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R Brits*

1 Introduction

This contribution concerns the judgment of the Cape High Court in *Opperman v Boonzaaier*¹ as well as its confirmation by the Constitutional Court² in *National Credit Regulator v Opperman*.³ The high court per Binns-Ward J declared section 89(5)(c) of the *National Credit Act*⁴ unconstitutional because the section permitted an arbitrary deprivation of property in contravention of the constitutional property clause.⁵ This finding was confirmed by the majority of the CC per Van der Westhuizen J.⁶

The NCA requires that a person must apply to the National Credit Regulator⁷ to be registered as a credit provider if "that person, alone or in conjunction with any associated person, is the credit provider under at least 100 credit agreements other than incidental credit agreements".⁸ Registration is also required if "the total principal debt owed to that credit provider under all outstanding credit agreements

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¹ *Opperman v Boonzaaier* (24887/2010) 2012 ZAWCHC 27 (17 April 2012) (hereafter "*Opperman* (CHC)"). For a discussion, see Van der Walt 2012 *JQR* para 2.1.1.

² Hereafter "the CC".

³ *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) (hereafter "*Opperman* (CC)").

⁴ *National Credit Act* 34 of 2005 (hereafter "the NCA").

⁵ Section 25, particularly subs (1), of the *Constitution of the Republic of South Africa*, 1996 (hereafter "the *Constitution*").

⁶ Mogoeng CJ, Moseneke DCJ, Khampepe J, Nkabinde J and Skweyiya J concurred. Cameron J wrote a dissenting minority judgment with which Froneman J and Jafta J agreed.

⁷ Hereafter "the NCR".

⁸ Section 40(1)(a) NCA. On the registration requirement in general, see Van Zyl "Registration".

other than incidental credit agreements exceeds the threshold prescribed" by the minister.⁹ The current threshold is R500 000.¹⁰

The applicant in *Opperman*¹¹ lent R7 million (above the threshold) to a friend, the first respondent. On the first respondent's inability to repay the loan, the applicant applied to have him sequestered. On the return date Binns-Ward J refused to make a final sequestration order due to concerns emanating from the NCA's application to this dispute. After various postponements and an amendment to the notice of motion to include a constitutional challenge against the applicable provision, the matter again came before Binns-Ward J.¹² This time the Minister of Finance, the Minister of Trade and Industry and the NCR – the second to fourth respondents – were joined.¹³

The problem was that the applicant was not registered as a credit provider, which technically meant that he was not allowed to "make available or extend credit, enter into a credit agreement or agree to do any of those things".¹⁴ The effect of this prohibition was that the credit agreements were "unlawful ... and void to the extent provided for in section 89",¹⁵ which section emphasises that "a credit agreement is unlawful if at the time the agreement was made, the credit provider was unregistered" despite the fact that the NCA requires registration in this instance.¹⁶

In other words, because the credit agreement was unlawful, the court had to declare it "void as from the date the agreement was entered into".¹⁷ Accordingly, in terms of section 89(5)(c), the court was bound to order that

⁹ Sections 40(1)(b) and 42(1) NCA.

¹⁰ Draft National Credit Amendment Bill, 2013 (GN 713 in GG 28893 of 1 June 2006).

¹¹ For the facts, see *Opperman* (CHC) paras 1-3 and *Opperman* (CC) paras 4-6.

¹² *Opperman* (CHC) para 1.

¹³ *Opperman* (CHC) para 2.

¹⁴ Section 40(3) NCA.

¹⁵ Section 40(4) NCA.

¹⁶ Section 89(2)(d) NCA.

¹⁷ Section 89(5)(a) NCA. See *Opperman* (CHC) para 5. The agreement would have been saved from invalidity if the applicant, "at the time the credit agreement was made, or within 30 days after that time ... had applied for registration ... and was awaiting a determination of that application" (s 89(4)(a) NCA), which was not the case.

all the purported rights of the credit provider under that credit agreement to recover any money paid or goods delivered to, or on behalf of, the consumer in terms of that agreement are either -

- (i) cancelled, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer; or
- (ii) forfeit to the State, if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer.¹⁸

The court regarded the applicant's right to claim restitution of performance rendered in terms of a void contract (a personal right based on unjustified enrichment) as "property" for constitutional purposes. Therefore, based on this assumption the judge declared section 89(5)(c) unconstitutional because the forfeiture to the state of the applicant's "purported rights" would effect an *arbitrary deprivation* of property (that is, his enrichment claim) in contravention of section 25(1) of the *Constitution*. The NCR appealed to the CC in an effort to prevent the confirmation of constitutional invalidity, which appeal was opposed by the applicant.

The purpose of this discussion is to analyse the courts' application of the section 25(1) non-arbitrariness test. It is suggested that this decision is a valuable contribution not only to NCA jurisprudence but also to the development of constitutional property law in South Africa. Binns-Ward J (whose decision was approved by the CC)¹⁹ meticulously scrutinised the effects of section 89(5)(c) of the NCA, which effects were clearly overbroad. One of the most important contributions of these decisions (especially the CC judgment) is the authority for the proposition that personal rights (or remedies) sounding in money (that is, debts) qualify as "property" for section 25 purposes. Although the facts specifically dealt with a restitution claim (in enrichment), the same principle will likely apply to all personal rights or claims sounding in money.

¹⁸ For general literature on the consequences of unlawful credit agreements, see Kelly-Louw *Consumer Credit Regulation* 196-200; Van Zyl "Registration" 5-25-5-27; Otto "Conclusion" 9-7-9-9 and 9-12-9-13; Otto and Otto *National Credit Act* 52-53; Kelly-Louw "Consumer Credit" para 82.

¹⁹ *Opperman* (CC) para 88.

Moreover, the case illustrates the value of employing constitutional property law to interpret and evaluate the NCA to ensure that its debt relief mechanisms do not have an unjustified impact on creditors but result in a proper balance between the rights of credit providers and consumers. As noble and legitimate as the Act's purposes are, it is accordingly necessary to evaluate the relationship between these purposes and the effects of the Act's mechanisms on individual credit providers.

According to the CC, the questions that needed to be answered were as follows:²⁰

- (1) what is the correct interpretation of section 89(5)(c);
- (2) does section 89(5)(c) deal with property for the purposes of section 25(1);
- (3) does the provision amount to arbitrary deprivation of property;
- (4) does it contain a constitutionally permissible limitation of the right protected in section 25(1); and
- (5) what is the appropriate remedy?

The structure of the discussion that follows will roughly correspond to these questions. In the course of the analysis I also refer to another case that did not provide conclusive answers, namely the Free State High Court's decision in *Cherangani Trade and Investment 107 (Edms) Bpk v Mason*²¹ and its appeal to the CC in *Cherangani Trade & Invest 107 (Pty) Ltd v Mason*.²² This contribution is longer and more detailed than would traditionally be the case with case discussions, the reason being that it is necessary to set out exactly how each court dealt with the various ways in which the NCA allegedly could be interpreted on this point. It is also necessary to provide a detailed explanation of how especially the Cape High Court conducted the section 25(1) non-arbitrariness test, since it is an impressive example of how this kind of analysis ought to be done.

²⁰ *Opperman* (CC) para 3.

²¹ *Cherangani Trade and Investment 107 (Edms) Bpk v Mason* (6712/2008) 2009 ZAFSHC 30 (12 March 2009) (hereafter "*Cherangani* (FSHC)"). For a discussion, see *Otto* 2010 *TSAR*.

²² *Cherangani Trade & Invest 107 (Pty) Ltd v Mason* 2011 11 BCLR 1123 (CC) (hereafter "*Cherangani* (CC)").

2 Interpretation and effect of section 89(5)(c)

2.1 Introduction

Since the common law principles surrounding the consequences of unlawful agreements are discussed by various authors, a detailed treatise would be superfluous.²³ Not only does the NCA state that an unlawful agreement must be declared void, but the common law has the same effect. Under the common law, no obligations arise from a void contract and hence no action can be founded on it. Had the NCA not included section 89(5)(c), the common law would have regulated the consequences of the invalid agreement.

Under the common law, a party who has performed under a void agreement is entitled to restoration under an unjustified enrichment claim.²⁴ However, this right to claim restitution is restricted by the *par delictum* rule, which – as a point of departure – places an absolute bar on the recovery of performances rendered by a party who was guilty of disgraceful conduct. The rule can nonetheless be relaxed if it would be in accordance with public policy and if it is necessary to effect simple justice between the parties.²⁵

However, although it also ensures non-enforcement of performance under a void agreement, section 89(5)(c) of the NCA prevents courts from deviating from the strict *par delictum* rule.²⁶ The creditor can never reclaim performances rendered and any resultant unjustified enrichment for the debtor must be declared forfeit to the state. The intended outcome seems to be to punish the creditor but without unduly benefitting the debtor, with the state enjoying the benefit instead. Indeed, the NCA goes further than the common law, since the operation of section 89(5)(c) does not

²³ For instance, see Van der Merwe *et al Contract* 173-182; Van Rensburg, Lotz and Van Rhijn "Contract" para 413; De Wet and Van Wyk *Kontraktereg en Handelsreg* 89-90. See also Otto 2009 *TSAR* 424-427.

²⁴ Van Rensburg, Lotz and Van Rhijn "Contract" para 413 fn 8.

²⁵ *Jajbhay v Cassim* 1939 AD 537 544 and 550 and other sources listed in Van Rensburg, Lotz and Van Rhijn "Contract" para 413 fn 11. See also the CC's summary of the common law principles in *Opperman* (CC) paras 12ff.

²⁶ Otto 2009 *TSAR* 431.

require turpitude or disgraceful conduct. All that is required is that the agreement be unlawful in terms of the NCA. The current example (where the credit provider was not registering as required) will be affected by the provision despite the fact that there might have been no bad faith or turpitude involved. However, the exact interpretation of section 89(5)(c) proved to be controversial.

2.2 *The Cherangani decisions*

After the applicant in the *Cherangani* matter had instituted action to enforce loans granted, the respondent raised certain defences, including one based on the NCA.²⁷ The argument was that the credit transaction was unlawful and therefore void because the applicant was not registered as a credit provider.²⁸ As in *Opperman*, the lender in *Cherangani* was not in the business of providing credit, although it occasionally assisted persons with financing.²⁹ It actually seemed as though the applicant was involved in lending practices more often than he claimed and the court accepted the NCR's desire to take note of him.³⁰ Consequently, the court held that the credit agreements were unlawful and void, and that the applicant was – in terms of section 89(5)(c) – not entitled to claim restitution of the monies delivered to the respondent.

After unsuccessful recourse to the Supreme Court of Appeal,³¹ the judgment in *Cherangani* was taken on appeal to the CC, where the constitutionality of the forfeiture provision was first raised. The applicant argued that the high court was wrong in finding that section 89(5)(c) obliged it to make the relevant order. Instead, he claimed that the court should have found that it had a discretion in this regard and that this discretion should not have been exercised.³²

²⁷ *Cherangani* (FSHC) paras 27ff.

²⁸ *Cherangani* (FSHC) para 30.

²⁹ *Cherangani* (FSHC) para 34.

³⁰ *Cherangani* (FSHC) para 34.

³¹ Hereafter "the SCA".

³² *Cherangani* (CC) para 3.

In the course of asking whether the case raised a constitutional matter, the CC per Yacoob J referred to the applicant's argument that section 89(5)(c) of the NCA should be read in conformity with section 25(1) of the *Constitution* (in the light of the obligation in terms of section 39(2) of the *Constitution*). The result of this interpretation exercise would allegedly have been to grant the court a discretion as to whether or not the forfeiture order should be granted.³³ The applicant contended that the absence of such a discretion would render the forfeiture disproportionate and therefore it would amount to an arbitrary deprivation of property.³⁴ On the other hand, an appropriate discretion arguably would have avoided the unconstitutional result.

The applicant further asserted that the appeal to the CC was urgent because it would be in the interest of the general public as well as the credit market to ensure that forfeitures that amount to arbitrary deprivations of property are prevented.³⁵ Yet the CC refused to grant leave to appeal, since it would have had to act as a court of first and last instance. These matters were not raised in the high court, and the SCA did not provide reasons for its refusal to grant leave to appeal either.³⁶ Moreover, the issues that the case raised were complex ones in which "fairness and justice in the credit market in the context of rights in our Constitution" were implicated.³⁷

The CC moreover referred to the difficulty of giving meaning to section 89(5)(c),³⁸ and pointed out that³⁹

[i]t is difficult to fathom exactly what is taken away from the applicant and exactly what is forfeit to the state. Are they "purported rights" which do not exist anymore or is the right to sue for unjust enrichment also forfeited?

³³ *Cherangani* (CC) para 8.

³⁴ *Cherangani* (CC) para 8.

³⁵ *Cherangani* (CC) para 9.

³⁶ *Cherangani* (CC) para 12.

³⁷ *Cherangani* (CC) para 12.

³⁸ *Cherangani* (CC) para 13.

³⁹ *Cherangani* (CC) para 14.

These uncertainties emphasised why the issue could not be decided without the effective and meaningful participation by the Minister of Finance.⁴⁰ The state might, for example, want to explain the context and background of the provision and provide reasons why possible disproportionality may be justified:⁴¹

The state has a legitimate interest in curbing the scourge of irresponsible borrowing and lending, and it may be that a measure of disproportionality is the appropriate cost for the achievement of this laudable objective.

The CC consequently dismissed the application for leave to appeal, since there were too many uncertainties about the operation and effect of section 89(5)(c). Furthermore, the state had to be joined because – as beneficiary of the forfeiture provision that was being attacked – it had a substantial interest in the outcome of the case.

2.3 Otto's criticism⁴²

Based on the high court's decision in *Cherangani*, Otto criticises the effect of section 89(5)(c).⁴³ He also commented on the provision in an earlier publication, specifically with reference to the common law *par delictum* rule.⁴⁴ The author's criticism of the provision can be summarised by the way he describes it as a "*verregaande reëling*" (preposterous measure),⁴⁵ and he presents the *Cherangani* case as proof of this criticism.⁴⁶ Forfeiture to the state of applicant's claims is, according to Otto, "*skokkend*" (shocking).⁴⁷ However, he acknowledges that the fault does not lie with

⁴⁰ *Cherangani* (CC) para 15.

⁴¹ *Cherangani* (CC) para 15. However, from the CC's subsequent analysis in *Opperman* (discussed in 3.3.3 below), it is clear that the Court eventually did *not* find that the Act's "laudable" objectives justified this "measure" of disproportionality, at least not under these kinds of circumstances.

⁴² Otto 2009 *TSAR*; Otto 2010 *TSAR*. See also Otto and Otto *National Credit Act* 52-53; Otto "Conclusion" 9-12-9-13; Otto 2013 *TSAR* 234.

⁴³ Otto 2010 *TSAR*.

⁴⁴ Otto 2009 *TSAR*.

⁴⁵ Otto 2009 *TSAR* 431; Otto 2010 *TSAR* 162.

⁴⁶ Otto 2010 *TSAR* 162.

⁴⁷ Otto 2010 *TSAR* 167.

the judge but with the relevant provisions of the NCA, which, according to him, are inappropriate and unacceptable.⁴⁸ He also regards section 89(5) as draconian.⁴⁹

Otto argues that if one considers the nature of the prohibited contracts, it is unjustifiable for the Act to prescribe such drastic consequences since none of these types of agreements are offensive or concluded *per se* in bad faith.⁵⁰ A more just and equitable result would have been to impose criminal sanctions on parties who contravene the Act's prohibition against certain agreements.⁵¹ Of course, invalidity can still be the result but Otto contends that it ought to be left to the courts to decide whether performance should be returned or if the *par delictum* rule should be strictly adhered to.⁵² This investigation can then be premised on a value judgment made with reference to all the circumstances and the degree of turpitude.⁵³

Otto has subsequently expressed his agreement with the finding that section 89(5)(c) has unconstitutional results.⁵⁴ For instance, he refers to the Cape High Court's judgment in *Opperman* as "thorough and well-reasoned"⁵⁵ – a remark with which I agree.

2.4 *Opperman (CHC)*

For the Cape High Court in *Opperman*, it was clear that the effect of sections 89(2)(d) and 89(5)(a), read with 40(4), was that the loan agreements were unlawful and therefore should be treated as void.⁵⁶ However, the applicant argued that the words "must order" in section 89(5) should be read as "may order", leaving the court with a discretion in this regard.⁵⁷ The court did not agree with this contention and therefore concurred with the third and fourth respondents that the NCA left no

⁴⁸ Otto 2010 *TSAR* 167.

⁴⁹ Otto 2013 *TSAR* 234.

⁵⁰ Otto 2010 *TSAR* 167.

⁵¹ Otto 2010 *TSAR* 167; Otto 2009 *TSAR* 432.

⁵² Otto 2010 *TSAR* 167.

⁵³ Otto 2010 *TSAR* 167; Otto 2009 *TSAR* 431.

⁵⁴ Otto 2013 *TSAR* 234.

⁵⁵ Otto "Conclusion" 9-13 fn 57; Otto 2013 *TSAR* 234.

⁵⁶ *Opperman* (CHC) para 5.

⁵⁷ *Opperman* (CHC) para 6. This is the same argument raised in the *Cherangani* cases.

scope for doubt that unlawful agreements *must* be treated as void. Nothing in the section indicated an intention that the court would have a discretion to treat "as valid a credit agreement that is expressly stigmatised as void".⁵⁸

Nonetheless, the applicant submitted that section 89(5) should be read in conformity with the *Constitution*.⁵⁹ The applicant argued that, if the court did not have a discretion whether or not to make a cancellation or forfeiture order, the result would be an arbitrary deprivation of property, as well as an infringement of his section 34 rights (access to court).⁶⁰ However, the court found that this method of statutory interpretation was inappropriate in these circumstances, since it would have done violence to the language used by the legislature.⁶¹

The next question was whether the applicant could recover the money on the grounds of unjust enrichment, namely with the *condictio ob turpem vel iniustam causam*.⁶² The court held that, if the effect of section 89(5)(c) was that an enrichment claim should be ordered forfeit to the state, the applicant would have no claim against the first respondent.⁶³

It was important to establish what would either be taken away from the applicant ("cancelled") or – if the consumer would be unjustly enriched by this cancellation – declared forfeit to the state.⁶⁴ These are the two options that section 89(5)(c) prescribes without any discretion. Therefore, the key to the provision lay in the meaning of "purported rights", since this is what ostensibly would be cancelled or forfeited.⁶⁵ Within the context of section 89, the literal meaning of "purported rights" implies that nothing of substance is cancelled or forfeited, since no rights are

⁵⁸ *Opperman* (CHC) para 6, relying on *Absa Insurance Brokers (Pty) Ltd v Luttig* 1997 4 SA 229 (SCA) 238F-241B.

⁵⁹ *Opperman* (CHC) para 6, the applicant relying on *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) para 23 (hereafter "*Investigating Directorate v Hyundai*").

⁶⁰ *Opperman* (CHC) para 9.

⁶¹ *Opperman* (CHC) para 6, relying on *Investigating Directorate v Hyundai* paras 21-26.

⁶² *Opperman* (CHC) para 7.

⁶³ *Opperman* (CHC) para 8.

⁶⁴ *Opperman* (CHC) para 10.

⁶⁵ *Opperman* (CHC) para 11.

created by a void contract. Yet cancellation or forfeiture of something that does not exist could not have been the legislature's intention. Therefore, the provision is "confused and confusing" because the drafters did not consider the principles of contract law.⁶⁶

The court held that "purported rights" could be nothing other than the right to claim restitution of performance rendered in terms of a void agreement, since the cancellation of no other right would lead to unjust enrichment in this context.⁶⁷ In fact, for the creditor to recover monies paid or goods delivered in terms of a transaction that is void, he would have to claim restitution thereof.⁶⁸ However, the court noted that if the "purported rights" are the creditor's right to restitution, there would probably never be a situation where the cancellation of such a right would *not* unjustly enrich the consumer.⁶⁹ Hence, the court could not conceive of an example where a court could make an order to cancel the "purported rights" (right to restitution) under section 89(5)(c)(i) (the first option), since there would always be unjust enrichment of the consumer, which would compel the court to rather order the rights forfeit to the state under section 89(5)(c)(ii) (the second option).⁷⁰

The first respondent would obviously be unjustly enriched if the applicant was denied the right to recover the money advanced and received by the first respondent.⁷¹ In terms of the common law, "absent turpitude on the part of the [applicant], the *par delictum* defence is simply not available. Where payment, even though illegal, was not dishonourable, the [applicant] must succeed" with its claim to restitution.⁷² It was ironic that, if the creditor had acted in turpitude, the *par delictum* defence would have excluded him from claiming restitution and therefore

⁶⁶ *Opperman* (CHC) para 11.

⁶⁷ *Opperman* (CHC) para 13.

⁶⁸ *Opperman* (CHC) para 13.

⁶⁹ *Opperman* (CHC) para 13.

⁷⁰ *Opperman* (CHC) para 13.

⁷¹ *Opperman* (CHC) para 14, with reference to the common law right of restitution; *Jajbhay v Cassim* 1939 AD 537.

⁷² *Opperman* (HC) para 14, quoting from *Afrisure CC v Watson* 2009 2 SA 127 (SCA) para 40, with reference to Sonnekus *Verryking* 134 and Lotz "Enrichment" para 215.

section 89(5)(c) would not have been applicable.⁷³ However, in this case there was no indication of any turpitude.⁷⁴

The court asked if the effect of section 89(5)(c) was that the court had to order the applicant's claim for restitution forfeit to the state.⁷⁵ The third and fourth respondents argued that this was not the case and that the court was vested with a discretion. The court rejected this proposal and held that section 89(5)(c) requires the court to do either one of two things.⁷⁶ The court *must* order that the "purported rights" are *either* cancelled *or* forfeited to the state. Further, in order to decide between these two options, one had to determine whether the consumer would be unjustly enriched.⁷⁷

If the first respondent was not required to make restitution and was therefore enriched (as was the case in *Opperman*), the claim for restitution *had to* be ordered forfeit to the state.⁷⁸ The court did not have the option to choose *neither* of these options.⁷⁹ The court pointed to the anomaly represented by the fact that, in contrast to section 89(5), section 90 – which deals with unlawful provisions – *does* provide courts with a discretion based on what would be "just and reasonable".⁸⁰ The court could not think of a reason for the difference in approach between these two sections,⁸¹ which seemed to contribute to the irrationality of section 89(5)(c).

⁷³ *Opperman* (CHC) para 14.

⁷⁴ *Opperman* (CHC) para 15.

⁷⁵ *Opperman* (CHC) para 15.

⁷⁶ *Opperman* (CHC) para 16.

⁷⁷ *Opperman* (CHC) para 16.

⁷⁸ *Opperman* (CHC) para 16.

⁷⁹ *Opperman* (CHC) para 16.

⁸⁰ *Opperman* (CHC) para 17.

⁸¹ *Opperman* (CHC) para 17.

2.5 Opperman (CC)

2.5.1 Introduction

The *Opperman* case illustrates that the interpretation of section 89(5)(c) is all but clear. The NCR argued that the section could be interpreted in a way that does not allow for arbitrary deprivation, whereas the applicant contended in favour of the high court's interpretation, namely that the proper construct of the section indeed resulted in arbitrary deprivation. The minister, on the other hand, acknowledged that the section effected a deprivation of property but that it was not arbitrary because there were sufficient reasons for it. The minister also argued in the alternative that the section could be read to include a discretion, which would render it in line with section 25(1). As another alternative, the minister contended that, if the section was unconstitutional, the declaration of invalidity ought to be suspended and that an interim reading-in should apply.⁸²

Due to the phrase "despite any provision of common law" in section 89(c), the common law action for restitution is excluded by this section. Therefore, the question was not if and to what extent the provision amended the common law but if such a deviation was inconsistent with section 25 of the *Constitution*.⁸³ The Court commented that, if the common law had applied to the situation,⁸⁴

an unregistered credit provider who was unaware of the requirement to register appears to be a good example of an unlawful agreement where there is little or no turpitude on the part of the credit provider.

Similar to the common law position, section 89(5)(a) states that the agreement must be declared void from its inception.⁸⁵ However, where the NCA deviates from the common law is that section 89(5)(c) appeared to leave little or no room for a judicial

⁸² *Opperman* (CC) para 11.

⁸³ *Opperman* (CC) para 13.

⁸⁴ *Opperman* (CC) para 18.

⁸⁵ *Opperman* (CC) para 18.

discretion.⁸⁶ The creditor's right to recover money paid or goods delivered must either be cancelled or, if the debtor would be unjustly enriched, forfeited to the state, irrespective of turpitude, fairness or public policy. If this interpretation was correct, the section would take away a creditor's right to restitution.⁸⁷

Section 89(5)'s goal is to protect debtors by "attaching significant negative consequences to the failure to register by credit providers who are required to do so".⁸⁸ The section becomes complicated when dealing with money that the creditor paid to the debtor under the void credit agreement.⁸⁹ Section 89(5)(c) states that such money remains with the debtor because all of the creditor's "purported rights" to recover money are "cancelled", unless cancellation would "unjustly enrich" the consumer.⁹⁰ The matter becomes even trickier when the debtor would indeed be unjustly enriched.

Therefore, the crux of the CC's decision was how section 89(5)(c) should be interpreted to deal with the situation where the debtor is enriched by the fact that the creditor has no right of restitution. Regarding terminology, the court held that the term "unjustly enriched" does not mean anything other than unjustified enrichment in common law.⁹¹ In what follows I discuss the different possible interpretations that the CC considered, which is also where the point of contention between the majority and minority judgments originated.

2.5.2 Majority's judgment

The first possible interpretation is the one supported by Binns-Ward J in the Cape High Court. In this view the provision requires that the creditor's right to recover any money paid⁹²

⁸⁶ *Opperman* (CC) para 18.

⁸⁷ *Opperman* (CC) para 18. The CC also referred to the comment by Otto 2009 *TSAR* 431 and 434 that the provision is far reaching, outrageous and unfair.

⁸⁸ *Opperman* (CC) para 21.

⁸⁹ *Opperman* (CC) para 22.

⁹⁰ *Opperman* (CC) para 22.

⁹¹ *Opperman* (CC) para 24.

⁹² *Opperman* (CC) para 26 (original emphasis.)

must be *either* (i) cancelled, unless the court concludes that doing so would unjustly enrich the consumer, *or* (ii) forfeited to the state, if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer.

In terms of this construction there is no discretion and therefore there are only these two possibilities. The court must determine only if there is unjustified enrichment present and then make the appropriate order.⁹³ In terms of both possible orders, the creditor will lose his right to restitution – both the possible rights under the agreement as well as those based on the unjustified enrichment of the debtor.⁹⁴

The NCR acknowledged that this interpretation would amount to arbitrary deprivation of property,⁹⁵ but it argued that this construal was not correct.⁹⁶ Instead, the NCR put forward that the section could be interpreted in another, constitutionally compliant way.⁹⁷ Hence, the proposed interpretation entailed⁹⁸

that the right to restitution, consequent upon the declaration of voidness of the contract, must be cancelled *unless* the court concludes that doing so in the circumstances would unjustly enrich the consumer.

Therefore, the court would have a discretion to either cancel the creditor's right to restitution or to leave it intact and, if the court does not cancel the right, it does not have to declare it forfeit to the state.⁹⁹ In terms of this interpretation, a forfeiture order is possible, but the court may grant it only if cancellation of the right to restitution would lead to unjustified enrichment.¹⁰⁰ Consequently, the forfeiture provision does not automatically come into effect if cancellation would unjustly enrich the debtor, but the court has a discretion to leave the rights intact or to

⁹³ *Opperman* (CC) para 26.

⁹⁴ *Opperman* (CC) para 27.

⁹⁵ *Opperman* (CC) para 27.

⁹⁶ *Opperman* (CC) para 28.

⁹⁷ *Opperman* (CC) para 28, with reference to *Investigating Directorate v Hyundai* para 23.

⁹⁸ *Opperman* (CC) para 28 (original emphasis).

⁹⁹ *Opperman* (CC) para 28.

¹⁰⁰ *Opperman* (CC) para 29.

declare them forfeit to the state.¹⁰¹ The creditor's level of turpitude or blameworthiness can be considered in making this decision.¹⁰²

According to the NCR a court would have three options: (1) cancel the creditor's restitution rights; (2) leave the creditor's rights intact because cancellation would unjustly enrich the debtor; or (3) forfeit the creditor's rights to the state because the debtor would otherwise be unjustly enriched. However, the CC rejected the NCR's argument because an interpretation may be followed only if it can be reasonably ascribed to the words of the provision.¹⁰³ The CC held that the "*either ... or*" wording in the section did not allow for the NCR's proposal.¹⁰⁴ Rather, this way of connecting the two options meant that they had to be read together and that they presented only two alternatives, namely cancellation and forfeiture.¹⁰⁵

Another possible way to interpret the provision was initially suggested by counsel for the applicant. To save the section from unconstitutionality, it was proposed that the words "must order" in section 89(5) should be read as "may order".¹⁰⁶ The CC agreed with the high court's rejection of this argument and it was accordingly abandoned before the CC.¹⁰⁷

2.5.3 Minority's alternative interpretation¹⁰⁸

Cameron J – writing for the minority – supported an alternative interpretation and held that he could not endorse Van der Westhuizen J's approach.¹⁰⁹ According to the minority, the majority's interpretation ignored the words "rights ... under that credit agreement" in section 89(5)(c). Even though Cameron J acknowledged that these words rendered the provision inoperative, he found that "it is simpler, and truer to

¹⁰¹ *Opperman* (CC) para 29.

¹⁰² *Opperman* (CC) para 29.

¹⁰³ *Opperman* (CC) para 31, with reference to *Investigating Directorate v Hyundai* para 23.

¹⁰⁴ *Opperman* (CC) para 31.

¹⁰⁵ *Opperman* (CC) para 31.

¹⁰⁶ *Opperman* (CC) para 32.

¹⁰⁷ *Opperman* (CC) para 32.

¹⁰⁸ *Opperman* (CC) para 92ff per Cameron J (Froneman J and Jafta J concurring).

¹⁰⁹ *Opperman* (CC) para 92.

our task of interpretation, not to ignore the words, but to take them to mean what they say".¹¹⁰ If one interprets the section literally, as Cameron J suggested, the provision might be inoperative but at least it would not be unconstitutional.¹¹¹ According to him, this approach was better than the one followed by Van der Westhuizen J, namely "to struggle to find a meaning, in the face of the words ignored, only then to declare the provision invalid".¹¹²

If the words "rights ... under that credit agreement" were to be taken literally, the provision would be incoherent because it could not deprive lenders of their rights of recovery, because such rights were based on unjustified enrichment and hence not on "rights ... under that credit agreement".¹¹³ Moreover, the provision would be ineffectual because, since the agreement was void from its inception, there would never be any contractual rights that could be cancelled or forfeited to the state.¹¹⁴ However, Cameron J held that taking the provision as referring to restitutionary rights (as the majority did) was "even more radically misplaced", since it is legally and linguistically impossible to have restitutionary rights based on unjustified enrichment *under that credit agreement*.¹¹⁵ After all, "[r]ights of recovery in the case of a void contract are derived from the common law of restitution, not from the agreement".¹¹⁶

According to Cameron J, ignoring these words – which were pivotal to the provision – would go "further than a court should, even if it means acknowledging that the legislature, in enacting it, misfired".¹¹⁷ According to the minority, "[i]f words are reasonably capable of a meaning that avoids conflict with the Constitution, that

¹¹⁰ *Opperman* (CC) para 93.

¹¹¹ *Opperman* (CC) para 93.

¹¹² *Opperman* (CC) para 93.

¹¹³ *Opperman* (CC) para 101.

¹¹⁴ *Opperman* (CC) para 102.

¹¹⁵ *Opperman* (CC) para 103.

¹¹⁶ *Opperman* (CC) para 103.

¹¹⁷ *Opperman* (CC) para 94.

meaning must prevail".¹¹⁸ However, to ignore certain words and then hold that the provision is unconstitutional, as the majority had done, was inappropriate.¹¹⁹

2.5.4 Majority's response to minority's alternative interpretation¹²⁰

Van der Westhuizen J summarised the minority's interpretation as follows:¹²¹

This interpretation focuses on the words "rights ... under that credit agreement" in section 89(5)(c). It holds that as an enrichment claim is not based on the credit agreement, it is not included in the provision that deals with rights "under that credit agreement". The claim for restitution on the basis of enrichment that the credit provider has under common law, is thus not affected by the section. As the credit provider is not denied the right to restitution based on enrichment, there is no arbitrary deprivation. The provision is thus not constitutionally offensive.

Even though Van der Westhuizen J acknowledged that this interpretation was "attractive", he held that it posed certain problems.¹²² He found that the words "under that credit agreement" were not central to the meaning of the provision:¹²³

Why would courts be told to decide whether the consumer is unjustly enriched or not, which is the very difference between section 89(5)(c)(i) and (ii), if the intention is simply to cancel the non-existing rights under the void agreement and say nothing at all about restitution based on enrichment?

Further, section 89(5)(c)(ii) had to be interpreted within the context of the rest of the provision as well as within the context of the NCA's aims. Moreover, there was indeed a link between the "purported rights" and "that credit agreement". Even though an enrichment claim is not based on contract, it arises *because of* an

¹¹⁸ *Opperman* (CC) para 96, with reference to *Investigating Directorate v Hyundai*.

¹¹⁹ *Opperman* (CC) para 105.

¹²⁰ *Opperman* (CC) para 33ff.

¹²¹ *Opperman* (CC) para 34.

¹²² *Opperman* (CC) para 35.

¹²³ *Opperman* (CC) para 38.

agreement that is void.¹²⁴ Regarding the scheme of section 89(5), the court explained that the subsection appears¹²⁵

to state the negative consequences for an unregistered credit provider progressively, from voidness in (a), through the refunding of money paid by the consumer to the credit provider in (b), to the denial of the right to restitution under (c).

There might also be practical problems if the minority's interpretation was left in place (with the result that restitution claims were left intact). The creditor would have a claim for restitution against the debtor (in terms of (c)) and, at the same time, the debtor would have a claim (in terms of (c)) to a refund of all money paid by the debtor to the creditor. Van der Westhuizen J held that this approach would not make sense.¹²⁶ He could therefore not support an interpretation of section 89(5)(c) that rendered it "inoperative and meaningless".¹²⁷ The court could not find that the provision is in line with the Constitution just because of a drafting error either.¹²⁸

2.5.5 Majority's conclusion regarding the correct interpretation

Despite the incoherence with regard to words and phrases in the provision, the CC held that the objectives of the NCA as well as section 89(5)(c)'s context could assist in interpreting it.¹²⁹ According to the CC, the phrase "despite any provision of common law" indicates the legislature's intention to deny the creditor a remedy that he might have had under common law, but which is not in line with the NCA's purposes. This remedy could be nothing other than the right to restitution.¹³⁰ Furthermore, the term "purported rights" is, in Van der Westhuizen J's view, "clumsy

¹²⁴ *Opperman* (CC) para 39.

¹²⁵ *Opperman* (CC) para 39.

¹²⁶ *Opperman* (CC) para 40.

¹²⁷ *Opperman* (CC) para 41.

¹²⁸ *Opperman* (CC) para 41.

¹²⁹ *Opperman* (CC) para 52.

¹³⁰ *Opperman* (CC) para 53.

but understandable".¹³¹ The term refers to rights that the creditor might have had if the agreement was valid, or rights that he mistakenly thinks he still has.¹³²

The court also commented that the rights might in fact always be forfeited to the state.¹³³ In response to Cameron J, Van der Westhuizen J stated that his interpretation does not ignore the words "under that credit agreement" but merely "invokes context and recognises the references to unjust enrichment in that provision".¹³⁴ Therefore, the majority of the CC confirmed that the most plausible interpretation of section 89(5)(c) is the one given by Binns-Ward J in the Cape High Court. In this regard, Van der Westhuizen J explained that, in terms of common sense and in view of the NCA as a whole, the purpose of the provision was as follows:¹³⁵

[C]onsumers have to be protected against uncontrolled credit providers and therefore credit providers are required to register; credit providers who do not register in contravention of the NCA face severe consequences; courts must declare the agreement void and order *either* that all rights perceived to follow from the agreement (including the right to restitution) are cancelled *or* forfeited to the state.

For the rest of this contribution I accept the majority of the CC's interpretation of section 89(5)(c) as the correct one. It is to my mind evident that a forfeiture of the unregistered credit provider's right to reclaim performance rendered was indeed what the legislature intended, although it failed to express itself logically (which is nothing new when it comes to the NCA). Henceforth I focus on the constitutional property law enquiry.

¹³¹ *Opperman* (CC) para 54.

¹³² *Opperman* (CC) para 54.

¹³³ *Opperman* (CC) para 55, with reference to *Cherangani* (CC) para 14 and Otto 2009 *TSAR* 431, 434.

¹³⁴ *Opperman* (CC) para 56.

¹³⁵ *Opperman* (CC) para 55 (original emphasis).

3 The property challenge

3.1 General: Constitutional property law

Section 25(1) of the *Constitution* provides that¹³⁶

[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

To conduct a constitutional property challenge, one must follow the methodology set out by the CC per Ackermann J in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*,¹³⁷ which entails a number of steps. Roux lists the various questions, of which only the first four are relevant for section 25(1) purposes:¹³⁸

- (a) Does that which is taken away from [the property holder] by the operation of [the law in question] amount to property for purposes of s 25?
- (b) Has there been a deprivation of such property by the [organ of state concerned]?
- (c) If there has, is such deprivation consistent with the provisions of s 25(1)?
- (d) If not, is such deprivation justified under s 36 of the Constitution?

If one proves that the interest that is violated amounts to "property" and that there is a deprivation of such property, one needs to assess whether the deprivation is constitutionally valid and therefore whether it complies with the requirements of

¹³⁶ For the most comprehensive analyses of s 25 in general, see Van der Walt *Constitutional Property* and Roux "Property".

¹³⁷ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) (hereafter "FNB").

¹³⁸ Roux "Property" 46-3, with reference to *FNB* para 46. The rest of the steps relate to expropriation.

section 25(1). If the deprivation fails the section 25(1) test, there remains the possibility (in theory at least) to save it in terms of the limitation clause.¹³⁹

To satisfy the requirements of section 25(1), the deprivation in question must be effected in terms of *law of general application*. Secondly, this *law* may not permit the *arbitrary* deprivation of property. It was clear that the NCA is law of general application, but the more pertinent question was if section 89(5)(c) permitted the arbitrary deprivation of the applicant's property. Neither the high court nor the CC had any difficulty finding that the claim to restitution was "property" for section 25(1) purposes or that the forfeiture amounted to a deprivation. Instead, the decisions focussed mostly on assessing the deprivation against the non-arbitrariness standard.¹⁴⁰

3.2 Forfeiture of the right to claim restitution: deprivation of property

Although the third and fourth respondents "faintly" argued that forfeiture of the right to claim restitution is not a deprivation of property, the Cape High Court held that¹⁴¹

[t]here is ... no doubt that the claim would fall to be counted as an asset in the applicant's estate and thus part of his patrimony. The claim not only has a monetary value, it is amenable, like any corporeal property owned by the applicant, to being disposed of and transferred by him to a third party.

Opperman (CC)¹⁴² also addressed the question whether or not the "purported rights" of creditors to "recover any money paid or goods delivered" is property for section

¹³⁹ Section 36(1) of the *Constitution*. See 3.4 below.

¹⁴⁰ As Roux "Property" 46-2–46-5 predicted (and as the *Opperman* decisions seem to prove), the constitutional property challenge is bound to revolve around the non-arbitrariness test. He refers to this result as the arbitrariness vortex. See also Van der Walt *Constitutional Property* 229 and 236.

¹⁴¹ *Opperman* (CHC) para 18. The court cited Roux "Property" 46-16, who in turn relies on Van der Walt *Property Clause* 30-71 (currently in its third addition, published as Van der Walt *Constitutional Property*), and the court also referred to *Hewlett v Minister of Finance* 1982 1 SA 490 (ZS) 497-501 (hereafter "*Hewlett v Minister*").

¹⁴² *Opperman* (CC) paras 57-64.

25 purposes.¹⁴³ The CC had not previously specifically held that personal rights emanating from contract, delict or enrichment are "property" under section 25.¹⁴⁴

Although a personal right is not a real right in property like ownership or usufruct, the Court held that section 25 does not deal with ownership but with property.¹⁴⁵ Because the Court had also previously recognised a claim for loss of earning capacity or support as "property", it held that "the recognition of the right to restitution of money paid, based on unjustified enrichment, as property under section 25(1) is logical and realistic".¹⁴⁶ This position would also be in line with foreign jurisdictions in which personal rights have been recognised as property for constitutional purposes.¹⁴⁷

Because intangible property has become important in modern-day society, the CC held that "*property* should not be so narrowly interpreted as to diminish the worth of the protection given by section 25".¹⁴⁸ Van der Westhuizen J relied on the following statement in *Law Society v Minister*:¹⁴⁹

[T]he definition of property for purposes of constitutional protection should not be too wide to make legislative regulation impracticable and not too narrow to render the protection of property of little worth.

Therefore, the CC concluded that the applicant's enrichment claim qualified as property under section 25 of the *Constitution*.¹⁵⁰ The next question was if the

¹⁴³ *Opperman* (CC) para 57.

¹⁴⁴ *Opperman* (CC) para 61.

¹⁴⁵ *Opperman* (CC) para 61.

¹⁴⁶ *Opperman* (CC) para 63 (footnote omitted), citing Van der Walt *Constitutional Property* 115-116 and 141-142, and referring to the CC's earlier decision in *Law Society of South Africa v Minister for Transport* 2011 1 SA 44 (CC) para 84 (hereafter "*Law Society v Minister*").

¹⁴⁷ *Opperman* (CC) para 63. In this regard the CC mentioned Germany, Australia and Ireland, and cited Van der Walt *Constitutional Property* 150-168 and the Irish case of *In the matter of Article 26 of the Constitution and in the matter of the Health (Amendment) (No. 2) Bill 2004* [2005] IESC 7. It further referred to the case of *Hewlett v Minister*, where the Zimbabwean Supreme Court found that debts owed by the state are property for purposes of the *Constitution of Zimbabwe*, 1979.

¹⁴⁸ *Opperman* (CC) para 63 (original emphasis).

¹⁴⁹ *Law Society v Minister* para 83, as quoted by *Opperman* (CC) para 63.

¹⁵⁰ *Opperman* (CC) para 64.

forfeiture amounted to a *deprivation* in terms of the property clause.¹⁵¹ In this respect the CC confirmed its earlier definition of deprivation in *FNB*, namely that it "depends on the extent of interference with the use, enjoyment or exploitation" of the right.¹⁵² The Court also added the qualification it had made in *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd*,¹⁵³ namely that if the interference is "significant enough to have a legally relevant impact" on the affected rights, it qualifies as deprivation.¹⁵⁴

Since forfeiture involves state conduct through which property is lost to the state without the owner's consent and without just compensation,¹⁵⁵ the court confirmed the well-established principle that forfeiture results in the deprivation of property.¹⁵⁶ In other words, the forfeiture effected by section 89(5)(c) of the NCA also qualifies as deprivation of property and as such had to be tested against the requirements of section 25(1) of the *Constitution*.

Section 89(5)(c) of the NCA provides another example of how the state can interfere with property rights so as to achieve a public purpose. On the assumption that creditors should not be allowed to benefit from unlawful credit agreements or, more specifically, that debtors should not suffer as a result of creditors who operate unlawfully, the NCA obliges the courts to declare the creditor's right to claim restitution either cancelled or forfeit to the state. The motive behind this measure seems to be to discourage creditors from entering into these prohibited agreements. When they do so and if the debtor would be unjustly enriched (by the fact that it does not have to return the monies or goods received to the creditor), the state would acquire the right to claim such restitution from the debtor. This results in a

¹⁵¹ *Opperman* (CC) para 65.

¹⁵² *Opperman* (CC) para 66, with reference to *FNB* paras 57-58 and 60.

¹⁵³ *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2011 1 SA 293 (CC) paras 39 and 41.

¹⁵⁴ *Opperman* (CC) para 66.

¹⁵⁵ The court cited Van der Walt 2000 *SAJHR* and Van Jaarsveld 2006 *Fundamina* 138-147.

¹⁵⁶ *Opperman* (CC) para 67, citing *Van der Burg v National Director of Public Prosecutions* 2012 2 SACR 331 (CC) para 1; *S v Shaik* 2008 2 SA 208 (CC); and *Mohunram v National Director of Public Prosecution (Law Review Project as Amicus Curiae)* 2007 4 SA 222 (CC) para 9.

clear reallocation of patrimony from the creditor to the state and accordingly the creditor is deprived of property.

3.3 Arbitrariness

3.3.1 Definition of the test

Once one accepts that the forfeiture of the applicant's right to claim restitution of the R7 million is a deprivation of his property, the next step is to determine if it satisfies the requirement of section 25(1) that the deprivation may not be arbitrary.¹⁵⁷ With reference to the CC judgment in *FNB*, the Cape High Court in *Opperman* repeated the test for non-arbitrariness provided by the CC. It is appropriate to quote in full the wording of *FNB*.¹⁵⁸

[I]t is concluded that a deprivation of property is "arbitrary" as meant by s 25 when the "law" referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:

- (a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and the ends sought to be achieved, namely the purpose of the law in question.
- (b) A complexity of relationships has to be considered.
- (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
- (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
- (e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the

¹⁵⁷ *Opperman* (CHC) para 19.

¹⁵⁸ *FNB* para 100, also quoted in *Opperman* (CHC) para 19. Regarding the arbitrariness test, see further Van der Walt *Constitutional Property* 245-248.

deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property.

- (f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.
- (g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36(1) of the Constitution.
- (h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with "arbitrary" in relation to the deprivation of property under s 25.

In summary, to determine whether or not a particular provision – as "law of general application" – permits an arbitrary deprivation of property, one needs to consider the relationship between the means employed and the ends sought to be achieved by such a deprivation. The test not only requires a valid public purpose for the deprivation, but it also requires that there should be a sufficient nexus between such a purpose and the person whose property is affected. The nature of the property and the extent of the deprivation must also be considered.

Furthermore, the interplay between the person, the nature of the property, the extent of the deprivation and the purpose of the deprivation will determine whether the scrutiny is one of mere rationality or one closer to a full proportionality test. In other words, depending on all the factors, it may sometimes be enough to show that there is a rational link between the purpose of the deprivation and the impact thereof.¹⁵⁹ However, at other times it might be necessary to determine if the effect

¹⁵⁹ *FNB* para 65.

of the deprivation is proportionate to its stated purpose. The former test can be referred to as a "thin rationality" test and the latter as a "thick proportionality" test, these two being situated on the extreme ends of a continuum.¹⁶⁰ The case would then lie somewhere on the continuum, depending on the various relationships.

3.3.2 Opperman (CHC)

The way Binns-Ward J applied the non-arbitrariness test is interesting because he distinguished between two aspects of the test, albeit without expressly saying so. The court first analysed the general justification of the NCA's purposes to curb unscrupulous and unlawful credit activities. It is unproblematic for the Act to have measures in place to discourage certain unwanted behaviour and to regulate the credit market more strictly – even if these measures result in deprivation of property.

However, despite the general legitimacy and validity of the NCA initiatives, a closer individualised non-arbitrariness test must be conducted to investigate how the individual creditor will be affected by the Act's measures. Therefore, it may be that the Act's initiatives are generally valid but that they are overbroad insofar as they arbitrarily deprive certain individual creditors of their proprietary claims. For example, there might be no sufficient relationship between the purpose of the deprivation and the effects thereof on that specific creditor, which was exactly the case in *Opperman*.

Consequently, the way that Binns-Ward J approached the investigation indicates a logic in terms of which one would start off with a basic rationality enquiry, namely asking if there is a legitimate purpose for the deprivation envisioned by the provision. As the court stated, the apparent object of the provision is to discourage credit granting that falls outside the regulatory framework of the NCA.¹⁶¹ The court also rightly confirmed that there is "no quibble about the legitimacy of the state's

¹⁶⁰ Van der Walt *Constitutional Property* 246.

¹⁶¹ *Opperman* (CHC) para 20.

objectives in seeking to regulate the provision of credit".¹⁶² Moreover, there can be no argument against the requirement to have persons who are in the business of providing credit to register with the NCR.¹⁶³ Both the director-general of the Department of Trade and Industry¹⁶⁴ and the acting CEO of the NCR lodged affidavits to defend the need for this registration requirement.¹⁶⁵

The NCA was enacted to address the shortcomings caused by the outdated nature and ineffectiveness of the *Usury Act*¹⁶⁶ and the *Credit Agreements Act*.¹⁶⁷ According to the director-general's affidavit, the previous framework distorted the credit market by way of "differential and unequal treatment of different credit products and credit providers".¹⁶⁸ The result was also that consumer protection was afforded at different levels, "with the poorest and most vulnerable having the least protection".¹⁶⁹ Because the previous statutes were not properly enforced, the practices of unscrupulous credit providers became the norm, which had the effect that certain segments of the credit market were stigmatised. The result was that "reputable credit providers" (mostly banks) were discouraged from granting credit to the low-income market and from granting affordable loans to low-income earners. Over-indebtedness, reckless credit, as well as the high cost of credit and the lack of access to credit in some areas contributed to the need to re-evaluate the whole credit system.¹⁷⁰

Therefore, as the court summarised, the intended effect of the NCA – as confirmed by its long title and its provisions as a whole – is¹⁷¹

(i) to introduce controls in the credit industry directed at addressing the exploitation of poor persons – primarily micro lenders (ii) promoting the non-discriminatory

¹⁶² *Opperman* (CHC) para 20.

¹⁶³ *Opperman* (CHC) para 20.

¹⁶⁴ Hereafter "the DTI".

¹⁶⁵ *Opperman* (CHC) para 20.

¹⁶⁶ *Usury Act* 73 of 1968.

¹⁶⁷ *Credit Agreements Act* 75 of 1980. The NCA repealed both of these Acts.

¹⁶⁸ *Opperman* (CHC) para 21.

¹⁶⁹ *Opperman* (CHC) para 21.

¹⁷⁰ *Opperman* (CHC) para 21.

¹⁷¹ *Opperman* (CHC) para 22 (footnote omitted).

availability of credit, thereby breaking down the rich-poor divide in access to credit – a divide that manifested in large measure along racial lines; (iii) providing for the improved collection of credit-related data, and, in close connection with this object, creating a framework for the registration of credit bureaux, credit providers and debt counselling services; (iv) discouraging the reckless extension of credit; and (v) putting in place mechanisms to facilitate the redemption of credit-agreement related indebtedness and the adjudication of disputes or complaints concerning credit agreement transaction.

The court acknowledged the obvious legitimacy of these objectives but emphasised that the current case necessitated a focus on specific aspects of the NCA and an examination of whether or not there was sufficient reason for the particular deprivation contemplated by section 89(5)(c) of the Act.¹⁷² Hence, the next step in the court's logic (after accepting the general validity of the public purpose of the NCA) was to do a deeper scrutiny of the specific deprivation and to investigate the detailed nexus between the deprivation and its purpose.

The court verified that the registration of credit providers clearly fulfils an important part in assisting the NCR to discharge its functions, which include the maintaining of a register of credit providers, gathering information to monitor and supervise the credit industry, reviewing legislation, and submitting reports to the DTI to assist in ongoing improvements of the Act.¹⁷³ However, Binns-Ward J was sceptical as to whether information regarding the extension of credit by an individual on an *ad hoc* basis who is not doing so in the course of business would "contribute meaningfully" to the functions of the NCR.¹⁷⁴ In fact, the kind of information that registered credit providers would have to furnish to the NCR is the type of data that would be meaningful only with regard to persons who are in the business of providing credit and not with respect to those who provide credit "only on an isolated occasion".¹⁷⁵ Therefore, the court implied that there was no true nexus between having someone like the applicant register and the stated purpose for such registration. In my view,

¹⁷² *Opperman* (CHC) para 22.

¹⁷³ *Opperman* (CHC) para 22-23.

¹⁷⁴ *Opperman* (CHC) para 24.

¹⁷⁵ *Opperman* (CHC) para 24.

this problem is highlighted by the fact that the result is a deprivation of property, without which there would have been no constitutional property challenge.

The court noted that there are various indications in the Act itself that the legislature conceived of requiring registration only for persons who, either alone or in association with others, are engaged in "the business of providing credit".¹⁷⁶ These include section 40(2)(c), which contains the words "conducts business". It was not clear from the Act why a person like the applicant (who wanted to provide credit in excess of R500 000 on an *ad hoc* basis to a personal friend) would have to register and hence provide information to the NCR so that it can consider matters such as credit extended for black economic empowerment purposes or in relation to the combat against over-indebtedness.¹⁷⁷ The Memorandum on the Objects of the National Credit Bill, 2005 suggested that it was the initial intention of the Act not to apply to or regulate "loans between family members, partners and friends on an informal basis".¹⁷⁸ Yet the Act itself does not exclude credit agreements between friends.

The court commented that the purpose of its analysis of the apparent scope, purpose and objects of the Act was to illustrate its impression that the consequence of non-registration for a person like the applicant (namely, voidness and forfeiture) was "entirely incidental" and did not serve any of the NCA's core purposes.¹⁷⁹

The DTI's memorandum provided the following justification for section 89(5)(c):¹⁸⁰

The DTI believes that the remedy serves to balance the relative inequality of control in the design of such contracts between consumers and credit providers, and will ensure that credit providers will have a real incentive to avoid unlawful credit agreements.

¹⁷⁶ *Opperman* (CHC) para 26.

¹⁷⁷ *Opperman* (CHC) para 28.

¹⁷⁸ *Opperman* (CHC) para 28.

¹⁷⁹ *Opperman* (CHC) para 29.

¹⁸⁰ Clause 2.9 of the Memorandum on the Objects of the National Credit Bill, 2005, quoted at *Opperman* (CHC) para 30.

Strangely enough, the effects of section 89(5) were referred to as a "remedy" and the director-general's affidavit contended that this "remedy" will be restricted in its reach, since to obtain it¹⁸¹

the consumer must go to Court to protect their (sic) rights. In order to do so, consumers: (a) will have to know that credit providers are acting unlawfully; and (b) will have to be able to access legal representation.

In response, the court expressed "how misconceived the [DTI's] understanding of the effect of the provision" was.¹⁸² In the first place, the provision arose *mero motu* and not even in the context of debt enforcement proceedings or as a defence raised by the consumer.¹⁸³ Secondly, to state that the provision will be "not widely availed of" due to its alleged (and misconceived) narrow operation, "is hardly a cogent reason in defence of the impugned provision".¹⁸⁴ In fact, this argument contradicted one of the most important purposes of the Act, namely to protect vulnerable consumers.¹⁸⁵

The court further pointed out that there were other unaddressed aspects of section 89(5). For example, the Act neither indicates the context in which courts should make these orders; nor does it provide a mechanism whereby any forfeiture would be made known to the state.¹⁸⁶ The Act does not explain how the intention to prevent unjust enrichment is to be achieved either.¹⁸⁷ With reference to an anomaly when comparing the process followed before courts and the National Consumer Tribunal, the court noted that the third and fourth respondents did not make suggestions as to why the¹⁸⁸

¹⁸¹ Para 66.8 of the director-general's affidavit, quoted at *Opperman* (CHC) para 30.

¹⁸² *Opperman* (CHC) para 31.

¹⁸³ *Opperman* (CHC) para 31.

¹⁸⁴ *Opperman* (CHC) para 31.

¹⁸⁵ *Opperman* (CHC) para 31.

¹⁸⁶ *Opperman* (CHC) para 32.

¹⁸⁷ *Opperman* (CHC) para 32.

¹⁸⁸ *Opperman* (CHC) para 33.

system of administrative fines available in proceedings before the Tribunal could not, with suitable adaptation, by itself and without derogation from basic rights, afford a suitable incentive to compliance in the context of equivalent matters brought before the courts.

This sort of reasoning is typical of proportionality-type assessments. In other words, the court noticed that there might be another way to achieve the purposes of section 89(5)(c), without infringing the applicant's property rights under section 25(1).

In defence of section 89(5)(c)(ii), the director-general's affidavit included more considerations that "informed the adoption" of the provision.¹⁸⁹ The crux of the argument was that under the previous dispensation many micro-lenders refused to register and therefore continued to trade unlawfully and in an uncontrolled environment. The assumption was that these lenders would similarly fail to register in terms of the NCA, especially since the new dispensation is stricter. Consequently, these lenders will persist in doing business unlawfully, at the expense of the registered sector and ultimately to the prejudice of consumers. It would defeat the purposes of the Act to allow unregistered credit providers to continue trading and making invalid contracts. It would further deprive consumers of the Act's protection against unregistered credit providers. Therefore, the provision is aimed at protecting the public against such credit providers who fail to comply with the NCA and hence place vulnerable people at risk. Because a transgression of the registration requirement does not amount to an offence, the director-general argued further that section 89(5)(c) was a reasonable and effective way of enforcing the registration requirement.

Despite the director-general's arguments, Binns-Ward J found that these considerations¹⁹⁰

¹⁸⁹ Para 66.1 to 66.5 of the director-general's affidavit, quoted at *Opperman* (CHC) para 35.

¹⁹⁰ *Opperman* (CHC) para 36.

do not, either singly or collectively, provide sufficient reason for the forfeiture provision in s 89(5)(c) of the NCA. The facts of the current case demonstrate that an *ad hoc* lender of money, who is not in the business of providing credit, has been caught within the ambit of the provision the apparent objects of which do not bear on the type of transaction in which he engaged.

The applicant's actions did not place the public at risk. Moreover, he was neither a micro-lender, nor was the transaction remotely similar to the kind of transactions that the stricter regulation (and registration requirement) was aimed at.¹⁹¹ Ironically, the provision did not impact on a person who was involved in 99 outstanding micro loans of R5 000 each – someone who was actually in the business of micro lending.¹⁹² The reason for this is that such a person would, in terms of the Act, not be required to register, since he was involved in less than 100 credit agreements and the total outstanding debt was below R500 000. In my view, this illogical outcome contributes to the prospect that there was no rational reason for the NCA to deprive the applicant of his claim to restitution. It aimed to punish the applicant (who was clearly not operating in contradiction to the spirit of the NCA) whereas others who may be operating unscrupulously would be able to get away with their actions because they are not required to register.

The court moreover noticed that this case did not illustrate any imbalance of power or vulnerability on the side of the borrower.¹⁹³ The court also rejected the argument that the deprivation in terms of section 89(5)(c) was necessary due to the absence of criminal sanctions for non-registration.¹⁹⁴ The omission of a criminal sanction (when it is required) is a result of poor drafting and does not of itself justify another sanction, like forfeiture. Moreover, it is not correct that non-registration is not criminalised.¹⁹⁵ Section 54 of the Act authorises the NCR to issue a notice to any unregistered person (who is required to be registered) to stop what it is doing. The

¹⁹¹ *Opperman* (CHC) para 36.

¹⁹² *Opperman* (CHC) para 36.

¹⁹³ *Opperman* (CHC) para 36.

¹⁹⁴ *Opperman* (CHC) para 37.

¹⁹⁵ *Opperman* (CHC) para 37.

failure to comply with this notice then qualifies as an offence.¹⁹⁶ In addition, according to sections 89(2)(e), read with 89(5)(a), any agreement concluded in breach of such a notice would also be void and subject to section 89(5)(c).

Therefore, the court stated the essence of its conclusions as follows:¹⁹⁷

As the facts of the current case show, the means chosen to incentivise compliance leads to a consequence arbitrarily determined irrespective of the presence of any wilfulness or negligence on the part of the unregistered credit provider, or its degree, and notwithstanding that its failure to have registered in the particular circumstances might hold little or no threat to the public in the context of the evils or mischiefs at which the statute is expressly directed.

The result of the court's analysis was that the concept of forfeiture in terms of section 89(5)(c)(ii) "was not properly thought through".¹⁹⁸ Therefore, in the light of the *FNB* test, the court held that sufficient reason for the forfeiture provision was not established.¹⁹⁹ The substantive effect of the provision was an arbitrary deprivation of property. The court also held that it was procedurally arbitrary, since it did not allow for any consideration of evidence or submissions by the credit provider who desires to mitigate the effect of the provision.²⁰⁰

3.3.3 Opperman (CC)

In the CC the minister argued that the deprivation effected by section 89(5)(c) was not arbitrary because the requirement of procedural fairness is satisfied. The reason for this contention was that a court must make an order before the forfeiture takes place. The problem with this argument, the CC held, was that the provision did not provide the court with a discretion based on justice and equity.²⁰¹ In this regard, the

¹⁹⁶ *Opperman* (CHC) para 37. Otto 2010 *TSAR* 168 makes the same point.

¹⁹⁷ *Opperman* (CHC) para 37.

¹⁹⁸ *Opperman* (CHC) para 38.

¹⁹⁹ *Opperman* (CHC) para 38.

²⁰⁰ *Opperman* (CHC) para 38.

²⁰¹ *Opperman* (CC) para 69.

CC referred to its previous judgment in *Mohunram v NDPP*,²⁰² where it held that it would amount to arbitrary deprivation of property if the court that orders the forfeiture had no discretion.²⁰³ The *Opperman* case therefore confirms that a deprivation of property effected in terms of legislation will be arbitrary if the court is compelled to grant the order without being allowed to exercise a discretion that takes the justice of the case into consideration.²⁰⁴

Because the deprivation effected by the section 89(5)(c) forfeiture was not partial and it "effectively removes an unregistered credit provider's right to restitution", the court held there had to be persuasive reasons.²⁰⁵ The minister argued that the purpose of the deprivation was important, since it was aimed at protecting the public against unscrupulous creditors. Moreover, the provision was punitive in nature so as to deter unregistered creditors from operating outside the regulatory framework of the Act when they grant loans.²⁰⁶ Although the CC respected these objectives, it was not convinced that the importance of the purpose provided sufficient reason for the deprivation.²⁰⁷

The Court commented that "[w]hereas regulated deprivation may be permissible to further compelling interests, the state still has to be constrained in how it may pursue those ends".²⁰⁸ Since the scope of the deprivation was so far-reaching in this case, the purpose had to be stated clearly and the means chosen to accomplish it had to be narrowly framed.²⁰⁹ Concerning section 89(5)(c), the Court therefore found that the means chosen were disproportionate to the purpose.²¹⁰ In other words, the provision resulted in arbitrary deprivation in contravention of section

²⁰² *Mohunram v National Director of Public Prosecution (Law Review Project as Amicus Curiae)* 2007 4 SA 222 (CC) para 121.

²⁰³ *Opperman* (CC) para 69.

²⁰⁴ This position is reminiscent of Van der Walt's conclusion that a deprivation that takes place in terms of legislation will be procedurally fair only if the act provides for judicial oversight: See Van der Walt 2012 *Stell LR* 94. Judicial oversight necessarily implies a discretion, without which it will be judicial oversight in name only.

²⁰⁵ *Opperman* (CC) para 70, citing *S v Bhulwana, S v Gwadiso* 1996 1 SA 388 (CC) para 18 (hereafter "*S v Bhulwana*").

²⁰⁶ *Opperman* (CC) para 70.

²⁰⁷ *Opperman* (CC) para 71.

²⁰⁸ *Opperman* (CC) para 71.

²⁰⁹ *Opperman* (CC) para 71.

²¹⁰ *Opperman* (CC) para 71.

25(1) of the *Constitution*.²¹¹ The CC in essence endorsed the Cape High Court's analyses.

3.4 Justification under section 36

3.4.1 Opperman (CHC)

In terms of the *FNB* test, if one finds that a certain provision permits an arbitrary deprivation of property and accordingly violates section 25(1), the next step is to determine if such a limitation of the section 25(1) right can be saved in terms of section 36(1) of the *Constitution*. Before the Cape High Court, the third and fourth respondents argued that this indeed would be possible in this case.²¹²

Section 36 – the limitation clause – provides as follows:²¹³

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

The court noted that it would be realistic to acknowledge that an argument based on section 36(1) would not be an easy one to make:²¹⁴

²¹¹ *Opperman* (CC) para 72.

²¹² *Opperman* (CHC) para 39.

²¹³ On the limitation clause in general, see Woolman and Botha "Limitations"; Currie and De Waal *Bill of Rights* 163-188.

²¹⁴ *Opperman* (CHC) para 39.

Arbitrariness is essentially antithetical to the core values of the Constitution which espouse rationality, reasonableness and justifiability – without which accountability, responsiveness and openness go wanting, as indeed does a credible foundation for the rule of law.

Moreover, the court pointed out that the considerations for the section 25(1) sufficient-reason test correspond notably to the considerations one must take into account under the section 36 justification test.²¹⁵ Therefore, many of the aspects it would take into account when doing a section 36(1) enquiry had already been taken into account when it did the section 25(1) assessment.²¹⁶

The court nevertheless briefly considered if there might be further considerations that could justify the arbitrary deprivation of property. However, counsel could not provide the court with any equivalent provision in foreign law, not even from those jurisdictions that the government ostensibly investigated when it drafted the NCA.²¹⁷ Furthermore, there is no indication that the government took account of the common law principles laid down in *Jajbhay v Cassim*, and there was no reason why the normal common law consequences of void contracts could not be a sufficient incentive for credit providers to register.²¹⁸ A creditor who concluded an unlawful credit agreement would after all not be able to levy any interests, charges or fees, which is its sole purpose for concluding the agreement. The court could not contemplate why, in addition to losing its claim for profit, the credit provider would also have to forfeit its capital.²¹⁹ In further criticism of section 89(5)(c) the court held as follows:²²⁰

The difference between the ordinary consequences of voidness and those following on the operation of the attendant forfeiture provision points to the divide between a legitimately devised encouragement to statutory compliance (which is unexceptionable) and the creation, under a civil guise, of a substantively and

²¹⁵ *Opperman* (CHC) para 39. See also Van der Walt *Constitutional Property* 285.

²¹⁶ *Opperman* (CHC) para 40.

²¹⁷ *Opperman* (CHC) para 40.

²¹⁸ *Opperman* (CHC) para 40.

²¹⁹ *Opperman* (CHC) para 40.

²²⁰ *Opperman* (CHC) para 40.

procedurally unjust penal system for non-compliance (which does not bear constitutional scrutiny).

Accordingly, at least in many cases, the means used to achieve the statutory end (namely, the arbitrary deprivation of property) is "unreasonably and unjustifiably disproportionate" in its effects. For this reason the violation of section 25(1) could also not satisfy section 36(1).²²¹

3.4.2 Opperman (CC)

Before the CC, the minister once again argued, in the alternative, that section 89(5)(c) involved a constitutionally permissible limitation of the creditor's section 25(1) right.²²² The CC noted the immediate question: "can the deprivation of property which is indeed arbitrary, ever be a reasonable and justifiable limitation in an open and democratic society, in terms of section 36(1)?"²²³ As Roux had pointed out, there are obvious conceptual difficulties in acknowledging a positive answer to this question.²²⁴ The CC quoted from Ackermann J's judgment in *S v Makwanyane*:²²⁵

Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the precepts or principles of the Constitution.

Even the minister agreed that a section 36(1) argument would be a difficult one to make if arbitrary deprivation had been proven.²²⁶ However, *FNB* had earlier assumed, without deciding, that an arbitrary deprivation must be tested under

²²¹ *Opperman* (CHC) para 40.

²²² *Opperman* (CC) para 73.

²²³ *Opperman* (CC) para 73.

²²⁴ *Opperman* (CC) para 73, with reference to Roux "Property" 46-26. See further Van der Walt 2012 *JQR* para 2.1.1; Van der Walt *Constitutional Property* 76-77.

²²⁵ *S v Makwanyane* 1995 3 SA 391 (CC) para 156, quoted by Van der Westhuizen J in *Opperman* (CC) para 73.

²²⁶ *Opperman* (CC) para 73.

section 36.²²⁷ Moreover, as *FNB* also remarked, the wording of section 36 does not appear to exclude the limitation of any right from its provisions.²²⁸ In fact, section 25(8) expressly states that any departure from section 25 must be "in accordance with the provisions of section 36(1)".²²⁹

Like the Cape High Court, the CC in *Opperman* observed that many of the factors that would be used under the arbitrariness test would lead to the same conclusion when doing the section 36 test.²³⁰ As section 36(1)(d) requires, the relationship between the limitation and its purpose must be investigated. The CC confirmed that disproportionate means may not be used to achieve purposes that impact on constitutional rights.²³¹ Also, section 36(1)(e) requires that the availability of less restrictive means must be considered. In this respect the CC held that the common law position is less restrictive than section 89(5)(c). In the first place, turpitude is taken into consideration when restitution is claimed based on performance rendered in terms of an unlawful contract. Secondly, the common law does discourage the granting of loans by unregistered credit providers. In addition, as section 89(5)(b) requires, the creditor must refund all money paid by the debtor, with interest.

Therefore, the lack of "a discretion to distinguish between credit providers who intentionally exploit consumers and those who fail to register because of ignorance and lend money to a friend on an *ad hoc* basis" is disproportional.²³² The debtor can furthermore complain to the NCR, who can bring the complaint to the National Consumer Tribunal, who can declare the creditor's conduct as prohibited.²³³ The Tribunal can also impose certain administrative fines.²³⁴ This measure assists in achieving the NCA's stated purposes.²³⁵ Another mechanism to achieve the NCA's purpose is the fact that the creditor is not legally entitled to interest in terms of the

²²⁷ *Opperman* (CC) para 74, with reference to *FNB* para 110.

²²⁸ *Opperman* (CC) para 74, with reference to *FNB* para 110.

²²⁹ *Opperman* (CC) para 74.

²³⁰ *Opperman* (CC) para 75.

²³¹ *Opperman* (CC) para 76, citing *S v Manamela (Director-General of Justice Intervening)* 2000 3 SA 1 (CC) para 34.

²³² *Opperman* (CC) para 76.

²³³ *Opperman* (CC) para 77, with reference to s 136 NCA.

²³⁴ *Opperman* (CC) para 77, with reference to s 151(3) NCA.

²³⁵ *Opperman* (CC) para 77.

unlawful agreement. Hence, foregoing the interest is another way to achieve the goals of the NCA in a way that is less restrictive than the route chosen by section 89(5)(c).²³⁶

In effect, all the factors mentioned in section 36(1) were already taken into account when doing the arbitrariness test.²³⁷ Hence, the Court was "not persuaded that section 89(5)(c) [could] be saved as a reasonable and justifiable limitation" of the right contained in section 25(1).

3.5 Remedy

3.5.1 Opperman (CHC)

The Cape High Court re-emphasised that the forfeiture provision was not properly thought through and that it does not serve its purpose in an effective or coherent manner. There seemed to be no clarity with regard to why the provision was necessary or why the ordinary common law consequences of void agreements could not sufficiently achieve the legislature's intention. Therefore, regarding the possibility of reading words into the provision to remedy its unconstitutionality, the court held that "judicial re-crafting" of the provision would not amount to a just and equitable remedy.²³⁸

It had not been shown that section 89(5)(c) plays a necessary or important role in achieving the aims of the Act.²³⁹ Moreover, the court was of the opinion that the common law consequences of void agreements are in themselves enough incentive to comply with the registration requirement. In addition, the invalidity of section 89(5)(c) will leave unaffected the criminal and administrative sanctions that can be imposed upon unregistered credit providers. Therefore, no one could be expected

²³⁶ *Opperman* (CC) para 78.

²³⁷ *Opperman* (CC) para 79.

²³⁸ *Opperman* (CHC) para 43.

²³⁹ *Opperman* (CHC) para 44.

"to tolerate the infringement of basic rights" and therefore a suspension of the order of invalidity would also be inappropriate.

Since an order of invalidity would have no force until the CC confirms it, the court postponed the sequestration application and extended the rule *nisi* for six months so as to await the outcome of the CC proceedings.²⁴⁰

3.5.2 Opperman (CC)

Before the CC the NCR argued that the constitutional difficulty of the provision could be remedied by reading in an appropriate discretion.²⁴¹ The discretion would allow a court to take account of the objectives of the NCA.²⁴² However, the CC held that it would be preferable for Parliament to address the content of the provision comprehensively, "rather than for a court to venture into patch-work legislating".²⁴³ Hence, the Court decided to declare the provision invalid without any reading in.²⁴⁴

The minister requested the court to suspend the order of invalidity for two years to grant Parliament some time to amend the NCA. However, the CC agreed with the high court that "no significant gap would be created by an order which does not provide for a period of suspension".²⁴⁵ The common law will simply apply until the legislature replaces section 89(5)(c), which will result in just outcomes, since the degree of blameworthiness of the unregistered creditor will be taken into account.²⁴⁶ Concerning retrospectivity, the CC held that the order of invalidity will have no effect on cases that already have been finalised.²⁴⁷

²⁴⁰ *Opperman* (CHC) para 47.

²⁴¹ *Opperman* (CC) para 82.

²⁴² *Opperman* (CC) para 83.

²⁴³ *Opperman* (CC) para 84.

²⁴⁴ *Opperman* (CC) para 84.

²⁴⁵ *Opperman* (CC) para 85.

²⁴⁶ *Opperman* (CC) para 85.

²⁴⁷ *Opperman* (CC) para 87, citing *S v Bhulwana* para 32.

3.6 A brief comment on the remainder of section 89(5)

As Otto explains, the CC did not resolve all the problems regarding section 89(5), since it dealt with the constitutionality of paragraph (c) only, whereas paragraph (b) is still in place.²⁴⁸ This provision mandates a court to order that "the credit provider must refund to the consumer any money paid by the consumer under that [unlawful credit] agreement to the credit provider, with interest ... "²⁴⁹ Because this paragraph does not account for the rights of creditors, Otto believes that, similar to section 89(5)(c), it will be declared unconstitutional eventually.²⁵⁰ The author sees in this provision the startling possibility that the debtor would be able to reclaim all the amounts of the loan that he has repaid to the creditor, notwithstanding that this is the money that the creditor originally lent to the debtor.²⁵¹

With paragraph (c) having been declared invalid and hence removed from section 89(5), paragraph (b) makes little sense. The CC also acknowledged the potential problem with paragraph (b) and remarked that section 89(5) as a whole needs to be reformulated by Parliament, since leaving paragraph (b) in place may create tension between the debtor's claim for a refund and the creditor's enrichment claim.²⁵² The only way that paragraph (b) could have made sense is if paragraph (c) was constitutionally acceptable, but without paragraph (c) it would be artificial to try to establish meaning for the remainder of section 89(5). Instead, as Otto contends, the legislature ought to reconsider the subsection as a whole.²⁵³

4 Conclusion

The *Opperman* decisions show that the common law regulation of unlawful agreements (the *par delictum* rule and its exceptions) is more sophisticated and, since it leaves the court with a discretion, is more in line with the *Constitution* than

²⁴⁸ Otto 2013 *TSAR* 234.

²⁴⁹ Section 89(5)(b) NCA.

²⁵⁰ Otto 2013 *TSAR* 234.

²⁵¹ Otto 2013 *TSAR* 234.

²⁵² *Opperman* (CC) para 86.

²⁵³ Otto 2013 *TSAR* 234.

Parliament's attempt to address the issue in the NCA. The common law allows parties to forfeit performances rendered under invalid agreements only if there is a degree of bad faith or turpitude present. On the other hand, the NCA obliges courts to order such a forfeiture without any regard to the parties' blameworthiness.

The common law also does not result in the state's obtaining the right to claim restitution of performances rendered, whereas the NCA does have this effect. The NCA's apparent aim is to avoid unjust enrichment on the part of the debtor but nevertheless to punish the creditor for having granted credit without being registered. This punishment, which purports to discourage non-registration, however, does not take the form of a criminal fine (of which there are examples in the Act), but simply requires a forfeiture to the state of the "guilty" creditor's right of restitution.

As the scrutiny by the Cape High Court and the CC illustrates, the NCA's measures to address the consequences of unlawful agreements are incoherent, unclear, overbroad and constitutionally unacceptable. Hopefully Parliament will come up with something more sophisticated and more narrowly defined so as to address the problem of credit agreements entered into by unregistered credit providers.

Furthermore, Parliament should rethink the class of credit providers that ought to be registered, since it is clear that certain creditors who might actually commit the types of wrongs that the Act wishes to avoid do not even have to register, whereas others who pose a very low risk (like *ad hoc* lenders) must be registered. Given the degree to which it might result in the deprivation of *bona fide* creditors' property rights, this anomaly is patently arbitrary and irrational.

If Parliament is of the view that the normal consequences of unlawful credit agreements (like the *par delictum* rule) do not adequately discourage non-registration, this fact should be addressed by measures that are in line with the *Constitution*. That is, they must be fair, rational and narrowly defined so as to not unjustifiably prejudice those creditors who are not guilty of the undesired behaviour

that the registration requirement aims to address. When it amends the Act, the legislature ought to study the rules that have developed surrounding the application of the *par delictum* rule even if it wishes not to follow the exact same approach.

It is necessary to point out that the recently published Draft National Credit Amendment Bill²⁵⁴ acknowledges that section 89(5)(c)(ii) must be removed, yet no attempt is made to amend section 89(5) as a whole, despite the calls for its reconsideration. It appears that Parliament accepts that the common law as it stands should regulate the matter instead. Unfortunately, the legislature also does not propose the removal of paragraph (b). One can only hope that the eventual amendment will address the issue more comprehensively.

On a more general level, the decision will have broader consequences in the law regarding credit agreements, since it is clear how useful constitutional property law can be when analysing the effects of legislation like the NCA. *Opperman* dealt with the right to claim restitution of performance rendered in terms of an unlawful agreement. This claim – based on unjust enrichment – is a personal right sounding in money, which can now conclusively be regarded as "property" for constitutional purposes. More generally, the case also opens the door to assume that other money claims like personal rights created by contract and delict will also qualify as "property" for constitutional purposes.

Therefore, when the NCA (or any other law of general application) regulates creditors' rights to claim performance of personal rights created under credit agreements (or any other agreement), these regulations might amount to deprivation of property for section 25 purposes. The result would be that these interferences with creditors' rights must be measured against the non-arbitrariness standard as set out in *FNB* and illustrated in the *Opperman* judgments. Recognising the role of section 25 in the current context is a positive development and calls for

²⁵⁴ Draft National Credit Amendment Bill, 2013. See GN 560 in GG 36505 of 29 May 2013. See also para 2.1.3.4.7 of the Draft National Credit Act Policy Review Framework, 2013 (GN 559 in GG 36504 of 29 May 2013).

lawmakers to draft legislation in such a way that regulatory mechanisms are sophisticated, rational and sufficiently proportionate to their goals.

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List of abbreviations

CC	Constitutional Court
CEO	Chief Executive Officer
CHC	Cape High Court
DTI	Department of Trade and Industry
FSHC	Free State High Court
GG	Government Gazette
GN	General Notice
JQR	Juta's Quarterly Review
NCA	National Credit Act 34 of 2005
NCR	National Credit Regulator
SAJHR	South African Journal on Human Rights
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review
TSAR	Tydskrif vir die Suid-Afrikaanse Reg