

The termination of the bank-client relationship in South African banking law

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SUMMARY

In the year 2015/16, some of the major South African banks such as Standard Bank, terminated its bank-client contracts with its customers. The customers argued that Standard bank issued no notice of termination of these bank-client contracts. Alternatively, if the bank issued the notice of termination, the period thereof was insufficient for the client to arrange for an alternative banking option. As a result, the client argued that Standard Bank unlawfully terminated the bank-client relationship. Consequently, this paper examines this termination by considering, i) the nature of their relationship, ii) the duties of both the bank and the client, iii) and iv) the ways and circumstances which the bank-client contract may be terminated in South African banking law.

“The customer’s morality and integrity are accordingly characteristics which impact on the customer/banker relationship”¹

1 Introduction

After the Guptas’ scandal,² in 2015/16 the major South African banks issued notices of termination of their contractual relationship with *inter alia* Oakbay Investment (Pty) Ltd, Siva Uranium (Pty) Ltd, TNA Media (Pty) Ltd. The termination of contract came as a result of these Gupta owned companies being suspected and alleged of its directly or indirectly

1 Lamont J in *Breedenkamp v Standard Bank of South Africa* 2009 (6) SA 277 (GSJ) para 32.

2 On the 21 September 2017, it was reported that South Africa's Gupta-owned Oakbay and other affiliated holdings were faced allegations of using ties with South Africa's present to wield undue influence. These companies were further suspected of being directly or indirectly involved in various illicit activities. Consequently, between December 2015 and April 2016 all four major banks in South Africa, there are Standard Bank, Nedbank, Barclays Africa and FirstRand bank terminated the account of these companies controlled by the Guptas relying on the reputational risk. In passing one should mention that the banks derived its right of termination not only from the contractual relationship with these companies but more particularly from the Financial Intelligence Centre Act 38 of 2001, especially s 21, 21B, 21C, 22, 22A, 26A, 26B & 29.

involvement in various illicit activities.³ This article, therefore, seeks to determine whether a bank can, without the client's consent, close the client's bank account. As such I first evaluate the relationship between the bank and its client. Second, I consider the duties of both the bank and its client in relation to banking contractual relationship. Third, I answer the above vexing question by considering the current case law where the courts were called upon to pronounce on the question, the legislation governing banking practice and journal articles that seek to address it.

Essentially the article focuses on the banker-client relationship after the banking contract has been concluded. For convenience purposes, I shall refer to the banker-client relationship as the ("BC relationship /or BC contract"). Throughout the discussion, a "bank" and the "banker" are used interchangeably to refer to the bank as defined by section 1 of the South African Banks Act 94 of 1990 (the "Banks Act"),⁴ and other applicable regulations. It should be noted that banking law is a transnational subject and thus its operation is further subject to international standards.⁵ Consequently, reference is also made to foreign and international law to clarify some of the banking law principles that regulate the banking system.

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- 3 Writer "Another Major SA Bank Closes its Doors to Gupta Company" <https://businesstech.co.za/news/finance/119245/another-major-sa-bank-closes-its-doors-to-gupta-company/> (assessed 2018-04-06). *Minister of Finance v Oakbay Investments (Pty) Ltd; Oakbay Investments (Pty) Ltd v Director of the Financial Intelligence Centre* (80978/2016)[2017] ZAGPPHC 576; [2017] 4 All SA 150 (GP) (18 August 2017), par 12. *Annex Distribution (Pty) Ltd v Bank of Baroda* (52590/2017) [2017] ZAGPPHC 608; 2018 (1) SA 562 (GP) (21 September 2017).
 - 4 In terms of s 1 of the Banks Act, a bank means a public company registered as a bank in terms of the Act. Moreover, the purpose of this Act is to "provide for the regulation and supervision of the business of public companies taking deposits from the public and to provide for matters connected therewith".
 - 5 Basel Committee on Banking Supervision *Core principles for Effective Banking Supervision* Banking for International Settlements (The Basel Core Principles) (2012) 1-79. This publication is accessible at <https://www.bis.org> (assessed 2018-09-19). (United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1998; United Nations Convention against Transnational Organised Crime, 2000. The primary regulator of the Reserve Bank of India; Financial Action Task Force (FATF) available at <https://www.fic.gov.za/DownloadContent/NEWS/PRESSRELEASE/FIC%20Annual%20Report&202012-13.pdf> (assessed 2018-09-19); Politically Exposed Person (PEP); Banks Act 94 of 1990; See article 68(1) of the United Nations Convention against Corruption Resolution 58/4 of October 31, 2003 and the Money Laundering and Terrorist Financing Control Regulations.

2 The relationship between the banker and its client

The BC relationship is a multi-faceted relationship that is founded in various contracts.⁶ In *Standard Bank of SA Ltd v Absa Bank Ltd*,⁷ the court noted that amongst other forms of contracts emerges between these parties, the contract of mandate between the bank and its customer underpinned this relationship. This suggests that the common law contract principles apply in the BC relationship as well as other special contractual rules. In the English classic case of *Foley v Hill*,⁸ Lord Brougham pointed out that the BC relationship can be described as a “debtor-creditor relationship”.⁹ This was because as soon as the client deposits his/her money into the bank account, the bank immediately becomes a debtor to the client. It can be said that upon deposit by the client into his/her bank account, the money ceases to be the client’s and becomes the bank’s financial asset, which the bank is bound to return to its client upon demand.¹⁰ Accordingly, the bank is a debtor to the client to the extent that the client’s bank account shows a positive balance. To put it differently, the bank is only a debtor of the client subject to the condition that the client has funds in his/her bank account. It was further submitted in *Foley* case that the BC relationship should also be seen as a principal-agent relationship.¹¹ The court rejected this contention and held that the banker, after receiving the deposit, is free to decide on the manner and ways in which the money can be used, thus the banker is not strictly confined to the instructions of its client in this regard.

The court’s reasoning to classify the BC relationship as one of debtor-creditor in nature is that the bank, on demand by the client, will be expected to pay back the deposited amount of money.¹² Logically, the bank cannot be a debtor if the client has a negative balance in his/her account. In such an instance, the client becomes a debtor and the bank is the creditor. Therefore, the gist of the *Foley* matter is that the law of contract, which also include some elements of the debtor-creditor relationship, regulates BC relationship. Thus, both parties seem to be treated equally and they have the autonomy to contract on any terms

6 Schulze “*The Sources of South African Banking Law-a Twenty-First-Century Perspective*” (part 1) 2002 14 *South African Mercantile Law Journal* 440. The author indicates that this relationship involves different types of contracts such as “mandate, loan for use, depositum and deposit taking”.

7 1995 (1) All SA 535 (T).

8 *Foley v Hill* (1848) 2 HL Cas 28 (HL).

9 *Foley v Hill supra*, 28.

10 *Foley v Hill supra*, 35. Proctor *The Law and Practice of International Banking* 2010 301 para 15.13. See further the discussion of *Joachimson v Swiss Bank Corp.* [1921] 3 KB 110 in Holden *The Law and Practice of Banking Volume 1: Banker and Customer* (1974) 40-41.

11 *Foley v Hill supra*, 28. Smart & Chorley *et al, Chorley and Smart Leading Cases in the Law of Banking* (1990) 4. The author indicates that the bank is quite free to use the monies received from its customers.

12 *Foley v Hill supra*, 43.

and conditions subject to the rule of law.¹³ It appears the BC contract comes into being after both parties have reached an agreement regarding the terms and conditions thereof.

It is understood that once the BC contract comes into being, the general contract rules apply in the BC relationship, in addition to this, there are other unique contractual terms, which may apply between the parties. Hapgood's contention is that special contractual rules could arise in circumstances where the banking institution exclusively offers the service rendered.¹⁴ These special contractual rules entail all the banking services that cannot be rendered by any other contracting parties under the normal contract but that are conferred entirely on the bank. Therefore, it boils down to the question whether the banking institution has the necessary authorisation to render the bank services in terms of the applicable legislation. Thus, the difference between general and unique contractual rules become significant when illustrating the duties and obligations of the bank and its client. For the purposes of the nature of the BC relationship, it suffices to note the rules that govern contracts apply as well as other special contractual terms parties may agree upon. It seems correctly that the BC relationship depends mainly on express and implied contractual terms.¹⁵ In short, BC relationship may be classified as *sui generis* since the circumstances of each case will dictate the nature of the relationship between the parties. Hence, it is impossible to have one-fix all formula to explain the nature of the BC relationship.

3 Duties of the bank and its client

3 1 Duties of the bank

Initially, the bank concludes an agreement with its client to render banking services, as the parties deem fit and ethical. In terms of the international banking standard and domestic law, banks are ethically and legally bound to prevent financial crimes such as illicit transactions, money laundering, and corruption to name a few.¹⁶ It follows the bank is strictly prohibited to perform illegal duties as provided by the banking laws. Therefore, although the parties may enter into BC contract deem fit however, they may not agree to perform illegal acts.

Once the bank and the client has concluded the contract, the bank owes certain duties to the client. These duties include, but are not limited

13 *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 57.

14 Hapgood *Paget's Law of Banking* (2007) 145.

15 Talagala "The law relating to bank-customer relationship: some salient duties of banks" (2010)1 20 3. See also *Joachimson v Swiss Bank Corp supra*, 117.

16 Arts 5, 6 7, & 8 of the United Nations Convention against Transnational Organised Crime; s 20A, 21, 21A-E of the Financial Intelligent Centre Act 38 of 2001; the Prevention of Organised Crime Act 121 of 1998.

to the following, because the extent of such duties depends on the particular agreement between the banker and the client:

- (a) To accept funds and to collect cheques for the client.¹⁷
- (b) To make repayment of the deposited amount on demand at the branch in which the bank account is held during banking hours.¹⁸
- (c) To pay the client's orders according to the client's mandate provided there are sufficient funds available in the account.¹⁹
- (d) To act only upon the valid instructions of its client and not upon any fraudulent instructions.²⁰
- (e) Not to pay countermanded cheques.²¹
- (f) To provide the client with bank statements.²²
- (g) To protect the client's confidentiality, subject to certain exceptions.²³
- (h) Fiduciary duty in limited circumstances.²⁴
- (i) To give a reasonable notice before closing the client's bank account if it has a credit balance.²⁵

17 Proctor 301 par 15.20.

18 *Libyan Arab Foreign Bank v Bankers Trust* [1989] AC 80 PC. See also Schoeman *et al*, *An Introduction to South African Banking and Credit Law* (2013) 2 para 1.2.

19 *Well v First National Commercial Bank* [1998] PNLR 552, CA.

20 *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank* [1986] AC 80 PC.

21 Olanrewaju "Optimizing banker-customer relationship towards sustainable growth and profitability" accessible at on https://www.academia.edu/15965954/Optimizing_the_banker_customer_relationship_for_grwth_and_profitability (assessed 2018-09-19).

22 Olanrewaju.

23 *Tournier v National Provincial & Union Bank of England* [1924] 1 KB 461 772-473. See also Wadsley and Penn *The Law Relating to Domestic Banking* (2000) 167 para 4-064.

24 The fiduciary duty of the bank does not arise under the general contractual relationship with the client, however, in terms of the special contract the fiduciary duty may arise. See *National Westminster Bank plc v Morgan* [1983] 3 All ER 8, where the court held that fiduciary duty only arises under special contract, according to the court it could be where the client solely relies on the bank for its service. Talagala para 15, states that the fiduciary duty may arise firstly, when the bank offers investment or financial advice to the client, secondly, when the bank acts as an agent or a trustee of the client. See further Glover "Banks and Fiduciary Relationships" 1995 7 *Bond Law Review* 3, who also indicates that the fiduciary duty could be created by the fact that the customer is in a vulnerable position or has unequal access to certain information. Accordingly, the author provides that fiduciary duty may take two types. The first one is "one sided" relationship. In this regard, the client solely put reliance on the bank that it will employ its financial expertise in order to protect and benefit its customer. In other words, the client is in a vulnerable position because he lacks necessary skills, or information (e.g lack of access to the market or lack of investment skills). The second one may be "two-sided". In this type of fiduciary duty, the relationship is based on the agreement between the client and its banker. To put it differently, their relationship is based on a mutual agreement. In terms of the customer banker relationship, we concerned with the former. Consequently, the unequal or imbalance position between the client and the banker constitute the one-sided relationship. As such the vulnerable party deserves protection from the possible undue influence from the stronger party. See *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 142.

25 *Joachimson v Swiss Bank Corp supra*, para 18.

3 2 Client's duties

The bank's client also has corresponding duties toward the bank. The client has a duty to:

- (a) Exercise care when drawing cheques.²⁶
- (b) Disclose any forgeries.²⁷
- (c) Demand for the repayment of deposited money.²⁸
- (d) Pay bank charges accordingly and "interest on loans or overdrafts".²⁹
- (e) Inform the bank of any apprehensive dealings or fraudulent attempts on his\her account.³⁰

The above-listed obligations of the bank and its client are not exhaustive but vary depending on the contract between the parties.

The above two sections have considered the nature of the BC relationship and the duties of both the bank and its clients. In what follows, a discussion on the termination of the BC relationship is considered and whether the bank can unilaterally cancel banking contracts unilaterally.

4 Termination of BC relationship

The BC relationship may be terminated in many ways. These include but are not limited to notice by the bank, mental disorder of the client, insolvency of the client or by mutual agreement.³¹ It is noteworthy that in practice, it is nearly always the one party or the other wishes to end the relationship, as such, the BC relationship is terminated unilaterally as will be discussed below. The question arises is whether the bank is obliged to provide a reasonable notice to its client before it unilaterally closes the client's bank account.

4 1 Case law

4 1 1 Breedenkamp v Standard Bank of South Africa (Breddenkamp I).³² *The interim interdict application*

In *casu*, the United States government listed the applicant (Breedenkamp), Breco (the company) and other certain entities as

²⁶ Hapgood 149-150.

²⁷ *Joachimson v Swiss Bank Corp supra*, 127.

²⁸ *Joachimson v Swiss Bank Corp supra*, para 17.

²⁹ Olanrewaju.

³⁰ *London Joint Stock Bank v Macmillan and Arthur* [1918] AC 777 HL; *Greenwoods v Martins Bank* [1933] AC 51 HL. Olanrewaju. See also *Brown v National Westminster Bank Ltd* (1964) 2 Lloyd's Rep. 182.

³¹ Smart & Chorley 362, 364, 366, 377. Hapgood 153 para 7.13. The author indicates that the relationship between the banker and its client may be terminated by an agreement between parties, by unilaterally act by either party or by the death of the client.

³² *Breedenkamp v Standard Bank of South Africa* 2009 5 SA 304 (GSJ).

specially designated nationals (“SDN”).³³ This came because of allegations against Breedenkamp that he was involved in various illicit activities such as tobacco trading, arms trafficking, oil distribution, diamond extraction and of being a confidant and financial backer of Zimbabwe’s President Robert Mugabe.³⁴ Subsequent to this SDN listing, the US enforcement authorities imposed sanctions on the applicant, Breco and other entities.³⁵ In terms of US law, US nationals, including juristic persons, are strictly precluded from dealing with SDNs. The Standard Bank of South Africa (“Standard Bank SA”) became aware of these facts and upon issuing thirty (30) days’ notice of termination of the banking services with Breedenkamp, decided to cease its contract with Breedenkamp, Breco and other entities. The bank derived its powers to unilaterally terminate the contract from the “general terms and conditions for all accounts”,³⁶ entered by both parties and in terms of the Code of Banking Practice. In terms of these general terms and conditions, the bank could terminate any account, for any reason, by providing a written notice to such effect. In addition, the bank could at any time amend the terms and conditions of the BC contract by giving a written notice to the customer. The code of banking practice also empowered the bank to close its customer’s bank account if it had reasons to believe that the account was being used for any illegal purposes.³⁷ Therefore, Standard Bank SA relied amongst other reasons on these provisions to cancel its BC relationship after it became aware of the applicant being listed as the SDN by the US government.

Three initial reasons were advanced by the bank for the closure of the applicant’s accounts. First, that the US government as a specially designated person listed the applicant.³⁸ Second, that these allegations might impaired Standard Bank SA’s reputation.³⁹ Third, certain business risks could arise should the bank continued offering banking services to Breedenkamp and SDN.⁴⁰ In response to the intended closure of the bank accounts, the applicant approached the court for an interim interdict to restrain Standard Bank SA from cancelling the contract between the parties pending the finalisation of the matter.⁴¹ The applicant contended that the closure had drastic effects on his business

33 The Specially Designated National (“SDN”) is defined by the Terrorism and Financial Intelligence Office of Foreign Assets Control (“OFAC”) in the US as those “engaged in activities related to the proliferation of weapons for mass destruction, and other threats to the national security, foreign policy or economy of the US”. In terms of the OFAC Act confers powers to the presidential national and other authorities to impose controls on transactions and freeze assets under the US jurisdiction. Accessible at <https://www.treasury.gov/about.organization> (assessed 2018-09-19).

34 *Breedenkamp I supra*, para 4.

35 *Breedenkamp I supra*, para 4.

36 *Breedenkamp I supra*, para 21.

37 The Banking Association South Africa *Code of Banking Practice* para 7.3.

38 *Breedenkamp I supra*, para 33.

39 *Breedenkamp I supra*, para 33.

40 *Breedenkamp I supra*, para 33.

41 *Breedenkamp I supra*, para 12.

since it would be difficult, if not impossible, to conduct business without banking facilities.

Jajbhay J granted the relief based on several grounds. One of these grounds was that the bank did not have a unilateral right to cancel the contract as it claimed to have under the general terms and conditions, nor did the Code of Banking Practice confer such right. The court considered the evidence before it and concluded that the general terms and conditions were adopted after the accounts of the applicant were already opened therefore it seemed unreasonable for the bank to apply them to these specific bank accounts.⁴² Furthermore, the applicant denied that he had received the terms and conditions.⁴³ The court was not prepared to entertain this denial by the applicant. The court also referred to these general terms and conditions and concluded that they were not sufficient to entitle the bank the right to cancel the banking service contract.⁴⁴

The court also pointed out that Standard Bank SA only communicated its reasons to terminate the contract after it had already closed the bank accounts of the applicant. As such, the applicant's bank accounts were closed based on mere perceptions and not on the facts.⁴⁵ After evaluating clause 4.10 of the Code of Banking Practice the court concluded that, the Code did not expressly or by necessary implication entitle the bank to terminate the contract.⁴⁶ Jajbhay J further mentioned that the Code expressly provided that it could not be used in a court of law and it was not legally binding between the bank and its client.⁴⁷ Hence, the court concluded that the Code did not entitle Standard Bank to close the account of the applicant.⁴⁸ Consequently, the court ruled the applicant was entitled to an interim interdict pending the finalisation of the matter.

4 1 2 Breedenkamp v Standard Bank of South Africa (Breedenkamp II):⁴⁹ *The main application*

In the main application, the applicant challenged the manner in which Standard Bank SA had terminated the contract. The constitutional attack was directed at the issue of fairness in that Standard Bank SA termination

42 *Breedenkamp I supra*, para 26.

43 *Breedenkamp I supra*, para 26.

44 *Breedenkamp I supra*, para 28.

45 *Breedenkamp I supra*, para 32.

46 Clause 4.10 of the then Code of Banking Practice provided that the bank will not close the customer's bank account without giving a reasonable prior notice at the last address that the customer provided. The Code further stated that the bank reserve the right to protect its interest in its discretion, which include closing the account if the bank is compelled by law; if the customer has not the account for a significant period and if the bank believe that the account is being used for fraudulent purposes.

47 *Breedenkamp I supra*, para 24.

48 *Breedenkamp I supra*, para 25.

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

violated the standard of fairness as set out in the constitution. Both parties had agreed that should the court find that the termination had offended a constitutional right, Standard Bank SA could not therefore exercise the right to cancellation.⁵⁰ As a result, the court had to determine if the cancellation clause in itself offended the constitution and whether the exercise of right to terminate contract was fairly exercised as submitted by the applicant.⁵¹ The court held that to determine fairness the court should consider two considerations. First consideration involves the weighing up the public policy as informed by the constitution that requires freely and voluntarily compliance with contractual obligation – the maxim *pacta sunt servanda*. As the court correctly stated that this principle entails parties’ self-autonomy that contract entered freely and voluntarily must be honoured even to one’s own detriment. It seems that if the contract is *prima facie* contrary to public policy the question of enforceability would not arise. If the court is satisfied that the clause in question is reasonable – in that the clause does not offend one or more of the constitutional rights, then the second consideration entails an enquiry into the surrounding circumstances precluded compliance with the clause – a subjective test.⁵² The focus in this subjective approach is on the manner in which either party has exercised his/her right of cancellation, whether it violated the right to freedom of contract or dignity of the claimant.⁵³ The question in this regard is whether it was factually possible to enforce the contractual clause or to expect the other party to comply with BC contract. Therefore, the applicant is required to show that exceptional circumstances exist to justify his non-compliance.

It should be noted that the applicant had to lead evidence to prove that Standard Bank SA cancellation was unreasonable considering the relevant facts.⁵⁴ If the applicant successfully convinced the court that the clause could not reasonably be enforced considering the circumstances, such clause would not be enforceable. However, it should also be noted that courts are reluctant and cautious to interfere with the contractual relationship between individuals,⁵⁵ unless the contractual terms and conditions concerned are objectively or subjectively unreasonable. This is because of the parties’ right to freely arrange their affairs. Accordingly,

50 *Breedenkamp II supra*, para 13.

51 S 36 of the Constitution of the Republic of South Africa, 1996.

52 *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC) para 56.

53 *Breedenkamp II supra*, para 13(2).

54 *Breedenkamp II supra*, para 45. In this matter, the court held that “[t]he onus rests on the applicant to establish the fact that the unilateral cancellation of the contract alone results in the applicant being unable to obtain alternative banking facilities and it has failed to do so”.

55 *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 32; *Barkhuizen v Napier supra*, para 35; *Brisley v Drotzky* 2002 4 SA 1 (SCA) par 22, 24, 93; *Breedenkamp v Standard Bank of South Africa* 2010 4 SA 468 (SCA); *South African Forestry Co Ltd v York Timbers* 2005 3 SA 323 (SCA) para 30. *Annex Distribution (Pty) Ltd v Bank of Baroda* (unreported, referred to as case no (52590/2017) [2018] ZAGPPHC 6 (12 March 2018). Available online at <http://www.saflii.org/za/cases/ZAGPPHC/2018/6.html> para 17.

parties may arrange their affairs and conclude contracts that will be binding between themselves, the *pacta sunt servanda* principle. This entails that unless the contrary is proven, parties are bound by the general terms and conditions of their contract.

It was accepted that Standard Bank SA termination of the contract did not directly violate the applicant's right to freedom of contract, dignity or trade.⁵⁶ However, the applicant further submitted that should the court find that the cancellation had not directly infringed his constitutional values; the court ought to consider that the termination violated the fairness principle. In this regard, the applicant relied on the fairness principle in that, Standard Bank SA unfairly exercised its right of termination taking into account that the applicant had no sufficient time to move his business to another bank. Furthermore, other banks were not prepared to accept him and therefore it was fair to sustain his relationship with Standard Bank SA. Subsequently, the applicant sought the following reliefs. One, that the bank is prohibited from cancelling the contract without good cause.⁵⁷ Two that the bank is "interdicted and restrained from cancelling the account contract unless and until good cause arises."⁵⁸ The applicant's contention was that prior to the conclusion of the contract, Standard Bank SA was in a "privileged position" to impose standard-term clauses in the contract.⁵⁹ According to the applicant, this might have constituted an unequal bargaining position between the parties and it probably influenced the voluntariness of the applicant to enter into the contract regarding the bank account. Lamont J held that the unequal bargaining power prior to the conclusion of the BC contract did not on its own render the contract unenforceable. According to the court, this might however have had a bearing on the weight that would be attached to the terms of the contract and the extent to which the parties were able to act with dignity and freedom.⁶⁰

Moreover, the applicant argued that the BC contract contained a variation clause entitled the bank to change the terms and conditions from time to time. Subsequently, this empowered the bank to amend the terms from time to time. It can be argued that this seems to perpetuate the unequal bargaining power in that the client has no choice but to contract with the banker because of the need of the client's vulnerable position for banking facilities. If the applicant was not satisfied with the terms of the BC contract or their amendments, he had two options at his disposal. First, the applicant could have negotiated with the bank on different terms.⁶¹ Second, the applicant would be able to terminate the account contract himself.⁶² The applicant further argued that the imbalance was further perpetuated by the strict requirements that the he

56 *Breedenkamp II supra*, para 14.

57 *Breedenkamp II supra*, para 19(1).

58 *Breedenkamp II supra*, para 19(2).

59 *Breedenkamp II supra*, para 22.

60 *Breedenkamp II supra*, para 21.

61 *Breedenkamp II supra*, para 21.

62 *Breedenkamp II supra*, para 21.

had to comply with. Furthermore, the South African banking sector has a limited number of banks.⁶³ For these reasons, the applicant contended that Standard Bank SA was in indeed in a privileged position. The court accepted that banks do impose standard form contracts, but the evidence before the court did not prove that this constituted an aggravating factor in the present matter.⁶⁴ It seems that the court was prepared to accept that the parties were not on equal bargaining position provided evidence could support such conclusion. It is submitted that in the banking sector such as South Africa's one with few major banks, it seems difficult to justify that the parties would be on equal footing. This is because amongst other reasons, BC contracts tend to contain standard clauses that cannot easily be changed unless the banker grants such permission. The court continued to consider the applicant's contention and it held that the applicant was a strong entity that would have influenced Standard bank SA in one way or another. To put it differently, the applicant was "no shrinking lily".⁶⁵ Accordingly, the court concluded that the facts did not show that the applicant "was at a bargaining disadvantage or in a position of inequality" vis-à-vis the bank⁶⁶ It seems likely that the court would reached a different conclusion had the facts proven that the bank was in a more favourable position. In other words, the court would have granted the interdict stopping the bank from cancelling the BC relationship if the facts proved otherwise.

The applicant also submitted that it was fair for Standard Bank SA to have the applicant as its client because other banks were not willing to do business with him.⁶⁷ The court accepted that the unbanked position of the applicant impaired his dignity, integrity and respect to carry on trade as a respectable member of society.⁶⁸ However, the court further examined the submission and concluded that the applicant had to prove that the cancellation by Standard Bank SA rendered him unbanked.⁶⁹ According to the court, the applicant had failed to discharge such onus. In other words, the applicant had failed to establish that other banks could not take him on as a client because of the unilateral cancellation by Standard Bank SA.

The court further held that fairness principle also entailed the bank's right to choose which person it wanted to contract with.⁷⁰ Moreover, the bank had a duty to comply with and uphold banking regulations. As such, the court ruled that the process was procedurally fair. Substantively there was a proper rationale for the decision to terminate.⁷¹

63 *Breedenkamp II supra*, para 23.

64 *Breedenkamp II supra*, para 24.

65 *Breedenkamp II supra*, para 25.

66 *Breedenkamp II supra*, para 26.

67 *Breedenkamp II supra*, para 33.

68 *Breedenkamp II supra*, para 33.

69 *Breedenkamp II supra*, para 46.

70 *Breedenkamp II supra*, para 48.

71 *Breedenkamp II supra*, para 65.

4 1 3 Breedenkamp v Standard Bank of South Africa:⁷² SCA Judgment

The appellant appealed against the judgment of the High Court that the termination of banking facilities was fair and lawful. In the appeal case, the appellant based his argument squarely on the fairness principle.⁷³ The appellant submitted that the *Barkhuizen* principle that *pacta servanda sunt* is not “a sacred cow that should trump all other considerations”,⁷⁴ was applicable regardless of whether the contract violated public policy or not. According to the appellant, the absence of public policy violation did not mean that the contract was enforceable. As such, the appellant submitted that the enforcement of the contract must also be fair and reasonable. The court rejected this contention as follows:

“[...] I do not believe that the [*Barkhuizen*] judgment held or purported to hold that the enforcement of a valid contractual term must be fair and reasonable even if no public policy consideration found in the Constitution or elsewhere is implicated [...]”.⁷⁵

The court further relied on the dictum of Ngcobo J in the *Mohloni* case that parties in a contract have self-autonomy or the ability to regulate their own affairs.⁷⁶ Accordingly, the question of enforceability comes into play only if it can be shown that the terms of the contract are unreasonable. Hence, it meant that it would be objectively or subjectively impossible to enforce them. According to the court, since the contractual terms were valid, it was unnecessary for the cancellation process to be fair and reasonable as perceived by the appellant. Consequently, the appellant could not solely rely on fairness as a freestanding requirement to sustain the bank-client relationship.⁷⁷

The court opined that the issue to be decided was whether Standard Bank SA had complied with the termination requirements as agreed in the BC contract. Harms DP considered that in terms of the general terms and conditions the bank first had to issue a reasonable notice if it sought to terminate the contract. Second, it must have had a good cause for the termination of the contract. On the reasonable notice requirement, it was undisputed that the bank had given the appellant a reasonable notice to cease the bank-customer relationship. Based on the good cause requirement, the court held that the bank had exercised its right of cancellation lawfully as permitted by the BC contract. In other words, the bank was at liberty to terminate its contract emanating from the agreement between the parties. More so, the bank made its decision to cancel the banking contract based on the listing of the appellant and considered the reputational and business risk related thereto. The court

72 *Breedenkamp v Standard Bank of South Africa* 2010 4 SA 468 (SCA).

73 *Breedenkamp SCA supra* para 30.

74 *Breedenkamp SCA supra* para 15.

75 *Breedenkamp SCA supra* para 50.

76 *Mohloni v Minister of Defence supra*, para 57.

77 *Breedenkamp SCA supra* para 53.

remarked that whether or not these were the right factors to be considered was not for the court to decide. It was held further that Standard Bank SA was right to rely on the reputation of the appellant when closing the bank accounts since this had a bearing on the BC relationship.⁷⁸ Hence, the bank had exercised its right of termination in a *bona fide* manner.⁷⁹ Accordingly, the appeal was dismissed.

5 Analysis and discussion

What is the relevance of *Breedenkamp* in South African banking law? First, this case confirms the principle that fairness forms part of our law. However, it is not an independent legitimate ground for invalidating a BC contract. Thus, fairness cannot be employed as a free-floating requirement.⁸⁰ The dictum in the *Breedenkamp* SCA decision indicates that the client may not squarely rely on fairness principle to sustain BC contract with the banker. The client should be able to identify the specific constitutional values that he/she perceives to be unreasonably infringed. Once the constitutional right has been identified, the claimant can further rely on fairness as a “slippery concept”.⁸¹ Although a party cannot solely rely on the fairness principle to terminate a valid contract with the bank, however, the court enunciated an exception to this rule. This exception is that unless a claimant alleges unfairness can show that the terms and conditions of the banker-customer contract were objectively and/or subjectively unreasonable at the time of the conclusion of the contract, then the court will be more inclined to accept the principle of fairness as a ground to invalid the contract in question.

Second, this judgment also illustrates that where the BC contract contains an express cancellation clause, either party may exercise his/her right of termination. However, such right must be exercised in a *bona fide* manner.⁸² Third, there must be a good cause that justifies the termination of the BC contract. Fourth, the party that purports to cancel the banking contract must further comply with all contractual termination requirements if there are any, such as the compliance with a reasonable notice. In this regard, it is noted that normally a client does not need to issue a reasonable notice to the banker if he/she wishes to close his/her current bank account.⁸³ To put it differently, the client may summarily terminate the BC contract subject to paying a debit balance and any bank charges that may ensue.⁸⁴ Therefore, if the client has a credit balance in his/her account with the bank, he/she can simply

78 *Breedenkamp II supra* para 24.

79 *Breedenkamp II supra* para 64.

80 Bhana “Contract Law and the Constitution: *Breedenkamp v Standard Bank of South Africa Ltd (SCA)*” 2014 29 *South African Public Law* 509.

81 *Breedenkamp SCA supra* para 54.

82 *Breedenkamp SCA supra*, para 64.

83 Ellinger & Lomnicka *et al*, *Ellinger’s Modern Banking Law* (2011) 207 para 6.

84 *Breedenkamp II supra* para 29.

withdraw his/her money and close his/her account at any time.⁸⁵ However, the same cannot be said from the banker's perspective. Lord Hoffmann in the *National Commercial Bank of Jamaica Ltd v Olint Corporation Ltd* illustrated the banker's position,⁸⁶ where he stated that unless the banker and the client have agreed, or the statute provides otherwise, a banker might terminate its banking contract upon issuing of a reasonable notice. The notion of reasonable notice is also provided in the Code of Banking Practice that states that the banker will not close its client account without providing the client with a reasonable notice prior to the closing of his/her account.⁸⁷

Therefore, the circumstances of each case will most probably dictate what constitutes a reasonable notice regarding the relevant facts. In the *Breedenkamp* case, the SCA has found that the thirty (30) days termination notice was sufficient for the appellant to arrange his affairs. It could perhaps be mentioned that factors such as the nature of the account, the business in question, and the operational risk if the account is not closed and the grounds and seriousness of misconduct will play a pivotal role in this regard. As correctly argued by Du Toit, a sophisticated company might probably need more time as a small business or someone with a personal account.⁸⁸ The logic behind the reasonable notice from the banker's point of view is that any cheques or other effects payable to the client and/or deposited into his/her account must have a sufficient period to clear before the bank account is closed.⁸⁹

The position regarding inadequate notice may be traced back to the matter of *Prosperity Ltd v Lloyds Bank Ltd*,⁹⁰ where the court refused to grant an interdict stopping the bank from closing its client's bank account but allowed the declaration that the banker was not entitled to close the account without reasonable notice. The reason why the court could not order the bank to reopen the account was that such an order would be forcing the bank to perform a specific performance of a personal in nature. McCardie J held that based on a balance of probabilities the client could claim damages for loss suffered because of the closure.⁹¹ This principle was also enunciated in the *Breedenkamp* SCA decision where it was held that Standard Bank SA could not be forced to contract with the appellant if the bank had decided to terminate its contract. The suggestion is that whether the banking contract contains an express

85 Schulze "The Bank's Right to Cancel the Contract Between it and its Customer Unilaterally" (2011) 32 *Obiter* 219.

86 *National Commercial Bank of Jamaica Ltd v Olint Corporation Ltd* [2009] UKPC 16.

87 The Code of Banking Practice (2012) para 7.3.2. Available at <http://www.banking.org.za/consumer-information/legislation/code-of-banking-practice> (assessed on 2018-09-19).

88 Du Toit "Closing Bank Accounts: Recent Developments" in Hugo and Du Toit *et al*, Annual Banking Law Update: Recent Developments of Special Interest to Banks (2017) 31-42 32, footnote 10.

89 Ellinger and Lomnicka 208.

90 [1923] 39 TLR 372.

91 Ellinger and Lomnicka 209.

cancellation clause or not, it would be desirable for the banker to issue a notice of termination prior to the termination of the banking service contract. The absence of a termination clause in the banking contract should not discharge the banker from issuing a reasonable notice.⁹² This view emanates from the common law principle that a party could only unilaterally rescind from the contract if the breach is material or serious.⁹³

The banking practice, as shown above, depicts that there is nothing stopping the bank from unilaterally closing the account of the client if it perceives that the circumstances permit such termination. However, the bank must bear in mind that if it does not comply with the abovementioned requirements, it is likely that such termination may be set aside for being objectively and/or subjectively unreasonable considering all relevant facts. To sum up, it is essential to note that the BC relationship is governed by the law of contract. As such, either party may cancel the banking contract subject to compliance with the termination requirement.

Finally, considering the above decisions, it seems that adverse publicity regarding the client could encourage the banker to cut its ties with the client. Whether or not these allegations are accurate is irrelevant.⁹⁴ This suggests that the duty of the banker to uphold and comply with the banking practice,⁹⁵ carries more weight than the individual's interest. Therefore, if the banker subjectively perceives that whatever conduct by its client may negatively impair its business reputation, it could be argued that the bank's termination of its relationship with its client would be justifiable.

6 The exception to reasonable notice compliance

It should be mentioned that there are some exceptions to the obligation to comply with the reasonable notice-requirement. There are instances in which the banker may close the bank account of its client with immediate effect, without dispensing a notice informing the client of its

92 *Annex Distribution (Pty) Ltd v Bank of Baroda supra*.

93 *National Commercial Bank of Jamaica Ltd v Olint Corporation Ltd* [2009] UKPC 16. See also Schulze 220. See *Amalgamated Beverage Industries Ltd v Rond Vista Wholesalers* 2004 1 SA 538 (SCA), where the court pointed out that an indefinite contract may come to an end through a reasonable notice.

94 *Breedenkamp II supra*, para 24.

95 See further the Financial Intelligence Centre Act 38 of 2001; Financial Intelligence Centre Amendment Act 11 of 2008; Prevention of Organised Crime Act 121 of 1998; South African Reserve Bank Act 90 of 1989. Kersop and Du Toit "Anti-money Laundering Regulations and the Effective Use of Mobile Money in South Africa-(part 1)" 2015 *Potchefstroom Electronic Law Journal* 1603-1635.

intention to close the account. These include but are not limited to the following:⁹⁶

- (a) if a banker is obeying a court order;
- (b) if a client has acted unlawfully;
- (c) if the client has breached the bank's terms and conditions;
- (d) if the client has acted abusively towards bank staff.

It seems as if under these special circumstances the banker's action to immediately close its client's bank account would be justified. In other words, the court is more likely to find that the banker was compelled by the circumstance to respond with immediate closure of the client's account.

7 Conclusion

In the above discussion, I have shown that both the banker and its client have rights and obligations in terms of their banking contract. It has also been illustrated that the BC relationship may end in several ways for different reasons. However, the point of departure to determine the validity of the termination of this contract should be the terms and conditions that the parties have agreed to.

It has further been explained that the banker may unilaterally terminate its banking facilities subject to reasonable notice to the client. Subjectively speaking, whether such reasons are wrong or not is irrelevant, except if there is an abuse of the right of termination. Although either party may cancel the banking contract, it is, however, instructive to note that the facts and circumstances of each case will determine the manner and means of termination of the contract in question.

Imperatively, it is further submitted that once the banker has decided to close the client's bank account it is unlikely that the court would make a mandatory order to reopen the account. It seems that the most appropriate relief the client has is to claim damages he/she suffered if he/she can prove that the bank did not give a reasonable notice of termination, or that the closure in itself was unreasonable.⁹⁷

Finally, it should also be mentioned that the bank does not only owe the duty to its clients. The international banking community also requires the bank to uphold and protect the banking sector, the standard as well as the dignity thereof. Therefore, it is submitted that where the interests of the individual conflicts with the banking industry regulations and standard practice, it is likely that the protection of the banking sector will prevail.

96 Du Toit 32.

97 *Annex Distribution (Pty) Ltd v Bank of Baroda* par 14; *Joachimson v Swiss Bank Corp supra*, 110.