

Second annual report of the Banking Ombudsman/Adjudicator

An account of the work done by the Office of the Banking Ombudsman/Adjudicator in the period 1 May to 31 December, 1999

The Banking Ombudsman's Mission

The mission of the Banking Ombudsman is to:

- Facilitate the resolution of bank customers' problems and complaints, at no cost to complainants, in a fair, impartial, confidential and timely manner, and
- Influence the banking industry to improve service to customers.

Contents

Report from the Acting Ombudsman/Adjudicator
Review of activities

- Structure and powers
- Overview of the reporting period
- Withdrawal of cash over the counter
- Mortgage: inspectors, valuers
- Mortgage: sale of property: second bond
- Separating capital and interest accounts
- Failure to insure
- Closing the account
- Suretyships
- Lost cheques
- ATMs
- Bad investment advice
- Set-off
- Has cash been deposited?
- Confidentiality
- Surrender of pledged assurance policies

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Members of the Banking Adjudicator Commission

The Banking Adjudicator

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Report from the Acting Ombudsman/Adjudicator, David John

This report covers the period of eight months from 1 May to 31 December 1999. It is intended that future reports will cover a full calendar year.

Until the end of September 1999 Mr Charl Cilliers was the Ombudsman. From then on I have been Acting Ombudsman and will become Acting Adjudicator on 3 April 2000 unless the new adjudicator has taken office by then.

The complaints handled by the office of the Ombudsman or Adjudicator do not fall nicely into distinct time compartments. Many that we started dealing with in 1999 are still current.

The types of complaint and the problems they gave rise to recur. We have attempted to give as accurate a statement and statistical report on our work as we can. It is not always easy to decide into which category a complaint falls. The data quoted in the report do, however, give a reasonably comprehensive picture of the number and nature of the complaints the office has received.

The more common complaints are commented on in the body of the report. The lengthiest comment is on the subject of poor investment advice, which we have found to be not only distressing to the complainants and disturbing to the banks, but also difficult to resolve.

The changes that will come about in April 2000, not only in the name of the office but in the way in which it will be required to handle complaints, are dealt with under the heading "Structure and Powers".

I have a list of thanks to record: to the members of the Board of Directors and the Commission – the two bodies that control the activities of the section 21 company, The Office of the Banking Adjudicator; the members of the Banking Council for making funds available to run the office; to the Council's Chief Executive Officer,

Mr Bob Tucker, and other officials of the Council for the help they have given the office in preparing for the new structures and powers; and to Mr Jasper Hulley for assistance and advice on financial and administrative matters.

Within the office I am greatly indebted to all the members of the full-time and part-time staff: on the legal side Charl Cilliers as Consultant, and attorneys Jo Didcott, William Lane and Willie van Rensburg; on the part-time banking side, Clive Dickinson, Peter Bray, John Sayers (until the end of September 1999), Marius Dolman (from October); and on the full-time banking side, Don Mashigo (from September) and Octavia Hlatswayo (from October); and for the administrative functions of the office – Lynn Glaus, the office manager, Eva Masilo and Christina Moalusi. To Lynn I am especially grateful for the many extra hours, sometimes well into the night, she has spent capturing data for this report after computer problems derailed progress.

Thanks also to the temporary staff who have worked in the office during the reporting period, especially Ria de Weerd, Sheila Scholey, Doreen Werth, June Upton and Reatha du Preez, without whom our work would have ground to a halt.

Review of operations

- Structure and powers

In his first report as Ombudsman for Banking, Mr Charl Cilliers wrote about the founding of the Office. In November 1997 he was appointed by the Banking Council to be an independent ombudsman for the banking industry. It did not

take him long to learn that the perception was widespread that because he was appointed by the banks he could not be impartial. He therefore recommended that a body independent of the banks, but with banking representation, should be established to appoint the ombudsman and to define the terms of reference of the ombudsman's office.

The Banking Council accepted Mr Cilliers' recommendation and an independent steering committee was appointed to devise the structure and powers of the ombudsman's office and the manner of appointment of the ombudsman. This committee, under the chairmanship of Mr Justice Navsa, consisted of two bankers representing the banks, a representative of an NGO devoted to consumer interests, representatives of the Departments of Finance and of Trade and Industry, the Financial Services Board (FSB) and the Public Protector, and the ombudsman.

The report of the Steering Committee entitled "The Structure and Powers of the Office of the Banking Adjudicator" was accepted and endorsed by the Banking Council in August 1999. As recommended in the report, a section 21 company has been established, known as The Office of the Banking Adjudicator. The company is controlled by a board of directors and a commission.

The board of directors consists of representatives of the banks that have agreed to be bound by the Code of Banking Practice and a representative of one of the consumer interests NGOs and of the FSB. The primary job of the board of directors is to provide and oversee the finances of the office.

The Banking Adjudicator Commission consists of a judge or senior counsel as independent occupant of the chair, and representatives of each of two consumer interests NGOs, the Departments of Finance and of Trade and Industry and the Financial Services Board, and three bankers. The main task of the commission is to ensure the independence of the Adjudicator. This involves the appointment of the Adjudicator and the approval of the terms of reference of the Office and the rules of procedure to be followed in dealing with complaints.

The terms of reference require complaints received by the Office to be referred to the banks concerned to attempt to resolve them within a time stipulated by the Office. If a bank does not resolve a complaint it will come back to the Office for decision.

If the material facts are not in dispute a ruling will be given if the decision is based on the law only. In all other cases the decision will take the form of a recommendation, which will be based on the law and on the Code of Banking Practice. A ruling will bind the bank though there will be a right of appeal to a panel of three retired judges. A recommendation will not bind the bank but the Office will have the power to publish the recommendation in the media if it is not accepted and acted upon by the bank. An appeal from a recommendation will be possible with the consent of the appeal panel.

The Adjudicator will have the right, however, at his or her sole discretion, and in order to assist a bank customer, to mediate between a bank and its customer. The bank at its sole discretion may agree or refuse to participate in the mediation. When acting in this way the Adjudicator will not have the power to make any ruling or recommendation.

The Code of Banking Practice referred to above was developed by the Banking Council over a lengthy period in consultation with various interests. The first principle of the Code is that the banks will act fairly and reasonably in all their dealings with their customers. The banks have undertaken to comply with the

requirements of the Code when it comes into effect on 3 April 2000. At that time the Adjudicator's revised terms of reference and rules of procedure will come into operation and, it is hoped, a new Adjudicator will take office then or soon after.

We have on occasion experienced a reluctance on the part of some bank officials, especially legal advisers, to react to complaints with understanding and to co-operate with this office. Instead of putting right what was wrong or providing reasons for the bank's belief that the complaint was unfounded, there has been a dismissive attitude based on the merest technicality. The new structure and powers of the office should enable the Adjudicator to get a more positive reaction.

Brief reference should be made to the word to be used for the incumbent of the office. Despite the fact that "ombudsman" is the word used for the person who performs the envisaged function in all countries with a developed banking system, where men and women in that office both use the term without difficulty, objections to its perceived anti-feminist appearance caused an alternative term to be sought. The ugly non-word "Ombud" was seriously considered but in the end "Adjudicator" was chosen by the Steering Committee. It is regrettable that a term used worldwide could not withstand feminist sensitivities in South Africa.

- Overview of the reporting period

In the review of the activities of the Ombudsman's Office, contained in the first report, reference was made to the many telephone calls from members of the public who had complaints against their banks. The publicity received by the office from the launch of the first report brought a large increase in the number of calls and in the consequent completion of "application for assistance" forms. At one stage the number of blank application forms waiting for despatch by fax to complainants was so great that no incoming faxes, including completed application forms, could be received.

1 922 complaints were received in the reporting period. Of these, 1 213 have been finalised. Out of the total number of complaints finalised, 416 were closed without a full investigation. The reasons for this are shown in the graph above.

Most of the complaints received during this reporting period fell into the same categories as those described in the first report. Of the fully investigated complaints, a smaller proportion was resolved in the complainant's favour, wholly or partially, than in the preceding period (see graph above).

It appears from complaints received after publication of the first report that few of our comments on shortcomings in their service to customers have been taken to heart by the banks. They might in future find it desirable to pay heed to our strictures. One of the banks did take notice of what was said in the first report regarding crediting a cash deposit to the wrong account by relying only on an account number and not also checking the account holder's name. In two cases of this kind – one occurring after the end of the reporting period – the bank has refunded the amount due to the customer.

The British, Australian and American Ombudsmen have been kind enough to send us copies of their reports. It is interesting to observe that the nature of complaints received by them is of much the same kind as those received by us.

The complaints we received were of a great diversity. It is not proposed to

describe each of these categories but in what follows we comment on some of them (see table below).

Of the 799 complaints that were fully investigated, ATM complaints comprised 17% or 134 complaints. This category was treated as a separate category, as it was in the previous Report, due to the special circumstances that occur when money is lost by ATM fraud. ATM complaints resolved in the customer's favour is up 5% this period from 19% recorded in the last Report.

Of the remaining complaints, 58% were resolved in the bank's favour and 42% in the complainant's favour. Complainants were less successful this period than last. A possible reason is that the period covered by this Report is a third of the last period. The publicity that this Office has received has also resulted in many more complaints, many of which had little basis for success.

The average time taken to resolve a complaint was 100 calendar days. When the new arrangements are introduced in April 2000 it is likely that this average time will be shortened.

In terms of the number of complaints received from each province, the greatest number came from Gauteng, with only a small number from Mpumalanga and the Northern Cape. Action will be taken to spread information about this office far more widely.

Despite increasing our number of categories from seven in the last Report to 12 in the present, the category "Other" remains large. Into this category fall many miscellaneous complaints including those relating to overdrafts, loans, debit orders, bank guaranteed cheques, insurance problems, set off, "frozen" accounts and others.

It is hoped that henceforth, from data captured routinely, it will be possible to produce a status report on the work of the office at any time.

The total amount paid to complainants during the period was R4 072 244,75.

However, included in this figure is an amount of R1 590 000 which concerned a forged cheque purporting to be signed on behalf of an NGO. The cheque was marked "not transferable" but was credited by the collecting bank to an account in a name different from that of the named payee. The drawee bank refunded the full amount to the NGO plus interest against cession of the NGO's claim.

As this was an unusually large figure it has been deducted from the total in order to give a more representative average payment figure of about R11 000 each for the 230 successful complainants who received money on the resolution of their complaints.

- **Withdrawal of cash across the counter**

We believe that the practice of certain banks which allow customers to make withdrawals from an account at a teller over the counter by means of an autobank card and a PIN without proving identification is bad. This practice allows criminals in possession of a card and PIN to clear out a customer's account in one day, despite a daily withdrawal limit at the ATM, because amounts of R5 000 or less can be repeatedly withdrawn.

The banks' response is always that the customer who has lost money in that

way must have given his or her card to the person who made the withdrawal, to whom he or she also of course revealed his or her PIN. We, however, believe that in some cases both card and PIN have been obtained by fraud or threat or misadventure and that in all cases the customers' interests should be protected by two simple requirements: the production of personal identification, and a limit on the amount and frequency of withdrawal. It is absurd to limit withdrawal from the ATM to R1 000 a day and yet to put a much higher limit, or no limit at all, on withdrawals over the counter.

We have recently written to the banks urging them to change the practice and all banks should now take note that this office will henceforth react strongly against the banks on this issue. The banks say this is for the convenience of customers. It is hardly a convenience for a customer to have his or her money put at risk in this way unless he or she has arranged for high limits and unlimited withdrawals.

- **Mortgage: inspectors, valuers**

A common complaint is that serious defects appeared soon after the borrower moved into a house bought on mortgage. This matter was referred to in the ombudsman's first report, in which it was suggested that it should be brought very clearly to the attention of borrowers that the inspectors are assessors only. We now go further.

Where these defects should have been seen by anyone with the right experience, the borrower finds it difficult to accept the response of the bank that the inspection made by its official was for the sole purpose of checking that there was sufficient value in the property to provide the bank with security for the loan. But how can there be sufficient value for a hundred percent loan in a house that is seriously defective? Banks charge for the inspection and we believe that while they continue to do so they should employ inspectors who are trained to check that the construction is sound.

In a building bond there is even less room for a bank's argument that it is interested only in value. Advances and retention of funds as the building progresses must be made with care on the part of the bank, which should warn a borrower where it seems that the builder may not be able to complete the work for the quoted price or where the quality of the work is poor. Borrowers should understand that it is in their interest to have the buildings checked by a suitably qualified expert. In the case of a building bond the borrower should carefully check the progress of the work, preferably again with expert assistance.

We appreciate that many borrowers are unable to afford to employ an expert. Sadly, many of the complaints we receive are from people who cannot afford to sue the builder or to repair the defective workmanship.

- **Mortgage: sale of property: second bond**

We have seen cases where banks have acted in a way quite contrary to the glowing promises of their advertising slogans. Properties have been attached and sold for much less than the amount outstanding on the bond when a little extra time given to the borrower would have enabled him or her to pay the arrears or to sell the property for a price sufficient to cover the bond.

The impression we get all too often is that the collection of arrears and foreclosure decisions are left to a computer or to a distant and faceless credit

unit. Of course, we recognise that banks are in business to make a profit but they should accept that in housing loans there is a large human element which they ignore at the cost of their reputation and that of the banking industry as a whole, and put at risk the stability of society when people are ruined financially.

- Separating capital and interest accounts

A pernicious practice of some banks when loan repayment instalments are in arrear is to separate capital and interest in two separate accounts. When the borrower is able to pay off the debt and asks what amount is due, he is given the figure in the capital account. Great is his shock when he learns that there is a large amount of additional interest payable, and it is no consolation to be told that he must have known that loans always attract interest.

This practice arises most frequently in mortgage bonds and in vehicle financing.

If separate accounts are kept, the bank must ensure that customers are aware of this and of what is in each account.

- Failure to insure

Complaints have been received in respect of both mortgage bonds and vehicle hire-purchase agreements that when loss has occurred the customer has found that there is no insurance.

In the case of mortgage bonds this has happened in several cases when the husband has died. The widow thought a policy had been taken out at the time the bond was registered to repay the loan. This, however, was never issued. In other cases where damage occurred to the house there was no insurance, despite the fact that most banks require such insurance to be effected.

Similarly in vehicle finance it is usually a requirement that the vehicle be insured but confusion sometimes arises between bank and customer as to which party is to effect the insurance.

Every bank employee concerned with mortgage bonds or hire-purchase agreements should be fully trained to ensure that insurance is effected and that the customer understands clearly which party is to pay the premiums.

- Closing the account

Much misunderstanding arises when a customer pays off his bond and instructs the bank to close his bond account. The bank does not do this but allows premiums for insurance of the property to be debited to the account. This debt builds up until a substantial amount is owed by the customer and the bank threatens foreclosure on the property. The customer, who thought he owed no money on his bond and now truly owned his property, finds that he risks losing it.

- Suretyships

This matter was discussed in the first report. It continues to be a source of concern. We receive complaints that banks hold sureties liable for debts incurred

by private companies or close corporations in which the customer was a director or member, sometimes long after he has severed any connection with that company or corporation. We think that in these circumstances banks must be far readier to tear up deeds of suretyship or at least should require a new deed to be signed if for any reason the erstwhile director or member is to remain as a surety.

We think also that husbands and wives and partners in domestic relationships should have the same protection as they do in the United Kingdom, for instance. There, banks have to take special steps to protect one partner against a too ready submission to sentiment or intimidation.

We repeat what was said in the first report: that banks should not require individuals to sign suretyships unlimited as to amount or time, or both. Banks that do so can henceforth expect this office to look with disfavour on the practice.

- **Lost cheques**

This was another topic included in the first report. Many thousands of cheques are issued every day and it is perhaps surprising that there are comparatively few cheques lost after deposit and before presentation for payment. Nevertheless, 173 000 were lost in 1998.

Banks read into section 67 of the Bills of Exchange Act more than is justified. That section simply gives the payee of a cheque that is lost after being deposited to his account the right to require the drawer to issue a replacement cheque. It does not absolve a bank from liability for negligence in losing the cheque.

Loss is often a euphemism for theft and theft is sometimes perpetrated by syndicates whose members include bank employees. In our view, the banks must take responsibility for the safety of cheques between deposit and payment, a process in which the customer has no possible way of taking part and should not therefore bear any risk of loss.

This is a matter that deserves the urgent attention which we understand is being given to it by the banks.

- **ATMs**

A common source of complaint continues to be the automatic teller machine (ATM). The criminal element, which plays such a big role in South African life, has found in the ATM a ready source of illicit gain. Acting in groups of two or more, the thieves have found ways of getting hold of victims' cards and PINs, usually while the customer tries to use the machine. When the victim goes to report that "the machine has swallowed my card", the thieves within moments are in possession of the card and start ransacking the account.

The banks have adopted various counter-measures but the thieves find ways round them. It is very necessary for members of the public to protect themselves against ATM theft as far as possible. Care must be exercised at an ATM not to be distracted and not to give away the PIN by careless pinning in. Banks have in most cases taken steps to put up warnings about criminal behaviour and to provide means of communication with the bank to report the loss of a card.

Often, however, if a special telephone has been installed it is vandalised. If it is working, it must be answered promptly. Delays even of a minute or two may well be long enough to allow money to be taken out of an account.

A security system has been invented which shows promise of providing an effective protection to banks and customers at the ATM. The system is not hugely expensive and in the interests of customers the banks should seriously consider its widespread installation. If ATMs are there to reduce the need for tellers it may well be economic for the banks to install the new system.

An unfortunate consequence of the installation of effective methods of protecting cards from falling into thieves' hands might be an increase in the number of muggings and robberies in the vicinity of ATMs, for which the banks could only be held responsible in special circumstances.

Two practices used by certain banks call for review. The one is the facility to transfer funds immediately from one account in the bank to another unrelated or unlinked account in the same bank. With the use of a stolen card thieves have transferred large amounts from the account of an unsuspecting customer to a fictitious account opened for the sole purpose of receiving stolen money, which is promptly withdrawn.

The other facility – offered by only one of the large banks – allows cheques to be drawn from the ATM. This gives a thief the opportunity to withdraw a bank cheque of up to R5 000 per day. This is over and above the “daily limit” on ATM withdrawals and causes hardship to those whose cards have been swapped or stolen and then used to plunder the account.

No doubt this is a facility that some customers may find useful on occasion. In our view, all customers should be informed of the potential for loss that this facility can allow and should be required to agree in writing that such a facility be provided and that the risks inherent are understood and accepted.

We have written to the banks about this practice, in the same letter as that raising the withdrawal with card and PIN of cash across the counter.

- **Bad Investment advice**

This is a complaint which reflects much distress on the part of customers and which gives this office great difficulty because of the deadlock between the customer's belief that he or she has been ripped off, and the contention of the bank that at the time the advice was given it was appropriate and that the risks were understood by the customer.

The collapse of share prices on the stock exchange in 1998 caused a wave of complaints about the advice given by financial consultants or brokers employed by the banks. There were two main sources of loss of capital (either actual or potential). These were “back-to-back” insurance policies and unit trust management arrangements. In back-to-back arrangements, half a lump sum investment would be put into an annuity giving a monthly income over a five or ten year period, and the other half would be invested in an endowment policy maturing at the end of the period at a level, it was hoped, equivalent at least to the amount of the original capital.

Loss of capital was attributable to longer term investment decisions by the insurance companies which had provided the back-to-back vehicles. The

prevailing life office's illustrative values used the wildly optimistic figures of 15% and 12% – since reduced to a more sensible 12% and 9% annual growth rate – as the rate at which the investment in the endowment portion of the arrangement was required to grow to ensure a return of the original capital.

The second form of investment, in unit trusts, should also have been seen as medium to long term. Such was the euphoria concerning share prices in early 1998 that significant growth in the short term was held out as likely by some consultants.

In both these sorts of investments, complaints were that the consultants had not mentioned the possibility of share prices falling. Only the positive had been emphasised, never the negative. That was what complainants said. Banks, of course, strenuously deny that their consultants ever made any misleading statements. They assert that the consultants always explained fully the nature and risks of the investment to be made and the charges associated with it.

Charges were another cause of complaint. Reference would be made by the bank, in its response to the complaint, to the investment forms signed by the customer. These would state the charges and contain a statement that the details of the investment had been explained and were understood by the customer. The forms would be signed by him or her.

A common complaint is that when the customer became concerned about the investment the consultant who had arranged the investment was nowhere to be found or was “busy” or “unavailable”.

Far too often the customer with a fixed deposit would be approached by the consultant in the broking arm of the bank who was given access to the details of the customer's account – a dubious practice in itself. The consultant would then approach the customer and encourage him or her to change the safe investment at a lower, taxable interest rate to one where, it was held out, higher tax-free income would be earned, and there was a prospect of capital growth. The customer would always emphasise the need for the investment to be risk free. This would be answered by the consultant without a specific promise but with an indication that not only would the capital be safe but there might also be growth. The banks object to the description of the consultants' behaviour as being a “hard sell” and they say that their consultants are honest and honourable people. No doubt most of them are. No doubt also there was commission to be earned by bank or consultant or both.

An argument in favour of the proposed investment often advanced by a consultant is that the investment will be tax-free or at least reduce the impact of tax. In some cases the investment income of the customer would be taxed at a very low rate or even be tax free.

What emerges is the need for a few clear rules to be followed by banks and their consultants. They must, firstly, check the risk profile of the customer very carefully. The extent of resources available to the customer, in relation especially to his or her age, must determine the suitability of an investment when some risk is involved. For example, if an elderly couple have a nest egg of R100 000 with no prospect at their age of ever earning again, any risky investment must be avoided.

Investment in unit trusts should not be recommended to people who have no understanding of the volatility of the share market, e.g. people who have never

invested in shares and have only invested in fixed interest investments.

Secondly, consultants must ensure that the customer fully understands the nature of the investment and whatever risks there are in it. Many customers are illiterate, while others who are educated are not necessarily experienced in investment matters. Special care must be taken to ensure that the risks are understood. It cannot be assumed that an educated person follows share prices or reads the personal financial articles in newspapers. If the relative merits of respective unit trusts, for instance, are discussed in relation to the degree of risk involved, the customer's mind can be focussed on this aspect.

No customer must be hurried into a decision, and enough time must be given him or her to read the relevant documentation. Important wording in the document must be given prominence. This wording must state the risks in the investment and must also state clearly what the costs are; not only in percentages, but in actual figures. Customers should sign immediately beneath this wording.

Thirdly, if a bank talks about management in relation to a unit trust investment it must ensure that the investment continues to be managed, that the investor receives regular statements and that the investment adviser actively manages the investment in regular consultation with the customer.

Banks should also understand that little weight will be given by this office to their argument "but if the capital had indeed increased, then there would have been no complaint from the customer". The point is that it is the loss of the capital that the bank must be held responsible for if it allows the customer's capital to be put into an inappropriate investment.

- Set-off

Many bank customers are unaware of the legal principles of set-off and the fact that their bank is entitled to apply set-off to their accounts. When banks do exercise their right in terms of the law, it often causes customers a sense of outrage at what is perceived to be an unauthorised transfer of "their" money. Customers sometimes feel that the bank has "stolen" their money because it has been removed from one of their accounts and placed in another to extinguish part or all of a debt owed to the bank by the customer.

The legal position is that when money is deposited into an account, it becomes the bank's money and is no longer owned by the customer. Ownership in the money vests in the bank. The bank merely owes the customer the amount deposited. The rule of set-off allows a bank to set-off the positive balance standing to one of the customer's accounts against a negative balance standing against another account of the same customer, provided the debt is due by the customer and easily ascertainable.

This means that a customer who has, for example, an overdraft of R4 000 which the bank has asked him to repay, runs the risk of having his savings account of R6 000 depleted by R4 000 which the bank will take from the account to extinguish the debt owed to the bank on the overdraft. The bank owes the customer a debt on the savings account and the customer owes the bank a debt on the called-up overdraft. These two debts can be set-off. In law, the bank is not obliged to notify the customer that it intends applying set-off and the customer's consent is not required.

We think that it would be better for customer relations if the bank explained that it had applied set-off when it transferred the money. Where the customer's business dealings are complex and he runs several accounts of different kinds, it might be unfair of the bank to apply set-off if it caused the customer substantial inconvenience, financial embarrassment or prejudice.

We have had several complaints from customers whose bank applied set-off. In most cases, the bank was entitled to act as it did. However, in one case a bank applied set-off where it was not entitled to do so. A debt owed by a corporation that was part of a group of corporations all owned by different family members was set-off against a credit standing in another family member's account. As the legal entity who owed the debt was not the same as the legal entity that possessed the credit, set-off was not allowed in law. The bank returned the money.

- Has cash been deposited?

The closely-related question whether a cheque in payment of goods has been cleared was dealt with in the first report. A bank customer who has an item of some value for sale often wants cash. Arrangements may be made with the buyer that cash will be deposited to the credit of the seller's account and a copy of the deposit slip delivered or faxed to the seller. A seller in such circumstances must be on guard, for it does not seem to be difficult to produce a fraudulent duplicate deposit slip, even one stamped by the teller, which shows cash, while in fact on the original slip the truth is stated that a cheque was deposited.

To protect themselves in these cases sellers ask their banks if cash has been deposited. Often the answer is yes, because a credit shows up on the computer screen. The credit lasts only until the truth is discovered that it was a cheque that was deposited and it has been returned unpaid. A seller must make very careful note of enquiries made to the bank. He must stress that there is a need to know that cash has been received, not a cheque. The bank employees' name and his or her response must be noted.

The seller is unlikely to succeed in getting the price refunded by the bank if the bank has simply responded that a credit is reflected or that funds are available. Banks should instruct their staff carefully on how to evaluate and respond to such an enquiry: Check carefully to make quite sure that it was indeed cash that was deposited and not a dud cheque.

A variation on this theme occurs when the seller of an article wants cash and asks that the copy of the deposit slip be faxed to him. The fraudster enters a cheque on the original slip and cash on the duplicate. If the teller stamps the duplicate and returns it in its false form to the fraudster, we think the bank should bear the loss.

- Confidentiality

The first report of the Ombudsman dealt in some detail with this important but difficult subject. It is important because breach by a bank of the duty it owes its customer to keep his financial affairs confidential can cause not only material damage but also emotional hurt.

The law permits a bank to disclose details of a customer's account when it is in the public interest; or when compelled by court order; or when the customer

consents; or when it is in the bank's interest to do so. It is this last exception to the secrecy rule that makes confidentiality a source of concern to this office.

Every time a bank breaches banker-customer confidentiality it could claim that it was in its own interest to do so, because inevitably it is. If this exception were to be interpreted broadly, the duty of a banker to keep customers' confidential information private would be severely reduced.

The law therefore interprets this exception very narrowly. An example of when a bank may breach banker-customer confidentiality in its own interest is when it wishes to sue a customer for an overdue debt. In order to issue a summons, the bank has to state the exact amount owed by the customer as well as the fact that the debt is due. As banker-customer confidentiality requires that such information be kept private, the banker would be unable to sue the debtor unless it breached confidentiality. In such a situation, it is not only fair but necessary that the duty be waived.

It can be seen from this example that a bank may only breach banker-customer confidentiality in its own interest where it is essential that it do so and not merely when it is profitable, convenient or useful. Bankers in South Africa need to demonstrate to customers that they take banker-customer confidentiality seriously and should therefore put out a "privacy code" for customers' use, as occurs overseas. Such a code should inform customers in detail of the way in which their bank will protect their confidential information.

Privacy Codes do not assist criminals or those wishing to launder money. The Prevention of Organised Crime Act 121 of 1998 places a duty on bankers, among others, to inform designated officials if there is any suspicion that money in their possession is the "proceeds of unlawful activity". The reporting of suspicions would fall into the exception of "the public interest" and would not constitute a breach of confidentiality.

The Code of Banking Practice puts the following limitation on "the bank's interest": "This will not be used as a reason for disclosing information about you or your accounts (including your name and address) to anyone else including other companies in our group for marketing purposes." The Office is likely to apply this limitation strictly, so that investment consultants or advisers or brokers employed by or associated with a bank should in future not be allowed access to customers' accounts for the purpose of persuading customers to make investments.

- Surrender of pledged assurance policies

A standard form of security taken by a bank is a life assurance policy, which is often the major asset of the borrower.

A regular complaint is that the borrower who has fallen into arrear in settling a debt to the bank has found that on little or no notice his policy has been surrendered.

Although the bank correctly asserts that a warning was sent to the debtor at a chosen address, a few moments' thought by the bank, a further letter or a couple of telephone calls could have enabled the debtor to make the necessary effort to avert the surrender and have the chance of maintaining the policy to maturity.

The Board of Directors of the Office of the Banking Adjudicator

Mr VW Bartlett, Managing Director, First National Bank Limited
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Mr S Hackner, Director – Private Banking, Investec Bank Limited
(Alternate: Mr S Heilbron, Managing Director – Private Banking, Investec Bank Limited)

Mr E Hanekom, Operating Executive – Commercial Bank, ABSA Bank
(Alternate: Mr P van der Merwe, Operating Executive, ABSA Bank)

Mr D Harrison, General Manager – Retail Banking Division, Nedcor Bank Limited

(Alternate: Ms D Williams, Assistant General Manager – Manager: Customer Satisfaction, Nedcor Bank Limited)

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(Alternate: Mr T Adams, General Manager Risk, BoE Bank Limited)

Mr NT Webb, Managing Director – Retail Banking, Standard Bank of South Africa Limited

(Alternate: MR CS Poplett, Director: Service Delivery – Retail Banking, Standard Bank of South Africa Limited)

Mr LGT Wessels, Head: Legal and Policy, Financial Services Board

(Alternate: Dr FH van Zyl, Head: Legislation and Research, Financial Services Board)

Mrs I Wilken, Chairman, National Consumer Forum

Members of the Banking Adjudicator Commission

Mr A Hirsch, Chief Director, Business Regulations and Consumer Services, Dept of Trade and Industry

(Alternate: Mr S Bavuma, Deputy Director, National Consumer Affairs Office, Dept of Trade and Industry)

Mr CR Liebenberg, Chairman, Nedcor Limited

(Alternate: Mr L Ndlovu, Executive Director: Human Resources – Reconstruction and Corporate Affairs, Nedcor Limited)

Mr C Malan, Director: Financial Regulations, Dept of Finance

Dr CB Strauss, Chairman, Standard Bank Investment Cor

(Alternate: Mr NT Webb, Managing Director – Retail Banking, Standard Bank of South Africa Ltd)

Ms DR Terblanche, Chief Executive Officer, Consumer Institute

(Alternate: Mrs TM Manly, Director, Consumer Institute)

Mr LGT Wessels, Head: Legal and Policy, Financial Services Board

(Alternate: Dr FH van Zyl, Head: Legislation and Research, Financial Services Board)

Mrs I Wilken, Chairman of the National Executive of the National Consumer Forum

(Alternate: Dr G de Wulf, Member of the National Consumer Union)

(Adv D Moseneke SC, who was chairman of African Merchant Bank Limited, has resigned as a banking representative on the Commission.)

"I acknowledge and appreciate the manner in which the matter was handled and resolved by your office. I once more say thanks a million and millennium times."

"To you, and please convey to your staff, our sincere appreciation for the efforts

you have all made to bring this unfortunate event to a fair conclusion.”

“I hereby express my gratitude to your office for intervening in the dispute between the bank and myself. Really, you came to my rescue as all my previous efforts were unsuccessful to solve the problem. I am now a happy man and the bank has confirmed the settlement in a statement dated 21 May 1999.”

“Thank you for looking out for us small guys and taking the time and effort to look into our problems. It really feels good knowing that there is someone out there who not only listens, but actually does something about the problem.”

“I am very happy for Ombudsman to help me in the money that was lost two years back in the bank. That was not my money it was a society money. Everybody was cross for me but after two years Ombudsman help a lot. I said I am very happy. God bless you all.”

Merchant Beware

Not every complaint we receive is well founded. There are occasions when the complainant has himself to blame for his loss. There was, for example, the case of a business which accepted credit cards (of the same card issuer) on three occasions in the first ten days of February 1999. The amounts involved were something over R10 000, R29 000 and R27 000 respectively.

In all three cases, prior authorisation had been obtained from the card division by telephone. However, the merchant had failed to protect himself by acting vigilantly to prevent fraud and to ensure that the customer was a genuine card-holder. In the first transaction the slip was not signed; in the second the name on the card was not the same as the signature on the slip; in the third the signature was different from that used in the second, although the customer was the same, and the merchant was aware that the signatures were different.

The card division of the bank agreed to refund the amount of the third transaction. This was generous, in the circumstances. We had to tell the customer that he had been at fault in regard to the first two transactions and had no claim against the bank.

Not a guarantee but also not the whole truth

A cheque for R53 000 and two other similar cheques drawn by a shopkeeper in favour of a manufacturer were unpaid and returned R/D. The shopkeeper's bank manager then wrote to the manufacturer asking him to present the cheques for payment again and to accept the cheques from the shopkeeper in future, “as there was a mistake in their account”. The cheques were deposited again and the one for R53 000 was again dishonoured. The bank denied that the letter from the manager was a guarantee.

We said that the manager at least should have told the manufacturer that cheques had been returned R/D. In the end the manufacturer, who was anxious to maintain the fruitful relationship he had with the bank, accepted R25 000 in full settlement.

Lost Share Certificate: Loss made good

A customer left a share certificate for 600 Southern Life shares with his bank for safekeeping in 1985. In May 1998 the customer wished to apply for the new FirstRand shares arising out of the merger of Southern Life and FNB with RMB. When he asked for his certificate he was, after a long delay, given a letter stating that the certificate was "lost". This was not sufficient for the share registrars.

The bank should have known that an indemnity was required before the lost shares were replaced. There was another long delay on the part of the bank. Meanwhile, the FirstRand shares had been listed on the stock exchange. The customer had a need of funds but without the new certificate could not sell his shares. When he eventually could do so, and sold, the proceeds were much less than they would have been at the time of listing. The bank accepted responsibility and credited the customer's account with the agreed amount of the loss.

Breach of confidence or simple enquiry?

A customer with a bond and an overdraft had told the bank that he had sold the mortgaged property and his account would be credited with the proceeds. The bank later telephoned the conveyancers and asked when the transfer would go through. The conveyancers told the customer of the call from the bank. The customer objected strongly to what he considered the failure by the bank to keep his financial affairs secret. He contended that the inference the conveyancers would draw from the bank's enquiry was that the bank was anxious about the state of his overdraft. The bank insisted that nothing had been said to the conveyancers about an overdraft.

Was the enquiry to the conveyancers in the bank's interest? We, with some reluctance, held that it was.

"Your word is my bond"

A deposit of R50 697,53 was made at a branch of a bank. The deposit slip completed by the customer recorded the deposit as consisting of R42 000 in cash (notes only) and three cheques individually detailed and totalling R8 697,53. The teller had ticked the two figures of R42 000 (in the notes line and in the sub-total line). These figures were written boldly and the cents blocks had strong lines drawn through them. In a blank space below the names of the drawers of the three cheques, the teller had scribbled:

50 x 10	R 500
100 x 29	R2 900
200 x 4	R800
	R4 200

The machine journal reflected cash as R4 200 but the total of the deposit as R50 697,53. The bank reversed an amount of R37 800 out of the account.

The video footage of the making of the deposit showed a woman carrying a sling

bag. When she removed the deposit from the bag there was only one movement which indicated that there was not a large amount of cash in the bag. Although not quite clear in the picture, it looked as though the teller's drawer had not been lowered; a "dropped" drawer would indicate a large deposit. The total time that elapsed from when the woman reached the teller's window until she left the bank was under three minutes. Had there been R42 000 in cash and not R4 200, the transaction would have taken longer.

We therefore felt initially that we could not contest the bank's decision. We later raised a matter of principle, that a deposit slip serves the same purpose as a receipt. The deposit slip was very clearly written. Even a busy teller could hardly have failed to notice the figures of R42 000 in cash written twice in large bold figures. The teller's tick or mark was made twice, next to those figures.

After the bank declined to accept this argument, we in the end conceded that while the deposit slip was *prima facie* proof, no other evidence of a conclusive nature could be produced. We stated, however, and asked that it be made known to senior management as well as management at branch level, that should the same teller be involved in any other disputed deposit or similar questionable incident, we would re-open the matter and seek full restitution for the customer. Six weeks later the bank informed us that the teller concerned had been involved in a dishonest transaction, though of a totally different nature, and had been dismissed.

The bank, to its great credit, deemed it proper to pay the customer R37 800 without prejudice and without admission of liability.

Categories of complaints

	In Bank's favour	Complainant's favour	In Total
Bad investment advice	22	17	39
Confidentiality	8	2	10
Credit Bureau listings	6	8	14
Credit Card fraud	9	5	14
Deceased estates	10	6	16
Foreign exchange	5	3	8
Fraudulent withdrawals	27	38	65
HP and lease problems	27	17	44
Lost and stolen cards	14	27	41
Mortgage bond	98	49	147
Suretyships	9	7	16
Other	149	102	251
Total	384	281	665

"Arrogance Unrepented"

In December 1996, using her husband's card, without purporting to use his signature, a wife caused a bank to pay R2 123 to a gym which subsequently went into liquidation. The husband challenged the debit to his account. The bank

replied by invoking a provision in the credit card conditions that only the person in whose name the card is issued may use the card. The Ombudsman's office received no reply to its inquiry of 12 July 1999 as to how the bank claimed that the condition applied only to these circumstances.

On 13 September 1999 the bank wrote to the customer to say that the charge, together with interest, had been reversed. It offered no apology or explanation. A request to the bank was made on 4 October 1999 for an explanation of how it came about that the charge was raised, subsequently defended on grounds which were unsupportable, and ultimately corrected without any explanation or apology. At the time of going to press, no explanation has been received by the Ombudsman's office.