BANKS MAY NO LONGER TAKE MONEY TO SETTLE A CREDIT AGREEMENT, WITHOUT YOUR AUTHORISATION

On 27 June 2019, the South Gauteng High Court ("***the Court***"), handed down a favorable judgment on the part of the National Credit Regulator ("***the NCR***") and the South African Human Rights Commission ("***SHRC***") in respect of the common law right of set-off and whether it applies to credit agreements in the court case of the *National Credit Regulator vs Standard Bank of South Africa Limited & South African Human Rights Commission*

The NCR brought an application seeking a declaratory order that in light of section 90(2)(n) and 124 of the National Credit Act 34 of 2005 ("***the Act***"), the common law right of set-off is not applicable in respect of credit agreements which are subject to the Act. This was done after various complaints were lodged against the respondent, Standard Bank of South Africa Limited ("***the Bank***") by consumers regarding its practice of applying the common-law principle of set-off against amounts received by consumers into accounts that they hold with the Bank. The common-law principle of set-off allows one debt to be cancelled by another and applies in circumstances where debts are mutually owing between two parties so that each party is simultaneously the debtor and the creditor of the other. The Bank would thus debit the accounts in question without the consent of the account holders against amounts owed by the account holders to the Bank, for example, a credit card or a loan.

The parties agreed that section 90(1)(n) and section 124 establishes a statutory scheme of set-off that does not mimic the common law, and that the effect of the two provisions is that if a credit agreement includes a provision for set-off, it must comply with the requirements of section 124. These requirements include amongst others that:

a) the consumer's prior written authorisation is required;
b) set-off may only be applied against an asset, account or amount specifically named by the consumer in the authorisation;
c) set-off may only be applied to satisfy an obligation specifically named by the consumer in the authorisation; and
d) the credit provider is required to give notice to the consumer in the prescribed manner before set-off can be affected.

The Bank, however, argued that if a credit agreement does not include a set-off provision, the common-law set-off continues to operate as a parallel system even though the credit agreement itself is regulated by the Act. 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 the "statutory set-off" under the Act.

The NCR, on the other hand, argued that in terms of the Act, section 90(1)(n) and section 124 prescribes the only permissible scheme of set-off applicable to credit agreements. The SHRC, admitted as *amicus curiae*, further argued that the common-law right of set-off also negatively impacts on consumers' rights, specifically their socio-economic rights and often renders debtors incapable of complying with their repayment terms under the debt review process.

The Court found that unlike the right of set-off as envisaged in the Act, where the consumer has control over the process, the common-law right of set-off gives the creditor full control of the set-off process without any input or authorisation from the consumer. The Court noted that meaning must therefor be given to the specific section in the Act that is consistent with the purpose of the Act. Accordingly, the Court found that "*the system of set-off established under section 124 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 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 its accounts." The court further stated that the interpretation favoured by the Bank is at odds with the above as it retains the upper hand for credit providers with little actual benefit to consumers.

Accordingly, the Court declared that the correct interpretation of section 91(2)(n) and 124 is that it excludes the operation of the common-law right of set-off in all credit agreements that are regulated by the Act, and that all credit providers must adhere to the process as stipulated in section 124 of the Act in respect of all credit agreements falling under the ambit of the Act, insofar as set-off is concerned.

We, therefore, urge all credit provider to take notice of the outcome of the court case and implement the necessary controls and clauses in their credit agreements, to ensure that the follow the correct "statutory set-off" processes as prescribed by the Act.

Moonstone Compliance offers various compliance related services to registered credit providers, including assistance with the implementation of internal controls and credit agreement reviews, to ensure that you comply with the requirements of the Act. Should you require further assistance in this regard, please contact Mieke Whitehead, our Junior NCA Compliance Officer on mwhitehead@moonstonecompliance.co.za or 021 883 6178.