Jopie Pretorius

Combining bank accounts

The validity of this practice explored

It often happens that a bank may wish to include the debts relating to, for example, the non-payment of a motor vehicle finance transaction in the cancellation figures of a mortgage bond owed to the bank. In this way, the bank effectively forces its client to pay all the outstanding debts from the proceeds of the sale of the property that was bonded as security for the mortgage loan. In this article I want to examine the validity of this practice.

In English law, the banking practice of combining the different accounts of customers is well known, and there are several cases dealing with the issue. In fact, English law has developed a set of integrated and specific rules dealing with the bank’s right of combining a customer’s accounts. These rules are discussed at length by EP Ellinger, E Lomnicka & RJA Hooley Modern Banking Law 3 ed (2002) 199–220 (‘Ellinger’). Although it would serve very little purpose to repeat or explain all these rules here, it is still interesting to highlight a few of them:

• The bank’s right to combine the customer’s accounts is a common-law right. This right may be abrogated or changed by agreement between the parties (idem at 204).
• Despite some uncertainty in the past, in modern English law the bank’s right to combine the balances of all the accounts of a single customer is regarded as a right of set-off (idem at 203).
• One basic principle supports the doctrine that in certain situations the bank is entitled to combine the accounts of the customer.

The customer’s underlying contractual relationship is with the bank, not with the branch at which the account is maintained. Moreover, the basic relationship of banker and customer governs all the accounts of a customer, regardless of their type. This is so despite the slight variations in the rights of the parties in the different types of account (idem at 200).

• In In re European Bank (1872–73) LR 8 Ch App 41, the question was whether the credit available in the loan account could be used to pay off an overdraft. In the Court of Appeal in Chancery, James LJ observed (at 44) that

'It was only for convenience that the loan account was kept separately. ... In truth, as between banker and customer, whatever number of accounts are kept in books, the whole is really but one account, and it is not open to the customer, in the absence of some special contract, to say that the securities which he deposits are only applicable to one account.'

(This statement was quoted with approval by Conner CJ in In re White v Brown (Standard Bank) (1883) 4 NLR 88 at 90.)

• Ellinger (at 201) points out that although the view expressed in European Bank has become well established and that it is indisputable that there is only one basic relationship between the banker and his customer, it has to be emphasized that its details vary from account to account. The authors state (at 200):
'Thus, a current account is operable by cheques, whilst a savings account cannot be utilized in this way. Funds deposited in an ordinary savings account are usually repayable on demand; but amounts standing to the credit of an "extra interest account" fall due at one month's notice. In reality, it is possible to treat the contracts involved in separate types of accounts as distinct arrangements between the bank and its customer. Re European Bank and the cases following it do not overlook the point. All they suggest is that the parties to the contractual relationship, effected in respect of each account, are the customer and the bank. For this reason, debts accrued to the customer are due from the bank and not from the individual branch. Equally, debts due from the customer are recoverable by the bank and not by its branches. There is, thus, room for a set-off'.

* As is always the case, one should not underestimate the intricacies of English law. In *In re Ef Mored* (1934) Ltd [1962] Ch 21, the question of combination arose in the case of liquidation. Buckley J (at 31–32), with reference to *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833 (CA), observed that

'there is an important difference between a case where a customer has several current accounts, and a case where a customer has an account which is not a current account, and one or more current accounts in the bank. In the first case where all the accounts are current, the banker can combine those accounts in whatever way he chooses, treating them all as being one account of his relationship with his customer. In the other case the accounts are of a different character, and the banker is not free to combine them in that way'.

* Whether or not the mere designation of an account is of significance is relevant where the question of combination arises in respect of a loan account. The circumstances leading to the opening of a loan account usually indicate that the parties have agreed that it be not combined with other accounts as long as a customer is able to carry on business. In *Bradford Old Bank v Sutcliffe* supra, the court held that the fact that one of the accounts was designated a loan account clearly showed 'that the accounts were kept distinct by arrangement' of the parties. A loan account and a current account are usually not meant to be combined and it will be unusual for a bank to exercise a right of set-off in respect of such an account whilst the customer's business was a going concern (Ellinger at 208).

We can now deal with the South African law. Much has been written on the legal nature of the relationship between a bank and its customer. For present purposes we can accept that the banker-client relationship is multifaceted. It invariably involves various types of contract, for example, mandate, loan for use, deposit, and deposit-taking. The parties to the bank-client relationship may, depending on the circumstances, fill the role of either debtor or creditor. The description of the relationship by English and South African courts as a debtor-creditor relationship is only a general description, not really a classification. After all, every contract involves a debtor and a creditor. It is true that in the important English case of *Foley v Hill* [1848] 2 HLC 26 at 37 (9 ER 1002 at 1006), the court expressly stated that 'the banker is not an agent or factor, but he is a debtor'. It must, however, be kept in mind that, in this case, the court had to determine the ownership of money deposited in a bank account. It is for this purpose that the court described the bank as being a debtor, and not an agent, of the customer. The court wished to make it clear that the bank was not merely an agent of the customer, receiving money which remained the property of the customer and which the bank could apply only on behalf of and in accordance with the instructions of its principal. According to this decision, ownership in the money deposited actually passes to the bank, which may use it for its own purposes.
as it sees fit, with only a debtor’s obligation to repay the customer. This is also the ratio of the South African judgments in which the relationship between the bank and the holder of a cheque account has been described as a debtor-creditor relationship, ‘with a super-added obligation to discharge the debt in a particular way, namely by paying cheques drawn by the customer’. Whatever the position in English law may be, in South African law it clearly does not lead to unacceptable results if it is accepted that the agreement consists of more than one type of contract known at common law. The essential elements of both a loan (mutuum) and mandate (mandatum) are present, while the interdependent functioning of these different elements is explained by the operation of set-off.

Although it has been said (on the authority of White v Brown supra) that a South African bank has the right to combine bank accounts (Cowan on The Law of Negotiable Instruments in South Africa 4 ed by Denis V Cowen & Leonard Gering (1966) 371), I still submit that a bank may do so, in the absence of a contractual agreement, only on the basis of a set-off. I have already pointed out that the decision in European Bank leaves room for a set-off.


The authors of Wille's Principles of South African Law (9 ed by François du Bois (gen ed) et al (2007) 833) point out that 'no set-off takes place where the one debt is payable only at a future date, eg under a promissory note, or under a mortgage bond which has not matured; or where one debt is conditional, eg the contingent liability of a surety'.

When an appeal to set-off is made, its effect is retrospective to the moment when the two debts first existed as against each other in a form in which set-off was possible. A very important prerequisite for the bank’s right to set-off is that the accounts must be kept in the same capacity.

The importance of set-off within the bank-customer relationship becomes especially relevant when the customer has two or more accounts at the same bank. The fact that the accounts are kept at different branches of the bank makes no difference to the applicable principles, because the branches are not separate legal persons (see Volksskas Bank Bpk v Bankorp Bpk (b/a Trust Bank) en 'n ander 1991 (3) SA 605 (A) at 611). It is generally accepted that a bank may set off a debit balance on one account against a credit balance on another account. It does not matter if the accounts are kept at different branches or even under different names, as long as the same person is the account holder. The parties may expressly or tacitly agree that the bank will not have the right to combine two or more accounts. For example, if a bank grants a loan to a customer with a substantial credit balance on his current account, and no specific date for repayment of the loan is agreed upon, the bank may not simply debit the account with the amount of the loan. The bank first has to give reasonable notice of its intention.

A South African bank may combine bank accounts on the basis of either a contractual agreement with its client, or a set-off.

Set-off is an old and well-known phenomenon. It enables two persons, if they both owe debts to each other, to set off the two debts against each other, so that only the balance (if any) remains due. In short, the requirements for a successful reliance on set-off are the following:

- The debts must exist between the same persons. A cannot set off a claim that C has against B, against a claim by B against A.
- The debts must be of exactly the same kind.
- Both debts must be claimable.
to do so. In this type of case, it is clearly the parties’ intention that the credit balance on current account should remain available to the customer until reasonable notice for repayment has been given. Consolidation of two accounts is also not possible if an amount is paid into one of the accounts on the express understanding between the parties that the particular amount should be utilized only for that particular account.

There is no doubt, however, that the bank’s right to combine accounts without notice to the customer can create problems for the customer. Also, the bank’s right to combine accounts and thus to rely on set-off is useful if the customer becomes insolvent. In such a case, the bank may, for example, set off a debit balance of R1 000 on one account against a credit balance of R1 000 on another account. The result is that the bank actually receives full payment of its claim against the insolvent. If the debts became capable of set-off within six months before sequestration or liquidation, the bank will usually have no problem in complying with section 46 of the Insolvency Act 24 of 1936. This provision provides for the disregarding of set-off by the trustee or liquidator if it did not take place in the ordinary course of business. If an amount is paid into a customer’s overdrawn account after sequestration or liquidation, the bank may, of course, not utilize this deposit to reduce the debit balance. The bank would have to keep the amount deposited available for administration by the trustee or liquidator, and would have to prove a concurrent claim for the debit balance.

Jopie Pretorius: University of South Africa, Pretoria (e-mail: Pretoji@unisa.ac.za)