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SAFETY DEPOSIT BOXES IN BANKS: A BANK'S FIDUCIARY DUTY OR A FUTILE ATTEMPT TO SAFE GUARD THE GOODS OF THEIR CLIENTS?

by

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Declaration

I, Kirsten Cornelia Hunt, declare that this mini dissertation, which I hereby submit for the degree LLM in Banking Law at the University of Pretoria, is my own work and has not previously been submitted by me for a degree at this or any other university or tertiary institution. I have provided references where I have used the works of other writers. I hereby present this work in partial fulfilment for the award of the LLM degree in Banking Law.

Kirsten Cornelia Hunt

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Chapter 1

Introduction

1.1 Background to research problem

On 18 December 2016, several hundred safety deposit boxes were stolen from First National Bank's Randburg branch.¹ Less than two weeks later, on New Year's Eve, First National Bank's Parktown branch was also robbed of 30 safety deposit boxes.² These robberies were not isolated events and vast quantities of irreplaceable family heirlooms and uninsured valuables stored in safety deposit boxes were stolen, which left affected customers with the question of who to hold accountable for their losses and whether these banks and their directors had failed in their fiduciary duty to ensure the safety of their goods.

Authority for a possible fiduciary duty of a director, chief executive officer and executive officer of a bank towards its customers, can be found in section 60(1) of the Banks Act which states that: "Each director, chief executive officer and executive officer of a bank owes a fiduciary duty and a duty of care and skill to the bank of which such person is a director, chief executive officer or executive officer."³ Also, in section 3 of the Code of Banking Practice, a customer's entitlements are listed and include that the bank will act fairly, reasonably and ethically towards their customers.⁴

However, it is currently not clear whether these, or any other, measures provide effective relief for a customer who suffered loss due to the theft of a safety deposit box. Therefore, the rights of customers versus the reach of a bank's duties in this regard is a contested matter deserving of a more thorough investigation.

¹ 'Safety deposit box holders want to hold FNB to account', available at <http://www.iol.co.za/news/crime-courts/safety-deposit-box-holders-want-to-hold-fnb-to-account-7347647> (accessed 28-03-2017).

² 'Safety deposit box holders want to hold FNB to account', available at <http://www.iol.co.za/news/crime-courts/safety-deposit-box-holders-want-to-hold-fnb-to-account-7347647> (accessed 28-03-2017).

³ Act 94 of 1990.

⁴ Code of Banking Practice 2012.

To this end, his mini dissertation is intended to assist in the formulation of arguments that the rights of the affected customers are not limited by the law but rather argues that the law has broadened the scope of a bank's fiduciary and other duties owed to their customers, consequently easing the process of holding the banks accountable for their actions or lack thereof. As its title indicates, this dissertation asks whether the provision of safety deposit box services to customers involves a fiduciary duty on the bank's part. Hence, can such a duty strengthen the value of such boxes for customers or is the provision of such services a futile exercise that affords less security than expected? Moreover, have new developments in recent years changed anything?

1.2 Overview of chapters

This mini dissertation will consist of four chapters in total. Chapter one is the introductory chapter which provides background information to the research question and lays down the foundation for the rest of the mini dissertation by providing an overview of how the chapters below substantiate the argument that the banks do have a fiduciary duty to safeguard the goods of their clients.

In chapter two the relationship between the African practice of Ubuntu and the fiduciary duty of banks will be investigated. The research problem investigated is a complex matter as it involves ascertaining which fiduciary duties a bank owes its customers, if at all, and whether or not the scope of these duties have been broadened by the inclusion of the fundamental principles of Ubuntu into the South African law.

The question of whether or not the practice of Ubuntu can be included in the fiduciary duty of banks is answered affirmatively. Karin van Marle and Drucilla Cornell co-authored an academic article on Ubuntu. In this article, *Exploring ubuntu: Tentative reflections*, the authors argue that Ubuntu has become a vital part of South-African law, and that the principles of Ubuntu are now becoming a fundamental part of how we interpret the law.⁵ The role of Ubuntu in a post-apartheid legislative setting is also extensively discussed in

⁵ D Cornell & K van Marle 'Exploring Ubuntu: tentative reflections' (2005) 5 *AHRLJ* 195-220.

the book, *Ubuntu and the Law: African Ideals and Post-Apartheid Jurisprudence*.⁶ The importance of incorporating Ubuntu into South-African banking law and how this incorporation has broadened the bank's duties owed to their customers is thus argued and substantiated in chapter two.

Chapter three which examines how the institutional trust created by banks in turn creates additional duties and accountability standards for these banks. When investigating the effects and consequences of Institutional trust created by the banks, the argument is made that by creating this trust, a simultaneous and more onerous obligation to ensure the safety of a customer's goods, is created. Hence, it expands the bank's duties towards its customers.

The conclusion and findings of this mini dissertation are contained in chapter four which is the last chapter of this mini dissertation. In this chapter, it is apparent that a radical shift in accountability and consumer rights has taken place in recent years. Large and powerful corporate institutions such as banks are no longer permitted to overlook their duties towards their customers and in a rapidly evolving social and economic climate such as South Africa, the rights of consumers can no longer be undermined or denied.

⁶ D Cornell & N Muvangua (eds) *Ubuntu and the law: African ideals and post-apartheid jurisprudence* (2012).

Chapter 2

Including Ubuntu in the fiduciary duties of a bank towards its customers

2.1 Introduction

In this chapter, the question is asked whether or not the practice of Ubuntu and its fundamental principles must be included in the fiduciary duty that banks owe their customers. The argument is forwarded that this question should be answered affirmatively. The foundation of this argument lies in the general inclusion of Ubuntu in the South African judicial process, which will be discussed below. It is therefore essential to determine what Ubuntu is, how far the reach of Ubuntu is, and most importantly, how Ubuntu is incorporated in the South African judicial process. The conclusion of the chapter is that Ubuntu – both its practice and principles – must be included in the fiduciary duty that banks owe to their customers. This prospect is then used specifically with reference to a bank's duties when it comes to safety deposit boxes.

2.2 The challenge of defining Ubuntu

2.2.1 Introduction

It is of great importance to define what exactly the practice of Ubuntu entails in order to substantiate the argument that Ubuntu must be included in the fiduciary duty that banks owe their customers but providing a clear definition for Ubuntu has proven difficult as both academics and legal minds have struggled to do so. In the next number of sections, an attempt will be made – with reference to the debates and different sources – to arrive at a working definition that can be used at least for purposes of the narrow topic of this dissertation, namely the role Ubuntu could play in elaborating on a bank's duties as far safety deposit boxes are concerned.

2.2.2 The academic struggle to provide a definition for Ubuntu

The translation of Ubuntu is necessary to determine what exactly Ubuntu is, but this necessity poses a challenge in itself. Metz states that the simple task of translating Ubuntu is difficult 'because it has many different connotations associated with it.'⁷ In an attempt to ease this difficulty, a group of academics concentrated their efforts in an attempt to define Ubuntu. This was made possible by the Stellenbosch Institute for Advanced Studies who funded a pilot project, *The Ubuntu Project*, focusing on the practice of Ubuntu and its place in the South African judicial system. During a 2004 conference held by this Institute, the question of how Ubuntu can be defined was debated by the numerous academic minds in attendance.⁸

The argument was made that because of the interactive nature of Ubuntu, one ultimate definition of Ubuntu cannot be formulated.⁹ It was further argued that if such a definition was formulated, it would go against the spirit of Ubuntu because the society which we live in is ever changing and adapting with the standards of moral and socially acceptable behaviour.¹⁰

This conclusion is also reiterated by Keep and Midgley who could not concretely define Ubuntu because they argue that the legal system in South Africa is still in the process of fully incorporating Ubuntu.¹¹ They further argue that the legal system and culture in South Africa only becomes legitimate once it reflects the demographic and cultural diversity of the country.¹² Only once this system has become a legitimate system, can a definition for Ubuntu be formulated.¹³ By not providing a restrictive definition for

⁷ T Metz 'Toward an African moral theory' (2007) 15 *The Journal of Political Philosophy* 321-323 323.

⁸ D Cornell & K van Marle 'Exploring ubuntu: tentative reflections' (2005) 5 *AHRLJ* 195-220.

⁹ D Cornell & K van Marle 'Exploring ubuntu: tentative reflections' (2005) 5 *AHRLJ* 195-220 202.

¹⁰ D Cornell & K van Marle 'Exploring ubuntu: tentative reflections' (2005) 5 *AHRLJ* 195-220 202.

¹¹ H Keep & R Midgley 'The emerging role of ubuntu-botho in developing a consensual South African legal culture' in F Bruinsma & D Nelken (eds) *Recht der Werkelijkheid* (2005) 29-51 48.

¹² H Keep & R Midgley 'The emerging role of ubuntu-botho in developing a consensual South African legal culture' in F Bruinsma & D Nelken (eds) *Recht der Werkelijkheid* (2005) 29-51 48.

¹³ H Keep & R Midgley 'The emerging role of ubuntu-botho in developing a consensual South African legal culture' in F Bruinsma & D Nelken (eds) *Recht der Werkelijkheid* (2005) 29-51 48.

Ubuntu, Keep and Midgley describe Ubuntu, and the development it provides to the South African society as an 'ideal overarching vehicle for expressing shared values'.¹⁴

Understandably academic minds have not been able to concisely define the complicated notion of Ubuntu and the inquiry as to how legal minds interpret and perceive what Ubuntu is therefore necessary. As explained below, this definition is also not yet established by the legal minds with exposure to the juristic system but it does however emphasize how far-reaching Ubuntu is.

2.2.3 The juristic struggle to provide a definition for Ubuntu

The legal minds involved in the juristic system have also not been able to provide a concise definition for Ubuntu and have opted to follow in the footsteps of the academics, who argue that a single definition of Ubuntu is simply not possible. Former Constitutional Court Justice Yvonne Mokgoro therefore argued that by attempting to define Ubuntu, this definition would: 'simplify a more expansive, flexible and philosophically accommodative idea'.¹⁵ Justice Madala also did not provide an exact definition for Ubuntu but described it as an over-arching notion that encompasses the ideas of 'humaneness, social justice and fairness'.¹⁶

Although the judicial system does not provide for an exact definition of what Ubuntu encompasses, it is clear that the concept of Ubuntu develops as society's values evolve. Prinsloo thus argues that in societies such as South Africa that are governed by Ubuntu, the rights and duties of the members of these societies are implied and not necessarily defined.¹⁷

Even though both the academic world as well as the legal minds involved in the judicial system have elected not to restrictively define Ubuntu, it is still necessary to broadly define Ubuntu. These broader definitions provide for a better understanding of

¹⁴ H Keep & R Midgley 'The emerging role of ubuntu-botho in developing a consensual South African legal culture' in F Bruinsma & D Nelken (eds) *Recht der Werkelijkheid* (2005) 29-51 48.

¹⁵ Y Mokgoro 'Ubuntu and the law in South Africa' (1998) 1 *PELJ* 15-26 16-17.

¹⁶ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) 237.

¹⁷ ED Prinsloo 'Ubuntu culture and participatory management' in PH Coetzee & APJ Roux (eds) *Philosophy from Africa: a text with readings* (1998) 41-51 43.

when Ubuntu is applicable, and it also emphasises that Ubuntu is a far-reaching practice in the South African judicial system.

2.2.4 *Ubuntu's definition in a broad context*

When attempting to define Ubuntu in a broader context, Louw's definition that 'Ubuntu thus defines a person through one's relationship with others' is the most accurate definition, as Louw argues that an individual's relationship with another ultimately leads to the forming of an intertwined community of relationships.¹⁸

To substantiate this broad definition, Richardson's definition that 'Ubuntu is concerned with the welfare of everyone in the community' must also be included.¹⁹ It is thus clear that the interests, whether they are financial or social, of the members of society are protected by the far-reaching nature of Ubuntu. As the academic, judicial and broader definitions of Ubuntu provide no clear exclusions of where Ubuntu cannot be applied, it is arguable that, because of Ubuntu's expansive nature, its principles must be included when social as well as commercial relationships are formed within a community.

2.2.5 *The Interim Constitution, the Final Constitution and Ubuntu*

In the post-apartheid era, Ubuntu has become an enforceable practise and its principles are widely applicable. Before being able to argue that Ubuntu must be included in the fiduciary duty of the directors of banks, it is essential to analyse the inclusion of Ubuntu in the South African judicial system.

Ubuntu, as a part of the formal South African judicial proses, made its first appearance in the Interim Constitution of 1993.²⁰ The Interim Constitution included a post-amble entitled 'National Unity and Reconciliation', which declared that 'there is a need for

¹⁸ DJ Louw 'Ubuntu: an African assessment of the religious other', paper delivered at the Twentieth World Congress of Philosophy (Aug 1998), available at <https://www.bu.edu/wcp/MainAfri.htm> (accessed 5-05-2017).

¹⁹ RN Richardson 'Reflections on reconciliation and ubuntu' in R Nicolson (ed) *Persons in community: African ethics in global culture* (2008) 19.

²⁰ Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution').

understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation’.

The need for a radical transformation of the previous oppressive legal system, which did not take basic human rights for all citizens into account, was thus identified and rectified by including the practise of Ubuntu in the Interim Constitution. The first judicial application of Ubuntu took place in the case of *S v Makwanyane and Another*.²¹ During the ruling of this historic Constitutional Court case, the importance of applying the practice of Ubuntu in the South African judicial system was highlighted by Justice Mokgoro who ruled that ‘[o]ur courts have found room for the exercise of Ubuntu’.²²

It was further held that there is a need to ‘develop an all-inclusive South African jurisprudence’ and that by including Ubuntu in the South African jurisprudence, this development is made possible.²³ The value that the Ubuntu philosophy added to human rights and to society as a whole was thus recognised by the post-apartheid Constitutional Court. This philosophy was also not omitted when the Final Constitution of 1996²⁴ was introduced.

Although South Africa’s Final Constitution makes no specific mention of Ubuntu, section 39(3) recognises the existence and development of customary law by stating as follows: ‘The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.’ The reference to customary law suggests that Ubuntu is implied into the Final Constitution. For example, in the *Bhe* case the Constitutional Court described Ubuntu as ‘a valuable aspect of customary law’.²⁵ It is thus obvious that Ubuntu is inherently a part of customary law and as the court stated, ‘more than justify its protection by the Constitution’.²⁶

It is now apparent that because of its Constitutional inclusivity and its far-reaching nature, the practice of Ubuntu must be integrated into all aspects of South African society

²¹ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

²² *S v Makwanyane and Another* 1995 (3) SA 391 (CC) 243.

²³ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) 305.

²⁴ Constitution of the Republic of South Africa, 1996 (‘Final Constitution’ or ‘Constitution’).

²⁵ *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) BCLR 1 (CC) 45.

²⁶ *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) BCLR 1 (CC) 45.

and business. The argument that Ubuntu must be included in the fiduciary duties of the directors of banks will be initiated below by first briefly explaining the nature of a bank-customer relationship.

2.3 The contractual nature of the bank-customer relationship and the impact of Ubuntu

2.3.1 Introduction

As seen in the above paragraphs, Ubuntu must be included in all aspects of South African society. This far reaching nature of Ubuntu extends to the commercial sector and is protected and enforced by the Constitution. Before being able to argue that Ubuntu must be included in the fiduciary duty of the directors of banks it is essential to understand how banks operate.

2.3.2 The public policy and ubuntu dimensions of the general relationship between a bank and its customer

According to section 11 of the Banks Act 94 of 1990 the registration of a public company, is one prerequisite, from a list of many prerequisites, for the registration as a bank to take place and thus enables this company to conduct the business of a bank. As discussed further below, this has implications from the perspective of possible fiduciary duties that directors and so forth might have towards the customers of the bank as public company.

The business of a bank, as defined in chapter 1 of the Banks Act, includes for example the acceptance of deposits from the general public.²⁷ This activity is facilitated by means of a contract between the bank and customer. In other words, while conducting the business of the bank, a relationship between the bank and its customers comes into existence and according to the case of *Standard Bank v Oeanate Investments*, '[t]he law treats the relationship between banker and customer as a contractual one'.²⁸

²⁷ See the definition of 'the business of a bank' in section 1 of the Banks Act 94 of 1990.

²⁸ *Standard Bank of SA Ltd v Oeanate Investments (Pty) Ltd* 1995 (4) SA 510 (C) 530G-H.

Malan further explains that ‘The relationship between a bank and its customer is contractual in nature, with authority for the view that the relationship is that of debtor and creditor, that is a contract sui generis or a contract of mandate.’²⁹ Because the relationship is contractual, it includes public policy values. As Justice Van Zyl stated in the *Di Giulio* case, ‘[t]hese values occur with consistent frequency in private law in general, and in the law of contract in particular’.³⁰ In *Barkhuizen v Napier* the importance of including public policy in contractual agreements was emphasised by the majority of the court in the following terms:

“Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law.”³¹

By this stage it is clear that a bank enters into contracts with their customers and that these contracts must comply with public policy so as to adhere to the principles contained in the Constitution. The question of where Ubuntu factors into these contracts will be answered below.

The majority judgement in *Barkhuizen v Napier* emphasised the importance of including Ubuntu in public policy by stating that ‘public policy is informed by the concept of ubuntu’.³²

Consequently, by registering a bank as a public company and by conducting the business of a bank, a contractual agreement between the bank and its customers creates a relationship between the former and the latter. The administration of this relationship must thus adhere to public policy and consequently must include the concept of Ubuntu.

²⁹ FR Malan, JT Pretorius & SF du Toit *Malan on bills of exchange, cheques and promissory notes in South African law* (5 ed 2009) 219.

³⁰ *Di Giulio v First National Bank of South Africa Limited* (A1080/2001) [2002] ZAWCHC 33 (19 June 2002) 38.

³¹ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 28.

³² *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 51.

It can therefore be argued that if all contracts are regulated, amongst others, by the principles of Ubuntu, the relationship between the bank and its customers must also embody the principles of Ubuntu.

2.3.3 The development of contract law and Ubuntu

Ubuntu appears, in theory at least, to be a prevalent feature of South African contract law, but the question arose as to whether or not contract law should develop in light of section 39(2) of the Constitution. The *Everfresh Market Virginia* case³³ provided an answer in this regard. More specifically, it was argued in this case that when negotiating contracts, these contracts must require the presence of good faith in order to instil the law of contracts with the values of The Bill of Rights.³⁴ In addition, this case also established that not only is the presence of good faith required but it is a necessity for contract law to be infused with other constitutional values such as Ubuntu.³⁵

The role of good faith negotiations and the presence of Ubuntu in furthering the development of the contract law was thus accepted in this case. It can be argued that because of this development, contracts concluded between a bank and its customers, facilitated by the bank, must be based on good faith and must contain the spirit and objectives of Ubuntu. Furthermore, to the degree that it may become necessary to develop the common law contractual principles surrounding safety deposit boxes, ubuntu should be taken into account as part of the constitutionally-infused public policy considerations.

³³ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).

³⁴ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) 1.

³⁵ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) 72.

2.4 The fiduciary duty of a bank towards its customers?

2.4.1 Introduction

As any public company, a bank will naturally have a board of directors. Just as any other company, public or private, these directors owe certain duties towards the customers of the bank. One category of such duties is known as fiduciary duties.

The fiduciary duties of a bank derive from the fiduciary relationship, based on trust and confidence, between a bank and its customers.³⁶ It comes into existence when a fiduciary, or a legal entity such as a bank, holds assets or information as an agent, who then acts on behalf of the principle or customer.³⁷ The Banks Act codifies these fiduciary duties in section 60(1) by stating that: "Each director, chief executive officer and executive officer of a bank owes a fiduciary duty and a duty of care and skill to the bank of which such person is a director".³⁸ This duty is owed specifically to the bank, so who forms part of the bank?

It is common knowledge that banks operate on the most basic of economic principles of profitability in order to survive. Rootman, Tait and Sharp explain that the survival of banks is based on customer retention which is achieved by displaying empathy, appreciation, friendliness, communality, decreased prices as well as experiencing feelings of trust and they ultimately emphasize that without any customers there would be no banks.³⁹ It is thus argued that customers are the bank and section 60(1) must therefore be interpreted as a fiduciary duty being owed to the customers of the banks.

³⁶ M Ramnath 'Interpreting directors' fiduciary duty to act in the company's best interest through the prism of the Bill of Rights: taking other stakeholders into consideration' (2013) 27 *Speculum Juris* 98-115 100.

³⁷ 'Defining a fiduciary', available at <http://www.businessdictionary.com/definition/fiduciary.html> (accessed 16-05-2017).

³⁸ Section 60(1) of the Banks Act 94 of 1990.

³⁹ 'Relationship marketing and customer retention lessons for South African banks', available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.892.9433&rep=rep1&type=pdf> (accessed 26-04-2018).

It is however important to note that financial institutions, such as banks, are viewed with a higher public profile than the institutions of other industries, resulting in these financial industries being held accountable by means of more regulations.⁴⁰

In the case of *Phillips v Fieldstone Africa (Pty) Ltd*, the ambit of a fiduciary duty is described as follows:

'The existence of [a fiduciary duty] and its nature and extent are questions of fact to be adduced from a thorough consideration of the substance of the relationship and any relevant circumstances which affect the operation of that relationship'.⁴¹

The fiduciary duty of the directors of banks are not only included in legislation but have also derived from the common law. This common law position on these duties will be discussed below.

2.4.2 The common law position on the fiduciary duty of a bank towards its customers

In the case of *Howard v Herrigel*, Justice Goldstone stated that as follows:

"At common law, once a person accepts appointment as a director he becomes a fiduciary in and is obliged to display the utmost good faith towards his dealings. That is the general rule and its application to any particular incumbent of the office of director must necessarily depend on the facts and circumstances of each case."⁴²

Not only is the requirement of good faith highlighted but the duty of skill and care owed by directors was set out in the case of *Fisheries Development Corporation of SA Ltd v Jorgenson*.⁴³ In this case, it was ruled that the extent of a director's duty of skill and care depends on the nature of the business of the company.⁴⁴ The effect of the common law

⁴⁰ C Tucker 'Greater Duty of Skill by the Directors of a Bank', available at <http://www.bowmanslaw.com/insights/greater-duty-of-skill-by-the-directors-of-a-bank/> (accessed 16-05-2017).

⁴¹ *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA) 477H.

⁴² *Howard v Herrigel* 1991 (2) SA 660 (A) 678.

⁴³ *Fisheries Development Corporation of SA v Jorgensen* 1980 (4) SA 156 (W).

⁴⁴ *Fisheries Development Corporation of SA v Jorgensen* 1980 (4) SA 156 (W).

is thus that a director of a bank can be expected to exercise a greater degree of skill and care because of the nature of the business that a bank conducts.⁴⁵

DeMott expands on the argument above by stating that ‘The character or texture of parties’ dealings with each other over time may form a basis that justifies an expectation of loyal conduct... A plaintiff may justifiably expect loyal conduct from an actor when either the nature of their relationship or of the specific role occupied by the actor leaves the plaintiff unable to self-protect against the actor’s misconduct once the relationship is formed or the actor assumes the specific role. Either explicitly or implicitly, the justification for such expectations turns on an analogy to a consequence of the structure of conventional fiduciary relationships. Once a principal and an agent form a relationship of agency, just as once a settlor creates a trust relationship with respect to property, the principal and the trust’s beneficiaries, however sophisticated they may be, are no longer able to self-protect against misconduct by the agent or the trustee, at least until it comes to light.’⁴⁶

It is thus clear that the common law places a duty on directors to act honestly and to bear the responsibility for their actions. The fact of the matter remains that the common law, together with statutory provisions and banking regulations, provides a more concise understanding of what this fiduciary duty entails. These statutory provisions must therefore also be included in this argument.

2.4.3 Ubuntu and the fiduciary duties of the directors of banks

The fiduciary duties of the directors of banks entail the ethical behaviour of these directors to ensure that their customers are protected. In the case of *English v Dedham Vale Properties Ltd*⁴⁷ it was held that the classes of fiduciary duties are never closed, effectively meaning that a so-called *numerus clausus* of fiduciary duties is not possible.⁴⁸

⁴⁵ *Di Giulio v First National Bank of South Africa Limited* (A1080/2001) [2002] ZAWCHC 33 (19 June 2002) 38.

⁴⁶ D DeMott ‘Breach of fiduciary duty: On justifiable expectations of loyalty and their consequences’ (2006) 48 *Arizona LR* 925-956 945.

⁴⁷ [1978] WLP 93 (ChD).

⁴⁸ *English v Dedham Vale Properties Ltd* [1978] WLP 93 (ChD) 110.

In his LLM dissertation, Grové argues that ‘Fiduciary duties are continuously evolving and they need to adapt to ever changing situations and environments’.⁴⁹ The standards of what is regarded as morally and ethically acceptable behaviour is governed by society. This statement not only rings true when it comes to the fiduciary duties of the directors of banks, but it is the foundation on which Ubuntu is based.

One example of these changing standards is the recognition that customers must be treated fairly. The Financial Services Board compiled regulations titled *Treating Customers Fairly*.⁵⁰ These regulations seek to ensure that, amongst others, financial services customers, such as the customers of banks, are assured of a fair outcome when conducting business with banks.⁵¹ It is argued that these standards are consistent with the basic of the principles of fairness contained in Ubuntu and consequently, Ubuntu must be included in the fiduciary duties of the directors of banks to ensure that these directors uphold their prescribed duties and to adhere to the fiduciary standards which customers expect.

2.5 Ubuntu and good corporate governance

The end goal of any financial services provider, such as a bank, is customer satisfaction. This result, with the inclusion of Ubuntu-driven fiduciary duties, is achieved when good corporate governance takes place. Good corporate governance is thus the embodiment of certain principles that lead to a successful business and a satisfied customer.

It is argued that Ubuntu and good corporate governance is linked by the philosophy that society does not operate in isolation. As a result of this philosophy, the directors of financial institutions, such as banks, have a responsibility not only towards the customers of these banks, but also towards the broader community in which these banks operate.

⁴⁹ AP Grové *Company directors: fiduciary duties and the duty of care and skill* (2013) LLM dissertation University of Pretoria 6.

⁵⁰Treating Customers Fairly’, available at <https://www.fsb.co.za/feedback/Documents/TCF%20presentation%20for%20CIS%20Oct%202014.pdf> (accessed 20-05-2017).

⁵¹Treating Customers Fairly’, available at <https://www.fsb.co.za/feedback/Documents/TCF%20presentation%20for%20CIS%20Oct%202014.pdf> (accessed 20-05-2017).

The Institute of Directors in Southern Africa (IoDSA) has drafted the fourth edition of the King Reports, namely the King Code IV, which became effective in mid 2017.⁵² The King IV Code serves as a benchmark for good corporate governance in South Africa, and thus also applies to the way in which banks are governed.⁵³ Although this Code is not legally enforceable, it falls in line with the Companies Act and is therefore widely used in South Africa.

The question of how Ubuntu factors into the King IV Code can be answered by looking at the Code itself.⁵⁴ The Code describes the interdependency between organisations and society as being an integral part of the regulation of business. In fact, the Code expressly states that the 'idea of interdependency between organisations and society is supported by the African concept of Ubuntu'.⁵⁵ In the *South African Broadcasting Corporation* case,⁵⁶ Justice Victor ruled that good corporate governance is 'underpinned by the philosophy of ubuntu-botho' and that '[t]he time is right to incorporate the views of umuntu ngumuntu ngabantu in the King code of good governance'.⁵⁷

It is thus clear that good corporate governance, supplemented by the Ubuntu driven fiduciary duties of directors, ultimately leads to the commercial sector falling in line with the standards of conduct that society expects.

2.6 Conclusion

The South African judicial system is dynamic, resourceful and adaptive to the continuous social and economic developments it faces. It continues to ensure that all citizens of this

⁵²'King IV Report On Corporate Governance For South Africa 2016', available at https://c.ymcdn.com/sites/www.iodsa.co.za/resource/resmgr/king_iv/King_IV_Report/IoDSA_King_IV_Report_-_WebVe.pdf (accessed 10-04-2017).

⁵³'King IV Report On Corporate Governance For South Africa 2016', available at https://c.ymcdn.com/sites/www.iodsa.co.za/resource/resmgr/king_iv/King_IV_Report/IoDSA_King_IV_Report_-_WebVe.pdf (accessed 10-04-2017).

⁵⁴'King IV Report On Corporate Governance For South Africa 2016', available at https://c.ymcdn.com/sites/www.iodsa.co.za/resource/resmgr/king_iv/King_IV_Report/IoDSA_King_IV_Report_-_WebVe.pdf (accessed 10-04-2017).

⁵⁵'King IV Report On Corporate Governance For South Africa 2016', available at https://c.ymcdn.com/sites/www.iodsa.co.za/resource/resmgr/king_iv/King_IV_Report/IoDSA_King_IV_Report_-_WebVe.pdf (accessed 10-04-2017).

⁵⁶ *South African Broadcasting Corporation Ltd and Another v Mpofu* [2009] 4 All SA 169 (GSJ).

⁵⁷ *South African Broadcasting Corporation Ltd and Another v Mpofu* 2009] 4 All SA 169 (GSJ) 66.

country have equal rights and duties and that these rights and duties are enforced. The various legal influences, whether they are historical or cultural by nature, have led to an all-inclusive judicial approach that the courts have adopted. In short, the law is not an isolated part of our society because the members of this society continue to reshape the way in which the law is interpreted. The inclusion of the practice of Ubuntu into the South African judicial system is important because of its wide definition and its far reach, making it applicable not only in social but also in financial circumstances. By considering the various arguments that were made in the paragraphs above, it is thus submitted that the practice of Ubuntu must be included in the fiduciary duties of the directors of banks.

Chapter 3

Institutional trust and consumer protection

3.1 Introduction

In this chapter, the role of institutional trust that banks in South Africa have created will be closely examined. It will be argued that because of the institutional trust these banks have accumulated, they must be held accountable for the damage resulting from the theft of a consumer's goods from safety deposit boxes procured from these banks. A basic overview of the current law's shortcomings regarding the theft of safety deposit boxes is discussed below as well as how these shortcomings can be strengthened.

This argument will be substantiated by incorporating elements from the Consumer Protection Act 68 of 2008 and the evolution of liability of South African banks after the Consumer Protection Act was enacted. Ultimately, this chapter will contend that, because of the institutional trust created by the banks, together with prioritising consumer protection and treating consumers fairly based on the arguments in chapter two, these banks have failed their customers and must therefore be held accountable for their losses.

3.2 What is institutional trust?

Defining the term "institutional trust" is of great importance to support the argument that banks must be held liable for the loss of goods that the customers of these banks have suffered due to the theft of deposit boxes. McKnight defines institutional trust as a situation that '[r]eflects the security one feels about a situation because of guarantees, safety nets and other structures (structural assurance), and the belief that things are normal and customary and that everything seems to be in proper order (situational normality)'.⁵⁸ In the above definition, it is apparent that institutional trust is comprised of both structural assurances together with situational normality. McKnight further defines

⁵⁸ DH McKnight & NL Chervany 'Trust and distrust definitions: one bit at a time' in R Falcone, M Singh & Y-H Tan (eds) *Trust in cyber-societies* (2001) 27-54.

'structural assurances' as being 'the likelihood of trust owing to the presence of contextual conditions such as promises, contracts, regulations and guarantees',⁵⁹ and situational normality where 'trustors are likely to trust because the situation is normal'.⁶⁰

Effectively, the theory is that the various physical, structural and electronic security measures inside any given bank immediately creates situational normality and consequently a customer trusts that their goods will be safe. Thereafter, the structural assurances created by the bank, by signing a contract, legitimises the customer's trust that their goods will indeed be secure. After all, the majority of customers who make use of these safety deposit boxes have one common goal in mind, namely the safety and security of their goods.

3.3 Capitalising on institutional trust

Daniel Kahneman, a behavioural scholar, has written that 'we can be blind to the obvious, and we are also blind to our blindness'.⁶¹ It is argued that the banks have capitalised on the institutional trust that they have created but have rejected the associated liability. These banks are therefore blind to their obvious obligations towards their customers while they capitalise on the public need for the secure storage of their valuables.

This capitalisation takes place in a number of ways. Firstly, the banks provide a service for the safe keeping of their customers' goods and secondly the banks promptly display the fact that they are well regulated and assisted by institutions such as the South African Banking Risk Intelligence Centre.⁶²

On 28 September 2017 the *Victims of Crime Survey 2016/17* was published by Statistics South Africa.⁶³ An astonishing 59% of South African households believe that the police

⁵⁹ DH McKnight & NL Chervany 'Trust and distrust definitions: one bit at a time' in R Falcone, M Singh & Y-H Tan (eds) *Trust in cyber-societies* (2001) 27-54.

⁶⁰ DH McKnight & NL Chervany 'Trust and distrust definitions: one bit at a time' in R Falcone, M Singh & Y-H Tan (eds) *Trust in cyber-societies* (2001) 27-54.

⁶¹ 'Daniel Kahneman Quotes', available at https://www.goodreads.com/author/quotes/72401.Daniel_Kahneman (accessed 19-10-2017).

⁶² 'South African Banking Risk Intelligence Centre', available at <https://www.sabric.co.za/> (accessed 10-10-2017).

⁶³ 'Victims of Crime Survey 2016/17' available at <http://www.statssa.gov.za/?p=10521> (accessed 15-10-2017).

service is not capable of recovering stolen goods. The survey also found that South Africans are disgruntled with the courts and believe that the courts hand down far too lenient judgments against convicted perpetrators.⁶⁴ The words of Samuel Lover's Rory O'More, "better safe than sorry",⁶⁵ seemingly emphasises the approach taken by customers who have procured these safety deposit boxes, in an effort to ensure the safety of their goods. The inclusion of this statistic is of great importance to illustrate the rampant crime levels in South Africa and the need for South African consumers to turn to alternative means of protecting their goods that they perceive to be safe. The rapidly growing need for an alternative means of protection for the goods of consumers is explained below.

The head of sales at Absa Bank, Johan van Schalkwyk, stated that procurement of these boxes is a 'safe custody service' that 12000 Absa customers make use of. Thembi Malabi, senior communications manager at Nedbank stated that the bank has noted a 'growing demand from customers who wish to take up this product'.⁶⁶ With a customer base as large as these numbers above, the adequate protection of their goods must be a priority for banks. The regulation and compliance of banks is also advertised on every major South African bank's website and includes the National Credit Act.

The National Credit Act 34 of 2005 is applicable to banks in their capacity as credit providers and amongst other objectives, aims to improve the standards of consumer information.⁶⁷ More importantly, the Consumer Protection Act 68 of 2008 which ensures fair, accessible and sustainable market standards for consumers, must be adhered to by the banks.⁶⁸ By promptly displaying the adherence to the above mentioned legislation on, for example, a bank's website, the perception of a minimised risk is created and consequently a customer's trust is earned.

⁶⁴ 'Victims of Crime Survey 2016/17' [available at http://www.statssa.gov.za/?p=10521](http://www.statssa.gov.za/?p=10521) (accessed 15-10-2017).

⁶⁵ 'Samuel Lover's Rory O'More Quotes', available at <http://original.antiwar.com/pena/2010/09/30/better-safe-than-sorry/> (accessed 10-10-2017).

⁶⁶ 'How safe is your safety deposit box?', available at <https://www.iol.co.za/personal-finance/my-money/banking/how-safe-is-your-safety-deposit-box-1714604> (accessed 15-10-2017).

⁶⁷ 'Banking Regulatory and Market Framework in South Africa', available at <http://ssrn.com/abstract=2442154> (accessed 12-10-2017).

⁶⁸ T Moloi 'Banking Regulatory and Market Framework in South Africa', unpublished paper available at <http://ssrn.com/abstract=2442154> (accessed 12-10-2017).

Justice Pillay emphasised the importance of adhering to consumer protection legislation by stating that '[i]nstitutions such as the Bank should welcome the framework proffered by the NCA and the CPA if for no reason but that sustained inequalities and need lead to unrest and social instability which is not good for business'.⁶⁹

Additionally, the South African Banking Risk Intelligence Centre, who assists the banks in detecting, preventing and reducing organised crime, instils a sense of confidence in these customers that the banks are even more secure because of the supplementary steps taken in order to prevent a possible break-in from taking place.⁷⁰ Consequently, banks have successfully capitalised on the public's dwindling faith in the justice system by creating an image of an institution that is safe and that can be trusted.

3.4 The Consumer Protection Act

3.4.1 Introduction

As mentioned above, the Consumer Protection Act 68 of 2008 is the cornerstone for consumer protection in South Africa. When arguing that the bank must ultimately be held accountable for the losses that their customers have suffered, the foundation of this argument lies in the fact that that bank breached the fundamental consumer rights ensured by this Act.

The definitions provided for in this Act of what constitutes an 'agreement' which 'includes an arrangement or understanding between or among two or more parties, which purports to establish a relationship in law between those parties;' as well as a 'consumer', that is defines in terms of a credit agreement and states that it applies to ' (a) the party to whom goods or services are sold under a discount transaction, incidental credit agreement or instalment agreement; (b) the party to whom money is paid, or credit granted, under a pawn transaction; (c) the party to whom credit is granted under a credit facility; (d) the mortgagor under a mortgage agreement; (e) the borrower under a secured loan; (f) the lessee under a lease; (g) the guarantor under a credit guarantee; or (h) the

⁶⁹ *Standard Bank of South Africa Ltd v Dlamini* 2013 (1) SA 219 (KZD) 78.

⁷⁰ See <https://www.sabric.co.za/about-us/> (accessed 15-10-2017).

party to whom or at whose direction money is advanced or credit granted under any other credit agreement'. These definitions combined with the stipulations regulating the applicability of the Act, undoubtedly constitutes for the Consumer Protection Act 68 of 2008 and its provisions to apply to the bank-client safety deposit box contracts entered into by the respective parties.⁷¹

The Consumer Protection Act protects the rights of a bank's customers from various forms of potential abuse, such as in the case of an unreasonable contract or the failure of a product both. Both of these aspects can be relevant for safety deposit boxes and are therefore discussed in the following sections.

3.4.2 The unreasonable contract

Section 48(1)(a) of the Consumer Protection Act prohibits a supplier of goods to supply, offer to supply or enter into an agreement to supply goods or services at a price or on terms that are unfair, unreasonable or unjust. If the bank contravenes this duty, the contact between the bank and its customers is regarded as unreasonable.⁷²

Section 48(1)(c) of the Act also prohibits a bank from requiring a consumer to waive any liability of the bank on terms that are unreasonable. In *Barkhuizen v Napier*⁷³ the court held that reasonableness involves the balancing act between two considerations. Public policy as informed by the Constitution requires the two contacting parties to voluntarily comply with the obligations which they have agreed upon.⁷⁴

Corbett defines public policy as 'sets of norms and values, which reflects the wishes and perceptions of the people ... also, society's notions of what justice demands'.⁷⁵ In

⁷¹ Sections 1, 5.

⁷² W Jacobs, P Stoop & R van Niekerk 'Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis' (2010) 13 *PELJ* 301-406 310.

⁷³ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 57.

⁷⁴ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 57.

⁷⁵ MM Corbett 'Aspects of the role of policy in the evolution of our common law' (1987) 104 *SALJ* 52-69 67-68.

Jaibhay v Cassim, the concept of justice is defined as ‘the doing of simple justice between man and man’.⁷⁶

Consequently, if a contract’s terms are detrimental to the welfare of the public, the courts must take the contractual consequences into account⁷⁷ and they possess the power to refuse the enforcement of the contract.⁷⁸ On the opposite side of this balancing act, the fundamental consumer rights, as stated above, must also be considered.⁷⁹ Arguably, the argument is that these contracts issued by the bank are void.

3.4.3 The product failure of the safety deposit boxes

The Supreme Court of Appeal case of *Eskom Holdings Limited*⁸⁰ confirms that section 61(1)(b) of the Consumer Protection Act makes provision for accountability due to the failure of a product.⁸¹ The argument here is simple. The safety deposit box and the bank’s security facilities did not perform in the intended manner since the banks could not secure nor protect the goods of their customers which were stored inside of these boxes. Consequently, the banks must be held accountable for the damages that their customers have suffered and take full responsibility for their failure to provide a service that they had advertised.

3.4.4 The powers of the court

The court possesses various powers in order to ensure that the contractual terms and conditions are fair and just towards South African consumers. If unreasonable contractual terms are alleged, or if the Consumer Protection Act does not give a sufficient remedy to impugn the prohibited conduct, then the provisions stated in section 52 of the Act must

⁷⁶ *Jaibhay v Cassim* 1939 AD 537 544.

⁷⁷ *Hurwitz v Taylor* 1926 TPD 86.

⁷⁸ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 8.

⁷⁹ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 57.

⁸⁰ *Eskom Holdings Limited v Halstead-Cleak* 2017 (1) SA 333 (SCA).

⁸¹ *Eskom Holdings Limited v Halstead-Cleak* 2017 (1) SA 333 (SCA) para 24.

be followed.

In terms of section 52(3)(a) to (b) of the Act, the court has the power to declare either the whole or a part of the transaction unreasonable, or to make any reasonable order in the circumstances, which includes an order to compensate the consumer for losses that resulted from the unreasonable contract. The restoration of money or property to the consumer can also be ordered by the court. Even though the circumstances of every case must be taken into account, the courts are given the power to ensure that consumers receive the protection and relief that they are entitled to.

3.5 The Banking Ombudsman's statement

In 2014, then Ombudsman for Banking Services, Clive Pillay, released an official statement regarding the liability of banks in respect to the theft of goods from safety deposit boxes.⁸² This statement was reiterated by the release of the Ombudsman for Banking Services consumer note titled *Consumer information note 9*, which was published on 9 December 2015.⁸³

The statement in conjunction with the note expresses the view that banks are not contractually responsible for the loss of items stolen out of safety deposit boxes, irrespective of whether the bank was negligent or not.⁸⁴ The statement and note however do not seem to dismiss the possibility of liability in cases where the bank could have prevented the loss. According to Pillay, this question is 'more appropriate for a court of law to determine'.⁸⁵ Pillay further stated that the bank does not know what will be placed

⁸² 'Banks not liable for loss, says banking ombudsman', available at <https://www.pressreader.com/south-africa/weekend-argus-saturday-edition/20140705/282707635161844> (accessed 19-10-2017).

⁸³ Consumer Information note 9, available at http://www.obssa.co.za/images/ConsumerNotes/CIN_9_Bank_robberies_safety_deposit_box_theft_Updated_9_December_2015.pdf (accessed 19-10-2017).

⁸⁴ Consumer Information note 9, available at http://www.obssa.co.za/images/ConsumerNotes/CIN_9_Bank_robberies_safety_deposit_box_theft_Updated_9_December_2015.pdf (accessed 19-10-2017).

⁸⁵ Consumer Information note 9, available at http://www.obssa.co.za/images/ConsumerNotes/CIN_9_Bank_robberies_safety_deposit_box_theft_Updated_9_December_2015.pdf (accessed 19-10-2017).

in these boxes and can therefore not be held liable if a loss of its contents occurs.⁸⁶ He substantiates his position with the reasoning that, if a bank had to assume responsibility, the keeping of accurate records confirming the contents of the boxes, valuation certificates as well as possible value limitations would need to be implemented.⁸⁷

He concluded the statement which was reiterated by the note that by explaining that '[t]hese requirements would obviously negate the purpose of a safety deposit box entirely'.⁸⁸ Ironically enough, this statement is accompanied by Clause 4 of the Code of Banking Practice, which confirms an undertaking that banks will act fairly, reasonably and in a consistent manner towards their customers to ensure that their services are safe and secure.⁸⁹

It is thus clear that the Banking Ombudsman does not wholly exclude the potential liability of a bank and that, if their customers provide a valid argument to a court, it will be up to the court to decide the question of liability.

3.6 The bank's defence

3.6.1 Introduction

The primary defence of banks, protecting these banks against any form of liability regarding the items stored inside a safety deposit box, is the exemption clause invariably included in the standard contract when procuring a safety deposit box. This section of the chapter will closely examine the developments regarding the interpretation of exemption clauses before the courts in order to determine whether these clauses still exempt a bank from liability.

⁸⁶Consumer Information note 9', available at http://www.obssa.co.za/images/ConsumerNotes/CIN_9_Bank_robberies_safety_deposit_box_theft_Updated_9_December_2015.pdf (accessed 19-10-2017).

⁸⁷Consumer Information note 9', available at http://www.obssa.co.za/images/ConsumerNotes/CIN_9_Bank_robberies_safety_deposit_box_theft_Updated_9_December_2015.pdf (accessed 19-10-2017).

⁸⁸Consumer Information note 9', available at http://www.obssa.co.za/images/ConsumerNotes/CIN_9_Bank_robberies_safety_deposit_box_theft_Updated_9_December_2015.pdf (accessed 19-10-2017).

⁸⁹'Code of Banking Practice', available at <http://www.banking.org.za/docs/default-source/default-document-library/code-of-banking-practice-2012.pdf?sfvrsn=10> (accessed 20-10-2017).

3.6.2 What do exemption clauses look like?

In the case of *Rosenblum*⁹⁰ the standardised contract for the storing of goods in a safety deposit box contained the following exemption clauses:

'The Bank hereby notifies all its customers that while it will exercise every reasonable care, it is not liable for any loss or damage caused to any article lodged with it for safe custody whether by theft, rain, flow of storm water, wind, hail, lightning, fire, explosion, action of the elements or as a result of any cause whatsoever, including war or riot damage, and whether the loss or damage is due to the Bank's negligence or not.'⁹¹

And:

'The Bank does not effect insurance on items deposited and/or moved at the depositor's request and the depositor should arrange suitable insurance cover.'⁹²

In the *Fouche* case⁹³, which followed shortly after the *Rosenblum*⁹⁴ case, the court also quoted the exemption clause found in the standard contract. This clause read as follows:

'While the Bank will exercise every reasonable care for the security of the Locker Area, it is a special term and condition of the acceptance thereof that no responsibility for loss or damage of the contents of the Locker whether partial or total, from whatever cause, whether by theft, fire, water, explosion, war, riot or otherwise, is accepted and that the customer himself shall be responsible to insure the contents of the locker.'⁹⁵

3.6.3 The legality of exemption clauses

Exemption clauses are, in terms of the basic principles of contract law, legal and valid unless the party seeking to rely on this clause is guilty of wilful misconduct, the terms of the exemption clause is against public policy or the agreement is so unconscionable that

⁹⁰ *First National Bank of SA Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA).

⁹¹ *First National Bank of SA Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA) para 3.

⁹² *First National Bank of SA Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA) para 3.

⁹³ *Absa Bank Ltd v Fouche* [2002] 4 All SA 245 (SCA).

⁹⁴ *First National Bank of SA Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA).

⁹⁵ *Absa Bank Ltd v Fouche* [2002] 4 All SA 245 (SCA).

is becomes unenforceable.⁹⁶ Furthermore, in the case where an exemption clause opposes a contracting party's basic purpose by undermining the relationship of reciprocity between the agreed upon obligations of both parties involved, the exemption clause will not be legal.⁹⁷

Rautenbach and Van der Vywer correctly state that standardised contracts containing provisions that are contrary to a consumer's fundamental rights 'undermines the consensual basis of contracts', and that these unnegotiable terms and conditions lead to the detriment of these customers.⁹⁸

3.6.4 Development by the courts

In this section development effected by the courts regarding the validity of exemption clauses, will be examined. The two court cases examined below, illustrate how the courts have interpreted these clauses in the past, and most importantly, how the need for consumer protection is slowly being recognised by the courts. It is important to note that even though the two banks involved were ultimately not held liable, the cases illustrate that the need for consumer protection is gathering momentum.

In 2001, the question of the bank's liability, where a customer's goods were stolen out of her safety deposit box, was answered in the *Rosenblum*⁹⁹ case. The majority judgment of the Supreme Court of Appeal ruled that if First National Bank clearly explained to their customer that by signing the contract, their liability was wholly excluded, the bank could not be held liable.¹⁰⁰ Ultimately, the judgment was in favour of First National Bank, who relied on the exemption clauses found in the contract, and thus could not be held liable in any capacity.¹⁰¹

⁹⁶ T Naudé & G Lubbe 'Exemption Clauses- A Rethink Occasioned by Afrox Healthcare' (2005) 122 *SALJ* 441-463 455.

⁹⁷ T Naudé & G Lubbe 'Exemption Clauses- A Rethink Occasioned by Afrox Healthcare' (2005) 122 *SALJ* 441-463 455.

⁹⁸ IM Rautenbach & IW van der Vywer '*Volenti non fit iniuria* en grondwetlike waarborge' 1993 *TSAR* 647-648.

⁹⁹ *First National Bank of SA Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA).

¹⁰⁰ *First National Bank of SA Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA) para 6.

¹⁰¹ *First National Bank of SA Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA) para 27.

This Supreme Court of Appeal case set the president on whether or not a bank can be held liable for the contents of a safety deposit box that was stolen. One year later, in 2002, the bank's liability once again came into question before the Supreme Court of Appeal, in the *Fouche*¹⁰² case. In this case, a customer's goods were stolen out of a safety deposit box that was procured from Absa Bank. The president set in the *Rosenblum*¹⁰³ case was followed and ultimately the ruling was in favour of Absa Bank, who could similarly not be held liable.

Conradie JA, when handing down his judgment regarding the liability of First National Bank in the *Rosenblum* case, did in fact leave the door open to argue that if the circumstances were different, the bank could have been held liable. The judge stated as follows:

‘An honest person's concern about the safety of deposit boxes (and his assessment of the measures required to keep them reasonably safe) would have depended in the first place on the level of anxiety about break-ins at banks in 1986.’¹⁰⁴

Conradie JA referred to 1986, when Rosenblum first procured a safety deposit box, at a time when crime was not as ramped as it is now. It can therefore be argued that because of the higher levels of anxiety in 2018 regarding brake-ins at banks, an assessment of the safety measures required to keep this safety deposit box safe, would be far more serious. The reasonable consumer would therefore expect a far more secure system because of a greater risk of break-ins occurring at banks, which arguably places a duty on these banks to ensure that they have put every measure in place to prevent a break-in.

Conradie JA also referred to ‘institutional trust which has been created by the bank’¹⁰⁵. As previously argued, with the creation of institutional trust comes an obligation to uphold the expectations of a safe and secure bank.

Additionally, the minority judgment delivered by Schutz JA, who disagreed with the decision that the bank could not be held liable, must be taken into account. He argued that there was a perception among the customers of the banks that when they left their

¹⁰² *Absa Bank Ltd v Fouche* [2002] 4 All SA 245 (SCA).

¹⁰³ *First National Bank of SA Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA).

¹⁰⁴ *Absa Bank Ltd v Fouche* [2002] 4 All SA 245 (SCA) para 11.

¹⁰⁵ *Absa Bank Ltd v Fouche* [2002] 4 All SA 245 (SCA) para 17.

goods at a bank for safe-keeping, their valuables would be safe, hence relying on the phrase 'safe deposit'.¹⁰⁶ He then reasoned that 'a member of the public's outlook [would] conform with the idiom "safe as the Bank of England"' and that '[t]he bank's argument seems to me to be a classic case of blaming the victim'.¹⁰⁷

The institutional trust that the bank has created is criticized in the above case law and it is apparent that the liability which accompanies this trust can lead to banks loosing clients and facing the possibility of a decrease of their profits.

In addition to the arguments above, the fact that the plaintiff had read the exemption clause only indicated that the plaintiff new there was a risk of a bank robbery taking place.¹⁰⁸ It is argued that there is always an element of risk involved when dealing with corporate institutions, but the perception of a safe and secure bank clearly outweighed the risk level in the plaintiff's mind.

Most importantly, Schultz JA pointed out that the bank did not offer a contract of lease or of deposit but rather a safe deposit facility.¹⁰⁹ He reasoned that 'if the service fell well short of being "safe" in the sense that allows that there is always some risk, then it was a misrepresentation, if in fact the facility was "unsafe"'.¹¹⁰

The arguments from the minority judgment support the argument that banks must be held liable for the loss of their customers goods. The minority judgment further proves that corporate institutions are not too powerful to be held liable and that a judgment that recognises fundamental consumer's rights, is imminent. This forward looking and insightful judgement indicates a shift in applying the principles of Ubuntu and basic consumer rights and most importantly, paves the way forward in how the courts must interpret legislation in an environment that demands that consumer rights are no longer minimalised.

¹⁰⁶ *Absa Bank Ltd v Fouche* [2002] 4 All SA 245 (SCA) para 10.

¹⁰⁷ *Absa Bank Ltd v Fouche* [2002] 4 All SA 245 (SCA) para 10.

¹⁰⁸ *Absa Bank Ltd v Fouche* [2002] 4 All SA 245 (SCA) para 11.

¹⁰⁹ *Absa Bank Ltd v Fouche* [2002] 4 All SA 245 (SCA) para 12.

¹¹⁰ *Absa Bank Ltd v Fouche* [2002] 4 All SA 245 (SCA) para 12.

3.7 Conclusion

Undoubtedly, a new era is beginning where customers can successfully hold powerful corporate institutions such as banks accountable for their losses. These consumers must argue that legislation like the Consumer Protection Act 68 of 2008, the National Credit Act 34 of 2005 as well as international regulations which ensure that their rights are protected.

Another factor that must be taken into account in order to substantiate the claim for the bank's accountability, is the concept of institutional trust. It is argued that the institutional trust that the banks have created is a double-edged sword. It does not exclusively benefit the banks, it also places a responsibility on these banks to ensure the safety of their customers goods while not excluding their accountability.

In the concluding chapter below, the argument that bank's must be held liable for the loss of their consumer's goods, is once again reiterated by referring to how Ubuntu and institutional trust have ensured that customers and entitled to greater protection of their rights and must consequently receive greater protection.

Chapter 4

Recommendations and conclusion

4.1 Introduction

In the previous two chapters the principles of ubuntu and institutional trust were closely examined in their own right. This examination in chapter one concluded that Ubuntu's fundamental principles of fairness and justice are enforced by law and applicable to communities as well as the corporate institutions who operate in those communities. Consequently, these principles apply to the directors of banks who are expected and obliged to protect the interests of their customers especially when the theft of customer goods occur. The examination of institutional trust that took place in chapter three concluded that when banks create the impression that the goods of customers are safe and secure, an obligation is placed in return on those banks to take responsibility and to be held accountable by their customers when a theft of their goods occurs.

In this concluding chapter, the nexus between ubuntu and institutional trust and fundamental principles of ubuntu and the consequential implications of institutional trust are reciprocal in nature.

4.2 The reciprocal nature of Ubuntu and Institutional Trust

It is evident from the current enacted legislation that the expectations from members of a community regarding justice and the fair treatment of those participating members, plays a vital role in how legislation is written and how consumer rights have been emphasized in the current South African economic market. It is thus clear that when institutions such as banks create certain expectations relating to the services that they provide, that they are expected to deliver and if not, that they be held accountable for their actions.

4.3 Recommendations

The theft of safety deposit boxes in recent years combined with legislation which focuses on consumer protection, is uncharted territory. The best current recommendation that is these consumers must argue their rights in a court of law and must continue to pursue justice and to continue to hold accountable institutions such as the banks, accountable.

When considering how to better the service that banks offer to their customers, relating to the procurement of a safety deposit box, South African banks need to look abroad for a guideline on the best practices and use them as possible guidelines locally. Internationally, banks face similar obstacles as the South African banks such as the theft of goods stored inside these safety deposit boxes. It is however not the similarities between the obstacles but the differences in options provided to consumers, that are important.

In this section, the policies of the United Kingdom and of the United States of America will be analysed briefly and will be used as suggestions for how South African banks can improve their safety deposit box service to customers. Even though these international practises are not law but a particular service that a bank happened to offer to their customers, they must still be considered by South African banks as a possible addition to the safety deposit box service that these banks already offer.

In the United Kingdom, a basic amount of insurance may be included in the rental costs of the safety deposit box and an additional amount of insurance can be bought by the customer. For example, the Metropolitan Safe Deposits provides £10 000 of insurance as a standard amount and there is an optional provision where a customer can receive an additional £1 000 coverage for an additional amount of only £2.52 per month.¹¹¹

This process mentioned above should be considered in all South African banks and must become standard practise when safety deposit boxes are renter to customers. Not only does the insurance provided highlight the fact that there is a risk of losing their

¹¹¹ 'Want to stash your stuff in a safety deposit box? Here's how...', available at <http://www.telegraph.co.uk/personal-banking/savings/want-stash-stuff-safety-deposit-box/> (accessed 16-10-2017).

valuables to theft, but the option to increase the amount of coverage will provide customers with a state of mind that if their goods are stolen, that they will be covered.

In the United States of America, a company that exclusively insures the contents of a safety deposit box, was established. The *Safe Deposit Box Insurance Coverage*, or SDBIC, does not require of their customers to disclose the contents of their safety deposit boxes but rather offers a simple option. Their customers must make use of their website and they decide on the amount of coverage required and on which a set premium is based.¹¹² Additionally, there are no deductibles and policy fees and the only exclusion that prevents a pay-out is when the content of these boxes go missing without any knowledge of place, time or manner of the disappearance.¹¹³

Another service that American banks can make use of is to hire a consultancy firm that specialises in teaching courses on safety deposit box procedures. As a result of these courses the bank employees are better educated in these matters and can in turn assist their customers more informatively.¹¹⁴

Lastly, the option to add a special policy to a home loan, which specifically insures valuables stored inside of safety deposit boxes,¹¹⁵ could be considered as a viable option for South African banks. These practices must be used as a base to develop a local system that is effective and beneficial to both the banks and to the consumers.

Finally, it is argued that the best recommendation is the most simple one; banks must be fully aware of the responsibility they have to ensure that they fully deliver an advertised service and that their obligation to their customers cannot be limited to what

¹¹² 'Safe Deposit Boxes: Your Valuables Aren't Actually Insured or Safe', available at <https://www.valuepenguin.com/2015/04/safe-deposit-boxes-your-valuables-arent-actually-insured-or-safe> (accessed 16-10-2017).

¹¹³ 'Safe Deposit Boxes: Your Valuables Aren't Actually Insured or Safe', available at <https://www.valuepenguin.com/2015/04/safe-deposit-boxes-your-valuables-arent-actually-insured-or-safe> (accessed 16-10-2017).

¹¹⁴ 'Safe Deposit Boxes: Your Valuables Aren't Actually Insured or Safe', available at <https://www.valuepenguin.com/2015/04/safe-deposit-boxes-your-valuables-arent-actually-insured-or-safe> (accessed 16-10-2017).

¹¹⁵ 'What you should (and shouldn't) store in a safe deposit box', available at <http://www.bankrate.com/banking/savings/safety-deposit-box-etiquette-what-not-to-put-in-your-safe-box/> (accessed 16-10-2017).

the current legislations states but is widened by their obligation to the community in which they choose to operate in.

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