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THE CODE OF BANKING PRACTICE: AN INVESTIGATION INTO ITS ROLE AND ENFORCEABILITY IN SOUTH AFRICAN BANKING LAW

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ABSTRACT

The date of commencement of the current version of the Code of Banking Practice ("the Code") was 1 January 2012. Although, the Banking Association of South Africa had drafted a code as far back as 3 April 2000, the first Code of Banking Practice commenced (and bound all members of the banking association) on 1 October 2004. The Code was amended on two further occasions into its current version. Accordingly, all member banks of the Bankers Association have committed themselves to apply, and abide by, the Code. The provisions of the Code provide for, amongst other things, the standards for conduct expected by the banks when dealing with their clients.

The Code can best be described as an enigma within the context of South African banking law. The aim of this work is to investigate the role and enforceability of the Code in South Africa.

Closely associated with the Code is the office of the Ombudsman for Banking Services which was established to, amongst other things, oversee compliance with the Code. Where it exercises jurisdiction, the Ombudsman acts as an alternative dispute resolution agent in resolving disputes between banks and clients. The applicability of the Code in resolving disputes between banks and their clients depends on several factors, including the type of client, the nature of the dispute and the amount involved.

If regard is had to the provisions of the Code, which the writer submits are to a large extent geared towards the benefit of the client, it is surprising that same has hardly been considered by our courts when adjudicating matters and disputes pertinent to South African banking law, and more particularly matters regarding the bank-client relationship, especially considering the deluge of cases heard on a daily basis in South African courts regarding disputes between banks and their clients.

The purpose of this work is to investigate the origins of the Code and aspects associated therewith, and, in light thereof, to investigate the role and enforceability of the Code in South African banking law bearing in mind aspects such as legislative developments as well as to elaborate on certain comparative analyses with foreign law.

In conducting the abovementioned investigation, it is imperative to highlight certain aspects pertinent to the bank-client relationship as well as the nature and sources of South African banking law. Ultimately, this work aims to ascertain what impact, if any, the Code may have on the future of South African banking law.

CHAPTER 1

A SYNOPSIS OF THE CODE OF BANKING PRACTICE AND THE OMBUDSMAN FOR BANKING SERVICES IN SOUTH AFRICA

1.1 *A brief note on the code of banking practice*

The preamble of the Code of Banking Practice states:[1]

> "The Code of Banking Practice ("the Code") is a voluntary code that sets out the minimum standards for service and conduct you can expect from your bank with regard to the services and products it offers, and how we would like to relate to you. The Code applies to personal and small business customers…
>
> In the Code we refer to issues that may be subject to specific legislation and regulation which may change from time to time and will take preference over the Code.
>
> We accept the jurisdiction of the Ombudsman for Banking Services to mediate, to make binding determinations based on this Code and on the law where appropriate, and to make recommendations in other circumstances including those based on equity. A determination made by the Ombudsman for Banking Services may be made an order of the court."

According to the Banking Association of South Africa:[2]

> "The Code of Banking Practice provides the platform for the Ombudsman for Banking Services to adjudicate disputes between banks and their customers. It supplements the regulatory and contractual requirements that govern relationships between banks and these customers, committing the banks to do that little bit more in providing good service.
>
> A critical tool through which banks fulfil their obligations to customers is the Code of Banking Practice, which sets out the aspirational commitments banks make to their customers, and provides information on the respective rights and obligations of both parties."

The above extracts reflect numerous key aspects which will be expanded upon further on in this work, and touches upon the role of the Ombudsman for Banking Services. Importantly, the aforementioned extract suggests that banks and their clients may be bound by the provisions of the Code.

Unless otherwise stated, or the context indicates otherwise, a reference to the Code is a reference to the South African Code of Banking Practice which came into effect on 1 January 2012, which is the version which is currently applicable. Similarly, a

[1] Ombudsman for Banking Services in South Africa "Code of banking practice" 3 (http://www.banking.org.za/downloads/Code_of_Banking_practice.pdf (12-11-2015)).
[2] Banking Association of South Africa "The purpose of the code of banking practice" 1 (http://www.banking.org.za/consumer-information/legislation/code-of-banking-practice (12-11-2015)).

reference to the Ombudsman is a reference to the South African Ombudsman for Banking Services, and a reference to the Banking Association is a reference to the Banking Association of South Africa.

As is apparent from the above, the Code is applicable to personal and small business customers. Clause 12 of the Code defines a "small business" as:[3]

> "An association of natural or legal persons incorporated in or outside the Republic of South Africa, which has legal personality or enjoys a similar status in terms of which it may enter into contractual relations and legal proceedings in its own name and whose turnover for the last financial year was less than R5 million."

On 31 May 2011, the Terms of Reference of the Ombudsman increased the aforementioned limit of turnover in respect of small businesses to R10 million. In April 2000, the first version of the Code was drafted,[4] which came into effect in 2004,[5] and which was based on the British Banking Code of 1997.[6] The Code was revised in 2008 following the implementation of the National Credit Act.[7] Following the enactment of the Consumer Protection Act,[8] and the findings of the Competition Commission's enquiry into banking, the Code was revised into its third, and currently applicable, version.[9]

Section 1 of the Banks Act states that a deposit-taking bank is obliged to be a member of the Banking Association.[10] The preamble to the Code states that it is a voluntary code which the banks may abide by, should they elect to do so.[11] However, by virtue of their membership of the Banking Association, all 26 member banks are obliged to apply and abide by the provisions of the Code, and are automatically subject to the

[3] Ombudsman for Banking Services in South Africa (n 1) 43.
[4] Schulze "The sources of South African banking law – a twenty-first century perspective (part I) 2002 *SA Merc LJ* 438 456.
[5] Absa Bank "The code of banking practice" (http://cib.absa.co.za/Absa%20Capital%20Documents/CodeOfBankingPractice.pdf (11-8-2013)). On 3 November 2014, the writer accessed the aforementioned website address, however, the 2004 version of the code had been replaced with the currently applicable code of banking practice. The writer is in possession of a hard copy of the 2004 version of the code in the event that same may be required for perusal or consideration; Malan, Pretorius and Du Toit *Malan on Bills of Exchange, Cheques and Promissory Notes* (2009) 296.
[6] Schulze "The South African banking adjudicator – a brief overview" 2000 *SA Merc LJ* 38 39.
[7] 34 of 2005.
[8] 68 of 2008.
[9] n 1 above.
[10] 94 of 1990.
[11] n 1 above.

jurisdiction of the Ombudsman.[12] Accordingly, the reality is that the Code is not a voluntary code, despite it stating as such in its preamble.

The previous two versions of the Code contained the following provision in their respective preambles, which provision is absent from the current version:[13]

> "None of the provisions of this Code:
>
> - Will be legally binding in any court of law;
> - May be used to influence the interpretation of the legal relationship between you and your bank;
> - Will give rise to a trade custom or tacit contract or otherwise between you and your bank."

The lack of the abovementioned provision in the current version of the Code alludes to the idea that the banks do consider the provisions of the Code to be binding, and that it may be referred to in adjudicating disputes and in influencing the bank-client relationship.

The question arises whether the provisions of the Code gives rise to a trade custom or implies terms into the contract between banks and their clients. If that is the case, the Code ought to have been invoked or referred to on more occasions in our courts. However, as will be demonstrated, numerous provisions of the Code are reflected and crystallised, amongst other things, in legislation which supersedes the provisions of the Code.

It may be argued that the Code is superfluous and unnecessary. The writer respectfully submits, for the reasons stated more fully hereunder, that the Code does have a significant, yet untapped, potential and role to play in the development of South African banking law, and cannot simply be cast aside.

[12] n 1 above.
[13] Malan, Pretorius and Du Toit (n 5) 299; Du Toit "Reflections on the South African code of banking practice" 2014 *TSAR* 568 569 and n 4 above.

1.2 *An outline of some of the provisions of the Code of Banking Practice*

There are numerous provisions of the Code which mirror and reflect the provisions of legislation. However, there are some provisions of the Code which seem to detract from the "crystallised law" set out in legislation and case law.

The critical question which needs to be considered is whether the provisions of the Code will impact South African banking law in the future and, if so, to what extent. More importantly, and the question which still needs to be determined by our courts, is what legal status ought to be given to the Code, and to what extent can its provisions be enforced. The effects of the provisions of the Code on the bank-client relationship need to be considered too.

Clause 2 of the Code sets out its objectives as follows:[14]

> "This Code has been developed to:
>
> 1. Promote good banking practices by setting minimum standards for your bank when dealing with you;
> 2. Increase transparency so that you can have a better understanding of what you can reasonably expect of the products and services;
> 3. Promote a fair and open relationship between you and your bank; and
> 4. Foster confidence in the banking system".

Clause 3 of the Code sets out a general summary of the rights and obligations of the client. Amongst other things, the bank will act fairly, reasonably and ethically towards the client.[15] It also states that the client is responsible for checking and verifying the correctness of all entries on their statements.[16]

Clauses 4 and 5 of the Code set out the key commitments of the banks towards their clients, some of which are to promote affordable and accessible basic banking services to South Africans.[17]

[14] Ombudsman for Banking Services in South Africa (n 1) 4.
[15] n 14 above.
[16] n 14 above.
[17] Ombudsman for Banking Services in South Africa (n 1) 7.

Clause 6 of the Code sets out the principles of conduct adhered to by the banks and deals with aspects such as loyalty and reward programmes, credit insurance, charges and fees, interest rates and copies of documents.[18] Clause 6.1 of the Code provides for the banks' obligations with regards to the privacy and confidentiality of their clients' information, and to refrain from disclosing any such information about their clients and their accounts, except in the circumstances listed therein.

Clause 6.2 of the Code states that the banks shall not unfairly discriminate against any client on the basis of certain grounds,[19] which mirror the grounds reflected in section 9 of the Constitution.[20] Clause 6.5.1 of the Code states that the banks will use plain language in their agreements.[21] Furthermore, efforts must be made by the banks to ensure that clients understand the terms and conditions in agreements.[22]

Clause 7 of the Code contains provisions pertinent to the administration of accounts, from the opening of an account to the closing thereof.[23] Clause 7.1 of the Code states that a bank is required to verify a client's identity when opening an account, so as to protect all stakeholders against the illegal use of accounts.[24]

Clauses 7.3.2 and 7.3.3 of the Code state as follows:[25]

> "We will not close your account without giving you reasonable notice...We reserve the right, however, to protect our interests in our discretion, which might include closing your account without giving you notice: if we are compelled to do so by law (or by international best practice);...if we have reasons to believe that your account is being used for any illegal purposes."

Clause 7.5 of the Code deals with the ability of the banks to apply set-off in respect of monies owing from their clients in certain accounts against credit balances in other accounts of the same client in the same bank.[26] Clause 7.8 of the Code states that if the

[18] Ombudsman for Banking Services in South Africa (n 1) 9.
[19] Ombudsman for Banking Services in South Africa (n 1) 10.
[20] The Constitution of the Republic of South Africa Act 108 of 1996.
[21] Ombudsman for Banking Services in South Africa (n 1) 13.
[22] n 21 above.
[23] Ombudsman for Banking Services in South Africa (n 1) 16.
[24] n 23 above.
[25] Ombudsman for Banking Services in South Africa (n 1) 18.
[26] Ombudsman for Banking Services in South Africa (n 1) 20.

client acts in a negligent fashion, or without reasonable care, and such action or omission has caused the bank losses, the client may be held liable for such losses.[27]

Clause 8 of the Code sets out provisions regarding the granting of credit to clients and elaborates on some of the enforcement provisions.[28] Clause 9 of the Code deals with aspects pertaining to the payment services provided by banks.[29] Clause 10 of the Code provides dispute resolution mechanisms to resolve disputes between banks and their clients.[30]

It further states as follows:

> "The ombudsman for banking services office is entitled to mediate, make a determination based on this Code or on the law where the law is reasonably certain or make a recommendation in other circumstances including those based on equity."[31]

1.3 *The Ombudsman for Banking Services in South Africa, the Terms of Reference and the Code of Ethics*

The Ombudsman seeks to provide individual and small-business bank customers with a fair, quick and effective dispute-resolution process.[32] The services of the Ombudsman are free.[33] The Ombudsman provides an informal process whereby disputes may be resolved without resort to the courts.[34]

The Ombudsman is a scheme that was given its recognition as such on 27 October 2006,[35] in terms of section 11 of the Financial Services Ombuds Schemes Act.[36] The Ombudsman has been registered as a section 21 non-profit company in terms of the then applicable Companies Act.[37] The Ombudsman is appointed by the board of

[27] Ombudsman for Banking Services in South Africa (n 1) 23.
[28] Ombudsman for Banking Services in South Africa (n 1) 24.
[29] Ombudsman for Banking Services in South Africa (n 1) 30.
[30] Ombudsman for Banking Services in South Africa (n 1) 35.
[31] Ombudsman for Banking Services in South Africa (n 1) 36.
[32] Ombudsman for Banking Services in South Africa "Terms of reference" 2 (http://www.obssa.co.za/images/documents/approved%20terms%20of%20reference%20updated%20may%202011.pdf (12-11-2015)).
[33] Ombudsman for Banking Services in South Africa (n 32) 2.
[34] n 33 above.
[35] n 33 above.
[36] 37 of 2004 and n 33 above.
[37] 61 of 1973 and n 33 above.

directors.[38] The board of directors is comprised of four directors independent of the banking industry, an independent chairperson, and three directors who represent the interests of the banking industry.[39]

With regards to the independence and impartiality of the Ombudsman, the Terms of Reference state as follows:[40]

> "The Ombudsman acts independently and objectively in resolving disputes and is not influenced by anybody in making his or her decisions. The Ombudsman enjoys security of tenure and can only be dismissed on the grounds of incompetence, gross misconduct, or inability to effectively carry out his or her duties. The Ombudsman may not be dismissed for being unpopular with the banks or the consumer groupings."

The Ombudsman handles and adjudicates on complaints. The Ombudsman is a well-resourced organisation which is not reliant on funding from any particular party which may influence its decisions and is only accountable to its board of directors.[41]

The Ombudsman uses the following criteria to resolve disputes:[42]

> "1. The law, especially [the] FSOS [Financial Services Ombuds Schemes Act] and [the] NCA [National Credit Act];
> 2. Applicable industry codes or guidelines;
> 3. Good banking practice;
> 4. Banking practice in other jurisdictions; and
> 5. Fairness in all the circumstances."

The powers and duties of the Ombudsman as well as member banks are defined by the Terms of Reference including the operational procedures defined therein.[43] The Terms of Reference oblige banks to, amongst other things, act within the Terms of Reference and to abide by the provisions of the Code.[44]

[38] n 33 above.
[39] n 33 above.
[40] n 33 above.
[41] n 33 above.
[42] n 33 above.
[43] Ombudsman for Banking Services in South Africa (n 32) 3.
[44] Ombudsman for Banking Services in South Africa (n 32) 5.

A determination made by the Ombudsman is binding and may be made an order of court, and may only be reviewed by a panel of three retired high court judges appointed by the board of the Office of the Ombudsman.[45]

Only decisions taken on review and test cases shall establish precedent in the Office of the Ombudsman for Banking Services.[46] No decisions based on the Terms of Reference shall establish legal precedent.[47] The Office of the Ombudsman has also established its own Code of Ethics which applies to all members and directors thereof regardless of seniority, which provides guidance on aspects of integrity and impartiality for all staff and directors of banks.[48] Du Toit states that it is unlikely that the Ombudsman will make decisions which are inconsistent, and that the Ombudsman will seek to display some consistency when adjudicating disputes.[49]

1.4 *The history of the Ombudsman for Banking Services*

Although not the sole body or forum which adjudicates upon disputes between banks and their clients, it is clear that the intention of the Banking Association is that the Ombudsman is meant to be the body which is aimed at primarily applying the provisions of the Code in adjudicating upon disputes. It is a forum meant for quick and informal resolutions to complaints. Accordingly, it is prudent to look briefly at the history of the Ombudsman and, generally, to place this office into context within the greater sphere of South African banking law.

Prior to November 1997, the chief executive officer of the Banking Council performed mediatory functions in disputes which arose between banks and their clients.[50] The Banking Council was criticised for not being independent and impartial in light of the fact that it was mostly comprised of representatives of the banking industry which gave rise to the perception that the banks were the adjudicators in their own disputes.[51]

[45] Ombudsman for Banking Services in South Africa (n 32) 10.
[46] Ombudsman for Banking Services in South Africa (n 32) 11.
[47] n 46 above.
[48] Clause 6.1 of the code of ethics of the ombudsman for banking services (http://www.obssa.co.za/images/documents/OBS%20Code%20of%20Ethics%20revised%209Sep2013.pdf (08-12-2015)).
[49] Du Toit ("Reflections" n 13) 576.
[50] Schulze ("Adjudicator" n 6) 38.
[51] n 1 above.

The Office of the Ombudsman was established in November 1997 in order to address the perception of the lack of independence and impartiality.[52]

On 10 February 2000, the Office of the Banking Adjudicator was established. The Banking Adjudicator was a separate and distinct juristic person from the banking industry. The management of the Banking Adjudicator was split between the board of directors and the Banking Adjudication Commission.

The board of directors managed the financial operations of the Banking Adjudicator. The Banking Adjudication Commission (which was also comprised of members of the board) managed the mediatory and adjudicatory functions in disputes between banks and their clients.[53] In February 2004, the name of the Adjudicator was changed to its current name, being the Office of the Ombudsman for Banking Services.[54]

1.5 *The Financial Services Ombuds Schemes Act 37 of 2004 and its influence on the Code of Banking Practice*

The Financial Services Ombuds Schemes Act was enacted on 1 April 2005. The purpose thereof was amongst other things:

> "To provide for the recognition of financial services ombud schemes…to lay down minimum requirements for ombud schemes…to develop and promote best practices for complaint resolution; to empower the ombud for Financial Services Providers to act as a statutory ombud in certain cases… ."

Section 1 of the Financial Services Ombuds Schemes Act defines "the Statutory Ombud" as the financial advisory and intermediary services ombud, appointed in terms of the Financial Advisory and Intermediary Services Act.[55] A bank falls within the definition of a "financial institution" in terms of section 1(1) of the Banks Act.

[52] n 50 above.
[53] Schulze ("Adjudicator" n 6) 41.
[54] n 53 above.
[55] 37 of 2002.

Subject to sections 13 and 19 of the Financial Services Ombuds Schemes Act, the Statutory Ombud may deal with complaints against a financial institution in the circumstances and on the basis set out in Section 14(2), (3) and (4).[56]

Where a financial institution participates in a recognised scheme but that ombud lacks jurisdiction to entertain a complaint, the Statutory Ombud must deal with the said complaint.[57]

The ombuds referred to in the Financial Services Ombuds Schemes Act exercise the jurisdiction provided to them by the procedures under which such scheme operates, and their own respective Terms of Reference.[58] The Statutory Ombud has jurisdiction in respect of matters not within the jurisdiction of the said ombuds.[59]

If there is uncertainty as to whom a complaint ought to be referred to, the relevant ombud, Adjudicator, Ombud for Financial Services and Statutory Ombud involved must consult with each other to determine who should deal with the complaint.[60] If there is no consensus following the said consultation, the Statutory Ombud will make a determination as to who may exercise jurisdiction and advise the client accordingly.[61]

Regulation 7(1) provides that the Statutory Ombud is not empowered to deal with any complaint referred to in terms of Section 14(1) in the following circumstances:

> "(*a*) if the responding party has addressed the complaint to the satisfaction of the complainant within four weeks of its receipt by the responding party;
> (*b*) if the complaint constitutes a monetary claim in excess of R800 000,00 for a particular kind of financial prejudice or damage, unless the responding party has agreed in writing to this limitation being exceeded, or the complainant has abandoned the amount in excess of R800 000,00;
> (*c*) if the complainant has, prior to submitting the complaint, or while the complaint is pending, brought proceedings before an arbitrator or a court of law for determination of the matter of the complaint;

[56] Section 14(1) of the Financial Services Ombuds Schemes Act 37 of 2004. The provisions of the subsections referred to respectively set outs the circumstances when the Statutory Ombud must deal with a complaint, the procedure be followed and costs payable by a financial institution.
[57] Section 14(2)(*c*) of the Financial Services Ombuds Schemes Act 37 of 2004.
[58] Section 13(1)(*b)* of the Financial Services Ombuds Schemes Act 37 of 2004.
[59] Section 13(1)(*c)* of the Financial Services Ombuds Schemes Act 37 of 2004.
[60] Section 13(3)(*a)* of the Financial Services Ombuds Schemes Act 37 of 2004.
[61] Section 13(3)(*b*) of the Financial Services Ombuds Schemes Act 37 of 2004.

(*d*) if the facts or legal issues underlying the complaint appear to the ombud to be so complex that lengthy or expert evidence may probably be required to determine them;

(*e*) where the complainant is, at the time of lodging of the relevant complaint a person carrying on any business or profession with a net asset value, an annual turnover (including group turnover) or annual income of more than R8 million; and

(*f*) when the complainant's grievance primarily relates to general industry policies or practices rather than being a complaint against a particular financial institution."

Bearing the above in mind, it is submitted that the effect of the abovementioned provisions is that the Statutory Ombud may adjudicate on disputes where the Ombudsman for Banking Services lacks jurisdiction, provided that the dispute or complaint falls within the parameters of the jurisdiction of the Statutory Ombud, as reflected in Regulation 7(1). Notably, the Statutory Ombud has a higher monetary jurisdiction than the Ombudsman.

1.6 *The reference to the Code of Banking Practice in South African case law thus far*

The Code has hardly been referred to in South African case law. In *Macru Farming CC v Standard Bank of South Africa Ltd,* [62] the Supreme Court of Appeal, without going into much detail or authority, or elaborating on its remarks in any way, dealt with the appellant's contention that the bank was required to provide assistance to the appellant as contemplated in the Code prior to instituting legal proceedings.

Although the Code was referred to in *Muthusamy v Nedbank Ltd,* [63] the Labour Court did not comment thereon in any relevant way. In the matter of *Bredenkamp v Standard Bank of South Africa (Pty) Ltd,*[64] although the learned judge acknowledged that the bank deemed the provisions of the Code to be applicable to the bank-client relationship by virtue of what was contained in certain correspondence annexed to the affidavits, no ruling on the enforceability of the Code was made.

The aforementioned judgment was in respect of an urgent application, and was the first in a series of subsequently reported judgments between the parties.[65] Regrettably,

[62] 2008 JDR 301 (SCA).
[63] 2010 ILJ 1453 (LC).
[64] 2009 5 SA 304 (GSJ).
[65] See *Bredenkamp v Standard Bank of SA Ltd* 2010 4 All SA 113 (SCA); n 64 above and *Breedenkamp v Standard Bank of South Africa Ltd* 2009 6 SA 277 (GSJ).

neither the urgent court nor any of the subsequent forums dealt with the Code in any material form or at all.

In all of the aforementioned cases, the writer is of the opinion that the courts missed the opportunity to pronounce on the legal status and enforceability of the Code, particularly in the *Macru Farming CC* and *Bredenkamp* decisions.

What would have been of significant importance in doing so, is the fact that the aforementioned cases would have been decided at a time when the previous versions of the Code were applicable. The said versions of the Code contained the provision in their respective preambles that none of the terms of the Code would be legally binding in any court of law, and could not be used to influence the interpretation of the legal relationship between the bank and the client, or give rise to a trade custom or tacit contract between the banks and their clients.

Accordingly, the question regarding the role and enforceability of the Code in South African banking law remains an unanswered one, which is yet to be tested in our courts. At best, the learned judges in the aforementioned cases gave a passing acknowledgment to the Code. Having said that, the writer submits that the learned judges can hardly be criticised for their approach, bearing in mind the facts of each particular case, as the writer submits that the Code would have had little to no effect or impact on the ultimate decision reached.

Arguably, the most apt of all three of the abovementioned decisions primed to answer the aforementioned question would have been the *Bredenkamp* cases, more particularly the judgment in the urgent application where reference to the Code was made, as it dealt with the banks right to unilaterally terminate the bank-client relationship when the continuing such a relationship could potentially prejudice the bank.

CHAPTER 2

THE NATURE AND SOURCES OF SOUTH AFRICAN BANKING LAW

Before elaborating on the Code within South African banking law any further, it is necessary to place same into context against the backdrop of the history and development of South African banking law in general, including the nature, sources and influences thereof.

2.1 *The history and development of banking law in South Africa*

Banks existed as far back in time as the ancient civilizations of Babylon, Assyria, Judea, Greece and Rome.[66] Over time, and more particularly during the period of the thirteenth and the sixteenth centuries, there was a significant increase in activity with regards to trade and merchants which saw the rise and development of a set of rules of trade throughout Europe. Naturally, this had an effect on banking by the merchants.[67] The merchants spread their influence and customs, including that of banking, bills of exchange and insurance to England.[68]

A body of common legal rules and customs known as the *lex mercatoria* developed in Europe during the middle ages.[69] One of the reasons for the commonality in the *lex mercatoria* was due to the reception of Roman law, as well as the influence of canon law, which were incorporated in the early codifications of the *lex mercatoria.*[70]

Roman-Dutch law became applicable in South Africa during the seventeenth century and became our common law. By this time, Roman-Dutch law had already significantly absorbed, and been influenced by, the *lex mercatoria.* These "absorbed" rules accordingly became applicable in South Africa. [71]

[66] Willis *Banking in South African Law* (1981) 5.
[67] n 66 above.
[68] Willis (n 66) 6.
[69] n 66 above.
[70] For a more comprehensive exposition regarding the reasons for the development of a similar *lex mercatoria* among nations, which falls outside the scope of this work, the reader is referred to n 66 above.
[71] Cowen and Gering *Cowen on the Law of Negotiable Instruments in South Africa* (5h ed) 132.

English procedural law as well as the English law of evidence was introduced into the South African legal system in the early part of the nineteenth century. However, the substantive law in South Africa remained the same. With regards to this aspect, Schulze makes reference to the statement made by Lord Mansfield in the case of *Campbell v Hall* as follows: "The laws of a conquered country continue in force until they are altered."[72] In 1828, the concept and rule of *stare decisis* was introduced into South African law.[73]

Notwithstanding the aforegoing, commerce in South Africa was dominated by the English at the time. Thus, it is hardly surprising that South African laws regarding, amongst other things, negotiable instruments, trade, companies and insurance were adopted from English law, to such an extent that the corresponding South African legislation which followed in due course closely followed and resembled the corresponding English legislation.[74] Morice states:[75]

> "The law of South Africa is identical with English law in most matters that belong properly to banking…. Both are derived from the Law Merchant, a body of rules which grew out of the customs of merchants brought together especially by the great fairs and markets of the middle ages…".

Willis states that South Africa directly inherited its banking system from England.[76] There have been significant developments in South African banking law and the *lex mercatoria*. In this regard, Schulze goes so far as to state that reference no longer, to a large extent, needs to be made to English law, bearing in mind the development of the common-law principles.[77] Furthermore, Schulze is of the view that South African banking law can no longer afford to look to one jurisdiction only for guidance in developing its own banking law."[78]

2.2 *The nature of banking law in South Africa*

Schulze states that modern South African banking law consists of a wide variety of legal principles, which originates from various sources including South African common law and English law. Schulze further states that this expansion of the principles applicable to South

[72] Schulze "The sources of South African banking law – a twenty-first century perspective (part II)" 2002 *SA Merc LJ* 601 617.
[73] Schulze ("Sources I" n 4) 448.
[74] Willis (n 66) 19.
[75] Morice "The Law of Banking in South Africa Part 1" 1904 *SALJ* 355 355.
[76] Willis (n 66) 7.
[77] Schulze ("Sources I" n 4) 438.
[78] Schulze ("Sources I" n 4) 439.

African banking law is as a result of "five fundamental phenomena of modern banking law", which are listed as follows:[79]

> "1. Banking law is not an autonomous branch of the law, but rather an application of concepts and techniques of the general law of obligations as well as the law of things;
> 2. The banker-client relationship is a multi-faceted relationship;
> 3. South African law has witnessed an explosion of new legislative materials;
> 4. Banking, like most other industries, has been globalised;
> 5. Banking, like many branches of law, has undergone substantial practical changes."

2.2.1 Banking law is not an autonomous branch of the law

Although in the past, great reliance has been placed on English law in our courts when seeking possible solutions to banking law issues, there has now been a broadening of the application of the general common law principles.[80]

The previous reliance of our courts in applying English law or seeking possible solutions to banking law issues from English case law, given our history and development as aforesaid, is understandable. Furthermore, South Africa is not the only jurisdiction to seek solutions to banking-law issues from English law. Other Commonwealth countries such as Australia, also resort to English law and precedent for solutions to banking-law issues.

As aforesaid, much of the South African legislation and laws pertaining to, amongst other things, commerce, insurance and banking resemble their English counterparts. The Bills of Exchange Act is one such example.[81] However, as aforesaid, one must remember that the *lex mercatoria* was absorbed, not only into Roman-Dutch law, but also into English law. Although English law can still play a significant role in giving substance to South African banking law, given the hybrid nature of the South African legal system, most solutions to banking-law issues in South Africa may be found through the application of common law principles as opposed to resorting to foreign law.

[79] n 78 above.
[80] n 78 above.
[81] Act 34 of 1964.

2.2.2 The bank-client relationship is a multi-faceted one

The bank-client relationship is a multi-faceted one which involves various types of contracts. In this regard, at any given time, depending on factors such as whether a client has a debit or credit balance, the debtor-creditor relationship shifts.

The very nature of the contract may differ depending on the nature of the product that the bank has provided to the client. In this regard, the relationship may, depending on the circumstances, be classified as *mandatum, mutuum, depositum,* etc. Schulze is of the view that the overarching agreement between banks and their clients is one of mandate.[82] English law does not recognise the relationship between a banker and a client as being one of mandate. In England, the relationship is categorised as being one of agency.[83]

2.2.3 South African law has witnessed an explosion of new legislative material

In the absence of legislation which deals with a particular aspect, resort is had to, amongst other things, the common law. In the years following democracy and the enactment of the Constitution,[84] there have been numerous legislative instruments which have had an impact on South African banking law (and indeed, as will be demonstrated below, have impacted and influenced the provisions of the Code). This penetration into, and minimisation of, the common law, will continue with the continued enactment of legislation which either "codifies" the common law position or changes it.[85]

2.2.4 Banking: a globalised industry encompassing international co-operation regarding standards and regulations

In order for South African banks to be globally competitive, they need to be front runners in developing new and innovative products as well as become more "global" in their compliance with international regulations and standards. The development of

[82] Schulze ("Sources I" n 4) 440.
[83] Schulze ("Sources II" n 72) 621.
[84] n 20 above.
[85] n 82 above.

many internationally accepted principles, trade practices and guidelines have even led to the notion that a new *lex mercatoria* has arisen.[86]

2.2.5 Substantial practical changes to the banking industry

The continuous development and innovation of new technology, has prompted the banking sector to be on a constant drive to innovate and improve technologies, so as to facilitate banking and improve customer satisfaction.[87]

Malan and Pretorius recognise that the industry undergoes practical changes, which is one of the factors they state as to why a collecting bank has a duty to ensure that cheques are paid out correctly.[88]

2.3 *The sources of South African banking law*

The sources of South African banking law may be broadly categorised as primary sources and secondary sources.[89] Primary sources contain the principles which are binding in South African courts whilst secondary sources hold persuasive value and are generally used to interpret, augment or give meaning to the primary sources.[90]

Primary sources of law can be further categorised into formal sources on the one hand, and material or historical sources on the other.[91] There are three main formal sources of South African banking law namely, legislation (or statute), case law and trade usage or custom.[92] The material or historical sources are those sources which can be deemed to be the origins of the formal sources, such as Roman-Dutch law.[93]

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[86] Schulze ("Sources "I" n 4) 441.
[87] n 86 above. As an example, ABSA Bank launched the "Pocket Pebble", which is a portable card machine which links up with a client's smartphone and facilitates payments by cards for those who operate mobile businesses or do not have the technological infrastructure to for conventional portable card machines.
[88] Malan and Pretorius "Negligence and the collecting bank: Liability at last?" 1993 *SA Merc LJ* 206 210.
[89] Schulze ("Sources I" n 4) 442.
[90] Schulze ("Sources I" n 4) 443.
[91] n 90 above.
[92] n 90 above.
[93] n 90 above.

2.3.1 Primary sources: Formal sources of South African banking law

The Constitution is the supreme law of the land and binds, amongst other things, banks and their clients.[94] The courts are obliged to develop and interpret all law, including legislation and the common law, so that they are in line with the Constitution.[95] An example of this is when the Constitutional Court held that section 38(2) of the North West Agricultural Bank Act 14 of 1981 was unconstitutional in that it restricted a debtor's constitutional right to access to a fair public hearing in court.[96]

Several provisions of enacted legislation have impacted and influenced South African banking law.[97] A few examples of the aforegoing, as well as the corresponding provisions contained in the Code, will be discussed below. Regulations promulgated in terms of legislation are also a source of South African banking law.[98]

Considering that banking law is the application of several fields of law, many acts which apply to other fields of law may apply indirectly to banking law.[99] The case of *Standard Bank Investment Corporation v The Competition Commission and Others* is one such example,[100] where provisions pertaining to the Competition Act 89 of 1998 were considered and applied in interpreting the intention of the legislature regarding section 37(2)(a) of the Banks Act 94 of 1990 in the proposed merger between Nedcor and Standard Bank.[101]

Case law is the concept that a judicial decision serves as authority for subsequent cases on a particular point, and is embodied in the maxim of *stare decisis.*[102] Accordingly, judges also create the law in that their decisions on rules or principles of law may become law through the concept of judicial precedent.[103] The decisions of higher courts bind lower courts and the hierarchy of the courts in the South African

[94] Schulze ("Sources I" n 4) 444.
[95] n 94 above; Section 8(3) of the Constitution of the Republic of South Africa Act 108 of 1996.
[96] *Chief Lesapo v Northwest Agricultural Bank* 2000 1 SA 409 (CC) 420.
[97] Schulze ("Sources I" n 4) 445.
[98] Schulze ("Sources I" n 4) 446.
[99] Schulze ("Sources I" n 4) 447.
[100] 2000 2 All SA 245 (SCA).
[101] n 99 above.
[102] n 73 above.
[103] n 99 above.

legal system is reflected in the Constitution.[104] The volumes of the law reports contain the reported decisions of the higher courts and are an invaluable resource in accessing case law on many topics, which goes a long way in ensuring that the law is applied with certainty by the courts.[105]

For the reasons set out below, trade usages and custom are also an important primary source of South African law. Trade usages or custom are implied terms in agreements.[106]

2.3.2 Primary sources: Material or historical sources

As aforesaid, banking law is the general application of the law of obligations and the law of things. Roman law continuously plays an important role in modern day South African banking law, which in turn impacts on the bank-client relationship.[107] As will be elaborated on further, the terms implied into contracts have been to a large extent influenced by Roman law.[108]

The contract between a bank and its client is *sui generis*, as there are many underlying contracts which may be applicable at any given time, such as loan for consumption, *depositum*, and *mandatum*, depending on the facts and circumstances.[109] Malan classifies the contract as one of *mandatum*,[110] however there are many divergent views on the classification of the bank-client contract, depending on the circumstances. However, with regards to the operation of a current account there is consensus between South African and English law, that the bank-client relationship is best categorised as being one of debtor-creditor.[111]

[104] Schulze ("Sources I" n 4) 449.
[105] n 104 above.
[106] Schulze ("Sources I" n 4) 451.
[107] Schulze ("Sources I" n 4) 458.
[108] Van Der Merwe, Van Huyssteen, Reinecke and Lubbe *Contract General Principles* (2d ed) 260.
[109] Schulze ("Sources I" n 4) 459 - 460.
[110] Malan, Pretorius and Du Toit (n 5) 335.
[111] Du Toit "The FAIS specific code of conduct for authorised financial services providers and representatives conducting short-term deposit business and the bank and customer relationship" 2004 *TSAR* 574 576.

With regards to the common-law (Roman-Dutch law), and more particularly the *lex mercatoria*, Cowen states:[112]

> "Although the *lex mercatoria*, in the sense of the custom of merchants in medieval times, was absorbed into the common law of England by the end of the eighteenth century, and into the Roman-Dutch common law, as the *wisselrecht*, much earlier, it must not be thought that the *lex mercatoria* is a closed book. On the contrary, in the shape of judicially recognized contemporary mercantile custom, it still operates as a legal source of a constantly evolving body of law."

The similarity in the *lex mercatoria* may briefly be ascribed to the reception of Roman law into the *lex mercatoria,* the supra-national character of canon law, the early codification of the *lex mercatoria* and the establishment by the merchants of their own courts (admiralty courts).[113]

In *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (In Liquidation),*[114] which dealt with, amongst other things, the concept and character of interest in South African commercial law, the learned judge pointed out how Roman-Dutch law may be outdated and be irreconcilable with the needs of modern day commerce.[115]

As aforesaid, with the increasing enactment of legislation, the common-law position with regards to certain aspects is crystallised or amended to some degree to make same reconcilable with legislation. A case in point is that of *Nedbank Ltd v National Credit Regulator* where the Supreme Court of Appeal amended the common-law *in duplum* principle with regards to credit agreements so that it reconciled with section 103(5) of the National Credit Act.[116]

Indigenous law, like Roman and Roman-Dutch law, is a formal source of South African law.[117] The application of indigenous law principles in South African banking law is limited, at this stage, to stokvels. Banks are increasingly acknowledging the

[112] Cowen and Gering (n 71) 117.
[113] n 68 above.
[114] 1998 1 SA 811 (SCA).
[115] Schulze ("Sources II" n 72) 603 with reference to the case of *Linton v Corser* 1952 3 SA 685 (A) 695H.
[116] 2011 4 All SA 131 (SCA).
[117] Schulze ("Sources II" n 72) 604.

importance of stokvels, which means that same cannot be ignored by our legal system and ought to be developed.[118]

Indigenous law seldom finds application in South African banking law, or even mercantile law for that matter. However, as is evident from the above, it may not be completely disregarded and may find application in certain cases and become more applicable in future – particularly when one considers that one of the aims of the Banking Association is to increase the accessibility of banking services to South Africans.

2.3.3 Secondary sources

As aforesaid, secondary sources are those sources of law which are not binding in our courts but which hold persuasive value. Secondary sources are especially useful when certain points or issues are underdeveloped or unclear.[119] According to Schulze,[120] the secondary sources of South African banking law may broadly be categorised as follows: international law, customary international law or international trade usage (including the standards and regulations issued by the Basel Committee on banking supervision and European community or European Union law), and foreign municipal law (such as English and Australian law).

These influences in South African banking law cannot be underestimated. For example, the recommendations of the Basle Committee on Banking Supervision, which was in essence "soft law", became positive law when most of its recommendations and principles were adopted in the Banks Act 94 of 1990.[121]

With regards to international law, there is a distinction between public international law (which concerns the customary and conventional rules which governs relations between states, and thus is a seldom applicable source of banking law) and private

[118] Schulze ("Sources II" n 72) 608.
[119] n 90 above.
[120] Schulze ("Sources II" n 72) 609.
[121] Malan and Pretorius "The Reserve Bank, banks, and clearing houses in South African law: Part 1" 2001 *SA Merc LJ* 35 46.

international law.[122] International conventions such as the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit aims to standardise practices with regards to undertakings and financing throughout the world, and is an example of public international law.

Private international law concerns itself with cross-border conflicts of laws pertinent to, amongst other things, the laws of obligations, delict, property and the recognition and enforcement of foreign judgments. Private international law is an important source of banking law, such as in the field of commercial financing.[123] Our courts will continue to refer to English law as a persuasive source, which in turn continues to be influenced by private international law, more particularly the laws of the European Union.

With reference to section 232 of the Constitution, Schulze states that customary international law or international trade usage has the force of law in South Africa unless it is inconsistent with the Constitution or an act of parliament.[124]

2.4 *Trade usage and custom*

Consensual or implied terms, provided that they do not conflict with the express provisions of an agreement, and in the absence of legislation stating otherwise, are applicable to the relationship between the banks and their clients.[125]

A contract is comprised of *essentialia, naturalia* and *incidentalia.*[126] The *essentialia* are terms in an agreement which provide the essence of a contract, without which there would be no contract, or one which is fundamentally different.[127] In other words, the *essentialia* provide the "bare bones" of a contract.[128]

[122] n 120 above.
[123] n 120 above.
[124] Schulze ("Sources II" n 72) 610.
[125] n 105 above.
[126] Schulze ("Sources I" n 4) 452.
[127] Christie and Bradfield *Christie's the law of contract in South Africa* (6h ed) 164.
[128] Van Der Merwe, Van Huyssteen, Reinecke and Lubbe (n 108) 261.

The *naturalia* of a contract are terms implied by law into a contract which may stem from custom, trade usage, legislation, or from the common law.[129] In *Standard Bank of SA Ltd v Sarwan,*[130] it was held that a term implied by law or custom into an agreement forms part thereof irrespective of either of the respective parties' knowledge thereof.[131] In *Botha v Swanepoel,*[132] it was held that the *naturalia* of a contract may only be excluded by means of consensus between the parties.

The *incidentalia* of a contract are terms that are not implied by law, nor may they be categorised as an essential term of a contract. They are terms which the parties have agreed to include in a contract.[133] Naturally, it is the inclusion of the provisions of the Code as *naturalia* into the bank-client agreement, and the implications thereof, which is of concern to this work. As such, and as Du Toit points out,[134] the Code may be categorised as "soft law".

In *Crook v Pedersen Ltd,*[135] the learned judge examined English and Roman-Dutch law with regards to what is necessary in order to establish a trade usage or custom, and stated the following principles when considering evidence of a trade usage:[136]

> "(1) The implication must be a necessary and not merely a reasonable one.
> (2) Where the implied term relied on is based upon a usage or custom, the evidence must be clear and consistent.
> (3) The custom or usage must be long-established, reasonable, have been uniformly observed and certain.
> (4) Generally speaking no one is bound by a term in a contract of which he had or could have had no knowledge.
> (5) Where, however, a custom is universal and notorious a person may be presumed in certain circumstances or cases to have had knowledge of such custom and to have intended to include such custom in his contract.
> (6) Circumstances which might lead to such a presumption are, where a principal deals or employs a person to deal on his behalf with other persons, in a particular market, or where the transaction is peculiar to a particular locality, or where the persons engaged in such transactions belong to a particular class, who, for the better conduct of their business, are subject to certain customs and rules, or where the transaction itself is of a special or peculiar nature."

[129] n 105 above.
[130] 2002 3 All SA 49 (W).
[131] Christie and Bradfield (n 127) 168.
[132] 2002 4 SA 577 (T).
[133] n 128 above.
[134] Du Toit ("Reflections" n 13) 479.
[135] 1927 WLD 62.
[136] n 135 above 71.

In *Golden Cape Fruits (Pty) Ltd v Fotoplate (Pty) Ltd,*[137] the court held that, despite the ignorance thereof by a party, a trade usage may be implied into a contract if it is shown to be universally and uniformly observed within the particular trade concerned, long-established, notorious, reasonable and certain, and does not conflict with positive law or the clear terms of the contract.[138]

In *Van Breda v Jacobs,*[139] the learned judge of appeal made a *dictum* that a court must be satisfied beyond reasonable doubt that a custom exists. The writer agrees with Christie's opinion that the aforementioned *dictum* may not bear an onus greater than the standard burden of proof applicable to civil cases, which is on a balance of probabilities.[140]

Although English law draws a distinction between trade usages and customs,[141] and Christie elaborates on such a distinction,[142] the writer hereof agrees with Schulze's view that such a distinction is a moot point,[143] especially when considering the role and enforceability of the Code. In *Tropic Plastic & Packaging Industry v Standard Bank of SA Ltd,*[144] the court stated that there is no distinction between custom and trade usage in Roman-Dutch law.[145] Accordingly, in South African law, there is no distinction between customs and trade usages, and the requirements to prove either are the same.

With reference to the case of *African Mining and Financial Association v De Catalin & Muller*, Christie states:[146]

> "If a trade usage in a new trade, or an old trade experiencing new circumstances, fulfils all the other requirements it would be wrong not to imply it in a contract simply on account of its recent origin, but of course recent origin may have an important bearing on whether the usage is notorious."

[137] 1973 2 SA 642 (C).
[138] n 137 above 645G. For an in-depth discussion into each particular requirement, which falls outside the scope of this work, the reader is referred to Christie and Bradfield (n 128) 170.
[139] 1921 AD 330 333.
[140] Christie and Bradfield (n 127) 173.
[141] n 126 above.
[142] Christie and Bradfield (n 127) 171.
[143] Schulze ("Sources I" n 4) 453.
[144] 1969 4 SA 108 (D).
[145] Schulze ("Sources I" n 4) 454.
[146] n 142 above.

In *Absa Bank Bpk t/a Volkskas Bank v Retief,*[147] the omission of the court in dealing with, or even mentioning, the requirement of proving whether the trade usage in question was long-established, left open the question whether it is necessary to prove the long-establishment of a trade usage.[148] In the English case of *Crouch v Credit Foncier of England,* it apparently became accepted that it is not necessary to prove the long-establishment of a trade usage.[149]

Schulze believes that the rapid pace of technological and socio-economic developments in the twenty-first century have caused the law to lag behind in many respects and that, in order to keep up with the demands and requirements of society, the law must become flexible and adaptable to changing circumstances.[150]

In the case of *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration,*[151] the Appellate Division considered the distinction between a term in a contract implied by law, and a term implied by the parties. In this regard, the Learned Corbett JA stated as follows:[152]

> "The significance of this distinction is not merely academic. The implied term (in the above-defined sense) is essentially a standardised one, amounting to a rule of law which the Court will apply unless validly excluded by the contract itself. While it may have originated partly in the contractual intention, often other factors, such as legal policy, will have contributed to its creation. The tacit term, on the other hand, is a provision which must be found, if it is to be found at all, in the unexpressed intention of the parties. Factors which might fail to exclude an implied term might nevertheless negative the inference of a tacit term. The Court does not readily import a tacit term. It cannot make contracts for people; nor can it supplement the agreement of the parties merely because it might be reasonable to do so. Before it can imply a tacit term the Court must be satisfied, upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication necessarily arises that the parties intended to contract on the basis of the suggested term. The practical test to be applied—and one which has been consistently approved and adopted in this Court—is that formulated by SCRUTTON, L.J., in the well-known case of *Reigate* v. *Union Manufacturing Co.*, 118 L.T. 479 at p. 483:
>
> > 'You must only imply a term if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that you can be confident that if at the time the contract was being negotiated someone had said to the parties: 'What will happen in such a case?' they would have both replied: 'Of course, so-and-so. We did not trouble to say that; it is too clear.'
>
> This is often referred to as the "bystander test"."

[147] 1999 1 All SA 68 (NC) and 1999 3 SA 322 (NC).
[148] Schulze ("Sources I" n 4) 455.
[149] Schulze ("Adjudicator" n 6) 51.
[150] n 145 above.
[151] 1974 3 All SA 497 (A).
[152] n 151 above 521.

Given the wording of the Code itself and the intention of the banking industry to abide by the provisions thereof, the writer agrees with the suggestion of Du Toit that the Code is more than "soft law".[153]

It is unlikely that banks will apply double standards in how they treat their small personal clients as opposed to their corporate clients.[154] Bearing the above in mind, the writer submits that certain provisions of the Code are implied terms in the bank-client contract, and enforceable as such, particularly in light of the legislature's actions in levelling the playing fields between suppliers and consumers, including banks and their clients, as will be set out below.

[153] Du Toit ("Reflections" n 13) 569.
[154] Du Toit ("Reflections" n 13) 571.

CHAPTER 3

THE PROVISIONS OF THE CODE OF BANKING PRACTICE JUXTAPOSED WITH LEGISLATION AND CASE LAW

The aim of this work is not to fully and extensively discuss all of the similarities and conflicts between the provisions of the Code with that of legislation or case law. In order to practically demonstrate the interplay between the provisions of the Code and legislation or case law, a few examples and a brief discussion thereon is set out below. As aforesaid, it must be borne in mind that the provisions of the Code will give way to the express provisions of the law (legislation and case law) and the express provisions of the agreement between banks and their clients.

3.1 *The National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008*

At the outset, it must be pointed out that both the National Credit Act and the Consumer Protection Act may be categorised as consumer legislation, as they both seek to promote equity between the providers and suppliers with consumers.

Accordingly, some overlapping between the two acts is to be expected, along with an amount of vagueness and confusion when approaching a matter which may be litigious and in which both acts may apply.[155] In determining whether either of the acts apply, one needs to determine whether the agreement constitutes a transaction in terms of the Consumer Protection Act, or a credit agreement in terms of the National Credit Act.[156]

The writer agrees with Otto's submission that the legislature intended for the provisions of the Consumer Protection Act to only be applicable with regards to the goods and services themselves which may be supplied in terms of a credit agreement, but not the provisions of the agreement itself, which are governed by the National Credit Act.[157] Otto points out that a conflict may arise between the two acts where an

[155] Otto JM and Otto R-L *The National Credit Act Explained* (2d ed) 135.
[156] n 155 above.
[157] Otto JM and Otto R-L (n 155) 136.

incidental credit agreement is concerned. An agreement becomes a credit agreement in terms of the National Credit Act when a fee, charge or interest becomes due after a period of time.[158] In such a case, according to Otto:[159]

> "The answer probably lies in section 2(9) of the Consumer Protection Act which states that when there is an inconsistency between that Act and another, the provisions of both Acts will apply concurrently if possible, otherwise the provision that extends the greater protection to a consumer prevails."

According to the definition of "service" in section 1 of the Consumer Protection Act, a service:

> "includes, but is not limited to any banking services, or related or similar financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service-
>
> (i) Constitutes advice or intermediary services that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002; or
> (ii) Is regulated in terms of the Long-term Insurance Act, 1998, or the Short-term Insurance Act, 1998."

One of the purposes of the National Credit Act is to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers.[160]

The National Credit Act must be interpreted in a manner which gives effect to the purposes set out in section 3 thereof.[161] Our courts have, on numerous occasions, considered the approach which ought to be adopted when interpreting the National Credit Act. The writer agrees with the view of Otto that a well-balanced approach,[162] as was adopted in the case of *Standard Bank of SA Ltd v Hales,*[163] should be followed by our courts in interpreting the provisions of the National Credit Act.

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[158] n 157 above.
[159] Otto JM & Otto R-L (n 155) 137. For more information which falls outside the scope of this work, the reader is referred to: Otto, Van Heerden and Barnard "Redress in terms of the National Credit Act and the Consumer Protection Act for defective goods sold and financed in terms of an instalment agreement" 2014 *SA Merc LJ* 247.
[160] Section 3(*d*).
[161] Section 2(1) of the National Credit Act 34 of 2005.
[162] Otto JM and Otto R-L (n 155) 7.
[163] 2009 3 SA 315 (D) 322B-C.

If such an approach is followed, the rights of credit providers are compromised, and the banking industry is put in danger of a situation where the rights of consumers supersede the rights of credit providers. This may lead to the downfall of the banking industry. With regards to the aforegoing, it is respectfully submitted that this approach which was followed by the court in the case of *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* was incorrect.[164]

The Consumer Protection Act contains similar provisions with regards to the interpretation of the said act.[165] It also seeks to advance social and economic consumer welfare through promoting fair practices.[166] If regard is had to some of the abovementioned provisions of the Code, the language utilised, as well as some of the objectives and key commitments stated therein, the language used is similar to that utilised in the aforementioned acts, more particularly with regards to promoting fairness and equity between credit providers and suppliers in their dealings with consumers.

Like the Code, both the said acts have thresholds and limitations with regards to their applicability to agreements. With regards to the National Credit Act, juristic persons with an annual turnover or asset value of at least R1 million, are not deemed to be consumers for the purposes of the said act.[167] Similarly, the Consumer Protection Act shall not apply to agreements where the consumer is a juristic person whose asset value or annual turnover or asset value equals or exceeds R2 million.[168]

Part D of chapter 2 of the Consumer Protection Act provides for the right to disclosure and information, more particularly a consumer's right to information in plain and understandable language.[169] The aforementioned provisions are aligned in principle with the provisions of part A of chapter 4 of the National Credit Act. The aforegoing echoes what is contained in clauses 3.1, 4.2 and 6.5 of the Code which sets out a few of the client's entitlements.

[164] 2010 1 SA 143 (GSJ).
[165] Section 2(1).
[166] Section 3(1)(*a*) & (*c*).
[167] Section 4(1)(*a*)(i) read with section 7(1)(*a*).
[168] Section 5(2)(*b*) read with section 6.
[169] Section 22.

Many provisions of the National Credit Act are echoed in the provisions of clause 8 of the Code, including the provisions with regards to debt enforcement and recovery by the banks. Interestingly, the Code contains an extra step or duty that banks need to telephonically contact defaulters before embarking on enforcement proceedings by delivering a notice in terms of section 129 of the National Credit Act. In this regard, clause 8.6 of the Code states:

> "Should your account go into default, your bank's first step will be to try to contact you to discuss the matter. It is therefore imperative that you inform us at all times of any changes to your address and contact details."

Although banks generally do contact defaulters prior to embarking on any debt enforcement proceedings in order to discuss possible solutions, there is no such duty on credit providers to do so in terms of the National Credit Act. There has been a plethora of cases adjudicated on in our courts regarding the section 129 notice, as same is required to be delivered before any credit provider may enforce a credit agreement.[170]

In due course, it may very well be argued by a consumer, in a case where the bank seeks to enforce a credit agreement, that the bank failed to adhere to clause 8.6 of the Code, in that it did not contact the consumer to discuss such default before delivering the section 129 notice.[171]

3.2 *The bank's duty of confidentiality and secrecy*

It is trite law that a bank owes its clients a duty of confidentiality and secrecy in maintaining a client's bank affairs.[172] The decision of *Tournier v National Provincial and Union Bank of England* has often been cited and referred to as a point of departure by our courts when a bank's duty to maintain secrecy or confidentiality is an issue, and the exceptions to the said duty.[173] The court held that the following four exceptions to this duty are, depending on the circumstances, classified as follows:[174]

[170] Section 130(1) of the National Credit Act 34 of 2005.
[171] Ombudsman for Banking Services in South Africa (n 1) 29.
[172] Schulze "Confidentiality and secrecy in the bank-client relationship" 2007 *Juta's Business Law* 122 122.
[173] n 172 above.
[174] Malan, Pretorius and Du Toit (n 5) 312.

"(a) Where disclosure is under compulsion by law;
(b) where there is a duty to the public to disclose;
(c) where the interests of the bank require disclosure;
(d) where the disclosure is made by the express or implied consent of the customer."

A bank has a duty to respect the personal and financial privacy and confidentiality of its clients.[175] With reference to the decision of *Densam Ltd v Cywilnat Ltd*, the South African courts have held that a client's right to privacy may be breached where it is reasonable and proper for a bank to further its own interests.[176] With reference to the unreported decision of *Firstrand Bank Ltd v Chaucer Publications (Pty) Ltd* case no 12645/07 (CPD) (unreported), Schulze states:[177]

> "Although the duty not to disclose rests with the bank, the privilege not to have the details of its dealings with the bank disclosed belongs to the client. It is thus the client alone who can invoke this privilege."

With regards to the first exception as aforesaid, there are numerus provisions of legislation which compel a bank to disclose information regarding its client.[178] Arguably, the legislation which has most impacted on the bank's duty of secrecy as aforesaid is the Financial Intelligence Centre Act.[179]

One of the main aims of the aforementioned act is to combat money laundering. In essence, the aforementioned act imposes upon banks the duty to identify their clients (including a duty to turn away clients or potential clients with uncertain or questionable credentials), the duty to keep records and the duty to report suspicious transactions.[180]

Over and above the exceptions listed in the *Tournier* case, clause 6.1 of the Code lists a further two instances in which a bank may disclose the information of its clients,[181] being when a client's account is in default, and when a client's cheque has been

[175] n 172 above.
[176] Van Jaarsveld "The end of banking secrecy? Some thoughts on the Financial Intelligence Centre Bill" 2001 *SA Merc LJ* 580 591.
[177] Schulze (n 172) 124.
[178] See Malan, Pretorius and Du Toit (n 5) 310 and n 172 above.
[179] Act 38 of 2001.
[180] Van Jaarsveld (n 176) 585.
[181] Ombudsman for Banking Services in South Africa (n 1) 9.

"referred to drawer". The provisions of the Code (more particularly clause 7.1) reinforce the bank's duty of secrecy and confidentiality, and extends it to an extent.

3.3 *The bank's rights with regards to applying set-off*

Clause 7.5 of the Code states as follows:[182]

> "When you open an account, we will provide you with information that will include clear and prominent notice of any right of set-off that we may claim over credit and debit balances in your different accounts.
>
> When you obtain credit from us, we may require your consent to *set-off* any outstanding amounts against funds available in other accounts you hold with us. Any such arrangement will be concluded in terms of the NCA, if the credit agreement is subject to the NCA…."

In the case of *Joint Stock Company Varvarinskoye v Absa Bank Ltd,*[183] the bank was aware from the outset regarding the purpose of the account in respect of which monies were being "warehoused". The bank had also agreed that funds could only be withdrawn from a certain account using a particular procedure. The court held that the rule that only an account holder may assert a clam to money held in a bank account is not universal or inflexible, especially in light of the bank's knowledge of the purpose of the account.[184] This approach was approved and followed in *Absa Bank Ltd v Intensive Air (Pty) Ltd (in liquidation).*[185]

The provisions of the Code as aforesaid reinforce the bank's right to apply set-off. However, it is respectfully submitted that, in doing so, the principles pronounced in the aforementioned cases temper the bank's seemingly unrestricted rights regarding set-off. The courts will follow the approach of giving the consumer the greatest protection (where the law allows).

[182] Ombudsman for Banking Services in South Africa (n 1) 20.
[183] 2008 3 All SA 130 (SCA).
[184] n 183 above 136 [31].
[185] 2011 3 All SA 2 (SCA).

CHAPTER 4

COMPARATIVE ANALYSIS WITH FOREIGN LAW

4.1 *English law*

As aforesaid, South African banking law was considerably influenced by English banking law. The provisions of the Code echo those of its English counterparts.[186] Where our law is silent on a matter pertaining to banking practice, the decision in English courts have held strong persuasive value.[187]

In January 1986, the United Kingdom established the Office of the Banking Ombudsman in order to deal with complaints and issues which were not resolved through the banks' internal dispute resolution mechanisms.[188] The main aim of the Banking Ombudsman was to receive unresolved disputes regarding the provision of banking services to private individuals and to facilitate the settlement thereof.[189] Writing before the implementation of any banking code in Britain, Wallace and McNeil stated the following with regards to the Banking Ombudsman:[190]

> "In making any recommendation or award the Ombudsman must observe any applicable rule of law or relevant judicial authority and have regard to general principles of good banking practice and any relevant code of practice applicable to the subject-matter of the complaint."

In March 1992, England introduced its own Banking Code, which was recognised by most of the building societies and banks and was applicable to their relations with personal customers.[191] The aim of the said Code was to establish minimum standards of practice to be followed by banks and building societies when dealing with their personal customers.[192] The Banking Code was a voluntary code to which the main banks and building societies subscribed to.[193] In 1997, with the advent of the said

[186] Schulze ("Adjudicator" n 6) 40.
[187] Willis (n 66) 20.
[188] Warne and Elliot (eds) *Banking Litigation* (2d ed) 100.
[189] Caskie *Wallace and McNeil's Banking Law* (10h ed) 33.
[190] n 189 above.
[191] Warne and Elliot (n 188) 37.
[192] Ellinger, Lomnicka and Hooley *Ellinger's Modern Banking Law* (2d ed) 62.
[193] Warne and Elliot (n 188) 92.

Code's third edition, the Code of Good Banking Practice was renamed to its current name, the Banking Code.[194]

In March 2002, the Business Banking Code was introduced. The Business Banking Code was applicable to the relationship between banks and sole proprietors, partnerships, associations, clubs, charities and limited companies with an annual turnover of less than £1 million.[195]

The Business Banking Code was introduced in response to a finding by the competition commission that banking services to small and medium enterprises were being monopolised.[196] Membership by the banks to the Business Banking Code is also voluntary. The Banking Code and the Business Banking Code are similar in layout and content, and both are monitored by the Banking Code Standards Board, which periodically reviews the said codes.[197]

In March 2005, the latest version of the Banking Code was introduced. Interestingly, both the Banking Code and the Business Banking Code contain six "key commitments" which are worded in promissory terms and which appear to impose duties upon banks in their dealings with clients.[198]

The aforementioned codes are silent regarding their legal status and enforceability. However, the mere fact that all the banks subscribe to the codes and make them available to their clients means that the said codes may be regarded as implied terms of the contract between the banks and their clients.[199] In this regard, Warne and Elliot state:[200]

> "The question whether such 'promises' have contractual effect has not been tested in the courts, but it is difficult to avoid the conclusion that, subject to the usual rules governing the incorporation of terms, those banks which are parties to the Code may now owe their personal customers a contractual duty to advise in the circumstances covered by the 'key commitments'".

[194] n 193 above.
[195] n 193 above.
[196] Warne and Elliot (n 188) 93.
[197] n 196 above.
[198] n 196 above.
[199] n 196 above.
[200] n 196 above.

However, English courts will have regard to the provisions of the said codes in formulating legal principles.[201] Notwithstanding the aforegoing, many disputes are informally resolved without the need for the ombudsman to make a determination thereon.[202] The ombudsman's duty is to make a determination on a complaint on the basis of what is fair and reasonable in all the circumstances, taking into account good banking practice and the applicable codes at the time.[203]

Warne and Elliot are of the opinion that, although the provisions of either of the aforementioned codes have not been tested in the English courts, subject to the usual rules regarding the incorporations of terms into a contract, that the said codes have established a contractual duty upon banks towards their clients.[204]

4.2 *Australian law*

Unlike the English and the South African codes of banking practice, the Australian Code of Banking Practice expressly states in clause 4.2 thereof that the obligations imposed upon the banks in terms thereof must be complied with, except in the case where compliance therewith would lead to a breach of law.[205]

The provisions of the Australian Code of Banking Practice may be described as consumer-centric in that, like the South African Code, it sets out standards of good banking practice.[206] The Australian Code is reviewed every five years,[207] the current version having come into effect on 1 January 2014.

Like the South African and English versions, the Australian Code of Banking Practice is applicable to individual and small business customers.[208] However, unlike the South

[201] n 193 above.
[202] Warne and Elliot (n 188) 101.
[203] n 196 above.
[204] Warne and Elliot (n 188) 38.
[205] Australian Bankers' Association Inc. "Code of banking practice" 10 (http://www.bankers.asn.au/industry-standards/ABAs-code-of-banking-practice (08-02-2016)).
[206] Australian Bankers' Association Inc. (n 205) 6.
[207] Australian Bankers' Association Inc. (n 205) 10.
[208] n 207 above.

African and English codes, the Australian Code expressly states in clause 41 that the banks are bound by the provisions of the said code.[209]

The Australian banking system, for the reasons stated by Schulze, is an important and obvious comparative source for South Africans when studying the respective banking ombudsman schemes, a discussion on which falls outside the scope of this work.[210] Schulze, with reference to clause 15 of the 1993 version of the Australian Code,[211] refers to three main criteria which the Australian Ombudsman considers when making a recommendation, namely: the law, good banking practice and fairness.

The Ombudsman is required to consider and observe any applicable rule and case law, which it does in the context of the other two criteria as aforesaid.[212] With regards to the criterion of good banking practice, the Ombudsman relies on a number of guidelines in determining what constitutes same,[213] including the advice of the Banking Advisor and the banking industry, the Code of Banking Practice and the Electronic Funds Transfers Code of Conduct.

Importantly, at the stage when the aforementioned codes were in the process of being drafted, the stakeholders (including the banking industry) agreed that the codes would take precedence over any practice or provision inconsistent therewith.[214] Schulze states as follows:[215]

> "Tyree is of the opinion that the intention is that the Banking Code should have contractual effect by means of incorporation into the terms and conditions of the various banking services. If that is indeed the case, so he argues, then there is no doubt that the terms of the Banking Code would override implied contractual terms which are inconsistent with the Code…. By Implication the bank-client contract would then not be able to exclude or contradict any of the terms of the Banking Code…the terms of the Banking Code, including those which describe what constitutes 'good banking practice', are non-waiverable naturale of the bank-client contract."

[209] Australian Bankers' Association Inc. (n 205) 37.
[210] Schulze ("Adjudicator" n 6) 44.
[211] Schulze ("Adjudicator" n 6) 46.
[212] n 211 above.
[213] Schulze ("Adjudicator" n 6) 47.
[214] n 213 above.
[215] n 213 above.

The criterion of fairness allows the Ombudsman to take into account considerations of equity when applying strict legal principles.[216]

[216] Schulze ("Adjudicator" n 6) 48.

CHAPTER 5

THE CURRENT AND POTENTIAL APPLICATION OF THE CODE OF BANKING PRACTICE

An ombudsman provides for a cost-effective, speedy and informal resolution to disputes, without the overt emphasis on legal technicalities, and is a ground which encourages settlement.[217] Where a matter involves complicated factual and legal issues, as well as the public policy issues or the need to cross-examine expert witnesses, a court is likely to be a more appropriate forum.[218] Importantly, the ombudsmen are an under-utilised resource. The increasing use of ombudsmen may free up the courts to deal with matters deserving of their attention.[219]

Although the Code states that it is applicable to the individual and small business clients of the banks, it is unlikely that the banks will apply double standards in treating its bigger or corporate clients differently, the smaller client being treated better than the bigger clients.[220] There are many cases which have been referred to the Ombudsman and may be regarded as a success, in that most matters resolved, some to the satisfaction of the client.[221]

With regards to the case studies and the bulletins that are to be found on the website of the Ombudsman, a common denominator to be found in most cases, is that the Ombudsman would find in favour of the consumer because of a lapse in communication by the bank to the client, and that relevant information was not provided to the consumer.[222] It is expected that the Ombudsman would make rulings or determinations that are consistent with its own previous decisions and with the law.[223]

As aforesaid and for the reasons stated above, in due course, the provisions of the Code may be deemed by our courts as being implied terms in the bank-client contract. Even when the

[217] Melville "Has ombudsmania reached South Africa? The burgeoning role of ombudsmen in commercial dispute resolution" 2010 *SA Merc LJ* 50 55.
[218] Melville (n 217) 57.
[219] Melville (n 217) 63.
[220] N 154 above and Rautenbach "Cancellation clauses in bank-customer contracts and the Bill of Rights" 2010 *TSAR* 637 644.
[221] Du Toit ("Reflections" n 13) 578.
[222] Du Toit ("Reflections" n 13) 576 and the examples set out therein.
[223] n 222 above.

previous versions of the Code contained the statement in their preamble specifically stating that the terms thereof would not give rise to a tacit contract or be enforceable in a court, Schulze provides three reasons:[224]

> "Firstly, the mere fact that that a particular banking practice or usage has been acknowledged and explained in the Code in the first place, is already a strong indication that it qualified or existed as a banking practice or usage in its own right even before its inclusion in the Code. Secondly, because the Code is not incorporated by reference in the banker-customer contract (and does not for that reason qualify as a consensual term of the contract), it is doubtful whether the Code can operate extra-contractually to exclude the inclusion of a term implied by trade usage…Thirdly, there is English authority to substantiate my argument. The South African Banking Code is based on the British Banking Code. Although the British Code is also not accepted as evidence of a trade usage and thus as a basis for implying terms in a bank-customer contract, British courts will have regard to its provisions in formulating legal principles…because subscribing banks advertise the fact that they adhere to the Code and make it available to their customers, its provisions could be treated as implied terms in the banking contract."

Furthermore, the General Code of Conduct for Authorised Financial Service Providers and Representatives places an obligation on all financial service providers to render financial services honestly, fairly, with due skill, care and diligence and in the interest of their clients and the integrity of the financial services industry.[225]

Bearing all of the above in mind, as well as the consumer-centric legislation which has been passed in recent times, as well as the strong persuasive value of the position in England and Australia, that it is only a matter of time before our courts deem the provisions of the Code as being implied terms of the bank-client contract, and enforce the provisions thereof.

[224] n 4 above.
[225] *Government Gazette* 25299 (8 Aug 2003) and Jones and Schoeman *An Introduction to South African Banking Law* (2006) 30.

BIBLIOGRAPHY

Books

1. Caskie DB *Wallace and McNeil's Banking Law* W Green & Son Ltd Edinburgh (10 ed).

2. Christie RH and Bradfield GB *Christie's The Law of Contract in South Africa* LexisNexis Durban (6 ed).

3. Cowen DV and Gering L *The Law of Negotiable Instruments in South Africa* Juta and Co Ltd Cape Town (5 ed).

4. Ellinger EP, Lomnicka E and Hooley R *Ellinger's Modern Banking Law* Oxford University Press New York (4 ed).

5. Jones M and Schoeman H *An Introduction to South African Banking and Credit Law* LexisNexis Butterworths Durban (2006).

6. Malan FR, Pretorius JT and Du Toit SF *Malan on Bills of Exchange, Cheques and Promissory Notes* LexisNexis Durban (2009).

7. Otto JM and Otto R-L *The National Credit Act Explained* LexisNexis Durban (2 ed).

8. Van Der Merwe S, Van Huyssteen LF, Reinecke MFB and Lubbe GF *Contract General Principles* Juta Law Cape Town (2 ed).

9. Warne D and Elliott N (eds) *Banking Litigation* Sweet & Maxwell London (2 ed).

10. Willis N *Banking in South African Law* Juta and Co Ltd Cape Town (1981).

Legislation

1. The Banks Act 94 of 1990.

2. The Bills of Exchange Act 34 of 1964.

3. The Constitution of the Republic of South Africa Act 108 of 1996.

4. The Consumer Protection Act 68 of 2008.

5. The Financial Advisory and Intermediary Services Act 37 of 2002.

6. The Financial Intelligence Centre Act 38 of 2001.

7. The Financial Services Ombuds Schemes Act 37 of 2004.

8. The National Credit Act 34 of 2005.

9. *Government Gazette* 25299 (8 Aug 2003).

Case Law

1. *Absa Bank Ltd v Intensive Air (Pty) Ltd (in liquidation)* 2011 3 All SA 2 (SCA).

2. *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2010 1 SA 143 (GSJ).

3. *ABSA Bank Bpk t/a Volkskas Bank v Retief* 1999 1 All SA 68 (NC), 1999 3 SA 322 (NC).

4. *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 All SA 497 (A).

5. *Bredenkamp v Standard Bank of South Africa Ltd* 2009 5 SA 304 (GSJ).

6. *Bredenkamp v Standard Bank of SA Ltd* 2010 4 All SA 113 (SCA).

7. *Breedenkamp v Standard Bank of South Africa Ltd* 2009 6 SA 277 (GSJ).

8. *Chief Lesapo v Northwest Agricultural Bank* 2000 1 SA 409 (CC).

9. *Crook v Pedersen Ltd* 1927 WLD 62.

10. *Golden Cape Fruits (Pty) Ltd v Fotoplate (Pty) Ltd* 1973 3 All SA 118 (C); 1973 2 SA 642 (C).

11. *Joint Stock Varvarinskoye v Absa Bank Ltd* 2008 3 All SA 130 (SCA).

12. *Macru Farming CC v Standard Bank of South Africa Ltd* 2008 JDR 301 (SCA).

13. *Muthusamy v Nedbank Ltd* 2010 ILJ 1453 (LC).

14. *Nedbank Ltd v National Credit Regulator* 2011 4 All SA 131 (SCA).

15. *Standard Bank Investment Corporation v The Competition Commission* 2000 2 All SA 245 (SCA).

16. *Standard Bank of SA Ltd v Hales* 2009 3 SA 315 (D).

17. *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 4 SA 510 (C).

18. *Standard Bank of SA Ltd v Sarwan* 2002 3 All SA 49 (W).

19. *Tropic Plastic & Packaging Industry v Standard Bank of SA Ltd* 1969 4 SA 108 (D).

20. *Van Breda v Jacobs* 1921 AD 330.

Journal Articles

1. Du Toit SF "The FAIS specific code of conduct for authorised financial services providers and representatives conducting short-term deposit business and the bank and customer relationship" 2004 *TSAR* 574.

2. Du Toit SF "Reflections on the South African code of banking practice" 2014 *TSAR* 568.

3. Malan FR and Pretorius JT "Negligence and the collecting bank: Liability at last?" 1993 *SA Merc LJ* 206.

4. Malan FR and Pretorius JT "The Reserve Bank, banks and clearing houses in South African banking law: Part 1" 2001 *SA Merc LJ* 35.

5. Melville N "Has ombudsmania reached South Africa? The burgeoning role of ombudsmen in commercial dispute resolution" 2010 *SA Merc LJ* 50.

6. Morice GT "The law of banking in South Africa part 1"1904 *SALJ* 355.

7. Schulze H "Confidentiality and secrecy in the bank-client relationship" 2007 *Juta's Business Law* 122.

8. Schulze WG "The sources of South African banking law - a twenty-first century perspective (part I)" 2002 *SA Merc LJ* 438.

9. Schulze WG "The sources of South African banking law – a twenty-first century perspective (Part II)" 2002 *SA Merc LJ* 601.

10. Schulze WG "The South African banking adjudicator – a brief overview" 2000 *SA Merc LJ* 38.

11. Van Jaarsveld IL "The end of bank secrecy? Some thoughts on the Financial Intelligence Centre Bill" 2001 *SA Merc LJ* 580.