The legal duty of a bank to protect non-customers from pure economic loss

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Up until recently, our law has advanced cautiously from the principle that a claim for pure economic loss is not actionable under the Lex Aquilia. Dating back to **Lillicrap Wassenaar and Partners v Pilkington Brothers (S.A) (Pty) Ltd.** [1985] 1 All SA 347 (A), our courts gradually came to recognise that a claim for pure economic loss may be actionable where there is a legal duty on the defendant to protect against such harm. However, the imposition of this legal duty in cases of pure economic loss was always a matter of careful judicial determination involving the balancing of various criteria of public or legal policy. See **Fourway Haulage SA (Pty) Ltd v SA National Road Agency Ltd** 2009 2 SA 150 (SCA).

When it comes to claims of pure economic loss against banks, our courts have been willing to grant redress in certain limited circumstances where (i) the bank's customer, prospective customer, and in some situations a non-customer acted fraudulently and (ii) the bank was negligent in not detecting the fraud. In **Indac Electronics (Pty) Ltd v Volkskas Bank** Ltd 1992 1 SA 783 (A), the Appellate Division found that there is a duty of care owed by a collecting banker to the owner of a cheque not to collect the proceeds negligently on behalf of someone not entitled to payment. The case involved fraud by a non-customer and negligence by the bank in not detecting the fraud.

In **KwaMashu Bakery Ltd v Standard Bank of South Africa Ltd** 1995 1 SA 377 (D), the court expanded the duty of care to encompass the obligation on a collecting banker to take reasonable care when receiving and processing an application to open a new bank account through which cheques belonging to another person were fraudulently collected for payment. The case involved fraud by a prospective customer of the bank and negligence by the bank in not detecting the fraud.

In **Energy Measurements (Pty) Ltd v First National Bank of SA Ltd** 2001 (3) SA 132 (W), the court dealt with a situation where the director of a company who sought to open the account in question was unknown to the bank. In such circumstances, the court found that a bank is under a duty to take reasonable measures to ascertain and verify the new customer's identity and trustworthiness to combat the risk that the account could be used for fraudulent purposes. This case involved fraud by a prospective customer of the bank and negligence by the bank in not detecting the fraud.

In **Columbus Joint Venture v Absa Bank** 2002 (1) SA 90 (SCA), the court distinguished the duty of a bank towards a stranger who wishes to open an account from an existing client who requests further facilities or another account to be opened. The SCA found that a bank does not have the same duty of care towards existing customers wishing to open a new account because these customers generally have verified identities and confirmed work and residential contact details. The case involved fraud by an existing customer of the bank.

In **Commissioner South African Revenue Service & Another v Absa Bank Limited & Another** 2003 (2) SA 96 (W), the court concluded that society's notion of justice demands that a bank should not turn a blind eye to the possibility of a customer's using an account for criminal purposes. Where large VAT refunds are received and large amounts in cash are withdrawn immediately thereafter, while to the knowledge of the bank no genuine transactions took place in the account, society would not expect that the bank could stand back with impunity. This case involved criminal activities by a customer of the bank and negligence by the bank in not detecting the criminal activities.

By contrast, the recent case of **Spar Group Limited v Absa Bank Limited** [2020] ZAGPJHC 259 involved no fraudulent activity by a customer, prospective customer or non-customer of the bank, and arguably no negligence by the bank. It involved a request by a customer of Absa bank to reverse several debit order payments, and the decision by Absa bank to accede to that request. According to the South Gauteng High Court, this situation represented a "novel issue of delictual liability" resulting from a bank's "wrongful and negligent" conduct in the reversal of EFT payments collected by debit order. The primary issues to be determined were whether (a) a legal duty rested on Absa to act reasonably towards a third party (Spar) which had been adversely affected by the debit order reversal; (b) Absa breached that duty; and (c) Spar's interests should be accorded judicial protection against Absa's conduct in this situation.

The court compared the matter to the **Indac** case (see above) in concluding that Absa had a legal duty in the present case to establish whether the reversal of the debit order would cause financial loss to Spar. Even though Absa did not have a contractual relationship with Spar, it assumed a legal duty to Spar (as beneficiary/payee) to exercise its discretion to refuse to effect the reversals where Spar might be prejudiced by the non-payments.

Closing Thoughts

Anyone considering the full repercussions of the **Spar** case would be justifiably startled by the propositions for which it stands:

- A bank cannot accept an instruction from a customer (to which it owes a legal duty) to stop a debit order if the result would be to prejudice a third party beneficiary which is not its customer, but to which it now owes an overriding legal duty.
- Instead of complying with its customer's instruction, the bank needs to enter into a potentially convoluted exercise to find out from the third party beneficiary whether the bank's own customer is acting in good faith by attempting to reverse the debit order.
- If the bank comes to the conclusion that the reversal of the debit order is not in good faith, and would prejudice the third party beneficiary (which is inevitable every time a debit order is reversed), then the bank has a legal duty not to comply with its customer's request, and instead protect the interests of the third party by refusing to reverse the debit order.

In embracing these propositions, the High Court effectively sidestepped a long line of judicial precedents which impose a limited duty on a bank to prevent harm to third parties that are not its customer. If not overturned on appeal, the result of this case is that every time a customer of a bank tries to reverse a debit order, the bank may find itself in the unenviable position of having to assess the prejudice that the third party beneficiary will suffer before reversing the payment. Aside from having a chilling effect on a bank's ability to honour the requests of its customers, this judgment is antithetical to the principle of wrongfulness in our law of delict. In the words of Brand JA in **Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng** 2014 (2) SA 214 (SCA), "holding contracting parties delictually liable for harm suffered by strangers, flowing from the repudiation of their contracts, would raise the spectre of indeterminate liability to a multiplicity of potential claimants". Similarly, by holding a bank liable to third party beneficiaries in the absence of fraud by a customer or potential customer and negligence by the bank is inviting the very indeterminate liability that our law has so diligently tried to avoid.

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