The FSCA Conduct Standard for Banks and the Termination of the Bank-Client Relationship: Some Thoughts

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SUMMARY

Our courts have considered the termination of bank-client relationships on several occasions – most notably in *Bredenkamp v Standard Bank* 2010 (4) SA 468 (SCA) (*Bredenkamp*). Several cases following *Bredenkamp* reaffirmed the principles established in *Bredenkamp*. However, it would go a long way towards achieving consistency in the approach of all South African banks if a single instrument stipulated how banks may fairly terminate a bank-client relationship. This research investigates to what extent an instrument published by the Financial Sector Conduct Authority (FSCA) creates this standardisation in the termination process across the banking sector and whether the termination provisions in this instrument resemble what was established in *Bredenkamp*.

The Financial Sector Regulation Act 9 of 2017 (FSR Act) explicitly empowers the FSCA to make conduct standards in order for the FSCA to achieve its obligations under the FSR Act. This article briefly discusses the provisions contained in Conduct Standard 3 of 2020 for Banks relating to the termination of a bank-client relationship. This research considers whether the provisions in the Conduct Standard resemble the duty, as established through case law, on banks when terminating their relationship with a client. Put simply, this study seeks to determine to what extent the termination provisions contained in the Conduct Standard correspond to or expand on the principles enunciated in *Bredenkamp*. It is clear in this research that the principles included in case law on the termination of the bank-client relationship have

not merely been repeated but have been expanded upon in the Conduct Standard for Banks.

KEYWORDS: banking sector; common law of contract; contract; termination; bank-customer relationship; financial sector; Financial Sector Conduct Authority; Conduct Standard for Banks

1 INTRODUCTION

The contract concluded between a bank and its client informs the scope of the bank-client relationship.[1] This relationship is correctly referred to as being *sui generis.* The common-law principles of contract law generally regulate the complex nature of the bank-client relationship; one aspect thereof, namely termination, has been considered by our courts on several occasions – most notably in *Bredenkamp v Standard Bank,*[2] as briefly discussed below. However, the scope of the bank-client relationship is also influenced by the content of industry-specific documents, which includes the Code of Banking Practice (the COBP)[3] and Conduct Standard 3 of 2020 (Banks) (Conduct Standard for Banks).[4] This influence is clear, as banks incorporate the provisions from such instruments into the terms and conditions entered into with their clients. Moreover, with the implementation of the Financial Sector Regulation Act[5] (FSR Act), a renewed focus on fair treatment of clients has brought different aspects of the bank-client relationship under scrutiny, potentially impacting how a bank should terminate its relationship with a client. More specifically, the Treating Customers Fairly (TCF) Principles are applicable, with particular reference in this research to TCF Outcome 6, which requires that customers not experience unreasonable post-sale barriers when they intend to change a product *or switch providers* (emphasis added).[6]

Having consistency among banks on why and how to terminate a client relationship fairly would ensure the fair treatment of South African financial consumers. Accordingly, this article aims to determine whether the provisions concerning the termination of a bank account, as clarified through case law, are comprehensively captured in the Conduct Standard for Banks

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1 *Joint Stock Co Varvarinskoye v Absa Bank Ltd* 2008 (4) SA (SCA) par 37. See also Schulze "The Bank's Right to Cancel the Contract Between It and Its Customer Unilaterally – *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA)" 2011 *Obiter* 217.

2 2010 (4) SA 468 (SCA) (hereafter *Bredenkamp*).

3 The Banking Association South Africa "Code of Banking Practice" (1 January 2012) https://www.banking.org.za/wp-content/uploads/2019/04/Code-of-Banking-Practice-2012.pdf (accessed 2025-04-10). Clause 7.3 (at 18–19) contains details of a bank's obligation when terminating the bank-client relationship.

4 Financial Sector Conduct Authority "Conduct Standard 3 of 2020 (Banks)" (3 July 2020) https://www.banking.org.za/wp-content/uploads/2020/07/Conduct-Standard-3-of-2020-BANKS-Annexure-A.pdf (accessed 2025-04-10).

5 9 of 2017.

6 Schmulow "Treating Customers Fairly (TCF) in the South African Banking Industry: Laying the Groundwork for Twin Peaks" 2022 30(1) *Afr J Int'l & Comp L* 26–30, where the author provides a summary of the origin and purpose of the TCF Principles.

to provide a standardised approach for use by all South African banks in the termination of the bank-client relationship. To achieve such a purpose, an analysis of existing law concerning a bank's right to terminate a bank-client relationship is required. It is necessary to analyse the case law on a bank's obligations and rights when terminating a bank-client relationship. Secondly, it must then be established to what extent the Conduct Standard for Banks adds to or merely now provides a documented stipulation of the South African law relating to the termination of a bank-client relationship. The contribution is novel in the sense that previous research did not reflect whether the provisions contained in the Conduct Standard for Banks added any provisions to the requirements clarified through case law in relation to a bank's duty when terminating a bank-client relationship, or whether the content of the Conduct Standard is merely a combined representation of what we already know. The next part of the discussion provides an overview of the law concerning the termination of a bank-client relationship as developed through South African case law.

2 AN OVERVIEW OF THE EXISTING LAW RELATING TO THE TERMINATION OF THE BANK-CLIENT RELATIONSHIP

2 1 Introduction

The foundation of a bank-client relationship is a consensual contract concluded between the parties. Thus, when terminating a bank-client relationship, the same principles that apply to any other contract will apply to a bank-client contract.[7] It is important to remember that banks must have the contractual freedom to decide with whom they contract and continue to be contracted. It is not ideal effectively to force a bank to keep a client where such a bank-client relationship could cause serious reputational risk for that bank.[8] However, the process that considers whether there is in fact a risk to the bank's reputation should be transparent and consistently applied by all South African banks.[9]

Schulze correctly points out that, as the underlying contract between a bank and its customer is a contract of mandate, there is also a duty on the client to conduct its business to avoid operational or business risk for the bank.[10] Thus, where a client, as the mandatory, acts in contravention of this duty, a bank would be in a position to terminate the bank-client relationship

7 Schulze 2011 *Obiter* 218.

8 Banks have been challenged on their decision not to onboard a client with certain political connections. See Hlati "ANC Bigwig Puzzled by Standard Bank's Move" *CapeTimes* (29 November 2024) https://www.iol.co.za/capetimes/news/anc-bigwig-puzzled-by-standard-banks-move-6582d926-1292-4e2e-968d-f538ae164877 (accessed 2024-02-02).

9 See in this regard Letsoalo "Navigating Reputational Risks: Cautionary Considerations for South African Banks in the Unilateral Termination of Bank-Customer Relationships Navigating Reputational Risks: Cautionary Considerations for South African Banks in the Unilateral Termination of Bank-Customer Relationships" 2024 27 *PER* http://dx.doi.org/10.17159/1727-3781/2024/v27i0a16012.

10 Schulze 2011 *Obiter* 220.

unilaterally regardless of whether or not the contract contained a *lex commissoria*.[11] This would be a material breach of the contract by the client, which would allow the bank to terminate the bank-client relationship unilaterally. However, before cancelling the bank-client relationship, regardless of the reason for cancellation, the bank must provide the client with reasonable notice.

South African courts have handed down several judgments concerning a bank's right to terminate a bank-client relationship. *Bredenkamp* is referred to most frequently; others include those matters related to the Gupta family, including *Minister of Finance v Oakbay Investments (Pty) Ltd*,[12] *South African Reserve Bank v Public Protector*;[13] *Annex Distribution (Pty) Ltd v Bank of Baroda*[14] and *Annex Distribution (Pty) Ltd v Bank of Baroda*.[15] Recently, the termination of a bank-client relationship was again considered in a few cases related to the Sekunjalo Group, one instance being *Survé v Nedbank*,[16] in which the court's comment concerning the termination of a bank-client relationship was obiter, as the court held that it did not have the necessary jurisdiction to hear the application. The facts of the case law mentioned are not repeated, as previous research has extensively discussed such case law.[17]

2 2 *Bredenkamp*

The complexities of the bank-client relationship and a bank's right to terminate such a relationship, specifically unilaterally, were fully ventilated and considered by the Supreme Court of Appeal in *Bredenkamp*.[18] In short, the appellant's application was premised on the fact that the bank had provided reasonable notice before closing the appellant's accounts and had followed the terms of the underlying agreements, such termination was unfair and, therefore, invalid and unconstitutional.[19] The appellant in *Bredenkamp* failed to prove on appeal that this matter dealt with a constitutional issue.

The court ultimately found that the bank was entitled, in terms of the contract between it and the client, to terminate the bank-client relationship,[20] albeit requiring that reasonable notice be given to the client before the

11 *Ibid*.
12 2018 (3) SA 515 (GP).
13 2017 (6) SA 198 (GP).
14 2018 (1) SA 562 (GP).
15 2017 ZAGPPHC 639.
16 2022 ZAWCHC 19.
17 Schulze 2011 *Obiter* 211–223. See also Schulze and Eiselen "The Unilateral Termination by a Bank of the Bank-Client Agreement Between It and Its Client" 2022 *TSAR* 828–838.
18 See Schulze 2011 *Obiter* 211–223 for a discussion of how the two lower courts dealt with the matter before reaching the Supreme Court of Appeal.
19 *Bredenkamp supra* par 1.
20 *Bredenkamp supra* par 64.

termination occurred. The court further held that forcing a bank to endure a relationship with a client against its will would be inconceivable.[21]

In its judgment, the SCA laid down seven guiding principles, suggesting what a bank must do before terminating a bank-client relationship. These principles, as summarised by Schulze,[22] are: (1) a bank has a right to terminate a relationship with its client, albeit with notice, per the underlying agreement, which would be in the form of a *lex commissoria*;[23] (2) a bank must "consider and assess" its reasons for wanting to close a bank account;[24] (3) a bank is not required to provide reasons for terminating a relationship with a client in the ordinary course of events; (4) a client can summarily terminate a bank-client relationship, but a bank must give reasonable notice before it terminates a bank-client relationship;[25] (5) a bank must ensure that a decision to terminate a bank-client relationship does not cause the client to become (temporarily) unbanked, unless the bank has compelling reasons for cancelling the contract;[26] (6) a termination should not contravene any constitutionally protected right, and it must not be against public policy;[27] and (7) the duty of confidentiality a bank owes to a client continues even after the termination of the bank-client relationship.[28]

2 3 Case law following *Bredenkamp*

Since the *Bredenkamp* matter, our courts have heard many other cases in which the nature of the bank-client relationship and a bank's right to terminate a relationship were considered. Many of the cases relate to entities linked to possible improprieties where there was some link to the government. The first selection of case law relates to the Gupta family, while another collection of case law relates to the Sekunjalo Group.

In the matter of *Annex Distribution v Bank of Baroda*,[29] the facts of which are almost identical to those in the *Bredenkamp* matter, the court confirmed the position as set out in *Bredenkamp* – that the relationship between the bank and its client is contractual and that the rules of the contract govern a decision by the bank to terminate its relationship with a client.[30] The court in *Minister of Finance v Oakbay Investments*[31] further confirmed the general

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21 *Bredenkamp supra* par 57.

22 Schulze 2011 *Obiter* 220–222.

23 *Bredenkamp supra* par 24. See also Schulze 2011 *Obiter* 220.

24 Schulze 2011 *Obiter* 221.

25 Schulze 2011 *Obiter* 221. According to Schulze, 30 days' notice would be reasonable.

26 *Ibid*. Harms observed what should remain valid for any matter related to whether a bank can terminate the bank-client relationship, namely that it is not fair to expect a bank to keep a client where the client relies on the fact that no other bank will take them as a client (*Bredenkamp supra* par 60).

27 Schulze 2011 *Obiter* 222. Instances where termination would not be allowed include discrimination based on gender, race, culture or religion (*Bredenkamp supra* par 64–65).

28 Schulze 2011 *Obiter* 222.

29 *Annex Distribution (Pty) Ltd v Bank of Baroda* 2018 (1) SA 562 (GP).

30 *Annex Distribution (Pty) Ltd v Bank of Baroda* 2018 (1) SA 562 (GP) par 22. This court also referred with approval to the principles in *Hlongwane v Absa Bank Ltd* [2016] ZAGPPHC 938.

31 *Supra* par 56.

principle that the relationship between a bank and a client is contractual in nature.

More recently, much adjudication has occurred concerning the termination of the bank-client relationship between some South African banks and companies forming part of the Sekunjalo Group. Three different banking institutions elected to terminate their relationship with approximately 200 companies forming part of the Sekunjalo Group. The Sekunjalo Group approached the Eastern Cape High Court,[32] the Equality Court sitting at the Western Cape High Court,[33] and the Competition Tribunal,[34] to name a few, for interim interdicts preventing the termination of the relationships between the banks and the companies forming part of the group. The closure of the bank accounts for these companies was triggered by the publication of the Mpati Commission of Inquiry report and the implication of allegations of impropriety raised against certain companies in the Sekunjalo Group concerning the Public Investment Corporation.

The first of the Sekunjalo Group applications was brought by Talhado Fishing Enterprises (Pty) Ltd (Talhado) against Firstrand Bank Limited (FNB).[35] FNB had, based on reputational risk, elected to terminate its relationships with Talhado, and Talhado disputed FNB's right to do so. Talhado's application was unsuccessful. In its judgment, the court agreed with the judgment in *Bredenkamp* and upheld the bank's right to terminate the relationship based on the provisions of the underlying contract.

In another matter related to the Sekunjalo Group, the Western Cape High Court did not grant an interdict that would have prevented Nedbank from terminating its relationship with the aggrieved client.[36] The respondents' opposition to the application relied on the court's decision in *Bredenkamp*. While the court ultimately found that it did not have the relevant jurisdiction to deal with the matter and was accordingly not required to deal with the merits of the matter, it did make some interesting comments relating to the right of the bank in question to terminate the bank-client relationship. In referring to the judgment in *Bredenkamp*, the Western Cape High Court expressed the view that *Bredenkamp* should not simply be applied "uncritically or mechanically" to all bank-client relationships,[37] and that, as stated by the Constitutional Court in *Barkhuizen v Napier*,[38] a contractual term is unenforceable if enforcement would be unfair or unjust. Nevertheless, the authors agree with Schulze and Eiselen that this obiter

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32 *Talhado Fishing Enterprises (Pty) Ltd v Firstrand Bank Ltd t/a First National Bank* [2023] ZAECQBHC 16.

33 *Africa Community Media (Pty) Ltd v Standard Bank of SA Ltd; Africa Community Media (Pty) Ltd v Standard Bank of SA Ltd NO* [2023] ZAWCHC 146.

34 Competition Tribunal *The Sekunjalo Group v Bidvest Bank Ltd, Mercantile Bank Ltd, Nedbank Ltd, Absa Bank Ltd, Standard Bank Ltd, Investec Bank Ltd, Sasfin Bank Ltd and First Rand Bank Ltd* (IR153Dec21) (16 September 2022) https://www.comptrib.co.za/case-detail/19857 (accessed 2024-02-24) (*Sekunjalo Group v Banks*).

35 *Talhado Fishing Enterprises (Pty) Ltd v Firstrand Bank Ltd t/a First National Bank supra*.

36 *Survé v Nedbank* [2022] ZAWCHC 19.

37 *Survé v Nedbank supra* par 60.

38 2007 (5) SA 323 (CC).

remark should not be construed to mean that *Bredenkamp* was incorrect.[39] Ultimately, the position set out in the *Bredenkamp* case remains as the leading authority relating to the termination of a relationship between a bank and its client: a bank may terminate the bank-client relationship, at its discretion, albeit after providing reasonable notice, provided that such termination is not in contravention of either public policy or constitutional values.[40]

The respondents then approached the Equality Court, which granted an interim interdict preventing Nedbank from closing certain bank accounts of companies forming part of the Sekunjalo Group. Then, the Supreme Court of Appeal handed down a judgment on 18 December 2023, upholding an appeal against the decision of the Western Cape Division of the High Court sitting as the Equality Court.[41] The Supreme Court of Appeal held that even though the interim interdict granted by the Equality Court was typically not appealable, the facts of this matter were "one of those exceptional cases" where considerations of justice required the court to render this interim order appealable.[42] The Supreme Court of Appeal held that the respondents failed to make a clear case that Nedbank treated the respondents as "Black customers" differently from its "White customers". The court held that the respondents had not established the foundational element of discrimination owing to the client's racial identity. Ultimately, the respondents' case was based merely on perception and an inference of racial discrimination without providing evidence to support the allegations.[43] The Supreme Court of Appeal also held that considering the serious implications a claim of racial discrimination may have on Nedbank's reputation, there should have been proper evidence presented, and the Western Cape Court sitting as the Equality Court should not have made the interim order preventing Nedbank from closing the client's bank accounts in question.[44]

In their application to the Competition Tribunal, the Sekunjalo Group alleged that the conduct of the various banking institutions in closing their bank accounts and their refusal to provide banking services contravened sections 4, 5 and 8 of the Competition Act.[45] The scope of this article excludes a discussion regarding the provisions of the Competition Act.[46] In opposing the application, the respondent banks relied on *Bredenkamp*. In its judgment, the Competition Tribunal made two interesting remarks regarding the effect of competition law on the bank-client relationship. The tribunal remarked that while the law of contract, as correctly set out in the *Bredenkamp* judgment, may entitle banks to terminate a bank-client relationship without reason, banks were still required to act in compliance

39 Schulze and Eiselen 2022 *TSAR* 832.

40 Schulze and Eiselen (2022 *TSAR* 838) summarise the outcome in *Bredenkamp*.

41 *Nedbank Limited v Survé* [2023] ZASCA 178.

42 *Nedbank Limited v Survé supra* par 18.

43 *Nedbank Limited v Survé supra* par 25.

44 *Nedbank Limited v Survé supra* par 30.

45 89 of 1998.

46 However, mentioning the link between competition law and banking law merits a remark for future research to explore this link.

with the laws of competition.[47] The tribunal further remarked that, while *Bredenkamp* and the bank's commercial rights may be implemented in cases where there is no harm to competition, the competition authorities must intervene when there is harm to competition.[48] In conclusion, the tribunal granted interim relief in favour of the Sekunjalo Group, interdicting the respondent banks for six months from terminating the bank-client relationship by closing the client's bank accounts, pending an investigation by the Competition Commission of the matter. However, three of the eight respondent banks took the matter on appeal to the Competition Appeal Court and successfully overturned the tribunal's earlier decisions.[49] The Minister of Finance has also supported a bank's right to close accounts, following yet another instance in which the Competition Tribunal dismissed an interim relief application to force Nedbank Ltd to reinstate the group's bank accounts,[50] stating that banks are following the Conduct Standard when deciding how to deal with the closure of customers' bank accounts.[51]

Even though the foundation for the bank-client relationship relies on the contract between the parties, some instruments applicable to South African banks contain guidance on how the bank-client relationship should be terminated. The question answered in the next part is to what extent these instruments confirm or expand on the principles established in *Bredenkamp*.

2 4 The Code of Banking Practice

The Code of Banking Practice (COBP) is a voluntary code. Banks, as members of the Banking Association South Africa (BASA), must comply with the provisions of the COBP. Despite the COBP being a voluntary code, it has been suggested that its provisions may be regarded as terms implied by law derived from trade usage.[52]

In the COBP Preamble, BASA members are to be guided by "fairness, transparency, accountability and reliability" in their conduct with bank clients. The COBP further sets out the rights and responsibilities of customers,[53] and the principles of conduct required from banks when engaging with their customers.[54]

In respect of the termination of a bank-client relationship, the COBP requires that a bank: (1) provide its client with at least 20 business days' notice, or five business days' notice concerning credit agreements, before the bank implements changes in any terms and conditions or the

47 The *Sekunjalo Group v Banks supra* par 322.
48 The *Sekunjalo Group v Banks supra* par 323.
49 *Mercantile Bank, A Division of Capitec Bank Limited v Surve* [2023] ZACAC 2.
50 Ensor "Godongwana Backs the Right of Banks to Close Accounts" *Financial Mail and Business Day* (10 January 2025) https://bd.pressreader.com/article/281775634801303 (2025-04-10).
51 *Ibid*.
52 Du Toit "Reflections on the South African Code of Banking Practice" 2014 *TSAR* 568.
53 Cl 3 of the COBP.
54 Cl 6 of the COBP.

discontinuation of products and services;[55] and (2) only close a client's account after reasonable prior notice has been given to the client.[56] The COBP does not indicate what would be regarded as reasonable. The COBP also requires a bank to advise its client, when the client opens an account with the bank, of the client's rights and obligations concerning the banking account, including, among other things, how the bank will deal with a dormant account.[57] Banks must also inform clients of the implications of having dormant accounts, the failure to close accounts, and the steps that must be taken to claim any amounts due to the client that remain in a closed bank account.[58]

In addition, the COBP provides that banks must assist clients in closing accounts that they no longer require,[59] and should not close a client's account unless reasonable notice has been given to the client.[60] The COBP lists three circumstances under which banks may terminate the relationship with a client without giving the client prior notice. These are: (1) where the bank is compelled to do so by law; (2) if the client has not used the account for a significant period; and (3) where the bank believes the account is being used for any illegal purpose.[61] It does not sit well that a bank should be entitled to close a bank account without notice where there is a significant period the account was not used or where the bank merely has a belief (not proved) that the bank account is used for any illegal purpose.

The COBP is a voluntary code, but there is statutory regulation concerning the duties of a bank through the Conduct Standard for Banks. The provisions in the Conduct Standard related to termination are discussed next.

3 THE CONDUCT STANDARD FOR BANKS

3 1 Overview

The FSR Act empowers the FSCA, the regulator overseeing market conduct, to publish conduct standards on specific market-conduct-related matters.[62] Such conduct standards may relate to financial institutions,[63] key persons or representatives of financial institutions,[64] and contractors.[65] The FSCA must develop a supervisory regulatory framework to measure the conduct of

55 Cl 3.1 of the COBP.
56 *Ibid*.
57 Cl 7.1.7 of the COBP.
58 Cl 7.3 of the COBP.
59 Cl 7.3.1 of the COBP.
60 Cl 7.3.2 of the COBP.
61 Cl 7.3.3 of the COBP. These three instances are also listed in the Conduct Standard for Banks.
62 S 106 of the FSR Act. Cl 67 of the Second Draft of the Conduct of Financial Institutions Bill (CoFI Bill) refers to the authority, the FSCA, that can make conduct standards according to s 106 of the FSR Act.
63 S 106(1)(*a*) of the FSR Act.
64 S 106(1)(*b*) and (*c*) of the FSR Act.
65 S 106(1)(*d*) of the FSR Act.

financial institutions, and this will also relate to banks.[66] FSCA conduct standards will form part of this framework. One such conduct standard is the Conduct Standard for Banks.[67] Certain provisions of the Conduct Standard for Banks became operational on 3 March 2021.[68] Other provisions only became effective on 3 July 2021.[69] At the time of writing this article, no statistics were available on the extent to which South African banks were implementing the Conduct Standard for Banks.[70]

The purpose behind adopting conduct standards is to achieve specific objectives.[71] An objective that may relate to the termination of the bank-client relationship is fair treatment and education of financial customers.[72] The FSR Act also identifies the types of matters to which a conduct standard may relate.[73] These matters would include: (1) the prevention of abusive practices by financial institutions;[74] (2) the fair treatment of customers, which includes the appropriateness of products and services, marketing and promotion of products and services, and reporting requirements;[75] and (3) financial education programmes for customers.[76] In this regard, how a bank-client relationship is terminated relates to the fair treatment of customers.

3 2 Provisions concerning termination of a bank-client relationship

The Conduct Standard for Banks is more comprehensive concerning the termination, closure, withdrawal or switching of financial products or financial services if compared to the COBP. One paragraph is dedicated to the termination by a bank of a bank-client relationship, and another paragraph deals with a client termination of the relationship, potentially also including rights and obligations for the client.

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66 FSCA "Regulatory Strategy of the Financial Sector Conduct Authority: October 2018 to September 2021" (2018) https://www.fsca.co.za/Documents/FSCA_Strategy_2018.pdf (2025-04-10) 16.

67 This contribution does not contain a detailed analysis of the general provisions of this conduct standard as such a discussion has formed part of previous research. See Pesci and Koekemoer "The FSCA Conduct Standard for Banks as a Means to Reform the Internal Consumer Complaint Resolution Mechanisms of South African Banks" 2023 44(2) *Obiter* 254–270 for a discussion of those aspects of the conduct standard about consumer complaints.

68 Cl 3, 4, 5 and 6 of the Conduct Standard for Banks.

69 Cl 7, 8, 9 and 10 of the Conduct Standard for Banks.

70 However, see the reflection by the FSCA on the impact of the Conduct Standard for Banks in Makhubalo "How the Conduct Standard for Banks Has Elevated the Fair Treatment of Customers" (June 2021) https://www.fsca.co.za/TPNL/fsca%20Newsletter2/2.html (accessed 2023-11-01).

71 S 106(2) of the FSR Act.

72 S 106(2)(*b*) and (*c*) of the FSR Act.

73 S 106(3) of the FSR Act.

74 S 106(3)(*b*) of the FSR Act.

75 S 106(3)(*c*) of the FSR Act.

76 S 106(3)(*d*) of the FSR Act.

The Conduct Standard for Banks requires a bank to ensure that the terms and conditions of the bank-client contract are fair.[77] Banks must consider fairness when drafting, negotiating and enforcing the relevant contracts with their clients. According to the Conduct Standard for Banks, it would be considered unfair to a client[78] if the terms, conditions and requirements: (1) would cause an imbalance in the rights and obligations of the parties under the contract;[79] (2) are not necessary to protect the bank and would result in the bank being unduly advantaged;[80] (3) would result in an unfair outcome for the client;[81] or (4) requires the client to waive a right or absolve the bank of any obligation.[82] Arguably, terminating a bank account may result in an unfortunate outcome for a client, and it would have to be determined whether this outcome is regarded as unfair. However, the outcome in *Bredenkamp*, a provision allowing the bank to terminate the contract, albeit subject to providing the client with reasonable notice, is considered fair. Also, the mere fact that a client will become unbanked when a bank-client relationship is terminated is not regarded as unfair.

An essential provision of a contract (and related procedures) between a bank and its client includes the parties' respective rights (and accompanying duties) to terminate such a contract. In this regard, the Conduct Standard for Banks places specific obligations (or duties) on a bank. First, there must be a provision in the contract setting out the circumstances under which a bank may either withdraw from or terminate its relationship with its client.[83] Arguably, in terms of this provision in the Conduct Standard, a bank can only terminate a bank-client relationship where the circumstance relied on for the termination is listed as a permitted termination circumstance.

Then, the bank must create and implement procedures specifying how the closure and withdrawal of banking facilities and the termination of its relationship with a client will take place.[84] This creates consistency in when and how all banks terminate the bank-client relationship. The authors add that, in order to comply with the principle of transparency, the nature of the termination procedures must be communicated to the client. Furthermore, the client must be provided with reasonable notice by the bank before closure, withdrawal or termination.[85] The meaning of what is regarded as "reasonable" has already been established in case law.[86] However, there is an argument to be made that not including a specific notice period in the Conduct Standard provides a bank with the flexibility to terminate a relationship summarily when there is a serious concern for the bank's reputation if they continue with the bank-client relationship. Then, the bank

77 Cl 5(1)(d) of the Conduct Standard for Banks.
78 Cl 5(2) of the Conduct Standard for Banks.
79 Cl 5(2)(a) of the Conduct Standard for Banks.
80 Cl 5(2)(b) of the Conduct Standard for Banks.
81 Cl 5(2)(c) of the Conduct Standard for Banks.
82 Cl 5(2)(d) of the Conduct Standard for Banks.
83 Cl 9(5) and 10(3) of the Conduct Standard for Banks.
84 Cl 9(1) of the Conduct Standard for Banks.
85 Cl 9(2) of the Conduct Standard for Banks.
86 Schulze 2011 *Obiter* 221.

must inform the client of the reasons behind the closure, withdrawal or termination.[87]

The Conduct Standard for Banks provides three circumstances under which a bank may withdraw or terminate a contract with a client without prior notice and reasons being given to the customer, which circumstances are almost identical to those that are set out in the COBP and which have been discussed above. These are: (1) if the bank is obliged to do so by law;[88] (2) where the bank holds a reasonable suspicion that the customer is using that financial product or service for an illegal purpose;[89] or (3) if the bank has reported to the appropriate authority.[90] These three instances correspond to what was included in the COBP. As to what would qualify as "reasonable suspicion" of an illegal purpose, there is no clear guidance from case law regarding the termination of the bank-client relationship. In the *Bredenkamp* matter, the court only considered whether the bank's decision to terminate the bank-client relationship was a *bona fide* business decision that was on the face of it reasonable and rational.[91] Apart from this consideration, there is no clear guidance from case law. Bank clients may possibly rely on provisions concerning access to information to gain access to the reasons a bank considered before terminating a bank-client relationship.[92]

In addition, the Conduct Standard for Banks deals with the termination and closure of a bank account by the client. It provides that a bank cannot impose unreasonable barriers on a client that wants to terminate its contract or close its account with the bank.[93] Moreover, the bank must assist the client in this regard.[94] This links to Outcome 6 of the TCF Principles concerning post-sale barriers, which must not be imposed on the client. The bank must also advise the client of the consequences of keeping an account dormant as opposed to closing the account,[95] and then implement procedures to identify and notify a client of such dormant accounts.[96]

4 PRINCIPLES IN CASE LAW AND THE CONDUCT STANDARD

It is apparent from a reading of the termination provisions of the Conduct Standard for Banks that the seven common-law principles explained by the court in *Bredenkamp*, and which have been consistently applied to the bank-client relationship over the preceding decade, have for the most part been incorporated into the Conduct Standard. Furthermore, the Conduct Standard

87 Cl 9(3) of the Conduct Standard for Banks.
88 Cl 9(4)(a) of the Conduct Standard for Banks.
89 Cl 9(4)(b) of the Conduct Standard for Banks.
90 Cl 9(4)(c) of the Conduct Standard for Banks.
91 *Bredenkamp supra* par 64–65.
92 See in this regard *Ndudane v Financial Intelligence Centre* [2024] ZAWCHC 38.
93 Cl 10(1) of the Conduct Standard for Banks.
94 *Ibid*.
95 Cl 10(4) of the Conduct Standard for Banks.
96 Cl 10(5) of the Conduct Standard for Banks.

incorporates a number of the provisions contained in the COBP, but now also expands on those principles.

The Conduct Standard does not directly state that the bank has a right to terminate a relationship with its client, albeit with notice, per the underlying agreement, which would be a *lex commissoria*. However, the reference in clause 9(5) of the Conduct Standard that the bank must make provision for the types of circumstances when the contractual agreement may be terminated or withdrawn does create a right to terminate, although the circumstances in which the bank can terminate the relationship seem to be now limited to those instances listed in the agreement concluded between the bank and its client. The question arises as to what would happen if the bank wanted to terminate a bank-client relationship but the circumstances causing the necessity for termination were not listed as an allowed instance in the agreement. A plain reading of this clause of the Conduct Standard does imply that, where the circumstance leading to termination falls outside the circumstances mentioned in the agreement with the client, the circumstance would have to be of such a serious nature as to be regarded as a material breach before the bank would be able to terminate the bank-client relationship.

Furthermore, it is submitted that the Conduct Standard should require specifically that the bank consider and assess its reason for wanting to close a bank account . However, the general reference in the Conduct Standard to the bank having to "adopt and implement processes" when deciding to terminate the bank-client relationship would involve a standardised process where a bank would consider and assess its reasons for wanting to close a bank account, with the added benefit that the same procedures ought to be used for all instances where the bank intends to terminate a bank-client relationship. This implies that, at least for each bank, there should be consistency in deciding whether to terminate a bank-client relationship. Unfortunately, this does not guarantee consistency between different South African banks in the process of deciding on and terminating a bank-client relationship. This is an aspect the FSCA could potentially consider – namely, giving meaning to the need to be "fair" when a bank-client relationship is terminated. The same application of the meaning of fairness when deciding to terminate a bank-client relationship would allow standardisation of the termination process among South African banks.

Then, whereas the court in *Bredenkamp* asserted that the bank was not required to provide the client with reasons for the termination, the Conduct Standard for Banks compels banks to provide the client with reasons why the bank terminated the bank-customer relationship.[97] The Conduct Standard further requires that the bank not only be required to give notice to the client of the intended termination of the relationship, but that such notice also be reasonable.[98] This also linking the requirement in the Conduct Standard to what is stipulated in *Bredenkamp*. However, as mentioned above, the Conduct Standard specifically excludes an exact period of notice,

[97] Cl 9(3) of the Conduct Standard for Banks.
[98] Cl 9(2) of the Conduct Standard for Banks.

also allowing the banks some flexibility in this regard. Interestingly, the Conduct Standard goes beyond the principle put forward in *Bredenkamp* and provides three instances when a bank will not be required to provide a customer with reasonable prior notice or reasons before terminating the bank-client relationship. Such circumstances include: (1) if the bank is compelled to do so by law; (2) where the bank has a reasonable suspicion that a client is using a financial product or service for any illegal purpose; or (3) where the bank has made necessary reports to the appropriate authority concerning certain activities of the client.[99] In this regard, it is submitted that banks may rely on these listed instances, and the client would have to resort to provisions concerning rights of access to information to be able to challenge the reasons that the banks used to determine that the bank-client relationship should be terminated.

The Conduct Standard for Banks also provides protection when the client terminates the bank-client relationship. Clause 10(1) starts by linking the termination provision to TCF outcome 6, where it is cautioned that the bank must not impose unreasonable barriers if a customer requests the termination, closure or transfer to another bank of a financial product or service. Furthermore, clause 10(5) also obligates banks to implement systems to identify dormant bank accounts, and the bank must also ensure that clients are informed of the consequences linked to maintaining a dormant financial product as per clause 10(4).

The crucial question to ask is what the consequences would be if a bank fails to comply with the provisions related to termination as contained in the Conduct Standard. Previous research has already provided an answer in this regard to some extent.[100] In summary, the FSCA can issue a directive requesting a bank to comply with the Conduct Standard (a financial law), and where the offender fails to do so, the FSCA can impose an administrative penalty; where an offender fails to pay the imposed administrative penalty, a High Court can issue an administrative order.

5 CONCLUDING REMARKS

This article discussed the provisions of the Conduct Standard for Banks relating to the termination of a bank-client relationship. It highlighted to what extent a bank's obligations when terminating a bank-client relationship (as apparent in case law) have been amended by the Conduct Standard for Banks. The main question addressed was whether the principles concerning the termination of a bank-client relationship as contained in *Bredenkamp* were incorporated into the Conduct Standard for Banks.

It is clear from the above discussion that, with the implementation of the Conduct Standard for Banks, the principles included in case law on the termination of the bank-client relationship have not merely been repeated but have been expanded upon. For example, the Conduct Standard for Banks provides for instances when a bank would not be required to notify a

[99] Cl 9(4)(*a*)–(*c*) of the Conduct Standard for Banks.
[100] Pesci and Koekemoer 2023 *Obiter* 263–265.

client before terminating the bank-client relationship. The Conduct Standard for Banks also refers to the client being adequately informed about when the bank may terminate the bank-client relationship. The Conduct Standard also requires that a client receive reasonable notice before a bank terminates the bank-client relationship, but with no indication of what number of days would qualify as reasonable notice. An important aspect is that the breach of a provision of the Conduct Standard will be regarded as a breach of financial law, potentially being an offence under the FSR Act. Thus, banks must follow the guidelines on terminating a bank-client relationship unilaterally.

With the implementation of the Conduct Standard for Banks, the FSCA has created defined parameters within which the bank-client relationship can be terminated. This, in the authors' view, is a much-needed addition to current banking-sector regulation since unilateral termination of the bank-customer relationship is a recurring issue that has come before the courts several times in the last few years, and which continues to form a point of discussion in the popular press. The provisions of the Conduct Standard for Banks now provide some consistency by setting out how a bank may terminate a bank-client relationship. However, when this article was written, the FSCA was in the process of assessing whether the Conduct Standard's provisions should be amended, with particular consideration for how the industry understood fairness, especially concerning the decisions banks make when closing bank accounts.[101] The FSCA will provide guidance in the future on whether the Conduct Standard will be amended to provide more clarity on whether the termination provisions contained in the Conduct Standard amount to "fairness" for the now unbanked client.

[101] West "FSCA Is Assessing Bank Regulations About Treating Clients Fairly" *Business Report* (6 September 2023) https://www.iol.co.za/business-report/economy/fsca-is-assessing-bank-regulations-about-treating-clients-fairly-43e3aab8-5eda-46ae-8933-713b0d4d0c9e (accessed 2024-02-24).