CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 34/12
[2012] ZACC 29

In the matter between:

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

Heard on : 21 August 2012

Decided on : 10 December 2012

JUDGMENT

VAN DER WESTHUIZEN J (Mogoeng CJ, Moseneke DCJ, Khampepe J, Nkabinde J and Skweyiya J concurring):

Introduction

[1] The central issue is whether section 89(5)(c) of the National Credit Act[1] (NCA) is consistent with the right not to be arbitrarily deprived of property, recognised in section 25(1) of the Constitution.[2] The Western Cape High Court, Cape Town (High Court) found that it was not, because it denies an unregistered credit provider the right to restitution of money lent out, without affording a court the discretion to consider whether restitution would be just and equitable. The High Court declared the provision to be constitutionally invalid. This Court has to determine whether the order of constitutional invalidity should be confirmed.

[1] 34 of 2005. Section 89(5) states:

> "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—
>
> (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."

[2] Section 25(1) states: "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

[2] The National Credit Regulator (NCR) appeals against the declaration of constitutional invalidity. The first respondent, Mr Opperman, opposes the appeal and asks this Court to confirm the order of the High Court. The second respondent, Mr Boonzaaier, and the third respondent, the Minister of Finance, did not file opposing papers in this Court. The fourth respondent, the Minister of Trade and Industry (Minister), opposes the confirmation of the order.

[3] The questions to be answered are:

(a) What is the correct interpretation of section 89(5)(c)?

(b) Does section 89(5)(c) deal with *property* for the purposes of section 25(1)?

(c) Does the provision amount to *arbitrary deprivation* of property?

(d) Does it contain a constitutionally permissible limitation of the right protected in section 25(1)?[3]

(e) Depending on the above, what is the appropriate remedy?

[3] Section 36(1) of the Constitution states:

> "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—
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> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
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> (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."

Background

[4] Mr Opperman is a Namibian farmer. In 2009 he lent his friend, Mr Boonzaaier, a total sum of R7 million for property development in Cape Town. They concluded three written loan agreements. Mr Opperman was not registered as a credit provider at the time of providing the loan as required by the NCA.[4] He was not in the business of providing credit, was unaware of the requirement to register and had no intention of violating the NCA.[5] When the dates for the repayment of the loans had passed, Mr Boonzaaier informed his friend that he was unable to meet his obligations.

[5] Mr Opperman applied for the sequestration of Mr Boonzaaier's estate in the High Court. This application was unopposed and a provisional order was granted. On the return date the Court – of its own volition (*mero motu*) – raised concerns about the provisions of the NCA, and refused to grant a final order. It postponed the sequestration proceedings and extended the rule *nisi* to enable the parties to prepare argument to address its concerns.

[6] Counsel for the first respondent subsequently amended the notice of motion to include a challenge to the constitutionality of section 89(5) of the NCA. This resulted in the joinder of the NCR, the Minister of Finance and the Minister of Trade and Industry as parties to the proceedings. The Minister of Finance did not take an active part in the proceedings before the High Court or this Court.

[4] Sections 40 and 42 of the NCA.

[5] This is according to an affidavit filed by Mr Opperman's attorney in the High Court. Mr Opperman's lack of intention to violate the NCA was not contradicted.

High Court

[7] The High Court found that the loans concerned were "credit agreements" in terms of the NCA.[6] The first respondent, as the lender, was a "credit provider" and the second respondent, as the borrower, was a "consumer" under the NCA.[7]

[8] Section 40 of the NCA requires certain credit providers to register with the NCR.[8] Because Mr Boonzaaier's total principal debt exceeded the R500 000

[6] See the definition of "credit agreements" in section 1 of the NCA read with section 8 of the NCA. Section 8 of the NCA provides:

> "(1) Subject to subsection (2), an agreement constitutes a credit agreement for the purposes of this Act if it is—
>
> . . .
>
> (b) a credit transaction, as described in subsection (4);
>
> . . .
>
> (4) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is—
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> . . .
>
> (f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of—
>
> (i) the agreement; or
>
> (ii) the amount that has been deferred."

[7] Section 1(h) of the NCA defines "credit provider" as "the party who advances money or credit to another under any other credit agreement". It defines "consumer" to mean "the party to whom or at whose direction money is advanced or credit granted under any other credit agreement."

[8] The relevant subsection of section 40 of the NCA reads:

> "(1) A person must apply to be registered as a credit provider if—
>
> (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
>
> (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)."

threshold, prescribed in terms of section 42(1) of the NCA,[9] the High Court held that Mr Opperman was required to register. Since he was not registered, the credit agreement was unlawful. Section 89(5)[10] stipulates how unlawful credit agreements must be dealt with by courts.

[9] The High Court found section 89(5)(a) to mean that the credit agreement is void and that it bars Mr Opperman from recovering any of the money lent out, either under the agreement or on the basis of unjustified enrichment of Mr Boonzaaier. According to the Court, the object of section 89 was to discourage the provision of credit outside the regulatory framework provided by the statute. That objective is legitimate, particularly as applied to those who are in the business of providing credit. The Court stated that the NCA's most important objectives are to protect vulnerable consumers and abate the inequality between credit providers and consumers.[11]

[10] The High Court found that there was insufficient reason to deprive the first respondent of his right to restitution of the money lent. Thus section 89(5)(c) provides

[9] The amount was set at R500 000 by the Minister in *Government Gazette* No 28893 1 June 2006 (see item 5 of the schedule to Government Notice 713).

[10] Above n 1.

[11] The High Court relied on an affidavit of the Director-General of the Department of Trade and Industry and listed the following as the purposes of the NCA:

> "(i) to introduce controls in the credit industry directed at addressing the exploitation of poor persons - primarily by micro-lenders; (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."

for an arbitrary deprivation of property in breach of section 25(1)[12] of the Constitution. It further held that the provision could not be saved under section 36(1)[13] of the Constitution as a reasonable and justifiable limitation of the right not to be arbitrarily deprived of property. The High Court held that section 89(5)(c) is inconsistent with section 25(1) and thus constitutionally invalid.

Positions of the parties before this Court

[11] The NCR submits that section 89(5)(c) can be interpreted in a manner that is consistent with the Constitution. The provision does not allow for arbitrary deprivation. The interpretation of the High Court was incorrect. Mr Opperman supports the High Court's reasoning and asks this Court to confirm the declaration of invalidity. The Minister submits that section 89(5)(c) does not infringe section 25(1). Although it results in deprivation, the deprivation is not arbitrary because there are sufficient reasons for it. In the alternative, the Minister submits that section 89(5)(c) can be read to include a residual discretion and when read in that way, there is no arbitrary deprivation. If, however, this Court finds that the section is unconstitutional, the Minister invites us to suspend any declaration of invalidity, during which time an interim reading-in should apply.

Interpreting the provision: common law and context

[12] Common law rules on unlawful agreements and enrichment originated centuries ago and have been shaped by court decisions over time and set out by academic

[12] Above n 2.

[13] Above n 3.

authors.[14] The introductory part of section 89(5) indicates an awareness of the existence of common law rules in this area by stating that the rest of the provision follows "despite any provision of common law."[15]

[13] Mr Opperman claims that his common law action for restitution is denied by section 89(5)(c). The legislature may of course codify, deviate from, change, or abolish parts of the common law. The Constitution is the supreme law of the land. The common law and statute law must be consistent with it. The crucial question in this case is not whether or how far the provision deviates from the common law, but whether it is inconsistent with section 25 of the Constitution. However, a basic understanding of the common law position regarding unlawful contracts and enrichment is necessary to grasp the purpose, meaning and effect of section 89(5)(c).

[14] Lawfulness is one of the requirements for a valid contract. Unlawful contracts are void from the outset (*ab initio*) and cannot be enforced. If one party fails to perform as agreed, the other cannot successfully compel him or her to perform.[16]

[15] A party who wants to claim the restitution of money paid or goods delivered in pursuance of an unlawful agreement cannot do so under the agreement and must make

[14] See Christie *The Law of Contracts in South Africa* 5 ed (LexisNexis Butterworths, Durban 2006) at 392; Visser *Unjustified Enrichment* (Juta & Co, Cape Town 2008) in general; Lotz "Enrichment" 9 *LAWSA* 2005 at paras 214 – 6; Otto "Die par delictum-reël en die National Credit Act" (2009) 3 *TSAR* 417 at 417-8; and Otto "National Credit Act, ongeoorloofde ooreenkomste en meevallertjies vir die fiscus" (2010) 1 *TSAR* 161 at 162 - 3. Regarding the English law position, see Burrows *The Law of Restitution* 3 ed (Oxford University Press, Oxford 2002).

[15] Above n 1.

[16] This rule is expressed in the maxim *ex turpi causa non oritur actio.* See the reasoning of Innes CJ in *Schierhout v Minister of Justice* 1926 AD 99 at 109.

use of an action based on the unjustified enrichment of the receiver.[17] Professor Visser describes the basic function of the law of unjustified enrichment as "to restore economic benefits to the plaintiff, at whose expense they were obtained, and for the retention of which by the defendant there is no legal justification."[18] The enrichment action relevant to this matter is the *condictio ob turpem vel iniustam causam.* Its requirements are generally described as follows: ownership must have passed with the transfer; the transfer must have taken place in terms of an unlawful agreement;[19] and the claimant must tender the return of what he or she received.[20]

[16] In order to be successful, ordinarily the party who claims on the basis of unjust enrichment must be free of turpitude and show that he or she has not acted dishonourably. This is the *par delictum* rule.[21] The underlying principle is that the law should discourage and deter illegality; it should not render assistance to those who defy it.[22]

[17] Even under Roman law this rule was at times applied in a nuanced way by evaluating and comparing the degree of turpitude of both parties involved in the transaction. In Roman Dutch law the rule was applied more strictly. However, since

[17] Visser above n 14 at 442.

[18] Id at 4.

[19] Lotz above n 14 at para 215. On this action, see Visser id at 414 and onwards.

[20] See the principles governing the reversal of payment or transfer as set out by Visser id at 441 and onwards.

[21] The full Latin term is: *In pari delicto potior conditio possidentis vel defendentis*, meaning that where the parties are equally in the wrong the party in possession or the defendant is in a stronger position.

[22] *Afrisure CC and Another v Watson NO and Another* 2009 (2) SA 127 (SCA) at para 39.

Jajbhay v Cassim[23] South African courts have been prepared to relax the *par delictum* rule, to prevent injustice or to satisfy the requirements of public policy, by taking fairness considerations into account. The rule is thus not an absolute bar to a claim for restitution.[24] Definite requirements as to when the rule should be relaxed have not been stated, but courts have emphasised their freedom to reject or grant an unjust enrichment claim on the facts before it by exercising a discretion.[25]

[18] A credit agreement entered into by 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. Section 89(5)(a) states that the agreement must be declared void from its inception. This corresponds with the common law position. But there appears to be little room for judicial discretion under section 89(5)(c). It provides that the rights of the credit provider under the agreement to recover money paid or goods delivered to the consumer must either be cancelled, or forfeited to the state if the consumer would be unjustly enriched, regardless of turpitude or other factors relevant in a fairness or public policy inquiry. If this interpretation is the correct one, section 89(5)(c) would differ substantially from the common law by taking away a credit provider's right to

[23] 1939 AD 537 at 544 and 558.

[24] See *Visser en 'n Ander v Rousseau en Andere NNO* 1990 (1) SA 139 (A) at 148; *Henry v Branfield* 1996 (1) SA 244 (D) at 251; *Mamoojee v Akoo* 1947 (4) SA 733 (N) at 738; and Visser above n 14 at 447 – 53.

[25] Visser above n 14 at 448 – 51 gives examples of instances where the *par delictum* rule was relaxed and where it was not.

restitution. Academic literature has labelled the provision as "far reaching" or "outrageous", and unfair.[26]

[19] The statutory context of section 89(5)(c) is important in the interpretation of the provision. The NCA must be interpreted to give effect to its objects and purposes.[27] Before its advent, South African credit legislation consisted mainly of the Usury Act[28] and the Credit Agreements Act.[29] The need for a review of our credit legislation became apparent in 1994 after the South African Law Reform Commission had recognised shortfalls in our credit regulatory framework.[30] One of the many concerns that led to the review was "effectiveness of consumer protection, particularly in relation to the 85 per cent of the population in low-income groups".[31]

[20] According to its preamble, the objects of the NCA include removing unfair credit practices; regulating credit information; promoting responsible credit granting and use; and prohibiting reckless credit granting.[32] Section 3 sets out its purposes: "to

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[26] See Otto "Die par delictum-reël en die National Credit Act" above n 14 at 431 and 434, who calls it "verregaande" and unfair.

[27] *Nedbank Ltd and Others v The National Credit Regulator and Another* 2011 (3) SA 581 (SCA) at para 2. Section 2(1) of the NCA states that it must be interpreted "in a manner that gives effect to the purposes set out in section 3."

[28] 73 of 1968.

[29] 75 of 1980.

[30] On the background and purposes of the NCA see Otto JM and Otto R-L *The National Credit Act Explained* 2 ed (LexisNexis, Durban 2007) Chapter 1 and Kelly-Louw "Introduction to the National Credit Act" 2007 *JBL* 147.

[31] Kelly-Louw id.

[32] The preamble to the NCA provides:

> "To promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information; to promote black economic empowerment and ownership within the consumer credit industry; to prohibit certain unfair credit and credit-marketing practices; to

promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers". This Court accepted in *Sebola*[33] that the main objective of the NCA is to protect consumers, but stated that the interests of credit providers should not be minimized or disregarded in the process of interpretation.[34]

[21] Section 89(5) is aimed at protecting consumers by attaching significant negative consequences to the failure to register by credit providers who are required to do so. A credit agreement entered into by an unregistered credit provider is void from its inception. The credit provider may not enforce the agreement. And it must refund to the consumer any money paid by the consumer to the credit provider, with interest.[35]

> promote responsible credit granting and use and for that purpose to prohibit reckless credit granting; to provide for debt re-organisation in cases of over-indebtedness; to regulate credit information; to provide for registration of credit bureaux, credit providers and debt counselling services; to establish national norms and standards relating to consumer credit; to promote a consistent enforcement framework relating to consumer credit; to establish the National Credit Regulator and the National Consumer Tribunal; to repeal the Usury Act, 1968, and the Credit Agreements Act, 1980; and to provide for related incidental matters."

[33] *Sebola and Another v Standard Bank of South Africa Ltd and Another* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) (*Sebola*).

[34] In *Sebola* id at para 40 Cameron J stated:

> "The statute sets out the means by which these purposes must be achieved, and it must be interpreted so as to give effect to them. The main objective is to protect consumers. But in doing so, the Act aims to secure a credit market that is 'competitive, sustainable, responsible [and] efficient'. And the means by which it seeks to do this embrace 'balancing the respective rights and responsibilities of credit providers and consumers'. These provisions signal strongly that the legislation must be interpreted without disregarding or minimising the interests of credit providers. . . . I . . . agree that 'whilst the main object of the Act is to protect consumers, the interests of creditors must also be safeguarded and should not be overlooked'." (Footnotes omitted.)

See also *Nedbank Ltd* above n 27:

> "[t]he interpretation of the NCA calls for a careful balancing of the competing interests sought to be protected, and not for a consideration of only the interests of either the consumer or the credit provider." (Footnote omitted.)

[35] Section 89(5)(a) and (b) quoted in full in n 1 above.

[22] The question is what happens to money paid by the credit provider to the consumer under the unlawful and void agreement. In terms of section 89(5)(c) it stays with the consumer, because all the "purported rights" of the credit provider to recover money are "cancelled", unless cancellation would "unjustly enrich" the consumer.[36] But what happens if the consumer would indeed be unjustly enriched?

[23] Before proceeding to the interpretations of section 89(5)(c) advanced in this case, I need to point out that the term "unjustly enrich" is used in subsection (c)(i) and (ii), whereas the terms "unjustified enrichment" and "unjustifiably enriched" are mostly used in academic literature and in many judgments by courts.[37] Linguistically there appears to be some difference between "unjust" and "unjustified". The first refers to the concept of justice, or fairness, whereas the second normally means the absence of justification, in this case legal justification for the enrichment.[38]

[24] The question could be asked whether the choice of terminology in the two subsections is deliberate and significant. The more correct term – "unjustified enrichment" – does not seem to be adhered to strictly by our courts and the two terms appear to be used synonymously in practice. It appears that the words "unjustly enrich" were not consciously chosen to refer to anything other than unjustified enrichment, as recognised in common law.

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[36] Id.

[37] See Visser and Lotz above n 14.

[38] See Giglio "A Systematic Approach to 'Unjust' and 'Unjustified' Enrichment" (2003) 23 *Oxford Journal of Legal Studies* 455 at 456.

Different interpretations

[25] Different interpretations of section 89(5)(c) have been proposed by the High Court, the NCR and Mr Opperman, as well as during oral argument in this Court. I deal with each of these in turn. Then the question whether section 89(5)(c) has a clear meaning, or is perhaps so vague that it may be constitutionally void, is addressed.

The High Court's interpretation

[26] The High Court interpreted the provision to mean that the rights of the credit provider to recover any money paid 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. It held that the provision allows for these two possibilities only. Therefore, it does not afford a court a discretion. The only decision required is whether there is unjustified enrichment on the part of the consumer.

[27] The provision contemplates two possible orders. Under both, the credit provider would lose his or her right to restitution; that is not only any possible right under the credit agreement, but also the right based on the unjustified enrichment of the consumer. The High Court thus held that section 89(5)(c) results in the arbitrary deprivation of property. The NCR acknowledges that this interpretation would result in constitutional invalidity.

The applicant's interpretation

[28] The NCR contends that the High Court's interpretation is incorrect. It submits that the provision can be construed in a constitutionally acceptable manner, as allowed for by *Hyundai*.[39] According to the NCR, subsection (i) provides 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. Section 89(5)(c)(i) thus enables the court to either cancel the right of the credit provider to restitution, *or* leave it intact by not cancelling it. If the court follows the last-mentioned route, it need not concern itself with subsection (ii) and with forfeiture to the state.

[29] The NCR contends that subsection (ii) makes a forfeiture order possible, but a court may only grant it if cancellation of the credit provider's restitution rights would result in unjust enrichment. The effect of this interpretation is that subsection (ii) does not automatically come into operation if cancellation would unjustly enrich the consumer; the court has a discretion to leave the rights intact, or to forfeit them to the state. Thus a court may, for example, consider the level of turpitude or blameworthiness on the part of the credit provider.

[30] In sum, in the NCR's interpretation a court has three options, namely, to (a) cancel the credit provider's right to restitution; or (b) leave the credit provider's right

[39] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Distributors (Pty) Ltd v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at para 23: "[J]udicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section."

to restitution intact for the credit provider to exercise, because the consumer would be unjustly enriched if the rights are cancelled; or (c) forfeit the credit provider's rights to the state because the consumer would otherwise be unjustly enriched if the court exercises its discretion to apply subsection (ii).

[31] According to *Hyundai*, a constitutionally compliant interpretation must be given if it can be reasonably ascribed to the words of the provision.[40] The "*either* . . . *or*" wording in section 89(5)(c) does not reasonably allow for the interpretation proposed by the NCR. These two words have the effect that (i) and (ii) must be read together, leaving only two alternatives to a court: cancellation or forfeiture to the state.

The first respondent's interpretation

[32] Counsel for Mr Opperman initially suggested that in order to save the provision from unconstitutionality, the words "must order" in the introductory sentence of section 89(5) can be read as "may order". This interpretation was correctly rejected by the High Court and then abandoned before this Court.[41]

[40] Id.

[41] This Court has read down words in order to save a statute from unconstitutionality. For instance, the word "shall" in section 50(1)(a) of the Prevention of Organised Crime Act 121 of 1998 has been interpreted as "may". See *Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae)* [2007] ZACC 4; 2007 (4) SA 222 (CC); 2007 (6) BCLR 575 (CC) at para 121. This is not possible here. The words "must order" in the introductory phrase of section 89(5) apply to the entire provision, including subsection (a), which declares that the unlawful credit agreement must be ordered to be void. It is well-established in our law that unlawful contracts are void. It is unlikely that section 89(5) seeks to give courts a discretion not to declare them void. Further, this reading would be at odds with section 89(2)(d) and section 40(4) where the unlawful credit agreement has been expressly declared to be void. This interpretation would not be in line with the scheme and purpose of the Act.

An alternative interpretation

[33] The interesting interpretation proposed in the judgment by my colleague Cameron J was not raised before or mentioned by the High Court in its judgment. Counsel did not accept it as a viable possibility when it was put to them during the presentation of oral argument in this Court.

[34] 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.

[35] This interpretation is attractive to the extent that it attempts to give meaning to the words "under that credit agreement" and does not result in constitutional invalidity. However, it poses problems.

[36] Section 89(5)(c) would then mean that only the rights under the credit agreement are cancelled or forfeited to the state. But we know that no rights flow from or exist under an unlawful and void agreement. The provision would be

"inoperative, a patently regrettable result",[42] ineffectual and in fact meaningless. It would be a patent "drafting error".[43]

[37] According to this interpretation, the legislature would simply be required to remove the words "under that credit agreement" to give the provision meaning and thereby remedy the defect. Then the cancellation and forfeiture would indeed apply to restitution based on enrichment. The unconstitutionality complained of by Mr Opperman and found by the High Court would thus arise again and would still have to be determined by courts, including this Court.

[38] In my view the words "under that credit agreement" are no more central and pivotal to the provision than the words "to recover any money paid or goods delivered", together with the repeated mentioning of "unjustly enrich" in section 89(5)(c)(i) and (ii). 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?

[39] The provision has to be interpreted within the context of the stated aims of the NCA as a whole, as well as the rest of the provision. It should be understood within the broader context of section 89(5) and in the light of the unjust enrichment enquiry referred to in (i) and (ii). There is a link between the "purported rights" and "that

[42] [93] below.

[43] [105] below.

credit agreement" although a claim based on enrichment is not a contractual right; it arises as a result of an agreement being void. Section 89(5) seems 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 under (b), to the denial of the right to restitution under (c). This is the scheme of the provision, which is quite understandable within the context of the aims of the NCA.

[40] There might furthermore be practical implications if the restitution claim is left intact by section 89(5)(c), as proposed by this interpretation. The credit provider would have a claim for restitution against the consumer (under (c)). At the same time the consumer would have a claim (under (b)) to a refund of all money paid by the consumer to the credit provider.[44] This would make little sense.

[41] A court must try to give a reasonable meaning to the text enacted by the legislature. I am unable to endorse an interpretation that renders section 89(5)(c) inoperative and meaningless. And I cannot find a provision to be constitutionally compliant, if that finding is based on a drafting error. This Court has previously rejected an interpretation that would render a provision ineffective and nugatory, even if it results in constitutional compliance.[45] It is not the most plausible interpretation for the provision, if a plausible one at all.

[44] See the wording of section 89(5)(b) and (c) above n 1.

[45] In *Abahlali baseMjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* [2009] ZACC 31; 2010 (2) BCLR 99 (CC) (*Abahlali*) at paras 110 – 11 this Court rejected an interpretation that "pulls the coercive teeth [of a provision at stake and] renders the provision nugatory."

[42] I disagree with the view of Cameron J insofar as it is suggested that this Court does not have a duty to give meaning to a provision if that meaning would result in unconstitutionality. Before constitutional compliance can be evaluated, a court must attribute a meaning to a provision. If more than one meaning is reasonably plausible, the one resulting in constitutional compliance must be chosen. But if the interpretation that emerges from the wording and context results in constitutional invalidity a court has to make a finding of unconstitutionality. The fact that a constitutionally compliant interpretation cannot reasonably be given to it, does not necessarily lead to vagueness. A finding of vagueness based on a perceived inability to interpret the provision would in any event also result in constitutional invalidity. And an interpretation that renders the provision meaningless would lead nowhere. It would be futile.

Vagueness

[43] It appears from the different interpretations advanced that aspects of the wording of section 89(5)(c) are problematic and do not fit perfectly with any of these interpretations. The wording of the provision also does not seem to properly recognise the common law position referred to in the introductory part of section 89(5). The words "cancelled" and "forfeit" in relation to "all the purported rights . . . under that credit agreement" are nebulous. The credit agreement is after all void from its inception because it is unlawful, under common law, as well as in terms of section 89(5)(a). Given that no contractual rights exist "under that credit

agreement", one wonders which "purported rights" stand to be "cancelled". And what rights remain to be forfeited to the state? What are "purported rights" in any event?

[44] This Court previously found significant ambiguity in section 89(5)(c)[46] and stated that it was "difficult to fathom exactly what is taken away from the applicant and exactly what is forfeited to the state."[47] Similarly poor formulation of other provisions of the NCA has also resulted in litigation.[48] But no provision of the NCA has been argued or found to be unconstitutionally vague.

[45] The question arises whether the provision is indeed vague to the extent of being constitutionally unacceptable. Vagueness was not a ground on which the High Court found section 89(5)(c) constitutionally invalid. It was also not raised by any of the parties before this Court. After the hearing of oral argument, the parties were directed to make additional written submissions on whether section 89(5)(c) is constitutionally invalid due to its vagueness. In response, all the parties submitted that the provision is not unconstitutionally vague.

[46] *Cherangani Trade and Invest 107 (Pty) Ltd v Mason NO and Others* [2011] ZACC 12; 2011 (11) BCLR 1123 (CC) (*Cherangani*) at paras 13 and 18, per Yacoob J.

[47] Id at para 14. Yacoob J further mentioned at para 19 that even the parties' counsel could not provide a clear meaning of the provision.

[48] See for example, *Sebola* above n 33 at para 66 ("[t]he lack of clarity in the drafting of the Act has justly been bemoaned") and *Nedbank Ltd* above n 27 at para 2 ("[n]umerous drafting errors, untidy expressions and inconsistencies" make interpreting the NCA "a particularly trying exercise").

[46] Laws must of course be written in a clear and accessible manner.[49] Impermissibly vague provisions violate the rule of law, a founding value of our Constitution.[50] For the "law" to "rule", it must be reasonably clear and certain.

[47] However, courts have a duty to interpret and apply the law.[51] On the assumption of office, each judge must swear or affirm to administer justice in accordance with the Constitution and the law.[52] The doctrine of the separation of powers requires the legislature to make law and the courts to interpret and apply it to the best of their ability. In *Affordable Medicines*[53] Ngcobo J stated: "[t]he doctrine of vagueness must recognise the role of government to further legitimate social and economic objectives".

[48] The need for clarity does not require absolute certainty. The law must indicate with reasonable certainty to those bound by it what is required of them.[54] When considering vagueness, a court must construe the relevant provision by applying the normal rules of construction, which would include looking at the statute as a whole.[55]

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[49] *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines*) at para 108. See also *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) at para 100 and *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others* [2006] ZACC 7; 2009 (1) SA 565 (CC); 2006 (8) BCLR 901 (CC) (*South African Liquor Traders*) at para 27.

[50] See section 1(c) of the Constitution.

[51] See section 165(2) of the Constitution.

[52] See item 6 of Schedule 2 of the Constitution.

[53] *Affordable Medicines* above n 49.

[54] Id at paras 108 – 9 and *Hyundai* above n 39 at paras 22 and 24.

[55] *Affordable Medicines* above n 49 at para 109. See also generally *South African Liquor Traders* above n 49.

[49] Only once has this Court found legislation to be impermissibly vague. In *South African Liquor Traders* the lack of a timeframe in a definition rendered that definition completely unworkable and impermissibly vague and thus unconstitutional. Section 1 of the Gauteng Liquor Act[56] defined a "shebeen" as "any unlicensed operation whose main business is liquor and is selling less than ten (10) cases consisting of 12 x 750 ml of beer bottles", without stipulating the period within which these had to be sold. O'Regan J stated on behalf of a unanimous court:

> "The difficulty arises from the fact that the definition does not stipulate the period within which the prescribed quantity of beer must be sold: it could be defined by reference to a day, a week, a month or even a year. The absence of a stipulated period from the definition renders the definition vague. Furthermore, there is nothing in the rest of the Act which assists in any way in providing a meaning to the definition. Its meaning cannot therefore be ascertained with any precision. It is simply not clear which unlicensed liquor traders will fall within the definition and which without."[57]

The preferred interpretation

[50] In view of the less than accurate language of the provision, a robust conclusion that section 89(5)(c) is unconstitutionally vague appears tempting. A finding to this effect would result in a declaration of invalidity without more, which would render it unnecessary to grapple with the questions concerning the arbitrary deprivation of property that still have to be addressed. But it would amount to shirking one's responsibility to give meaning to an important piece of legislation.

[56] 2 of 2003. See also *South African Liquor Traders* above n 49 at para 2.

[57] *South African Liquor Traders* above n 49 at para 26.

[51] The provision is not well drafted. The inaccuracy is frustrating. But it does not rise to a constitutionally fatal level of vagueness. The situation is very different from the one in *South African Liquor Traders,* where the provision was utterly meaningless and unworkable and where nothing in the rest of that Act assisted in giving a meaning to the definition.

[52] In spite of words and phrases that may show incoherence and a lack of understanding of common law, the stated objectives of the NCA and the context within which section 89(5)(c) appears assist in interpreting the provision.

[53] The phrase "despite any provision of common law" may, arguably, indicate the aim either to override the common law, or to regulate the relationship between the credit provider and the consumer, whatever the common law position might be. In view of the stated objects of the NCA, it is fair to assume that the legislature intervenes because of a perceived need to do so. This need is probably to deny the credit provider a remedy which he or she may have under common law but which would not accord with the purposes of the NCA, namely the right to restitution.

[54] The use of the term "purported rights" is clumsy but understandable. It can only refer to the rights a credit provider might have had if the agreement were valid, or might mistakenly think he or she still has, even under the unlawful agreement.

[55] The most plausible meaning of section 89(5)(c) is the one the High Court gave it. The interpretation reflects what common sense tells one the aim of the provision is, in view of the NCA as a whole: consumers 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. In practice it may well always be forfeited to the state. *Cherangani*[58] recognised this, without deciding, as one possible meaning of section 89(5)(c). This is how authors appear to interpret the provision.[59] This interpretation does not unduly strain the wording of the provision.

[56] It does not escape me that this interpretation may result in a finding of constitutional invalidity even though it requires a somewhat robust treatment of aspects of the language of the provision. But it does not ignore the words in the provision, at least not substantially more than in *Abahlali*.[60] Rather than ignoring the phrase "under that credit agreement", it invokes context and recognises the references to unjust enrichment in the provision.

[58] See above n 46 at para 14.

[59] See Otto "Die par delictum-reël en die National Credit Act" above n 14 at 431 and 434.

[60] See above n 45.

Does section 89(5)(c) deal with "property" under section 25?

[57] In order to engage section 25(1) the "purported rights" of a credit provider under a credit agreement "to recover any money paid or goods delivered", referred to in section 89(5)(c), must indeed be *property* within the meaning of section 25.

[58] The High Court found that section 89(5)(c) has the effect that a credit provider is deprived of his or her goods or money through the denial of their restitution rights. The Court mentioned that the claim has monetary value and can be disposed of and transferred. It can be counted as an asset in one's estate and is part of one's patrimony.

[59] All the parties, furthermore, accept that we are dealing with property under section 25.

[60] Section 25 does not define *property*, other than stating that it is not limited to land.[61] This Court reasoned in *FNB v CSARS*[62] that assigning a comprehensive definition to the term *property* is not possible or wise and was not necessary in that case.[63]

[61] This Court has not specifically found that personal rights emanating from contract, delict, or enrichment are indeed *property* under section 25. Our

[61] Section 25(4)(b).

[62] *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] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (CC) (*FNB v CSARS*) at para 51.

[63] Id.

constitutional jurisprudence accepts that deprivation of ownership of corporeal property constitutes deprivation for purposes of section 25.[64] Without discussing the specific point, this Court has also accepted a trade mark to be property, albeit incorporeal, deserving protection under section 25.[65] Intellectual property, even though incorporeal, is of course different from an enrichment claim. The right to claim restitution on the basis of enrichment is a personal right. It can only be enforced against a specific party or parties, in this case the consumer who received the money. It is not a real right in property like, for example, ownership or a usufruct, enforceable against all. Section 25 deals with *property* and not with *ownership*. But reliance has been placed on the link to ownership in evaluating whether there is a deprivation or whether section 25 comes into play.[66]

[62] In *Law Society of South Africa and Others v Minister for Transport and Another*[67] this Court was faced with a right which is not universally enforceable, but sourced in the law of obligations. The Court assumed without finding that a claim for loss of earning capacity or support is property.

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[64] Id. See also *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* [2009] ZACC 24; 2009 (6) SA 391 (CC); 2010 (1) BCLR 61 (CC); *Du Toit v Minister of Transport* [2005] ZACC 9; 2006 (1) SA 297 (CC); 2005 (11) BCLR 1053 (CC); *Phoebus Apollo Aviation CC v Minister of Safety and Security* [2002] ZACC 26; 2003 (2) SA 34 (CC); 2003 (1) BCLR 14 (CC); and *Harksen v Lane NO and Others* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC).

[65] See *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as* Amicus Curiae*)* [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) and *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* [2006] ZACC 6; 2006 (8) BCLR 883 (CC) (*Phumelela*).

[66] This is reflected by the reasoning of this Court in the following judgements: *Phumelela* id; *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as* Amici Curiae*)* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at para 34; and *FNB v CSARS* above n 62 at para 51.

[67] [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) (*Law Society of South Africa v Minister for Transport*) at para 84.

[63] In the circumstances of this case, the recognition of the right to restitution of money paid, based on unjustified enrichment, as property under section 25(1) is logical and realistic.[68] It would be in accordance with developments in other jurisdictions where personal rights have been recognised as constitutional property.[69] Intangible property has become important in modern-day society and *property* should not be so narrowly interpreted as to diminish the worth of the protection given by section 25. In *Law Society of South Africa v Minister for Transport* this Court stated that "the 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."[70]

[64] Mr Opperman's enrichment claim falls within the scope of section 25 of the Constitution. The question is whether he is arbitrarily deprived of it.[71]

[68] For support for the view that intangible property like rights, that are themselves seen as the objects of property rights, must qualify as property, see Van der Walt *Constitutional Property Law* 3 ed (Juta & Co, Cape Town 2011) at pages 115 – 6 and 141 – 2.

[69] Other jurisdictions have accepted personal rights emanating from contract and delict as constitutional property. Debts and claims that sound in money have been recognised as constitutional property in, for example, Germany, Australia and Ireland. See in this regard id at 150 – 68. See also 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. See also *Hewlett v Minister of Finance & Another* 1982 (1) SA 490 (ZS) where the Zimbabwean Supreme Court found that debts owed by the state, arising from the actual awards of compensation, are *property* within the meaning of the Constitution of Zimbabwe (1979).

[70] Above n 67 at para 83.

[71] Roux "Property" in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed at 46-2 – 5.

Arbitrary deprivation?

[65] Section 25(1) of the Constitution protects against the arbitrary deprivation of property. Its primary function has been described as "striking a proportionate balance" between the right of property holders and the interests of the public.[72]

[66] Whether there has been a *deprivation* depends on the extent of interference with the use, enjoyment or exploitation of the constitutionally protected property.[73] Interference significant enough to have a legally relevant impact on the rights of the affected party amounts to deprivation.[74]

[67] Forfeiture involves state conduct by which property is lost to the state, without the consent of the owner and without just compensation.[75] It is well established that forfeiture results in the deprivation of property and therefore must be consistent with the Constitution.[76]

[72] *FNB v CSARS* above n 62 para 50.

[73] Id at paras 57 – 8 and 60.

[74] *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* [2010] ZACC 20; 2011 (1) SA 293 (CC); 2011 (2) BCLR 189 (CC) paras 39 and 41. See also *FNB v CSARS* above n 62.

[75] Van Der Walt "Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause" (2000) 16(1) *SAJHR* 1. See also Van Jaarsveld "The history of *in rem* forteiture: a penal legacy of the past" (2006) 12 *Fundamina* 137 at 138 – 47 quoting Justice Blackstone: "The natural justice of forfeiture . . . is founded on this consideration: that he who hath thus violated the fundamental principles of government, and broken his part of the original contract between king and people, hath abandoned his connections with society, and hath no longer any right to those advantages which before belonged to him as a member of the community; among which social advantages the right of transferring . . . property to others is one of chief."

[76] *Van der Burg and Another v National Director of Public Prosecutions* [2012] ZACC 12; 2012 (2) SACR 331 (CC); 2012 (8) BCLR 881 (CC) at para 1. See also *S v Shaik and Others* [2007] ZACC 19; 2008 (2) SA 208 (CC); 2007 (12) BCLR 1360 (CC) and *Mohunram* above n 41 at para 9.

[68] Is the deprivation *arbitrary*? Dealing with a provision of the Customs and Excise Act,[77] this Court held in *FNB v CSARS* that a deprivation of property is arbitrary when the law does not provide sufficient reason for the particular regulatory deprivation in question, or when it is procedurally unfair.[78] A complexity of relations must be considered in testing whether there is sufficient reason for the regulatory deprivation. These include the relationship between the means employed and the ends sought by the legislative scheme; 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 that property.[79] The more extensive the deprivation and the stronger the property interest, the more compelling the state's purpose has to be for having the regulatory deprivation at question in place.[80]

[69] The Minister argues that the deprivation is not arbitrary. Counsel for the Minister submitted that the procedural leg of the inquiry is satisfied, because a court adjudicates the matter and makes an order. The problem is of course that the court is denied any discretion to decide on a just and equitable order. This Court indicated in *Mohunram*[81] that a lack of discretion on the part of a court to forfeit property would result in an arbitrary deprivation of property.[82]

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[77] 91 of 1964.

[78] *FNB v CSARS* above n 62 at para 100.

[79] Id. According to Roux above n 71 at 46 – 22 the level of scrutiny in an arbitrariness test is higher than rationality review but lower and less stringent than proportionality evaluation.

[80] *FNB v CSARS* above n 62 at para 100.

[81] Above n 41.

[82] Id at para 121: "[Courts] have correctly held all requests by state prosecutors for civil forfeiture to the standard of proportionality which amounts to no more than that the forfeiture should not constitute arbitrary deprivation of property or the kind of punishment not permitted by section 12(1)(e) of the Constitution."

[70] The deprivation at issue here is not of a partial nature; it effectively removes an unregistered credit provider's right to restitution. For this, there must be persuasive reasons.[83] The Minister submits that the purpose of the limitation is important, namely to protect the public against unscrupulous money lenders. The punitive nature of the provision must deter unregistered credit providers from advancing credit to consumers, outside of the regulatory framework.

[71] Though one can be sympathetic to the objects of the provision, I am not persuaded that the importance and purpose of the limitation, including deterrence and protection of the public, provide sufficient reason for the deprivation embodied in this provision.[84] Whereas regulated deprivation may be permissible to further compelling interests, the state still has to be constrained in how it may pursue those ends. Given that the extent of deprivation here is far reaching, the purpose should be stated clearly, and the means chosen to accomplish it must be narrowly framed. In this case the means chosen are disproportionate to the purpose, as is further demonstrated by the less restrictive means analysed below under the justification enquiry.

[72] Thus section 89(5)(c) results in arbitrary deprivation of property in breach of section 25(1) of the Constitution.

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[83] *S v Bhulwana, S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) (*Bhulwana*) at para 18:

> "The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be."

[84] See above n 11 for a list of purposes of the NCA.

A reasonable and justifiable limitation?

[73] In the alternative to the Minister's main submission that there is no arbitrary deprivation, it was argued on behalf of the Minister that section 89(5)(c) contains a constitutionally permissible limitation of the right not to be arbitrarily deprived of property in section 25(1). The immediate question is: 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)?[85] The conceptual difficulties are obvious.[86] When considering the concept of arbitrariness, Ackermann J opined in *S v Makwanyane and Another*[87] that "[n]either 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."[88] Counsel for the Minister conceded in the High Court that the section 36(1) argument is a difficult one to advance, once arbitrary deprivation is established.

[74] In *FNB v CSARS* this Court assumed, without deciding, that it must be determined whether or not the deprivation was justified under section 36,[89] even

[85] See above n 3 for the wording of section 36.

[86] See Roux above n 71 above at 46-26.

[87] [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

[88] Id at para 156.

[89] *FNB v CSARS* above n 62 at para 110 states:

> "It might be contended that, once the deprivation has been adjudged to be arbitrary, no scope remains for justification under section 36. By its terms, section 36 of the Constitution draws no distinction between any rights in the Bill of Rights when it provides that '[t]he rights in the Bill of Rights may be limited'. Neither the text nor purpose of section 36 suggests that any right in the Bill of Rights is excluded from limitation under its provisions. In view of the conclusion ultimately reached on this part of the case, it is not necessary to decide this question finally here. It will be assumed, without deciding, that an infringement of

though it was arbitrary. The Court was of the view that the text of section 36 does not suggest that any right is excluded from limitation under its provisions. Section 25(8) of the Constitution also expressly states that any departure from the provisions of section 25 has to be "in accordance with the provisions of section 36(1)."[90]

[75] Many of the factors employed under the arbitrariness test to determine sufficiency of reasons yield the same conclusion when considering whether a limitation is reasonable and justifiable under section 36.

[76] Section 36(1)(d) specifically requires that attention be given to the relation between the limitation and its purpose. Laws impacting on constitutional rights may not use disproportionate means to achieve their purpose.[91] Furthermore, the availability of less restrictive means has to be considered in terms of section 36(1)(e). The common law position is less restrictive: unlawful contracts are void and not enforceable and turpitude is taken into account when restitution is claimed on the ground of unjustified enrichment. It does discourage unlawful agreements by unregistered credit providers. Section 89(5)(b) furthermore states that the credit provider must refund all money paid by the consumer, with interest. The failure to

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> section 25(1) of the Constitution is subject to the provisions of section 36." (Emphasis added and footnote omitted.)

[90] Section 25(8) provides:

> "No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1)."

[91] *S v Manamela and Another (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 34 states: "Section 36, however, does not permit a sledgehammer to be used to crack a nut."

allow a court 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, for example, is disproportional.

[77] Further, under the NCA a consumer may bring a complaint about an unlawful agreement to the NCR.[92] The NCR can bring the complaint to the National Consumer Tribunal. The Tribunal is empowered to declare the conduct prohibited.[93] The Tribunal may impose an administrative fine the amount of which must be determined by considering the factors enumerated in section 151(3) and which may not exceed certain limits.[94] This helps to achieve the stated purposes of the NCA.[95]

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[92] See section 136 of the NCA.

[93] Prohibited conduct is defined in section 1 of the NCA as meaning:

> "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".

[94] 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."

[95] As set out in the Preamble, quoted in full above n 32.

[78] As the High Court pointed out, a credit provider's object is to make money by way of interest. A credit provider who enters into an unlawful agreement is not legally entitled to the interest. Forgoing the interest is another means to achieve the aims of the NCA that is less restrictive than the means employed by section 89(5)(c).

[79] The nature of the right, the importance of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the purpose have all, in effect, been considered in determining whether the deprivation is arbitrary. And I take note of the High Court's recognition of the situation in other open and democratic societies, in so far as these are comparable in the area relevant here.

[80] I am not persuaded that section 89(5)(c) can be saved as a reasonable and justifiable limitation of the right not to be deprived of property arbitrarily.

Remedy

[81] The High Court declared section 89(5)(c) inconsistent with the provisions of section 25(1) of the Constitution and thus invalid. No reading-in or suspension of the order of invalidity was ordered.

[82] The NCR submits that since the only difficulty with the provision would be the lack of a discretion, the appropriate remedy in the circumstances would be to read-in

that discretion into the section. It proposes that the following words be read into the provision immediately after section 89(5)(c)(ii):

> "Provided that where the Court concludes that it would not be just and reasonable in the circumstances to make either of the orders set out in sub-paragraphs (i) and (ii) above, the Court must make such order as it deems fit in order to give effect to the objects of the Act."

[83] This remedy makes provision for the objects of the NCA to be taken into account by a court, but giving a court such a wide discretion, albeit guided by the aims of the NCA, seems to be a broader construction than what is necessary.

[84] It is preferable for the legislature to address the problematic content of the provision comprehensively, because it is part of an important piece of legislation with laudable objectives, rather than for a court to venture into patch-work legislating. In the circumstances I would simply declare it invalid without any reading-in.

[85] The Minister asked this Court to suspend any order of constitutional invalidity for a period of two years to afford the legislature an opportunity to amend the NCA. But no significant gap would be created by an order which does not provide for a period of suspension, as made by the High Court. If section 89(5)(c) is declared invalid, the common law position regarding unlawful contracts would prevail until the legislature replaces it. The unlawful agreement would be void and the credit provider would be able to claim successfully from the consumer on the basis of unjustified enrichment, if the requirements of the action are met. This could include the

consideration of the circumstances of each case and especially the degree of blameworthiness of the unregistered credit provider, in order to reach a just outcome.

[86] As observed by the High Court, the continuing existence of subsection (b) may create tension between the consumer's claim for a refund of money paid to the credit provider and the credit provider's enrichment claim. This is another reason (in addition to the inaccurate language used) for the legislature to consider a reformulation of section 89(5) as a whole, within the context of section 89 and the rest of the NCA.

Retrospectivity

[87] The NCR raised concern that the High Court did not limit the retrospective effect of its order. An order of invalidity of this Court will, however, have no effect on cases that have already been finalised.[96]

Conclusion

[88] It follows that the High Court's judgment and order cannot be faulted. Its interpretation of section 89(5)(c) is the most plausible of the interpretations advanced. The interpretation of the NCR cannot reasonably be applied to the provision. The alternative interpretation proposed is futile. The provision is also capable of interpretation and is thus not unconstitutionally vague. It results in the deprivation of Mr Opperman's property because it extinguishes his right to claim restitution based on

[96] See *Bhulwana* above n 83 at para 32.

unjustified enrichment, without leaving any discretion to a court to consider a just and equitable order under the circumstances. This deprivation is arbitrary because sufficient reasons have not been given for it. The infringement of the right not to be arbitrarily deprived of property is disproportionate to the purpose of the provision. There are less restrictive means available to achieve the purpose. Therefore it is not a constitutionally acceptable limitation of the right.

Costs

[89] Mr Opperman did not initially apply for costs of the application before this Court as he would have received costs in the main sequestration proceedings. He has belatedly requested a costs order due to changed circumstances in the High Court proceedings. Standard Bank, a secured creditor, brought an urgent application in the High Court to intervene as a party to the proceedings. Standard Bank discharged Mr Opperman's *rule nisi* and obtained a *rule nisi* in its favour, thus Mr Opperman is no longer a party to the sequestration proceedings.

[90] The NCR opposes the request for costs on the basis that it is belated. The delay is understandable because when the papers were filed in this Court, Standard Bank had not intervened. As the successful party, Mr Opperman is entitled to his costs before this Court.

Order

[91] The following order is made:

1. The appeal is dismissed.
2. The order of the High Court is confirmed.
3. Section 89(5)(c) of the National Credit Act 34 of 2005 is inconsistent with section 25(1) of the Constitution and thus invalid.
4. The applicant must pay the costs of the first respondent.

CAMERON J (Froneman J and Jafta J concurring):

[92] At issue is the constitutional validity of a provision of the National Credit Act[97] (NCA) that requires cancellation or forfeiture of the rights of recovery of a lender who advances money under an unlawful credit agreement. The High Court concluded that the provision arbitrarily deprives the lender of property and hence is constitutionally bad. The main judgment, by my colleague Van der Westhuizen J, which I have had the pleasure of reading, reaches the same conclusion, for broadly the same reasons. I cannot endorse this approach.

[93] The route the main judgment takes lies along a path that requires the Court to ignore plain words in the provision that are central to it. In my view, it is simpler, and truer to our task of interpretation, not to ignore the words, but to take them to mean what they say. Doing so renders the provision inoperative, a patently regrettable result. But the words the legislator enacted render that unavoidable. And the consequence is that it is not necessary to strike the provision down. That is better, I

[97] 34 of 2005.

suggest, than to struggle to find a meaning, in the face of the words ignored, only then to declare the provision invalid.

[94] On either approach the effect is to blunt the provision's bite. It cannot deprive unauthorised lenders of their rights of recovery. In both cases, if the legislature wishes to give the provision teeth, it must re-draft and re-enact it in better form. But behind the management of the practical outcome lies the difficult question how far we can stretch or squeeze language to arrive at meaning. Ignoring words pivotal to the provision, in my view, goes further than a court should, even if it means acknowledging that the legislature, in enacting it, misfired.

[95] The provision causing the pain requires a court in the case of an unlawful credit agreement (including one concluded with an unregistered credit provider, as here) to order that "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 cancelled or forfeited to the state.[98] The provision taxed this Court in *Cherangani*,[99] which found that "it will not be easy to give a comprehensible meaning" [100] to it:

> "Neither counsel could tell us what the provision meant and their submissions tended to go sometimes in one direction and sometimes in another."[101]

[98] Section 89(5)(c) of the NCA.

[99] *Cherangani Trade and Invest 107 (Pty) Ltd v Mason NO and Others* [2011] ZACC 12; 2011 (11) BCLR 1123 (CC) (*Cherangani*).

[100] Id at para 13.

[101] Id at para 19.

The phrase "purported rights" in particular caused puzzlement:

> "It is difficult to fathom exactly what is taken away from the [unregistered credit provider] and exactly what is forfeited to the state. Are they 'purported rights' which do not exist anymore or is the right to sue for unjust enrichment also forfeited?"[102]

[96] The Court in *Cherangani* declined to determine the provision's meaning because of late presentation of the question and non-joinder of a state entity.[103] In addition, the prejudice to the party concerned had not been spelt out.[104] Those factors are absent here and we must now decide what the provision means. In doing so, we must be guided by the precepts of statutory interpretation this Court has embraced in its task of constitutional adjudication. The words must be given their ordinary meaning, in context.[105] If the words are reasonably capable of a meaning that avoids conflict with the Constitution, that meaning must prevail.[106] If two meanings promote the spirit, purport and objects[107] of the Bill of Rights, that which better does so should be adopted.[108]

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[102] Id at para 14.

[103] Id at para 22.

[104] Id at paras 22-5.

[105] *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 13 (Chaskalson P). For a recent comprehensive treatment of the rules of interpretation, see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) (Wallis JA).

[106] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC).

[107] Section 39(2) reads:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[108] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) at paras 46-7.

[97] The High Court found, and the main judgment concludes,[109] that the provision deals with the credit provider's restitutionary rights. The provision, so the main judgment finds, requires that courts – in the case of agreements entered into by credit providers who in contravention of the statute do not register – must declare the agreement void, and must order either that the credit provider's right to restitution is cancelled, or that it is forfeited to the state. In ascribing this meaning to the provision, Van der Westhuizen J notes that the use of the term "purported rights" is "clumsy"[110] and that the interpretation that rights under an unlawful and void agreement must be cancelled or forfeited "may result in a finding of constitutional invalidity even though it requires a somewhat robust treatment of aspects of the language of the provision."[111]

[98] These very considerations drive me to conclude that it is better to avoid embracing this interpretation. Pivotal to my colleague's conclusion that the provision requires cancellation or forfeiture of the credit provider's right to restitution is ignoring the words "under that credit agreement".

[99] A longstanding precept of interpretation is that every word must be given a meaning. Words in an enactment should not be treated as tautologous or superfluous.[112] This is for good reason. Interpretation is a cooperative venture

[109] [53] and [55] above.

[110] [54] above.

[111] [56] above.

[112] *Wellworths Bazaars Ltd v Chandler's Ltd and Another* 1947 (2) SA 37 (A) at 43 ("a Court should be slow to come to the conclusion that words [in a statute] are tautologous or superfluous").

between legislator and judge, bounded by mutually understood rules, in which the latter seeks to give meaning to the text enacted by the former.[113] The mutual suppositions, and the constraints of principle and constitutional precept on the judge's role, enable the joint process to reach a coherent and practical outcome. For this, it has to be assumed that the legislator's enacted text includes only words that matter.[114] For to enact words that do not would violate the most basic supposition of the shared enterprise. Hence none can be ignored.

[100] The shared enterprise is imperilled if this precept is too readily ignored. It could seem to license judges to pick and choose among words and phrases, and to omit those considered inconvenient. That cannot be. Everything the legislator has enacted must be included in the meaning assigned to the whole. The rule performs a boundary-setting function. Its observance shows that judges are staying within their assigned role of interpretation, and not straying outside it into amendment, enactment or innovation. As this Court pointed out in its very first judgment, if the language used by the lawgiver is ignored in favour of other pursuits, "the result is not

[113] Judges are expected to deal with the text by engaging in judicial interpretation, not "judicial vandalism", as observed by Lord Bingham in *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837 (HL) at para 30.

[114] De Ville *Constitutional and Statutory Interpretation* (Interdoc Consultants (Pty) Ltd, Cape Town 2000) at 114 explains that the precept "can either be expressed as a rule of grammatical interpretation or as a presumption: that the legislature does not intend to enact invalid or purposeless provisions." Du Plessis *Re-interpretation of Statutes* (Butterworths, Durban 2002) at 213 submits in response that the presumption and rule can remain distinct:

> "The presumption expresses the inherent validity and purposefulness of statute law, that is, its effect-directedness, while the rule verbalises the expectations as to the language in which effect-directed enactments will be couched. The literalist formulation of the rule is unduly narrow and encourages an excessive peering at the words of legislative instruments. Words are not the only signifiers that generate statutory meaning. Phrases, sentences, paragraphs, sections and, finally, the instrument of the text as a whole all generate meaning. The linguistic expression of the purposefulness of a statutory text should therefore be broader: all language used, that is, every linguistic signifier and the syntax must be taken seriously."

interpretation but divination."[115] Though said in a different context, the point is that constitutionalism has not upended the basic rules of interpretation.

[101] The phrase "rights . . . under that credit agreement" is central to the phraseology of the provision. It cannot in my view be ignored. At the same time, its inclusion renders the provision incoherent and ineffectual. It is incoherent because a right to restitution does not derive from contract. It arises from the very fact that a contract is invalid.[116] Restitution as a remedy lies outside the parties' agreement, precisely because their agreement has failed.

[102] The provision is ineffectual since it lacks retributive bite. If one takes the language the legislator has enacted seriously, as we must, the plain meaning of the provision is that the unregistered credit provider's purported rights under the credit agreement to recover what has been transferred to the borrower must either be cancelled or forfeited. On its own terms, this is not incoherent. Many contractual agreements provide for recovery by the lender when the agreement is cancelled because of malperformance by the borrower. So the wording can quite plausibly be

[115] *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 18. Kentridge AJ was talking about constitutional interpretation, but what he says applies all the more to statutory interpretation generally. He stated at paras 17-8:

> "I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.
>
> We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination."

[116] See Visser *Unjustified Enrichment* (Juta & Co, Cape Town 2008) at 90 and Lotz "Enrichment" 9 *LAWSA* 2005 at para 209.

taken as directed at those contractual rights of recovery. The difficulty, of course, is that the statute itself ordains that the credit agreement is void from the moment it was concluded.[117] So, by the legislator's own logic, there cannot be any rights of recovery under the agreement. So the contractual right could not vest in the state, thus sapping the provision of any effective punitive force.

[103] Recognising this, the main judgment takes the provision as meaning to reach restitutionary rights. But the conception of restitutionary rights "under that credit agreement" is even more radically misplaced, both legally and linguistically. Rights of recovery in the case of a void contract are derived from the common law of restitution, not from the agreement. So to hold in defiance of what the language states that the provision effectively reaches the unregistered credit provider's restitutionary rights is to squeeze it into a meaning its words, taken together, cannot sustain.

[104] Other decisions of this Court and of the Supreme Court of Appeal have lamented the dismal drafting of the NCA.[118] Duty-bound, in fidelity to our task of protecting constitutional rights, we have strained to give meaning to provisions that have seemed to defy it. We have done so to give coherence to what we justifiably assume is a well-directed even if poorly-crafted statutory enterprise. But sometimes we have to acknowledge that fidelity to language, and to what we can fairly hope for in coherent drafting, require us to leave well alone. Elementary meaning demands

[117] Section 89(5)(a) of the NCA.

[118] *Sebola and Another v Standard Bank of South Africa Ltd and Another* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) at para 66 and *Nedbank Ltd and Others v National Credit Regulator and Another* 2011 (3) SA 581 (SCA) at para 2. The main judgment also refers to these decisions above n 48.

that we stop short of the extreme expedient of interpreting a provision against its own language.

[105] This case, in my respectful view, signals the limits of cooperative effort in giving meaning to ill-chosen words. To virtually ignore the wording of the provision, and then find it constitutionally bad, seems to me an unnecessary dissonance. Put differently, once the words, taken as a whole, preclude a constitutionally compliant interpretation, the conclusion beckons that no constitutionally rational meaning can be given to the provision. The result may be that the provision is constitutionally void for vagueness. But even if constitutionally impermissible vagueness is not the result, then it seems there is little constitutional purpose in examining alternative meanings that will result in unconstitutionality or depriving the provision of the purpose for which it seems to have been enacted. There is then no particular constitutional imperative to squeeze a meaning from the provision. Rather, we must accept the words of the provision for what they say, even at the cost of accepting that the provision is ineffectual. It is better, in my view, to acknowledge the drafting error, and to leave Parliament to correct it.

[106] I would therefore decline to confirm the High Court's order of invalidity.

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