

A RIGHT TO SET-OFF OUSTED IN ALL CREDIT AGREEMENTS REGULATED BY THE NATIONAL CREDIT ACT

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Abstract

In the case of National Credit Regulator vs. Standard Bank of South Africa Limited (44415/16) [2019] ZAGPJHC 182 (27 June 2019) the South Gauteng High Court in South Africa held that a common-law right of set off is not applicable to credit agreements which are subject to the National Credit Act 34 of 2005 (NCA). The common-law right of set-off comes into operation when two parties are reciprocally indebted to each other. The contractual and other debts will extinguish each other Rautenbach, Rautenbach-Malherbe Constitutional Law 6 edition (2012) at 475. In terms of the principle of set-off, a creditor (bank) will debit a consumer's account without notice or consultation with the consumer. The bank will also deduct the money from consumer account that is validly due to the bank without authorisation of the consumer. The Court found that the provisions of the National Credit Act ousted the application of the principle of set-off to credit agreements that are regulated by the National Credit Act. The purpose of the National Credit Act is to protect consumers, however, the Act should also secure a credit market that is competitive, sustainable, responsible and efficient. The Act could only achieve this objective by balancing the respective rights and responsibilities of credit providers and consumers.

This article will critically analyse the decision in National Credit Regulator vs. Standard Bank of South Africa Limited in view of the application and interpretation of the principle emanating from *audi alteram partem rule*. Reference will be made to the common-law principle of set off. The common law practice of set off other than in terms of the National Credit Act fundamentally threatens the socio-economic rights and/or livelihood and dignity of the low-income earners, a distinctly vulnerable group in society. While it is true that the main objective of the National Credit Act is to protect consumers, the interests of creditors must also be safeguarded and should not be overlooked. The South Gauteng High Court granted a declaratory order to the effect that in light of section 90(2)(n) and section 124 of the National Credit Act, 34 of 2005, the common law right of set-off is not applicable in respect of credit agreements which are subject to the National Credit Act. In terms of the principle of *audi alteram partem rule*, the affected person must be afforded a reasonable chance or opportunity to answer to the charges or allegations against him/her and put forward his/her case. In other words, a party who is affected by the outcomes of the administrative decision should be heard or afforded an opportunity to state his/her version before the decision is taken, particularly an adverse decision is taken against him/her. The banks normally applied the set-off common law principle to the consumers without affording the consumers an opportunity to arrange and agree on the terms of payments to settle the debt.

REFERENCES

1. National Credit Act (No. 34 of 2005). Retrieved from <https://www.polity.org.za/article/national-credit-act-no-34-of-2005-2006-03-29>
2. Du Bruyn NO and Others vs. Karsten (929/2017) [2018] ZASCA 143; 2019 (1) SA 403 (SCA) (2018, September 28). Retrieved from <http://www.saflii.org/za/cases/ZASCA/2018/143.html>
3. National Credit Regulator v Standard Bank of South Africa Limited (44415/16) [2019] ZAGPJHC 182 (2019, June 27). Retrieved from <http://www.saflii.org/za/cases/ZAGPJHC/2019/182.html>
4. Sebola and Another vs. Standard Bank of South Africa Ltd and Another (CCT 98/11) [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) (2012 June, 7) Retrieved from <http://www.saflii.org/za/cases/ZACC/2012/11.html>
5. Section 90(2)(n), section 124 of national credit act 34 of 2005. Retrieved from <http://www.justice.gov.za/mc/vnbp/act2005-034.pdf><http://www.justice.gov.za/mc/vnbp/act2005-034.pdf>