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DISPUTE RESOLUTION **ALERT**

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Common law set-off in credit agreements given the boot?

It would seem that, pending an appeal of the recent judgment in the matter of the *National Credit Regulator v Standard Bank of South Africa Limited* (44415/16) [2019] ZAGPJHC 182 (27 June 2019), which ruled in favour of the National Credit Regulator, common law set-off in circumstances where the National Credit Act is applicable, has been se(n)t off packing.

In a previous Alert we dealt with the question of whether credit providers' right to apply set-off is regulated by the common-law only or whether credit providers are subject to the National Credit Act's more onerous requirements regarding set-off. Our 2017 article mentioned that the National Credit Regulator had approached the High Court for clarity on the meaning of the National Credit Act's set-off provisions: Section 90 and section 124. On 27 June 2019, the High Court delivered its judgment.

Section 90(2)(n) of the Act stipulates that a provision in a credit agreement is unlawful if it permits the credit provider to satisfy an obligation of a consumer by making a charge against an asset or amount deposited for the consumer, unless s124 of the Act permits this. Section 124 basically allows the charge against the asset if specific authorisation is given by the consumer in the credit agreement.

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It must be pointed out that this judgment once again highlighted that the Act's drafting imperfections are nothing new and that the Supreme Court of Appeal has already held that the Act is not a model of clarity.

Set-off allows the termination of obligations without an exchange of performance. Where parties are indebted to one another, set-off operates automatically under the common law when the requirements for set-off are satisfied.

Set-off is an important revenue-generating option for a bank. By way of an example, customer A has an overdrawn current account, but a credit balance in a savings account or any other account for that matter. By operation of the common law, the credit balance in the savings or other account can automatically be set-off against the overdrawn current account.

However, s90(2)(n)of the Act requires a number of stringent factors to be present in order for set-off to be possible. The customer must give prior authorisation that set-off can be applied against a specific amount in a specific account to satisfy a specific obligation. This presents a significant departure from the common law.

The continued application of the common law principle of set-off is not expressly excluded by s124 of the Act.

The real issue that the court grappled with is whether banks could dodge s124's stringent requirements by not making any reference to set-off in their credit agreements, continuing instead to apply the common law principle of set-off.

Quite understandably, the Regulator's position was that the Act displaced the common law principle of set-off and described the only set-off regime

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Common law set-off in credit agreements given the boot?...*continued*

The current position is that the common law right to set-off is not applicable in respect of credit agreements which are subject to the Act.

permissible under the Act. On the other hand, the bank favoured the interpretation that if the credit agreement is silent on set-off, the common law principle applies. These two positions cater for the two different sides of the divide and understandably so – consumers on the one hand and financial institutions on the other hand.

On a careful analysis of the arguments presented, the Regulator, supported by the South African Human Rights Commission, was certainly aware of the fundamental rules to be applied when interpreting specific words used in statutes, but seemed to draw substantial support from the main objective of the Act, namely to protect consumers. The bank on the other hand argued valiantly that the court could not lose sight of the actual words used in the statute. It argued further that, like other sections of the Act, if the lawmakers wanted to exclude the common law principle of set-off in credit agreements, they would have said as much.

The Court held that s124 is not aimed only at regulating set-off when a set-off clause is incorporated in the credit agreement itself. Where a credit agreement does not make provision for set-off, a charge to a consumer's account can only be lawful if the consumer has authorised it. Until such authorisation is granted, set-off, whether by way of contract or common-law, is unlawful. The current position is that the common law right to set-off is not applicable in respect of credit agreements which are subject to the Act.

Eugene Bester and Nomlayo Mabhena

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Privatising taxation: The future of legal costs recovery

By using arbitration, or even mediation, for purposes of assessment and taxation of bills of costs, the parties to the settled dispute can then control the process.

Taxation is the process that is followed to assess costs usually paid by the losing party once the courts in civil litigation have handed down an order. Since costs in litigation can be considerable, the level of costs recovery is important for the winner.

Those costs are presented as a "bill of costs" to the opposing party in terms of the procedures set out in the court rules. The bill of costs is then "taxed" by the Taxing Master of the High Court who provides an *allocatur* containing a final figure which is recoverable from the opposing party. The *allocatur* has the status of an order of court.

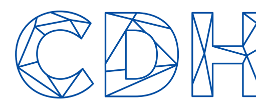
Alternative Dispute Resolution (ADR) refers to private means of adjudicating disputes outside of the court process and includes arbitration and mediation. ADR allows parties to tailor-make their process to incorporate the needs of both parties. Furthermore, the parties can elect an arbitrator or mediator to their liking, often with specific expertise in a particular field. As the process is private and regulated between the parties, the process is not subjected to the same time delays one finds in ordinary court processes.

Of late, the process of taxing bills of cost in the High Court and even in the Magistrates Court has become subject to excessive delays, frustration and unnecessary conflict. This comes from congested court rolls, the lack of adequate personnel and resources, an inexplicably high rate of absenteeism, and delaying tactics of losing parties reluctant to pay.

A potential solution to protect clients' rights and effectively and quickly recover a client's legal costs without unnecessary delay is an alternative method of taxation based on ADR principles. By using arbitration, or even mediation, for purposes of assessment and taxation of bills of costs, the parties to the settled dispute can then control the process. An "arbitrated taxation" could take place at a location of the parties' choosing, in front of a Legal Costs Practitioner (senior cost consultant) of their own choosing, on a date and time suitable to the parties and their schedule. Not only is this more convenient but it would have the added benefit of relieving the pressure on the already-overburdened court systems.

Private taxation would consist of the parties to a cost dispute presenting arguments and evidence to an independent Legal Costs Practitioner (senior cost consultant) who will then make a determination by exercising his/her discretion based on past experience, case law and current practices. For all intents and purposes, the taxation would proceed in the same manner as a taxation in the High Court or Magistrates Court.

A potential drawback to private taxation would be the cost of the independent Legal Cost Practitioner. Nevertheless, when a party can recover their costs through this streamlined process; the time and interest lost by waiting for costs to be taxed through the courts will in many cases justify the costs of this process. It would be necessary for the parties to agree on how and by whom the Legal Cost Practitioner will be paid. It could be agreed that the costs of the taxation become "costs in the cause" and are added to the final taxed figure in the *allocatur*.



Privatising taxation: The future of legal costs recovery*...continued*

Private taxation will require the parties to enter an agreement, stating the manner in which the bill of costs is to be taxed; and both agreeing to abide by the rulings of the appointed arbiter or assessor (Legal Cost Practitioner), and that the *allocatur* will not be subject to review.

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Since parties often conclude arbitration clauses in their contracts, this method of private costs determination could be included in such arbitration clauses. As part of this agreement, the parties should consent to the *allocatur* being presented to the Taxing Master of the High Court or Magistrates Court, to be stamped and signed as "settled between the parties". This would then have the effect of making the privately taxed *allocatur* of equal force and effect to that of the Taxing Master's *allocatur*.

Maryna Van Staden (MVS Cost Consultants) in collaboration with Richard Marcus and Andrew MacPherson

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