

# THE DUTY OF BANK CONFIDENTIALITY IN SOUTH AFRICA AND OTHER JURISDICTIONS SUCH AS ZIMBABWE: JUSTIFICATIONS, JUDICIAL LIMITATIONS AND LEGISLATIVE INROADS RISING FROM THE NEED TO AVERT CRIMES

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## INTRODUCTION

At common law, the bank is under an obligation not to disclose any of its clients' information but to keep it confidential. Nowadays, the banks are confronted with two conflicting duties: the duty to maintain confidentiality of the customer's information and the duty to disclose such information when special circumstances arise. Until Prevention of Organised Crime Act (POCA) and Financial Intelligence Act (FICA) many legislative interventions to the duty of confidentiality were characterised as 'reactive' because the bank would only disclose information upon receiving a request from higher authority'.<sup>2</sup> The importance of the duty of confidentiality is that it has been recognised for centuries and that the courts have analysed the role of the banks and the relationship between a bank and its customer in imposing a qualified duty of confidentiality'.<sup>3</sup> For this reason, it would be unthinkable to dismiss the duty of confidentiality in today's life because of technological innovations. In determining whether the duty is still relevant or not this paper will discuss the historical significance of the duty of confidentiality in enhancing the bank customer relationship; the judiciary recognition in South Africa and other jurisdictions such as Zimbabwe; judiciary limitations imposed on the duty; and legislative inroads arising

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<sup>2</sup> T Walsh 'The banker's duty of confidentiality: dead or alive' 2009-2012 Edinburgh Student Law Review 1.

<sup>3</sup> Roy Elbert Huhs, Jr 'To disclose or not to disclose customer records' 1991 Banking Law Journal 30.

from the need to avert transactional crimes. Finally, I will give possible recommendations that might improve the application of the principle to achieve best practice both in business and banking law.

**DUTY OF CONFIDENTIALITY: HISTORICAL SIGNIFICANCE AND THE JUDICIAL RECOGNITION IN SOUTH AFRICA AND OTHER JURISDICTIONS SUCH AS ZIMBABWE**

As held in *Parry Jones v Law Society*,<sup>4</sup> the historical duty of confidentiality exists not only between an attorney and a client but also between a banker and a customer. The duty of confidentiality is defined as 'an obligation of a financial institution and of its officers and employees, to protect and withhold information acquired while handling a client's business.'<sup>5</sup> The duty of confidentiality can be traced back from the early English mercantile custom where the wealthy would have their surplus gold and other valuables stored in the Tower of London.<sup>6</sup> The key factors for banking were trust, safekeeping and confidential dealings. In *Djowharzadeh v City National Bank & Trust Co*,<sup>7</sup> the court held that the 'duty has existed traditionally and continues to exist'.<sup>8</sup> This means that the duty of confidentiality can be viewed as a historical continuation and, hence, banks must guarantee a high degree of confidentiality in order to do business and attract customers.

The banker's duty of confidentiality begins at the creation of the bank-customer relationship and extends to the time when the contract is terminated or even after death.<sup>9</sup> The duty of confidentiality is an implied or tacit term between the bank and customer. This means that the contractual duty is a natural

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<sup>4</sup> (1969) 1 ch 1.

<sup>5</sup> S.Paolo & D Gaalvese 'The duty of confidentiality of Banks in Switzerland: where it stands and where it goes, recent developments and experience. The Swiss assistance to cooperation with the Italian authorities in investigation of corruption among civil servants in Italy' 1995 Pace Law Review 329.

<sup>6</sup> WG Schulze 'Depositum, Deposit and deposit- taking Institutions - Birds of the Feather? Not quite (2001) South African Mercantile Law Journal 2001.

<sup>7</sup> 1982 OK CIV APP 3 646 P.2D 616.

<sup>8</sup> 646 P.2d 616 (Okla. Ct. App. 1982).

<sup>9</sup> M Hapgood (ed) Paget' Law of banking 13th edition (2002) 158.

element of the contract between a bank and a client. In *Tournier v National Provincial & Union Bank of England*,<sup>10</sup> the court held that there was an implied contract not to disclose the client's information subject to exceptions; hence the bank was under an obligation to maintain the duty of confidentiality. The relationship created between a bank and its customer is an implied agency relationship. In the case of *Peterson v Idaho First National Bank*,<sup>11</sup> the court held that it is a breach of an implied term to disclose a customer's information. This enables individuals to feel free and secure to give full information to the bank since they trust that it is protected.

In South Africa, as in other jurisdictions such as Zimbabwe, the bank has both a contractual and statutory duty to keep their client's affairs confidential. The agreement forms part of the right to privacy in the Bill of Rights in South Africa. The statutory duty is imposed by section 33(1) of the South Africa Bank Act, which provides a general prohibition on the disclosure of client information. In addition, recently one house of Parliament passed a bill protecting personal information<sup>12</sup> which is data-protection legislation describing a law intended to protect individuals from detriment resulting from the processing of information about them.<sup>13</sup> In *Consultants & Investments v Datasys Ltd*,<sup>14</sup> Stegmann J held that a bank has an obligation to observe the duty of confidentiality. These cases show that confidentiality in banks is still upheld.

This duty of confidentiality was first recognised in *Abrahams v Burns*,<sup>15</sup> where the court accepted the duty of confidentiality and found that the bank will be held liable if it discloses the client's confidentiality to a third party if done without adequate reason. In *First Rand Bank Ltd v Chaucer Publications (Pty) Ltd*,<sup>16</sup> Judge Traverso concluded: 'It seems to me that for considerations of public policy the relationship between a

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<sup>10</sup> (1924) 1 KB 461.

<sup>11</sup> 367 P.2d 284 (Idaho 1961).

<sup>12</sup> Protection of Personal Information Bill 9 of 2009 (POPIA).

<sup>13</sup> See Lee A Bygrave 'An international data protection stock take at 2000 Part 1: regulatory trends' (2000) 6 Privacy Law & Policy Reporter 129.

<sup>14</sup> 1988(3) SA 726 WLD.

<sup>15</sup> 1914 CPD 452.

<sup>16</sup> 2008(2) SA 592 (CPD).

bank and its client must be of a confidential nature'. He further asserted that the bank had a contractual obligation to maintain secrecy and privilege but had no duty to prevent third parties from publishing confidential information about the bank's client affairs. Similarly, in *Cambanis Building Pty Ltd v Gal*,<sup>17</sup> the court held that a bank was bound by a duty not to disclose any information of its clients.

A banker's duty of secrecy in Zimbabwe is statutory as it is clearly provided under legislation.<sup>18</sup> In *Standard Chartered Bank Zimbabwe Ltd v Chapuka*,<sup>19</sup> where the respondent appealed against part of the judgment of the then Labour Relations Tribunal setting aside his dismissal from employment with the appellant and substituting the penalty of "FINAL WRITTEN WARNING" on a conviction of misconduct inconsistent with the fulfilment of the express or implied conditions of his contract of employment, the court held that relationship between Standard Chartered and Chapuka was one based upon trust and confidence. The court dismissed the application with costs.

#### JUSTIFICATIONS

Bank confidentiality is crucial to an individual's ability to place faith in their bank and financial community generally. Customers would be unlikely to entrust their money and financial affairs to banks if the confidentiality of their dealings could not be secured. In *Djowharzadeh v City National Bank & Trust Co*,<sup>20</sup> the court held that banks are the source of an enormous public trust and have a virtual monopoly on lending money, which is dependent solely on the public's funds to operate. For this reason, customers expect high standards from their banks, in such a way that if they find out that their private information has been divulged to a third party their trust would be destroyed. Thus a bank must not use its position to compete financially for customers or otherwise act to their customers' disadvantage.

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<sup>17</sup> 1983 (2) SA 128 (NC).

<sup>18</sup> Banking Act [Chapter 24:20] section 76 and the Reserve Bank of Zimbabwe Act [Chapter 22.15] section 60.

<sup>19</sup> (361/03) ((361/03) [2005] ZWSC 101 (27 January 2005)

<sup>20</sup> Supra note 7.

Furthermore, the importance of bank confidentiality to the stability of a country's banking system, requires that access to bank information by authorities should not be unfettered.<sup>21</sup> Unauthorised disclosure of the customer's information could jeopardise the financial welfare of the clients of the bank, unless justified by law (e.g. under the Companies Act a bank may disclose information about a business in liquidation to a liquidator). For instance, if the customer is running a business the disclosure could have a negative effect on business and lead to the customer suffering loss. For this reason, the bank will be entitled to pay compensation to the customer.

The duty of confidentiality is also important in contemporary life as it forms part of the right to privacy. South Africa and other jurisdictions such as Zimbabwe have statutory acknowledgements to the duty of confidentiality which prohibit disclosure of a client's information.<sup>22</sup> Moreover, in Malaysia, section 97 of the Banking and Financial Institutions Act 1989 (BAFIA) provides the general prohibition on disclosure of confidential information, followed by exceptions.<sup>23</sup> For this reason banks must comply with personal information held about their customers. Interference with someone's private life leads to breach of the mentioned statutes and may have legal consequences.

The disclosure of the customer's information to a wrong person could cause harm to the customer. In *Tournier v. National Provincial & Union Bank of England*,<sup>24</sup> the bank breached the customer's confidentiality by disclosing to Tournier's employers that he had defaulted on his obligation to the bank. For this reason, he was dismissed from his job and successfully sued for losses. Thus, loss of customer confidence in their bank will likely lead to their withdrawal as a client and could lead to bank failure. This would globally affect the economy since the circulation of money through banks leads to an efficient

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<sup>21</sup> OECD Improving Access to Bank Information for Tax Purposes (2000) 19.

<sup>22</sup> Section 7 of the POPIA and s 33 of the Constitution prohibit unauthorised disclosure of a client's information.

<sup>23</sup> S Jawahitha 'Banking Confidentiality: A comparative analysis of the Malaysian banking statutes' (2002) Arab Law Quarterly 255.

<sup>24</sup> 24Supra note 10.

banking system. Moreover, it is most likely that the disclosure of financial information may lead to crimes such as identity theft or fraud due to the sensitive nature of this information. Bank confidentiality is thus a practical necessity as bankers often have access to a good deal of information about their customer's business, which each customer would have reason to conceal from their commercial competitors.<sup>25</sup>

#### JUDICIAL LIMITATIONS

The Court of Appeal in *Tournier v National Provincial and Union Bank of England* (supra) held that the duty of confidentiality is not absolute, as Blankes LJ admitted that it is not possible to frame any exhaustive definition of the duty, but the most that can be done is to classify the qualification and indicate its limits e.g. where disclosure is under the compulsion of law; where the interests of the bank require disclosure; where the disclosure is made by the express or implied consent of the customer; and where the disclosure is in the interests of the public. Thus the court in the case of *Densam (Pty) Ltd v Cywilnat (Pty) Ltd*,<sup>26</sup> stated that the duty may be breached if it was reasonable and proper for the bank to further its own interests. In this instance, it is clear that the duty of confidentiality becomes limited in its application.

From a Zimbabwean perspective, regarding the preservation of secrecy, legislation provides that:<sup>27</sup>

- (1) Except for the purpose of the performance of his functions or when lawfully required to do so by any court or under any enactment, no director, officer, employee or agent of the Bank shall disclose to any person any information relating to the affairs of the Bank or of a customer of the Bank which he has acquired in the course of the performance of his functions. (2) Any person who contravenes subsection
- (1) shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for

<sup>25</sup> D Chaikin 'Adapting the qualifications to the banker's common law duty of confidentiality to fight transnational crime' 2011 Sydney Law Review 265-268.

<sup>26</sup> (1991) 1 ALL SA 275 (A) (28 SEPTEMBER 1990).

<sup>27</sup> Reserve Bank of Zimbabwe Act [Chapter 22.15] section 60.

a period not exceeding two years or to both such fine and such imprisonment”

In the Australian context, the duty of confidentiality may be breached by both the customer and the bank since they may be compelled by law to disclose information.<sup>28</sup> The fact that they are so many statutes which require disclosure of information by banks has led to the erosion of the duty of confidentiality. In the *Australian Securities Commission v Zarro*,<sup>29</sup> the court held the bank’s duty of confidentiality was no reasonable excuse for non-compliance of the law.

#### LEGISLATIVE INROADS TO NON-DISCLOSURE ARISING FROM THE NEED TO AVERT CRIMES

Where the government wants to root out criminal activities undertaken through the bank, then confidentiality becomes irrelevant. On the one hand, the bank is required to disclose the confidential information of a customer if it has been compelled to do so legally. The banker would, therefore, be justified in disclosing information to meet statutory requirements. Section 8(2) of the European Convention on human rights, authorises disclosure of information if the disclosure is in accordance with the law.

Section 330 of the Prevention of Organised Crime Act imposes an express duty on the banks as regulated bodies to report any actual knowledge or suspicion or in circumstances where there are reasonable grounds for knowing or suspecting that someone, e.g. a customer of a bank, is involved in money laundering. FICA is the administrative legislation that gives effect to the aim of POCA. This section provides an obvious challenge to the duty of confidentiality owed by a bank to its customers.

By complying with the POCA, the bank discloses the information to a limited number of relevant authorities only, and the disclosure is limited to that detail which is suspicious. This means that if there is no suspicion, the confidential

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<sup>28</sup> P. Latimmer ‘Bank secrecy and confidentiality law in practice in Australia and their impact on the control of economic crime’ 1995-1996 *Dick Journal of International Law* 551.

<sup>29</sup> 1992 FCA 159; 10 ACLC 553.

information can still be protected due to its limited disclosure; this was a point which was made by the court of appeal in *Franco v Mirror Group Newspaper*.<sup>30</sup>

When public interest dictates that law and order should be maintained then confidentiality becomes secondary. The public duty to disclose information applies where there is a danger to the state in that the public needs protection against crime. In balancing the public interest of confidentiality and disclosure, the bank must take extra care in deciding whether the disclosure is justified. Section 28 of the National Prosecuting Authority Act 32 of 1998 (NPAA) states that, 'if the investing director has a reason to suspect that a specified offence has been or is committed or that an attempt has been made to commit an offence he or she may hold an inquiry'.

In re *Price Waterhouse v BCCI Holdings (Luxembourg) SA*,<sup>31</sup> it was held a bank's duty of confidentiality has been singled out for special protection in cases of sufficient gravity of disclosure, particularly where it was limited, in order for it to be protected. A person relying on the exception of public interest can simply argue it is in the interest of the public. However, in the case of *A & Ors v Hayden*,<sup>32</sup> the court made it clear that the person who owes a duty to maintain confidentiality will not be allowed to escape from his obligation simply because that he alleges that a crime has been committed and that it is in the interest of the public. Therefore, one can conclude that the inception of s 28 of the NPAA overrides the judgement in this case because the director is given powers to investigate where there is a suspicion.

## RECOMMENDATIONS

### **Secrecy**

I suggest that confidentiality needs to be upheld for every customer so as to ensure an effective business practice in banks. Confidentiality is built on the integrity of the business, as, without confidentiality there will be no business protection. A business without confidentiality is likely to be exposed to harmful actions.

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<sup>30</sup> CA(1984) 1 WLR 892.

<sup>31</sup> (1992) BCLC.

<sup>32</sup> 1984 156 CLR 532 Gibbs CJ at 546-547.

**Law (explicit legislation remains the basis for bank secrecy)**

The rules of confidentiality should be included in banking law to protect people against bank disclosure without express consent. For instance; s 47 of the Singapore Banking Act provides focused, limited and practical circumstances allowing the disclosure of customer information. The high court of Singapore in *Susilawati v America Express Bank*,<sup>33</sup> held that statutory confidentiality replaced the common law principle in *Tournier's* case. In Switzerland, a breach of the duty of confidentiality is a criminal offence which has ensured that client confidentiality has remained intact and the strength of the Swiss banking system has been enhanced.

**Exceptional circumstances where disclosure of confidentiality becomes relevant**

Where the duty of confidentiality exists to balance competing interests between individuals and the public at large, then confidentiality becomes relevant. This means that where justice is involved, confidentiality should be upheld. In certain circumstances, a bank may be compelled by law to disclose information so as to maintain justice in a country or to protect society. Such a case, for example, exists if the disclosure seeks to protect the country against crimes such as money laundering and drug dealing. Since the duty to disclose under public interest is broadly interpreted, I suggest that it should be given a narrow interpretation to include only those aspects where there is suspected criminal activity.

***Business best practise***

In practice, every contract normally expressly states that the parties must keep all their communication confidential and under no circumstance shall relevant information be divulged to a third party. Confidentiality should be a day-to-day business practise in order to maintain or strengthen the bank-customer relationship. The banks must maintain the integrity of the customers so as to ensure effective business practice.

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<sup>33</sup> 2008 1 SLR 237.

**CONCLUSION**

In the final analysis, one can conclude that based on the above reasoning, the bank's duty of confidentiality is still relevant although contemporary business regulations require disclosure to provide information in the interest of better regulation for the benefit of all stakeholders in the economy.<sup>34</sup> It can be argued that the duty could be protected through human rights law. POCA and FICA allow disclosure to be granted only to the extent that they appear necessary for the purposes of the Act and provided that the interests of justice and public order prevail over the interest to protect the confidentiality of the information. For instance, information relating to third parties is not to be provided unless absolutely necessary to the prosecution of the case and justified by importance of the investigation. The duty of confidentiality has remained relevant and the respectability and strength of the right to privacy in different legislations has been enhanced in the Zimbabwean banking system

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<sup>34</sup> *Supra* note 3.