

BANKING LAW: *¹

1 NATURE OF THE BANKING RELATIONSHIP

- 1.1 The legal relationship between a bank and its client is based on contract and there may be several different contractual relationships between a bank and its customer. A contract between the bank and its client imposes on the bank a duty to act prudently and it often acts as agent for the customer. Where the bank acts as agent, the bank must not allow its interests in the matter at hand and its duty as agent to conflict.
- 1.2 As in the case with all contracts and documents, the terms of a written mandate or other contract filed with the bank must be interpreted to determine the rights and obligations flowing from it.
- 1.3 The customer's obligation towards his banker depends on the terms of the loan agreement. The customer must warn the bank of known or suspected forgeries or fraud committed on the account and take reasonable steps to prevent such unlawful conduct.
- 1.4 The Code of Banking Practice requires that the customer to discuss his financial difficulties with his banker and to keep the bank informed of changes in his personal details or financial situation and to manage his account properly and to seek independent tax advice.
- 1.5 There are essential pieces of legislation impacting banks and the relationship between a bank and its customer, for example the National Credit Act, 34 of 2005, the Banks Act, 94 of 1990, the Consumer Protection Act, 68 of 2008, the Electronic Communications and Transactions Act, 25 of 2002 and the Bills of Exchange Act, 34 of 1964.
- 1.6 The NCA covers a wide variety of credit agreements, including: direct personal loans, loan secured by mortgage bonds, overdrawn cheques accounts, credit cards, rendering of services, sales and leases of movable goods. A credit agreement has two main elements, firstly credit is granted and, secondly a fee, charge or interest is imposed in respect of the deferred payment of the amount of credit advanced.

*¹ **DISCLAIMER:** this text contains generalisations, is not exhaustive of all the relevant criteria or issues and there may be exceptions to that stated and does not constitute legal advice to the reader. The reader is strongly advised to consult an admitted attorney and not to rely on this text as being sufficient for the reader's purposes.

- 1.7 The NCA does not apply to:
 - 1.7.1 a credit agreement in which the consumer is a juristic person whose asset value or annual turnover equals or exceeds R1 million;
 - 1.7.2 a large credit agreement concluded by a credit provider with a juristic person whose asset value or annual turnover is less than R1 million. A large agreement is either a mortgage agreement or a credit transaction in terms whereof the principal debt equals or exceeds R250,000.00.
- 1.8 The CPA does not apply to a transaction that constitutes a credit agreement under the NCA but the goods or services that are the subject of the credit agreement are not excluded from the ambit of the CPA.
- 1.9 Provision is made in the CPA for the disclosure of prescribed information to the consumer and any notice, document or visual representation must be in the form prescribed or otherwise in plain language. When a written agreement is entered into, it must apply with these requirements, including, the price of goods or services

2 THE DEBTOR – CREDITOR RELATIONSHIP

- 2.1 The fundamental relationship between a bank and its client is that of creditor and debtor. The client whose account is in credit is a creditor who makes a loan to the bank; the roles are reversed when the account is in debit as the bank becomes the creditor and the client the debtor.
- 2.2 Entries in the bank's books constitute *prima facie* evidence of the transactions, but a court is not precluded from looking "behind" the entries to ascertain the true nature and state of affairs.

3 CONFIDENTIALITY

- 3.1 Banks obtain access to confidential information of customers and there exists a tacit or implied term requiring the bank to treat such information as secret, but the obligation is not absolute.
- 3.2 The duty to respect the customer's privacy and protect the confidentiality of the customer's information is expressly recognised in the Code of Banking Practice. Therefore, the customer's personal details must not be disclosed by the bank to any one, not even to other companies in the same group, unless the bank is compelled by law to do so or disclosure is in the public interest or in the interests of the bank or is done at the request or with the consent of the customer.
- 3.3 However, the Bank may sue its own customer, thus revealing the details of the account in court papers.

4 **THE MANDATE**

- 4.1 A bank may not debit a client's account without due authority, but we live in the electronic age and in many instances it is no longer necessary for the customer to interact directly with a bank official when transacting business on an account.
- 4.2 Electronic transactions are also governed by the Electronic Communications and Transactions Act, 25 of 2002. The use of data messages is governed by this Act, which must be read in conjunction with the contractual terms governing the bank – client relationships in electronic banking.
- 4.3 The customer has the onus to prove that the bank has exceeded its mandate.

5 **INTEREST RATE**

- 5.1 If the rate of interest is not agreed or recorded in the loan agreement, the rate of interest applicable to the overdraft (or in terms of another type of loan agreement) is the rate prescribed by the Minister of Justice (commonly referred to as *mora* interest).
- 5.2 As at 1 June 2013 the *mora* rate was 15.5% per annum.
- 5.3 The *in duplum* rule provides that interest stops running as soon as unpaid interest is equal to the outstanding capital.
- 5.4 It is customary to charge compound interest on overdrawn accounts. In the absence of agreement to the contrary, the bank is entitled to vary the rate of interest charged on the overdraft unilaterally up to the maximum permissible rate.
- 5.5 The maximum interest rates are stipulated in the NCA, the Prescribed Rate of Interest Act.

6 **CESSION OF BANK'S CLAIM AGAINST THE CUSTOMER**

- 6.1 The bank may cede its claim against the customer for payment of the loan to a third person, without the customer's permission, unless the loan agreement records the contrary.
- 6.2 The cession by the bank of its claim against the customer to a third party is considered not to be an infringement of the bank's confidentiality obligations owed to its customer as the bank is furthering or protecting its own interests.

7 **SET-OFF**

- 7.1 Generally, set-off takes place by the operation of law.

- 7.2 The right of a banker to set-off one account against another is well established on condition that both accounts are in the name of the same customer.
- 7.3 In the Code of Banking Practice, the bank undertakes to inform a client of any rights to set-off that it might claim.
- 7.4 The requirements for set-off are the following:
 - 7.4.1 the debts must be owed between the same persons in the same capacities;
 - 7.4.2 the debts must be of the same kind;
 - 7.4.3 the debts must be due and enforceable (set-off cannot operate if there is a valid defence to one of the claims);
 - 7.4.4 both debts must be liquidated (i.e. being money).

8 **PROOF OF THE DEBT**

- 8.1 A provision in a loan agreement or deed of suretyship thereto providing that a certificate issued on behalf of the bank "shall be *prima facie* evidence of" the amount owed places the onus of rebuttal on the customer seeking to avoid quantification of the bank's claim. Remembering that the bank has to prove the precise amount it claims from the customer in the summons issued against the customer.
- 8.2 The purpose of the aforementioned certificate is to facilitate proof of the amount of the customer's indebtedness. If the *prima facie* evidence is not rebutted at the close of the case it becomes sufficient proof. The customer has to do more than cast doubt and aspersions on the calculations set out in the certificate.
- 8.3 However, a loan agreement or deed of suretyship which contains the clause that the certificate aforementioned constitutes conclusive proof of the amount of the customers debt owed to the bank may be unenforceable, being the *contra bonos mores*.

9 **VICARIOUS LIABILITY**

- 9.1 Like all companies, bank's always act through the agency of humans. The decisions and actions of its management are those of the bank and it may be held vicariously liable for the delicts committed by its employees and agents.

10 **SURETYSHIP**

- 10.1 It is standard practice for banks to require corporate borrowers (i.e. the principal debtor) to have directors and/or shareholders bind themselves as sureties for payment of the debt owed to the bank. Even if the borrower is an individual, the bank often requires a deed of surety to be signed by the borrower's spouse or some other third party.
- 10.2 A suretyship must be in writing and must be signed by the surety. The identity of the bank must also be disclosed in the deed of suretyship.
- 10.3 A surety who binds himself as co-principal debtor remains as a surety but, by undertaking this liability, renounces the benefits of excussion and division and becomes liable jointly and severally with the principal debtor.

11 **TYPES OF LENDING AGREEMENTS**

Credit Card Agreements

- 11.1 The credit-card concept involves at least two contracts between at least three parties, namely:
- 11.1.1 between the customer and the bank;
- 11.1.2 between the bank and each supplier.

Independently of these contracts, the customer contracts for the purchase of the goods or services with the supplier. The claims of the supplier for payment are ceded to the bank. The bank then charges the customer's account with the amount reflected on the sales voucher received from the supplier.

- 11.2 In the absence of an agreement to the contrary, the supplier's acceptance of the credit card payment is conditional upon two events the fulfilment of either of which discharges the card user. First, should the card issuer (i.e. the bank) pay the supplier, the first condition is fulfilled and the debt discharged. Second, then the card user pays the card issuer (i.e. the bank) the amount due to the supplier the debt is also discharged, the second condition is fulfilled and the customer cannot be expected to pay the same amount twice.

Instalment Agreements

- 11.3 This relates to the sale of a movable, such as a motor vehicle. Payment of all or part of the purchase price is deferred, and either ownership is reserved or there is the right of re-possession.

Lease Agreements

- 11.4 In the NCA this means a sale whereby transfer of ownership is deferred, whereas a true lease, which may still qualify as a credit agreement, ownership is not transferred from the credit provider to the credit receiver.

Mortgage Agreements

- 11.5 This relates to loans for the purchase of immovable property where the property serves as security for the loan by virtue of the registration of a mortgage over the property in favour of the bank.

Debtor Finance Agreements

- 11.6 An alternative form of overdraft funding is the sale by a customer (normally a corporate customer who has a manufacturing or supply business) to the bank of its invoices issued to its clients.
- 11.7 This type of funding is commonly referred to as factoring finance or debtor finance and is akin to affording the customer an overdraft facility based on the amount of the customers aggregate debtors from time-to-time. This type of lending is governed by written agreements executed between the customer and the bank. Here the bank actually purchases the customers invoices and the bank becomes the owner of the debt owed in terms of the invoice.

Overdraft Agreements

- 11.8 The bank and the customer may enter into an express or tacit agreement that the bank will extend overdraft facilities to the customer. This is a contract of money lent and advanced.
- 11.9 Depending on the terms and conditions of the contract, the bank is not entitled to unilaterally without reason to revoke or suspend the overdraft facilities. Should the customer breach the terms and conditions of the lending contract, the bank may be entitled to suspend or revoke the overdraft facilities. When the overdraft facilities are granted on the strength of security provided, the bank is entitled to terminate the overdraft facilities if the security is withdrawn.
- 11.10 Generally, the bank may not withdraw an overdraft facility granted for a specific period prior to the termination of the period in question, unless the customer is in breach of the terms and conditions governing the lending transaction.
- 11.11 In the absence of an agreement that the overdraft will be operative for a fixed period of time, the bank retains the right to reclaim repayment of the overdraft on demand.

Term Loan Agreements

- 11.12 A fixed amount of money is advanced by the bank to the lender and this amount is repaid in equal monthly instalments over an agreed period, generally not exceeding 60 (sixty) months.
- 11.13 The loan is normally secured by a covering mortgage bond over the lenders immovable property registered in favour of the bank.

12 **BANK'S RIGHT TO ENFORCE PAYMENT**

- 12.1 The NCA prescribes a two stage approach to debt enforcement. The required procedures before debt enforcement are contained in section 129 and the debt procedures in the court are dealt with in section 130.
- 12.2 Section 129 requires a specific notice to be sent to the defaulting consumer in respect of the specific credit agreement before debt enforcement, drawing the default to the consumers notice.
- 12.3 Section 130 contemplates the bank being entitled to approach the court for an order to enforce a credit agreement if the consumer has been in default under the credit agreement for at least twenty (20) days after the receipt of the notice contemplated in section 129.
- 12.4 Where the NCA is not of application, the bank's rights are determined by the applicable lending contract, the common law and any applicable legislation. Generally, in these circumstances, there is no need for the bank to first address a letter of demand, subject to the terms of the applicable lending contract.
- 12.5 Provided the bank has complied with the prescribed formalities, for example, sections 129 and 130 of the NCA, it is permitted to institute legal proceedings for recovery of payment of the debt and, if applicable, exercising its rights to any security, for example mortgaged immovable property or the financed vehicle.
- 12.6 Legal proceedings are governed by the applicable rules of court.