Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 24887/2010

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

FILIPPUS ALBERTUS OPPERMAN	Applicant
and	
JACOBUS BOONZAAIER	First Respondent
THE MINISTER OF FINANCE	Second Respondent
THE MINISTER OF TRADE AND INDUSTRY	Third Respondent
THE NATIONAL CREDIT REGULATOR	Fourth Respondent

JUDGMENT DELIVERED: 17 APRIL 2012

BINNS-WARD J:

[1] The applicant, who resides in Namibia and is a farmer by occupation, lent his then friend, the first respondent, who at all times relevant resided in Stellenbosch, an amount of R7 million. The purpose of the loans, which were advanced in terms of three written agreements, two of them concluded on 12 August 2009 and the other on 8 September 2009, was to assist the first respondent to undertake a property development in Cape Town. When the due dates for the repayment of the loans had

passed, the first respondent confessed his inability to meet his obligations. The applicant thereupon applied for the sequestration of the first respondent's estate. The application was not opposed. The applicant succeeded in obtaining a provisional order. When the matter subsequently came before me on the return day of the rule *nisi* granted in terms of s 11 of the Insolvency Act,[1] I declined to make a final order because of certain concerns that I had arising out of the provisions of the National Credit Act ('the NCA').[2] I acceded to a request by the applicant's counsel for a postponement to enable argument to be prepared on the points of difficulty that I had raised, and extended the rule accordingly. The application has thereafter been further postponed in the unopposed motion court on a number of subsequent occasions. The notice of motion has also been amended to include a challenge to the constitutionality of s 89(5) of the NCA.

[2] The introduction of the constitutionality challenge resulted in the joinder as parties in the proceedings of the second, third and fourth respondents, being the Minister of Finance, the Minister of Trade and Industry and the National Credit Regulator, respectively. The joinder of the second respondent was necessary because the impugned provision puts in prospect a forfeiture to the state of all or part of the applicant's claim against the first respondent.[3] The second respondent has not taken an active part in the proceedings and abides the judgment of the court. The third respondent is the member of the Cabinet responsible for the administration of the NCA. The fourth respondent is a juristic person established in terms of s 12 of the

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[1] Act No. 24 of 1936.
[2] Act No. 34 of 2005.
[3] Cf. *Cherangani Trade and Invest 107 (Pty) Ltd v Mason NO and others* 2011 (11) BCLR 1123 (CC) at para.s 10 and 14-16; and *Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy* 1984 (3) SA 1 (A) at pp.10-12 and 14F-H.

NCA, which has a number of relevant functions, including the enforcement of the Act[4] and the promotion of public awareness of consumer credit matters, obtaining declaratory relief on the interpretation or application of any provision of the NCA[5] and reviewing legislation and reporting to the third respondent concerning matters relating to consumer credit.[6]

[3] The implication of the NCA arises because the loans by the applicant to the first respondent are credit agreements to which the provisions of the statute apply.[7] The applicant, as the lender, qualifies in the language of the NCA as a '*credit provider*'[8] and the first respondent, as the borrower, is a '*consumer*' as defined in the Act.[9] Subject to the exclusions provided in terms of s 39 of NCA (none of which applies on the facts of the current case), s 40 of the Act requires a person who alone, or in conjunction with any 'associated person',[10] is the credit provider under at least 100 credit agreements, other than 'incidental credit agreements',[11] or to whom the total principal debt owed in terms of all such outstanding credit agreements exceeds

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[4] Section 15(1) of the NCA.
[5] Section 16(1)(b)(ii) of the NCA.
[6] Section 16(1)(g) of the NCA.
[7] Although the applicant 'is located outside the Republic', an exemption from the operation of the Act as contemplated in terms of s 4(1)(d) of the NCA was not sought by the first respondent from the Minister.
[8] See para. (h) of the definition of 'credit provider' in s 1 of the NCA.
[9] See para. (h) of the definition of 'consumer in s 1 of the NCA.
[10] Section 40(2)(d) contains a definition of the term 'associated person'. Part of the definition is quoted in para. [26], below.
[11] An 'incidental credit agreement' is '*an agreement, irrespective of its form, in terms of which an account was tendered for goods or services that have been provided to the consumer, or goods or services that are to be provided to a consumer over a period of time and either or both of the following conditions apply:*

(a) *a fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined period or date; or*

(b) *two prices were quoted for settlement of the account, the lower price being applicable if the account is paid on or before a determined date, and the higher price being applicable due to the account not having been paid by that date.*'

the threshold prescribed in terms of s 42(1) of the Act (currently R500 000[12]) to apply to be registered as a credit provider. In terms of s 45(1) of the NCA a person who wishes to be so registered must apply for registration in the prescribed manner and form to the fourth respondent.[13] Having regard to the amount advanced by him to the first respondent, it follows that the applicant was required by the statutory provisions to have applied for registration as a credit provider.

[4] Section 40 of the NCA provides (insofar as relevant):

> **40 Registration of credit providers**
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> (1) A person must apply to be registered as a credit provider if-
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> (a) 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; or
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> (b) the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1).
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> (2) In determining whether a person is required to register as a credit provider-
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> (a) the provisions of subsection (1) apply to the total number and aggregate principal debt of credit agreements in respect of which that person, or any associated person, is the credit provider;
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> (b) each associated person that is a credit provider in its own name and falls within the requirements of subsection (1) must apply for registration in its own name;
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> (c) a credit provider that conducts business in its own name at or from more than one location or premises is required to register only once with respect to all of such locations or premises; and
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> (d) .....

[12] See item 5 of the schedule to GN713, dated 1 June 2006, published in Government Gazette No. 28893. It is of no consequence in the current matter, but I have found no indication that the applicable threshold was re-determined by the Minister by 1 June 2011, as required in terms of s 42 of the NCA.

[13] See reg. 4 of the National Credit Regulations, 2006 (GN R489 published in Government Gazette No. 28864 of 31 May 2006).

(3) A person who is required in terms of subsection (1) to be registered as a credit provider, but who is not so registered, must not offer, make available or extend credit, enter into a credit agreement or agree to do any of those things.

(4) A credit agreement entered into by a credit provider who is required to be registered in terms of subsection (1) but who is not so registered is an unlawful agreement and void to the extent provided for in section 89.

(5) .....

(6) .....

[5] The impugned provision in s 89(5) of the NCA comes into consideration because the applicant was not a registered credit provider at the time he advanced the sum of R7 million to the first respondent, and had not applied to be so registered within a month of making the loan. Section 89 deals with 'unlawful credit agreements'. It provides:

89 Unlawful credit agreements

(1) This section does not apply to a pawn transaction.

(2) Subject to subsections (3) and (4), a credit agreement is unlawful if-

(a) at the time the agreement was made the consumer was an unemancipated minor unassisted by a guardian, or was subject to-

(i) an order of a competent court holding that person to be mentally unfit; or

(ii) an administration order referred to in section 74(1) of the Magistrates' Courts Act, and the administrator concerned did not consent to the agreement,

and the credit provider knew, or could reasonably have determined, that the consumer was the subject of such an order;

(b) the agreement results from an offer prohibited in terms of section 74(1);

(c) it is a supplementary agreement or document prohibited by section 91(a);

(d) at the time the agreement was made, the credit provider was unregistered and this Act requires that credit provider to be registered; or

(e) the credit provider was subject to a notice by the National Credit Regulator or a provincial credit regulator requiring the credit provider-

(i) to stop offering, making available or extending credit under any credit agreement, or agreeing to do any of those things; or

(ii) to stop offering, making available or extending credit under the particular form of credit agreement used by the credit provider,

whether or not this Act requires that credit provider to be registered, and no further appeal or review is available in respect of that notice.

(3) Subsection (2)(a) does not apply to a credit agreement if the consumer, or any person acting on behalf of the consumer, directly or indirectly, by an act or omission-

(a) induced the credit provider to believe that the consumer had the legal capacity to contract; or

(b) attempted to obscure or suppress the fact that the consumer was subject to an order contemplated in that paragraph.

(4) Subsection (2)(d) does not apply to a credit provider if-

(a) at the time the credit agreement was made, or within 30 days after that time, the credit provider had applied for registration in terms of section 40, and was awaiting a determination of that application; or

(b) at the time the credit agreement was made, the credit provider held a valid clearance certificate issued by the National Credit Regulator in terms of section 42(3)(b).

(5) If a credit agreement is unlawful in terms of this section, despite any provision of common law, any other legislation or any provision of an agreement to the contrary, a court must order that-

(a) the credit agreement is void as from the date the agreement was entered into;

(b) the credit provider must refund to the consumer any money paid by the consumer under that agreement to the credit provider, with interest calculated-

(i) at the rate set out in that agreement; and

(ii) for the period from the date on which the consumer paid the money to the credit provider, until the date the money is refunded to the consumer; and

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

(Underlining supplied to highlight the parts of the provision most relevant in the circumstances of the current case.)

The clear effect of ss 89(2)(d) and 89(5)(a), read with s 40(4), of the NCA is that the loan agreements upon which the applicant relies to base his liquidated claim against the first respondent for the purpose of satisfying the requirements of s 9 of the Insolvency Act were unlawful and must be treated as void.

[6] The primary contention advanced by the applicant's counsel was that the provisions of s 89(5) should be read as directory in the sense that the words 'must order' in the introductory phrase should be read as 'may order'. The third and fourth respondents' counsel took issue with that interpretation, quite correctly in my view. General principles would suggest that the unlawful transaction would fall to be treated as void;[14] and a reading of s 89(2)(d) with s 89(4) and s 40(4) of the NCA leaves no scope for doubt in this regard. There is nothing in the wording of s 89(5), read in both its immediate and broader context, which gives any indication of a legislative intention that the court should have the discretion to treat as valid a credit agreement that is expressly stigmatised as void in terms of the other provisions mentioned. The argument was advanced by the applicant's counsel on the premise of her understanding of the enjoinder in *Investigating Directorate: Serious Economic*

[14] Cf. e.g. *Absa Insurance Brokers (Pty) Ltd v Luttig and Another* NNO 1997 (4) SA 229 (SCA), at 238F-241B, and the authorities cited there.

Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO 2001 (1) SA 545 (CC); 2000 (2) SACR 349; 2000 (10) BCLR 1079, at para. 23, that 'judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not'. That interpretative approach (i.e. 'reading in conformity') is, of course, well established; but it does not licence doing violence to the language used by the legislature. Violence to the language can be done either by perverting or unduly straining its ordinary meaning, or by construing it without appropriate regard to its contextual employment. Counsel's reliance on the well-known passage in *Hyundai Motor Distributors* overlooked the condition to which the principle enunciated there was expressly acknowledged to be subject, i.e. 'provided that such an interpretation can be reasonably ascribed to the [provision]'.[15] The applicant's counsel conceded, correctly, that if the word 'must' could not be construed as 'may' in respect of paragraph (a) of s 89(5), it had also to be read in its usual peremptory sense in respect of paragraphs (b) and (c).

[7] It is evident therefore that the applicant cannot found his claim for the sequestration of the first respondent's estate on a claim predicated on the loans. The facts do, however, beg the question whether the applicant has the right to recover the money which he advanced to the first respondent on the grounds of unjust enrichment. Despite the absence in the papers of any allegations expressly supporting a liquidated claim based on unjust enrichment, the applicant's counsel contended for the existence of such a claim in the context of the voidness of the transaction that was alleged in the papers – Ms *McChesney* referred in this regard to the *condictio ob turpem vel iniustam causam*. She submitted that such claim would fall to be computed in the

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[15] See *Hyundai Motor Distributors* at para.s 21-26.

sum of R7 million, in other words in the amount advanced by the applicant and received by the first respondent. The applicant's counsel also stated that in the event that the provisions of s 89 of the NCA provided an insuperable obstacle to the applicant's ability to obtain a final order of sequestration, the applicant wished to pursue his application in terms of paragraph 2 of the amended notice of motion for a declaration of constitutional invalidity as a free-standing matter. The applicant's interest in obtaining such relief bore on his ability to prove himself to be a creditor of the first respondent in terms of a claim based on unjust enrichment.

[8] If the effect of s 89(5)(c) of the NCA is that any claim based on unjust enrichment that the applicant might have must be ordered forfeit to the state, then it is clear that the applicant will have no claim, liquidated or otherwise, against the first respondent. It was therefore not surprising that it was not contended by any of the respondents that the construction of s 89(5) of the NCA was not a material issue requiring of determination, including, if necessary, the aspect of its constitutionality.

[9] The applicant contends that if the court does not have a discretion whether or not to make a cancellation or forfeiture order, as provided in terms of s 89(5)(c) of the NCA, the result is an arbitrary deprivation of property in infringement of s 25(1) of the Bill of Rights and an ouster of the right to a fair hearing in terms of s 34 of the Constitution.[16] Although the consequent constitutional challenge is on the face of it directed at the whole of s 89(5), it seems to me on closer scrutiny that the applicant's complaint in the factual context of the current matter is in substance directed only at paragraph (c) of the provision, rather than at the sub-section as a whole. There can in any event be no difficulty with the constitutionality of s 89(5)(a) in the absence of any

[16] The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996).

challenge to the constitutionality of s 40(4). This is because the only effect of an order in terms of s 89(5)(a) on the facts of the current case would be to confirm what has already been determined by s 40(4) read with s 89(2)(d). The facts of the current matter do not implicate s 89(5)(b).

[10] A determination of the validity of the challenge has to proceed upon the basis of a proper construction of the impugned provision. The opacity of s 89(5) of the NCA was remarked upon by Yacoob J in *Cherangani* supra,[17] where the learned judge observed that it 'would not be easy to give a comprehensible meaning to the forfeiture provision'[18] and commented that counsel on both sides in that case could not tell the court what the provision meant, with the consequence that the import of the forfeiture order made in terms of it by the court of first instance was also uncertain.[19] Establishing the meaning of s 89(5)(c), and fathoming exactly what it is that falls to be taken away from the applicant, and if the consumer is to be unduly enriched by this, forfeited to the state,[20] is moreover not assisted, as far as I have been able to discern, by anything to be found in the long title of the statute, or in chap. 1 (especially ss 1-3), which is directed at the 'Interpretation, Purpose and Application of [the] Act'.

[11] The key to finding the meaning of the provision lies in the character of what falls to be cancelled or forfeited by reason of its operation; that is in the import of the words 'purported rights'. Given their literal meaning within the context of s 89, the words would imply that nothing of substance is liable to cancellation or forfeiture,

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[17] Note 3.
[18] See *Cherangani* supra, at para. 13.
[19] See *Cherangani* supra, at para. 19.
[20] *Cherangani* supra, at para. 14.

because no rights are created by a contract that is legally a nullity. But the cancellation or forfeiture of something that does not exist, being a self-evidently futile undertaking, can hardly have been what the legislature had in mind when it imposed upon the courts the mandatory duty to make the order prescribed in terms of s 89(5)(c)(i) or (ii). Allowing that much however, affords no escape from the reality that the formulation of the provision is both confused and confusing. It is unfortunate that the drafters of the statute do not appear to have borne the principles of contractual law in mind when engaged in framing a law entirely directed at regulating a certain category of contracts. This is evident, with similarly confusing effect, not only in regard to the provision in issue, but also in other parts of the Act. So, for example, in part C of chap. 6 of the Act, the concept of 'enforcement' of a credit agreement seems to include the cancellation of such an agreement, whereas in contract the remedies of enforcement and cancellation are the very antithesis of each other.

[12] The concept of a 'cancellation' of purported rights might be construed as intended to emphasise and underline the declaration of voidness required in terms of paragraph (a), (just as the declaration required in terms of paragraph (a) does no more than to lend emphasis and affirmation to what in any event follows on the provisions of s 40(4) read with s 89(2)(d), as qualified by s 89(4)). But that, by itself, could never give rise to the result of unjust enrichment comprehended in sub-paragraphs (i) and (ii) of paragraph (c) of the sub-section, and thus cannot be the intended meaning.

[13] Counsel were indeed unable to conceive of any right the 'cancellation' or negation whereof might give rise to unjust enrichment in the context of a performed or partially performed credit agreement that was void by reason of s 40(4) of the NCA other than the right to claim restitution. Nor can I. The recovery by a credit provider of money paid or goods delivered in terms of a transaction otherwise qualifying as a credit agreement, but which is void, by reason of s 40 read with s 89, can notionally be enforced only by way of a claim for restitution. But if the 'purported rights' are the credit provider's right to restitution, when could there ever be a situation when the cancellation of the right would not unjustly enrich the consumer? It is therefore difficult to conceive in the abstract of a case in which a court could make an order in terms of paragraph (c)(i), rather than in terms of paragraph (c)(ii), especially if the order were made contemporaneously with one made in terms of paragraph (b).

[14] In the current case the money has been advanced to and received by the first respondent, and if the applicant is to be denied the right - which he would enjoy under the common law as developed in *Jajbhay v Cassim* 1939 AD 537 - to recover it, the first respondent would obviously be unjustly enriched. As observed in *Afrisure CC and another v Watson NO and another* 2009 (2) SA 127 (SCA),[21] with reference to JC Sonnekus *Ongegronde Verryking in die Suid-Afrikaanse Reg* (2007), at 134, and 'Enrichment' in Joubert (ed) *The Law of South Africa* vol 9 (2 ed) para. 215, '(a)bsent turpitude on the part of the plaintiff, the *par delictum* defence is simply not available. Where payment, even though illegal, was not dishonourable, the plaintiff must succeed' with its claim for restitution. It is ironic then that in cases attended by turpitude, - an example would be when a person provided credit in contempt of an

[21] At para. 40.

order by the National Credit Regulator – the *par delictum* rule would exclude a right by the credit provider to claim restitution and, having regard to the apparent meaning of 'purported rights' in s 89(5)(c), the provision would find no foundation for operation.

[15] There is nothing on the papers in the current case to show turpitude on the part of the applicant. Is the effect of s 89(5)(c) then that his claim for restitution must be ordered forfeit to the state? Counsel for the fourth respondent, with whom counsel for the third respondent aligned herself, argued not. Accepting that the 'purported rights' concerned were the credit provider's right to restitution, counsel submitted that the provisions of s 89(5)(c) vested the court with a discretion. He submitted that on a proper construction of the provision cancellation of the right would not follow if the court concluded that this would result in the unjust enrichment of the consumer. In advancing this construction counsel placed emphasis on the qualification 'unless' in the following part of sub-paragraph (i) of paragraph (c): '*cancelled, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer*'.[22]

[16] In my judgment the construction contended for by the fourth respondent's counsel is untenable. It takes the wording relied upon completely outside the context in which it is employed in the provision. Paragraph (c) of s 89(5) requires of a court

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[22] The third and fourth respondents' argument in this respect appears to be essentially the same as that advanced on behalf of the applicant before the Constitutional Court in *Cherangani* supra. In *Cherangani* the applicant did not seek to impugn s 89(5)(c) as unconstitutional, contending instead that it afforded the court a discretion, and seeking a direction that the forfeiture ordered in that case by the High Court be referred back to that court for reconsideration in the exercise of the contended for discretion. As appears from Yacoob J's remarks about the argument advanced in that case (see the first sentence in para. 19 of the judgment), counsel appear to have experienced difficulty in sustaining their argument; understandably, having regard to the quandary presented by the wording of the provision. The applicant's counsel in *Cherangani* did, however, concede that 'absent a discretion, the section would result in disproportionate forfeitures which would constitute arbitrary deprivation of property'; *Cherangani* at para. 8.

to do one of two things in respect of 'all the purported rights of the credit provider' under a credit agreement which is unlawful in terms of s 89. It *must* order *either* that they be cancelled *or* that they be forfeit to the state. The criterion for determining which of the alternatives is applicable is the unjust enrichment of the consumer. If, as in the current case, the consumer will be unjustly enriched if he is not required to make restitution, the claim for restitution *must* be ordered forfeit to the state. The provision does not countenance the situation implicit in the fourth respondent's argument, which is that the court might neither cancel the 'purported rights', nor order them forfeit to the state.

[17] The absence of any discretion in the application of s 89(5) falls to be contrasted with the position under s 90 of the NCA, which deals with unlawful provisions in credit agreements. Such provisions are void and, to the extent that they cannot be severed without going to the root of the contract, can result in the court being obliged, in terms of s 90(4), to declare '*the entire agreement unlawful as from the date that the agreement....took effect*'. In the event of the court making such a declaration or severing any unlawful provision, it is also required to '*make any further order that is just and reasonable in the circumstances to give effect to the principles of section 89(5) with respect to that unlawful provision, or entire agreement, as the case may be*'. Ignoring the difficulties that might attend the expression 'the principles of section 89(5)', the qualification introduced by the words 'just and reasonable' makes it clear that under s 90(4) the court is invested with a discretion to temper the consequences of s 89(5) when making the further order enjoined. Such discretionary power is absent in respect of agreements that are unlawful in terms of s 89. The third and fourth respondents made no reference in their affidavits to the distinction in

approach between ss 89 and 90, and there is no comment by the Department or the State Law Advisers in the Memorandum on the Objects of the National Credit Bill, 2005 (a copy of which was annexed to the answering affidavit made on behalf of the third respondent) on the dichotomous approach evident from a comparison of s 89(5) and s 90(4).

[18] The third and fourth respondents' counsel argued only faintly that a forfeiture of the applicant's right to claim restitution did not amount to a deprivation of his property.[23] There is, in my view, no doubt that the claim would fall to be counted as an asset in the applicant's estate and thus part of his patrimony.[24] 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. To demonstrate beyond any doubt that the effect of the provision can entail the forfeiture of property one has only to postulate an instalment agreement[25] that falls to be treated as void by reason of the non-registration of the seller. The seller would by reason of s 89(5) lose the right to reclaim the goods delivered in terms of the agreement, and, unless the purchaser would not be unjustly enriched by retaining them, the seller's

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[23] The deponent to the answering affidavit made on behalf of the third respondent (the Director-General of the Department of Trade and Industry) contended that the subject of any forfeiture in terms of s 89(5)(c) was not property within the meaning of s 25 of the Bill of Rights because it entailed only 'purported rights'. The difficulty with that contention is that the deponent cast no light on the import of the term 'purported rights'. Without an explanation of his understanding of the meaning of the term, his contention went limping. It is impossible to understand the deponent's contention in the context of his explanation that in the drafting of the Act the forfeiture was seen as a device that would serve as an incentive to compliance by credit providers with the regulatory framework, in the absence of any penal sanction under the Act for non-compliance with the requirement to register. If the forfeiture holds no adverse proprietary consequences for the non-complaint credit provider, where then are the teeth in the incentive?

[24] As pointed out by Theunis Roux in *Constitutional Law of South Africa*, Second Edition, Vol. 3, at 46-16, citing AJ Van der Walt *The Constitutional Property Clause* (1997) at 30-71, 'the overwhelming preponderance of foreign law authority favours the constitutional protection of incorporeal property'. See also the discussion in *Hewlett v Minister of Finance and another* 1982 (1) SA 490 (ZS) at 497-501.

[25] An instalment sale is categorised as a credit agreement subject to the provisions of the NCA in terms of s 8(4)(c) of the Act. See also the definition of '*instalment agreement*' in s 1 of the NCA.

right to recover the goods would be forfeit to the state. On either approach the seller would be deprived of its corporeal property, which would either remain with the purchaser, or be liable to be claimed from the purchaser by the state.

[19] Now, can the resultant deprivation be said to be arbitrary? In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC); 2002 (7) BCLR 702[26] it was held 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 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.

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[26] At para. 100.

(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 deprivation than in the case when the property is something different and the property right something less extensive.... [The judgment was 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.'

[20] The apparent object of the impugned provision is to discourage the provision of credit outside the regulatory framework provided in terms of the statute. There can be no quibble about the legitimacy of the state's objectives in seeking to regulate the

provision of credit. Nor can there be any argument against the requirement in that context that persons in the business of providing credit should be obliged to register themselves with the National Credit Regulator. The director-general of the Department of Trade and Industry ('the DG') has made an affidavit on behalf of the third respondent defending the need for the impugned decision, as has the acting chief executive officer of the National Credit Regulator on behalf of the fourth respondent.

[21] The DG has explained that the NCA was intended to address the shortcomings in the Usury Act[27] and the Credit Agreements Act,[28] which had been the primary regulatory instruments in the credit market during the 20 to 40 years preceding the enactment of the NCA. He averred that these instruments had become outdated in the context of the significant evolution in the market that had taken place during their currency. He added:

> In addition to being outdated, the previous regulatory framework has also been largely ineffective. It distorted the credit market through its differential and unequal treatment of different credit products and credit providers. It also had the result of affording different consumers different levels of protection, with the poorest and most vulnerable having the least protection.
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> Furthermore, as a result of the lack of enforcement of the previous statutory regime, the practices of less scrupulous providers had become the norm, and this has stigmatised certain segments of the credit market. This, in turn has discouraged reputable credit providers, in particular banks, from venturing into the low income market and from providing more affordable finance to low income earners.
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> Accordingly, the need for the review of the pre-existing regime was underpinned by the following concerns:
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> 1. The fragmented and outdated legislative framework.
> 2. Ineffective consumer protection particularly in relation to consumers in low income groups.

[27] Act no. 73 of 1968.
[28] Act no. 75 of 1980.

3. The high cost of credit and in some areas access to credit.
4. Rising levels of over-indebtedness.
5. Reckless behaviour by credit providers and exploitation of consumers by micro lenders, intermediaries, debt collectors and debt administrators.

[22] The DG expatiated at some length and in general terms on how the NCA was directed at addressing the concerns identified in the passage just quoted. Suffice it to say that the theme of his affidavit is to the effect that the legislation was intended (i) to introduce controls in the credit industry directed at addressing the exploitation of poor persons - primarily by micro-lenders;[29] (ii) promoting the non-discriminatory 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 transactions. What the DG has said in this regard is indeed borne out by a consideration of the statute's long title and its provisions read generally. The issue in the current case, however, requires a focused examination of aspects of the statute that are pertinent to the consideration of whether or not sufficient reason is provided for the deprivation contemplated in terms of s 89(5)(c) of the NCA.

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[29] Micro-lenders and the micro-lending industry are identified in the papers and discussion documents annexed to the DG's affidavit as a major concern in the lead up to the adoption of the NCA. No definition of micro-lending is given in the documents or in the affidavit. It may be inferred, I think, that it relates to lending involving sums smaller than R10 000. Such loans were the subject of an exemption notice dated 1 June 1999 under the then applicable Usury Act. The notice established the Micro Finance Regulatory Council, which the documentation annexed to the DG's affidavit suggests was ineffectual in controlling or eradicating reportedly widespread abuses in the micro-lending industry. See Government Notice 713 of 1999 issued in terms of s 15A of the Usury Act 73 of 1968 and published in Government Gazette No 20145 of 1 June 1999.

[23] It is evident that the fourth respondent, which is a juristic person with statutorily invested institutional independence, is given a key role in the administration of the Act and the achievement of its objects.[30] It is part of the functions of the fourth respondent to register credit providers, credit bureaux and debt counsellors and to maintain the relevant registers and make the information contained therein available in the manner provided in terms of s 53 of the NCA. Section 69 of the NCA contemplates the establishment of a national register of 'outstanding' (?executory) credit agreements (including those entered into by unregistered credit providers), also to be maintained by the fourth respondent, if so directed by the third respondent. (I am unaware that the third respondent has exercised the power to require the creation and maintenance of such a register, which would no doubt give rise to an herculean administrative challenge.[31] No mention of it is made of it in the third and fourth respondents' answering papers.) The functions of the fourth respondent also include conducting reasonable periodic audits of registered credit providers in respect of historical data relative to credit applications and credit agreements in order to-(i) establish demographic patterns of the credit market; (ii) investigate socio-economic trends in the credit market, particularly among persons contemplated in section 13 (a);[32] and (iii) detect patterns of possible discriminatory practices;[33] and monitoring trends in the consumer credit market and industry with respect to- (i) the needs of persons contemplated in s 13(a) of the Act; and (ii) the

[30] See part A of chap. 2 (ss 12-25) of the NCA.
[31] In terms of reg. 60(2) of the National Credit Regulations, 2006, a registered credit provider is required to keep a register in electronic format of the history of its dealings with each consumer.
[32] These persons are (i) historically disadvantaged persons; (ii) low income persons and communities; and (iii) remote, isolated or low density populations and communities.
[33] See s 16(1)(d) of the NCA.

promotion of black economic empowerment and ownership within the industry.[34] The fourth respondent is expected to use the information gathered in the course of its monitoring and supervisory role to 'over time' review applicable legislation and submit reports to the third respondent thereon, presumably to assist in ongoing improvements in means of achieving compliance with the objects of the statute.

[24] The registration of credit providers obviously fulfils an important part in assisting the fourth respondent to fulfil its functions. That said, information concerning the extension of credit by an individual on an *ad hoc* basis, and not in the course of business, is hardly likely to contribute meaningfully to the exercise contemplated by the legislation; certainly, there is no reasoned assertion to the contrary in the answering affidavits deposed to on behalf of the third and fourth respondents. Indeed, the nature of much of the information that registered credit providers are required to periodically furnish to the NCR in terms of Part A of chap 8 of the National Credit Regulations is of the sort which it would be meaningful for the regulator to collect and analyse for the purposes of the statute only from persons in the business of providing credit, and not from anyone who provided credit only on an isolated occasion.

[25] Section 13 of the Act treats discretely and quite extensively with the fourth respondent's responsibility to promote the development of an accessible credit market 'to serve the needs of – (i) historically disadvantaged persons, (ii) low income persons and communities and (iii) remote, isolated or low density populations or communities'. Indeed, the statute specially categorises certain types of credit agreement intended to benefit such persons or communities as 'developmental credit

[34] See s 16(1)(e) of the NCA.

agreements',[35] and, of relevance in the current context, provides for the supplementary registration of registered credit providers as credit providers in respect of developmental credit agreements.[36] Only close corporations, companies, credit co-operatives, trusts, statutory entities, mutual banks or banks qualify to apply for such supplementary registration. The transactions in issue in the current case were not developmental credit agreements and the applicant, as a natural person, could not have qualified for registration for the purpose of providing credit in terms of that category of agreements.

[26] Chapter 3 of the NCA (ss 39-59 of the Act) is devoted to the regulation of the 'consumer credit industry'. Section 40 of the Act, to which quite extensive reference was made earlier,[37] resorts in this part of the statute. In my view there are a number of indications in s 40 that the legislature conceived of the credit provider who requires to be registered as such in terms of the Act to be a person, who either alone or in association with others, is engaged in *the business* of providing credit to consumers. The following provisions of the section support such a reading:

(a) the determination of the number of executory credit agreements to which the credit provider as 100 or more before registration is required;

(b) the reference in s 40(1)(b) (which provides for the monetary value threshold requirement) to 'the <u>total</u> principal debt owed to that credit provider under <u>all</u> outstanding credit agreement<u>s</u>', which implies a

[35] See s 10 of the NCA.
[36] See s 41 of the NCA.
[37] See para.s [4] - [6], above.

contemplation of a number of credit agreements, not just one or two - this notwithstanding that the language used does nevertheless catch within its embrace any person who makes provides credit in terms of even a single transaction qualifying as a credit agreement if the 'principal debt'[38] thereunder exceeds the threshold requirement.

(c) the determination of the registration requirement with reference to the totality of credit agreements entered into not only by an individual credit provider, but also to those transacted by any of its 'associated persons'. The definition of 'associated persons' in s 40(2)(d) of the NCA includes in respect of natural persons their 'business partners' and in respect of juristic persons

> aa) any person that directly or indirectly has a controlling interest in the credit provider, or is directly or indirectly controlled by the credit provider;
>
> bb) any person that has a direct or indirect controlling interest in, or is directly or indirectly controlled by, a person contemplated in clause (aa); or
>
> cc) any credit provider that is a joint venture partner of a person contemplated in this subparagraph.

(d) Section 40(2)(c) provides that a credit provider that *conducts business* in its own name at or from more than one location or premises is required to register only once with respect to all such locations or premises.

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[38] '*Principal debt*' is defined in s 1 of the NCA as '*the amount calculated in accordance with section 101 (1)(a)*' of the Act.

[27] Other provisions also confirm the impression that the legislature had in mind persons carrying on business as credit providers when it determined upon a registration requirement. Thus, for example, s 50(2) of the NCA provides that it is a condition of every registration issued in terms of the Act that the fourth respondent or any person authorised by the regulator may 'enter any premises at or from which the registrant *conducts the registered activities* during *normal business hours*, ... to conduct reasonable inquiries for compliance purposes'. So too, s 52, which contemplates a certificate of registration or duplicate thereof to be issued for each premises from the credit provider conducts the activities authorised in terms of the registration and which requires the 'registrant' to 'a) post the certificate or duplicate registration certificate in any premises at or from which it conducts its registered activities; b) reflect its registered status and registration number, in a legible typeface, on all its credit agreements and communications with a consumer; c) comply with its conditions of registration and the provisions of [the] Act; d) pay the prescribed annual renewal fees within the prescribed time; e) keep any prescribed records relating to its registered activities, in the prescribed manner and form; and f) file any prescribed reports with the [fourth respondent] in the prescribed manner and form' is unlikely to have been aimed at regulating the activity of a person like the applicant who entered into only three closely related and short-term credit agreements with a single consumer, and whose business was not the provision of credit, but something quite unrelated, like farming.

[28] It is also not evident from the provisions of the statute why a person like the applicant intending to provide credit on an *ad hoc* basis to a personal friend should, in order to be able to do so in an amount exceeding R500 000, have to provide

information to the fourth respondent to enable the latter to consider matters such as the commitments, if any, made by him or any associated person in terms of black economic empowerment considering the purpose, objects and provisions of the Broad-based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003), or in connection with combating over-indebtedness (s 48(1)(a) and (b)). Indeed, the 'Memorandum on the Objects of the National Credit Bill, 2005' that accompanied the proposal to Parliament for the adoption of the NCA[39] suggested that the Act would not apply to or regulate 'loans between family members, partners and friends on an informal basis'. (There was no explanation, however, of what was meant by a loan 'on an informal basis', and the statute itself, while excluding from its ambit credit agreements concluded between persons in a familial relationship who are in a situation of dependence or co-dependence,[40] makes no reference to friends.[41]) The content of the prescribed application form for registration as a credit provider[42] is also consistent with that which someone carrying on business as a credit provider might be

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[39] A copy of the Memorandum was annexed as annexure AA4 to the third respondent's answering affidavit.

[40] See s 4(2)(b)(iii) of the NCA.

[41] Section 4(2)(b)(iv) contains a provision which arguably may have been intended to include credit agreement transactions between friends, but is worded in a manner which is liable to give rise to many an argument about what might fall, or not fall within its embrace:

'*any other arrangement-*

aa) in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction; or

bb) that is of a type that has been held in law to be between parties who are not dealing at arm's length'

[42] See Form 2 in Schedule 1 to the National Credit Regulations, 2006. A copy of the form was annexed to the third respondent's answering affidavit. Amongst the information which the application form solicits is the applicant's 'trading name'; date of commencement of trading; VAT registration number, information about other regulated activity engaged in by the applicant, such as banking, insurance, debt collecting, or provision of financial advice; name of auditor or accountant; particulars of compliance officer (if applicable); details of 'products' such as mortgage agreements, credit facilities, unsecured credit transactions, vehicle finance, 'clothing retail', 'furniture retail', pawnbroking or developmental credit; the ancillary financial products sold by the applicant in conjunction with its credit products, such as life insurance, funeral cover, credit life insurance or short term insurance; and total number of business premises.

expected to complete, rather than a person intending to make just one, or even two or three *ad hoc* loans to someone in their ken, even if in a large sum.

[29] I mention these considerations in the context of the required review of the apparent scope, purpose and objects of the Act merely to record my impression that the requirement that someone like the applicant had to register as a credit provider to avoid the credit transactions that he entered into with the first respondent being visited with legal voidness was an entirely incidental effect of the prescripts of the NCA, rather than one serving the Act's central objectives. In my view these considerations are relevant when it comes to weighing some of the questions mentioned earlier that are pertinent to a decision as to whether sufficient reason exists for the forfeiture required in terms of s 89(5)(c) of the NCA, such as to negate a basis for its characterisation as an arbitrary deprivation of property.

[30] The Memorandum on the Objects of the National Credit Bill, 2005, prepared by the Department of Trade and Industry, motivated the adoption of the impugned provision in the following terms[43]:

> If the [National Consumer] Tribunal[44] or a court declares a credit agreement to be unlawful, all its provisions are unenforceable, the consumer is not required to return any goods or money received from the credit provider under the agreement and the court may either order the credit provider to return all money received from the consumer under the agreement or order such funds forfeit from the State. The DTI[45] 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.

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[43] At clause 2.9. A copy of the Memorandum was annexed to the answering affidavit made on behalf of the third respondent.
[44] A body established in terms of s 26 of the NCA.
[45] Department of Trade and Industry.

In the DG's affidavit the second sentence in the passage from the Memorandum just quoted is cited as 'the justification for the provision'.[46] The Memorandum, however, does not accurately summarise the content of the provision. It also, interestingly, describes the effects of s 89(5) as a 'remedy'. The DG also categorises the effects as a remedy, and appears on that basis to contend that they will be limited in reach because in order to obtain it '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.'[47]

[31] The manner in which the issue has arisen in the current case demonstrates how misconceived the Department's understanding of the effect of the provision is. There has been no reliance on the provision by the consumer in this matter. The application of the provision arose for consideration *mero motu* in the course of the discharge by the court of its obligation to enforce and apply the law (cf. *CUSA v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para. 68, and not even in the context of enforcement proceedings by the credit provider,[48] or a defence raised by the consumer. The Department's view that the 'remedy' will be available only to those consumers with sufficient legal knowledge and access to legal representation, and therefore, by implication, not widely availed of, is hardly a cogent reason in defence of the impugned provision; being instead at odds with the some of the most important declared objects of the statute - the protection of vulnerable consumers and the abatement of inequality between credit providers and consumers.

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[46] At para. 66.6 of the DG's affidavit.
[47] At para. 66.8 of the DG's affidavit.
[48] Cf. *Naidoo v ABSA Bank Ltd* 2010 (4) SA 597 (SCA); [2010] 4 All SA 496, in which it was held that sequestration proceedings do not constitute 'debt enforcement' proceedings in terms of part C of chap. 6 of the NCA.

[32] The Department's reference to the effects of the provision as a 'remedy' incidentally attracts attention to other aspects of the subsection which are unaddressed in the statute. The Act does not expressly indicate the contexts in which the orders provided for in s 89(5) will fall to be made by courts, nor does it establish any mechanisms by which any forfeiture ordered in terms of s 89(5)(c) would come to the attention of any relevant organ of state so that its value could be realised by the state, and the apparent intention that consumers should not be unjustly enriched by the operation of the provision actually achieved.[49] These aspects are not dealt with in the affidavits made on behalf of the third and fourth respondents.

[33] There is furthermore a relevant anomaly in the Act in that while it is evident that a consumer (and indeed any person) may take a complaint about an unlawful credit agreement to the National Consumer Tribunal rather than to a court,[50] the consequences provided in terms of s 89(5) do not follow upon any determination of prohibited conduct by the Tribunal. The definition of '*prohibited conduct*'[51] plainly includes the conclusion of a credit agreement by an unregistered credit provider in circumstances in which the NCA requires the credit provider to be registered. The Tribunal is empowered, if such a matter should be brought before it, amongst other things, to declare the conduct in issue to be prohibited and to impose an administrative fine.[52] An administrative fine imposed by the Tribunal is subject to limitation in

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[49] Such mechanisms could conceivably be established in terms of regulations made in terms of s 171(d)(ii) of the NCA, but as far as I have been able to determine this has not been done.

[50] See s 136 of the NCA.

[51] '*Prohibited conduct*' is defined in s 1 of the NCA as meaning '*means an act or omission in contravention of this Act, other than an act or omission that constitutes an offence under this Act, by-*

(a) an unregistered person who is required to be registered to engage in such an act; or

(b) a credit provider, credit bureau or debt counsellor'.

[52] See s 150(1) of the NCA. Failure to comply with an order of the Tribunal constitutes an offence, for which harsher penalties may be imposed than for the commission of any other offence in terms of the statute. See ss 160 and 161 of the NCA.

respect of its amount, and is liable to be fixed in a sum considered 'appropriate' after a consideration by the Tribunal of the factors enumerated in s 151(3) of the Act.[53] Moreover, the first respondent, had he suffered any loss or damage as a consequence of the transaction concluded with the applicant, would not have been able to initiate court proceedings thereanent without first obtaining a determination from the Tribunal; see s 164(3) of the NCA. There is, however, no requirement under the statute that a matter that has been dealt with by the Tribunal arising out of a credit transaction which is void in terms of the Act must go on to be dealt with thereafter by a court for the purposes of obtaining the orders provided in terms of s 89(5). It is notable that the third and fourth respondents have not remarked on this anomaly, or ventured any suggestion why the system of administrative fines available in proceedings before the Tribunal could not, with suitable adaptation, by itself and without a derogation from basic rights, afford a suitable incentive to compliance in the context of equivalent matters brought before the courts. Perhaps because their clients did not lay any evidential foundation, their counsel also did not refer at all in their arguments to the Tribunal's powers in the context of the statute read as a whole.

[34] Another anomaly arises, in my view, from s 54(3)(c) of the Act, which provides that when the National Credit Regulator gives an unregistered person notice

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[53] Section 151(3) of the NCA provides:

When determining an appropriate fine, the Tribunal must consider the following factors:

(a) *The nature, duration, gravity and extent of the contravention;*
(b) *any loss or damage suffered as a result of the contravention;*
(c) *the behaviour of the respondent;*
(d) *the market circumstances in which the contravention took place;*
(e) *the level of profit derived from the contravention;*
(f) *the degree to which the respondent has co-operated with the National Credit Regulator, or the National Consumer Commission, in the case of a matter arising in terms of the Consumer Protection Act, 2008, and the Tribunal; and*
(g) *whether the respondent has previously been found in contravention of this Act, or the Consumer Protection Act, 2008, as the case may be.*

to cease carrying on activity for which registration is required, the notice must give a date by which the cessation must take place. What is the purpose of this period of notice if everything done during it is in any event unlawful and void, and liable to give rise to a duty on a court to make the orders enjoined by s 89(5)? A sensible answer to the rhetorical question does not come to mind.

[35] Bearing in mind the factors mentioned above[54] to which regard must be had in determining whether there is sufficient reason for the deprivation of property required in terms of s 89(5)(c)(ii), it is appropriate, for completeness, to record the other considerations described in para. 66.1 to 66.5 of the DG's affidavit as having 'informed the adoption of section 89(5)(c)' of the NCA:

> 66.1 Historically, a significant percentage of micro-lenders refused to register with the Microfinance Regulatory Council[55] and continued to trade unlawfully in an uncontrolled environment. While the Department was unable to establish the exact size of the unregistered sector, its consultants estimated that it was more than one half of the registered sector. Given that the requirements under the NCA are even more stringent than was previously the case, it is likely to result in an even lower number of registrations of credit providers. The result is that these lenders will continue to operate unlawfully and they will do so at the expense of the registered sector, and ultimately at the expense of the consumer. (underlining supplied for emphasis)
>
> 66.2 There is a considerable imbalance of power between the consumer and the credit provider. This is due to poor consumer education levels and knowledge of consumer rights and the inability to enforce such rights through negotiation or legal action.
>
> 66.3 To permit an unregistered credit provider to make valid contracts and hence continue trading indefinitely, would defeat the intention of the legislature by depriving the public of protection given against unregistered credit providers. The section is fundamentally aimed at protecting the public against credit providers who do not

[54] At para. [19], above.
[55] See note 29, above.

comply with the regulatory framework and thereby place vulnerable members of the public at risk.

66.4 A transgression of the requirements of registration does not constitute an offence. There is accordingly no criminal sanction for non-compliance with the requirements of registration. In light thereof, section 89(5)(c) was considered reasonable and indeed an effective means of enforcement. Section 89(5)(c) was also informed by the fact that the criminal sanctions imposed under the previous regulatory regime did not sufficiently deter unlawful and unscrupulous lenders.

66.5 As addressed, the purpose of registration is to facilitate control and regulation of the credit industry and ultimately to protect the poor and vulnerable.

[36] In my judgment the considerations mentioned by the DG do not, either singly or collectively, provide sufficient reason for the forfeiture provisions 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. They also do not provide any indication that the applicant was likely to 'continue trading indefinitely' as a credit provider, or that his actions had placed the public at risk. The applicant is not a microlender and the transactions in which he involved himself were not remotely similar to those at which the requirement of registration is stated to have been directed as a means of tighter regulation. The irony is that whereas the provision impacts on the applicant, it would not have done so had he been involved as credit provider in 99 'outstanding' microloans of R5000 each; in other words had he actually been engaged in the business of microlending. Furthermore, the current case also involves a matter in which considerations of an 'imbalance of power' between consumer and credit provider do not characterise the transactions that are involved. All the indications are that the lender and borrower were both persons of means engaged in relatively

sophisticated entrepreneurial enterprise. The first respondent is not a 'vulnerable member of the public' in the sense of that term as used in the DG's affidavit, and, notwithstanding that the failure of his property development venture has left him insolvent, he was not part of the 'poor and vulnerable' section of the population when he entered into the loan transactions with the applicant. It is indeed inherently unlikely that any borrower of an amount of more than R500 000 in what was essentially a single transaction would be amongst those persons properly to be regarded as poor and vulnerable.

[37] The argument that the absence of any criminal sanction for non-registration affords sufficient reason for the deprivation of property involved in the application of s 89(5)(c) of the NCA is not persuasive. The argument is advanced as if the absence of any penal sanction was something that arose independently and therefore fell to be compensated for in some or other way. This, of course, is not so: the omission of any provision criminalising non-registration when it is required is the product of the drafting of the statute, and not a feature that required a compensating incentive for enforcement to be provided. The contention that non-registration does not carry a criminal sanction is in any event not absolutely correct. In terms of s 54 of the NCA the fourth respondent may issue a notice to any unregistered person who is engaged in any activity which requires registration to stop engaging in or offering to engage in the activity. Failure to comply with such a notice constitutes an offence. In terms of s 89(2)(e) read with s 89(5)(a) of the NCA any agreement concluded by a credit provider in breach of such a notice would also be void and subject to the provisions of s 89(5)(c), and indeed, irrespective of whether or not the notice had been given on correct or valid grounds. As the facts of the current case show, the means chosen to

incentivise compliance leads to consequences 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.

[38] The resultant impression upon a consideration of the all of the aforementioned features of the statute is that the concept of forfeiture in terms of the impugned provision was not properly thought through. Having regard in a broad manner to the general considerations listed in *First National Bank of SA Ltd t/a Wesbank* supra, I have been impelled to conclude that sufficient reason for the forfeiture provision has not been demonstrated. On the contrary, I consider that its substantive effect is conducive to an arbitrary deprivation of property in breach of s 25(1) of the Constitution. Furthermore, and because it operates whenever a withholding of the credit provider's entitlement to restitution would result in the unjust enrichment of the consumer, and without any allowance for a consideration by the court of any evidence or submissions the credit provider might wish to advance in mitigation of its effect, I consider also that the provision is arbitrary on procedural grounds.[56]

[39] The third and fourth respondents' counsel argued that were the court to reach this conclusion the provision nevertheless fell to be saved in terms of s 36(1) of the

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[56] Cf. *Armbruster and Another v Minister of Finance and others* 2007 (6) SA 550 (CC); 2007 (12) BCLR 1283, in which the proviso to reg. 3(5) of the regulations framed under s 9 of the Currency and Exchanges Act 9 of 1933, which mitigated the effect of the forfeiture provision under the regulations by allowing for the discretionary refund of part or all of the property subject to forfeiture, saved the forfeiture provision involved in that matter from unconstitutionality. The Constitutional Court held that the forfeiture provision did not amount to a law permitting the arbitrary deprivation of property because the deprivation could competently occur only after the affected party had been afforded an opportunity to make representations in support of a refund in terms of the proviso and after a reasonable determination by the functionary after consideration of such representations.

Constitution as a justifiable limitation of rights. It was realistically acknowledged by Ms *Pillay* for the third respondent, who dealt with this aspect of the submissions on behalf of both parties in terms of a division of labour agreement with Mr *Budlender* for the fourth respondent, that this was not an easy argument to advance. 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. It is not surprising - despite the fact that if the law of general application under consideration does not permit arbitrary deprivation of property, justification in terms of s 36(1) does not arise as a question - that there is a notable coincidence between the considerations relevant to a determination of sufficient reason within the meaning used in *First National Bank of SA Ltd t/a Wesbank* supra. loc cit, and those falling to be weighed in adjudging, in terms of s 36(1) of the Constitution, the reasonableness and justifiability of any limitation of rights in the Bill of Rights.

[40] In determining the forfeiture provision to be an infringement of s 25(1) of the Constitution I have already taken many of its aspects into account in the manner that is required in any review in terms of s 36(1). For present purposes I might add to those the consideration that counsel were not able to direct my attention to any provision equivalent to s 89(5)(c) in the credit regulation statutes of any other country, including those whose systems were reportedly investigated by government in the process of formulating the NCA. There has furthermore been no indication in the answering papers of the third and fourth respondents that any consideration was given

to the principles enunciated in *Jajbhay v Cassim* supra,[57] in the determination of s 89(5)(c) of the NCA; and no reason is offered why the ordinary consequences of visiting the affected transactions with voidness would not be sufficient incentive, by themselves, to compliance by credit providers with the regulatory requirements of the statute. After all, the only reason any person would wish to do business in the field of providing credit (save in the context of 'developmental credit agreements') is to make a profit, which is achieved through the levying of interest, charges and fees of the sort comprehended in s 101 of the NCA. A credit provider who was party to an agreement that was void by reason of s 40(4) would not be able to legally recover or retain any interest, charges and fees contemplated in terms of the transaction. Why in addition to foregoing any contractual claim for profit for non-compliance with the registration requirements of the Act should the credit provider also have to forfeit its capital? 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 procedurally unjust penal system for non-compliance (which does not bear constitutional scrutiny). In the result the impugned provision as the means selected to the achievement of the identified end of statutory compliance is unreasonably and unjustifiably disproportionate in its effect, or at least is liable to be so in many cases. I have thus not been persuaded that the provision can be saved in terms of s 36(1) as a reasonable and justifiable limitation of rights.

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[57] See para. [14], above.

[41] If a statutory provision is found to be unconstitutional the appropriate remedy, it has been held, is, if possible, 'to be in the form of a notional or actual severance, or reading in, so as to bring the law within acceptable constitutional standards. Only if this is not possible, must a declaration of complete invalidity of the section or sub-section be made.'[58] The undertaking of a severance or reading in is remedial, being done under the authority of s 172(1)(b) of the Constitution. It is thus wholly distinguishable from the interpretative approach of reading in conformity discussed earlier in this judgment.[59] The proper approach to severance or reading in was described in general terms in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 at para.s 66-76. The purpose of reading in or severance is, as I understand it, to seek to make the affected provision read constitutionally while remaining faithful to the apparent scheme and objects of the legislation of which it is part. It will thus be an appropriate remedy in a matter in which the impugned provision serves an important and coherent purpose in the statute which, in the public interest, should and can be salvaged from complete invalidity by means of excising or reading in words to cure the flaws which have rendered an otherwise worthy provision unconstitutional. Reading in should not be undertaken 'unless in so doing a court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution'.[60]

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[58] *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 at para. 88.
[59] At para. [6], above.
[60] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs* supra, at para. 75.

[42] While treating of the topic of severance, it is the appropriate stage to record that in my judgment paragraph (c) of the subsection falls to be read as a whole and in an integrating manner, as both sub-paragraphs (i) and (ii) bear indiscriminately on the credit provider's ability to claim restitution when there has been performance or partial performance in terms of a purported credit agreement which is declared void in terms of s 89(5)(a). There is thus no purpose served by striking down sub-paragraph (ii) and leaving sub-paragraph (i) intact.

[43] I have already remarked that my impression is that the forfeiture provision does not seem to have been properly thought through and that it does not appear to serve the purposes identified by the third respondent in an effective or coherent way. It is not apparent why the provision is necessary, or why the ordinary consequences of the partial execution of a void agreement addressed in the manner laid down in *Jajbhay*'s case should not adequately serve the legislative intent. I thus do not consider that this is a case in which a judicial re-crafting of the impugned provision would provide a just and equitable remedy. Indeed the respondents' counsel did not contend for such a remedy, limiting themselves, were it to be held against their principal submissions, that the provision was unconstitutional, to a request that any declaration of invalidity be suspended for two years to allow for legislative amendment after due reflection.

[44] It has not been demonstrated that the cancellation or forfeiture provisions in terms of s 89(5)(c) of the NCA play a necessary or important part in the achievement of the objects of the statute. As I have remarked, the common law consequences of the statutory voiding of credit agreements entered into by unregistered credit

providers who require registration are sufficient in themselves to incentivise compliance with the registration requirement, and there is, in addition, a framework within the Act that will remain unaffected by the invalidity of s 89(5)(c) whereby criminal and administrative sanctions can be brought to bear appropriately on persons found in default of an obligation to register as credit providers. In the face of these considerations there can be no warrant for requiring anyone to tolerate the infringement of basic rights that suspending the effect of the declaration of invalidity would unavoidably occasion.

[45] As observed earlier in this judgment, the facts of the current matter do not implicate s 89(5)(b) of the NCA. It is evident, however, that s 89(5)(b) bears a close relationship to s 89(5)(c). Section 89(5)(b) appears on its face to require a court to order an unregistered credit provider to repay any amount received from a consumer in terms of a transaction which is void in terms of s 40(4) of the Act, irrespective of questions of unjust enrichment and restitution. But the character of the practical interrelationship of paragraphs (b) and (c) is by no means clear and no light was shed on it in the argument that was addressed to the court. In the circumstances I have considered it inappropriate to grant any relief concerning s 89(5)(b) of the Act. That, if needs be, can be the subject of another case.

[46] The alleged infringement of the applicant's s 34 rights was hardly touched upon in oral argument and little need be said in that regard. The challenge to s 89(5) of the NCA founded on an alleged infringement of the applicant's rights in terms of s 34 of the Constitution is without merit in my view. Section 89(5) does not bar access by the applicant to the courts. The provision merely determines how the courts

must determine certain issues concerning credit agreements which are void in terms of the NCA. The fact that the applicable law might be adverse in its effect on the applicant's proprietary rights does not detract in a cognisable way from his right to have it applied in a fair hearing.

[47] The declaration of invalidity that will follow has no force unless it is confirmed by the Constitutional Court.[61] In the circumstances it will be appropriate to postpone the sequestration application and extend the rule *nisi* for a period of six months to await the outcome of the confirmation proceedings.[62] It may be necessary depending on the accommodation of the confirmation proceedings on the Constitutional Court's calendar for further postponements of the sequestration application to be granted. My remarks in this regard should not be read as intended to imply any derogation from the right of any other creditor of the first respondent to intervene in the sequestration application, if so advised, with a view to bringing it to a more expeditious conclusion, nor should this judgment be read to determine whether the applicant is entitled on the basis of the papers as they currently stand to a final order of sequestration. I should also record that the applicant does not seek a costs order against the third and fourth respondents despite their opposition to his constitutional challenge.

[48] The following orders are made:

(a) Section 89(5)(c) of the National Credit Act 34 of 2005 is declared to be inconsistent with the provisions of s 25(1) of the Constitution and thus invalid.

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[61] See s 172(2)(a) of the Constitution.
[62] See s 172(2)(b) of the Constitution.

(b) The order made in terms of paragraph (a), above, is referred to the Constitutional Court to determine whether it should be confirmed.

(c) The application for the final sequestration of the first respondent is postponed until Monday, 5 November 2012, in the Third Division, pending the determination of the confirmation proceedings contemplated in terms of paragraph (b), above; and the rule *nisi* is extended to that date.

(d) There will be no order as to costs as between the applicant and the third and fourth respondents.

A.G. BINNS-WARD
Judge of the High Court

Hearing date:	**5 March 2012**
Date of judgment:	**17 April 2012**
Applicant's counsel	**Adv. M.A. McChesney**
Applicant's attorneys	**Gerhard Gous Attorneys, Stellenbosch**
	Van Zyl Prokureurs, Cape Town
Third respondent's counsel	**Adv. K. Pillay**
Third respondent's attorney	**State Attorney, Cape Town**
Fourth respondent's counsel	**Adv. S. Budlender**
Fourth respondent's attorneys	**Norton Rose South Africa, Cape Town**