Consumer Note 14

Closure of Bank Accounts - Circumstances under which banks close customers' account

Disclaimer

Please note that the information provided does not constitute expert legal or financial advice. You should consult a legal professional or financial adviser for expert advice.

We have only mentioned sections of the various Acts where they are applicable to the complaints we receive. These Acts however contain many other sections and details that may not have been mentioned. There may also be other legislation that is applicable. For more information and detail on the Acts and other applicable legislation you should consult a legal professional.
The purpose of the document is to provide you with practical information based on our experience. Each case we investigate is however assessed on its merits.

Introduction

It needs to be stressed that the office of the Banking Ombudsman is impartial and independent. This article is neither a defence nor a criticism of the business practices of any company, the conduct of any individual or actions taken by any bank.

It is intended solely to expound upon the salient principles that ought to be adhered to, to ensure that South African institutions are compliant with both local and international laws and conventions designed to effectively combat financial crime.

Background

Earlier this year, several banks closed the accounts of a certain investment company. Whilst the confidential nature of the bank/customer relationship precluded the banks from furnishing reasons for the closures, it is widely speculated that a possible reason is that the owners of the company allegedly exercise considerable influence over the South African President and use that influence to secure favours.

An intimation as to the reason for the action by the banks appears in a statement attributed to the Banking Association, where it is reported as stating that banks must comply with regulations relating to the Financial Intelligence Centre Act (FICA) and money laundering.

With the reported reference by the Banking Association to FICA and money laundering, we think it apposite to touch on some of the relevant legislation and conventions with which financial institutions must comply.

The Mischief – Money laundering

What is money laundering?

Criminal activity can generate substantial profits for the individual or group that carries out the act. Money laundering is the processing of these criminal proceeds to disguise their illegal origin. This process is of critical importance, as it enables the criminal to enjoy these profits without jeopardising their source.

How much money is laundered per year?

The United Nations Office on Drugs and Crime (UNODC) estimates that the sum of money laundered globally in one year is 2% - 5% of global GDP, or USD 800 billion to USD 2 trillion.

Laws and Conventions

Some features of the more immediate laws and conventions that financial institutions have to comply with are highlighted.

United Nations Convention against Corruption – Article 68(1) of United Nations Resolution 58/4 of 31 October 2003

South Africa is a signatory to the United Nations Convention against Corruption, which came into effect on the 14th December 2005. It is a globally legally binding international anti-corruption instrument which requires States to implement several anti-corruption measures which may affect their laws, institutions and practices. These measures are aimed at preventing corruption, including domestic and foreign bribery, embezzlement, trading in influence and money laundering.

The Financial Action Task Force (FATF) on money laundering

In response to mounting concerns over money laundering and recognising the threat posed to the banking system and to financial institutions, the FATF, which is an inter-governmental body was established in 1989 by the ministers of it's various member jurisdictions. It is a policymaking body and has no investigative powers.

The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.

In April 1990, the FATF issued a report containing a set of Forty Recommendations, intended to provide a comprehensive plan of action needed to fight money laundering and terrorist financing.

These recommendations were revised in 1996, 2001, 2003, 2012 and 2014 to ensure the further strengthening of the agreed international standards for combating money laundering and terrorist financing.

The Financial Intelligence Centre Act

Pressure from the FATF and the international community to implement effective money laundering control legislation led to the development of the Financial Intelligence Centre Act (FICA). South Africa's commitment to the implementation of the FATF recommendations as codified in FICA meant South Africa became the first African country to become a fully-fledged member of FATF.

South Africa was accepted as a member of the FATF in June 2003 after it was evaluated and found to have developed a comprehensive legal structure to combat money laundering activities.

The Financial Intelligence Centre Act (38 of 2001) (FICA) came into effect on the 1st July 2003 and was introduced to fight financial crime, such as money laundering, tax evasion, and terrorist financing activities.

A Politically Exposed Person (PEP)

In financial regulation, a PEP is a term describing someone who has been entrusted with a prominent public function. A PEP generally presents a higher risk for potential involvement in bribery and corruption by virtue of their position and the influence that they may hold.

The Financial Intelligence Centre Amendment Bill (33B - 2015)

Section 21G of the Bill introduces the concept of a domestic prominent influential person (PIP). Section 21G(c) obliges a bank to conduct enhanced ongoing monitoring of any business relationship with a PIP.

Parliament has already passed the Amendment Bill and it is with the President for signature.

If the President does not sign the Amendment Bill, South Africa will be non-compliant with the FATF recommendations. FATF will then issue its public statement identifying the Republic as a jurisdiction with strategic deficiencies in anti-money laundering / countering terrorism financing measures.

Prevention and Combatting of Corrupt Activities Act (Act 12 of 2004).

The Prevention and Combatting of Corrupt Activities Act (Act 12 of 2004), imposes a duty on banks to report knowledge of corrupt activities.

In terms of Chapter 7, Section 34 (1)(b) of the Act, any person who holds a position of authority and knows or ought reasonably to have known or suspected that any other person has committed an act of corruption involving an amount of R100 000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official.

Naturally, failure to comply with the provisions of this Act, could result in a fine and/or a term of imprisonment and/or a further fine equal to 5 times the value of the gratification involved in the offence.

The Banks Act (94/1990)

In terms of the Section 6(2) of the Banks Act (the Act), as amended by Section 3(b) of the Banks Amendment Act (19/2003), Banks are obliged to submit to the supervision and control of the Registrar of Banks and must meet and maintain various standards imposed upon it by the Act including details of the funds held and their business practices.

Failure on the part of a bank to meet these standards may result in a bank being liable for losses and even criminal sanctions.

The Inspection of Financial Institutions Act (80/1998)

In terms of Section 5 of The Inspection of Financial Institutions Act (80/1998), banks are subject to the investigation and inspection of their affairs. Failure to co-operate on the part of banks and bank employees could render them liable to the payment of a fine or to imprisonment or both a fine and imprisonment.

The Prevention of Organised Crime Act (POCA) (121/1998)

Banks have to comply with the measures spelt out in POCA, especially Sections 4-6, to combat money laundering.

Failure to comply with these measures could attract a fine of R100 million or 30 years' imprisonment for individual bank employees.

Code of Banking Practice

The Code of Banking Practice states that a bank will not close an account without giving reasonable prior notice. A bank however reserves the right to protect its interests in its discretion, and this might include closing an account without giving prior notice if a bank is compelled to do so by law (or by international best practice); if an account has not been used for a significant period of time; or if the bank has reason to believe that an account is being used for any illegal purposes.

A bank's contractual right

Our courts have upheld a bank's right to close accounts on the basis that the agreement that establishes the banker / customer relationship constitutes a contract like any other and that the general rules of contractual interpretation apply.

A term within that contract which allows the bank at will, subject only to giving reasonable notice to terminate the contract, (provided the termination is procedurally fair and does not offend constitutional values), has been held not to be unusual, onerous or unconscionable.

Conclusion

So, not only are banks entitled to close an account in terms of the contract that establishes the banker / customer relationship, subject to certain conditions, they may indeed be obliged to do so in terms of domestic and international law and international convention.

Banks must take care to ensure that they comply with their statutory and common law obligations, since a failure to do so could attract very significant monetary penalties.

Recent examples of the level of penalties imposed on banks for alleged money laundering offences include:

- In December 2012 HSBC Bank was fined the sum of USD1,9 billion following a US Senate Sub-Committee investigation.

- In March 2012, a record fine of £8,75 million was imposed on Coutts Bank by the Financial Services Authority.

The Ombudsman for Banking Services
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