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SET-OFF AS A MEANS OF DEBT RECOVERY

by

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DECLARATION

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SUMMARY

This mini-dissertation concerns the principles applicable to the concept of set-off from a South African perspective. As a point of departure, it is important to note that a lot has been written about the concept of set-off, yet its operation remains unclear.

The development of the principle of set-off or *compensation*, as it was known during the Roman law era, will be discussed from the Roman law point of view and how it was interpreted in the post-classical Roman law era by the Glossators of the time.

This dissertation will further discuss the manner in which the concept of set-off is affected by the provisions of the National Credit Act 34 of 2005 (NCA) and more particularly how set-off is being used as a means of debt recovery by financial institutions. It is for this reason that a discussion of sections 90, 124, 129, 130 and 131 is included.

An analysis of the advantages and disadvantages of set-off will be conducted with a focus on how banks can utilise set-off to prevent the loss of a customer's primary residence, and therefore how the application of set-off can lead to the protection of the customer's right to housing as envisioned in the Constitution. In light of the aforesaid, it will be demonstrated how the application of set-off may play a role in avoiding the application of Rule 46 of the Uniform Rules of Court, which contains provisions detailing the process to be followed in executing against immovable property.

The large South African banks subscribe to the Code of Banking Practice ("the Code"), which is a voluntary code that sets out the minimum standards for service and conduct one can expect from their bank with regard to the services and products it offers, and how the bank relates to its customers. The Code only applies to persons and small business customers. The

concept of set-off is also addressed in the Code and clarifies the bank's rights and responsibilities in applying set-off.

Lastly, international developments regarding the operation of set-off will be discussed briefly, specifically how set-off is applied in the United Kingdom, European Union and New Zealand.

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CHAPTER 1:

INTRODUCTION

1.1 Background to research problem

Set-off is a manner in which obligations due between parties can be terminated without the exchange of performance. Set-off can apply to obligations arising from contract or any other source.¹ In instances where the parties are mutually indebted to each other for the same amount, set-off will terminate the indebtedness between the parties as if the parties had performed.² If the parties are indebted to each other for different amounts, then the lesser debt is extinguished while the larger debt is merely reduced by the amount of the lesser debt.³ Set-off operates automatically once its requirements are met or in terms of a declaration by one of the parties. Set-off is sometimes viewed as a form of effecting payment *brevi manu*,⁴ which is important in analysing the pertinent question of whether and how set-off is being utilised as a means of debt recovery and the implications thereof.

This dissertation will illustrate that set-off remains a difficult topic of law and its application already during the Roman law era has contributed to this difficulty.⁵ The application of set-off from a South African perspective has to a large extent been influenced by the uncertainty that was brought about in the Roman law interpretation of set-off. However, the National Credit Act 34 of 2005 ("NCA") has established some certainty with regard to the application of set-off to debts created under credit agreements that fall within the ambit

¹ SM van Deventer *Set-off in South African Law: Challenges and Opportunities* (2016) LLM Thesis Stellenbosch University 1. In general, see also S van Deventer "The enforcement of credit agreements through set-off: evaluating the impact of the National Credit Act 34 of 2005" (2017) 138 *SALJ* 415-440.

² Van Deventer 1.

³ Van Deventer 1.

⁴ *Faatz v Estate Maiwald* 1933 SWA 73 87.

⁵ JH Loots & P Van Warmelo "Compensation" (1956) 19 *THRHR* 166; see also ch 2 (2.1 & 2.2.1–2.2.5).

of the NCA, but it has not amended the common law applicable to set-off in all instances.⁶

The advent of the NCA has brought the discussions regarding set-off back into the spotlight. The NCA attempts to regulate the consumer credit sector, which is why this dissertation focuses on the provisions of the NCA and the manner in which the operation of set-off has been affected by the provisions of the NCA and more particularly the interaction between the concepts of set-off and debt recovery within the prescripts of the NCA.⁷

The proposed amendment to section 124 of the NCA is discussed in conjunction with section 26 of the Constitution⁸ and rule 46 of the High Court Rules.⁹ This discussion serves to indicate the benefits of utilising set-off as a means of debt recovery in order to prevent the loss of an individual's primary residence.

1.2 Overview of chapters

In order for this dissertation to achieve the objective as stated under above, the dissertation will be structured as follows:

Chapter 2 will explore the historical developments of the principles of set-off, and will set out how these developments were interpreted and entrenched into South African law. Chapter 3 will explain the requirements to be met for set-off to be operational. The different approaches to set-off and the circumstances in which these approaches are relied upon by the party effecting the set-off will also be discussed along with the circumstances that preclude the operation of set-off. Chapter 4 will elaborate on how the NCA has influenced set-off, with a particular emphasis on sections 90, 124, 129, 130 and 133. Chapter 5 contains a brief discussion of set-off as applied in

⁶ See Ch 4 (4.4 & 4.5).

⁷ Especially ss 90, 124, 129, 130 and 131.

⁸ Constitution of the Republic of South Africa, 1996.

⁹ Uniform Rules of Court.

selected other jurisdictions, namely the United Kingdom, the European Union and New Zealand

Chapter 6 provides a suggestion for the amendment to section 124 of the NCA. It will be argued that the provisions of the NCA affecting the application of set-off must be brought in line with global technological developments in order for the aforesaid provisions to remain relevant and to adequately deal with set-off in the modern era.

CHAPTER 2:

THE DEVELOPMENT OF THE PRINCIPLES OF SET-OFF

2.1 Introduction

The principle of set-off is of Roman law origin and therefore the challenges in fully understanding how set-off operates have been attributed to the fact that Roman law failed to provide clarity on the topic.¹⁰ In order to understand the underlying challenges brought by the principles of set-off, one must therefore refer to the origins and development of set-off.¹¹

This chapter aims to provide an overview of set-off as applied in Roman law and Roman-Dutch law. Roman-Dutch law was eventually entrenched into the South African legal system. This chapter plays a critical role in explaining the challenges that have been carried from one legal system to the next and the many attempts made to clarify the operation of set-off.

According to Voet, *compensatio* or set-off came about as a result of the ancient custom of weighing up bronze. Where equal amounts of bronze were due on either side, then the claims by the parties against each other ceased to exist.¹²

2.2 *Compensatio* (“set-off”) from a Roman law perspective

2.2.1 Introduction

In Roman law, set-off operated during judicial proceedings. However, there was no rule making provision for the general application of set-off.¹³ The

¹⁰ Loots & Van Warmelo 166; Van Deventer 11.

¹¹ Loots & Van Warmelo 166.

¹² J Voet *Commentarius ad Pandectus* 16 2 1 tr P Gane *The Selective Voet being the Commentary on the Pandects by Johannes Voet and the Supplement to that Work by Johannes van der Linden* 3 (1956) 148. See further C Fountoulakis *Set-Off Defences in International Commercial Arbitration: A comparative Analysis* (2011) 12.

¹³ JAC Thomas *Textbook of Roman Law* (1976) 107.

Institutiones of Gaius¹⁴ identifies three scenarios wherein set-off could be applied, except where the parties reached an agreement pertaining to set-off, namely:

- *bonae fidei iudicia*; and
- *actiones stricti iuris*, which involved actions by bankers and actions by purchasers of insolvent estates.

2.2.2 *Bonae fidei iudicia*

This type of set-off required a presiding officer to establish how much was due to a plaintiff while taking good faith into account. Therefore, the presiding officer had a discretion to decide how much the defendant owed. The presiding officer could take into account and deduct the counterclaim from the plaintiff's claim even though he was not obliged to do so.¹⁵ It therefore seems relatively clear that set-off did not take place by operation of the law.¹⁶

If the presiding officer refused to take the counterclaim of the defendant into cognisance, the defendant would have the right to institute legal action against the plaintiff for its counterclaim.¹⁷ A further requirement for the presiding officer to take the counterclaim into account is that it must have resulted from the same transaction.¹⁸

2.2.3 *Actiones stricti iuris*

In this instance the presiding officer had no discretion to evaluate a set-off based on the criteria of good faith. In light thereof, the court could not consider

¹⁴ G IV 61–68 *tr E Poste Gaii Institutiones Iuris, Civilis Commentarii Quattuor* of Elements or Roman law Gaius 3 ed (1890) 445 – 447.

¹⁵ G IV 63; Fountoulakis *Set-Off Defences* 27.

¹⁶ Loots & Warmelo 1956 *THRHR* 167.

¹⁷ Loots & Warmelo 1956 *THRHR* 168 citing *Solazzi La Compensazione nel diritto romano* (1950) 22 sq.

¹⁸ Van Deventer 13.

the possibility of a set-off.¹⁹ *Compensatio* was only available on certain occasions, which were classified into two categories, namely the actions by the bankers and actions by purchasers of insolvent estates. Should the two situations not prevail, the court could only establish whether there was an agreement between the parties to reduce their claims or whether the *exceptio doli* was applicable.²⁰

(a) *Actiones* by bankers

The first instance where set-off was permitted under *stricti iuris* actions was for purposes of an action instituted by a banker. The relationship between the banker and its clients comprised of transactions either performed by the banker together with the client or on the client's behalf.

In this instance, the banker was only permitted to institute legal action against the client for the net balance of the client's account. This type of *compensatio* was implemented to prevent an unnecessary duplication of claims by the banker and the client.²¹ Furthermore, this type of *compensatio* only came into operation when the banker instituted action and not when the client brought a claim against the banker.²²

(b) *Actiones* by purchasers of insolvent estates

This type of *compensatio* operated in the circumstances of a buyer, also known as a *bonorum emptor*, who bought the estate of an insolvent.²³ At the time, if an individual was unable to fulfil his financial obligations, his assets

¹⁹ R Zimmerman *The law Obligations: Roman Foundations of the Civilian Tradition* (1990) 761.

²⁰ 762.

²¹ Loots & Van Warmelo 1956 *THRHR* 168–169.

²² Van Deventer 14.

²³ Loots & Warmelo 1956 *THRHR* 170.

were sold as a unit to a buyer. In return for the assets the buyer would commit to paying a dividend to creditors of the insolvent estate.²⁴

The assets sold to the buyer could include claims against the debtors of the insolvent estate.²⁵ The buyer was allowed to proceed with legal action against the debtors of the insolvent estate in order to recover amounts owed. In the instance where the debtor of the insolvent estate was also a creditor of the said estate, the buyer could only claim the balance of the claim.²⁶ In other words, the buyer's claim was reduced by the amount of the counterclaim of the debtor of the insolvent estate.²⁷

In this instance the court was only obliged to determine and balance the two claims. However, the court did not have any further discretion in making the decision. The presiding officer merely had to decrease the award by the amount of the debtor's counterclaim.²⁸

(c) Agreement between the parties and the *exceptio doli*

Under the *exceptio doli*, the parties were permitted to enter into an agreement to set off their claims against each other. In cases where the parties had not entered into such an agreement, they had to institute separate actions against each other.²⁹

The court had to establish whether the claim contained in the formula was due or not.³⁰ The defendant was allowed to object to the existence of the claim but could not revert with a counterclaim. The aforementioned rules were later done away with, which resulted in the defendant being able to plead a counterclaim. The counterclaim had to be due and of the same nature

²⁴ Van Deventer 15.

²⁵ 15.

²⁶ G IV 65.

²⁷ Loots & Warmelo 1956 *THRHR* 170–171.

²⁸ P Van Warmelo *An introduction to the Principles of Roman Civil Law* (1979) 240.

²⁹ Zimmerman *Obligations* 762.

³⁰ Van Deventer 17.

as the plaintiff's claim, and furthermore, the counterclaim had to be a liquidated amount.³¹

The *exceptio doli* came into operation in situations where the presiding officer was uncertain about the defendant's counterclaim.³² The *exceptio doli* presented the defendant with the right to plead a counterclaim in *stricti iuris* actions. Therefore, the defendant could still rely on a counterclaim that had not yet been liquidated.³³ This eliminated the requirement that the claim had to be of the same kind.

It seems clear that the Roman jurists did not develop a uniform approach to set-off.³⁴ In certain instances the debt had to be of the same kind whereas in other instances this was not required. In certain circumstances the obligations had to emanate from the same transaction and in others this was not a requirement.³⁵ Furthermore, in certain instances set-off took place by operation of the law, while in other situations a presiding officer had to exercise a discretion in this regard.³⁶

2.2.4 *Compensatio* as interpreted in post-classical Roman law

During the post-classical period, the move towards generalisation³⁷ commenced and the differentiation between the types of *compensatio* came to an end.³⁸ Therefore, Justinian made an attempt to create a rule in terms of which, set-off could take place by operation of the law in possible situations where the claim could be immediately assessed.³⁹

³¹ Fountoulakis *Set-off Defences* 28.

³² Zimmerman *Obligations* 762.

³³ Fountoulakis *Set-off Defences* 28.

³⁴ Zimmerman *Obligations* 765.

³⁵ Van Deventer 20.

³⁶ 21.

³⁷ Zimmerman *Obligations* 766

³⁸ Loots & Van Warmelo 1956 THRHR 173,176

³⁹ Van Deventer 20.

The procedure used in the *bona fidei* was extended to all actions, Van Deventer states that:

“the judge determined the amount to which the defendant was condemned, but in calculating the amount he had to take into account any liquid counterclaims and set-off no longer depended on his discretion. Only the balance was regarded as the amount of the debt. Importantly, it was no longer required that the actions arose from the same cause, although the performances owed had to be of the same nature”.⁴⁰

Justinian’s decrees that set-off takes place by operation of the law is not clear, and a number of interpretations of the decrees exist.⁴¹ On the one hand, the ordinary meaning of the decrees regarding *compensatio*, is that it takes place automatically, without any action by neither of the parties nor the judge.⁴² On the other hand, there is an interpretation that compensation did not take place by operation of the law, this interpretation is premised upon the fact that Justinian in his Codex stated that set-off can be pleaded.⁴³

Subsequent to uncertainty created by Justinian and in reaction to the fragmented approach in Roman law, the Glossators of the time attempted to establish the basis upon which set-off could operate. However, the Glossators themselves were divided into two schools of thought.⁴⁴

The one group of Glossators was of the view that *compensatio* takes place automatically⁴⁵ and the court had to deduct a liquidated counterclaim even in situations where the defendant did not plead set-off as a defence. The other group of Glossators also accepted that set-off operated automatically, but they were of the view that it was a requirement that it had to be presented in court in order for the presiding officer to take it into consideration.⁴⁶

⁴⁰ 21.

⁴¹ 21.

⁴² 21.

⁴³ 22.

⁴⁴ Zimmerman *Obligations* 767.

⁴⁵ Loots & Warmelo 1956 *THRHR* 178-179.

⁴⁶ Van Deventer 23.

2.2.5 The Roman-Dutch law approach and the views of the German Pandectists

The two divergent approaches pertaining to the operation of set-off found expression in Roman-Dutch law.⁴⁷ The majority of the Roman-Dutch writers were of the view that set-off takes place by operation of law, while accepting that the defendant must raise *compensatio* as defence for the court to take cognisance of it.⁴⁸ While other writers held a contrasting view, namely that a declaration by one of the parties was required for set-off to operate. Such a declaration operated retrospectively and therefore the debts cancelled each other from the moment they were in mutual existence.

Both approaches required the intervention of a judge for set-off to operate, however set-off did not depend on the judge's discretion. Furthermore, it was not permissible for the declaration to be made out of court.⁴⁹

The German Pandectists also entered the debate, it has been suggested that the German Pandectists emphasised the importance of the declaration required for set-off to operate⁵⁰. Under the Pandectists, the required declaration moved from being merely declaratory, to being imperative, therefore to realise set-off, declaration had to have taken place. Van Deventer⁵¹ states that Pichonnaz is of the view that the development of the idea that declaration had a retrospective effective is due to the importance placed on declaration, however, he further states that it is not clear why the effect of declaration should be retrospective.

2.2.6 Conclusion

From the above discussion it is evident that attempts to unify the approach to set-off led to a further fragmentation of the approach to set-off. Therefore, the next chapter will explore the requirements to be met for set-off to apply

⁴⁷ BvD van Niekerk "Some Thoughts on the Problem of Set-off" (1968) 85 SALJ 36.

⁴⁸ Van Deventer 24.

⁴⁹ 26.

⁵⁰ 26.

⁵¹ 29.

and the different approaches to set-off from a South African law point of view.

CHAPTER 3:

THE REQUIREMENTS AND APPROACHES TO SET-OFF

3.1 Introduction

Chapter 2 briefly discussed the historical origin of the debates surrounding set-off and especially pointed to the various interpretations pertaining to the operation of set-off. This chapter will explain the requirements to be met for set-off to be operational in modern South African law. The different approaches to set-off and the circumstances in which these approaches are relied on by the party enforcing the set-off will be considered along with the circumstances that preclude the operation of set-off.

The automatic (by operation of law) approach has been criticised for limiting the autonomy of the contracting parties on the one hand, but on the other hand the retrospective approach has been criticised for leading to practical difficulties.⁵²

3.2 Operation of set-off in South Africa

The uncertainties regarding the operation of set-off in South African law stems from Roman-Dutch law. South African law has failed to settle on one approach to set-off, as a result thereof, is said that set-off either operates by *ipso iure*, however, it must still be pleaded and proven or alternatively, set-off requires a declaration to operate, if that is the case then set-off applies retrospectively.⁵³

The courts have entered the debate of whether set-off operates *ipso iure* or retrospectively. It has been stated that many cases seem to support the

⁵² Van Deventer 73.

⁵³ Van Deventer 45.

view that set-off must be invoked and once invoked it applies retrospectively.⁵⁴ In the case of *Schierhout v Union Government*⁵⁵ held that;

"The doctrine of set-off with us is not derived from statute and regulated by rule of court, as in England. It is a recognised principle of our 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 *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 *compensatio* 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."

In *Mahomed v Nagdee*⁵⁶ the Appellate Division confirmed that it accepts the view expressed in the above case.

Furthermore, South African law accepts the view that it is not only the effect of Set-off that operates retrospectively at the moment set-off first became possible, but the declaration is also regarded as having been made retrospectively. The defendant may rely on set-off if it was possible sometime in the past, even though set-off is no longer possible at the time the declaration is made due to any one of the requirements no longer being satisfied.⁵⁷

⁵⁴ GB Bradfield Christie's *The Law of Contract in South Africa* 7ed (2016) 553.

⁵⁵ 1926 AD 286.

⁵⁶ 1952 1 SA 410 (A) 416H.

⁵⁷ Van Deventer 47.

3.3 The requirements for set-off

It is accepted in South African law that set-off applies by operation of law provided that the following requirements are satisfied:

1. The obligations must be mutual – both parties must be indebted to each other in the same capacity;⁵⁸
2. the debts must be of the same kind;⁵⁹
3. the debts must be due and enforceable; and
4. both debts must be liquidated.

The requirement that the debts must exist between the same parties and in the same capacities, means for example that an amount owed by a legal person (like a company) cannot be set off against an amount owed to a shareholder of the company. However, since a sole proprietorship is not a separate legal entity, amounts owed by the sole proprietor in his or her personal capacity can indeed be set-off against the credit balance in an account held in the name of the sole proprietorship.⁶⁰

The fact that the debt must be of the same kind confirms that where a customer deposits valuables or documents with the bank for safekeeping, the bank's obligations to deliver such valuables or documents to the customer may not be set-off against a money debt that the customer owes to the bank as a result of a loan or an overdrawn overdraft facility.⁶¹

The requirement that both debts must be due and enforceable contemplates that by relying on set-off the debtor fully settles his debt or merely reduces his debt and in the same breath compels the creditor to discharge or reduce his debt. It therefore creates a manner of enforcement of the debtor's claim.⁶²

⁵⁸ J Pretorius "Combining bank accounts" (2008) 16 (2) *Juta's Business Law* 53; C Smith "Some thoughts on the law of set-off and the banker" (1980) *Modern Business Law* 28.

⁵⁹ Cf Smith (1980) 29.

⁶⁰ R Sharrock (ed) *The Law of Banking and Payment in South Africa* (2017) 153.

⁶¹ 154.

⁶² Van Deventer 38.

Also, it is evident that set-off cannot apply if the debt is not due and enforceable. Where a suspensive clause or time clause is applicable, the debt cannot be set-off unless the party in whose favour the clause operates waives the benefit.⁶³ Furthermore, if the debt has prescribed, set-off cannot apply.

Finally, the debt must be liquidated. In other words, the debt must be capable of easy and speedy proof. Examples of this category include bank charges and debts arising from an overdraft facility.⁶⁴ In addition, for set-off to apply, its operation must not have been contractually excluded.⁶⁵

The application of the above requirements depends on the type of approach followed in respect of set-off.⁶⁶ How the requirements for set-off and the operation of set-off connect, assists in understanding the different approaches to set-off.

3.4 The five models pertaining to set-off

According to Zimmerman,⁶⁷ the approaches to set-off are encapsulated in five models.

The first model is reflected in the view that set-off leads to an automatic discharge of debts once the debts mutually exist, and therefore no action or declaration is required by either party in order for set-off to come into operation. This also has the effect that interest will stop running and all sureties and securities will be released.⁶⁸ This view emphasises the notion that set-off is a convenient manner to avoid a duplication of performance and

⁶³ 38.

⁶⁴ Smith (1980) 29; SWJ van der Merwe et al *Contract: General Principles* 4 ed (2012) 42; RH Christie & GB Bradfield *Christie's The law of Contract in South Africa* 6 ed (2011) 495-496.

⁶⁵ DJ Joubert *General principles of the law of contract* (1978) 292.

⁶⁶ Van Deventer 40.

⁶⁷ R Zimmerman *Comparative Foundations of the European Law of Set-off and Prescription* (2002) 32 – 34.

⁶⁸ Van Deventer 42.

ensures a speedy settlement of debts. This view therefore promotes the payment function of set-off.

The second model finds expression in the view that set-off comes into being by operation of the law (*ipso iure*) but subject to it being pleaded in court. The pleading of set-off must be to inform the court that set-off has already occurred. Hence, operation of set-off is just suspended until it is pleaded.

The third model is that set-off must be pleaded in court and only comes into effect once a judgment has been granted confirming that set-off has occurred. In light thereof, set-off does not operate automatically in terms of this model. Yet, once it is confirmed in a judgment, it applies retrospectively.

The fourth model requires that in order for set-off to operate, a declaration by any one of the parties is required. It is important to note that all the requirements for set-off must be met before one can rely on set-off under this model. Therefore, if any one of the requirements for set-off no longer exists at the time when the declaration is made, set-off cannot be relied on.

The fifth model provides that set-off has no effect until a unilateral declaration is made by one of the parties.⁶⁹ However, in this instance, once a declaration is made, interest will stop running, the debts are settled in full, and any sureties or other securities are released.

3.5 Set-off and the bank customer relationship in South Africa

Banking law is not an autonomous branch of the law, but a modern development which relies on the principles developed by the general law of obligations. The bank customer relationship must be explained in accordance with these principles. This relationship is based on contract a debtor and creditor relationship, in terms of which the bank becomes the owner of the

⁶⁹ Zimmermann *European Law of Set-off* 41.

moneys deposited⁷⁰ on the customer's current account, but the bank is obliged pay cheques drawn on it by the customer.

Set-off is common in the South African banking sector and is an important aspect of the bank-customer relationship. Therefore, set-off as applied by the banks between the customer's different bank accounts will be discussed.

In situations where a customer of a bank has two separate current accounts with the same bank, one with a positive balance and the other with a negative balance, the debts that the bank and the customer owe to each other may be reduced or settled by applying set-off. In such circumstances, set-off will apply by operation of law provided that the requirements referred to above are met.⁷¹

In terms of the Code of Banking Practice, banks have undertaken to inform customers promptly after effecting a set-off between accounts held by the bank. However, the requirements of set-off as discussed under paragraph 3.3 above must be met before set-off can be effected between two bank accounts which are not both current accounts.⁷²

In the case of *Ball v Keefer*⁷³ the court confirmed the importance of the application of set-off. In this instance the plaintiff proceeded in terms of a provisional sentence premised upon a promissory note that was endorsed by its customer. However, at the time, the customer had sufficient funds in his account to meet his liabilities on the promissory note. The court confirmed that in this instance set-off should have been applied and that the customer's account should have been debited with the amount that was due.

It is further important to note that set-off will not operate where the bank and the customer have expressly or tacitly agreed that the bank accounts are to be maintained separately or that money deposited into one of the accounts

⁷⁰ Standard Bank of South Africa v Echo Petroleum CC 2012 (5)SA 283 (SCA).

⁷¹ Sharrock 153.

⁷² Smith (1980) 27.

⁷³ (1883) 2 HGC 27.

is to be utilised for a specific purpose only.⁷⁴ However, set-off can still apply in circumstances where the customer had a right to dispose of the money lying in credit on his or her account. It is also accepted that set-off will not apply if it is excluded by statute.

The issue of set-off can also be looked at in relation to the law of insolvency. In terms of section 46 of the Insolvency Act 24 of 1936, if a set-off has taken place between the bank and its customer, and thereafter the estate of the account holder is sequestrated within a period of six months of the set-off, then the trustee of the insolvent estate may either

- abide by the set-off; or
- if the set-off was not in the ordinary course of business, the trustee may, with the approval of the Master, disregard the set-off and call upon the person concerned to pay to the estate the debt which he would owe had set-off not been applied.

If the second option is chosen, the person concerned will have a concurrent claim against the estate.⁷⁵ In the case of *Al-Kharafi & Sons v Pema and Others NNO*⁷⁶ the court looked at section 46 of the Insolvency Act and found that, as far as set-off is concerned, the question is whether set-off was brought about or accomplished in the ordinary course of business. In other words, would businessmen regard the transaction, with all its particular facets, as usual or anomalous.⁷⁷ In instances where the debtor is aware that the creditor will be prejudiced by the set-off, it will not be regarded as being in the ordinary course of business. In fact, it is considered to be a fraudulent disposition.

Bertelsmann and others are of the view that “a reduction by a bank of the amount of a customer’s overdraft by appropriating deposits made” would

⁷⁴ *Joint Stock Co Varvarinskoye v ABSA Bank* 2008 (4) SA 287 (SCA).

⁷⁵ Sharrock 156.

⁷⁶ 2010 (2) SA 360 (W).

⁷⁷ 2010 (2) SA 360 (W).

qualify as being in the ordinary course of business unless such deposits were only one incident in a transaction of an ordinary kind.⁷⁸

3.6 Conclusion

The challenges surrounding set-off in the South African context are created by the approaches followed in applying set-off. Van Deventer correctly points out that the approach to set-off that is utilised should be applied as consistently as possible with the theoretical principles underlying it.⁷⁹ Currently the approaches followed in South Africa fall short of this requirement. In light of the above, it is submitted that it is time to move away from the fragmented approach to set-off to a more uniform approach, since legal certainty and commercial transactions require it. The next chapter will specifically focus on how the NCA impacts on the principles of set-off as a debt collection mechanism.

⁷⁸ E Bertelsmann *et al Mars The Law of Insolvency in South Africa* 9 ed (2008) 266.

⁷⁹ Van Deventer 84.

CHAPTER 4:

THE NATIONAL CREDIT ACT AND ITS EFFECT ON SET-OFF

4.1 Introduction

The previous chapters have provided an analysis of the development of set-off and the manner in which such developments have become entrenched into South African law. The discussion to ensue in this chapter should be considered on the backdrop of the analysis of how South African banks apply set-off in situations where a customer has two separate accounts, in the event where the one account has a credit balance and the other a debit balance.

It has been discussed that set-off operates automatically under the common law when the requirements for set-off are satisfied. Conversely, sections 90 and 124 of the NCA ostensibly create a process that is not automatic but rather one that is onerous on credit providers.

Whether set-off is regulated only by the common law or also by the NCA, is uncertain and therefore remains a point of contention. The National Credit Regulator has applied to the High Court for declaratory order regarding the effect that section 124 of the NCA has on the common law pertaining to set-off. In essence, the National Credit Regulator seeks an order from the High Court confirming that the common law relating to set-off has been revised by section 124 of the NCA. In light of this question, this chapter will investigate the impact of the NCA on set-off.

4.2 Sections 90 and 124 of the NCA

As stated in chapter 1 above, set-off is a manner in which obligations are terminated without the exchange of performance. Section 90(n) of the NCA

seems to prohibit the operation of set-off in the absence of compliance with section 124 of the NCA.

Section 124 provides that a credit agreement containing a clause authorising the operation of set-off, the credit provider must get the customer's authorisation confirming the following points:

- (i) the account from which the funds can be withdrawn;
- (ii) the debt to be paid;
- (iii) the amount to be transferred; and
- (iv) the date of the transfer.

In addition to the above, the credit provider must also notify the customer of the credit provider's intention to institute set-off together with details of the transaction prior to transferring the funds from the account in terms of the authorisation.

In order to understand whether section 90(2)(n) and section 124 have a blanket effect on the bank's common law right to set-off, the application of the NCA as a whole must be established because, to the degree that these sections have indeed changed the common law, this will only apply to debts created by credit agreements to which the Act applies. The NCA applies to credit agreements as defined in the NCA. The credit agreements can be classified into four categories, namely credit facilities, credit transactions, credit guarantee and credit agreements comprising of a combination of the three types.

Although an agreement falls within the definition of a credit agreement, it does not mean that the NCA will be applicable to the agreement automatically. Furthermore, there are instances where the NCA will have limited application,

for example in the case of incidental credit agreements or where the consumer is a juristic person.⁸⁰

The NCA applies to all credit agreements where the parties act at arm's length and where the agreements are concluded within or have an effect within South Africa, subject to certain exceptions. Section 4(2)(b) provides that the following parties cannot be seen to be dealing at arm's length:

- (a) a shareholder loan or other credit agreement between a juristic person, as a consumer and a person who has a controlling interest in that juristic person, as the credit provider;
- (b) a loan to a shareholder or other credit agreement between a juristic person, as the credit provider, and a person who has a controlling interest in that juristic person, as the consumer;
- (c) a credit agreement between the natural persons who are in a familial relationship and –
 - i. are co-dependant on each other; or
 - ii. one is dependent upon the other; and
- (d) any other arrangement –
 - i. in which each party is not independent of the other and consequently does not necessarily attempt to obtain the utmost possible advantage out of the transaction; or
 - ii. that is of a type that has been held in law to be between parties who are dealing at arm's length.

It is important to note that there are circumstances where the NCA does not apply at all. For example, the NCA will not apply to the credit agreement where:⁸¹

- (a) the consumer of credit (borrower) is the state or an organ of state;

⁸⁰ Kelly Louw (2012) 28.

⁸¹ Kelly-Louw (2012) 32.

- (b) the credit provider is the South African Reserve Bank;
- (c) the credit provider is located outside South Africa and his or her exemption from the Act is approved by the responsible Minister on application by the consumer in the prescribed manner and form;
- (d) the consumer of credit is a juristic person, as defined in Section 1 of the Act, whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7(1);
- (e) it constitutes a large credit agreement in terms of which the consumer is a juristic person, as defined Section 1 of the Act whose asset value or annual turnover is, at the time the agreement is made, below the threshold value determined by the Minister in terms of Section 7(1).

The NCA further excludes certain agreements, regardless of their form, from the ambit of the NCA. It provides that the following are not credit agreements:⁸²

- (a) an insurance policy or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance;
- (b) a lease of immovable property, for example a lease of a house or flat; and
- (c) a transaction between a Stokvel and one of its members in accordance with the rules of that Stokvel.

Section 8(3) further identifies two instances where the transaction is not considered a credit agreement and therefore falls outside the ambit of the NCA. This includes the situation where a person sells any goods or services and accepts, as full and payment for the goods or services:

⁸² S 8(2).

- (a) a cheque or similar instrument upon which payment is subsequently refused for any reason; or
- (b) a charge by or on behalf of the buyer against a credit facility in terms of which a third person is the credit provider, and that credit provider subsequently refuses that charge for any reason.

4.3 The objectives and interpretation of the NCA

Before engaging in the discussion surrounding the impact of sections 90 and 124 of the NCA, it is important to consider the objectives and interpretation of the NCA.

The growth of the micro-lending industry led to the extension of credit to consumers in the low-income group, most of whom did not have access to the formal banking sector. The micro-lending industry was characterised by unscrupulous lending and unfair debt collection practices, which were exacerbated by high interest rates. This led to increased indebtedness, as the customers were not adequately protected by the legislative framework that was in place at the time.⁸³

In response, the NCA repealed the Usury Act⁸⁴ and the Credit Agreements Act,⁸⁵ which were the backbone of the previous consumer-credit legislative framework. Kelly-Louw⁸⁶ observes that the NCA represents a major departure from the previous consumer credit legislative framework, as the scope and application of the NCA is much broader. The above view has also found expression in the case of *Nedbank Ltd and Others v National Credit Regulator and Another*,⁸⁷ where Malan JA commented that the NCA is not a mere amendment of the previous consumer-credit legislation.

⁸³ M Kelly-Louw *Consumer Credit Regulation in South Africa* (2012) 3.

⁸⁴ Act 73 of 1968.

⁸⁵ Act 75 of 1980.

⁸⁶ M Kelly-Louw "Consumer Credit" in *LAWSA vol 5(1) 2 ed (replacement volume)* (2010) (eds WA Joubert & JA Faris) para 1.

⁸⁷ 2011 (3) SA 581 (SCA) para 1.

The NCA aims to regulate the relationship between credit providers and credit consumers. It provides protection to consumers by stipulating formalities for credit agreements and prohibiting certain contractual terms. The Act further sets the consequences of the contractual relationship between credit providers and the consumers.⁸⁸

The NCA aims to curb challenges that exist in the consumer-credit market such as:⁸⁹

- The failure to make proper disclosure to assist the consumer to make informed decisions when obtaining credit or buying financial products;
- reckless lending by credit providers;
- high interest rates;
- consumer over-indebtedness; and
- inaccessibility of the credit market.

In order to attend to the above challenges, the NCA established the National Credit Regulator and the National Consumer Tribunal. The purposes of the NCA are set-out in section 3 of the Act as well as in its preamble. The NCA purports to create a unified system of consumer credit legislation and for the National Credit Regulator to administer the consumer credit market.

The NCA further aims to promote and advance the social and economic welfare of South Africans and to promote a fair, transparent, competitive, efficient, sustainable, responsible and accessible credit market especially for those who did not have access to the credit market in the past. The NCA aims to prohibit unfair credit extension and unfair marketing practices and strives to improve the standards of consumer credit information while encouraging

⁸⁸ Kelly-Louw (2012) 5.

⁸⁹ Kelly-Louw (2012) 14.

responsible borrowing and avoiding over-indebtedness and reckless borrowing.⁹⁰

The Act seeks to attain the socio-economic purposes and ensure consumer protection by:⁹¹

- “(a) promoting the development of a credit market that is accessible to everyone, particularly to those who have historically been unable to access credit under sustainable market conditions;
- (b) ensuring consistent treatment of different credit providers and different credit products;
- (c) promoting responsibility in the credit market by –
 - (i) encouraging responsible borrowing fulfilment of financial obligations by consumers and avoidance of over-indebtedness; and
 - (ii) discourage reckless credit granting by credit providers, and contractual default by consumers;
- (d) promoting equity in the credit market by balancing the different rights and responsibilities of consumers and credit providers;
- (e) addressing and correcting imbalances in negotiating power between consumers and credit providers by –
 - (i) providing consumers with education about consumer credit rights and credit;
 - (ii) providing consumers with adequate disclosure of standardised information so that they can make informed credit choices;
 - (iii) providing consumers with protection from deception, and from unfair or fraudulent behaviour by credit providers and credit bureaux;
- (f) improving consumer credit information and reporting, and regulating credit bureaux better;
- (g) dealing with and preventing over-indebtedness of consumers, and providing mechanism, for resolving over-indebtedness based on the principle of satisfaction by the consumer of all his or her responsible financial obligations;
- (h) providing for a consistent and accessible system of consensual resolution of disputes that arise from credit agreements; and
- (i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, that places greater importance on the

⁹⁰ Kelly Louw (2012) 21.

⁹¹ S 3 of the NCA. See also *Malachi v Cape Dance Academy Int (Pty) Ltd* [2010] 3 All SA 86 (WCC) para 4.

eventual satisfaction of all responsible consumer obligations incurred under credit agreements.”⁹²

Although the NCA aims to protect the consumers of credit, this is not the NCA’s only purpose. In the case of *Standard Bank SA Ltd v Hales and Another*⁹³ Goven J emphasised that:

“Since section 3 lists a number of purposes, it cannot be said that the protection of consumers is the sole purpose. Neither can it be said that this is the chief purpose. No prioritisation is provided. A number of the listed means by which the purposes are to be achieved include the protection of the consumers but not all do so. Others include a balancing of rights and responsibilities of consumers and credit providers as well as enforcement of debt. Whilst consumer protection is a clear object, it is one factor, albeit a very important one, in the purposes of the Act.”

Furthermore, in *FirstRand Bank Ltd t/a First National Bank v Seyffret and Another and Three Similar Cases*⁹⁴ the court confirmed that:

“It is clear from reading section 3 of the NCA, which sets out the purposes of the Act, that it pursues varied objectives which must be held in balance. Certainly, the NCA is designed to protect consumers, but it must not intend to make of South Africa a “debtor’s paradise”. Indeed a “debtor’s paradise” will not last for long. Very soon, credit would not be available to ordinary people. Sight must not be lost of the fact that among the purposes of the Act is the development of a credit market that is accessible to all South Africans.”

Guidance regarding the interpretation of the NCA is contained in section 2(1) of the Act. The subsection provides that the NCA must be interpreted in a manner that gives effect to the purposes of the NCA. To this end the courts have indeed taken into consideration the purposes of the NCA. This is evident in a case like *Collette v FirstRand Bank Ltd*,⁹⁵ where the court was of the view that when a court interprets the provisions of the NCA, it must balance the rights and obligations of the consumer and the credit provider, and that such

⁹² S 3 of the NCA.

⁹³ 2009 (3) SA 315 (D) para 13.

⁹⁴ 2010 (6) SA 429 (GSJ) para 10.

⁹⁵ 2011 (4) SA 508 (SCA) para 10.

a balance will result in an interpretation of the NCA that not only favours the consumer.⁹⁶

4.4 Criticism of set-off under the NCA

In light of the above it is evident that the NCA is not applicable to all transactions and credit agreements, and therefore sections 90(2)(n) and 124 of the NCA will also not apply to all aspects involving the bank-customer relationship. There currently exists a debate surrounding the effect of sections 90(2)(n) and 124 of the NCA on the common law of set-off. In fact, there are opinions to the effect that the NCA does not prevent credit providers from applying set-off in terms of the NCA.⁹⁷

Therefore, in situations where a credit agreement is involved, in deciding whether or not to apply set-off in accordance with the NCA or the common law, it must first be established if the NCA is applicable to the credit agreement in question. In the event where the NCA is not applicable, the set-off must be applied in accordance with the common law while taking into account the following principles laid down by the Code of Banking Practice:⁹⁸

“When you open an account, we will provide you with information that will include clear and prominent notice of any rights of set-off that we may claim over credit and debit balances in your different accounts.

When you obtain credit from us, we may require your consent to set-off any outstanding amounts against funds available in other accounts you hold with us. Any such arrangement will be conducted in terms of the requirements of the NCA, if the credit agreement is subject to the NCA.

We will inform you promptly after we have effected set-off in respect of any of your accounts. You will receive timely statements (if statements are generally produced on the relevant account), which will reflect the set-off position.

⁹⁶ See also *FirstRand Bank Ltd v Mwelase* 2011 (1) SA 470 (KZN) paras 20-21; Kelly-Louw (2012) 23.

⁹⁷ Van Deventer 117.

⁹⁸ The Banking Association of South Africa “Code of Banking Practice”(01-12-2012) The Banking Association of South Africa <http://www.banking.org.za/docs/default-source/default-document-library/code-of-banking-practice-2012.pdf?sfvsn=11> (accessed 31-03-2017).

Prior to setting off your debit balances, we may elect to place any of your funds on hold pending a discussion with you on any amount owed to us.”

There is a pending dispute before the High Court involving the National Credit Regulator (“NCR”) and Standard Bank. In this instance the National Credit Regulator is seeking an order preventing the banks from unilaterally appropriating money from a customer’s account to settle a debt due under another account also held by the same customer. Although the application is against Standard Bank, the NCR is willing to accept complaints from consumers pertaining to other banks as well. In essence, the NCR is trying to obtain clarity regarding the effect of section 124 on the common law right to set-off.⁹⁹ Once the above dispute has been resolved we will hopefully have clarity regarding whether or not section 124 of the NCA supersedes the bank’s common law right to set-off. In the absence of a court decision, the question shall remain.

The failure of the NCA to adequately deal with set-off is evidenced by the dispute between the NCR and Standard Bank as referred to above. The main criticism against set-off as governed by the NCA is premised on the fact that the NCA will have a direct effect on a customer’s property being sold in execution as prescribed in the recently amended Rule 46 and Rule 46A of the High Court Rules, while a customer has a positive balance in another account and the customer is not in a position to furnish the required authorisation required in terms of section 124 of the NCA.

The process in terms of Rule 46 can be avoided by amending section 124 to make provision for a credit provider to be enable a credit provider to apply set-off without the required authorisation if the account in arrears is secured by a mortgage bond which is registered over the customer’s primary

⁹⁹ “Regulator takes Standard Bank to Court to Stop practice of set-off” “ (18-01-2017) <http://www.acts.co.za/news/blog/2017/01/regulator-takes-standard-bank-to-court-to-stop-practice-of-setoff> (accessed 31-03-2017).

residence, this proposed amendment is in line with the objectives of the NCA as discussed in paragraph 4.3 above.

The unnecessary execution against an immovable property which serves as an individual's primary residence is a practice that is frowned upon. The recent amendments to Rule 46 and especially the introduction of Rule 46A were effected to prevent credit providers from executing against a customer's primary residence by requiring the court to consider whether the judgement debt can be satisfied without the execution against the judgment debtor's primary residence.¹⁰⁰ The court is further required to consider all factors in deciding that the execution against immovable property is warranted.¹⁰¹ Therefore, it is my submission that section 124 of the NCA in its current form is contrary to the ideals that Rule 46A aim to achieve.

4.5 Debt enforcement in terms of the NCA

4.5.1 Introduction

In accordance with the objectives of the NCA, the usual debt recovery procedures had to change in order to align the procedure with these objectives. The NCA introduced new procedures to be followed during the debt collection procedures. The procedures are contained in Part C of Chapter 6 of the Act. The provisions also stipulate the manner in which a credit provider must conduct itself prior to the institution of legal action against the defaulting consumer.

Kelly-Louw¹⁰² states that the NCA limits a credit provider's right to enforce the credit agreement, if it falls within the ambit of the NCA, in circumstances where the customer defaults under the credit agreement or in instances

¹⁰⁰ Rule 46A(2)(a)(ii).

¹⁰¹ Rule 46A(2)(b).

¹⁰² Kelly-Louw (2012) 407.

where the credit provider wishes to terminate the credit agreement and calls for the repossession of goods or claim specific performance.

The discussion that follows from this section is to enable one to compare the provisions of sections 90(2)(n), 124, 129 and 130. In essence, this comparison aims to establish if set-off can potentially be viewed as a manner in which the banks enforce a debt.

4.5.2 Section 129(1)(a) – pre-enforcement procedures

Once a consumer is in default under the credit agreement that falls within the ambit of the NCA, section 129 of the NCA comes into play. Section 129(1)(a) of the NCA makes it a requirement for the credit provider to draw the default to the consumer's notice. The notice must be in writing and should inform the consumer to consider referring the credit agreement to a debt counsellor, dispute resolution agent, consumer court or an ombud with jurisdiction with the intention that parties will resolve any dispute under the agreement or develop and agree on a plan to ensure that the payments due under the agreement are brought up to date.

Section 129(1)(a) read with section 130(3)(a) and (b) makes it clear that the notice referred to above must be sent before the institution of legal proceedings.¹⁰³ The credit provider must send section 129(1)(a) notices even in the case where the credit provider wants to terminate a credit agreement that is governed by the National Credit Act when the said credit agreement is in default.¹⁰⁴

It is however important to note that the credit provider's failure to send a section 129(1)(a) notice does not invalidate a summons that is already issued. In this instance the court has a discretion in terms of section 130(4)(b) to adjourn the matter *sine die* and make an order setting out the steps to be

¹⁰³ JM Otto & R-L Otto *The National Credit Act Explained* 4 ed (2016) at 117; JW Scholtz et al (eds) *Guide to the National Credit Act* (Service Issue 9, Jun 2017) para 12.4.2.

¹⁰⁴ Otto and Otto (2016) 118-119.

followed by the credit provider before the matter may be re-enrolled and heard by the court.¹⁰⁵

The section 129(1)(a) notice must provide the consumer with information that the consumer can utilise to make an informed decision when exercising the rights stipulated in section 129(1)(a) of the NCA. In the case of *BMW Financial Services (South Africa) (Pty) Ltd v Dr MB Mulaudzi Inc*¹⁰⁶ the court confirmed that the section 129(1)(a) notice must be in understandable language and not a mere word-for-word reproduction of section 129(1)(a). In the case of *African Bank Ltd v Myambo NO and Others*¹⁰⁷ the court agreed with the view expressed in the case of *BMW Financial Services (South Africa) (Pty) Ltd*, but the court went further and stated that the section 129(1)(a) notice must communicate the default to the consumer and present the consumer with the proposals aimed at assisting the consumer to bring the payments up to date.

In contrast to the above, the court in the case of *Standard Bank of South Africa Ltd v Maharaj t/a Sanrow Transport*¹⁰⁸ was of the opinion that the credit provider must not be burdened with any onerous tasks other than those created by the NCA and that the provisions of section 129(1)(a) do not impose the burdensome requirements stipulated in the cases of *BMW Financial Services v Mulaudzi* and *African Bank Ltd v Myambo*.¹⁰⁹

The manner of delivery of the section 129(1)(a) notice is also prescribed by the NCA. Section 65(1) provides that every document that is required to be delivered to a consumer in terms of the NCA must be delivered in the manner that is prescribed in the NCA, if any. If no method of delivery is prescribed in

¹⁰⁵ *Greve and Others v Bergkriek Properties CC* (unreported case noA3063/2010, 16 September 2011 GSJ).

¹⁰⁶ 2009 (3) SA 348 (B).

¹⁰⁷ 2010 (6) SA 298 (GNP).

¹⁰⁸ 2010 (5) SA 518 (KZP).

¹⁰⁹ See M Kelly-Louw "The default notice as required by the National Credit Act 34 of 2005" (2010) 22 *SA Merc LJ* 568-594 573, 591.

the NCA, section 65(2) provides that the person required to deliver that document must:

- “(a) make the document available to the consumer through one or more of the following mechanisms –
 - (i) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer’s expense, or by ordinary mail;
 - (ii) by fax;
 - (iii) by e-mail;
 - (iv) by printable web-page
- (b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a).”

The word “delivery” is defined in Regulation 1 as “unless otherwise provided for in the NCA [or its regulations], means sending a document by hand, by fax, by email, or registered mail to an address chosen in the agreement by the proposed recipient, if no such address is available, the recipient’s registered address”.

Furthermore section 168 provides that:

“Unless otherwise provided in this Act, a notice, order or other document that, in terms of this Act, must be served on a person will have been properly served when it has been either –

- (a) delivered to that person; or
- (b) sent by registered mail to that person’s last known address

In light of the above it is evident that the NCA, not only prescribes the content of the section 129(1)(a) notice, but goes further to give guidance regarding the manner in which the notice ought to be delivered.”

There used to be a debate regarding whether the notice had to come to the actual attention of consumer or whether it was sufficient for the creditor provider to send it.¹¹⁰ The Constitutional Court eventually settled the above

¹¹⁰ Case law on this issue includes *FirstRand Bank Limited v Ngcobo and Another* (unreported case no 2466/2009, 11 September 2009 (GNP); *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D); *FirstRand Bank Ltd v Dhlamini* 2010 (4) SA 531 (GNP), but there were many other judgments. For academic discussions, see e.g. JM Otto “Kennisgewing kragtens National Credit Act: moet die verbruiker dit ontvang? *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D)” (2010) 73 *THRHR* 136-144 139- 140, 144; JM Otto “Notices in terms of the

debate in the case of *Sebola v Standard Bank of South Africa Ltd*.¹¹¹ The majority judgment held that the notice requirement stipulated in section 129 cannot be understood in isolation from section 130. Section 129 places a focus on the prospect that the consumer ought to be furnished with the notice, and that the information that must be included in the notice is stipulated in section 130. In deciding on the meaning of delivery, the court analysed sections 65, 96 and 168 of the NCA.¹¹² The court therefore held that the despatch of the section 129(1)(a) must at the very least be done by means of registered mail. The credit provider must provide proof that the notice was delivered to the correct post office, and therefore the credit provider must obtain a “track and trace” from the website of the South African Post Office.¹¹³ The aforesaid judgment subsequently found expression in the inclusion, by the National Credit Amendment Act 19 of 2014, of new subsections 129(5) and (7) in the NCA.¹¹⁴

4.5.3 Sections 90(2)(n) and 124 – pre-enforcement of set-off

As mentioned in 4.6.1 above, the aim of this part of the dissertation is to compare the provisions of section 90(2)(n), 124, 129 and 130 in order to establish whether set-off can be viewed as a manner in which the banks enforce a debt.

Once a consumer is in default under a credit agreement that falls within the ambit of the NCA, section 129 of the NCA comes into play. The pre-enforcement processes stipulated in section 129(1)(a) have been discussed

National Credit Act: wholesale national confusion. *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors; Munien v BMW Financial Services; Starita v Absa Bank Ltd; FirstRand Bank Ltd v Dhlamini* (2010) 22 SA Merc LJ 595-607 603; A Boraine & S Renke “Some practical and comparative aspects of cancellation of instalment agreements in terms of the National Credit Act 34 of 2005 (Part 2)” (2008) 41 *De Jure* 1-15 2.

¹¹¹ 2012 (5) SA 142 (CC).

¹¹² JW Scholtz et al (eds) *Guide to the National Credit Act* (Service Issue 9, Jun 2017) 12–25(3).

¹¹³ Scholtz et al at 12–26.

¹¹⁴ The matter was further clarified in *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC).

in under 4.6.2. The next step is to consider the situation where a consumer is in default under a credit agreement while at the same time the debtor has a credit balance in another account with the same credit provider.

According to sections 90 and 124 of the NCA, if a credit provider intends to insert a clause into a credit agreement granting the transfer of funds from an account of a debtor to satisfy a debt in terms of a credit agreement, the authorisation must comply with the stipulated requirements.¹¹⁵ The requirements contained in the aforesaid sections have the effect of limiting the credit provider's rights to apply set-off.

Section 90(2)(n) of the NCA provides as follows:

"A provision of 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".

Furthermore, section 124 of the NCA provides as follows:

- "(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 -
 - (a) a charge or series of charges may be made only against an asset, account, or amount that has been –
 - (i) deposited by or for the benefit of the consumer and held by that credit provider or that third party; and
 - (ii) specifically named by the consumer in the authorisation;
 - (b) the charge or series of charges may be made only to satisfy –
 - (i) a single obligation under the credit agreement, specifically set out in the authorisation;
 - (ii) a series of recurring obligations under the credit agreement, specifically set out in the authorisation;
 - (c) the charge or series of charges may be made only for an amount that is –

¹¹⁵ Van Deventer 112.

- (i) calculated by reference to the obligation it is intended to satisfy under the credit agreement;
 - (ii) specifically set out in the authorisation;
 - (d) the charge or series of charges may be made only on or after a specified date, or series of specified dates –
 - (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
 - (ii) specifically set out in the authorisation; and
 - (e) any authorisation not given in writing, must be recorded electromagnetically and subsequently reduced to writing.
- (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 the subsection, of the charge or charges to be made under that authorisation.”

Van Deventer¹¹⁶ states that a bank often elects to include a “cross-default” clause in a loan agreement. In terms of this clause, the bank is granted the right to make use of funds held by the bank in another account of the same client in order to settle a debt that is outstanding in another account. Section 90(2)(n) of the NCA does not permit a credit provider to include an all-encompassing clause authorising the bank to utilise any funds held on behalf of a customer in the event of a default.¹¹⁷ Instead, if a creditor intends to include a provision authorising the transfer of funds from one account to another, the provision must comply with section 124 of the NCA.

Section 90 of the NCA is found in Chapter 5, which deals with consumer credit agreements, and more specifically under Part A of the chapter, dealing with “Unlawful agreements and provisions”. On the other hand, section 124 is dealt with under Chapter 6 with the heading “Collection, Repayment, Surrender and Debt Enforcement” and more specifically under Part A governing “Collection and repayment practices”. Section 129 is included in

¹¹⁶ Van Deventer 114.

¹¹⁷ Van Deventer 114.

Chapter 6 as well, but it falls under Part C as part of “Debt enforcement by possession or judgment”.

The above gives guidance with regard to the legislature’s opinion regarding where set-off falls within the consumer credit legislative framework. In other words, it is evident that set-off is not viewed as a debt enforcement procedure but rather as a “collection and repayment practice”. This study will not concern itself with the difference between “debt enforcement” and “collection and repayment process”, nor the reasons why the NCA provides different procedures to be followed by a credit provider before embarking on the two processes.

Section 130(1)(a) of the NCA provides clarity with regard to the time limits applicable to a section 129(1)(a) notice.¹¹⁸ Section 130(1)(a) provides that a credit provider may approach the court for an order enforcing the agreement only if the consumer has been in default under a credit agreement for at least twenty business days and after the expiry of ten business days since the credit provider delivered the section 129(1)(a) notice to the consumer. In light of the aforesaid, the consumer has at least ten business days to respond to the notice. Should the consumer fail to respond to the notice and fail to indicate their acceptance of the proposal indicated or reject the proposal contemplated in the notice, then the credit provider may approach a court.

Conversely, section 124 fails to clarify the time periods within which the credit provider has to apply set-off. It is my submission that the process to be followed in accordance with section 124 is premised on the credit provider obtaining authorisation to effect the set-off. In other words, although provision is made for the customer to be notified, notification is not the primary preceding factor for the application of set-off to be valid. For purposes of set-off it is not sufficient to only give notice to the customer; the credit provider must further obtain the customer’s authorisation before applying set-off.

¹¹⁸ See C van Heerden & A Boraine “The conundrum of the non-compulsory compulsory notice in terms of section 129(1)(a) of the National Credit Act” (2011) 23 *SA Merc LJ* 45-63 47.

4.5.4 Advantages of limiting the credit provider's right to set-off

In instances where the bank fails to properly apply its mind when effecting a set-off, the customer can be prejudiced by the unfair process and could result in financial losses for the customer. Van Deventer relies on the following example in illustrating the harmful effect that set-off may have on a customer:¹¹⁹

“Consider for instance a client who falls in arrears with one or two loan payments due to unforeseen circumstances. The bank enforcing its right to set-off, appropriates amounts due from the transactional account of the client, leaving an amount insufficient for subsistence of the client and rendering the client unable to service his other debts. This can, in turn, result either in the client's other creditors accelerating the repayment of his loans or in the client having to incur additional debt (at a less favourable interest rate) to stay afloat. If the client is unaware of the reduction in the balance of his account (since notice is not required for set-off), he may also unknowingly incur the additional costs of a returned cheque or a declined debit order”.

A further cause for concern is that the client is not granted an opportunity to present a defence against the bank's claim. Therefore, the reason for limiting the credit provider's right to rely on set-off is due to the fact that such a right can negatively impact the customer's finances and leave a consumer destitute.¹²⁰

4.5.5 Disadvantages of limiting the credit provider's right to set-off

Set-off provides a mechanism for the collection of debts that is effective and less costly. Therefore, limiting the right to set-off can present challenges for the credit provider. The limitation of the right to set-off may result in increased costs of credit and might impact the accessibility to credit. Low-risk loans are proportional to lower interest rates charged by a bank. Limiting the bank's

¹¹⁹ Van Deventer 123.

¹²⁰ 123.

right to rely on set-off negatively affects the security presented by set-off, thus potentially increasing the bank's risk and resulting in an increased cost of credit.¹²¹

We live in the era of great technological developments, such as internet and telephone banking. Requiring the bank to notify the consumer before applying set-off will provide the consumer with an opportunity to withdraw or transfer the funds that the bank intends to appropriate to settle a debt due in another account. This might have the effect of set-off

“ceasing to be the swift remedy that it is today (and banks) lacking this power...may be less reticent to call in a depositor's loan, thereby accelerating a different kind of injury to the depositor”¹²²

An advantage for the consumer in allowing the bank to apply set-off is that it prevents a customer from being indebted to the bank when there are sufficient funds in another account, which funds can be utilised to pay the outstanding debt.

4.6 Conclusion

The debt enforcement requirements set out in the NCA lead to a process that is onerous for credit providers. Section 124 potentially adds to the onerous nature of the process by requiring the credit provider to obtain authorisation from the customer before applying set-off.

It is my submission that the provisions of section 124 present a narrow view of the limitation of the credit provider's right to apply set-off. The section assumes that all consumers act in good faith and therefore fails to take cognisance of a consumer who abuses the section to frustrate a credit provider's right to collect a debt due to it. All the consumer has to do once the

¹²¹ 124.

¹²² Van Deventer 125 citing SL Sepinuck “The problems with set-off: a proposed legislative solution” (1988) 30 *Wm & Mary Law Review* 51 65.

bank communicates its request for the customer's authorisation, is to access the internet and transfer the money.

In light of the above, it is my further submission that section 124 should be amended to make provision for the credit provider to be allowed to apply set-off without authorisation, to settle debts that are secured by mortgage bonds, if such a mortgage bond is registered over a property that is the primary residence of the customer. This submission is premised upon the fact that a failure to apply set-off could ultimately result in the customer losing their primary residence should the credit provider proceed with legal action and have the property declared specially executable.

CHAPTER 5:

SET-OFF FROM AN INTERNATIONAL PERSPECTIVE

5.1 Introduction

The previous chapter contained a discussion of the NCA and its impact on set-off. It analysed the South African position regarding set-off since the dawn of the era ushered in by the NCA. To deepen the analysis, it may be valuable to consider some principles of set-off developed in other countries. In deciding which countries to discuss, guidance is taken from the countries that were considered during the drafting of the NCA. These countries include Australia, New Zealand, England, Canada and the European Union.¹²³

During the review of the regulatory framework of consumer credit, a comparison was made of the legislation and how the legislation affects the different aspects of consumer credit. The regulatory frameworks utilised in the aforesaid countries were taken into account in developing South Africa's policy framework.¹²⁴

However, for the sake of brevity, only the legislative approaches followed in the United Kingdom, the European Union and New Zealand will be discussed.

5.2 United Kingdom

5.2.1 Introduction

¹²³ Department of Trade and Industry "Credit Law Review August 2003: Summary of Findings of the Technical Committee", National Credit Regulator 23.

¹²⁴ Van Deventer 130 citing "Financial Ombudsman Service "Banking: Firm's Right of Set-off " (2004) 40 Ombudsman News 3-7.

In England specifically, set-off can be defined as the setting off of monetary cross-claims against each other to produce a balance.¹²⁵ English law further accepts that set-off is the existence of cross-demands.

The term set-off is commonly utilised to describe a situation where the damages payable by a defendant to a claimant may be reduced due to a benefit incidentally accruing to the claimant arising from the defendant's breach.¹²⁶

5.2.2 The forms of set-off

There are two types of set-off recognised in the United Kingdom.

Firstly, in the circumstances where none of the parties are bankrupt or a company is not in liquidation, set-off is governed by two old statutes, namely (1729) 2 Geo II¹²⁷ and (1735) 8 Geo II.¹²⁸ These statutes were enacted in 1729 and 1735 respectively. The statutes only governed instances involving mutual debts.¹²⁹ In the alternative set-off could be applied in accordance with the principles laid down by the courts of equity.

The second form of set-off pertains to two types of rights, namely "combination of accounts" and the rule set out in the case of *Cherry v Boulton*.¹³⁰ The combination of accounts refers to the bank's right to apply set-off against a customer's account to settle a debt owed under another account.¹³¹ The rule in *Cherry v Boulton* is applicable in circumstances where a person is entitled to receive a contribution from a fund and the person is also liable to contribute to the fund.

¹²⁵ R Derham *The Law of Set-off* 3 ed (2003) 1

¹²⁶ *Nadeph Ltd v Willmet & Co* [1978] WLR 1537.

¹²⁷ (1729) 2 Geo II, c22, s13.

¹²⁸ (1735) 2 Geo II, c24, s 5.

¹²⁹ Derham 7.

¹³⁰ (1839) 4 My & Cr 442, 41 ER 171.

¹³¹ Derham 7.

5.2.3 The applicable law

Set-off is also dealt with in the Civil Procedure Rule 1998. In the case of *Milan Tramways Co ex p. Theys*¹³² the court emphasised that the rule itself did not determine the availability of set-off, but only laid down the procedure for claiming a defence other than bankruptcy and company liquidation.

The consumer credit legislation applicable in the United Kingdom is the Consumer Credit Act.¹³³ The Act does not expressly provide for the limitation of the credit provider's right to apply set-off and does not deal with set-off in the manner that sections 90(n) and 124 of the NCA does.¹³⁴ However, section 55A of the Consumer Credit Act provides that

“the features of the agreement which may operate in a manner which would have a significant adverse effect on the debtor in a way which the debtor is unlikely to foresee [and] the principal consequences for the debtor arising from a failure to make payments under the agreement at the times required by the agreement including legal proceedings and, where this is a possibility, repossession of the debtor's home”.¹³⁵

Most banks in the United Kingdom subscribe to the Lending Code. In terms of the Code, the banks are obliged to disclose to the client the circumstances under which the bank may apply set-off.¹³⁶ The client must be informed of these circumstances during the time in which the bank is contemplating the application of set-off. Before applying set-off, the banks are further obliged to assess the client's financial circumstances by making use of the information at the bank's disposal. The Financial Ombudsman¹³⁷ further provides that the banks must inform the client as soon as possible after applying set-off.

¹³² (1882) 22 Ch D 122.

¹³³ 1974 (as amended by the Consumer Credit Act 2006).

¹³⁴ Van Deventer 128.

¹³⁵ Ss 55A(2)(c) and 55A(2)(d) of the Consumer Credit Act 1974.

¹³⁶ Van Deventer 130, citing British Banker's Association & The UK Cards Association “The Lending Code” (28-09-2015) Lending Standards Board, <http://www.lendingstandardsboard.org.uk> (accessed 30-11-2015).

¹³⁷ Van Deventer 130, citing Financial Ombudsman Service “Banking: Firms' Right to Set-off” (2004) 40 Ombudsman News 3-77.

Wood and Good provide contrasting opinions regarding the right to combination of accounts. On the one hand, Wood is of the view that it is permissible for a client to invoke the right to set-off and direct the bank to treat the account as one.¹³⁸ Good, on the other hand, disagrees with the above opinion and states that the client only has the right to transfer the credit balance from one account to another, and that such a transfer does not amount to set-off.¹³⁹

5.3 European Commission

Directive 2008/48/EC¹⁴⁰ (the Consumer Credit Directive) governs consumer credit in the European Union. The Consumer Credit Directive was adopted in 2008 by the European Commission and sets the standards that the legislation of the member states must comply with.

The Consumer Credit Directive makes reference to set-off from the view of protecting the consumer's right to rely on it. In circumstances where the banks disagree, the Consumer Credit Directive provides that in instances where the creditor assigns its right under the credit agreement, the consumer retains the rights he would have had against the creditor, including the right to rely on set-off. Furthermore, Directive 93/13/EEC, which deals with unfair terms,¹⁴¹ prohibits a supplier from excluding a consumer's right to rely on set-off.

It is a widely accepted view in Europe that set-off should not be utilised to deprive one of claims, which provides consumers with a "minimum level of

¹³⁸ PR Wood *English and International Law of Set-off* (1989) 96.

¹³⁹ R Goode *Legal Problems of Credit and Security* 3 ed (2003) 255.

¹⁴⁰ Directive 2008/48/EC of the European Parliament and the Council of 23 April 2008 on the credit agreements for consumers and repealing Council Directive 87/102/EEC.

¹⁴¹ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

subsistence”.¹⁴² For example, in France the application of set-off against amounts received as maintenance is prohibited.¹⁴³

4.4 New Zealand

In New Zealand the Credit Contracts and Consumer Finance Act 2003 governs consumer protection in the context of credit agreements. The Act merely provides a creditor to the right to set off statutory damages and penalties due against the indebtedness of the consumer.¹⁴⁴ The Act does not expressly refer to set-off otherwise.¹⁴⁵

New Zealand law is also faced with the challenges of determining if set-off is available against a sum of money which is viewed by an adjudicator as payable.¹⁴⁶ This challenge arises due to the provisions of the UK’s Housing Grant’s Construction and Regeneration Act 1996.

In the case of *Thameside Construction Co Ltd v Stevens*,¹⁴⁷ renovations were completed on a home belonging to the Stevens family. The renovations were completed later than agreed upon between Stevens and Thameside Construction Co Ltd. Stevens refused to pay the final invoice, and thus Thameside referred the refusal to pay the amount of £190 102.89 to adjudication. A counterclaim for a reduction of £88 891.40 and further damages of £60 000.00 was then brought by Stevens. The adjudicator ordered Stevens to pay £88 606.22 (plus VAT). Stevens paid only a portion of the amount determined by the adjudicator but issued a “withholding notice” pertaining to their intention to pursue a claim of £40 000.00 for liquidated damages. Thameside launched proceedings to recover the balance in a bid

¹⁴² Zimmerman “European Law of Set-off and Prescription” (2002) 57.

¹⁴³ Art 1293 (3) Code civil

¹⁴⁴ S 24(1) of the Contracts and Consumer Finance Act 2003.

¹⁴⁵ Van Deventer 133.

¹⁴⁶ JG Walton “Is set-off available against a sum determined as payable by an adjudicator?” <<http://www.johnwalton.co.nz> (accessed 30-03-2018)

¹⁴⁷ [2013] EWHC 2071 (TCC).

to obtain clarity regarding whether Stevens is entitled to recover the liquidated damages flowing from the subsequent adjudication proceedings.

Justice Akenhead took cognisance of the general rule that an unsuccessful party in an adjudication process cannot rely on a right of set-off to avoid paying the amount determined by the adjudicator. He made reference to the following:¹⁴⁸

- consider what the adjudicator determined;
- differentiate the *directive* and *decisive* parts of the determination from the reasoning;
- the general rule is that directions to pay a sum of money are to be honoured without set-off;
- there are limited exceptions, for example in instances involving contractual right to set-off, and if the adjudicator fails to expressly direct the payment of money, then set-off may be evoked; and
- the adjudicator may direct that set-off is applicable to the sum of money determined to be payable.

In this context also, section 790 of the Construction Contracts Act 2002 provides that any proceedings for the recovery of a debt in accordance with sections 23, 24 or 59, counterclaims, set-off and cross demands may not be relied upon unless there has been judgment for the amount claimed by way of counterclaim, set-off or cross demands, or if there is no dispute over the amount.

5.4 Conclusion

The brief comparison of set-off in different jurisdictions has illustrated that although set-off is recognised in the jurisdictions, its application differs

¹⁴⁸ [2013] EWHC 2071 (TCC).

significantly. This chapter further indicates that the degree of the limitations to set-off differ across the jurisdictions. What is of significance in this chapter is the fact that other established legal systems do not have the stringent and onerous requirements included in section 124 of the NCA. This begs the question of whether section 124 is in line with the legislative framework of other jurisdictions.

CHAPTER 6: CONCLUSION

6.1 General

This dissertation discussed the historical developments¹⁴⁹ of the principles of set-off, how these principles found application in South African law¹⁵⁰ and thereafter how these principles interact with the NCA.¹⁵¹ For the sake of completeness, the dissertation also briefly dealt with the application of set-off in the United Kingdom, the European Union and New Zealand.¹⁵²

As mention in chapter 2 above, the principles of set-off are rather complex and the complexities date back to Roman law and the different schools of thought that existed in that era.¹⁵³

6.2 Overview of the findings

6.2.1 Findings regarding the historic developments of set-off

In the Roman law era set-off came into effect during judicial proceedings while there was no rule providing for the general application of set-off.¹⁵⁴ Gaius provides guidance on the three scenarios where set-off could be applied, except where an agreement has been reached by the parties regarding set-off. More specifically, Gaius makes reference to the *bonae fidei iudicia* and *actiones strictii iuris*.¹⁵⁵ The *actiones strictii iuris* included actions by bankers and actions by purchasers of insolvent estates.

¹⁴⁹ See Ch 2.

¹⁵⁰ See Ch 3.

¹⁵¹ See Ch 4.

¹⁵² See Ch 5.

¹⁵³ See Ch 2 (2.2).

¹⁵⁴ See Ch 2 (2.2.1).

¹⁵⁵ See Ch 2 (2.2.1).

For purposes of *bonae fidei iudicia*, the presiding officer enjoyed a discretion regarding the amount to be awarded to a defendant and with regard to the consideration of the defendant's counterclaim.¹⁵⁶ For purposes of the *bonae fidei iudicia*, set-off did not take place by operation of the law.¹⁵⁷ However, in the case of *actiones stricti iuris*, the presiding officer had no discretion to evaluate set-off based on the requirement of good faith. *Compensatio*, as set-off was known in the Roman law era, was only available on certain occasions, which occasions were classified into two categories, actions by bankers and actions by purchasers of insolvent estates.¹⁵⁸ Should the aforesaid situations not prevail, the court's mandate was to determine if there was an agreement between the parties relating to the reduction of their respective claims or whether to apply the *exceptio doli*.¹⁵⁹

In the post-classical Roman law era, the Glossators attempted to unify the fragmented operation of set-off that existed during the Roman law period, but the glossators themselves were divided into two schools of thought.¹⁶⁰ The one group of Glossators held the view that *compensatio* took place automatically and that the court had to deduct a liquidated counterclaim even in situations where the defendant did not plead it as a defence.¹⁶¹ Whereas the other group of Glossators also accepted that set-off operated automatically, they were of the opinion that set-off had to be presented in court in order for the presiding officer to take into account.¹⁶² The German Pandectists contributed to the abovementioned schools of thought and were of the opinion that a declaration by a judge was the only way to effect set-off.¹⁶³ It is therefore evident that the contrasting views reflected above have

¹⁵⁶ See Ch 2 (2.2.2).

¹⁵⁷ See Ch 2 (2.2.2).

¹⁵⁸ See Ch 2 (2.2.3).

¹⁵⁹ See Ch 2 (2.2.3).

¹⁶⁰ See Ch 2 (2.2.4).

¹⁶¹ See Ch 2 (2.2.4).

¹⁶² See Ch 2 (2.2.4).

¹⁶³ See Ch 2 (2.2.4).

largely contributed to the continued fragmentation of the principles surrounding set-off.¹⁶⁴

6.2.2 Findings regarding the requirements and approaches to set-off

In the discussion conducted in chapter 3 of this dissertation, an analysis of the requirements of set-off and the approaches to set-off took place. From a South African point of view, set-off applies by operation of the law on condition that its requirements are met.¹⁶⁵ In addition to the requirements being met, set-off must not be contractually excluded in order for it to apply. The interaction between the requirements and the operation of set-off is crucial in understanding the approaches to set-off.

As far as the bank-customer relationship in South Africa is concerned, this dissertation discussed set-off in the context where set-off is applied by banks against the customer's bank accounts.¹⁶⁶ In the case where a customer of a bank has two separate current accounts with the same bank, one with a positive balance and the other with a negative balance, the debts that the bank and the customer have against each other may be reduced or settled by applying set-off.¹⁶⁷ In such circumstances, set-off will apply by operation of the law provided that the requirements for set-off are met.¹⁶⁸

6.2.3 Findings regarding the National Credit Act and its effect on set-off

A discussion regarding the debt enforcement procedure as set out in the NCA has illustrated the onerous requirements to be met by a credit provider before applying set-off in terms of section 124.¹⁶⁹ An analysis of section 124 is discussed on the backdrop of section 129 in order to compare the requirements that a credit provider ought to comply with under the two

¹⁶⁴ See Ch 2 (2.2.5).

¹⁶⁵ See Ch 3 (3.2).

¹⁶⁶ See Ch 3 (3.4).

¹⁶⁷ See Ch 3 (3.4).

¹⁶⁸ See Ch 3 (3.4).

¹⁶⁹ See Ch 3 (4.3 and 4.5.2-4.5.3).

sections. The interaction between section 124 and Rule 46 of the High Court Rules was discussed in order to indicate the importance of set-off in the banking sector and the benefit that set-off has not only for the banks but potentially for consumers too. The proposed amendment to section 124 of the NCA is advised in the aforesaid discussion.

6.2.4 Closing remarks

Set-off between accounts is a regular occurrence,¹⁷⁰ as in most instances a bank will, as a prerequisite, require that a client must operate a transactional account with the bank before granting a loan to the client. The bank will then be in a position to apply set-off in circumstances where the client defaults on the loan.

The analyses of set-off as a means of debt recovery has resulted in the submission that set-off as applied in terms of section 124 of the NCA is outdated and fails to take into account technological advancements in the banking sector. Therefore, Van Deventer is correct in stating that:

“There is little doubt that the current law regarding the operation of set-off is both uncertain and unable to cater for modern commercial relationships”.¹⁷¹

¹⁷⁰ Van Deventer 123.

¹⁷¹ 155.

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