NATIONAL UNIVERSITY OF LESOTHO

THE BANKER'S DUTY OF SECRECY & THE EXCEPTION OF DISCLOSURE BY COMPULSION OF AN ORDER OF COURT: A critical analysis of the Case of David v Barclays Bank of Botswana.

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LL.M Mini Dissertation Declaration:

I, Nts'iuoa Mokatse, 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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Date 31st May 2023

DEDICATION

I dedicate this dissertation to all women in law, may our pursuit to make our mark in the noble profession be fruitful and surpass wildest expectations. We are powerful beyond measure, and the world is a better place because of our existence.

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My biggest gratitude goes to my supervisor, Dr. L. Ramokanate, you really are a precious academic gem in our mist. I am because you are. May God continue to guard and guide you through and through.

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Above all, I thank the Almighty God for every beautiful adventure my life's journey is. I truly am blessed.

CHAPTER 1

1.1 TITLE

"The Banker's Duty of Secrecy & the Exception of Disclosure by Compulsion of an Order of Court: A critical analysis of the Case of David v Barclays Bank of Botswana."

1.2 INTRODUCTION AND BACKGROUND

The bank as a financial institution has a contractual relationship with its customers.[1] This relationship involves several aspects to it and it is mainly based on financial dealings. It is therefore of a very sensitive nature. There are duties and responsibilities; both written and tacit, inherent to this relationship. First and foremost, once the contract is established, customers expect banks to keep the information relating to the former; confidential.[2]

For purposes of this piece we will primarily focus on the duty of confidentiality on the part of the bank; caution must be taken that all duties of the bank are interrelated (example, the duty of care and the duty of acting in good faith) and may therefore overlap in discussion.

Due to their expertise in the field of financial services and financial products, banks have a duty of secrecy; this general duty of secrecy obliges banks to act in the best interest of the customer in all its actions.[3]

This duty of secrecy or confidentiality is inherent in the very nature of the relationship between the bank and the customer, which is wholly voluntary and that of consensus between independent persons.[4]

1.3 STATEMENT OF THE RESEARCH PROBLEM

The rules around bank's duties continue to evolve for aspired exaltation of the rule of law, however in many cases this evolution tends to be detrimental to individuals. Especially when it comes to the duty of banks to maintain secrecy. It is stated in the *Financial Institutions Act*[5] that, the bank and its personnel shall maintain secrecy of bank dealing with individuals save

[1] Standard Bank South Africa Ltd v Oneanate Investment (pty) Ltd (1995) 4 SA 510 (C) .
[2] Cambanis Buildigs (pty) Ltd v *Gal* 1983 1 All SA 383 (NC); Hedley *Byre and Co. Ltd v Heller and Partners Ltd* 1924 AC 465.
[3] Central Bank of Lesotho (2000) PART III, Section 18.
[4] H. Schulze, 'Confidentiality and secrecy in the bank-client relationship: Banker's duty or privilege (2007) Juta's Business Law) 122.
[5] (2012) Section 29(1).

when lawfully required to disclose by a competent court. This implies a limitation to this duty which also imposes an invasion on the financial privacy of the bank customer; the financial activities of the customer.

This stance of the law brings to light an array of grey arrears which may be problematic and unclear to stakeholders involved, such as the bank, the courts of law and especially the lay persons that are bank customers.

It begs such questions for investigation as the **extent** to which a bank can disclose the customer's information on the basis of the court order.

To what extent is the decision of *David v Barclays Bank of Botswana* correctly decided as regards the application of the exception (to the banker's duty of secrecy) of disclosure by compulsion of a court order?

1.4 SIGNIFICANCE OF THE RESEARCH PROBLEM

It is worth investigating the extent to which a bank may be compelled to disclose customer's confidential information so as to ascertain the demarcation concerning both these doctrines; secrecy and compulsion to disclose by law. For instance, in a case where a court incorrectly interprets a law which requires a bank to disclose information; consequences thereof being that the bank is compelled to disclose more information than is required by law.

What must a bank do in such cases? Should it refuse to follow an erroneously informed decision of court? Surely this would amount to contempt of court. Conversely, should the bank comply with manifestly incorrect order and disclose more information than is permitted by law? And would such compliance not in turn render the bank susceptible to liability to the customer for disclosing information the law protects, notwithstanding the court order? The case of *David v Barclays Bank of Botswana*[6] is a landmark authority on this discussion and on articulation of underlying principles hereon. This case will therefore be of prime reference point in this piece.

Disclosing customers' sensitive financial information is in itself a delicate matter, bearing in mind the nature of the bank customer relationship. It requires a gingerly approach, because failure to exercise due diligence has very dire implication; thus the grey areas that this dissertation intents to investigate and shed some light on.

[6] [2001] (2) BLR 340 (HC).

There would seem to be a tug of war here on the scale of balance of justice; the bank's duty of secrecy to a customer is a natural expectation of the **bank-customer relationship**, however deviation thereof is allowed in law where it favours the **rule of law**. It is essential that we strike a balance and harmonize the law in this respect.

1.5 SCOPE AND PURPOSE OF THE STUDY

The objective of this piece is to critically discuss the bankers' duty of secrecy. This will primarily be done by a critical discussion of the exception of disclosure by compulsion of law, focussing on court orders.

In ultimate fulfilment of the purpose of this study; we will articulate, discuss and critique the decision of *David v Barclays Bank of Botswana* with a view to determining whether the exception of compulsion by disclosure of an order of court was correctly applied therein.

1.6 LITERATURE REVIEW

It is undisputed that the duty of the bank of secrecy is a cordial principle in banking law.[7] The most inherent and outstanding feature of a bank-customer relationship is that the bank undertakes to conduct banking services on behalf of the customer which the latter mandates the former on. As a result of this mandate, a duty of secrecy is owed to the customer at all material times.[8]

However the legislation is not very definite when it comes to the extent and limitation of this duty, the interpretation is left to the discretion of the courts.[9] Despite existence of this principle for decades, the enactment of legislations purported to regulate the extent to which bankers are able to protect and safeguard it; materially diminish the effect of this duty. This in turn created concerns for persons whose financial privacy and confidentiality rights may be infringed in the process of disclosing information.[10]

[7] S. Jwahitha, 'Banking confidentiality-A comparative analysis of Malaysian banking systems' (2002) Arab Law Quarterly 255.
[8] C.J. Nagel & J.T. Pretoriuos*, The bank & customer relationship, combination of accounts and set-off* (2016) THRHR 661.
[9] M.A. Mthembu, *Marriage of convenience, bank-customer relationship in the age of the internet- A South African perspective* (Journal of International Commercial Law & Technology 2014) 22
[10] R. Ismail, *Legislative Erosion of the Banker-Client Confidentiality relationship* (Cadicullus 2008) 3

The landmark English case of *Tournier v National Provincial & Union Bank of England*,[11] lays down a number of exceptions to the duty of secrecy. The case highlights FOUR instances that warrant deviation from this duty as; public interest sake, in the interest of the bank,[12] compulsion by law and or where the customer gives implied or expressed consent to such. The case of Bank *Bumiputra Malaysia Bhd v Cheong Yoke Cho; Malaysian Central Depository sdn Bhd*[13] provides extensively for the disclosure of confidential information by compulsion of law.

The stance of the courts in these cases is a perfect illustration of the legal issue this piece aims to address. How do we balance the interest of the customer with the interest of the bank and or compulsion of law?

In the case of *David v Barclays Bank of Botswana*,[14] the Plaintiff instituted an action for damages against his banker claiming that it had breached its duty to observe banker-customer confidentiality by disclosing details of his banking account to third defendant, a Police Officer. The Police Officer had obtained an order from court compelling the Bank (first defendant herein) to produce all relevant information and documents relating to plaintiff's account as per statute provision allowing such compelled disclosure. The court held that the said court order was *ultra vires* the baseline statute to the extent the bank was obliged to produce relevant information. The bank was only permitted to divulge information that the Police Officer specifically requested.

It was further held that it is not required that the bank reveals the source of funds in a customer's account, such is the duty of a third party that has interest in knowledge thereof. Such information can only be revealed subject to the customer's consent or authorisation. The interesting part of this matter is that the Police Officer that had sought an order of disclosure had prayed for permission to peruse the books and records pertaining to Plaintiff's (bank customer herein) account. This is also pronounced as the **extent** of the law's permission of exception from adherence to the duty of secrecy in this case. However the court had phrased its order such that it permitted the bank to produce **all** relevant information and documents relating to the Plaintiff's account which was under investigation.

[11] [1924] 1 KB 461 250 JICLT, Vol 7 Issue 3 (2012)
[12] N.T. Masete*, The challenges in safeguarding Financial Privacy in South Africa* (Journal of International Commercial Law & Technology 2012) 253
[13] [2002] 7 CLJ 157
[14] [2001] 2 BLR 340 (HC)

This then presents the misguided court order which the bank is prima facie obliged to obey despite its erroneousness. It was however decided in this case that the bank is not under any legal duty to disclose to third parties customer's source of funds or transactions related thereto.

The court in this spearheading case was of the view that the Bank was entitled to desist from complying with the direction of the court order which was set against a backdrop of misinterpreted law. This dissertation is intended to critically analyse the correctness or otherwise of the Court's judgement in this case.

1.7 HYPOTHESIS

It is hypothesized that the law should be followed to the letter when issuing an order in deviation of the duty of secrecy in favour of compulsion of disclosure by law.

The baseline of the law in general is to balance the scale of justice; therefore the principle that prevails in a bank-customer relationship in terms of nonconformity to the duty of secrecy has to be one that serves the true essence of the rule of law.

This means that the Courts indeed bear the brunt of due diligence in their adjudication, realising that the right of the bank account owner to privacy should not be trumped by an erroneously issued order following such adjudication.

The second leg of the hypothesis is in relation to banks. It would be beneficial that the bank be party to the proceedings seeking an order of court to disclose. This way, the bank becomes an active part of the proceedings ensuring that the decision of the court is just. Thus making enforcement of an order of court compelling disclosure of customer's confidential information an indisputable necessity.

1.8 METHODOLOGY

The research for this dissertation will mainly be desk research, collecting information and data available for the purpose of exhausting this topic and following through for a decisive conclusion.

1.9 SUMMARY OF CHAPTERS

The chapters will be allocated content thusly;

- **Introduction and background**

  This is to provide groundwork of the subject matter herein. To briefly and concisely point the reader towards the principles of law to be tackled in this piece.

- **The Banker's duty of secrecy**

  This is an extensive discussion of the banker's duty of secrecy. We will learn where this duty is rooted and the rationale behind it. This discussion will provide a foundation of the law in this regard.

- **The exception of disclosure by compulsion of a court order: With specific focus on the case of *David v Barclays Bank of Botswana*.**

  An examination of the principles enunciated by the court in this landmark case will assist in articulation of the scope and extent of the duty of secrecy in relation to the exception of compulsion by law.

- **Conclusion**

  This is where the yield of this critical analysis of the subject matter will become apparent. Basing ourselves on the information gathered in totality of this piece, we will be in a position to say with conviction whether or not the case of *David v Barclays Bank of Botswana* was decided correctly. Ultimately demarcating clear boundaries of the banker's duty of secrecy in the face of compulsion by law.

CHAPTER 2

2. THE BANKER'S DUTY OF SECRECY (RATIONALE AND EXTENT)

2.1 INTRODUCTION

The word 'secrecy' originates from the word 'secret' in the English language, which basically means a piece of information that is only known by one person or a few people and should not be disclosed to others.[15] Similarly 'confidentiality', originates from 'confidential' which also means a secret matter.

Banking secrecy involves a financial aspect. It is defined as the obligation placed on banks to preserve confidentiality on economic, financial and personal issues related to customers and other persons. Put differently, banking secrecy is defined as the obligation placed on the bank not to disclose to any unpermitted third party, information it has attained during its handling of a client's bank account.[16]

Due to the sensitive nature of the business of the bank with its clients, a certain level of confidentiality or secrecy is arguably the heart and soul of the bank-customer relationship.[17] The client trusts that his account and or information related thereto will only be accessed by the banking personnel solely for purposes of acting on his mandate and will be limited to those engaged in that activity only. There is a mountain of information revealed to banks by customers in the creation and during subsistence of bank-customer relationships. Individuals only voluntarily divulge such personal and sensitive information unto banks primarily because of the obligation of trust and confidentiality.[18]

It is evident from the nature of the bank-customer relationship that the banker holds a preponderance of sensitive information concerning the client. Without the existence of any regulations, in particular the obligation to secrecy, this information may be abused. For instance, it would prejudice the customer for the bank to disclose the financial position of the client, the manner in which he finances his business, who the client associates with, the security balance of this client's business and more.

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[15] <https://dictionary.cambridge.org/dictionary/english/secret > accessed 03 May 2023.
[16] D. Pipel, 'Banking secrecy:its Scope and Exceptions'. Law Studies K (5754) 125
[17] Advocate Shaul Kotler, 'Banking Secrecy- Legislative Achoring Here and now.' < http://kotler-law.co.il/Uploads/Bank%20Secrecy%20Article.pdf> accessed 3 May 2023.
[18] See n 16

However, as will be illustrated in this chapter, this duty does not exist in a vacuum, and is therefore subject to exceptions. The objective of this chapter is to discuss in detail the meaning of the banker's duty of secrecy, the rationale thereof and the extent to which banks are obliged to comply with this duty. The discussion will provide a foundation of the law in this regard. Unless the context indicates otherwise, the words "confidentiality" and "secrecy" will be used interchangeably in this chapter. In addition to discussing the duty of secrecy, the chapter will also discuss the recognised exceptions to this duty.

2.2 THE BANKER'S DUTY OF SECRECY; MEANING & RATIONALE

In the information-age we live in, access to information which would otherwise be confidential is a power tool most seek. Information privacy is the creation and maintenance of rules that structure and limit access to and use of personal data. The duty of confidentiality is defined as a bank's duty to protect its customers' information, to keep the financial information private and secure.[19]

The concept of a banker's duty of secrecy explains that a banker should not reveal the personal information of his or her clients to other customers or any other third party. The banker must uphold the confidentiality of their customer's information even after they close or end the relationships with banks. If a banker breaches the secrecy, he or she is liable to face the legal consequences of the same.[20]

When dealing with privacy relating to financial issues, the bank has a duty of confidentiality to protect the customer's information. This is due to the fact that individuals are required to furnish a wide range of personal information in the course of conducting business with the bank. In instances such as purchasing a motor vehicle, opening a bank account, securing a loan and many others, the bank's duty of confidentiality plays a vital role in safeguarding financial privacy.[21]

It is of prime importance to contextualize the concept of financial privacy so as to reach the crux and rationale behind the duty of banks secrecy. In doing so, one must examine the following concepts; financial privacy, right to privacy and confidential information.

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[19] Edward J. Janger, Gramm-Leach-Bliley Act, Information Privacy, and the Limits of Default Rules, The Symposium:
Modern Studies in Privacy Law, Minnesota Law Review (2002), Vol.86, p1223

[20] See n16

[21] Case & Curtis v Minister of Safety and Security 1996 (3) SA 617 (CC) 656-657.

a. Financial privacy is defined as various rights that shield consumers from unlawful access to their fiscal accounts by any unauthorized third parties. It further prohibits financial institutions from revealing financial data to third parties without authorisation of the affected party.[22]
b. The right to privacy consists of all personal facts relating to a person as an individual.[23] And the constitutional right to privacy[24] provides for the right to respect for private and family life. This is the foundational basis of the obligation placed on banks to protect the confidential information of their customers.
c. Confidential information is defined as data, technology and or techniques known by a considerable number of persons in a particular industry.[25]

In the modern societies currently, it has become increasingly important to protect financial privacy. This is due to the fact that almost all societies are confronted with threats against vulnerabilities of information infrastructure and systems. A preponderance of modern life society relies heavily on the integrity, availability and reliability of systems and infrastructure.[26] To wit, the modern society daily lives revolve around the use of electronic transactions and the like. Fraud and prearranged crime usually take place on the information highway. When criminals gain access by any means to confidential information, they are able to, meticulously execute the most heinous of financial crimes.

One of the main concerns for customers is whether their data collected by banks will be guarded safely and secure. Trust is therefore of prime importance to successful banking. Furthermore, trust will develop when participants to banking business feel secure and assured that only authorised users have access to their information and that such will only be used in execution of authorized mandates.[27]

The landmark English case of *Tournier v National Provincial & Union Bank of England*[28] firmly placed an obligation of secrecy onto banks. Before then, secrecy was seen as a moral issue, and not a legal obligation. The facts of the case are as follows; Tournier had an

[22]< www.businessdictionary.com/financial-privacy.html> accessed 29 April 2023; Central Bank Lesotho Act 2000 Section 18.
[23] Neethling J. et el, *Neethling's Law of Personality* (Durban 2nd edn Butterworths 2005) 30.
[24] Constitution of Lesotho 1993 Section 11.
[25] Robert Unikel, 'Bridging the "Trade Secrets" Gap: Protecting "confidential Information" Not Rising to the Level of Trade Secrets' (1998) Loyola University, Chicago Law Journal. Vol.29 p844.
[26] N.T. Masete, 'The Challenges in Safeguarding Financial Privacy in South Africa' (2012) Journal of International Commercial Law and Technology. Vol.7 Issue 3
[27] See n17
[28] [1924] 1 KB 461

overdraft facility with the National Provincial and Union Bank of England and undertook to make instalment repayments of the debt. However, after three instalments he stopped to make any further payments. Tournier became the payee of a cheque drawn by Woldingham Traders Ltd and opted to endorse the cheque to a customer of the London City and Midland Bank, instead of depositing the cheque into his account with the defendant bank. The defendant bank came to know about the cheque since Woldingham was its customer. Using his official capacity, the bank manager made inquiries from London City and Midland Bank and discovered that the endorsee was a bookmaker, being a person who accepts and pays off bets. The manager then called the employers of Tournier, Kenyon & Co and had conversations with two of the directors.

It was alleged that the manager informed them that Tournier was having transactions with a bookmaker and therefore a hard-core gambler. As a result of the discussion, Kenyon & Co refused to renew Tournier's contract of employment.

Tournier sued National Provincial and Union Bank of England for defamation and breach of contract. The decision of the court in this case focused on many issues, such as the type of information to which the duty applies, the duration of the duty and consequences of breach of that duty. The court in its wisdom stated as follows;

> I certainly think that the duty does not cease the moment a customer closes his account. Information gained during the currency of the account remains confidential unless released under circumstances bringing the case within one of the classes of qualification I have already referred to. Again the confidence is not confined to the actual state of the customer's account. It extends to information derived from the account itself. A more doubtful question, but one vital to this case, is whether the confidence extends to information in reference to the customer and his affairs derived not from the customer's account but from other sources, as, for instance, from the account of another customer of the customer's bank…
>
> I cannot think that the duty of non-disclosure is confined to information derived from the customer himself or from his account. To take a simple illustration; A police officer goes to a banker to make an inquiry about a customer of the bank. He goes to the bank, because he knows that the person about whom he wants information is a customer of the bank. The police officer is asked why he wants the information. He replies, because the customer is charged with a series of frauds. Is the banker entitled to publish that information? Surely not. He acquired the information in his character of banker. So in the present case Mr. Fennell was put upon inquiry by a cheque drawn

> in the plaintiff's favour upon a customer's account. He acquired the information which he is said to have divulged in his character as the plaintiff's banker.

Further issue for determination by the court was whether the alleged conversation did really take place between the bank manager and Tournier's employers; and if so, whether such words spoken were defamatory of the plaintiff, that is, were they calculated to expose him to hatred, ridicule, or contempt in the mind of a reasonable man.

The court held that a bank owes its customer a legal duty of confidentiality not to disclose information to any third party, and any breach of this duty could give rise to liability in damages. This duty arises between the bank and its customer upon the opening of the customer's bank account and continues beyond the time when the account is closed.

The Court held that secrecy was an implied term in the bank-customer's relationship and that any breach thereof could give rise to liability in damages if loss results. Put differently, it is an implied term of the contract between a banker and his customer that the banker will not divulge to third persons, without the express or implied consent of the customer, either the state of the customer's account, or any of his transactions with the bank, or any information relating to the customer acquired through the keeping of his account.[29]

In essence, it can be said that the rationale behind the duty of secrecy is basically the protection of commercially sensitive information which would be detrimental to bank customers if business rivals would have knowledge of such.[30] Moreover, individuals that conduct their financial transactions with the bank seek protection of their autonomy. In both instances, commercial and private customers seek protection from exploitation and domination by others, they value confidentiality. Needless to say, a bank which acquired a reputation for not adhering to secrecy would lose the public trust.[31]

This stance was reiterated by the court in *GS George Consultants and Investments (Pty) Ltd and Others v Datasys (Pty) Ltd*[32]

> For practical purposes it is quite sufficient to recognise, firstly, the inevitability of a banker's having access to a good deal of information about his customers' businesses, which each customer would have reason to conceal from his commercial competitors; and, secondly, that if a banker is to provide his customer with financial accommodation, he would need to inquire

[29] *Tournier* at page 470
[30] R.Wack, 'Personal Information' (Oxford Clarendon 1989)11-12; Vand. J Trans, 'International Banking Secrecy' (1990) 23 L653, 656-8.
[31] See n 16
[32] [1988] 3 All SA 726 (W).

> for, and be entrusted with, facts about his customer's financial affairs which, if disclosed to the wrong persons or at the wrong time, could do the customer harm. For these and no doubt other sound reasons there has always been a practical need for the existence of a provision which precludes bankers from revealing what they learn of their customers' affairs. In answer to that need the existence of the tacit or implied term of secrecy in the contract between banker and customer has long been recognised.

The court in *Tournier* set down four exceptions to the duty of secrecy and provided that such a duty may be breached where the bank is compelled disclose; compulsion by law, or instances where it would be in the public interest to disclose, where it would be in the interest of the bank to disclose and where the customer gives express or implied consent is obtained for such disclosure.

The main prerequisite in law is that compelled disclosure, has to be the last and only remedy available. The judgment also states that the bank bears the burden of proof for deriving the disclosure from one of these qualifications. The exceptions as detailed in the *Tournier* case are discussed below.

2.3 EXCEPTIONS TO THE BANKER'S DUTY OF SECRECY

It is generally accepted that the banker's duty of secrecy is not absolute. There are instances under which the bank can disclose the customer's information to third parties without breaching its duty of confidentiality. The court in *Tournier*'s case identified four exceptions under which banks are not obliged to guard privacy: these being (1) where the bank is compelled by law to disclose the customer's information, (2) where there is public duty on the bank to disclose the customer's information, (3) where it is in the interest of the bank to disclose the customer's information, and (4) where the customer has consented, even implicitly, to disclosure. These exceptions are discussed in detail separately below.

2.3.1 Interest of the bank

The duty of secrecy may be relaxed when the bank's own interests require it to reveal information pertaining to its customer's affairs. These instances include where the bank decides to sue the customer on an overdraft, or where the bank decides to cede the debt(s) of

the customer to a third party. The bank is entitled in such instances to disclose the customer's information in order to protect or advance its own interests. . Other times, the customer's data may be passed to third parties in the financial sector, and this information is useful to the creditors, moneylenders and credit grantors for decision making purposes.[33]

As shown above, there may be instances where the duty of secrecy imposed by law on a bank conflicts with other interests of the bank which require disclosure of the customer's information. It is generally agreed in such cases that the interests of the bank must prevail over its duty to keep the customer's information confidential. A typical example of this conflict which has been encountered in South African law is in cases of cession. It is understandable in that regard that a bank cannot cede the customer's debt without disclosing to the cedent that the customer is indebted to it a certain amount.

The first case in which the issue arose in South Africa is *GS George Consultants and Investments (Pty) Ltd and Others v Datasys (Pty) Ltd*.[34] The issue for determination by the court in that case was in relation to the validity of a cession of a banker's claim against its customer for repayment of the amount of an overdraft. The court came to the conclusion that:

> [I]n the absence of agreement to the contrary, the contract of a banker and customer obliges the banker to guard information relating to his customer's business with the banker as confidential, subject to various exceptions, none of which is presently relevant; that such duty of secrecy imparts the element of delectus personae into the contract; and that the banker's claims against his customers are accordingly not cedable without the consent of the customer…that the bank's rights in respect of the contracts of cession and pledge signed by the applicants, and in respect of the shares delivered to the bank pursuant thereto, were also subject to the bank's duty of secrecy owed to the applicants and were therefore not cedable.[35]

The nature of the bank-customer relationship was taken into account in the court's ruling that a responsibility rests on the banker as against the customer to maintain confidentiality and secrecy. The court found that in the contract between banker and its customer there exists a tacit or implied term of secrecy arising as a matter of law, or as representing the tacit consensus of the parties. Regardless of its finding, the court herein did acknowlege that this duty is not absolute and is therefore subject to exceptions.

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[33] Katlego Mailola, 'A Bank's Duty of Secrecy towards its Customers and Consequences in the case of Breach'(University of Pretoria 2019) 28.
[34] See n32.
[35] at 737 E-F.

This decision was, however, overruled in *Densam (Pty) Ltd v Cywilnat (Pty) Ltd.*[36] Here, the court held that indeed the bank is absolved from its duty of secrecy in recovering its debt from a customer by way of a cession. The court held that a contractual obligation of confidentiality was not necessarily breached by the cession of a claim.

Another consideration for justification of this exception is that confidentiality or secrecy is not always economically efficient.[37] Over indebtedness, which is also a social problem, would sky rocket should financial institutions be denied access to the fullest information about the credit history of applicants of credit.

Furthermore, the modern technology of banking; e-money introduction, FTA's and internationalisation gave added weight to the relaxation of the duty of secrecy. [38] This slackening protects the business of the bank and makes business decisions informed and efficient.

2.3.2 Interest of the public

The duty of secrecy owed to a customer may be overridden by the duty of the bank to the public. One of the issues posed by the duty of secrecy is that it acts as a cloak for wrongdoing, often on a massive scale.[39] It is common cause that often Political leaders who have exploited their people, drug lords and fraudsters with various modus operandi have often used banking systems to evaporate their ill-gotten gains. In this sense, the concept of secrecy used to act as an almost impenetrable barrier to bringing culprits to justice nor recovering their loot.

The duty of secrecy placed on banks is a primary explanation for how international terrorists have transferred their financing around the world without detection. Tax evasion would be at an all-time high should payers be afforded yet another avenue of evasion. Simply put, the modern state could not function properly in the face of unregulated duty placed on banks for secrecy.

In the case of *United States v Miller*[40] the United States Supreme Court held that banks have no duty to protect the privacy of their customers' financial records from disclosure to the

[36] 1991 (1) SA 100 (A).
[37] R. Posner, 'The Right to Privacy' (1978) 12 Georgia LR 393.
[38] D. de Montmollin, 'Are Recent Developments in International Cooperation Incompatible with Swiss Banking Secrecy?' (2001) 2 JIBFL 72.
[39] Ross Cranston, *Principles of Banking Law* (2nd edn, Oxford University Press 2002) 166.
[40] 425 U.S. 435, 96 S. Ct. 1619 (1976).

government, as long as the government can show that it has a legitimate interest in obtaining the records.

In *re Bank of Nova Scotia*[41] a Canadian court held that a bank had a duty to disclose information about its customer's accounts to the Canadian government, as part of a broader investigation into tax evasion.

Lastly, in *United States v Bank of America*[42] the United States government sued Bank of America for allegedly facilitating fraudulent mortgage loans. As part of the lawsuit, the government sought access to confidential information about Bank of America's customers. The court ultimately ruled that the government was entitled to the information, as long as it took adequate measures to protect the privacy of the customers.

These cases illustrate that a bank's duty to disclose customer information on account of public interest is a prioritized phenomenon. Regardless of it being complex and dependant on a variety of factors, including the nature of the information, the legal and ethical obligations of the bank, and the interests of the government and the public.

2.3.3 Consent of the customer

Deviation from the implied duty of secrecy is first and foremost permitted with the express or implied consent of the customer. This is due to the fact that the customer voluntarily opens an account and instructs the bank on transactions relating to his account, he bears the utmost authority on revelation of any particular information in this regard.

In the case of *Lee Gleeson Pty Ltd v Sterling Estates*,[43] a builder sued a property owner that had hired him for unpaid building work. The property owner's bank informed this builder that it had mandate from its customer to make payments on his behalf. The builder subsequently quashed the legal proceedings. However the bank client (property owner) cancelled this mandate due to insufficient funds and the bank reverted to the builder to inform him of this.

The issue for the court to determine was whether the bank breached its duty of secrecy towards their client by revealing such confidential information as the state of his account to a third party (the builder). It was held that the customer had given consent to the bank divulging the details of his mandate to the builder; hence the builder dropped his law suit.

[41] 1989.
[42] 2011.
[43] (1991) 23 NSWLR 571.

The court held further that the customer's initial authorization contained an implied authority to disclose to the builder any relevant changes in those instructions for equity's sake.

The exception from the duty by consent of the customer is an extension of the dominis and autonomy afforded an individual on his property. It would be unappealing to customers if banks would unilaterally or by some unreasonable direction withhold information or refuse to avail records upon request by such customers. Surely this would render customers powerless and not in control of their own finances. It is, therefore, of prime importance as indicated by scholars and the courts of law that information be revealed at the instance of a customer of the bank.

In the case of *Bankers Trust Co v Shapira,*[44] the court held that a bank had a duty to maintain the confidentiality of its customer's information, even when the customer had given consent for the information to be disclosed. The court stated that the bank must act in good faith and ensure that the customer fully understood the implications of giving their consent.

In the case of *Durant v Financial Services Authority,*[45] the court held that a bank had breached its duty of confidentiality by disclosing a customer's financial information to a government agency, even though the customer had given consent for the information to be disclosed. The court stated that the bank had not obtained sufficient consent from the customer and had not adequately informed the customer about the potential consequences of the disclosure. In the above cases, the overlap between the duty of the bank to act in good faith and the duty of secrecy can be seen clearly.

It is worth noting that even when the bank has obtained the consent of the customer, it must do so within the ambit of that consent. The bank commits breach of contract if it makes disclosure to the extent beyond that which it was authorised to disclose, therefore, such disclosure of confidential information would also appear to be a violation of the customer's right to privacy, giving the customers recourse against the bank in delict.[46]

2.3.4 Compulsion of law

A bank may be compelled by law to disclose the customer's information to public authorities. In such cases, the bank must comply with the law. It is mostly in cases of fraud and other

[44] (1980) 1 WLR 1274 (CA).
[45] [2003] EWCA Civ 1746.
[46] See n 12.

financial crimes where the law requires the bank to report the transactions of the customer, either voluntarily as in the case of Money Laundering and Proceeds of Crime Act,[47] or upon request by the proper authority, as in the case of Prevention of Corruption and Economic Offences Act.[48] In both cases, the bank is not required to request the customer's consent or approval before disclosing his information. The bank is also prohibited from tipping-off the customer by informing him that he is being investigated for financial crimes as this would defeat the purpose of the entire enterprise to ascertain actual facts.[49]

Historically the imposition of strict adherence to the duty of secrecy became notorious as a barrier to law-enforcement agencies in various jurisdictions tracing the proceeds of wrongdoing. A number of jurisdictions were successfully transforming themselves into offshore financial centres.[50]

The Courts of law are recognized by statute as authorities that may do away with the duty of secrecy in Bank-customer relationships. The statute that governs the Central Bank of Lesotho[51] states implicitly that all Bank employees and or personnel are charged with the duty of secrecy in all bank dealings with customers safe when disclosure is compelled via an order of a competent court.

The statute states in Section 8 that, "Except for the purpose of the performance of his duties…or **when required to do so by any Court**…shall disclose to any person, any information relating to the affairs of the bank…or of a customer of the Bank…" (Emphasis added). This same stance was echoed in the Financial Institutions Act.[52]

It can be derived from the previous stages of this discussion that; imposition of the exception of the duty of secrecy by compulsion of law is usually contained in Statutes which in essence state that deviation from the duty is permitted subject to an order of a competent court.

Further discussion on the exception on compulsion by law will ensue in the subsequent chapter as it bears directly on the subject matter of this piece.

[47] 2008. Section 18(1).
[48] 1999. Section 8(1),(d).
[49] Metsing v Director General: Directorate on Corruption and Economic Offences and Others (C OF A (CIV) 6/15) [2015] LSCA 32 (06 November 2015)
[50] D. Campbell, 'International Bank Secrecy' (1992) London Sweet Maxwell 8C; B. Rider, 'The Practical and Legal Aspects of Interdicting the Flow of Dirty Money' (1996) Fin. Crime 234-236.
[51] 2002. PART III, Section 18.
[52] 2012. Section 29.

2.4 CONCLUSIONS

The key findings of this chapter in relation with the meaning and rationale of the duty of secrecy are that this duty is placed on banks to protect and preserve the sanctity of the bank-customer relationship. The nature of the bank-customer relationship entails a wide range of sensitive customer information being revealed to banks, it is essential that this entrusted information is kept safe and secure from any unauthorised third parties.

Secondly, it has been established in this chapter that the duty of secrecy is not absolute. It is common knowledge that privilege without exception is in it self-defeating to the rationale behind such privilege. This is to say, where the duty of secrecy is applied without accommodation of any exceptions, it would pose prejudice to other stakeholders such as the public and the like.

The duty of secrecy, however necessary is not absolute. It is hardly accurate to say that disclosure in all four given instances as explained by the case of *Tournier* is an exception to the duty of secrecy. Rather, disclosure is a duty of the banks that overrides the duty of the bank of secrecy.

The overriding duty to disclose is a duty to comply with the law of the land in all its spheres.[53] It is the duty of the bank to disclose in the greater public interest that justice is administered effectively; it is this regulated transparency that asserts confidence in all stakeholders in the Banking business that the ends of justice will be met regardless.

Because it has been illustrated in this chapter that the duty of secrecy is the foundational basis of the bank customer relationship, waiver or deviation from this duty bears dire consequences on this relationship and should therefore be approached with utmost caution. It is important to note that confidentiality or secrecy should only be waived where the interest of disclosing in establishing the truth or ascertaining facts outweighs the interest of maintaining confidentiality.[54] This is the interrelation of the four exceptions discussed in this chapter, they permit disclosure wherein the end result is even-handedness.

[53]Parry-lones v Law Society [1969] 1 ch. 1, 9.
[54]Municipality of Hillegom v Hillenius [1985] 3 ECR 3947, [1986] 3 CMLR 422

CHAPTER 3

3. THE EXCEPTION OF DISCLOSURE BY COMPULSION OF AN ORDER OF COURT: THE CASE OF *David v Barclays Bank of Botswana*

3.1 INTRODUCTION

It has been demonstrated in the preceding chapter that the banker's duty of secrecy is not absolute. A number of exceptions to that duty were identified and discussed in the said chapter.[55] One of those exceptions entails disclosure by compulsion of law, this being where a bank is compelled by law to disclose the customer's information to a third party.

While the exception of disclosure by compulsion of law is ordinarily understood to cover cases of statutory law; such as wherein a bank is compelled by statute to disclose the customer's information to a governmental agency.[56] This is not the only way in which the exception exists. Another way that disclosure by compulsion of law may arise is by an order of court.

It is generally understood that, as with any other subject of a legal dispute, a bank must abide by an order of court where it is directed to disclose the customer's information. This is recognized in many statutes across the word. For instances, in Lesotho the Financial Institutions Act provides in section 29 (5) that a bank must maintain secrecy unless it is required to make disclosure, inter alia, "by a court of competent jurisdiction." The bank cannot cite its duty of secrecy to justify non-compliance with a court order. Such would amount to a breach of court order, which is a punishable offence.

There are not many cases in the SADC region where the exception of disclosure by order of court has been considered. There is so far only one case in the region which offers a rare glance into that exception, namely *David v Barclays Bank of Botswana*. The objective of this chapter is to discuss in detail the exception of disclosure by an order of court, focusing on that case. The first part of the chapter will discuss in detail what a court order is, and when or how it is issued, how it is enforced, and what punishment is meted out for non-compliance with a court order. The second part of the chapter will discuss in detail the facts, issue,

[55] See n12.
[56] Prevention of Corruption and Economic Offences Act, 1999, Section 8(1) (d).

arguments and ruling in the abovementioned case. The third part will involve a critical analysis of that decision with a view to finding out if it was correctly decided in light of the law of court orders. Conclusions will follow.

3.2 COURT ORDER: WHAT IS IT, HOW AND WHEN IS IT ISSUED AND ENFORCEMENT

An order of court may be simply defined as a formal decision of the court. In addition, court orders are defined as, '[T]he means in which decisions or judgments of judicial officers are issued from a court. They can include: an order made after a hearing by a judicial officer, or an order made after parties who have reached their own agreement have applied to a court for consent orders.'[57]

The general rule is that a court order stands and must be strictly obeyed until set aside or varied by the same court or a higher court.[58] Furthermore, an order of a court of law stands until set aside or varied by a court of competent jurisdictions and it must be obeyed even if it may be wrong.[59] As a matter of law, often times, one may even be barred from approaching the court until he or she has complied with an order of court that has not been properly set aside.[60]

The duty to obey court orders is imperative because it maintains the rule of law and the legal rights of parties. It further fortifies and protects the dignity of the courts in the furtherance of the public interest. When one fails to obey or comply with an order of court, despite their rationale behind such delinquency, it is considered as taking the law into one's own hands.[61] And such is against public policy, which is why it is a punishable offence of contempt of court.

Contempt of court is firstly, a mechanism for the enforcement of court orders. Secondly, disobedience of the court as a punishable offence immensely enhances the effectiveness and legitimacy of the judicial system. This means that a court called upon to commit such a

[57] <http://law.cornell.edu/wex/court_order> accessed 23 May 2023
[58] Bezuidenhout v Potensie Sitrus Beherebd BPK 2001 (2) SA 224 (E) 229
[59] Culverwell v Beira 1992 (4) SA 494 A-C
[60] Hadkinson v Hadkinson [1952] 2 All ER 567 CA

[61] Kotze v Kotze 1953 (2) SA 184

litigant for his or her contempt is not only protecting the interest of the frustrated successful litigant but also, equally importantly, the court is acting as a guardian of the public interest.[62]

In conclusion with regard to the issuing, enforcement and punishment meted out for non-compliance with orders of court; in a constitutional democracy based on the rule of law, final and definitive court orders must be complied with by private citizens and the state alike. Without this fundamental principle, the harsh reality is that constitutional democracy and the rule of law cannot survive in the long run.[63]

3.3 DAVID V BARCLAYS BANK OF BOTSWANA [2001] 2 BLR 340 (HC)

3.3.1 FACTS

A brief summary of this case was set out in Chapter one of this dissertation. However, the full facts and decision of the court will be detailed in this chapter in order to enable a thorough analysis thereof.

It is common cause that at the material time when the dispute arose, one Emmanuel Daniel, the plaintiff herein was a customer of, first defendant or the bank, being Barclays Bank of Botswana. The plaintiff held a savings account with first defendant. This account was erroneously debited by the bank employees with P6, 000.00 without the plaintiff's authorisation or knowledge. The transaction was subsequently reversed.

It is also common cause that five months following this mishap with plaintiff's account, the third defendant, a police officer, swore an affidavit by which he sought an order of court in accordance with the provisions of Section 250 of the Criminal Procedure and Evidence Act (Cap. 08:02) herein after the CP & E Act.

The *CP & E Act* provision read as follows;

> Where, on application made on oath by a Policeman, a magistrate or justice who is not a member of the Botswana Police Force is satisfied that the Policeman believes there are reasonable grounds to suppose that the ledgers, daybooks, cash books or other account books or other accounting devices used by a bank (including savings

[62] Samancor Manganese (pty) ltd v Azam Fabrication CC Case No: 2018/85581 [23]
[63] Magidimisi v Premier of the Eastern Cape and others 2006 JDR 0346 (B) 1

> bank) may afford evidence as to the commission of any offence, the magistrate or justice may issue his warrant authorising the Policeman or Policemen named therein;
>
> To inspect all those ledgers, daybooks and other account books and other account devices carrying written records and make and retain in his or their possession copies or other records of any entries therein or extracted there from and,
>
> To have access to all those other accounting devices carrying unwritten records and retrieve there from any information and make and retain in his or their possession a written or other record of that information.

The Police officer then sought a court order authorising him to inspect the accounts of the Plaintiff held with the first defendant following his suspicion that illegal diamond proceeds had been deposited into said account.

In his affidavit, the Police officer had prayed that the honourable court ordered Barclays Bank of Botswana under the *CP& E Act* Section 250 (1)(a) and (b) to allow him to inspect all those books, days, cashbooks and other accounts devices carrying written records. To allow him to make and retain in his possession copies and other records of any entries therein or extracted there from. He further prayed to have access to all those other accounting devices carrying unwritten records and retrieve there from any information and make and retain in his possession written or other records thereof.

The Police officer did successfully obtain the order of court to facilitate his investigation. In granting him an order that was signed by a senior magistrate which was addressed to the first respondent, the honourable court phrased their order thusly;

> It is hereby ordered as prayed under the Criminal Procedure and Evidence Act (cap. 08:02) of the Botswana Laws Section 250(1)(a),(b) **to produce all relevant** information and documents relating to the account of the following: EMMANUEL DAVID to No 6654 DETECTIVE SERGENT MANAWE, O. of Botswana Police. (Emphasis added)

In the course of his investigation, the Police officer managed to obtain all the books of accounts and other documents pertaining to plaintiff's saving account held with the defendant bank. The plaintiff had been arrested during the investigation, however the investigation was eventually completed and the plaintiff released.

Following his release, the plaintiff lodged the legal suit that forms the subject matter of this discussion; plaintiff claimed, among others, damages from the defendant bank for having

wrongfully and without authority debited his account with the huge sum of money (P6, 000.00) as this had allegedly led to the Police investigation of his account. Plaintiff further claimed damages from the bank for failure to disclose to the third defendant the sources of deposits made by the bank employees to his account. Lastly, the plaintiff sought damages for unlawful arrest and detention from second defendant herein (the Attorney General) and the Police officer who is the third defendant.

The first defendant upon receiving papers lodging this suit filed an exception to the effect that the bank was under a legal duty to observe banker-customer confidentiality not to make any disclosure of information to the Police officer herein regarding the sources of funds in plaintiff's account. It is solely in respect of such exception that this judgement is made.

3.3.2 ISSUE

The key issue relevant to this discussion is mainly whether the order or warrant of the magistrate was properly worded in light of the provisions of the CP & E Act. Secondly, whether in light of the disparity between the two (CP&E Act and order of court), the bank was correct in abiding by the order.

3.3.3 ARGUMENTS

Arguments for the first defendant were that the banker was under a duty to observe banker-customer confidentiality not to disclose any information to third parties without the consent of customers. It was argued further that for the banker to unilaterally disclose the sources of plaintiff's funds without the knowledge or authorisation of the customer would amount to breach of the duty to maintain secrecy.

Counsel for the first defendant further stated that the bank was bound in law to allow the inspection of ledger books and cash books regarding the plaintiff's accounts in terms of the order of court presented to it by the Police officer. Adding that the banker being under the duty of confidentiality was not in a position to disclose any further information to the Police officer concerning the plaintiff's account except such information that was ordered by the court or that the plaintiff would have consented to.

It was further contended for the first defendant that the first defendant did not negligently or deliberately fail to inform the Police officer of the circumstances surrounding the various adjustments of plaintiff's bank balance for the following reasons; it is illogical and

unreasonable to assume that the banker knew prior to the presentation of the court order at the bank premises by the Police officer that the Plaintiff was under investigation on suspicion of dealing with precious stones, therefore the bank was not in a position to make the unlikely conclusion that the debiting and crediting of plaintiff's account five months prior was the reason for the police investigation. These were mutually independent occurrences.[64]

In response, it was argued for the plaintiff that the inspection by the police was a result of the huge sums of money deposited in the plaintiff's account and it was therefore negligent for the bank and its employees to be silent about the circumstances surrounding the back and forth transactions of the huge sum of money. Thus the plaintiff was subsequently arrested and detained by the Botswana Police.

Further arguments were made for the plaintiff that under the exception of compulsion of law and also the court order granted in accordance with Section 250 of the CP& E Act, the first defendant was ordered to reveal 'all relevant information and documents' relating to plaintiff's account. It was then submitted that the court order had relieved first defendant off its duty of secrecy to the extent that it should have disclosed the sources of funds in plaintiff's account.[65]

3.3.4 RATIONALE OF THE COURT'S RULING AND PRINCIPLES ENUNCIATED

In making its decision, the court made the following considerations; the affidavit by the Police officer followed very closely to the words or provisions of the relevant section of the CP&E Act. What was expected of the bank was to avail to the Police for inspection all the books of accounts specified in the affidavit and to also permit the Police officer to make copies of any such documents; to allow the Police access to all other accounting devices carrying unwritten records and allow them to retrieve any information and retain it for their use.

It was said by the court that it is certainly not the duty of the bank under law to provide or disclose any information to the Police relating to the customer's accounts concerning, for example, the sources of the deposits made in the client's accounts. That would be the duty of the Police to verify with the holder of the accounts investigated.

[64] Page 3
[65] Page 3

The court further pointed out that nowhere had the plaintiff averred as to what led to the third defendant to suspect that diamond proceeds had been deposited in Barclays Bank and to inspect his account. Thus any averment and suggestion that it is the P6,000.00 that had been debited that led to the investigation is unsubstantiated. This was considered to be mere speculation.

Even if indeed it was due to this transaction that the Police began the investigation, nothing in law could place a duty upon the first defendant to disclose to the Police the sources of such credits made unless the first defendant had been authorised by the Plaintiff.

The court herein conceded that it is true, as argued by Plaintiff's counsel that according to the court's order, the defendant was directed to 'produce all relevant' information and documents relating to Emmanuel David, the plaintiff. However, the court said this was erroneous as it went contrary to the fundamental statute; the CP&E Act as well as the very prayers of the third defendant.[66]

3.3.5 RULING

It was therefore held that the said order of court was ultra vires the provisions of section 250 of the CP&E Act to the extent that it required first defendant to produce 'all relevant information' relating to the plaintiff's accounts. Thus the court was of the view that the bank was entitled to desist from complying with a blatantly erroneous court order.

The court stated that the essence of the law and the legal force of any court order are derived from two factors. Firstly, it has to be made by an officer competent to do so and secondly, such an order has to be based upon a correct application or enforcement of the provisions relevant or the applicable law of the land.

That notwithstanding, the court was of the stance that whatever information the first defendant was to produce to the third defendant had to be at the instance or request of the third defendant. The bank was not in a position to divulge any information at its own initiative. Yet the plaintiff failed to show that the third defendant demanded any such information from the bank.

It was further held that the first defendant did successfully discharge its duty to surrender the plaintiff's account to the third defendant as required and provided for under the relevant law. It is not the requirement of the law that the bank has to disclose as well the sources of the

[66] Page 6

deposits credited to the customer's account. That is the duty of the investigating Police officer to find out from the customer undergoing investigation.

It was lastly held that the plaintiff had failed to disclose a cause of action against the first defendant in this instance. Hence the bank's exception from plaintiff's second claim was upheld.

3.4 CRITICAL ANALYSIS OF THE DECISION

The hitch in this case is that the court said that the bank should have refused to abide by the court order because in issuing the order, the magistrate had directed the bank to disclose more information than is permitted by the CP & E Act.

The court further said that the essence of the law and the legal force of any court order are derived from two factors. One of them being that such an order has to be based upon a correct application or enforcement of the provisions relevant or the applicable law of the land. Should the bank have refused to abide by the order because it directed disclosure of "all relevant information," instead of the books mentioned in the CP & E? Surely the decision of the court blatantly contravenes the law concerning compliance with orders of court.

The obligation to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. Allowing parties to ignore court orders would shake the foundation of the law and compromise the status and constitutional mandate of the courts. Contrary to the view of the court in the above discussed case, the duty to obey court orders is the scaffold on which a state founded on supremacy of the constitution and the rule of law is built.[67]

There are a lot of interesting questions brought about the decision of the court. For instance, is a bank a kind of institution that we expect to have knowledge of the CP & E Act, consequently to realise when the order deviates from that statute? This then renders the decision of the court impractical.

Alternatively, should the bank be expected to seek legal advice on the correctness of a court order before complying with it? Surely this contravenes the law concerning compliance with the orders of court since until or unless a court order is set aside or varied, failure by the party whose compliance is expected will be deemed as contempt of court.[68]

[67] See n 62.
[68] See n 62.

It is evident that the court's decision is ill informed in as far as it permitted bank to desist with complying with the order of court merely because it did not follow the letter of the statute. It is the basis of the law that if individuals were to be allowed to defy the authority of the court on the ground of error of judgement on the part of the court, the question would arise in every case whether the judge is correct in its interpretation of the law and there would not be a readily available tribunal to decide on this. Undoubtedly, it is the duty of the party whose compliance is anticipated by the court to comply with an order of court and to seek his remedy elsewhere.[69]

On the other hand, if the bank abides by a wrongly worded court order or warrant as per the law on compliance with court orders and finds itself liable to the customer, can it sue the magistrate? Surely there must be recourse for a bank which has incurred liability due to compliance with a blatantly defective order of court. However, due to the concept of judicial immunity, the bank may not recover damages from the judge personally, however the bank may sue the office of the judge and claim reimbursement for damages incurred and owed to the customer.[70]

3.5 CONCLUSIONS

This chapter has brought to light that indeed the exception of the duty of secrecy by compulsion of law also includes compulsion to disclose by an order of court.

It has been established that an order of court carries with it a duty of compliance unto those bound by it regardless of its rightfulness or otherwise. This is the bedrock of the supremacy bestowed upon the judiciary. It would amount to self-help for individuals to refuse compliance due to the faulty nature of a court order.

The court in the Barclays case was of the view that an entity or individual may refuse to comply with an erroneous order of court, however this has proved itself problematic in so far as it undermines the authority of the court and encourages said juristic persons' rebellion against the law.

[69] S v Maxhosa 1986 (1) SA 346 (c) 353

[70] S P Stafford, 'Overview Of Judicial Immunity' (1977) <http:// https://www.ojp.gov/ncjrs/virtual-library/abstracts/overview-judicial-immunity> accessed 26 May 2023

It is apparent that compliance with an order of court is mandatory and it is of utmost importance for the court to uphold its own dignity and see to it that its authority is respected by the practitioners before court and the public at large. Such that the court ensures that it has correctly interpreted the law on which it basis its ruling on. Failure to do this will consequently defeat the very purpose of supremacy placed on the judiciary.

Lastly, it is pertinent for the bank to be enjoined in proceedings seeking an order that compels deviation from the duty of secrecy. This way, the bank becomes an active part of the proceedings ensuring that the decision of the court is just. Thus making enforcement of an order of court compelling disclosure of a customer's confidential information an unquestionable requisite which the bank is not arbitrarily forced to comply with.

CHAPTER 4

4. CONCLUSION CHAPTER

4.1 INTRODUCTION

This chapter is where the yield of this critical analysis of the subject matter becomes apparent. The intention of this research was to harmonize the law is respect of the duty of secrecy and the exception of overriding court orders thereto. The case of Barclays bank was used to reach the heart of this research by investigating the intrinsic nature of the exception of compulsion by order of court.

The chapter will be broken down as follows; first will be a summary of findings, recommendations will be stated secondly and lastly a conclusion of this study will be drawn.

4.2 SUMMARY OF FINDINGS

First and foremost the yield of the research revealed that at the centre of the Economic sector is the bank-customer relationship. This relationship is sui generis and entails numerous duties for both parties to ensure a smooth working relationship. The duty that forms the subject matter of this piece is the duty of secrecy. It has been established that this duty is the heart and soul of the bank-customer relationship and is necessary to maintain customer's right to financial privacy.

On the other hand, it has been established that banks have a greater duty to obey the orders of judicial courts that compel disclosure of information which would otherwise remain confidential. It is first and foremost, the duty of the state and individuals alike, to comply with court orders in a bit to respect judicial supremacy.

As per statue and the law on complying with court orders, the duty of banks to maintain secrecy may be overridden by compulsion of law and this poses an infringement on customer's right to financial privacy especially where banks are obliged to comply with a prima facie flawed order of court to disclose customer's information.

To reiterate, the main question for investigation in the face of these findings was the extent to which a bank can disclose the customer's information on the basis of a court order. In an attempt to answer this question, the case of David v Barclays Bank was used as a case study.

In this case, the court essentially held that the bank only has a duty to disclose information that is requested by a third party as per an order of court. However, the bank is entitled to deny compliance with an erroneous court order. The stance of the court in this regard was in contradiction with the law on court orders as it renders it acceptable for banks to be in contempt of court whereas this is a known punishable offence.

Therefore this case was correctly decided in as far as it was held that the bank did not have a duty to voluntarily disclose the sources of plaintiff's funds. However, the court was wrong in so far as it condoned contempt of court by non-compliance with a court order.

4.3 RECOMMENDATIONS

It is recommended that the law should be followed to the letter when issuing an order in deviation of the duty of secrecy in favour of compulsion of disclosure by law.

The baseline of the law in general is to balance the scale of justice for all stakeholders; therefore the courts in administering their judicial functions have to make rulings that serve the true essence of the rule of law. This means that the Courts indeed bear the brunt of due diligence in their adjudication, realising that the right of the bank account owner to privacy should not be trumped by an erroneously issued order following such adjudication.

The second leg of the recommendation is in relation to banks. It would be beneficial that the bank be party to the proceedings seeking an order of court to disclose. This way, the bank becomes an active part of the proceedings ensuring that the decision of the court is just. Thus making enforcement of an order of court compelling disclosure of customer's confidential information an indisputable necessity.

4.4 CONCLUSION

In a democratic state, all individuals are equal and deserve equal protection of their rights. As it has been established that all individuals have a right to privacy without unnecessary interference from the state; it is however common cause that for every general rule there is an exception put in place for the sake of balance. Such that the general rule or proclaimed right does not run wild and ultimately cause infringement on the rights of others.

Hence the judicial court is placed as an intermediary to adjudicate whenever there are clashing rights on the scale of justice, so as to ensure that balance is restored. Thus disclosure

of a customer's secret information can be legitimately made following sufficient consideration by a competent court.

The judicial court as the official guardian of the law should indeed exercise due diligence in ensuring that the orders issued which compel disclosure are based on correct interpretation of the law. Only then can there be harmony and true justice with regard to the bank's duty of secrecy and the duty to obey court orders.

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