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BANKING LAW AND PUBLIC POLICY: RECENT DEVELOPMENTS IN ZIMBABWEAN LAW

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INTRODUCTION

The banker-customer relationship is largely a matter of contract.[1] Although there are other special contracts which arise in specific transactions,[2] the main contract is that of debtor and creditor.[3] An important question which arises from this contract basis of banking law is to what extent is public policy invoked to interfere with the freedom of the parties to contract as they wish? Where the banker's customer is a mere ordinary individual, the inequality of bargaining power between the two parties is obvious and the temptation to resort to public policy to protect the weaker party against unfair contract terms dictated by the other appears to be high. However, orthodox contract theory has resisted such inroads and its crudeness has been very well captured by Professor Hahlo in the following passage:

> Provided a man is not a minor or a lunatic and his consent is not vitiated by fraud, mistake or duress, his contractual undertakings will be enforced to the letter. If, through inexperience, carelessness or weakness of character, he has allowed himself to be over-reached, it is just too bad for him, and it can only be hoped that he will learn from his experience. The courts will not release him from the contract or make a better bargain for him. Darwinian survival of the fittest, the law of nature, is also the law of the market place.[4]

This approach has been defended.[5] The chief supporting basis is that the courts are not qualified to determine what is fair or unfair in the financial market. Further, invoking public policy to cut down bargains is said to be a recipe for creating unnecessary uncertainties in the law.

This crude approach to contract has not been followed in banking law. Public policy has been invoked in banking law to protect the weaker party from unfair contract terms, or unconscionable bargains and this article seeks to briefly explore the extent to which this has been the case. Notwithstanding the already outlined supporting arguments for keeping public policy interventions out of the operation of contracts, there are plausible arguments to the contrary. First, market forces on their own are not always perfect and public policy

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1 Thus Ross Granston States, "contract emerges as the overarching feature of the (banker-customer) relationship ..." see *Principles of Banking Law* (1997) p. 138 et seq. See also *Paget's Law of Banking* (11th edition) at p.110 et. seq.

2 For example, the contract of depository.

3 *Foley v Hill* (1848) 2H L Case 28; *Joachimson v Swiss Bank Corporation* [1921] 3 KB110, *R v Bester* 1961 (2) SA 52 (FSC), *S v Keaney* 1964 (2) SA 495(A); *S v Kotze* 1965(1) SA 118 (AD); *Standard Bank of SA Ltd v Oneanate Investments* 1995 (4) SA 510(C); *Standard Bank of S.A Ltd v ABSA Bank Ltd & Another* 1995(2) SA 740 (T).

4 Hahlo 1981 (98) SALJ 70.

5 For a simple summary of this defence, see McKendrik, *Contract Law* (1977) at p.33. For a detailed discussion of this subject, see for instance, M. Trebilcock, *The Limits of Freedom of Contract* (1993); A Ogus, *Regulation: Legal Form and Economic Theory* (1994; R.A. Posner, *Economic Analysis of Law*, 4th edition (1992).

interventions are essential to promote efficiency.[6] Secondly, it is submitted that any legal system worth its salt should strike down certain unfair contract terms to promote fairness as an end in itself.[7] It has thus been rightly suggested that legal intervention in contractual bargains may be justified for the "preservation of morality in the market system".[8] A broad concept of fairness should be able to accommodate the striking down of 'immoral' barriers behaviour and this is a legitimate function of law.

Apart from the area of contract, banking law also faces public policy considerations in the area of the delictual obligations imposed on bankers in relation to both the customer and third parties. The following aspects of banking law which have raised issues of the role of public policy will be explored in this article: the *in duplum* rule, (ii) undue influence and sureties, (iii) conclusive proof certificates and (iv) the delictual liability of a collecting banker.

THE *IN DUPLUM* RULE

The *in duplum* rule was crisply stated by Selikowitz J in *Standard Bank of S.A. Ltd v Oneanate Investments (Pty) Ltd*[9] in the following terms:

> The *in duplum* rule is as it is known in our law provides that interest stops running once unpaid interest is equal to the unpaid capital. It follows that a creditor may not recover more, in legal proceedings against the debtor, than unpaid capital together with interest equal to the unpaid capital.[10]

The rule further provides that should interest thereafter fall below the unpaid capital, it begins to run again until it reaches the unpaid capital.[11] The Zimbabwean High Court recently confirmed this rule as part of our law in the leading case of *Commercial Bank of Zimbabwe v MM Builders and Suppliers*.[12] This is in line with a long line of authorities entrenching the rule as part of Roman Dutch law.[13]

The basis of the *in duplum* rule is public policy. This much was accepted in *Commercial Bank of Zimbabwe v MM Builders & Supplies* where Gillespie J stated:

> The ancient Roman and Roman-Dutch law applied the *duplum rule* rigorously, to the extent that interest could not accrue after the amount of the double was reached. The rule was one conceived in public policy and in order to supply protection perceived to be necessary.[14]

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6 In addition to the texts referred to in note 5, see also B.R. Cheffins, *Company Law: Theory, Structure, and Operation* (1997), chapter 3..

7 *Ibid.* Unfairness as a basis for setting aside bargains has been embraced by the Australian courts: see for instance *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

8 B.R. Cheffins, *op cit* p.156.

9 1995 (4) SA S10 (C).

10 At p. 559 1-J.

11 *LTA Construction Bpk v Administrateur* 1992 (1) SA 473 (A).

12 1996 (2) ZLR 420 (H).

13 *Neikerk v Niekerk* 1830 1 Menzies 452; *Roberts v Booy* 1884 (4) EDC 22; *Taylor v Hollard* (1886) 2 SAR 78/85; *Van Diggelen v Triggs* 1911 SR 154; *Union Government v Jordans Executors* 1916 TPD 411; *Oosthuizen + Ors v South Africa Railways & Harbours* 1928 WLD 52; *Van Copenhagen v Van Copenhagen* 1947 (1) SA 576 (T); *Administrasie van Transvaal v Oosthuizen en 'n Ander* 1990 (3) SA 387 (W); *LTA Construction Bpk v Administrateur, Transvaal* 1992 (1) SA 473 (A) *Standard Bank of SA v Oneanate Investments* 1995 (4) SA 510 (C) *Leech & Ors v ABSA Bank Ltd* (1997) 3 All SA 380(W); *Standard Bank of South Africa Ltd v Oneanate Investments* 1998 (1) SA 811(SCA).

14 At p. 465 F-G.

In *Standard Bank of SA v Oneanate Investments (in Liquidation)*[15] the South African Supreme Court of Appeal put the public policy issue more forcefully in the following words of Zulman JA:

> The rule is out based on a public policy designed to protect borrowers from exploitation by lenders.[16]

The recent extensive discussion of the scope of the rule by Gillespie J in *Commercial Bank of Zimbabwe v MM Builders & Suppliers* does not, it is submitted, adequately address the public policy basis of the rule. There are four aspects worth noting from Gillespie J's judgment. First, the court had to consider whether the *in duplum* rule applied to bank overdrafts as distinct from other loan accounts. It had been argued on behalf of the bank that the rule did not apply to an overdrawn account because interest debited on such an account was itself a loan by the bank to the customer. Accordingly, it was argued, there was essentially no interest on an overdraft to which the rule could apply. An acceptance of this argument would have ousted the *in duplum* rule from overdrafts, thus substantially reducing its public policy value given that it would have failed to protect the banker's customer in one of the commonest relationships between a bank and its customer. The argument was rightly rejected, although it is somewhat disappointing that the court did not spell out a clear conceptual basis for the rejection. The conceptual basis is that whether an amount is capital or interest is a question of law and not a matter of accounting gymnastics. An overdraft is conceptually the lending of money[17] and interest is the charge for the use of that money regardless of how it is reflected in the books of accounts. The same conceptual analysis applies to the alternative argument put forward by the bank, namely that on capitalisation, interest ceases to be interest and becomes capital. The court was therefore correct to reject this alternative argument.[18] The holding that the *in duplum* rule applied to overdrafts in the same way as it does to other loan accounts enhanced the public policy basis of the rule by making it available to a common financial instrument used by banks.

The same cannot be said in relation to how Gillespie J dealt with the second aspect of the mode of appropriation of payments made to an overdrawn account. The judge refused to follow the position of Selikowitz J. in *Standard Bank of SA Ltd v Oneanate* who had applied the English law rule in *Clayton's* case.[19] According to this latter rule, payments to an overdrawn account are appropriated first to the first debt to be incurred, hence the description of the rule as "first incurred, first discharged." Gillespie J reasoned that Roman-Dutch law had its own substantive rule which provided that when a debt produces interest, appropriation of payments is to interest first and then to capital.[20] Although this approach has been supported by the South African Supreme Court of Appeal[21] it is submitted that it is of doubtful correctness and undermines the public policy value of the *in duplum* rule. The *Clayton's* rule is merely a presumption of fact which can easily be reconciled with the

15 1998 (1) SA 811 (SCA).

16 At 828 D-E It endorsed an earlier lower court decision of *Leech & Ors v ABSA Bank Ltd* [1997] 3 ALL SA 308 (W).

17 See Re Hone exp *The Trustee v Kensington Borough Council* (1951) Ch 85 at 89, E.P. Ellinger and E Lomnicka, *Modern Banking Law* 2nd ed (1994) p.577.

18 On this aspect, it followed the judgment of Selikowitz J in *Standard Bank of SA Ltd v Oneanate Investments* 1995(4) SA 510 (C) and affirmed an appeal 1998 (1) SA 811 (SCA) at 828-829.

19 *Davaynes v Noble Clayton's* I Mer 529, 35 ER 767.

20 At p 461-463.

21 *Standard Bank of SA Ltd v Oneanate Investments* 1998(1) SA 811 (SCA) at 831 et. seq.

substantive rule of law relied on by Gillespie J. It is submitted that the better view of the law is as follows: If neither party has appropriated a payment, the *Clayton's* rule applies as a presumption of fact to appropriate payment to the oldest debt. Where, however, the evidence shows that the parties never intended that mode of appropriation, the *Clayton's* rule will not apply and the substantive rule of law applies to appropriate the payment to the interest component first. If the public policy basis of the *in duplum* rule is borne in mind, it can easily be noted that there is nothing inherently inequitable about the *Clayton's* rule applying in favour of the debtor by reducing the capital amount even after the running of interest is suspended by the *in duplum* rule.[22]

The third aspect worth noting from Gillespie J's judgment and which directly raises the issue of public policy is whether or not the *in duplum* rule can be waived. In view of the public policy basis of the rule, the court had no difficulty in correctly holding that the rule cannot be waived by the agreement of the parties. This position has been recently endorsed by the courts in South Africa.[23] The problem, however, is Gillespie J's suggestion that despite the invalidity of waiver of the rule, parties may, once the debt is called up, agree to a novation of the debt so that the new debt (made up of the combined capital and interest) can once again start accruing interest.[24] This position was recently accepted in *Aguy Clement Georgias & Anor v Standard Chartered Finance Zimbabwe Limited.*[25]

It is submitted that there is no basis for such an artificial arrangement which will effectively undermine the rule. Creditors will naturally seek to have the debt novated once the rule affects the accruing of further interest. The moment the debtor requires the most protection of the law is when the debt is called up and there is harassment from the creditor. Taking away that protection at a time when it is needed most is inconsistent with the avowed public policy goal of the rule of protecting debtors from exploitation. Gillespie J. cited no authority for this exception and the South African cases already referred to create no such exception. The suggested exception should therefore be rejected as having no foundation either on authority or in policy.

UNDUE INFLUENCE AND SURETIES

Recent developments in English banking law in relation to a wife acting as a surety for her husband's individual or business bank borrowing raise questions as to the extent of public policy dictates in this area. In *Barclays Bank v O'Brien*[26] it was held by the House of Lords that where a wife has been induced to enter into a suretyship contract guaranteeing the debt of a company in which her husband has business interests by the misrepresentation or undue influence of the husband, she has an equity against the latter to set aside the transaction. This equity is enforceable against the bank (the creditor) either (i) where the husband acts as the bank's agent or (ii) where the bank has actual or constructive notice of the facts giving rise to the equity. The bank would be struck with constructive notice where it fails to take reasonable steps to satisfy itself that the wife's agreement was properly obtained provided the transaction is *prima facie* not to the advantage of the wife and there is a substantial risk of the husband having committed a legal or equitable wrong.

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22 Contrast the position of Selikowitz J. who, while applying the *Clayton's rule* nevertheless made it inapplicable where the *in duplum* rule suspended the further running of interest: see p.576 D-E.

23 See *Leech & Ors v ABSA Bank Ltd* [1997]3 ALL SA 308(W); *Standard Bank of SA Ltd v Oneanate (In Liquidation)* 1998 (1) SA 811 (SCA) at 828D-E.

24 At 466D.

25 HH-59-98.

26 [1994] 1 AC 180; [1993]4 ALL ER 417.

Although the House of Lords rejected the Court of Appeal's thesis that wives were a "protected class" there can be little doubt that *Barclays Bank v O'Brien* is premised on the need to protect persons in vulnerable relationships, with wives being identified as the foremost candidates for the protection. Indeed, the majority of the post-*O'Brien* cases have involved wives.[27] The result is that whenever a wife is involved, the question is whether the advantage is to the wife. If it is, a second question arises: Is there a substantial risk that the husband has committed a legal or equitable wrong? If there is, the bank is obliged to take reasonable steps to avoid being struck with constructive notice. It appears that banks now invariably take reasonable steps whenever a wife is involved as a surety.[28]

Reasonable steps have been identified as explaining the nature and risks of the transaction to the wife in the absence of the husband and advising the wife to take independent legal advice.[29]

Although these principles are not exclusive to wives,[30] it is clear that the courts have considered that the public policy of protecting vulnerable women from the undue influence of their husbands warrants extension to affect a third party (the bank) which is innocent of the undue influence. The device of constructive notice, which essentially imposes a duty on the bank to ensure that no undue influence has been exerted by a third party is clearly public policy at play. It goes beyond the logical principle that a party to a contract cannot be affected by the misrepresentation or undue influence of a third party unless it had knowledge of it or was the principal of the third party.

These developments in English law are relevant for Zimbabwean banking law in two possible ways. First, it is arguable, in view of section 89 of the Constitution of Zimbabwe, that the law applicable at the Cape on 10 June 1891 in relation to undue influence was English law. Accordingly, the *O'Brien* principles, to the extent that they are a declaration of English law as it existed on 10 June 1891, can be regarded as representing Zimbabwean law. Secondly, and in the alternative, it is submitted that these developments are likely to inspire similar developments under Zimbabwean law. The likely direction from which this development will emanate is the concept of good faith in contract.[31] Thus is the recent case of *Eerste Nasionale Bank von Suidelike Bpk v Saayman NO*,[32] Olivier JA, in a minority view, was prepared to use the *bona fides* principles to protect an 85 year old woman from the consequences of a suretyship contract which she had signed under the undue influence of her son. The old woman, who is described in the headnote as "hard of hearing and almost blind . . . and often confused and disoriented" was held by the majority to have

27 See for instance *Bancor Exterior International v Mann* [1995]1 ALL ER 93, *TSB Bank p/c v Camfield* [1995]1 ALL ER 951; *Bancor Exterior International v Thomas* [1997]1 ALL ER 46; *Royal Bank of Scotland plc v Etridge & Another* [1997]3 ALL ER 628. For other cases, see Fehlberg, "The Husband, the Bank, the Wife and her Signature — The Sequel", [1996] MLR 675.

28 See Hooley, "Taking Security After *O'Brien*" [1995] LMCLQ 346.

29 See *Barclays Bank plcv O'Brien* (supra) at 429-430, *CIBC Mortgages plc v Pitt* (1993) 4 ALL ER 433 at 441.

30 The principles have been applied to cohabitees (see *O'Brien* itself); to persons in an emotional or sexual relation short of cohabitation (*Massey v Midland Bank plc* [1995] 1 ALL ER 929; *Banco Exterior International SA v Thomas* (1997) 1 ALL ER 46) and even to an employer- employee relationship (*Credit Lyonnais Bank Nederland NV v Burch* [1997]1 ALL ER 144).

31 For a instructive discussion of the place of good faith in contract, see generally Reinhard Zimmerman, "Good Faith and Equity" in Zimmmerman and Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (1996.

32 1997(4) SA 302 (SCA).

lacked contractual capacity. However, Olivier JA disagreed that she lacked contractual capacity but agreed to set aside the contract on a different ground. He held that she was saved by the principle of *bona fides* and said public policy, in the circumstances of the case, required a relaxation of the principle that a party to a contract was bound by the contents thereof. The headnote apply summarises Olivier JA's public policy intervention in the following words:

> Where a surety was, as in the instant case, obviously physically weak and confused and possibly unable to understand fully the contents of the agreement, or where the surety was to the knowledge of the creditor, the debtor's spouse or elderly parent, public policy required that the creditor ensure that the surety understood the full import of the agreement and of any consequent cessions. This could be achieved by insisting that the surety obtain independent legal advice or by having the creditor explain to the surety the full implications of the agreement and any related document. What happened in the instant case fell far short of these requirements. In the circumstances, the *bona fides* required that the surety agreement and cession not be enforced.[33]

This substantially covers the same area as the *O'Brien* principles. It is submitted that the public policy of protecting persons in vulnerable relationships from oppressive contractual provisions even where the other party is not responsible for inducing consent cannot be faulted. The law should not overlook unconscionable or manifestly disadvantageous transactions merely to promote freedom of contract. For this reason, it is likely that the principles in *O'Brien* will eventually be reflected in Zimbabwean law either through adoption on the basis of the law applicable at the Cape on 10 June 1891 or along the lines suggested by Olivier JA in the South African case just discussed. In that way, public policy will once again shape another important area of banking law.

CONCLUSIVE PROOF CERTIFICATES

Conclusive proof certificates, which are a favourite tool of banks, have raised another avenue through which public policy has been invoked to resolve an issue in banking law. These certificates are a common feature of suretyship contracts and are typically in the following terms:

> The amount of the indebtedness of the debtor and the undersigned surety to the bank at any time shall be determined and proved by a certificate signed by any manager or accountant of the bank. Such certificate shall be binding and be conclusive proof of the amount of the indebtedness.

In the South African case of *Sasfin (Pty) Ltd v Beukes*[34] a clause of this nature in a deed of cession was held to be void as being contrary to public policy. Subsequent to that decision, two conflicting cases emerged in the lower courts in South Africa as to what the decision was authority for. In *Nedbank Ltd v Abstein Distributors (Pty) Ltd and Others*[35] it was held that the Sasfin case stood for the proposition that in all cases, a clause of that nature in a contract was contrary to public policy and therefore void (the perse rule). This perse rule was rejected in *Donelly v Barclays Bank National Bank Ltd* which held that each case was to be considered on its own merits. In the case, the bank was allowed to enforce the clause

33 At p. 304-305.
34 1989 (1) SA1(A).
35 1989(3) SA 750(T).

given that it was a "recognized and reputable commercial bank of more than a century's standing in the country" and so the clause could not be regarded as contrary to public policy. As most banks can easily meet the description of being "recognized and reputable", the reasoning of the court effectively restricted *Sasfin* to the non-banking sector.

In *Ex parte Minister of Justice*[36] *the Appellate Division resolved the conflict between the two cases. It adopted the perse* rule and held that any "conclusive proof certificate" which is signed by the creditor was contrary to public policy and therefore void. It firmly rejected any attempt to put banks in a separate class as being honest and of integrity and emphasised that as long as the certificate rested exclusively on signature by the bank, it was void, it being unconscionable to allow creditors to be judges in their own cause and exclude the jurisdiction of the courts.[37]

The court categorically rejected the approach of English law which has refused to hold such clauses to be contrary to public policy on the basis that bankers are "honest and reliable man of business who are most unlikely to make a mistake".[38]

Although the Zimbabwean Supreme court did not analyse the public policy issues of conclusive proof certificates, it adopted the *per se* rule in *Karimazondo v Standard Chartered Bank of Zimbabwe.*[39] *Be that as it may, it is submitted that the perse rule makes good law. Apart from the compelling reasoning in Ex parte Minister of Justice,* the English justification for refusing to hold conclusive proof certificates as contrary to public policy, cannot be supported in the context of Zimbabwe. Given many new commercial banks, it is not in the public interest to adopt the view that bankers are "honest and reliable men of business who are unlikely to make a mistake."

DELICTUAL LIABILITY OF A COLLECTING BANKER TO THE TRUE OWNER OF A CHEQUE

The liability of a collecting bank to the true owner of a cheque which it has negligently collected on behalf of a customer who is not the true owner is a matter in which public policy has played a decisive role. This arises from the nature of delictual liability under the *actio leges Aquilia*: negligence alone is not sufficient to ground liability, the action must also be wrongful in the sense that there is breach of a legal duty owed to the plaintiff. Whether or not there is a legal duty in any particular case depends on the dictates of public policy and it is for the courts to determine whether there are sufficient policy considerations to warrant the imposition of a legal duty.[40]

Traditionally, courts were unwilling to impose a legal duty where negligent conduct only led to 'pure economic loss'.[41] Accordingly, since the negligent conduct of a bank in collecting

36 1995(3) SA 1 (AD).

37 At p. 21B-C.

38 See *Bache and Co (London) Ltd v Banquet Venes at Commercial Paris SA* [1973] 2 LiLR at p439-440.

39 1995(2) ZLR 404(S).

40 For a recent enunciation of the development of the wrongfulness requirement under the *lex Aquilia*, see *Zimnat v Chawanda.*

41 See for instance *Dickson and Co v Levy* (1894) 11 SC 33; *Union Government v National Bank of South Africa Ltd* 1921 AD 121; *Herschell v Mrupe* 1954 (3) SA 464 (A); *Union Government v Ocean Accident and Guarantee Corporation Ltd* 1956(1) SA 577 (A); *Combrink Chiro praktiese Klinkiek (Edms) Bpk v Datsun Motor Vehicle Distributors (Pty) Ltd* 1972 (4) SA 185(T). The exception during this period was *Perlman v Zoutendyk* 1934 CPD 151, which was described by McKerron as "the leading heresy in the law of delict": [see (1973) 90 SALJ1].

a cheque on behalf of a non-owner only causes pure economic loss to the true owner, the liability of the collecting bank thus faced this unwillingness of the courts to create a legal duty. Up to 1992, Zimbabwean and South African banking laws had been developing in different directions, owing to differing views on what public policy required in this area of the law.

Zimbabwe took the lead in imposing a legal duty on the collecting bank not to negligently cause loss to the true owner of a cheque. Thus in *Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd*[42] the then High Court of Rhodesia accepted the existence of a legal duty in the circumstances notwithstanding the loss being purely economic. This was immediately followed in *Philsam Investments (Pvt) Ltd v Beverley Building Society*.[43] The main public policy consideration advanced by these Rhodesian cases was that the collecting banker was the only one in a position to know whether or not the cheque was being collected on behalf of the true owner[44] and it was therefore fair and just that a legal duty be imposed. The Supreme Court of Zimbabwe had to seal this position in *Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation*[45] given the then continuing refusal by the South African courts to follow suit. The court had to reconsider the public policy implications of imposing a legal duty. It had been argued that imposing liability on a collecting bank was detrimental to the speed and cost of the collection process.[46] The Supreme Court was not persuaded by this reasoning and maintained that the imposing of a legal duty would not cause havoc in the commercial and financial world given that:

> *Since February 1972 when the decision in the Rhostar* case was given, banks in this country have assumed that duty of care and the consequences flowing from it, and no doubt have ordered their affairs, procedures and techniques accordingly. The need to display vigilance has become a fact of their daily lives and there is no basis upon which to suppose that they are unable to cope with it.[47]

Further, "considerations of justice and convenience"[48] supported the imposition of the legal duty. It is therefore clear that the justification for this position of the law is public policy.[49]

Interestingly, it was precisely on the basis of public policy that the South African courts initially refused to impose a legal duty on the collecting bank.[50] The main arguments were that imposing a legal duty would unnecessarily increase the costs and burden of the collection process[51] and that it was undesirable for the courts to interfere with the law which has been laid down over a long period of time.[52] It was also argued that the duty

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42 1972(2) SA 70 (R).

43 1977(2) SA 546 (R).

44 See Goldin J in *Rhostar* at 715.

45 1985 (1) ZLR 358 (SC).

46 See for instance Cowen 1981 TSAR 195 at 220.

47 Per Gubbay JA at p.378F.

48 At p 379.

49 See also *Bank of Credit and Commerce Zimbabwe Ltd v Udc Ltd* 1990(2) ZLR 397(SC); *Biddulphs Removals & Storage v Standard Chartered Bank Zimbabwe Ltd & Anor* 1996 (2) ZLR 206 (H)..

50 There has been extensive academic comment on the subject in South Africa. For a sample, see the articles cited in Malan & Pretorius, *Malan on Bills of Exchange, Cheques and Promissory Notes* (3rd edition) p.429, note 20.

51 Cowen, *op. cit* note 33. See also *Worcester Advice Office v First National Bank of SA Ltd.* 1990 (4) SA811 (C) at 819.

52 See C. Hugo, " Negotiable Instruments" in Zimmerman & Visser (ed) *Southern Cross: Civil Law and Common Law in South Africa* (1996) p.481 at p.514.

would operate unfairly towards banks.[53] The first South African case to reject the duty of the collecting bank was *Yorkshire Insurance Co Ltd v Standard Bank of SA Ltd.*[54] This was followed some fifty years latter in *Atkinson Oates Motors Ltd v Trust Bank of Africa Ltd.*[55] Despite the acceptance of the principle of delictual liability for pure economic loss in *Adminstrateur Natal v Trust Bank van Afrika Bpk*[56] subsequent South African cases continued to hold that public policy did not require the imposition of the legal duty.[57] Finally, however, in *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd*[58] the South African Appellate Division refused to be persuaded by the public policy arguments hitherto used to deny the existence of a legal duty and thundered:

> There can be no reason in principle why a collecting banker should not be held liable under the extended *lex Aquilia* from negligence to a true owner of a cheque, provided all the elements or requirements of Aquilian liability have been met.[59]

This represented a changed conception of public policy in this area as the court considered that there was no spectre of indeterminate liability as potential claimants were easily identifiable. Thus the bank was not being exposed to limitless liability. Further, since the bank professes to have special skills and competence in its professional calling, it was only fair that a duty be imposed to avoid loss to the true owner of a cheque.[60] This new South African position has been followed in subsequent cases.[61]

The contrasting developments in Zimbabwe and South Africa and later the changed South African position on this issue, show the extent to which public policy can be used to influence the development of banking law in either way. Ultimately, it is the court's perception of what is fair, convenient and desirable, which determines the direction of the law.

CONCLUSION

The four areas discussed in this article have shown that public policy plays a central role in shaping the development of banking law. However, it is also clear that given its vague nature the extent of its influence largely depends on the attitudes of the judges. The result is that it can thus be resorted to in support of contrasting positions of the law. It has been shown, for instance that public policy has been used to hold conclusive proof certificates null and void in South Africa and Zimbabwe, while English law has used the same public policy to make the certificates perfectly valid. It has also been seen that the differences which used to exist between Zimbabwean and South African law over the delictual liability of a collecting banker were each justified on the basis of public policy. Be that as it may, public policy is a useful device in banking law, both to protect the weaker party and to create a fair and convenient financial market.

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53 See *Worcester Advice Office v First National Bank of SA Ltd* (supra) at 820I.

54 1928 WLD 251.

55 1977 (3) SA 188(W).

56 1979 (3) SA 824(A).

57 See *Worcester Advice Office v First National Bank of SA Ltd* 1990 (4) SA 811 (C); *Bonitas Medical Aid Fund v Volkskas Bank Ltd* 1991 (2) SA 231 (W).

58 1992(1) SA 783(A).

59 At p. 796C.

60 At p. 799B-E.

61 See *Kwa Mashu Bakery Ltd v Standard Bank of South Africa Ltd* 1995(1) SA 377 (D); *Fedgen Insurance Ltd v Bankorp Ltd* 1994 (2) SA 399(W); *First National Bank of SA Ltd v Quality Tyres (1970) (Pty) Ltd* 1995 (3) SA 556 (A).