A CONSIDERATION OF THE BANK'S POSITION IN THE CONTEXT OF AN ERRONEOUS DEPOSIT MADE

By

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DECLARATION

I, Vanessa Ncube, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

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“Now unto him who is able to do exceedingly abundantly above all that we ask or think, according to the power that works in us…” For propelling me forward even when tides were against me, I am forever grateful.

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ABSTRACT

The issue of erroneous deposits is one that is of importance not only to academics and the public but banks too, especially with the rise of and change in technological developments which comes with the ineluctable erroneous/mistaken deposits, for example, through internet banking.

It is within the context of the above that I seek to consider the bank's position where an erroneous deposit has been made. In tackling this, I will examine whether a bank owes an obligation to a third party (the person that made the deposit) if the bank allows its customer (the accountholder to whom the erroneous deposit was made) to utilise the mistakenly deposited funds, given that the bank is aware that the customer does not have a well-founded entitlement to the funds. Within the context of the bank's obligation, regard will be had to whether in fact the bank can use the funds for its own benefit by setting off the customer's debt owed to it, taking into consideration the lack of legal entitlement of the customer to the funds.

I will also discuss the bank's ownership and potential liability in relation to the use of erroneously deposited funds. I also seek to examine possible remedies having regard to the litigious regulatory framework in subsequently recovering the mistaken deposit from the bank.

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1. INTRODUCTION

Banks form part of the financial sector, one of the most important sectors that contribute to a country's economy.[1] They act as intermediaries within the financial sector, enabling money to easily and instantly be transferred from one person to another. Banks also accept deposits from customers in the form of investments, in pursuit of financial gain, utilise the money deposited and pay it back to the customer on demand at a later stage.[2]

It is however inevitable that with the relative ease and instantaneous nature that banking transactions occur and also as we embrace the fourth industrial revolution and the intended progressive digitalization of the economy, there is an increased and inherent risk in the mistaken transactions. Mistaken transactions happen in a number of ways, including, filling in the incorrect account number when using online banking, thus, making a deposit to the wrong accountholder, and depositing the incorrect amount to a party.[3]

When a deposit is erroneously made to the incorrect recipient, it may be easier to recover it if the recipient is either known by the party that made the deposit or if the recipient does not argue that the money was sent to them in error.[4] It however becomes difficult if the recipient of the funds is an unknown party because the bank needs to get consent from the recipient first before they can reverse the funds.[5] The recipient's bank and the payer's bank then have to work together to liaise with the recipient to allow the money to be repaid.[6]

Reversing erroneous deposits is generally complicated because the recipient may quickly withdraw the money and disappear or allege that he was not aware of the mistake and as such, that the payment was received by him in good faith.[7]

In light of the above, the next discussion in this report is chapter two where I will define some key terms which will enable a better understanding of the research. This will be followed by chapter 3

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[1] H Kawadza *Rethinking the definition of the* 'business of banking' in *South Africa against the backdrop of the registrar of banks v Net income solutions* [2013] ZAWCHC 92" University of the Witwatersrand.
[2] The Banks Act 94 of 1990.
[3] Dr Jacob Enyia, Daisy Nwokedi 'Mistaken payments in banking transactions: An appraisal of the legal consequences' in *international Journal of economics business and management research*, Vol.2, No.01:2018 at 93.
[4] Ibid, pg 312.
[5] Ibid.
[6] Sharrock *R Law of banking and payment in South Africa* (2016).
[7] Dr Enyia Opcit note 3.

where I discuss the duties that a bank owes to a customer and chapter 4 which is a discussion of duties that a customer owes to a bank, so as to ascertain the nature of the relationship between the two parties. In chapter 5, I examine case law to ascertain how courts have approached the issue of erroneous deposits. Chapter 6 is a consideration of possible remedies that can be used to recover an erroneous deposit from a bank. Lastly chapter 7 will, in light of the case authority, conclude by summing up the findings of the research, that being: the legal principles that apply to erroneous deposits, steps that can be followed by a third party in recovering erroneously deposited funds from the bank, as well as a recommendation that can be used to curb erroneous deposits.

(The use of words 'he/his' in this report includes 'she/hers'. Words, 'mistaken' and 'erroneous' will be used interchangeably).

2. DEFINING KEY TERMS

Customer

"A customer of a bank is someone who has, or maintains an account with a bank or who is in such a relationship with the bank that the relationship of a banker and customer exists".[8] "A person becomes a customer of a bank when they open a bank account in their name and deposit some money".[9]

The Business of a Bank

The Banks Act 94 of 1990[10], as amended (the Banks Act) governs the business of a bank and its relations with customers. Section 1 of the Banks Act defines the business of a bank as follows:

"The acceptance of deposits from the general public as a regular feature of the business in question;

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[8] Dr Enyia opcit note 3 at 93.
[9] Schoeman Heidi *An introduction to South African banking and credit* law 2 ed (2013), last accessed on 03 October 2022 via https://0-web-p-ebscohost-com-innopac.wits.ac.za.
[10] Banks Act supra note 2.

The utilisation of money, or of the interest or other income earned on money, accepted by way of deposit …".[11]

According to Dr Kawadza, it has become difficult to define the business of a bank because of statutory definitions that have limited banks to certain activities.[12] Nonetheless, "to many people banks act as asset-transforming intermediaries and mobilise the flow of funds between primary investors and ultimate borrowers".[13] To lawyers, however, "knowing the business of a bank is crucial because of the nature of activities and legal consequences which require institutions to award it special and thorough considerations".[14]

<u>The meaning of deposit</u>

The purpose of the Bank's Act is to "regulate and supervise the business of public companies which take deposits from the public and to provide for matters connected with taking deposits".[15]

The word 'deposit', when used as a noun, means-:

> " *An amount of money paid by one person to another person subject to an agreement in terms of which –*
>
> *(a) an equal amount or any part thereof will be conditionally or unconditionally repaid, either by the person to whom the money has been so paid or by any other person, with or without a premium, on demand or at specified or unspecified dates or in circumstances agreed to by or on behalf of the person making the payment and the person receiving it; and*
>
> *(b) no interest will be payable on the amount so paid or interest will be payable thereon at specified intervals or otherwise, …"*[16]

But does not include an amount of money:

[11] Ibid.
[12] Kawadza opcit note 1 pg 91.
[13] Ibid.
[14] Kawadza opcit note 1 pg 92.
[15] Banks Act supra note 2 s1.
[16] Ibid.

(i) *"paid as an advance, or as part payment, in terms of a contract for the sale, letting and hiring or other provision of movable or immovable property or of services, and which is repayable only in the event of - (aa) that property or those services not in fact being sold, let and hired or otherwise provided; (bb) the fulfilment of a resolutive condition forming part of that contract; or (cc) the non-fulfilment of a suspensive condition forming part of that contract;*

(ii) ...

(iii) ...

(iv) *paid by a holding company to its subsidiary, or by a subsidiary to its holding company, or by one subsidiary to another subsidiary of the same holding company".*[17]

We notice from the above definition of the word 'deposit', in section 1(a), that it suggests that money deposited into one's bank account is not necessarily repaid by the person to whom it is deposited or paid to, but rather, repayment could be made by any other person. The word person includes any partnership[18] or juristic person.[19] One can therefore argue that this definition could be suggesting that an erroneous deposit may be repaid by a bank (any other person). The trueness or falseness of this argument will be confirmed under the case analysis examination. This then brings us to a discussion of the bank's duties.

3. DUTIES OF A BANK

Generally, a bank owes duties to its customer but not necessarily to a third party, owing to the fact that there is a special relationship that exists between a bank and its customer.[20] Customers owe certain statutory duties to banks and banks also owe certain statutory duties to its customers.[21]

[17] Ibid.
[18] Ibid.
[19] The Companies Act 71 of 2008, s1.
[20] Schoeman opcit note 9 ch 1.
[21] Ibid.

3.1 Duty to exercise reasonable care and skill

"A bank has a duty to exercise reasonable care and skill in performing its mandate which includes interpreting, ascertaining and acting in accordance with the instructions of the customer rather than acting in a way which defeats the intentions of the customer".[22] A bank has to exercise the duty of care and skill in communications which the customer sends to the bank,[23] in opening bank accounts and in ensuring that proceeds are not paid to someone not entitled to receive them[24], amongst other functions. It is necessary that the duty of care is imposed so as to avoid rendering banks unanswerable to any mistake or breach which may in turn result in them not incurring liability in their relationship with customers.[25]

3.2 Fiduciary duty

A bank owes a fiduciary duty to its customer and is therefore obliged to be open and honest.[26] The duty is founded on custom, contract and legislation.[27] This fiduciary relationship means that a bank has a duty to act in good faith towards its customers so that customers can have trust in banks. In deciding whether banks are in breach of the required fiduciary duty, all circumstances, including the extent to which a transaction appeared out of the ordinary course, ought to be considered.[28]

3.3 Confidentiality/ Secrecy

The Banks Act is silent on the banks' confidentiality requirement, however, the duty of a bank to preserve confidentiality has long been recognised in English law, in *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461.[29] This duty was acknowledged in South Africa in *Abrahams v Burns* 1914 CPD 452[30] where the court held that "a banker should not

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[22] *Selangor United Rubber Estates Ltd v Cradock* (No.3) [1968] 2 All ER at 1558.
[23] *Hilton v Westminster Bank Ltd* (1926) 135 LT 358 and 362.
[24] *KwaMashu Bakery Ltd v Standard Bank of South Africa Ltd* [1995] 1 All SA 147 (D) pg 148-150.
[25] *Rhostar (Pvt) Limited v Netherlands Bank of Rhodesia Limited* 1972(2) SA 703(R), pg 716 D-E.
[26] Schoeman opcit note 9 ch 1.
[27] Ibid.
[28] *Standard Bank v Estate van Rhyn* 1925 AD 266.
[29] *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461, pg 466. The court expressed that it was the duty of the defendants not to disclose the particulars of the plaintiff's account unless compelled by law.
[30] *Abrahams v Burns* 1914 CPD 452.

disclose details of a customer's account because doing so gives rise to liability if the said disclosure results in the damage suffered by his customer".[31] The requirement of confidentiality was also recognised in *FirstRand Bank Ltd v Chaucer Publications (Pty) Ltd* 2008 (2) SA 544 (C)[32] where Traverso DJP said:

"*It seems to me that for considerations of public policy the relationship between a bank and its clients must be of a confidential nature. Equally, for considerations of public policy, this duty is subject to being overridden by a greater public interest. Although the duty not to disclose rests with the bank, the privilege not to have the details of its dealings with the bank disclosed belongs with the client. It is therefore the client alone who can invoke this privilege and insists that the bank keeps the information about its dealings confidential*".

What this means is that it is a legal right of the customer to have his affairs kept confidential[33] unless if the customer agrees to the disclosure of his information. Courts have however agreed that the duty of confidentiality is not absolute.[34]

There are situations which render it necessary for a bank to reveal information of a customer, these include: where disclosure is in the interest of the public[35]; where disclosure by the banker is compelled by law; where a client gives permission to his information being shared; or where the protection of the banker's own interest requires disclosure.[36] The court in *Tournier's* case confirmed that the duty of confidentiality and the above exceptions are not only limited to the client's information but they also extend to the state of the customer's account and any of his transactions with the bank.[37]

The duty of confidentiality has also been affirmed in our legislation. First, the Protection of Personal Information Act 4 of 2013[38] (POPI Act) promotes confidentiality and non-disclosure of personal information of data subjects ("a person to whom personal information relates"),[39] when being processed by public and private companies. It prohibits the processing of personal

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[31] Ibid.
[32] *FirstRand Bank v Chaucer Publications (Pty) Ltd* 2008 (2) SA 544 (C), para 20.
[33] Tounier's case supra note 29.
[34] Ibid pg 472.
[35] Chaucer publications case supra note 32.
[36] Tournier's case supra note 29 pg 473.
[37] Ibid.
[38] Protection of Personal Information Act 4 of 2013.
[39] Ibid, section 1.

information where a data subject's permission has not been obtained unless if processing is necessary to fulfil the conditions of a contract[40] or is required by law[41] or if processing is required for fulfilling the legitimate interests of a party to whom the information is supplied.[42]

On the other hand we have the Financial Intelligence Centre Act[43] (FICA) which qualifies the POPI Act and the exceptions to the confidentiality rule since it requires a person who carries on a business (a bank in this instance) to report unusual or suspicious transactions to the Centre pursuant to or upon the receipt of proceeds of unlawful activities by the business.[44] This brings us to the bank's duty to prevent financial loss suffered by a party, as provided for in FICA and case law.

The Bank's duty to prevent financial loss suffered

It is argued that since erroneous deposits are unavoidable, the bank has a duty to prevent financial loss suffered by a party in fraudulent or mistaken online transactions. *Hartog v Daly and Others* (A5012/2022) [2023] ZAGPJHC 40,[45] is a case that considered whether a bank owes its customer, the appellant, a duty to be cautious enough so as to prevent loss suffered. In this case, money was electronically paid by the appellant into a fraudster's account after the fraudster intercepted emails and sent the appellant an email informing him to pay the money into the incorrect account.[46]

The first principle that we derive from this case is that "a bank cannot be responsible in delict for loss of moneys where wrongfulness, negligence, causation and damages have not been established".[47] The reason is that when a person opens a bank account the bank performs the required identification checks of an accountholder before the account can be opened,[48] thus, the fact that a fraudster sends an email requesting moneys to be paid to a named account or that a party deposits funds to an incorrect account is not wrongful or negligent on the part of the bank since

[40] Section 11(1)(b).
[41] Section 11(1)(c).
[42] Section 11(1)(f).
[43] Financial Intelligence Centre Act, 38 0f 2001.
[44] Ibid s29(1)(a)-(c).
[45] *Hartog v Daly and Others* (A5012/2022) [2023] ZAGPJHC 40.
[46] Ibid, para 93.
[47] Ibid, para 106.
[48] Ibid.

the bank would have done what is required of it, which is performing the necessary identification checks.[49]

The second principle is that there is no duty on the bank to ensure that the accountholder's number matches the accountholder's name to which money is deposited, in electronic transfers.[50] This is because "interbank transfers in South Africa are conducted with account numbers only and the electronic system in South Africa does not have a technological function which matches account numbers with the name of the accountholder".[51]

Be that as it may, it could however be argued, as was argued in the *Hartog* case, that FICA provides for legal duties which are owed to the public by banks (accountable institutions) and that if FICA requirements are not applied properly by a bank, it might result in fraud or loss of moneys.[52] For example, section 20A of FICA "prohibits an accountable institution from establishing a business relationship or concluding a transaction with an anonymous client or a client with a false/fictitious name".[53] In response, the court in the above case expressed that a fraudster is not anonymous because he submitted all the required documents to the bank, including his identification documents when he opened an account.[54] I concur with this reasoning and I submit that the section 20A argument will not hold where a third party mistakenly deposits moneys to an incorrect account, for the same aforementioned reasons.

Section 21A of FICA requires "an accountable institution when engaging with a prospective client to establish a business relationship so as to obtain information that will reasonably enable the accountable institution to determine the source of funds which the prospective client expects to use, as well as to determine whether future transactions that will be performed in the course of the business relationship are consistent with the institution's knowledge of the prospective client".[55]

On the other hand, section 21C requires "an accountable institution to conduct ongoing due diligence in respect of a business relationship, which includes, monitoring transactions undertaken

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[49] Ibid, para 106.
[50] Ibid, para 95.2 and 99.
[51] Ibid para 101.
[52] FICA s20 and Hartog's case supra note 119 para 107.
[53] FICA s20A.
[54] Hartog's case Supra note 119 para 93.1 and 106.
[55] FICA supra note 43 s21A.

throughout the course of the relationship, including, where necessary, the source of funds, as well as the background and purpose of all complex, unusual large transactions".[56]

In relation to section 21A and 21C of FICA, the *Hartog* judgment rejected this line of reasoning and held that there was no evidence that the bank concerned should have conducted due diligence or that it could have prevented the receipt of funds into the fraudster's account[57] because section 21C of FICA must be read in relation to section 29 of FICA which requires monitoring of transactions to be done when there are suspicious transactions that have been noted such as money laundering and related activities,[58] thus, the requirements of section 21A and C were not met.[59] To further explain that, where a party mistakenly deposits moneys or where a party sends another a defrauding email requesting moneys to be deposited to a particular account, there is no requirement on a bank to conduct due diligence so as to obtain information about the source of funds.

The above discussed duties have proven to us that indeed a bank ought to exercise reasonable care and skill and that a bank must keep its customer's information and account transactions confidential unless if there are situations which require it to disclose the information. In addition, a bank can report fraudulent activities to the relevant authorities such as the Financial Intelligence Centre Act but it does not have a legal duty to prevent financial loss suffered in fraudulent or erroneous deposits in the context of this report.[60] Next we discuss duties that a customer owes to a bank.

4. DUTIES OF A CUSTOMER

One cannot consider the duties of a bank without mentioning the duties of a customer because there are reciprocal obligations that exist between a bank and its customer.

[56] Ibid s21C.
[57] Hartog's case supra note 119 para 109.
[58] FICA supra note 43 s29.
[59] Hartog's case supra note 119 para 109.
[60] Ibid.

4.1 Exercising reasonable care in drawing payment instructions

A customer has to exercise the duty of reasonable care when giving payment instructions to the bank by ensuring that he gives the bank correct instructions. A customer must inform the bank of any fraud and forgery that the customer knows or suspects.[61] The obligation placed on a customer seems less strict than that placed on a bank because it is said that in as much as a customer has a duty to warn a bank of known or suspected fraud or forgery, he has no control over how a bank supervises its employees, runs the business carefully or detects fraud, hence it is provided that the negligence or carelessness of a customer must be the real, direct and immediate cause of the bank having been misled.[62] What this means is that if a customer warns the bank of suspected fraud and the bank fails or does not do enough to act on that warning, the bank and not the customer will be held liable of the resultant effects.

4.2 Making demand on the bank

Since the bank is entrusted with the responsibility of keeping the customer's moneys, the customer is entitled at any time to demand that the bank pays him any amount in his account.[63] The court in *Nissan South Africa (Pty) Ltd v Marnitz No and Others* [2004] ZASCA 98[64] held that "where a customer acquired the money through fraud, theft or an erroneous deposit, a bank is not required to pay the funds to a customer upon demand because the customer is not entitled to the funds".[65] This is yet to be discussed in detail under 'case analysis' below.

5. CASE ANALYSIS

Some would think that where a mistaken deposit has been made, it is final and not recoverable from the bank, while some may be under the idea that it is easy to recover it by merely calling your bank to reverse the transaction, however, this is not always the case. The case analysis below will aid in understanding the principles and procedure regarding erroneous deposits.

[61] *Absa Bank Limited v Hanley* [2014] 1 All SA 249 (SCA). Para 26.
[62] Tournier's case supra note 29.
[63] Dr Enyia opcit note 3 pg 312.
[64] *Nissan South Africa (Pty) Ltd v Marnitz No and Others* [2004] ZASCA 98 para 23.
[65] Ibid para 23.

Ownership of deposits

The ordinary banker-customer relationship has been described as that of a debtor and creditor.[66] The bank is a debtor if the customer has a credit in its bank account and therefore the customer becomes a creditor.[67] The relationship however is inverse in certain circumstances, for example if the customer is in overdraft, he would be the debtor while the bank becomes the creditor.[68]

The general principle is that ownership of money deposited, rests with the bank.[69] "The origin of the funds is immaterial in determining ownership".[70] In other words, ownership of funds belongs to the bank whether the funds have been correctly deposited, incorrectly deposited or obtained by the customer by way of fraud. Vesting ownership on a bank enables it to carry out its business and execute its right to grant credit and loans without reference to customers who made such deposits.[71] Although the bank has ownership of the funds, the funds stand to the credit of the customer's account and the bank is said to have a contractual obligation to repay the customer in the following ways: on demand when the customer instructs the bank to transfer the money,[72] when the customer instructs the bank to pay the persons designated by the customer,[73] when the customer withdraws the money from the account or when the customer makes electronic transfers.[74]

The above discussed obligations were confirmed by the court in *FirstRand Bank Limited v The Spar Group Limited* [2021] ZASCA 20,[75] when it stated that "when a customer deposits funds into his bank account, it becomes secondary to the contract between the bank and the customer that the bank has a responsibility to pay the customer the amount that sits as a credit balance emanating from the deposit made".[76]

Apart from the bank discharging its obligation through the aforementioned ways, the bank may set-off the funds that reflect as a credit balance in the customer's account.[77] Set off is whereby two

[66] *Absa Bank Bpk v Janse van Rensburg* 2002 (3) SA 701 (SCA) para 15-16.
[67] *Absa Bank Ltd v Standard Bank of SA Ltd* (578/95) [1997] ZASCA 71, pg 5 (Absa v Standard Bank case).
[68] Janse van Rensburg case supra note 66.
[69] *Standard Bank of South Africa Ltd v Echo Petroleum CC* [2012] 5 SA 283 (SCA) para 27.
[70] Spar case infra note 73 para 42.
[71] Ibid, para 38.
[72] Nissan case supra note 64 para 208H-I.
[73] *FirstRand Bank Limited v The Spar Group Limited* [2021] ZASCA 20, Para 39.
[74] Schoeman opcit note 9 ch 1.
[75] Spar case supra note 73.
[76] Spar case supra note 73 para 41.
[77] Ibid, para 39.

parties are indebted to one another, for example, when a customer owes the bank and the bank likewise owes the customer.[78] When both debts are due to be paid the bank may settle what the customer owes the bank against the customer's claim from the bank by using the credit in the customer's account to pay off the debt so that these debts can be extinguished.[79]

In *Standard Bank of South Africa Ltd v Echo Petroleum* CC [2012] 5 SA 283 [SCA],[80] the court expressed that it is not in all circumstances that the bank has an unqualified right of ownership to the funds deposited in an account. The bank's rights have to be balanced against the needs of an individual, which is perceived as the so-called, public interest.[81]

It might seem that there are contrasting views where on the one hand deposits are owned by a bank, but the right is not fixed, while on the other hand, a deposit that is standing to the credit of the customer's account can be demanded by the customer. The questions that follows therefore are: can a customer qualify the bank's ownership right by demanding payment of the funds because the funds stand to the credit of his account, even if those funds have been erroneously deposited? Does the bank have the right to refuse payment of the funds over to the customer since the funds were not meant to be deposited to the customer? This leads us to the next part of the discussion, that being, the entitlement of an erroneous deposit, wherein the above questions will be answered.

<u>Entitlement of an erroneous deposit</u>

The general rule as set out in the aforementioned *Nissan* judgment is that where a client mistakenly deposits funds into an incorrect bank account and the holder of that account knows that he is not entitled to receive that money, the accountholder is not permitted to appropriate the funds for his own use knowing that they are not due to him nor does he have any legal entitlement thereto, as doing so would constitute theft.[82]

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[78] Ibid, para 39-40.
[79] Ibid.
[80] Echo Petroleum case supra note 68 para 28.
[81] Ibid, para 28.
[82] Nissan case supra note 64.

The above rule was considered by a number of South African courts, for example in *S v Graham* 1975 (3) SA 569 (A)[83], the court held that "if A gives a cheque in payment to B, mistakenly thinking that the amount is due to B and B knowing that the amount is not due, deposits the cheque, B commits theft even though he has not appropriated the money".[84] The court noted that by so doing, B is claiming to be entitled to be credited with the money that is why this act constitutes theft.[85]

It follows therefore that a customer cannot disburse or apportion the funds, due to the fact that in the *Spar* case, the court held that since the customer was not entitled to the funds but nevertheless made disbursements, the disbursements were wrongful.[86]

It is clear that where funds have been erroneously deposited and the accountholder knows that he is not entitled to those funds, he does not have a right to withdraw, use or give instructions in relation to those funds.

The *Nissan* judgment held that where a customer obtained money by way of fraud or theft, the bank is not required to uphold its duty of paying the customer the money upon demand because the thief has little entitlement to the money.[87]

A different viewpoint suggests that a bank ought to uphold its duty of paying the customer moneys standing to the credit of his account.[88] It argues that if an amount is credited to a customer's account and the bank is, in certain situations, not required to pay the funds as per the customer's instructions, this would be destructive of banking practice because first, it would mean the bank is not honouring the customer's instructions and second, that with each customer and each transaction a bank would have to ascertain where the customer's funds emanated as well as the reasons for payment of the funds to the customer so that it can establish whether to pay the funds to the customer or not.[89] A purported response to this viewpoint could be found in *Standard Bank Ltd v Estate van Rhyn*[90] which held that if a bank is suspecting that a customer's deposit was

[83] *S v Graham* 1975 (3) SA 569 (A) para 573.
[84] Ibid.
[85] Ibid.
[86] Spar case supra note 73 para 72.
[87] Nissan case supra note 64 para 23-24.
[88] Ibid para 28.
[89] Ibid.
[90] Estate van Rhyn case supra note 28 para 6.

fraudulently obtained, an enquiry ought to be made by the bank regarding the authenticity of the funds, if an enquiry is not made the bank would be deemed negligent.[91]

I believe that we would be creating an unduly onerous burden banks if we were to follow the decision in the aforementioned *Estate van Rhyn*. The *Nissan* judgment came to the rescue when it held that a bank does not need to investigate every matter and every customer.[92] If a bank receives a claim from the customer where the customer is claiming that it is entitled to funds that were deposited with the bank, the bank does not need to investigate the matter but it should take a neutral stance because if it transfers the funds it will be doing so at its own risk.[93] This case however still held that there are situations where a bank is not required to pay the funds to a customer, it stated that "payment is a bilateral act requiring the meeting of two minds".[94] In other words, where A mistakenly deposits money to B believing that money is due to B, and B is aware of the mistake, he is not entitled to take the money or to further assign it. In addition, the bank incurs no liability to the customer.[95] In my understanding, what the court is alluding to is that, if an accountholder is not entitled to funds deposited, the bank is not obliged to and in fact, the bank should not honour the accountholder's instructions and by so doing, it is not destructive of banking practice as the accountholder's claim in relation to such funds would have become less paramount.

As to whether the bank is entitled to use or appropriate the erroneous deposit, the court in the *Estate van Rhyn* case,[96] stated that since the relationship between a customer and a banker is somewhat peculiar the rules which regulate it should be approached with caution.[97] The court further expressed that if a banker is in possession of its customer's funds, the banker has to honour the order which the customer gives in relation to such funds.[98] For example, if a banker accidentally becomes aware that a customer, in his fiduciary capacity is thinking of committing a breach of trust, "the banker who has no interest in the transaction has no right to refuse the payment of the cheque because if he does he will be making himself a party to an enquiry between his customer

[91] Ibid.
[92] Nissan case supra note 64 para 28.
[93] Ibid.
[94] Ibid para 24.
[95] Spar case supra note 73 para 62-63.
[96] Estate van Rhyn case supra note 28 para 280-281.
[97] Ibid.
[98] Ibid.

and third parties".[99] In this case the court held that personal benefit to bankers must be proved in order to establish that bankers are a party to the breach of trust.[100]

Again, we cannot rely on the *Estate van Rhyn* case on this view point as there have been other cases that have been decided after *Estate van Rhyn* and they have slightly differed from the above view. For example, the court in *Absa Bank Ltd v Intensive Air*[101] firstly expressed that since the bank-customer relationship is that of a debtor and creditor, the bank is entitled to set off funds in a customer's account against the customer's debt to the bank if the bank is not aware of the source of funds.[102] However, "if funds in an account can be identified as having been reserved for or belonging to another"[103] the bank is not entitled to appropriate those funds, and the person entitled to those funds has a right to demand payment of the funds.[104] On that note, the next discussion concerns the bank's knowledge and liability, which may seem to slightly overlap with the entitlement discussion.

The Bank's Knowledge and Liability

In *Absa Bank Ltd v Intensive Air* (Pty) Ltd 2011(2) SA 275 (SCA),[105] Fourie J made it clear that if the bank has no knowledge of the source of funds or if there is no agreement between the bank, the accountholder and the third party, that the funds belong to the third party, the bank may appropriate or set-off the funds standing to the credit of the account holder's account.[106] Absent that agreement with the bank or knowledge of where the funds are coming from, the bank cannot be held liable for appropriating or setting off the funds because it would have done that with the assumption that the funds in the account of an accountholder belong to the accountholder.[107] In such instances, the bank's actions are considered contractual.[108]

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[99] Ibid.
[100] Ibid.
[101] *Absa Bank Ltd v Intensive Air (Pty) Ltd* 2011(2) SA 275 (SCA) para 20.
[102] Ibid para 47.
[103] *Joint Stock Co Varvarinskoye v Absa Bank Ltd* 2008 (4) SA 287 (SCA).
[104] Intensive Air case supra note 101 para 24.
[105] Ibid.
[106] Ibid.
[107] Ibid para 24.
[108] Ibid para 20.

The court in *Commissioner of Customs and Excise v Bank of Lisbon International Ltd and Another* 1994(1) SA 205 (N)[109] held the same view. It held that since the bank received the money without knowledge, suspicion or belief that it was fraudulently obtained, it can appropriate funds in the customer's account.[110]

Authors, Nagel and Pretorius are of the view that "mere knowledge of the bank about a particular arrangement is insufficient".[111] That a person claiming the funds deposited into an account and which are held in its client's name will have to prove that the bank was a party to such agreement that permits the accountholder to hold the funds for a third party.[112] That the absence of such an agreement with the bank would lead to increased fraud and grave consequences where a bank would not be entitled to use the money for other purposes such as lending to the public.[113]

In the *Joint Stock case*, the court agreed with the above view when it held that for the third party to enjoy the entitlement to funds deposited, there has to be "an agreement between the bank, customer and third party".[114] In addition, the court held that knowledge of the entitlement of the funds by the bank mean that the bank may pay the funds to the third party, thus, "the bank cannot set off its customer's indebtedness against the funds to which a third party is entitled to".[115]

In the *Spar* case, the court stated that what matters is not necessarily the knowledge of the bank but the consequences that result from the bank's knowledge that its customer has no entitlement to the money deposited.[116] These consequences are that the customer does not have a claim against the bank to the money reflecting as a credit in his account and the second is that the bank cannot apply set off because there is no mutuality of debts between the customer and the bank.[117] Third, that the bank is liable to pay the funds to a third party if it allows its customer to misappropriate the funds.[118]

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[109] *Commissioner of Customs and Excise v Bank of Lisbon International Ltd and Another* 1994(1) SA 205 (N).
[110] Ibid, para 208G.
[111] C.J Nagel and J.T Pretorius 'Ownership and appropriation of funds deposited in a bank account- Spar Group Ltd v FirstRand Ltd 2017 (1) SA 449 (GP)' in *Journal of Contemporary Law*, May (2017) 312.
[112] Ibid pg 312.
[113] Ibid.
[114] Spar case supra note 73 para 45.
[115] Ibid.
[116] Ibid para 59.
[117] Ibid.
[118] Ibid.

In the *Spar* case the court had to decide "whether a bank can set off the customer's debts to the bank against amounts standing to the credit of a customer, if the bank knows that a third party has a claim to these funds".[119] The court followed *First national Bank of Southern Africa Ltd v Perry NO's*[120] reasoning and held that, if the bank knows that a third party has no claim to the funds it has no liability to its customer and once the bank has no liability to its customer regarding a mistaken or fraudulent deposit made, it becomes enriched and its assets increase at the expense of the transferor who deposited the funds, conversely, the third party is impoverished. The bank therefore cannot set-off or appropriate the funds.[121]

Another principle derived from the *Spar case* is that "a bank, knowing that its customer is not entitled to funds but allows its customer to make disbursements is a joint wrongdoer to the unlawful conduct and therefore owes a legal duty to the third party who is entitled to the funds and has suffered economic loss as a result of the customer's disbursements".[122]

The issue of wrongdoer was considered in *Yorkshire Insurance Co Limited v Barclays Bank* 1928 WLD 200, where the bank honoured cheques knowing that the customer had no right to draw them.[123] It was therefore held that the bank was a party to the customer's unlawful conduct and was rendered a joint wrongdoer as it had a duty to refrain from assisting anyone else to injure another's right.[124] The court also stated that both the customer and the bank intentionally caused another damage through its wrongful or unlawful conduct.[125] This reasoning was confirmed in *Breetzke and Others N.O v Alexander and Others* 2020 (6) SA 360 (SCA).[126]

In the *Breetzke case*, the court held that where a person breaches a fiduciary duty and another party has knowledge that such a transaction involves a breach of a fiduciary duty but enables or facilitates the breach, that party acts wrongfully and is also liable for the person's breach of the fiduciary and should therefore be responsible for the loss suffered by the injured party.[127] I agree

[119] Ibid.
[120] *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 SCA.
[121] Spar case supra note 73 para 63.
[122] Ibid para 72, 75, 86-8.
[123] *Yorkshire Insurance Co Limited v Barclays Bank* (Dominion, Colonial & Overseas) 1928 WLD 200.
[124] Ibid.
[125] Ibid.
[126] *Breetzke and Others N.O v Alexander and Others* [2020] JOL 48345 (SCA). ZASCA 97; 2020 (6) SA 360 (SCA).
[127] Ibid para 74.

with this court's view when it held that "our law has always imposed a fiduciary duty on certain persons, requiring them to act in good faith when dealing with affairs of other people that have been entrusted to them"[128], especially in matters to do with financial issues.

The court further explained that the party owing a fiduciary duty to the other "must place the interests of the other party to whom the duty is owed before their own".[129] Further, that "the legal convictions of the community requires that a party who has knowledge that a fiduciary duty has been breached",[130] shares liability with the person who breached the fiduciary duty because even if they don't owe the injured party a similar duty as the party who breached the fiduciary duty, them, enabling the breach makes them equally responsible for the loss suffered by the injured party. In other words, "it is against legal convictions of the community for people to assist others to breach their fiduciary duty".[131] The bank has a fiduciary duty to act in good faith in its dealings by not enabling its customer to defraud third parties. The judge expressed that there is no reason why the principal perpetrator would be liable but not the one who further aided the breach, just as in criminal law where both the criminal and their accomplice or accessory after the fact, are all subject to the criminal laws.[132]

The *Breetzke* judgment also stated that the reason for imposing fiduciary duties in certain circumstances or on certain persons, is that the law seeks to protect the vulnerable from being exploited by a person to whom the duty is imposed and that protection is not only limited "against a person owing the primary obligation but also against those who knowingly aid or facilitate deprivation".[133] "There is a requirement of honesty and fairness in dealing with the propriety interests of others".[134] It is for this reason that liability should follow in instances where there has not been honesty and fairness.[135]

[128] Ibid para 36.
[129] Ibid.
[130] Ibid para 37 and 41.
[131] Ibid para 37 and 41.
[132] Ibid para 37 and 41.
[133] Ibid para 38.
[134] Ibid.
[135] Ibid.

Lastly, the court held that knowledge that one is engaged in aiding, enabling or facilitating a breach of fiduciary duty is enough to hold a party liable for loss or damage which results from that breach of duty.[136]

We note from the above discussion that a customer who has knowledge of the erroneously deposited funds is not entitled to use them regardless of the contract or duties that exist between him and the bank. On the other hand, the bank may appropriate funds reflecting as a credit in its customer's account if it does not have knowledge of the source of funds but may not if it has knowledge that the funds have been erroneously deposited because doing so would render it a joint wrongdoer. This is done so as to uphold the fiduciary duty and the legal convictions of the community which protect the vulnerable parties.

Seeing that both the customer and the bank are not entitled to the use of erroneously deposited funds, it is only fitting that we discuss means of recovering the erroneous deposit.

6. PRACTICAL MEANS OF RECOVERING THE ERRONEOUS DEPOSIT

This section will examine remedies that can be used in recovering the mistaken deposit from a bank. In doing so, it will discuss each remedy as considered by the courts and also generally explain what each remedy entails, reasons will also be given to show why the remedy is or is not suitable as a means of recovering the mistaken deposit.

Malan and Pretorius argue that there is no need for parties to first obtain judgment against the thief or receiver of funds for time constraint purposes, instead, an interdict and attachment can be used as interim remedies to prevent the customer from accessing erroneously deposited funds and to prevent the bank from paying out the funds pending an action to trace the money back to its source.[137]

[136] Ibid.
[137] Perry case supra note 120 pg 337.

Courts have deliberated on different suitable remedies and have expressed that our law would be unjust if it did not provide a remedy which can be used to return funds to a third party.[138] They have accepted that an interdict and attachment order are appropriate interim remedies.[139]

For example, in the *Bank of Lisbon* case, Thirion J confirmed that the law would be deficient if it provided a remedy to claim the money from the thief and not directly from the bank given that the funds still stand to the credit of the thief's account. The judge therefore found "the *actio Pauliana* and the *condictio sine causa* to be better remedies"[140] for reasons yet to be discussed.

"The *actio Pauliana* is an action in Roman law intended to protect creditors from fraudulent legal transactions, specifically transactions intended to reduce a debtor's estate by transfers to third parties in bad faith".[141] The return of the property may also be sought from the person whom the property has been alienated to even if he is not party to the fraud. The difference is that if he is not party to the fraud he is only liable to the extent of his enrichment.[142]

Regarding the *actio Pauliana*, Thirion J stated that it is a better remedy for two reasons, first, where the debtor pays money to a bank which he obtained by fraud, and once paid, the money became the property of the bank. Second, that when the respondent obtained money from the Commissioner by fraud, he became indebted to the Commissioner and therefore when he deposited money to the bank he reduced his assets that were available to pay his debt to the Commissioner.[143]

In my view, the *actio Pauliana* is not an appropriate remedy because it is used where a debtor intentionally and fraudulently transfers funds in bad faith to a third party so as to avoid paying creditors. This remedy would have been fit if the claim was against a customer who defrauded a third party, in this aspect however, the claim is against a bank wherein the third party mistakenly deposited money. My argument is supported by the *Nissan case*[144] which disagreed with reliance on the *actio Pauliana* by holding that the duty of the bank to repay the third party is not affected by the fraud that exists between the customer and the third party.

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[138] Bank of Lisbon case supra note 109. See also Nissan and Spar case.
[139] Nissan case supra note 64.
[140] Bank of Lisbon case supra note 109 para 209-213.
[141] Jacques Plessis *South African Law of Unjustified Enrichment* (2012) 239.
[142] Ibid pg 239.
[143] Bank of Lisbon case supra note 109 para 213H.
[144] Nissan case supra note 64 para 13-16.

On the other hand, “the *Condictio sine causa* is used to effect restitution where a person is enriched at the expense of another without legal ground, i.e. where there is no cause/valid basis for the transfer in the first place and when no other specific enrichment action is available”.[145] This applies where something has been given or transferred, more specifically where a transfer lands in the hands of third parties. An example is where recipients receive proceeds of fraud.[146] If A, for example, mistakenly believes that he has to make a payment to C and instructs his bank, B, to make such payment to C. A then realises that he made a mistake and revokes his instruction to B but he nonetheless accidentally makes a payment to C. C's enrichment is therefore without legal ground. What this means is that even if C's enrichment is without legal ground, a party can still base its claim on *condition sine causa* if the payer is able to prove that he made an excusable mistake.[147]

Condictio has been argued in the *Perry* case as an unsuitable remedy. The court's reasoning was that using this remedy requires the bank to have knowledge at the time of transfer, that the transfer is mistaken or fraudulent, in erroneous deposits however, the bank receives the transfer in good faith.[148]

The court in the above case also expressed a different, some-what opposing view point. It stated that the fact that the bank gains knowledge of the circumstances surrounding the funds while it is still in possession of the funds should qualify the *condictio* remedy.[149] In other words, it should not matter whether the bank acquired knowledge of the origin of funds at the time of the transfer or at a later stage, what matters is that the bank acquired such knowledge while still in possession of the funds because the aim is to return possession or to recover the money given that both the customer and the bank are not entitled to the funds. The court however expressed that this view point does not mean that the bank is treated as liable for a delict, its liability is only limited to its enrichment unless if the bank is a joint wrongdoer. [150]

Although this approach in relation to *condictio* is criticised by judges and writers, in my view, the above is an interesting approach which can be adopted, developed or at least considered by courts

[145] Du Plessis opcit note 141 pg 18.
[146] Du Plessis opcit note 141 pg 18.
[147] Du Plessis opcit note 141 pg 219.
[148] Perry case supra note 120 para 24.
[149] Perry case supra note 120 para 24-25.
[150] Ibid.

because, as expressed in the *Perry* case, the aim is to return the funds to a third party and not to hold the bank liable for being in possession of an erroneous deposit, thus, the fact that a bank acquires knowledge of how the funds were obtained while still in possession of those funds could suffice to adopt *condictio* as a possible remedy. It goes without saying that the remedy would have to fail where the bank is a joint wrongdoer.

Another remedy which was considered by courts is *rei vindicatio*, an action whereby an owner who is unlawfully deprived of his property can reclaim the identifiable property from any person who is exercising unlawful physical control over it, even if the person is exercising such physical control in good faith.[151]

In *Commissioner of Customs and Excise v Bank of Lisbon*[152], the court held that money is *res fungibiles* i.e not distinguishable from other monies once it is mixed and that since the bank received the money without knowledge, suspicion or belief that it was fraudulently obtained, it could not be reclaimed by *rei vindicatio*.[153]

This remedy also failed in the *Perry* case where the court held that "once money is mixed with other money without the owner's consent, ownership in it passes".[154] *Rei vindicatio* cannot hold as an appropriate remedy in an instance such as the one that is being discussed in this report because the bank is not in unlawful possession of the funds and also, we are dealing with money, a property which is not identifiable. Had we been dealing with identified and identifiable property, the third party could have used *rei vindicatio* to claim the funds against the bank even if the bank had acquired such property in good faith.[155]

The remedy that was found by a number of courts to be the better possible remedy is *unjust enrichment/ enrichment*.[156]

The purpose of *enrichment* is to reverse a gain of one party by requiring that party to return the gain to the other party.[157] It is used to return property lost or stolen to its owner. To use a claim of

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[151] Herbert Hausmaninger and Richard Gamauf *A casebook on Roman property law* Oxford University Press, pg 120; See also Bank of Lisbon case para 208H-I and Perry case.
[152] Bank of Lisbon case supra note 109.
[153] Ibid para 208H-I.
[154] Perry case supra note 120 para 16.
[155] Ibid para 17.
[156] Spar case supra note 73.
[157] Du Plessis opcit note 141 pg 24-6.

enrichment, the plaintiff must meet certain general elements of enrichment liability. These elements are that, first, "the plaintiff (third party) was impoverished. Second, that the defendant (bank) was enriched. Third, that the defendant's enrichment was at the plaintiff's expense. Fourth, that there is no legal ground or justification for retention of the enrichment".[158]

The plaintiff therefore has to show proof of transfer as well as that the defendant was enriched. Proving the elements does not however guarantee that the requirements for a claim of *enrichment* have automatically been met, for example, if a customer instructs the bank to make a transfer to B and then revoke's the instruction but the bank goes ahead and mistakenly makes the transfer. If it so happens that the transfer indeed fulfils a debt which the customer owed to B, the customer will not meet the requirement that B was enriched. This will result in failure of the customer's enrichment action against B.[159] Put differently, if party A makes a payment to party B when he intended to make it to party C and then instructs the bank to reverse the payment but it is later found that party A indeed owed B some debt, enrichment action cannot be used to recover money from B.

This is supported by *Take and Save Trading CC and others v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA),[160] where the court differentiated between a valid transfer and an invalid transfer. Harms JA explained that if funds are transferred from A to B in exchange of goods by B to A, which goods are later delivered, A cannot therefore reverse the funds without B's consent.[161]. The court however stated that this should be read in context, if credit is a valid transfer, the credit belongs to the recipient and can only be reversed with the recipient's consent.[162]

Being impoverished is one of the elements of *unjust enrichment*.[163] Being impoverished means that there has to be a decrease in the plaintiff's assets, for example where money or assets leave the third party's estate, or an increase in the third party's liabilities. It has been said that only actual enrichment counts. In other words, the third party's assets must have actually increased and his liabilities must have actually decreased.[164] For example, in *Krueger v Navratil* [1952] 4 All SA 55

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158 Ibid.
159 Ibid.
160 *Take and Save Trading CC and Others v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA). Para 9.
161 Ibid, see also Nissan case, para 19-20.
162 Ibid.
163 Du Plessis opcit note 141 pg 57-58.
164 Ibid.

SWA,[165] the defendant benefited from theft of property and the court held that a claim for enrichment includes profit that the defendant gained from the use of stolen property.[166] In this case, the court awarded the profits, holding that it is the profits which are the actual property because the extent of the enrichment was not clear based on the stolen property itself. The profit derived is what was clear hence the court awarded the profit only, the court further stated that the agent of the defendant may have acted negligently in managing the property of the plaintiff hence the court cannot award assumed gains. The court also held that the plaintiff cannot claim based on *enrichment* for benefits which the defendant should but may not in fact have enjoyed.[167] My understanding and interpretation of *Krueger's* argument is that a bank may be required to pay a third party, both the mistaken deposit and the interest that accumulates on that deposit.

Some argue that innocent recipients should be protected from a claim of *unjust enrichment* because the recipient (the bank) receives the transfer bona fide from the debtor, irrespective of whether he is a fraudster or a third party and therefore courts ought to focus on the fact that a bank receives the transfer in good faith.[168] This argument would not hold because, as already stated, courts have argued that a bank cannot be enriched at the expense of another, there has to be a remedy to return money to its rightful owner.

In referencing *Perry*, the court in *Nissan* stated that "if a bank is obliged to account to its customer in respect of money received it would not be enriched"[169] and therefore the enrichment action cannot be used against it. Conversely, if a bank is not obliged to account to its customer then an enrichment action can be used to recover the money from the bank.[170] Furthermore, if the bank receives instructions from its customer to transfer or pay the amount without the bank's knowledge that the amount was mistakenly received, a claim for enrichment against the bank would not succeed.[171]

165 *Krueger v Navratil* [1952] 4 All SA 55 (SWA).
166 Ibid.
167 Ibid.
168 Du Plessis opcit note 141 pg 242.
169 Nissan case supra note 64 para 20.
170 Ibid.
171 Ibid para 28.

We have already established in this research that a bank is not obliged to account to its customer since the customer is not entitled to the funds, hence, following *Perry* and *Nissan* in relation to the obligation argument, *enrichment* would be an appropriate remedy.

The court in *Nissan* held that *enrichment* should be used as the appropriate remedy because where funds have been erroneously deposited, the bank is enriched at the expense of a third party, in addition, the bank does not have entitlement over such funds.[172] The *Spar* case, a most recent case, also holds the same view regarding enrichment.[173]

With that being said, I hold that the appropriate remedy to recover an erroneous deposit is *enrichment*, neither the bank nor the account holder has a legal ground to keep or use the funds. By keeping the funds, the bank would have been enriched. Moreover, the elements of *enrichment* are best suitable in erroneous deposits: "that the third party was impoverished; that the bank was enriched; that the bank's enrichment was at the third party's expense; and that there is no legal ground or justification for the bank to retain the enrichment".[174]

It is also worth noting that a third party who is dissatisfied by the service received from a bank can lodge a complaint against the bank with the Ombudsman for Banking Services for assistance in claiming the money.[175] The complaint has to be two million Rand or less for a natural person and less than ten million Rand for entities and must have arisen within the last three years.[176]

7. CONCLUSION

This research report has shown that a bank and a customer owe certain duties to each other. Duties that a bank owes to a customer include the duty of confidentiality, duty to be open and honest without the intention to defraud third parties, duty to exercise reasonable care and skill and the duty to act on the instructions of a customer. On the other hand, duties that a customer owes to a

[172] Ibid para 26.
[173] Spar case supra note 73 para 62-63.
[174] Du Plessis opcit note 141 pg 24.
[175] Ombudsman for Banking Services South Africa, available at *https://www.obssa.co.za* last accessed on 15 February 2023.
[176] Ibid.

bank include the duty to notify the bank of known or suspected forgeries and the duty to make demand for payment. A bank however does not always have to adhere to its customer's instructions, an example is where the bank has knowledge or suspicion that the money received has been fraudulently obtained and therefore that its customer is not entitled to it.

Once a third party realises that he has deposited money to the incorrect account, the first step is to contact his bank as soon as possible, informing the bank of the mistake. The next step is to apply for a court order to freeze such funds and to stop the accountholder as well as the bank from using the funds.[177] The sooner this is done, the better the chances of recovery.

South African courts have had to consider the matter of erroneous deposits because regulatory framework such as the Banks Act is silent on the subject. In so doing, a number of principles have come up, these are summed up below:

Money deposited is owned by a bank, whether it was fraudulently obtained, mistakenly deposited to an incorrect recipient or deposited in good faith. However, ownership does not entitle the bank to appropriate the funds if the bank has knowledge that its customer is not entitled to the funds, neither is the bank permitted to allow its customer, the accountholder, to use the funds. Doing so renders the bank a joint wrongdoer just as the use of funds by the accountholder renders him a thief if he knows that he is not entitled to them. The only person entitled to erroneously deposited funds is the third party, the party that made the erroneous deposit, who can claim the funds from the bank by way of the *enrichment* remedy. This is to avoid enriching the bank at the expense of the third party.

From a systemic point of view, it is important that banking institutions develop a crisis management solution that minimises risks, for example, in the UK the banking sector introduced a 'confirmation of payee' that prevents scams and mistaken payments by letting customers know if the account number they have entered matches the account name of the recipient.[178]

[177] Dr Enyia opcit note 3 pg 313.
[178] Recovering wrong payments, available at *https://www.wrighthassall.co.uk/knowledge-base/banking-security-recovering-wrong-payments* last accessed on 21 September 2022.

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