

Perspectives on selected aspects regarding the registration of credit providers in terms of the National Credit Act 34 of 2005 (2)*

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4 REGISTRATION THRESHOLDS IN SECTION 40(1)

4 1 Introduction

As indicated,¹ the consumer credit law of the United Kingdom does not provide for any specific thresholds in respect of licensing of credit providers, unlike section 40 of the NCA which is discussed hereinafter. However, it is submitted that the test for whether a person in the United Kingdom must apply to be licensed appears to be that the person carries on the business of a credit provider, specifically a consumer credit business, consumer hire business or an ancillary credit business.²

A person who meets the registration requirements or thresholds as set out in section 40 of the NCA is required to register as a credit provider with the National Credit Regulator, subject to such person not being a disqualified person and further subject to meeting the conditions of registration imposed by the Act and the regulator, as discussed above.³ Section 40(1) is cast in peremptory terms obliging a person to register with the National Credit Regulator if such person, alone or in conjunction with any associated person,

- (a) is the credit provider under at least 100 credit agreements, other than incidental credit agreements,⁴ or
- (b) if the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the current threshold of R500 000.⁵

* See 2014 *THRHR* 614 for Part 1.

1 Para 1 above.

2 Para 3 1 1 above.

3 Para 3 2 2.

4 S 40(1)(a).

5 S 40(1)(b) read with the Determination of thresholds Regulations GN 713 in *GG* 28893 of 1 June 2006, hereafter the Threshold Regulations.

Failure to register as a credit provider in an instance where section 40 of the Act requires such credit provider to be registered has, among others, the specifically stated effect that a credit agreement entered into by such unregistered credit provider is unlawful.⁶ In terms of section 89(5) as it currently reads, the unlawfulness of a credit agreement due to non-compliance with section 40 is met with extremely dire consequences for the credit provider⁷ which, in brief, entail that the agreement is void from the date it was entered into,⁸ the credit provider must refund any money paid by the consumer together with interest,⁹ and the credit provider's purported rights to recover money under the agreement are cancelled or alternatively forfeited to the state in the event that the consumer is unjustly enriched by the aforementioned cancellation of the credit provider's rights.¹⁰ However, in *Opperman v Boonzaaier*¹¹ the court declared section 89(5)(c) to be inconsistent with the provisions of section 25(1) of the Constitution and invalid due to the fact that the subsection permits the arbitrary deprivation of a person's property.¹² The effect of this decision is that the common law principles regarding unlawful or illegal agreements consequently apply and a credit provider may even succeed to claim its goods or money back.¹³ In terms of the National Credit Amendment Act, 19 of 2014¹⁴ that was approved, section 89(5) is amended so that the words preceding paragraph (a) now provide that

“[i]f 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 [the credit agreement is void as from the date the agreement was entered into]”.¹⁵

A discussion of the unconstitutionality of section 89(5)(c), however, falls beyond the scope of this contribution.

Applying the provisions of section 40 in practice, however, poses significant challenges, as discussed below.

4 2 Who is required to register as a credit provider in terms of section 40?

4 2 1 Introduction

Before proceeding with a discussion of the registration requirements as set out in section 40, it should be noted that section 40 does not apply to a credit provider who operates only within one province and is registered as a credit provider in terms of applicable provincial legislation, if the Minister has declared that the

6 S 89(1)(d).

7 See, in general, Van Zyl in Scholtz (ed) para 5.6; Otto in Scholtz (ed) para 9.3.4.1; Otto and Otto *The National Credit explained* (2013) 52–53; Otto “Die *par delictum*-reël en die *National Credit Act*” 2009 *TSAR* 417 and Otto “*National Credit Act*, ongeoorloofde ooreenkomste en meevallertjies vir die *fiscus*” 2010 *TSAR* 161.

8 S 89(5)(a).

9 S 89(5)(b). S 27(b) of the National Credit Amendment Act, 2014 deletes s 89(5)(b).

10 S 89(5)(c). S 27(b) of the National Credit Amendment Act, 2014 deletes s 89(5)(c).

11 Unreported case nr 24887/2010 (WCC) (17 April 2012) para 48. See also para 4 5 3 below.

12 Paras 29 38. This decision was confirmed by the Constitutional Court in *National Credit Regulator v Opperman* 2013 2 SA 1 (CC). See also para 4 5 3 below.

13 See Otto in Scholtz (fn 7) para 9.3.4.1 and Otto and Otto (fn 7) 53.

14 S 27(a).

15 S 89(5)(a).

registration requirements in terms of that provincial legislation are comparable to or exceed the registration requirements of the Act.¹⁶

Section 40(1) obliges a “person” to register as a credit provider if the criteria of section 40(1)(a) *or*¹⁷ 40(1)(b) are met and, of course, subject to that person not being disqualified from being registered as such.¹⁸ Such a person may thus be either a natural or a juristic person. For purposes of the NCA, “juristic person” is defined broadly and not only refers to companies and close corporations but also to partnerships, associations and trusts with three or more members or of which the trustee itself is a juristic person.¹⁹

From the wording of section 40(1) it is also evident that the person referred to must be a credit provider in respect of “credit agreements”, with the exception of incidental credit agreements.²⁰ Section 40(1)(a) and (b) make it clear that a person who provides only incidental credit, regardless of the number of incidental credit agreements or the total principal debt owed under such outstanding agreements, is not required to register as a credit provider.

4.2.2 *Credit provider*

The concept “credit provider” is defined in section 1 of the Act in the following terms:

“**credit provider**”, in respect of a credit agreement to which this Act applies,²¹ means—

- (a) the party who supplies goods or services under a discount transaction, incidental credit agreement or instalment agreement;
- (b) the party who advances money or credit under a pawn transaction;
- (c) the party who extends credit under a credit facility;
- (d) the mortgagee under a mortgage agreement;
- (e) the lender under a secured loan;
- (f) the lessor under a lease;
- (g) the party to whom an assurance or promise is made under a credit guarantee;
- (h) the party who advances money or credit to another under any other credit agreement, or
- (i) any other person who acquires the rights of a credit provider under a credit agreement after it has been entered into.”

16 S 39(1)(a) and (b). Both the requirements stated in s 39(1)(a) and (b) must be met for s 40 not to apply to a credit provider.

17 Our emphasis.

18 Para 3.2.2 above.

19 S 1 of the NCA. Note that trusts with less than three trustees, who themselves are not juristic persons, are treated as natural persons. Stokvels are also excluded from the definition of a juristic person. For the definition of “stokvel”, see s 1 of the NCA.

20 An incidental credit agreement is defined in s 1 of the NCA as “an agreement, irrespective of its form, in terms of which an account was tendered for goods or services that have been provided to the consumer, or goods or services that are to be provided to the consumer over a period of time and either or both of the following conditions apply: (a) a fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined period or date; or (b) two prices were quoted for settlement of the account, the lower price being applicable if the account is paid on or before a determined date, and the higher price being applicable due to the account not having been paid by that date”.

21 Our emphasis.

It is submitted that the words “in respect of a credit agreement to which this Act applies”, imply that where a person provides credit in respect of a credit agreement that does not fall within the scope of application of the NCA, such credit provider will also not be subject to the application of the Act and will not have to register with the National Credit Regulator as credit provider.²² There may thus in practice be credit providers who only provide credit in respect of credit agreements that fall outside the scope of application of the Act and, as such, it is submitted that they are not obliged to register as credit providers. However, if a credit provider only provides credit in respect of credit agreements governed by the NCA, alternatively provides credit in respect of credit agreements of which some fall within the scope of application of the Act and others not, such a credit provider will have to register in terms of section 40 of the NCA once the requirements of either section 40(1)(a) or (b) are met – preferably even before such time as discussed below.²³ As indicated, although an incidental credit agreement is mentioned in the aforesaid definition of credit provider, section 40(1) absolves persons who only provide incidental credit from registration as credit providers.²⁴ Thus, credit providers of incidental credit and credit providers in respect of credit agreements that are not governed by the NCA, are not required to be registered in terms of section 40(1).

4 2 3 *When does the NCA apply to a credit agreement?*

In view of the fact that it is only a credit provider in respect of a credit agreement to which the NCA applies (with the exception of incidental credit) that falls within the ambit of the threshold requirements for registration as set out in section 40(1) of the Act, the field of application of the NCA is important. The NCA applies to every credit agreement between parties dealing at arm’s length and made within or having an effect within, the Republic of South Africa.²⁵ A discussion of the field of application of the Act falls outside the scope of this article but various academic writings on the topic may be consulted in order to provide the reader with a detailed overview of such field of application.²⁶

22 See also Van Zyl in Scholtz (ed) para 5.2.2.1 where a similar opinion is expressed.

23 Para 4 3 2 below.

24 Para 4 2 1 above.

25 S 4(1). This application is subject to s 5 (which provides for the application of the NCA to incidental credit agreements) and s 6 (which provides for the limited application of the NCA to certain juristic persons). It is further subject thereto that no exclusion to the Act’s field of application applies. For these exclusions, see ss 4(1) (read with the Threshold Regulations (fn 5)) and 8(2) of the NCA. For a determination of what would constitute an arm’s length transaction for purposes of the NCA, see s 4(2)(b). See also Van Zyl in Scholtz (ed) para 4.2.

26 See, in general, in respect of the scope of the Act’s field of application Van Zyl in Scholtz (ed) ch 4; Otto in Scholtz (fn 7) ch 8; Stoop “Kritiese evaluasie van die toepassingsveld van die ‘National Credit Act’” 2008 *De Jure* 352; Kelly-Louw and Stoop (Part 1 fn 154) ch 2 and Otto and Otto (fn 7) ch 3. See *Paulsen v Slip Knot Investments* 434/13 [2014] ZASCA 16 (25 March 2014) where Wallis JA held that as the NCA did not apply to the credit agreement *in casu* it was unnecessary to consider whether the defendant was required to register as a credit provider in terms of s 40 of the NCA. It is submitted that this view is correct. However, note should be taken of the deviating view of Willis JA in this case (para 43) which extends the obligation to register as a credit provider in terms of the NCA. See further *Goolam v Pristina Investments CC* unreported case nr 63204/2013 (GNP) (11 November 2013) and *Troskie v Von Holdt* unreported case nr 2704/2012 (ECG)

4 3 Further observations regarding registration criteria

4 3 1 Introduction

From the above it thus appears that a person will not be required to register as a credit provider if such person provides incidental credit only or provides credit only in respect of credit agreements that fall outside the scope of application of the NCA by virtue of the agreement either being exempt from the application of the Act in terms of section 4 – even though it constitutes a credit agreement as defined in the NCA – or where, even though the agreement constitutes a credit agreement as defined, such credit is provided on a basis that is not at arm's length.²⁷

In order to provide clarity on the provisions of section 40(1), section 40(2)(a) provides that in determining whether a person is required to register as a credit provider, the provisions of section 40(1) apply to the "total number and aggregate principal debt of credit agreements" under which that person, or any associated person, is the credit provider. It is further apparent that a person who does not provide credit under at least a 100 credit agreements (credit agreements governed by the NCA) or to whom the total principal debt owed is not in excess of R500 000, need not register as a credit provider. Thus, for instance, a person who is a credit provider under 90 (outstanding) credit agreements to which the NCA applies (other than incidental credit agreements) and in respect of which the total principal debt owing is, for example, R450 000, would not be required to register as a credit provider. Likewise, a person who provides credit under only one credit agreement to which the Act applies (other than an incidental credit agreement) in respect of which the total principal debt owed is, for example, R490 000, will not have to register as a credit provider. However, because the requirements set out in section 40(1)(a) and (b) operate in the alternative as a result of the two provisions being joined by the conjunctive "or", it is submitted that section 40(1)(a) is susceptible to an interpretation that a person who provides credit in terms of 100 credit agreements regardless of the amount of the outstanding principal debt is required to register as a credit provider. It is further submitted that section 40(1)(b) is also susceptible to the interpretation that a person who provides credit in terms of even just one credit agreement to which the Act applies, but in respect of which the total principal debt owed exceeds R500 000, will be obliged to register as a credit provider. Nevertheless, there are forceful arguments to the contrary, as will be pointed out below.

4 3 2 Requirement of 100 credit agreements

As indicated,²⁸ registration in terms of section 40(1)(a) is required when a person is the sole provider of credit under at least a 100 credit agreements to which the NCA applies, with the exception of incidental credit agreements. However, the registration requirement in section 40(1)(a) also applies when a person is such a

(11 April 2013). In *TUM Investments (Pty) Ltd v Xalindri Boerdery (Pty) Ltd* unreported case nr 2857/2007 (FSB) (9 May 2013) it was held that in order to enforce a credit agreement it must be alleged either that the credit provider was registered as such in terms of s 40 of the NCA or that the credit provider was being exempted from being registered as such.

²⁷ See fn 25 above in connection with "arm's length transactions".

²⁸ Para 4 1 above.

credit provider in conjunction with an associated person. The NCA describes an associated person as follows:²⁹

“[A]ssociated person” –

- (i) with respect to a credit provider who is a natural person, includes the credit provider’s spouse or business partners, and
- (ii) with respect to a credit provider that is a juristic person, includes –
 - (aa) any person that directly or indirectly has a controlling interest in the credit provider, or is directly or indirectly controlled by the credit provider;
 - (bb) any person that has a direct or indirect controlling interest in, or is directly or indirectly controlled by, a person contemplated in clause (aa); or
 - (cc) any credit provider that is a joint venture partner of a person contemplated in this subparagraph.”

Consequently, where for instance a person provides credit under credit agreements to which the NCA applies and such person has branches elsewhere in the country that also provide such credit, the number of credit agreements entered into will be calculated together for purposes of determining whether such credit provider has to register in terms of section 40(1)(a).³⁰

A question that arises with regards to the requirements of section 40(1)(a) is when exactly a person who is required to register in terms of the said subsection must register. Should such person wait until the 100th credit agreement is concluded, in view of the requirement of at least 100 credit agreements, before registering? Section 42(3)(a) appears to shed some light on this aspect albeit only in regard to the R500 000 threshold discussed hereinafter by providing that

“[i]f, as a result of a determination made by the Minister in terms of [section 42(1)] after the effective date –

- (a) a credit provider is required to be registered for the first time, that credit provider must apply for registration by the time the threshold takes effect, and may thereafter continue to provide credit until the time that the National Credit Regulator makes a decision in respect of its application.”³¹

By analogy one would be able to argue that a credit provider would only be required to register once the 100-agreement “threshold” in section 40(1)(a) takes effect. Technically a credit provider would be compliant with the provisions of section 40(1)(a) and the 99 credit agreements entered into before registration would not be unlawful (provided that the total principal debt owed in terms of outstanding credit agreements does not exceed R500 000) if the credit provider waits until conclusion of the 100th agreement before registering. However, it is submitted that where a person foresees that he would in future be providing credit under 100 or more credit agreements, especially where the likelihood of those agreements exceeding the R500 000-threshold mentioned in section 40(1)(b)

²⁹ S 40(2)(d).

³⁰ Note should further be taken of s 40(2)(b) which provides that each associated person that is a credit provider in its own name and falls within the requirements of s 40(1) must apply for registration as a credit provider in its own name. However, s 40(2)(c) states that a credit provider that conducts business in its own name at or from more than one location or premises is required to register only once with respect to all of such locations and premises.

³¹ This effectively means that a credit provider who has applied for registration may extend credit until such time as he is registered which may be a few months depending on how long the National Credit Regulator takes to register the person as a credit provider.

is good, it would be prudent to register much earlier, at least before the total principal debt owed exceeds R500 000, so as not to compromise the lawfulness of any subsequent agreements entered into whilst the credit provider is unregistered. Indeed, it is submitted that it would be best practice for a credit provider who is about to set up his business and who foresees that he will soon meet the requirements for registration to apply to register as credit provider before he enters into credit agreements with prospective consumers. For those credit providers who are already in business but not yet registered because they do not yet meet the requirements of section 40, it would also be prudent to ensure that they apply for registration well in advance of them meeting such requirements. It is also submitted that the registration process may prove to be a more protracted exercise than envisaged and that it is therefore better to err on the side of caution.³²

It may be asked what is the rationale behind the credit agreement threshold in section 40(1)(a). When one considers the possibility that section 40(1)(a) creates the opportunity for a credit provider who has, for example, 90 credit agreements with an outstanding principal debt of R400 000 in respect of all those credit agreements to lawfully carry on business without being registered, and compares such a situation to the requirement in section 40(1)(b) that appears to place a registration obligation on a person who provides credit in terms of only one credit agreement where the outstanding principal debt exceeds R500 000, it is submitted that there appears to be no reasonable justification for the threshold requirement in section 40(1)(a). Why should the 90 consumers under the small credit agreements forego the added layer of protection that is brought about by registration of the credit provider whom they are dealing with, whereas the one consumer who borrows an arguably large amount is afforded such protection in view of the registration requirement in section 40(1)(b)? To argue that this is justified by the fact that the 100 agreements are small is about as sensible as to argue that brain surgeons should be regulated but not medical practitioners who only remove tonsils and appendices. The point is that in the case of smaller credit agreements the consumer could be more vulnerable and therefore in a greater need of the added protection afforded by the registration and subsequent better monitored regulation of credit providers. Rather, it is submitted that the 100 agreement-requirement can also be construed to point towards the legislature's intention to regulate persons for whom providing credit is their ordinary course of business as a person who gives credit under such a number of credit agreements is clearly in the business of providing credit.

4 3 3 Requirement in section 40(1)(b) regarding outstanding principal debt

Section 40(1)(b) sets the requirement of registration once the total principal debt owing to a credit provider under all outstanding agreements, with the exception of incidental credit, exceeds R500 000. The "principal debt" referred to in section 40(1)(b) is defined as the amount calculated in accordance with section 101(1)(a).³³ The latter section refers to the principal debt as the amount deferred

³² It is submitted that although s 89(4) (see fn 105 below) may in certain limited instances come to the assistance of a credit provider, it is still better to act prudently insofar as registration as a credit provider is concerned.

³³ S 1 of the NCA.

in terms of the agreement, *plus*³⁴ the value of any item contemplated in section 102. In terms of section 102(1),

“[i]f a credit agreement is an instalment agreement, a mortgage agreement, a secured loan or a lease, the credit provider may include in the principal debt deferred under the agreement any of the following items to the extent that they are applicable in respect of any goods that are the subject of the agreement –

- (a) an initiation fee as contemplated in section 101(1)(b),³⁵
- (b) the cost of an extended warranty agreement;
- (c) delivery, installation and initial fuelling charges;
- (d) connection fees, levies or charges;
- (e) taxes, licence or registration fees; or
- (f) subject to section 106, the premiums of any credit insurance payable in respect of that agreement.”

Section 40(6) is also relevant in calculating whether the section 40(1)(b)-threshold has been met as it provides that when determining whether a credit provider is required to register in terms of section 40(1), the value of any credit facility issued by that credit provider is the credit limit under that facility,³⁶ and any credit guarantee to which a credit provider is a party must be disregarded.³⁷

It is submitted that the requirement that the total principal debt under all “outstanding” credit agreements may not exceed R500 000 has the effect that where a credit provider, for example, provides credit for R400 000 under a credit agreement and after payment in respect of that credit agreement is settled and the agreement has come to an end, the credit provider later enters into a new credit agreement in terms whereof he provides R400 000 credit, such credit provider will not be required to register because the amount owing under “outstanding” credit agreements is R400 000, which does not meet the section 40(1)(b)-threshold. Consequently, a person can over a prolonged period of time provide credit in the aforementioned manner in large amounts but will escape the registration requirement in section 40(1)(b) as long as he ensures that he enters into individual transactions which, though they may each involve large amounts, fall just short of the R500 000 threshold: if he enters into only one such transaction per year and finalises the transaction and the payment due in terms thereof before he enters into a new transaction the following year, he can extend credit annually for the duration of his lifetime without ever having to be registered.

It is further submitted that, although section 40(1)(b) at first glance appears to facilitate an interpretation that a person who extends credit is obliged to register as credit provider even if he has entered into one credit agreement only where the principal debt owed is in excess of R500 000, the wording of section 40(1)(b) does not, however, exclude an interpretation that the legislature did not have once-off or mere *ad hoc* credit agreements in mind when it enacted section 40(1)(b). The basis for this submission is the use of the plural form “agreements”

³⁴ Our emphasis.

³⁵ This will apply if the consumer has been offered and declined the option of paying that fee separately – s 102(1)(a).

³⁶ S 40(6)(a).

³⁷ S 40(6)(b). The rationale for this provision is probably based on the fact that the surety’s indebtedness only becomes an issue where the principal debtor fails to comply with its obligations in terms of the credit agreement.

and the fact that the subsection refers to “all outstanding credit agreements” which creates the impression that the legislature was contemplating a situation where the credit provider is party to a number of agreements: accordingly it is submitted that the reference to “all outstanding credit agreements” in the subsection is rather compatible with a situation where a person extends credit in the ordinary course of his business than where he extends such credit on a once-off or a mere *ad hoc* basis.

4 4 Applying the thresholds in section 40

When it has to be determined whether a specific person is required to be registered as a credit provider, the following questions need to be asked:

- (a) Does the person provide credit in respect of (a) credit agreement(s) to which the NCA applies, with the exception of incidental credit?
- (b) If so, is such person the credit provider under at least 100 such credit agreements (as mentioned in (a))?
- (c) Alternatively to (b), is the total principal debt outstanding under such credit agreement(s) (as mentioned in (a)), in excess of R500 000?

If the answer to the first question is in the negative, such person does not have to register as a credit provider even if the answer to the next two questions is in the affirmative. One actually needs not even bother to answer the next two questions in such an instance. If, however, the answers to all three of the abovementioned questions are in the affirmative, the person providing the credit must register with the National Credit Regulator as credit provider. Similarly, if the answers to either (a) and (b) or to (a) and (c) are in the affirmative, the person providing the credit will also be required to register due to the fact that the threshold requirements operate in the alternative.

4 5 Application by the courts of the thresholds for registration of credit providers

4 5 1 Introduction

The application of section 40(1)(b) has received attention by the high courts in the matters of *Cherangani Trade and Investment 107 (Edms) Bpk v Mason*,³⁸ *Friend v Sendal*³⁹ and *Opperman v Boonzaaier*.⁴⁰ The main focus of *Cherangani* and *Opperman* was on the constitutionality of section 89(5) which is beyond the scope of this article. However, the facts of these two cases, insofar as the nature of the credit providers in those matters is concerned and certain relevant remarks made in the context of section 40(1)(b), require consideration and will be dealt with below.

4 5 2 *Cherangani Trade and Investment 107 (Edms) Bpk v Mason*⁴¹

The issue of unlawfulness of a credit agreement as a result of non-registration of the credit provider at the time that the credit was extended was initially dealt with in the unreported *Cherangani* case. The relevant facts were briefly as

38 Unreported case nr 6712/2008 (FSHC) (12 March 2009).

39 Unreported case nr 24425/2009 (GNP) (Appeal nr A973/2010) (3 August 2012).

40 Fn 11 above.

41 Fn 38 above.

follows:⁴² the respondent-debtors possessed a number of farms that were encumbered with mortgage bonds in favour of First National Bank (hereinafter FNB). In November 2007 FNB obtained judgment against the respondents in the amounts of R849 928,82 and R1 248 020,35, respectively, together with interest and costs. The properties were attached in terms of a warrant of execution and would have been sold at a sale in execution. Shortly before the intended sale the fourth respondent, acting on advice of the auctioneer that would conduct the sale, met with a certain Mr Barnard, the sole director of the applicant. This took place during March 2008, at which instance the fourth respondent requested financial assistance from Mr Barnard in order to pay FNB and so to prevent the loss of the farms by means of the sale in execution. Mr Barnard consented on behalf of the applicant to lend money to the respondents, subject, *inter alia*, to the condition that the respondents would enter into a loan agreement with the applicant in the amount of R2 661 482,89.⁴³ The loan agreement between the parties further provided that the aforementioned debt would only bear interest if the respondents failed to repay the total debt to the applicant within 120 days, in which event interest would be charged on the amount at 30 per cent per annum.

Shortly after entering into the aforementioned agreements, the respondents, with the consent of the applicant as bondholder in terms of cessions that were given to the applicant, gave instructions to auctioneers to sell two of the farms at an auction in order to pay the applicant. The auction was held and the farms were sold for R2 550 000. However, the sale fell through because the respondents decided not to proceed with same. In the meantime, the applicant, as requested by the fourth respondent, also paid smaller amounts on behalf of the respondents to other creditors of the respondents.

The respondents failed to repay the loan amounts to the applicant who eventually proceeded with legal action. The respondents raised various defences, *inter alia* that the agreement, being a credit transaction in terms of the NCA, was unlawful and void due thereto that the applicant was not registered as a credit provider in terms of section 40 of the NCA at the time that the credit agreement was entered into.⁴⁴

In dealing with this issue, the court referred to the requirements for the registration of credit providers set out by section 40(1)(b) of the NCA and indicated that, in accordance with section 40(4), a credit agreement is unlawful if entered into by an unregistered credit provider and void to the extent provided for in section 89.⁴⁵ The court further referred to section 89(2)(d), which provides that a credit agreement is unlawful if the credit provider was obliged to be registered at the time of entering into the agreement but failed to be so registered.⁴⁶

42 Paras 9–17.

43 Of this amount, R250 000 would represent a raising fee in favour of the applicant and the balance would be the amount due to FNB.

44 *Cherangani* (fn 38) para 27.

45 *Ibid.*

46 *Ibid.* It also indicated that in this instance the circumstances under which a credit provider would be exempt from the application of section 89(2)(d) did not apply and that in terms of section 85(5)(*sic*) the court had to declare such an unlawful credit agreement void from the date it was entered into. Finally the court indicated that section 89(5)(c) prescribes certain orders that a court is obliged to make if it declares a credit agreement void.

The court remarked that the loan agreement between the parties clearly fell within the provisions of the NCA.⁴⁷ It pointed out that the applicant was not registered as a credit provider and that there were no allegations to the effect that it applied for registration or was in possession of a certificate as intended by section 42(3)(b).⁴⁸ The court also indicated that the total of the amounts lent (in other words, the outstanding principal debt) exceeded the threshold set by the Act in section 40(1)(b) by far.⁴⁹

The applicant submitted that the granting of credit was not its business but that, from time to time (thus *ad hoc*), it assisted persons and institutions with financing.⁵⁰ The court, however, indicated that it was not quite unknown that the applicant rendered financing assistance – at least not to the auctioneer who brought the applicant and respondents together.⁵¹ The address of the applicant was also “die Finansiële Huis”.⁵² The court accordingly held that it had sufficient reason to believe that the applicant did not enter into financing transactions as infrequently as it pretended to and that its dealings at least deserved the attention of the National Credit Regulator.⁵³ The court subsequently held that, in respect of the fourth respondent, the loan agreement and accompanying agreement of sale as well as the additional loans were unlawful in terms of the NCA and that the applicant was not entitled in terms of section 89(5)(c) to exercise any right of recourse in respect of the fourth respondent’s indebtedness.⁵⁴ It declared the loan agreement and agreement of sale, and additional loans insofar as they applied to the fourth respondent, void *ab initio* and held all the applicant’s rights to recover any payment or compensation from the fourth respondent to be forfeited to the state.⁵⁵

Leave to appeal against the order of the Free State High Court was refused by both the High Court and the Supreme Court of Appeal. The appellant subsequently approached the Constitutional Court and sought to challenge the correctness of part of the order made by the High Court in terms of section 89(5)(c) of the NCA.⁵⁶ It is to be noted that the appellant did not challenge the correctness of the High Court’s finding that it had to be registered. Due to various problematic issues that the court pointed out it was, however, not prepared to entertain the matter and the application for leave to appeal to the Constitutional Court was dismissed with costs.⁵⁷

47 *Cherangani* (fn 38) para 30.

48 *Ibid.*

49 Para 33.

50 Para 34. The applicant indicated that it did not do business as moneylender but that it conducts a game farm and does business in the buying and selling of properties. By implication the applicant regarded this specific instance as an unusual one in respect whereof the applicant would not as a rule get involved.

51 *Ibid.*

52 Or the “Financial House” – *ibid.*

53 *Ibid.*

54 Para 35.

55 Para 38.

56 *Cherangani Trade & Invest 107 (Pty) Ltd v Mason* (CCT 116/2009) [2011] ZACC 12.

57 *Idem* para 26.

*4 5 3 Opperman v Boonzaaier*⁵⁸

This matter concerned a Namibian farmer (the applicant) who lent his friend in Stellenbosch (the first respondent) R7 million in terms of three written loan agreements to assist the latter to undertake a property development in Cape Town.⁵⁹ Two of the three agreements were entered into in August and September 2009, respectively.⁶⁰ When the due date for payment of the aforesaid loans had passed, the first respondent confessed his inability to meet his obligations, whereupon the applicant applied for the sequestration of the first respondent's estate and succeeded in obtaining a provisional order.⁶¹ On the return date Binns-Ward J raised concerns arising from the NCA.⁶² The matter was postponed and the applicant's notice of motion was subsequently amended to include a challenge to the constitutionality of section 89(5) of the Act.⁶³

Binns-Ward J commenced his judgment by stating that the loans concerned were credit agreements to which the NCA applied and that the applicant qualified as a credit provider and the first respondent as a consumer.⁶⁴ The court then referred to the provisions of sections 40 and 89(5) which were in issue as the applicant was not a registered credit provider at the time he advanced the sum of R7 million to the first respondent and had not applied to be so registered within a month of making the loan.⁶⁵ According to the court, the clear effect of sections 89(2)(d) and 89(5)(a) was that the loan agreements upon which the applicant based his liquidated claim against the first respondent for the purpose of satisfying the requirements of section 9 of the Insolvency Act⁶⁶ were unlawful and had to be treated as void.⁶⁷

During the course of its judgment, which focused mainly on the constitutional validity of section 89(5)(c) of the NCA, the court, however, made some remarks that have a bearing on the interpretation of section 40(1)(b). It stated that in its view there are a number of indications in section 40 that the legislature conceived of the credit provider who requires to be registered as such in terms of the Act to be a person, who either alone or in conjunction with others is engaged in *the business*⁶⁸ of providing credit to consumers.⁶⁹ The court indicated that

58 See fn 11 above.

59 The *Opperman* case (fn 11) para 1.

60 *Ibid.*

61 *Ibid.*

62 *Ibid.*

63 *Ibid.*

64 Para 3.

65 Paras 3–5.

66 Act 24 of 1936.

67 *Opperman* (fn 11) para 5.

68 The court's emphasis.

69 *Opperman* (fn 11) para 26. The court indicated that the following provisions of the section support such a reading: (a) 'the determination of the number of executory credit agreements to which the credit provider as 100 or more before registration is required (*sic*); (b) the reference in s 40(1)(b) (which provides for the monetary value threshold requirement) to 'the total principal debt owed to that credit provider under all outstanding credit agreements', which implies a contemplation of a number of credit agreements, not just one or two – this notwithstanding that the language used does nevertheless catch within its embrace any person who makes provides (*sic*) credit in terms of even a single transaction qualifying as a credit agreement if the 'principal debt' thereunder exceeds the threshold requirement; (c) the determination of the registration requirement with reference to the

other provisions, such as sections 50(2)⁷⁰ and 52,⁷¹ also confirm the impression that the legislature had in mind persons carrying on business as credit providers when it determined upon a registration requirement.⁷²

The court remarked that it is also not evident from the provisions of the Act why a person such as the applicant intending to provide credit on an *ad hoc* basis to a personal friend should, in order to be able to do so in an amount exceeding R500 000, have to provide information to the National Credit Regulator in order to enable the regulator to consider matters such as the commitments, if any, made by him or any associated persons in terms of black economic empowerment considering the purpose, objects and provisions of the Broad-based Black Economic Empowerment Act,⁷³ or in connection with combating over-indebtedness.⁷⁴ It further referred to the Memorandum on the Objects of the National Credit Bill, 2005 which suggested that the Act would not apply to or regulate “loans between family members, partners and friends on an informal basis”.⁷⁵ It also pointed out that the content of the prescribed application form for registration as a credit provider is also consistent with that which someone carrying on business as a credit provider might be expected to complete, “rather than a person intending to make just one, or even two or three *ad hoc* loans to someone in their ken, even if in a large sum”.⁷⁶

The court remarked⁷⁷ that it mentioned these considerations in the context of the required review of the apparent scope, purpose and objects of the Act merely to record its impression that

*“the requirement that someone like the applicant had to register as a credit provider to avoid the credit transactions that he entered into with the first respondent being visited with legal voidness was an entirely incidental effect of the prescripts of the NCA, rather than one serving the Act’s central objectives”.*⁷⁸

The court further indicated that the facts *in casu* demonstrate “that an *ad hoc* lender of money, who is not in the business of providing credit, has been caught within the ambit of the provision the apparent objects of which do not bear on

totality of credit agreements entered into not only by an individual credit provider, but also to those transacted by any of its ‘associated persons’; (d) section 40(2)(c) provides that a credit provider that *conducts business* in its own name at or from more than one location or premises is required to register only once with respect to all such locations or premises.”

70 S 50(2) provides that it is a condition of every registration issued in terms of the Act that the National Credit Regulator or any person authorised by the regulator may “enter any premises at or from which the registrant *conducts the registered activities* during *normal business hours*, [court’s emphasis] . . . to conduct reasonable inquiries for compliance purposes.”

71 S 52 deals with the certificate of registration and the various “administrative” compliance obligations of the registrant.

72 *Opperman* (fn 11) para 27.

73 Act 53 of 2003.

74 *Opperman* (fn 11) para 28, with reference to s 48(1)(a) and (b).

75 *Ibid.* The court pointed out that there was no explanation, however, of what was meant by “on an informal basis” and the NCA itself, while excluding from its ambit agreements concluded between persons in a familial relationship who are in a situation of dependence or co-dependence (s 4(2)(b)(iii)) makes no reference to friends.

76 *Ibid.*

77 Para 29.

78 Our emphasis.

the type of transaction in which he is engaged”.⁷⁹ It remarked that the facts *in casu* also do not provide any indication that the applicant was likely to “continue trading indefinitely” as a credit provider, or that his actions had placed the public at risk.⁸⁰ According to the court the current case was not one characterised by considerations of an “imbalance of power” between the consumer and credit provider.⁸¹

The court eventually found that section 89(5)(c) of the NCA constitutes an arbitrary deprivation of property and is therefore unconstitutional as it infringes upon section 25 of the Constitution.⁸²

The judgment of the Western Cape High Court in *Opperman v Boonzaaier* above, was referred to the Constitutional Court to determine whether the order of constitutional invalidity of section 89(5)(c) should be confirmed.⁸³ Although the Constitutional Court⁸⁴ was preoccupied with the constitutional validity of section 89(5)(c) and did not specifically consider the interpretation of section 40(1)(b), it should, however, be noted that it stated that the failure by section 89(5)(c) to 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*,⁸⁵ is disproportional.⁸⁶

4 5 4 *Friend v Sendal*⁸⁷

The implications of section 40(1)(b) were considered on appeal by a full bench of the Gauteng North High Court in the matter of *Friend v Sendal*. The background to the matter was that on or about 10 December 2006, the appellant acknowledged in writing that he was indebted to the respondent in the amount of R1 225 000.⁸⁸ He also undertook to pay the aforesaid amount in full on or before 1 December 2007 and to pay interest on the aforesaid amount calculated at the prime rate charged by Standard Bank from time to time on unsecured overdraft facilities.⁸⁹ By 1 December 2007 the appellant had paid a portion of the capital amount, but failed to make payment of the remainder of the capital amount as a

⁷⁹ Para 36.

⁸⁰ *Ibid.* The court remarked that the applicant was not a micro lender and that the transactions in which he involved himself were not remotely similar to those at which the requirement of registration is stated to have been directed as a means of tighter regulation. It pointed out that the irony was that whereas the provision impacts on the applicant, it would not have done so had he been involved as credit provider in 99 outstanding microloans of R5 000 each – thus, had he actually been engaged in micro lending.

⁸¹ *Ibid.* The court remarked that all indications were that the parties were involved in a relatively sophisticated entrepreneurial enterprise and that the first respondent was not a “vulnerable member of the public”, notwithstanding his subsequent insolvency. According to the court “[i]t is indeed inherently unlikely that any borrower of an amount of more than R500 000 in what was essentially a single transaction would be amongst those persons properly to be regarded as poor and vulnerable”.

⁸² Paras 38 and 48.

⁸³ Para 48.

⁸⁴ See *National Credit Regulator v Opperman* fn 12 above.

⁸⁵ Our emphasis.

⁸⁶ *National Credit Regulator* (fn 12) para 76.

⁸⁷ Fn 39 above.

⁸⁸ *Sendal* (fn 39) para 4.

⁸⁹ *Ibid.* The interest was to be paid monthly in full on or about the first day of every month commencing on 1 December 2006.

result whereof the respondent subsequently instituted motion proceedings against him for payment of R620 000 plus interest.⁹⁰

The appellant raised two defences before the court *a quo*.⁹¹ Firstly, that the acknowledgement of debt was a credit agreement as envisaged by the NCA and that the respondent was not entitled to institute the application in that matter without first having given a notice in terms of section 129 of the Act.⁹² Secondly, and relevant to this discussion, it was argued that “inasmuch as the acknowledgement of debt amounted to a credit agreement, the agreement was null and void as the respondent was not registered as a credit provider”.⁹³ The court *a quo* found that the acknowledgement of debt did indeed constitute a credit agreement as envisaged in section 8(4)(f) of the Act.⁹⁴ It further found that the respondent was obliged to register as a credit provider.⁹⁵

The court of appeal considered the question whether the respondent was obliged to register as a credit provider for the *one*⁹⁶ transaction that he had concluded.⁹⁷ It referred to the definition of “credit provider” in section 1 of the NCA⁹⁸ and concluded as follows:⁹⁹

“It is clear from the definition that with the acknowledgement of debt concluded between the appellant and the respondent, the respondent does not fall within the categories as set out in the definition above. True, the acknowledgement of debt in question, is a credit agreement as envisaged in section 8(4)(f). But, that did not automatically make the respondent to be a credit provider who was obliged to register in terms of section 40. Simply put, the respondent was not a credit provider as defined; and that makes sense as it would appear from the provisions of the Act discussed hereunder.”

90 *Sendal* (fn 39) para 5 6. The court *a quo* subsequently granted judgment against the appellant. The court handed down a judgment ordering the appellant to pay the amount of R620 000 together with interest accrued on the capital amount calculated on the applicable interest rate levied by Standard Bank from time to time on the unsecured overdraft facility from 2 December 2008 to 1 March 2009 in the amount of R30 515.89. The appellant was further ordered to make payment of interest on the capital amount calculated on the applicable interest rate levied by Standard Bank from time to time on the unsecured overdraft facility from 2 March to date of payment as well as the costs of the application – see paras 1–3.

91 Para 7.

92 *Ibid.* A discussion of this issue falls beyond the scope of this contribution.

93 *Ibid.*

94 With which the appeal court concurred – paras 8 and 10. The court *a quo* also found that “the acknowledgement of debt was not a ‘credit agreement between parties dealing at ‘arm’s length’ to which the Act applies” (*sic*). See para 10. See in general in connection with an acknowledgement of debt as a credit agreement in terms of the NCA the discussion by Van Heerden “The impact of the National Credit Act 34 of 2005 on standard acknowledgements of debt” 2011 *THRHR* 644ff.

95 *Sendal* (fn 39) para 11. It is unclear exactly what the court *a quo* decided on the issue of registration of the respondent as a credit provider: the judgment of the court of appeal makes no specific reference thereto apart from referring to the heads of argument for the appellant’s counsel wherein it is stated that the court *a quo* found that the respondent was obliged to be registered as a credit provider.

96 Our emphasis.

97 *Sendal* (fn 39) para 13.

98 For the definition of credit provider, see para 4 2 2 above.

99 *Sendal* (fn 39) paras 13–15.

The court then motivated its opinion by referring to the contents of section 40¹⁰⁰ and indicating that section 40(1)(a) envisages a situation where a person *frequently*¹⁰¹ provides credit or concludes credit agreements as defined.¹⁰² The court commented that for such a person to be obliged to register as a credit provider, the subsection must have contemplated a situation where he or she, either alone or in conjunction with any associated person, will conclude credit agreements “of under at least 100”.¹⁰³ It then indicated that subsection (2)(a) seems to make this even clearer as it states that in determining whether a person is required to register as a credit provider, subsection 1 applies “to a total number and aggregate principal debt of credit agreements in respect of which a person or any associated person is a credit provider”.¹⁰⁴ The court remarked that subsections (1)(a) and (2)(a) of section 40 appear to contain the closest provisions relevant to the respondent in the present case and that it was satisfied that these provisions do not support the notion that the respondent was under an obligation to register as a credit provider.¹⁰⁵

The court then further indicated, with reference to the argument that section 40(1)(b) required the respondent’s registration as credit provider, that it does not understand the provisions of section 40(1)(b) as referring to a single principal debt exceeding the threshold or to a single outstanding credit agreement in respect of which the amount exceeds the threshold.¹⁰⁶ According to the court the provisions of section 40(1)(b) should be interpreted as they read, namely, that it is “*the total principal debt and under all outstanding credit agreements*” that bring in an obligation to register a credit provider. Hence it held that it is the respondent’s *frequency of providing credits*¹⁰⁷ under section 40(1)(b) that is envisaged.¹⁰⁸

The court pointed out that the purpose of the Act should also not be overlooked and emphasised the fact that such purpose is, *inter alia*, to promote and advance an accessible credit market and industry.¹⁰⁹ Therefore, it held¹¹⁰ that

“subsection 1(b) of section 40 must be seen as having been directed at those who are in credit market [*sic*] and or industry or at those who intend to participate in the credit market and or industry. The respondent in this once-off transaction, cannot be seen as participating in the credit market”.

The court then dealt with the suggestion that section 89(4)¹¹¹ read with subsection (2)(d), makes it clear that there was an obligation on the part of the

100 See para 4 1 above.

101 Our emphasis.

102 *Sendal* (fn 39) para 17.

103 *Ibid.* The court probably meant “under at least 100 credit agreements”.

104 Para 18. Underlining added by court.

105 Para 19.

106 Para 21. The paragraph contains a typing error namely “single credit outstanding agreement” and the court did not specify the nature of the amount it referred to.

107 *Sic.* Our emphasis.

108 Para 22. The court indicated that if this was not so, the subsection could simply have been couched to read as follows: “**Registration of credit providers.** – (1) a person must apply to be registered as a credit provider if (a) . . . ; or (b) the principal debt owed to that credit provider under credit agreement, other than incident [*sic*] credit agreements, exceeds the threshold prescribed in terms of section 42(1).”

109 Para 23. Court’s underlining.

110 Para 24.

respondent to register as a credit provider, despite the fact that it was a single transaction.¹¹² It rejected this suggestion and remarked that for section 89(4) to be applicable, there must have been an obligation to register as a credit provider and that the respondent *in casu* was not under such obligation.¹¹³ It remarked later in the judgment¹¹⁴ that, “[w]hilst the agreement between the appellant and respondent is a credit agreement as envisaged in section 8(4)(f) of the Act, the respondent was not obliged to register as a credit provider in terms of section 40 for a once-off transaction. I do not think it could ever have been the intention of the law makers”.

5 COMPLIANCE WITH REGISTRATION REQUIREMENTS

The NCA empowers the National Credit Regulator to enforce compliance of the Act’s registration requirements¹¹⁵ by means of compliance notices. Such a notice may be issued to a person who is not registered but who conducts an activity that requires registration under the Act, or to a registrant who fails to comply with the provisions of the Act or with his conditions of registration.¹¹⁶ These instances and the cancellation of registration as a credit provider are briefly discussed next.¹¹⁷

A person¹¹⁸ who is not registered in terms of the Act and who is engaging in an activity that requires registration, may be required by the National Credit Regulator to stop engaging in that activity. Under section 54 a notice in the prescribed form¹¹⁹ will be issued to such a person.¹²⁰ Subject to section 59,¹²¹ such a notice remains in force until a registration certificate is issued to the person to whom the notice was issued, or, alternatively, until the notice is set aside.¹²² Non-compliance with a section 54 notice constitutes an offence.¹²³

111 S 89(4) provides that s 89(2)(d), which provides that a credit agreement is unlawful if, at the time the agreement was made, the credit provider that is required by the Act to be registered was unregistered, “does not apply to a credit provider if (a) at the time the credit agreement was made, or within 30 days after that time, the credit provider had applied for registration in terms of section 40, and was awaiting determination of that application; or (b) at the time the credit agreement was made, the credit provider held a valid clearance certificate issued by the National Credit Regulator in terms of section 42(3)(b)”.

112 *Sendal* (fn 39) para 26.

113 *Ibid.*

114 Para 28.

115 Discussed in paras 3 2 2 and 4 above.

116 Van Zyl in Scholtz (ed) para 5.5.

117 For full detail, see *idem* paras 5.5.1, 5.5.2 and 5.6 respectively.

118 Or an association of persons.

119 See, in this respect, reg 13 read with Form 12.

120 S 54(1)(a) and (b). The same holds true for a person who is offering to engage in such an activity, or is holding himself out as authorised to engage in such an activity. Before such a notice is issued to a regulated financial institution, the National Credit Regulator must consult with the regulatory body that issued a license to that institution – s 54(2). The content of the s 54 notice is prescribed in terms of s 54(3) read with reg 13. The person to whom the notice is being issued must *inter alia* be informed of his right under s 56 to object to the notice.

121 Discussed immediately below.

122 By the National Consumer Tribunal, or a court upon an appeal or review of a Tribunal decision – s 54(4)(a) and (b) respectively.

123 S 54(5).

Finally, section 56(1) affords the right to object to a section 54 notice. This is done by way of an application to the Tribunal¹²⁴ to review the notice.¹²⁵

The National Credit Regulator, on the one hand, may issue a section 55 compliance notice to a person¹²⁶ who has failed to comply with a provision of the Act or is engaging in an activity in a manner that is inconsistent with the Act.¹²⁷ Such a notice, on the other hand, may also be issued to a registrant whom the regulator believes has failed to comply with a condition of its registration.¹²⁸ The notice must be in the prescribed form¹²⁹ and remains in force until it is set aside¹³⁰ or until a compliance certificate is issued by the regulator.¹³¹

A person issued with a section 55 compliance notice may object to the notice in terms of section 56.¹³² In the event of failure to comply with a compliance notice, without raising an objection in terms of section 56,¹³³ the regulator may refer the matter to the National Prosecuting Authority, if the failure to comply constitutes an offence in terms of the Act.¹³⁴ The matter may otherwise be referred to the Tribunal for an appropriate order.¹³⁵

Ultimately, a registration in terms of the Act may be cancelled by the Tribunal on request by the regulator.¹³⁶ Under section 57(1) this may be the case where the registrant repeatedly

- (a) fails to comply with a condition of its registration;
- (b) fails to meet a commitment¹³⁷ contemplated in section 48(1);¹³⁸ or
- (c) contravenes the Act.

It needs to be mentioned for the sake of completeness that a person who is affected by any decision of the National Credit Regulator under Chapter 3, may apply to the Tribunal to review the regulator's decision.¹³⁹ A decision by the Tribunal,¹⁴⁰ in turn, is subject to appeal to or review by the High Court.¹⁴¹

124 See reg 15 read with Form 14.

125 S 54 contains no reference to s 56.

126 Or association of persons. Registrants are naturally included. S 52(5)(c) imposes an obligation on a registrant to comply with its conditions of registration and the provisions of the Act.

127 S 55(1)(a)(i) and (ii) respectively. Before such a notice is issued to a regulated financial institution, the National Credit Regulator must consult with the regulatory body that issued a licence to that institution – s 55(2).

128 S 55(1)(b).

129 See reg 14 read with Form 13. The content of the s 55 notice is prescribed in terms of s 55(3) read with reg 14.

130 By the Tribunal, or a court upon an appeal or review of a Tribunal decision – s 55(4)(a).

131 S 55(4)(b). Under s 55(5) the regulator must issue a compliance certificate if the requirements of a compliance notice have been satisfied.

132 See the discussion immediately above.

133 *Ibid.*

134 S 55(6)(a).

135 S 55(6)(b). The orders that the Tribunal may make are set out in s 150. This includes the imposing of an administrative fine in terms of s 151. See also para 7 2 below.

136 S 57(1). See also Van Zyl in Scholtz (ed) para 5.5.2. The Act also provides for the voluntary cancellation of registration by a registrant – s 58.

137 In respect of black economic empowerment or in connection with the combating of over-indebtedness.

138 Para 3 2 2 above.

139 S 59(1). The Tribunal may eg set aside a condition of registration – s 59(2).

140 In terms of s 59.

141 S 59(3).

As explained in paragraph 4 1 above, a credit provider that should be registered in terms of section 40 but which provides credit under the NCA despite not being duly registered, is further sanctioned by the relevant credit agreement being unlawful and void. It is therefore clear that non-compliance with the registration requirements under the Act can have dire consequences for an unregistered credit provider and the gravity of these sanctions serves to confirm the legislature's objective to effectively regulate the credit market by ensuring compliance by credit providers.

6 FUTURE DEVELOPMENTS

The National Credit Amendment Bill, 2013, initially proposed no changes to section 40 in the first draft thereof. However, the Bill was subsequently changed in various respects and the third draft thereof¹⁴² which was accepted by Parliament now amends section 40(1) by deleting the registration requirement in section 40(1)(a) which related to the 100 credit agreements. Accordingly, the only registration requirement set by section 40 once the Bill is signed into legislation will be that a person must apply to be registered as a credit provider if 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) which is currently R500 000.

7 FINAL REMARKS AND RECOMMENDATIONS

7 1 Fitness to be a credit provider

It was indicated that a credit provider's competence or fitness to be registered as a credit provider under the NCA is evaluated on certain grounds of disqualification and the prescribed information provided to the National Credit Regulator in the application form for registration.¹⁴³ In this regard a few important aspects were pointed out.¹⁴⁴ It is commendable that grounds of disqualification are set out in the Act and considered as part of the decision to register or not. It is also exemplary that the applicant's commitment to combat over-indebtedness, whether the applicant has subscribed to any relevant industry code of conduct in this regard, and the credit products the applicant is involved in, are considered.¹⁴⁵

It is also to be welcomed that the regulator may impose conditions on the registration of an applicant, *inter alia*, by having regard to the applicant's commitment to combat over-indebtedness.¹⁴⁶ It is submitted that the regulator's power to review these conditions, and impose new conditions, *inter alia* if a registrant has contravened the Act, has not met a commitment or undertaking that was made in connection with its registration or if at least five years have passed since the last review and variation of conditions,¹⁴⁷ should also be endorsed. It is further submitted that the new section 49(1)(e)¹⁴⁸ should, in particular, be welcomed. In our

142 Cl 10 of the National Credit Amendment Bill, 2013.

143 Para 3 2 2.

144 *Ibid.*

145 *Ibid.*

146 *Ibid.*

147 *Ibid.*

148 Para 3 2 3.

opinion, the additional power afforded to the National Credit Regulator to review a credit provider's conditions of registration, and to propose new conditions on any registration if the Regulator, on compelling grounds, "deems it necessary for the attainment of the purposes of this Act and efficient enforcement of its functions", broadens the fitness test for credit providers in terms of the NCA and the Regulator's powers in this regard. The same holds for the amendment to section 45(3)¹⁴⁹ conferring the power on the National Credit Regulator to refuse to register an applicant if the Regulator, after subjecting the applicant to a fit and proper test, is of the view that "there are other compelling grounds that disqualify the applicant from being registered in terms of this Act" and for the insertion of the new section 45(4). The latter, as was seen,¹⁵⁰ empowers the Minister to prescribe the criteria to be considered in conducting a fit and proper test.

If the new approach¹⁵¹ adopted by the South African legislature in respect of the fitness of a person to be registered as a credit provider is compared to the post-2006 licensing regime in the United Kingdom, the prominent features of which have been set out earlier,¹⁵² it is submitted that the South African credit law in this regard has now been brought in line with the United Kingdom approach. However, in prescribing the criteria to be considered in conducting a fit and proper test, care should be taken to place the focus on credit competence and the applicant's ability to run the credit business in a proper manner, versus credit risk and the integrity of the applicant only, indicated by for instance the applicant's past conduct.

It is submitted that, in accordance with the regime in the United Kingdom,¹⁵³ a more pertinent statutory obligation is now imposed on the National Credit Regulator in terms of the amended section 48(1)(b)¹⁵⁴ to consider irresponsible lending practices, such as contraventions of the provisions of Part D of Chapter 4,¹⁵⁵ when considering whether or not to register a credit provider. This is in particular true due to the obligation that is now imposed on the National Credit Regulator to consider compliance with affordability assessment regulations before registering the applicant for registration.¹⁵⁶ However, guidance to credit providers similar to the United Kingdom's OFT Guidance to Creditors 2010 should be strongly considered.

Further, the submission is made that the powers of the National Credit Regulator in respect of registration should be revised and improved. Included should be the regulator's ability to monitor the fitness to be registered as a credit provider on a continuous basis. It is submitted that the proposed amendment to the Act by the insertion of section 49(1)(e)¹⁵⁷ will contribute towards the achievement of this goal. Also, in accordance with the Consumer Credit Act 1974, the regulator should be statutorily authorised and compelled to publish guidance to credit

149 *Ibid.*

150 *Ibid.*

151 *Ibid.*

152 Para 3 1 2.

153 See *ibid.*

154 Para 3 2 3.

155 Dealing with reckless lending and over-indebtedness.

156 Para 3 2 3.

157 See discussion immediately above.

providers in relation to how it determines, or how it proposes to determine, whether an applicant is fit to be registered as a credit provider under the Act. The regulator must also be empowered to have regard to its own guidance when it carries out its registration functions. Finally, although it is submitted that the instruments by means of which the National Credit Regulator is empowered to enforce compliance with the Act's registration requirements,¹⁵⁸ or with a registrant's conditions of registration, should be endorsed, it was seen that a registration may only be cancelled by the Tribunal on request by the regulator.¹⁵⁹ In the latter respect the submission is made that, in accordance with the position in the United Kingdom,¹⁶⁰ the National Credit Regulator should be empowered to cancel a credit provider's registration itself.¹⁶¹

In conclusion, it is submitted that the amendments to the NCA will ensure a more proactive approach in terms of South African credit law towards the evaluation of the fitness of an applicant to be registered as a credit provider. It is further submitted that by enhancing the powers of the National Credit Regulator in respect of its registration functions, the registration of credit providers would become an even more powerful enforcement tool in the hands of the regulator.

7.2 Registration thresholds

The 100-agreement threshold in section 40(1)(a) has received scant attention in case law but, fortunately, the section 40(1)(b)-threshold which appears to be the more problematic threshold, has been considered in a number of cases, albeit in a limited manner. Binns-Ward J in *Opperman v Boonzaaier*¹⁶² recorded his impression that section 40 requires persons who are in the business of providing credit to register as a credit provider. In *Friend v Sendal*¹⁶³ the full bench remarked that it looks as if section 40(1)(a) envisages a situation where a person frequently provides credit. From the case law it appears that the courts are reluctant to interpret section 40(1)(b) in such a manner that once-off or *ad hoc* granting of credit would oblige a credit provider to register in terms of section 40. In *Cherangani*¹⁶⁴ the court's interpretation that the credit provider called itself a financing house and that there were indications that it did not provide credit infrequently, may be construed as favouring an interpretation that registration under section 40(1)(b) is occasioned by the granting of credit being part of the consumer's ordinary course of business. The court in *Opperman*¹⁶⁵ was much clearer about its opinion in this regard and in essence indicated that the objectives of the NCA do not support an interpretation that persons who only grant *ad hoc* credit should be caught by the registration thresholds in section 40.

158 Para 5.

159 *Ibid.*

160 Para 3 1 3.

161 It is interesting to note that the Draft National Credit Act Amendment Bill, 2013, Invitation for the public to comment, published on 29 May 2013 in GN 560 of 2013 in GG 36505, empowered the National Credit Regulator, and not the Tribunal upon request by the Regulator, to cancel a registration in terms of the Act if the registrant fails to comply with any condition of its registration or to meet a commitment contemplated in s 48(1) discussed in para 3 2 2 above.

162 Para 4 5 3.

163 Para 4 5 4.

164 Para 4 5 2.

165 Para 4 5 3.

However, it did not make the unequivocal statement that section 40(1)(b) does not apply to *ad hoc* agreements as it pointed out that the facts *in casu* demonstrated that an *ad hoc* lender of money has been caught within the ambit of section 40(1)(b).¹⁶⁶ In *Friend v Sendal*,¹⁶⁷ a full bench of the North Gauteng High Court has indicated that section 40(1)(b) does not require a person who provides credit in terms of a *once-off*¹⁶⁸ transaction to be registered. However, despite the aforementioned cases, persons who grant *ad hoc* credit are still not certain as to whether they will be at risk if they fail to be registered as credit providers when they enter into such agreements. Certain micro lenders and small credit providers will also still be able to engage in behaviour that may go undetected due thereto that they are not registered with the National Credit Regulator hence monitoring their activities are impeded.

As indicated above, registration is an onerous process which brings about continuous financial, administrative and compliance obligations for as long as the credit provider remains registered. In addition, failure to register when required to do so under section 40, *inter alia*, has the result that the credit agreement entered into whilst the credit provider who should have been registered failed to register, will be unlawful. As indicated, the National Credit Regulator may also send the credit provider a compliance notice.¹⁶⁹ Consequently, failure to register triggers a double-barrelled sanction for the unfortunate credit provider: it not only has the effect that the relevant credit agreement is unlawful but also yields the potential to culminate in a hefty administrative fine or even prosecution for committing an offence in the event that the credit provider fails to comply with a section 54 notice delivered to him by the National Credit Regulator.¹⁷⁰

The point is thus that failure to register in accordance with section 40 can have extremely dire financial consequences for a credit provider. It is thus pivotally important, from the perspectives of credit providers, that the registration requirements in section 40 are clear and unambiguous given their vast implications. However, as pointed out, the selection of these thresholds appears to be arbitrary and their application is unclear and rife with problems.

The thresholds in their current format, *inter alia*, have the effect that a micro lender who, for instance, has 90 credit agreements of R1 000 each, does not have to be registered as opposed to a person who extends credit once-off for R600 000. The 90 vulnerable consumers who are the clients of the micro lender and can only afford to borrow small amounts at exorbitant rates arguably might be more in need of added protection than the one consumer who borrows R600 000. To compound the gravity of the arbitrary effect of the registration thresholds: because he is not obliged to register as credit provider, it would also be possible for the micro lender in the aforementioned scenario to conduct the business of a credit provider without having to meet the fitness requirements in sections 46 and 47 as supplemented by the conditions of registration that can be imposed upon registration of a credit provider. Therefore, he sidesteps the fitness requirements and further, his credit agreements are not at risk of being unlawful on the basis of non-registration.

¹⁶⁶ *Ibid.*

¹⁶⁷ Para 4 5 4.

¹⁶⁸ Our emphasis.

¹⁶⁹ See para 5.

¹⁷⁰ See fn 135 and para 5 above.

It may further be asked why a person who provides credit once-off or at the most *ad hoc* and not in the ordinary course of his business, should be saddled with onerous registration obligations which not only impact on him administratively and financially, but also puts the validity of his agreement and his opportunity for recovering the money due to him at risk, as opposed to absolving a person with a significant number of credit agreements who is obviously in the business of providing credit, from those risks and obligations. Apart from being arbitrary it is submitted that the section 40 thresholds may also be open to an equality challenge in terms of section 9 of the Constitution; and it is further submitted that is highly unlikely that these thresholds will pass constitutional muster as being a reasonable limitation on the rights of the once-off or *ad hoc* credit provider.

What one should never lose sight of in the debate regarding the necessity to require credit providers to be registered is that the application of the NCA is not dependent upon the registration of the credit provider. The basis for the application of the Act is that the credit provider and consumer entered into a credit agreement to which the Act applies and as a result thereof the consumer is protected by various provisions in the Act aimed at specific forms of non-compliance by the credit provider. Consequently: non-registration does not equal non-protection. An unregistered credit provider who enters into credit agreements to which the Act applies can accordingly be heavily sanctioned. The main difference between the measure of protection that the consumer of the unregistered credit provider who is not obliged to register will have in comparison with the consumer of the unregistered credit provider who is obliged to register, is that in the first instance the credit agreement will not be unlawful but in the latter instance it will be.

However, this should not be construed as an argument to do away with the requirement of registration but rather to revisit the thresholds contained in section 40 and to replace them with a single non-arbitrary threshold or requirement. In this regard the absence in the credit law of the United Kingdom of threshold requirements similar to those in section 40 may serve to illustrate that effective regulation does not require the ring-fencing of certain credit providers by means of arbitrary and arguably unreasonable registration thresholds. Registration of credit providers is a powerful regulatory tool by means of which the regulator can monitor and regulate the credit market and, of course, it serves to fund the regulatory activities of the regulator. These consumer protection qualities of enhanced regulation through the registration of credit providers should never be understated. If, however, one has regard to section 40 and especially to the fact that providers of incidental credit are not required to register in terms of section 40, it is submitted that it is clear that what the legislature had in mind was that persons who do not extend credit in the ordinary course of their business should not be required to register. This principle extends not only to entering into incidental credit agreements but it also covers situations where a person extends credit in a once-off transaction or *ad hoc* two or three times over the course of a number of years. Although the National Credit Amendment Act, 2014 has now done away with the 100 credit agreement registration requirement in section 40(1)(a),¹⁷¹ the retention of the requirement in section 40(1)(b) that a credit

171 Para 6.

provider that provides credit in excess of R500 000 must register is still problematic and may lead to unfair consequences. It is accordingly submitted that the registration conundrum could be better addressed by doing away with both the arbitrary registration thresholds set in section 40(1)(a) and (b) and rather introducing the blanket requirement that a person should register as a credit provider if providing credit is in his ordinary course of business.