

# Inaugural Report of the Banking Ombudsman/Adjudicator

## 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.

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## Report from the Banking Ombudsman

his Report is the account of work done by this Office from November 1997, when the Office officially opened, until 30th April 1999. This term has been chosen because I have been loathe to leave until next year, commentary on the events during the past six months. I have received such a broad range of complaints involving so many issues that I think it is appropriate, in this first report, to mention and comment on some of these. It should be possible for future reports to be less detailed.

Prior to my appointment, the Chief Executive Officer of The Banking Council of South Africa performed the function of mediator between bank and customer. One journalist amusingly described this situation as similar to "putting Dracula in charge of the blood bank". Mr Bob Tucker, the incumbent CEO of The Banking Council, realised that an impartial and independent mediator was necessary.

I was approached to become the Ombudsman and to start the Office. I readily agreed as I had for many years been a supporter of the Ombudsman concept and had been a member of the International Bar Association's Ombudsman Committee. I had performed the function of Ombudsman at various times and had served on a committee which the Law Society had appointed to study the need

for an Ombudsman in South Africa.

The Banking Council assured me that the Ombudsman would be completely independent. Neither the Council nor any bank would interfere with my operations or decisions. On this basis, I accepted the position for an initial period of one year and have since agreed to stay on pending the appointment of my successor later this year.

Soon after being appointed, I realised that the Banking Ombudsman's independence might be questioned because he was both funded and appointed by the industry. No alternative source of funding seemed possible. Banking Ombudsmen all over the world are funded by the industry they watch over and their independence is not challenged on this score.

A more serious problem exists when an industry appoints its own watchdog; the industry may be open to accusations that it had appointed a tame and toothless watchdog, who would not vigorously uphold customer's rights but would give the banks the least possible trouble.

I hope this Report will show that although I have been appointed by The Banking Council, I have jealously guarded my independence and impartiality and that the banks have not been given preferential treatment.

When considering the problem of the perceived independence of the Ombudsman, I was cheered by the fact that the two South African Insurance Ombudsmen, Judge Jan Steyn and Mr Michael Bennett, found themselves in the same position, being both appointed and funded by the insurance industry. They have suffered no lack of public confidence in their independence because of this.

I researched the manner in which the independence of Ombudsmen in the United Kingdom, Australia and New Zealand was ensured and, as a result, made a recommendation to The Banking Council that an independent Commission be established to appoint future Banking Ombudsmen.

While I was researching this matter, Ms Diane Terblanche, Executive Director of the Consumer Institute of South Africa, brought the Policy Report published by the UK Consumer's Association to my attention. This document greatly assisted me in my search for an appropriate method of safeguarding the Ombudsman's independence. Other policy documents to come into my possession since then have reinforced this view.

The Council has accepted my recommendation that a Banking Ombudsman's Commission be established to ensure and protect the independence of the Ombudsman. The Commission will comprise members drawn from consumer organisations, business, statutory bodies, the legal fraternity and banks. Bankers will be in the minority.

Mr Bob Tucker has provided a great deal of support to the Office. I would like to express my appreciation to him and the Council for all that has been done to ensure our success. The budget of the Office has had to be substantially increased, as more staff has been employed to cope with the increasing number of complaints. The Banking Council has been generous in providing for this and in ensuring the continued efficiency and strength of the Office.

I have also received valuable assistance from the two SA Insurance Ombudsmen, Judge Jan Steyn and Mr Michael Bennett, and would like to thank Mr Bennett for the information he provided soon after the Office started. I have consulted both of them on issues which have troubled me and benefited from their wise counsel.

Mr David Thomas, the British Banking Ombudsman, generously allowed me to spend four days in London with him. This was an invaluable experience. Since then, we have been in contact with the Banking Ombudsmen of New Zealand, Australia, Belgium, Canada and the United States. All of these have provided us with information and assistance and I would like to express my thanks to them.

When I accepted the appointment, I realised that in order to make a success of the operation, I would have to convince both the banks and the public of the value of the Office in resolving disputes.

While customers have welcomed the Ombudsman concept, many executives employed by the banks have approached the idea with caution. Banks in South Africa have not previously been required to explain to an independent mediator why they have acted in a particular way.

Some banks tended to treat the letters from our Office as if they emanated from an attorney representing a client. Our letters would be passed to the legal department, who would reply in a legalistic or evasive manner. After explaining to the banks concerned that the Ombudsman is an independent and impartial mediator attempting to resolve a dispute fairly, the situation improved.

Banks are learning to engage in the mediation process with the Ombudsman.

I thought the problem had been resolved and was appalled when I recently received the following letter from a very large bank:

“Dear Sir, We do not intend to deal with each and every allegation as contained in your letter and our failure to do so must not be construed as an admission as to the correctness thereof. It does not appear as if this dispute will be resolved by way of correspondence and as we are of the opinion that the matter was sufficiently investigated and that the Bank did not cause Mr S’s loss we stand by our decision to deny liability.

We therefore regret to inform you that the Bank will not entertain this claim.” I have raised the matter with the Managing Director of the bank as the adviser clearly does not understand what the relationship between the Ombudsman and the bank should be. The statement “We are of the opinion that the matter was sufficiently investigated and that the Bank did not cause Mr S’s loss” is not sufficient to satisfy us. We require details of what the investigation revealed and a well reasoned argument on the facts and the law so that we can properly judge whether the bank is liable.

Occasionally, a bank that agrees it is in the wrong is reluctant to set the matter right, fearing the setting of a costly precedent. While appreciating this fear, I have insisted that a complainant be reimbursed whenever a bank has acted unfairly.

Apart from the instances when banks make mistakes or act unfairly, the factors responsible for many complaints referred to the Ombudsman are crime, poor service, inefficiency and lack of communication between bank and customer.

Crime pervades every aspect of our society and banks and their customers are a prime target. Automatic Teller Machines (ATMs) are frequently rigged by thieves who are able to retrieve a card and withdraw funds from a customer’s account.

Some of the many complaints we receive include:

- 👉 cheques that are lost by the banks;

- ATM scams;
- the summary closing of accounts in credit;
- breaches of banking confidentiality;
- credit card fraud;
- liability on suretyships; and
- problems with mortgage bonds.

These are dealt with later in the report.

Some of the problems experienced by bank customers are a result of the customer's lack of understanding of basic economic facts and bank procedures. Banks are partly to blame for this, as they do not always communicate effectively with customers. However, the banking public frequently displays apathy and a lack of concern in matters affecting their own interests, which makes them responsible for their problems. Perhaps the best example is the failure of customers to check their bank statements. Illiteracy, lack of education and language problems frustrate effective communication between bank and customer.

Complainants sometimes express their helplessness and outrage at the lack of service, high handedness or inefficiency of their banks. I have recommended in the proposed Terms of Reference that the bank should pay compensation for a customer's distress or inconvenience in certain of these cases.

The problems, achievements and progress of the Office during its first 18 months are described in the rest of the Report. It will be seen that the problems range from large complex issues to various simple matters. We give the stories behind some of the more important, topical and interesting matters we have dealt with. These illustrate the real life implications of our work. It should not be forgotten that when the office opened in November 1997, there were no guidelines or precedents to assist us. I had to work out answers or at least an approach to the many diversified problems and issues which confronted us on a daily basis. I was the only lawyer on the staff and was assisted by two retired bankers who each worked a few mornings a week.

Mr Jasper Hulley of The Banking Council gives us valuable assistance with various administrative functions. I wish to pay a special tribute to Mrs Doris Atterbury, who recently died in a motor vehicle accident. She had been my secretary at Bowman Gilfillan & Blacklock Inc. for many years. After my retirement from full-time legal practice, I had an office at the Legal Resources Centre's National Office in my capacity as Chairman of the Legal Resources Trust, and she worked for me there. Soon after the Office of the Banking Ombudsman opened, Doris agreed to postpone her retirement to act as my secretary. She also accepted responsibility for the administration of the Office and made a substantial contribution to the efficient manner in which it functioned.

In addition to myself, the Office comprises seven professional staff:

Attorneys David John, Willie van Rensburg, Jo Didcott and William Lane (who assists from time to time); and retired bankers Clive Dickinson, Peter Bray and John Sayers, who work three or four mornings a week. Administrative support is provided by Lynn Glaus and Eva Masilo. We also have the support of a number of additional temporary members not mentioned here. It gives me great pleasure to commend and thank these people for their enthusiasm, dedication and support. I am satisfied that when I retire later in the year my successor will inherit a group

of highly competent people who give of their best.

### **Draft Code of Banking Practice**

Recently, The Banking Council released for comment its first Draft Code of Banking Practice. This Code sets minimum standards of good banking practice on a wide range of issues. Banks will comply with the Code on a voluntary basis. It will provide the Ombudsman's Office with a useful tool in resolving most disputes. This Office ensured that certain issues were addressed in the Draft Code before it was made public. Later, a detailed commentary on the draft Code with suggestions for improvement was submitted to The Banking Council.

We would like to voice some concerns about issues affecting the Draft Code.

- The Banking Council's Draft Code is based on the old British Banking Code. In 1998, a new Code was adopted by the British banks and, as far as we are aware, the Banking Council has not considered the improvements reflected in the new Code. We understand that the British Banking Ombudsman will be submitting comments for the further improvement of the new British Code.
- The Banking Code should contain an undertaking by the banks to publicise the existence of the Ombudsman's Office in every branch.
- The British Banking Code is a promise by the banks to their customers.

In the draft SA Banking Code, banks merely undertake to use their "best endeavours" to apply the Code, which is described as an inspirational document and not a contractual undertaking. We have said to the Banking Council that the Code should be more than an "aspirational" document, in line with the position in other countries.

Since year end, some of our concerns about the Draft Code have been addressed. The most important change to the Draft Code is the removal of the "best endeavours" clause, and its replacement with an undertaking by the banks to apply the Code, although a statement that the Code has no legal effect remains.

As South African law lags behind other systems with regards to consumer protection, it may be necessary for the Banking Code to fill these deficiencies by, for example, providing protection for spouses or partners in the matter of suretyships.

### **When the Ombudsman can act**

The Banking Ombudsman may only act according to the mandate given to him by the banks participating in the Ombudsman's scheme. A copy of this mandate appears at the end of the Report.

Participation in the Ombudsman's scheme is voluntary but at present all the major commercial banks as well as 36 other banks are members. A complainant who wishes to obtain assistance from the Office must make the complaint in writing and is required to complete and sign the Application Form. Documents that can assist the Ombudsman to investigate the complaint should be attached to the form. Such form also authorises the bank to furnish information that would otherwise be confidential.

### **When the Ombudsman cannot act**

The Ombudsman may not investigate a complaint which concerns commercial decisions by banks, such as decisions relating to the granting of credit, assessment of risk, bank charges for services or products or increases in interest rates. However, if a bank charged more than an agreed rate we can act. Similarly, we can act if the rate breached the Usury Act.

When a complainant has issued summons against his bank, the Ombudsman will decline to intervene.

### **The Ombudsman's jurisdiction**

According to the present mandate, the Ombudsman has the power to make recommendations involving sums of up to R100 000.00. These are not binding on the banks.

As we consider it important that in certain circumstances the Ombudsman's decisions should be binding on the bank and that the Ombudsman's powers be extended beyond the present mandate, we have prepared and submitted proposals for a new mandate to The Banking Council.

A copy of this mandate appears at the end of the Report as the Proposed Terms of Reference and includes provisions that the Ombudsman:

- be entitled to make binding rulings of up to R500 000.00 for pecuniary loss, and
- be given the power to advise the bank to pay the complainant's incidental expenses incurred in pursuing the complaint, as well as
- an amount of up to R2 500.00 as compensation for a complainant's inconvenience and distress.

### **Making ourselves known**

Although the number of complaints made to the Banking Ombudsman's Office continues to increase, it appears as if most South Africans are not yet aware of the Banking Ombudsman's existence.

In the event of a dispute, banking staff seldom inform the customer that the Ombudsman's Office exists. In rare cases, customers have reported that bank staff at branch level have taken offence at the customer referring the matter to the Ombudsman. Unfortunately, the Banking Ombudsman's contact details are not yet displayed by the banks in their branches.

The press has played a significant role in publicising the Office. Many complainants have been referred to us by champions of consumer interests, such as Isobel Jones and June Bearzi of Star Line. Radio talk shows have broadcast the contact details of the Banking Ombudsman to the public. The Ombudsman has appeared on ABSA bank's internal television, with Mr Michael Bennett on Isobel Jones's radio programme as well as in many other radio phone-in programmes.

Publications on the Ombudsman's function have appeared in some in-house bank magazines.

Every time we receive media coverage, a large number of additional complaints are received. NGOs, the Departments of Trade and Industry and of Finance, the Public Protector's Office and Legal Wise occasionally refer complainants to the Office.

The most obvious place for the Ombudsman's contact details to be publicised is in the banks themselves. In the UK, every branch of every participating bank displays such a notice, ensuring that all customers are informed that an independent dispute resolution process is available, free of charge to bank customers. Those customers who do not feel confident enough to argue a matter with a bank are made aware that an impartial independent Office might be able to assist them.

The Office receives many telephone calls from members of the public who have complaints. Some of these complaints involve matters the Ombudsman is unable to investigate and these are referred elsewhere. Complainants are sent Application Forms by fax or by post. A small number of complainants come into the Office to make their complaints. Any complainant who requires help in completing the form is assisted.

Complainants sometimes contact the Office for the first time when a matter has reached a crisis point and request that the Ombudsman take instant emergency action. This occurs at such a late stage either because the complainant has recently become aware of the existence of the Ombudsman or is making a last ditch attempt to stave off legal action, such as a sale in execution. When properties are about to be sold in execution, we try to intervene immediately. It is naturally far better if a complainant contacts the Office in good time.

In rare cases, a complainant without a legitimate defence or answer to the bank's claim tries to use us to stave off legal proceedings. We have also had complainants who plan to sue their banks and wish to use us to obtain information useful to them. In such cases we refuse to become involved.

### **Facts and figures**

The Office handled a total of 1 899 complaints in the 18 months under review; 1 233 of these have been resolved. Statistics have been extracted from 78% of resolved complaints and represent a fair sample.

Computer problems frustrated a survey of the remaining 22%. ATM complaints, which comprise 13% of the total number of resolved complaints, have been treated as a completely separate category.

Included in the large category "Other" are complaints about investment advice, deceased estates, overdrafts and current accounts, suretyships, foreign exchange transactions and policies ceded to banks.

Files closed without a full investigation Some 48% of the total number of complaints resolved were not fully investigated for the following reasons:

- application forms were not completed,
- information required from the complainant was not provided, or
- the complaint did not fall within our mandate. The category "not within our mandate" includes:
  - complaints which were directed elsewhere, for example to the Life Assurance Ombudsman;
  - complaints where the complainant instituted legal action against his bank; and
  - complaints about commercial banking decisions, for example: a bank's decision not to grant credit to a customer.

formally lodge a complaint by completing the Application for Assistance form. One of the reasons for this could be that the complaint had fallen away owing to the matter being successfully resolved. Files were also closed when it became apparent that the complaint did not warrant further investigation, for example, when it was quite obvious that the bank was not at fault and that the complainant had merely misunderstood the bank's actions. In such cases, a letter would be sent to the complainant explaining the matter. This occurred in 6% of the complaints resolved.

Additional information was sometimes required from a complainant either before a complaint could be investigated or during the course of an investigation. If the complainant failed to supply such information or to respond to our requests within a reasonable time, we closed the file. This occurred in 4% of all complaints received.

### **Fully investigated complaints**

Fifty-two percent of complaints warranted a full investigation and almost half of these were resolved partly or wholly in the complainant's favour.

### **What complainants received**

In our sample of fully investigated complaints, the total sum paid by banks to complainants as a result of our investigations amounted to R1 067 550.00. This figure should be viewed in the context of a large number of complaints involving comparatively small amounts. Not every complaint resolved in the complainant's favour resulted in the payment of money. Many complaints were resolved in other ways, for example when a bank provided information, or sorted out an administrative problem.

### **ATM complaints**

As mentioned above, these complaints form a separate category. There was little we could do to assist most complainants in this category who had compromised their PINs or had failed to cancel a card in time for loss to be prevented.

Nevertheless, 19% of ATM complaints were resolved partly or wholly in the complainant's favour and these complainants received a total of R45 343.00.

### **The average time taken to resolve a complaint**

It took an average of four months to resolve a fully investigated complaint. Naturally, the time taken to resolve each complaint differed depending on the circumstances. Some complaints were resolved within days, while a few matters took over a year to resolve. These cases were in the minority. One of our main concerns is to reduce the time taken to resolve a complaint. Both the banks and our Office are working to achieve this.

### **Resolution of complaints**

One of the main benefits of the Ombudsman's scheme is the expeditious resolution of complaints and the avoidance of costly and protracted litigation.

The main obstacle to a speedy resolution of a complaint by the Ombudsman is a failure of one of the parties to provide the information required for an investigation within a reasonable time. In such cases, we write to the party concerned warning

that, should the required information not be provided within a specified time, we will make a decision based on the facts available to us.

When handling complaints, the Ombudsman first attempts to negotiate a fair settlement. This can be a lengthy process, but is frequently successful. However, on the rare occasions when a settlement is not reached, the Ombudsman makes a recommendation. The banks have seldom ignored such recommendation. When a bank pays any amount in terms of a settlement, payment is usually made without admission of liability and in full and final settlement of the matter.

### **Uncertainty in the Law:**

#### **A need for test cases**

In most complaints, the applicable law is determined fairly easily. However, on rare occasions, a complaint falls into a “grey” area where the law is undeveloped, unclear or ambiguous. In such situations, the Ombudsman may be reluctant to make a recommendation.

In the UK, Australia and New Zealand, Banking Ombudsmen have a provision in their Rules providing for “test cases” in these circumstances. Both the complainant’s case and the bank’s case are presented to a court, at the bank’s expense. After obtaining a judgement on the issue, future complaints can be speedily resolved.

At present, we have no mandate to call for a test case, but a recommendation has been made in the Proposed Terms of Reference that this be provided for.

### **Deposit slips**

One of the large banks accepts cash deposits in a manner which we consider unfair. This bank has informed us that tellers use only the account number written on the cash deposit slip to allocate the deposit. The bank does not check that the account number and the name of the account holder correspond.

As a result of this practice, if the depositor makes a mistake when writing out the account number, the money may be transferred into a wrong account. In such circumstances, the bank refuses to take responsibility for the depositor’s mistake.

We consider this practice unfair because:

- The first and most prominent detail reflected on the slip is the name of the person into whose account the money is to be deposited. The last detail required before the depositor signs the deposit slip is the number of the account.
- In refusing to accept responsibility for not checking the name of the account holder against the account number, the bank relies upon one of the terms written on the deposit slip in fine print. We consider the terms on the slip to be of doubtful legal effect. No warning appears on the slip that only the account number is used when the bank allocates the money. The bank concerned has agreed to meet us to discuss this problem.

### **Cheques returned unpaid**

When cheques are returned “Refer to Drawer”, the collecting bank reverses any credits it may have made to the customer’s account. Although banks have told us that cheques deposited should be cleared within a week or two, they give no

undertakings in this regard. Far too many people fail to call for a special clearance when it is in their interests to do so and end up sustaining a loss.

Banks sometimes reverse credits passed for an RD or lost cheque months after the cheque was deposited. At least two major commercial banks have informed us that they consider that they are under no obligation to contact customers to notify them of cheques that have been returned unpaid, unless special clearance has been requested.

Banks should undertake to clear cheques within a reasonable period, and that period should be made known so that customers may know for how long the risk that a cheque may be returned unpaid exists.

The customer should be informed as soon as a bank becomes aware that a cheque has been returned unpaid.

Banks that unreasonably delay in warning a customer of the return of a cheque may be held liable for his loss. The story on the previous page gives an example of this problem and is interesting because initially the complainant believed that the bank was liable for three unpaid cheques, whereas the bank felt that it had no liability whatsoever.

### **Lost cheques**

Some 173 000 cheques were lost last year while in the care of banks. In fairness, the sum of 173 000 represents a very small proportion of the number of cheques processed annually. It appears that the term "lost" is a banking euphemism that includes "loss" of a cheque due to theft, fraud, hijacking, willful destruction or damage incurred during the processing of cheques. The number of cheques actually lost comprises a small percentage of this figure.

When banks lose cheques, they generally refuse to accept liability. When doing so, Section 67 of the Bills of Exchange Act is usually mentioned. This Act states that the holder of a cheque that has been lost may require the drawer to provide him with a replacement cheque. If the drawer refuses to comply, he can be compelled to do so. This involves instituting legal proceedings against the drawer. Banks expect customers to obtain replacement cheques from drawers and if this is not possible, to bear the loss.

As the Act merely requires the drawer to supply a replacement cheque, it does not exonerate a bank from liability for negligence in losing a cheque. While it is difficult enough to obtain a replacement cheque from a drawer should the bank lose a cheque, a depositor's problems are greatly increased if the drawer cannot be traced. Shopkeepers who accept cheques in payment for goods frequently find themselves in this predicament.

Bank customers are not generally aware that many cheques are lost after being deposited. Unaware of this risk, the depositor cannot be held to have accepted the risk nor can he be expected to take steps to protect himself from this loss before depositing a cheque by recording the name, address and phone number which is usually written on the back of a cheque.

The UK Banking Ombudsman reports that it is rare for UK banks to lose customer's cheques. Banks that do so are considered to be in breach of contract, negligent and guilty of maladministration. Where the depositor is able to obtain a replacement cheque from the drawer, the UK Ombudsman, Mr David Thomas, recommends that the bank which lost the cheque pay the customer for the inconvenience and expense caused by the loss. If a replacement cheque cannot

be obtained, the bank pays the customer's full loss as well as an amount in compensation for the customer's inconvenience.

The Australian Banking Ombudsman, Mr Colin Neave, reports that banks in Australia seldom lose cheques. He has never had a case where a bank has lost a cheque and the drawer could not be traced to provide a replacement.

The Australian Ombudsman, however, agrees that should this situation occur, the bank may well be held liable for the customer's loss if proved negligent. Machinery at the Automatic Clearing Bureau sometimes causes damage to cheques being processed. Staples left in cheques are a frequent cause of damage. Another cause of "lost" cheques is theft by bank employees, who are in a position to select cheques most suitable for alteration.

We see no reason why a bank that negligently loses a cheque should not be held liable for the loss this causes.

### **"Is the cheque clear?"**

Customers who wish to know whether a particular cheque has been cleared frequently ask their bank. Sometimes, bank staff give incorrect or misleading information to the customer.

If information on the clearance of a cheque is required because the customer wishes to deliver goods, bank staff should know that if the information is incorrect, the customer may suffer financial loss. In these circumstances, where a bank has given incorrect information to a customer which the customer has relied upon to his detriment, we recommend that the bank reimburse the customer for the loss caused.

### **Cheques to be paid on two signatures only**

When customers give instructions to their bank to pay cheques only when they are signed by two designated signatories, and a bank fails to carry out these instructions and pays out cheques bearing only one signature or the signature of someone other than the designated signatories, the bank can be held liable for any loss. We have had a number of cases where this particular problem has occurred.

### **Cheque details unchecked by the bank**

We understand that banks do not check signatures on cheques under R5 000.00. Banks which fail to examine cheques for forged signatures, unauthorised alterations or crossings should reimburse the drawer for any loss incurred. The ingenuity of criminals who alter cheques is dealt with below under the heading "Scams".

### **Bank guaranteed cheques and bank cheques**

It is not widely appreciated that there is a distinction between bank guaranteed cheques and bank cheques. From a purely technical point of view, a bank cheque is not a cheque according to the definition in the Bills of Exchange Act, as the bank draws the cheque on itself. Generally speaking, whereas a bank guaranteed cheque assures that payment will be made provided certain conditions have been met, payment of a bank cheque can be stopped in exceptional circumstances.

### **Account information**

ATM slips / misleading technology.

Customers are sometimes misled by ATM slips that make no distinction between cheques which have been cleared and those which have not or which lead a customer to believe that a cheque has been cleared when that is not so. Banks use various terms on ATM slips to describe a customer's balance which may sometimes be misunderstood. The sort of terms that the banks use are "cleared effects", "uncleared effects", "balance", "balance available" and "funds available".

If a customer obtains an ATM slip reflecting "available balance" and this balance includes an amount from a recently deposited cheque, the customer sometimes assumes that the cheque tendered in payment has been cleared. The most common problem we experience in this regard relates to the situation when a customer delivers an article believing that the cheque tendered has been cleared, when in fact participation in the Ombudsman programme by a bank is voluntary. A bank may withdraw from the programme at any time. Complaints being dealt with by the Ombudsman at the time of withdrawal shall remain with the Ombudsman until resolved.

The Ombudsman is appointed by the Board of Directors of The Banking Council. The Ombudsman is responsible for investigating complaints by the public against participating banks, for mediating between the complainant and the bank to try to find an amicable settlement, and where there is no amicable settlement, for making a recommendation as to how the complaint should be settled, including a recommendation that the bank make a monetary payment of an amount up to R100 000.00.

The Ombudsman may deal with complaints against a participating bank in respect of business transactions having their origin in the Republic of South Africa. In dealing with a complaint, in mediating and in making his recommendation, the Ombudsman will rely on the existing Code of Good Banking Practice. Apart from relying on the Code, the Ombudsman shall base his mediation and recommendation on what is fair, just and equitable between the parties and not solely on the law.

The complainant and/or the bank may decline to accept the recommendation of the Ombudsman, in which case either or both parties may resort to normal legal procedures. The sanction of the Ombudsman, in the event of his recommendation not being accepted by either or both parties, is to publish that fact in any manner that he deems appropriate.

Participating banks will, by virtue of their participation in the Ombudsman programme, be deemed to have agreed to the suspension of the running of prescription. The period of such suspension shall be from the date that the bank acknowledges that it is unable to resolve the complaint, or the Ombudsman determines that the bank has had sufficient time in which to resolve the complaint and has not done so, until the date on which the Ombudsman makes his recommendation.

The Ombudsman shall enjoy security of tenure of office for the period of his appointment and may not be dismissed during that period for any reason other than failure to perform his duties. No participating bank may in any way whatsoever seek to unduly influence the Ombudsman in his mediation or recommendation.

The Banking Council Board of Directors may from time to time, and after consultation with the Ombudsman:

- agree to amendments to the Code of Banking Practice;
- agree to the adoption of a completely new Code of Banking;
- agree to amendments of the constitution and structures of the

Ombudsman's office proposed by the Ombudsman; and u restructure the office of the Ombudsman (inter alia by the establishment of an independent Board of Control for that office). The Ombudsman may from time to time determine the procedures according to which his office will operate.

Every participating bank shall nominate one person who shall have authority, on behalf of that bank, to deal with all issues relating to the Ombudsman's office. Notices given by the Ombudsman as to the deeming of adequate time for the settlement of complaints, calling for information, documentation or the argument of the bank, and advising of his recommendation will be deemed to be satisfactorily given if given to that nominee. Participating banks shall be obliged at all times to maintain the name of the nominee and his or her successor with the Ombudsman.

Until otherwise decided by The Banking Council Board of Directors, the cost of running the Ombudsman function will be borne by the Council.

### **A brief history of the ombudsman concept**

The concept of an independent watchdog to voice public concerns and to hold the providers of public services to account originated in Sweden about 200 years ago. Our Public Protector, Mr Selby Baqwa, is one of these classic Ombudsmen. In recent years, the concept has been enlarged and Ombudsmen have been appointed worldwide to watch over sectors of private enterprise that have a large social impact. Some crisis usually prompts the establishment of an Ombudsman.

Ombudsmen have proved to be highly effective in resolving problems where power is wielded over the public by large and powerful bodies, whether governmental or private. An Ombudsman allows those who cannot afford legal action to have a voice and to obtain justice informally. As a result of the valuable function they provide, Ombudsmen are increasingly seen as an essential component of a truly democratic society.

Ombudsmen have a reputation for impartiality, uncompromising integrity and independence. Some governments have passed legislation preventing those who are not real Ombudsmen from using the title. In South Africa there are several Ombudsmen in office. The financial services industry is watched over by the Short Term Insurance Ombudsman, the Life Assurance Ombudsman, the Pensions Fund Adjudicator and the Banking Ombudsman.

*“Graag wil ek u bedank vir die advies wat u aan ons gegee het.”*

*“I wish to take this opportunity to thank you for the prompt and efficient manner in which you have dealt with my complaint.”*

### **A signature: forged or not?**

A customer's signature was forged on a stolen cheque. The bank maintained that the cheque had been signed by the customer, but finally conceded that the signature had been forged. The bank refunded the amount of the cheque.

## **Lightning does strike twice**

We were amazed when a complainant told us that his company had 15 cheques lost in eight months. Five cheques had been lost in one month! Fortunately, the complainant in this matter did not sustain loss because in each case replacement cheques could be obtained. We intend to recommend payment of a fairly substantial amount to compensate the complainant for the inconvenience he suffered in obtaining so many replacement cheques.

*"It is a source of great encouragement to know that prestigious institutions such as yours are willing and able to lend support to the man in the street in times of need. Thank you."*

## **The 'cash' deposit scam**

The complainant sold computers. When she wrote to us, she explained that she had been the victim of a scam. The fraudster had phoned from Bloemfontein and placed an order for a computer. It had been arranged that he would deposit cash, not a cheque, into the complainant's bank account and fax her a copy of the deposit slip. Within hours she received a fax which showed that cash at the agreed price had been paid into her account.

The following day she phoned her bank and asked whether the money was in her account. She claimed that she had used the word "cash" when she had spoken to her bank. In any event, she was told that her account reflected the payment. She allowed the computer to be collected. To her dismay she discovered a few weeks later that a cheque, not cash, had been deposited into her account and that it had "bounced". Of course, the original deposit slip reflected the details of the cheque which had been deposited.

She blamed her bank for her loss claiming that she would not have parted with the computer if she had not been told by the bank that the money was safely in her account.

The bank denied liability saying that their staff member (X) could not remember whether the word "cash" had been used. We argued that when a customer telephoned his bank to enquire whether a specific amount was in his account it was not an idle enquiry and the bank had to give an accurate reply. In other words, even if the word "cash" had not been used, X should not have answered in the affirmative unless he was sure that the money was in the complainant's account.

The bank did not accept liability without a struggle. It used many and varied arguments to avoid liability. For example, it said that the scam was so prevalent that the complainant should have been more careful. We countered that argument by pointing out that if the bank knew that the scam occurred frequently, X should have been more careful when he dealt with the complainant's enquiry. We were disturbed when the bank said it would not consider the claim until the complainant furnished it with the original copy of the duplicate deposit slip. Clearly, such document was in the possession of the fraudster.

Eventually the bank decided that in the special circumstances of the case, it would accept liability.

When the same type of scam is referred to us, we support the complaint only if the complainant contacted the bank before delivering the goods.

*"I hereby express my gratitude to your Office for intervening in the dispute. You*

*really came to my rescue as all my previous efforts to solve the problem were unsuccessful. I am now a happy man."*

### **A bank that granted an overdraft to pay cancelled debit orders**

A customer who had a current account signed debit orders for two insurance policies. The customer had no overdraft facilities and had not requested his bank for such a facility. When the customer experienced financial problems, he instructed his bank not to pay out the debit orders, as he could no longer afford the premiums.

However, the bank continued to pay the debit orders even though the customer had insufficient funds in his account to meet the premiums. As a result of this, the customer was "granted" an overdraft of approximately R3 500.00, which he had not asked for and did not want.

The customer was unaware of the situation until he was contacted about the "overdraft". The customer contended that it was very unfair of the bank to continue to pay out the debit orders by granting him an unrequested and unwanted overdraft.

After admitting that the customer had requested that the debit orders be stopped, the bank decided to write off the balance remaining on the overdraft. However, as the customer had received the benefit of the policies during the period that they remained in force and because he had failed to notify the insurance companies that the debit order should be stopped, we accepted that no refund was due of amounts he had already paid.

### **A breach of banking confidentiality embarrasses a customer in court**

The complainant, a widow, was the defendant in a High Court case. The plaintiffs were two middle-aged relatives. There was a great deal of bitterness between the parties which could only happen in a family dispute.

The plaintiff's attorneys served a subpoena on the complainant's bank manager, requesting him to produce details of her financial affairs at the trial. The bank manager handed a file containing such information to the Deputy Sheriff when he served the subpoena. This was then given to the Plaintiff's attorneys.

The legal position in such a situation is clear. The bank manager should not have handed the file to the Deputy Sheriff but should have taken the file to court on the trial date. The judge would then have decided whether the plaintiff's attorneys were entitled to the file.

The bank manager's conduct was a clear breach of the duty of confidentiality which the bank owed to its customer, the complainant.

The complainant claimed that she had lost the case because of the bank's conduct and said that she had been deeply embarrassed by her hostile relatives having access to details of her private finances. After studying the judgement, we decided that the judge had not relied upon the financial records in determining the outcome of the case, and therefore we did not support the complainant's contention that the bank had caused her to lose the case.

However, we had no doubt that the bank had seriously breached its duty of confidentiality and that the complainant had a valid claim for compensation. The bank offered an apology and contended that as "general damages" could not be

awarded for a breach of contract, no payment should be made to the complainant. However general damages can be awarded when a case is based on the law of delict ("tort" in British law) so we pressed for payment for a fairly substantial sum on this basis.

After protracted discussions, the bank agreed to pay an amount that was acceptable to the complainant. This was the first time that we had invoked the law of delict.

*"My family and myself are so happy to see that there is really someone who can listen and do something positive and free of charge. Nothing this positive has ever happened in my life."*

### **An unreasonable expectation**

A bank customer was informed that a customer of his had deposited a cheque into his account. The complainant went to an ATM four hours later and requested a balance on his account. He received information from the ATM slip that the amount had been deposited. The amount was described on the slip as "available". The customer misunderstood this to mean that the amount had been cleared.

On the strength of this information, the customer handed over the goods. When the cheque was returned unpaid, the customer approached the Ombudsman for assistance, claiming that the bank had provided him with incorrect information. Although the message on the slip was misleading, we decided in this case that the complainant had acted unreasonably in believing that a cheque could have been cleared within four hours and that he was the cause of his own loss.

### **A successful ATM complaint**

At a rural branch of a bank, only one person was responsible for opening the ATM and handling the deposits made at the machine. A customer claimed he had deposited R1 000.00 at the ATM in R10.00 notes. However, the bank official who emptied the machine, stated that the ATM envelope deposited by the customer was empty when he opened the machine.

Upon finding that only one person had emptied the ATM and that this person had been involved on a previous occasion when cash went missing, the bank reimbursed the customer.

A salary cheque: first lost, then stolen The Department of Education paid a teacher her salary by cheque every month. In November 1998, the teacher deposited her salary cheque into her bank account and was immediately credited with the amount. Two months later, when she obtained a mini statement from an ATM, she noticed that the amount of her salary had recently been debited to her account. She immediately went into the bank to enquire why the amount had been debited, only to be told that the bank had lost the cheque some time ago.

The bank had been aware that the cheque was lost soon after it was deposited, but had failed to inform the complainant. Meanwhile, it transpired that the cheque had in fact been stolen. The thief had managed to have the cheque paid out to him and as a result, the Department of Education had been debited with the amount and refused to issue a replacement cheque.

Had the bank informed the teacher in good time of the loss of the cheque, it could

have been stopped. In this case, the bank reimbursed the complainant for her loss.

A bank that did not ask for identification when cashing a cheque An amount of R9 000.00 was found to be missing from a customer's account. A cheque for that amount had been cashed over the counter. The number of the cheque was six numbers ahead of that of the last cheque drawn by the customer. A poor forgery of the customer's signature appeared on the cheque. The teller confirmed that cash had been paid to an unknown man who had not been asked for his I.D. number. Having regard to the size of the cheque and the circumstances in which it was presented for payment, it could have been expected of the bank that it would telephone the customer to ask if the cheque should be paid. This was not done. The bank agreed to refund the amount of the cheque.

### **The alteration of a cheque crossing not checked by the bank**

A cheque for about R4 000.00 had been altered by adding a crossing in a way that helped to change the payee's name. The thief made this crossing after the cheque was issued, an act unlawful in terms of section 77 of the Bills of Exchange Act. The other alterations were apparent from the use of different coloured ink. The drawee bank finally agreed to refund the amount of the cheque to the drawer.

### **Goods sold and delivered on unpaid cheques**

The complainant had on three occasions sold goods to Y who in turn sold the goods to his customers. On each occasion, the complainant accepted a cheque from Y. All three cheques "bounced". The bank denied liability. The complainant contended that the bank was responsible because of the particular circumstances ? and should reimburse her in full in respect of all three amounts.

We set up a meeting in our offices which was attended by the complainant and the bank. The bank brought along one of its legal advisers. During the course of the discussions which took place, the following facts were canvassed:

- The complainant delivered goods and accepted Y's first cheque believing that he depended on her for the goods in question and therefore his cheque would not "bounce".
- Sixteen days after the first cheque was deposited the bank knew that it had been dishonoured but did not advise its client until three weeks had elapsed.
- The complainant accepted a second cheque from Y twenty-one days after the first cheque and delivered goods to Y believing that the first cheque had been honoured (paid). She wrote "special clearance" on the cheque before depositing it.
- Thirty days after the first cheque was accepted, the complainant again delivered goods to Y. She assumed that the first two cheques had been paid and again wrote "special clearance" on the cheque before depositing it.

### **We adopted the following attitude:**

- With regard to the first cheque we pointed out that as this was the first time the complainant had done business with Y, she accepted the risk that his cheque would not be paid. Accordingly, we did not consider the bank to be liable for

this cheque.

- With regard to the second cheque, the complainant again accepted the risk that the cheque would not be paid. We asked the bank why it had ignored the words "special clearance" written on the cheque. Its legal adviser explained that a depositor had to arrange a special clearance with the teller when a cheque was deposited. He accepted that it was not unreasonable for a customer to assume that a bank would scrutinise a cheque and see the words "special clearance". He was embarrassed when the complainant pointed out to him that the bank had charged a fee for the special clearance of the third cheque.
- With regard to the third cheque which was for a much larger amount than the other two cheques, we argued that had the bank advised the complainant that the first two cheques had not been paid she would not have accepted such cheque. The bank accepted such argument. The bank was reluctant to accept liability for the second cheque. We pointed out that had the bank contacted the complainant by telephone immediately after it knew that that first cheque had been dishonoured, she would not have accepted the second cheque. The matter was resolved on the basis that the bank accepted liability for the full amount of the third cheque and for half of the amount of the second cheque.

### **The Banking Ombudsman's existing mandate**

### **The Banking Ombudsman's proposed Terms of Reference**

A complainant asked us if we could prevent the imminent sale in execution of his late mother's house. The bank had informed the complainant that it intended selling the house by Sheriff's auction to satisfy a judgement of approximately R20 000.00. The complainant, one of the heirs of the estate, did not understand why the bank was selling the house, as a life insurance policy covered the full balance of the bond.

The complainant was in possession of a deposit slip showing that the balance of the bond owing had been paid to the bank. The complainant approached the Office just two days before the sale was due to take place; he had only recently found out that a Banking Ombudsman existed.

We faxed a letter to the bank concerned, explaining the situation and asking the bank to investigate the matter before proceeding with the sale of the house. The bank acted immediately, and discovered that the executor of the deceased estate had waited several years before claiming the balance of the bond from the insurance company. During this time, the bond installments had not been paid and an additional amount of R20 000.00 had become due.

The bank postponed the sale so that it could investigate why the executor delayed claiming from the insurance company and later informed us that it had decided, in the circumstances, to write off all amounts owed by the deceased estate.

This was a commendable response and we were able to give the good news to a very relieved complainant.