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Marriage of Convenience : Bank –Customer Relationship in the Age of the Internet : A South African Perspective

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Abstract. The last three decades has experienced the introduction of computers and information technology at many levels of human transaction, namely transfer of funds, data collation and conclusion of contract. The internet is used a medium of transmission of a customer's mandate and communication of information between the parties. Banking law proper deals with the relationship between the bank and the customer. Traditionally the relationship is that of the mandatory and mandatee. This relationship not only embraces mutual duties and obligations for the parties, but also offers privileges. Internet improves the efficiency of the bank's systems of collecting and transmitting orders for execution, regardless of the location of the customer. In a typical internet banking transaction, the relationship between the online bank and the customer gives rise to a hybrid nature of the contract between the parties. The relationship of the bank and the customer does not arise unless both parties intend to enter in a relationship. This paper will analyse some of the legal risks created by laws regulating the bank-customer relationship.

1. Introduction

Banking and financial services are heavily regulated products of law. Their structure and economic value are often determined by legal requirements that shape the obligations of the parties[1]. The internet has overturned the traditional bank-customer relationship by providing a common, global infrastructure for the wide range of banking services. The internet does not only serve as the principal channel for global commercial, education and leisure communication, but also as an interactive communication between banks and customers whereby extensive amount of information can be exchanged. It has brought about changes namely, moving away from physical objects as the substance of commerce to information[2]. In the age of internet banking is a mass market activity and therefore the relationship is not of a personal nature as it was in the early 19th century and it has liberated banking from the physical constraints. Banking services available over the internet open new possibilities for users and customers but also new risks for the regulation of the bank-customer relationship. [3] Technically, the internet facilitates the customer's access to the bank's services. Wiegand[4] argues that the bank-customer relationship is very complex and difficult and that this difficulty is exacerbated when the relationship is combined with the technology of internet banking

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[1] Apostolos at 311.

[2] Abu Bakar Munir *Internet Banking: Law and Practice* Lexis Nexis 2004 at 2.

[3] Reed Chris *Electronic Finance Law* Woodhead-Faulkner 1991 at 1. See also Alastair Hudson The law of Finance, 1st ed, Sweet and Maxwell, 2009, p771

[4] *Legal Aspects of Bank-Customer Relationship in Electronic banking* N Horn (ed) Legal Issues in Electronic Banking 163-186, (2002) *Kluwer Law International.* See also Willis Nigel, *Banking in South African Law* 41

2. Nature of Bank-Customer Relationship

The heart of banking law is the contractual relationship between the bank and the customer[5]. The relationship[6] of a bank and a customer was a closed one in that the former primarily acted for businessmen, the professions and the landed classes. The bank-customer relationship[7] was essentially that of a debtor-creditor relationship.[8] The nature of the relationship is contractual, the scope of this paper will only examine the terms of contract implied by custom. The relationship consist of a general contract that is basic to all transactions, having special contracts which arise only as they are being brought into being in relation to specific transactions or banking services.[9] The fundamental distinguishing feature is between the obligations which come into existence upon the creation of the relationship and the obligations which are consequently assumed by specific agreement.[10] This relationship may not be superimposed as it was decided in *Midland Bank Ltd v Conway Corpn*[11] where the court held receiving of sums by the cashier as representing rent, when they were physically handed over the counter, does not mean that such sums were received by the bank as the customers agent.

A person becomes a customer[12] of a bank[13] when he opens an account with the bank[14]. Ellinger[15] opines that there are three conclusions which can be drawn in analysing the concept customer. Firstly is that the relationship comes into being when the bank agrees to open an account in the customer's name. The fact that the bank agrees to open an account in a person's name signifies the bank's consent to enter into a business relationship with that person. Secondly, by entering into the relationship the bank agrees

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[5] In *Foley v Hill* (1848) 2 H.L Cas 28, 9 ER 1002 (Foley), it was authoritatively stated that the legal relationship between the bank and the customer was that of a debtor as to a creditor with the 'superadded obligation to honour the debt by paying cheques drawn by a customer. See Burdick, William L. The Principles of Roman Law and Their Relation to Modern Law 2004, Law Book Exchange, Burdick states that 'there exists between the bank and the customer a complex contractual relationship comprising reciprocal rights and duties founded on the customs and usages obtaining among banks.

[6] The bank –customer relationship is commonly brought about by a customer opening a current account with the bank. This relationship is preferably reduced in writing which will stipulate obligations between bank and customer.In *Hedley Byre and Co Ltd v Heller and Partners Ltd* [1964] AC 465 (*Hedley)* the court observed as follows (529): '[i]t is a relationship that is voluntarily accepted or undertaken, either generally where a general relationship, such as ... banker and customer, is created, or specifically in relation to a particular transaction'. It should be note that the relationship is nowhere defined in banking legislation and therefore its nature has been mostly described by the courts.

[7] In *Ladbroke & Co v Todd* (1914) 30 TLR 433 (Ladbroke), it was stated that the relationship commences when the bank agrees to open the account in question.

[8] *Foley v Hill* (1848) 2 *HLC* 28, 9 *ER 1002* at 1005-6 (Foley). In *Standard Bank of SA v Oneanate Investments (Pty) Ltd 1*995 (4) SA 510 (C) (*Oneanate I*) the court analysed the bank-customer relationship and found its designation as one of *mutuum*, *depositum* or agency unsatisfactory. It therefore declared the relationship as one of debtor and creditor (531I–532D). Malan & Pretorius (1996) *SA Merc LJ* 401) described the decision as: '[t]ouching on practically all aspects of the current-account relationship between a bank and its customer.'

[9] *Willis Nigel* at 24. See also Hapgood at 115.The relationship between a bank and a customer has been accepted by South African courts as that of a debtor to creditor (*See S v Kotze* 1965 (1) SA 118 (AD) (Kotze) at 124-125, *S v Kearney* 1964 (2) SA 495 (AD) at 502- 503 *and* S v Graham 1975 (3) SA 569 (AD).

[10] *ibid* note 11.

[11] [1965] 2 All ER 972, (Midland Bank).

[12] Customer will be used to mean anyone who deals with the bank in relation to a banking service. Customers can be banks, commercial customers and private customers. In *Commission of Taxation v English, and Australian Bank Ltd* [1920] AC 683 at 687, the Pri*vy council* defined a customer to signify a relationship in which duration is not of essence. See also Mark Hapgood QC 'Paget's Law of Banking' 12th ed at 110, where it is stated that is impossible to define the term customer with exactness, but the chief criterion is that there exists an account with a bank through which transactions are passed. In *Importers Company v Westminster Bank Ltd* [1927] 2 KB at 309 a customer was defined as a person who keeps an account at the bank. While in *Commissioners of Taxation v English, Scotish and Australian Bank* [1920] AC 683 at 687 the court held that a 'customer signifies a relationship in which a duration is not of essence. A person whose money has been accepted by a bank on the footing that they undertake to honour cheques up to the amount standing to his credit is, in the view of their lordships, a customer of the bank in the sense of statute, irrespective of whether his connection is of short or long standing'.

[13]. Section 1 of the Banks Act 94 of 1990 (hereinafter referred to as the Banks Act), defines a bank to mean a public company registered as a bank in terms of this Act. The Banks Act defines bank in terms of two concepts, namely 'deposit taking' and business of a bank'; Nigel Willis *Banking in South African Law,* Juta and Co Ltd 1981 at 44, where a commercial bank is defined as meaning any person who carries on a business of which a substantial part consists of the acceptance of deposits of money which can be withdrawn by cheque. Section 1 of the Bills of Exchange Act of 1964 defines a bank as a body of persons that carries on the business of banking.

[14] Hapgood QC *ibid* note 4.

[15] Ellinger's Modern Banking Law, EP Ellinger; E Lomnicka; RJA Hooley 4th ed oxford University Press 2006 at 121

to act as customer's agent in banking transactions and lastly once the bank has accepted a person as a customer it acquires defences against third parties. The Uniform Commercial Code (UCC)[16] defines the bank-depositor relationship and provides regulations to discourage adhesive contracts.

3. The Banks Duty of Confidentiality[17]

The dictionary definition of a fiduciary[18] relationship illustrates its potentially broad interpretation and application. Black's Law Dictionary[19] defines a fiduciary relationship as being founded on trust or confidence reposed by one person "in the integrity and fidelity of another". Hudson opines that the status of being a fiduciary imposes burdensome obligations of good faith on a person[20]. That the fiduciary obligations are imposed on trustees, directors of a companies, business partners and agents in relation to their principal. Ellinger states that the primary legal consequence is the duty of confidentiality and unequivocally state that there are fundamentally three prosaic legal consequences which ensue because of this relationship, firstly that the bank has to collect in good faith and without negligence cheques remitted to it by a customer, secondly it has a duty to obey its customer's instructions regarding the collection of cheques, effects payable to the customer and payments ordered by the customer and lastly it owes certain incidental duties to its customer.[21]

3.1 The Fiduciary Obligations

Hudson[22] in examining the fiduciary obligation states that there are two types of private law which exist in any system of commercial or financial law, namely, the obligations which the parties choose to impose on one another in the form of a contract and the obligations which the law imposes in a mandatory fashion regardless of the parties' wishes. In the latter category of mandatory rules it is the law of tort, the criminal law, financial regulation and fiduciary law. The former category may include fiduciary responsibilities where the parties expressly create those obligations in their contract, such as in an agency contract. Fiduciary obligations are more extensive and more onerous than common law duties under contract law. The advantage of contract law is that obligations borne are limited by the terms of the contract. Fiduciary law in the banking context constitutes mandatory obligations existing outside the ordinary contract law.[23]

There are five principal obligations which exist in a fiduciary relationship, firstly, the fiduciary must avoid conflict of interest, secondly may not take any unauthorized profit from its fiduciary obligations, thirdly, the fiduciary must maintain the confidentiality of its beneficiaries, fourthly, the fiduciary must act in good faith in the best interest of the beneficiaries and fifthly, the fiduciary must act with care and skill.[24]

A bank will not ordinarily owe fiduciary duties to its customers, since the fiduciary relationship does not arise in ordinary banking relationship, however, the duty may arise where there special circumstances giving rise to fiduciary relationship. To avoid liability as fiduciary the bank may seek to acquire authorization or indemnity or exclusion of liability in the contract of business letter between the parties for any act or omission which would otherwise constitute a breach of fiduciary duty.

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[16] U.C.C. **§§** 4-101-4-504.
[17] T*ournier v National Provincial & Union Bank of England* [1924] 1 KB 461 (*Tournier*).
[18] John F. Mariani, Christopher W. Kammerer, and Nancy Guffey-Landers, *Understanding Fiduciary Duty, The Florida Bar Journal,* Volume 83 No3, 2010,20, where it is stated that the concept of a "fiduciary" originated in equity and is derived from the "use," the forerunner of today's trusts. The use from the Latin "ad opus" (meaning "on his behalf") grew out of arrangements in medieval England that allowed land to be held on behalf of religious orders who were pledged to vows of poverty and hence unable to own land.
[19] Black's Law Dictionary 563 (5th ed. 1979).
[20] Alastair Hudson The law of Finance, 1st ed, Sweet and Maxwell, 2009, 93. A fiduciary obligation arises when one person has agreed to act in the affairs of another person. 96. Article 47 of Swiss Federal Banking Law of 1934, bases the banks duty of confidentiality in criminal law.
[21] Ellinger's Modern Banking Law, EP Ellinger; E Lomnicka; RJA Hooley 4th ed Oxford University Press 2006 at 117.
[22] *Supra* note 19 at 95.
[23] *Ibid*.
[24] *Ibid* at 101.

3.2 The Banks Mandate

The concept mandate[25] has been used by civil lawyers to catergorised the relationship between customers and their bank[26]. In terms of English banking the term has not been given a precise meaning, however, it is used as a general term applying to the contract with banks customers governing particular banking services.[27] If the bank acts outside any authority so conferred, the customer will not be bound and the bank will be liable for any loss. If the mandate is withdrawn, the bank must comply. If the mandate is given in a narrow sense, the customer has a duty to exercise care to make the mandate clear and unambiguous, so that the bank does not suffer loss while executing the mandate with reasonable care and skill.[28] The consequence of disobeying a mandate is often expressed as an issue of authority, the bank having no authority to act and being liable for the customer's loss. The English courts follow a strict approach which protects the customer, in that it states that once the nature of the mandate has been determined the bank must do what the customer requires it to do.

3.3 The Law of Agency

Section 1[29] defines agency in relation to a bank, to mean a right granted to a person by that bank to receive on its behalf from its clients any deposits, money due to it or applications for loans or advances, or to make payments to such clients on its behalf[30]. Vollans argues that agency is epitomised by one person acting for another to bring that person into a legal relationship with a third party[31]. The agent intercedes between the principal and a third party having the ability to effect legal relations between the principal and third party[32].

Vollans[33] alludes that agency was a common necessity in eras without real time global communication. Whereas some elements of the justification for agency have diminished over the years, the use of agency in commercial contracts remains commonplace not least in IT provision where several parties need to interact to achieve successful delivery. Normally, these contracts rely heavily on third party provision for the procurement of basic elements.[34] In summary he submits that through the

[25] A mandate is a consensual undertaking in terms of which one person agrees to execute the specific instruction of another for remuneration. See Malan, FR & Pretorius, JT *Bills of Exchange, Cheques and Promissory Notes in RAU Annual Banking Law Update* (23 April 2003) Indaba Hotel, where Pretorius suggested that the contract between the bank and the customer is that of mandate. In *Harding and others NNO v Standard Bank of South Africa* 2004 (6) SA 464 (*Harding)* the court explained that the consensus between a bank and its customer as regards services that should be rendered emanates from a contract of mandate in terms of which the customer is the *mandator* and the bank is the *mandatory* (468B–C). In *Joint Stock Varvarinskoye v Absa Bank Ltd* 2008 (4) SA 287 (SCA) (Joint Stock) the court used the word 'agent' to describe the relationship between Absa Bank and the appellant. Burdick, supra note 5at 458.

[26] Schulze, WG 'The Sources of South African Banking Law - A Twenty-first century Perspective- Part 1 (2002) 14 *SA Mercantile Law Journal* 438, 459–460;See also *Volkskas Bpk v Johnson* 1979 (4) SA 775 (C) (*Johnson)* 777H–778A.

[27] Principles of Banking Law Ross Cranston 2nd ed Oxford University Press 2002 at 140. Mandate when used in the narrow sense it means the authority the bank has to act n a particular way and it does not constitute a contractual variation. Once the mandate is binding on a bank, it must act or be in breach of contract.

[28] The authentication under the contract for the bank to act for the customer in a particular way e.g. to make a payment. Signature is a typical form of authentication but there are other avenues such as a PIN, electronic signature or SWIFT message.

[29] The Banks Act. It should be noted that that the South African Law of Agency was borrowed from English Law. This relationship was discussed in *Northview Shopping Centre v Revelas Properties*
(275/09) [2010] ZASCA 16 (18 March 2010) (Northview). For the discussion on the Law of Agency see LAWSA Vol 17 *Mandate and Negotiorum Gestio*; AJ Kerr The Law of Agency 4th edition (Lexus Nexis Butterworth); Peter Havenga et al General *Principles of Commercial Law*, 7th ed (2010) and Robert Sharrock *Business Transactions Law* 6th ed, Juta & Co, (2004) and Wille's Principles of South African law, 9th Ed (Juta).

[30] Fridman GHL *Law of Agency* (7ed) 1996, LexisNexis, Butterworths.

[31] See *Liebenberg v ABSA Bank Ltd t/a Volkskas Bank* [1998] 1 All SA 303 (C) (*Liebenberg)* 308B–309H, the court held that instructions given to a bank by a customer are governed by the law of agency.

[32] Tim Vollans *Secret Commissions in IT Contracts, Journal of International Commercial Law and Technology* Vol. 5, Issue 2 (2010) 73 at 74. See *Sasfin Bank Ltd v Soho Unit 14cc t/a Aventura Eiland* 2006 4 SA 513 (TPD) (Soho Unit) where limitations on the application of the doctrine were considered.

[33] *Ibid.*

[34] Tim Vollans Secret Commissions in IT Contracts' *Journal of International Commercial Law and Technology* Vol. 5, Issue 2 (2010) 75. 'Whilst the duties are fiduciary, their extent and nature remain subject to the terms of the underlying legal contractual agreement - as the High Court confirmed in Towcester Racecourse Co Ltd v. Racecourse Association Ltd. Thus, the fiduciary rules are not immutable but are protected, and whilst all of these obligations can

application of the rules of agency, the agent's contractual link remains with the principal to which the agent's duties were owed and to the exclusion of any to third parties.

4. Classification of the Contract between the Bank and the Customer

Willis[35] opines that the contract between the bank and the customer closely resembles that of a *mutuum*. A *mutuum* is a contract whereby one person delivers some fungible thing to another person who is bound subsequently to return to the former a thing of the same kind, quality and quantity. There must be an obligation on the receiver to return an equivalent to what has been received[36]. However the appellate division in *S V Kearney*[37] held that money deposited with a bank is no longer owned[38] by the depositor but the bank. It is this characteristic of the bank-customer relationship which distinguishes the contract from a *depositum*[39] or *commodatum*.

Some writers are however critical on the view that the bank customer relationship is founded on the contract of *mutuum*, pointing out that ' firstly in a contract of *mutuum* it is the intention of the parties that it be for the benefit of the borrower only but in the bank customer relationship the contract is for the benefit of both parties, secondly, the bank owes the customer a duty of secrecy, thirdly, money deposited with a bank may be reclaimed without notice, while in the case of *mutuum* the lender must give reasonable notice of a claim for repayment and fourthly, in many respects the bank acts as an agent of the customer.[40] It is further argued that the bank customer relationship is similar to agency in that the bank like the agent, owes a duty of secrecy to his customer and the use of cheques substantially adapts the principles of agency. He submits that the contract between the bank and the customer is *sui generis* and that this is implicit in the views adopted by the courts[41]

4.1 Contracting Online

A contract is a consensual agreement between two or more persons to give, to do or to refrain from doing something.[42] Commonly, the relationship of the bank and the customer has been governed by implied contract. For a contract to be enforceable in law it should be recognised as having been validly effected in law. The basic principles of contract, whether in writing, oral or online, have remained the same. However transactions on the internet do present certain unique challenges to the established principles. One of these challenges is that the parties may never meet in person. To ensure that binding rights and obligations are created, it is significant that each party has unlimited contractual capacity.[43]

The parties must have legal capacity to contract. Factors affecting contractual capacity include minority, insanity, intoxication, insolvency and marital status. With online contracts it is significant to ensure that contracting parties disclose their personal details. However, since parties are reluctant to disclose their personal details on the internet they should warrant that they have the necessary legal

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be displaced by agreement between the principal and the agent, the playing field is tilted against the agent asserting any such displacement i.e. contra proferentem.'

[35] *Supra* note 9.

[36] See however, Zamzar Trading (Pty) Ltd (in Liquidation) v Standard Bank of SA Ltd 2001 (2) SA 508 (W) (Zamzar) where the court reasoned that a bank that was unaware of a contractual relationship between a customer and a third-party tainted by turpitude and had no knowledge of such turpitude, could not be held liable to repay money which it had at some stage held legally for the customer. To hold someone liable irrespective of whether he had knowledge of wrongdoing affronted the principle that a party had to act *wrongfully* before it could be held liable for its conduct.150 The court further found that there was no evidence that the bank breached the contract it concluded with Zamzar Trading or that it had entered into an unenforceable contract with the company. The bank merely held money legally for Zamzar Trading and unknowingly assisted in wrongdoing.

[37] 1964 (2) SA 495 (A) at 503 (*Kearney*).

[38] For a discussion of ownership on Money in an account, see van Jaarsveld *Money* Laundering unpublished Thesis, Chapter 3.

[39] A *depositum* is a contract whereby one person hands over a thing to another for safe keeping on condition that the depositor is to receive it back at his wish. A *commodatumi* is where a specific thing is lent to another for his use on condition that he returns the thing to the lender.

[40] Willis Nigel at 31. See also Burdick, at 463.

[41] *Ibid*

[42] Kerr, AJ *The Law of Agency in South Africa* (1991)

[43] Reinhardt Buys, Francis Cronje, Cyber Law @SA; The Law of Internet in South Africa 2nd ed Van Schaik, 2004, at 101-105.

capacity to enter into a contract.[44] Once the customer has signed a contract he is bound, even if they have not read the terms. Justification thereof is based on form not substance. Thus the signature is a formal device for the conclusion of a contract.[45]

The contract will only be legally binding if the acts to which the parties agree are legal, the performance of the terms of the contract at the time it was entered must be possible and not contrary to good morals. In terms of South African law, the general rule is that validity and enforceability of contracts does not require formalities to be complied with, however there are exceptions. In cases of sale of immovable property the contract must be reduced to writing.[46]

The parties must reach a consensus. Reinhardt[47] opines that according to section 24[48] an offer is not without legal effect merely on the grounds that it is expressed in the form of a data message or that it is not established by means of an electronic signature but by some other means from which a parties' intent can be inferred. An offer must be clear and unequivocal with the intention and an unequivocal acceptance can be inferred from the writing or conduct of the offeree to create a binding contract.[49]

5. Courts Interpretation of the Fiduciary Relationship

The landmark decision of *Tournier*[50] established the common law duty of confidentiality[51]. It was held that the disclosure by the bank constituted a breach of the bank's duty to the plaintiff. Disclosure of confidential information is prohibited, provided such disclosure falls within the scope of one of the recognised exceptions. His Lordship in Tournier's[52] case classified the qualifications as:

> "where disclosure is under compulsion by law[53]; where there is a duty to the public to disclose54; where the interest of the bank require disclosure; and where the disclosure is made by express or implied consent of the customer."

The principles governing the general principles of breach of confidence are applicable in examining the scope of the duty is not any special law of bank confidentiality. A duty of confidence comes into being when confidential information comes to the knowledge of a person (bank) in circumstances where he has notice, or is held to have agreed, that the information is confidential. The courts in *Aschkenasy*[55] case and *Tai Cotton Mill*[56] case have held that the relationship of the bank-customer is of a contractual nature. This contract is essentially implied, rather than explicit. When emphasising the contractual nature of the bank-customer relationship Wickrema[57], concurs with the decision of the Privy Council which stated that:

> 'there is no doubt that the relationship between banker-customer is contractual and its incidents, in the absence of express agreement, are such as must be implied into the contract because they can be seen to be obviously necessary.'

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44 *Ibid* note 29 at 102.
45 Ross Cranston Principles of Banking Law 2nd ed Oxford University Press 2002 at 145.
46 *Ibid* at 102.
47 *Supra* note 44.
48 ECTA.
49 Crawley v Rex 1909 TS 1105, where the court held that an advertisement does not necessarily constitute an offer, but may be regarded as an invitation to do business.
50 *Tournier supra* note 17.
51 *Cambanis Buildings (Pty) Ltd v Gal* 210 1983 (2) SA 128 (N) 137F (Cambanis).
52 *Ibid* note 13.
53 *Tournier* 472–473. It should be noted that these exceptions are likewise included in the South African Banking Code (SAB *Banking Code* par 3.6). In terms of the Income Tax Act 58 of 1962. In *Hindry v Nedcor Bank Ltd and another* (1999 (2) SA 757) the court found that a bank is in no position than any other debtor when it has to furnish information about the finances of a customer to the tax commissioner (773F–H).
54 Jawahar v Manoharan, Decision No. CIC/SG/A/2012/000207/18090, it was held that it was not in the public interest to disclose information.
55 *Aschkenasy v Midland Bank Ltd* (1934) 51 TLR 34 (*Aschkenasy*)
56 *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank* Ltd [1986] AC 80 (Tai Hing Cotton Mill). See also Canadian Pacific Hotels Ltd v Bank of Montreal (1987) 40 DLR (4th) 385 (SCC) (*Canadian Pacific Hotels)*) and National Australia Bank Ltd v Hokit Pty Ltd [1996] 1 NZLR 420 (CA) (Hokit).
57 Wickerema Weerasooria & Nerida Wallace "Banker-Customer Resolving Banking Disputes" 1st ed (1994) p89.

Alquash[58] opines that the duty of confidentiality includes the non-disclosure of information which was acquired by the bank from its customers, directly or indirectly. Any information acquired by the bank in connection with, the relationship the bank has with the customer will be confidential, unless, such information is regarded as public information. Any information about the customers supplied by a third person, other than in a course of banker-customer relationship falls outside the scope of the duty of confidentiality. The duty of confidentiality is based on the implied term in the contract between the bank and the customer.

The Cape Provincial Division in Abraham's[59] case recognised the duty of secrecy when Searle J stated that:

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

It is however, clear from this decision that liability is based on the breach of contract, not on the wounded feelings or insult of the customer. Willis opines that the principles of equity require that the disclosure of information should be done only with the knowledge and consent of the customer. Equity does have a role in protecting confidences in disclosure situations independently of contract. Equity also provides assistance through its remedy of the injunction to underpin any contractual duty. Cranston states that Posner is concerned that confidentiality (or privacy) is not always economically efficient. There are arguments in favour of imposing the duty of confidentiality on banks, namely, the commercially sensitive nature of business information and the value of the individual in protecting personal autonomy. If there are public interests in the law obliging banks to keep customers' financial information confidential, so too are there public interests on the other side of the equation.

When dealing with the issue whether the bank can cede its rights to a third party, the court in *GS George Consultants and Investments v Datasys*[60] erred by concluding that a banker cannot cede or pledge its personal rights against its customer. The court held that

> "in the absence of agreement to the contrary, the contract of a bank and customer obliges the bank to guard information relating to his customer's business with the banker as confidential, subject to various exceptions, none of which is presently relevant; that such duty of secrecy imports the element of *delectus personae* into the contract; and that the banker's claims against his customers are accordingly not cedable without the consent of the customer."

The Appellate Division in *Sasfin (Pty) Ltd v Beukes*[61] when interpreting the notion of *delectus personae* stated that a cession by the banker of his claim does not involve delectus personae. The court stressed correctly that the fact that performance to the cessionary does not amount to something essentially different from the performance of a cedent. It was accordingly held that a cession can be effected without the disclosure of confidential information. Scott opines that a banker may freely cede his personal rights against his customers, provided there is no disclosure of confidential information regarding his relationship with the customer and where the banker does not disclose information such as the name of the customer, therefore such a disclosure will have to be treated as falling under the third exception, which allows disclosure where the interests of the banker require it.

In addressing the banker's duty of confidentiality the court[62] held that the decision of GS George holds no water in that there was no circumstance relieving the bank of its duty of secrecy. Referring to the

[58] Fayyad Alquash "Banks Duty of Confidentiality in the wake of Computerised Banking 1995 JIBL 50.
[59] Abrahams v Burns 1914 CPD 452 (Abrahams).
[60] 1988 (3) SA 726 (W) (George).
[61] 1989 (1) SA 1 (A) (Sasfin).

exceptions established in Tournier's case where the interests of the banker require disclosure, the court held that, as the bank wished to dispose of its claim, it had an interest to disclose of its claim. It had an interest to disclose the existence of such a claim to the proposed cessionary. Thus there seems to be no ground for prohibiting a bank from ceding his personal rights against its customers. The object of the cession can be described without revealing any confidential information regarding the exact relationship between the bank and the customer.

In *Densam (Pty) Ltd v Cywilnat (Pty) Ltd63* it was held that the right of action may be ceded freely, there was no principle of law by which the appellant could preclude the respondent from enforcing the claim in its own name. In *First National Bank of South Africa Ltd v Budree*[64] the facts briefly are that the Plaintiff instituted an action against the respondent for the payment of various sums of money lent to the respondent. The court held that the only damages which could properly be awarded for breach of contract or an *actio ex lege Aquilia* for the negligent breach of a duty of care by wrongfully dishonouring a cheque were damages in the sense of patrimonial loss (damnum) and dignity, or reputation.

6. Legislation Governing the Bank-Customer Relationship

South Africa relies to a large extent on common-law principles of the law of contract to solve the many potential legal problems posed by electronic banking. The primary sources of law relating to electronic banking are the law of mandate and the law of contract. There is no legislation in South Africa dealing directly and exclusively with electronic banking. Although the ECTA[65] provides a wide and general framework for the facilitation and regulation of electronic communications and transactions, including electronic transactions for financial services, especially S42 it does not deal exclusively with electronic banking services. The Regulation of Interception of Communications and Provisions of Communication Regulated Information Act[66] is another example of a statute that may be relevant to electronic banking which provides a wide and general framework for the facilitation and regulation of electronic communications and transactions, including electronic transactions for financial services, however, it does not deal exclusively with electronic banking services.[67]

It is trite law that banks must maintain their duty of confidentiality[68] towards their customers. The following legislation are pro the maintaining of confidentiality. First, Section 14[69] guarantees the right to privacy. This right is protected by common law[70]. Second, the E CTA[71] also protects the personal information obtained through electronic transactions. Third, Section 33 (1) (a)[72] provides for the preservation of secrecy on financial information and confidential information of bank customers and it prohibits disclosure of any information relating to affairs of the bank, shareholders of the bank or a client of the bank except to the Minister of Finance, Director- General, or for purpose of performing his or her duties or when required to do so before a court of law.[73] Section 33(1) (b)[74] indicates that disclosure of information of a client of the bank requires the written consent of the Minister of Finance and the Governor after consultation with the client.[75] Fourth, section 236(4) [76]prohibits the disclosure of

[63] 1991 (1) SA 100 (AD) (Densam), the court stated '[t]here is no need to embark upon a consideration of the juristic nature of the contract between banker and customer ... I must make it plain ... that the bank was contractually obliged to maintain secrecy and confidentiality about its [customer's] affairs, in accordance with the decision in *Tournier*'s case.'
[64] 1996 (1) SA 971 (NPD) (Budree).
[65] 25 of 2002.
[66] 70 of 2002 (hereinafter referred to as RICPCRIA).
[67]Schulze 2004
[68] Willis *Banking in South African Law* 41
[69]The Constitution of the Republic of South Africa of 1996.
[70] See Neethling J et el *Neethling's Law of Personality* Butterworths Durban 2005 ch 8, The *locus classicus* for the recognition of an independent right to privacy in South African law is *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 3 SA 244 (C).
[71] Act 25 of 2002 (hereinafter referred to as the ECTA).
[72] South African Reserve Bank Act No. 90 of 1989 (hereinafter referred to as the SARB).
[73] *Ibid.*
[74] *Ibid.*
[75] *Ibid.*
[76] Criminal Procedure Act 51 of 1977 (hereinafter referred to as CPA), as amended.

information on court unless pursuant to a court order. The Act furthermore provides in section 153(2) (b) that no information about a pending charge may be published.

Conversely, the following legislations are pro disclosure of information. First, the National Credit Act[77] provides that a holder of confidential consumer information may disclose such information only to the consumer or a third party if allowed by the NCA or any other legislation. The provisions of the NCA therefore empower the bank to disclose their customer's information when necessary. Second, the Promotion of Access to Information Act[78] provides for a right of access to information in private hands. The PAIA was promulgated with the intention of providing customers with a means of obtaining information held by other natural or juristic persons. Third, sections 21-47[79] provide for reporting duties and access to information. FICA[80] overrides the confidentiality duty of banks, where it introduces know your customer (KYC) standard reporting duty which requires a bank to breach customer confidentiality for the sake of money laundering control. No confidentiality duty or other statutory or common-law limitations on the disclosure of information. Fourth, the Prevention of Organised Crime Act[81] which allows for the disclosure of information and the right to access to information held by any statutory body. Lastly, section 10(2)[82] placed a duty on the executive staff of financial institutions to report suspicions as regards the source of money acquired in the course of business. Notably, no obligation to observe the confidentiality of customers or any other limitation on the disclosure of information is included in the DDTA.

7. Conclusion

It is submitted that online bank-customer services are exposed to unacceptable risks of legal uncertainty and over/non-regulation. The existing legislation in its imperfect current form has not quite eliminated the persistent regulatory and enforcement role of the administrative and judicial authorities regarding the bank-customer relationship. Even though the existing rules applicable to the bank-customer relationship are also applicable to internet bank-customer relationship, we are still faced with the challenge of who is liable where the customer's financial details become available to a third party through unauthorised access. The paper demonstrates that despite the suitability of internet, for banking services, it has not significantly altered the way in which the bank-customer relationship is regulated.

Conversely, the lack of definition of this relationship by the legislation contributes to the imperfect or lack of regulation, since the interpretation is left to the courts. The enactment of the legislation dealing with the disclosure of information by legislature was promulgated taking into consideration the national economic interest. Legislations have recognised the bank's duty of confidentiality as two fold, namely confidentiality is imposed on certain banks officials and imposing a duty on banks to report. Two legislations eroded the confidentiality duty of banks, namely FICA[83] through section 29 of by introducing the KYC standard reporting duty and POCA[84] through sections 71-72. The precise basis of breach of confidence in the common law is secondary to the underlying notion of upholding the customer's confidentiality. It should also be noted that that section 36(1)[85] limits the right to privacy[86] under certain circumstances and that the disclosure provisions of FICA[87] are therefore applicable. The statutory provisions do not override the duty of confidentiality completely but compulsion of law gives the bank substantial discretion whether to disclose or not. It is important that communications regarding

[77] Act 3 of 2007 (herein after referred to as the NCA). Section 69 thus provides for a national register of outstanding credit agreements in which credit providers will report certain information either directly to the National Register or credit bereau regarding their customer's credit information.
[78] Act 2 of 2000 (herein after referred to as the PAIA)
[79] Financial Intelligence Centre Act 38 of 2001 (hereinafter referred to as the FICA)
[80] *Ibid* section 29
[81] 121 of 1998 (hereinafter referred to as POCA) Section 71-72.
[82] Drugs and Drug Trafficking Act of 1992 (hereinafter referred to as the DDTA) which was repealed by POCA.
[83] *Supra*
[84] *Supra*
[85] Constitution
[86] *Ibid* section 14
[87] section 29

customer's financial information be protected to resolve the conflict which exists between the banks duty of confidentiality and section 29[88] reporting duty.

Even though the internet diminishes distance, creates access to banking services and may potentially offer choice to customer's, however internet banking in South Africa has not yet overcome the deadly sins of conflicting laws, uncertainty as to the applicable law, mandatory adaptation of services and overregulation. It is submitted that equable solutions are not readily available; however, legal harmonisation is a necessary precondition of a well-functioning model of internet banking industry because it will achieve minimum convergence of national laws and thereby implanting confidence in the bank customer relationship. It is significant that the risks are identified and managed in a prudent manner under the supervisory oversight of regulatory agencies.

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[88] *Ibid*