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AT THE DAWN OF THE 21ST CENTURY
Essays in Honour of Lovell Derek Fernandez

EDITORS

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Bank Secrecy: Implementing the Relevant Provisions of the United Nations Convention against Corruption in South Africa

Jamil Ddamulira Mujuzi

Abstract

For many decades South African law has recognised a bank's duty to keep its client's information confidential. This is popularly known as bank secrecy. However, this duty is not absolute. National and international law provide for circumstances in which a bank may disclose information relating to a client. The UN Convention against Corruption, which South Africa ratified in 2004, has three Articles which deal directly with the issue of bank secrecy, namely, Articles 31(7), 40 and 46(8). The purpose of this essay is to discuss whether South Africa has measures in place to give effect to Articles 31(7), 40 and 46(8) of the UN Convention against Corruption.

1 Introduction

For many decades South African law has recognised a bank's duty to keep its clients' information confidential. This is popularly known as bank secrecy. However, this duty is not absolute. The law also provides for circumstances in which a bank may disclose information relating to a client.¹ These exceptions are provided for under common law, statutes and also some of the multilateral and bilateral international treaties to which South Africa is a party. The multilateral treaties include the United Nations Convention against Corruption,² the United Nations Convention against Transnational Organised Crime,³ the African Union Convention on Preventing and Combating Corruption,⁴ and the Southern African Development Community Protocol on Mutual Legal Assistance in Criminal Matters.⁵ The bilateral treaties include the Mutual Legal Assistance in Criminal Matters Treaty between the Republic of South Africa and the Republic of India⁶ and the Convention between the Republic of South Africa and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income.⁷ South Africa ratified the

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- 1 These exceptions are discussed later in this essay.
 - 2 Articles 31(7), 40 and 46(8)
 - 3 Articles 12(6) and 18(8).
 - 4 Article 17.
 - 5 Articles 2(3) and 20(3).
 - 6 Article 4(3).
 - 7 Article 25(3).

United Nations Convention against Corruption in November 2004 and South African courts have held that this treaty, although not yet domesticated in South African law, imposes obligations on South Africa which must be complied with. For example, in *S v Shaik and Others* the Constitutional Court held that:

South Africa has ratified the United Nations Convention against Corruption and thus bears international law obligations under it ... Article 31 of that Convention requires States Parties to legislate to provide for confiscation of the proceeds of crime or property the value of which corresponds to that of such proceeds to the greatest extent possible.⁸

In *Glenister v President of the Republic of South Africa*, the Constitutional Court held that Article 6 of the UN Convention against Corruption "imposes an obligation on each State party [including South Africa] to ensure the existence of a body or bodies tasked with the prevention of corruption".⁹ In *Potgieter v Tubaste Ferrochrome*, the Labour Appeal Court held that South Africa is obliged by the UN Convention against Corruption to protect whistle-blowers.¹⁰ Courts in different African countries, such as Namibia,¹¹ Kenya¹² and Seychelles¹³ have also emphasised the importance of the UN Convention in the fight against corruption. This treaty has various provisions dealing with the issue of bank secrecy. The first is Article 31 which provides for freezing, seizure and confiscation of proceeds derived from corruption or property, equipment or other instrumentalities used in or destined for use in corruption. Article 31(7) provides:

8 *S v Shaik* para 73.

9 *Glenister v President of the Republic of South Africa* para 183. However, in *Helen Suzman Foundation v President of the Republic of South Africa and Others*; *Glenister v President of the Republic of South Africa*, the Constitutional Court did not refer to the UN Convention against Corruption in holding that the government has a duty to establish an independent corruption fighting unit.

10 See *Potgieter v Tubaste Ferrochrome* para 14: "The fostering of a culture of disclosure is a constitutional imperative as it is at the heart of the fundamental principles aimed at the achievement of a just society based on democratic values. This constitutional imperative is in compliance with South Africa's international obligations. Article 33 of the United Nations Convention against Corruption (UNCAC) enjoins party states to put appropriate measures in place 'to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences' established in accordance with that convention."

11 *S v Goabab* para 15 and *Shalli v Attorney-General* para 15.

12 *Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission* and *Okiya Omtatah Okiiti v Attorney General*.

13 *Dugasse v R* para 25.

[E]ach State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

Article 40 of the treaty provides that:

Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.

The above two provisions deal with the issue of bank secrecy in a domestic context. That is, the information is needed for the purpose of investigating or prosecuting or combating corruption at a domestic level. Article 46, which deals with mutual legal assistance between states parties to the Convention, provides that: "States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention."¹⁴ If a state party requests mutual assistance in obtaining bank records, for example,¹⁵ Article 46(8) provides that: "States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy." The effect of Article 46(8) is that South Africa has an international obligation to assist other countries in the fight against corruption, even if the information that is being requested by those other countries requires a South African bank to hand over a client's confidential information. It should be noted that South Africa ratified the UN Convention against Corruption without making a reservation to or declarative interpretation of any of the articles being discussed in this essay.¹⁶ This means that it has a duty to implement these articles as they stand. The

14 Article 46(1).

15 Article 46(3) provides that: "Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes: (a) Taking evidence or statements from persons; (b) Effecting service of judicial documents; (c) Executing searches and seizures, and freezing; (d) Examining objects and sites; (e) Providing information, evidentiary items and expert evaluations; (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records; (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes; (h) Facilitating the voluntary appearance of persons in the requesting State Party; (i) Any other type of assistance that is not contrary to the domestic law of the requested State Party; (j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention; (k) The recovery of assets, in accordance with the provisions of chapter V of this Convention."

16 South Africa made a reservation to Article 66(2).

purpose of this essay is to discuss whether South Africa has measures in place to give effect to Articles 31(7), 40 and 46(8) of the UN Convention against Corruption. I shall start by discussing the drafting history of these articles, followed by a discussion of the law of bank secrecy in South Africa, and finally assess the effectiveness of those laws in giving effect to the above-mentioned articles of the UN Convention against Corruption.

2 The Drafting History of Articles 31(7), 40 and 46(8) of the UN Convention against Corruption

As early as 1996, the General Assembly of the United Nations was concerned with the direct link between bank secrecy and corruption and bribery. As a result of that concern, it passed the Declaration against Corruption and Bribery in International Commercial Transactions in terms of which member states were committed to ensuring that "bank secrecy provisions do not impede or hinder criminal investigations or other legal proceedings relating to corruption, bribery or related illicit practices in international commercial transactions, and that full co-operation is extended to Governments that seek information on such transactions".¹⁷ The issue of banking secrecy was discussed at different forums that preceded the negotiations leading to the adoption of the UN Convention against Corruption.¹⁸

During the negotiations towards the UN Convention against Corruption, the issue of bank secrecy came up three times – when draft articles 31(7), 40 and 46(8) were being discussed. At the first session¹⁹ delegates were presented with five texts (options) of the draft provision of what would later become article 37 (then it was article 42). The drafts from Austria and the Netherlands, Colombia and the Philippines proposed that one of the clauses of article 37 should provide, *inter alia*, that: "States Parties shall not decline to act under the provisions of this paragraph on the ground of bank secrecy."²⁰ The one from Mexico was to the effect that "each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized".²¹ The one from Turkey did not include a provision on banking secrecy.²² At the second session,²³ the rolling combined text which was submitted by Austria, Colombia, Mexico, the Netherlands, Pakistan, the Philippines and Turkey, provided that: "States Parties shall not

17 See Declaration against Corruption and Bribery in International Commercial Transactions para 10.

18 UNODC (2010) xxxvi & xxxix.

19 It took place in Vienna from 21 January-1 February 2002.

20 UNODC (2010) 264, 266 & 267.

21 UNODC (2010) 265.

22 UNODC (2010) 266.

23 It took place in Vienna from 17-28 June 2002.

decline to act under the provisions of this paragraph on the ground of bank secrecy.”²⁴ At the fourth session,²⁵ the revised rolling text that had been discussed at the second session was considered and no amendments were made to the words of the article that dealt with bank secrecy.²⁶ This is also what happened at the fifth session.²⁷ As a result, the proposal that was put forward at the second session was the one that was later adopted and became Article 31(7) of the Convention.²⁸

The most comprehensive provision of the Convention on bank secrecy is Article 40. The first draft on bank secrecy which was discussed at the first session was submitted by Mexico and it provided that:

1. The requested State Party shall not invoke bank secrecy as a ground for refusal to provide the assistance sought by the requesting State Party. The requested State Party shall apply this article in accordance with its domestic law, its procedural provisions or bilateral or multilateral agreements or arrangements with the requesting State Party.
2. The requesting State Party shall be obligated not to use any information received that is protected by bank secrecy for any purpose other than the proceeding for which that information was requested, unless authorised by the requested State Party.
3. States Parties shall strengthen their laws in order to prevent bank secrecy from being used to obstruct criminal or administrative investigations that relate to the subject of this Convention.²⁹

The rolling text that was discussed at the second session substantially reproduced the one discussed at the first session, except that a slight amendment was made to clause 3 to read: “States Parties shall strengthen their laws in order to prevent bank secrecy from being used to obstruct criminal or administrative investigations that relate to offences covered by this Convention.”³⁰ The rationale behind the amendment was that: “During the first reading of the draft text, at the second session of the Ad Hoc Committee, the

24 UNODC (2010) 269. It should be recalled that Mexico’s draft, which was combined with the other countries’ drafts to form the rolling text that was discussed at the second session, did not include a provision on bank secrecy. This is because Mexico thought it was unnecessary as the draft Convention contained a provision dedicated exclusively to bank secrecy. See UNODC (2010) 249 fn 15.

25 It took place in Vienna from 13-24 January 2003. The drafting history is silent on whether this issue was also discussed at the third session. If it had been discussed, that fact would have been mentioned.

26 UNODC (2010) 271.

27 UNODC (2010) 272.

28 UNODC (2010) 273.

29 UNODC (2010) 319.

30 UNODC (2010) 320.

phrase ‘offences covered by this Convention’ was deemed to be more in line with the general formulation of this article and was thus inserted in the draft text.”³¹

At the fourth session, the United States presented another proposal to the effect that: “States Parties shall ensure that appropriate mechanisms are available within their domestic legal systems to overcome obstacles to the investigation of offences covered by this Convention that may arise out of the application of bank secrecy laws.”³² However, the Ad Hoc Committee did not review the Mexican proposal after its distribution.³³ After the fourth session, the Ad Hoc Committee reported:

Article 58 [the Mexican draft] was deleted. Following the second reading of the draft text, at the fourth session of the Ad Hoc Committee, the Vice-Chairman with responsibility for this chapter of the draft convention established an informal working group, co-ordinated by the United States, to produce a revised text of this article. The informal working group proposed the deletion of article 58 on the following basis: (a) the inclusion of a second paragraph in article 50 *bis* on ‘International co-operation’; (b) the insertion of paragraphs 1 (without the first sentence) and 2 of article 58 in the footnote attached to paragraph 8 of article 53 (mutual legal assistance), noting that Mexico wished those paragraphs to be considered in that context; (c) the deletion of the brackets in paragraph 8 of article 53 and around the last sentence of paragraph 8 of article 42; and (d) the reformulation of paragraph 3 of article 58 and its inclusion in the draft text as new article 42 *bis*. The Ad Hoc Committee did not have the opportunity to review the proposal of the informal working group at its fourth session.³⁴

At the fifth session, the following article on bank secrecy was proposed:

Each State Party shall ensure that, in the case of domestic criminal investigations of offences established by that State Party in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.³⁵

It is reported that:

2. At its fifth session, the Ad Hoc Committee provisionally approved article 42 *bis* of the draft convention.

31 UNODC (2010) 320 fn 5.

32 UNODC (2010) 321.

33 UNODC (2010) 320 fn 6.

34 UNODC (2010) 321.

35 UNODC (2010) 321.

3. At its seventh session ... the Ad Hoc Committee considered, finalised and approved the article, as orally amended. The last amendment is reflected in the final text of the convention ... that was submitted to the General Assembly for adoption at its fifty-eighth session.³⁶

Had the Mexican draft been included in the Convention it would have obliged states parties to provide information requested by other states parties without being hindered by bank secrecy laws; it would have been applied in the light of the requested state party's domestic law, or procedural provisions or bilateral or multilateral agreements or arrangements; the information could only be used for the purpose for which it was sought unless the requested state party authorised the requesting state party to put it to another use; and measures were supposed to be put in place to ensure that criminal or administrative investigations were not hindered by bank secrecy laws. This should be contrasted with the article that was included in the Convention which has the following two features. One, it is applicable only to domestic investigations. In other words, information or evidence obtained on the basis of Article 40 should not be transferred to a state party to the Convention. Two, it is applicable only to criminal investigations. In other words, it does not extend to administrative investigations.

Another provision which deals with the issue of bank secrecy is Article 46(8), which focuses on mutual legal assistance in criminal matters. During the negotiations towards the Convention, some delegates proposed that the current Article 43 (which deals with international co-operation) should also deal with the issue of bank secrecy. The rolling text which was discussed at the fourth session³⁷ was presented by Cameroon, Mexico, the Netherlands and Thailand and stated:

States Parties shall consider adopting legislative and administrative measures to provide that assistance in relation to investigations of administrative offences and civil and administrative proceedings shall not be refused on the ground of bank secrecy [or taxation provisions].³⁸

However, in a revised proposal by Thailand "following consultations with interested delegations" the issue of bank secrecy was excluded from the current

36 UNODC (2010) 321.

37 It was held in Vienna from 13-24 January 2003.

38 UNODC (2010) 341. Another formulation which was tabled by some delegates provided that: "States Parties shall consider adopting legislative and administrative measures to provide that assistance in relation to proceedings other than criminal proceedings shall not be refused on the ground of bank secrecy [or taxation provisions]." See UNODC (2010) 341 fn 3.

article 43.³⁹ This does not mean that bank secrecy laws may be invoked to frustrate international co-operation in the fight against corruption. Article 43 has to be read with Articles 44 – 50 of the Convention. In this range falls Article 46(8) which, as stated earlier, deals with the issue of bank secrecy in mutual legal assistance. It is now imperative to have a look at the drafting history of Article 46(8).

At the first session delegates had three draft articles (options) to consider on mutual legal assistance.⁴⁰ The first draft was submitted by Austria and the Netherlands⁴¹ and it provided in the relevant part that: “States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.”⁴² The second draft was presented by Mexico⁴³ and it was identical to that of Austria and the Netherlands.⁴⁴ The third draft was submitted by Turkey⁴⁵ and it provided in the relevant part that: “States Parties shall not prevent the implementation of this article on the ground of bank secrecy.”⁴⁶ At the second session,⁴⁷ Turkey withdrew its proposal,⁴⁸ and Austria, the Netherlands and Colombia merged their drafts.⁴⁹ The relevant provision in the merged draft was to the effect that: “States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.”⁵⁰ However, Mexico was of the view that the paragraph on bank secrecy should be deleted as the Convention contained an independent provision on bank secrecy.⁵¹ The rolling text which was discussed at the fourth session⁵² included the same provision on bank secrecy and “some delegations proposed the deletion of” the paragraph on bank secrecy as the issue had been provided for in other provisions of the Convention.⁵³ The rolling text which was discussed at the fifth session⁵⁴ still included the same provision on bank secrecy.⁵⁵ This means that the Ad Hoc Committee did not delete it after the

39 UNODC (2010) 342.

40 It was held in Vienna from 21 January-1 February 2002.

41 UNODC (2010) 365.

42 UNODC (2010) 366.

43 UNODC (2010) 370.

44 UNODC (2010) 371.

45 UNODC (2010) 374.

46 UNODC (2010) 375.

47 It took place in Vienna from 17-28 June 2002.

48 UNODC (2010) 378 fn 7.

49 UNODC (2010) 378.

50 UNODC (2010) 380.

51 UNODC (2010) 380 fn 16.

52 It was held in Vienna from 13-24 January 2003.

53 UNODC (2010) 386 fn 26.

54 It was held in Vienna from 10-21 March 2003.

55 UNODC (2010) 391.

fourth session. The reasons for this are not stated in the *travaux préparatoires*.⁵⁶ At the sixth and seventh sessions, there was no debate on the provision on bank secrecy and it was later to be included in the Convention.⁵⁷ It should be recalled that Article 46(8) is silent on the purpose for which the information or evidence obtained from a bank could be used.

Another provision that could be used to acquire information protected by bank secrecy laws in the context of mutual legal assistance is Article 46(19) which provides that:

The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

According to the drafting history of Article 46(19):

It was agreed that the *travaux préparatoires* would reflect the understanding that the requesting State party would be under an obligation not to use any information received that was protected by bank secrecy for any purpose other than the proceeding for which that information was requested, unless authorized to do so by the requested State party.⁵⁸

The above fact is clearly reflected in the interpretive notes to the *travaux préparatoires*.⁵⁹ It is argued that articles 46(8) and 46(19) should be read in tandem so that any information which the requesting state party obtains from the requested state party which is protected by bank secrecy is not used for any purpose other than that stipulated in the request. It is important to note that although South Africa made submissions on draft Article 46(9), it did not make submissions on draft Article 46(8).⁶⁰ This could be interpreted as implying that it had no objection to the way in which the article was phrased. It is now necessary to have a look at South African law on bank secrecy and later discuss

56 UNODC (2010) 395.

57 UNODC (2010) 397–404.

58 UNODC (2010) 399 fn 34.

59 UNODC (2010) 409.

60 UNODC (2010) 401–402.

whether or not it meets South Africa's obligations under the UN Convention against Corruption.

3 South African Law on Bank Secrecy

South African bank secrecy law is based on common law, statute⁶¹ and international law (bilateral and multilateral agreements). The seminal decision of the English King's Bench on a bank's duty of confidentiality, *Tournier v National Provincial and Union Bank of England*, has been adopted by South African courts. It is therefore important that the conclusions reached in that decision are highlighted in this essay. In *Tournier v National Provincial and Union Bank of England* the Court emphasised the principle of the bank's duty of confidentiality towards its clients in the following terms:

At the present day I think it may be asserted with confidence that the duty is a legal one arising out of contract, and that the duty is not absolute but qualified. It is not possible to frame any exhaustive definition of the duty. The most that can be done is to classify the qualification, and to indicate its limits.⁶²

The Court added:

On principle I think that the qualifications can be classified under four heads: (a) Where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer.⁶³

The Court gave some examples under each of the above qualifications. It stated:

An instance of the first class is the duty to obey an order under the Bankers' Books Evidence Act. Many instances of the second class might be given. They may be summed up in the language of Lord Finlay in *Weld-Blundell v. Stephens* ... where he speaks of cases where a higher duty than the private duty is involved, as where 'danger to the State or public duty may supersede the duty of the agent to his principal'. A simple instance of the third class is where a bank issues a writ claiming payment of an overdraft stating on the face of the writ the amount of the overdraft. The familiar instance of the last class is where the customer authorises a reference to his banker. It is more difficult to state what the limits of the duty are, either as to time or as to the nature of the disclosure. I certainly think that the duty does not cease the moment a customer closes his account. Information gained during the currency of the

61 Jones & Schoeman (2006) 6.

62 *Tournier v National Provincial and Union Bank of England* 471–472.

63 *Tournier v National Provincial and Union Bank of England* 473.

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 ... 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.⁶⁴

There are only a few South African cases in which the issue of bank secrecy has been dealt with. The paucity of cases should be understood against the background that this is an area in which traditionally there have not been many cases.⁶⁵ There have been cases in which South African courts have invoked *Tournier v National Provincial and Union Bank of England* to hold that a bank owes its client a duty of confidentiality. The first case (as far as the author is aware) in which this decision was referred to was the Appellate Division (now Supreme Court of Appeal) decision of *Densam (Pty) Ltd v Cywilnat (Pty) Ltd*. This case was about the bank disclosing to a third party in cession proceedings that the appellant was indebted to it. The trial court invoked the principle in *Tournier v National Provincial and Union Bank of England* and held 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.⁶⁶

In commenting on the above finding, the Appellate Division held that:

The first part of the learned Judge's conclusion, viz the finding that an obligation rests on the banker as against the customer to maintain confidentiality and secrecy, followed upon a discussion in the judgment ... of the nature of the contractual relationship between a banker and a customer. From an analysis of the discussion it appears that the learned Judge found that in the contract between banker and customer there exists a 'tacit or implied term of secrecy' ... arising 'as a matter of law, or as representing the tacit

64 *Tournier v National Provincial and Union Bank of England* 473.

65 In *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 479, the court held that: "It is curious that there is so little authority as to the duty to keep customers' or clients' affairs secret, either by banks, counsel, solicitors or doctors. The absence of authority appears to be greatly to the credit of English professional men, who have given so little excuse for its discussion."

66 *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* 109.

consensus of the parties' ... but that such term was 'not an absolute provision', there being circumstances in which a banker may be relieved of the duty of secrecy ... and that for both these findings the learned Judge relied mainly on the English case of *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 (CA).⁶⁷

On appeal, the respondent's lawyer argued that in South African law "unlike as in the English law, there was no duty of secrecy as between banker and customer, and that [South African] law demanded of a banker no more than ... to act in good faith and not fraudulently".⁶⁸ The Court held that on the facts of the case:

[T]here is no need to embark upon a consideration of the juristic nature of the contract between banker and customer, nor upon an investigation as to whether the banker owes the customer a duty of confidentiality or secrecy and, if so, what its origin or limits may be. For the purposes of deciding this appeal I shall simply assume ... (but, I must make it plain, without deciding) that the Bank was contractually obliged to [the appellant] to maintain secrecy and confidentiality about its affairs, in accordance with the decision in *Tournier's* case supra.⁶⁹

However, the Court "disregard[ed] the so-called exceptions to the general rule as laid down in that case".⁷⁰ The above case is very clear that the Court did not decide the question of whether a bank owes its client a duty of confidentiality. It just assumed that such a duty exists. The court did not find it necessary to state the legal position of the exceptions in *Tournier's* case in South African law. This means that those two important questions remained unanswered. The reason for this was that the outcome of the case did not hinge on the Court's deciding whether or not the bank owed its client a duty of confidentiality. This position was not to remain unchanged indefinitely.

In *Optimprops 1030 CC v First National Bank of SA Ltd*,⁷¹ the issue of bank secrecy arose. The plaintiff's cheques had been stolen by one of its employees and cashed at one of the defendant's branches. The plaintiff suspected that one of its employees, who was a client of the defendant, had stolen the cheques and requested the defendant to provide him with the following information: the full names and addresses of the account holder; the full details or references that were obtained at the time that his account was opened with the bank; the name and address of his employer at the time the account was opened; full

67 *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* 109.

68 *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* 110.

69 *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* 110.

70 *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* 111.

71 *Optimprops 1030 CC v First National Bank of SA Ltd* [2001] JOL 7817 (D).

details of his banking history in the bank's possession at the time the account was opened; what references he gave to the bank at the time the account was opened; and the name and address of his landlord.⁷² This information was requested on the basis of section 81(3) of the Bills of Exchange Act,⁷³ which provides that:

If a person took any such cheque into his possession or custody after the theft or loss, and fails to furnish the true owner or any person who has in terms of subsection (7) the rights of a true owner, at his request, with any information at his disposal in connection with the cheque, he shall for the purposes of subsection (1) be deemed to have been a possessor of the cheque and either to have given a consideration therefor or to have taken it as a donee.

The Court held that:

The object of section 81(3) is obviously to enable the true owner to identify the previous possessor of the cheque or cheques to enable him to recover his loss under section 81(1). Section 81(3) virtually holds a gun to the head of the bank and says: 'If you refuse to give the information you do so at your peril.' The section constitutes an inroad into the duty of secrecy of a bank and confidentiality which the banker owes to its client. The obligation placed on the bank however overrides the duty of confidentiality as it is a disclosure under compulsion of law which is a recognised exception to the bank's duty. (*Tournier v National Provincial and Union Bank of England* 1924 (1) KB 461.) A bank can be placed in an invidious position where it receives a letter requesting information regarding an account holder particularly where the information is not stated to be required in connection with a cheque crossed and bearing the words 'Not negotiable' and it is not said to be required in terms of section 81(3). The logical course to be adopted by a prudent bank would be to enquire for what purpose the information is sought and only once it is established that it is in connection with a crossed 'Not negotiable' cheque which has been lost or stolen and paid, furnish the information requested. In my view the section should be restrictively interpreted. The section introduces the English Law of Conversion which is completely foreign to our law.⁷⁴

The Court, in dismissing the case, held that the bank did not have a duty to provide the plaintiff with the information it had requested as the plaintiff had the relevant information it could have used to ascertain that its employer had stolen the cheques.⁷⁵ The plaintiff appealed against the Judge's finding

72 *Optimprops 1030 CC v First National Bank of SA Ltd* 6.

73 Act 34 of 1964.

74 *Optimprops 1030 CC v First National Bank of SA Ltd* 11–12.

75 *Optimprops 1030 CC v First National Bank of SA Ltd* 14.

successfully and, without referring to the case of *Tournier v National Provincial and Union Bank of England*, the Appeal Court held that:

I have some difficulty, with all due respect to the judge *a quo*, with the concept that a restrictive interpretation is warranted because section 81(3) erodes the sanctity of confidentiality which banks invoke in respect of information concerning their clients' business and dealings. Nor, in my respectful view, does the circumstance that the subsection introduces a principle equivalent to the English doctrine of 'conversion' into our legal system necessarily mean that our courts should, in the process of interpretation, restrict its ambit.⁷⁶

The Appeal Court does not dispute the fact that a bank owes its client a duty of confidentiality. It concentrates on the correct interpretation of section 81(3) of the Bills of Exchange Act which obliges a bank to disclose information about its client to a person whose negotiable instruments have been stolen and have been cashed at the bank.

In *FirstRand Bank Ltd v Chaucer Publications (Pty) Ltd*, the High Court dealt with the issue of whether a bank may invoke its duty of confidentiality towards its clients to prevent a newspaper from publishing information which would reveal that the bank misled its clients by advising them to invest in a given scheme. This information would have revealed the clients' details. The bank argued that it brought the application because it had a "substantial interest" in the matter "based on the confidential nature of the relationship between a bank and its clients".⁷⁷ The Court referred to *Tournier v National Provincial and Union Bank of England* and held that a "banker's contractual obligation to preserve the confidentiality has long been recognised in the English law".⁷⁸ The Court went on to explain the nature and extent of that relationship and the circumstances in which the bank is permitted to disclose its client's information.⁷⁹ The Court referred to the relevant case law and held that in South Africa "this duty of confidentiality (or secrecy as it is sometimes referred to) [has been] recognised" since 1914.⁸⁰ The Court held that several authors and some pieces of legislation also recognise "the confidential nature of the relationship between a bank and its client".⁸¹ The Court concluded that:

It seems to me that for considerations of public policy the relationship between a bank and its client must be of a confidential nature. Equally - for considerations of public policy - this duty is subject to being overridden by a

76 *Optimprops 1030 CC v FNB of SA* 9.

77 *FirstRand Bank Ltd v Chaucer Publications (Pty) Ltd* para 18.

78 *FirstRand Bank Ltd v Chaucer Publications (Pty) Ltd* para 18.

79 *FirstRand Bank Ltd v Chaucer Publications (Pty) Ltd* para 18.

80 *FirstRand Bank Ltd v Chaucer Publications (Pty) Ltd* para 19.

81 *FirstRand Bank Ltd v Chaucer Publications (Pty) Ltd* para 19.

greater public interest ... Although the duty not to disclose rests with the bank, the privilege not to have the details of its dealings with the bank disclosed belongs with the client. It is therefore the client alone who can invoke this privilege and insist that the bank keeps the information about its dealings with the client confidential. In this case it is not the bank who wishes to publish confidential information about its clients. It is a third party who obtained certain documents, and who wishes to publish the information reflected therein. Insofar as it may be argued that the mere publication of the names of the clients may impinge on the bank's right to privacy or its confidential relationship with its clients, the mere publication of the fact that a person is a client of FirstRand cannot, in my view, impinge on FirstRand's privacy. FirstRand is merely seeking an interdict to prevent the identities of its clients and their trusts from being published. The common law did not recognise class actions and ... prior to 1994 a class action was foreign to our law. I therefore conclude that FirstRand has not shown that it has *locus standi* at common law.

In other words, a bank has a duty not to disclose its client's information unless public policy requires that that information should be disclosed. However, a bank does not have a right to prevent a third party from disclosing its client's (the bank's) information. Whether or not that holding accommodates some exceptions is debatable.⁸² In *Stevens v Investec Bank Limited*, some banks were being investigated for allegedly committing financial crimes. Subpoenas were issued for them to appear before a magistrate to answer questions that would be put to them by prosecutors. The answers to these questions would have forced them to reveal their clients' confidential information.⁸³ They challenged the validity of the subpoenas and applied to the High Court for an interdict. In granting the interdict, the Court held that:

There is no doubt that a banker-client relationship requires the highest *uberrimae fides* and that confidentiality is one of the essential aspects of such relationship of trust as between ... banker and client. Privacy in financial and banking affairs is often an important aspect of successful business enterprise in a competitive economy.⁸⁴

However, the Court added that "[p]enetration of the banking vault and disclosure of that which is contained therein is not always a breach of confidentiality or unlawful" and that one should "realise" that in terms of the law "there must always be circumstances where the needs of privacy must give way to the needs of the administration of justice".⁸⁵ However, what is clear is

82 See, for example, Schulze (2007) 122-126.

83 *Stevens v Investec Bank Limited* para 7.

84 *Stevens v Investec Bank Limited* para 10.

85 *Stevens v Investec Bank Limited* para 11.

that South African case and common law recognise bank secrecy and that there are exceptions to the general rule that a bank has to keep its clients' information confidential.

Furthermore, bank secrecy is also recognised in a number of pieces of legislation. These include section 43 of the Land and Agricultural Development Bank Act, which states that:

(1) Subject to the Constitution and the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000), no person may— (a) in any way disclose any information submitted by any person in connection with any application for any agricultural financial service rendered or offered by the Bank; or (b) publish any information obtained in contravention of paragraph (a), unless ordered to do so by a court of law or unless the person who made such application consents thereto in writing.

(2) Any person who contravenes subsection (1) is guilty of an offence.⁸⁶

The general rule under section 43 therefore is that information submitted to the Bank by any person who applies for agricultural finance is to be confidential. However, this information may be disclosed if the Constitution requires its disclosure; if the disclosure is required in terms of the Promotion to Access to Information Act; if a court of law orders that such information should be disclosed; or if the person who submitted that information consents to its disclosure.

Another provision which deals with bank secrecy is section 33 of the South African Reserve Bank Act.⁸⁷ It stipulates that:

(1) No director, officer or employee of the Bank, and no officer in the Department of Finance, shall disclose to any person, except to the Minister or the Director-General: Finance or for the purpose of the performance of his or her duties or the exercise of his or her functions or when required to do so before a court of law or under any law— (a) any information relating to the affairs of— (i) the Bank; (ii) a shareholder of the Bank; or (iii) a client of the Bank, acquired in the performance of his or her duties or the exercise of his or her functions; or (b) any other information acquired by him or her in the course of his or her participation in the activities of the Bank, except, in the case of information referred to in paragraph (a) (iii), with the written consent of the Minister and the Governor, after consultation with the client concerned.

(1A) The provisions of subsection (1) shall not be construed as preventing any director, officer or employee of the Bank who is responsible for exercising

⁸⁶ Land and Agricultural Development Bank Act 15 of 2002.

⁸⁷ Act 90 of 1989.

any power or performing any function or duty under the Exchange Control Regulations, 1961, issued in terms of section 9 of the Currency and Exchanges Act, 1933 (Act No. 9 of 1933), from disclosing to the Commissioner for the South African Revenue Service any information as may be required for purposes of exercising any power or performing any function or duty in terms of any Act administered by the Commissioner.

The director, officer or employee of the bank is permitted to disclose confidential information under the following circumstances: to the Minister or the Director-General: Finance; for the purpose of the performance of his or her duties; for the purpose of the exercise of his or her functions; when required to do so before a court of law; where required to do under any law; and to the Commissioner of South African Revenue Service. Although the South African Reserve Bank Act, unlike the Land and Agricultural Development Bank Act, does not specifically refer to the Constitution and to the Promotion of Access to Information Act, it cannot be argued successfully that it is not subject to those two pieces of legislation. Therefore, if the Constitution or the Promotion of Access to Information Act requires that information should be disclosed, it has to be disclosed under the general exception of "under any law". In terms of section 10 of the National Payment System Act, the Reserve Bank may also disclose any confidential information relating to a payment system: "(a) in the course of performing functions under any law; (b) for the purpose of legal proceedings; (c) when required to do so by a court; (d) if in the opinion of the Reserve Bank, disclosure is in the public interest, or (e) that is already publicly available".⁸⁸ The Banks Act does not include a provision imposing a duty on all banks to keep their clients' information confidential.⁸⁹ However, section 87(2) provides that "[t]he husband of a woman who is a depositor with a bank shall, save with her written consent, not be entitled to demand or receive from the bank any particulars concerning the deposits she holds with that bank". It is argued that, in the light of the fact that South African common law imposes a duty on banks not to disclose their clients' information unless such disclosure falls within one of the exceptions, banks have a duty not to disclose that information. It should be recalled that the common law and the pieces of legislation discussed above allow banks to disclose their clients' confidential information if the law requires that disclosure.⁹⁰

Although there are many pieces of legislation which allow a bank to disclose its clients' confidential information, the main piece of legislation on corruption in South Africa, the Prevention and Combating of Corrupt

88 National Payment System Act 78 of 1998.

89 Act 94 of 1990.

90 For an outline of other pieces of legislation see Schulze (2007) 122.

Activities Act, is silent on that very important issue.⁹¹ This should be understood against the background that it was enacted before South Africa ratified the UN Convention against Corruption which, *inter alia*, requires states parties to put in place measures to ensure that bank secrecy does not become a stumbling block in the investigation of corruption. This explains why its Preamble states that: "South Africa desires to be in compliance with and to become Party to the United Nations Convention against Corruption." Therefore, for South African authorities to compel a bank to disclose confidential information of a client in a corruption investigation, they have to invoke other pieces of legislation, if they are relevant, otherwise they would have to rely on common law principles developed by the courts. This means that there may be a need to amend the Prevention and Combating of Corrupt Activities Act to ensure that it expressly provides that bank secrecy will not be invoked where information is required from the bank for the purpose of investigating corruption. This is an approach adopted by some African countries, such as Sierra Leone,⁹² Rwanda,⁹³ Uganda,⁹⁴ Malawi,⁹⁵ Namibia,⁹⁶ Lesotho,⁹⁷ and Zambia.⁹⁸ In the light of the above discussion, it is submitted that South Africa has mechanisms in place to guarantee that bank secrecy will not be invoked to prevent an investigation or prosecution of corruption. This is in line with the UN Convention against Corruption and, in particular, with Article 40.

4 South African Banks Disclosing Confidential Information to Foreign Authorities

Bank secrecy would not pose a problem to South African authorities if they are investigating any corruption matter. This is so because there are many pieces of legislation which allow the disclosure of confidential information held by banks. Should these pieces of legislation not apply in a given case, the common law will be invoked to disclose such information. This would be on the basis of the principles established in the cases discussed above. However, the situation is not that simple when it comes to disclosing such information to an authority of a foreign country or pursuant to an order issued by a foreign court. The question that one has to answer is whether that order would be issued on the

91 Act 12 of 2004.

92 See section 53 of the Anti-Corruption Act, 2008.

93 Article 35 of Law No 23/2003 Related to the Punishment of Corruption and Related Offences, 07/08/2003.

94 Section 41(2) of the Anti-Corruption Act 6 of 2009.

95 Section 12A(2) of the Corrupt Practices Act, Chapter 7:04.

96 Section 26(2) of the Anti-Corruption Act 8 of 2003.

97 Section 8(2) of the Prevention of Corruption and Economic Offences Act 5 of 1999.

98 Section 8(1)(d) of the Corruption and Economic Crime Act, 1994.

basis of the UN Convention against Corruption or in terms of relevant legislation, such as the International Co-operation in Criminal Matters Act.⁹⁹ It should be noted that the Banks Act empowers South African registered banks to conduct banking businesses outside South Africa. Section 1 of the Banks Act defines a "branch of a bank" to mean "an institution by means of which a bank conducts the business of a bank outside the Republic". The Registrar's permission is required for a South African bank to open or acquire a branch outside South Africa.¹⁰⁰ South African banks have indeed opened or acquired branches outside South Africa, especially in many African countries.¹⁰¹

There are at least three challenges that face anyone trying to obtain confidential information from a South African bank for use in a corruption related investigation or trial. One, South Africa is yet to domesticate the UN Convention against Corruption. Therefore, this Convention is not part of South African domestic law.¹⁰² This means, *inter alia*, that South Africa cannot invoke it as the basis to force a South African bank to disclose confidential information for an investigation or prosecution outside South Africa. Two, the South African Prevention and Combating of Corrupt Activities Act is silent on the issue of bank secrecy. In other words, it cannot be invoked to compel a South African bank to disclose confidential information for use in a foreign investigation or trial. And, three, the UN Convention against Corruption does not require states parties which do not have a specific law on mutual legal assistance on the issue of compelling banks to disclose their clients' information to foreign authorities to consider the Convention as the basis to honour such a request.¹⁰³ Against that background, it is imperative to have a look at the relevant mechanisms in place to ensure that South African authorities compel banks in South Africa to disclose their clients' information to foreign authorities for either investigations or prosecutions.

The first mechanism would be to invoke the relevant sections of the International Co-operation in Criminal Matters Act. What a foreign court or authority would have to do is to issue a letter of request for evidence or information from South Africa. Section 7 of this Act provides that:

99 Act 75 of 1996.

100 Section 52 of the Banks Act.

101 See Ndzamela (2012).

102 For a discussion of how international law becomes part of South African law, see *Glenister v President of the Republic of South Africa*.

103 The Convention approaches the issue of extradition differently by providing that states could extradite persons on the basis of the Convention if such extradition would not be possible under national law. See Article 44(4)-(6). The same approach is followed with respect to mutual enforcement co-operation. See Article 48(2).

- (1) A request by a court or tribunal exercising jurisdiction in a foreign State or by an appropriate government body in a foreign State, for assistance in obtaining evidence in the Republic for use in such foreign State shall be submitted to the Director-General.
- (2) Upon receipt of such request the Director-General shall satisfy himself or herself - (a) that proceedings have been instituted in a court or tribunal exercising jurisdiction in the requesting State; or (b) that there are reasonable grounds for believing that an offence has been committed in the requesting State or that it is necessary to determine whether an offence has been so committed and that an investigation in respect thereof is being conducted in the requesting State.
- (3) For purposes of subsection (2), the Director-General may rely on a certificate purported to be issued by a competent authority in the State concerned, stating the facts contemplated in paragraph (a) or (b) of the said subsection.
- (4) The Director-General shall, if satisfied as contemplated in subsection (2), submit the request for assistance in obtaining evidence to the Minister for his or her approval.
- (5) Upon being notified of the Minister's approval the Director-General shall forward the request contemplated in subsection (1) to the magistrate within whose area of jurisdiction the witness resides.

On the basis of section 7, a foreign state may request evidence for the purpose of a trial or for the purpose of an investigation. The Act defines "evidence" to include "all books, documents and objects produced by a witness".¹⁰⁴ This definition is broad enough to include confidential information held by South African banks. In *Thatcher v Minister of Justice and Constitutional Development*, the Court held that section 7 "does not require the requesting state to motivate or substantiate its request. Provided it is a genuine request made in good faith it should, and would in all probability, be accepted as such."¹⁰⁵ Section 7 has to be read with section 8, which provides that:

- (1) The magistrate to whom a request has been forwarded in terms of section 7(5) shall cause the person whose evidence is required, to be subpoenaed to appear before him or her to give evidence or to produce any book, document or object and upon the appearance of such person the magistrate shall administer an oath to or accept an affirmation from him or her, and take the evidence of such person upon interrogatories or otherwise as requested, as if the said person was a witness in a magistrate's court in proceedings similar to those in connection with which his or her evidence is required: Provided that a person who from lack of knowledge arising from youth, defective education or other cause,

104 Section 1.

105 *Thatcher v Minister of Justice and Constitutional Development* para 58.

is found to be unable to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in the proceedings without taking the oath or making the affirmation: Provided further that such person shall, in lieu of the oath or affirmation, be admonished by the magistrate to speak the truth, the whole truth and nothing but the truth.

- (2) A person referred to in subsection (1) shall be subpoenaed in the same manner as a person who is subpoenaed to appear as a witness in proceedings in a magistrate's court.
- (3) Upon completion of the examination of the witness the magistrate taking the evidence shall transmit to the Director-General the record of the evidence certified by him or her to be correct, together with a certificate showing the amount of expenses and costs incurred in connection with the examination of the witness.

The effect of sections 7 and 8 is that a witness, that is a bank official, does not travel to a foreign country to give evidence in court or to investigating officers. All the evidence is given to a magistrate in South Africa who then forwards it to the Director-General who transfers it to the relevant foreign authority. Such a witness cannot be prosecuted or sued in South Africa for breach of his duty of confidentiality towards his client. If he were to be prosecuted, he would argue, successfully, that he was compelled by a court of law to give that evidence. It should also be noted that the International Co-operation in Criminal Matters Act does not specifically provide that a witness who has been subpoenaed to give evidence shall not decline to do so on the basis of bank secrecy. However, if the country which has sought evidence from South Africa is in Southern Africa and has ratified the Southern African Development Community Protocol on Mutual Legal Assistance in Criminal Matters, it would not present a major hurdle for the bank to disclose confidential information at such a hearing. This is so because this Protocol makes it very clear that "state Parties shall, to the extent permitted by their laws, not decline to give assistance under this Article on the grounds of bank secrecy".¹⁰⁶ The same applies to proceedings where evidence or information is required in a country which is a state party to one of the treaties mentioned above and which South Africa has ratified.

One issue that needs to be examined closely is whether an employee of a South African bank is immune from prosecution or from civil suit before a South African court if he gives evidence in a foreign court which discloses his South African based client's confidential information. For example, a South African citizen, D, is doing business in Malawi and has a bank account in a Malawian bank, Bank A, which is a subsidiary of a South African registered bank, Bank B. He also has an account in South Africa with Bank B. The

106 Article 20(3).

manager of Bank A is a South African expatriate working in Malawi. D has been arrested in Malawi for allegedly financing unlawful activities. It emerges during the investigation that some of the money used to finance such activities originated from his bank account in South Africa and was transferred to the bank account of his accomplice in Malawi. A Malawian court, on the application of a prosecutor or investigator, orders the manager of Bank A to produce in court all the transactions that have taken place on D's accounts, including his South African account. He is advised (or misadvised) by his Malawian lawyer that under Malawian law he is obliged to disclose this information and that he will not be prosecuted. He is not sure whether this legal position is correct as regards the information held by a South African bank. However, he is aware that under South African law, there are exceptions to the rule that a bank has a duty to keep its client's information confidential. It is argued that should the manager disclose the South African bank details on the basis of an order by a Malawian court or investigator, he could be sued successfully in a South African court. He cannot successfully argue that the disclosure is protected by South African statute or case law. This is so because South African law, unless otherwise expressly stated, is not of extra-territorial application. The question that arises is: how does one ensure that the Malawian investigators acquire D's South African account details legally? The only way to ensure that this evidence is obtained legally from South Africa is to invoke South African law. Assuming that the Malawian authorities do not invoke the International Co-operation in Criminal Matters Act, it is argued that a manager of a South African bank who has been ordered or requested by a foreign state to disclose his client's confidential information may apply to a South African court to invoke its inherent jurisdiction and rule on whether it would be unlawful for him to disclose such evidence. The court may also be asked to rule on whether such manager may be indemnified from prosecution under South African law for disclosing such evidence before a court in a foreign country. This is an approach that banks have taken in Malaysia¹⁰⁷ and in the United Kingdom¹⁰⁸ to avoid being sued by their clients when they have given evidence

107 See *Attorney General of Hong Kong v Zauyah Wan Chik & Ors and Another Appeal* [1995] 2 MLJ 620. The Court of Appeal invoked its inherent jurisdiction to declare that bank officials would be indemnified from criminal and civil proceedings if they gave evidence in a court in Hong Kong disclosing their client's confidential information.

108 *Pharaon and others v Bank of Credit and Commerce International SA (in liquidation) (Price Waterhouse (a firm) intervening); Price Waterhouse (a firm) v Bank of Credit and Commerce International SA (in liquidation) and others* [1998] 4 All ER 455. The court in the United States of America ordered one of the parties to disclose its UK client's confidential information. The UK court held that, on the basis of the US order, the bank should go ahead and give evidence in the US court and that it will not be prosecuted or sued in the UK for breach of the duty of confidentiality towards its client.

in foreign countries on the basis of requests from or orders by foreign courts. The above discussion shows that South Africa has mechanisms in place to comply with its obligations under the UN Convention against Corruption when it comes to co-operating with foreign countries in the fight against corruption. The most important piece of legislation through which foreign countries may obtain evidence from South African banks about their clients is the International Co-operation in Criminal Matters Act.

5 Conclusion

It has been pointed out above that the South African Banks Act does not include an express provision imposing an obligation on banks to keep all their clients' information confidential. The only provision which imposes such a duty is section 87(2) which deals with the duty not to disclose a wife's information to her husband. It is recommended that a section should be inserted into the Banks Act making it very clear that banks have a duty to keep their clients' information confidential. This would strengthen the existing common law duty. This example has been followed in some countries, such as Singapore¹⁰⁹ and the United Kingdom.¹¹⁰ It is recommended that South Africa should domesticate the UN Convention against Corruption so that its provisions have direct application in South African domestic law.

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109 Section 47(1) of the Banking Act (Cap 19, 2003 Rev Ed) provides that: "Customer information shall not, in any way, be disclosed by a bank in Singapore or any of its officers to any other person except as expressly provided in this Act." The Court of Appeal of Singapore held that 'In light of the plain wording of s 47, our current statutory regime on banking secrecy leaves no room for the four general common law exceptions expounded in *Tournier* to co-exist. They have been embraced within the framework of s 47 of the Banking Act, which is now the exclusive regime governing banking secrecy in Singapore. Section 47 makes it plain that no customer information shall be disclosed by a bank in Singapore or any of its officers except as expressly provided for in the Banking Act. A breach of any of the prescribed statutory obligation amounts to a criminal offence. The Third Schedule to the Banking Act sets out, in illuminating detail, the circumstances, conditions, and details of permissible disclosure. It is axiomatic that, in terms of details and scope, this is a more comprehensive regime than that articulated in *Tournier*. There is simply no room, in Singapore, for the less sophisticated and more general common law rules articulated in *Tournier* to have any further relevance save for the perspective of historical evolution and context it provides."

See *Susilawati v American Express Bank Ltd* [2009] SGCA 8 (27 February 2009) para 67.

110 Section 204 of the Banking Act, 2009.

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