Credit providers: Setting it off

By Rui Lopes and Michael Collett

19 Aug 2019

For many years, it has been a common practice for both banks and other financial institutions (both referred to as credit providers) to exercise their common law rights of set-off in instances where a credit provider is both owing a debt to an individual and is owed a debt by the same individual. Additionally, credit providers have applied the concept of set-off to debts arising under credit agreements, in terms of the National Credit Act of 2005 (NCA), where such credit agreements are silent on the provisions of set-off. However, the recent decision of *National Credit Regulator v Standard Bank of South Africa Limited*, has thrown the proverbial spanner in the works when it comes to the concept of set-off relating to credit agreements.

© alexskopje – 123RF.com

Traditionally, credit providers have utilised the common law concept of set-off in instances when dealing with credit agreements, where such credit agreements are silent on the point, through their reliance on the provisions of section 90(2)(n) of the NCA. This section provides that:

> *"A provision in a credit agreement is unlawful if- ... (n) it purports to authorise or permit the credit provider to satisfy an obligation of the consumer by making a charge against an asset, account, or amount deposited by or for the benefit of the consumer and held by the credit provider or a third party, except by way of a standing debt arrangement, or to the extent permitted by section 124."*

In doing so, credit providers have thereby circumvented the stringent requirements placed on them through section 124 of the NCA, which provides that a credit provider would be empowered to make a charge or a series of charges contemplated in section 90(2)(n), if it meets the conditions set out therein.

That being said, the very nature by which section 90(2)(n) of the NCA is worded, it is quite clear that it would be the subject of much interpretation. However, the decision of *National Credit Regulator v Standard Bank of South Africa Limited*, has put to bed any question of interpretation of section 90(2)(n) of the NCA, as well as, having set in stone, the instances where section 124 of the NCA is applicable.

The High Court in this matter held that section 90(2)(n) of the NCA should not be read in isolation and is to be read in conjunction with section 124 as well as the purpose of the NCA which is to:

> *"promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market, industry, and to protect consumers."*

The High Court accordingly held that in the circumstances, the common law right of set-off is contrary to the purpose of the NCA as it provides the credit provider with full control of the set-off process without affording the consumer any consultation or authorisation process, which the NCA seeks to afford consumers. Accordingly, the High Court held that the common law right to set-off is not applicable to credit agreements which are subject to the National Credit Act, *irrespective of whether the credit agreements are silent or not on the provisions of set-off*.

Accordingly, all set-off processes applied to these credit agreements will have to be applied in accordance with the provisions of section 124 of the NCA, which are that:

a. the prior written authorisation of the consumer will have to be obtained before the set-off can be effected;

b. only the asset, account or amount detailed by the consumer in the written authorisation shall be capable of set-off;
c. only the obligations detailed by the consumer in the written authorisation shall be capable of set-off;
d. the set-off can only occur in respect of amounts and on the dates detailed by the consumer in the written authorisation; and
e. the set-off may only be effected once a credit provider (as defined under the NCA) has given notice to the consumer in the prescribed manner and form.

Banks and financial institutions must accordingly take heed of the High Court decision of *National Credit Regulator v Standard Bank of South Africa Limited*, going forward. Additionally, banks and financial institutions should take into account the provisions of section 90(2)(n), section 124 and the purpose of the NCA when entering into credit agreements which are subject to the NCA, or these credit agreements could fall foul of the NCA and become unenforceable.

ABOUT THE AUTHOR

Rui Lopes, Associate, and Michael Collett, Candidate Attorney, Dispute Resolution, Baker McKenzie, Johannesburg