CAN YOUR BANK TAKE YOUR MONEY WITHOUT PERMISSION?

“A bank is a place that will lend you money if you can prove that you don't need it” (Bob Hope)

A recent High Court decision has settled the knotty question of whether your bank can take money it holds for you in one account to cover your debt to it in another, without your permission and without notice to you.

Firstly, what is “set-off”?

To understand how important this new decision is, we need to go back to our common law (unwritten law) principle of set-off. In simple terms, common law set-off allows one debt to be cancelled out by another. So if for example I owe you R1,000 and you owe me R900, I am both your creditor and your debtor, and vice-versa. If we come to blows, I can then set the one debt off against the other with the net effect that I owe you R100.

Credit-lenders, and in particular banks, used to make extensive use of this to collect debt. If for instance you fell behind in your mortgage bond or credit card payments, your bank could, if it was so inclined, take the arrears out of your current account as soon as your salary was paid into it – without your consent and without notice to you.

Banks have always argued that this ability has made it easier for them to lend money to us when we ask for it, as it reduces their risk by giving them more security if things go wrong. Giving notice or asking for consent would, they argue, allow a recalcitrant debtor to quickly withdraw the funds and frustrate the debt collection. But the other side of the coin of course is that you could suddenly find yourself without money to live, let alone to service your other debt payments – a situation particularly hard on lower earners and those struggling with mountains of debt.

Enter the NCA (National Credit Act) in 2005…

How the NCA changed things

In broad terms, the NCA (when it applies – see next paragraph) restricts set-off in such a way as to give the consumer the right to choose whether or not to consent to set-off, which accounts it may be applied to, in respect of which amounts, when it is to be applied, and in respect of which debts.

But does the NCA apply to your particular debt? In most cases, yes. In a nutshell (there are some “ifs” and “buts” here so ask your lawyer for specific advice) the NCA applies to most personal loans, home loans, overdrafts, credit card debt, asset finance agreements, lease agreements and so on. It covers consumers who are individuals and some – not all - “juristic persons” (companies and the like - take advice for details).

Which brings us to the High Court…

Nevertheless at least one bank (which is unlikely to be alone in this practice) has continued until now to apply common law set-off without consent, in other words they would take money from a customer’s account to cover the customer’s debt on a separate credit agreement. The bank argued that the NCA’s set-off restrictions did not apply on its interpretation of the NCA, in its circumstances and to its credit agreements. Importantly, its agreements omitted any mention of set-off (where an agreement does mention set-off, there is no argument - the NCA restrictions definitely apply).

Having received complaints from consumers to this effect, the National Credit Regulator asked the High Court to interpret the NCA’s provisions and to rule on the legality of the bank’s practice.

The High Court’s decision

Common law set-off without your consent as above cannot happen if the NCA applies to your credit agreement.

In a nutshell – you have the choice! Banks and other credit-lenders must ask you before taking money from one account to cover your debts in another.