**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 88/14

In the matter between:

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| **CHEVRON SA (PTY) LIMITED** | Applicant |
| and | |
| **DENNIS EDWIN WILSON t/a WILSON'S TRANSPORT** | First Respondent |
| **MINISTER OF FINANCE** | Second Respondent |
| **MINISTER OF TRADE AND INDUSTRY** | Third Respondent |
| **NATIONAL CREDIT REGULATOR** | Fourth Respondent |

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| **Neutral citation:** | *Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport and Others* [2015] ZACC 15 |
| **Coram:** | Moseneke DCJ, Cameron J, Froneman J, Jappie AJ, Khampepe J, Madlanga J, Molemela AJ, Nkabinde J, Theron AJ and Tshiqi AJ |
| **Judgment:** | Madlanga J (unanimous) |
| **Heard on:** | 24 March 2015 |
| **Decided on:** | 5 June 2015 |
| **Summary:** | National Credit Act 34 of 2005 — constitutional validity of section 89(5)(b) — section is procedurally unfair — National Credit Amendment Act 19 of 2014 — section 27(a) and (b)<br><br>Unlawful credit agreements — refund of money paid under credit agreement if credit provider unregistered — substantive and procedural fairness of mandatory refund |

Constitutional challenge — section 25(1) of the Constitution — arbitrary deprivation of property — procedural arbitrariness — lack of judicial discretion — less restrictive means

Unjustified enrichment — *condictio ob turpem vel iniustam causam* — creditor free from turpitude — *par delictum* rule

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**ORDER**

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Application for confirmation of the order of the Western Cape Division of the High Court, Cape Town (Baartman J):

1. Condonation is granted for the late filing of the statement of facts by the applicant and the third and fourth respondents.
2. Condonation is granted for the late filing of further written submissions by the applicant and the first respondent.
3. The order made by the Western Cape Division of the High Court is confirmed to the extent set out below:
   3.1 Section 89(5)(b) of the National Credit Act 34 of 2005 is declared inconsistent with the Constitution and invalid.
   3.2 To remedy the defect, from 5 June 2014 to 13 March 2015, section 89(5) of the National Credit Act is deemed to read as follows:

> "(5) If a credit agreement is unlawful in terms of this section, despite any other legislation or any provision of an agreement to the contrary, a court must make a just and equitable order including but not limited to an order that:
>
> (a) The credit agreement is void as from the date the agreement was entered into."

4. The orders in paragraphs 3.1 and 3.2 above have no effect on matters in which final judgment has been delivered and in which no appeal or application for leave to appeal is pending.

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**JUDGMENT**

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MADLANGA J (Moseneke DCJ, Cameron J, Froneman J, Jappie AJ, Khampepe J, Molemela AJ, Nkabinde J, Theron AJ and Tshiqi AJ concurring):

*Introduction*

[1] These are confirmation proceedings brought in terms of section 172(2)(a) of the Constitution.[1] In the Western Cape Division of the High Court, Cape Town (High Court) Baartman J granted an order declaring section 89(5)(b) of the National Credit Act[2] (NCA) inconsistent with the Constitution on the basis that it permits arbitrary deprivation of property in contravention of section 25(1) of the Constitution.[3]

[2] The NCA was amended by the National Credit Amendment Act[4] (Amendment Act) after the initiation of proceedings but before the High Court order was made on 5 June 2014. The President had assented to the amendment in May 2014. However, the Amendment Act had not yet come into force. It took effect on 13 March 2015.

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[1] Section 172(2)(a) states:

> "The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[2] 34 of 2005.

[3] Section 25(1) prohibits anyone from being "deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".

[4] 19 of 2014.

[3] In order to remedy the defect, the High Court reformulated the impugned section. The reformulation mirrors the wording of the Amendment Act.[5] The parties are in agreement that the High Court's order of constitutional invalidity should be confirmed. They also agree that the reformulation by the High Court and the recent amendment cure the constitutional defect in section 89(5)(b).

*Background*

[4] Facts relevant to the determination of this matter are common cause. In 1997 the applicant, Chevron SA (Pty) Limited (Chevron), extended credit to the first respondent, Dennis Edwin Wilson t/a Wilson's Transport (Mr Wilson), for the purchase of petroleum products. Chevron provided Mr Wilson's vehicles with diesel at its Caltex filling stations and supplied Mr Wilson with diesel in bulk to a tank at his business premises. Until a dispute arose between the parties in 2008, Mr Wilson paid the amount owing to Chevron at the end of each month upon receiving details of the month's purchases.

[5] In 2008 Mr Wilson contested the accuracy of Chevron's billing. Negotiations on this did not bear fruit. In 2010, Chevron brought suit in the Wynberg Magistrate's Court, Cape Town (Magistrate's Court) for payment of the outstanding balance which – according to Chevron – was in the amount of R3 330 977.03.

[6] During the pre-trial conference process, Chevron accepted that it was required to be registered as a credit provider in terms of section 40(1) of the NCA, but that it was not, in fact, registered.[6] Section 40(4) of the NCA provides:

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[5] For the amended wording, see [12].

[6] Regarding the registration of credit providers, section 40(1) of the NCA provides that:

> "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)."

> "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."

[7] In terms of section 89(2)(d) a credit agreement is unlawful if, at the time it was concluded, the credit provider was unregistered and the NCA requires that credit provider to be registered. If a credit agreement is unlawful in terms of section 89, section 89(5)(a) enjoins the court concerned to declare the agreement void as from the date it was entered into. Section 89(5)(b) then adds:

> "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*—
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> . . .
>
> (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—
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> (i) at the rate set out in that agreement; and
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> (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". (Emphasis added.)

[8] From 1997 to 2009 Mr Wilson had made payments to Chevron in terms of the credit agreement. Section 89(5)(b) exposed Chevron to the risk of having to repay Mr Wilson all amounts paid after the NCA came into effect.[7] Amounts paid after the NCA came into force totalled approximately R33 million.

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The threshold prescribed by section 42(1) is to be determined by the Minister of Finance by notice in the Government Gazette at certain intervals, but cannot be less than R500 000.

[7] The majority of the provisions of the NCA came into effect on 1 June 2006, although chapter 5, which incorporates section 89, only came into effect on 1 June 2007.

[9] By agreement between Chevron and Mr Wilson, the Magistrate granted an order in the following terms: (i) declaring that the agreements concluded by Chevron and Mr Wilson from the inception of the NCA constituted credit agreements as envisaged in the NCA; (ii) declaring the agreements unlawful and void in terms of sections 40 and 89 of the NCA; and (iii) postponing the trial indefinitely to enable Chevron to institute proceedings challenging the constitutional validity of section 89(5) of the NCA.

*High Court*

[10] Before the High Court, Chevron contended that section 89(5)(b) permits an arbitrary deprivation of property which constitutes an infringement of section 25(1) of the Constitution. The arbitrary deprivation stems from the fact that section 89(5)(b) makes it obligatory for courts to order the refund of all amounts paid under the invalid agreement, leaving no room for the exercise of judicial discretion.

[11] The third respondent, the Minister of Trade and Industry, and the fourth respondent, the National Credit Regulator, agreed that section 89(5)(b) was constitutionally invalid for the reason advanced by Chevron. They reached an agreement with Chevron on how to reformulate the provision in order to remedy its unconstitutionality. Mr Wilson later also accepted the proposal.[8]

[12] The High Court accepted Chevron's argument.[9] It also found that the arbitrary deprivation could not be reasonably justified in terms of section 36 of the Constitution.[10] It adopted the Amendment Act's wording of section 89(5)[11] and handed down the following order:

[8] The second respondent, the Minister of Finance, has remained silent during the proceedings both before the High Court and this Court.

[9] *Chevron SA (Pty) Ltd v Dennis Edwin Wilson t/a Wilson's Transport and Others* [2014] ZAWCHC 121 (High Court judgment) at paras 7-8.

[10] Id at para 9. Section 36 of the Constitution provides:

> "(1) 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

"1. That Section 89(5)(b) of the National Credit Act 34 of 2005 (the Act) is declared invalid and unconstitutional.

2. That, to remedy the defect, section 89(5) of the Act be reformulated to read as follows:

> (5) If a credit agreement is unlawful in terms of this section, despite any other legislation or any provision of an agreement to the contrary, a court must make a just and equitable order including but not limited to an order that:
>
> (a) The credit agreement is void as from the date the agreement was entered into
>
> (b) . . . . . .

3. That the orders in paragraphs 1 and 2 above shall have no impact on matters in which final judgment has been delivered and in which no application for leave to appeal is pending.

4. That each party shall be liable for its own legal costs, including the costs of counsel, for this application.

5. That these orders are referred to the Constitutional Court for confirmation in terms of section 172(2)(a) of the Constitution."

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and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[11] Section 89(5) of the NCA was amended thus:

"If a credit agreement is unlawful in terms of this section, despite any other legislation or any provision of an agreement to the contrary, a court *must make a just and equitable order including but not limited to an order that*:

(a) The credit agreement is void as from the date the agreement was entered into." (Emphasis added.)

*In this Court*

[13] The parties agree that the High Court's order should be confirmed in full, albeit they diverge on some of the reasons. This agreement notwithstanding, it is incumbent upon this Court to determine that the impugned section is indeed constitutionally invalid before confirming the High Court's order of invalidity.[12] Before dealing with this question, there is a matter that must be dealt with summarily.

[14] Must this Court still decide whether to confirm the High Court's declaration of constitutional invalidity in light of the fact that the impugned section has since been amended; and the amendment has already taken effect? Yes. The applicant's case is still pending before the Magistrate's Court; and it is governed by the impugned section. Possibly, there are other pending cases to which the old section 89(5) is applicable.

*Is section 89(5)(b) constitutionally invalid?*

[15] Under this head a number of issues arise, namely—

(a) whether monies paid to a credit provider by a consumer[13] constitute property;
(b) if they do, whether their repayment by the credit provider to the consumer in terms of section 89(5)(b) amounts to deprivation;
(c) if it does amount to deprivation, whether the deprivation is arbitrary;
(d) if available to the credit provider upon repayment of the monies to the consumer, whether an unjustified enrichment claim expunges any arbitrariness that might otherwise exist; and
(e) whether the limitation is justified in terms of section 36(1) of the Constitution.

[12] See *Mdodana v Premier of the Eastern Cape and Others* [2014] ZACC 7; 2014 (4) SA 99 (CC); 2014 (5) BCLR 533 (CC) at paras 17-8.

[13] "Credit provider" and "consumer" are terms used in the NCA for what would be the creditor and debtor (Chevron and Mr Wilson, respectively, in this case).

*Property*

[16] While this Court has deemed it "unwise to attempt . . . a comprehensive definition of property",[14] it cannot be gainsaid that money in hand constitutes a property interest protected by section 25 of the Constitution.[15] Unlike the personal right this Court was concerned with in *Opperman*,[16] here Chevron received payment of approximately R33 million.

*Deprivation*

[17] On the issue of deprivation, this Court has held:

> "Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. . . . [S]ubstantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation."[17]

[18] When dealing with an unlawful credit agreement, section 89(5)(b) enjoins a court to direct, in all circumstances, the credit provider to repay to the consumer all amounts paid under the credit agreement, together with interest. Being forced by an order of court or operation of law to part with payment already received from the consumer is the very essence of deprivation of property.[18] And it is a substantial deprivation because Chevron is totally divested of the monies which it received under the credit agreement.

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[14] *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 (CC); 2002 (7) BCLR 702 (CC) (*FNB*) at para 51.

[15] See *FNB* id. See also *Troskie v Von Holdt and Others* [2013] ZAECGHC 31 at para 37, where the Court noted that "it hardly need be said that the money advanced in terms of the agreements constitutes property" within the meaning of section 25 of the Constitution.

[16] *National Credit Regulator v Opperman and Others* [2012] ZACC 29; 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC) (*Opperman*) at paras 61-3.

[17] *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* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) (*Mkontwana*) at para 32.

[18] See *Opperman* above n 16 at para 67.

[19] This is an even stronger case of deprivation than what was at issue in *Opperman*.[19] That decision dealt with section 89(5)(c) of the NCA,[20] which was very closely related to the section now before us. There, this Court found that taking away a credit provider's legal remedies to recover monies paid by it to the consumer under a credit agreement constituted an arbitrary deprivation of property. Surely, if eliminating a credit provider's ability potentially to recover money in the future is a deprivation of property, it follows more strongly that ordering the refund of money that a credit provider has already received is a deprivation. Is the deprivation arbitrary?

*Arbitrariness*

[20] This Court has fully canvassed the meaning of "arbitrary" in prior judgments. Ackermann J had this to say in *FNB*:

> "Having regard to what has gone before, it is concluded that a deprivation of property is 'arbitrary' as meant by section 25 when the 'law' referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair."[21]

[21] It is doubtful that the first of these requirements is met. The proscription of unlawful credit agreements serves the crucial purpose of protecting consumers. It can

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[19] Compare id at para 70.

[20] That section provided:

> "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—
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> . . .
>
> (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."

[21] *FNB* above n 14 at para 100. See also *Opperman* above n 16 at para 68.

hardly be said that the law in issue here "does not provide sufficient reason" for the deprivation.[22]

[22] Regarding procedural unfairness, the primary concern is that the court hearing the matter is given no discretion when making an order under section 89(5)(b).[23] Recently, in *Opperman*, Van der Westhuizen J explained why section 89(5)(c) ran afoul of section 25(1) of the Constitution:

> "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* that a lack of discretion on the part of a court to forfeit property would result in an arbitrary deprivation of property."[24] (Footnotes omitted and emphasis added.)

[23] This is equally true of section 89(5)(b). The court may not take relevant circumstances into account. For example, the deprivation takes place without any consideration being given to: the conduct of the parties to the transaction; their respective financial positions; their levels of business and financial acumen; the possible apportionment of blameworthiness to the parties in relation to the unlawfulness of the agreement; and the extent to which the credit receiver has profited from the transaction.

[24] The short point: section 89(5)(b) is procedurally unfair and this renders deprivations under it arbitrary.[25]

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[22] *FNB* id.

[23] *Opperman* above n 16 at para 69.

[24] The reference in the quotation is to *Mohunram and Another v National Director of Public Prosecutions and Another* [2007] ZACC 4; 2007 (4) SA 222 (CC); 2007 (6) BCLR 575 (CC) at para 121.

[25] *FNB* above n 14 at para 100.

*Unjustified enrichment*

[25] But does the availability of an unjustified enrichment claim negate the arbitrariness of the deprivation to which section 89(5)(b) subjects the creditor? Repayment to the consumer of money paid by her to the credit provider in exchange for goods supplied to her may result in the consumer retaining both. It matters not that the goods may no longer be in the possession of the consumer. The point of substance is that she would have derived a benefit from them or, at the very least, have had the opportunity to do so.

[26] A possible route open to the credit provider for restitution is an unjustified enrichment claim.[26] The relevant enrichment action is the *condictio ob turpem vel iniustam causam*.[27] Of this *Opperman* said:

> "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; and the claimant must tender the return of what he or she received."[28] (Footnotes omitted.)

And:

> "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."[29]

[27] If the credit provider is not free of turpitude, the *par delictum* rule stipulates that the law should not come to her aid.[30] But as far back as 1939, our law has

[26] *Opperman* above n 16 at para 15.

[27] Id.

[28] Id. Where the claim arises from a section 89(5)(b) court order, there would be no need for the tender because the order itself directs the return of what was received.

[29] Id at para 16.

recognised that a rigid application of the rule could result in injustice. As a result, in *Jajbhay* the Appellate Division relaxed the rule, and infused into it the exercise of a discretion so as to do justice between the parties.[31] It is the existence of this discretion, in the context of the enrichment claim, that is of relevance to the matter before us. The question is whether the possible availability of the enrichment claim to the credit provider coupled with this discretion negatives or, at the very least, ameliorates the arbitrariness of the section 89(5)(b) deprivation. I say it does not.

[28] In the first instance, the section 89(5)(b) refund is mandatory. On the other hand, all that the creditor is entitled to is a claim. That claim must still be proven. Like any claim, it may succeed or fail bearing in mind that it is subject to the *par delictum* rule.

[29] The success of an unjustified enrichment claim does not necessarily mean that the creditor is out of the woods. Restitution is not guaranteed. The debtor may be impecunious or even insolvent and subject to sequestration or winding-up proceedings. In the case of insolvency, the creditor will have no more than a concurrent claim worth some cents in the rand. The debtor may be a shell company, existing only for the purposes of entering into the specific credit agreement and may have little in the way of recoverable assets.

[30] In sum, I am not convinced that the availability of an unjustified enrichment claim serves to neutralise the arbitrariness of the deprivation to which section 89(5)(b) subjects the creditor.

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[30] *In pari delicto potior est conditio possidentis*, loosely translated, means that when the parties are equally in the wrong, the position of the possessor is stronger. See Black *Black's Law Dictionary* 2 ed (West Publishing, Saint Paul 1910).

[31] *Jajbhay v Cassim* 1939 AD 537.

*Limitation analysis*

[31] This Court has previously assumed, without deciding, that the right contained in section 25(1) may be subject to limitation in terms of section 36(1) of the Constitution.[32] This, despite that it is difficult to conceive of a situation where arbitrary law or conduct can be reasonable and justifiable.[33] In light of the conclusion reached below that the limitation of the section 25(1) right is not justified, the need to reach a firm conclusion on this issue is obviated: I adopt an approach similar to that in *Opperman*.

[32] Section 36(1) of the Constitution stipulates that a fundamental right may be limited by law of general application only 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 relevant factors including: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relationship between the limitation and its purpose; and less restrictive means to achieve the purpose. To determine whether there is sufficient reason for a deprivation, it is necessary to evaluate the relationship between the purpose of the law and the deprivation caused by that law.[34]

[33] The prevention of, and punishment for, unlawful credit agreements serve an important purpose. That purpose is the protection of consumers. But then the question arises: are there no less restrictive means to achieve this purpose? It is worth noting that the National Credit Regulator concedes that "[w]hat is . . . clear is that the reach of section 89(5)(b) extends beyond what is reasonably necessary to protect vulnerable consumers". The most strikingly apparent of available means is to grant a discretion to a court to make a just and equitable order.[35] This allows for

[32] *FNB* above n 14 at para 110.

[33] *Opperman* above n 16 at paras 74-5.

[34] *Mkontwana* above n 17 at para 35.

[35] The parties also suggest that the remedies provided for in terms of sections 150, 151 and 160 of the NCA demonstrate an example of less restrictive means already present within the Act itself. These provisions give the National Consumer Tribunal (Tribunal) wide ranging powers, including the power to impose administrative

individualised justice. Indeed, this is the means identified by the Legislature in the Amendment Act. It is excessive, unfair, inequitable and arbitrary to compel, *in all circumstances*, an unregistered credit provider to refund monies paid by the consumer for goods or services it *actually* received or enjoyed, simply because that credit provider is not registered. The operative words are "in all circumstances". This is not to suggest that in some circumstances this may not be acceptable. The problem is that section 89(5)(b) does not admit of exceptions to make it possible for courts to exercise a discretion.

[34] As Madala J, Sachs J and Yacoob J pointed out in *Manamela*:

> "It should be noted that the five factors expressly itemised in section 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list." (Footnote omitted.)[36]

On balance, I am satisfied that the arbitrary deprivation arising from the operation of section 89(5)(b) constitutes an unjustifiable limitation of the property right contained in section 25(1) of the Constitution. Section 89(5)(b) is constitutionally invalid.

*Remedy*

[35] What is a just and equitable remedy?[37] The parties agree that the Amendment Act adequately addresses the constitutional infringement and that, in the

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fines or "any other appropriate order required to give effect to a right" under the NCA (section 150(i)). Section 160 makes it an offence to contravene or fail to comply with an order of the Tribunal.

[36] *S v Manamela and Another* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 32.

[37] Section 172(1)(b) of the Constitution reads:

> "When deciding a constitutional matter in its power a court—
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> . . .
>
> (b) may make any order that is just and equitable".

circumstances, the appropriate remedy is the relief granted by the High Court. Quite mindful of the need to avoid giving a stamp of approval to legislation the constitutional validity of which may still be challenged before the courts, the unfettered discretion contained in the amending section does address the deficiency in section 89(5)(b) of the NCA. The High Court order is appropriate. Moreover, that type of order commends itself for it is consonant with what the Legislature has decreed in the Amendment Act. No concerns of possible judicial encroachment on legislative terrain arise.

[36] As the Amendment Act has since taken effect, that part of the order that is modelled on the wording of that Act must apply from 5 June 2014, the date of the High Court's order, to 13 March 2015, the date on which the Amendment Act came into force.

[37] Finally, in *Bhulwana* this Court noted that as a "general principle . . . an order of invalidity should have no effect on cases which have been finalised prior to the date of the order of invalidity".[38] The parties, recognising this general rule, have requested that the order should not operate retrospectively. This is the proper course to adopt.

*Costs*

[38] The norm in confirmation proceedings is that a party who successfully challenges the constitutional validity of a law is entitled to costs.[39] However, the parties have agreed that each should bear its own costs. I see no reason, in this instance, not to grant the parties their desire. There will be no order of costs.

*Condonation*

[39] Rather than being the exception, condonation applications are received by this Court with disturbing frequency. Not that this Court was ever permissive in this

[38] *S v Bhulwana, S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32.

[39] See for example *Mvumvu and Others v Minister for Transport and Another* [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC) at para 56.

regard, the time has come for it to be firm and stern with errant litigants. It will not allow its process to be treated with tardiness. So, litigants have been put on notice. Why all this? We have before us three applications for condonation: one by the applicant and third and fourth respondents for the late filing of the agreed statement of facts; and the second and third by the applicant and first respondent, respectively, each for the late filing of further written submissions which were invited by this Court. Although in respect of the one or other application there are some features which cause concern, on balance I take the view that all the applications for condonation should be granted. It is not necessary to get into any detail on this.

*Order*

[40] The following order is made:

1. Condonation is granted for the late filing of the statement of facts by the applicant and the third and fourth respondents.
2. Condonation is granted for the late filing of further written submissions by the applicant and the first respondent.
3. The order made by the Western Cape Division of the High Court is confirmed to the extent set out below:
    3.1 Section 89(5)(b) of the National Credit Act 34 of 2005 is declared inconsistent with the Constitution and invalid.
    3.2 To remedy the defect, from 5 June 2014 to 13 March 2015, section 89(5) of the National Credit Act is deemed to read as follows:

> "(5) If a credit agreement is unlawful in terms of this section, despite any other legislation or any provision of an agreement to the contrary, a court must make a just and equitable order including but not limited to an order that:
>
> (a) The credit agreement is void as from the date the agreement was entered into."

4. The orders in paragraphs 3.1 and 3.2 above have no effect on matters in which final judgment has been delivered and in which no appeal or application for leave to appeal is pending.

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| For the Applicant: | A C Oosthuizen SC and P A Torrington instructed by Butler Blanckenberg Nielsen Safodien Incorporated. |
| For the Third Respondent: | K Pillay instructed by the State Attorney. |
| For the Fourth Respondent: | S Budlender instructed by Gildenhuys Malatji Incorporated. |