secrecy may also be relaxed when the bank's own interests require it to disclose information pertaining to its customer's affairs.[132] For instance, where the bank decides to sue the customer on an overdraft, the bank may be entitled to publish the affairs pertaining to the overdrawn account in its pleadings.[133] At times, the customer's information may be passed to third parties and this information is useful to the creditors, moneylenders and credit grantors.[134]

3.4.4 Where the disclosure was made by express or implied consent of the customer

The customer may authorise the bank to disclose information about him and his affairs. The most common example is where a customer requests the bank to provide

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[128] Section 10 (2) of Drugs and Drug Trafficking Act.
[129] Sharrock (2016) 138.
[130] *FirstRand Bank Limited v Chaucer Publications (Pty) Ltd and Another* 2008 2 SA 595(C).
[131] *Ibid*.
[132] CF Fourie (1993) 61.
[133] *Ibid*.
[134] NT Masete "The Challenges in Safeguarding Financial Privacy in South Africa" *Journal of International Commercial Law and Technology* (2012) 253.

information on him to another person, but even when the bank has obtained the consent of the customer, it must do so within the ambit of that consent.[135]

The bank commits breach of contract if it makes disclosure when it was not authorised to do so.[136] The customer may obtain an interdict to prevent the bank from disclosing information in breach of its duty.[137] Disclosure of confidential information would also appear to be a violation of the customer's right to privacy, giving the customers recourse against the bank in delict.[138] It is an offence under the National Credit Act to disclose any confidential information concerning the affairs of any person obtained in carrying out any function in terms of the NCA.[139] There is an implied consent of a customer when a surety obtains information on the account he guarantees from a bank and also in circumstances where the bank gives bank reports to another bank acting on the mandate of the customer.[140]

3.5 Conclusion

This chapter discussed the South African laws that governs disclosure of confidential information. As seen from the above, the duty of secrecy in South Africa is derived from common law and statutes as well as case law. The chapter discussed the relevant statutes providing for the bank's duty of secrecy in South Africa.

The chapter also discussed the exceptions to the bank's duty to keep the customer's information confidential, which was first outlined in the English *Tournier* case. In that case, it was recognised that the bank may disclose a customer's information if it is compelled to do so by law, where there is an obligation to the public to release such information, where it is in the interests of the bank to disclose such information or where the customer has given consent for such disclosure.

From the above overview, it is evident that our statutes require the banks to maintain a duty of secrecy by keeping their customers affairs confidential. However, there are exception to this whereby the banks are required to disclose such confidential information. These exceptions are provided for in the *Tournier* case.[141]

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[135] *Ibid.*
[136] *Ibid*.
[137] *Ibid*.
[138] *Ibid.*
[139] *Ibid*.
[140] Masete (2012) 253.
[141] *Ibid.*

Chapter 4:
The bank's duty of secrecy in Malaysia

4.1 Introduction

As a general rule, financial institutions in Malaysia are under the duty to keep any information relating to its customers confidential and the banks are not allowed to disclose any information to third parties except in certain circumstances.[142] The law relating to the banks' duty of secrecy in Malaysia is statutory and the relevant statutory provisions pertaining to banking secrecy are found in the Financial Services Act 2013 as discussed below.

This chapter seeks to explore the Malaysian banks duty to keep the affairs of its customers confidential. The chapter will look at the Malaysian statutes providing for this duty, in particular the Financial Services Act 2013, which explicitly provides for this duty. The chapter will further look at the circumstances under which the duty may be relaxed in Malaysian law.

4.2 Legislative provisions for the duty of confidentiality in Malaysia

4.2.1 The Banking and Financial Institutions Act 1989

Prior to the enactment of the Financial Services Act 2013, the bank's duty of confidentiality was contained in the Banking and Financial Institutions Act 1989 (BAFIA).[143] Generally, the rationale for the bank's duty of secrecy in BAFIA was to foster the confidence of the banking public on the sanctity of their accounts and affairs.[144] In *Wako Merchant Bank (Singapore) Ltd v Lim Lean Heng & Ors*,[145] it was noted that it was obvious that the intention of Parliament in enacting section 97 of BAFIA was to protect the secrecy of the affairs and accounts of a customer of a financial institution.

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[142] S Miskam & F Shahwahid "Privacy and Personal Data Protection: The Legal Framework In Malaysia and its Implication in the Financial Services Sector" (2014) *International Islamic University College Selangor* 8

[143] Section 97 of the Banking and Financial Institutions Act 1989 (BAFIA).

[144] AA Rahman "Combating money laundering and the future of banking secrecy in Malaysia" (2014) *Journal of Money Laundering Control* 221.

[145] *Wako Merchant Bank (Singapore) Ltd v Lim Lean Heng & Ors* [2000] 4 CLJ 223, 226.

In essence, section 97 of BAFIA prohibited a director or an officer of a bank or other regulated institution and any other person who had access to any document or material relating to the affairs or account of the customer from disclosing such information.[146] The prohibition, however, was not applicable where the information was or had already been made publicly available at the time of disclosure from any other source other than the licenced institution.[147] Against this background, it was an offence under BAFIA to disclose the information about the affairs or account of a customer.[148]

However, there were exceptions to the bank's duty of secrecy under BAFIA.[149] Firstly, the bank's duty of secrecy did not apply to the Bank Negara Malaysia and its officials for the purposes of enabling or assisting it to discharge its duties.[150] Secondly, the bank's duty of secrecy could be lifted under the following circumstances:[151]

a) Where the customer or their representative had given written consent to disclose the information;
b) where the customer was declared bankrupt or, in the case of a corporation, it was wound up;
c) where there was an action by the bank against a customer;
d) where a licenced institution was served with a garnishee order;
e) where information related to credit facilities;
f) where the disclosure was required by or authorised under BAFIA such as disclosures to the Bank Negara Malaysia under sections 43, 71, 98, 102 and 113 and disclosures to auditors under section 40(16) (h);
g) where the disclosure was authorised under any statute; or
h) where such disclosure was authorised by the Bank Negara Malaysia.

It is important to note is the fact that the common law exception that a bank can disclose information in the public interest was not covered in BAFIA.[152] However, the case of *Bank Bumiputra Malaysia Bhd v Cheong Yoke Choy: Malaysian Central*

[146] Rahman (2014) 222.
[147] *Ibid.*
[148] Section 97(3) of BAFIA 1989.
[149] Section 98 and 99 of BAFIA 1989 set out the exceptions to the bank's duty of secrecy.
[150] Section 98(1) (a) of BAFIA 1989.
[151] Section 99 of BAFIA 1989.
[152] Rahman (2014) 2223.

Depository Sdn Bhd[153] provides for the disclosure of confidential information to be in the interest of the public. In this case the plaintiff instituted proceedings for breach of trust, fraud and conversion against the defendant and its employee. The court granted the orders as prayed for by the plaintiff. The intervener was required to provide to the plaintiff confidential information relation to the shares held by the defendant. An application to set aside the order were launched by the intervener, claiming that the disclosure is confidential and required to maintain secrecy relating to trading and ownership of shares. The intervener claimed that the disclosure would expose the officials involved to criminal liability and is in breach of section 43 of the Securities Industry (Central Depositories) Act 1991. The court ordered that the disclosure be made as it is in the public interest.[154]

4.2.2 The Financial Services Act 2013

The Financial Services Act 2013 (FSA) provides that no person who has access to any document or information relating to the affairs or account of any customer of a financial institution shall disclose to another person any document or information relating to the affairs or account of any customer of the financial institution.[155] Failure to comply with the provisions of this section constitutes an offence and shall on conviction be liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million ringgit or both.[156]

Section 132 of the FSA expressly prohibits the Minister from giving directions to the Central Bank or authorising the Bank to inquire specifically into the affairs or account of any customer of any financial institution subject to certain exceptions created for purposes of exercising of powers of the Central Bank.[157]

However, the FSA also sets out the exceptions to the bank's duty of confidentiality under schedule 11 and allows the following disclosures to be made:[158]

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[153] *Bank Bumiputra Malaysia Bhd v Cheong Yoke Choy: Malaysian Central Depository Sdn Bhd* [2000] 7 CLJ 157.
[154] *Ibid*.
[155] This provision includes the financial institution itself or any person who is or has been a director, officer or agent of the financial institution. See section 133(1) (a) and (b) of the Financial Services Act 2013.
[156] Section 133 (4) of the Financial Services Act 2013.
[157] Section 132 of the Financial Services Act 2013 (FSA). See also Miskam & Shahwahid (2014) 9.
[158] Section 134 of the FSA 2013. See also Miskam & Shahwahid (2014) 9.

a) Disclosure of documents or information which is permitted in writing by the customer, the executer or administrator of the customer, or in the case of a customer who is incapacitated, any other legal personal representative;
b) disclosure in connection with an application for a Faraid certificate, grant of probate, letters of administration or distribution order under the Small Estates (Distribution) Act 1955 in respect of a deceased customer's estate;
c) disclosure in a case where the customer is declared bankrupt, is being or has been wound up or dissolved in Malaysia or in any country, territory or place outside Malaysia;
d) disclosure of any criminal proceedings or civil proceedings between a financial institution and all persons to whom the disclosure is necessary for the purpose of the criminal proceedings or civil proceedings;
e) disclosure by a licenced bank or licenced investment bank to comply with a garnishee order which has been served on them to attach moneys in the account of the customer;
f) disclosure to comply with a court order made by court not lower than a Sessions Court;
g) disclosure to comply with a court order or request made by an enforcement agency in Malaysia under any written law for the purposes of an investigation or prosecution of an offence under any written law;
h) disclosure in performance of functions of the Malaysian Deposit Insurance Corporation;
i) disclosure by a licenced investment bank for the purposed of relevant specified functions;
j) disclosure by a licenced bank or licenced investment bank for the purpose of performance of functions of an approved trade repository under the Capital Markets and Services Act 2007;
k) disclosure of documents of information required by the Inland Revenue Board of Malaysia under section 81 of the Income Tax Act 1967 for purposes of facilitating exchange of information pursuant to taxation arrangements having effect under section 132 or 132A of the Income Tax Act 1967;
l) disclosure of credit information of a customer to a credit reporting agency;

m) disclosure in performance of any supervisory functions, exercise of any supervisory powers or discharge of any supervisory duties by a relevant authority outside Malaysia which exercises functions corresponding to those of the Bank under the Financial Services Act 2013;

n) disclosure as a result of conduct of centralised functions, which include audit, risk management, finance or information technology or any other centralized function within the financial group;

o) disclosure as a due diligence exercise approved by the board of directors of the financial institution in connection with a merger and acquisition, capital raising exercise or sale of assets or whole or part of the business;

p) disclosure in performance of functions of the financial institution which are outsourced; or

q) disclosure in the case where a financial institution has reason to suspect that an offence has been, is being or may be committed.

4.2.3 The Personal Data Protection Act 2010

The overarching purpose of the Personal Data Protection Ac*t* 2010 (PDPA) is to regulate the processing of personal data in commercial transactions.[159] Prior to the enactment of the PDPA, Malaysia's approach to personal data protection was sectoral.[160] This means that statutes, rules, guidelines and codes of practice were developed to regulate the collection, use and dissemination of personal data in specific sectors such as banking and financial institutions sectors.[161] However, none of these statutes, rules or guidelines was comprehensive enough to cover all aspects of data protection.[162] Therefore, the enactment of the PDPA finally provided Malaysia with an exclusive law that governs personal data protection.[163] As the PDPA is the primary legislation that specifically regulates personal data protection, it is therefore applicable to most sectors including banks and financial institutions.[164]

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[159] The Preamble of the Protection of Personal Data Act 2010.
[160] N Ismail & E Lee Yong Cieh "Beyond Data Protection: Strategic Case Studies and Practical Guidance" (2013) 79.
[161] An example of legislation developed in this regard is the Banking and Financial Institutions Act 1989. See Ismail & Lee Yong Cieh (2013) 79.
[162] *Ibid*.
[163] *Ibid*.
[164] *Ibid.*

4.3 Conclusion

From the above overview, it is clear that banking confidentiality is a cardinal principle in banking law.[165] Realising its importance, the Malaysian legislature has gone to the extent of codifying it in a statute. Unlike in South Africa, this duty is explicitly provided for in legislation. The Malaysian law also specifically provides for circumstances under which banks are allowed to disclose their customers' affairs. The exceptions, as provided in the Malaysian statutes, immensely deviate from the exceptions established by the *Tournier* case. However, this could be a lesson for South Africa and other countries that, if the duty of confidentiality is codified, it creates greater clarity on the expectations on banks as well as avoids unnecessary lawsuits against banks for breaching the duty.

[165] S Jwahitha "Banking confidentiality – A Comparative analysis of Malaysian banking statutes" (2002) *Arab Law Quarterly* 255.

Chapter 5:
Conclusions and recommendations

5.1 Conclusions

The aim of this dissertation was to explore the relationship between a bank and its customers, with a focus on the bank's duty to keep its customers' affairs confidential. A comparison was also done between South Africa and Malaysia regarding the application of this duty. The discussion started with an exploration of the general relationship between the bank and its customers with a focus on the bank's duty of secrecy towards its customers. The bank-customer relationship is based on a contract between the bank and its customers. Therefore, all the terms and obligations relating to this contract are determined by the conduct of the bank and its customers. This relationship can also be terminated by both parties. However, there are instances, as shown in chapter two, where unilateral termination of the relationship may occur.

As a result of this unique relationship between the bank and its customer, certain duties arise between these two parties. Of importance in this research is the bank's duty of confidentiality. As observed from this research, the duty of confidentiality requires banks to keep the affairs of its customers' confidential. However, this duty is not absolute and they are exceptions to this duty. These exceptions were first outlined in *Tournier* case and they are still applicable today. In this regard, it is noteworthy to highlight that lifting the banks' duty of confidentiality does not take away the banks duty towards its customer.[166]

A comparative study was conducted between South Africa and Malaysia. In this regard, it was found that, just like South Africa, the Malaysian courts also recognise the banks' duty of confidentiality while Malaysia has even gone to the extent of codifying this duty. However, the research also showed that, unlike in Malaysia, there is no legislation in South Africa that explicitly makes a provision that places an obligation towards banks to keep their customers' information confidential. It is, therefore, noteworthy to highlight that South Africa should take into consideration, the Malaysian approach to the banks' duty of secrecy and codify it in one of its banking statutes. It is important to mention that some legal systems recognises the importance

[166] Ismael (2008) *Codicillus 3.*

of the bank's duty of confidentiality but fails to address the issue in a comprehensive manner so that the interests of customers can be protected by legal enforcement.[167]

5.2 Recommendations

The above discussion shows that South African law does indeed provide for the bank's duty of confidentiality towards its customers.

As pointed above, several statutes have been enacted in South Africa to provide for the disclosure of personal information. However, none of these statutes specifically apply to banks. It is consequently recommended that a provision has to be enacted that clearly stipulates the circumstances in which a bank may disclose confidential information of its customer. In the same way, there is no statutory provision that regulates the banks in case such duty is breached. Therefore, it is worth highlighting that the South African policymakers should consider enacting provisions regarding liability for banks for breaching the duty of confidentiality as well as sanctions to be imposed.

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[167] Jawahitha (2002) 255.

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