NATIONAL UNIVERSITY OF LESOTHO

# The Banker's Duty of Care with Regard to Financial Advice

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Dedication

For Neo Justinus Mosese

We miss you and love you always.

Declaration

I Nteboheng Mosese, solemnly declare that this mini dissertation has not been submitted for a qualification in any other institution of higher learning, nor published in any journal, textbook or other media. The contents of this dissertation entirely reflect my own original research, save for where the work or contributions of others has been accordingly acknowledged.

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Place: Roma

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CHAPTER ONE

# 1.Introduction

## 1.1General Introduction

The banker-customer relationship is best described as contractual in nature.[1] By this is meant that the rights and the obligations of the parties arise from the contract that exists between them. In spite of that, however, other terms are usually implied into the contract by common law. These implied terms impose superadded obligations on the bank.[2] The superadded obligations obligate the bank to provide what are called services *de caisse* to its customer acting on his mandate.[3] A common example of these services is the obligation of the bank to make payment at the instruction of and on behalf of the customer, provided the customer's account is in credit.

The banker-customer relationship that comes into play in respect of the superadded obligations is governed by the law of mandate or agency.[4] This is so because the customer instructs the bank to perform some services on his behalf. The bank acts as an agent and executes the customer's mandate, which elevates the customer to the position of a principal. As the law of agency requires the agent to exercise reasonable care and skill in carrying out the customer's mandate, the bank is obliged by the law to do the same as the agent of the customer.

This duty of care that is owed by the bank to its customer means that the bank should not act negligently in carrying out the customer's mandate.[5] On the other hand, the bank must act diligently or without carelessness. This is important because negligent conduct on the part of the bank may expose the customer's account to financial losses.[6] The bank acts diligently when it acts in a way that a reasonable bank would act under the same or similar circumstances. If the

[1] Chris Nagel & Joseph Thomas Pretorius 'Mandate and the bank and customer relationship' [2016] Vol 79 Journal of Contemporary Roman-Dutch Law p 514 Da Ungaro & Sons (Pty) v Absa bank Ltd [2015] 4 All SA 783.
[2] M.H Ogilvie 'Banks, Advice-Giving and Fiduciary obligation' [1985] Vol 17 Ottawa Law Review p 263.
[3] *Di Giulio v First National Bank of South Africa Limited* [2002] ZAWCHC 33 Para 21 'In essence the contract between bank and customer obliges the bank to render certain services, the so-called services de caisse, to the customer on his instruction and for this reason it can be classified as a contract of mandatum….'
[4] Chris Nagel & Joseph Pretorius (n-1).
[5] M.J.L. 'The Cheques as a mandate to the Banker' [1967] Vol 9 No.2 Malaya Law Review p317.
[6] *FirstRand Bank Ltd v Kgethile* (M370/2018) [2021] ZANWHC 63.

bank fails to act diligently and the customer suffers loss as a result of the bank's negligence, the customer will be entitled to damages either in contract or in delict.[7]

## 1.2 Problem statement

The problem of this study concerns the nature and scope of the banker's duty of care. In particular, this study seeks to critically examine the extent to which the banker owes a duty of care to its customer in respect of financial advice. Customers believe that the bankers are highly qualified and experienced in financial matters.[8] For this reason, customers normally seek financial advice from their bankers on a wide range of issues including financial products, investments, tax avoidance schemes and currency exchanges. The customer, after receiving advice from the banker, will conduct his or her affairs in accordance with that advice.

In some cases, the customer will suffer some financial or economic loss as a result of the advice given to him or her by the bank. When this happens, the customer will bring a claim for damages against the bank on the grounds that the bank rendered a negligent advice. The first legal problem that arises in cases of this nature is that giving advice does not form part of the ordinary business of a banker.[9] Nevertheless, the bank is expected to exercise a reasonable care and skill in rendering advice to the customer. Even though it is not part of its ordinary business if it chooses to render the advice it must do so with expected skill and care.[10]

The second problem which arises in cases of negligent financial advice is whether the relationship between the parties is advisory in nature. If there is no advisory relationship, the bank does not owe the customer a duty of care in giving the advice.[11] This problem relates to the

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[7] *McCarthy Ltd V Absa Bank Limited* 2010 (2) SA 321 (SCA) 'the employees of Absa ought to have suspected that Fourie was not entitled to the cheques, and thus they were negligent in accepting them for collection and therefore the customer was entitled to damages.'

[8] Jim Marous 'Banking industry not meeting basic consumer expectations' <https://www.reseearchgate.net/publication/263372605-Relationships-between-advisor-characteristics-and-consumer-perceptions>= accessed July 28, 2022.

[9] David Allan 'Bankers' Liability for Financial Advice' Melbourne University Law Review Vol 16 (1987) pg 123.

[10] Danny Busch & Cees Van Dam 'A Bank's Duty of Care' Hart Publishing 2017.

[11] *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 'the customer alleged that there was there was an advisory relationship between the bank and the customer which obliged the bank to advice what investments were appropriate for the customer. The court referred to the decision in *Titan steel Wheels limited v The Royal Bank of Scotland Plc* [2010] EWHC 211 where it was held that the scope of the obligations owed by the bank to its customer were fully defined in the contractual terms. The judge held that these terms expressly provided that the bank would not provide advisory services and that any opinions expressed by the bank did not constitute investment advice as might be necessary.

manner in which the courts determine whether there is an advisory relationship between the bank and the customer. It also relates to the factors on which the courts of law rely in determining that issue. Further the problem relates to how the courts differentiate between giving advice and merely giving information.

Since the customer is not experienced in banking business he normally fails to understand the difference between advice and information. In law, however, the giving of advice and the rendering of a mere information on financial matters have different effects for the banker.

Continuing consecutively, if it transpires that there is no existence of advisory relationship, another question which arises is whether the banker's duty to give financial advice must be established in delict or contract. The significance of this question is seen in cases where the contract does not explicitly impose such an obligation on the bank. In the cases of that nature the onus is on the customer to proof that there is an implied contractual duty of care on the banker. It can also be that the bank owed him a duty of care in delict. It is significant in addressing this issue to determine and critically examine different elements considered by courts of law in establishing whether there is any owed duty of care to a customer either in contract or delict with respect to financial advice.

The aforesaid legal issues sufficiently expose the nature of the legal issue which this study seeks to examine, being the circumstances under which and the degree to which the banker owes a duty of care to the customer in relation to financial advice.

## 1.3 Hypothesis

The research proceeds on the presumption that giving financial advice is not ordinary practice of a banking business. However, if a bank chooses to give advice, the duty to advice with care and skill arises. The duty does not arise where the customer is sophisticated. For instance, in syndication of loans, each bank that wants to be part of syndication can investigate the customer on its own before deciding to be part of the syndication.

## 1.4 Aims and objectives

The aims and objectives of this research are to:

(a) Critically discuss the meaning, nature and scope of the banker's duty of care and skill

(b) Critically discuss the extent to which a bank owes the duty of care and skill to the customer with respect to the giving of financial advice.

## 1.5 Research methodology

This study is largely based on literature review of relevant primary and secondary legal sources including case law, legal text books, law journal articles and internet sources from reliable websites. These sources will be subjected to a critical analysis with a view to addressing the research question.

In this thesis, the methodology employs an analytical approach focused on studying court decisions in South African and English law. The purpose of the analytical legal research will be to distil valuable lessons from English law for the development and improvement of South African law.

## 1.6 Chapter outline

The second chapter will discuss in detail the banker's duty of care and skill. The first part of that chapter will discuss the nature of the legal relationship between the bank and the customer. The second part will discuss the meaning and scope of the banker's duty of care and skill. The third part will discuss the nature of the banker's duty of care and the standard of care and skill expected of a banker. The chapter will also discuss the rationale of the banker's duty of care. The fourth part will discuss breach of the banker's duty of care; it will look into judicial guides. The aim of this part is to distil judicial guides for determining the banker's duty of care. Lastly the chapter will discuss causation and the banker's liability for breach of duty of care.

The third chapter deals with the banker's duty of care with regard to financial advice in South African and English law. The first part will discuss bank's liability for negligent advice in both South African and English law. It will look into how these two jurisdictions deal with the cases that result from negligent financial advice. The last part will discuss which of the two jurisdictions deal better with cases of this nature.

The fourth chapter, being the last chapter, covers the final conclusions drawn from the discussion and the analysis made in the foregoing chapters. This chapter contains brief summaries of all the discussions and conclusions made in the entire work, and from all that recommendations follow.

CHAPTER TWO

# 2. The banker's duty of care and skill

## 2.1 Introduction

The aim of this chapter is to critically analyse the banker's duty of care and skill. The first part of the chapter will discuss in detail the legal relationship between the banker and a customer. It is common cause that the relationship between a bank and the customer, in respect of current account, is that of a debtor and creditor. That relationship, however, furthermore obligates the bank to render certain services, the so called services *de caisse*, to the customer on his order.[12] For instance, the bank is obliged to make payment to third parties out of the credit balance remaining in the current account on the instructions of the customer, or to receive payment into that account from third parties on behalf of the customer. This, in turn, creates a relationship of agency between the parties, which imposes a duty on the bank to perform the customer's mandate with reasonable care and skill.

The second part of the chapter will focus on the banker's duty of care and skill. The discussion will explain what the duty of care and skill on the part of the bank entails, the nature of the banker's duty of care and skill, the standard of care and skill expected of a banker, and the rationale behind the banker's duty of care and skill. The third part hereof will critically discuss the guidelines that have been developed by courts of law to help determine whether the bank has breached its duty to exercise care and skill while the fourth part will discuss the liability of a bank where the duty of care and skill has been breached. Conclusions will follow.

## 2.2 The relationship between a bank and the customer.

It is generally accepted that the relationship between the bank and the customer is contractual in nature.[13] This relationship is said to be contractual in the sense that the rights and obligations of the parties are created by agreement. As a result, the characterization of the bank-customer relationship frequently differs from one customer to another depending on the terms of the

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[12] F R Malan & J T Pretorious, *Malan on bills of exchange, cheques and promissory notes in South African Law* (3rd ed,1997) par 203 p334.

[13] All Answers ltd, 'Legal Relationship between Bank and Customer' (Lawteacher.net, May 2022) <https://www.lawteacher.net/free-law-essays/commercial-law/general-legal-relationship-between-bank-and-customer-commercial-law-essay.php?vref=1 >accessed 19 May 2022.

agreement concluded by each customer with the bank. In explaining the relationship between the banker and customer, Moseneke AJ correctly cautioned in the case of *Standard Bank of SA Ltd v Absa Bank Ltd*[14] that, the right direction to utilize is not to employ inflexible established characterization of the financial institution and its client legal relationship, but to analyse certain legal connection which is there between financial institution and its client.[15] This means that, when one is tasked with determining the type of legal relationship which exists between the banker and its customer, the best solution is to examine or interrogate their contract. It is only from the terms stated in the contract that one may be able to classify and typify the relationship between the bank and its customer into any of the well-known legal relationships, and consequently, to determine the rights and obligations of the parties.

Although it is understandably difficult for one to be fully comprehensive in that regard, common examples of contracts that are usually concluded by banks with their customers include that of mutuum, depositum, mandatum (agency), and trust. Sometimes the relationship may even be a combination of two or more of these contracts; wherefore Moseneke AJ prefers to describe the bank-customer relationship as a composite assemblage of juridical relationships which exist between a financial institution and its client[16] The current discussion will be limited to the contract of mutuum and agency, which are selected because of their relevance to this research.

The relationship between the bank and the customer, on a current account, is usually classified in law as that of mutuum (Loan for consumption).[17] The description of the banker and customer relationship as that of mutuum comes into play in the case of a current account. A credit balance in a current account is considered in law to be a loan made by the account holder to the bank. This, in turn, gives rise to a debtor-creditor relationship where the bank is the debtor and the customer the creditor. Because a credit balance in a current account is considered in law to be a loan made by the customer to the bank. The bank is at liberty to use that money for consumption, subject to an undertaking to repay the customer on demand. In other words, after the money has been deposited into a current account, it does not remain the customer’s property. Ownership

[14] 1995(2) SA 740.
[15] *Standard Bank of SA Ltd v Absa Bank Ltd* p 747.
[16] *Standard Bank of SA Ltd v Absa Bank Ltd.*
[17] *Foley v Hill* pp 36-3.

over such money passes to the bank, and the bank can use it as it pleases, with the obligation to repay it whenever the customer makes a demand.[18]

As mentioned above, ownership of a money deposit made by a customer actually passes to the bank, giving the bank all the rights. This has been determined in one of the significant English cases, *Folly v Hill.*[19] The court clarified that the financial institution is not a person who acts on behalf of a client, accepting funds which its ownership stayed unchanged or under client's ownership and which the financial institution could only use when authorized by the client or when following client's orders. But rather, money becomes property of the bank. Briefly, in cases where a customer deposited money in their bank account, they make withdrawals at some point, and make withdrawal again at another point in time, and that shows the limits of their relationship.

In *Folly v Hill.*[20], Folly sued the bank on the ground that the relationship between him and the bank was that of trust, consequently that the bank (as his trustee) owed him a fiduciary duty to account on how it had used his money. The issue was, therefore, whether the relationship between a customer and the bank was that of trust. The court ruled that the relationship that comes into play when the bank and the client starts working together is that of a debtor and creditor. No trust was infringed because money was under financial institution's ownership not customer's. The financial institution was not an agent of the client, so in simple terms, we can talk about reliability and honesty, where a customer trusted the bank with their money, and the bank benefits from that money being kept.

As the debtor, the bank is obliged to repay the customer's money. This was held to be so in the case of *Joachimson v Swiss Bank Corporation*.[21] The court explained in that case that, banker's obligation to repay the customer arises on demand. This is in contrast to an ordinary debtor-creditor relationship, where the debtor must actually look for the debtor in order to make payment to him. In context of the bank-customer relationship, the bank is not obliged to find the whereabouts of the customer. On the other hand, the customer must go to the premises of the bank.

[18] *Folly v Hill* 1848 (9) E.R. 1002.
[19] Ibid.
[20] 1848 (9) E.R. 1002.
[21] [1921].

The aforesaid debtor-creditor relationship arising between the bank and a customer imposes some superadded obligations on the bank.[22] In terms of this obligations, the banker is bound to perform certain services, known as services *de caisse*, to the customer on his instructions. The performance of these services gives rise to the relationship of agency between the parties, where the bank is an agent and the customer a principal.[23] For instance, a bank initiating a relationship with a customer impliedly undertakes to transfer funds from the customer's account to specified payees on the customer's requisition, and the bank acts as an agent in that setting. For instance, when a cheque is issued, the customer, who is a principal, instructs the agent (bank) to perform some service on its behalf, which is normally to pay out the cheque. This kind of payment is governed by the law of agency. Therefore, even in the normal day to day banking business, the relationship explained as debtor-creditor relationship, includes aspects referred to as additional or superadded obligations regulated by the law of agency[24]

In *London Joint Stock Bank v Macmillan and Arthur*[25] it was vividly stated that the relationship between the bank and its client is that of debtor and creditor, with additional obligations that obliges the financial institution to honour the cheque if the account has a positive balance. The customer's derivative can come in the form of a cheque ordering the banker to make payment to the named payee, or in the form of a self-initiated electronic funds transfer done online.

## 2.3 The banker's duty of care and skill

### 2.3.1 The meaning of the banker's duty of care and skill

It is a duty or responsibility of the banker to employ reasonable care and skill or competency and proficiency in performing its role to business activities which forms part of commitment they concluded or that fall within the contract which exists with its customer.[26] This connotes that, the bank must not act carelessly with regard to what has been mutually agreed to and specified in the contract. Additionally, the bank must act diligently to execute the customer's mandate. In the mind of a reasonable banker, it should always be a sole objective to act according to the contract

[22] *London Joint Stock Bank, Limited v Macmillan and Arthur* [1918] AC 777 (HL) p 789.
[23] *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510, p 531F-H.
[24] Ibid.
[25][1918] AC 777 (HL).
[26]W222 Manual 2 (8th edition) Commercial transactions: law and practice Units 8-14 SUP034094", Open University.

specifications. Although the banker has a duty to honour the instruction of the customer, where there is suspicion that the instruction is not legitimate, the bank is justified to refuse to make payment. If the banker executes the customer's mandate, considering that a reasonable bank officer would have conducted investigations before executing such mandate, then the concerned bank will be liable for negligence.

In *Karak Rubber Co. Ltd v Burden and others*[27] Karak was a rubber plantation company (Karak) which stopped operating and traded its plantation. Later on, the directors of the company took a decision to realize its shareholding, this decision was in favour of its shareholders. The board sold the company to Mr. Burden. As a way to fund Mr. Burden, a corporation called Minories, who was a client of Barclays Bank, requested the said bank to issue a draft in favour of the National Bank. The directors of Minories mentioned to the bank that he was carrying out the transaction to finance a business of his client, namely one Mr. Burden. The draft of Barclays bank was, nevertheless, eventually traded for a cheque drawn by the Chartered Bank in favour of Karak representing cash position of Karak with the Chartered Bank.

As a way to convince Barclays Bank to receive a cheque that is meant for the draft, it was informed that Mr. Burden was soon to be chosen as a director of corporation known as Karak to replace the pre-existing board, that the cheque could then be in custody of the bank so that Burden, the new director would open an account for Karak with the bank so that the cheque could be paid into that account and that Mr. Burden would then draw a cheque on the new Karak account in favour of Barclays Bank, which could be paid into the Minories account in place of the banker's draft. This was done as promised.

After Mr. Burden being made the director, Karak started operating, after five months it was wound up compulsorily. The board of the Trade appointed inspectors to look into the affairs of Karak, which brought about the case. Karak and the Board of Trade instituted an action against Barclays Bank on the basis that, Barclays bank must have known that the Karak cheque from which it recovered its draft to Minories was being misappropriated because a reasonable banker and a reasonable businessman would have obtained such knowledge from the facts of which the bank was actually aware. Alternatively, that, the bank would have obtained such knowledge if certain inquiries had been made which must have been made.

[27](1965) k no 112.

In holding for the plaintiff(s) the court noted that the question to be determined is whether Barclays Bank, in the performance of its contractual duty of care as a paying bank should have made inquiry as to the propriety of the Karak cheque before honouring it. The court found several factors that depicted a suspicion in the mind of the employees of the bank. The bank was, therefore, held liable for negligence because regardless of all the suspicious factors, employee made a payment and the customer's money was lost. The suspicious factors were that, transaction was unusual, the same bank had never dealt with the transaction of that nature before, causing a disputable action and compromising the duty of care and skill. The amount involved was also too high. All these factors ought to have raised suspicion in the mind of a reasonable banker thus compelling him to make fair and sensible inquiries. Making inquiries would have been a way of verifying the arisen suspicions or rather directly dismissing the transaction. This is what is meant by exercising reasonable care and skill.

After considering what transpired in the case, the judge opined that the transaction in question was not a normal business performed by the bank. Employees of the bank must have asked for clarification before completing the transaction. Barclays bank had never dealt with the transaction of that nature before. The transaction was large regarding the business of Minories with regard to its credit-worthiness and also with regard to the assets of Karak. The bank had enough time to make inquiries. There was adequate evidence to arise necessary suspicion in the mind of a reasonable banker. After the meeting the bank employees were aware that the discussion was about a purchase of a corporation known as Karak. Mr. Burden was in charge of the purchase process. That was meant to cover the draft. A reasonable banker would have realized that Karak money was being used to pay the price for its purchase and raised the suspicion to question the customer. However, employees of the bank, overlooked all the suspicious factors because those funds were going to cover the costs of the draft.

A bank is liable because, entrusting its employee to deal with the customer accounts guarantees that such an employee is qualified for the job. Therefore, an employee (banker) is in a position to exercise a required reasonable skill and care. Failure to do what is expected in any given situation where a reasonable banker would have applied the necessary care and skill, the banker's conduct in the general run of things amounts to negligence. It has been professed in the above case that the banker's duty of care and skill means that the bank must not act delinquent in providing banking services to the customer under the contract. That is, this duty is breached when the bank acts negligently, and consequently opening a way for criminals to defraud the customer. Failure, to put forward a query that might have made it impossible for fraudsters to steal from the customer is slipshod and the bank will bear liability if the customer sustains loss from its negligence. If banks for fear of offending their customers will not make inquiries into unusual circumstances, they must take with the benefit of not annoying their customers the risk of liability because they do not inquire. If a bank lets unusual activity to take place with regard to the customer's account, it is failing to exercise its contractual duty of reasonable care and skill which it owes to its customer. The bank is exposing itself to negligence offence and will ultimately be liable for any loss incurred.

Even though the court could not hold the customer liable in *Firstrand Bank v Kgethile*[28] where the bank sued the customer after losing money which was defrauded using the customer's banking details, the court found that the bank was negligent for failing to make inquiries when the customer used the card which was not meant to be a credit facility as such. The bank only complained after the loss occurred. The duty to exercise reasonable care and skill requires the bank to make inquiries whenever there is any abnormal situation with regard to customer's account. Exercising reasonable care and skill can protect both parties in banker-customer relationship. Turning a blind eye to unusual circumstances may amount to negligent conduct which the bank will bear its loss.

In *McCarthy Limited v ABSA Bank Limited*[29] the customer's claim was that they have been defrauded. Banker failed to realize that the person who presented the cheque for payment was not entitled to do so. There were facts that could have brought light to raise a suspicion that the fraudster was not entitled to the payment. McCarthy contended that the bank officers did not fulfil their duty of employing the necessary skill of the reasonable banker. In that case, the judge noted that, an employee at the bank should have recognized that the cheques were drawn by their own customer McCarthy who would be responsible for their payment. The judge also stated that the evidence proved that McCarthy never said anything about the payment that was effected and that had to be taken into account, and there ought to be an explanation why the officers of the

[28](M370/2018) [2021] ZAANWHC 63 (31 August 2021).
[29](2009) ZASCA 118.

bank should not be connected to the mistake when the cheque was being processed for payment. Nevertheless, the judge indicated that there was sufficient evidence presented thereof, as a result Absa might be held liable for negligence, for failure to authenticate the cheque prior payment.

Even though, the purpose of the duty is not to turn the bank into amateur detective, it is important to observe compliance with its duty of care, and the bank is expected to make enquires where there are valid reasons to suspect fraud. This is known as Quince care duty which requires financial institutions to refrain from performing the customer's mandate if they are "put on enquiry" that the mandate might be an attempt to defraud the customer. The bank is not expected to exercise some extra ordinary skills in order to figure out that the mandate given is not valid. Required skills of a normal banker are sufficient to know when the mandate is invalid. The moment a banker realizes that there is something suspicious it has to investigate and find out if there is any foul play. But this does not mean that the bank should question everything because doing so would hinder a smooth running of a banking business.

It has therefore been vividly stated by the Court in *Barclays Bank Plc v Quince care Ltd*[30] that the law should not burden the banker with obligations that will curb the normal running of business. On the contrary, the bank should preclude the prospects of fraud from occurring, and a reasonable standard of care should be applied in order to preclude fraud that may compromise the customer's money, and customers' deposits should be secured. To place liability on the part of the bank only in cases where it showed improbity would be applying a very narrow method. On the contrary, to place liability on the part of the bank every-time there is suspicion would be utilizing a highly demanding approach which can make it almost impossible to carry out operations. The bank must simply refrain from carrying an order if and for as long as the banker is 'put on inquiry' in the sense that he has on reasonable grounds believe that the order or mandate forms part of an attempt to misapply the customer's money. If the bank decides to carry out a mandate which a reasonable banker would harbour suspicion, it exposes itself to liability that will be based on breach of the duty of care.[31]

Similarly, the bank and its prospective officers (Bankers) for each particular case ought to exhibit a prudence like a reasonable banker would do in exactly the same situation or under the

[30] (1992) 4 All ER.
[31] *Absa Bank Limited v Hanley* [2012] ZASCA183 1 ALL SA 249.

same situation. The requisite factors for executing the customer's instructions satisfactorily are diligence, caution and proper care. To establish whether the banker conducted himself like a prudent banker, the banker is supposed to conduct himself in a way that another banker in similar position would act. The standard procedures applied takes the upper hand to establish whether the mandatary carried out the mandate as expected or whether the mandatary carried out the instructions carelessly. If after looking at all the relevant facts, the bank is found to have failed to exercise the care and skill as expected, hence causing the customer financial loss, the customer will be entitled to compensation from the bank.

Based on the stipulated facts and cases, it is clear that acting without caution places responsibility on the bank, and the banker has an obligation to guard against the financial loss that may happen on the customer's account. If fraud takes place under the bank's watch, the bank will have to pay damages for the losses suffered. The banker only has an obligation to execute the valid mandate of the customer, such instruction must be carried out with the expected degree of care and the mandate must be carried out in good faith. The banker has to pay attention to details so that it can identify if the given mandate is valid. Even if the bank can be fooled into believing that the mandate is valid, it will be liable for damages if loss occurs. As long as the customer that suffered loss did not facilitate the invalid instruction operated on his account, he will be entitled to damages. Therefore, figuring out whether the mandate is valid or not is the bank's responsibility. If there is existence of any pointers that a reasonable banker in a same situation would have identified that the mandate is invalid, the banker who failed to do so will be liable for loss that will result.

## 2.3 The nature of the banker's duty of care

It has been cited that the bank's duty of care is a contractual obligation. However, the same conduct which constitutes a breach of contract also amounts to breach of a delictual duty of care. The affected party can claim damages for losses either in contract or delict. In the case of *Holtzhausen v Absa Bank Ltd*[32], the court held that a customer who sustained economic losses because of the bank's negligence may institute a delictual claim. What happened in that case is that the plaintiff acting on behalf of the undisclosed principal, offered to make a diamond

[32] 2008 5 SA 630 (SCA).

delivery to a third party whom he did not have much information about. The agent was to be paid commission when the deal is finalized.

At the later stage, the agent informed the plaintiff that the diamonds had been paid. He gave the plaintiff phone numbers to confirm that the payment had been made. The plaintiff received a financial statement which verified that the payment had indeed been made. The said payment was made by cheque. The manager of the bank which the defendant had an account with was asked to opine whether it was secure to carry on with the deal. Firstly, the manager made calls to the same phone numbers given by the agent and after the phone calls he informed the plaintiff that he can continue to complete the deal. The manager of the bank also approved the payment for the agent's commission.

At the later stage, it was found that the plaintiff had been tricked and the payment that was made into the account had been reversed. The plaintiff sued the bank for pure economic loss in delict. The court decided in favour of the plaintiff, it stated that the bank manager was careless for allowing the plaintiff to continue with the transaction and saying that it was secure to do so. On top of that, the manager authorized payment of the agent's commission, yet, he knew that until the cheque had been honoured the plaintiff's account would not have the funds to be able to pay this debt. After considering all the proven facts, the court's finding stated that no misrepresentation was made. The manager must have first made the inquiries or effect no payment without such inquiries.

The court found that independent delictual liability is possible leading to instances of pure economic loss where the delictual claim is not based solely on breach of contract but on general delictual principles concerning negligent misrepresentation. The pleadings covered a claim for damages for negligent misstatement. The plaintiff does not rely on the breach of any contractual obligation which the defendant may have owed him as constituting the negligence for this claim. The plaintiff's case as it was presented in evidence was that the rights which it independently had in a contract were breached. A legal duty giving rise to an action in tort can exist independently of a contract.

## 2.3.2 The standard of care and skill expected of a banker

The standard of care expected from a banker is objective. The failure by a banker to question the customer's doubtful instruction does not automatically give rise to the breach of the duty of care, for each case all the material facts are taken into account. In *Karak Brothers Co. Ltd v Burden and others*[33], it was stated that a bank has a contractual obligation owed to its client to employ reasonable care and skill in carrying out its responsibilities with respect to its contract with the customer.

The test that is used is whether a reasonable banker in the same position as the defendant bank would have harboured a reasonable suspicion and discovered that the client's money was being stolen. A reasonable banker who is doubtful about any part of the customer's instruction would not carry out such instruction without asking the customer all the necessary questions. If the defendant bank follows the customer's orders without forming a reasonable suspicion and making investigations where necessary the defendant banker's conduct would not have met the expected standard of a reasonable banker, therefore would have carried out the customer's mandate carelessly and breached the duty of care.

## 2.4 The rationale of the banker's duty of care

The type of banker-customer relationship where the duty of care principle is entrenched on is agency.[34] It is commonly acknowledged that the banker operates as an agent of the banker when offering banking facilities. The bank acts as an agent when receiving bills for collection on customer's behalf. In such instances, the bank is obliged to employ the requisite due diligence and skill, the failure of which will result in bank bearing the liability that may be incurred.[35]

The relationship resulting from the bank and its customer is that of mandate or agency, justifying the importance of this relationship. The laws of such relationships accordingly apply. The circumstances of each case determine what is reasonable and due diligence.[36] The implied duty of care owed by the bank to its customer come into play as a result of the agency relationship between these two parties. According to common law, an agent has a duty to employ due

[33]1972) All ER.

[34] < https://isochukwu.com/2017/12/29/banking-1-2-banker-customer-relationship / >=accessed 16 May 2022.

[35] G. Vijayaragavan Iyengar "Introduction to banking" 1st ed. 2009.

[36]<https://gfgc.kar.nic.in/vemgagal/filehandler/61-b8aa7bea-e723-4345-a2bc-6b8fdt7abc5.pdf >=accessed 28 June 2022.

diligence, skill and care in following the orders of the principal. An agent is obligated to perform the mandate of the principal with care and skill. The said duty comes with a requisite obligation not to execute the mandate of the principal's affairs with carelessness.[37] In carrying out the terms of agency, the agent must show paramount or necessary care, skill and diligence. He ought to exhibit sufficient level of presentation and ought to be cautious.[38]

Additionally, what common law holds in cases where experience is required for execution of customer's orders is that through acceptance to perform the mandate, the agent guarantees that he has requisite experience, relevant qualification and skills.[39] The required standard from the banker, is that of a discreet person in the same occupation to make informed decision without compromising the customer's money. [40] The law of agency also states that, the bank as an agent proves that it possesses the required knowledge and necessary skills to handle customer's banking services. In the same manner that, an ordinary agent would bear liability, the bank, will thus, bear liability that may result from its failure to act as it is required.

It is an important rule of the law of agency that where a person carries himself out as possessing the required competency and proficiency (skill and care ) for performing some operation or in occupation such as banking, he is obliged to carry it out with necessary competency and proficiency expected from a skilful professional in that occupation..[41] Normally, the bank carries out itself as expertly proficient in securing the customer's money. Where it evades from performing that commitment, a prima facie act of negligence arises on the basis of non-observance of its main responsibility of a duty of care [42] If it is not or it fails to exercise care on its duty, it will be liable for damages resulting from its misconduct. Where the parties entered in a mandate contract, the agent is under obligation to execute the mandate exactly as instructed, failure to stick to the specified orders may attract liability.[43]

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[37] <https://thebusinessprofession.com/agency-law/principal-and-agent-relationship >=accessed 28 June 2022.

[38]< https://ww.researchgate.net/publication/345904925-law-of-agency >=accessed 28 June 2022.

[39]< https://lawguide.co.za/south-africa-law-of-agencygcm-legal.com >=accessed 28 June 2022.

[40]Ibid.

[41] Margret (n-7).

[42] Bolaji Ogungbemi "duties of a bank to its customers: effect of failure in its duty of care" < www.oraro.co.ke>= Accessed on 5 April 2022.

[43]Ibid.

The rights and obligations stated under common law of mandate are applicable between a bank and a customer. It is clear that the mandatary assumes a responsibility of executing the business of the principal.[44] Where a violation occurs it has to be ascertained whether the bank has complied with its rights and obligations that emanates from the mandate contract. The existence of the mandate agreement between the banker and its customer comes with reciprocity of duties. The banker (mandatary) has to abide by the orders as specified by the mandatory. It has been clarified in this regard that the onus of the bank entails more than an obligation to observe compliance of the customer's orders, the bank has to employ a degree of careful scrutiny. [45]

This would include occasions where the banker either realizes that the order is not genuinely given, or believe that something is fishy and the customer's money is being misapplied. Another instance may be where the banker acts carelessly due to its failure to question the orders he has a doubt about, which a careful banker would have questioned. The banker may have to assume responsibility for the lost funds. If the failure by mandatary to carry out the mandate with caution turns out to result from its carelessness it will be held accountable for the loss that was sustained because of its careless conduct.

The perfect illustration of where the bank acted carelessly due to its failure to ask necessary questions that a reasonable banker would or should ask and consequently the bank having to be accountable for liability emanating from negligence is the case of *Absa v Hanley*[46]. In brief summary the facts were as thus: a customer of a bank (Hanley) who was also an appellant hold an investment account with the bank and had an investment in that regard. At some point in time, while the course of the investment was still running, portion of the investment funds was withdrawn out of the account. It was petitioner's contention that he did not authorize the transfer of the money, the petition stated that a credit transfer order came from the person called La Cote who had no authority to give such an order. This person was also a customer of the same bank. Consequently, as the transfer of the money was not authorized by him, he brought the claim against the bank.

[44] WG Schulze, "duty of a Bank to act with necessary skill and care when issuing an automated Teller Machine Card" (2007) De Jure pg370.
[45] Ibid.
[46](2013) ZASCA 183.

In defence, Absa argued that the payment occurred from Hanley's carelessness, because he made it possible for La Cote to have access to his signed documents. These presented documents came with an order stating the sum of money to be transferred out of Hanley's investment. This stated sum was changed by La Cote. The Bank advanced an argument that Hanley was not allowed to request reimbursement as he had an on obligation to handle his account cautiously. The court had to decide whether Hanley was negligent. The judgement of the court of the first instance was that Absa transferred the funds out of the customer's account due to its failure to observe its required duty of care and skill. This had nothing to do what the customer did. It stated that the banker shrank from its responsibility to exercise necessary proficiency and for these reasons it should reimburse Hanley. The judgement of the Appeal court was that the principal duty of the bank carrying out a credit transfer is to perform its instruction on time and diligently.

On the other hand, the client has an obligation to draw its cheque with care as a way of blocking criminals from stealing from it (customer) and it also makes it difficult for third parties to interfere with its cheque. The customer also has an obligation to warn the bank of any suspected fraud. Absa did not seek any confirmation from its customer to be sure that the documents were bearing the customer's signature. It effected the payment in the absence of actual documents it relied on scanned material. Moreover, Absa opened the bank account for a customer who purported that it was a company's account without necessary documents proving these averments. The falsification that was operated on Hanley's bank papers was not reasonably foreseeable and as a result it made it impossible to argue that he facilitated theft. The proximate cause of the harm sustained was on the part of the bank.

## 2.5 Breach of the banker's duty of care: judicial guides

To find out whether a bank had an obligation towards its customer to employ its competency and proficiency in dealing with it, the circumstances of each case will be determining factors. The court looks at whether the conduct of the bank caused a customer some loss, which a bank ought to have known that it was likely to cause that harm.[47] The degree of proficiency that rests upon the bank is to take all appropriate measures necessary which a reasonable banker would have taken under the similar situation. These measures or safeguards however, differs according to the

[47] John Mbaluto "*Obligated: Examining the duty of care in Banking*" –Oraro & Company Advocates. <https://www.oraro.co.ke >= Accessed on 11 May 2022.

facts of each situation.[48] What the bank is supposed to do in order to observe its duty of care, will depend on occurrence of affairs of each case. Every case is determined by its own circumstances looking at whether the act of the bank was careless given what transpired. In *Lipkin Gorman v Karpnale*[49] it was established by the court that there was implied duty of care which rested upon the bank executing the client's orders to effect payment. The bank specifically ought to refuse to execute the instruction if he is aware or ought to be aware that someone is trying to steal from a customer.

In applying this proposition, the courts have been very conservative taking into account that the banks have an obligation to honour payment orders on time. Applying this duty in this context could hinder smooth running of usual banking business. Accordingly, courts have emphasized that the bank is not required to turn itself into some investigator, rather it is allowed to deal with every instruction at face value to find out what could go wrong and make it right. In the case of *Lipkin* Gorman v *Karpnale*[50] the bank effected payment following a dishonest instruction to pay a cheque presented by a member of a law firm, that person gambled with the money. The contention of the law firm was that the bank's conduct lacked diligence in proceeding to complete the transaction that came from dishonest order.

The law firm advanced the contention that the bank manager was aware that this partner was a gambler addict. The manager of the bank noted in his notes that he did not put confidence in what he had been told about the purpose of the money. He did not believe that it was indeed going to be used for the purposes that were put forward to him. Nevertheless, the manager did not disclose this information to its customer, and did not mention anything concerning the transactions that were being performed on the account of the customer. He asked no questions regarding these transactions despite the doubt he had about them. The view of the judge of the court *a quo* was that the bank turned the blind eye to the points that were doubtful. The Appeal Court agreed that the bank had an obligation to comply with its duty of care when dealing with the law firm. It held that the applicable test was adequately met if the banker knew of the factors

[48] Efraim Weinstein Law Offices "*The Bank's duty of care and Fiduciary Duty Towards its customer*" 2021 <https://www.mondaq.com >=accessed 5 April 2022.
[49] (1989) 1 WLR 1340.
[50] (1989) 1 WLR 1340.

that he should have taken into consideration that it was possible that someone was committing theft on customer's funds.

The bank will be held liable for negligence where it fails to make enquiry which is necessary because of the suspected fraud. Asking questions or making inquiry is one of the measures or guidelines that are employed by the courts to find out whether the violation or the breach occurred. Nevertheless, it is not in all cases that the bank will be 'put to notice'. This measure is only used where a competent banker in a similar situation would have had doubts. Although there are set measures they do not apply just by virtue of the existence of the duty, their application depends on the situation of each case.

In the *Selangor United Rubber Estates Ltd* v *Cradock*[51] and *Karak Rubber Co Ltd* v *Burden*[52] both these cases have stated that the bank has a duty to verify that the mandate to effect payment were honest orders by the principal. However, it has been noted that the banker deals with the agent and for that reason this is the customer that is known to it. In the case of Selangor, the bank rendered financial advice on behalf of its customer. The customer sustained loss due to the banker's carelessness and ignorance. The court ruled that a person performing a transaction on behalf of the other and assists in getting rid of the trust asset will be in violation of the duty of trust and will be held accountable personally for the loss that occurred if he was supposed to be aware of the violation.

The court used the standard of reasonable banker test and found the bank guilty of negligence. The same situation transpired in the case of Karak where the bank settled a written order to pay a specified amount against the account of its client, Karak. The officers of the bank ought to have noticed that Karak money was being used to foot the bill for its own shares.

However, both these cases were reprehended in *Lipkin Gorman v Karpnale Ltd*[53] on the grounds that it uses a very high standard against the banker. What took place in Lipkan case is that someone who had a share in a law firm misappropriated the funds of the firm. He took advantage of the right he had of making authorizations and obtained the money with the cheque that he authorized, he gambled that money away. It was noted by the judge that with respect to the

[51](1968) 1 WLR 1555.
[52](1965) K No.112.
[53](1989) 1 WLR 1340.

current account, the bank has a duty to pay out the cheque presented by the client as per its orders. It noted further that taking into account large number of cheques which are presented to the bank for payment each and every day, the bank should refuse making payment where there is an issue that if another banker was faced with it would also refuse to pay, before asking necessary questions. In addition, he indicated that it is unusual that the manager would instructs his subordinates to handover the cheques to him for authorization where another reasonable banker in the similar situation would not do the same.

The court stated that the bank is not supposed to act like a non-professional investigator or amateur detective. However, where the bank executes customer's orders, where it is clear that those orders are not genuine, that act is considered as a failure to adhere to the instructions because the duty requires carefulness in adhering to the instructions. A good instance may be in a situation where an order is asking a bank to pay a huge amount of money and the bank is only permitted to honour such order if the cheque bears signatures of several people from the executive of a company. But the bank ignores lack of required number of signatures and pays out the money where an order comes with a single signature. The bank should be held accountable only where it was obvious that the agent is violating the mandate it has. The law does not require a bank to see a criminal in every customer who conduct a business with it. What can turn out to be doubtful may actually seem usual in a hectic day at work.

The chances of fraudulent activities are high, if the cheque needs to be signed by more than one person like in case of joint account or partnership account, as it happened in Lipkin Gorman. In spite of, the signal of fraud being present in Lipkin Gorman, May LJ came to the conclusion that, because of the large amount of cheques dealt with each and every day by a branch and the number of cheques presented to the bank by the partner of well-respected company, the manager of the bank was not 'put on notice'.

May J said that a bank did not have to turn a blind eye to visible signs that indicated that fraud was being committed on a customer's account, and found that there are rare circumstances when a bank would be put on inquiry and when its failure to investigate circumstances further would constitute a breach of its duty of care.

Parker LJ concurred that the bank was not put on notice, because the money was never moved from the company's account and went directly to the defrauders account which he holds under his own names. Lipkin Gorman has set the precedent for the theory that the customer is not owed any specific duty of care by the bank with regard to everyday usual payment executed by an individual who holds authority given by the account holder.

The case of Selangor and Karak apply a different perspective, from the view point of these two cases forasmuch as suspicion exists, the bank should ask necessary questions. Failure to conduct necessary enquiries, will render it liable for breaching the duty of care. Additionally, its failure to ask necessary questions where another banker would ask them when faced with the similar problem, that would be considered as a failure to employ the requisite expertise and care. On the contrary, Lipkin Gorman avers that such perspective is an extremely demanding standard to place on part of the bank. According to Lipkin the correct perspective is that if there is no valid foundation where a doubt that there is an attempt to steal from a customer can rest, then the bank ought to pay the customer. A mere mistrust or a little dissatisfaction do not lay a strong foundation for bank justification of its failure to follow the customer's instruction. A bank is not required to conduct itself like a non-professional investigator. The perspective of Selangor and Karak seem to be more fair, sensible, reasonable and having a sound judgement. If there is a formation of suspicion that lays a valid foundation to make investigation and asking necessary questions. There should never be a time that a suspicion is taken for granted yet the customer's money may be at stake.

In South African law, the courts seem to use the same guides to determine the banker's duty of care. What is important in banker-customer relationship is to prevent financial loss with respect to the account of the customer.

There is no other party in better position to prevent financial loss with respect to the account of the customer than a banker. The same has been outlined by COMBRINCK J in *KwaMashu Bakery Ltd v Standard Bank of South Africa Ltd*[54] that as a way to get the fraudulent money, the person who stole the customer's cheque will definitely need to have an account with a bank so that he can be able to access the money. Usually, this takes place following stealing of the cheque, the account will be opened using the identity of or that is very close to a person to whom a cheque is made payable. As a way of trying to protect the actual holder of the cheque, the reasonable banker is expected to do more than accepting the identification purported by of a new

[54] 1995 1 SA 377.

client. He is also expected to look into all the particulars that may confirm the true identity of the client or such client or the entity which he or she claims to be. He can check where their offices are, or where the person is employed, confirm the addresses provided, try to locate the near relative etc. before welcoming anyone as a client. This could definitely not retard the smooth running of a banking business or demand a ridiculous amount of time or cost. What this is suggesting is that the banker should make investigation to be satisfied about the true identity of its customer before it opens a bank account for it. This is the same to what has been set out by English courts as a guide to establish if the banker acted like a prudent banker.

South African courts have dealt with the issue of banker's duty of care with regard to opening of the bank account. The guides that were used to establish whether the banker has acted as expected or like a person with expertise in the same position seem to be the same. In *Peterson & another NNO v Absa Bank Limited*[55] the customer of the bank was defrauded and the employee of the banker did not stop the fraudulent transaction. Another person opened bank accounts under the identification of the already existing customers of the bank. The employee did not check with these exiting customers to verify if they authorized this. The opened accounts were used to move large sums of money. The banker did not ask anything about these transactions which were out of ordinary. At the stage of the opening of the accounts the forms were not filled properly and the necessary supporting documents were not available but the banker went on and opened the accounts and managed them.

In deciding whether a banker's duty, both in relation to the opening and the conduct of the accounts, was established. The judge said it was evident from the documents submitted to open the account. They were not filled appropriately and lacked required attachments as per the rules of the bank. This should have made the bank suspicious to act. This means that the judge consider suspicion as a guide to determine whether the reasonable care and skill duty was discharged.

The judge went on to say that taking into account the high rate of illegal activities in South Africa, especially money laundering, public idea of fairness dictates that a bank should not ignore the chances that its client might be utilizing the account it holds with it for criminal purposes. In that case a lot of money was transferred between the accounts and eventually

[55][2011] ZAGPPHC 127.

withdrawals were made. A bank should pay attention to abnormal activities. This still relates to the point of suspicion. Whenever the customer withdraws questionable amounts of money within a short period of time, it should raise suspicion in the mind of any reasonable banker. Once there is suspicion making enquiry is the next step.

The banker in its dealings with the customer should avoid negligence by all means. The bank is a safe custody for the customer's money. Acting negligently opens a way for fraudsters to steal from the customer. The bank by allowing its employees to deal with the customer's account warrants that they have expected skill and care, where they fail to discharge this duty as expected the bank will have to bear liability. Making enquires where there is suspicion is exercising requisite skill and care.

It has been stated by the judge in *Ungaro & sons (pty) limited v Absa bank limited*[56] that making necessary inquires will always assist the banker to know if the mandate was given by the customer. Paying attention to the instruction and making the simplest enquiries is what is expected from a reasonable banker. In this case the employee of the bank defrauded the money of the company. The court noted that if the bank made enquires where it obviously had to, the customer could not have suffered loss. One of the things that should have formed suspicion in the mind of the defendant bank was that, because the account was being opened for a company, a bank should have realized that the particulars of where it was situated (address) were residential. A simple question by the bank into such an obvious alarming element should have shed some light that something was off and the harm sustained would have been prevented.

The main guides that are applied by the courts to establish whether the banker exercised a reasonable care and skill is to raise suspicion and make enquires. Where the banker has applied these guides it is rare for the funds of the customer to be misappropriated. This shows the importance of applying expected skill and care by the banker.

## 2.6 Causation and the banker's liability for breach of duty of care

The reciprocity feature of the bank's duty of care puts a responsibility on both the customer and the bank to exercise necessary requisite diligence and skill in working with each other. It has been noted that the contract concluded between the bank and its customer obligate the bank to

[56][2015] 4 All SA 783 (GJ).

execute some services for the customer. It comprises of many services; the type of contract that comes into play is that of mandate.

The customer also has an obligation to employ the care in working with the bank. Its duty is to write the orders for payment with necessary carefulness, this will help in combating any illegal attempt that may be committed and any interference that may take place. The duty also includes warning the banker of any illegal activities that the customer may doubt that are about to be done on its cheque or that is certain about.

The customer owes the bank a duty of care with regard to its duty to give out its orders requesting payment in a way that does not open ways for criminals to commit illegal activities on its account. In *London Joint Stock Ltd v Macmillan*[57] a company which was client of the bank authorized one of its employees to write cheques, this employee was trusted and believed to be truthful. The employee took a cheque which was written in favour of the company and asked one of the partners of the company to sign it. The money to be paid was only written in figures.

The partner put its signature on the cheque. At some point the employee who was authorized to deal with the cheques changed the amount written on the cheque and wrote the larger amount. The employee then went to the bank to cash the cheque and obtained the money from the company's account. The court had to find out whether the bank was liable to the company for that loss that it sustained because of its employee.

The court found that there was a duty resting on the part of the customer. To begin with, his cheque must not be ambiguous and must be ex facie in such a condition as not to arouse any reasonable suspicion. It is the duty of the customer, if he will not be the one to present his cheque to fill it carefully and neatly to avoid any kind of interference with the amount written by him that may not be noticeable. Therefore, raising no suspicion when it lands in the hands of the bank that it had been tempered with. Failing to act in accordance with this duty constitute negligence. As a result, the customer will bear liability of such negligence.

The court decided that the company had violated its duty arising out of its agreement with bank to draw the cheque carefully, and that the changes effected by its trusted employee resulted

[57](1918) A.C. 777.

directly from the violation of the duty. Subsequently, the bank was authorized to debit the account of the customer with the sum of money written on that cheque.

Where the customer is the one who made it possible for criminals to steal its money the bank will not be accountable for the sustained loss. If the banker receives the cheque without anything alarming or that can raise questions, the banker obviously cannot be said to have had a hand if the defrauders scam the customer. The negligent party in this situation is definitely the client who wrote his cheque in a way that another person can simply make changes that cannot be recognized that they were not part of what was initially written. The bank cannot assume responsibility for the loss that was incurred with regard to that.

The customer's duty also requires it to make the banker aware of anything that it may think is an attempt to steal from it or it knows exactly that it is an attempt to steal, in *Greenwood v Martins Bank Limited*[58] Mr. Greenwood hold an account which was not a joint account, there was a cheque book with regard to the account. The authority to utilize the cheque book rested upon him only. Normally, the cheque book was kept by his spouse. One day when he wanted to use the cheque book, his spouse informed him that there was no money left. She told him that that she had forged a cheque and had presented it for payment in order to finance her sister's court case and he understood and did not do anything about it. Subsequently, he found out that the spouse did not use the money for the purpose that she told him. He told his spouse that he was going to turn her to the police for stealing from him. His spouse killed herself. Only then the husband informed the bank that the cheques were presented without his authorization and he claimed lack of mandate.

The court's judgement was in favour of the bank, it held that the customer must have made the bank aware of the incident as soon as it came to its attention. Because of his failure to do so, he no longer had a right to complain about the stealing of his money. There was nothing the bank could do to get his money back given the passage of time and that the spouse was deceased.

The customer's duty to alert the bank of anything it thinks is an attempt to steal is to assist the bank to prevent effecting payment to the cheques which are not written by the actual owners. A failure to report forgery which came to the attention of the customer in time is obviously making

[58](1933) AC 51.

it easy for defrauders to steal. The customer cannot withhold the information about stealing that was effected on his account, and later on when the stealing is long completed, the customer then tells the bank about it. The customer cannot report the fraud when it suits it and expect the bank to be held accountable. The customer is obviously the one in fault and should bear liability.

Usually, when customers bring claims of violation of the duty of care against banks, banks take an objection on the ground that the harm was induced instead by the carelessness of the customer. To settle this kind of matter, usually, courts apply the proximate cause test to find out whose conduct, as between the bank and the customer is the direct cause of the loss.

According to the law of delict, proximate cause is a doctrine by which a person who brings the claim to court has the onus on his shoulders to show that the person who committed breach did some actions that followed one another and that eventually caused harm. That this actions should have been reasonably realized that they can cause harm. If those actions are proved to be direct cause to have foreseeably led to the sustained harm, the liability will be imposed. Contrarily, if those actions were interrupted so much so that the chain they made was irregular, and it could not have reasonably been realized that they cause harm, there will be no liability imposed.[59]

If the harm could have taken place even without the customer's action, the customer's action cannot be said to have brought the harm. That means the customers actions could not be said to be the direct cause. Between the parties involved in a case, the one whose conduct resulted in harm will be held liable. In *FirstRand bank Ltd v Kgethile,*[60] Kgethile who was the customer of the bank concluded a contract with the bank for opening of a bank account. Kgethile was only permitted to use the account when it had sufficient funds. Kgethile went to cyber centre and a message suddenly appeared on his screen notifying him that he had won money. The message requested Kgethile's banking details. He gave out the requested information and his information was used to steal the money form the bank.

The bank contended that the client acted carelessly by giving out his banking information to someone it does not know and it is its careless conduct that brought about the loss. The court stated that the duty to act with care has a reciprocity feature. Bank ought to follow the client's

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[59] < https://taxguru.in/corporate-law/concept-causa-proxima-proximate.html >=accessed 29 June 2022.

[60] (2021) ZANWHC 63.

mandate and execute the instructions with due care and skill. The bank is only obliged to act on the legitimate mandate of the customer not on dishonest orders.

The carelessness conduct of the client cannot be a justification for a judgement that his carelessness generally gives the bank the right to be reimbursed for damages resulting from this specific careless conduct. The customer was not the only party who breached the owed reciprocal duty of care. The bank did not deny the fact that its computers malfunctioned, hence, failing to block fraudulent transaction. The conduct of Kgethile was not the direct cause of the harm sustained because the bank also had a hand in the sustained harm. The proximate cause test failed to show that the customer's conduct was the actual cause of the harm sustained.

For the client to be accountable for the harm that was sustained its carelessness and negligence ought to be direct, immediate, and the real cause of the bank being deceived. It has to be obvious and apparent in the transaction in question, in the manner in which the cheque was written. Even if the customer can succeed in showing that the bank had a duty to observe competence or care in dealing with its account, the customer has a burden to show that the violation of the duty resulted in the harm and the harm was foreseeable. If the customer fails to discharge the burden of proving the foreseeability, its allegation against the bank will fail.[61]

## 2.7 Conclusion

The first part of this chapter engrossed on the legal definition of the banker's duty of care and skill. The definition states that the bank ought to act with skill and care or competence and proficiency, when following the orders of the customer. It also attended to the banker-customer relationship and the observation was that, many types of agreements may come into play from bank and customer relationship. The second part examined the rationale of the duty of care. It was discovered that the law imposed duty of care and skill on the bank because the bank performs tasks for the customer and it proclaims or profess that the bank uses its skill or proficiency to carry out the mandate. The third part administered the measures or guidelines developed by the court to assist in figuring out whether the bank violated its duty to employ skill and care and such measures are but not limited to, magnitude of the act, time, and decree of suspicion. These guidelines are to be applied by a reasonable banker depending on the situation

[61]< https://www.ius.uzh.ch/dam/jcr >= accessed 1 July 2022.

of every case. The last part concentrated on the party that bears liability in case of foul play. According to the provided evidence, the party whose actions were direct cause of the harm sustained is held liable and pay compensation to the other party.

CHAPTER THREE

# 3. The Banker's Duty of Care with Regard to Financial Advice in South Africa and English law

## 3.1. Introduction

The aim of this chapter is to do analysis by comparison on how South African courts and English law courts approach the extension of the duty of care with regard to the giving of financial advice. This study will have a glance at how the duty of care is imposed in giving a professional advice. The first part will focus on the South African approach. The second part will focus on the English law approach. After discussing how each jurisdiction deals with this duty the chapter will discuss which approach is the better one.

## 3.2. Justification of jurisdictions selection

This thesis focus on court decisions in South African and English law, guided by their historical, and legal interconnection. Commercial law influence of English law in South Africa, continued use of English law authorities, and adoption of different solutions to mention but a few. South Africa's colonial past has significantly influenced its legal system, particularly in commercial law, where English law principles have been extensively adopted. Despite these influences, South Africa has tailored its legal solutions to suit its unique needs and challenges. By conducting a thorough comparative analysis, this thesis aims to identify which jurisdiction uses a viable approach.

## 3.3. South African approach

### 3.3.1 When should the extension of the duty of care be applied

Customers receive advices from banks regarding services which include investments, wills, and insurance. Where inaccurate advice or information is provided, the bank will be accountable as such. It has been shown in the previous chapter that the bank has no legal duty to advice its customers, but where it chooses to do so, and liability arises, it will have to make good the liability. Different jurisdictions use different approaches to decide when the bank should be held liable. That is, when the extension of the duty of care should be applied.

The South African law uses a cautious approach to determine the matter.[62] Where the banker gives advice, then the duty of care extends beyond its normal application in the banker-customer relationship. This becomes the case in the sense that the banker must advice with due care and diligence whereas the normal limitation of the duty of care is to execute the mandate of the customer with care and skill. So the question is which approach does South Africa courts apply to the extension of the duty of care.

It has been established in the case of *Lillicrap Wassenaar and Partners v Pilkington Brothers*[63] that South African law uses the cautious approach in dealing with the matter and does not expand the sphere of aqulian action to novel matters except if there are positive policy considerations which favours such extension. Although the Lillicrap case was dealing with soil investigation, it established the approach for professionals' advice.

South African law utilizes a conservative approach. When the courts take a look at the standard that is expected from the banker, they avoid exposing banks to endless liability. If in every case where professional negligence is suspected the bank will have to pay damages, the customers will end up investing in products which are clearly risky but not expect to lose any money. At the same time, it uses the standard that does not allow banks to be negligent and get away with it at the peril of the public or customers.

In determining the degree of skill and care to be expected from the banker, the courts try to establish what the other reasonable person within the same branch of profession would have done.[64] The South Africa courts apply the cautious approach to avoid testing the standard against that of a person with a higher expertise. For instance, the court becomes conservative so as to avoid testing the skill and expertise of a nurse against that of a doctor just because they are all in health department.[65] In the context of this research, the bank manager's expertise cannot be tested against that of a teller. However, the courts in applying this method bear in mind that the financial institution by placing someone in a certain position profess to the public that the particular person possesses the expertise expected from a fair-minded individual in the similar situation. So if the financial institutions place a person with less expertise in a position which

[62] *Lillicrap Wassenaar and Partners v Pilkington Brothers (S.A) (Pty) Ltd*. [1984] ZASCA 132; [1985] 1 All SA 347 (A).
[63] Ibid.
[64] *Van Wyk v Lewis* 1924 p 444.
[65]Ibid p 456.

requires a more skilled person, the courts will apply the standard reasonable care that would be required if the position was held by the person who qualifies to do so.[66]

Although courts do not want to extent the standard of the duty of care expected, the courts also do not allow the banks to place responsibility on under qualified employees, who may not be able to perform it the way that it is expected to be performed. The South African law somehow provides a balanced protection between the bank and the customer in their relationship with each other. It does not favour the financial institution in giving their client inappropriate advice or in selling unsuitable products. At the same time, it does not favour customers to purchase high risk investment on a mere reliance of advice tendered by the financial advisor. This approach is a good one in a commercial setting because; it does not discourage financial institutions to run banking business smoothly. Simultaneously, it does not allow customers to place the liability of their own negligence on banks.

In South Africa where the perspective is conservative, when determining what is sensible the court will focus on the degree of expertise and utmost care hold and practiced at the moment by the people of a particular career that a person is part of.[67]

In *Durr v Absa Bank Ltd and another*[68] Durr requested an advice regarding investment from Stuart, being a regional manager of the bank's broking division. Durr was interested in investing her funds in a safe investment; she was not looking for investment that yields high profits. The recommendations that Stuart made were debentures and preference shares provided by Supreme Holdings and Supreme Investments Holdings (Supreme). Stuart promised Durr that the products he recommended were secure and stable, so much that even his own parent invested in them.

Through the advice provided by Stuart, Durr invested a lot of money in the recommended products. The investments did not bring a positive result as anticipated due to the liquidation of the companies. The companies were already bankrupt by the time the advice was provided. Stuart claimed to have conducted proper research on these companies but he did not discover that they were insolvent. However, there were indicators or factors that should have alerted him that something was not right. If he was focused enough and applying the necessary skill and care

[66] Ibid.
[67] *Van Wyk v Lewis* [1924] AD 438 at 444.
[68] [1997] 3 All SA 1 (A).

expected from the person in his position. The indicators included the higher returns to be yielded by the investment, and the commission offered to Stuart by these companies was too high. He depended on what he has been told by the directors of the companies and on what has been written in papers. It became apparent that he did not do investigations on his own. When the experts were called, they affirmed that there were factors that should have gave rise to the formation of suspicion in the mind of Stuart which would in turn lead to conducting investigations about these companies. The experts stated that there were flashing lights and any reasonable banker faced with the same situation would have recognized them.

The Supreme Court of Appeal had to answer two questions. One of those questions was about the level of knowledge and skill required. This was to be measured against the level of expertise expected from a banker. Thus, if a bank officer undertakes to be an expert in the banking field, his capabilities ought to be judged against the standard of the professionals in the banking field. Another question that the court was faced with was whether the expected standard was that of the normal broker or that of the manager of the region of the broking sector of a financial institution purporting to have investment skills and providing financial advice.

The judge of the court a quo applied a wide test for standard of competency and proficiency required, which is much strict. The judge had accepted the contention that Stuart was at all material times a member of the broking career, and for that reason his action should be judged against the general level of competency and proficiency which might be required of a normal broker.

This standard that the court used includes having many skills that Stuart obviously did not have. These skills given by the expert included the knowledge that asking for financial statements would give him the clear picture, or the true financial standing of the companies. Not taking secured debenture certificate at face value. He would know that a prospectus is no different from a glossy marketing material. The respondent expert stated that this standard is too high and clearly Stuart was ignorant of all these.

As much as the evidence tendered was significant, in the end the court had to make its own decision or finding relying on the evidence given. However, Absa and Stuart did not bring any expert from the banking department to tell the court what was to be comprehended by Absa carrying itself out as competent or what Stuart would have been told if he sought assistance.

The standard to be applied in view of the judge of the Supreme Court of Appeal, was not that of normal broker as has been explained by the evidence of defence. Schutz JA stated that to welcome that level would be to permit an explanation chosen by a person who only had to give evidence, for his own reasons so that the evidence can come out as he desires. Rendering the investigation of what is expected from a certain type of broker unnecessary. What should really happen is first to find out what expertise the certain type of broker must have, this would depend on what expertise he implies to the public to have. If thing were to happen the other way round, the respondent argumentation would serve as justification of a specialist doctor tested against the standard of a general practitioner. This would mean that the court is ignoring the authority of *Van Wyk v Lewis*[69] in which the judge referred to, “a specific field of career that a person forms part of.”

Schutz JA found that there were warning signs such as the high commissions and interest rates promised which should have been heeded, that better information should have been obtained about the debtor and that manager should at some point have looked about for guidance. Stuart was so inexperienced so much so that, he failed to know that he was supposed to ask questions. A qualified professional must recognize when he may be getting in water too deep for himself.[70] Either Stuart had to pre-warn the Durrs about the extent of his skills. That would have assisted the Durrs to acknowledge that relying on his advice was not entirely safe and he should not have made recommendation at all or recommend something he knows. He had no right to step into a field he was not qualified to be in and went on to profess skills which he clearly did not have. He should not have recommended the products which he did not himself understand and worse to assure the clients that the same investments are sound. He had an opportunity to ask about these products, after obtaining the necessary explanation then he could continue to provide the kind of advice that is expected from a person occupying his position. He had an obligation to ask because he made a very shallow investigation himself. [71] Schutz JA was of the view that correct standard is that of the broking division of a financial institution purporting to have investment knowledge and providing investment advice at professional level.

[69]1924 AD 438 at 444.
[70] *Durr v Absa Bank Ltd and another* [1997] 3 All SA 1 (A). Para 466C-D.
[71] Ibid. Para 469 H.

This issue was considered more in *Oosthuizen v Castro*[72] in that case a stockbroker was held accountable for advising a customer to invest in a product which did not yield as anticipated. The case was about the harm suffered by the investor who was advised by the stockbroker and the company having to compensate the investor. The defendant knew about the publicity material which indicated that the products he was recommending were poor. But he still convinced the investor otherwise. He recommended this poor product without proper research that a reasonable professional in his position would have conducted. The investor relied on his bad advice and invested. His advice was bad and there was no justification for it. It indicated that he acted without required skill and care; his conduct did not match the commission he was getting.

The Judge agreed that the broker acted without due diligence, this was due to his failure to ask for clarification which was readily available to him. He could have asked the accountant or the attorney so that he could be able to appreciate the financial structure of what he was recommending. Since, he did not seek any explanation he was not able to recognize that the investment had very slim chances of making profits. Moreover, he overlooked an article from a reliable source which stipulated the risk involved in his recommended product. His recommended product was not feasible and this was proved. The reasonable broker holding the same position would have or should have known that it is impossible for a shopping complex which was still being built to make profit.

What was important point to take into consideration was the profile of the investor and the risk she was willing to take. This was to be known from what the investor told the stockbroker. The investor had just lost her spouse, and she just wanted to secure her baby's future by investing in secure investment. However, the stockbroker recommended very high risk investment which was obviously bad for the investor given what she wanted. The judge analysed the investor's conduct, checked it against the commission he was being paid and hold him liable for negligence.

The reasonable broker is not supposed to give financial advice without proper knowledge about the financial product. The broker should employ the required level of skill expected. Where his knowledge lacks, he should conduct adequate investigation or should not render advice altogether, instead of offering inadequate advice. However, if he chooses to continue and render

[72] [2017] ZAFSHC 163; [2017] 4 All SA 876 (FB); 2018 (2) SA 529 (FB).

advice on the matter he is not well informed about, then he ought to be liable for any loss that may occur.

### 3.3.2 Instances of non-extension of the duty of care

The South African cautious approach is not automatically applied where the customer of the financial institution suffered loss. The customer bears the onus of proving that the loss sustained was a result of the banker's negligence. The negligent behaviour can only be proved by weighing it against that of a particular banker placed in the same situation. The customer may indeed suffer loss due to the negligence of the banker. However, if the customer fails to establish how the negligent banker must have acted, the court will not impose the obligation to exercise diligence. It must be clear how the extension of the duty is being applied. Otherwise, bearing in mind that it is not a normal banking business to give advice, the duty remain as thus until it should reasonably be imposed or extended.

In *Atwealth and others v Kernick and others*[73] Ms. Moolman a financial advisor who was working for Atwealth and Vaidro (companies) made a presentation to the Kernicks about certain products offered by these companies. Kernicks subsequently invested in the marketed products by Ms Moolman. Ms Moolman persuaded the Kernicks to invest in these companies. She also assured them that these companies make a lot of turn over through legitimate investment vehicles than was the case with alternative investment products. This was not true.

The Kernicks contended that Ms. Moolman in giving them financial advice did not act in accordance with the legal duties she owed to them and had offered them negligent advice. Because of the given negligent advice, they suffered significant loss. These investment companies in which they put their money into did not yield positive results as anticipated, but used the investors' money to pay out the returns.

The Kernicks' case was that the investments in which Ms. Moolman advised them to put their money were not what she professed them to be. Rather, they were part of a scheme under which the profits were not generated by reinvesting the client's money; instead they used the new members' money to pay the old members their returns. This kind of scheme collapses as soon as there are no new members joining it become impossible to make pay-outs.

[73][2019] ZASCA 27; [2019] 2 All SA 629 (SCA); 2019 (4) SA 420 (SCA).

Ms. Moolman's counsel argued that she had rendered information about financial products, not an advice. The Counsel said that Ms. Moolman only advised on the procedures to be followed for concluding an investment transaction. However, the court found that the exhibition by Ms. Moolman represented, in simple terms, the giving of financial advice, at least in the form of product information to the Kernicks.

The Kernicks clearly had intentions of relying on the advice given and they were entitled to rely, as it was given by the professional from whom they sought advice. Ms. Moolman was asked to have a meeting with the Kernicks because she held herself out as experienced and having necessary knowledge in what she was doing. That amounted to a giving of advice in any ordinary understanding of the term. Having found that Ms. Moolman indeed rendered investment advice about investments products to the Kernicks who subsequently invested their money, another question arises.

Another question which the court had to determine was whether Ms. Moolman observed her obligation which she owed to the Kernicks, and thus, whether with regard to that her advice was careless. The answer will be determined initially by both competency and proficiency needed of an advisor in similar occupation as Ms. Moolman. It had to be determined whether someone with necessary competence and proficiency would have advised the Kernicks in another way given the similar situation as the discussion at hand.

The Kernicks bear onus to show that if another fair-minded financial advisor was in the similar situation would have advised the clients about the risk of the product so that the client can appreciate it and make a decision about whether they are willing to take it. The basis for the contention was in the law of delict. It was not based in violation of the statutory duty.

The court stated that the violation of statutory duty does not bring about delictual liability; at common law, aquilian action requirements must be met. In this case to find out whether the prerequisites were fulfilled the court noted that proof must be provided about how the product was demonstrated to the client and there was no such proof. Additionally, there was no proof provided about, "what a sensible competent commercial service supplier would know about products in the market place before delivering an exhibition to a future customer and what material of intelligence they would have visited".[74]

The Kernicks failed to show how another professional in the same position would have advised them. There was no evidence showing how the investment played out, that is how it started, operated and how it ended up crashing. Because of the lack of evidence, the court concluded that there was nothing to substantiate the Kernicks claim. The burden to prove the alleged negligence rested upon the Kernicks and they failed to discharge it, therefore the appeal was dismissed.

This illustrates the difficulties of proving that a financial institution was negligent in recommending an investment that subsequently failed. The customer had to show whether a reasonable financial advisor with required skill and care would have made a different recommendation after making enough research. If the customer of the bank had to call as many experts as possible to prove negligence of the banker, then it should do so. In that way, it gives the court what it should work with. There would be many different opinions that would be given.

What was significant in bringing about a claim questioning Ms. Moolman skills and advice she provided as a financial adviser was to find out exactly what she said to the Kernicks regarding her recommendations. Another thing that was important to do was to call in experts to deliver evidence stating what a reasonable financial broker was supposed to know about the products in the market place. What due diligence they would have done before delivering a demonstration to a future customer and what sources of information they would have consulted.

One would expect there to be evidence in terms of the products in which the Kernicks invested. The evidence given by an expert would have counselled against investing in the investments recommended by Ms. Moolman, the expert would have also proved that another professional would have advised the Kernicks that the returns were too high. But there was no evidence in that regard, the attorney conducted a cross-examination on what he believed was expected from a reasonable financial service provider. The question about the standard of the fair-minded individual in this case remains. The test for negligence must unavoidably be based upon the

[74] Ibid p 41.

factual matrix of the argument needing judgement.[75] Reference was also made to *Van Wyk v Lewis*[76] as it had been done in Durr.

In this case it has been clearly stated that there was no evidence led about what a reasonable financial service advisor with required skills would have advised them. There was no evidence addressing an important issue, being what a reasonable financial service provider would have said in advising the Kernicks about the investment they were considering. The court did not know what counselling a sensible advisor would have given in making presentation about these products.

Any doubts about Ms. Moolman's expertise and capabilities of financial matters are buried by the absence of any evidence concerning what occurred at the critical discussion held by Ms. Moolman with the Kernicks. The evidence given was not sufficient to determine the level of competence expected to be exercised or that a sensible advisor would have counselled with the products invested in. In the Durr case three experts were called and gave their opinion, such evidence was completely absent in the present matter.

The courts stay as cautious as possible in extending the duty of care. Regardless of how much clear it can be that the customer suffered loss, it must be established by the plaintiff how another professional in defendant's position would have acted. It is not the job of the court to find such evidence. However, the counsel of the plaintiff has a legal duty to provide the court with sufficient evidence to help it in administering justice. Where the counsel has done so, no matter how much the bank may try to escape the liability if the negligence of the banker had been proved, the liability will be imposed due to the violation of the extended obligation to act with competence. On the other hand, if customer of the financial institution fails to discharge the duty it bears, then there is not much that the court can do.

In *Standard Chartered Bank of Canada v Nedperm Bank Ltd*[77] the parties to this case are the Standard Chartered Bank of Canada (Stanchart) which is the appellant and Nedperm Bank Ltd (Nedbank) who is the respondent. The other important party is Richard Bay (Pty) Ltd. (Triomf RB) which was the company producing fertilizer. Triomf RB was using sulphur in fertilizer

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[75] *Durr v Absa Bank Ltd and another* [1997] ZASCA 44; [1997] 3 All SA 1 (A).
[76] 1924 AD 438.
[77][1994] ZASCA 146; 1994 (4) SA 747 (AD); [1994] 2 All SA 524 (A).

production. One of the suppliers of sulphur was Cansulex Limited (Cansulex). In supplying Triomf RB with sulphur Cansulex had been using banking facilities provided by Standchart.

Standchart case in both court a quo and on appeal was that Standchart sought financial reports of Triomf from Nedbank on behalf of Cansulex, Nedbank provided erroneous statement which created wrong impression to the Standchart regarding the ability of Triomf RB to pay his debtor whether he is trustworthy. By lying about financial situation of Triomf Nedbank performed carelessly. This false statement subsequently resulted in financial loss. The bill of exchange that Triomf drawn on behalf of Cansulex was dishonoured and all the money owed to Cansulex was lost.

The court had to determine five issues being (a) whether the banker stated false information that was misleading in the report, (b) whether the bank was careless, (c) whether the provided report opened a way for criminals to defraud the customer, (d) whether the bank acted unlawfully, (e) whether a customer had a hand in what happened, if it did what are the consequences that comes with that.

The onus with regard the first four issues was upon Standchart to prove and the last one upon Nedbank. The customer's case was that if the report given did not state the true facts, the bank should bear liability for giving negligent report. Nedbank was requested to urgently provide the report, to an extent that the report was to be provided on the same day it was requested. The bank had no time to look into the financial matters of Triomf so that it can establish whether they were good or bad. The bank could have simply refrained from providing a report at all.

Standchart alleged that the bank was aware of the financial standing of Triomfs. Thus, a professional possessing the necessary skill in the same occupation as the officer of the bank would have declined to provide the report. Stanchart allegation was right; Nedbank was not obliged to provide a report within such a short notice. The bank knew about all that was going on when it comes to Triomf account, it should have reasonably foreseen that financial standing of Triomf was very poor. It should have also realized that Stanchart was going to depend on that report to make a business decision. The conduct of Nedbank and the harm that occurred were closely related. The loss was sustained about a month later, even though it only came to light few months down the line. Thus, Nedbank provided the report carelessly. However, Stanchart bear an onus of proving that the owed duty of care was violated. Failure to discharge the onus exonerates the bank from liability. Whenever the bank decides to act out of the perimeters of their duty of care by rendering financial advice, they have an obligation to provide it with required skill and care of a person in the similar situation.

The court was faced with many issues; the important one for the purposes of this research is the issue of unlawfulness. The court had to determine whether Nedbank in issuing the report which contained incorrect information to the customer acted unlawfully that is in breach of a legal responsibility owed to the customer not to issue incorrect information. Six factors were to be considered in answering this question.

1. The circumstances in which the statement was uttered.

The statement was intended to help Stanchart to know about the creditworthiness of Triomf and it was purely a commercial investigation. The requisition was not a friendly enquiry, and it was clear that the client was going to rely on the report given considering how many times they asked for it.

2. The essence of the statement.

The statement was about the client of Nedbank and Nedbank had the necessary knowledge to make the statement. It is an ordinary banking business to make a financial statement.

3. The reason of the statement and what Nedbank knew with regard to that

The purpose of obtaining the bank report was to enable Stanchart to decide whether to do business with Cansulex, it wanted to know its creditworthiness. Nedbank was probably aware that the request of the report was made on behalf of the third party who wanted to know if it could do business with Triomf

4. Dependence by third party on statement.

Nedbank must have realized that another person would depend on the statement in taking a decision about whether to work with Triomf RB or consider it credible and could sustain harm if the statement gave false impression about Triomf RB's commercial standing.

5. Relationship between the parties.

The relationship was not the direct one but the foreseeability factor was found present. It was also established that it was highly probable that Nedbank knew the purpose of the statement that was needed therefore the relationship was reasonably close one.

6. Public policy, fairness.

Finding in favour of Stanchart would not be against any public policy. It would not open stream of endless cases or expose banks to liability. The bank decided to furnish the report which it could have refused to give.

Counsel for the respondent relying on English law authorities, argued that; Nedbank owed no duty of care to Stanchart and that, therefore, the requirements of unlawfulness were absent. The judge after considering those English law authorities was not convinced that they provide compelling support for the contention of the respondent's representative. It appears from Caparo[78] case that for imposing the duty of care in tort, particularly cases of carelessness giving rise to pure financial loss English law has established three basic methods being foseability of damages, proximity relationship and that attaching legal liability in the circumstances be fair, just and reasonable.

With regard to the test of proximity as applied to a case of negligent misstatement by judge in Caparo case, if applied to the facts of Nedbank, in terms of English law proximity existed. The judge was not convinced that if English law were to be employed, a different outcome would be achieved and therefore the unlawfulness was established the imposition of the duty in this case was based on unlawfulness.

It is clear how the cautious approach by South African courts is applied. The plaintiff bears the onus of proving that a sensible being, if placed in the situation of the defendant, would act differently and as expected. For as long as this onus has been discharged, the extension of the duty of care will be imposed. In the same manner, where the plaintiff fails to show or prove to the court that another person would have acted differently or counselled differently from the defendant, no duty of care will be imposed. This application of the law is crystal clear and leaves no room for uncertainties.

[78] *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605.

## 3.3 English law

English law uses a liberal approach to the extension of a duty of care. If the relationship between the banker and its customer is close enough, in such a way that when examining the person who is allegedly in the wrong, and the negligent act that he committed have a potential of causing harm to plaintiff, the prima facie duty of care exists, and it can only be eliminated by the court's contemplation that there are considerations which ought to negative, reduce or limit the scope of the duty.

It has been shown through the decision of *Hedley Byrne & Co Ltd v Heller & Partners* Ltd and other cases that English law approach is liberal,

> "The position has now been attained that as a way to show that the duty to act with due diligence comes into play in certain circumstances, it is insignificant to take the facts of that case within those of past cases in which a duty to act with due diligence was present. Rather two methods should be used in addressing the question. The first one is whether, as between a person who is allegedly in the wrong and the person who sustained harm, the proximity relationship was adequate, such that in rational observation of the former, negligence on her side has a possibility of causing harm to the later. In which situation a prima facie duty of care comes into play. The second question to consider if the answer to the first one is positive, it is important to take into account whether there is any contemplation which ought to narrow the extent of the duty or the group of people whom it is owed or liability to which violation of it may result."

In the previous chapter it has been stated that the banks have no duty of care to advice its clients. However, when it chooses to do so it must employ due care and skill. Failure to adhere to the required due diligence of care and skill will give rise to liability for negligent advice. The House of Lords in *Hedley Byrne v Heller Partners*[79] had set an accepted precedent that if one knows very well that he attains an influential position and because of such position and his skill, his advice will be taken, then the duty of care will arise. It will therefore be reasonable for the person whom the advice is given to act upon it.[80]

Sometimes there is confusion as to whether the banker rendered advice or just gave information to the customer. It is important to note that English law categorize banker's duty of care with regard to giving advise into two parts, that is rendering of advice and rendering of mere

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[79] *Lillicrap Wassenaar and Partners v Pilkington Brothers (S.A) (Pty) Ltd*. [1984] ZASCA 132; [1985] 1 All SA 347 (A).
[80] *Hedley Byrne v Heller Partners* [1964] AC 465.

information. Where the banker gave the correct information, and not any advice, no duty of care arises.[81]

However, English courts in some cases had established that the liability should not arise just because the advice was given.[82] It has clarified that the parameters of the duty of care accepted by a qualified adviser is regulated by the reason of the duty, tested on an objective grounds by mention of the reason for which the advice is being provided.[83] The test is, therefore, to analyse what risk the duty was meant to control and then find out whether the loss suffered by the claimant represents the realization of that risk.

The House of Lords in *Caparo Industries plc v Dickman*[84] refined the Hedley Byrne test. Lord Bridge set out the three requirements to be found before a relationship of sufficient proximity would be established in a misstatements case,

> The salient feature of all these cases is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him, directly or indirectly and knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation.

In that case a firm of accountants appealed against a decision of the Court of Appeal in which it was decided that the accountants owed a duty of care to the appellant shareholders when producing an audit report required by statute. The claim was for negligent misstatement. Caparo had bought shares in the company of which the report was about a part of a takeover. The appellant had relied upon the results of the report. However, it was later found that the results of the report had misrepresented the profits of the firm, in turn causing a loss for Caparo.

The House of Lords reversed the decision of the Court of Appeal and held that no duty of care had arisen in relation to existing or potential shareholders. The only duty of care the auditor`s owed was to the governance of the firm. It was found that three factors had to exist for there to be a duty of care which where: proximity, knowledge of who the report would have been

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[81] Ibid.
[82] Ibid.
[83] Richard Edwards, *'The liability of banks for negligent advice: time to go back to basics?'* [2019] Butterworths Journal of international Banking and financial law 3.
[84] [1990] 2 AC 605; [1990] 1 All ER 568; [1990] UKHL 2.

communicated to and for what purposes it would have been used. Lastly, there had to be knowledge that the shareholders or investors would rely on the report in regards to the transaction. Furthermore, the judges noted that audit reports of plc`s are regularly carried out, which differs from reports carried out for specific purposes and for an identified audience. Thus, the accountants owed no duty to the entire public who might or might not place reliance on the report when making financial decisions. Moreover, appointing liability would open the floodgates to society. Consequently, limitations have to be set when pure economic loss occurs in the absence of contractual agreements between parties.

In Caparo itself, reliance on the information was not reasonable because it was supplied for one purpose and could (and should not) be relied upon for any other purpose.

### 3.3.1 Bolam test

In *Manchester Building Society v Grant Thornton Manchester Building Society*,[85] to its clients, MBS provided mortgages that attract fixed interest rate. In order to manage interest rate risk, MBS uses interest rate swaps. MBS received advice from Grant Thornton (GT) with regard to lowering volatility in its books.

Thereafter, it was realized that the advice provided was inadequate and MBS had to revisit its accounts. Which had capital shortfall, MBS had to sell swaps and its mortgages with less price and it ran loss. GT was sued by MBS for providing a poor advice. GT admitted to have rendered a poor advice. What it did not admit is that the harm incurred was within the scope of the duty of care it owed to MBS.

The high court noted that if it was not because of the poor advice provided, MBS would not have brought the products and it would have broken swaps. But the court did not place liability on the part of GT. The court noted that the loss incurred resulted from the decision taken by MBS to invest. The court said that if it was not for the negligent advice given, MBS would not have purchased the products and it would have broken the swaps. Nevertheless, GT was not found liable. The court stated that the loss was due to MBS business decision to make the investment, it made that decision on its own, and GT did not accept that in case of failure it will be liable.  This decision was not influenced by GT, and GT never undertook to bear liability if loss occurred.

[85] [2021] UKSC 20.

The Court of Appeal concurred with the decision of the High court. But it based its decision on varying reasoning. It noted that in order to establish whether GT was liable or not, it should be determined whether what was provided constituted an advice or it was just information. According to the court of Appeal decision GT provided information not an advice. Thus, GT can only bear liability to the extent of what was foreseeable. The harm sustained was not within the scope of the owed duty of care.

The Supreme Court handed down a judgement in favour of MBS, there were three different views. Two judges took the same view, the majority judgement. They came with six questions to be answered in order to establish whether in the first place the duty was owed or not. Secondly, whether the harm sustained was within the parameters of the duty of care. The third question was whether the duty was violated. Fourthly whether the harm sustained was a direct consequence that occurred from defendant's act. The fifth issue for consideration was whether there was a causal link between defendant and the sustained harm. Lastly, whether there was obligation to compensate.

According to majority judgement, the extent of the duty of care is established by the reason why the duty was owed. The test is objective; it should be determined why the advice was provided. The risk that was to be guarded against by the duty be taken into account and find out whether the loss suffered resulted from the risk that was supposed to be controlled.

Other two judges provided a separate but concurring decision; they hold a different view about the test. One of these two judges hold the view that the question should be whether there was a closely related relationship between advice provided and loss sustained. Another judge focused more on the policy consideration of obtaining a genuine and sensible allocation risk between the advisor and the person who received the advice than on the theoretical structure.

When determining these issues with regard to what is currently being considered, the majority judgement holds the same view that the purpose for the provided advice was to assess whether MBS could use hedge accounting. Taking into account, how it plans to make profit and the requirement regulatory capital. GT provided a poor advice that the hedge could be used. MBS acted on this poor advice. By the time it was discovered that MBS was poorly advised MBS was exposed to the risk already, which the hedge was not intended to control. After these considerations the court holds that MBS had a right to be reimbursed for loss it suffered.

The duty to provide information comes into play where the customer makes such requisition and the bank only has an obligation to give a genuine response to the question.  The second duty comes into play where the customer asks the bank for an advice, and it is in relation to this second duty that this thesis is concerned. This duty comes into play where there is an advisory relationship.

The position of English law regarding the banker's duty of care to give financial advice has gone through some modifications; these modifications are seen in the latest judgements many of which have dealt with the banker's duty to advice with care. These judgements have developed different various tests for the violation of the banker's duty of care. Somehow it can be said that there is really a confusion of what test is actually being used by English courts. As much as the approach is liberal, there should at least be some consistency or certainty or uniformity in the application of the test used. It is reasonable that each case should be decided on its own merits but still in doing so it should be clear that the same test is being applied to different case scenarios. However, this does not seem to be the case. There is a series of cases with each setting and applying its own test. As much as this research appreciates that the test is liberal, it cannot shy aware from the confusion that exists.

We already have the MBS case and the test developed or used in it, and the expectation would be that at least there would be many cases which seem to follow it. If it was found not to be the correct one, then the new test will be set and followed and it seems there is always a new test for a new case.

The case of MBS followed the Bolam test, which looks at whether the adviser was acting in accordance with a "practice admitted as appropriate by experts in that profession". The test that followed Bolam test is called "Montgomery test" developed in *Montgomery v Lanarkshire Health Board*[86] which is whether when providing advice, the person who gave it disclosed all the important facts about the risk and made the investor aware of they can opt for.

[86] [2015] UKSC 11.

## 3.3.2 Montgomery test

In *Montgomery v Lanarkshire Health Board*[87] the court concluded that explanation given by a practitioner in a medical field when providing advice to a patient was not regulated by Bolam test. Rather, what should be done was "to employ sensible competency and proficiency to make sure that the patient knows of any significant risks that comes with any suggested remedy or surgery and of any good option or different nursing".[88] The test of materiality is whether, in the situation of the given case, a fair-minded individual in the position of the patient would be likely to attribute importance to the risk, or the person who is talking about the risk should realise that the certain patient would possibly attribute importance to it".[89] The medical practitioner should converse with a patient, in such a way that the patient will understand how serious his medical condition is, and what effects may be expected from treating such condition, both positive and negative effects. Also what are other options that he can opt for?

This is the second test that we see in English law. The expectation would be that there should be some uniformity. Surely by applying liberal approach the courts did not intend to develop a new test for every new case.

This test was also applied in the case of *O'Hare v Coutts & Co*,[90] which is how the application of law should go about. Developing a precedent and applying it to subsequent cases. In this case O'Hare relying on the advice provided by a banker made an investment. The banker who recommended the investment was Mr. Shone, who was in charge of overseeing the investments and he was also the one who helped O'Hare.

O'Hare alleged that the recommended products did not suit him considering the loss he could afford to sustain. The report was issued by the banker to relevant people indicating the claimant's interest in the investment. On the contrary, O'Hare contended that the banker had persuaded him to register into the investment. If the banker was not so persistent at persuading them to register into the investment they would not put their money in jeopardy. The banker defended that O'Hare had enough knowledge about investment. He was commercially knowledgeable and he

[87]Ibid.
[88]Ibid par 87.
[89]Ibid par 87.
[90] [2016] EWHC 2224 (QB).

was engaged in the administration of businesses. Additionally, he stated that the investments were not unsuitable per say, they just did not perform as anticipated.

O'Hare maintained the allegation that the investments were inappropriate for them and denied being experienced investors. They indicated that the products were sold on misleading advice. However, the banker insisted that they had sufficient knowledge and were aware of the risk involved. O'Hare brought a claim based on breach of contract, statutory duty and negligent misrepresentation. All the allegations were denied by the banker.

The court referred to the duty of reasonable skill and care, the new Montgomery test. The judge stated that the test used where the doctor rendered explanation to the patient in medical field has recently been held no longer to be governed by the Bolam test. In *Montgomery v Lanarkshire Health Board*[91] the Supreme Court held that the an obligation to act with competence when enlightening a patient of the risks is usually "to take sensible care to make sure that the patient knows about any critical risks involved in any suggested cure or treatment, and of any sensible option they have."[92]

The test of whether a risk is material is "whether, in the circumstances of a particular case, a sensible person in the similar situation as the patient would possibly attribute importance to the risk, or the doctor is or should know that the particular patient would likely to attribute importance to it."[93]

Kerr J held that in the context of investment advice the adviser and the customer should converse in a decent way. "to make sure that the customer comprehends the advice and the risks that comes with a recommended product".[94] However, the test that the financial adviser should meet is not the Bolam test but the 'Montgomery test' that is whether the adviser had taken sensible care to make sure that the customer was aware of any material risks involved in any investment, and of any choices she can opt for.[95]

On the facts before him, Kerr J found that the "sufficient information" the O'Hare' had been provided with in respect to the products" meant it was impossible to argue that the investments

[91] [2015] UKSC 11.
[92] Ibid par 87.
[93] [2016] EWHC 2224 (QB).
[94] [2015] UKSC 11; [2015] AC 1430.
[95] Ibid Par 87.

did not suit him”.[96] By being able to show that the O’Hare had been adequately enlightened about the risks of the suggested products, Coutts (by their financial advisers) had not violated the Montgomery test and had observed compliance of the duty.

This Montgomery test is clear and reasonable enough. There are certain practices in every professional branch; that can be exercised by people in that branch without exhibiting the skills of an extra ordinary person. For instance, the ordinary doctor in Montgomery case would know the risk involved if the diabetic woman was to give virginal birth. It is reasonably expected that the doctor dealing with such woman should make them aware of the risk. In the context of banker-customer relationship, it is reasonably expected that if the banker recommends products which are high risk, it should make the customer aware that the risk involved is as high as the returns expected. Imposing the duty of care to make customer aware of the risk is reasonable.

### 3.3.3 Sophisticated investor test

Regardless of how fair, just and reasonable the Montgomery test seems to be in extension of the duty of care, the English courts have yet developed another test. This third category uses the ‘sophisticated investor’ test which concentrates on the know-how or the experience of the client and the level to which he depended on the advice. This test is advantageous to banks when it comes to sophisticated investors. To prove the unfairness of this test one can consider an example of a doctor performing surgery on another doctor and inflicting harm with the treatment administered. We cannot say the doctor who performed the wrong surgery on another doctor owes that doctor no duty of care. The Hedley Byrne principle applies.[97] Apparently the banks argument in applying this ‘sophisticated investor test’ is that the sophisticated customer can take care of themselves. This test, if applied loosely, will enable banks not to comply with the duty of care they owe to their customers.

When it comes to legal fraternity the example becomes clearer. No person would ever think of saying that the client is not owed a duty of care by its lawyer because the client is sophisticated and has a law degree.[98] Legal advisors owe a duty of care even to large and reputable financial institutions, regardless of having experienced in house attorneys. In cases of legal practitioner’s

[96] [2016] EWHC 2224 (QB) par 226.
[97] [1963] UKHL 4.
[98] Richard Edwards (n-88).

negligence, it is realized that the way by which advice is given may differ depending on the customer's capability of understanding but not the very existence of the duty. There is no justification for a different treatment when it comes to financial advice cases. Banks are no exceptions, where another banker is placing its reliance on the expertise of the other, the duty of care is owed.[99]

In most cases of this nature, clients have brought their claims on the grounds of express or implied misrepresentation, on the allegation that the financial institution made the said misrepresentation. These cases shows that English courts will attempt to uphold market standard contractual evident material utilized by financial institutions in such transactions which looks for a way to limit the circumstances in which misrepresentation can be said to be present and which its intention is to work as a contractual estoppel absolving banks from liability.

In *JPMorgan Chase v Springwell*,[100] Springwell was a product used by investors to gain positive returns, for a body that transported goods on ships which belonged to one family and managed by the same family. This company had good relations with some businesses which were part of a body called Chase. In 1980s, Springwell started making serious investments in new markets debts. Around 1990, its range of investments was intensive in Russia, specifically 'forwards' called GKO linked notes (GKO LNS) these were offered by Chase but they appeared in other products offered by Russian company. (GKO). Russia experienced economic collapse in 1998, the price of the products invested in fallen drastically and eventually their range of investment crashed.

The duties which were in contention were too many, broad and onerous in nature, for which there was no previous case or any legal decision which may be followed in dealing with this case. The judge had to do its own fully comprehensible examination of what actually took place to find out 'low level' elements which, might led a way to finding if these alleged new duties exists.

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[100] *Hedley Byrne v Heller & (1964) Partners* AC 465 the court had set an accepted precedent that if in a sphere in which a person is so placed that others could reasonably rely upon his judgement or his skill or upon his ability to make inquiry, a person takes it upon himself to give information or advice to another person who, as he knows or should know will place reliance upon it then a duty of care will arise.

The elements to be considered included “sophistication”; of Springwell as a hostile and acquisitive qualified investor in various ways at the leading position of investing in emerging markets;[101] there was no legal document that outlined the relationship between the client and investment advisor,[102] in situation covered difficult transactions, including large sums of money over long period of time;[103] the lack of the indication of an advisory relationship like statement that covers all investment information and many others. The judge said that all these elements considered as a whole did not show any presence of the ‘general advisory duty’ that was being claimed.

Springwell as an active qualified investor who was involved in market almost every day. What was really important in the appeal was the extent to which the bank officers talked about the type of danger that these products come with. Springwell based his contention in careless misrepresentation. The judge of the court a quo determined that misrepresentation was lacking and Springwell took the matter to appeal.

The Appeal Court concurred with the court a quo that Springwell was a qualified investor, who was able to appreciate the risk involved. The court went on to consider the issue whether irrespective of misrepresentation lacking, they can really be considered as misrepresentation or just the averment made by people who were justified to aver them. The officers of the bank made averments about the Russian products compared with other options in same situation. Springwell had a burden to show that the averments that were averred constituted implied averments of facts and prove that there is justification for assuming that they were certain averments.

The Appeal Court concurred with the court a quo that although there was existence of relationship between these parties such relationship is not valid justification of implied representation in law, these people were justified to make those averments. It further had a look at careless misrepresentation contention in common law and noted that the level was very low to the person selling investments not to carelessly misstate even a single thing or to make recommendations of products which come with less risk. It determined whether there was any contract concluded where the owing of the duty can emanate, which should be taken into account, considering a situation altogether.

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[101] Richard Edwards (n 88).
[102] *Riyad Bank & Ors v Ahli United Bank* (UK) plc [2006] 1 CLC 1007.
[103][2010] EWCA Civ 1221.

Regardless of the fact that Appeal Court concurred with the court a quo, there was no misrepresentation. Giving sufficient reason for a legal action. It also considered clause that the bank used to disclaim any dependent on it in case of loss and whether its applicable in cases where the representation was present with respect to advice concerning the products. Even after taking into account all these elements it still concurred with the judgment of the court a quo.

Moreover, the court considered whether a disclaimer clause can protect the bank. To determine this, it was considered whether the way that the contract is written exonerates the bank from liability and whether Springwell was not allowed to rely on any available remedy available in misrepresentation. If he is really not allowed to have legal action, can the disclaimer clause be considered fair. If the disclaimer protected the bank on the ground of lack of representation it will not be simple to categorize. It noted that misrepresentation was really there. The disclaimer was meant to protect the bank and it was subject to fairness. After all that had been taken into account the court was content that the contract was concluded on fair terms because Springwell was a sophisticated investor who could appreciate the risk.

The sophisticated investor test has also been applied by Singapore jurisdiction[104] but this research still maintains that that is unreasonable. It still remains ridiculous how a customer should not be afforded the duty of care like any other customers just because he is sophisticated. This sophistication factor is very vague. This research finds it difficult to accept that a duty of care should not be found because of it.

In trying to understand this sophistication test this research seeks to examine another case where multi factorial investigation in different characteristics of the customer of the bank had been applied. In *London Executive aviation v The Bank of Scotland*,[105] the claimant company London Executive Aviation (LEA) operated a business chartering private aircraft. In 2007 the business was doing well and the owners decided to buy more private jets to grow the business.

They started to negotiate loan facilities with their lender Lombard which is part of the Royal Bank of Scotland group of companies (RBS) to facilitate the purchase of the private jets. The terms of these binds LEA to pay interest set at a variable rate based on NatWest's base rate plus a small percentage. LEA was advised by the colleague of Mr. Brindley, to discuss the prospects

[104] *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] SGCA 39.
[105] [2018] EWHC 74.

of being part of hedging products of the loans. The discussion happened by means of phone calls, LEA refused to be part of any hedging products but eventually gave in.

At some point the interest dropped drastically and never picked up. The consequences of this was that, although LEA had managed to pay off the loans to Lombard, the company had a burden to pay the bank. LEA brought the claim against the defendant contending that they mis-sold these products. Also that Mr. Brindley recommended that they join hedging products and that the recommendation was negligent. LEA alleged that the bank had an obligation to employ its competence when advising it.

In considering whether the duty of care was owed, the court followed the test used in Spingwell case discussed above, which is multi factorial investigation into the defendant attributes as an investor as a way to decide whether it was justifiable to impose the duty of care. It looked at the sophistication of LEA, lack of any advisory document, chances of obtaining information from other people and indication of advisory relationship.

The first factor is sophistication, the court determined that the claimant was "sophisticated" since its representative was a spouse of one of its manager who had been in banking business. This very fact makes one to wonder whether someone who is really 'sophisticated' in the field would rely on being represented by someone who was not even working in their corporation. However, even without considering that, the decision of the court does not really reveal why it relied on precedent that LEA was not owed a duty of care by the bank. .[106]

Another factor is absence of written advisory agreement, the court found that there was no written advisory agreement, if it was there the duty would arise in contract. But it had been shown that the duty can also arise in tort. Another factor is availability of advice from other sources. The bank indicated that the said representative of LEA could have asked the people she previously worked with while she was still an employee of investment bank. However, it was not part of investment banks operation to offer advice to retail client, about the product that was in question, and just having a conversation with old people that LEA representative used to work with does not make LEA experienced to an extend that it could no more depend on the advice of the bank.

[106] Richard Edwards (n 105).

The last factor for the purposes of this research is, indication of advisory relationship, the court considered what was actually said when LEA was conversing with the bank and there was nothing that was said by LEA to the banker with regard to "what he thought LEA should do". However, asking such question was really unnecessary because the banker was clearly suggesting that LEA should put its money in one of the recommendations he had made. The finality of the matter was reached on formal discussion setting, where the banker made the presentation clearer with the aid of 'decision tree' for LEA to use in deciding what to pick, on the list he had prepared for them. In picking what it wanted to invest in, the banker was holding LEA's hand all the way and the court did not have to look further than this for "the indicia of an advisory relationship".

Instead of understanding the reasonableness of this test after discussing LEA's case, it brings confusion because now the judge wants to apply this factors exactly the way that they were applied in Springwell. These two cases are different, firstly, LEA's contention unlike the one that was raised by Springwell, was just a usual and typical duty to advice with care, while, the one that was raised by Springwell even the court made it clear that it was difficult and demanding in the sense that it had to make analysis from scratch. The LEA's allegation is the standard one which result from banker customer relationship, which has its roots in Hedley Byrne.[107] Also, Springwell was a certified investor and was actively involved in this investment things like almost every day. But the story was different with LEA, LEA was a beginner this product was its very first one.[108]

### 3.3.4 Which of the two jurisdictions utilizes a better approach

The South African cautious or conservative perspective or approach to the extension of the duty of care seems to be the better approach according to this research. South African courts have been consistent in applying the approach which makes it easy to predict the outcome of the subsequent cases. This is desirable because the application of the law must be certain and consistent. This approach does not seem to favour any of the parties either the bank or the customer. The cautious application also saves the court's time while at the same time does not leave any party with a doubt that the other party is being favoured over it.

[107] Ibid.
[108]Ibid.

With the English law liberal approach, it is completely the opposite, the test they are applying is so uncertain, as it keeps on changing. It is true that each case should be decided according to the facts of its situation but that for sure does not mean that instead of applying precedents, the judiciary should re-make laws for every law suit and to commence examination for every law suit like in LEA, that would just led to unreliability and unpredictability.[109] It might not be reasonable to suggest that English courts should follow the South African approach because the policy considerations of the two jurisdictions are definitely different.

However, the English law have to find one rule and stick to it. As much as this thesis is aware and appreciates the fact that *Caparo Industries Plc v Dickman*[110] case had refined the Hedley *Byrne & Co Ltd v Heller & Partners Ltd*[111] test. There is still a problem. The Caparo case highlights the difficulty in creating a single test or relying on a single factor to establish duty of care. As highlighted by Lord Bridge, 'since the Anns case a series of decisions of the Privy Council and of your Lordships' House… have emphasized the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope.[112] Therefore, a multi-factorial test was developed, but still only as a guide and not to be seen as a strict test. It was envisioned that the law will increasingly move to a more categorical approach, recognizing distinct categories. There is therefore, unhelpfully, still confusion as to the general application of this test.

Therefore, the English courts might have to sit down and scrutinize every possibility that might be bringing about the confusion and uncertainty and set a precedent to be followed going forward. The set precedent should not be followed only where it is reasonable to do so. Having looked into the tests that the English law applied its liberal approach, I am inclined to agree with Richard Edwards[113] that the return to first principles established in Hedley Byrne that a duty of care arises every time a bank decides to advice the customer with respect to investments. It has been long-established that where banks shy away from their responsibilities of advising client with care in investments cases liability arises. It is unnecessary to make further investigations

[109]Ibid.
[110] [1990] 2 AC 605; [1990] 1 All ER 568; [1990] UKHL 2.
[111][1964] AC 465.
[112] Caparo Industries Pic v Dickman [1990] 2 WLR 358 at pp.364-5.
[113] Ibid.

whether there is a proximity relationship between the parties, or to bring the doctrines of reasonableness and fairness to recognize this duty like it is a novel thing.[114]

The test developed in *Caparo Industries plc v Dickman*[115] is being interpreted incorrectly, it does not lay down a three- fold test to be applied anew in every law suit, but rather needs the court to consider what has been decided previously and follow the precedents unless it is necessary to consider whether the precedents should not be followed anymore. Hence it is usually only in a new kind of case, where developed principles do not provide an answer, that the courts need to go beyond those principles in order to decide whether a duty of care should be recognized.

## 3.4. Conclusion

The first part of this chapter examined the South African law approach to the extension of the duty of care. The approach is the cautious or conservative one. This approach tests the standard of care of an expert by a practice accepted as correct by experts skilled in that specific field. It does not impose the duty of care unless it had been proved how the responsible person on that position would have acted. The second part discussed the approach applied by the English law, which is liberal approach. It turned out that various tests had been used by the courts, the Bolam test, Montgomery test and the sophisticated investor test. These tests seem to create uncertainty in English law extension of the duty of care. The last part discussed which test is the better one between the two jurisdictions. It found that the better approach is the one used by South African law because it provides certainty. The English law still have to set the test that it will consistently follow or return to the Hedley Byrne and Caparo principles.

[114] Ibid.
[115] [1990] 2AC 605.

CHAPTER FOUR

# 4. Conclusions and recommendations

## 4.1 Introduction

The aim of this research was to analyse the scope of the banker's duty to exercise reasonable care and skill in rendering financial advice to the customer. This study sought to examine what happens when the banker had acted outside the perimeters of the scope of duty of care. That is when they have decided to give financial advice which eventually caused a customer financial loss. The first chapter of this research dealt with the problem statement, hypothesis, aims, objectives, research methodology and chapter outline.

## 4.2 Summary of key findings

The second chapter discussed in detail the banker's duty of care and skill. The initial section of that chapter entailed an introduction to the relationship that exists between the bank and the customer. It was demonstrated in that regard that the relationship between the bank and its customer is best described as contractual in nature. This was explained to mean that the rights and obligations of the parties are predominantly determined by courts with reference to their contract.

That notwithstanding, it was also demonstrated that the common law usually classifies the bank-customer relationship under certain pre-determined categories including debtor and creditor, and agency. The part two of the chapter dealt with the meaning and nature of the banker's duty of care. It discovered that, the meaning of the banker's duty of care is that the banker should not act carelessly with regard to what has been mutually agreed to and specified in the contract. Consequently, the violation of this duty occurs when the bank acts carelessly, and therefore, facilitating the criminals to defraud the customer.

Additionally, chapter two found that the bank has an obligation to make enquiries where there is suspicion of fraud, even though, this is not intended to turn the banker into amateur detective. Again, chapter two checked out the standard of care and skill expected of a banker. It discovered that the standard of care expected from a banker is objective. The test that is applied is whether a sensible financial institution in the similar situation as the defendant bank would have formed a sensible doubt and discovered that the someone was stealing from the customer. If another banker in the similar situation would have harboured the suspicion, then the defendant banker would be held liable for negligence.

Once more, chapter two discussed judicial guides developed by the courts to determine breach of the obligation of the banker to act with care. It found that asking questions is one of the measures that are used by the courts to find out if the obligation to act with care was violated. Nevertheless, it is not in every case that the bank will be 'put to notice'. This measure will only be applicable where a rational financial institution in similar situation would have had a doubt. Although, there are set measures whether they should be applied or not will depend on the situation of every case. The main guides that are used by the courts to determine whether the banker exercised a reasonable care and skill is to raise suspicion and make enquires.

Lastly chapter two examined causation and the banker's liability for breach of duty of care. It found that this duty has reciprocity feature that is both parties must act with sensible competency and proficiency. The courts often use the direct cause test in terms of which the court finds out whose conduct, as between the bank and the customer is the direct cause of the harm. For the negligent conduct of a party to constitute proximate cause, the conduct must be real, direct or immediate cause of the loss that occurred. Even if the bank's customer can succeed in showing that the banker owed it a duty of care, it has a burden to show that a violation of the duty resulted in the harm that is sustained. His failure to prove the violation will not help his case.

The third chapter discussed how South African and English law deals with cases that involve financial advice. The first part looked into South African law and the second part dealt with English law. The last part discussed which jurisdiction between the two applies the better approach.

## 4.3 Key findings in South Africa

Chapter three did comparative analysis on how South African courts and English law courts approach the extension of the duty of care with regard to the giving of financial advice. The chapter found that in South Africa the courts use cautions or conservative approach in applying the extension of the duty of care. The study also found that South African law does not extend the scope of aqulian action to new situations unless there are positive policy considerations which favours such extension.

Further, with regard to South Africa, chapter three looked at when should the duty of care be applied or imposed. The study found that in determining the extent of skill and care to be expected from the banker, the courts try to establish what the other reasonable person within the same branch of profession would have done. The South African courts apply the cautious approach to avoid to test the standard against that of a person with a higher expertise.

On the other hand, the chapter found that the courts in applying this method bear in mind that the financial institution by placing someone in a certain position profess to the public that the particular person possesses the expertise expected from a fair-minded individual in the similar situation. So if the financial institutions place a person with less expertise in a position which requires a more skilled person, the courts will apply the standard reasonable care that would be expected if the position was held by the person who qualifies to do so.

Chapter three further found that, the South African law somehow provides a balanced protection between the bank and the customer in their relationship with each other. In South Africa where the approach is conservative, when deciding what is sensible the court will have to look at the expertise of the expert s of the field where the person is in.

Additionally, the chapter found that the South African cautious approach is not automatically applied where the customer of the financial institution suffered loss. The customer bears the onus of proving that the harm sustained is a consequence of the banker's negligence. The negligent behaviour can only be proved by weighing it against that of a particular banker placed in the same situation.

Moreover, chapter three found that, however, if the customer fails to establish how the negligent banker must have acted, the court will not impose the duty of care. The study found that where the court was left in the dark as to what advice a reasonable advisor would have given in making presentation about these investments, no duty of care will be imposed. Where there is no sufficient evidence to determine the standard of care expected to be exercised or that a reasonable advisor would have counselled with the products invested in. The extension of the duty of care will not apply.

With regard to conservative approach, chapter three found that the courts stay as cautious as possible in extending the duty of care. Regardless of how much clear it can be that the customer suffered loss, it must be established by the plaintiff how another professional in defendant's position would have acted. For as long as this onus has been discharged, the extension of the duty of care will be imposed. In the same manner, where the plaintiff fails to show or prove to the court that another person would have acted differently or counselled differently from the defendant, no duty of care will be imposed. This application of the law is crystal clear and leaves no room for uncertainties.

## 4.3. Key findings in English law

On the other hand, English law uses a liberal approach to the extension of a duty of care. If the relationship between a banker and its client is close enough, in such a way that when examining the person who is allegedly in the wrong there, and the negligent act that he committed has a potential of causing harm to the plaintiff, the prima facie duty of care exists, and it can only be eliminated by the court's contemplation that there are considerations which ought to negative, reduce or limit the scope of the duty. The chapter found that the English law liberal approach applies different tests to impose the extension of the duty of care. These tests are, bolam test, Montgomery test and sophisticated investor test.

Regarding the bolam test English courts had established that the liability should not arise just because the advice was given. It has clarified that the scope of the duty of care assumed by a professional adviser is governed by the reason of the duty, tested on an objective basis by mention of the reason for which the advice was being provided. The test is, therefore, to examine what risk the duty was meant to control and then look at whether the harm sustained by the claimant represents the realization of that risk. The bolam test, looks at whether the adviser was acting in accordance with a performance accepted as appropriate by experts in that career.

With respect to the Montgomery test the chapter found that to determine whether when providing advice, the person who provided it made the customer aware of all the material facts involved concerning the risk and told investor about other recourses it can opt for. The test used to determine the materiality of the risk whether, in the situation of a certain case, a fair-minded individual if placed where the patient is position would probably attribute importance to the risk, or the medical practitioner is or should know that the certain patient would probably attribute importance to it.

Chapter three further looked at the third test being the 'sophisticated investor" test which focuses on how knowledgeable the customer is and the degree to which he depended on the advice. The chapter found that this test is difficult to apply because in other professions the customer is still owed the duty of care even where he has a knowledge in the field. The chapter found that in legal profession a person is owed the duty of care by the lawyer regardless of whether they have a law degree or not.

## 4.4 Final conclusions and recommendations

The findings of this study show that the South African cautious or conservative perspective to the extension of the duty of care have enabled the courts to be consistent in applying the approach which makes it easy to predict the outcome of the subsequent cases. This study recommends that cautious approach should be maintained to guarantee certainty and uniformity. Public confidence in the judiciary is boosted by uniform application of the law, and this in turn improves public insight of fairness and justice. The certainty of law will also save the court's time from endless cases that may arise out of the relationship of the banker and its customer. Precedents setting out clear, consistent and reliable rules may release the need for judicial intervention in resolving disputes. The South African cautious approach because of its stableness offers both banker and customer reliance in courts and in turn enhances efficiency in deciding cases.

However, this recommendation does not suggest that observing certainty and setting precedent should lead to the rigidity of the law which will hinder proper development of law. Where there is conflict of policy consideration, the courts should definitely do away with the cautious approach. This recommendation does not seek to compromise the principle of judicial independence.

On the other hand, the findings of this study show that the English law liberal approach, is a complete opposite of the South African cautions approach. The tests applied by English law liberal approach creates uncertainty, the tests keep on changing. It is true that each case should be decided on its own merits but that for sure that does not mean that the law should be re-made for every case. To start the examination from scratch with each new case is a method for inconsistency and uncertainty.

This research recommends that English law should put an end to developing these tests. Recommending another test with the hope that it will bring consistency would be wreaking havoc. The best thing to do is to return to first principles established in Hedley Byrne that a duty of care arises every time a bank decides to advice the customer with regard to investments. Attaching these many elements in extending the duty of care is bringing the uncertainty which is not good for the system. The persistence of conflicting court decisions create uncertainty which has potential of reducing public confidence in the judicial system.

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