Is a Bank Account Property Protected by Section 25 of the *Constitution*? A Constitutional and Doctrinal Analysis*

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Abstract

In the digital age access to the financial system, gauged primarily by having a bank account, has become fundamental to modern life. The act of opening a bank account establishes a legal relationship between the client and the bank, raising critical questions about the nature and ownership of the account itself. The purpose of this article is to interrogate the legal status of a bank account: What constitutes a bank account and who owns it - the bank or the account holder? The analysis is framed within the context of section 25 of the *Constitution*, which protects against the arbitrary deprivation and unlawful expropriation of property. The article examines the constitutional meaning of "property" and whether a bank account qualifies for protection under this provision. Central to the inquiry is whether the unilateral closure of a bank account by a bank constitutes an arbitrary deprivation. Notably, the focus is not on the funds credited to the account, which are legally recognised as the property of the bank, but on the bank account itself as a potential property interest. By exploring this area, the article contributes to the broader discourse on financial inclusion, property rights and constitutional protections in a technologically evolving society.

Keywords

Bank account; contract; property; section 25; deprivation; financial inclusion.

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1 Introduction

It is a well-established principle that the relationship between a bank and its client is founded on contract. Scholars generally agree that this relationship cannot easily be understood in proprietary terms, since it is difficult to determine whether the "property" lies in the bank account itself or in the funds credited to it.[1] The precise nature of the contract has been subject to extensive debate, but the most widely accepted view is that it is a debtor-creditor relationship explained as follows: once a client deposits funds, the bank becomes the debtor, obliged to make those funds available on demand (or at a specified date), while the client assumes the role of creditor.[2] The deposited funds become the property of the bank, and the client holds only personal rights against it. A parallel line of argument frames the bank-client relationship as a contract of mandate, meaning that the client, as the mandator, issues instructions to the bank, and the bank, as the mandatory, executes these instructions on the client's behalf.[3]

The centrality of a bank account to modern life cannot be overstated. Historically banking was the preserve of the wealthy, originating from merchants who entrusted their gold and silver coins to bankers for safekeeping.[4] Since depositors seldom reclaimed their money immediately, bankers began lending it out at interest, thereby giving rise to the business of banking as financial intermediation between lenders and borrowers.[5] Over time banking developed into a fully-fledged industry that not only generated substantial profits but also facilitated economic growth by enabling individuals to finance business ventures and investments.[6]

Today bank accounts underpin countless aspects of social and economic life. Receiving salaries, applying for visas, securing mortgages or purchasing insurance almost invariably requires the production of bank

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1 Smith *Property Law* 4.

2 Malan, Pretorius and Du Toit *Malan on Bills of Exchange* para 217; Moorcroft and Vessio *Banking Law and Practice* para 15.4.

3 Malan, Pretorius and Du Toit *Malan on Bills of Exchange* para 217; *ABSA Bank Ltd v Hanley* 2014 2 SA 448 (SCA) para 25.

4 Bamford 1997 *IBL* 74; Ellinger, Lomnicka and Hare *Ellinger's Modern Banking Law* 115; Beattie 2024 https://www.investopedia.com/articles/07/roots_of_money.asp para 17.

5 Cowton "Banking" 326.

6 Moorcroft and Vessio *Banking Law and Practice* para 1.2.

statements which one can access only if one has a bank account.[7] Furthermore, the global fight against financial crime, particularly money laundering (ML), terrorist financing (TF) and proliferation financing (PF) has reinforced the importance of financial system usage wherein anti-money laundering, the combatting of financing of terrorism, the combatting of proliferation financing (AML/CFT/CPF) and financial inclusion are viewed as complementary policy objectives.[8] The implication is that regulated entities who include banks must promote the usage of the financial system and must not engage in indiscriminate de-risking and the exclusion of certain categories of clients, which would push financial transactions in the unregulated channels where they cannot be scrutinised for AML/CFT/CPF purposes.[9] The Financial Intelligence Centre (FIC) has reiterated that an accountable institution that de-risks high-risk clients would not have applied the risk-based approach properly.[10] A central measure of inclusion is the ability to open and use a bank account for transactional purposes. Some jurisdictions have gone so far as to recognise the right to a basic payment account, ensuring universal access to the financial system.[11]

Although non-traditional players such as mobile money operators have expanded financial access by reaching previously unbanked populations, banks remain the custodians of the formal financial system. This explains why many technology firms either partner with or are acquired by banks.[12] Moreover, emerging financial technologies frequently rely on the underlying infrastructure of bank accounts, further underscoring their indispensability.[13]

Several legal questions arise against this backdrop. What is a bank account in legal terms? Who owns it? Can it qualify as constitutionally protected property? And does unilateral account closure by a bank amount to arbitrary deprivation of property? This article addresses these questions by first

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7 Competition Commission 2017 https://www.compcom.co.za/wp-content/uploads/2017/11/2-Market-power_non-confidential1.pdf; Van Nierkerk 2021 *SA Merc LJ* 450; Singh *et al* "Role of Banking System in Economic Development" 2163.

8 FATF 2025 https://www.fatf-gafi.org/content/dam/fatf-gafi/guidance/Guidance-Financial-Inclusion%20-Anti-Money-Laundering-Terrorist-Financing-Measures.pdf.coredownload.pdf para 1; World Bank 2025 https://www.worldbank.org/en/topic/financialinclusion/overview.

9 Takaedza 2025 *TSAR* 288.

10 FIC date unknown https://www.fic.gov.za/wp-content/uploads/2024/02/2027.2-PCC-PCC-44A-Targeted-financial-sanctions.pdf para 130.

11 European Commission date unknown https://finance.ec.europa.eu/consumer-finance-and-payments/retail-financial-services/access-bank-accounts_en para 3.

12 Phage and Mabetha 2024 https://www.ifwg.co.za/Pages/Alliance-banking-the-rise-of-bank-fintech-partnerships.aspx para 4. For example, Nedbank recently acquired fintech company iKhokha. See Fraser 2025 https://businesstech.co.za/news/banking/834822/nedbank-buying-one-of-south-africas-fast-growing-companies-for-r1-65-billion/ para 1.

13 Chinoda and Mashamba 2021 *Cogent Economics and Finance* 4.

examining the definitional concept and characteristics of a bank account. While section 25 of the *Constitution* protects against the arbitrary deprivation of "property", it does not define the term. This therefore requires scrutiny on whether and in what sense a bank account constitutes property in the legal sense. The article thus considers ownership, exploring whether the bank or the account holder can properly be said to own the account. The discussion proceeds to analyse property concepts such as corporeal and incorporeal rights, situating the bank account within this framework. Reference is made to the right to property under section 25 of the *Constitution of the Republic of South Africa*, particularly regarding lawful deprivation. The article then considers the constitutional implications of unilateral account closures by banks and concludes with recommendations.

2 What is a bank account?

A useful starting point is a dictionary definition. According to Oxford Languages, a "bank account" is "an arrangement made with a bank whereby one may deposit and withdraw money and in some cases be paid interest."[14] While simple, this definition does not capture the full legal nature of a bank account. It does, however, highlight the idea of an "arrangement", thereby supporting the view that a bank account rests on a contractual relationship between the client and the bank for the deposit and withdrawal of funds. It also points to the right of usage wherein the account holder is allowed to perform certain transactions within the agreed framework. Yet this definition is limited because it does not extend to all the functions that fall within the "business of a bank" in the legal sense. Thus, there is a need to probe more deeply into what constitutes a bank account.

In South Africa several statutes regulate the business of banks, including the *Banks Act*,[15] the *Financial Sector Regulation Act*,[16] the *Mutual Banks Act*,[17] the *Co-operative Banks Act*[18] and the *South African Reserve Bank Act*.[19] Collectively these statutes establish the framework for banks operating in South Africa. The *Financial Sector Regulation Act* recognises these various types of banks, but none of the legislation defines the term "bank account". Even the *Banks Act*, which governs systemically important financial institutions, does not provide a definition, although it defines a "bank" as a public company registered under the Act and sets out the "business of a bank" by listing activities performed by banks (with scope for

14 Oxford Languages date unknown https://www.google.com/search?q=bank+account+definition.
15 *Banks Act* 94 of 1990.
16 *Financial Sector Regulation Act* 9 of 2017.
17 *Mutual Banks Act* 124 of 1993.
18 *Co-operative Banks Act* 40 of 2007.
19 *South African Reserve Bank Act* 90 of 1989.

the Minister to expand them).[20] Similarly the *Conduct Standard for Banks*,[21] issued by the Financial Sector Conduct Authority (FSCA) under sections 106 and 108 of the *Financial Sector Regulation Act*, recognises institutions governed by the *Banks Act*, *Mutual Banks Act* and *Co-operative Banks Act*, but also stops short of defining a "bank account". This absence is striking, since the bank account lies at the heart of the long-term bank-client relationship. In the absence of a legislative definition, a doctrinal analysis must be considered before a constitutional analysis is undertaken.

To provide context an explanation is provided regarding how a bank account comes about. The creation of a bank account typically begins with an application by a prospective client. The bank requires the applicant to provide personal and financial information such as the client's identity, the sources of the funds and the intended services through filling in an application form. This process constitutes what is known as client due diligence (CDD), which is conducted using a risk-based approach in line with AML/CFT/CPF requirements.[22] Once the account is approved, the bank opens the account in the applicant's name and assigns a unique number called the account number, through which the client can access banking services. At this point the applicant formally becomes the client, and the bank-client relationship is established.

The *Protection of Personal Information Act*[23] (POPIA) defines "account number" as:

> 'Account number,' for purposes of this section and section 106, means any unique identifier that has been assigned—
>
> (a) to one data subject only; or
>
> (b) jointly to more than one data subject,
>
> by a financial or other institution which enables the data subject, referred to in paragraph (a), to access his, her or its own funds or to access credit facilities or which enables a data subject, referred to in paragraph (b), to access joint funds or to access joint credit facilities.[24]

For the purposes of POPIA a client is a data subject identifiable by a name and unique number and can perform transactions related to the bank account through utilising that unique identifier known as the account number. From a legal perspective the bank-client relationship gives rise to reciprocal rights and obligations. The client must use the account in accordance with the agreed terms and conditions, while the bank owes a

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20 See s 1 *sv* "bank" and "business of the bank" in the *Banks Act* 94 of 1990.

21 FSCA 2020 https://banking.org.za/bills_acts/conduct-standard-3-of-2020-banks/ (*Conduct Standard for Banks* 3 of 2020).

22 See ss 20A-29 of the *Financial Intelligence Centre Act* 38 of 2001 (FICA).

23 *Protection of Personal Information Act* 4 of 2013 (POPIA).

24 Section 105(5) of POPIA.

duty of care to protect the client's rights of access to funds.[25] In return the client pays fees for account usage and for additional services such as withdrawals, electronic transfers or other transactions. This therefore supports the notion that the bank-client relationship is contractual in nature, which binds the parties to the contract to act in accordance with the terms and conditions agreed upon. While the relationship is contractual, how best can a bank account, which is the basis of the relationship, be explained?

A bank account is not a tangible asset but a bundle of rights enabling the client to perform lawful financial transactions subject to the payment of applicable charges. Importantly, the ownership of the funds deposited passes to the bank, which may use them at its discretion, including for profit. The client, however, retains a personal right against the bank to access equivalent funds on demand or as agreed. Bank accounts are typically identified by the client's name and account number, the latter being treated as confidential.[26] Courts in South Africa, when adjudicating banking disputes, often refrain from disclosing full account numbers in judgments, thereby underscoring the private and sensitive nature of this identifier.[27]

The *Code of Banking Practice*,[28] (the Code), to which all South African commercial banks subscribe, also provides useful guidance. It obliges banks to inform clients and prospective clients of their rights and obligations, the applicable charges, and the circumstances in which an account may be closed. The Code also outlines situations in which banks may unilaterally close accounts and commits banks to assist clients who wish to switch institutions. While the Code does not define "bank account", it does define related terms such as "basic banking services", "dormant account", and "transaction account".[29] These categories illustrate the different forms of bank accounts available to clients who meet minimum requirements.

Drawing together these perspectives, a legally sound working definition may be proposed for the present purposes: A bank account is an arrangement between a bank and its client that establishes a long-term contractual relationship, enabling the client to perform financial transactions within the banking system in return for the payment of agreed fees.

When funds are deposited, they are mixed with the bank's general assets and become the bank's property. The bank acquires the ownership and

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25 See Malan, Pretorius and Du Toit *Malan on Bills of Exchange* para 218.

26 Section 106 of POPIA.

27 *First Rand Bank Limited v The Spar Group Limited* 2021 5 SA 511 (SCA) para 2; *Turner v Standard Bank of South Africa Limited* (9121/2023) [2025] ZAWCHC 177 (3 April 2025) para 3.

28 BASA 2025 https://www.banking.org.za/wp-content/uploads/2025/06/2025-basa-code-of-banking-practice.pdf (the *Code of Banking Practice* 2025).

29 See art 12 of the *Code of Banking Practice* 2025. "Basic banking services" are defined as "the opening, operation and maintenance of transactional accounts."

rights to use those funds, while the client acquires a personal right to repayment on demand. This reciprocal framework creates the foundation for the ongoing bank-client relationship, which may be terminated if either party fails to honour its respective obligations, most notably through account closure. The working definition provided herein does not clarify the ownership conundrum regarding bank accounts. The next section analyses this issue.

3 Ownership and legal nature of bank accounts

Although a bank account is intangible, it carries significant value. Account holders use it to store funds, make payments and access the financial services essential to daily life. In this sense a bank account can be classified as a form of incorporeal property since it cannot be touched or physically possessed, yet it can be owned, has economic value, and confers enforceable rights.[30] A bank account is thus a good example of an incorporeal thing in law. An incorporeal thing is a thing that cannot be touched or handled, consists in a right and is economically valuable.[31]

The personal nature of a bank account is underscored by its non-transferability. It cannot be inherited or assigned directly to another person. Upon the death of an account holder, or if the holder decides to terminate the relationship with a bank, the account itself is closed. What may be transferred are the rights to the funds standing to the credit of the account, which heirs or beneficiaries can access either in cash or by opening a new account in their own names, subject to the usual procedures.[32]

Access to financial services has become so vital in modern society that certain jurisdictions have taken steps to guarantee it. The European Union (EU), for instance, recognises the right to a basic payment account (a type of bank account), available to all legally resident persons.[33] Such an account enables essential transactions, including deposits, withdrawals, and payments for goods and services.[34] In contrast the United Kingdom (UK)

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30 Swart 2000 *Juta's Business Law* 65; *Bright Idea Projects 66 (Pty) Ltd t/a All Fuels v Former Way Trade and Invest (Pty) Ltd t/a Premier Service* 2023 6 SA 214 (KZP) (the *Bright Idea* case) para 31.

31 LexisNexis 2025 https://www.lexisnexis.co.uk/legal/glossary/corporeal-incorporeal-chattels paras 1-2.

32 By usual procedures is meant filling in an application form, providing the full names of the applicant, the nature of the business relationship and the source of funds in line with the CDD requirements as required in terms of FICA. See ss 20A-29 of FICA.

33 See art 16 of *Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features* [2014] OJL 257/214 (*Payments Accounts Directive*).

34 EU 2023 https://eur-lex.europa.eu/EN/legal-content/summary/opening-switching-bank-accounts-and-information-on-fees.html para 2.

does not recognise a universal right to a bank account. However, its nine largest credit institutions (mainly banks) are obliged by the Treasury to provide free basic accounts to eligible clients who would otherwise be excluded.[35]

The EU defines a "payment account" as "an account held in the name of one or more consumers which is used for the execution of payment transactions."[36] A "payment transaction" is further defined as "an act, initiated by the payer or by the payee, of placing, transferring or withdrawing funds, irrespective of any underlying obligations between the payer and the payee."[37]

The EU framework formulates the characteristics of a "basic payment account" as follows:

> 1. Member States shall ensure that a payment account with basic features includes the following services:
>
> (a) services enabling all the operations required for the opening, operating and closing of a payment account;
>
> (b) services enabling funds to be placed in a payment account;
>
> (c) services enabling cash withdrawals within the Union from a payment account at the counter or automated teller machines during or outside the credit institution's opening hours;
>
> (d) execution of the following payment transactions within the Union:
>
> (i) direct debits;
>
> (ii) payment transactions through a payment card, including online payments;
>
> (iii) credit transfers, including standing orders, at, where available, terminals and counters and via the online facilities of the credit institution.[38]

These functions represent the core services necessary for social and economic participation in contemporary society. Thus, banks and financial institutions should not impose undue barriers to consumer access to accounts that provide these basic features. This is why de-risking of so-called high-risk clients is not encouraged but the application of the risk-based approach wherein enhanced due diligence measures may be adopted is permitted.[39]

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35 FCA 2023 https://www.fca.org.uk/publication/corporate/uk-payment-accounts-access-and-closures.pdf 3.

36 See art 2(3) of the *Payments Accounts Directive*.

37 See art 2(5) of the *Payments Accounts Directive.*

38 See art 17 of the *Payments Accounts Directive*.

39 FIC 2025 https://www.fic.gov.za/wp-content/uploads/2025/09/Revised-Guidance-Note-7A-%E2%80%93-Implementation-of-various-aspects-of-the-FIC-Act.pdf paras 65-70.

From a legal perspective the rights of the bank account holder are personal in nature. Because a bank account cannot be physically possessed, ownership is manifested through the exercise of these rights.[40] The denial of such rights can amount to dispossession. In *Trustees, Estate Whitehead v Dumas*[41] the court affirmed that "the account-holder has no real right of ownership of the money standing to his credit but acquires a personal right to payment of that amount from the bank, arising from their bank-customer relationship."[42] This ruling reinforces the conceptualisation of bank accounts as contractual rights rather than tangible property.

Nevertheless, given their economic importance and the reliance individuals place on them for their personal and commercial activity, bank accounts may also be understood as commercial interests worthy of protection under section 25 of the *Constitution*.[43] The categorisation of bank accounts as incorporeal property raises the question of whether they are protected under the property clause of the *Constitution*. This requires a closer look at section 25, which defines the scope of property rights, the conditions under which deprivation is permissible, and the extent to which bank accounts fall within its protective framework.

4 Section 25 of the *Constitution*: property and deprivation

Building on the recognition of a bank account as incorporeal property, it is important to consider its protection under section 25 of the *Constitution*. Section 25 provides for the right to property and prohibits arbitrary deprivation.[44] It further stipulates that property may be expropriated only in terms of a law of general application, for a public purpose or in the public interest, and subject to the payment of compensation.[45] Unlike other rights in the Bill of Rights, section 25 is framed in negative terms. It does not confer a direct entitlement to property but limits the ways in which existing property rights may be interfered with. Importantly property is not confined to land and thus it encompasses any other thing capable of being owned. The section also sets the framework for lawful expropriation.

Property can be defined as an item of wealth that a person owns, granting enforceable rights.[46] In *JRM v VVC*,[47] the court emphasised that "the concept of property, from a constitutional point of view, cannot be divorced

40 The *Bright Idea* case para 33.
41 *Trustees, Estate Whitehead v Dumas* 2013 3 SA 331 (SCA).
42 *Trustees, Estate Whitehead v Dumas* 2013 3 SA 331 (SCA) para 13.
43 Van der Walt *Constitutional Property Law* 14.
44 *Constitution of the Republic of South Africa*, 1996 (the *Constitution*) s 25(1).
45 See s 25(2) of the *Constitution*.
46 Reich 1964 *Yale LJ* 739.
47 *JRM v VVC* 2024 3 All SA 853 (GP).

from the social context of the society that is regulated by the Constitution and its members."[48]

Some scholars contend that section 25 protects a broad spectrum of economically significant intangible property interests which may not traditionally be regarded as property under private law.[49] As Reich notes, "property is not a natural right but a deliberate construction by society."[50] Hence, section 25 recognises ownership as a constitutional right and outlines the circumstances in which deprivation is permissible.

In the *Code of Banking Practice* banks commit to providing affordable and accessible basic banking services to all South Africans who meet certain requirements.[51] The Code refers to "your account", implying that the bank account can be said to "belong"[52] to the client, even though it is operated on the bank's system. This can be likened to a sectional title arrangement, where one party owns a defined portion of property while all parties abide by shared rules to ensure orderly co-existence.[53]

Property may be lost through transfer, theft or other means. In the context of bank accounts, closure results in the loss of the client's rights to the account. Voluntary closure by the client presents no legal issue. However, unilateral closure by the bank engages section 25, raising questions of lawful versus arbitrary deprivation. In *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service*,[54] (hereafter called the *First National Bank* case) the court observed that section 25 protects existing private property rights while also serving the public interest.[55] Although the court explicitly pointed out that it was concerned with corporeal property rights, its principles regarding deprivation and expropriation apply to incorporeal property as well. Deprivation entails interference with the use, enjoyment, or exploitation of property, while expropriation involves a narrower category of interference, subject to lawful

48 *JRM v VVC* 2024 3 All SA 853 (GP) para 113.
49 Van der Walt *Constitutional Property Law* 65.
50 Reich 1964 *Yale LJ* 771.
51 See art 3.1 of the *Code of Banking Practice* 2025.
52 It is important to bear in mind that a bank account is a bundle of rights established from a contractual relationship, so it is incapable of ownership in the strict sense of the word. However, for the purposes of the constitutional argument being advanced herein, ownership of the account as an incorporeal intangible thing will be attributed to the bank.
53 Horn and Pienaar 2020 *Stell LR* 91.
54 *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service* 2002 4 SA 768 (CC) (*First National Bank* case).
55 *First National Bank* case para 50.

conditions and compensation.[56] Arbitrary deprivation occurs when a decision to deprive property is biased or unfair.[57]

It follows from this discussion that a bank account as an incorporeal intangible with economic value is protected as property under section 25. However, the right is not absolute. As with any other rights in the bill of rights, section 25 is subject to limitations as provided in section 36 of the *Constitution*. To open an account, the client must satisfy the CDD requirements. Once opened, the account must be operated within legal and contractual bounds. Closure by the bank is permissible under section 25, provided it does not constitute arbitrary deprivation and the closure can withstand constitutional scrutiny in terms of section 36,[58] keeping in mind the centrality of a basic bank account in modern life.

5 Does account closure equal expropriation?

Legally banks are permitted to close bank accounts in specific circumstances. These include compliance with AML/CFT/CPF obligations, United Nations Security Council (UNSC) sanctions and in certain cases reputational considerations. Section 21E of FICA allows an accountable institution[59] to terminate a business relationship if it has not been able to conduct CDD as required. The same Act prohibits the opening of accounts for persons listed under UNSC resolutions and requires the freezing of any pre-existing funds.[60] Where a listed person already holds an account, certain limited transactions may still be permitted.[61]

When bank account closure occurs under these statutory provisions, the deprivation of property is done in accordance with a law of general application. Such deprivation can withstand constitutional scrutiny. Similarly, the *Conduct Standard for Banks*[62] does not prohibit the termination of business relationships but requires that reasons be provided and notice given.[63] Where these procedures are followed, closure is not considered arbitrary. It is therefore clear that statutory account closures, including those mandated for AML/CFT/CPF or sanctions compliance, do not amount to expropriation, and compensation is not required.

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56 *First National Bank* case para 57.

57 *First National Bank* case para 62.

58 Section 36 of the *Constitution*, in summary, provides that a right in the Bill of Rights can be limited in terms of a law of general application only provided the limitation is reasonable and justifiable in an open and democratic society, based on factors such as the nature of the right, the purpose of the limitation, and the existence of less restrictive means to achieve that purpose.

59 Schedule 1 of FICA lists accountable institutions, and these include banks.

60 See s 26A of FICA.

61 Section 26B of FICA.

62 *Conduct Standard for Banks* 3 of 2020.

63 See art 9(2) and (3) of the *Conduct Standard for Banks* 3 of 2020.

Be that as it may, access to banking has become fundamental for participation in modern economic life. Access to financial services enables persons to exercise other rights in the Bill of Rights, such as the right to trade and economic participation.[64] While the bank account legally belongs to the client in terms of personal rights, operational control rests with the bank. The closure of a bank account deprives the client of the ability to transact, thereby denying the account holder the use and benefit of the account.

A more contentious issue arises where bank accounts are closed for business and reputational reasons, which are not explicitly legislated. Constitutional scrutiny applies here, particularly regarding the right to property and the economic impact on the affected individual. In the *First National Bank* case the court held that deprivation is arbitrary if it is procedurally unfair, irrational or lacks justification.[65] In that regard a bank's unilateral closure based solely on a client's perceived bad reputation or negative publicity may be deemed arbitrary.

Several court challenges have been launched against banks' decisions to unilaterally close accounts, though clients have rarely succeeded. Banks typically cite business and reputational risk as justifications, but these grounds are not explicitly provided for in legislation. This raises the question: under what circumstances are reputational and business risks reasonable grounds for closure?

The Sekunjalo/Nedbank[66] dispute provides context. Following adverse findings by the Mpati Commission against the Sekunjalo group, which is associated with a certain businessman by the name Iqbal Survé, and its dealings with the Public Investment Corporation (PIC) in 2020, several major banks, including Nedbank, moved to terminate or refuse bank accounts held by Sekunjalo companies, citing reputational risk. Sekunjalo responded by launching legal challenges in various courts and tribunals: the High Court,[67] the Equality Court,[68] the Competition Tribunal,[69] the Supreme Court of Appeal (SCA)[70] and finally the Constitutional Court (CC).[71] In 2022

64 Chitimira and Mavhuru 2024 *SA Merc LJ* 441.

65 *First National Bank* case para 67.

66 This refers to the dispute between the Sekunjalo group of companies associated with a certain businessman by the name Iqbal Survé and various banks, which resulted in various court cases, as will be explained in detail in the following discussion. The various court cases are cited in the following footnotes.

67 *Surve v Nedbank Limited* (698/2022) [2022] ZAWCHC 19 (14 February 2022) (*Surve* HC).

68 *Surve v Nedbank* [2022] ZAEQ 3 (17 June 2022) (*Surve* EC).

69 *Surve v Nedbank Ltd* (IR 153 Dec21) [2022] ZACT 34 (16 September 2022) (*Surve* CT).

70 *Nedbank Limited v Surve* 2024 1 All SA 615 (SCA) (*Nedbank* SCA).

71 *Mohammed Iqbal Surve v Nedbank Limited* (CCT02/24).

the Equality Court granted an interim interdict preventing Nedbank from closing certain accounts, finding a *prima facie* case of racial discrimination.[72] The Competition Tribunal also ordered several banks to reopen accounts and forbade closures pending a full investigation under the *Competition Act*.[73] But in later judgments, the SCA overturned the Equality Court's orders, and the CC unanimously dismissed Sekunjalo's attempt to revive the racism claim, finding there was no sufficient evidence that Nedbank's decision was racially motivated.[74] It also held that interim relief from the Competition Tribunal should not block banks from closing or refusing to open accounts in certain circumstances.

In various cases, however, the important role of banks has been emphasised. In *Ndudane v Financial Intelligence Centre*[75] an interlocutory application where the applicants sought to obtain various banks' risk management and compliance programmes (RMCPs) to determine what criteria the banks had used to unilaterally close their bank accounts, which closure they were challenging in the main application, the applicants were alleging that the banks had arbitrarily closed their bank accounts.[76] Even though the case did not address the closure of bank accounts *per se* but dealt with access to information regarding the closure of bank accounts, the court pointed out that access to information is important for clients to understand the decisions that banks make to close certain clients' accounts. In granting the application the court held as follows:

> Fairness and equity, and our constitutional values of openness and transparency, favours that the applicants be granted access to the reports which the respondent banks provided to the FIC as regards reputational and business risk as well as anti-bribery legal and regulatory framework. This is part of the portfolio of evidence that is material to determine whether the applicants were unfairly discriminated against, as they allege. The disclosure of this confidential information held by the FIC will help in the proper determination of the issues in the main application.[77]

On the other hand, banks are highly regulated and strictly supervised. Because of the central role they play in the economic and social fabric of society, they are expected to abide by the highest standards of corporate governance, integrity and accountability.[78] A bank's good name is not merely a matter of prestige but constitutes an essential asset that underpins

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72 *Surve* EC paras 54 and 68.
73 *Surve* CT paras 145 and 210.
74 *Nedbank* SCA paras 22 and 27. The CC summarily dismissed the case on the basis that there were no prospects of success on appeal.
75 *Ndudane v Financial Intelligence Centre* 2024 5 SA 549 (WCC) (*Ndudane).*
76 *Ndudane* para 14.
77 *Ndudane* para 21.
78 Bhengu 2025 https://uct.ac.za/casewritingcentre/blog/top-3-corporate-governance para 2.

public trust in the financial system as a whole.[79] This is what banks mean when they cite business and reputational risks: the potential damage to their credibility, which in turn can compromise client confidence, shareholder value, and even systemic stability.[80] They are the ones who best understand how reputational harm translates into financial loss, regulatory scrutiny, and in some cases a run on clients withdrawing their funds. Where they are found to have flouted any regulations the consequences are dire, as they may be required to pay hefty administrative penalties, face restrictions on their operations or even lose their operating licenses.[81] In extreme instances reputational damage can threaten their very survival, given the reliance of the sector on consumer trust and interbank confidence.[82] For example, during the state capture era the Bank of Baroda had to exit South Africa due to the negative reputation it had accumulated as a result of its association with the Gupta family and related companies.[83] For this reason courts have generally recognised that only those within the banking industry fully appreciate what constitutes reasonable and prudent conduct in protecting the bank's business interests. This has led to judicial reluctance to second-guess decisions taken by banks to close client accounts based on business and reputational risk, provided such decisions are not arbitrary, discriminatory or otherwise unlawful.[84]

In summary, banks are legally permitted to close accounts, but closure must not be arbitrary. A closure is arbitrary if it is unfair, discriminatory or lacks transparency. Lawful account closure under statutory or regulatory frameworks does not constitute expropriation, while closures based solely on unsubstantiated reputational concerns may raise constitutional concerns. Where closure is not supported by regulatory frameworks, reasonable notice and valid reasons must be provided in order to pass constitutional scrutiny.

6 Policy and practical implications

At its core the policy question revolves around financial inclusion. The ability to open and maintain a basic bank account is widely recognised as a primary metric for measuring financial inclusion globally. In modern society

79 Eccles, Newquist and Schartz 2007 https://hbr.org/2007/02/reputation-and-its-risks para 1.

80 Meyer Van den Berg and Dausab "Recalibrating Compliance" 11; Byrne date unknown https://www.thecorporategovernanceinstitute.com/insights/lexicon/what-is-reputational-risk/ para 2.

81 Carretta, Schwizer and Soana 2025 *Financial Review* 1359.

82 Meyer Van den Berg and Dausab "Recalibrating Compliance" 12; Fraser 2024 https://businesstech.co.za/news/banking/783766/all-the-banks-that-have-collapsed-in-south-africa/.

83 *Annex Distribution Pty Ltd v Bank of Baroda* 2018 1 SA 562 (GP) para 39.

84 See in this regard *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) (the *Bredenkamp* case) para 64.

having a bank account is no longer a luxury; it is essential for receiving salaries, paying bills and participating fully in the economy.[85] Currently there are no true alternatives that can fully replace the functionality of a bank account. The UK Financial Conduct Authority (FCA) has noted that basic bank accounts are critical for supporting the financial inclusion of vulnerable consumers.[86] While other players such as mobile money operators and fintech companies have emerged in the financial services sector, they have not displaced banks and do not pose much competition for banks. Instead, they largely complement banks and often require linkage to a bank account for effective operation.[87]

Whether a bank account is classified as "property" or a "bundle of rights and obligations" is less important than ensuring that access is not arbitrarily denied. As Van der Walt observes, certain intangibles have become so valuable in modern life that they must be protected as property, even if they are not traditionally recognised as such under private law.[88] A bank account is one such intangible. Given the economic power of banks, vulnerable consumers risk exclusion if clear protections are not in place. Recognising a right to a basic bank account, or at least imposing strict limits on closures, would strengthen both consumer protection and constitutional alignment.

As legal entities banks are highly regulated and have rights akin to ordinary legal persons. However, their operations directly affect how individuals and other legal entities exercise their constitutional rights, creating a need to balance these interests.

The current *locus classicus* on account closure is the *Bredenkamp* case, which recognised banks' contractual right to close accounts for reputational and business risks upon the giving of notice.[89] In giving a judicial imprimatur to this decision Fabricius J summarised the Bredenkamp principles as follows:

> 1. A bank has a right to terminate a contract with its clients on the notice periods specified in their particular contracts. In the absence of an express termination clause, a bank is entitled to terminate on reasonable notice:
>
> 2. A bank has no obligation to give reasons for terminating this relationship. Its motives for terminating such are generally irrelevant (there *may* be an exception where there is found to be an abuse of rights).

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85 World Bank 2025 https://www.worldbank.org/en/topic/financialinclusion/overview para 4.

86 FCA 2024 https://www.fca.org.uk/publication/corporate/uk-payment-accounts-access-closures-update.pdf 9.

87 Lu 2024 *JBL* 67.

88 Van der Walt *Constitutional Property Law* 66.

89 *Bredenkamp* case para 64.

> 3. There are no self-standing rights to reasonableness, fairness or goodwill in the law of contract.
>
> 4. Even if there were, however, it would be fair for a bank to exercise its contractual right to terminate its relationship with its clients on proper notice.
>
> 5. A bank is also entitled to terminate the relationship with a client on a basis of reputational and business risks and courts should be reluctant to second-guess that decision:
>
> 6. Irrespective of whether negative publicity about the client is true, a bank is fully entitled to terminate the relationship with a client that has a bad reputation. I may repeat that in this case, as in *Bredenkamp*, the bank did not seek to rely on the factual accuracy of the relevant reports, but merely on the particular reputation of its clients.
>
> 7. The fact that the client may have difficulty finding another bank does not impose any obligation on the bank to retain the client.[90]

Some of the principles highlighted above, it should be noted, have been overturned by subsequent legislation. One such is the requirement to give reasons for the termination of business relationships as stipulated in the Conduct Standard for Banks.[91] Although Francis J noted in the *Surve* HC judgment that the *Bredenkamp* case should not be applied uncritically in all account closure cases, it remains influential and authoritative.[92] Recognising a right to a basic bank account in South Africa could reduce arbitrary closures, prevent repeated litigation, and provide clarity for clients regarding the criteria banks apply when closing accounts for reputational reasons. Without criminality, accounts should not be closed arbitrarily.

Business and reputational risks are often linked to AML/CFT/CPF measures. The Prudential Authority Guidance emphasises that banks must mitigate the risk of their services being abused for ML/TF/PF.[93] Therefore, reputational risks unconnected to criminal activity, such as negative media coverage, should not constitute reasonable grounds for closure. The issue of negative reputation is so contentious that it found itself being discussed during the Commission of Inquiry into State Capture, where the chairperson asked an FNB representative if a bank would close a bank account of a perceived racist.[94] Even though this issue was not concluded, the issue of providing reasons and giving an opportunity to an aggrieved party (the one whose bank account has been closed unilaterally by the bank) was one of

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90 *Annex Distribution (Pty) Ltd v Bank of Baroda* 2018 1 SA 562 (GP) para 22 (references omitted).

91 *Conduct Standard for Banks* 3 of 2020 art 9(3).

92 *Surve* HC para 61.

93 SARB 2022 https://www.resbank.co.za/content/dam/sarb/publications/prudential-authority/pa-deposit-takers/banks-guidance-notes/2022/G6-2022%20-%20Business%20risk%20assessments.pdf.

94 Judicial Commission of Inquiry 2018 https://www.statecapture.org.za/site/files/transcript/12/September_17_2018_Session_1-2.pdf 17-21.

the final recommendations of the Commission of Inquiry.[95] The Commission also recommended that the bank-client contract be given legislative recognition, acknowledging that it is not an ordinary contract, based on the importance of banks in modern society.[96]

An important aspect of the *Bredenkamp* case that should be kept at the forefront of any discussion is the fact that the bank terminated the client's banking relationship because of the client's designation by the United States (US) Office of Foreign Assets Control (OFAC).[97] The designation had immediate implications for the bank's risk profile. In *Bredenkamp* the reputational risk to Standard Bank was not a vague or abstract concern as it was materially grounded in the reality that, even though the listing was effected by a foreign sovereign authority, the highly interconnected nature of global financial markets compelled Standard Bank to align with the US sanctions regime if it wished to maintain access to US financial markets and continue to trade in US dollars.[98] In practice, non-compliance with OFAC sanctions exposes financial institutions to secondary sanctions, exclusion from the US correspondent banking system, and the loss of access to US clearing houses, all of which would be catastrophic for a bank's operations.[99] This demonstrates how reputational risk in banking is not limited to domestic perceptions of integrity but also extends to compliance with international regulatory and market expectations.

From a constitutional perspective section 39(1)(c) of the South African *Constitution* explicitly states that when interpreting the Bill of Rights courts may "consider foreign law". Against that backdrop the reliance on OFAC designations in *Bredenkamp* can be regarded as legally sound, as it situates reputational risk within a broad transnational regulatory framework that South African banks cannot reasonably ignore. Importantly, there is a global call for cooperation and coordination in the fight against ML/TF/PF.[100] *Bredenkamp* thus illustrates how reputational considerations must be linked to a tangible regulatory obligation, whether domestic or foreign, rather than being based on arbitrary or subjective assessments of what might "harm" a bank's image. In other words, reputational risk acquires legal legitimacy

95 Judicial Commission of Inquiry date unknown https://www.statecapture.org.za/site/files/announcements/669/OCR_version_-_State_Capture_Commission_Report_Part_VI_Vol_I_-_Estina,Vrede.pdf 263-264.

96 Judicial Commission of Inquiry date unknown https://www.statecapture.org.za/site/files/announcements/669/OCR_version_-_State_Capture_Commission_Report_Part_VI_Vol_I_-_Estina,Vrede.pdf 263-264.

97 *Bredenkamp* case paras 12-14.

98 Meyer Van den Berg and Dausab "Recalibrating Compliance" 12.

99 Meagher 2020 *Fordham L Rev* 1001.

100 FATF 2025 https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html Recommendation 40.

when it is grounded in compliance imperatives, such as those arising from sanctions regimes, AML/CFT/CPF obligations or prudential regulations.[101]

However, unlike the situation in *Bredenkamp*, the banks in the Sekunjalo/Nedbank dispute did not point to any specific regulatory or sanctions regime that required them to act. Instead they relied on a more generalised assertion of reputational harm, largely flowing from media reports and perceived governance concerns. The contrasting outcomes of *Bredenkamp* and Sekunjalo/Nedbank therefore highlight an important principle, which is that reputational risk may be a legitimate ground for bank account closure, but only where it is anchored in a clear regulatory, legal or compliance framework. When invoked as a broad, subjective notion, it risks arbitrariness and may not withstand judicial scrutiny.[102] This distinction is constitutionally significant because the closure of a bank account has direct implications for a client's ability to exercise the right to choose and practise a trade, occupation or profession under section 22 of the *Constitution*, as well as the right to property under section 25. Where reputational risk is tied to regulatory compliance (as in the *Bredenkamp* case) the limitation of these rights is more easily justifiable under section 36 of the *Constitution*. By contrast, where reputational risk is invoked without reference to a specific legal framework (Sekunjalo/Nedbank) the balance tilts in favour of protecting the client's constitutional rights, since the bank's discretion cannot be allowed to operate in a manner that arbitrarily excludes individuals or entities from participating in the financial system.

7 Conclusion and recommendations

The analysis highlights a need for legal and policy clarity regarding when and under what circumstances banks can refuse certain categories of clients. Without such clarity there is a persistent risk of arbitrary exclusion from the financial system, which undermines both financial inclusion and constitutional protections.

The discussion confirms that the right to property is not absolute. There are circumstances in which a person may be deprived of property, and such deprivation is lawful provided it is not arbitrary, procedurally unfair, or discriminatory. A bank account may qualify to be treated as incorporeal property, and the holder's rights may be limited or terminated by the bank, provided proper reasons are communicated and due process is observed. The issue of expropriation does not arise in the context of bank account closures, as no compensation is payable when lawful procedures are followed.

101 Du Toit "Closing Accounts Revisited" 30-31.
102 Du Toit "Closing Accounts Revisited" 30.

The publication of the 2025 *Code of Banking Practice* is a positive step, particularly in defining "basic banking services" in South Africa. The next step should be to make these services compulsory as a minimum package, ensuring that even otherwise restricted individuals have access to essential financial services. While FICA provides limited access for persons and entities listed under UNSC resolutions, many others face exclusion when banks close accounts for reasons unrelated to sanctions, such as reputational risk or perceived business risk. This has led to a proliferation of court cases. Legislative recognition of a right to basic banking services would help prevent blanket or arbitrary exclusion and strengthen the policy of financial inclusion.

A bank account remains central to accessing broader financial services. Innovations such as fintechs, mobile money and other digital platforms largely complement rather than replace traditional banks, highlighting the continuing importance of ensuring universal access to the main gateway of the financial system. Legislative and regulatory frameworks should protect access while balancing the rights of private service providers, who are also constitutionally entitled to operate within their own commercial and reputational interests.

To summarise, the following recommendations are made:

1. Clear procedural requirements for account closure: Banks should provide reasons, adequate notice, and an opportunity for the client to respond, particularly in non-statutory cases such as reputational risk as required by the *Conduct Standard for Banks*. This can be included in the banks' terms and conditions which should be provided to clients on opening of bank accounts. Already, in the *Code of Banking Practice* banks undertake to provide information relevant to the bank's relationship with their clients.[103] This is a positive move.

2. Transparency in risk assessment: Clients should be able to access information regarding the criteria banks use when closing bank accounts, particularly where reputational or business risk is cited. This is in line with the findings of Thulare J in *Ndudane v Financial Intelligence Centre* that the principles that banks apply must be well documented and made available to affected clients.[104] The RMCP as stipulated in FICA is one such place where this information should be contained as it requires accountable institutions to develop, document, maintain and implement a programme of AML/CFT/CPF, which

103 See art 3.1 of the *Code of Banking Practice* 2025.

104 *Ndudane* para 21.

programme must record, among other information, how they refuse or terminate business relationships.[105]

3. Legislative recognition of the bank-client contract in South Africa: Given the centrality of banking services to modern life, the bank-client relationship should be afforded special legislative recognition beyond ordinary contract law. This would go a long way toward promoting financial inclusion efforts.[106]

4. Monitoring and enforcement: Regulatory authorities should monitor bank account closures to ensure compliance with statutory obligations, codes of practice such as the *Conduct Standard for Banks* and the *Code of Banking Practice*, and constitutional principles. This is because in some instances banks avoid risk instead of managing it.[107]

5. Promotion of financial inclusion: Any framework should prioritise the protection of vulnerable consumers, ensuring that access to basic banking services is maintained even in high-risk scenarios, provided there is no criminal activity. Even countries such as the UK, which do not recognise a universal right to a bank account, have initiatives in place to ensure that vulnerable consumers have access to the financial system. In South Africa initiatives such as the Mzansi account, which was a partnership between the National Treasury and the big four banks, helped millions previously unbanked low-income earners to access bank accounts.[108] This shows that access to a bank account remains dependent upon commercial considerations and institutional discretion rather than being guaranteed as a matter of right. Even though fintech companies have emerged, especially in developing countries, they have not managed to displace the position of banks in the financial services sector. This implies that any financial inclusion initiative requires the involvement of important stakeholders such as banks for it to be successful.

Enforcing these recommendations would lead to balancing legitimate compliance and risk management with the constitutional imperative to prevent exclusion from essential economic participation. Ultimately, protecting access to bank accounts and basic banking services is not only a matter of individual rights but also of broader economic development and social inclusion. Therefore, implementing these recommendations would significantly strengthen protection and access to financial services, ensuring

105 See s 42(2)(k) of FICA.
106 Chitimira and Mavhuru 2024 *SA Merc LJ* 444.
107 Meyer Van den Berg and Dausab "Recalibrating Compliance" 10.
108 Kostov, Arun and Annim 2015 *Review of Development Finance* 36.

that vulnerable consumers are not unfairly excluded from the financial system.

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List of Abbreviations

AML	anti-money laundering
BASA	Banking Association of South Africa
CC	Constitutional Court
CDD	client due diligence
CFT	combating the financing of terrorism

CPF	combating proliferation financing
CT	Competition Tribunal
EC	Equality Court
EU	European Union
FATF	Financial Action Task Force
FIC	Financial Intelligence Centre
FICA	Financial Intelligence Centre Act 38 of 2001
FCA	Financial Conduct Authority
Fordham L Rev	Fordham Law Review
FSCA	Financial Sector Conduct Authority
HC	High Court
IBL	International Business Lawyer
JBL	Journal of Business Law
ML	money laundering
OFAC	Office of Foreign Assets Control
PF	proliferation financing
PIC	Public Investment Corporation
POPIA	Protection of Personal Information Ac*t* 4 of 2013
RMCP	risk management and compliance programme
SA Merc LJ	South African Mercantile Law Journal
SARB	South African Reserve Bank
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review
TF	terrorist financing
TSAR	Tydskrif vir die Suid-Afrikaanse Reg (Journal of South African Law)
UK	United Kingdom
UNSC	United Nations Security Council
US	United States (of America)
Yale LJ	Yale Law Journal