

## CASES / VONNISSE

### THE BANK'S RIGHT TO CANCEL THE CONTRACT BETWEEN IT AND ITS CUSTOMER UNILATERALLY

**Bredenkamp v Standard Bank of South Africa  
Ltd 2010 4 SA 468 (SCA)**

#### **1 Introduction**

Does a bank have the right to cancel the contract between it and its customer unilaterally?

This was the crisp question put to the court in the recent decision in *Bredenkamp v Standard Bank of South Africa Ltd* (2010 4 SA 468 (SCA); 2010 4 All SA 113 (“*Bredenkamp*: appeal”). Before this case reached the Supreme Court of Appeal (“SCA”), two lower courts were asked to pronounce on the same question (see *Bredenkamp v Standard Bank of South Africa* 2009 3 All SA 339 (GSJ); 2009 5 SA 304 (GSJ) (“*Bredenkamp*: interim application”)); and *Bredenkamp v Standard Bank of South Africa Ltd* 2009 6 SA 277 (GSJ) (“*Bredenkamp*: main application”). (In passing it should be mentioned that Bredenkamp’s name was spelt incorrectly in the citation of both the interim and main applications; Bredenkamp’s name was correctly spelt in the citation of the decision of the SCA).

The present discussion will refer to all three these decisions.

#### **2 *Bredenkamp v Standard Bank of South Africa***

##### **2.1 *Facts***

Bredenkamp was a businessman of substantial means. He and the other three applicants (which were companies and trusts under his control) held bank accounts of various kinds at Standard Bank. All these accounts were in the nature of a current account.

On 25 November 2008 the American Department of Treasury’s Office of Foreign Assets Control (“OFAC”) listed Bredenkamp and the other applicants as “specially designated nationals” (“SFNs”). This meant that they became subject to the sanctions imposed and enforced by OFAC. On the following day Standard Bank became aware of Bredenkamp’s listing and that OFAC *suspected* Bredenkamp of “being involved in illicit business

activities including tobacco trading, arms trafficking, oil distribution, diamond extraction and of being a confidant and financial backer of Zimbabwe's Robert Mugabe" (par 6).

During December 2008, Standard Bank decided to terminate the relationship between it and Bredenkamp and to close the accounts which Bredenkamp had with Standard Bank.

There were three reasons why Standard Bank decided to close Bredenkamp's accounts: first, the mere fact of the OFAC designation of Bredenkamp and the other three applicants; secondly, the risk that Standard Bank's reputation may negatively be affected should it continue to have Bredenkamp as a customer; and thirdly, there were certain business risks for Standard Bank should it carry on granting banking facilities to Bredenkamp and the business entities under his control because of his listing as a SFN.

Standard Bank argued that the contract between itself and Bredenkamp contained a clause, express or tacit, in terms of which itself had the right to terminate the contract for good cause, bad cause or no cause at all (hereinafter "the *lex commissoria*").

These facts were trite and common to all three *Bredenkamp* cases. The decision in each of the three decisions will be discussed under separate headings below.

## 2.2 *The interim application in the Bredenkamp case*

Bredenkamp applied for an interim interdict to prevent Standard Bank from closing his bank accounts and thus to retain the *status quo*.

The crisp issue before the court was whether Standard Bank had the right to terminate the bank-customer relationship (*ie*, the agreements between it and Bredenkamp) and to close Bredenkamp's bank accounts unilaterally (par 12).

In the interim application Jabjhay J held that the decision by Standard Bank to terminate its relationship with Bredenkamp was not reasonable and granted the relief sought by Bredenkamp.

Jabjhay J held that Standard Bank's decision to terminate its relationship with Bredenkamp was based squarely on perceptions (regarding the latter's business activities and connections with Mugabe) and not on facts.

These perceptions might possibly have been wrong. In his replying affidavit Bredenkamp pointed out that he was not a "Mugabe crony and had in fact been imprisoned by the Mugabe regime" (par 36). He further pointed out that he and the other applicants "should never have been placed on any sanctions list" (par 37). They were in the process of having their names removed from the sanctions list at the time of when Bredenkamp launched his application (par 37).

The court considered Bredenkamp's *prima facie* right to an interdict in the light of recent constitutional law developments, and especially the court's duty to develop the common law through the Constitution (par 59).

It held that contractual relations, because they are regulated by the common law, are not immune from constitutional control and scrutiny. In this regard Jabjhay J relied on the decision in *Barkhuizen v Napier* (2007 5 SA 323 (CC)), which dealt with a potentially unfair term in an insurance contract, as authority for the proposition that a party to a contract cannot, first, impose a term on another party if it would, if applied, operate unfairly and cannot, secondly, enforce a term in a manner that is unfair (par 48).

In applying the guidelines as to the role of public policy and constitutional control in scrutinizing the fairness or otherwise of a contractual relationship, Jabjhay J pointed out that South African banks operate within the framework of an oligopoly in which the four large banks dominate the market for banking services (par 60). The court further held that this power is exploited by banks to impose standard-form contracts on their customers. Such powers would be exercised oppressively and there was undeniably an element of oppression when a bank decided to terminate the contract without good cause (par 62).

The court reasoned that Standard Bank had a range of alternative options available to it before resorting to the drastic expedient of closing Bredenkamp's accounts. These alternatives included a request for an undertaking by Bredenkamp (as he indeed offered to do in the present proceedings) to refrain from dealing with nationals from certain foreign jurisdictions; effective reporting on transactions by Bredenkamp that might be deemed controversial; and special monitoring of the accounts pending the final determination of the present dispute (par 64).

Thus, Standard Bank's decision to close all Bredenkamp's accounts summarily was not reasonable; it operated unfairly towards Bredenkamp; and was not in line with the constitutional guidelines laid down in *Barkhuizen v Napier* (par 68 and 71).

The court accordingly granted an interim interdict to restrain Standard Bank from terminating the accounts pending the determination of the main case (par 78).

Jabjhay J's reasoning in the interim application was controversial and not convincing. That was clear from the decision in the main application as well as the decision on appeal. Quite understandably, the court's decision caused the proverbial flutter in the banking dove cote.

### 2.3 *The main application in the Bredenkamp case*

In the main application in *Bredenkamp v Standard Bank* the court rejected Jabjhay J's reasoning when allowing the interim application. In the main application, the court confirmed a bank's right to terminate the relationship between it and its customer unilaterally, provided that certain requirements are met (par 64, 67 and 68).

The court examined the constitutionality of the *lex commissoria* present in the contract between Bredenkamp and Standard Bank. It was common cause that the *lex commissoria* in itself did not offend any constitutional values. The issue to be decided was whether or not in the particular circumstances of the case, the manner in which Standard Bank implemented

the *lex commissoria* entitling it to cancel the contract, offended any constitutional values (par 14).

Lamont J applied the approach in determining the fairness of enforcing contractual rights in the light of the applicable constitutional values as laid down in *Barkhuizen v Napier* (*supra*). Firstly, if a contractual clause is reasonable in a general sense, it must also be established whether the enforcement of the clause is reasonable in the light of the particular circumstances. Secondly, public policy dictates that parties should comply with their contractual obligations, but also incorporates notions of fairness, justice and reasonableness (par 16).

Applied to the specific circumstances present in the *Bredenkamp* case, the court held that the parties contracted on an equal footing, even though the contract was concluded on the basis of the bank's standard form contract (par 22). The court was at pains to emphasize that Bredenkamp, as well as the individual business entities which he represented, was a formidable *persona* and customers of Standard Bank. Bredenkamp was an international commodities trader who represented a multi-national entity of great wealth. Bredenkamp himself was reputed to have a USD 350 million fortune and was reported to be the seventy-sixth richest man in England in 1996 (par 25). There was further no evidence before the court that a bank is generally in a position to impose terms on prospective or existing customers (par 24).

This reasoning merits some comment. It is important to observe that the court held that in the absence of evidence to the contrary placed before it, a bank cannot generally be regarded to be in a position to impose terms on its customers. I believe that in practice banks will be extremely reluctant, if not unwilling, to deviate from using its standard-form contracts when contracting with a customer. This will especially be the case where the customer is not a particularly financial strong one with substantial bargaining power. Had Bredenkamp's case been presented differently before the court, and had the necessary evidence that banks and their customers generally don't contract on an equal footing (evidence which undoubtedly exists) been placed before the court, the outcome of its decision on this particular point (*ie*, regarding the general bank practice of imposing terms and conditions on customers) might easily have been different. Further, had Bredenkamp not been such a financially powerful customer, the court's *obiter* comments on the use of potentially unfair terms by banks might also have been different. Put differently, another court, on another day, dealing with a slightly less affluent customer (and therefore negotiating to terms of his contract with the bank from a less powerful position) may well lend a more sympathetic ear to the accusation levelled against a powerful bank imposing standard-form contracts on its customers.

The court concluded its reasoning on this point and held that there was no evidence that Bredenkamp was unable to obtain a bank account with any other bank, that is, that he was "unbanked" after Standard Bank had decided to terminate the contractual relationship between them (par 45 and 46).

As far as Bredenkamp's integrity was concerned, the court held that a bank is entitled to rely on the integrity of its customers to conduct their business legally. A bank also has certain obligations and regulations to

comply with in terms of national and international legislation (par 49). (For a list of legislative and other international requirements which a bank has to comply with when considering to conduct business with an applicant for a bank account with it, see par 49-51.) Failure to comply with these regulations may have serious legal consequences for a bank (par 32).

The court further emphasized the multi-faceted duties which rest on a bank when dealing with a customer, including its common-law duties in terms of the bank-customer relationship. In this regard it held that

“[t]he banker/customer relationship should not be seen in isolation in relation only to its impact upon persons within the country in which the bank operates. This is particularly so when the customer is an international entity. The bank inevitably, if it deals with an international entity, will be dealing with other international entities at the request of the customer. The bank in its dealings in the international world on behalf of the customer becomes obliged, in my view, to have regard to the impact of its actions in the international world. The need for dishonest people to set up international structures, to make use of a variety of banks internationally for the process of laundering monies and implementing fraudulent conduct is widely known. Steps are taken on an international basis to limit the activities of such persons. In my view, even if the foreign legislation does not have the effect of law nationally, to the extent that it has an impact on the relationship between the bank and external bodies, the bank is entitled to have regard thereto. The bank is an entity which on behalf of all of its customers performs acts for them throughout the world. These acts may be compromised if other persons in other jurisdictions take steps against them” (par 53).

The court concluded that the OFAC listing entitled Standard Bank to reassess Bredenkamp’s account. It was entitled to act reasonably on receiving such information, including terminating Bredenkamp’s account (par 55).

Bredenkamp appealed to the Supreme Court of Appeal.

#### 2 4 *The Bredenkamp appeal*

The Supreme Court of Appeal dismissed Bredenkamp’s appeal. Harms DP held as follows:

Firstly, Bredenkamp’s acceptance of the provisions of the contract which entitled Standard Bank to terminate the contract on reasonable notice as fair and reasonable, and therefore not in conflict of any constitutional values, limited Bredenkamp’s complaint to the exercise of the admittedly “fair” and valid *lex commissoria* (par 27).

Secondly, it was trite that it was not Bredenkamp’s case that Standard Bank’s right to cancel the contract implicated any constitutional principle, compromised constitutional democracy, or his dignity, and freedom or right to equality. The present case was about fairness as an overarching principle, and nothing more (par 30).

Thirdly, the court rejected the argument that recent case law had revived the *exceptio doli generalis*. The *exceptio doli generalis* was rejected more than two decades ago in *Bank of Lisbon & South Africa Ltd v De Ornelas* (1988 3 SA 580 (A)) as an anachronism which did not form part of South African law. Notwithstanding a bulky body of academic writings in which the

decision in the *De Ornelas* case was lamented, the court in *Bredenkamp* was at pains to emphasize that the *exceptio doli generalis* was simply a convenient label for a number of rules, but that it had no specific content (par 32-35).

Fourthly, Bredenkamp's argument that the decision in the *Barkhuizen* case had to be interpreted to entail that all contractual provisions have to be "reasonable", was rejected (par 26).

Fifthly, it held that the *Barkhuizen* case was not authority for the proposition that fairness is a core value of the Bill of Rights and that it is therefore a broad requirement of our law generally. Such an interpretation of the *Barkhuizen* case would lead to all types of absurdities and impracticalities. For example, a debtor would be able to argue that it would be unfair of a creditor to call up a loan on the due date because the debtor is unable to repay the loan and that enforcement could lead to the latter's sequestration (par 43-49).

Sixthly, it held that the *Barkhuizen* case was further not authority for the proposition 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 was implicated (par 50-51).

Seventhly, the principle of *pacta sunt servanda* (ie, contractual obligations must be honoured) was held to be a core principle of our law of contract, only limited by principles of public policy (par 37-38).

The court concluded that because of its decision that fairness was not a freestanding requirement of a contractual right, it was strictly speaking unnecessary for it to consider the facts of the *Bredenkamp* case relating to the requirement of fairness. It nevertheless held, by way of a list of *obiter dicta*, that Standard Bank had acted fairly in terminating its relationship with Bredenkamp.

Finally, the court considered the question whether Standard Bank had (in terms of the relief sought) good cause to close Bredenkamp's accounts. The court pointed out that the agreement between Standard Bank and Bredenkamp contained a valid *lex commissoria* that gave Standard Bank the right to cancel the contract. Standard Bank perceived that Bredenkamp's listing created reputational and business risks for it. It applied its mind to the matter and exercised its right of termination in terms of the *lex commissoria* in a *bona fide* manner. It gave Bredenkamp a reasonable time to take his business elsewhere. The termination of the agreement did not offend any identifiable constitutional value and was not contrary to any other public-policy consideration. Finally, the court pointed out that Standard Bank did not publicize the closure of Bredenkamp's accounts or the reasons for its decision to close the accounts (par 64).

The appeal was accordingly dismissed with costs. Application for leave to appeal to the Constitutional Court was dismissed (see asterisk footnote at 470J).

### 3 Comment

#### 3.1 *General*

Although the decision in the main application, as well as that on appeal in *Bredenkamp v Standard Bank*, is correct, they nevertheless merit a few comments.

Firstly, both decisions will be welcomed by the banking industry. It would have created an untenable situation for banks (as the court per Jadhav J held in the interim application in the *Bredenkamp* case) if certain individuals or juristic persons, who conduct their business affairs in dubious ways, could be forced upon a bank. Suffice it to say that not only are banks at financial risk in doing business with this category of customers, but it may also impact on their business reputation and good name.

Secondly, the decision in the main case, as well as on appeal, in stark contrast with the court's decision in the interim application, constituted a correct exposition of the relevant legal principles relevant to the termination of the bank-customer relationship.

On appeal Bredenkamp presented his case as one dealing with constitutional issues: firstly, that the benchmark for the constitutional validity of a term of a contract is fairness; and secondly, that even if a contract is fair and valid, its enforcement must also be fair in order to survive constitutional scrutiny. In doing so, Bredenkamp relied heavily on the decision in *Barkhuizen v Napier (supra)*. But the Supreme Court of Appeal rejected Bredenkamp's arguments and reasoned that *Barkhuizen v Napier (supra)* is not authority for the interpretation which Bredenkamp sought to impose in it.

Because the Supreme Court of Appeal rejected Bredenkamp's reliance on *Barkhuizen v Napier (supra)*, and also because the Supreme Court of Appeal held that no public-policy consideration was infringed in the *Bredenkamp* case, I shall in the present note not discuss any of these two aspects. Rather, I shall focus on two issues that are relevant to the bank-customer relationship in general, but which did not arise for decision and were not otherwise broached in any of the three *Bredenkamp* cases. Firstly, although the bank-customer contract in the *Bredenkamp* case contained a *lex commissoria* (ie, an express term which entitled Standard Bank to cancel the agreement unilaterally), I believe it is necessary also to consider the legal position where the bank-customer contract does not contain such a *lex commissoria* (see par 3.2 below). Secondly, I shall attempt to compile a check-list of requirements that a bank has to comply with, should it wish to terminate a bank-customer relationship (see par 3.3 below).

#### 3.2 *The contract of mandate as the underlying contract of the bank-customer relationship*

It is trite that the relationship between a bank and its customer is based on contract. The bank-customer relationship is a multi-faceted one. The complex relationship between a bank and its customers was discussed in

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*Standard Bank of SA Ltd v Absa Bank Ltd* (1995 2 SA 740 (T) 746G-747E; 1995 1 All SA 535 (T)). Mandate is but one of various types of contract which come into play when one attempts to describe the bank-customer relationship. Other types of contract which could also form the basis of that relationship include loan for use, depositum and deposit-taking. In the *Bredenkamp* case the customer held a number of current accounts with Standard Bank. It is trite that the type of contract which underlies a current account, is that of mandate. In terms of this contract of mandate, the customer lends money to the bank on current account, the bank undertakes to repay it on demand by honouring cheques drawn on it, and to perform certain other services for the customer, such as the collection of cheques, the payment of stop and debit orders, and the keeping and accounting of the customer's accounts with the bank.

The same approach in dealing with the bank-customer relationship is followed in codified legal systems. The bank-customer contract is merely another type of obligation (contract) and is regulated by the provisions of a Civil Code as well as a Commercial Code. A typical example of a codified legal system would be Maltese law. (For a discussion of the rules pertaining to the bank-customer relationship under Maltese law, see Randon *Aspects of Maltese Law for Bankers* (1983) 1 *et seq.* Under Maltese law, any "banking transaction" is categorized as a "commercial obligation" in terms of s 5 of the Commercial Code.)

For purposes of the present note, I shall thus restrict myself to a discussion of mandate as the underlying source of the bank-customer relationship. More specifically, I shall focus on the question whether the bank has the right to cancel the contract of mandate which exists between it and its customer unilaterally where the contract does not contain a *lex commissoria*.

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. The contractual relationship between a bank and its customer is but another type of contract and all the general principles of the law of contract apply, or should in principle apply, to the contract between a bank and its customer. One of the consequences of this is that the contract between a bank and its customers must satisfy all the general requirements for the validity, enforcement and termination of a contract (see Schulze "The Sources of South African Banking Law – A Twenty-first Century Perspective" 2002 14 *SA Merc LJ* 438 439; and on the bank-customer relationship in general, see Moorcroft assisted by Raath *Banking Law and Practice* (2009) par 15.1.)

The bank-customer contract is a consensual contract that may be terminated in the same way as any other consensual contract (Malan, Pretorius and Du Toit *Malan on Bills of Exchange, Cheques and Promissory Notes* 5ed (2009) par 214). No contract can continue perpetually against the will of either of the parties. This will also be the case where the bank-customer contract is one of mandate. A mandate is dissolved by renunciation on the part of the mandatary (here: Standard Bank). The mandatory (here: Bredenkamp) also has no claim if the mandatary had good reason to terminate the mandate (see Joubert and Van Zyl *Mandate and*



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*Negotiorum Gestio* in Joubert (original editor) *LAWSA* Vol 17, reviewed by Van Zyl, par 16; and Kerr *The Law of Agency* 4ed (2006) 200).

In *Putco Ltd v TV and Radio Guarantee Co (Pty) Ltd and Other Related Cases* (1985 4 SA 809 (A)) the court acknowledged the existence of an implied term to the effect that an indefinite contractual relationship may be terminated with reasonable notice (see, in this regard, also *Amalgamated Beverage Industries Ltd v Rond Vista Wholesalers* 2004 1 SA 538 (SCA)).

It is also important to note that the contract between a bank and its customer, like most commercial contracts, is generally not a fiduciary one in the sense that it contains a higher level of trust (see Robin Alexander Fisher *Grant's Treatise on the Law Relating to Bankers and Banking Companies* 3ed (1873) 1-2). The position would, of course, be different where the bank acts as trustee of a customer's trust company (see Wadsley and Penn *The Law Relating to Domestic Banking* 2ed (2000) 283 *et seq.*).

Also under English law the bank-customer relationship may be terminated in accordance with the terms agreed upon by the parties. It goes without saying that in the case of, for example, a fixed deposit, neither the bank nor the customer can terminate the agreement before the appointed day without the consent of the other party.

But in the case where the customer holds a credit balance in a current account, the customer is entitled to terminate the relationship at any time by withdrawing the funds from the account and so terminating the relationship (Ellinger, Lomicka and Hooley *Ellinger's Modern Banking Law* 4ed (2006) 195-196). Where the bank wishes to terminate the agreement, the position is different. For example, the customer may have asked his debtors to pay amounts due to him directly to the credit of his account. It could cause embarrassment, if not inconvenience, if the cheques or other effects were returned to the drawers, accompanied by a note stating that the account had been closed. This is what happened in *Prosperity Ltd v Lloyds Bank Ltd* ((1923) 39 TLR 372). The court held that the account could be closed only upon the giving of reasonable notice (see Ellinger, Lomicka and Hooley 197 for a discussion of the *Prosperity* case).

The requirement that the bank must give notice to a customer of its intention to terminate their agreement was explained in *Joachimson v Swiss Bank Corporation* ([1921] 3 KB 110 125), where it was held that "[t]here are some points in reference to the relation of banker and customer which seem to ... indicate that such obligation [ie, to give notice to the customer] is part of the contract". The court further held that it is "well settled that a banker is not at liberty to close an account in credit by payment of the credit balance without giving reasonable notice, and making provision for outstanding cheques".

The underlying contract between a bank and the holder of a current account is that of mandate. The duties of the mandatary (ie, the bank) include that of protecting the confidentiality of the affairs of the mandator (here: the client of the bank). In South Africa, the duty of confidentiality is a *naturalia* of the contract between a bank and its customer (that is, the law regards it as part and parcel of the contract). In this regard it has been held that the duty is a tacit or implied term of the contract between a banker and

its customer. A distinction has also been drawn between a contract of loan between a bank and its customer, on the one hand, and a contract of loan which does not involve a bank (see *Joachimson v Swiss Bank Corporation supra* 126, where the court seems to suggest that with a contract of loan where the lender of the money is not a bank, no prior notice by the lender to the borrower is required). However, the reasoning in the *Joachimson* case is not convincing and it may be suggested that in the absence of a term to the contrary, some form of notice is necessary, irrespective of the status of the parties involved in the loan.

Although the contract between a bank and its customer may generally be terminated unilaterally, it cannot necessarily be terminated without giving prior notice to the other party. In the light of the fact that the common-law principles of the law of contract apply to the bank-customer relationship, a bank may, in the absence of a cancellation clause (*ie*, a *lex commissoria*) only resile from the contract if the breach of contract by the customer is serious (see Van der Merwe, Van Huyssteen, Reinecke and Lubbe *Contract. General Principles* 3ed (2007) 356). The test for seriousness has been expressed in many ways, for example that the breach must go to the root of the contract or that it must relate to a material or essential term of the contract (see Van der Merwe, Van Huyssteen, Reinecke and Lubbe 356).

I have already pointed out that the underlying contract between a bank and the holder of a current account is that of mandate. The duties of a party to the contract of mandate include the duty not to cause damage to the other party. I believe that where a customer of a bank conducts his business in a way which poses operational and business risks to the bank, the latter can validly argue that the mandatory (*ie*, the customer) acts in conflict with this duty (Joubert *Die Suid-Afrikaanse Verteenwoordigingsreg* (1979) 190 *et seq*). Such conduct would probably satisfy the test of seriousness and will allow the bank to cancel the contract unilaterally, also in the absence of a *lex commissoria*.

Should the bank wish to cancel the contract, the customer must receive actual notification of the bank's decision to resile (see Van der Merwe, Van Huyssteen, Reinecke and Lubbe 401).

### 3.3 *A check-list of requirements for a bank to cancel validly the contract with its customer*

The decision in *Bredenkamp v Standard Bank* confirms the principle that the bank-customer contract may be terminated unilaterally by either of the parties. But what are the steps to be taken when a bank wishes to terminate unilaterally and validly the contract between it and its customer?

Firstly, the right to (unilaterally) cancel the contract will usually be entrenched in the contract (*ie*, by an express *lex commissoria*). But such right may also have its origin in an implied term of the contract. An implied term is one implied by law into all contracts of a particular nature (*ie*, it is a *naturalia*). I believe an implied term may also have its origin in a trade usage. It is nevertheless recommended that a bank includes an express *lex commissoria* in the contract with its customer. Where the contract does not

contain an express or implied *lex commissoria*, the party who wishes to resile from the contract (here: the bank) can obtain the right to cancel the contract if the breach of contract by the customer is serious (see again Van der Merwe, Van Huyssteen, Reinecke and Lubbe 356).

Secondly, the bank should consider and assess the reasons for its decision to cancel the contract with its customer. In short, it must apply its mind to the matter. Closely linked to this requirement is the requirement that the bank must come to the conclusion to terminate the agreement and to exercise its rights of termination in a *bona fide* manner (see the *Bredenkamp* appeal, par 64).

Thirdly, the bank would in the ordinary course of events not be under any obligation to inform the customer of its *reasons for termination*. The motive of a party in exercising a (contractual) right is usually irrelevant. However, it is strongly advised that a bank does inform a customer of the reasons for exercising its contractual rights. An absence of such communication could easily be construed as an absence of *bona fides*, or even worse, as a possible abuse of contractual rights by the bank (see the *Bredenkamp* appeal, par 59; and Van der Merwe, Van Huyssteen, Reinecke and Lubbe 401-402).

Fourthly, whereas a customer may terminate the contract summarily, the bank must give reasonable notice of termination. The court in *Bredenkamp v Standard Bank (supra)* confirmed the principle that if the bank wishes to terminate the contract, it must give reasonable notice. What a reasonable notice is will depend on the circumstances of each case. Banks undertake in the Banking Code that they will not close customers' accounts without giving them "reasonable prior notice" (see clause 4.10.1 of the *South African Code of Banking Practice*: [http://www.banking.org.za/code\\_of\\_banking\\_practice/](http://www.banking.org.za/code_of_banking_practice/) (accessed on 2010-09-2010)). In terms of the English Banking Code, banks undertake to give their clients at least 30 days' notice prior to the closing of an account (see Wadsley and Penn 231). I believe that, generally, a period of 30 days will constitute a reasonable notice.

Fifthly, the bank must ensure that its decision to terminate the contract does not cause the customer to become (temporarily) unbanked unless there are compelling reasons. I believe that the circumstances present in the *Bredenkamp* case constituted a good example of the type of situation that would excuse a bank from the obligation of preventing the customer from becoming unbanked. The reasons and circumstances which led to Standard Bank's termination of the contract would in all likelihood also have caused other banks to terminate any bank-customer relationship with Bredenkamp. In these circumstances Standard Bank would find it difficult, if not impossible, to convince another bank to take Bredenkamp as a customer. In this regard Harms DP's reasoning in the *Bredenkamp* appeal is compelling: "I find it difficult to perceive the fairness of imposing on a bank the obligation to retain a client simply because other banks are not likely to accept that entity as a client" (par 60).

Sixthly, the termination should not offend any identifiable constitutional value and the decision to terminate the agreement must not be contrary to any other public-policy consideration. For example, the reason to terminate

the contract must not constitute an act of discrimination based on grounds of gender, race, culture or religion (see the *Bredenkamp* appeal, par 64-65).

Finally, it should be pointed out that where the bank has terminated the contract, it generally remains obliged to keep confidential certain information concerning its former customer (see *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 772-473, where the duty of confidentiality which exists between a bank and its customers was acknowledged and explained). The bank's duty of confidentiality was first recognized in South African law in *Abrahams v Burns* (1914 CPD 452 456). It was subsequently further commented on and explained in *Cambanis Buildings v Gal* (1983 2 SA 128 (N) 137F); *GS George Consultants & Investments (Pty) Ltd v Datasys (Pty) Ltd* (1988 3 SA 726 (W) 735C-H); and *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* (1991 1 SA 100 (A) 109G-H). (There is a spate of South African academic materials in which the origin and scope of banking confidentiality are discussed: see Schulze "Big Sister is Watching You: Banking Confidentiality and Secrecy under Siege" 2001 13 *SA Merc LJ* 601 602, where a small number of these sources is listed.)

In *Firstrand Bank Ltd v Chaucer Publications (Pty) Ltd* (2008 2 SA 592 (C)) it was held that only the client of a bank (and not also the bank) may invoke the privilege of bank-client secrecy in order not to have the dealings of the client with the bank disclosed to the general public. Where a bank seeks to protect the rights of its clients by bringing a class action, certain requirements must first be met (for a discussion of these requirements, as well as other aspects relevant to the decision in *Firstrand Bank v Chaucer Publications*; and see Schulze "Financial Institutions and Stock Exchanges" 2008 *Annual Survey of South African Law* 359 373 *et seq*).

Upon termination of the bank-customer agreement, the bank's duty of confidentiality ceases to have a *contractual* obligation. But it nevertheless continues to exist and a bank should not without "good cause" disclose any confidential information about the former customer's banking affairs. Disclosure of a customer's banking affairs may be made under the following circumstances:

- (a) where disclosure is under compulsion of law;
- (b) where there is a duty to the public to disclose;
- (c) where the interests of the bank require disclosure; or
- (d) where the disclosure is made by the express or implied consent of the customer (see *Tournier v National Provincial and Union Bank of England supra* 473).

Thus, only where there is an overriding principle which requires disclosure of the customer's affairs, such as the circumstances present in *Bredenkamp v Standard Bank*, is a bank allowed to disclose it. I believe that in the *Bredenkamp* case there was indeed, on Standard Bank, if not a public duty, then at least a duty to the banking community at large to disclose to that community that it had terminated the agreement with Bredenkamp and also to disclose the reasons for terminating the relationship.

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## 4 Conclusion

The decision in both the main application and the appeal of the *Bredenkamp* case is sound and cannot be faulted. The Supreme Court of Appeal's interpretation and explanation of the principles first laid down in the *Barkhuizen* case constitute a correct application of the constitutional principles underlying the enforcement of contractual terms. It correctly held that *Barkhuizen* was not authority for the proposition that the enforcement of valid contractual terms had to be fair and reasonable. It further held that the *Barkhuizen* case did not lay down an overarching requirement of fairness in contracts (par 51-52).

Although the court's comments in respect of a bank's common-law right to terminate the contract between it and its customers unilaterally were made *obiter dicta*, there can be little doubt that had *Bredenkamp's* case been presented as a contractual issue, the outcome of the case would have been the same. In this respect the court's *obiter* comments as to the steps which a bank should take when it wishes to terminate the contract with its customers, will surely prove to be valuable guidelines if and when a future case dealing with similar facts serves before our courts (see again par 3 3 above for a detailed discussion and further expansion of these steps or requirements).

WG Schulze  
*University of South Africa (UNISA)*