The South African Banking Adjudicator—A Brief Overview

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1 Introduction

In the wake of the general hype of transparency and democracy which has flooded our country since 1994, came the appointment of a number of ombudsmen in the financial services sector. These included ombudsmen for the banking; short-term insurance; life insurance; and pension funds (see Tamara Cohen 'The Insurance Ombudsman—An Alternative Dispute Resolution Forum for the Insurance Industry' (1996) 8 *SA Merc LJ* 252 at 258; and at *http://www.fsb.co.za* (consulted on 3 Dec 1999) for the practices and procedures of the pension-fund adjudicator).

In passing, one or two comments on the term 'ombudsman'. It has its origin in the Swedish word for 'commissioner' and means 'representative' in Swedish. The term 'ombudsman' (plural: 'ombudsmen') generally connotes an official who investigates citizens' complaints against the government or its servants, or consumers' complaints against the officials involved in certain industries. In Britain an ombudsman is also referred to as a 'parliamentary commissioner' (see Marian Makins (managing ed) *Collins English Dictionary and Thesaurus* (1993) sv 'ombudsman').

Prior to November 1997, when the first Banking Ombudsman took office, the Chief Executive Officer of the Banking Council of South Africa performed the function of mediator between bank and customer. This situation was described by a cynical journalist as tantamount to 'putting Dracula in charge of the blood bank' (see Charl Cilliers *Inaugural Report of the Banking Ombudsman* (1999) at 4). The Banking Council realized the need for an impartiality and independence and asked Mr Charl Cilliers to set up the Office of the Banking Ombudsman. In November 1997 he became the first Banking Ombudsman. Initially appointed for a twelve-month period, his period of office had since been extended with a further six months. In 1999 Mr David John was appointed as the acting Banking Ombudsman with effect from 1 October 1999 (see The Banking Council of South Africa 'The Structure and Powers of the Office of the Banking Adjudicator' (*Recommendations Proposed by the Steering Committee to the Board of Directors of the Banking Council, and Approved at the Banking Council Board Meeting on 19 August 1999*) (1999) in par 20.1 (hereafter 'Banking Council')).

In a spirit of gender sensitivity, the name of the office has recently been changed from 'Banking Ombudsman' to 'Banking Adjudicator' (see Banking Council op cit in par 1.4) It is interesting to note that in a recent consultative paper prepared by the Financial Services Board, the

draftsmen (-persons?) specifically mention that they—quite correctly in my view—preferred to use the term 'ombudsman', being the 'international accepted non-gender specific name of an alternative dispute resolution office, in favour of the previously used term "ombudsperson"' (see Financial Services Board 'Proposal on the Future Constitution, Role and Function of Ombudsmen in the Financial Services Sector' (Consultative Paper published on 26 July 1999) in par 2.1 (hereafter 'FSB'). (See also Josephine Dawn Didcott *Why the Term Ombudsman Should Not Be Changed* (1999) (unpublished memorandum) where she convincingly argues that the term 'ombudsman' has no gender bias in the English version of it.) Be that as it may, the 'Banking Adjudicator' it shall be. I may just hasten to add that any reference in this analysis to the male gender includes the female gender, and any reference to the female gender likewise includes the male gender.

The purpose of this analysis is three-fold. First, I will present a broad outline of the Code of Banking Practice which has been proposed by the Banking Council of South Africa and which will come into operation shortly. Closely linked to the Code of Banking Practice are the activities of the Banking Adjudicator who will have to interpret and make recommendations on this Code in the course of his day-to-day functions. I will therefore also provide a cursory view of the purpose, powers, jurisdiction and structure of the Office of the South African Banking Adjudicator. Secondly, I will refer briefly to the structure and powers of the Australian Banking Ombudsman Scheme, as well as the Terms of Reference which determines the powers and jurisdiction of that Ombudsman. Thirdly, and closely related to the activities of both the South African Banking Adjudicator and the Australian Banking Ombudsman, are the interpretation and content of the concept of 'good banking practice'. I will therefore also briefly discuss the juristic nature and requirements of a 'banking practice' or 'trade usage'. Finally, I will argue that the Commentary written on the Australian Banking Ombudsman's terms of reference as to what constitutes 'good banking practice', may fruitfully be consulted by the South African Banking Adjudicator.

2 The South African Code of Banking Practice

A South African Code of Banking Practice (the 'Banking Code') has recently been drafted and will be implemented on 3 April 2000 (see at *http://www.banking.org.za*, consulted on 3 Dec 1999). This Banking Code is based on the Banking Code (3 ed, March 1997) of the British Bankers' Association (for a brief discussion of the British Banking Code, see Ross Cranston *Principles of Banking Law* (1997) at 168–170). In terms of the Banking Code member banks have accepted the jurisdiction of the Banking Adjudicator to make binding *rulings* based *on the law* where that is appropriate, and *recommendations* based *on the Banking Code*.

The Banking Code is a lengthy document and provides for a wide variety of aspects germane to the banker-client relationship. These aspects include the provision of information by the bank to its customer regarding services offered by the bank and accounts held by the client at that bank; charges levied by the bank on such services and accounts; and the protection of personal information of the client by the bank.

In terms of the Articles of the Office of the Banking Adjudicator (see par 3 below), the Banking Adjudicator Commission (see also par 3 below) has the power to make recommendations to the Banking Council on a regular basis on how the Banking Code should be amended in the light of experience in the Banking Adjudicator's Office (see Banking Council op cit in par 5.7). This provision clearly envisages the possibility of regular changes to the banking practices described in the Banking Code.

The Banking Code also provides guidelines as to its application and interpretation. I will refer to only three of these guidelines here. The Code provides expressly that none of its provisions

- 'will be justiciable in a court of law';
- 'may be used to influence the interpretation of the legal relationship between a customer and the bank'; and
- 'will give rise to a trade custom or tacit contract or otherwise between a customer and the bank'.

A client of a bank may therefore not rely on the provisions of the Banking Code to prove a banking practice or trade usage. However, I believe that the mere fact that a particular banking practice or trade usage has been acknowledged and explained in the Code in the first place, is already a strong indication that it qualified or existed as a banking practice or trade usage in its own right before its inclusion in the Code. Further, because the Banking Code is not incorporated by reference in the banker-customer contract (and does not for that reason qualify as a consensual term of the contract), it is doubtful whether the Banking Code can operate extra-contractually to exclude the inclusion of a term implied by trade usage. If a bank wishes to exclude the operation of a particular banking practice or trade usage, it should do so expressly. In the absence an express term which excludes the operation of a banking practice or trade usage, it is difficult to see how the Banking Code can operate as a general exclusion of certain banking practices and trade usages from the banker-client agreement.

Further, although the British Banking Code on which our Banking Code is based, is also not accepted as evidence of trade usage, and thus as a basis for implying terms in a bank-customer contract, British courts will have regard to its provisions in formulating legal principles (see Cranston op cit at 169n96 and the authority referred to there).

3 The Office of the South African Banking Adjudicator

The purpose of the Banking Adjudicator's Office has been formulated as follows: '[T]o provide customers of participating Banks with a dispute

resolution mechanism which is easily accessible, informal, quick, affordable and effective, without affecting the right of the customer to resort to litigation at any time if he or she wants to do so' (see Banking Council op cit in par 2).

The Banking Adjudicator's jurisdiction is confined to complaints by natural persons — whether or not they carry on business — and partnerships, trusts and juristic persons whose turnover for the last financial year was less than R3 million. The Adjudicator may consider claims up to R500 000 in amount but the bank concerned may waive this limitation in writing (idem in par 4).

The Office of the Banking Adjudicator was constituted as a section-21 company. There is no statutory obligation on banks to submit to the jurisdiction of the Adjudicator and their participation in the Banking Adjudicator's scheme is therefor voluntarily. Membership of the Banking Council of South Africa will deem member banks to have bound themselves to abide by the provisions of the Code of Banking Practice (see Banking Council op cit in par 1.2). Member banks will also be bound by the Banking Adjudicator's Terms of Reference and by the Rules of Procedure of his office.

The management of the section-21 company is divided between the Board of Directors (which is responsible for the financial soundness of business: see Banking Council op cit in par 3), and the Banking Adjudicator Commission (which is responsible for the mediatory and adjudicatory functions of the company: see idem in par 4).

4 The Banking Adjudicator's Terms of Reference

The Banking Adjudicator's Terms of Reference have been ratified by the Banking Adjudicator's Commission. These Terms of Reference govern the Banking Adjudicator's actions. The Terms of Reference consists of eighteen paragraphs. I will refer briefly to the more important ones here.

Paragraph 1 sets out the Adjudicator's principal powers and duties. It generally provides for the Adjudicator to receive and consider complaints relating to the provision of banking services within South Africa by banks to banking customers. The Adjudicator may further advise the public on the procedure for making a complaint to the Adjudicator's Office; and he may delegate all or any of his powers, except the power to make a ruling. Paragraph 2 lists other secondary powers and duties of the Adjudicator.

Paragraph 3 provides for the jurisdiction of the Adjudicator. In short it provides that the complaint is made by or on behalf of the complainant to whom or for whom the banking services in question were provided, and that the complaint has not or is not to become, the subject of proceedings in or before any court or other independent dispute-resolution body.

Paragraph 4 contains certain limitations on the Adjudicator's jurisdiction. In broad terms it provides that the Adjudicator may not investigate a complaint which concerns commercial decisions by banks,

such as decisions relating to the granting of credit, the assessment of risk, bank charges for services or products, or increases in interest rates. But if a bank charged more than an agreed rate, or if the rate charged contravened the Usury Act 73 of 1968, the Adjudicator can act (see Cilliers op cit at 8–9).

Paragraph 5 stipulates that, barring special circumstances, the Adjudicator will not deal with any complaint that has occurred more than two years prior to the date when it was lodged.

Paragraph 6 places a limit of R500 000 on the amount of compensation which the Adjudicator is allowed to recommend. This amount includes any recommendation for the payment of interest and for incidental expenses, but excludes any amount awarded for inconvenience or distress. The Adjudicator may recommend that the bank pay the complainant a sum not exceeding R2 500 for distress or inconvenience. A bank may waive any of the limitations on jurisdiction which the Terms of Reference places on the Adjudicator (see par 7).

The procedure relating to the lodging of a complaint is explained in par 8. On receipt of a complaint the Adjudicator informs the bank concerned in writing that a complaint has been lodged and that it has three weeks to resolve the dispute with its customer. If the bank fails to respond to the Adjudicator's notice or if it informs the Adjudicator that it is not able to resolve the dispute, the Adjudicator proceeds to investigate the complaint. This he does by first determining whether or not the complaint falls within the Terms of Reference.

Should the complaint fall within the Adjudicator's jurisdiction, he must seek to promote either a settlement between the parties, or a withdrawal of the complaint. If the complainant and the bank are unable to agree to settle the subject-matter of the complaint, the Adjudicator may make a recommendation for the settlement or withdrawal of the complaint, or he may make a ruling on the complaint (see paras 9.1 and 9.2; more about the concepts 'recommendations' and 'rulings' shortly). Recommendations and rulings are made in writing and, where appropriate, state the amount (including the amount of interest or incidental expenses, where applicable) that the bank must pay to the complainant. They also contain a list of the Adjudicator's reasons for making the award. The Adjudicator has a duty to make a 'reasonable effort' to ensure that recommendations and rulings are consistent with any previous ones made by him or by any predecessor in the Office of the Adjudicator (see paras 9.3–9.5). Interestingly enough, the Terms of Reference provide that records of proceedings, recommendations and rulings are not admissible as evidence in a court of law (see par 9.6).

Recommendations made by the Adjudicator must be fair in all circumstances and must take into account any applicable rule of law or relevant judicial authority; they must have regard to general principles of good banking practice and the Banking Code applicable to the subject-matter of the complaint. In determining what constitutes good banking

practice, the Adjudicator may consult with the industry or elsewhere (see par 10.1). Banks are *not obliged* to comply with the Adjudicator's *recommendation*, but the Terms of Reference provide that they 'shall not lightly ignore the recommendation' (see par 10.2).

I believe that the introductory part of the Banking Code (which provides that the Code will not 'give rise to a trade custom or tacit contract or otherwise between a customer and the bank' (see again par 2 above)), and par 10.1 of the Terms of Reference (which provides that the Adjudicator must have regard to general principles of good banking practice and the Banking Code applicable to the subject-matter of the complaint) may be in conflict with each other. A broad reading of the provisions contained in par 10.1 of the Terms of the Reference may create the impression that the Adjudicator is allowed to consult the Code of Conduct to ascertain whether a particular banking practice qualifies as a 'good banking practice' (or trade usage). More about the requirements of a banking practice or trade usage later (see par 7 below).

The sanction for non-compliance with a recommendation is that the Adjudicator may, at his discretion, publish, in the media or in any other way, that recommendation as well as such other information as he may deem appropriate (see par 10.3).

The Adjudicator may make a ruling provided that

- there is no serious dispute as to the material facts of the subject matter of the complaint;
- the law is certain; and
- the ruling does not relate to issues concerning good banking practice.

When the Adjudicator makes a *ruling*, the bank concerned is *obliged* to comply with it (see par 11).

At this point I should emphasize that presently the powers of the Adjudicator include the right to make *rulings on law*, but *recommendations only on the Banking Code*. Whether the Adjudicator's powers will ever be extended to include the right to make *rulings on the Banking Code*, including the question what constitutes good banking practice, is a vexed issue. Arguably the banks will be extremely hesitant to agree to such extension of the Adjudicator's powers, citing the vague language in which the Banking Code is presently couched as their main concern for such extension.

Paragraph 12 of the Terms of Reference lays down an appeal procedure available to the bank against recommendations and rulings made by the Adjudicator (see par 12.3–12.4). The Appeal Panel comprises no less than two members who are selected from retired High Court Judges by the Banking Adjudicator's Commission (see par 12.1). Complainants do not have the right to appeal against the Adjudicator's recommendations or rulings on their complaints (see par 12.2).

The Terms of Reference further provide for the suspension of legal proceedings by a bank named in a complaint (par 14); test cases (par 15); the terms of office of the Adjudicator (par 16); amendments to the Terms

of Reference (par 17); and an interpretation paragraph which contains definitions of key concepts (par 18).

5 The Australian Banking Ombudsman

5.1 Background

A study of the Australian Banking Ombudsman Scheme may be of relevance, if not importance, to South African lawyers for a number of reasons. First, Australian banking law provides an example of a legal system which was originally modeled on the English common-law system, but which has in the recent past been the subject of intense and innovative legislative reform. Secondly, and closely allied to the first point, is the fact that both South African and Australian banking law have their roots in English (banking) law (see par 7 below for a list of the sources of South African banking law). Australian banking law therefore constitutes an obvious source of comparative material for a South African banking lawyer. Thirdly, the Terms of Reference of the South African Banking Adjudicator and those of his Australian counter-part contain a number of important similarities. The Terms of Reference of the Australian Banking Ombudsman may therefore be consulted fruitfully in the interpretation and application of the local Terms of Reference. Fourthly, the Australian Banking Ombudsman Scheme, now in its eleventh year, was one of the first of its kind to be introduced. It accordingly provides an example of a developed and proven Banking Ombudsman Scheme. And for this reason the Terms of Reference of the Australian Banking Ombudsman and the Commentary written on it (see *Master Copy 8/7/99* — Structure of the Scheme (unpublished Commentary on the Terms of Reference of the Australian Banking Ombudsman Scheme, prepared by officials of the Ombudsman's Office) (1999)) (hereafter '*Commentary*'), constitute an important comparative pool of knowledge and expertise for other Banking Ombudsmen, including that of South Africa.

The Australian Banking Industry Ombudsman Scheme (the 'Scheme') was established in 1989 and was the first industry-based independent, alternative dispute-resolution scheme to operate in Australia. All retail banks operating in Australia are members of the Scheme. The three-tier level of the Scheme provides for a Board (consisting of six representatives of member banks); a Council (consisting of two consumer representatives, one small-business representative, three representatives of member banks, and an independent chairman); and the Ombudsman who is appointed by and answers to the Council. The Council, which stands between the Board and the Ombudsman, ensures the latter's independence. The Board determines the Terms of Reference and provides funding for the Scheme. Member banks pay a participation fee levied on a user-pays basis (see Alan L Tyree *Banking Law in Australia* 3 ed (1998) at 336 et seq; Colin Neave *Australian Banking Industry Ombudsman Annual Report 1998/99* (1999) at 6 and 32).

The aim of the Scheme is to provide independent and prompt resolution of disputes in accordance with the law, good banking practice and fairness. Resolution between complainants (clients) and banks is achieved through mediation, conciliation, facilitated negotiation, or investigation leading to a recommended resolution or the making of an award by the Ombudsman (see Tyree op cit at 336 and 337; Anon 'Report on Relationship Debt' (1999) 22 *Ombudsman Bulletin* 1; for a discussion of the terms 'negotiation', 'recommendation' and 'award', see par 6 below.)

5.2 The Terms of Reference of the Australian Banking Ombudsman

The Australian Banking Ombudsman's Terms of Reference are contained in a written agreement between participating banks (also called member banks) as to the Ombudsman's jurisdiction (Tyree op cit at 337; Neave op cit at 32). The Terms describe the types of complaint the Ombudsman may consider. Generally he may consider complaints about a banking service provided by a bank to an individual or a small business (ie, an incorporated or unincorporated business with less than 15 employees, a turnover of less than A$1 million — approximately R4 million — and independently owned and managed: see Neave op cit at 7 and 32). The Australian Ombudsman has power under the Terms of Reference to make an award of up to A$150 000 (approximately R600 000) to compensate a complainant for an act or omission of a member bank leading to direct loss. An award is binding on the member bank.

The Ombudsman may consider complaints that include contractual disputes, delays, lost funds, disputed transactions and withdrawal or deposit errors. A small sample of the legal issues raised by complainants include claims of breach of contractual or statutory obligations, misrepresentations, negligence, breach of the Code of Banking Practice (more about this Code later), maladministration in lending, lost documents, and the legal issues which arise in relation to guarantees. The Terms of Reference preclude the Ombudsman from considering complaints about bank policy such as increases in interest rates or the introduction of fees. The correctness of commercial decisions of a bank, such as a decision not to provide a credit facility, also falls outside the Ombudsman's jurisdiction (see Tyree op cit at 337–338; Neave op cit at 7 and 25).

Recently the Australian Banking Ombudsman's Office has prepared a Commentary on the Terms of Reference. This Commentary makes for interesting reading. I will briefly refer to those aspects of it which deal with settlements, recommendations and awards under the Scheme.

6 Settlements, Recommendations and Awards under the Australian Ombudsman Scheme

I have argued earlier that the Terms of Reference of the Australian Banking Ombudsman and the Commentary written on it are highly

relevant for other Banking Ombudsmen, including that of South Africa (see par 5.1 above). A number of provisions contained in the Australian Terms of Reference are of particular importance from a South African perspective. I will restrict myself and refer here only to the principles which the Ombudsman (Adjudicator) has to consider in making a recommendation or reward.

Clause 10 of the Australian Terms of Reference provides that at all the times the Ombudsman (and the parties involved) may negotiate a settlement of the dispute. The commentary on cl 10 provides that '[t]he Ombudsman's office may also encourage the parties to consider settlement in light of its assessment of the strengths and weaknesses of each party's position based on the *criteria of the law, good banking practice and fairness in all circumstances*' (my emphasis).

Clause 11 provides that if a negotiated settlement (or a settlement based on an initial consideration, the Ombudsman's view, or a case manager's opinion) cannot be achieved, then the Ombudsman may proceed to issue a formal written recommendation, setting out how the Ombudsman considers the matter should be resolved. Clause 12 provides for a full and final settlement.

Clause 13 provides that if, within the one month allowed, the Ombudsman's recommendation is accepted by the complainant, but not accepted by the bank, the Ombudsman may make a formal award in relation to the complaint (for a discussion of settlements, recommendations and awards under the Scheme, see Tyree op cit at 340.)

Clause 15 lists the criteria which the Ombudsman must apply in assessing the issues surrounding the complaint and reaching any views or decision. These are: the law; good banking practice; fairness in all circumstances; and previous decisions by the Ombudsman. The Commentary on the Terms of Reference explains these criteria in more detail.

6.1 The Criterion of the Law

The Ombudsman is required to observe any applicable rule of law or relevant judicial authority. Both the bank and complainant are allowed to make submissions to the Ombudsman based on any statute, case or legal advice obtained regarding the legal principles they deem relevant to the matters in dispute. The Ombudsman's Office may refer the complaint to an in-house or external legal advisor to identify and advise on the legal issues relevant to a complaint. Both the bank and the complainant are entitled to legal representation. Complainants who do not have legal representation will be assisted by internal or external legal advisors who may be called on by the Ombudsman to assist the complainant if necessary. Where external legal advise is called on by the Ombudsman, it is usually advisory only and whilst the Ombudsman would generally follow the advice given in an opinion, that advice is also considered in the context of the remaining two criteria, namely good banking practice and fairness.

6.2 Good Banking Practice

The second criterion is that of good banking practice. According to the Commentary on the Terms of Reference, the concept 'banking practice' refers to the manner in which banks process transactions, handle information, communicate with customers, and generally handle the business of banking in any given set of circumstances. Importantly, the Commentary notes that there is no determinative definition of what constitutes good banking practice for all situations. This implies the giving of a rather wide discretion to the Ombudsman to decide what constitutes good banking practice and what not.

In determining what constitutes good banking practice, the Ombudsman relies on a number of guidelines. First, he may refer an issue of banking practice to the Banking Advisor for advice.

Secondly, where the Banking Adviser is himself in doubt about what constitutes good banking practice in a particular case, or where there appears to be some uncertainty as to what exactly constitutes good banking practice, he may seek advice from the banking industry as represented by a group selected from the member banks.

Thirdly, the Ombudsman may refer to the Code of Banking Practice ('the Banking Code') and the Electronic Funds Transfers ('EFT') Code of Conduct to ascertain what constitutes good banking practice (for a summary of the provisions of both these codes, see Tyree op cit at 310 et seq). The Banking Code and the EFT Code of Conduct were agreed upon by the banks, the government and consumer representatives as the way in which banks should provide banking services. It is important to note that the banks which participated in the drafting of these codes and consented to it, undertook to comply with these codes. They further agreed that these codes would take precedence over any provision or practice of a bank which is inconsistent with the codes. It has been said that the 'Banking Code represents the norm in banking practice'. However, on its own it does not necessarily establish the principles of good banking practice which are relevant to a complaint as required by the Ombudsman Scheme (see *Commentary* op cit at 30). Tyree is of the opinion that the intention is that the Banking Code should have contractual effect by means of incorporation into the terms and conditions of the various banking services. If that is indeed the case, so he argues, then there is no doubt that the terms of the Banking Code would override implied contractual terms which are inconsistent with the Code (see Tyree op cit at 313). By implication the banker-client contract would then not be able to exclude or contradict any of the terms of the Banking Code. Put differently, the terms of the Banking Code, including those which describe what constitutes 'good banking practice', are non-waiverable naturale of the bank-client contract. This is in stark contrast with the position under South African law where the Banking Code expressly provides that none of its provisions 'will give rise to a trade custom or tacit contract or otherwise [meaning naturalia?], between a customer and the bank' (my insertion; see again par 2 above).

6.3 Fairness

Although the Ombudsman is not a judge, nor his office a court of law, he is often required to give decisions about what weight should be given to the information and statements available to him during the investigation of the case. In this process the criteria of the law on the one hand, and of good banking practice on the other hand, may sway the scales to the one side or the other. It is further possible that the requirements of good banking practice (see again par 6.2 above) relevant to a particular case may raise the standard of care in relation to obligations imposed on a bank by law.

It is generally accepted that the criterion of fairness does not automatically permit the law or good banking practice to be disregarded, but that it allows the Ombudsman to temper strict legal provisions with considerations of equity.

The criterion of fairness is a blanket consideration which allows the Ombudsman to make a decision which takes into account a number of considerations. These include: the specific circumstances of a case which may justify not applying the law rigidly; the discretion to allow for a balancing or weighting of all the information available; the freedom to recognize the possibility of a higher standard or care being placed on a bank by the requirements of good banking practice in certain circumstances; the excusing of one or both of the parties for minor breaches which might otherwise have had harsh results; and taking into account any uncertainty in the facts, the law or good banking practice as they apply to a particular case.

6.4 The Role of Previous Decisions

Although the role of previous decisions is strictly speaking not a fourth criterion to be applied by the Ombudsman in reaching a decision, it is nevertheless an important consideration to be taken into account. The Ombudsman is committed to consistency in his decision making. However, he is not bound by any previous decision given by himself, or by a predecessor (see *Commentary* op cit at 30).

To assist the Ombudsman's Office in achieving consistency, a number of practical, internal measures were put in place. These include:

- a computer-generated thesaurus of terms, issues and types of cases which allows cases to be cross-referenced;
- meetings to discuss significant cases;
- a review and quality-assurance procedure; and
- the publication of these guidelines.

7 Bank Practices and Trade Usages

What are the sources of South African banking law? By way of a broad generalization the following sources of South African banking law may be listed:

- legislation (eg, the Banks Act 94 of 1990; the Inspection of Financial Institutions Act 80 of 1998; the Financial Institutions (Investment of Funds) Act 39 of 1984; the South African Reserve Bank Act 90 of 1989; and the Corporation for Public Deposits Act 46 of 1984);
- South African law of contract (in those situations where the bank is a party to an agreement);
- in the area of private banking law one also has to take cognisance of English law, where that legal system has had a huge influence on the development of South African law, notably in the field of negotiable instruments, where the local Bills of Exchange Act 34 of 1964 is based on the English Bills of Exchange Act of 1882 (c 61) and often follows that Act verbatim; and
- in the absence of legislation, the relationship between the parties is regulated by the express and/or implied terms of their agreement and the relevant rules of the law of contract at common law. In the case of some areas of banking law, such as the operation of cheque accounts and the issuing of documentary letters of credit, customary law or trade usage plays an important role.

When will a banking practice or trade usage be acknowledged as such? It has been noted earlier that the Australian Ombudsman may (and often does) consult the Banking Code to establish what constitutes 'good banking practice' (see par 6.2 above). It is uncertain to what extent the provisions in the Banking Code constitute a codification of existing Australian banking practice and usage. According to the Australian Banking Code its purpose is to describe standards of good practice and service; to promote disclosure of information which is relevant and useful to customers; to promote informed and effective relationships between banks and customers; and to require banks to provide for dispute-resolution procedures (see Tyree op cit at 311). It remains to be seen to what extent the Australian Banking Code has or will become a general source of banking law. For present purposes I will accept that a 'good banking practice' presupposes that such practice indeed qualifies as a banking practice, being a particular type of trade usage.

A trade usage may form the basis of one of the terms of a contract. The terms of a contract can be classified into essentialia, naturalia and accidentalia. The naturalia of a contract are those terms implied by law, and may derive from common law, trade usage or custom, or statute (see Schalk van der Merwe et al *Contract: General Principles* (1993) at 201; RH Christie *The Law of Contract in South Africa* 3 ed (1996) at 178–179). An existing naturale may be extended, curtailed, or be declared obsolete by a court of law. New naturalia may develop through adaptation by the courts in response to changed circumstances, new legislation and through custom or trade usage (Van der Merwe et al ibid). A custom or trade usage will only qualify as a naturale when it forms part of the contract irrespective of whether the parties knew of the custom or trade usage (see idem at 201n201 and the authorities referred to there).

The nature of implied terms has been described as follows by Corbett AJA in *Alfred McAlpine & Son (Pty) Ltd v Tvl Provincial Administration* (1974 (3) SA 506 (A) at 531):

> 'In legal parlance the expression "implied term" is an ambiguous one in that it is often used, without discrimination, to denote two, possibly three, distinct concepts. In the first place it is used to describe an unexpressed provision of the contract which the law imports therein, generally as a matter of course, without reference to the actual intention of the parties. Such implied terms may derive from the common law, trade usage or custom, or from statute. In a sense "implied term" is, in this context, a misnomer in that in content it simply represents a legal duty (giving rise to a correlative right) imposed by law, unless excluded by the parties, in the case of certain classes of contracts. It is a *naturalium* of the contract in question.'

The concepts 'customary law' or 'trade usage' are not yet clearly defined. Other concepts that are also sometimes used (rightly or wrongly) in this regard include, 'public policy', 'banking practice', 'commercial usage' and 'usage'. The aim of the present note is not to define or distinguish between these concepts (if such a distinction is necessary or possible at all). Neither will I endeavour to answer the vexed question whether South African law recognizes the English distinction between custom and trade usage (for a small sample of the South African authorities which address this question, see Christie op cit at 182–185; Charl Hugo 'The Legal Nature of the Uniform Customs and Practice for Documentary Credits: Lex Mercatoria, Custom, or Contracts?' (1994) 6 *SA Merc LJ* 143 at 162–165; and AN Oelofse *The Law of Documentary Letters of Credit in Comparative Perspective* (1997) at 17–18 where the author equates the concepts 'customary law' and 'commercial usage'; for a discussion of the reception of English law with regard to implied terms in the South African law of contract, see JP Vorster 'The Influence of English Law on the Implication of Terms in the South African Law of Contract' (1987) 104 *SALJ* 588). However, for present purposes I will accept that a banking practice in the strict sense of the word qualifies as a particular type of trade usage, namely one that is prevalent in the banking sphere.

The requirements for a contractual term to be implied by trade usage were formulated and explained in *Crook v Petersen Ltd* (1927 WLD 62 at 71) and in *Golden Cape Fruits (Pty) Ltd v Fotoplate (Pty) Ltd* (1973 (2) SA 642 (C) at 645G). These requirements are as follows:

- The term must be universally and uniformly observed within the particular trade concerned.
- It must be long-established (more about this requirement later).
- It must be notorious.
- It must be reasonable.
- It must be certain.
- It should not conflict with positive law.
- It should not conflict with the clear provisions of the parties' contract (see Christie op cit at 182–187).

Christie (op cit at 183) justifiably queries the requirement that a trade usage must be long-established before it will be recognized as such. He

refers to the English case of *Crouch v Crédit Foncier of England* ((1873) LR 8 QB 374 at 386) where the Court was prepared to accept the binding nature of a trade usage, however recent. This approach was apparently accepted in *African Mining and Financial Association v De Catelin & Muller* ((1897) 4 OR 344 at 348). Christie (ibid) concludes that '[i]f a trade usage in a new trade, or an old trade, or an old trade experiencing new circumstances, fulfils all the other requirements it would seem wrong not to imply it in a contract simply on account of its recent origin, but of course recent origin may have an important bearing on whether the usage is notorious'. The South African Banking Code provides that it will be 'monitored and regularly reviewed'. For the reasons mentioned above, I believe that the mere fact that the Banking Code is reviewed (and amended) on a regular basis does not necessarily militate against its provisions qualifying, at least in theory, as customary law or trade usages (but see JC Stassen 'The Legal Nature of the Uniform Customs and Practice for Documentary Credits (UCP)' (1982) 4 *Modern Business Law* 125 at 127 where he argues that because many of the provisions of the UCP were formulated or reformulated in recent revisions, these provisions would fall short of the time requirement for a custom to be established). In *Catering Equipment Centre v Friesland Hotel* (1967 (4) SA 336 (O) at 339) it was decided that there is no Roman-Dutch authority supporting the English distinction between custom and trade usage. Even if one accepts that this is correct, and that consequently, the requirements for custom and trade usage are the same, the fact remains that 'time immemorial' has nowhere been emphasized as an essential to the validity of a custom in Roman-Dutch law (see Hugo op cit at 164 and the authority referred to there). Subsequently, a trade usage too does not need to exist from time immemorial before it will be acknowledged as such.

Trade or bank usages have recently came under the spotlight in two decisions of the Northern Cape High Court. In *ABSA Bank Bpk v Saunders* (1997 (2) SA 192 (NC)) and *ABSA Bank h/a Volkskas Bank v Retief* (1999 (3) SA 322 (NC)) the Court listed, without any discussion, the requirements of a trade usage in the banking sphere. In both these cases the Court referred with approval to the definition of a trade usage as laid down in *Golden Cape Fruits v Fotoplate* (supra).

In *ABSA Bank Saunders* (supra at 196J–197C) the Court decided that it was a long-standing usage of commercial banks to charge interest on overdrawn facilities and that it was not necessary (before the commencement of s 10(6) of the Usury Act 73 of 1968 in 1989), to inform clients about an increase or decrease in interest rates, provided that the trade usage is shown to be 'universally and uniformly observed within the [banking trade], long established, notorious, reasonable and certain'. In *ABSA Bank v Retief* the Court again referred to the same passage from *Golden Cape Fruits v Fotoplate* (supra) in laying down the requirements for a trade usage. But in this case the Court decided that

the 'trade usage' by banks according to which officials of banks at their discretion determine the rate at which interest is charged on overdrawn accounts, was not so universal, uniform, notorious and certain that the Court could take judicial notice of it (see at 337D–H).

In *ABSA Bank v Retief* case the Court noted further that the mere fact that a court had found that a trade usage existed in terms of which banks could charge interest on an overdrawn account, did not necessarily entail that a bank was entitled to charge interest in the absence of an agreement on that matter. It reasoned that no client of a bank was bound, mero motu and in the absence of any form of agreement, by the trade usages of the bank. If a client used the facilities of a bank there was an agreement between them. A client was bound by the trade usages of a bank on the basis of the agreement between them. The Court confirmed that the agreement, and more specifically its terms, did not have to be express, but could be tacit or implied (see at 339A–D). Thus, before the bank could rely on a trade usage, it had to prove that usage. The bank then had to prove that it was an implied term of the agreement that the client was bound by the trade usage (see at 340D–E). Similarly, one could argue, before a client could rely on a trade usage he has to prove that usage. He then has to prove that it was an implied term of the agreement that the bank was bound by the trade usage.

The question then remains: Which guidelines will the South African Banking Adjudicator follow in ascertaining whether an alleged practice or usage has indeed attained the status of a banking practice or trade usage?

If one accepts that 'time immemorial' is not a requirement for the recognition of a custom or a trade usage, it opens the door for the courts (and the Banking Adjudicator) to acknowledge trade usages of recent origin as well. Such approach is already followed in terms of the Australian Banking Ombudsman Scheme where the Ombudsman may refer an issue of banking practice to the Banking Advisor for advice as to whether a particular practice constitutes a 'good banking practice'. If the Banking Advisor is unable to assist the Ombudsman in this regard, the Ombudsman may seek advice from the banking industry as represented by a group selected from member banks. If there is still uncertainty as to the status of a banking practice, the Ombudsman may consult the Australian Banking Code and the EFT Code of Conduct to ascertain what constitutes good banking practice. The Australian Banking Code expressly provides that it may be amended from time to time to reflect what constitutes 'good banking practice'. This in itself is a clear indication that 'time immemorial' is not required for a banking practice or trade usage to be acknowledged as such by the Australian Ombudsman.

8 Conclusion

In conclusion, I believe that the South African Banking Code should follow the approach set out in its Australian counterpart and

should acknowledge the principle that the question what constitutes (good) banking practice, should be answered with reference to contemporary trends and usages in the banking industry. It should therefor be possible to imply a banking practice or trade usage in a contract between a bank and its client, even if it is of recent origin, provided of course it meets the other requirements for a trade usage.

I further believe that the pace at which technological and socio-economical developments takes place, also in the sphere of banking, has caused the law to lag behind in many aspects of banking. One of these aspects is the notion that a custom or trade usage, especially in a fast-moving trade such as banking, need to be long-established before it will be acknowledged as such. The commercial world of the 21st Century requires clarity and certainty in law, but most of all, it requires the law to be flexible to adapt to new and changing circumstances. By clinging to the antiquarian notion that a trade usage must be long established before it will be recognized as such, the law has lagged behind modern banking practice.

The question whether a particular banking practice or trade usage qualifies as a '*good* banking practice', still has to be answered with proper reference to all the other requirements of a trade usage, notably that of universal observance, notoriousness, and reasonableness.