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# ***A Critical Study of the Bank Secrecy Rule***

by

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## Summary

It has been a world-wide norm that in cases dealing with a bank customer's information, particularly public figures, third parties always tend to request from banks to reveal the banking details of their customers. This is often the case when a bank has, in its discretion, terminated one of its customers' bank account as a result of that customer's illicit and illegal activities that have the adverse effect of harming the banks' reputation and good name. Another example is where a tax notice has been served on a bank to make available the information of one of its customers that is under tax investigations, or where the National Prosecuting Authority orders a bank to disclose the information of its customer that is under criminal investigations. Criminal investigations and termination of bank accounts held by public figures always make news headlines, and it is such media coverage that tend to create the impression that a bank customer's information can be disclosed to third parties.

The bank secrecy rule dictates that a bank customer's personal details and business activities must be kept secure and confidential at all times. The bank secrecy rule applies before, during and after the termination of a bank customer relationship. The protection that stems from the bank secrecy rule will always depend on the facts and merits of each case. The bank secrecy rule is not absolute. There are common law and statutory exceptions to the bank secrecy rule. There are circumstances where a bank can justifiably disclose its customer's information to third parties, such as when the bank is compelled by law to disclose, and also where there is a public duty to disclose, where it is in the interest of the bank to disclose or the customer consents to the disclosure of their information. This study will embark on an analytical and critical study of the crux of the bank secrecy rule, the origin of the rule, its rationale and significance, its current position on the South African legal shelves, the interconnectedness of the bank secrecy rule with contract law, the nexus between the bank secrecy rule and the constitutional right to privacy, the legislative basis for the bank secrecy rule and lastly the answer as to whether the bank secrecy rule is absolute.

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# Chapter 1: Introduction

## 1.1 Background

The bank secrecy rule is a significant rule that maintains faith and trust in banks by customers. Customers entrust banks with their monetary deposits and their personal details are also revealed to the bank in the process. Banks undertake a duty to keep the deposits made by the customers and allow them to make withdrawals and payments to access their deposits. Banks further undertake the duty to keep the personal information and the financial activities of their customers safe, secure and private, this is the essence of the bank secrecy rule.

The intermediation role played by banks is the important part of any bank-customer relationship. The relationship between the bank and the customer is founded on a legally binding and enforceable contract. The South African law of contract is informed and regulated by the common law. Principles such as *pacta sunt servanda*, privity of contracts and sanctity of contracts are part of our contract law. Taking into cognisance these contractual principles, in a case where the bank reveals the personal information of its client, it will be in breach of contract. However, it is not a straightforward case of breach of contract. The bank can be ordered or obliged to disclose the information of its client. For instance, SARS can serve a notice on a bank to make available the information of its client if there are tax investigations by SARS regarding that client. Criminal law also has implications for the bank secrecy rule, because criminal investigators can order the bank to reveal the clients' information if there are criminal investigations against the client. This shows that the bank secrecy rule is not absolute.

The advent of the democratic era led to the promulgation of the supreme Constitution. Any law or conduct that is inconsistent with the Constitution is invalid. Contractual terms also have to be in line with the Constitution. Section 14 of the Constitution states that "everyone has a right to privacy". Section 14 extends protection in addition to the bank secrecy rule. The bank secrecy rule states that the bank customers' personal information may not be disclosed and this ties in well with section 14 which reiterates that a person's privacy may not be infringed.

The bank secrecy rule in its modern form is influenced by numerous factors and legislative provisions. The bank secrecy rule has its origin in English law. South African courts have relied on English cases when dealing with a bank confidentiality matter. This dissertation will also discuss the origin of the bank secrecy rule and the common law exceptions to the bank secrecy rule as stated in English case law.

## **1.2 Research problem**

The bank secrecy rule forms part of any standard contract entered into by a bank and its clients. Banks are at all times obliged to keep the information of their clients confidential. Banks cannot disclose their customer's information in terms of the contract with their clients. The regulation of banks is adamant in maintaining the bank secrecy rule in all bank-customer relationships. However, other areas of law take precedence over the bank secrecy rule, and in such circumstances banks are obliged to disclose the details of their client.

The bank secrecy rule plays a pivotal role in the banking sector. Customers have confidence on banks that their information will be kept secure and confidential. The bank secrecy rule serves as a shield of protection to the bank customer's personal information. Banks also warrant to its customers that their information will not be disclosed to any third parties.

In respect of criminal activities, mainly financial crimes such as money laundering and financing of terrorism, the bank secrecy rule does not afford the same protection to bank customers who commit crimes. The bank secrecy rule functions in a reciprocal way on both the bank and the customer. The bank undertakes to keep its customer's information confidential and the bank secrecy can only protect the customer if there are no illegal activities involved on the part of the customer.

## **1.3 Methodology**

This study will utilise a variety of approaches. It analyses the crux of the bank secrecy rule and its core effect on bank-customer relationships in South Africa. Taking into account that banks enter into contracts with their customers, this study will then analyse contractual principles such as *pacta sunt servanda*, privity of contracts and sanctity of contracts. The gist of these contractual principles is that contractual terms voluntarily entered into by contracting parties must be honoured and are only binding



between the parties at hand. The bank secrecy is one of the terms that forms part of the contracts used by banks, which means that the bank must honour the bank secrecy rule as a contractual terms, the effect being that the bank cannot disclose the personal information of its clients to third parties who are not party to the bank-customer contract.

The bank secrecy rule is also evaluated in view of section 14 of the Constitution, which guarantees the right to privacy. The rights enshrined in the Constitution are not absolute and can be limited in terms of the limitation clause in section 36 of the Constitution. The bank secrecy rule can be limited and as a result the information of the client can be disclosed to third parties but the limitation must meet the criteria set out in section 36 of the Constitution.

## Chapter 2: The history and origin of the bank secrecy rule

### 2.1 Introduction

It is important to trace the roots of the current legal position, in order to understand the *status quo*. Chapter 2 of this study focuses on the history and origin of the “bank secrecy rule”, and also illustrates the rationale behind the development of the bank secrecy rule. The South African legal system is mostly informed and adopted from the common law.<sup>1</sup> South Africa adopted the bank secrecy rule from English law, and the rule was domesticated into the South African banking law.

### 2.2 The origin of the bank secrecy rule

#### 2.2.1 English law origin of the bank secrecy rule

The roots of the bank secrecy rule dates back to as early as the 1800s when the rule was first given its judicial recognition. In the 1862 case of *Forster v The Bank of London*,<sup>2</sup> the court held that a bank has a duty not to disclose the affairs of its clients' bank account.<sup>3</sup> However, a contradicting judgment was given in the 1868 case of *Hardy v Veasey*,<sup>4</sup> where the court held that the obligation not to disclose a bank customer's bank account details to third parties was a moral duty instead of a legal duty.<sup>5</sup> It is quite clear that the bank secrecy rule is an important rule of banking law, its importance is deduced from its early recognition in English courts and reaffirms that a bank-customer relationship was always regarded as a confidential agreement between a bank and its client and only binding between the parties to the contract with no intrusion from third parties.<sup>6</sup> The early recognition of the bank secrecy rule in English law depicts a picture that even though there was not enough information on the bank secrecy rule then, it was pragmatically observed and it became a custom that a bank customers' information could not be disclosed to third parties. However, despite the early recognition of the bank secrecy rule in English law, it was evident that there

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<sup>1</sup> R. Sharrock et al., *The Law of Banking and Payment in South Africa* (2016) 119.

<sup>2</sup> *Forster v The Bank of London* 3 F & F 214.

<sup>3</sup> *Forster v The Bank of London* 217.

<sup>4</sup> *Hardy v Veasey* 1868 3 LR Ex.

<sup>5</sup> *Hardy v Veasey* 111.

<sup>6</sup> See *Forster v The Bank of London & Hardy v Veasey*.

was a grey area and an ambiguous legal position in English law on this part of its law, and as the bank secrecy rule existed in a legal vacuum a clear legal position required judicial clarification to answer the question as to whether the bank secrecy rule imposed a moral duty or a legal duty.<sup>7</sup>

### **2.2.2 South African origin and recognition of the bank secrecy rule**

The South African law of banking and financial institutions is largely based on English law.<sup>8</sup> The South African judiciary has relied on English case law in instances where there is no legislation or legal precedent that regulates a matter,<sup>9</sup> and this is how the bank secrecy rule was formalised and domesticated into South African banking law. South African courts have therefore held that the English position of the bank secrecy rule is applicable in South Africa.<sup>10</sup>

It stands to reason that even though there was no express provision or case law that required banks to uphold the bank secrecy rule in South Africa, banks in practical terms did give attention to the rule,<sup>11</sup> and kept their clients' information confidential as far as reasonable as one would expect from a bank, but there was no express regulation of the bank secrecy rule in the South African jurisprudence. It was held in *Densam v Cywilnat*<sup>12</sup> that South African banking law made no provision for the duty of secrecy between a bank and customer, and that banks were only required to act in good faith and not fraudulently.<sup>13</sup>

Prior to the judgment in the case of *Abrahams v Burns*,<sup>14</sup> there was no judicial decision that stated that a bank must at all times ensure that the information pertaining to its clients' bank accounts must be kept secure and confidential.<sup>15</sup> This meant that banks and financial institutions were not formally and legally obliged to conform to the bank secrecy rule. The bank secrecy rule was first acknowledged in South Africa in 1914 in the *Abrahams v Burns* case.<sup>16</sup>

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<sup>7</sup> WG Schulze "Big Sister Is Watching You: Banking Confidentiality and Secrecy under Siege" (2001) 13 SA Merc LJ 601.

<sup>8</sup> C Smith "The banker's duty of secrecy" 1979 *Modern Business Law* 24.

<sup>9</sup> Smith 1979 *Modern Business Law* 24.

<sup>10</sup> Smith 1979 *Modern Business Law* 24.

<sup>11</sup> Smith 1979 *Modern Business Law* 26.

<sup>12</sup> *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* 1991 (1) SA 100 (A).

<sup>13</sup> *Densam v Cywilnat* 21.

<sup>14</sup> *Abrahams v Burns* 1914 CPD 452.

<sup>15</sup> Smith 1979 *Modern Business Law* 24.

<sup>16</sup> Schulze 2001 SA Merc LJ 610.

In the *Abrahams v Burns* case, the plaintiff was an attorney who brought an application to court for a claim of damages against a bank manager. The plaintiff made an advance to his client to help the client to pay instalments owed to his creditors. At the moment the advance was agreed upon, the plaintiff did not have adequate funds and the bank manager allowed the advance to be made to the plaintiff's client and the plaintiff provided security over the advance. As a result the plaintiff proceeded to draw a cheque in favour of his client, which the bank honoured.<sup>17</sup> It later transpired that while the plaintiff was in the presence of a third party, the bank manager who was also acting on behalf of some of the plaintiff's creditors disclosed that the plaintiff had an outstanding amount on his advance. The plaintiff asserted that the disclosed information about his account was false and defamatory in nature and depicted him as a dishonourable person. The plaintiff further argued that the bank manager acted wrongfully and unlawfully and that he breached the bank secrecy duty by disclosing the plaintiff's bank account details without his consent to third parties.<sup>18</sup> The bank manager raised a defence by stating that there was no legal obligation on a bank not to disclose its client's bank details and if there was such a legal obligation, it would be sued for breach of contract.<sup>19</sup>

The judgment that was delivered by Searle J in the *Abrahams v Burns* case was disappointing and muddied the waters even more as it did not offer any assistance on the unclear legal position pertaining to bank customer confidentiality in South Africa. Searle J held that the English position was that a bank would only be held liable if it disclosed the client's bank account details to third parties without a valid reason and if the client endures damages by such disclosure,<sup>20</sup> and further held that if such disclosure is made by the bank to a third party then the bank's customer is entitled to sue the bank in delict.<sup>21</sup> Searle J also held that "English law indeed casted doubt on the bank secrecy principle and that the obligation not to disclose is a moral one and not a legal one".<sup>22</sup> It seems that the *Abrahams v Burns* case can only be commended for recognising the bank secrecy rule and nothing more, as Searle J did not utilise the

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<sup>17</sup> *Abrahams v Burns* 456.

<sup>18</sup> *Abrahams v Burns* 456.

<sup>19</sup> *Abrahams v Burns* 456.

<sup>20</sup> *Abrahams v Burns* 456.

<sup>21</sup> *Abrahams v Burns* 457.

<sup>22</sup> *Abrahams v Burns* 476.

facts before him to consider and at least attempt to clarify the legal position with regard to the bank secrecy rule.

### **2.2.2.1 *Tournier v National Provincial and Union Bank of England***

The *Abrahams v Burns* case is the first judicial authority that recognised the bank secrecy rule in South Africa, but the judgment and *ratio decidendi* thereof were not satisfactory as the court merely recognised the rule without providing clarity and details regarding the rule and its foundation and application in South Africa. Within a decade from the *Abrahams v Burns* judgment, the *Tournier* case was heard in England and it gave a more convincing judgment that provided legal clarity.

The *Tournier* case concerned bank confidentiality, which is another term for bank secrecy. The facts of the case can best be explained by way of an example: A was a customer of B Bank. A's bank account was overdrawn and he undertook to repay the amount in weekly instalments. The undertaking was in writing and made reference to a company by the name of X where A was employed as a traveller on a three months basis.<sup>23</sup> A later defaulted on the undertaking and a manager of B Bank telephoned X to request the residential address of A. During the conversation between X and the manager of B Bank, the manager disclosed to X that A had an overdraft and also defaulted on the agreed undertaking to pay in weekly instalments. The manager further disclosed that A was betting heavily.<sup>24</sup> As a result of the information that was disclosed by B Bank to X, X refused to renew the contract of employment of A after the three months period expired. A then instituted a claim for damages against B Bank and the court awarded the claim for damages in favour of A.<sup>25</sup>

In giving his judgment, Atkins LJ had to answer the question regarding the extent of information covered by the obligation of secrecy?<sup>26</sup> Atkin LJ held that the bank secrecy rule extends beyond the account that is held by the customer, and it includes the balance of such account.<sup>27</sup> Atkin LJ further held that the bank secrecy rule extends to the transactions that go through the account and any securities in respect of that account, and the bank secrecy rule extends beyond the period when the account is

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<sup>23</sup> Smith 1979 *Modern Business Law* 26.

<sup>24</sup> Smith 1979 *Modern Business Law* 26.

<sup>25</sup> Smith 1979 *Modern Business Law* 26.

<sup>26</sup> Smith 1979 *Modern Business Law* 26.

<sup>27</sup> Smith 1979 *Modern Business Law* 26.

closed or when the customer ceases to be an active bank customer of that bank.<sup>28</sup> Atkin LJ also held that the bank secrecy rule extends to the information that was obtained from other sources than the customer's actual account, which means that the bank secrecy rule covers the information that was given by the customer and the information that was given to the bank by other sources concerning the client.<sup>29</sup> This is also the case where the bank obtains information about the client in order to properly and conveniently conduct the business of the customer such as customers' employment information obtained from the customers' employer. Atkin LJ also stated that a bank customer's information can only be disclosed to other banks or third parties if it is justifiable in that there was implied or express consent of the customer.<sup>30</sup>

The *Tournier* case is the main authority for bank secrecy and its judgment has clarified the ambiguous position regarding bank secrecy. It is evident from the judgment that the bank secrecy rule is a legal duty and not a moral duty as it was contended by numerous cases before the *Tournier* judgment. The *Tournier* case shows that the bank secrecy rule forms part of a bank-customer relationship where the bank is obliged to preserve and protect the information of its customer's bank account at all times, including before there is a binding contract between the bank and the customer. Moreover, bank secrecy extends to during the existence of the bank customer relationship and after it has been terminated.

#### **2.2.2.2 Recognition of bank secrecy in South Africa after the *Tournier* judgment**

The bank secrecy rule was first recognised in the *Abrahams v Burns* judgment in 1914, and it was further recognised in subsequent cases. Contrary to the judgment in the *Abrahams v Burns* case, clarity was finally provided and the English *Tournier* case was cited as the main authority of the bank secrecy rule in South Africa.

From the *Abrahams v Burns* judgment in 1914, South Africa had no clarity for almost seven decades until the bank secrecy rule was fully recognised in the 1983 case of *Cambanis Buildings (Pty) Ltd v Gal*,<sup>31</sup> where the court held that "[a] bank is

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<sup>28</sup> Smith 1979 *Modern Business Law* 26.

<sup>29</sup> Smith 1979 *Modern Business Law* 26.

<sup>30</sup> See the discussion on chapter 6 on the exceptions to the bank secrecy rule.

<sup>31</sup> *Cambanis Buildings (Pty) Ltd v Gal* 1983 (2) SA 128 (N).

duty bound not to disclose any information in connection with its clients, the duty of secrecy on the part of a banker is recognised by our courts".<sup>32</sup>

An important aspect of banking law that has an impact on the bank secrecy rule is the cession of claims to third parties because a bank can cede its claim against its customer to third parties. The case of *GS George Consultants and Investments v Datasys* not only recognised and affirmed the ruling of bank secrecy in *Cambanis Buildings (Pty) Ltd v Gal* but also laid to rest the impact of cession of claims on bank secrecy. The main legal question the court had to answer was whether it was possible for a bank to cede its claim against its client to third parties without breaching the bank secrecy rule.<sup>33</sup> Stegman J upheld the ruling in the *Cambanis Buildings Pty Ltd v Gal* and *Abrahams v Burns*, by stating that bank secrecy has been recognised for a long period of time and has also been recognised by South African courts.<sup>34</sup> Stegman J further held that since the contract between a bank and its customer provides that a bank is obliged to protect the information of the client and to keep it secure and confidential, such contract also incorporated the principle of *delectus personae* and the bank cannot cede its claim against its customer to third parties without the prior consent of the customer.<sup>35</sup> The bank secrecy rule was further recognised in the 1991 case of *Densam (Pty) Ltd v Cywilnat (Pty) Ltd*, where the court held that a bank is obliged in terms of its contract with its client to preserve secrecy pertaining to its client's affairs in line with the principles of bank secrecy as handed down in the English *Tournier* case.<sup>36</sup>

### **2.3 Rationale behind the bank secrecy rule**

The bank secrecy rule has been considered by the courts on many occasions and there is also literature from scholars and academics on the bank secrecy rule. However, it is particularly important to point out the rationale or the significance of the bank secrecy rule from the numerous legal sources of the bank secrecy rule.

In addition to recognising the bank secrecy rule, the rationale for the bank secrecy rule can be deduced from the *ratio decidendi* of the case of *Firstrand Bank v*

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<sup>32</sup> *Cambanis Buildings v Gal* 137F.

<sup>33</sup> *GS George Consultants and Investments (Pty) Ltd and Others v Datasys (Pty) Ltd* 1988 (3) SA 726 (W).

<sup>34</sup> *GS George Consultants and Investments v Datasys* 735 D.

<sup>35</sup> *GS George Consultants and Investments v Datasys* 737 F.

<sup>36</sup> *Densam v Cywilnat* 110 B.

*Chaucer Publications*.<sup>37</sup> It was held that for “considerations of public policy the relationship between a bank and its client must be of a confidential nature”, while it was further held that “public policy will also hold that the bank secrecy rule is subject to being overridden by a greater public interest”.<sup>38</sup> Public policy also confirms that the bank secrecy rule is important and that bank-customer relationships are of a confidential nature, and can only be limited by a greater public interest. Public policy must be elaborated on in this regard in order to fully comprehend its impact on the bank secrecy rule. It was held in *Barkhuizen v Napier*<sup>39</sup> that public policy connotes the principles of fairness, justice and reasonableness and that public policy should be understood as the general sense of justice of the community, the *boni mores*, which manifested in public opinion.<sup>40</sup> Therefore, the *boni mores* are the legal convictions of the community.<sup>41</sup> In light of *FirstRand Bank v Chaucer Publications* and *Barkhuizen v Napier*, public policy considers what is fair, just and reasonable, and it was held that the bank secrecy rule is important in maintaining the confidentiality of bank customer relationships at all times, unless there is a greater public interest that outweighs maintaining bank confidentiality. It was held in the case of *Pharaon & Others v Bank of Credit and Commerce International SA, Price Waterhouse*<sup>42</sup> that the “public interest in making available confidential documents pertaining to an alleged fraud of an international bank to parties to private foreign litigation pursuant towards exposing such fraud outweighed the public interest in maintaining the confidentiality in those documents”.<sup>43</sup> Therefore, it is clear that public policy forms an integral part of the bank secrecy rule and it is one of the rationales behind the rule. It will be up to the court to decide and weigh which “public interest” between bank secrecy and any other “public interest” will prevail as all cases will depend on the facts before court.

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<sup>37</sup> *FirstRand Bank Ltd v Chaucer Publications (Pty) Ltd* 2008 (2) SA 592 (C) para 20.

<sup>38</sup> *FirstRand Bank v Chaucer Publications* 20.

<sup>39</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

<sup>40</sup> *Barkhuizen v Napier* 73.

<sup>41</sup> *Barkhuizen v Napier* 140.

<sup>42</sup> *Pharaon & Others v. Bank of Credit and Commerce International SA, Price Waterhouse* intervening [1998] 4 All ER.

<sup>43</sup> *Pharaon & Others v. Bank of Credit and Commerce International SA, Price Waterhouse* 455.



## 2.4 Conclusion

The purpose of chapter 2 of this study was to trace the origin of the bank secrecy rule to its current legal position in South Africa. English law has been the first point of reference for bank secrecy rule, and the bank secrecy rule was first mentioned in the 1800s and during its earlier recognition it was not clear whether the bank secrecy rule imposed a moral duty or a legal duty on banks not to disclose its customers' information to third parties. The bank secrecy rule was first recognised in South Africa in *Abrahams v Burns* where the court also held that the bank secrecy rule imposed a moral duty and that if there was a breach of this rule, the bank could be sued in delict and not in terms of the contract. It is safe to say that at the time the *Abrahams v Burns* case was heard it was only informed by the unclear position of English law. The *Tournier* case then finally held that the bank secrecy rule imposed a legal duty and forms part of a contract between a bank and its customer and banks are obliged not to disclose its customers information to third parties unless there is consent from the customer or if the exceptions to bank secrecy apply. The study then considered the application of the bank secrecy principles as laid down in the *Tournier* case in subsequent cases. The position in South Africa is clear that the bank secrecy rule imposes a legal duty not to disclose. Finally, the study deduced from case law that the rationale behind bank secrecy rule is that even public policy requires a bank customer relationship to be confidential and can only be overridden by a greater public interest.

## Chapter 3:

# Contract law and the bank secrecy rule

### 3.1 Introduction

The bank-customer relationship entails an interrelation of the law of contract and banking law. The relationship between a bank and its customer is based on a legal and binding contract, and it goes without saying that the normal principles and requirements that apply to any other contract apply *mutatis mutandis* to a bank-customer contract. The purpose of this part of this study is set out the nature of the bank-customer relationship, the role of common law principles of contract on the bank secrecy rule and the scope of bank secrecy.

### 3.2 The nature of a bank-customer relationship

The relationship between a bank and its customer is a legal relationship that takes the form of a contract between a debtor and a creditor.<sup>44</sup> The bank-customer relationship is a *sui generis* contract<sup>45</sup> due to its unique and exceptional traits. A bank-customer relationship is a special breed of a contract in a way that the bank and the customer can exchange roles of being a creditor and a debtor depending on the account that is held by the customer. In a case where the account is in credit, the bank will be the debtor, while in a case where the account is overdrawn, the customer will be the debtor and the bank will assume the role of a creditor.<sup>46</sup>

There are characteristics that render- the bank-customer relationship as a *sui generis* relationship which does not form part of the normal or general debtor and creditor relationship. A bank owes its customer certain obligations which emphasise the notion that the legal bond between the bank and its customer is a *sui generis*. Firstly, the bank is required to pay all the cheques that are properly drawn by the customer provided that there is enough money in the customer's account.<sup>47</sup> The bank is also required to collect the proceeds of the cheques and those that are paid to the credit of the customer's account.<sup>48</sup> Further, the bank is required to comply with the

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<sup>44</sup> Sharrock 2016 120.

<sup>45</sup> Smith 1979 *Modern Business law* 25.

<sup>46</sup> Sharrock 2016 115.

<sup>47</sup> Smith 1979 *Modern Business law* 25.

<sup>48</sup> Smith 1979 *Modern Business law* 25.

bank secrecy rule pertaining to its customers' bank account,<sup>49</sup> and in order for the bank to terminate the bank customer relationship, the bank is required to serve a reasonable notice on the customer before terminating the contract.<sup>50</sup> These duties do not arise in the normal debtor and creditor relationship.<sup>51</sup> The customer also has obligations towards the bank, such as drawing his cheques with care to avoid fraudulent alterations,<sup>52</sup> and to pay a reasonable fee for services performed by the bank.<sup>53</sup> A bank-customer relationship is regarded as *sui generis*, as it has characteristics that do not form part of a normal debtor-creditor relationship, and the duty of secrecy is one of the characteristics that renders the bank customer relationship a *sui generis*.

Even though the relationship between a bank and its customer is a *sui generis* relationship, it is still formed by way of a contract, governed by the law of contract. The South African contract law is founded and informed by the common law.<sup>54</sup> The requirements that apply to any form of contract applies to the contractual relationship between a bank and its customer.<sup>55</sup> As with any other contract, there are requirements that have to be complied with before a valid and binding contract can be entered into: an employee of the bank that will be contracting with the potential customer on behalf of the bank must have authority to contract on behalf of the bank;<sup>56</sup> the customer must have contractual capacity to enter into a contract;<sup>57</sup> the agreement must be certain and capable of performance;<sup>58</sup> both the potential customer and the bank that is represented by its employee must have the *animus contrahendi*;<sup>59</sup> the contract must be lawful and meet the legality principle;<sup>60</sup> and the contract must comply with the required formalities.<sup>61</sup>

The termination of a bank-customer contractual relationship also takes place through the normal ways of termination of a contract. The contract can be terminated through mutual agreement,<sup>62</sup> through the death of the customer if the customer is a

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<sup>49</sup> Smith 1979 *Modern Business law* 25.

<sup>50</sup> Sharrock 2016 116.

<sup>51</sup> Sharrock 2016 115.

<sup>52</sup> Smith 1979 *Modern Business law* 26.

<sup>53</sup> Smith 1979 *Modern Business law* 26.

<sup>54</sup> Sharrock 2016 121.

<sup>55</sup> Sharrock 2016 121.

<sup>56</sup> Sharrock 2016 121.

<sup>57</sup> Sharrock 2016 122.

<sup>58</sup> Sharrock 2016 124.

<sup>59</sup> Sharrock 2016 126.

<sup>60</sup> Sharrock 2016 125.

<sup>61</sup> Sharrock 2016 126.

<sup>62</sup> Sharrock 2016 162.

natural person, or the contract can be terminated through dissolution if the customer is a juristic person.<sup>63</sup> The bank-customer relationship can also be terminated by the sequestration of the customer,<sup>64</sup> through the insanity of the bank customer,<sup>65</sup> dissolution of the bank,<sup>66</sup> or through effluxion of time.<sup>67</sup> The bank-customer relationship can also be terminated by way of an express or implied cancellation clause in the contract.<sup>68</sup> The termination of the contract between the bank and the customer brings to an end the duties in terms of the contract.<sup>69</sup> However, the duty of secrecy continues to apply to the bank even after the termination of the contract.<sup>70</sup> This is due to the fact that the bank secrecy rule “extends beyond the period when the account is closed, or ceases to be an active account”.<sup>71</sup>

### **3.3 The impact of contract law principles on the bank secrecy rule**

The bank-customer relationship is formed and regulated by the contract.<sup>72</sup> Once a valid contract has been concluded between a bank and the customer, both parties must fulfil the duties and obligations as stipulated in the contract. The South African law of contract is also informed by the common law “cornerstones of contract”.<sup>73</sup> The principle of party autonomy in contract law is one of the fundamental cornerstones underlying the bank-customer relationship. Party autonomy is known as freedom of contract and it is based on the notion that people are at liberty to decide to enter into contracts with whomever they want and on whatever terms and conditions.<sup>74</sup> By way of application to bank-customer relationships, party autonomy means that customers are at liberty to decide to enter into bank-customer agreements with banks and are free to decide to be bound by the terms and conditions thereof as stated in the standard form contract. Even though banks make use of “standardised contracts” which contain “imposed terms” and these terms are usually non-negotiable,<sup>75</sup> during

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<sup>63</sup> Sharrock 2016 163.

<sup>64</sup> Sharrock 2016 164.

<sup>65</sup> Sharrock 2016 165.

<sup>66</sup> Sharrock 2016 165.

<sup>67</sup> Sharrock 2016 166.

<sup>68</sup> *Bredenkamp v Standard Bank of South Africa* 2010 (4) SA 468 SCA 27.

<sup>69</sup> Sharrock 2016 166.

<sup>70</sup> Sharrock 2016 166.

<sup>71</sup> Smith *Modern Business law* 26.

<sup>72</sup> Sharrock 2016 121.

<sup>73</sup> D Hutchison & CJ Pretorius et al., *The Law of Contract in South Africa* page 2<sup>nd</sup> edition (2015) 21.

<sup>74</sup> Hutchison & CJ Pretorius 2015 21.

<sup>75</sup> Hutchison & CJ Pretorius 2015 239.

the negotiation phase between the bank and the potential customer, the customer is free and allowed to either opt to bind himself to the terms of the contract or opt not to sign and bind themselves to the contract. Sanctity of contract is the other significant cornerstone that underlies contract law. *Pacta sunt servanda* holds that agreements that were “freely and seriously entered into by parties to the contract must be honoured and, if necessary, enforced by the courts”.<sup>76</sup> In the banking community, sanctity of contract would hold that the bank-customer contract must be fulfilled and honoured, and if either party does not fulfil their duties in terms of the contract, courts can enforce the contract against the defaulting party. A further important cornerstone of contracts is the principle of privity of contract, which holds that “a contract creates rights and duties only for the parties to the agreement, and not for third parties”.<sup>77</sup> Privity of contract is pivotal in relation to the bank’s duty of secrecy. The bank-customer agreement creates rights and duties for the parties thereto. The bank has a duty not to disclose the terms of the contract to third parties, and should the bank disclose the terms of the contract and details of the customer’s bank account, the bank will have breached the duty of secrecy and the contract altogether.

Particularly important to this study is the terms used in bank-customer contracts. The common law of contract generally recognises three kinds of terms: the *essentialia*, *naturalia* and *incidentalia*. *Essentialia* are those terms that are used to identify a contract in order to categorically and specifically recognise such a contract.<sup>78</sup> The *essentialia* of a bank-customer contract would specify this contract as a *sui generis* contract of *mandatum*.<sup>79</sup> *Naturalia* are those terms that automatically or by operation of law form part of any contract.<sup>80</sup> *Incidentalia* are those terms that are considered as “additional terms that are agreed upon by the parties that supplement or modify the rights and duties incorporated by law into the particular contract in question – namely, the *naturalia*”.<sup>81</sup>

It has been held that the bank secrecy rule can be an express or implied term of the bank-customer contract.<sup>82</sup> In the absence of an express clause in the bank-

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<sup>76</sup> Hutchison & CJ Pretorius 2015 21.

<sup>77</sup> Hutchison & CJ Pretorius 2015 21.

<sup>78</sup> Hutchison & CJ Pretorius 2015 237.

<sup>79</sup> Smith 1979 *Modern Business law* 25.

<sup>80</sup> Hutchison & CJ Pretorius 2015 237.

<sup>81</sup> Hutchison & CJ Pretorius 2015 238.

<sup>82</sup> Malan, Pretorius and Du Doit, *Malan on Bills of Exchange, Cheques and Promissory Notes* (2009) 311.

customer contract, the obligation of secrecy still forms part of the contract through operation of law and the bank is still obliged to maintain the confidentiality of its customers' banking details. The bank secrecy rule is also applicable where the bank was negotiating a potential bank-customer contract, and should it happen that parties decide not to enter into a contract,<sup>83</sup> the bank secrecy rule continues to apply and this connotes that the operation of the bank secrecy rule is not dependent on a contract, since even information disclosed by the customer to the bank during negotiations is also covered by the bank secrecy rule.

### **3.4 Scope of the bank secrecy rule in a bank customer contract**

The ultimate objective of the bank secrecy rule is to ensure that banks protect and maintain the confidentiality of their customers' banking details at all times. As mentioned above, the bank secrecy rule forms part of the standard contract between a bank and its customer either expressly or as a *naturalia*. These are the terms that would typically form part of a contract between a bank and the customer that will have the effect of ensuring that the bank does not disclose the information of its customer:

- a. The bank undertakes to keep the information of its former customer entirely confidential regardless of the termination of the agreement.<sup>84</sup>
- b. The bank undertakes to keep the information of its current customer entirely confidential during the existence of the agreement.<sup>85</sup>
- c. The bank undertakes to keep the information of former or current customer that was obtained during the operation of the customers' account entirely confidential during the existence of the agreement or after the account has been closed.<sup>86</sup>
- d. The bank undertakes to keep the information of a potential customer entirely confidential.<sup>87</sup>

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<sup>83</sup> Malan, Pretorius and Du Doit 2009 311.

<sup>84</sup> *Tournier v National Provincial & Union Bank of England* [1924] 1 KB 461 (CA) 473 (hereafter Tournier case).

<sup>85</sup> Malan, Pretorius and Du Toit 2009 311.

<sup>86</sup> *Tournier* 485.

<sup>87</sup> Malan, Pretorius and Du Doit 2009 311. Even information during negotiation stage cannot be disclosed.

- e. The bank undertakes to keep the information of the customers' account entirely confidential which includes information pertaining to the transactions that go through such account and the securities given thereto.<sup>88</sup>
- f. The bank undertakes to keep the information of the customers' account entirely confidential which includes information that was obtained from other sources solely based on the banking relations of the bank and the customer to this agreement.<sup>89</sup>
- g. The bank undertakes to keep the information of its customer entirely confidential at all times regardless of whether the customer is a natural or a juristic person.<sup>90</sup>
- h. The bank undertakes to keep the information of its current and former customers entirely confidential from third parties, members of the media or any party that is not a party to this agreement unless the customer gives consent for disclosure, or if any of the common law or statutory exceptions are applicable.<sup>91</sup>

### 3.5 Conclusion

Chapter 3 of this study focused on the interrelation between the law of contract and banking law. The relationship between the bank and its customer is a special kind of a relationship as the duties that are brought about by this relationship are not the usual duties between a creditor and a debtor and the bank secrecy rule is one of the duties that renders the bank customer relationship a *sui generis* contract. Chapter 3 further reflected on the application of the requirements of a contract in that they apply *mutatis mutandis* to the contract between a bank and its customers and the general ways of terminating a contract are also applicable to bank customer contractual relationships. The cornerstones of the law contract were also discussed in terms of their impact on bank-customer relationships. Freedom of contract states that every person is free to enter into a contract with any person on any agreed terms and conditions, and sanctity of contract holds that contracts entered into must be honoured. In the context of bank secrecy, these cornerstones would mean that the every person is free to enter into a

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<sup>88</sup> *Tournier* 485.

<sup>89</sup> Schulze "Confidentiality and secrecy in the bank-client relationship" 2007 *JBL* 122.

<sup>90</sup> Malan, Pretorius and Du Toit 2009 312.

<sup>91</sup> For a discussion on exceptions to bank secrecy see chapters 4, 5 & 6 of this study.

contract with a bank and that contract must be honoured. The bank secrecy rule is a term of the contract and it must be honoured as well. Lastly, the chapter reflected on the scope of the bank secrecy rule in bank customer contracts and also an attempted example on how a term or clause of the bank secrecy would look like.



## Chapter 4: The constitutional right to privacy

### 4.1 Introduction

Democracy in South Africa is based on a supreme Constitution.<sup>92</sup> All law, including common law rules, have to be in line with the Constitution,<sup>93</sup> which connotes that the bank secrecy rule has to be in line with the Constitution. Chapter 4 of this study will examine the constitutional right to privacy as enshrined in section 14 of the Constitution. The study will consider how the right to privacy supports the finding that some aspects are supposed to be kept confidential and cannot be disclosed to third parties, and lastly the study will also use the section 36 limitation clause to show that the right to privacy is not absolute.

### 4.2 Section 14 of the Constitution

The bank secrecy rule ensures that a bank customer's information is kept confidential and private from third parties. The Constitution also grants protection for privacy and prohibits invasion of privacy. Unauthorised disclosure of private facts is a form of invasion of privacy.<sup>94</sup> The common law bank secrecy rule is not absolute and can be limited as held in the *Tournier* case. The right to privacy as enshrined in the Constitution is also not absolute, and can be limited in terms of the limitation clause.<sup>95</sup>

It is important to consider what is regarded as private or confidential before the constitutional right to privacy will be elaborated upon. It was held in the case of *Bernstein v Bester*<sup>96</sup> that a private fact or private matter is that kind of information that a person wants to exclude from the knowledge of outsiders or third parties, which matters include matters pertaining to such person's family home, health and sexual preference.<sup>97</sup> In relation to bank secrecy this would mean that when a customer contracts with a bank and the contract is only binding between the bank and the customer, he or she wishes to exclude third parties from knowing the information of

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<sup>92</sup> Section 2 of the Constitution of the Republic of South Africa, 1996.

<sup>93</sup> Currie and De Waal *The Bill of Rights Handbook* 2013 6<sup>th</sup> edition 156.

<sup>94</sup> *Bernstein and Others v Bester NO and Others* (CCT23/95) [1996] ZACC 2.

<sup>95</sup> See sections 14 & 36 of the Constitution.

<sup>96</sup> *Bernstein v Bester*.

<sup>97</sup> *Bernstein v Bester* 67.

the contract and the details of his or her bank account. The judiciary has established the “legitimate expectation” of privacy doctrine,<sup>98</sup> in which an individual or litigant will have to prove that he or she has a legitimate expectation of privacy pertaining to the private facts that the individual is of the view that they must be protected. The legitimate expectation of privacy doctrine is both a subjective test and objective test, the individual’s subjective expectation of privacy must also be objectively reasonable.<sup>99</sup> The legitimate expectation of privacy will mostly be applied in those instances where there was no express clause stating the bank secrecy duty in the bank customer contract.

The main purpose of this part of this study is to consider the role and impact of the constitutional right to privacy on the bank secrecy rule. The Constitution provides for the protection of privacy and in order to determine whether a bank has infringed on its customer’s constitutional right to privacy, there is a constitutional enquiry approach that is used by courts to examine whether there was an invasion of privacy through a breach of the bank secrecy rule by a bank.

The Constitution enshrines the right to privacy and states that:<sup>100</sup>

“Everyone has the right to privacy, which includes the right not to have—  
(a) their person or home searched;  
(b) their property searched;  
(c) their possessions seized; or  
(d) the privacy of their communications infringed”.

Section 14 of the Constitution grants a general protection of privacy, which protection covers matters that are considered to be private, and as explained above these are aspects which an individual has a legitimate expectation of privacy in respect of. The essence and crux of section 14 is that private matters should be confidential, private and secure from third parties. Section 14(d) specifically states the specific ground that is protected by the privacy provision by stating that “everyone has the right to privacy, which includes the right not to have the privacy of their communications infringed”. A bank-customer is only binding and enforceable between the parties, even though the contract might be known to third parties, the information and details of that contract

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<sup>98</sup> *Bernstein v Bester* 75.

<sup>99</sup> *Bernstein v Bester* 75.

<sup>100</sup> Section 14 of the Constitution.

must be confidential from third parties. The moment the information of the contract has been disclosed to third parties, it is not only the bank secrecy rule that has been breached, but there is also a possible infringement of the constitutional right to privacy.

The lawfulness of the breach of privacy such as disclosing a bank customer's details will always depend on a valid ground of justification recognised in law, for instance consent by the customer or legislative authority justifying disclosure.<sup>101</sup> Similarly, as is the case with any other right in the Bill of Rights, there is a two stage enquiry that is utilised to determine if there was an infringement of the right concerned,<sup>102</sup> in this case the right to privacy, and if there is infringement the enquiry will further determine whether the infringement of the right concerned was reasonable and justifiable under section 36 of the Constitution. The limitation clause in the Constitution states that:<sup>103</sup>

- “(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”.

Constitutional rights may be limited in term of the limitation clause.<sup>104</sup> Section 8 of the Constitution is important in this regard and it stipulates that the “Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state”.<sup>105</sup> The phrase “the Bill of Rights applies to all law” in section 8 of the Constitution refers to all law including the common law, legislation and customary law.<sup>106</sup> Both the common law and statutory bank secrecy rules are subject to the Bill of Rights and the limitation clause.

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<sup>101</sup> Currie and De Waal 2013 152.

<sup>102</sup> Currie and De Waal 2013 152.

<sup>103</sup> Section 36 of the Constitution.

<sup>104</sup> Currie and De Waal 2013 150.

<sup>105</sup> Section 8(1) of the Constitution.

<sup>106</sup> Curie and De Waal 2013 155.

The two stage approach to the limitation of a constitutional right entails an enquiry as to whether there has been an infringement of a right in the Bill of Rights, and if the response is in the affirmative, the enquiry will then consider if the infringement is justifiable and reasonable.<sup>107</sup> The disclosure of a customer's bank details will amount to an infringement of the right to privacy and the reasonableness of the infringement will be determined in terms of the enquiry in section 36 of the Constitution.<sup>108</sup> The court will have to determine whether the infringement to the right to privacy is justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors as listed in section 36(1) of the Constitution, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and also the availability of less restrictive means to achieve the purpose.<sup>109</sup> Evidence must be placed before court which must prove that the infringement of the right to privacy through disclosing a customer's bank details is justifiable and reasonable. The evidence must satisfy the relevant factors in section 36(1) of the Constitution and the failure to produce evidence justifying the infringement of the right to privacy will lead to the conclusion that the disclosure of a customer's bank details is not justifiable and reasonable.<sup>110</sup>

The court will then use a proportionality test to weigh up the competing values and interests between the interests of the bank on the one hand and the interests of the customer on the other hand, and this will entail whether on a balance of probabilities the court should maintain the bank secrecy rule and protect the interests of the customer or will hold that the disclosure of the customer's details is justifiable and reasonable and protect the interests of the bank. The court will take into account the evidence placed before court in order to give a value judgment as to whether the disclosure of the customer's bank details is justifiable and reasonable or it amount to an unjustifiable infringement of the right to privacy.<sup>111</sup> However, it must be noted that the application of the two-stage enquiry will always depend on the facts before court.

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<sup>107</sup> Currie and De Waal 2013 155.

<sup>108</sup> Currie and De Waal 2013 152.

<sup>109</sup> See sections 14 and 36 of the Constitution.

<sup>110</sup> Currie and De Waal 2013 162.

<sup>111</sup> Currie and De Waal 2013 163.

### **4.3 Conclusion**

Chapter 4 of this study reflected on the constitutional right to privacy as enshrined in section 14 of the Constitution. The main focus of this chapter was to consider the impact and effect of the Constitution on the bank secrecy rule. It is evident that taking into account that the South African system is now based on a supreme Constitution, the common law position that regulates bank secrecy will always have to be closely interpreted, applied and coincide with the Constitution on matters dealing with secrecy. This chapter delved into what is meant by privacy and applied the “legitimate expectation of privacy” doctrine and reached the conclusion that the confidential information, rights, obligation, terms and conditions of the bank customer relationship are also protected by the right to privacy as granted by the Constitution. The chapter lastly focused on the two stage constitutional enquiry that is used to determine if there was an infringement of right and if there was whether the infringement was justifiable or not.

## **Chapter 5:**

# **Legislative bank secrecy provisions**

### **5.1 Introduction**

The common law bank secrecy rule has been domesticated in South Africa through legislation. There is legislation that has been enacted to place obligations on banks to report illegal activities of customers, and in the process of fulfilling its obligation to report a bank can breach the bank secrecy rule. The common law exceptions to the bank secrecy rule includes that a bank can under compulsion of law be obliged to disclose the information and details of its client. This part of the study will analyse the different legislative provisions that compel banks and institutions to disclose banking information of its customers.

### **5.2 Legislative provisions on bank secrecy**

The case of *Tournier v National Provincial & Union Bank of England*<sup>112</sup> not only held that a bank is not allowed to disclose the banking details of its clients but also stipulated four exceptions thereof, and one of the exceptions is that a bank can be compelled under law to disclose the banking details of its clients. The exception of “compulsion by law to disclose” includes legislative provisions that state in which circumstances a bank will be required to disclose, and court orders which can be given to compel a bank to disclose its customers banking details. However, this part of the study will focus only on the legislative provisions that oblige banks to disclose their customers’ banking details.

#### **5.2.1 National Prosecuting Authority Act 32 of 1998**

The first piece of legislation that will be used to show how legislation can encroach on the bank secrecy rule is the National Prosecution Authority Act. The National Prosecuting Authority Act provides that an inquiry may be held by an investigating director in a case where there are suspicions that an offence has been committed or is being committed,<sup>113</sup> and may summon any person that is believed to be able to

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<sup>112</sup> *Tournier v National Provincial & Union Bank of England* [1924] 1 KB 461 (CA).

<sup>113</sup> Section 28(1) of the National Prosecuting Authority Act 32 of 1998.

furnish information relating to the enquiry to appear before and to be questioned by the investigating director, and this include any person who is believed to have any book or document that relates to the enquiry by the investigating director.<sup>114</sup> What appears to be problematic to interpret is whether the use of the phrase “any person” in the wording of section 28 of the National Prosecuting Authority Act applies to banks and whether they can also be summoned and disclose information to the investigating director at an enquiry.<sup>115</sup> Schulze holds the view that “any person” in section 28 does not expressly refer to banks and he relies on the interpretation that an enactment of a piece of legislation does not alter the existing law more than is necessary, and if the legislature intended to alter the common law position section 28(6) of the National Prosecuting Authority Act, it would have explicitly referred to “banks” and not to “any person”.<sup>116</sup> However, Schulze also argues that banks can be required to disclose information to the investigating director at an enquiry in terms of section 28(6) under the exception of “public interest to disclose” and it will depend on the court’s interpretation of section 28(6) in order to decide if “any person” applies to banks as well and if not, public interest will dictate if a bank will be required to disclose the banking information of its client and breach bank secrecy rules. This will entail a weighing up of interests by the court between maintaining bank secrecy on the one hand or a greater public interest that outweighs bank secrecy on the other hand.

### **5.2.2 Promotion of Access to Information Act 2 of 2000**

The object of the Promotion of Access of information Act (PAIA) is to give effect to the constitutional right to access of information that is held by the state and any information that is held by another person and that is required for the exercise or protection of any rights,<sup>117</sup> which include the protection of privacy and commercial confidentiality.<sup>118</sup> PAIA also sets out the voluntary and mandatory procedures to follow for one to obtain access to records and information of public and private bodies in a swift and reasonable manner.<sup>119</sup> Chapter 4 of PAIA regulates access of information concerning natural and juristic persons. Section 63 of PAIA states that the head of a private body,

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<sup>114</sup> Section 28(6)(a) of the National Prosecuting Authority Act.

<sup>115</sup> Schulze 2001 *SA Merc LJ* 607.

<sup>116</sup> Schulze 2001 *SA Merc LJ* 608.

<sup>117</sup> See section 32 of the Constitution of the Republic of South Africa, 1996 and section 9 of the promotion of Access to Information Act 2 of 2000 (hereafter PAIA).

<sup>118</sup> Section 9(b)(ii) of PAIA.

<sup>119</sup> Section 9(d) of PAIA.

which includes a bank,<sup>120</sup> must refuse a request for access to a record or information of that private body if the disclosure thereof would lead to an unreasonable disclosure of personal information about a third party. For purposes of this study a third party is a bank customer. Section 64(1) of PAIA also states that the head of a private body, such as a bank, must refuse a request for access to information or to a record if the record so requested contains the trade secrets of a third party, or it contains financial and commercial information of a third party, or the requested record contains information that was given privately by that third party.<sup>121</sup> Section 66 of PAIA also provides that the head of a private body must refuse a request for access to a record of the body if the disclosure or access to the record can reasonably be expected to endanger the life of an individual.<sup>122</sup>

It is clear that a bank being a private body will be able to comply with its bank secrecy obligation towards its customers by relying on the provisions of PAIA should a request for access of information made to the bank. However, the provisions entitling a bank to refuse a request for access to a record are not absolute and there are instances where a bank or private body will be obliged to disclose the record pertaining to its client. Section 70 of PAIA states that notwithstanding the preceding provisions of section 70, the head of a private body must grant a request for access to a record of the body if the disclosure thereof will would reveal evidence of a contravention of law, or imminent and serious safety or environmental risk and the public interest favours the disclosure of the record and outweighs the harm that would be suffered by an individual as mention in sections 63 and 64 of PAIA.<sup>123</sup> Section 70 of PAIA also falls under the exception of “compulsion of law” to disclose, which is indicative of the point that bank secrecy is not absolute and a bank can disclose or make available a record or information about its client if the information of that particular client contains evidence that the client has contravened the law or there is public safety risks posed by the client. Public interest is the crucial factor that will indicate whether there should be disclosure of the customer’s information or whether confidentiality should be maintained.<sup>124</sup>

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<sup>120</sup> Schulze 2001 *SA Merc LJ* 610.

<sup>121</sup> See section 64(1)(a)-(c) of PAIA.

<sup>122</sup> See section 66(a) of PAIA.

<sup>123</sup> See sections 70(a)-(b) of PAIA.

<sup>124</sup> Schulze 2001 *SA Merc LJ* 609.



### **5.2.3 Income Tax Act 58 of 1962**

Bank secrecy rules cause a predicament when read with tax provisions in specifically the Income Tax Act 58 of 1962. There are instances where the Commissioner of the South African Revenue Service requests information from any person, such as from a bank, about a taxpayer who is a customer of a bank concerning tax investigations or in order to fulfil his or her duties in terms of Income Tax Act. Section 74A of the Income Tax Act states that “the Commissioner or any officer may, for the purposes of the administration of this Act in relation to any taxpayer, require such taxpayer or any other person to furnish such information (whether orally or in writing) documents or things as the Commissioner or such officer may require”. The Commissioner may rely on section 74A of the Income Tax Act to request a bank to make available or to disclose to him the banking information of a taxpayer who is a customer at that particular bank. The phrase “any other person to furnish such information” in section 74A has proven to be difficult to interpret, and questions have been raised whether such “any other person” includes a bank. Schulze argues that section 74A was not specifically drafted to compel banks to disclose its customer’s information at the Commissioner’s request as section 74A does not expressly hold to that effect but merely says “any other person”.<sup>125</sup> The views by Schulze are valid and section 74A only says the Commissioner may require any other person to produce information pertaining to the taxpayer and does not expressly state “banks” and it cannot be implied that such any other person includes banks. However, there is nothing precluding the Commissioner to apply for a court order requiring a bank to produce the required information about the taxpayer’s banking information from that bank. Even though interpretation of section 74A can have the effect of not allowing the Commissioner to obtain the information of the taxpayer from a bank, the Commissioner can always apply to court for an order compelling the bank to furnish the information of its client to the South Africa Revenue Service.

### **5.2.4 Financial Intelligence Centre Act 38 of 2001**

The Financial Intelligence Centre Act (FICA) also has implications for bank secrecy principles. The objectives of FICA entails identification of proceeds resulting from unlawful activities, and the combatting of financial crimes such as money

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<sup>125</sup> Schulze 2001 *SA Merc LJ* 611.

laundering.<sup>126</sup> The other main objective is for the Financial Intelligence Centre to make available the information it has obtained whilst performing its duties to authorities such as the National Prosecuting Authority, the Intelligence Service and so forth.<sup>127</sup> Financial crimes are being committed through banks, with money laundering being the prime example. Banks are defined as accountable institutions in terms of schedule 2 of FICA and have a duty to report to the Financial Intelligence Centre any financial crimes that take place at their bank and in so doing they may breach the bank secrecy rules as they would have disclosed the information of their customers to the Financial Intelligence Centre. Section 37(1) of FICA states 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”. This means that banks cannot rely on bank secrecy principles in order not to avoid complying with the FICA reporting duties as an accountable institution and the wording of section 37 of FICA shows a clear image of the exception of “compulsion of law” to disclose. Similarly, section 41 of FICA stipulates for the protection of confidential information held by the Financial Intelligence Centre and such information cannot be disclosed by any person except with an order of court, permission of the Centre, for purposes of legal proceedings and so forth.<sup>128</sup> Section 41A of FICA also requires the Financial Intelligence Centre to ensure that it has adequate measures to protect the personal information in its possession. FICA also has implications for the confidential information of bank customers that is in possession of the Financial Intelligence Centre. Even though FICA makes provision that there must be adequate measures to protect the personal information acquired by the Financial Intelligence Centre, such information is not subject to any bank secrecy rules and it can be disclosed to authorities such as the National Prosecuting Authority that may be conducting an investigation about a client of a bank.

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<sup>126</sup> Section 3 of the Financial Intelligence Centre Act 38 of 2001 (hereafter FICA).

<sup>127</sup> See section 3(2) of the FICA.

<sup>128</sup> See section 41(a)-(e) of the FICA.

### **5.2.5 South African Reserve Bank Act 90 of 1989**

The South African Reserve Bank Act is another piece of legislation that codifies the bank secrecy rules. Section 33 of the South African Reserve Bank Act states that “no director, officer or employee of the Bank, and no officer in the Department of Finance, shall disclose to any person, except to the Minister or the Director-General: Finance or for the purpose of the performance of his or her duties or the exercise of his or her functions or when required to do so before a court of law or under any law 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”.<sup>129</sup> Even those in the employ of the South African Reserve Bank cannot disclose the information about bank customers when exercising their duties in terms of the Act. It may happen that the banking details of certain bank customer are acquired by the South African Reserve Bank and such information must be dealt with in accordance the provisions of the Act, and before such information can be disclosed there must be written consent from the Minister and the Governor, after consultation with the bank customer concerned.<sup>130</sup> It is evident that the South African Reserve Bank cannot unilaterally decide to disclose the banking information of a bank customer of any bank that is has. It must first seek written consent from the Minister and also consult the client in question.

### **5.2.6 Criminal Procedure Act 51 of 1977**

Bank secrecy principles are also applicable to criminal proceedings. It may happen that a bank is required by a court to furnish evidence about its financial or accounting records and such evidence has the possibility of disclosing the banking details of customers. Section 236(4) read with section 236(1) of the Criminal Procedure Act states that a bank cannot be compelled to produce any document or account book at any criminal proceedings, except if the court concerned orders such bank to produce such account book or document.<sup>131</sup>

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<sup>129</sup> See section 33(1)(a)(i)-(iii) of the South African Reserve Bank Act 90 of 1989.

<sup>130</sup> Section (1)(b) of the Reserve Bank Act 9 of 1989.

<sup>131</sup> Smith 1979 *Modern Business law* 27.

### **5.2.7 Legal Practice Act 28 of 2014**

Even legal practitioners such as attorneys, notaries and conveyancers who operate and keep trust accounts at banks are covered by the bank confidentiality principles. The Legal Practice Act states that any bank at which a legal practitioner keeps a trust account shall, if directed by council of the society of the province in which such practitioner is practicing, furnish the council with a signed statement which states the details the trust account concerned at a date stated by the council.<sup>132</sup> The Legal Practice Act also falls under “compulsion of law” exception of bank confidentiality principles where a bank will be obliged to disclose the banking details of its client, being the trust account balance of a legal practitioner held by such practitioner to the compulsion of the legal counsel.

### **5.3 Conclusion**

Chapter 5 of this study considered the first exception to the bank secrecy principles of disclosure under compulsion of law as pronounced in the *Tounier* case. The chapter reflected on different statutory provisions which justifiably infringe on the bank secrecy rules that show the instances where a bank will be compelled by legislative provisions to disclose the information of their customers.

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<sup>132</sup> Section 91(4) of the Legal Practice Act 28 of 2014.

## **Chapter 6:**

### **Is the bank secrecy rule absolute?**

#### **6.1 Introduction**

The general principles of bank secrecy seem to portray a picture that banks cannot disclose the banking information of their clients. Banks have in certain circumstances successfully relied on bank confidentiality in an effort not to breach their contractual or implied duty of secrecy. However, as indicated in the preceding chapters of this study on the constitutional right to privacy and the legislative provisions on bank secrecy, the bank secrecy rule is not absolute and can be limited by legislation or the Constitution and a bank can be required to disclose the banking details of its customers. The purpose of chapter 6 of this study is to analyse the exceptions to the bank secrecy rule as stated in the *Tournier* case.

#### **6.2 Is the bank secrecy rule absolute?**

The first exception to bank secrecy as stated in the *Tournier* case has already been dealt with<sup>133</sup> Therefore, this chapters focuses on the other three exceptions to the bank secrecy rule. It is important to also explain the exceptions to the bank secrecy rule, in order to illustrate a comprehensive and a holistic study of the legal position pertaining to bank secrecy. Apart from a bank being compelled by legislation or a court order to disclose its bank customer's information, there are other grounds that may lead to the bank disclosing its customer's information.

##### **6.2.1 Duty to the public to disclose**

It often transpires that a certain customer of a bank poses danger to the state through his or her conduct, such as criminal activities, and in such a case the bank's duty to maintain confidentiality to that customer can be outweighed by the public duty.<sup>134</sup> The bank owes a duty to the public to uphold the law instead of complying with bank confidentiality rules as one of the requirements of a bank customer agreement is that

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<sup>133</sup> See chapter 5 for legislative bank secrecy provisions for the exception of disclosure under compulsion of law.

<sup>134</sup> Schulze 2001 SA *Merc LJ* 602.

it should meet the legality principle at all times.<sup>135</sup> In a case where a bank customer has deviated from the bank customer agreement and the agreement is unlawful due to the customer's illegal activities.

It was held in the *Tournier* case that there are instances where there is a higher public duty than a private duty where there is a danger to the state or the public duty may supersede the duty of the agent to his principal.<sup>136</sup> The overriding of bank secrecy rules is justifiable where there is crime involved and banks are required to assist in combatting crime if they have knowledge of such criminal activities. However, the duty to the public to disclose is a rare exception that arises mostly in cases concerning war, treason and such disclosure by banks would then assist the police and authorities with crime prevention.<sup>137</sup>

### **6.2.2 Disclosure in the bank's interests**

Disclosure in the bank's interests is the most prominent exception relied on by banks. Circumstances often require banks to disclose their customer's bank details and the *Tournier* judgment also handed down a few examples of when the exception of disclosing in the bank's interests will arise. Mostly banks will rely on this exception in legal proceedings against their own customers, for instance when a bank is suing its own customer for an overdraft account and the bank has no choice but to disclose the details of the customer's overdrawn account,<sup>138</sup> or where a bank sues a guarantor for a guaranteed amount and the details of the guarantee thereof must be disclosed, or where a bank sues a person who stood as surety for a bank customer.<sup>139</sup> Disclosure in such instances will fall under the ground of justification of disclosing in the bank's interests as there is no other plausible way a matter can be heard between a bank and its customer about the customer's account without disclosing the details of such account.

An example of the exception of disclosure in the bank's interests is a case concerning cession of debts. A banks will always seek to protect its interests and this includes enforcing a debt owed to it by its customer. Cession of claims is one of the ways in which a bank can enforce a debt owed to it. The case of *Densam v Cywilnat*

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<sup>135</sup> Sharrock 2016 25.

<sup>136</sup> *Tournier* case 473.

<sup>137</sup> Jonathan Speck & David Wilson *Bank Confidentiality: Duty and Exceptions* 2007.

<sup>138</sup> Smith 1979 *Modern Business Law* 27.

<sup>139</sup> Smith 1979 *Modern Business Law* 27.

illustrates the instance where a bank protects its interests by ceding its claim against its own customer to a third party. The facts of the case are that Densam owed a sum of money to Trust Bank of Africa, Trust Bank of Africa held security for the sum of money owed to it by Densam which included a cession by Densam to Trust Bank of Africa of Densam's claims against all its debtors, Densam encountered difficulties with making payments to Trust Bank of Africa and ended up with an overdraft as a result, Trust Bank of Africa then decided to cede its claim against Densam to Cywilnat and thereby transferring its rights and duties against Densam to Cywilnat.<sup>140</sup> *Densam v Cywilnat* was primarily about whether a bank is entitled to cede its claim against its customers. The court did hold that a bank can cede its claim against its own customer,<sup>141</sup> but for purposes of this study the main focus will be on the implications of cession of debts between banks and its customers on bank secrecy principles. It was held in *Densam v Cywilnat* that it is reasonable for a bank to protect its interests by ceding its claim to a third party.<sup>142</sup> A bank is entitled to protect its interests and can cede claims against its own clients to third parties, and the disclosure of the customer's banking details through the cession agreements will not amount to an encroachment of bank secrecy as the disclosure thereof is necessary for the conclusion of the cession. The *Densam v Cywilnat* case shows that a bank's cautionary measures of protecting its interests is an exception to the bank secrecy rule.

### **6.2.3 Disclosure with the customer's consent**

Consent by the customer will also qualify as a ground of justification for disclosing the customer's bank information. The customer can expressly or impliedly consent to their bank information being disclosed by its bank.<sup>143</sup> Express consent by the customer does not raise any problems as the customer would have unequivocally and unambiguously gave the bank its permission to disclose its bank details. The problem for a bank is proving that its customer gave implied consent for the disclosure of its banking information. In the absence of an express clause, the bank will bear the onus to prove that the customer gave consent. Banks have adopted the notion of proving the existence of a custom or practice to prove the tacit consent of the customer. The

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<sup>140</sup> *Densam v Cywilnat* 4.

<sup>141</sup> *Densam v Cywilnat* 50.

<sup>142</sup> *Densam v Cywilnat* 100.

<sup>143</sup> Smith 1979 Modern Business Law 27.

*Tournier* case provided an example of where a customer would authorise a reference to its bank account, and this is often the case when a customer applies for an extension of credit.<sup>144</sup> The *Tournier* case held that the sharing of customer information between banks and credit providers will be justifiable based on the implied consent of the customer,<sup>145</sup> and a bank would not have breached any confidentiality rules in that regard. Implied consent will be a valid ground of justification if the bank can prove that the customer through conduct or words gave consent to their information being disclosed and this does not only apply to credit application but to suretyships as well as a bank can disclose to a surety of the customer the details of the customer's bank account.

### **6.3 Conclusion**

This chapter discussed the exceptions to the bank secrecy as stated in the *Tournier* case. This chapter discussed the exception in terms of which the bank has a duty towards the public to disclose information, which is applicable in cases where a customer poses a danger to the state or where the information is necessary to assist in crime prevention. The chapter further discussed the exception of disclosure in the bank's interest, and it mostly arises in legal proceedings between a bank and its client such as where a bank is suing its own client or defending itself against a claim instituted by the client. The chapter concluded by discussing the exception of consent by a customer, which can be express or tacit. The exceptions to the bank secrecy rule show that bank confidentiality is not absolute and can be limited by both common law exceptions as stated in the *Tournier* case or in terms of section 36 of the Constitution or in terms of legislative provisions.

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<sup>144</sup> *Tournier* 473 and Schulze 2007 JBL 122.

<sup>145</sup> *Tournier* 486.



## Chapter 7:

### Conclusion

The bank secrecy rule has proven to be important in the banking sector and forms an integral part of all bank-customer relationships. Bank-customer agreements are concluded away from the knowledge of third parties and the details and terms and conditions of the agreement must remain private at all the times.

This study traced the origin of the bank secrecy rule from English law. In its early recognition in the 1800s it was unclear whether the bank secrecy rule imposed a moral or a legal duty. The bank secrecy rule was first recognised in South Africa in the 1914 case of *Abrahams v Burns*. The unclear legal position of the bank secrecy rule was clarified in the *Tournier* case in 1924 in the UK, where the court held that the bank secrecy rule imposes a legal duty on a bank to not disclose the bank details of its customers. The *Tournier* case further held that the bank secrecy rule forms part of a bank-customer contract and that banks must comply with the rule unless if any of the recognised exceptions to secrecy are applicable. The common law bank secrecy principles have been domesticated in South Africa through recognition in cases such as *Densam v Cywilnat* and *Firststrand Bank Ltd v Chaucer Publications*. This study also discussed case law to find the rationale behind the bank secrecy rule and it is apparent that public policy dictates that bank customer relationships must be confidential at all times and the confidentiality of that relationship can only be overridden by a greater public interest which in that instance would require a bank to disclose the information of its customer.

This study then considered the interaction between the law of contract and banking law. The chapter reflected on how the bank-customer relationship is a unique kind of relationship due to the fact the traits of a bank-customer relationship are not the normal duties that arise between a creditor and debtor and the bank secrecy rule is one of the characteristics that render a bank customer relationship a *sui generis* contract. The study revealed how closely linked contract law is to banking law, which is due to the fact that bank-customer relationships are formed by way of a contract and the general requirements that apply to any other contract including the formation and termination of a contract apply to any bank customer contractual relationship. The study also considered the common law cornerstones of the law of contract, and in the

context of bank secrecy this entails that a bank-customer contract that was freely and voluntarily concluded must be honoured, including complying with bank secrecy as a contractual term.<sup>146</sup>

Focus was also placed on the impact of the Constitution on bank secrecy. Bank secrecy is not only regulated by the common law but also regulated through the Constitution which grants a constitutional right to privacy in section 14 of the Constitution. The legitimate expectation of privacy test was used to determine what is meant by privacy and the application of the test indicated that confidential information between a bank and its customer including all the information relating to the bank account of the customers are covered and protected by the constitutional right to privacy. The general two stage constitutional enquiry into the rights in the Bill of Rights was utilised to examine cases of infringement of the right to privacy and if there was infringement whether such infringement is justifiable under section 36 the limitation clause of the Constitution.

As bank secrecy is not absolute, the exceptions to bank secrecy were set out. The common law exceptions as mentioned in the *Tournier* case were highlighted. The first exception was disclosure under the compulsion of law where a bank is compelled by law, being a court order or a legislative provision, to disclose the banking details of its customer. A few statutes were used as examples to show how statutory provisions would qualify as an exception to maintaining bank confidentiality and a bank would justifiably breach bank confidentiality as it is compelled by law to disclose. The study further reflected on the exception of the duty to the public to disclose where bank is required to disclose the banking details of its customer if its customer is posing a danger to the state and this exception most arise when dealing with a customer who is suspected of treason and in such circumstances the bank must disclose the banking details of that customer to assist authorities to avert and deter the danger posed by the customer. Disclosure in the bank's interests is another exception that was discussed and it will serve as a ground of justification for the bank. This exception mostly arises in legal proceedings between a bank and its customer. for example where a bank is suing its own customer for an overdraft or suing a person who stood as surety for the customer and the disclosure in those cases are reasonable and excused in law and cannot be regarded as a breach of bank confidentiality. Lastly, this

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<sup>146</sup> Malan, Pretorius and Du Doit 2009 311.

study considered the exception of consent on the part of the customer, a customer can expressly or impliedly consent to their bank information being disclosed and the bank can rely on the consent of the customer for justifying the disclosure.

This study has showed the importance of the bank secrecy rule. The early recognition of the bank secrecy rule to its current position shows how this rule has always been significant in the banking community. Third parties tend to request banks to disclosure the banking information of their customers, and this is prevalent with public figure customers. However, banks are obliged to comply with bank secrecy at all times and to not disclose the information of their client unless the disclosure is made within the recognised exceptions to secrecy.

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