

Reconsidering the Banker-Customer Relationship in the Context of Mobile Banking in Zimbabwe

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Abstract

Mobile banking has fundamentally changed the way customers interact with their banks by providing them with unprecedented convenience, flexibility and access to several financial services. The adoption of mobile banking services has continued to grow globally, with an increasing number of people using their mobile devices to perform banking transactions such as peer-to-peer transactions and bill payments, and to access account statements. These innovations have had a substantial impact on the traditional banker-customer relationship. This article examines the relationship between bankers and customers in the context of mobile banking in Zimbabwe with a comparative discussion of Kenya. The article also analyses how mobile banking has changed the traditional obligations and functions of both bankers and consumers. The findings of this research provide insight for both bankers and policy makers. For example, bankers need to recognise the evolving dynamics of the banker-customer relationship necessitated by mobile banking and adapt their *modus operandi* accordingly. This could create unique and interesting mobile banking experiences and provide users with the assistance and guidance they need to navigate the mobile banking environment. The regulatory environment must support the growth and development of mobile banking services while safeguarding the interests and rights of consumers.

Keywords

Mobile banking; banker-customer relationship; traditional obligations; perceived usefulness; perceived user-friendliness; consumer loyalty; regulatory environment.

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1 Introduction

The need to create new systems that enable businesses to adjust to emerging forms of customer engagement is brought about by the constant advancement of new information and communication technologies (ICTs) in the commercial sector.¹ The financial sector has not been spared from the effects of technological innovation which has seen the popularisation of mobile banking.² Mobile banking refers to the provision and management of banking and financial services through mobile devices.³ Mobile banking has significantly influenced the manner in which banks engage with their customers. Banks now have an option to conduct their commercial activities via mobile platforms since they provide distinct advantages for all the parties involved.⁴ As such, banks in Zimbabwe are moving away from paper-based transactions to digital transactions.⁵ Mobile banking services have attracted legislative intervention due to the associated risks such as phishing, money laundering and cyber-crimes. The introduction of mobile banking has increased the complexity of the banker-customer relationship.

The banker-customer relationship has its roots in the law of contract.⁶ As such, a contract on mobile banking services or terms and conditions for using mobile banking are governed by civil law.⁷ Mobile banking acts as an extension of traditional banking, which leverages the convenience of mobile technology to enhance the banking experience. Rights and obligations regarding the availability and use of mobile banking services are established by the contract and the liability of parties to such a relationship can vary from bank to bank.⁸

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¹ Roztock, Soja and Weistroffer 2019 *Information Technology for Development* 171-183.

² Severino, Nyamwanza and Life 2015 *International Journal of Economics, Commerce and Management* 2.

³ Rahmani *et al* 2012 *Journal of Business and Management Review* 37; Bhatt and Bhatt 2016 *Journal of Internet Banking and Commerce* 2.

⁴ Flavian, Guinaliu and Torres 2006 *International Journal of Bank Marketing* 415.

⁵ Chindudzi, Maradze and Nyoni 2020 *IJARIIIE* 1216.

⁶ *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 4 SA 510 (C).

⁷ *Joachimson v Swiss Bank Corporation* 1921 3 KB 110 (CA); Cranston *et al Principles of Banking Law* 10.

⁸ Zohra and Kashif 2011 *International Journal of Trade, Economics and Finance* 537.

The banker-customer relationship also involves the transmission of data from the banker to the customer and *vice versa*, which may lead to the establishment, alteration, exercise or termination of legal rights and obligations in accordance with the terms of the contract between the banker and the customer.⁹ Therefore mobile banking enables the initial establishment of the banker-customer relationship and the delivery and performance of services thereafter, within the legal framework governing the relationship.¹⁰

In Zimbabwe the contractual aspects of mobile banking activities are governed by a combination of the law of contracts, the *Banking Act*¹¹ and in some instances principles found in the English common law. The *Banking Act*¹² largely regulates the relationship between bankers and customers. An individual or a juristic person who is involved in the banking business is called a banker.¹³ According to the *Banking Act*, a banking business is one that accepts deposits that can be withdrawn or repaid immediately after a set amount of time, and uses those deposits in whole or in part for lending or other purposes for the account and at the risk of the person accepting the deposits. The *Bills of Exchange Act*¹⁴ in section 2 defines a banker to include a body of persons whether incorporated or not who carry on the business of banking.

The *Banking Act* does not adequately provide for the regulation of banker-customer relationship in the context of mobile banking.¹⁵ Thus, it can be submitted that Zimbabwe does not have a robust regulatory framework that protects depositors' funds under mobile banking.¹⁶ Despite the fact that the *Banking Act* attempts to regulate mobile banking services offered by banks, or any other wireless service provider, it does not comprehensively regulate mobile banking services.¹⁷

2 Background to the regulation of the banker-customer relationship in Zimbabwe

As technology continues to reshape the banking landscape, the regulatory framework must be strong enough to protect customers' rights by ensuring that regulatory bodies actively monitor and ensure compliance with the

⁹ Mishkin and Eakins *Financial Markets and Institutions* 457.

¹⁰ Osa 2016 *European Journal of Business and Innovation Research* 76.

¹¹ Section 7 of the *Banking Act* [Chapter 24:20] (the *Banking Act*).

¹² Section 7 of the *Banking Act*.

¹³ Section 3 of the *Banking Act*.

¹⁴ Section 2 of the *Bills of Exchange Act* [Chapter 14:02].

¹⁵ The preamble and s 7 of the *Banking Act* are silent on the regulation serve for the definition in s 2 of the Act. Nhavira, Mudzonga and Mugocho *Financial Regulation and Supervision* 48.

¹⁶ Nhavira, Mudzonga and Mugocho *Financial Regulation and Supervision* 49.

¹⁷ Sections 3 and 6 of the *Banking Act*.

regulations that govern mobile banking. While regulation is important, it should be implemented only in a way that does not lead to adverse outcomes connected with it.¹⁸ There have been concerns that the lack of clear regulation in the banking sector could exacerbate the abuse of the system by operators.¹⁹

The *Reserve Bank of Zimbabwe Act* (the *RBZ Act*)²⁰ regulates and supervises all banking institutions.²¹ In this regard it is also important to realise that mobile network operators, which provide mobile money services, are not on the list of institutions regulated and supervised by the Reserve Bank of Zimbabwe (the RBZ). Thus, the three mobile network operators (Econet, NetOne and Telecel) which also offer banking services are not directly governed by the *RBZ Act*.

This article focusses on mobile banking in Zimbabwe and its effect on the banker-customer relationship. It demonstrates that there is a need for redefining the common law position on the banker-customer relationship in order to accommodate the digital aspects associated with mobile banking as the common law recognises only the traditional banking system.

The Deposit Protection Corporation, which is tasked with compensating the depositors of bankrupt registered deposit-taking businesses, such as commercial banks, has also expressed its concern about the inadequacy of the *Banking Act* in regulating mobile banking activities in Zimbabwe.²² The mobile banking operator has one leg in the financial sector regulated by the RBZ and the other leg in the telecommunications sector regulated by the Postal and Telecommunications Regulatory Authority Zimbabwe (POTRAZ).²³ However, in order to address any regulatory gaps that may have been noticed as well as any weaknesses found in the system, quarterly meetings are held with the RBZ for policy review and evaluation.²⁴

Even though technological advancements are convenient to banking customers, they simultaneously bring risks and opportunities for fraud.²⁵ Today fraud, money laundering and terrorist financing have become major threats to the banking business and therefore banks in Zimbabwe should implement regulations to overcome these difficulties. The financial sector has quickly moved into new business media and the Zimbabwean regulator

¹⁸ Ogus 2002 *Annals of Public and Cooperative Economics* 627-629.

¹⁹ Dube, Chitura and Runyowa 2009 *Journal of Internet Banking and Commerce* 5.

²⁰ *Reserve Bank of Zimbabwe Act* [Chapter 22:15] (the *RBZ Act*).

²¹ Section 3 of the *RBZ Act*.

²² Nhavira, Mudzonga and Mugocha *Financial Regulation and Supervision* 11.

²³ Ncube 2022 https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/6343e33be2a9a91ed01e590a/1665393468942/Ncube_Mobile+banking+industry+in+Zimbabwe.pdf 16.

²⁴ *RBZ Bank Licensing, Supervision and Surveillance: Guideline No 2*.

²⁵ Dzomira 2014 *Risk Governance and Control* 16-17.

has been making attempts to keep up with the changes. In doing so, the objective of the financial sector has been to ensure that existing regulations that govern traditional banking are not circumvented, while not hindering the use of new technology to create commercial opportunities.²⁶

3 Effects of mobile banking on the legal relationship between the bank and its customers

Technological advancements such as internet banking, mobile payments and blockchain technology have given rise to various financial services and the opening of doors for new role-players such as telecommunications companies in a sector that was previously dominated by banks. It should be noted that the adoption of mobile banking brought both challenges and benefits to banks' customers.

Technology transformed the banking industry, making the technology itself an essential part of the finance industry. Previously all transactions were done in the banking hall, implying that there was a need for "brick and mortar" physical structures which required the physical presence of a customer whenever they needed to perform a transaction. Overhead costs were high, and all transactions were to be done in the bank.²⁷ Customers had to stick to the stipulated banking hours and could not enjoy the bank's services after banking hours. This led to a lot of inconvenience since customers had to wait for the bank to open in order to make transactions and at times had to wait in very long queues.²⁸ Thus, there was a need for banks to find new ways of conducting business in order to satisfy their customers more thoroughly and to reduce customers' costs arising from having to visit banking halls in person.²⁹

According to Hampe *et al*,³⁰ the convenience of using wireless mobile phones should be seen in the light of the increased responsibility placed on both the industry players and the regulators to ensure that the adoption of mobile banking is a success. In order to ensure end users benefits from the technology, regulators must bring into line their short-term, medium-term and long-term plans. A lot of learning has been devoted to the legal implications of the new mobile innovations and the possible dangers and possibility of obscuring consumer rights and freedoms have been addressed.³¹

²⁶ Worthy and Duncan 2011 *IFL Rev* 25-27.

²⁷ Saffu and Walker 2019 *International Journal of Bank Marketing* 185.

²⁸ Irechukwu "Enhancing the Performance of Banking Operations" 102.

⁴² Magweva and Maribha 2015 *Journal of Corporate Governance, Insurance, and Risk Management* 92.

³⁰ Hampe *et al* "Price of Convenience" 482.

³¹ Weber and Darbellay 2010 *Journal of Banking Regulation* 132.

According to Ellinger *et al*,³² there are three conclusions which can be drawn from analysing the concept of banker-customer relationship. The first conclusion is that the relationship commences at the moment the bank agrees to open an account in the customer's name.³³ Secondly, the establishment of such a relationship means that the bank agrees to act as the customer's agent in banking transactions. And lastly, once the bank has accepted a person as a customer it assumes liability for its customer, depending on the circumstances.³⁴

A contract is an agreement creating and defining the obligation established between two or more persons by which rights are acquired by one or more to acts or forbearance on the part of others.³⁵ The banker-customer relationship has been commonly governed by implication that is there is a proper written agreement that governs the actions of the parties. To be legally enforceable, a contract must be recognised as validly effected.³⁶ The basic principles of contract such as offer, consideration, acceptance, and mutuality, whether in writing, oral or online, have remained the same for a great deal of time. However, transactions on mobile platforms do present certain unique challenges to the established principles of contract.³⁷

One of the difficulties with mobile banking is that the parties may never meet in person. It is critical that each party possesses unlimited contractual capacity in order to generate binding rights and responsibilities, in that it cannot be ascertained whether or not the party to a contract is capable of contracting. The parties to a contract must be legally capable of contracting in order for the contract to be legally binding. Minority, insanity, alcoholism, insolvency and marital status are all factors that affect contractual capacity. While it is critical to ensure that contracting parties submit their personal information to warrant their contractual capacity in an online contract, parties may be hesitant to disclose such personal information, which may lead to confusion over whether the contracting party has capacity.³⁸

Like any other field, law is not a static body of inflexible rules and unyielding tradition, but changes with time.³⁹ The dynamic nature of current economic, cultural and technical evolution necessitates that the law should change to meet the demands brought about by the technology. Grafting old legal frameworks onto continuously changing conditions makes it more difficult to

³² Ellinger *et al* *Modern Banking Law* 121.

³³ Ellinger *et al* *Modern Banking Law* 121.

³⁴ Ellinger *et al* *Modern Banking Law* 121.

³⁵ Salmond *Principles of Contracts* 18.

³⁶ Lorenzen 2008 *Yale LJ* 658.

³⁷ Banstola 2007 *Journal of Nepalese Business Studies* 99.

³⁸ Cranston *et al* *Principles of Banking Law* 145.

³⁹ Kidd and Daughtrey 2000 *Rutgers Computer & Tech LJ* 217.

accommodate new challenges.⁴⁰ As the industrial and service society is changing into an even more modern information society, one of the most important indicators that show this change is the growing digital economy. However, the economy's full potential cannot be realised since the economic community lacks trust in electronic contracts.

It is certainly easier to develop a technical solution for legally binding electronic contracts than to reinterpret a legal system that has existed for centuries.⁴¹ A legal system developed thousands of years ago lacks the fundamentals required to incorporate current modes of communication; therefore the purpose of this article is to examine the impact that mobile banking has on the traditional system.

3.1 Pre-contractual phase

3.1.1 Know your customer

Mobile banking has great potential as one of the most valuable applications of the latest technologies. The performance of mobile banking is determined by compliance. At the centre of any compliance policy is customer identification and contractual terms. Identification (the "know your customer" principle) is a vital part both of money-laundering legislation and the regulation of the banker customer relationship in the context of mobile banking.

In the realm of mobile banking, the concept of know your customer arises first when a new account is opened.⁴² Current procedures of compliance with "know your customer" requirements rely on traditional, hard copy materials to prove identity. The problem encountered is to guarantee that the new verification methodologies are still able to achieve the threshold test, satisfying both the commercial need for identification and the regulatory criteria.⁴³

The phrase "know your customer" (KYC) relates to the idea that before conducting financial transactions with a customer (or potential customer), banks and other financial institutions must monitor, audit, gather and analyse pertinent information about them. KYC conformity entails the creation of auditable evidence of due diligence activities, in addition to the need for customer identification. There is a necessity for financial institutions to validate that their customers are not or have not been involved in illegal activities such as fraud, money laundering or organised crime in order to meet KYC conformity requirements.⁴⁴ In addition to preventing identity theft,

⁴⁰ Katsh 1993 *Vill L Rev* 403.

⁴¹ Gisler, Stanoevska-Slabeva and Greunz "Legal Aspects of Electronic Contracts" 20.

⁴² Worthy and Duncan 2011 *IFL Rev* 25-28.

⁴³ Bilali 2012 *University of Toledo Law Review* 319.

⁴⁴ Arasa and Ottichilo 2015 *Journal of Economics and Behavioural Studies* 162.

fraud, money laundering and the financing of terrorism, the KYC rules also aim to assist in controlling business risks linked with lending and investment activities between banks and their clients.⁴⁵ In recent years the centuries-old KYC principles have experienced a revolutionary change. They also cover fundamental ideas that are crucial to business and banking procedures because of their purpose of properly verifying the person's details before the person is allowed to open a bank account.

Being a crucial component of a bank's interaction with its customers, KYC programmes must achieve specific goals. Accurately identifying the bank's customers is one of the goals.⁴⁶ The bank should be aware of the identity of people and organisations before commencing the process of opening deposit accounts, executing loan agreements, or cultivating customer relationships. The bank is required to periodically evaluate and confirm the source of its customers' funds as part of its KYC programme.⁴⁷ When banks want to make loans or mortgages, they typically do this evaluation. A bank should confirm the customer's or borrower's ability to pay and supply a down payment prior to processing a loan application by requiring the customer to provide bank statements and collateral. The idea behind KYC emphasises a bank's need to confirm the source of a customer's finances in order to be sure it is dealing with money that has been lawfully obtained.⁴⁸

3.1.2 KYC regulations

The concept of KYC commenced as a simple directive to financial institutions to identify their clients and report any questionable activities. It has now evolved into a critical tool in combatting money laundering.⁴⁹ The foundation of what is currently known as the KYC was laid in the United States of America in the late 1960s.⁵⁰ Its objective is to impose mandatory reporting obligations on financial institutions in order to detect money laundering. Although there is no international "hard law" that specifically addresses KYC-related issues, many international organisations, such as the Financial Action Task Force (FATF), have contributed considerably to the programme's content. Knowing and identifying a consumer in cyberspace is difficult, and how to do so is primarily dependent on expertise. In order to provide banking and other financial services, financial institutions

⁴⁵ Byrne, Densmore and Sharp 1995 *Cap U L Rev* 40-41.

⁴⁶ Levine 2006 <https://www.americanbanker.com/news/viewpoint-to-curb-business-loan-fraud-automate-application-screening> 11.

⁴⁷ Byrne, Densmore and Sharp 1995 *Cap U L Rev* 27.

⁴⁸ Wawira *Effectiveness of KYC Policies* 22.

⁴⁹ IMF and World Bank 2003 <https://www.imf.org/external/np/mae/aml/2003/eng/033103.pdf> 4-16. This is a highly technical document listing diverse ways to detect money laundering operations.

⁵⁰ For further details, see Bank for International Settlements 2001 <https://www.bis.org/publ/bcbs85.pdf> 5-6.

are required by law to verify customers' credentials such as their name, identity and place of residence, using documents and other reputable sources.⁵¹ The rule derives from the Organisation for Economic Co-operation and Development (OECD) Forty Recommendations on money laundering.⁵²

Adequate KYC programmes consist of four primary requirements, each with its own components, namely⁵³ the know-your-customer requirement that forms the basis for the recognition and reporting of suspicious activities, the recognising and reporting requirement that creates an obligation to report knowledge or suspicion of money laundering, the retention of records requirement that describes which records must be kept and for how long, and the awareness-raising and training requirement that describes internal procedures that assist a bank to comply with these requirements.

3.1.3 KYC in mobile banking

Some consumers are unlikely to have access to digital signature technology for identity verification due to their lack of understanding of how they work. Indeed, it is premature to assume that financial agreements will be conducted over the phone between strangers, depending on digital signature certifications from reliable sources to verify identities.⁵⁴

Various mechanisms have been developed by banks to verify and vet the customer's identity, some of which rely on information received by trusted third parties such as credit reference agencies and public utilities such as Fincheck (Pvt) Ltd in Zimbabwe.⁵⁵ Another way in which a bank can verify the identity of a customer is by engaging with another financial institution which had verified the customer's identity in the past.

3.2 Duty of the bank

For the sake of openness and consumer safety, mobile banking service providers are required to give their clients thorough information about the services they are rendering prior to the signing of a contract.⁵⁶ Disclosure requirements are paramount because of the type of financial product, the

⁵¹ Bank for International Settlements 2003 <https://www.bis.org/publ/bcbs85annex.htm>.

⁵² OECD FATF on Money Laundering 2003 <https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/FATF%20Standards%20-%2040%20Recommendations%20rc.pdf> 5.

⁵³ FATF 40 Recommendations in Commonwealth Secretariat *Combating Money Laundering* 93, 102.

⁵⁴ Apostolos *Internet Banking and the Law* 187.

⁵⁵ Fincheck (Pvt) Ltd is a Zimbabwean company that provides vital business information gathered from the courts, government institutions, regulators, businesses, financial institutions and credit providers.

⁵⁶ RBZ 2017 https://www.rbz.co.zw/documents/consumer_protection/consumer-protection-framework-26-june-2017.pdf.

nature of the risk or the method of communication between the financial institution and the customer.

The European Union has several regulations that the service providers must meet. The consumer must receive the service provider's name, address and all other relevant information, such as his email address and other contact data that enable them to communicate with him directly and effectively.⁵⁷ Any distance contract⁵⁸ must be delivered within a reasonable length of time before the customer is served⁵⁹ in a clear and unambiguous manner paying attention to the principles of good faith in commercial transactions, and the principles governing the protection of those who are unable to give their consent such as minors.⁶⁰ Furthermore, the financial services provider is required to provide the customer with all contractual terms and conditions as well as the information specified in the Directive. This can be either in good time before or right away after the contract is concluded, and it may be done on paper or in another durable medium that the customer can access.⁶¹

4 Contractual phase

Two different situations are dealt with, one of which exists where there is a new customer, and the other is where the customer already has a bank account or has otherwise done business with the bank.⁶² Under the latter circumstances nothing is required other than a transformation from normal banking to mobile banking.

4.1 Offer and acceptance

Contracts can be created and carried out using a mobile device without the need for paper or ink. The current law is still based on a more limited business scope, physical documentation, and transactions involving more than just electronic signals. However, there has been a shift towards changing the law to reflect new business practices while maintaining the predictability and authority of legislation and common law.⁶³

⁵⁷ *European Union E-Commerce Directive (2000) Art 6.*

⁵⁸ A contract concluded between a trader and a consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded.

⁵⁹ *European Union Directive on Distance Marketing of Consumer Financial Services (2002) (Distance Marketing Directive) Art 3(1).*

⁶⁰ *Distance Marketing Directive Art 3(2).*

⁶¹ *Distance Marketing Directive Art 5(2).*

⁶² *Qadeer Service Quality and Customer Satisfaction 13.*

⁶³ *Johnson and Marks 1993 Vill L Rev 487.*

Electronic commerce changes the method of agreement more than the content of company contracts.⁶⁴ The essential question is whether contract law will recognise that either approach results in an equally enforceable agreement. The Internet provides four primary ways for parties to engage in an agreement: e-mail, listserv, and chat services, World Wide Web interfaces, and electronic data interchange are all examples of electronic data interchange.⁶⁵ Many agreements will use a combination of these techniques throughout talks and agreement development. E-mails and Short Message Services (SMS), like letters, are typically authored and sent by a single person for the benefit of another individual. Messages frequently contain private information, and only the sender and the recipient can communicate. E-mails may be "digitally signed" in order to be confirmed and authenticated, hence making it easier for a contract to be completed without the need to visit the bank.⁶⁶

5 Performance phase

5.1 *The fiduciary relationship*

Ellinger *et al*⁶⁷ state that the duty of confidentiality is the primary legal consequence of the banker-customer relationship, and that there are fundamentally three simple legal consequences that follow from this relationship. The first is that the bank has a duty to collect checks that customers send to it in good faith and without negligence. Secondly, the bank has a duty to follow its customers' instructions regarding the collection of checks and effects payable.

Fiduciary obligations are more extensive and burdensome than common law contractual obligations. Contract law has the advantage that the duties assumed are constrained by the terms of the agreement. In banking, mandatory obligations that go beyond traditional contract law are referred to as fiduciary obligations.⁶⁸ There are five main responsibilities in a fiduciary relationship: first, the fiduciary must avoid conflicts of interest; second, the fiduciary may not profit illegally from its fiduciary obligations; third, the fiduciary must maintain the privacy of its beneficiaries; fourth, the fiduciary must act in the beneficiaries' best interests; and fifth, the fiduciary must act with care and skill. These fiduciary duties are extended even to mobile banking as banks are still expected to perform their obligations. Thus, fiduciary duties under traditional banking system are still applicable under mobile banking.

⁶⁴ Harding *Doing Business on the Internet* 509, 512.

⁶⁵ Knable Gotts and Rutenberg 1995 *Harv J L & Tech* 278.

⁶⁶ Knable Gotts and Rutenberg 1995 *Harv J L & Tech* 280.

⁶⁷ Ellinger *et al Modern Banking Law* 117.

⁶⁸ Rogers 1975 *JAL* 58.

The fiduciary duties and responsibilities of the banks not only depend on the products but also on the contract or agreement between the bank and the customer. To avail themselves of the fiduciary services of the banks, the customers must know about the services and products of the banks that attract fiduciary rules and regulations. It is also important to know that the clauses in the business agreements should be made available to banks and the contract needs to be framed in such a way that the bank cannot act without the fiduciary responsibility.

A bank will not typically owe fiduciary responsibilities to its customers because a fiduciary connection does not develop in ordinary banking relationships; nonetheless, the duty may arise where unique circumstances give rise to a fiduciary relationship. To avoid liability as a fiduciary, the bank may seek authorisation, indemnification, or exclusion of liability in the contract or business letter between the parties for any conduct or omission that would otherwise be a breach of fiduciary duty.

5.2 Bank secrecy

Financial privacy is defined as a broad set of rights that protect customers from unauthorised access to their bank accounts by the government and other entities. Financial institutions are prohibited from disclosing financial data to third parties without the affected party's permission. In short, financial privacy is a conditional agreement between a bank and its clients that all foregoing activities remain secure, confidential and private. The right to privacy imposes an obligation on financial organisations to safeguard their customers' sensitive information. The right to privacy creates an obligation on financial institutions to protect the confidential information of their customers.⁶⁹ The scope of the banker's duty of confidentiality has been under threat from the legislature and the judiciary for some time now. This is especially the case with the growing number of limitations that fall under fewer than two of the Tournier qualifications, namely the compulsion of law and public interest exemptions. However, the scope of the duty of confidentiality is also being threatened by fundamental changes in the nature of banking itself.⁷⁰

5.2.1 Mobile banking and bank secrecy

The usage of mobile banking methods has various consequences. These include an increase in the volume of client records, more easily interceptable data, and greater exposure of consumer data to third parties.

⁶⁹ Masete 2012 *JICLT* 248.

⁷⁰ In *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* 1991 1 All SA 275 (A) the court stated that the duty may be breached if it is reasonable and proper for the bank to do so to further its own interests. In this instance, it is clear that the duty of confidentiality becomes limited in its application.

Banks face greater pressure than ever to maintain confidentiality, necessitating progressively more sophisticated capture and control systems. The digital era has also had a huge impact on how people interact with banks. Hence, in performing their obligations banks must ensure that their activities remain secure, confidential and private. Banks profit from the ability to recruit consumers without the need for branch offices. However, mobile banking raises new legal and practical issues, chief among which is how banks will be able to safeguard customer data and online transactions.⁷¹ Not only must banks ensure that personal data are not inappropriately disclosed but also that it is not intercepted or modified.

Institutions should establish an information and communication security management function to develop and maintain an ongoing information security management programme. These include promoting information security awareness and advising other ICT functions on security issues.⁷² Further, information and communication security also serve as the leader of the ICT incident response team, and reporting the institution's information security to the board.⁷³ A bank was previously required to make disclosure only upon receiving a request by a relevant authority. While the initial inroads were many, given they could be justified within the traditional qualifications to the general duty of confidentiality owed by a banker, their imposition was not often questioned. With mobile banking, the duty should be taken more seriously as the breach has more serious consequences on the trust that the public have in mobile banking.

5.2.2 *The duty of confidentiality*

The confidentiality of financial records is a traditional subject of concern among bank regulators, depositors and executives. As a result, a patchwork quilt of statute, regulation, common law and banking practice has evolved to preserve confidentiality. Traditionally banks have been subject to few requirements to publicly disclose their financial records owing to the perceived sensitivity of financial institutions to the loss of confidence by depositors, investors or the public. The duty of confidentiality is still applicable under mobile banking. In fact, banks should do more to ensure that the banker-customer relationship is maintained, with the bank fulfilling its obligations.

Confidentiality is utilised to ensure the safety and soundness of the mobile banking system by preventing the disclosure of information which could weaken the public confidence in banks.⁷⁴ Confidentiality shields banking

⁷¹ Unikel 1998 *Loy U Chi L J* 844.

⁷² Mirtsch *et al* 2021 *Computers and Security* 1-23.

⁷³ Saint-Germain 2005 *Information Management Journal* 60.

⁷⁴ Coombe and Lopic 1985 *Bus Law* 485.

institutions which are still building public confidence in mobile banking from sudden or severe market reactions that might destabilise the financial system. The banking system, being a vital aspect of our society, is seen to be too sensitive to altering market pressures to remain stable. Finally, the principle of the secrecy of financial records is based on the widely accepted belief that the banking industry requires particular treatment.

6 Comparative analysis with Kenya

In Kenya payments and money transfers form a substantial portion of all financial transactions.⁷⁵ It is one of the jurisdictions with a successful regulatory framework governing mobile banking. M-Pesa, which is similar to some mobile network operators in Zimbabwe, has expanded from transferring remittances to including virtually all types of financial transactions.⁷⁶ The service has managed to operate without physical branches, which is a clear testimony that mobile banking can be accessible whenever there is a network and a mobile device.

The regulatory framework in Kenya is highly organised and provides adequate supervision of the issuance of e-money, especially where it involves non-banking institutions which may not be completely prudentially monitored by the Central Bank of Kenya. These supervisions significantly protect consumers from all kinds of risks, setting up mechanisms for overseeing branchless banking, and developing an inclusive, interfaced and interoperable payment system. The regulatory framework in Kenya also extends to competition laws, which are sufficiently well developed as to ensure that a balance is maintained between service providers on one the one hand and customers on the other, given that unhealthy competition or even a lack of competition will affect customers.⁷⁷ These principles have been incorporated in a regulatory policy which is proportionate and has fostered rather than inhibited innovation in connection with regulated activities. Further, this has allowed scope for different ways of compliance, so that market participants are not unduly restricted from launching new financial products and services. Such a policy needs to be frequently reviewed to keep up with the rapid developments.

⁷⁵ Kirkby *Regulation of Electronic Money* 16.

⁷⁶ Donovan 2012 *Information and Communications for Development* 61; Maimbo, Saranga and Strychacz 2010 <https://documents1.worldbank.org/curated/en/685911468113055049/pdf/600190BRI0Afri11public10BOX358300B0.pdf> 1-4.

⁷⁷ CGAP 2008 <https://www.cgap.org/sites/default/files/CGAP-Focus-Note-Regulating-Transformational-Branchless-Banking-Mobile-Phones-and-Other-Technology-to-Increase-Access-to-Finance-Jan-2008.pdf> 1.

According to Porteous,⁷⁸ there is a legal framework in Kenya that enables principles for mobile payments and mobile banking. The author argues that different principles are applicable at different stages of mobile money market development. Various factors need to be considered for mobile banking to establish its roots, which include certainty in the legislation authorising and governing mobile transactions, and sufficient protection of customers from fraud and other forms of criminal abuse. In addition, efforts should be made to promote and encourage interoperability by ensuring that the telecommunication corporations have access to other payment platforms and that customers of one network can switch financial providers with ease.

The legal framework, customer protection and interoperability in Kenya are critical factors for the establishment and growth of mobile banking. A solid legal foundation, coupled with adequate consumer safeguards and efforts to enable interoperability help create a conducive environment for mobile banking to thrive, expanding access to financial services and contributing to financial inclusion.

6.1 Cyber protection in Kenya

In 2013 the government of Kenya formed a committee which masterminded steps taken to combat cybercrime in compliance with Kenya's *Communication Act*. This was an important step in the light of mobile banking, where such crimes are prevalent. With harsh penalties for illegal actions including cyber bullying and hacking, this Act wages war on cybercriminals.⁷⁹ The Act aims to secure growth by defending the government inside the larger ICT system that powers e-commerce and e-governance. The *Kenyan Information and Communication Act* also includes provisions for mobile financial transactions and addresses cybercrime in Kenya. With respect to the regional convention—the *AU Convention on Cyber Security*—this makes the Act compliant and more relevant in the era of technology, so that the customers are able to have confidence in the banking system, especially when banking is done through mobile phones without the need to visit banking halls.

In order to demonstrate the significance of electronic contracts Kenya adopted the *Evidence Act*, which introduced amendments to allow admissibility of electronic evidence and the conditions for storing, preserving and presenting electronic evidence.⁸⁰ Therefore the question of primary or secondary evidence does not arise. Instead the emphasis is on the weight

⁷⁸ Porteous 2006 https://www.findevgateway.org/sites/default/files/publications/files/mfg-en-paper-the-enabling-environment-for-mobile-banking-in-africa-may-2006_0.pdf 7-10.

⁷⁹ Anderson *Security Engineering* 45.

⁸⁰ Section 106B of the Kenyan *Evidence Act* [Chapter 80].

or the relevance of the electronic evidence. There are also other laws that deal with cybercrime, such as the *Central Depositories Act* and the *Penal Code*. These laws have gone a long way towards ensuring that mobile banking has been successfully adopted.

It is sad to note that this achievement in Kenya has not been replicated in Zimbabwe.⁸¹ Little or no success has been reported in Zimbabwe in terms of the successful adoption and implementation of e-business practices.⁸² In particular, researchers such as Chtourou and Souiden⁸³ note that in developing economies banks face a host of organisational challenges when implementing e-business practices, which affect the banker-customer relationship.

Financial services providers in Kenya are concerned about the rapidly evolving technology, the rapid uptake of mobile banking, and the rise in instances of fraud. As a result they need to improve the ways in which they safeguard the data of their clients.⁸⁴ All customers expect that their financial privacy will be protected. Everyone has the right to privacy in Kenyan law, according to Article 31. The right to financial privacy is not specifically covered by any laws in Zimbabwe specifically in relation to mobile banking.⁸⁵ There is no specific legislation that comprehensively addresses the right to financial privacy.

The following rules are mandated by Kenya's regulatory framework and are applicable to all mobile devices: The regulatory body is required to protect customers. It is necessary to provide customers with sufficient information about the services offered in order for them to be able to make informed decisions about the lawful collection, transmission, and storage of their personal information. Customers are thus safeguarded against all kinds of losses.

6.2 The National Payment System Act of Kenya, 2011

The institutions that have a mandate for the supervision and regulation of payment systems and any other related matters in Kenya are governed by the *National Payment Systems Act*. It provides for important principles that every payment system is expected to honour. The responsibility is placed upon the Central Bank to ensure that the country's national law on payment

⁸¹ Chao and Chandra 2012 *Journal of Small Business and Enterprise Development* 119.

⁸² Dube, Chitura and Runyowa 2009 *Journal of Internet Banking and Commerce* 1-13.

⁸³ Chtourou and Souiden 2010 *Journal of Consumer Marketing* 338.

⁸⁴ Masete 2012 *JICLT* 248.

⁸⁵ Every person has the right to privacy, which includes the right not to have their person, home or property searched, their possessions seized, information relating to their family or private affairs unnecessarily required or revealed, or the privacy of their communications infringed.

systems meet international requirements, thus avoiding circumstances where negative connotations are recognised and prejudice the whole system.⁸⁶ By adhering to international standards Kenya mitigates the risk of being labelled as a jurisdiction with inadequate safeguards or weak regulations, which could affect investor confidence and hinder the growth of mobile banking and other payment systems.⁸⁷

6.3 The Competition Act of Kenya

The Act is designed to protect and encourage competition by prohibiting anti-competition practices and to establish the Competition Authority of Kenya. The Authority may make enquiries into the grievances of the general public and supervise mergers as well as set standards to create consumer bodies which in turn undertake research on competition and consumer interests and analyse relevant government policies. This law also considers the regulation of services like mobile banking. Its scope is limited, however, to the extent that it does not prohibit collusion and the formation of cartels by rival companies which set prices illegally. This is a possibility that the few mobile money providers may exploit to the detriment of their customers.

The *Competition Act* aims to promote competition in the market, including the banking sector. Encouraging a competitive environment ensures that customers have a variety of options and choices when it comes to banking services. Increased competition can lead to improved quality of services, innovation and competitive pricing, ultimately benefiting customers by offering them better value and options.

The Kenya *Information Communication Act*,⁸⁸ provides that the formation of a contract, unless otherwise agreed, can be done electronically, the offer and acceptance being made by means of electronic messages. The validity of the contract in terms of the Act cannot be questioned on the grounds that it has been formed electronically.

The 1996 *UNCITRAL Model Law on Electronic Commerce* is also clear on the fact that a legal requirement that a financial contract must be in writing cannot render contracts concluded electronically void or invalid unless as an exception exist a provision that suggests to the contrary that the contract must be exclusively in writing and in writing alone, which requires physical paper. Such provisions are rare.⁸⁹

7 Conclusion

⁸⁶ The *National Payment Systems Act* 39 of 2011.

⁸⁷ Section 2 of the *National Payment Systems Act* 39 of 2011.

⁸⁸ Section 83J(1) of the *Information and Communications Act* [Chapter 411A].

⁸⁹ *McConnell and McConnell v Kimani* 1967 EA 702.

In conclusion, the advent of mobile banking has brought about a need to reconsider and redefine the banker-customer relationship in the digital era. Mobile banking has significantly transformed the way customers interact with their banks, providing convenience, accessibility and a host of innovative services. However, this transformation also poses unique challenges and opportunities that require careful consideration.

The adoption of mobile banking has the potential to address challenges related to financial inclusion, given the limited traditional banking infrastructure in Zimbabwe's remote areas. Mobile banking provides an avenue for individuals to access basic financial services, make payments, and manage their finances through mobile devices. The banker-customer relationship in Zimbabwe's mobile banking landscape requires a focus on providing reliable and secure services, as well as educating customers on the benefits and safe usage of mobile banking platforms.

With mobile banking the traditional physical barriers between bankers and customers have diminished, as banking services are now accessible at anytime, anywhere, through mobile devices. This has led to an increased emphasis on providing seamless and personalised experiences to customers, ensuring that their needs are met promptly and efficiently. Moreover, the banker-customer relationship in the context of mobile banking necessitates a strong focus on trust, security and consumer protection. Customers entrust their financial information and transactions to mobile banking platforms, expecting robust security measures and safeguards against fraud and data breaches. Banks must prioritise the implementation of advanced security technologies and educate customers about best practices for secure mobile banking usage.

Further, mobile banking has expanded the range of available services, enabling customers to perform various transactions beyond traditional banking activities. This necessitates an evolving relationship that goes beyond mere transactional interactions. Banks have an opportunity to become trusted advisors and provide personalised financial guidance to customers, leveraging mobile banking data and analytics to offer tailored recommendations and solutions.

According to this study, Kenya has been at the forefront of mobile banking innovation and adoption, with the success story of M-Pesa being widely recognised. The regulatory framework, including the *National Payment Systems Act*, has played a significant role in providing a solid foundation for mobile banking in Kenya. The banker-customer relationship in Kenya's mobile banking ecosystem emphasises trust, security, consumer protection and competition. The use of mobile banking data to offer personalised financial guidance has become more prevalent, allowing banks to tailor

services and recommendations based on customer behaviour and preferences.

8 Recommendations

It is therefore important to implement the following recommendations in the spirit of maintaining the banker-customer relationship in the context of mobile banking in Zimbabwe. Successful mobile banking depends heavily on a stable and reliable network infrastructure. Banks should collaborate with telecommunication companies to enhance their network coverage and connectivity in rural areas and remote regions. This would ensure that customers across the country can access mobile banking services without interruption.

Banks should also design mobile banking apps with user-friendly interfaces that are easy to navigate, even for customers with limited technological literacy. They should use simple language and provide clear instructions to ensure that customers can easily understand and use the app, regardless of their level of education or familiarity with technology. Furthermore, intermittent internet connectivity is a challenge in Zimbabwe. Banks could develop mobile banking apps that offer offline functionality, allowing customers to perform basic transactions such as balance inquiries and fund transfers even when they don't have an active internet connection. Once the connection is restored, the app can sync the data.

Mobile banking has the potential to improve financial inclusion in Zimbabwe. Banks should actively promote and educate customers, particularly those in underserved areas, about the benefits and accessibility of mobile banking. They should collaborate with local community organisations, schools and government institutions to raise awareness and provide training on mobile banking usage.

Zimbabwe is a diverse country with many languages and a multi-currency economy. Mobile banking apps should support the various local languages, allowing customers to interact in their preferred language. Additionally, they should ensure that the app handles different currencies accurately, including the local Zimbabwean dollar and foreign currencies like the US dollar or South African rand.

Mobile banking platforms must comply with local regulations and security standards and should work closely with regulatory bodies, such as the Reserve Bank of Zimbabwe, to ensure that mobile banking services adhere to guidelines on customer protection, data privacy, and cybersecurity. They should regularly update their security measures to protect customer information and transactions. They should embrace digital identity verification. They should leverage technological advancements such as

biometric authentication, facial recognition and document verification technologies to streamline and automate the KYC process. They should implement robust digital identity verification systems that can validate customer identities in real-time, thus reducing manual errors and improving efficiency.

It is also important that customers should have access to prompt and reliable customer support. In addition to in-app support, assistance should be provided through other channels like phone helplines, email, or even physical branches. This multi-channel approach ensures that customers can seek help and resolve issues, regardless of their preferred mode of communication. The banks should also invest in financial education initiatives, including in-app resources, tutorials and workshops held in collaboration with local organisations, where customers are educated about banking services, budgeting, saving, and responsible borrowing. This would empower them to make informed financial decisions.

Customers will accept and use the new technology more frequently as a result, generating more income for the banks and the national economy. The mobile banking business model must guide commercial banks' strategies for business expansion.⁹⁰ The banks should invest more in risk and compliance activities, since doing so will prevent them from suffering significant losses from fraud and data theft.

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Bus Law	Business Lawyer
Cap U L Rev	Capital University Law Review
FATF	Financial Action Task Force
Harv J L & Tech	Harvard Journal of Law and Technology
ICT	information and communication technology
IFL Rev	International Financial Law Review
IMF	International Monetary Fund
JAL	Journal of African Law
JICLT	Journal of International Commercial Law and Technology
KYC	know your customer
Loy U Chi L J	Loyola University Chicago Law Journal
OECD	Organisation for Economic Co-operation and Development
RBZ	Reserve Bank of Zimbabwe
Rutgers Computer & Tech LJ	Rutgers Computer and Technology Law Journal
UNCITRAL	United Nations Commission on International Trade Law
Vill L Rev	Villanova Law Review
Yale LJ	Yale Law Journal