REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 44415/16

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.
27/6/2019 DATE SIGNATURE

In the matter between:

NATIONAL CREDIT REGULATOR Applicant

and

STANDARD BANK OF SOUTH AFRICA LIMITED Respondent

SOUTH AFRICAN HUMAN RIGHTS COMMISSION *Amicus curiae*

Summary

National Credit Act - section 90(2)(n) and section 124 - interpretation of - effect of these provisions on common-law set-off for credit agreements under the Act - Declarator granted that in light of sections 90(2)(n) and 124 of the National Credit Act 34 of 2005, the common law right to set-off is not applicable in respect of credit agreements which are subject to the National Credit Act.

JUDGMENT

KEIGHTLEY, J:

INTRODUCTION

1. This matter concerns the proper interpretation of certain provisions of the National Credit Act (the Act).[1] More specifically, the question raised is whether

[1] 34 of 2005

s 90(2)(n) and s124 of the Act render the common-law right of set-off inapplicable in respect of credit agreements that are subject to the Act.

2. The applicant is the National Credit Regulator (the Regulator). In terms of s12 of the Act, the Regulator is an independent juristic person which is tasked with regulating the South African credit industry. It has various statutory functions and powers, one of which is to ensure the enforcement of the Act. It brings the application in its statutory capacity and in its representative capacity on behalf of all consumers of credit who have been affected by the practices adopted by banks in respect of the common-law principle of set-off.

3. The Regulator seeks an order in the following terms:

> "It is declared that, in light of sections 90(2)(n) and 124 of the National Credit Act 34 of 2005, the common law right to set-off is not applicable in respect of credit agreements which are subject to the National Credit Act."

4. The respondent is the Standard Bank of South Africa Limited (the Bank). It is a duly registered credit provider in terms of the Act. The present application evolved out of various complaints lodged with the Regulator by consumers against the Bank regarding the Bank's practice of applying the common-law principle of set-off against amounts received by consumers into accounts that they hold with the Bank. Relying on its common-law right of set-off, the Bank debited the accounts in question without the consent of the account holders against amounts owed by the account holders to the Bank. It's stated position is that it is entitled to do so under the Act. It says that on a proper interpretation of the Act, provided a credit agreement does not contain a provision regulating set-off, the Act does not oust its common-law right to apply set-off. In other

words, if a credit agreement is silent on the question of set-off, the common law still applies. It opposes the relief sought on this basis.

5. I should add that while the Bank is the only financial institution involved as a party in the present application, there is no suggestion that it is the only financial institution to adopt this position. The interpretation of the relevant provisions of the Act in this application is thus likely to have widespread ramifications for the banking sector and debtors throughout South Africa.

6. The South African Human Rights Commission (the SAHRC) is admitted as *amicus curiae* in the matter. Its constitutional mandate is, among other things, to promote respect for human rights, to promote their protection, development and attainment, and to monitor and assess the observance of human rights in the Republic. In the SAHRC's view, the case raises important questions relating to the protection of human rights of marginalised members of society. In particular, the SAHRC says that the application of the common-law right of set-off takes away income upon which indigent debtors rely on for their subsistence without their consent, and without the protection otherwise afforded to them under the NCA. It thus negatively impacts on various of their basic rights, including their socio-economic rights.

7. The SAHRC broadly aligned itself with the Regulator in its attitude to the application, although it made additional submissions pertaining, in particular, to what it submitted was the negative impact of the Bank's preferred interpretation on the debt review process established under the Act.

8. The SAHRC sought leave both to be admitted as an *amicus* and to adduce evidence concerning the impact of the application of common-law set-off on the debt review process. The Bank did not oppose its admission as an *amicus*, but

it did oppose its application for leave to adduce evidence. The opposed application came before Chohan AJ, who handed down judgment on 28 June 2018. He granted the SAHRC both leave to be admitted and leave to adduce evidence. I will deal with his judgment in a little more detail later, as it is relevant to the Bank's continued objection to parts of the evidence adduced by the SAHRC.

THE NATIONAL CREDIT ACT

9. The Act's drafting imperfections are nothing new. As the Supreme Court of Appeal recently put it:

> "That the National Credit Act 34 of 2005 (the NCA) is not a model of clarity, has been bemoaned by the High Court, this Court and the Constitutional Court on a number of occasions."[2]

The present application is yet another example of how the Act's lack of clarity has sowed confusion for consumers and credit providers alike.

10. The purpose and objects of the Act form the underlying context within which the provisions in question must be given meaning. These are clearly set out in the Act itself. Section 3 describes its general purposes to be 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."

As the Constitutional Court has indicated, the Act sets out the means by which these purposes must be achieved. It has stressed that the Act must be interpreted so as to give effect to them:

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[2] *Du Bruyn NO & others v Karsten* (929/2017) [2018] ZASCA 143 at para [1]

> "The main objective is to protect consumers. But in doing so, the Act aims to secure a credit market that is 'competitive, sustainable, responsible [and] efficient'. And the means by which it seeks to do this (is to) embrace 'balancing the respective rights and responsibilities of credit providers and consumers.' These provisions signal strongly that the legislation must be interpreted without disregarding or minimising the interests of credit providers. ... 'whilst the main object of the Act is to protect consumers, the interests of creditors must also be safeguarded and should not be overlooked.'"[3]

A balanced approach to the Act is thus required, taking into account the need to protect the interests of consumers without undermining the interests of credit providers.

11. As far as the specific provisions in question in this case are concerned, section 90(2)(n) falls under Chapter 5 of the Act, which regulates "consumer credit agreements". Section 90 is headed "Unlawful provisions of credit agreement", and the subsection in question provides as follows:

> "(2) 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". (my emphasis)

12. As I discuss in more detail later, the Bank places particular emphasis on the wording of s90(2)(n) in its submissions to the court. It submits that on a plain reading of this section, it is only express provisions of a credit agreement that will be unlawful if they do not accord with s124. As the common law principle of set-off does not have to be expressed in a credit agreement, it does not fall within the ambit of this section at all.

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[3] *Sebola v Standard Bank of South Africa & Another* 2012 (5) SA 142 (CC) at [40]

13. Section 124 falls under Chapter 6, which deals with "collection, repayment, surrender and debt enforcement". More specifically, it falls under Part A of this Chapter, which is headed "collection and repayment practices". The section itself is headed "charges to other accounts" and provides, in relevant part:

> "(1) It is lawful for a consumer to provide, a credit provider to request or a credit agreement to include an authorisation to the credit provider to make a charge or series of charges contemplated in section 90(2)(n), if such authorisation meets all the following conditions-
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> (a) the charge or series of charges may be made only against an asset, account, or amount that has been-
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> (i) deposited by or for the benefit of the consumer and held by that credit provider or that third party; and
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> (ii) specifically named by the consumer in the authorisation;
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> (b) the charge or series of charges may be made only to satisfy-
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> (i) a single obligation under the credit agreement; or
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> (ii) a series of recurring obligations under the credit agreement,
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> specifically set out in the authorisation;
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> (c) the charge or series of charges may be made only for an amount that is-
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> (i) calculated by reference to the obligation it is intended to satisfy under the credit agreement, and
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> (ii) specifically set out in the authorisation;
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> (d) the charge or series of charges may be made only on or after a specified date, or series of specified dates-
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> (i) corresponding to the date on which an obligation arises, or the dates on which a series of recurring obligations arise, under the credit agreement; and
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> (ii) specifically set out in the authorisation; and
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> (e) any authorisation not given in writing, must be recorded electromagnetically and subsequently reduced to writing.
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> (2) Before making a single charge, or the initial charge of a series of charges, to be made under a particular authorisation, the credit provider must give the consumer notice in the prescribed manner and form, setting out the particulars as required by this subsection, of the charge or charges to be made under that authorisation. ..."

14. All of the parties agree that when s 90(2)(n) refers to "a credit provider ... satisfy(ing) an obligation of the consumer by making a charge against an ... account, or amount deposited by or for the benefit of the consumer and held by the credit provider" it is essentially referring to set-off. Further, that s90(1)(n) and s124 establish a statutory scheme of set-off that does not mimic the common law. They also agree that the effect of these two provisions is that if a credit agreement includes a provision for set-off, then it must comply with the requirements of s 124. In other words, in this instance, the statutory scheme of set-off will apply to the exclusion of the common law.

15. The scheme of set-off established under the Act has certain key characteristics:

15.1. Under s124(1), read with s124(1)e), for set-off to be valid, the consumer's prior authorisation is required, in writing.

15.2. Under s124(1)(a), set-off may only be applied against an asset, account or amount specifically named by the consumer in the authorisation.

15.3. Under s124(1)(b), set-off may only be applied to satisfy obligations specifically named by the consumer in the authorisation.

15.4. Under s124(1)(c) and (d), set-off can only occur in respect of amounts specified, and on dates specified in the authorisation.

15.5. Under s124(2), the credit provider is required to give notice to the consumer in the prescribed manner before set-off can be effected.

16. Thus, set-off under the Act gives the consumer considerable control over the process. It requires the considered consent of the consumer not only as to whether set-off may be applied at all by the credit provider, but also as to which

accounts it may be applied to, in respect of which amounts, when set-off is to be applied and in respect of which obligations.

17. As we shall see shortly, set-off under the Act represents a marked departure from the common-law principle of set-off relied on by the Bank. Significantly, however, s124 does not expressly exclude the continued application of the common-law principle of set-off. The question for this court is whether it nonetheless ought to be interpreted so as to have this effect.

SET-OFF UNDER THE COMMON LAW

18. In simple terms, under the common law set-off allows one debt to be cancelled by another. It applies in circumstances where debts are mutually owing between two parties so that each is simultaneously the debtor and the creditor of the other. It has been described in the following terms:

> "The doctrine of set-off ... is a recognised principle of the common law. When two parties are mutually indebted to each other, both debts being liquidated and fully due, then the doctrine of compensation comes into operation. The one debt extinguishes the other two *pro tanto* as effectually as if payment had been made. Should one of the creditors seek thereafter to enforce his claim, the defendant would have to set up the defence of compensation by bringing the facts to the notice of the Court - as indeed the defence of payment would also have to be pleaded and proved. But, compensation once established, the claim would be regarded as extinguished from the moment the mutual debts were in existence together."[4]

19. The Bank states that the common-law principle of set-off is an important tool in banking practice. It allows a bank, as creditor, to recover a debt owed to it as soon as there is a credit balance in favour of the debtor in the debtor's account. It is part of the risk factored in to the granting of credit to the debtor in the first place, and the bank considers its ability to apply common law set-off as a form of security.

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[4] *Schierhout v Union Government* 1926AD 286 at 290-90

20. Furthermore, the Bank points out that certain conditions must be present before common law set-off can be applied. The mutual debts must be of the same nature and quality; they must exist between the same persons; and the debts must be fully enforceable. The latter requirement ensures that set-off cannot take place in circumstances where the debt is not yet due, or where a valid defence may be raised. It is always open to the Bank's customer to raise a valid defence if the set-off was unlawfully applied. The Bank accepts that the customer bears the burden of invoking any available remedy, regardless of how onerous or expensive this may be.

21. Common-law set-off permits a creditor, like the Bank, who is owed money by its customer, immediately to debit a customer's account when funds are credited to it. It can do so without notice to the customer; without the customer's authorisation; and in any amount that the Bank considers to be validly due to it. In short, under the common law, set-off gives a creditor like the Bank, full control of the set-off process without any input, let alone authorisation, from the customer.

22. It is understandable why the Regulator contends that the common-law principle of set-off is completely at odds with the set-off scheme established under the Act. It is plainly at odds with the statutory scheme. However, the question remaining is whether, despite the incongruity between the statutory and common-law schemes, the Act, properly interpreted, permits credit-lenders, like the Bank, to continue to rely on the common-law principle of set-off instead of that established under the Act by simply ensuring that their credit agreements are silent on the question of set-off.

THE PARTIES' SUBMISSIONS

23. The Regulator correctly pointed out that the parties adopted widely divergent interpretations of s90(2)(n) and s124 of the Act. On the Regulator's interpretation, the effect of these provisions is to displace the common-law principle of set-off in respect of credit agreements that are regulated by the Act. In other words, the Act prescribes the only permissible scheme of set-off applicable to those credit agreements.

24. On the other hand, on the interpretation favoured by the Bank, the Act goes no further than to regulate those set-off provisions that are actually and expressly included in the terms of a credit agreement. If a credit agreement does not include a set-off provision, the Bank contends that common-law set-off continues to operate as a parallel system even though the credit agreement itself is regulated by the Act.

25. These two divergent views stem from equally divergent submissions as to how the interpretational principles are to be applied in respect of the relevant provisions. This divergence in approach is apparent from the detailed submissions made by the parties, a summary of which is set out below.

The Regulator's submissions

26. For the Regulator, the context of the provisions and the underlying purposes of the Act are paramount. It does not dispute the importance, for interpretational purposes, of the ordinary meaning of the words used in a statutory provision. However, it says that the general principles of interpretation require more than a consideration of the ordinary grammatical meaning of words, as explained in the

following dictum of the *Constitutional Court in Cool Ideas 1186 CC v Hubbard & Another*:[5]

> "A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
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> (a) that statutory provisions should always be interpreted purposively;
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> (b) the relevant statutory provision must be properly contextualised; and
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> (c) all statues must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This provision to the general principle is closely related to the purposive approach referred to in (a)." (my emphasis)

27. This approach was recently affirmed by the Constitutional Court in *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd*,[6] in which the Court also confirmed the principle that the text, context and purpose must always be considered at the same time when interpreting legislation.[7] Further, that the obligation to interpret legislation to promote the spirit, purport and object of the Bill of Rights entails understanding statutes to lay the foundations for a democratic and open society, improve the quality of life for all and build a united democratic South Africa.[8]

28. Proceeding from this basis, the Regulator submitted that what s124 does is to depart significantly from the common law by permitting set-off, but subject to stringent safeguards that are designed to protect the consumer. None of these safeguards exist under the common-law principle. Instead, under the common

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[5] 2014 (4) SA 474 (CC) at para 28

[6] [2018] ZACC 12 at para [30]

[7] At para [31]

[8] At para [32] and see the cases referred to in the footnotes of that paragraph.

law, it is left to the consumer to identify any set-off that may be unlawful, and to pursue a remedy, such as prescription, at the consumer's own cost, and *ex post facto* the set-off having occurred. The Regulator submitted that for lower income consumers, the costs involved in pursuing a remedy against a credit provider in these circumstances will be prohibitive. The safeguards built into s124, on the other hand, are in line with one of the fundamental purposes of the Act, which is to protect consumers.

29. The Regulator submitted further that if the Bank's interpretation is accepted, it would completely undermine this important purpose of the Act. Further, it would effectively render s124 nothing but a meaningless dead letter. This is because, on the Bank's interpretation, provided a credit agreement does not contain an express provision permitting set-off, it falls outside the regulatory ambit of s90(2)(n) and s124, rendering the common-law application of set-off permissible. The Regulator argued that in these circumstances it is unlikely that any credit provider would opt to subject itself to the more stringent regime of s124. It would be absurd, said the Regulator, if credit providers could simply circumvent the consumer safeguards built into s124 by saying nothing in their credit agreements about set-off.

30. For these reasons, the Regulator submitted that s124 and s90(2)(n) must be interpreted purposively to exclude the continued application of common-law set-off in credit agreements regulated by the Act. This is the only interpretation consistent with the underlying purpose of the Act and with Constitutional values. It does not prevent the recovery of debt by credit providers, nor does it prevent set-off, provided that set-off is subject to the consumer safeguards built into s124. The Regulator submits that this conforms with the object of promoting

equity in the credit market by balancing the rights and responsibilities of credit providers and consumers.[9]

The SAHRC's submissions

31. Both the Regulator and the SAHRC submitted that the Bank's interpretation of the Act undermined the debt review scheme established under the Act. In addition, the SAHRC submitted that the Bank's interpretation was inconsistent with a number of basic constitutional rights, in particular the socio-economic rights of consumers, as well as their fundamental right to dignity.[10]

32. The SAHRC highlighted the importance of interpreting a statute in its socio-economic and institutional context. It referred to the following Constitutional Court *dictum* in *South African Police Service v Public Servants Association* in this regard:

> "Interpreting statutes ... does, however, require that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution. This in turn will often necessitate close attention to the socio-economic and institutional context in which a provision under examination functions. In addition, it will be important to pay attention to the specific factual context that triggers the problem requiring solution."[11] (my emphasis)

33. The gist of the SAHRC's submissions was that the effect of set-off was to interfere with the carefully constructed debt review process established under s86 of the Act. The debt review process permits a debtor who is over-indebted to seek the assistance of a debt counsellor to assess her financial position and, if appropriate to propose a debt-rearrangement plan, that is made an order of

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[9] Section 3(d) of the Act

[10] Both the SAHRC and the Regulator submitted that the Bank's interpretation also conflicted with the right of consumers to be protected from the arbitrary deprivation of their property. There was some debate between the parties on this issue in the written heads of argument. Although it raises interesting questions of law, I did not find it necessary to engage in this debate for purposes of making a determination in this matter.

[11] 2007 (3) SA 521 (CC) at para [20]

court. In this way, a debtor's repayment obligations may be restructured to include, for example, a postponement of dates when payments are due, and a reduction in the amount of each payment over an extended period of time.

34. In support of its submissions, the SAHRC provided an affidavit by a Mr Slot, who is a registered debt counsellor, and who has been in practice as such since 2007. In his affidavit he testified to his experience as a debt counsellor and, in particular, his experience of the effect of common-law set-off on debtors who are under debt review. He stated that banks do apply set-off to persons under debt review. This often has a crippling effect on the debtor, as set-off is almost always applied without notice to, or interaction with, the consumer.

35. According to Mr Slot, in his experience, what occurs in practice is that, relying on the common-law principle of set-off, the bank simply removes money from the consumer's bank account. This will often place the consumer under debt review in the position that they will not be able to meet their repayment instalment obligations to other creditors included in the repayment plan. If this occurs, creditors are entitled to exercise their rights and enforce the full debt obligations against the consumer, placing the entire debt review process in jeopardy. The SAHRC submitted that this effect of common-law set-off on the debt review process is in conflict with one of the stated aims of the Act, viz. to "place priority on the eventual satisfaction of all responsible consumer obligations under credit agreements", as it permitted a credit provider like the Bank to prioritise the debts due to it over those of other creditors.

36. Mr Slot attested to a further effect of common-law set-off on consumers who are under debt review: it may leave consumers with insufficient accessible money to purchase the basic social necessities, such as school fees, electricity, water, food and transport to and from work. This, in turn, compounds their financial

difficulties. The SAHRC submitted in this regard that the same considerations that were applied in the Constitutional Court's judgment[12] on emolument attachment orders were applicable in this matter. There the Constitutional Court highlighted the risks to the basic human rights of indigent debtors who stand to lose income without court supervision as follows:

> "Moreover, taking away the basic income that indigent debtors rely on for subsistence, without court supervision, rubs right up against the right to dignity (which underlies all the socio-economic rights of housing food and health care). It may also implicate the protection against arbitrary deprivation of property afforded under section 25."

37. Mr Slot also stated that banks had changed their practice since the introduction of the Act. Prior to the Act's introduction, it was common for banks to include an express provision permitting common-law set-off in credit agreements. Since the Act was introduced, however, the common practice now is to exclude any express reference to set-off in credit agreements. Mr Slot believes that this is an attempt to side-step the application of set-off under the Act. The Bank did not dispute that it had changed its practice along these lines since the introduction of the Act. However, it asserted that it had simply updated its approach to set-off in line with the clear wording of the Act.

38. Based on these considerations, the SAHRC submitted that the interpretation of the Regulator was to be preferred. It submitted that the Bank's interpretation leads to the undermining of an important element of the Act, viz. debt review, and should be rejected on this basis. In addition, it should be rejected on the

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[12] *University of Stellenbosch Legal Aid Clinic & Others v Minister of Justice and Correctional Services & Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic & Others; Mavava Trading 279 (Pty) Ltd & Others v University of Stellenbosch Legal Aid Clinic & Others* 2016 (6) SA 596 (CC) at para [133]

basis that the Regulator's interpretation better protects and promotes the constitutional rights of consumers.

39. It is perhaps appropriate at this point to deal with the Bank's objection to, in the form of an application to strike out, certain key elements of Mr Slot's affidavit. The Bank objected on the basis that the paragraphs in question were not relevant to the issues to be determined, or, alternatively that they went beyond the bounds of the order granting the SAHRC admission as *amicus* and the right to adduce evidence. The evidence complained of encompasses that evidence by Mr Slot to which I referred earlier.

40. In my view, there is no merit in the application to strike out. Chohan AJ's order expressly granted the SAHRC leave "to adduce the expert evidence of Mr Slot as contemplated in paragraphs 16.2 and 16.3 of the ... founding affidavit". These paragraphs of the founding affidavit described the nature of the evidence the SAHRC intended to adduce as follows:

> "16.2 the experience of the debt counsellor is that the use of the practice of set-off by creditor providers is contrary to the purpose and object of the NCA and has the effect of undermining the debt review process, either by rendering the consumer incapable of complying with the debt repayment programme and agreements with creditors or by causing debtors to lose faith in the debt review process and to abandon the process.
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> 16.3 the practice of set-off other than in terms of the National Credit Act fundamentally threatens the livelihood and dignity of low-income earners, a distinctly vulnerable group in society. Not only do debtors lose a part of their property (i.e. their monthly income), there is a real risk of severely prejudicial consequences when debtors cannot service their debts under debt review agreements e.g. attachment of their assets, eviction from their homes etc."

41. In granting leave to the SAHRC to adduce evidence of this nature, Chohan AJ considered its relevance. In his judgment, he noted that although historically such evidence would not have been relevant, and thus inadmissible, that approach has been jettisoned in favour of the reception of evidence, including

expert evidence, for purposes of statutory interpretation.[13] The learned Acting Judge gave particular attention to the relevance of "evidence as to the likely impact of a particular construction of a statute and whether or not that was intended by the legislature" and concluded that this would constitute the factual matrix or context to be considered in the interpretation of the statute in question. He concluded that "the evidence sought to be adduced by (the SAHRC) as to the likely impact of a possible construction of sections 90(2)(n) and 124 of the NCA would be relevant to its interpretation ... (and) such evidence would also be of assistance to the court."[14]

42. As is evident from the dictum cited earlier from the *South African Police Service* judgment, the Constitutional Court has recognised the importance in the interpretation process of paying attention to the "specific factual context that triggers the problem requiring solution". As Chohan AJ recognised, and with respect, correctly so, the evidence of Mr Slot provides useful factual insight into the effect of common-law set-off on vulnerable consumers, in particular, those who have resorted to debt review, or those in respect of whom the process of debt review is aimed at assisting. For these reasons, I decline to strike out the impugned portions of Mr Slot's affidavit.

The Bank's submissions

43. In its approach to the interpretation of the Act the Bank focused on the language of the provisions, and particularly that of s90(2)(n). It accepted that the interpretive exercise is holistic, taking into account the context and purpose of the legislation in question. However, it emphasised that courts cannot lose

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[13] Unreported judgment of Chohan AJ in *National Credit Regulator v The Standard Bank of South Africa Limited & South African Human Rights Commission* (28 June 2018)

[14] Judgment of Chohan AJ, at paras [32] & [33]

sight of the actual words used by the lawmakers. In particular, courts cannot, under the guise of interpreting the meaning of words, "impos(e) a view of what the policy or object of legislation is or should be."[15] The Bank also drew attention to the warning sounded in *Endumeni*, to the effect that:

> "Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or buisnesslike for the words actually used. To do so in regard to a statute or stature instrument is to cross the divide between interpretation and legislation ... ."[16]

44. The Bank submitted that this is precisely what the Regulator and the SAHRC sought to do with their interpretation: they ignored the actual and plain wording of the provisions, leapfrogging over the words themselves to get to a meaning that in their view represented a better policy outcome for consumers.

45. The Bank submitted that, to the contrary, the inevitable departure point of the interpretive exercise was the language of s90(2)(n). Of significance here is that this section refers specifically to set-off that is contained in "a provision in a credit agreement". The plain meaning of this wording is that it is only a provision written into a credit agreement that will be unlawful if it does not comply with s124. According to the Bank, s90(2)(n) cannot be intended to apply to common-law set-off because common-law set-off is not dependent on any contractual *nexus* between the parties, as it applies *ex lege*. In other words, a credit agreement does not need to include a set-off provision in its terms if the credit provider intends to rely on it, rather than set-off under the Act. It is only if the Bank wishes to depart from the common law, and apply a different form of set-off, that it must make provision for this in the agreement itself. The Bank submitted that in this instance, s90(2)(n) ensured that the

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[15] *Mankanyi v Anglogold Ashanti Ltd* 2010 (5) SA 137 SCA at para [25]

[16] *Natal Joint Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18]

credit provider would be restricted to terms no more favourable than those set out in s124. However, the same stricture does not apply to circumstances where a credit provider relies solely on its *ex lege* right to impose common-law set-off without making any express provision for this in the credit agreement between the parties. Here, according to the Bank, s90(2)(n), and by necessary reference, s124 simply have no application.

46. Furthermore, the Bank contended that had it been the intention of the lawmakers to oust the application of common-law set-off to credit agreements under the Act, it would surely have made this clear. The Bank pointed to s103(5) as a comparative provision in the Act. That section deals with interest, and it provides that: "Despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated ....". This indicated, contended the Bank, that the lawmakers were fully aware of the need expressly to oust the application of the common law where they intended a provision to have that effect.

47. The Bank also argued that its interpretation of the Act, which keeps alive and applicable common-law set-off in respect of credit agreements, is compatible with the objects and purposes of the Act. It submitted that it was favourable to consumers in that if set-off under the common law is applied at the instance of the credit provider, it could prevent default on the part of the consumer of her debt, thus avoiding a breach and acceleration of the entire debt. At a macro-economic level, the prohibition of set-off under the common law to credit agreements would increase the cost of providing credit to consumers. Moreover, if the Act is read as restricting set-off under credit agreements to that provided for in s124, the notice requirement of s124(2) would provide the debtor with the opportunity of frustrating the application of set-off. In other words, set-

off could always be avoided by the consumer, providing an inequitable weighing of interests between credit provider and consumer. A result that the Bank submitted was anomalous and contrary to the underlying equitable balance of interests inherent in the Act.

INTERPRETATIONAL ANALYSIS

48. Despite the divergent approaches to, and interpretations of, the provisions in question, there are certain issues that are common cause. The first is that an express exclusion of common-law set-off does not appear in either s90(2)(n) or in s124. The Regulator's contended for interpretation requires a reading in of the exclusion of common-law set-off. The Regulator accepted that this is so. It submitted that while it may not be common to read words into a statute as part of the interpretational exercise, it is not impermissible to do so, provided that the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands.[17]

49. The second issue that is common cause is that the Regulator and the SAHRC do not contend that set-off is no longer permissible in respect of credit agreements regulated by the Act. Instead, they contend that although set-off is still permissible, the only form of set-off permitted is the statutory scheme established under s124 and s90(2)(n). This is where the two sides part company, with the Bank contending that both set-off under the common law, as well as set-off under the Act remain open as options to credit providers.

50. The third issue that seems to be common cause is that set-off under the Act presents a distinct departure from common-law set-off. In particular, s124

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[17] *Medox v CSARS* 2015 (6) SA 310 (SCA) at 314E, citing *Rennie NO v Gordon & Another NNO* 1998 (1) SA 1 (A) at 22E-F

contains safeguards for consumers that are unavailable to it under common-law set-off. The Bank has difficulty with what it considers to be the over consumer-friendly weighting of set-off under the Act. On the other hand, the opposite might just as easily be said of common-law set-off favouring the credit provider at the expense of the consumer's interests.

51. A final point in respect of which the Bank cannot disagree is that its interpretation that the common law remains applicable is to a large extent premised on the absence of any reference to set-off in a credit agreement. On its interpretation, s90(2)(n) is key, and the key element of that provision is that it only applies to set-off provisions that are actually contained in a credit agreement. Provided a credit agreement is silent on set-off, according to the Bank, the common law still applies.

52. In my view, there is an irrationality at the heart of the Bank's departure point in this regard. On the Bank's approach, a provision in a credit agreement to the effect that common-law set-off is applicable between the parties would be invalid under s90(2)(n) read with s124. It seems irrational to me that the lawmakers would have been content to allow this far-reaching invalidity to be avoided through the simple expedient of the credit provider excising all reference to set-off in its credit agreements.

53. There is conundrum inherent in Bank's interpretation, and it is this: it is unlawful for a credit provider to actually tell a consumer in the credit agreement that it will be relying on common-law set-off by including a provision to this effect in the credit agreement; however, it is perfectly lawful for the credit provider to keep the consumer in the dark by making no reference to set-off in the agreement at all, and then to rely on common-law set-off (which is far less favourable to the consumer) nonetheless. This seems to me to be fundamentally irrational, and

contrary to section 3 of the Act that provides, as one of the general purposes of the Act, the promotion of a transparent credit market. It also appears to me to be subversive of s3(e)(iii), which records, as one of the Acts more specific purposes, that of "addressing and correcting imbalances in negotiating power between consumers and credit providers by ... providing consumers with protection from deception, and from unfair conduct by credit providers ...". Surely the Act should be interpreted in a manner that promotes transparency and fair disclosure of all relevant information? On the contrary, the Bank's interpretation is actually premised on the consumer necessarily being kept in the dark about the application of set-off.

54. These difficulties in my view highlight the importance of a purposive approach to the interpretation of s90(2)(n) and s124. It goes without saying that the Bank is correct in its submission that a purposive approach cannot ignore the wording of the statutory provisions in question. It is also so that s90(2)(n) is very specific in its injunction that it is unlawful for "a provision of a credit agreement" to permit set-off other than as provided under s124. The Bank's case is that this must mean, in plain terms, a written provision contained in the credit agreement.

55. None of the parties addressed me on whether s90(2)(n) could or should be interpreted as being broad enough to include a reference also to implied, rather than express, terms. Our law of contract has long recognised that agreements extend beyond the actual express terms in a contract, and can also be said to include implied terms. These are unexpressed provisions of a contract that are not reached by agreement between the parties, but which are nonetheless imported as a matter of course by way of the ordinary operation of law. In other

words, an implied term is one that is imposed by the law from without.[18] Unless the agreement excludes implied terms, they are binding on the parties despite not being stated in the agreement. It seems to me that the common-law principle of set-off fits neatly into the scheme of implied terms that would ordinarily be regarded as applicable in a credit-provider/consumer contractual context.

56. If this is so, is s90(2)(n) not open to the interpretation that it covers not only provisions expressly contained in the credit agreement itself, but also those that are implied therein by operation of law? If this is the case, then it makes no difference whether a credit agreement expressly includes a provision dealing with set-off or not. Even if it does not expressly do so, by operation of the common law, set-off would be implied as a provision contained in the agreement, within the meaning of s90(2)(n). On this basis, the unstated, implied provision of common-law set-off would be as unlawful under s90(2)(n) as an express provision applying common law set-off.

57. As neither of the parties addressed me on this issue, I make no finding as to whether this is the correct interpretation of s90(2)(n) or not. What I am prepared to find, however, is that the Bank's contended for clear and plain meaning of s90(2)(n) is not as clear and plain as it appears to be at first sight. It is certainly open to the interpretation I have posited above. This means that the linguistic leapfrogging of which the Bank accused the Regulator and the SAHRC is non-existent: if the language of s90(2)(n) is open to an interpretation that applies also to implied common law provisions, the Regulator and the SAHRC cannot be accused of ignoring its wording.

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[18] Per Corbett AJA (dissenting) in *Alfred McAlpine & Sons v Transvaal Provincial Administration* 1974 (3) SA 414 (A) at 531

58. There is a further difficulty with the Bank's interpretation of the relevant provisions. It's starting point, as I have emphasised, is s90(2)(n), and the language of that section. Apart from referring to the absence of an express exclusion of the common-law principle of set-off in s124, the Bank did not make much of that section at all.

59. In my view, this was an important oversight on the Bank's part. The real starting point of the inquiry is really s124, and not s90(2)(n). It is s124 that establishes what form of set-off is lawful in respect of credit agreements regulated by the Act. Critically, it is not limited to set-off provisions contained in a credit agreement only. Instead, s124 covers a broader field incorporating different possible lawful "repayment practices". Section 124 (1) provides that the making of a charge against a consumer's account by a credit provider to satisfy an obligation of the latter to the former (essentially meaning set-off) will be lawful if:

> "... a consumer ... provide(s), a credit provider ... request(s) or a credit agreement ... include(s) an authorisation (therefor) ...".

60. What is plain is that the provision for set-off in a credit agreement is not the only situation governed by s124. In other words, s124 is not aimed only at regulating set-off when a set-off clause is actually included in the credit agreement itself, as the Bank submitted. Even if a credit agreement does not make provision for authorisation for set-off, to constitute a lawful charge to a consumer's account, the consumer must otherwise offer such authorisation or the credit provider must request it (and presumably the authorisation must follow). Unless this is so, it will not be a lawful "repayment practice" as envisaged in s124.

61. Although it is clear that s124 extends its reach beyond the express inclusion of a set-off clause in a credit agreement, the question remains whether it necessarily implies an exclusion of common-law set-off? It certainly cannot be said that s124 is stated in such plain terms that its clear meaning is to preserve common-law set-off in respect of credit agreements under the Act. I do not think that the inclusion in s103(5) of an express clause ousting the common law is very helpful in this regard. The general poor drafting of the Act, which as I have indicated, is well documented, weighs against placing too much store on the fact that an express ouster was not included in s124 in contrast to s103(5).

62. The accepted interpretational principles require that a meaning must be given to s124 and s90(2)(n) that is consistent with the purposes of the Act, its context and with the Constitution. Further, section 2(1) of the Act requires that it must be interpreted in a manner that gives effect to the purposes set out in in section 3. The Constitutional Court has previously noted that the Act introduced a "major overhaul" of and "clean break from" the position that preceded it:

> "A major overhaul of previous credit legislation was essential. This was also necessary because low-income consumers relied increasingly on commercial credit and many were becoming swamped with debt. ... The statute 'represents a clean break from the past and bears very little resemblance to its predecessors.'"[19]

63. As I have already noted, while the Act aims to balance the rights and interests of consumers with those of credit providers, the main object of the Act is to protect consumers. The system of set-off established under s124 is plainly designed to represent a complete break from the past application of the common-law principle of set-off, and its overt purpose is to safeguard the rights of consumers in the set-off process. Section 124 has at its heart the

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[19] *Sebola*, above n3 at para [40]

requirement that the consumer who owes a credit provider must have a say in, and must authorise, whether and how set-off is to be applied in respect of credit balances in her accounts. It gives the consumer a say in how her debts are to be met, rather than leaving it to the sole discretion of the credit provider to deduct money from her accounts. The Constitutional Court has recognised the importance of giving debtors a say in how their debts are paid. Although the following *dictum* was stated in the emoluments attachment order context, it is equally apposite here:

> "A decision on the means of paying a debt can often be as important as the debt itself - and parties may contest the means of payment, even when they do not dispute that the debt itself must be paid."[20]

64. The interpretation favoured by the Bank is at odds with all of this: it retains the upper hand for credit providers with little actual benefit to consumers. At common law no consultation with and no notice to the consumer/debtor is required before the credit provider effects set-off. In fact, on the Bank's interpretation, it is necessary for the credit provider to actually conceal the application of set-off from the consumer because the credit agreement must be silent if the common law is to apply. While set-off may provide a means by which the consumer/debtor can avoid defaulting on her debt, there is no reason why she should be excluded from having a say in that process. It seems to me to be precisely for this reason that s124 preserves a system of set-off but requires the consent of the consumer/debtor before it can be effected. It is through this mechanism that the Act promotes equity in the credit market by balancing the respective rights and responsibilities of credit providers and

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[20] *University of Stellenbosch*, above n12, at para [130]

consumers.[21] That balance is entirely absent from the common-law process of set-off.

65. The effects of the application of common-law set-off in respect of over-extended debtors is usefully illustrated in Mr Slot's affidavit. It gives debtors no control over how monies standing to their credit are used to satisfy their debts, and places primacy on the debtor's indebtedness to the credit provider over her indebtedness to other creditors. This is contrary to s3(g) of the Act which lists as one its purposes being to "... provide mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations" (my emphasis).

66. It is also evident from Mr Slot's affidavit that the application of common-law set-off has a detrimental effect on the socio-economic welfare of debtors. The absence of any consultation with the debtor before set-off is applied, which is a hallmark of common-law set-off, renders debtors vulnerable to being deprived of using their own income to see to their basic needs before satisfying their credit obligations to the credit provider. Not only does this undermine the socio-economic welfare of debtors, but it may also place additional burdens on the State to provide the necessary socio-economic safety net. In this respect, although the prohibition of common-law set-off may increase the cost of credit, as submitted by the Bank, the retention of it potentially increases the socio-economic burden on the *fiscus*.

67. As to the SAHRC's submissions regarding the prejudicial impact of common-law set-off on a cornerstone of the Act, viz. the debt review process, Mr Slot averred that in his experience, credit providers applied set-off regardless of

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[21] Section 3(d) of the Act

whether a debtor was under debt review or not. The Bank averred that it did not generally apply set-off to debtors who were under debt review. Of course, it could not speak for all credit providers on this score, nor did it purport to do so. It was also submitted on behalf of the Bank that common-law set-off could not interfere with the debt review process. This is because in terms of s86(5)(b), where a consumer has applied to a debt counsellor for review, each affected credit provider is obliged to "participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement". Mr Loxton, for the Bank, submitted that the effect of this obligation was to preclude a credit provider from effecting common-law set-off from the moment a consumer applied to a debt counsellor, as to do so would be in breach of the duty of good faith imposed on all credit providers under this section. If this is indeed how s86(5) ought to be interpreted, based on Mr Slot's affidavit, it would appear that no or little heed is being paid to this injunction. It is not necessary for me to make a finding in this regard. Even if I were to assume that this interpretation is correct, it would not cure all of the deep-seated problems that arise from the Bank's interpretation of s90(2)(n) and s124.

68. Perhaps most significant of all, is the Regulator's submission that if the Bank's interpretation is accepted, the effect is to render s124 a dead letter. This seems to me to be the inescapable effect of reading s124 as retaining common-law set-off alongside set-off under the Act. The two mechanisms are so divergent that there is very little overlap between them. Importantly, the common-law overwhelmingly favours the interests of credit providers while providing consumers with very little effective protection. On the other hand, set-off under s124 is undoubtedly designed to redress the balance by providing extensive safeguards for consumers that are completely unavailable to them under the common law.

69. Given this divergence, there would seem to be absolutely no incentive at all for credit providers to elect to regulate set-off under s124 rather than resorting to their common-law rights if these were still available. This must surely have been in the contemplation of the lawmakers when they drafted s124. Had they intended merely to leave the common law in place, what possible reason would there have been to introduce s124? While common-law set-off remains available as a parallel system to credit providers there is no real likelihood of s124 and s90(2)(n) providing any protection to consumers. In interpreting a statute, courts must assume that provisions are included for a purpose. That purpose must not only be theoretical, but realistic. It is clear to me that so long as common-law prevails as an alternative form of set-off, s124 and s90(2)(n) will serve no purpose. For interpretational purposes, an interpretation that renders a statutory provision meaningless should be avoided.

70. For all of these reasons, I am unable to accept the interpretation of s90(2)(n) and s124 as contended for by the Bank. That interpretation is not plainly indicated by the wording of the sections, nor is it consistent with the underlying purposes of the Act, or the context within which the Act was adopted. It is also does not promote the basic constitutional rights of consumers insofar, at least, as their rights to socio-economic welfare, dignity and possibly property, are concerned. To accept the Bank's interpretation is to ignore the fact that the Act was specifically adopted to break with the past regulation of consumer credit that rendered few safeguards to consumers.

71. In my view the purpose of s124 was precisely to effect that break from the common-law past that was necessary in order to achieve the underlying objects of the Act. When s124 provides that "it shall be lawful for ... a charge or a series of charges contemplated in s90(2)(n)" to be made on the conditions set

out thereunder, it means that these are the only conditions under which set-off may lawfully be applied in respect of credit agreements under the Act. While it does not expressly oust the continued application of common-law set-off in parallel with s124, its meaning and effect is to do so. In my view, these provisions are plainly intended to alter, and to oust the common law position as regards credit agreements regulated by the Act.[22] To hold otherwise would be to render these provisions ineffective for the purpose at which they were directed. In the circumstances, I find that this is one of those circumstances where a reading-in is permissible for interpretational purposes: unless an express exclusion of the common law is read in, effect cannot be given to s124, read with s90(2)(n). I conclude that the correct interpretation of s124 is that it excludes the operation of common-law set-off in all credit agreements that are regulated by the Act.

CONCLUSION AND ORDER

72. It follows from the above that the Regulator is entitled to an order in the form of the declarator set out in the Notice of Motion.

73. I make the following order:

1. It is declared that, in light of sections 90(2)(n) and 124 of the National Credit Act 34 of 2005, the common law right to set-off is not applicable in respect of credit agreements which are subject to the National Credit Act.

2. The respondent is ordered to pay the applicant's costs, including the costs of two counsel.

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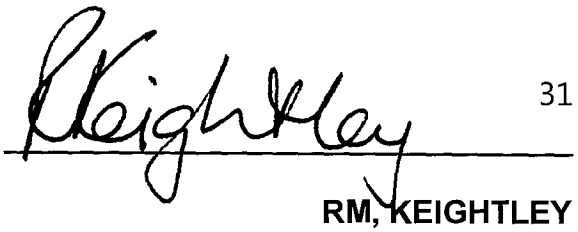
[22] *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 at 823



RM, KEIGHTLEY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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APPLICANT'S COUNSEL:	S Budlender SC
	P Seseane
INSTRUCTED BY:	Gildenhuys Malatji Inc
RESPONDENT'S COUNSEL:	CDA Loxton SC
	A Milovanovic
INSTRUCTED BY:	Norton Rose Fullbright South Africa Inc
COUNSEL FOR AMICUS CURIAE:	E Webber
INSTRUCTED BY:	Legal Resources Centre