

**Unlawful credit agreement: An analysis of Section 89(5) of the National Credit Act 34 of 2005 with specific focus on Section 89(5)(c)**

by

**Lorraine Pearl Maodi**

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Supervisor: Professor Van Heerden

## **Summary of thesis**

Lorraine Maodi

Student number: 25130732

Supervisor: Prof Van Heerden

Title: Unlawful credit agreement: An analysis of Section 89(5) of the National Credit Act 34 of 2005 with specific focus on Section 89(5)(c)

This study is a critical analysis of section 89(5) of the National Credit Act, with specific focus on section 89(5)(c). Although section 89(5) deals with the consequences of unlawful credit agreements listed under section 89, this study will focus on the consequences of unlawful credit agreements of unregistered credit providers. The National Credit Act is the regulatory framework for the credit market in South Africa and it places an obligation on certain individuals or legal persons to register as credit providers. Credit providers who fail to register when they are required to do so face the consequence of having their credit agreements being void and unlawful. A further adverse consequence is that the credit providers rights to restitution for goods delivered or money lend will either be cancelled or forfeited to the State in terms of section 89(5)(c). Case law will be utilised to demonstrate the far-reaching consequences of section 89(5)(c). The key problem with section 89(5)(c) of the National Credit Act is that it does not afford the court the opportunity to exercise a discretion when dealing with disputes concerning credit agreements which are unlawful. The common law action of unjustified enrichment, on the other hand, allows the court to exercise this discretion. The recent approval of the National Credit Amendment Bill has resulted in an amendment to section 89(5). This study will reveal whether or not the proposed amendment to section 89(5) will solve the problems which have arisen from the provision.

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## CHAPTER 1

### General Introduction

#### 1.1 Introduction

The National Credit Act<sup>1</sup> provides the regulatory framework for the credit market in South Africa and regulates credit agreements between consumers and credit providers and also makes provision for instances where credit agreements are considered unlawful. Furthermore, the National Credit Act regulates the registration of credit providers. This is in line with the purpose of the Act which *inter alia* seeks to protect consumers against unscrupulous credit providers. Section 3 of the National Credit Act provides that the purpose of the Act is to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry. The failure by credit providers to register when they are required in terms of the Act to register results in the credit agreements they entered into with consumers while they are unregistered being void and unlawful. This study will focus on the development regarding the consequences of unlawful agreements in terms of section 89(5)(c) of the National Credit Act which arise as a result of failure by credit providers to register when they are required to do so, by the Act.

#### 1.2 Research Statement

In this study, section 89(5) of the National Credit Act will be investigated and critically analysed, with specific focus on section 89(5)(c). While section 89(5) of the National Credit Act deals with the consequences of unlawful credit agreements listed under section 89(2), this study will specifically focus on the consequences of unlawful credit agreements entered into by unregistered credit providers who are required to be registered in terms of the National Credit Act. As indicated, credit providers who fail to register when they are required to do so face the consequence of having their credit agreements being declared void and unlawful. It was originally also provided that the credit provider's rights to

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<sup>1</sup> Act No. 34 of 2005.

restitution for goods delivered or money lent either be cancelled or forfeited to the State in terms of section 89(5)(c) of the National Credit Act.

Case law, namely *Cherangani Trade and Investment 107 (Pty) Ltd v Mason*<sup>2</sup> and *National Credit Regulator v Opperman*<sup>3</sup> will be utilised to demonstrate the initial far-reaching consequences of section 89(5)(c) of the National Credit Act which will be contrasted against the consequences of unlawful agreements in terms of the common law. The key problem with section 89(5) of the National Credit Act was originally that it did not allow courts to exercise a discretion when dealing with disputes concerning unlawful credit agreements. The common law action of unjustified enrichment, on the other hand, allows the court to exercise a discretion when dealing with disputes concerning unlawful agreements.

### 1.3 Research objectives

The research objectives below have been formulated in line with the research statement. The research objectives of this study are as follows:

- a) It is imperative that the scope of application of the National Credit Act is outlined. The National Credit Act seeks to regulate almost every aspect of the granting of credit in South Africa.<sup>4</sup> It regulates a wide spectrum of credit agreements, including loans secured by mortgage bonds, the sale of movable goods on credit, credit cards, pawn transactions, personal loans, overdraft facilities and suretyship agreements. The scope of application of the National Credit Act will briefly be discussed in chapter 2 of this study.
- b) The registration of credit providers will be discussed in chapter 2 of this study. Section 40(1)(a) of the National Credit Act originally required that a person who alone, or in conjunction with any associated person is a credit provider under at least 100 credit agreements, other than incidental credit agreements, or to whom the total principal debt owed in terms of all outstanding credit agreements exceeds the threshold prescribed in terms

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<sup>2</sup> 2011 (11) BCLR 1123 (CC).

<sup>3</sup> 2013 (2) BCLR 170 (CC).

<sup>4</sup> JW Scholtz, *Guide to the National Credit Act* (2008 et seq) page 4-1(loose leaf).

- c) of section 42(1), currently R500 000, to apply to be registered as a credit provider. The consequences of unlawful agreements of unregistered credit providers who are required to be registered will be discussed.
- d) While section 89(5)(c) of the National Credit Act originally left no room for the courts to exercise a discretion when dealing with unlawful credit agreements as far restitution of goods or money lent is concerned, the common law allows courts to exercise this discretion. The common law position regarding unlawful agreements will be discussed in chapter 2.
- e) The case of *National Credit Regulator v Opperman*<sup>5</sup> will be discussed comprehensively in chapter 2 to illustrate the far-reaching consequences of section 89(5)(c) of the National Credit Act prior to the amendment by the recently enacted National Credit Amendment Act 19 of 2014, which amendment Act has at the time of writing this dissertation, not yet been put into operation.
- f) In the final chapter, namely chapter 3, recommendations will be made regarding section 89(5)(c) of the National Credit Act taking into account the amendments enacted in terms of the National Credit Amendment Act 19 of 2014. Conclusions will also be provided in this chapter and will be aligned to the research statement.

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<sup>5</sup> 2013 (2) BCLR 170 (CC).

## CHAPTER 2

### Unlawful Credit Agreements under the NCA contrasted to the common law position regarding unlawful agreements

#### 2.1 Introduction

In order to ascertain whether or not a credit provider is required to be registered in terms of the National Credit Act, it will first need to be established whether or not the National Credit Act applies to the specific credit agreement. In instances where the National Credit Act is not applicable to a credit agreement, the credit provider will not be required to register as credit provider.<sup>1</sup> In this chapter, the scope of application of the National Credit Act will be discussed. The requirements to register as credit provider will also be discussed and will be followed by a discussion regarding the consequences of unlawful agreements due to failure to register as credit provider as it was originally provided for by section 89(5) of the Act. The anomaly in the discretion that can be exercised by the courts when dealing with unlawful agreements in terms of the common law will be contrasted with section 89(5)(c) of the National Credit Act which did not originally give the courts the power to exercise a discretion when dealing with unlawful agreements. Case law<sup>2</sup> regarding the interpretation of section 89(5)(c) by the courts will be considered. The Constitutional Court decision in *National Credit Regulator v Opperman*<sup>3</sup> will also be discussed comprehensively in this chapter. Finally, the amendment to section 89(5) by the National Credit Amendment Act<sup>4</sup> will be discussed with the view to consider whether or not the problems which arose with section 89(5)(c) as it was originally formulated will be resolved by the aforesaid amendment which has yet to come into operation.

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<sup>1</sup> The fact that a transaction complies with one of the definitions of a credit agreement will not necessarily mean that the Act applies to it. Other requirements must also be met before the Act finds application to such transactions, for example, that it was concluded between parties dealing at arm's length and that it was concluded in South Africa and has an effect in South Africa—Stoop, *Consumer Credit Regulation in South Africa* (2012) page 28.

<sup>2</sup> *Cherangani Trade and Investment 107 (Pty) Ltd v Mason* 2011 (11) BCLR 1123 (CC) and *Opperman v Boonzaaier* 2012 JOL 29470 (WCC).

<sup>3</sup> 2013 (2) BCLR 170 (CC).

<sup>4</sup> Act No. 19 of 2014.

## 2.2 Scope of Application of the National Credit Act

### 2.2.1 General

The National Credit Act has a much broader scope and application than any of its predecessors.<sup>5</sup> The majority of consumers are using some form of credit or, at the very least, have access to it, whether in the form of credit cards, overdraft facilities or their current (cheque) account, vehicle and asset finance, home loans, personal loans, study loans, or clothing accounts.<sup>6</sup> The National Credit Act generally applies to all these types of consumer credit, irrespective of the amount of credit involved, and it is not limited to credit agreements in regard to certain goods or services only.<sup>7</sup>

When determining the scope of application of the National Credit Act, section 4(1) of the Act serves as the point of departure. Section 4(1) states that the Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic. There are certain exceptions to this general statement.<sup>8</sup> The National Credit Act has limited application to incidental credit agreements<sup>9</sup>, credit guarantees<sup>10</sup>, credit agreements in which the consumer is a juristic person<sup>11</sup>, and pre-existing credit

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<sup>5</sup> Stoop, *Consumer Credit Regulation in South Africa* (2012) page 28.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> JW Scholtz, *Guide to the National Credit Act (2008 et seq)* page 4-1(loose leaf).

<sup>9</sup> Section 1 of the National Credit Act defines an incidental credit agreement 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 a consumer over a period of time and either or both of the following apply: a) a fee, charge or interest became payable when payment of the amount charged in terms of that account was not made on or before a determined period or date b) 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. For example, a credit provider of an incidental credit agreement does not have register as credit provider with the National Credit Regulator due to the limited application of the National Credit Act to incidental credit agreements.

<sup>10</sup> The National Credit Act applies to a credit guarantee only to the extent that it applies to the primary debt secured by the guarantee. If the National Credit Act does not apply to the credit facility or credit transaction in respect of which the guarantee is granted, it does not apply to the credit guarantee-JW Scholtz, *Guide to the National Credit Act (2008 et seq)* page 4-9(loose leaf).

<sup>11</sup> For example provisions dealing with credit marketing practices, over-indebtedness, reckless credit etc. do not apply where the consumer is a juristic person. See footnote 21 for the definition of "juristic person".



agreements. Some agreements may also fall outside the scope of the Act or may be specifically exempt<sup>12</sup> from the provisions of the Act.<sup>13</sup>

## 2.2.2 Credit Agreements in terms of the National Credit Act

As stated above, the National Credit Act applies only to credit agreements. An agreement constitutes a credit agreement for purposes of the Act if it is a credit facility<sup>14</sup>, credit transaction<sup>15</sup>, credit guarantee<sup>16</sup> or any combination of these.<sup>17</sup> In addition, the Act has introduced two special types of credit agreements, namely development credit agreements<sup>18</sup> and public interest credit agreements.<sup>19</sup>

## 2.2.3 Dealing at Arm's Length

Once it has been established that an agreement is a credit agreement as defined in the Act, the next enquiry is whether the agreement was entered into

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<sup>12</sup> See section 4(1)(a)-(d) of the National Credit Act No. 34 of 2005 for agreements that are exempt from the provisions of the National Credit Act No. 34 of 2005.

<sup>13</sup> Stoop, *Consumer Credit Regulation in South Africa*, 2012, page 29.

<sup>14</sup> See section 8(3) of the National Credit Act No. 34 of 2005. An agreement constitutes a credit facility if in terms of that agreement a credit provider undertakes i) to supply goods or services or to pay an amount or amounts as determined by the consumer from time to time or on behalf of or at the direction of the consumer and either to ii) defer the consumer's obligation to pay any part of the cost of goods or services or to repay to the credit provider any part of such amount or bill the consumer periodically for any part of the cost of goods or services and any charge, fee or interest is payable to the credit provider in respect of such deferred payment or amount billed and not paid within the time provided in the agreement. Common examples of a credit facility are personal loans where money is paid over to the consumer by the credit provider, overdrawn cheque accounts, credit card transactions, an account with a retailer which supplies furniture or other consumer goods on a buy-now-pay later system, and services rendered by professional people such as doctors, or indeed by anyone-JW Scholtz, *Guide to the National Credit Act (2008 et seq)*, para 8.2.2 (loose leaf).

<sup>15</sup> See section 8(4) of the National Credit Act No. 34 of 2005. A credit transaction can be any of the following: pawn transaction, discount transaction, incidental credit agreement, instalment agreement, mortgage agreement, secured loan, lease agreement, other credit agreements. See JW Scholtz, *Guide to the National Credit Act (2008 et seq)*, para 8.2.3 (loose leaf) for examples of these credit transactions.

<sup>16</sup> See section 8(5) of the National Credit Act No. 34 of 2005. An agreement constitutes a credit guarantee if a person undertakes to or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or credit transaction to which the Act applies. Eg an ordinary suretyship in terms of which a person provides personal security for another person's debts arising out of an overdrawn cheque account, or for payment of the instalments in terms of an instalment sale-JW Scholtz, *Guide to the National Credit Act (2008 et seq)*, para 8.2.4 (loose leaf).

<sup>17</sup> Section 8(1) of the National Credit Act No. 34 of 2005.

<sup>18</sup> Section 10 of the National Credit Act No. 34 of 2005 states that it is an agreement between a credit co-operative as credit provider and a member of that credit co-operative as consumer, if profit is not the dominant purpose for entering into the agreement, and the principal debt under that agreement does not exceed the prescribed maximum amount. Developmental credit agreements also include educational loans and the purpose of the development credit agreement is for the development of small businesses, the acquisition, rehabilitation, building or expansion of low income housing or for any other prescribed purpose.

<sup>19</sup> Section 11 of the National Credit Act No. 34 of 2005 states that the Minister may declare that credit agreements entered into in specified circumstances, or for specified purposes, during a specific period are public interest credit agreements.

between parties dealing at arm's length. The National Credit Act does not define dealing at arm's length but merely sets out arrangements in respect whereof it is considered that parties to a credit agreement are not dealing at arm's length.<sup>20</sup> Section 4(2)(b) states that in any of the following arrangements, the parties are *not* dealing at arm's length:

- a) a shareholder loan or other credit agreement between a juristic person<sup>21</sup>, as consumer, and a person who has a controlling interest in that juristic person, as credit provider<sup>22</sup>;
- b) a loan to a shareholder or other credit agreement between a juristic person, as credit provider, and a person who has a controlling interest in that juristic person, as consumer<sup>23</sup>;
- c) a credit agreement between natural persons who are in a familial relationship and are co-dependent on each other or one is dependent upon the other<sup>24</sup>;
- d) any other arrangement in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction<sup>25</sup>; or
- e) the arrangement is of a type that has been held in law to be between parties who are not dealing at arm's length.<sup>26</sup>

#### **2.2.4 Agreement made within or having an effect within the Republic**

Where a credit agreement or proposed credit agreement falls within the ambit of the National Credit Act, the Act will apply to it irrespective of whether or not the

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<sup>20</sup> Stoop, *Consumer Credit Regulation in South Africa* (2012) page 29.

<sup>21</sup> Section 1 of the National Credit Act No. 34 of 2005 defines a juristic person as a partnership, association or other body of persons, corporate or unincorporated or a trust if there are three or more individual trustees or the trust is itself a juristic person. This definition of juristic person does not include a stokvel.

<sup>22</sup> Section 4(2)(b)(i) of National Credit Act No. 34 of 2005.

<sup>23</sup> Section 4(2)(b)(ii) of National Credit Act No. 34 of 2005.

<sup>24</sup> Section 4(2)(b)(iii) of National Credit Act No. 34 of 2005.

<sup>25</sup> Section 4(2)(b)(iv)(aa) of National Credit Act No. 34 of 2005.

<sup>26</sup> Section 4(2)(b)(iv)(bb) of National Credit Act No. 34 of 2005. See as an example *Southern African Music Rights Organisation Limited v National Credit Regulator* (unreported case no 31104/08, 20 April 2011(GNP), also cited as 2011 JDR 0519 (GNP) para 10.

credit provider resides or has its principal office within or outside South Africa.<sup>27</sup> Parties to a credit agreement will accordingly not be able to circumvent the provisions of the Act merely by concluding their agreement offshore.<sup>28</sup> Whether an agreement has “an effect” in South Africa is a factual inquiry in each case.<sup>29</sup> Questions of private international law may also arise, especially when offer and acceptance do not take place in the same jurisdiction.<sup>30</sup> Determination of the proper law of contract may be crucial.<sup>31</sup>

## 2.3 Registration of Credit Providers

### 2.3.1 General

The National Credit Act brought about an entirely new regime for regulating the consumer credit industry.<sup>32</sup> It also made it compulsory for certain industry participants to register with the National Credit Regulator.<sup>33</sup> The National Credit Regulator has the duty to register compliant credit providers, credit bureaux and debt counsellors.<sup>34</sup> Only the registration of credit providers will be discussed in this dissertation. Although certain credit providers do not have to register with the National Credit Regulator it must be borne in mind that where they conclude credit agreements which fall within the scope of application of the National Credit Act, those agreements are still governed by the Act, and therefore those agreements need to be compliant with the relevant provisions of the Act. This means that unregistered credit providers still have to comply with all the relevant provisions of the Act governing and dealing with credit agreements in respect of any credit agreements they enter into that may fall within the scope of application of the Act.

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<sup>27</sup> Stoop, *Consumer Credit Regulation in South Africa* (2012) page 29.

<sup>28</sup> JW Scholtz, *Guide to the National Credit Act* (2008 et seq), page 4-3(loose leaf).

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> Stoop, *Consumer Credit Regulation in South Africa* (2012) page 126, para 4.1.

<sup>33</sup> The National Credit Regulator is a regulatory consumer credit institution and is responsible for ensuring the proper enforcement of the Act- Stoop, *Consumer Credit Regulation in South Africa* (2012) page 126, para 4.1. See Section 12(1) of the National Credit Act No. 34 of 2005 regarding the establishment of the National Credit Regulator.

<sup>34</sup> Stoop, *Consumer Credit Regulation in South Africa* (2012) page 126.

### 2.3.2 Who should register?

Many credit providers such as banks, other financial institutions, large micro-lenders and retailers have to register with the National Credit Regulator.<sup>35</sup> Not every person who grants credit is required to be registered as credit provider in terms of the National Credit Act.<sup>36</sup> Thresholds and exclusions apply, the effect of which is that a person who grants credit only occasionally and in small amounts need not register.<sup>37</sup>

Prior to its amendment section 40 provided that a person must apply to be registered as credit provider if<sup>38</sup>:

- a) that person, alone or in conjunction with any other associated person<sup>39</sup>, is the credit provider under at least 100 credit agreements, other than incidental credit agreements, or
- b) the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold<sup>40</sup> prescribed in terms of section 42(1).

In<sup>41</sup> 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 in respect of which that person, or any associated person, is the credit provider.

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<sup>35</sup> Stoop, *Consumer Credit Regulation in South Africa* (2012) page 127, para 4.1.1.

<sup>36</sup> JW Scholtz, *Guide to the National Credit Act* (2008 et seq) , para 5.2.2.1 (loose leaf).

<sup>37</sup> *Ibid.*

<sup>38</sup> Section 40 of the National Credit Act No. 34 of 2005.

<sup>39</sup> Section 40(2)(d) of the National Credit Act No. 34 of 2005 states that an “associated person” with respect to a credit provider who is a natural person, includes the credit provider’s spouse or business partners. With respect to a credit provider that is a juristic person, includes 1) any person that directly or indirectly has a controlling interest in the credit provider, or is directly or indirectly controlled by the credit provider; 2) any person that has a direct or indirect controlling interest in, or is directly or indirectly controlled by such a person; or 3) any credit provider that is a joint venture partner of any of the aforesaid persons.

<sup>40</sup> Government Gazette 28893 published in General Notice 713 on 1 June 2006. The initial threshold of R500 000 took effect on the effective date, and each subsequent threshold will take effect six months after the date on which it is published in that Gazette. In determining whether or not a credit provider is required to be registered, section 40(6) provides that the value of any credit facility issued by that credit provider is the credit limit under that credit facility and any credit guarantee to which a credit provider is a party is to be disregarded.

<sup>41</sup> Section 40(2)(a) of the National Credit Act No. 34 of 2005.

The National Credit Amendment Act<sup>42</sup>, which has not yet come into operation; has now amended section 40 to provide for registration of credit providers in the following instances:

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<sup>43</sup> prescribed in terms of section 42(1).

It is clear from the amendment that the total number of credit agreements will no longer be a requirement for the purposes of establishing whether or not a credit provider is required to register in terms of section 40 of the Act. Once the National Credit Amendment Act<sup>44</sup> comes into operation, only the total principal debt under all outstanding credit agreements will be taken into consideration when establishing whether or not a credit provider is required to be registered in terms of section 40 of the Act.

A credit provider of only incidental credit agreements does not have to register with the National Credit Regulator.<sup>45</sup> However, certain provisions of the Act will still apply to incidental credit agreements.<sup>46</sup>

## **2.4 Unlawful Credit Agreements**

### **2.4.1 General**

Section 89 of the National Credit Act declares certain consumer credit agreements unlawful. Of importance is section 89(2) of the National Credit Act because it lists circumstances in which credit agreements will be considered unlawful. One of these instances of unlawful credit agreements is provided for by section 89(2)(d), namely that if at the time the agreement was made, the credit provider was unregistered and the Act requires that specific credit provider to be registered. In this study, only the consequences of the aforementioned unlawful

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<sup>42</sup> Act No. 19 of 2014.

<sup>43</sup> Section 11 of the National Credit Amendment Act No. 19 of 2014 has now amended section 42(1) to read “the Minister, by notice in the Gazette, must determine a threshold for the purpose of determining whether a credit provider is required to be registered in terms of section 40(1).

<sup>44</sup> Act No. 19 of 2014.

<sup>45</sup> Stoop, *Consumer Credit Regulation in South Africa* (2012) page 128.

<sup>46</sup> See Section 5 of the National Credit Act No. 34 of 2005 for provisions that apply to incidental credit agreements.

credit agreements entered into by unregistered credit providers will be discussed as provided for by section 89(5)(c) of the National Credit Act.<sup>47</sup>

## **2.4.2 Consequences of unlawful credit agreements due to failure to register as credit provider**

Section 89(5)(c)<sup>48</sup> of the National Credit Act originally stated that if a credit agreement is unlawful in terms of section 89, despite any provision of common law, any other legislation or any other provision of an agreement to the contrary, a court must order that all the purported rights of the credit provider under that credit agreement to recover any money paid or goods delivered to, or on behalf of, the consumer in terms of that agreement are either:

- a) cancelled, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer<sup>49</sup>, or
- b) forfeit to the State, if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer.<sup>50</sup>

The provisions of section 89(5)(c) are clearly mandatory, since it provides that a court must make the applicable orders, and it seems that the court will not have a discretion as to whether or not it wants to grant the orders provided for in the section.<sup>51</sup>

## **2.5 Common Law position regarding Unlawful Agreements**

### **2.5.1 General**

In terms of the common law, generally (with a few exceptions) if an unlawful contract is void none of the parties to the contract acquire any enforceable rights

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<sup>47</sup> Section 89(2)(d) of the National Credit Act No. 34 of 2005 which states “a credit agreement is unlawful if at the time the agreement was made, the credit provider was unregistered and this Act requires that credit provider to be registered”.

<sup>48</sup> Section 89(5)(c) must be read with section 89(2)(d) of the National Credit Act No. 34 of 2005. Section 89(2)(d) of the National Credit Act stipulates that the credit agreements of unregistered credit providers will be unlawful and will result in the automatic harsh consequences of section 89(5)(c) of the National Credit Act becoming applicable.

<sup>49</sup> Section 89(5)(c)(i) of the National Credit Act No. 34 of 2005.

<sup>50</sup> Section 89(5)(c)(ii) of the National Credit Act No. 34 of 2005.

<sup>51</sup> Stoop, *Consumer Credit Regulation in South Africa* (2012) page 199.

or duties from the contract.<sup>52</sup> In such a case no party may institute an action against the other to claim a promised performance on the ground of the unlawful agreement (this rule is expressed in the maxim *ex turpi causa non oritur actio* – no action arises from a shameful case).<sup>53</sup> This rule is never relaxed.<sup>54</sup> Also, a party that has already performed in terms of such a contract is not entitled to restitution of his performance and a court will not recognize such a contract.<sup>55</sup> Normally a person who has performed may also not reclaim his or her own performance on the ground of unjustified enrichment, as a result of the rule contained in the maxim in *pari delicto potior est conditio possidentis* (generally known as the *par delictum* rule); which means that where there is equal guilt the possessor is in the strongest position.<sup>56</sup> The rule entails that neither party to an unlawful contract is entitled to restitution of performance if both parties acted improperly.<sup>57</sup> The person in possession of the performance has the stronger right when a contract is illegal and both parties forfeit their respective performances.<sup>58</sup>

However, even if both parties acted improperly, a court may deviate from this harsh *par delictum* rule and may order a return of performance when particular circumstances show that public interest and justice call for it.<sup>59</sup> In contrast to this, section 89(5)(c) of the National Credit Act originally conferred no such discretion upon a court in the instance of an unlawful contract.

### 2.5.2 Par delictum

A development that already started in the post-classical Roman law and in accordance with which the relative blameworthiness of the parties' conduct was graded, has developed in South African law to a far larger extent than the so-called doctrine of clean hands or, then, the *par delictum* rule.<sup>60</sup> It means that the

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<sup>52</sup> Stoop, *Consumer Credit Regulation in South Africa* (2012) page 200.

<sup>53</sup> *Ibid.* See Otto 2009 *TSAR* 417 for a discussion of this subject and criticism of the provisions in the National Credit Act, particularly at 432. See also Otto 2010 *TSAR* 161 particularly at 167-JW Scholtz, *Guide to the National Credit Act (2008 et seq)*, at footnote 56a (loose leaf).

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> JC Sonnekus et al, *Unjustified Enrichment in South African Law (2008 et seq)* page 129 at para 5.3.5.1 on page 138.



defendant may introduce the turpitude of the plaintiff's conduct as a defence or justification for the patrimonial transfer when the plaintiff attempts to undo the patrimonial transfer by claiming the return of his performance with an action in enrichment.<sup>61</sup> The requirements of unjustified enrichment 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.<sup>62</sup> In order to be successful, ordinarily the party who claims on the basis of unjust enrichment must be free of turpitude and must show that he or she has not acted dishonourably.<sup>63</sup> This is the *par delictum* rule.<sup>64</sup> The underlying principle is that the law should discourage and deter illegality; it should not render assistance to those who defy it.<sup>65</sup> According to our law, the courts are not bound to enforce rigidly in every case the general rule in *pari delicto potior est condition defendentis* but may come to the relief of one of the parties where such a course is necessary in order to prevent injustice or to satisfy the requirements of public policy.<sup>66</sup>

It has been highlighted how the action of unjust enrichment is applied, especially with regard to the *par delictum* rule. This is clearly a contrast to section 89(5)(c) of the Act as it was originally formulated since it did not allow courts to exercise a discretion when restitution was claimed for money paid or goods delivered to a consumer by an unregistered credit provider.

## **2.6 Case law dealing with the effect of section 89(5)(c) of the National Credit Act**

### **2.6.1 General**

The effect of section 89(5)(c) of the National Credit Act was the subject in a number of cases. Two cases will be briefly discussed which dealt with the effect

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<sup>61</sup> *Ibid.*

<sup>62</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 15 on page 177.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Jajbhay v Cassim* 1939 AD 537 at page 558.



of section 89(5)(c) of the National Credit Act, namely *Cherangani Trade and Investment 107 (Pty) Ltd v Mason*<sup>67</sup> and *Opperman v Boonzaaier*.<sup>68</sup>

## **2.6.2 *Cherangani Trade and Investment 107 (Pty) Ltd v Mason*<sup>69</sup>**

### **2.6.2.1 Facts of the case**

In this case, the Applicant advanced loans in excess of R2 million to the Respondent.<sup>70</sup> The Applicant instituted action against the Respondents in the High Court after the Respondent defaulted on payments in terms of the loan agreement.<sup>71</sup> The High Court made an order in terms of section 89(5)(c) of the National Credit Act because the Applicant was an unregistered credit provider.<sup>72</sup> The loan agreements were, consequently, held to be void and unlawful. The Applicant unsuccessfully applied for leave to appeal the order<sup>73</sup> of the High Court to both the High Court and the Supreme Court of Appeal. Thereafter, the Applicant approached the Constitutional Court seeking leave to appeal against the order of the High Court.<sup>74</sup>

### **2.6.2.2 The Constitutional Court's view regarding section 89(5)(c)**

According to Judge Yacoob, section 89(5) read with section 89(2)(d) buttressed by section 40(4) of the Act provides that a court must declare credit agreements concluded by credit providers who have not been registered under the Act void.<sup>75</sup> This may mean that neither rights nor obligations can flow from these agreements, except perhaps the right to claim based on unjust enrichment.<sup>76</sup> Judge Yacoob further stated that section 89(5)(c) provided for the forfeiture of "purported rights" to payment of money or delivery of goods to be taken away from the credit provider and, if the consumer would be unjustly enriched by this,

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<sup>67</sup> 2011 (11) BCLR 1123 (CC).

<sup>68</sup> 2012 JOL 29470 (WCC).

<sup>69</sup> 2011 (11) BCLR 1123 (CC).

<sup>70</sup> *Cherangani Trade and Investment 107 (Pty) Ltd v Mason* 2011 (11) BCLR 1123 (CC) para 5 on page 1127.

<sup>71</sup> *Cherangani Trade and Investment 107 (Pty) Ltd v Mason* 2011 (11) BCLR 1123 (CC) para 6 on page 1127.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Cherangani Trade and Investment 107 (Pty) Ltd v Mason* 2011 (11) BCLR 1123 (CC) para 3 on page 1126, the Applicant contending that i) the High Court was wrong in holding that it was obliged by section 89(5)(c) to make the order, ii) that the High Court should have held that it had a discretion whether to make the order, iii) the discretion ought to have been but was not exercised by the High Court.

<sup>74</sup> Case number 6712/2008 of the Free State High Court.

<sup>75</sup> *Cherangani Trade and Investment 107 (Pty) Ltd v Mason* 2011 (11) BCLR 1123 (CC) para 14 on page 1129.

<sup>76</sup> *Cherangani Trade and Investment 107 (Pty) Ltd v Mason* 2011 (11) BCLR 1123 (CC) para 14 on page 1130.

to be forfeited to the state.<sup>77</sup> The difficulty of giving meaning to section 89(5)(c) of the National Credit Act is evident from Judge Yacoob's statements when he remarked that "it is difficult to fathom exactly what is taken away from the applicant and exactly what is forfeited to the state. Are they "purported rights" which do not exist anymore or is it the right to sue for unjust enrichment also forfeited?"<sup>78</sup> It is clear from these remarks by Judge Yacoob that the meaning of section 89(5)(c) of the National Credit Act as it was originally formulated was not without problems. The provision was mandatory and required the court to make one of two orders stipulated in section 89(5)(c)(i)<sup>79</sup> and (ii)<sup>80</sup> without allowing the court to exercise a discretion regarding whether or not to impose the forfeiture orders on unregistered credit providers.

In the course of asking whether the case raised a constitutional matter, Judge Yacoob referred to the applicant's argument that section 89(5)(c) of the Act should be read in conformity with section 25(1)<sup>81</sup> of the Constitution (in light of the obligation in terms of section 39(2)<sup>82</sup> of the Constitution).<sup>83</sup> The result of this interpretation exercise would allegedly have been to grant the court a discretion as to whether or not the forfeiture order should be granted.

The appeal to the Constitutional Court was refused mainly due to the complex issues of the case. The issues<sup>84</sup> the case raised were ones in which "fairness

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<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> All the purported rights of the credit provider under the that credit agreement to recover any money paid or goods delivered to, or on behalf of, the consumer in terms of that agreement are either cancelled, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer.

<sup>80</sup> Forfeit to the State, if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer.

<sup>81</sup> Section 25(1) of the Constitution of the Republic of South Africa, 1996 states "no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

<sup>82</sup> Section 39(2) of the Constitution of the Republic of South Africa, 1996 states "when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

<sup>83</sup> R Britz, "Arbitrary deprivation of an unregistered credit provider's right to claim restitution of performance rendered *Opperman v Boonzaaier* (24887/2010) 2012 ZAWCHC (17 April 2012) and *National Credit Regulator v Opperman* 2013 2 SA 1 (CC)" 2013, volume 16, *Potchefstroom Electronic Law Journal*, page 422, para 2.2 on page 428/484.

<sup>84</sup> *Cherangani Trade and Investment 107 (Pty) Ltd v Mason* 2011 (11) BCLR 1123 (CC) para 15 on page 1130, Judge Yacoob remarked that "it may well be necessary for the state to explain the context and background of the provision, and put up a commercially sensible market related explanation that will impact on whether or not, if the measure does give rise to disproportionality, it can be justified in all circumstances". This remark

and justice in the credit market in the context of our Constitution” were implicated.<sup>85</sup> The complexity of giving meaning to section 89(5)(c) emphasized why the issues could not be decided without the effective and meaningful participation of the Minister of Finance.<sup>86</sup> The state may for example, have wanted to explain the context and background of the provision and provide reasons why possible disproportionality could be justified.<sup>87</sup> Judge Yacoob remarked that “the state has a legitimate interest in curbing the scourge of irresponsible borrowing and lending, and it may be that a measure of disproportionality is the appropriate cost for the achievement of this laudable objective”. While Judge Yacoob’s statement may to some extent be correct in light of the objectives of the Act, I am of the view that the provision as it was originally formulated was draconian and it was too harsh a punishment for unregistered credit providers.

The Constitutional Court dismissed<sup>88</sup> the application for leave to appeal, since there were too many uncertainties about the operation and effect of section 89(5)(c).<sup>89</sup> Furthermore, a serious difficulty was that the state had not been joined, because as beneficiary of the forfeiture provision that was being attacked, it had a substantial interest in the outcome of the case.<sup>90</sup> This meant that the court could not adjudicate upon the matter in the absence of the state, whose interests were also at stake.

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makes it clear that the issues in the case were not simple one’s that the constitutional court could easily deal with and give a meaningful discussion unless the issues were investigated much deeper.

<sup>85</sup> R Britz, “Arbitrary deprivation of an unregistered credit provider’s right to claim restitution of performance rendered *Opperman v Boonzaaier* (24887/2010) 2012 ZAWCHC (17 April 2012) and *National Credit Regulator v Opperman* 2013 2 SA 1 (CC)” 2013, volume 16, *Potchefstroom Electronic Law Journal*, page 422, para 2.2 on page 428/484.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Cherangani Trade and Investment 107 (Pty) Ltd v Mason* 2011 (11) BCLR 1123 (CC) para 22 on page 1131, Judge Yacoob remarked that “on the one hand the fact that the case raises a constitutional issue of public importance and the difficulties in relation to the High Court order point to the interests of justice requiring that leave to appeal be granted. On the other hand factors that point strongly in the opposite direction are that it is undesirable for this court to be a court of first instance and that the relevant state entity had not been joined. The scales tilted against the Applicant since no particulars were given of the extent to which it will be prejudiced by the High Court order, or any basis upon which the High Court, if the case is referred back to that court, could find for the Applicant as no reasonable benefit had been established by the Applicant had the matter had been referred back to the High Court.

<sup>89</sup> R Britz, “Arbitrary deprivation of an unregistered credit provider’s right to claim restitution of performance rendered *Opperman v Boonzaaier* (24887/2010) 2012 ZAWCHC (17 April 2012) and *National Credit Regulator v Opperman* 2013 2 SA 1 (CC)” 2013, volume 16, *Potchefstroom Electronic Law Journal* page 422 para 2.2 on page 429/484.

<sup>90</sup> *Ibid.*

## 2.7 Opperman v Boonzaaier and others<sup>91</sup>

### 2.7.1 Facts of the case

In this case, the Respondent entered into loan agreements with a certain Mr Boonzaaier for the amount of R7 million.<sup>92</sup> The respondent was not registered as a credit provider in terms of the National Credit Act.<sup>93</sup> When Mr Boonzaaier defaulted on payment, the Applicant brought an application to the High Court for the sequestration of Mr Boonzaaier.<sup>94</sup> Section 89(5)(c) of the National Credit Act was declared unconstitutional by the High Court.

### 2.7.2 The court's decision regarding section 89(5)(c)

The High Court, as per Judge Binns-Ward, stated that the clear effect of section 89(2)(d) and 89(5)(a), read with section 40(4) of the National Credit Act, was that the loan agreements were unlawful and had to be treated as void.<sup>95</sup> While the Applicant argued that section 89(5) should be read as directory in the sense that the words “must order” should be read as “may order”, the High Court did not accept this argument.<sup>96</sup> The High Court stated that general principles suggest that unlawful transactions should be treated as void and that sections 89(2)(d) read with section 89(4) and section 40(4) of the Act leaves no scope for doubt in that regard.<sup>97</sup> The High Court went on to say that there is nothing in the wording of section 89(5) which gives any indication of a legislative intention that a Court had a discretion to treat as valid a credit agreement that is expressly stigmatized as void in terms of the other provisions mentioned.<sup>98</sup>

The High Court remarked that the key to finding the meaning of the provision lies in the character of what falls to be cancelled or forfeited by reason of its operation, and that is the import of the words “purported rights”.<sup>99</sup> Within the context of section 89, the literal meaning of the words implies that nothing of

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<sup>91</sup> 2012 JOL 29470 (WCC).

<sup>92</sup> *Opperman v Boonzaaier* 2012 JOL 29470 (WCC) at para 1 on page 1.

<sup>93</sup> *Opperman v Boonzaaier* 2012 JOL 29470 (WCC) at para 3 on page 3.

<sup>94</sup> *Opperman v Boonzaaier* 2012 JOL 29470 (WCC) at para 1 on page 1.

<sup>95</sup> *Opperman v Boonzaaier* 2012 JOL 29470 (WCC) at para 5 on page 5.

<sup>96</sup> *Opperman v Boonzaaier* 2012 JOL 29470 (WCC) at para 6 on page 6.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Opperman v Boonzaaier* 2012 JOL 29470 (WCC) at para 11 on page 9

substance is liable to cancellation or forfeiture because no rights are created by a contract that is legally a nullity.<sup>100</sup> The cancellation or forfeiture of something that does not exist can hardly have been what the legislature had in mind when it imposed upon courts the mandatory duty to make the order prescribed in terms of section 89(5)(c)(i) or (ii).<sup>101</sup> The High Court went on to say that the formulation of the provision is both confused and confusing and that the drafters of the statute did not have the principles of the law of contract in mind when the statute was drafted.<sup>102</sup>

The High Court also opined that the recovery by a credit provider of money paid or goods delivered in terms of a credit agreement which is void by reason of section 40 read with section 89, can notionally only be enforced by way of a claim for restitution.<sup>103</sup> If, however, the “purported rights” are the credit provider’s right to restitution, then there would probably never be a situation where cancellation of the right would not unjustly enrich the consumer.<sup>104</sup> Furthermore, the High Court stated that it could not conceive of a case in which a court would make an order in terms of section 89(5)(c)(i) instead of section 89(5)(c)(ii).<sup>105</sup>

According to the High Court, section 89(5) requires a court to do one of two things in respect of “all the purported rights of the credit provider” under a credit agreement which is unlawful in terms of section 89.<sup>106</sup> It must order that they either be cancelled or forfeited to the state.<sup>107</sup> The criterion for determining which of the alternatives is applicable is the unjust enrichment of the consumer.<sup>108</sup>

The High Court stated that it is not apparent why the provision is necessary or why the ordinary consequences of the partial execution of a void agreement

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<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

<sup>103</sup> *Opperman v Boonzaaier* 2012 JOL 29470 (WCC) at para 13 on page 10.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> *Opperman v Boonzaaier* 2012 JOL 29470 (WCC) at para 16 on page 12.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

addressed in the manner laid down in *Jajbhay's*<sup>109</sup> case should not adequately serve the legislative intent.<sup>110</sup>

## 2.8 National Credit Regulator v Opperman<sup>111</sup>

### 2.8.1 Facts of the case

Mr Opperman is a Namibian farmer.<sup>112</sup> In 2009, Mr Opperman lent his friend, Mr Boonzaaier, a total sum of R7 million for property development in Cape Town.<sup>113</sup> They concluded three written loan agreements. Mr Opperman was not registered<sup>114</sup> as a credit provider at the time of providing the loan as required by the National Credit Act.<sup>115</sup> Mr Opperman was not in the business of providing credit, was unaware of the requirement to register and had no intention of violating the National Credit Act.<sup>116</sup> When the dates for the repayment of the loan had passed, Mr Boonzaaier informed his friend, Mr Opperman that he was unable to meet his obligations.<sup>117</sup>

Mr Opperman applied for the sequestration of Mr Boonzaaier in the High Court.<sup>118</sup> This application was unopposed and a provisional order was granted.<sup>119</sup> On the return date the High Court, of its own volition, raised concerns about the provisions of the National Credit Act, and refused to grant a final sequestration order.<sup>120</sup> It postponed the sequestration proceedings and extended the rule *nisi* to enable the parties to prepare argument to address its concerns.<sup>121</sup>

Counsel for the first respondent (Mr Opperman) subsequently amended the notice of motion to include a challenge to the constitutionality of section 89(5) of the National Credit Act.<sup>122</sup> This resulted in the joinder of the National Credit

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<sup>109</sup> See paragraph 2.9.2 of this dissertation.

<sup>110</sup> *Opperman v Boonzaaier* 2012 JOL 29470 (WCC) at para 43 on page 32.

<sup>111</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC).

<sup>112</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 4 on page 174.

<sup>113</sup> *Ibid.*

<sup>114</sup> See section 40 of the National Credit Act No. 34 of 2005 for the requirements of registration.

<sup>115</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 4 on page 174.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*

<sup>118</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 5 on page 174.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 6 on page 174.

Regulator, the Minister of Finance and the Minister of Trade and Industry as parties to the proceedings.<sup>123</sup> The Minister of Finance did not take an active part in the proceedings before the High Court or the Constitutional Court.<sup>124</sup>

The High Court had found that there were insufficient reasons to deprive the first respondent (Mr Opperman) of his right to restitution of the money lent.<sup>125</sup> As a result, it was found that section 89(5)(c) provided for the arbitrary deprivation of property in breach of section 25(1)<sup>126</sup> of the Constitution.<sup>127</sup> It was also held that the provision could not be saved under section 36(1)<sup>128</sup> of the Constitution as a reasonable and justifiable limitation of the right not to be arbitrarily deprived of property.<sup>129</sup> The High Court held that section 89(5)(c) is inconsistent with section 25 (1) of the Constitution and is, therefore, constitutionally invalid.<sup>130</sup>

In the Constitutional Court, the National Credit Regulator submitted that section 89(5)(c) of the National Credit Act can be interpreted in a manner that is consistent with the Constitution.<sup>131</sup> It contended that the provision did not allow for arbitrary deprivation of property.<sup>132</sup> The National Credit Regulator also opined that the interpretation of the High Court was incorrect.<sup>133</sup> Mr Opperman, on the other hand, supported the High Court's reasoning and asked the Constitutional Court to confirm the declaration of invalidity.<sup>134</sup> The Minister of Trade and Industry submitted that section 89(5)(c) of the National Credit Act did not infringe section 25(1) of the Constitution.<sup>135</sup> Furthermore, the Minister submitted that

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<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

<sup>125</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 10 on page 176.

<sup>126</sup> Section 25 of the Constitution of the Republic of South Africa, 1996 reads "no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".

<sup>127</sup> 2013 (2) BCLR 170 (CC) at para 10 on page 176.

<sup>128</sup> Section 36 of the Constitution of the Republic of South Africa, 1996 reads "The rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: a) the nature of the right b) the importance of the purpose of the limitation c) the nature and extent of the limitation d) the relation between the limitation and its purpose; and e) less restrictive means to achieve the purpose."

<sup>129</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 10 on page 176.

<sup>130</sup> *Ibid.*

<sup>131</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 11 on page 176.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*



although the provision had resulted in deprivation, the deprivation was not arbitrary because there were sufficient reasons for it.<sup>136</sup> In the alternative, the Minister submitted that section 89(5)(c) of the National Credit Act could be read to include a residual discretion and that when it was read in that way, there would be no arbitrary deprivation.<sup>137</sup> If the Constitutional Court found that the section was unconstitutional, the Minister invited the Constitutional Court to suspend any declaration of invalidity, during which time an interim reading-in would apply.<sup>138</sup>

## **2.8.2 Various interpretations regarding section 89(5)(c) of the National Credit Act by the High Court, National Credit Regulator and Mr Opperman**

### **2.8.2.1 High Court's interpretation of section 89(5)(c)**

The High Court interpreted the provision to mean that the rights of the credit provider to recover any money paid had to either (i) be cancelled unless the court concluded that doing so would unjustly enrich the consumer; or (ii) be forfeited to the State, if the court concluded that cancelling those rights in the circumstances would unjustly enrich the consumer.<sup>139</sup> It held that the provision allowed for only two possibilities.<sup>140</sup> Therefore, it was the High Court's view that the provision did not afford a court the discretion to make a just order other than one of the two orders specified in sub-section 89(5)(c)(i) and (ii).<sup>141</sup> The only decision that was required was whether there was unjustified enrichment on the part of the consumer.<sup>142</sup>

According to the High Court, section 89(5)(c) of the National Credit Act contemplated two possible orders.<sup>143</sup> Under both, the credit provider would have lost his/her right to restitution.<sup>144</sup> In other words, not only would the credit

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<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

<sup>139</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 26 on page 180.

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

<sup>143</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 27 on page 180.

<sup>144</sup> *Ibid.*



provider have lost any possible right under the credit agreement, but also the right based on the unjustified enrichment of the consumer.<sup>145</sup>

### 2.8.2.2 National Credit Regulator's interpretation of section 89(5)(c)

According to the National Credit Regulator, section 89(5)(c)(i) provided that the right to restitution, consequent upon the declaration of voidness of the contract, had to be cancelled unless the court had concluded that doing so in the circumstances would have unjustly enriched the consumer.<sup>146</sup> Furthermore, the National Credit Regulator held the view that section 89(5)(c) of the National Credit Act enabled the court to either cancel the right of the credit provider to restitution, or leave it intact by not cancelling it.<sup>147</sup> It also held the view that in the event where the court followed the route of leaving the credit agreement intact, the court would not have had to concern itself with section 89(5)(c)(ii) which is the forfeiture of the credit provider's right to the state of recovering money paid or goods delivered to the consumer.<sup>148</sup>

The National Credit Regulator opined that section 89(5)(c)(ii) of the National Credit Act made a forfeiture order possible, but that a court could only have granted it if cancellation of the credit provider's restitution rights would have resulted in unjustified enrichment.<sup>149</sup> The effect of this interpretation was that section 89(5)(c)(ii) would not have automatically come into operation if cancellation would have unjustly enriched the consumer because the court would have had a discretion as to whether or not to leave the rights intact, or to forfeit them to the State.<sup>150</sup>

I agree with Judge Van der Westhuizen's view with respect to the National Credit Regulator's interpretation of section 89(5)(c) of the National Credit Act. According to Judge Van der Westhuizen, the words "either"... "or" in section 89(5)(c) did not reasonably allow for the interpretation that was proposed by the National Credit Regulator.<sup>151</sup> The two words had the effect that sections

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<sup>145</sup> *Ibid.*

<sup>146</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 28 on page 181.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

<sup>149</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 29 on page 181.

<sup>150</sup> *Ibid.*

<sup>151</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 31 on page 181.

89(5)(c)(i) & (ii) had to be read together, leaving only two alternatives to a court, namely cancellation or forfeiture to the State.<sup>152</sup>

### **2.8.2.3 Mr Opperman’s interpretation section 89(5)(c)**

Counsel for Mr Opperman had opined that the words “must order” in the introductory sentence of section 89(5)(c) of the National Credit Act could be read as “may order”.<sup>153</sup> This interpretation was, however rejected by the High Court and abandoned before the Constitutional Court.<sup>154</sup>

### **2.8.2.4 Majority judgement of the Constitutional Court**

Despite the incoherence with regard to the words and phrases in the provision, the Constitutional Court held that the objectives of the National Credit Act and the context within which section 89(5)(c) appeared could assist in interpreting it.<sup>155</sup> According to the majority judgement, the phrase “despite any provision of the common law” could, arguably, have indicated the aim to either override the common law, or to regulate the relationship between the credit provider and the consumer, whatever the common law position could be.<sup>156</sup> Furthermore, the majority judgement opined that the legislature’s intention was to deny the credit provider a remedy which he or she may have had under the common law but which would not have accorded with the purposes of the National Credit Act, namely the right to restitution.<sup>157</sup>

The majority judgement held the view that the use of the term “purported rights” could only have referred to the rights a credit provider could have had if the agreement had been valid, or might mistakenly thought he or she had, even under the unlawful agreement.<sup>158</sup> The majority judgement remarked that the most plausible meaning of section 89(5)(c) is the one given by the High Court.<sup>159</sup> According to the Constitutional Court, the interpretation of the High Court

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<sup>152</sup> *Ibid.*

<sup>153</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 32 on page 181.

<sup>154</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 32 on page 182.

<sup>155</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 52 on page 186.

<sup>156</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 53 on page 186.

<sup>157</sup> *Ibid.*

<sup>158</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 54 on page 186.

<sup>159</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 55 on page 186.

reflected what common sense would tell one was the aim of the provision, in view of the National Credit Act as a whole<sup>160</sup>, namely:

“to protect consumers against uncontrolled credit providers and therefore credit providers are required to register; credit providers who do not register in contravention of the National Credit Act face severe consequences; courts have to declare the agreement void and order either that all rights perceived to follow from the agreement (including the right to restitution) are cancelled or forfeited to the State”.<sup>161</sup>

I agree with the interpretation of the majority judgement that “purported rights” refers to rights flowing from the credit agreement as well as the right to restitution. The word “purported rights” was, however, not without problems. This is evident from the remark made by Judge Yacoob in the following statement:

“It is difficult to fathom exactly what is taken away from the applicant and exactly what is forfeited to the state. Are they “purported rights” which do not exist anymore or is the right to sue for unjust enrichment also forfeited?”.<sup>162</sup>

General principles of the law of contract iterate the fact that a void agreement does not give rise to any rights and obligations.<sup>163</sup> I, therefore, agree with the reasoning of the majority judgement that it cannot be the rights flowing from the credit agreement that are cancelled or forfeited to the State since a void agreement does not give rise to rights or obligations from the outset. In my mind, like the reasoning of the majority judgement, it is the right to sue in terms of the action of unjustified enrichment that can either be cancelled or forfeited to the State.<sup>164</sup> To sum up, the “purported rights” which can either be cancelled or forfeited to the State include the right to the restitution under the credit agreement and the right to sue under the action of unjustified enrichment.<sup>165</sup>

The majority judgement referred to the common law position of unlawful agreements for purposes of grasping the purpose, meaning and effect of section

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<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.*

<sup>162</sup> *Cherangani Trade and Investment 107 (Pty) Ltd v Mason* 2011 (11) BCLR 1123 (CC) para 14 on page 1129.

<sup>163</sup> See *National Credit Regulator v Opperman and others* 2013 (2) BCLR 170 (CC) para 14 on page 177 where Judge Van der Westhuizen remarked that “lawfulness is one of the requirements of a valid contract. Unlawful contracts are void from the outset (*ab initio*) and cannot be enforced. If one party fails to perform as agreed, the other cannot successfully compel the other party to perform.”

<sup>164</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 55 on page 186.

<sup>165</sup> *Ibid.*

89(5)(c).<sup>166</sup> The majority judgement stated that a party that wanted to claim restitution in pursuance of an unlawful agreement could not do so under the agreement but had to make use of an action based on the unjustified enrichment of the receiver.<sup>167</sup> The majority judgement went on to say that the action relevant in the case was the *condictio ob turpem vel iniustam causam*.<sup>168</sup> In order to be successful, the ordinary party who claimed on the basis of unjust enrichment had to be free of turpitude and had to show that he or she had not acted dishonourably.<sup>169</sup> This is the *par delictum* rule.<sup>170</sup> It was opined by the majority judgement that the underlying principle was that the law had to discourage or deter illegality and not render assistance to those who defy the law.<sup>171</sup> Since the case of *Jajbhay v Cassim*<sup>172</sup>, South African courts have been prepared to relax the *par delictum* rule to prevent injustice or to satisfy the requirements of public policy, by taking fairness considerations into account. The rule is, therefore, not an absolute bar to claim restitution.<sup>173</sup> The majority judgement also indicated that the definite requirements as to when the rule had to be relaxed had not yet been stated, but went on to say that courts have emphasized their freedom to reject or grant an unjust enrichment claim on the facts before it by exercising a discretion.<sup>174</sup> Furthermore, it stated that there appears to be little room for judicial discretion under section 89(5)(c) of the National Credit Act.<sup>175</sup> The majority judgement stated that section 89(5)(c) differs from the common law by taking away the credit providers right to restitution.<sup>176</sup> It is clear from the majority judgements remarks regarding the difference in the common law consequences of unlawful agreements and section 89(5)(c) as it was originally formulated that there was little room for courts to exercise a discretion as far as section 89(5)(c) was concerned. It is only under the common law action of unjust enrichment where courts are able to exercise a discretion. What is also apparent is that

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<sup>166</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 13 on page 177.

<sup>167</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 15 on page 177.

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*

<sup>172</sup> *Jajbhay v Cassim* 1939 AD 537 para 544.

<sup>173</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 17 on page 177.

<sup>174</sup> *Ibid.*

<sup>175</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 18 on page 178.

<sup>176</sup> *Ibid.*

section 89(5)(c) as it was originally formulated changed the common law position regarding the consequences of unlawful agreements.

### 2.8.2.5 Minority judgement of the Constitutional Court

In terms of the view held by the minority judgment, the majority judgement ignored the plain words in the provision that were central to it.<sup>177</sup> Furthermore, the minority judgement opined that it was simpler and truer to not ignore the words, but to take them to mean what they said.<sup>178</sup> Doing so rendered the provision inoperative but the words the legislator enacted rendered that unavoidable and this would not have resulted in the provision having to be struck down.<sup>179</sup> This was, according to the minority judgment, better than struggling to find meaning to words which were ignored only for the provision to be declared invalid.<sup>180</sup> The minority judgement remarked that ignoring<sup>181</sup> words which were pivotal to the provision went further than a court should, even if it meant that the legislature, in enacting it, misfired.<sup>182</sup> Furthermore, the minority judgement opined that words had to be given their ordinary meaning in context and that if words were reasonably capable of a meaning that avoided conflict with the Constitution, then that meaning had to prevail.<sup>183</sup>

According to the minority judgement the phrase “rights....under the credit agreement” were central to the phraseology of the provision.<sup>184</sup> Furthermore, the minority judgement opined that while the phrase could not be ignored, the inclusion of the phrase rendered the provision incoherent and ineffectual.<sup>185</sup> It was, according to the minority judgment, incoherent because a right to restitution did not derive from the contract.<sup>186</sup> It arose from the very fact that the contract

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<sup>177</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 93 on page 194

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*

<sup>181</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 99 on page 196, Judge Cameron remarked that “a long standing precept of interpretation is that every word must be given a meaning. Words in an enactment should not be treated as tautologous and superfluous and that this was for good reason.”

<sup>182</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 94 on page 195.

<sup>183</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 96 on page 195.

<sup>184</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 101 on page 197.

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.*

was invalid.<sup>187</sup> Restitution, in terms of the minority judgment's view, lay outside the parties' agreement because their agreement had failed.<sup>188</sup>

The minority judgement stated that the concept restitutionary right "under the credit agreement" was even more radically misplaced, both legally and linguistically.<sup>189</sup> This was because rights of recovery in the case of a void contract were derived from the common law of restitution, not from the agreement.<sup>190</sup> According to the minority judgment, to have continued to hold in defiance that the provision effectively reached the unregistered credit providers restitutionary right's was to squeeze it into a meaning that could not be sustained.<sup>191</sup>

I do not agree with this interpretation of the minority judgement. While the minority judgement is correct in stating that the right to restitution is derived from the common law and not the void contract, it failed to properly consider the word "purported rights". The "purported right" in my view cannot be rights emanating from the void credit agreement since it does not give rise to rights or obligations from the outset. It is, therefore, the right to sue based on the action of unjustified enrichment that can either be cancelled or forfeited to the State. Therefore, giving rise to the same problem where the credit provider is arbitrarily deprived of his property.

#### **2.8.2.6 Majority judgements response to the minority judgment**

The majority's judgement response to the minority's judgements interpretation of the words "rights...under that credit agreement" was that it posed problems.<sup>192</sup> As already mentioned, the minority judgements interpretation of the words "rights under that credit agreement" was that the enrichment claim was not based on the credit agreement and that the claim for restitution under the common law is not affected by the section.<sup>193</sup> Consequently, because the credit provider is not denied the right to restitution based on enrichment, then no arbitrary deprivation

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<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*

<sup>189</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 103 on page 198.

<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.*

<sup>192</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 35 on page 182.

<sup>193</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 34 on page 182.

of property would occur.<sup>194</sup> In response to this, the majority judgement opined that section 89(5)(c) would have meant that only the rights under the credit agreement would be cancelled or forfeited to the State.<sup>195</sup>

Furthermore, in response to the minority judgements interpretation, the majority judgement opined that since no rights flowed from or existed under an unlawful and void agreement, the provision would be “inoperative, a patently regrettable result, ineffectual and in fact meaningless”.<sup>196</sup> The majority judgement went on to say that it would have been a patent “drafting error”.<sup>197</sup> I agree with the majority judgement’s responses to the minority judgements interpretation as the minority judgement’s interpretation indeed rendered the provision meaningless.

The majority judgment rightly stated that the words “under that credit agreement” were no more central and pivotal than the words “to recover any money paid or goods delivered” and the repeated mentioning of “unjustly enrich” in section 89(5)(c)(i)&(ii).<sup>198</sup> The majority judgment rightly questioned why courts would be called upon to decide whether or not the consumer had been unjustly enriched, which is the very difference between section 89(5)(c)(i) and (ii) had the intention simply have been to cancel the non-existing rights under the void agreement and nothing was said at all about restitution based on enrichment.<sup>199</sup> This reasoning of the majority judgment is in my opinion, logical as it takes into context all the words appearing in the provision and does not only focus on the words “under that credit agreement”.

The<sup>200</sup> interpretation of the minority judgement would have also meant that a credit provider would have had a claim for restitution against the consumer under section 89(5)(c) while the consumer would at the same time have had a claim against the credit provider under section 89(5)(b).<sup>201</sup> The majority judgment correctly points out that this would have made little sense.<sup>202</sup> I agree with this

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<sup>194</sup> *Ibid.*

<sup>195</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 36 on page 182.

<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.*

<sup>198</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 38 on page 182.

<sup>199</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 38 on page 183.

<sup>200</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 40 on page 183.

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.*



statement of the majority judgment since the aim of the provision was to punish the unregistered credit provider and a remedy for the unregistered credit provider to recover money or goods delivered would, therefore, not have made sense.

The majority judgment also disagreed with the minority judgment's view that a court did not have a duty to give meaning to a provision if the meaning resulted in unconstitutionality.<sup>203</sup> The majority judgment remarked that before constitutional compliance could be evaluated, a court had to attribute a meaning to a provision and that if more than one meaning was plausible, the one resulting in constitutional compliance had to be chosen.<sup>204</sup> If, however, the interpretation that emerged from the wording and context resulted in constitutional invalidity, a court would have had to make a finding of unconstitutionality.<sup>205</sup> Furthermore, the majority judgment stated that the fact that a constitutionally compliant interpretation could not reasonably be given had not meant that the interpretation was vague.<sup>206</sup> A finding of vagueness based on a perceived inability to interpret the provision would in any event have resulted in constitutional invalidity.<sup>207</sup> The interpretation would in any event have rendered the provision meaningless and, therefore, futile.<sup>208</sup> These remarks by the majority judgment are in my view, correct.

## **2.9 Section 89(5) as amended by the National Credit Amendment Act 19 of 2014**

### **2.9.1 General**

The National Credit Amendment Act<sup>209</sup> which has not yet come into operation has amended section 89(5)(c) of the National Credit Act. Section 89(5)(c) as it was originally formed became the subject of discussion in case law as courts battled with the interpretation of the provision. Section 89(5)(c) was confirmed as

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<sup>203</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 42 on page 183.

<sup>204</sup> *Ibid.*

<sup>205</sup> *Ibid.*

<sup>206</sup> *Ibid.*

<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid.*

<sup>209</sup> Act No. 19 of 2014.



constitutionally invalid by the Constitutional Court in *National Credit Regulator v Opperman*.<sup>210</sup> The effect of the amendment will be discussed below.

### 2.9.2 The effect of the amendment

Section 89(5) has now been amended by the deletion of paragraph (b)<sup>211</sup> and (c).<sup>212</sup> The amended section 89(5) now states that if a credit agreement is unlawful in terms of the provision, 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.<sup>213</sup>

The result of the amendment, it is submitted, is that the rules of the common law are virtually re-instated.<sup>214</sup> The contract will be void and the court will make an equitable order.<sup>215</sup> This may include enforcing or relaxing the *par delictum* rule.<sup>216</sup> I am of the view that the effect of this amendment is that courts will now be able to exercise a discretion when dealing with unlawful credit agreements. Courts, as with the common law action of unjust enrichment, will be able to look at the circumstances of each case and decide whether or not to enforce or relax the *par delictum* rule. They will also now be able to take fairness considerations into account to prevent injustices or to satisfy the requirements of public policy.<sup>217</sup> Going forward, courts will no longer have to grapple with giving meaning to a provision that has in the past resulted in harsh consequences for unregistered credit providers. I am also of the view that the words “just and equitable” highlight the fact that courts will be able to look at each case and assess whether or not to assist an unregistered credit provider who is seeking

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<sup>210</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC).

<sup>211</sup> Section 89(5)(b) of the National Credit Act 34 of 2005 used to read “the credit provider must refund to the consumer any money paid by the consumer under that agreement to the credit provider, with interest calculated i) at the rate set out in that agreement ii) for the period from the date the money is refunded to the consumer.

<sup>212</sup> Section 89(5)(c) of the National Credit Act used to read “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 concluded that doing so in the circumstances would unjustly enrich the consumer, or ii) forfeited to the State, if the court concluded that cancelling those rights in the circumstances would unjustly enrich the consumer.”

<sup>213</sup> Section 89(5)(a) of the National Credit Act No. 34 of 2005.

<sup>214</sup> JW Scholtz, *Guide to the National Credit Act* (2008 *et seq*) page 9-14(1)(loose leaf).

<sup>215</sup> *Ibid.*

<sup>216</sup> *Ibid.*

<sup>217</sup> *National Credit Regulator v Opperman* 2013 (2) BCLR 170 (CC) at para 17 on page 177.

restitution of money or goods delivered to a consumer and, therefore, make an order which is just and equitable.<sup>218</sup>

It is also my view that courts will also be able to look at the rights of both the credit provider and the consumer when considering a just and equitable order and will, accordingly, be able to balance the rights of both the credit provider and the consumer. This is contrary to section 89(5)(c) as it was originally formulated because it clearly favoured the rights of the consumer over those of the credit provider as far as the consequences of unlawful agreements was concerned. Courts will now, therefore, be able to follow the principle laid down in *Jajbhay v Cassim*<sup>219</sup> as far as unjustified enrichment is concerned as the claim for restitution will not be based on the credit agreement since it will be unlawful and void in instances where the credit provider is unregistered when the Act requires registration. The court in *Jajbhay v Cassim*<sup>220</sup> stated that the principle underlying the *par delictum* rule is that courts will discourage illegal transactions, but the exceptions show that where it is necessary to prevent injustice or to promote public policy, it will not rigidly enforce the general rule.<sup>221</sup> Courts that will follow this principle will, therefore, arrive at just and equitable orders.<sup>222</sup>

## 2.10 Conclusion

It has been illustrated in this chapter how our courts struggled to give meaning to section 89(5)(c) of the National Credit Act as it was originally formulated. Courts had no choice but to make one of two orders<sup>223</sup> in terms of section 89(5)(c) and were not able to exercise a discretion. Therefore, section 89(5)(c) as it was originally formulated had changed the common law position of the consequences

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<sup>218</sup> *Jajbhay v Cassim* 1939 AD 537 at page 544, Judge Stratford remarked that “courts of law are free to reject or grant a prayer for restoration of something given under an illegal contract, being guided in each case by the principle which underlies and is inspired by the maxim.

<sup>219</sup> *Jajbhay v Cassim* 1939 AD 537.

<sup>220</sup> *Ibid.*

<sup>221</sup> *Jajbhay v Cassim* 1939 AD 537 at page 550.

<sup>222</sup> See JM Otto, “*Die par delictum-reel en die National Credit Act*” (2009) volume 3, *Tydskrif vir die Suid-Afrikaanse Reg*, page 417, where Otto remarked on page 435 that “in South African law the *par delictum* rule is alive and well but exceptions have been made to do simple justice between man and man. The courts are, rightly, of the opinion that it is impossible to work with hard and fast rules. Circumstances differ from case to case and a court has to determine in each case what the dictates of public policy are.”

<sup>223</sup> money paid or goods delivered to, or on behalf of, the consumer in terms of the agreement had to either i) be cancelled, unless the court concluded that doing so in the circumstances would unjustly enrich the consumer, or ii) forfeited to the State, if the court concluded that cancelling those rights in the circumstances would unjustly enrich the consumer. This is in terms of section 89(5)(c) of the Act.

of unlawful agreements. It was also illustrated how the common law consequences of unlawful agreements differ from those of section 89(5)(c) as it was originally formulated. With the *par delictum* rule, courts are able to enforce or relax the rule in order to prevent injustices or satisfy the requirements of public policy when dealing with unlawful transactions.<sup>224</sup> With the amendment to section 89(5) by the National Credit Amendment Act<sup>225</sup>, courts will now be able to exercise a discretion when dealing with matters concerning unlawful agreements of unregistered credit providers.<sup>226</sup> The harsh and draconian consequences of section 89(5)(c) as it was originally formulated will no longer be a cause for concern for unregistered credit providers. Courts will now be able to make just and equitable orders.<sup>227</sup>

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<sup>224</sup> *Jajbhay v Cassim* 1939 AD 537 at page 550.

<sup>225</sup> Act No. 19 of 2014.

<sup>226</sup> See paragraph 2.8 of this dissertation.

<sup>227</sup> *Ibid.*

## CHAPTER 3

### Final Conclusions and Recommendations

#### 3.1 Introduction

The purpose of this dissertation was to critically analyse section 89(5) of the National Credit, with specific focus on the section 89(5)(c) as it was originally formulated. As already discussed in this dissertation, section 89(5)(c) of the Act did not allow courts to exercise a discretion when dealing with unlawful agreements of unregistered credit providers.<sup>1</sup> This was in contrast to the common law *par delictum* rule which allowed courts to exercise discretion and return performance in instances where there was no turpitude or bad faith on the part of the claimant.<sup>2</sup> To demonstrate the effect that section 89(5)(c) of the Act had, case law was utilized to show the effect and the far-reaching consequences of the provision.<sup>3</sup>

#### 3.2 Conclusions

It has been established that section 40 as it was originally formulated required a person to register as credit provider if:

- c) that person, alone or in conjunction with any other associated person, is the credit provider under at least 100 credit agreements, other than incidental credit agreements, or
- d) 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).

Furthermore, it was established that section 40 was amended by the National Credit Amendment Act<sup>4</sup> to read as follows:

“A person must apply to be registered as a credit provider if:

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<sup>1</sup> See paragraph 2.8.2.4 of Chapter 2 of this dissertation for a discussion on the courts inability to exercise a discretion due to section 89(5)(c) of the Act as it was originally formed.

<sup>2</sup> See R Britz, “Arbitrary deprivation of an unregistered credit provider’s right to claim restitution of performance rendered *Opperman v Boonzaaier (24887/2010) 2012 ZAWCHC (17 April 2012) and National Credit Regulator v Opperman 2013 2 SA 1 (CC)*” 2013, volume 16, *Potchefstroom Electronic Law Journal*, page, 422, at para 4 on page 463/484 where R Britz remarks that “the common law allows parties to forfeit performances under invalid agreements only if there is a degree or bad faith or turpitude present.”

<sup>3</sup> See paragraphs 2.6, 2.7 and 2.8 of Chapter 2 of this dissertation for a discussion on case law that was utilized.

<sup>4</sup> Act No. 19 of 2014.

- a) the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold<sup>5</sup> prescribed in terms of section 42(1).”

It is clear from the amendment that the number of credit agreements will no longer be a factor that will be taken into consideration when determining whether or not a person is required to register as a credit provider in terms of the Act. It has also been established that unregistered credit providers had to face the harsh consequences of section 89(5)(c) in instances where the Act required that they be registered. I am of the view that criminal sanctions for unregistered credit providers who are required to be registered should be considered by the legislature.<sup>6</sup>

It has also been demonstrated how section 89(5)(c) did not allow courts to exercise a discretion. The court had to make one of the following two orders when dealing with the unlawful agreements due to failure to register as credit provider:

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 were either:

- a) cancelled, unless the court concluded that doing so in the circumstances would have unjustly enriched the consumer, or  
b) forfeited to the State, if the court concluded that cancelling those rights in the circumstances would have unjustly enriched the consumer.

The National Credit Amendment Act<sup>7</sup> has now amended section 89(5) as follows:

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<sup>5</sup> Section 11 of the National Credit Amendment Act No. 19 of 2014 has now amended section 42(1) to read “the Minister, by notice in the Gazette, must determine a threshold for the purpose of determining whether a credit provider is required to be registered in terms of section 40(1). It is clear from the amendment that the threshold amount of the principal debt will no longer be restricted to an amount which is less than R500 000.

<sup>6</sup>See R Britz, “Arbitrary deprivation of an unregistered credit provider’s right to claim restitution of performance rendered *Opperman v Boonzaaier* (24887/2010) 2012 ZAWCHC (17 April 2012) and *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) ” 2013, volume 16, *Potchefstroom Electronic Law Journal*, page 422 at para 4 on page 464/484 where R Britz remarks that “the punishment, which purports to discourage the non-registration, however, does not take the form of a criminal fine(of which there are examples in the Act), but simply requires a forfeiture to the state of the “guilty” creditors right of restitution.

<sup>7</sup> Act No. 19 of 2014.

If a credit agreement is unlawful in terms of section 89, 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.<sup>8</sup>

This amendment is in line with the common law *par delictum* rule. The courts will now be able to exercise discretion once the amendment to section 89(5) by the National Credit Amendment Act<sup>9</sup> is put into operation. Courts will no longer be left with the problem of having to make a choice between two orders. Credit providers will be able to claim restitution of money or goods delivered to consumers by relying on the common law action of unjust enrichment. In order for courts to make “just and equitable” orders, I am of the view that courts will have to look at the blameworthiness or turpitude of the claimant when considering whether or not to allow restitution.<sup>10</sup> Courts will also have to take fairness considerations into account as enunciated in *Jajbhay v Cassim* and either enforce or relax the *par delictum* rule in order to prevent injustices or to promote the requirements of public policy.<sup>11</sup> In following these principles, courts will be able to arrive at “just and equitable orders.”

### 3.3 Recommendations

It is my view that the imposition of criminal sanctions by way of a fine or imprisonment may deter individuals who are required to register in terms of the Act from avoiding this duty of registering as credit providers.

Furthermore, by applying the principles laid down in *Jajbhay v Cassim*<sup>12</sup> as discussed in chapter 2 of this dissertation with respect to the *par delictum* rule, courts would be better able to arrive at just and equitable orders.

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<sup>8</sup> Section 89(5)(a) of the National Credit Act No. 34 of 2005.

<sup>9</sup> Act No. 19 of 2014.

<sup>10</sup> See R Britz, “Arbitrary deprivation of an unregistered credit provider’s right to claim restitution of performance rendered *Opperman v Boonzaaier* (24887/2010) 2012 ZAWCHC (17 April 2012) and *National Credit Regulator v Opperman* 2013 2 SA 1 (CC)” 2013, volume 16, *Potchefstroom Electronic Law Journal*, page 422 at para 4 on page 463/484 where R Britz remarks that “the common law allows parties to forfeit performances under invalid agreements only if there is a degree of bad faith or turpitude present.”

<sup>11</sup> *Jajbhay v Cassim* 1939 AD 537 at page 550.

<sup>12</sup> 1939 AD 537.

# BIBLIOGRAPHY

## Acts

- 1 National Credit Act No. 34 of 2005.
- 2 National Credit Amendment Act No.19 of 2014.

## Books

- 1 JW Scholtz, *Guide to the National Credit Act (2008 et seq)* (loose leaf), LexisNexis (Durban).
- 2 Stoop, *Consumer Credit Regulation in South Africa (2012)*, Juta (Cape Town).
- 3 JC Sonnekus et al, *Unjustified Enrichment in South African Law (2008 et seq)*, LexisNexis (Durban).

## Case Law

- 1 Cherangani Trade and Investment 107 (Edms) Bpk v Alan Clifford Mason N.O. and Others, Case No. 6712/2008 & 287/2009, Free State High Court, Bloemfontein, 12 March 2009, unreported.
- 2 Cherangani Trade and Investment 107 (Pty) Ltd v Mason 2011 (11) BCLR 1123 (CC).
- 3 Jajbhay v Cassim 1939 AD 537.
- 4 National Credit Regulator v Opperman 2013 (2) BCLR 170 (CC).
- 5 Opperman v Boonzaaier 2012 JOL 29470 (WCC).
- 6 Southern African Music Rights Organisation Limited v National Credit Regulator (unreported case no 31104/08, 20 April 2011(GNP), also cited as 2011 JDR 0519 (GNP).

## Government Publication

- 1 Government Gazette 28893 published in General Notice 713 on 1 June 2006.

## Journals

- 1 JM Otto, “Die par delictum-reel en die National Credit Act” (2009) volume 3, *Tydskrif vir die Suid-Afrikaanse Reg*, page 417.
- 2 JM Otto, “National Credit Act, ongeoorloofde ooreenkomste en meevallertjies vir die fiscus” (2010) volume 1, *Tydskrif vir die Suid-Afrikaanse*, page 161.
- 3 R Britz, “Arbitrary deprivation of an unregistered credit provider’s right to claim restitution of performance rendered Opperman v Boonzaaier (24887/2010) 2012 ZAWCHC (17 April 2012) and National Credit Regulator v Opperman 2013 2 SA 1 (CC)” 2013, volume 16, *Potchefstroom Electronic Law Journal*, page 422.