

The National Credit Act and the bill of rights: towards a constitutional view of consumer credit regulation

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1 Introduction

Disputes surrounding the National Credit Act 34 of 2005 (the act) have already reached the constitutional court on a significant number of occasions. In some of the cases the constitutional validity of a provision in the act was challenged, but in most of them the court had to pronounce on the interpretation of certain controversial sections. The facts firstly that litigation regarding the act nowadays often reaches the constitutional court and secondly that the court regards the disputes as constitutional in nature¹ beg the question: what is the relationship between the act and the Constitution of the Republic of South Africa, 1996?² How can or should the bill of rights³ influence the interpretation of the act and, more broadly, how can it inform the theoretical development of consumer credit law in South Africa?

The relationship between human rights and consumer credit regulation is complex and still largely unexplored, so this article cannot provide a complete or final answer. It has the mere goal of taking a step towards a more defined model for analysing the act from a constitutional and human rights viewpoint, as opposed to viewing it only from a traditional private or commercial law perspective.

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¹ S 167(3)(b)(i)-(ii) of the constitution provides that the constitutional court may decide (1) "constitutional matters" and (2) "any other matter". Under category (2) the constitutional court may decide the matter only if it "grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court". Before 23 August 2013, when the Constitution Seventeenth Amendment Act, 2012, came into operation, the court's jurisdiction was formally limited to "constitutional matters" and "issues connected with decisions on constitutional matters". Both before and after this amendment, the constitutional court has affirmed that it has jurisdiction over disputes regarding the act: see *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) par 36; *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC) par 16; *Ferris v FirstRand Bank Ltd* 2014 3 SA 39 (CC) par 7-8; *Nkata v FirstRand Bank Ltd* 2016 4 SA 257 (CC) par 33, 94-96. See also *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2015 3 SA 479 (CC) par 14; *Baliso v FirstRand Bank Ltd t/a Wesbank* 2017 1 SA 292 (CC) par 42; *De Klerk v Griekwaland Wes Korporatief Bpk* 2014 8 BCLR 922 (CC) par 12-14.

² For a summary of cases regarding the act that involved the constitution, see also Scholtz "The implementation, objects and interpretation of the National Credit Act" in Scholtz *et al* (eds) *Guide to the National Credit Act* (2016) par 2.5.

³ ch 2 (s 7-39) of the constitution.

⁴ Otto and Otto *National Credit Act Explained* (2016) 4 observe that "the private-law and commercial-law dimensions of the Act are not as dominant as they used to be in legislation of the nature in the past. The formal law is certainly putting up its hand." The past laws they refer to include the Hire-Purchase Act 36 of 1942, the Credit Agreements Act 75 of 1980 and the Usury Act 73 of 1968. Regarding the purposes of the act, Scholtz (n 2) par 2.3 remarks that the act "is an ambitious (perhaps even an idealistic) piece of legislation with pronounced socio-economic aims". See further

Therefore, the purpose is to survey case law in which the act featured in order to identify themes and extract guidelines for a human-rights-infused approach to consumer credit law. The prime focus will be on judgments of the constitutional court, since it is the country's apex court and because it sets an authoritative tone for others to follow. However, I will also refer to some judgments of interest from other courts. Although the focus is on cases regarding consumer credit, the article also includes a number of cases that do not concern the act in as far as these provide context and insights for the impact of human rights in the broader credit law.

It should be stressed that none of the cases will be analysed comprehensively, since the aim is to focus only on some aspects of interest for the present discussion. Moreover, my intention is not to comment on the accuracy of the decision taken in each case. For now, I am interested only in discovering what role human rights played in the courts' understanding of consumer credit law, and to start exploring the possibilities of a more systematic approach to reading the act in conjunction with the bill of rights. Indeed, if consumer credit disputes are going to continue to reach the constitutional court, it will become increasingly necessary for theoretical and practical purposes to attain greater clarity on the constitutional considerations involved when dealing with the act.⁵

2 First impressions

It is trite that the constitution is the supreme law of South Africa⁶ and that the bill of rights is the cornerstone of our democracy.⁷ The bill of rights applies to all law; it binds the legislature, the executive, the judiciary and all organs of state.⁸ With certain qualifications, it mostly also binds natural and juristic persons.⁹ The constitutional court has explained that our entire system of law is shaped by the constitution, and that all law derives its force from the constitution and is subject to constitutional control.¹⁰ For purposes of the act, these foundational principles are important firstly because any law that is inconsistent with the constitution is invalid¹¹ and secondly

Renke, Roestoff and Bekink "New legislative measures in South Africa aimed at combating over-indebtedness – are the new proposals sufficient under the constitution and law in general?" 2006 *Int Insolv Rev* 91 for some early views on the constitution and the act when it was still in bill form. For a more recent discussion, see also Vessio *The National Credit Act 34 of 2005: Background and Rationale for its Enactment With a Specific Study of the Remedies of the Credit Grantor in the Event of Breach of Contract* (2015 thesis UP) 132-146.

⁵ An aspect that I do not explore here, but which should be kept in mind, is the debate surrounding the impact of the constitution on the common law of contract and particularly how the concepts of good faith and/or public policy are influenced by the constitution and used to test the validity or enforceability of contractual terms. See *eg* the constitutional court judgments in *Barkhuizen v Napier* 2007 5 SA 323 (CC); *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC); *Botha v Rich* 2014 4 SA 124 (CC). Although these issues are relevant in the broad sense, when it comes to the act, public policy (as infused by the bill of rights) should in my view only play an indirect role in the implementation of the purposes and provisions of the act. Thus, when the act applies, public policy should not be a separate concept that can be used independently of the provisions and purposes of the act.

⁶ s 1(c), 2 of the constitution.

⁷ s 7(1).

⁸ s 8(1).

⁹ s 8(2)-(4).

¹⁰ *Pharmaceutical Manufacturers Association of SA: in re Ex parte President of the RSA* 2000 2 SA 674 (CC) par 44.

¹¹ s 2 of the constitution.

because all legislation must be interpreted in a manner that promotes the spirit, purport and objects of the bill of rights.¹²

The only direct reference to consumer law in the constitution is in schedule 4, where “consumer protection” is listed as a topic over which the national and provisional legislatures have concurrent legislative competence. But there is no section in the bill of rights that expressly provides persons with some sort of right to consumer protection or that obliges the state to provide statutory consumer protection. Consequently, unlike certain other statutes,¹³ the act was not enacted to give effect to a specific fundamental right as such, but from both the preamble and the purposes of the act¹⁴ it is clear the act is not constitutionally neutral either. For instance, the preamble refers *inter alia* to the promotion of “a fair and non-discriminatory marketplace for access to consumer credit” and the ideal “to promote black economic empowerment and ownership within the consumer credit industry”. The purposes of the act mention matters like “to promote and advance social and economic welfare”,¹⁵ “a credit market that is accessible to all and in particular to those who have historically been unable to access credit under sustainable market conditions”,¹⁶ “promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers”,¹⁷ and “correcting imbalances in negotiating power between consumers and credit providers”.¹⁸

These aspects clearly link the act with at least the constitutional right to equality. As the constitution stipulates, “the achievement of equality” is one of the founding values of democratic South Africa.¹⁹ Furthermore, section 9(1) of the constitution provides that “[e]veryone is equal before the law and has the right to equal protection and benefit of the law”, whereas section 9(2) states that “equality includes the full and equal enjoyment of all rights and freedoms”. The rest of section 9 deals with the prevention and rectification of unfair discrimination.

In several of the judgments discussed below, the constitutional court based its jurisdiction over the act on the fact that the act implicates equality. However, quite a number of other rights and values in the bill of rights can also be linked to the purposes and/or effects of the act. For instance, the right of access to information²⁰ is reflected where the preamble of the act refers to things like “improved standards of consumer information” and where the purposes of the act mention consumer education and the providing of “adequate disclosure of standardised information in order to make informed choices”.²¹ Another example is the right of access to courts,²² which is promoted by the act where it for instance provides for dispute resolution mechanisms and fair debt-enforcement procedures. However, in certain instances the right is also limited – for example when credit providers are prevented from

¹² s 39(2). For the impact of the constitution on statutory interpretation, see Du Plessis *Re-interpretation of Statutes* (2002) 133-148.

¹³ eg the Promotion of Access to Information Act 2 of 2000 (giving effect to s 32 of the constitution); Promotion of Administrative Justice Act 3 of 2000 (giving effect to s 33 of the constitution).

¹⁴ s 3 of the act.

¹⁵ s 3.

¹⁶ s 3(a).

¹⁷ s 3(d).

¹⁸ s 3(e). There have even been calls for categorising consumer rights as human rights. See eg Deutch “Are consumer rights human rights?” 1994 *Osgood Hall LJ* 537. See further Vessio (n 4) 135-136.

¹⁹ s 1(a) of the constitution.

²⁰ s 2.

²¹ s 3(e)(i)-(ii) of the act. See Renke, Roestoff and Bekink (n 4) 94.

²² s 34 of the constitution.

accessing enforcement mechanisms before complying with certain requirements²³ or by the debt enforcement moratorium created during debt review.²⁴ Furthermore, the right not to be arbitrarily deprived of property²⁵ has featured in some prominent constitutional court judgments regarding provisions in the act that mandated the forfeiture of certain creditors' rights.²⁶ Also, the right to housing²⁷ is often implicated when consumer mortgage agreements are enforced through the sale in execution of the consumer's residential property.

One can probably go on and on identifying the numerous ways in which the purposes and provisions of the act are linked to various constitutional rights and values. The values of dignity and freedom are obviously also relevant in general. Although there is no constitutional right to consumer protection as such, in their capacity as persons, both credit consumers and credit providers are endowed with certain fundamental rights, and the regulatory measures in the act implicate (either promote or limit) many of these rights. Of course, both parties have common-law rights too, and these are constitutionally recognised to the degree that they do not conflict with the bill of rights.²⁸ What is more, the right to insist on the fulfilment of a common-law contractual or property right is sometimes covered by one or more sections in the bill of rights.²⁹

The next part of the article commences with a journey through case law in order to tease this perspective out further.

3 *Constitutional court cases that did not directly concern the National Credit Act but that are relevant for credit law in general*

3.1 Introduction

The reason for briefly discussing some non-credit act constitutional court cases is to present a broader background to the impact of the constitution on credit law and to illustrate some of the constitutional considerations that have come to influence the relationship between debtors and creditors. The cases are divided according to certain themes.

3.2 Freedom and security of the person

Based on the right to freedom and security of the person contained in the interim constitution,³⁰ the constitutional court in *Coetsee v Government of the Republic of South Africa*³¹ declared statutory rules³² that provided for the imprisonment of judgment debtors to be unconstitutional. The case makes at least one interesting point: under the constitution the inability to pay a debt is not stigmatised as criminal behaviour. It might be different if someone wilfully refuses to pay, but it is unjustifiable to imprison a person who in good faith simply cannot pay. A

²³ eg s 129-130 of the act.

²⁴ s 88(3).

²⁵ s 25(1) of the constitution.

²⁶ See part 4.2 below.

²⁷ s 26 of the constitution.

²⁸ s 39(3).

²⁹ such as s 25 (property) and s 34 (access to courts).

³⁰ s 11(1) of the interim Constitution of the Republic of South Africa Act 200 of 1993.

³¹ 1995 4 SA 631 (CC). See Stander, Myburgh and Jansen van Rensburg "Die einde van siviele gevangensetting in Suid-Afrika" 1996 *THRHR* 485.

³² s 65A-65M of the Magistrates' Courts Act 32 of 1944.

broad conclusion is that debtors should be treated with dignity during the debt-enforcement process and that their physical freedom should not be impeded as a result of their debts.

3.3 Judicial oversight and housing rights

A noteworthy theme in a number of constitutional court judgments is the importance of judicial oversight when a debt is enforced and executed against a debtor's property. The relevant constitutional provision is the right of access to courts in section 34 of the constitution, but some of the judgments were based on the housing clause in section 26.³³

In *Chief Lesapo v North West Agricultural Bank*³³ and *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa*³⁴ the constitutional court declared statutory provisions³⁵ that allowed for the seizure and sale of a debtor's property without court oversight to be unconstitutional for unjustifiably contravening the right of access to courts. This development inspired another controversy in the context of summary execution (*parate executie*) clauses in pledge agreements.³⁶ These clauses authorise a pledgee to sell the pledged property without going through the normal judicial execution process. One high court³⁷ declared such clauses unconstitutional based on the aforementioned constitutional court judgments, but after academic criticism,³⁸ the supreme court of appeal confirmed the common-law position³⁹ that summary execution clauses are indeed permissible and are not subject to the same objections as statutory seizure-and-sale powers.⁴⁰ Nevertheless, questions remain regarding the validity of summary execution clauses under section 34 of the constitution⁴¹ as well as on the impact of the act on the use of these clauses in consumer agreements.⁴²

Another important line of cases concerns the impact of housing rights⁴³ on mortgage foreclosure. First in *Jafitha v Schoeman; Van Rooyen v Stoltz*⁴⁴ and later in *Gundwana v Steko Development*⁴⁵ the constitutional court established the principle that a home may not be sold in execution of a secured or unsecured debt before a judge or magistrate first considers all the relevant circumstances of the case. In addition to this procedural layer of protection, the court also affirmed the

³³ 2000 1 SA 409 (CC).

³⁴ 2000 3 SA 626 (CC).

³⁵ s 38(2) of the North West Agricultural Bank Act 14 of 1981 (NW) (originally titled the Agricultural Bank of Bophuthatswana Act and proclaimed when that used to be a sovereign legislature); s 34, 55 of the Land Bank Act 13 of 1944.

³⁶ See generally Brits *Real Security Law* (2016) 170-180.

³⁷ *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd* 2001 1 SA 251 (E).

³⁸ Scott "Summary execution clauses in pledge and perfecting clauses in notarial bonds" 2002 *THRHR* 656.

³⁹ *Osry v Hirsch, Loubser and Co Ltd* 1922 CPD 531 547.

⁴⁰ *Bock v Duburoro Investments (Pty) Ltd* 2004 2 SA 242 (SCA) par 15; *SA Bank of Athens Ltd v Van Zyl* 2005 5 SA 93 (SCA) par 9-13; *Juglal v Shoprite Checkers (Pty) Ltd* 2004 5 SA 248 (SCA) par 9.

⁴¹ Cook and Quixley "Parate executie clauses: is the debate dead?" 2004 *SALJ* 719; Scott "A private-law dinosaur's evaluation of summary execution clauses in light of the Constitution" 2007 *THRHR* 289. See also Sonnekus "Onverwagte raakpunte tussen menseregte en saaklike sekerheidsregte?" 2002 *Tijdschrift voor Privaatrecht* 1.

⁴² Brits "Pledge of movables under the National Credit Act: secured loans, pawn transactions and summary execution clauses" 2013 *SA Merc LJ* 555.

⁴³ s 26 of the constitution.

⁴⁴ 2005 2 SA 140 (CC).

⁴⁵ 2011 3 SA 608 (CC).

substantive test for when homes may be sold in execution. If the sale of the home limits the owner's right of access to adequate housing,⁴⁶ it will only be justifiable if the requirements in section 36 of the constitution (the limitations clause) are met. In other words, will the infringement be justifiable in an open and democratic society based on the values of freedom, equality and dignity? The essential question is whether the limitation is proportionate to its purpose. Does the means justify the end? Basically, the loss of the home must be the last resort. However, if the creditor's rights cannot be satisfied in another reasonable manner and if the creditor did not make itself guilty of any procedural abuses, then generally the house may be sold to satisfy the debt.⁴⁷

In the latter line of cases the court did not rely on the right of access to courts. Instead, it based the judicial oversight requirement on the right of access to adequate housing⁴⁸ read with the rule that someone may not be evicted from a home without a court order which was granted after having considered all the relevant circumstances.⁴⁹ It should be noted that the supreme court of appeal subsequently found that the judicial oversight requirement for the sale in execution of homes does not apply to non-residential property.⁵⁰

Judicial oversight also featured in the constitutional court case of *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services*.⁵¹ The act applied to the credit agreements *in casu* but the judgment did not concern the relationship between the act and the bill of rights as such. The case involved emolument attachment orders as provided for in section 65J of the Magistrates' Courts Act 32 of 1944. Basically, an emolument attachment order is an order in terms of which a debtor's salary is attached in execution of a judgment debt and the debtor's employer is directed to pay the relevant amounts directly to the creditor.

The high court⁵² had declared certain parts of section 65J⁵³ unconstitutional because it failed to provide for judicial oversight when such an order is issued. The constitutional court confirmed this finding. For present purposes, I only emphasise the premium that especially Cameron J placed on judicial oversight. The judge explained that because the execution of court orders is part of the judicial process, judicial oversight is required. By analogy he relied on the previous cases that dealt with debtors' homes (the *Jaftha* and *Gundwana* cases) and found that "the principle underlying them was that judicial oversight of the execution process against all

⁴⁶ s 26(1) of the constitution.

⁴⁷ See further Brits (n 36) 68-100; Van Heerden "Enforcement of credit agreements" in Scholtz *et al* (n 2) par 12.19; Fuchs "Huidige regsontwikkeling ten aansien van uitwinbaarverklaring van 'n verband oor 'n onroerende saak" 2015 *PER* 3259; Brits and Van der Walt "Application of the housing clause during mortgage foreclosure: a subsidiarity approach to the role of the National Credit Act" 2014 *TSAR* 288 and 508; Fuchs "Ingrypende ontwikkeling in die oproepingsproses van verbande op onroerende sake" 2014 *LitNet Akademies* 221; Steyn *Statutory Regulation of Forced Sale of the Home in South Africa* (2012 thesis UP); Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012 thesis US); Van Heerden "The impact of the right of access to adequate housing on the enforcement of mortgage agreements and other credit agreements" 2012 *THRHR* 632.

⁴⁸ s 26(1) of the constitution.

⁴⁹ s 26(3).

⁵⁰ *Mkhize v Umvoti Municipality* 2012 1 SA 1 (SCA) especially par 20.

⁵¹ 2016 6 SA 596 (CC).

⁵² *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* 2015 5 SA 221 (WCC) par 58.

⁵³ s 65J(2)(a) and 65J(2)(b)(i).

forms of property is constitutionally indispensable”.⁵⁴ The judge reasoned that the fundamental prohibition against self-help flows from the right of access to courts (s 34 of the constitution).⁵⁵ The judge’s remarks on the importance of judicial oversight are very broad and seem to extend to all kinds of execution, regardless of the class of property or debtor involved. However, it remains to be seen how broadly these remarks will be applied when it comes to sales in execution in general.

3.4 Two cases on the Alienation of Land Act

The constitutional court in *Sarrahwitz v Maritz*⁵⁶ dealt with the Alienation of Land Act 68 of 1981, which is also a piece of legislation that regulates an aspect of consumer credit law. One of the central goals of the act is to provide special protection for persons who purchase residential property in instalments (that is, on credit) and under circumstances where ownership is only to transfer once the entire purchase price has been paid.⁵⁷ The act states that if the contract is for two or more instalments over a period of more than one year and if the seller’s estate is sequestrated before ownership can be transferred to the purchaser, then the purchaser is, subject to certain conditions, entitled to demand transfer from the trustee of the seller’s estate.⁵⁸

In casu the purchaser had paid the full purchase price in cash but transfer of ownership never took place. Because the contract involved less than two instalments and because payment took place over less than one year, the purchaser technically did not enjoy the benefits of the act and thus did not have the right to claim transfer of ownership from the seller’s trustee. A consequence of this was that the purchaser, who had paid in full for the property, had to forego her home so that it could be realised for the benefit of the general body of creditors. She had no real right to the property (nor a preferred claim to its proceeds) but only a concurrent claim against the seller’s estate.

The act was meant to protect vulnerable purchasers of immovable property from becoming homeless due to the seller’s insolvency, but the majority of the constitutional court essentially found that it was unjustifiable for the act to only provide such protection for purchasers under instalment agreements. This differentiation violated the rights to housing, dignity and equality of cash purchasers who are vulnerable and face homelessness. So, to provide for this category of purchasers also, the court read certain words into the act.

Another constitutional court case on the Alienation of Land Act is *Botha v Rich*.⁵⁹ The court had to interpret section 27(1) of the act and, in the alternative, had to assess whether the enforcement of the cancellation clause in question was reasonable, fair and constitutional.

⁵⁴ the *Stellenbosch Legal Aid* case (n 51) par 129.

⁵⁵ par 129.

⁵⁶ 2015 4 SA 491 (CC). See Rautenbach “Overview of constitutional court judgments on the bill of rights – 2015” 2016 *TSAR* 294 295-297.

⁵⁷ On the act in general, see Kelly-Louw *Consumer Credit Regulation in South Africa* (2012) ch 20. s 21-22 of the Alienation of Land Act.

⁵⁹ (n 5). See Bhana and Meerkotter “The impact of the constitution on the common law of contract: *Botha v Rich* (CC)” 2015 *SALJ* 494; Sharrock “Unfair enforcement of a contract: a step in the right direction? *Botha v Rich* and *Combined Developers v Arun Holdings*” 2015 *SA Merc LJ* 174; Rautenbach “Overview of constitutional court judgments on the bill of rights – 2014” 2015 *TSAR* 379 384.

Section 27(1) of the act provides that if a purchaser of land on instalments has paid at least 50% of the purchase price, he is "entitled to demand from the seller transfer of the land on condition that simultaneously with the registration of the transfer there shall be registered in favour of the seller a first mortgage bond over the land to secure the balance of the purchase price and interest in terms of the deed of alienation". *In casu* the purchaser had defaulted on the instalment agreement but by that time more than 50% of the purchase had been paid. Based on this the purchaser demanded transfer in accordance with section 27(1). However, the seller averred, on the supposed strength of section 27(3), that when the seller fails to effect the demanded transfer, the purchaser only has the right to cancel the contract, not a right to specific performance of the duty to transfer. The constitutional court rejected this argument because although section 27(3) grants the purchaser a right of cancellation, it does not limit the purchaser's remedies to such cancellation. The seller's argument would contradict the whole purpose of the act, which is to protect purchasers of immovable property who have partially paid the purchase price. Therefore, the court confirmed that the purchaser has the right to claim specific performance of the seller's duty to transfer ownership. The court pointed out that this interpretation "is consistent with the object of our Constitution that contracting parties are treated with equal worth and concern".⁶⁰ The high court's failure to uphold this interpretation was also "inconsistent with the constitutional injunction for courts, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights".⁶¹

In finding the right balance between the seller and purchaser, the court relied on a proportionality approach. The judge stated that to deprive the purchaser of the right to receive transfer of the property would be disproportionate compared to the portion of the purchase price that she had already paid, rendering the outcome unfair. However, to allow such transfer without providing that the purchaser should first pay the arrears and outstanding municipal debts would be equally disproportionate.⁶² Hence, the interpretation that would treat both parties fairly is to allow the purchaser's claim for transfer of ownership but on the condition that all arrears and municipal debts are paid first.

The court took a similar proportionality approach with regard to the enforceability of the cancellation clause, which had as one of its effects the forfeiture by the purchaser of all amounts already paid towards the purchase price. The court held that forfeiture of such a large portion of the purchase price would be a disproportionate penalty for breach of contract. This disproportionate burden would render the enforcement of the cancellation clause unfair.⁶³

3.5 The *in duplum* rule and the development of the common law

When a debtor is in default, the common-law *in duplum* rule limits the accumulation of unpaid interest to an amount equalling the outstanding capital. Hence, interest accrues only until his total debt reaches double the capital debt. The commonly accepted purpose of this rule is to protect a debtor from becoming ridiculously over-indebted as a result of amassing interest. It also encourages the creditor to

⁶⁰ the *Botha* case (n 5) par 40.

⁶¹ par 41.

⁶² par 49.

⁶³ par 51.

timeously collect the outstanding debts before unpaid interest reaches the *duplum*.⁶⁴ The common-law *in duplum* rule is not limited to consumers but is of general application. However, a statutory version of the rule is included in the act,⁶⁵ which therefore has replaced the common-law rule when it comes to debts that fall under the act. The two rules differ in that, as can be expected, the statutory rule generally provides greater protection than the common-law rule.⁶⁶

The issue that reached the constitutional court did not relate to the section in the act but the interpretation of the common-law rule. The question was whether the rule is suspended *pendente lite*, that is from the moment that the debt enforcement process commences. In *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd*⁶⁷ the supreme court of appeal had previously developed the common law so that the rule is indeed suspended *pendente lite*, essentially because from that point the basis for halting the accrual of interest is no longer present. However, the constitutional court in *Paulsen v Slip Knot Investments 777 (Pty) Ltd*⁶⁸ found that the supreme court of appeal was wrong when it developed the common law to limit the protection afforded to debtors. The debate between the majority and minority judgments in the *Paulsen* case shows that there are strong considerations both in favour of and against the suspension of the *in duplum* rule *pendente lite*. In fact, the matter is so fraught with policy questions that the majority of the constitutional court criticised the supreme court of appeal's choice to change the rule as it did in the *Oneanate* case. To attempt a full explanation of the constitutional court's reasoning here would not do justice to the complexity of the issues involved, so I just share some general thoughts.

The case did not deal with the act and technically therefore it does not have an impact on the relationship between the act and the constitution. However, the common-law *in duplum* rule covers situations that are not covered by the act but that involve natural persons who would otherwise be regarded as consumers. Although the act does not apply to natural persons standing surety for the mortgage debt of a juristic person,⁶⁹ the constitutional court in the *Paulsen* case seems to have treated

⁶⁴ In general, see Vessio "A limit on the limit on interest? The *in duplum* rule and the public policy backdrop" 2006 *De Jure* 25; Otto "Die gemeenregtelike verbod teen die ophoop van rente" 1992 *THRHR* 472; Lubbe "Die verbod op die ophoop van rente *ultra duplum* – 'n konkretisering van die norm van *bona fides*?" 1990 *THRHR* 190. For an alternative interpretation of the historical scope and purpose of the rule, see Sonnekus "Limitering van renteheffing en die *ultra duplum*-reël: 'n evaluering van die historiese ontwikkeling van die reël en die vermeende oogmerk daaragter" 2012 *TSAR* 247 and 387.

⁶⁵ s 103(5) of the act.

⁶⁶ See Van Zyl "Interest, fees and charges" in Scholtz *et al* (n 2) par 10.6.4; Otto and Otto (n 4) 99-101; Friedman and Otto "Section 103(5) of the National Credit Act 34 of 2005 as inspired by the common-law *in duplum* rule" 2013 *THRHR* 132 and 361; Kelly-Louw "The statutory *in duplum* rule as an indirect debt relief mechanism" 2011 *SA Merc LJ* 352; Campbell "The *in duplum* rule: relief for consumers of excessively priced small credit legitimised by the National Credit Act" 2010 *SA Merc LJ* 1; Vessio "A short discussion on the effects of the *in duplum* rule upon commencement of litigation and after judgment: a view both 'inside' and 'outside' the National Credit Act" 2010 *Obiter* 725; Kelly-Louw "Better consumer protection under the statutory *in duplum* rule" 2007 *SA Merc LJ* 337. See also Vessio *The Effects of the In Duplum Rule and Clause 103(5) of the National Credit Bill 2005 on Interest* (2006 thesis UP).

⁶⁷ 1998 1 SA 811 (SCA).

⁶⁸ (n 1). See Rautenbach "Die toepassing van die gemeenregtelike *in duplum*-reël tydens gedingvoering, grondwetlike proporsionaliteit en die skeiding van magte" 2015 *LitNet Akademies* 789; Otto "Die *ultra duplum*-reël haal die konstitusionele hof na meer as 2000 jaar" 2015 *TSAR* 863. See also Rautenbach (n 56) 307-308.

⁶⁹ See s 4(1)(a), 4(1)(b), 4(2)(c) of the act.

these debtors as if the policy considerations underlying the act nevertheless applied to them. I cannot deal with this issue in more detail here, but I have reservations about the court's approach in this regard. For instance, assuming that the exclusion of the debtors' *in casu* from the act does not amount to unfair discrimination,⁷⁰ the courts should in principle accept the legislature's policy choice to deny them the protection of the act.⁷¹

One must also suppose that when the act was drafted, the legislature was aware of the common-law rule as defined in the *Oncanate* case. It elected not to amend it, except for those debtors who fall under the scope of the act. Accordingly, one could argue that it is inappropriate for the constitutional court to change a common-law rule that the legislature tacitly approved of when it left it untouched when drafting legislation that deals with that topic. An exception would be if it is shown to be necessary to develop the common law to bring it in line with the constitution, but it is not clear to me that this was the situation in the *Paulsen* case.

The *in duplum* rule places a limitation on contractual autonomy because beyond a certain point interest is not permitted to accumulate as agreed upon. Although this is an important and worthy protection measure for both consumer and commercial debtors, one must be mindful of the fact that it restricts the creditor's legitimate contractual rights. Such an interference with rights should arguably be interpreted restrictively; it should go no further than what is necessary to fulfil the public policy in question. If the debtor is a consumer, it makes sense that a larger limitation on the creditor's rights could be permissible to achieve the policy behind legislation like the act. But when the debtor is not a consumer, the same policy considerations are not present and thus one would expect a rule that imposes less on the creditor.

3.6 Some constitutional property cases in the credit context

Below⁷² I discuss three constitutional court judgments in which provisions of the act were challenged under the property clause in section 25 of the constitution. But here I first briefly mention some constitutional court cases on the property clause that did not deal with the act but that were located in the general credit context. It is indeed interesting that some of the court's leading property judgments involved credit law.

The foremost case on the interpretation of section 25(1) of the constitution is *First National Bank of SA Ltd v Commissioner, South African Revenue Service*,⁷³ which concerned a statutory lien that vests over a debtor's property in terms of section 114 of the Customs and Excise Act 91 of 1964 as security for the payment of certain customs debts.⁷⁴ The lien could be established over property not belonging to the customs debtor, which the constitutional court declared to be an arbitrary deprivation of the non-debtor's property.

Another constitutional court case on section 25(1) in the credit context is *Mkontwana v Nelson Mandela Metropolitan Municipality*.⁷⁵ Here the constitutional court held that section 118(1) of the Local Government: Municipal Systems Act 32

⁷⁰ See part 4.1 below.

⁷¹ Perhaps the reason for this controversy is not the *in duplum* rule itself, but the fact that the act does not protect natural persons who sign as surety for juristic persons that are not protected by the act – a distinction that has been criticised by eg Kelly-Louw "Should all natural persons standing surety be protected by the National Credit Act 34 of 2005?" 2012 *SA Merc LR* 298.

⁷² See part 4.2 below.

⁷³ 2002 4 SA 768 (CC).

⁷⁴ In general, see Brits (n 36) 376-382.

⁷⁵ 2005 1 SA 530 (CC).

of 2000, which creates an embargo against the transfer of land if certain municipal debts are outstanding,⁷⁶ is not necessarily unconstitutional if the debt was incurred by someone other than the owner, such as unlawful occupiers.⁷⁷

Mention can also be made of *Jordaan v Tshwane City*,⁷⁸ where the high court recently declared section 118(3) of the Local Government: Municipal Systems Act unconstitutional to the degree that the security right created in that section is enforceable against a transferee of immovable property who did not incur the debts secured by that security right. This effect of section 118(3) was found to be an arbitrary deprivation of property under section 25(1) of the constitution, a decision that is still to be confirmed by the constitutional court.⁷⁹

The three cases mentioned here all deal with real security rights that are imposed by legislation to assist with the enforcement of certain tax debts. They illustrate the principle that statutory debt enforcement mechanisms (such as the creation of special security rights and burdens) are not permitted to unjustifiably infringe on debtors' constitutional property rights.

3.7 Concluding remarks

The cases discussed above illustrate how often constitutional rights and values are relevant in the broader credit law. This is not surprising, as credit plays an invaluable part in modern consumer and commercial life. Therefore, the legal regimes that regulate the various aspects of credit provision, whether common or statutory law, must necessarily comply with the constitution and support the overall ideal of a South African society founded on constitutional values. Noteworthy themes that have come up include judicial oversight, housing rights, property rights and equality. As will become clear below, most of these themes also feature in the act cases that have reached the constitutional court.

4 *National Credit Act cases in which the constitutionality of a provision was challenged*

4.1 Cases involving equality that did not reach the constitutional court

Certain provisions in the act have been challenged for allegedly violating the right to equality.⁸⁰ However, none of these were successful or have been analysed by the

⁷⁶ In general, see Brits (n 36) 394-400.

⁷⁷ For criticism, see Van der Walt "Retreating from the FNB arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bissett v Buffalo City Municipality*; *Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*" 2005 *SALJ* 75; Van der Walt *Constitutional Property Law* (2011) 248-256.

⁷⁸ 2017 2 SA 295 (GP).

⁷⁹ On this controversy, see further Brits "Why the security right in section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 is not enforceable against successors in title – a follow-up occasioned by the SCA's *Mitchell* judgment" 2017 *Stell LR* 47; Sonnekus "Sogenaamde statutêre retensieregte ten gunste van plaaslike owerhede vir agterstallige erfbelasting en munisipale rekeninge" 2016 *THRHR* 443; Brits (n 36) 400-413; Ratiba "Ghosts of the municipal debts' past: is *Mitchell* resurrecting the *Mathabathe* spectre? – not quite" 2016 *Obiter* 423; Delpont "The implications of section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 for purchasers of immovable property" 2015 *THRHR* 219; Brits "The statutory security right in section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 – does it survive transfer of the land?" 2014 *Stell LR* 536; Ratiba "The municipal debt collection beyond the *Mathabathe* case – a welcome solution or multiplication of problems?" 2014 *Obiter* 691.

⁸⁰ s 9(1) of the constitution.

constitutional court. There is also an example of a high court judgment in which a provision in the act was interpreted purposively with reliance on the right to equality.

Regarding the possible unequal application of the act, two interrelated aspects have been raised. Without going into specifics, these are (1) juristic persons and natural persons do not enjoy the same protection under the act; and (2) a natural person who signs as surety for a juristic person does not always enjoy the same protection as a natural person who signs as surety for another natural person.⁸¹

These distinctions were first challenged in *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd (No 1)*,⁸² where it was argued that the right to equality was violated. However, the high court found that there was no unfair discrimination because there is a rational connection between the differentiation created by the act and the legitimate governmental purpose behind it.⁸³ Essentially, the act is not intended to protect juristic persons in general and also not natural persons who make use of juristic persons for tax purposes. The same issues came up in *Investec v Louw*,⁸⁴ where the court came to the same conclusion but provided a more detailed explanation.

In *Standard Bank of South Africa Ltd v Dlamini*⁸⁵ the court used the right to equality to interpret sections 63 and 64 of the act. In simple terms, these sections entitle a consumer to receive documents in an official language that he can read or understand and in plain language. The court purposefully interpreted these rights to include a right to be informed by reasonable means of the material terms of the documents consumers sign.⁸⁶ Hence, credit providers should have measures in place to ensure that their customers are made aware of their rights and responsibilities, especially when they are historically disadvantaged and/or illiterate.⁸⁷

4.2 Constitutional court cases involving the property clause and the National Credit Act

Section 25(1) of the constitution (the property clause) provides that no one may be deprived of property except in terms of law of general application and that no law may permit the arbitrary deprivation of property.⁸⁸ This subsection has been used in three constitutional court cases to challenge the validity of provisions in the act. All of them related to section 89(5) of the act, which regulates the consequences for a credit provider who enters into a credit agreement unlawfully. The specific unlawfulness in all three cases was the fact that the credit provider had entered into the agreement without being duly registered with the national credit regulator.⁸⁹

Essentially, section 89(5)(c) compelled the court to order that any right of the credit provider to claim restitution of the funds lent under the unlawful agreement is either

⁸¹ See s 4(1)(a), 4(1)(b), 4(2)(c) of the act. For criticism of this distinction, see Kelly-Louw (n 71).

⁸² 2010 1 SA 627 (C).

⁸³ par 25. For criticism, see Kok "Not so hunky-dory: failing to distinguish between differentiation and discrimination" 2011 *THRHR* 340.

⁸⁴ case no 21145/2011, 21143/2011, 21144/2011 (C) (unreported) par 43-64.

⁸⁵ 2013 1 SA 219 (KZD). See further Sharrock and Steyn "The problem of the illiterate signatory: *Standard Bank of South Africa Ltd v Dlamini*" 2014 *SA Merc LJ* 150.

⁸⁶ the *Dlamini* case (n 85) par 48.

⁸⁷ par 49-50.

⁸⁸ For a detailed analysis, see Van der Walt (n 77) ch 3.

⁸⁹ This failure to register renders the agreement unlawful and void: see s 40(3)-(4), 89(2)(d), 89(5)(a) of the act. On the registration requirement in general, see Van Heerden and Renke "Perspectives on selected aspects of the registration of credit providers in terms of the National Credit Act 34 of 2005" 2014 *THRHR* 614 and 2015 *THRHR* 80.

cancelled or, if such cancellation would unjustly enrich the consumer, declare the credit provider's claim forfeit to the state. This forfeiture of the creditor provider's enrichment claim triggered the constitutionality challenges in two constitutional court cases.

The issue first reached the constitutional court in *Cherangani Trade and Invest 107 (Pty) Ltd v Mason NO*.⁹⁰ The high court had declared the agreement in question unlawful and void, and held, on the basis of section 89(5)(c), that the credit provider could not claim restitution of the moneys extended to the debtor.⁹¹ After the supreme court of appeal denied the application for leave to appeal, the credit provider approached the constitutional court and for the first time raised the constitutionality of section 89(5)(c). However, the court refused to grant leave to appeal, basically because the constitutional issue was not raised in the lower courts and because all interested parties were not before the court.⁹²

The effect of section 89(5)(c) was criticised⁹³ and subsequently the matter reached the high court again in *Opperman v Boonzaaier*.⁹⁴ The court found that the forfeiture of the credit provider's restitution claim amounted to an arbitrary deprivation of property as contemplated in section 25(1) of the constitution. This finding was confirmed by the constitutional court in *National Credit Regulator v Opperman*.⁹⁵ A full analysis of the courts' reasoning is not necessary here,⁹⁶ but suffice it to emphasise the role that the property clause played. Not only did the constitutional court classify the creditor's personal right (a monetary restitution claim based in unjustified enrichment) as "property" for constitutional purposes, but it also found that the forfeiture in question amounted to a "deprivation of property". The crux of the judgment was that this deprivation was arbitrary because, all things considered, the end did not justify the means.⁹⁷

In both the *Cherangani* and the *Opperman* cases the contention was made that section 89(5)(c) should be interpreted in conformity with section 25(1) of the constitution so that the court should have a discretion whether or not to declare the credit provider's rights forfeit. The presence of this discretion would mean that any arbitrariness is avoided. However, in both cases the constitutional court found that the wording of the provision did not make it reasonably possible to arrive at this

⁹⁰ 2011 11 BCLR 1123 (CC).

⁹¹ *Cherangani Trade and Invest 107 (Edms) Bpk v Mason NO* (6712/2008) 2009 ZAFSHC (12 March 2009).

⁹² the *Cherangani* case (n 90) par 12, 15.

⁹³ Otto "Die *par delictum*-reël en die *National Credit Act*" 2009 *TSAR* 417; Otto "*National Credit Act*, ongeoorloofde ooreenkomste en meevallertjies vir die *fiscus*" 2010 *TSAR* 161. See also Otto "Onagsame wetopstelling – die Nasionale Kredietwet op die operasietafel" 2013 *TSAR* 217 234.

⁹⁴ (24887/2010) 2012 ZAWCHC 27 (17 April 2012).

⁹⁵ 2013 2 SA 1 (CC).

⁹⁶ For more detail, see Marais "The constitutionality of section 89(5)(c) of the National Credit Act under the property clause: *National Credit Regulator v Opperman*" 2014 *SALJ* 215; Brits "Arbitrary deprivation of unregistered credit provider's right to claim restitution of performance rendered: *Opperman v Boonzaaier* (24887/10) 2012 ZAWCHC 27 (17 April 2012) and *National Credit Regulator v Opperman* 2013 2 SA 1 (CC)" 2013 *PER* 422; Rautenbach "Overview of constitutional court judgments on the bill of rights – 2012" 2013 *TSAR* 306 317-320.

⁹⁷ However, see *Cool Ideas 1186 CC v Hubbard* 2014 4 SA 474 (CC), where the constitutional court upheld the forfeiture of a claim for restitution by an unregistered home builder in terms of s 10 of the Housing Consumers Protection Measures Act 95 of 1998. The deprivation in question was found to pass the arbitrariness test in s 25(1) of the constitution, as there was a rational and proportional connection between the penalty and its purpose (par 38-44). But see also the dissenting minority judgment, which favoured an interpretation less imposing on the builder's property rights. See further Rautenbach (n 59) 386-387.

interpretation. The section afforded the court no discretion and thus the claim had to be declared forfeit to the state, regardless of the level of turpitude on the part of the credit provider. This lack of a discretion was one of the main reasons why the deprivation of property was judged as arbitrary.⁹⁸

In addition to the problems with section 89(5)(c), it seemed apparent that there would be similar objections against section 89(5)(b),⁹⁹ which in simple terms stipulated that the credit provider under an unlawful credit agreement “must refund to the consumer any money paid by the consumer under that agreement to the credit provider”. Therefore, this provision was also challenged, and after the high court¹⁰⁰ declared it unconstitutional, the constitutional court in *Chevron SA (Pty) Ltd v Wilson*¹⁰¹ confirmed the declaration of invalidity. The court accepted that moneys paid to the credit provider qualify as property for constitutional purposes.¹⁰² The court also explained that, “[b]eing forced by an order of court or operation of law to part with payment already received from the consumer is the very essence of deprivation of property”.¹⁰³ For similar reasons as in the *Opperman* case, the court found that the deprivation mandated by section 89(5)(b) was arbitrary because it left the court with no discretion and was procedurally unfair.¹⁰⁴ It should be noted that section 89(5)(b) and (c) had in the meantime been deleted from the act and section 89(5)(a) had been amended to give the court a broader discretion when deciding on the consequences of unlawful agreements.¹⁰⁵

Two preliminary lessons can be derived from the three constitutional court judgments discussed above. First, a creditor’s right to receive payment is regarded as “property” and any interference with such “property” must have a sufficient reason – the deprivation may not be arbitrary. Secondly, a premium is placed on the presence of a judicial discretion in order to ensure that limitations on property rights are just and equitable.

5 Constitutional court cases involving the interpretation of provisions in the National Credit Act

5.1 Introduction

Courts are constitutionally mandated to interpret statutes in a manner that promotes the spirit, purport and objects of the bill of rights.¹⁰⁶ In addition, the act has its own stated purposes,¹⁰⁷ which is important because the act must be interpreted in a manner that gives effect to these purposes.¹⁰⁸ In other words, when interpreting the act, there are two levels of normative guidelines: (1) the act’s own purposes and (2) the spirit, purport and objects of the bill of rights. In general, the purposes of the act can be regarded as a contextualised expression of the values in the bill of rights.

⁹⁸ the *Cherangani* case (n 90) par 8; the *Opperman* case (n 95) par 18, 26, 69.

⁹⁹ the *Opperman* case (n 95) par 86; Otto (n 93 (2013)) 234; Otto “Die *condictio ob turpem vel iniustam causam* en die Nasionale Kredietwet” 2016 *TSAR* 369 374; Otto “Conclusion, alteration and termination of credit agreements” in Scholtz *et al* (n 2) par 9.3.4.1; Brits (n 96) 463.

¹⁰⁰ *Chevron SA (Pty) Ltd v Dennis Edwin Wilson* (5244/13) 2014 ZAWCHC 121 (5 June 2014).

¹⁰¹ 2015 10 BCLR 1158 (CC). See Otto (n 99 (2016)); Rautenbach (n 56) 301.

¹⁰² the *Chevron* case (n 101) par 16.

¹⁰³ par 18.

¹⁰⁴ par 20-24, 33.

¹⁰⁵ s 27(b) of the National Credit Amendment Act 19 of 2014.

¹⁰⁶ s 39(2) of the constitution.

¹⁰⁷ s 3 of the act.

¹⁰⁸ s 2(1).

The purpose of the following section is to discuss some constitutional court judgments concerning the interpretation of the act. The idea is not to discuss the cases comprehensively but to focus on comments that the judges made regarding the role of the bill of rights in the act disputes. The discussion is divided according to the topics that the cases dealt with.

5.2 Requirements surrounding delivery of notices

5.2.1 Background

Section 129(1)(a) of the act provides that if a consumer is in default, the credit provider may in writing “draw the default to the notice of the consumer” and make certain proposals regarding how the dispute can be resolved. Section 129(1)(b) states that enforcement proceedings may not commence before providing this notice. Section 130(1)(a) further stipulates that the credit provider may approach the court to enforce the agreement only if 10 business days have passed since the credit provider has “delivered a notice” contemplated in sections 129(1)(a) or 86(10).

The major conundrum with these provisions revolved around the relationship between the requirement in section 129(1)(a) that the default must be *drawn to the notice* of the consumer, and the reference in section 130(1)(a) to the notice having to be *delivered* to the consumer. Judges of the high court initially debated whether the credit provider has to prove that the notice came to the actual notice of the consumer¹⁰⁹ or whether it was sufficient to show that the written notice was duly sent to the consumer.¹¹⁰ The supreme court of appeal then found in *Rossouw v FirstRand Bank Ltd*¹¹¹ that the credit provider had to prove only that it duly dispatched the notice. As discussed below, the constitutional court subsequently had two opportunities to decide on this issue.¹¹² In the meantime, section 129 had also been amended to provide more clarity.¹¹³

¹⁰⁹ See eg *Absa Bank Ltd v Prochaska* 2009 2 SA 512 (D); *Imperial Bank v Kubheka* (28713/08) 2010 ZAGPPHC 3 (4 Febr 2010); *FirstRand Bank Ltd v Dhlamini* 2010 4 SA 531 (GNP); *Nedbank v Dhlamini* case no 23028/2010 (GP) (unreported).

¹¹⁰ See eg *Munien v BMW Financial Services (SA) (Pty) Ltd* 2010 1 SA 549 (KZD); *Standard Bank of South Africa Ltd v Mellet* (3846/09) 2009 ZAFSHC 110 (30 Oct 2009); *FirstRand Bank Ltd v Bernardo* (608/09) 2009 ZAECPEHC 19 (28 Apr 2009); *First National Bank Ltd v Rossouw* (30624/09) 2009 ZAGPPHC 165 (6 Aug 2009); *Starita v Absa Bank Ltd* 2010 3 SA 443 (GSJ); *Standard Bank of South Africa Ltd v Rockhill* 2010 5 SA 252 (GSJ).

¹¹¹ 2010 6 SA 439 (SCA).

¹¹² For literature on the controversy, see eg Van Heerden in Scholtz (n 47) par 12.4.4; Otto and Otto (n 4) 116-124; Fuchs “Regsposisie indien ’n artikel 129(1)(a)-kennisgewing ingevolge die National Credit Act 34 van 2005 nie die verbandskuldenaar bereik het nie” 2014 *THRHR* 217; Van Heerden and Coetzee “Artikel 129(1)(a) van die Nasionale Kredietwet 34 van 2005: verwarrende verwarring oor voldoening” 2012 *LitNet Akademies* 254; Kelly-Louw (n 57) 419-434; Otto “The National Credit Act: default notices and debt review; the *ultra duplum* rule” 2012 *THRHR* 127 133; Van Heerden and Boraine “The conundrum of the non-compulsory compulsory notice in terms of section 129(1)(a) of the National Credit Act” 2011 *SA Merc LJ* 45; Kelly-Louw “The default notice as required by the National Credit Act 34 of 2005” 2010 *SA Merc LJ* 568; Tennant “A default notice under the National Credit Act must come to the attention of the consumer unless the consumer is at fault” 2010 *TSAR* 852; Otto “Notices in terms of the National Credit Act: wholesale national confusion” 2010 *SA Merc LJ* 595; Otto “Kennisgewing kragtens National Credit Act: moet die verbruiker dit ontvang?” 2010 *THRHR* 136.

¹¹³ See s 32(e) of the act.

5.2.2 The *Sebola* case

In *Sebola v Standard Bank of South Africa Ltd*¹¹⁴ the credit provider had sent the default notice by registered post to an address elected by the consumer. However, the post office's "track and trace" record indicated that the postal service delivered the notice to the wrong post office and therefore it was clear that the consumer never actually received the notice. The question was whether the credit provider nevertheless complied with the act when it dispatched the notice to the correct address.

With reference to sections 8(3) and 39(2) of the constitution, the consumers challenged the interpretation adopted in the *Rossouw* case.¹¹⁵ The credit provider conversely opposed the view that the supreme court of appeal's interpretation did not promote the spirit, purport and objects of the bill of rights. It relied on the balance that the act is meant to maintain between consumers and credit providers and even pointed out that the interpretation contended for by the consumers might unjustifiably limit the credit provider's right of access to courts.¹¹⁶ One of the *amici curiae*, the banking association of South Africa, also made the point that the interpretation contended for by the consumers (and the other two *amici curiae*)¹¹⁷ is not constitutionally required.¹¹⁸ In fact, the banking association of South Africa argued that the allocation of the risk of non-delivery to the consumer "is consistent with the Constitution".¹¹⁹

Cameron J mentioned that the supreme court of appeal in the *Rossouw* case did not have the benefit, as the constitutional court did, of "argument specifically on the constitutional impact of the various interpretations".¹²⁰ The question was whether the supreme court of appeal "gave enough weight to constitutional considerations in assigning a meaning to the statute's provisions".¹²¹ The court confirmed that constitutional considerations are important because the preamble of the act indicates that it was enacted *inter alia* to promote "a fair and non-discriminatory marketplace for access to consumer credit".¹²² The judge also reasoned that the goals of the act and the means by which they are to be pursued "are intimately connected to the Constitution's commitment to achieving equality". Therefore, because of the link between the purposes of the act and constitutional concept of equality, the court had jurisdiction over the matter.¹²³

As further background, the judge stated:

"While the Act deals mainly with commercial transactions between credit providers and consumers, as defined, its provisions also have a significant impact on aspects of public law. It introduces new forms of protection for consumers. These include regulation of the consumer credit industry, prohibiting credit providers from extending 'reckless credit', and mechanisms to assist over-indebted consumers to manage their debt burden."¹²⁴

¹¹⁴ (n 1). See Rautenbach (n 96) 306.

¹¹⁵ the *Sebola* case (n 1) par 3 and 17.

¹¹⁶ par 21.

¹¹⁷ the socio-economic rights institute of South Africa and the national credit regulator.

¹¹⁸ the *Sebola* case (n 1) par 30.

¹¹⁹ par 50.

¹²⁰ par 34.

¹²¹ par 36.

¹²² par 36.

¹²³ par 36.

¹²⁴ par 41 (footnotes omitted).

Without going into detail, the court's conclusion regarding the interpretation of the act was that when the credit provider sends the notice by registered mail, it must prove, by means of the "track and trace" report, that the notice reached the correct post office.¹²⁵ If this was done, "it may reasonably be assumed in the absence of contrary indication ... that notification of its arrival reached the consumer and that a reasonable consumer would have ensured retrieval of the item from the post office".¹²⁶

Soon after the *Sebola* case, which was meant to bring clarity on how to comply with the default notice requirement, a new debate surfaced regarding the interpretation and application of the law as laid down by the constitutional court. The problem involved situations where there was proof that the default notice reached the correct post office but because the notice was not collected and thus sent back to the post office of origin, it was equally clear that the default notice did not come to the consumer's attention.¹²⁷ One option was that proof of the notice reaching the correct post office is enough to comply with section 129(1). The fact that the consumer did not actually receive notice is irrelevant, because the risk of such non-receipt rests with the consumer.¹²⁸ The other option is that, even if there is proof that the notice reached the correct post office, the court cannot ignore the fact that the notice was not collected and therefore clearly did not come to the consumer's attention. Consequently, section 129(1) is not complied with under such circumstances.¹²⁹ The supreme court of appeal opted for the second option.¹³⁰

5.2.3 The *Kubyana* case

In light of the abovementioned debate, the constitutional court in *Kubyana v Standard Bank*¹³¹ was called upon once more to provide clarity on section 129(1). The consumer argued in favour of the second option above, whereas the credit provider supported the first interpretation.

One of the consumer's arguments was that section 32(1)(b) of the constitution supported his case. This provision establishes that everyone has the right to have access to "information held by another person if that information is required for the exercise or protection of his rights". He alleged that this right was infringed when he did not receive the default notice, as it contained information that was necessary for him to exercise his rights under the act.¹³² However, the court upheld the credit provider's contention that, because the right in section 32(1)(b) is given effect to by the Promotion of Access to Information Act 2 of 2000, the consumer cannot rely directly on the constitutional provision.¹³³

The majority of the constitutional court confirmed that "the interpretation of the Act's notice provisions implicates fundamental notions of equity in, and the transformation of, the credit market. Such an interpretation is therefore inherently

¹²⁵ par 75-77.

¹²⁶ par 77.

¹²⁷ See further Van Heerden and Coetzee (n 112).

¹²⁸ *Nedbank Ltd v Binneman and Thirteen Similar Cases* 2012 5 SA 569 (WCC); *Absa Bank Ltd v Petersen* 2013 1 SA 481 (WCC).

¹²⁹ *Absa Bank Ltd v Mkhize* 2012 5 SA 574 (KZD); *Balkind v Absa Bank Ltd* 2013 2 SA 486 (ECG); *Standard Bank of South Africa Ltd v Van Vuuren* (32847/12) 2013 ZAGPJHC 16 (26 Febr 2013).

¹³⁰ *Absa Bank Ltd v Mkhize* 2014 5 SA 16 (SCA).

¹³¹ (n 1).

¹³² par 11.

¹³³ the *Kubyana* case (n 1) par 13.

linked to the constitutional objective of achieving substantive equality”.¹³⁴ The court remarked that “legislation must be understood holistically and, it goes without saying, interpreted within the relevant framework of constitutional rights and norms”.¹³⁵ However, the court emphasised that the clear meaning of the wording of the act should not be ignored because “interpretation is not divination and courts must respect the separation of powers when construing Acts of Parliament”.¹³⁶ The court concluded that “the correct interpretation of s 129 is one that strikes an appropriate balance between the competing interests of both parties to a credit agreement”.¹³⁷

Without going into specifics, the court used the notion of the “reasonable consumer” to help solve the conundrum of what section 129(1) expects of credit providers. In other words, the court held that the credit provider should take steps to deliver the notice in such a way that the default will come to the attention of the *reasonable* consumer.¹³⁸

To sum up, the majority of the court in the *Kubyana* case clarified the position taken in the *Sebola* case by finding that, if the notice was sent to the correct post office, it can be assumed (unless proved otherwise) that the notification (informing the consumer to collect the registered mail at the post office) arrived at the consumer’s address. Moreover, it can be presumed that a reasonable consumer who has received this notification would have retrieved the registered mail from the post office, unless the consumer can show that he acted reasonably when failing to collect or tend to the registered mail (notice of default).¹³⁹ In other words, if a credit provider has sent the notice of default to the correct post office and there is proof that it indeed arrived there, the onus shifts to the consumer to show why it was reasonable for him not to collect the notice from the post office.¹⁴⁰

In Jafta J’s concurring judgment, the judge remarked that sections 129(1) and 130 “suspend the credit provider’s rights under the credit agreement until certain steps have been taken”.¹⁴¹ Therefore, the credit provider is “not entitled immediately to exercise its rights under the agreement”.¹⁴² If the consumer defaults due to his financial difficulties, “instead of enforcing the agreement, the credit provider must afford the consumer an opportunity to refer the agreement to one of the bodies listed in s 129(1)(a)”.¹⁴³ If a consequence of this opportunity is that the terms of the credit agreement is rearranged, “the credit provider loses the right to enforce the original credit agreement”.¹⁴⁴ With respect to the notice of default, the judge reasoned that:

¹³⁴ par 16, citing the *Sebola* case (n 1) par 36.

¹³⁵ the *Kubyana* case (n 1) par 18, citing *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC).

¹³⁶ the *Kubyana* case (n 1) par 18, citing *S v Zuma* 1995 2 SA 642 (CC) par 17-18; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 1 SA 545 (CC) par 23-24, 26.

¹³⁷ the *Kubyana* case (n 1) par 21.

¹³⁸ par 33.

¹³⁹ par 52.

¹⁴⁰ See also Du Plessis “Rethinking notification in the law of contract” 2017 *THRHR* 113, who relies on the s 129(1) notice requirement, as interpreted by the constitutional court, to argue for a “receipt”-based approach when it comes to common-law notice requirements.

¹⁴¹ the *Kubyana* case (n 1) par 69.

¹⁴² par 70.

¹⁴³ par 70.

¹⁴⁴ par 71.

“A consumer who receives notification from the local Post Office but decides not to collect the notice should not be permitted to frustrate the purpose of the provisions while, at the same time, the credit provider is precluded from enforcing its rights under the contract.”¹⁴⁵

These remarks are interesting because they view the requirements in the act with reference also to the effect that they have on the credit provider. Although the judge did not say so, these remarks can arguably be linked to the sections 25 (property) and 34 (access to courts) rights of credit providers, which may only be restricted under justifiable circumstances. Adding this viewpoint, along with the “reasonable consumer” concept, can therefore assist in finding a suitable – and constitutionally acceptable – balance between the interests of consumers and credit providers.

5.2.4 The *Baliso* case

*Baliso v FirstRand Bank Ltd t/a Wesbank*¹⁴⁶ concerned the notice that must be sent in terms of section 127(2) of the act. The subsection provides that if a consumer surrenders to the credit provider any property that is subject to an instalment agreement, secured loan or lease (the purpose being to terminate the credit agreement and instruct the credit provider to sell the relevant property), then the credit provider must within a specified time period give written notice to the consumer, which notice must set out the estimated value of the goods as well as any other prescribed information. The purpose of this notice is to enable the consumer to choose, based on the information provided, whether to withdraw from the termination of the agreement or to permit the credit provider to sell the property.

The constitutional court had to consider whether the requirements established in the *Sebola* and the *Kubiyana* cases for the sending of a section 129(1) notice also apply to the section 127(2) notice. In its first (majority) judgment, the court conceded that, in view of the importance of the section 127(2) notice, it would be illogical to make a distinction between the delivery requirement in this provision and the one in section 129(1).¹⁴⁷ The constitutional court again made use of the “reasonable consumer” standard to explain that the consumer may not unreasonably frustrate the credit provider’s attempts to comply with section 127(2).¹⁴⁸

5.3 Debt enforcement after defaulting on rearrangement order

In *Ferris v FirstRand Bank Ltd*¹⁴⁹ the consumers had fallen behind with their obligations under a debt-rearrangement order, which caused the credit provider to apply for a default judgment enforcing the terms of the original mortgage agreement. The high court granted the application and later denied an application for the rescission of the judgment. Both the high court and the supreme court of appeal then denied an application for leave to appeal, causing the consumers to approach the constitutional court for leave to appeal. The legal question was whether a credit provider can continue with the enforcement of the original credit agreement if the consumer has defaulted on the debt-rearrangement order.

¹⁴⁵ par 83.

¹⁴⁶ (n 1).

¹⁴⁷ par 22-23 and 27-33.

¹⁴⁸ par 29. See also the second (concurring) judgment (par 72-79).

¹⁴⁹ (n 1). See Roestoff “*Ferris v FirstRand Bank Ltd* 2014 3 SA 39 (CC): Enforcement of a credit agreement after breach of a debt rearrangement order and the ineffectiveness of debt review in terms of the National Credit Act” 2016 *De Jure* 134.

Although the constitutional court accepted its jurisdiction to decide the case,¹⁵⁰ it denied leave to appeal because the consumers' case did not display a reasonable prospect of success. There was no error in the default judgment because the act entitled the credit provider to enforce the agreement as soon as the consumer defaulted on the rearrangement order, without the need to give any further notice to the consumer.

Section 88(3) of the act creates a moratorium on the enforcement by the credit provider of any of its rights under the credit agreement during the debt-review process. However, this restriction is balanced by the rule that enforcement may go ahead if the consumer is both in default of the original credit agreement and has defaulted on any obligation in terms of the debt-rearrangement plan.¹⁵¹ Furthermore, section 129(2) of the act provides that the requirement of sending the consumer a default notice does not apply to debt-rearrangement (restructuring) orders. The unavoidable conclusion is that, as soon as a consumer defaults on the debt-rearrangement order, the credit provider can continue with normal debt enforcement action without having to provide any further notices to the consumer. The constitutional court confirmed this interpretation, which was deemed "clear from the wording of the relevant sections".¹⁵²

In view of the clear wording of sections 88(3) and 129(2), it is hard to conceive of a way in which the constitutional court could have reached a different conclusion. Also, the consumers presented no constitutional reason for why this interpretation is not acceptable. Of course, the mortgage agreement in the *Ferris* case related to the consumers' home, but this factor did not inspire the court towards a more lenient interpretation of the act. Indeed, the court mentioned that, even if it were to rescind the default judgment, the inevitable would merely have been delayed. Although the consumers might have got their house back for a short period, the credit provider would be permitted to enforce the agreement again because there was little indication that the consumers would henceforth be able to comply with the debt-rearrangement order.¹⁵³

Accordingly, it is arguable that after the consumer has been given a reasonable second chance in the form of a debt-rearrangement order, it would be unreasonable to restrict the creditor's legitimate rights any further. As the supreme court of appeal subsequently stated in *Jili v FirstRand Bank Ltd t/a Wesbank*:¹⁵⁴

"To allow the [consumer], who has spurned the advantages flowing from the magistrate's [rearrangement] order ... by defaulting in her payments, yet further opportunity to attempt to get her affairs in order at the expense of the [credit provider] who is entitled to the relief it seeks, would not be in the interests of justice. To refuse summary judgment would be to afford the [consumer] a further advantage not envisaged by the [act] – and a second bite at the cherry, so to speak – to the detriment of the clear rights of the [credit provider]."

It may be, as Roestoff¹⁵⁵ convincingly argues, that the *Ferris* case reveals deeper flaws in the debt-review system and that there is a need for reform. The only thing I might add is that a constitutional framework, involving the rights (and the limitation

¹⁵⁰ the *Ferris* case (n 1) par 7-8.

¹⁵¹ s 88(3)(a), (b)(ii) of the act.

¹⁵² the *Ferris* case (n 1) par 14. At par 16-17 the constitutional court confirmed a similar finding of the high court in *FirstRand Bank Ltd v Fillis* 2010 6 SA 565 (ECP) par 16.

¹⁵³ the *Ferris* case (n 1) par 31.

¹⁵⁴ 2015 3 SA 586 (SCA) par 30.

¹⁵⁵ (n 149) especially 143-154.

of rights) of both consumers and credit providers, could be useful for reassessing the entire debt-review process.

5.4 Sequestration and debt review

In *De Klerk v Griekwaland Wes Korporatief Bpk*¹⁵⁶ the question was whether the sending of a debt-restructuring proposal by a consumer to a credit provider in terms of section 86(1) of the act is an act of insolvency under section 8(g) of the Insolvency Act 24 of 1936.

Although the constitutional court assumed its jurisdiction over the matter, it held that it was not in the interest of justice to decide on the relationship between section 86 of the act and section 8 of the Insolvency Act. First, there was an independent finding by the high court that the consumer was factually insolvent. Since the court could find no reason to interfere with this finding, there would be no purpose in deciding on the issue of the act of insolvency.¹⁵⁷ Secondly, the Insolvency Act was about to be amended to add a new section 8A, determining that a debtor who has applied for a debt review must not be regarded as having committed an act of insolvency.¹⁵⁸ Hence there would be no purpose for the court to deal with the issue.¹⁵⁹

The *De Klerk* case is not a major case regarding the relationship between the act and the constitution. What can be mentioned is that, regarding its jurisdiction, the constitutional court did not expressly classify the case as a constitutional matter. However, it did mention its newly expanded jurisdiction in terms of the Constitution Seventeenth Amendment Act, 2012, which came into operation on 23 August 2013, after the application in the *De Klerk* case had been filed. The court did not deem it necessary to deal with its jurisdiction in terms of the latter act but simply assumed its jurisdiction due to the importance of the issue.¹⁶⁰

A question one could ask is how the constitutional court would have dealt with the matter had the Insolvency Act not been amended. It is arguable that the court would have arrived at an interpretation very close to the content of the new section 8A of the Insolvency Act. In other words, it probably would have found that the sending of a debt-rearrangement proposal is not an act of insolvency. Not only does this interpretation seem more in line with the purposes of the act but constitutionally it also makes sense that the consumer should be permitted to engage with the credit provider without fear of being sequestered for this reason alone.

¹⁵⁶ (n 1).

¹⁵⁷ par 15-19.

¹⁵⁸ See the schedule to the credit act. This amendment was occasioned by uncertainty following cases such as *Ex parte Ford* 2009 3 SA 376 (WCC); *Naidoo v Absa Bank Ltd* 2010 4 SA 597 (SCA); *FirstRand Bank Ltd v Evans* 2011 4 SA 597 (KZD); *Nedbank v Andrews* (240/2011) 2011 ZAECPEHC 29 (10 May 2011); *Investec Bank Ltd v Mlisana* (5399/11) 2011 ZAWCHC 413 (25 Oct 2011); *De Klerk v Griqualand West Corporative CC* (1353/10) 2013 ZANCHC 29 (30 Aug 2013); *FirstRand Bank Ltd v Janse van Rensburg* 2012 2 All SA 186 (ECP); *South African Bank of Athens v Muhammed* (8623/13) 2014 ZAKZDHC 29 (20 June 2014); *FirstRand Bank Ltd v Hardijzer* case no 47568/2008 (GP) (unreported). See further Chokuda "An application for debt review does not constitute an act of insolvency: *First Rand Bank Ltd v Janse van Rensburg*" 2013 *SALJ* 5; Steyn "Sink or swim? Debt review's ambivalent 'lifeline' – a second sequel to '... a tale of two judgments'" 2012 *PER* 190.

¹⁵⁹ the *De Klerk* case (n 1) par 20.

¹⁶⁰ par 12-14.

5.5 Reinstatement of credit agreements

Section 129(3) of the act provides that a consumer who is in default may remedy the default ("re-instate" the agreement) any time before the agreement is cancelled, by paying all amounts outstanding together with the credit provider's prescribed default charges and the reasonable costs of enforcing the agreement. Section 129(4) qualifies the operation of section 129(3) by listing certain events after which reinstatement can no longer occur. There are several problems with the interpretation of these provisions, even after their recent amendment.¹⁶¹

After the high court¹⁶² and the supreme court of appeal¹⁶³ pronounced on several aspects of the interpretation of section 129(3) and (4), the main question posed to the constitutional court in *Nkata v FirstRand Bank Ltd*¹⁶⁴ was whether the consumer had met the requirement in section 129(3) that he must pay the credit provider's reasonable enforcement costs. The case is interesting due to the divergent opinions expressed in, on the one hand, the majority judgment of Moseneke DCJ and, on the other hand, the two minority judgments of Cameron J and Nugent J respectively. The majority found that a consumer who wishes to rely on section 129(3) must pay only the enforcement costs if these were formally demanded by the credit provider and if the costs have either been quantified through agreement or have been assessed for reasonableness by a taxing official. Both minority judgments essentially held that none of this is required by the act.

A full exposé of the judges' reasoning cannot be provided here,¹⁶⁵ so I will restrict myself to some remarks of Moseneke DCJ regarding the relationship between the act and the constitution. The following passage is significant:

"The Act seeks to infuse values of *fairness, good faith, reasonableness and equality* in the manner actors in the credit market relate. Unlike in the past, the sheer raw financial power difference between the credit giver and its much-needed but weaker counterpart, the credit consumer, will not always rule the roost. Courts are urged to strike a balance between their respective rights and responsibilities. Yes, debtors must diligently and honestly meet their undertakings towards their creditors. If they do not, the credit market will not be sustainable. But the human condition suggests that it is not always possible – particularly in credit arrangements that run over many years or decades, as mortgage bonds over homes do. Credit givers serve a beneficial and indispensable role in advancing the economy and sometimes social good. They too have not only rights but also responsibilities. They must act within the constraints of the statutory arrangements. That is particularly so when a credit consumer honestly runs into financial distress that precipitates repayment defaults. The resolution of the resultant dispute must bear the hallmarks of *equity, good faith, reasonableness and equality*. No doubt, credit givers ought to be astute to recognise the

¹⁶¹ s 32 of the National Credit Act. See further Brits, Coetzee and Van Heerden "The re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *quo vadis?*" 2017 *THRHR* 177; Steyn "Re-instatement of a home mortgage bond by paying the arrears: the need for appropriate legislative reform" 2015 *Stell LR* 132; Brits "The 'reinstatement' of credit agreements: remarks in response to the 2014 amendment of section 129(3)-(4) of the National Credit Act" 2015 *De Jure* 75; Brits "Purging mortgage default: comments on the right to reinstate credit agreements in terms of the National Credit Act" 2013 *Stell LR* 165.

¹⁶² *Nkata v FirstRand Bank Ltd* 2014 2 SA 412 (WCC).

¹⁶³ *FirstRand Bank Ltd v Nkata* 2015 4 SA 417 (SCA).

¹⁶⁴ (n 1).

¹⁶⁵ See further Van Heerden "*Nkata v FirstRand Bank Ltd* [2016] ZACC 12 (12 April 2016) and its impact on the reinstatement of credit agreements governed by the National Credit Act 34 of 2005" in Hugo (ed) *Annual Banking Law Update 2016: Recent Legal Developments of Special Interest to Banks* (2016) 169.

imbalance in negotiating power between themselves and consumers. They ought to realise that at play in the dispute is not only the profit motive, but also the *civilised values of our Constitution*.¹⁶⁶

The judge furthermore drew the following conclusions from the *Sebola* case. First, the act “infuses constitutional considerations into the culture of borrowing and lending between consumers and credit providers”.¹⁶⁷ Secondly, the “purposes of the Act are directly attributable to the constitutional values of fairness and equality”.¹⁶⁸ And thirdly, the act aims “to create a credit marketplace that agrees with our constitutional democracy, both through its purpose ... as well as through the means that ought to be adopted to achieve these goals”.¹⁶⁹

6 Towards a constitutional view of consumer credit regulation?

6.1 General

Most disputes surrounding the interpretation and application of the act involve situations where the interests of credit providers and consumers come into conflict, and it is the role of the act to mitigate these tensions. Matters are complicated further by the fact that, despite espousing a balance between the interests of all parties, significant aspects of the act clearly aim to advance the consumer’s position in order to proactively rectify certain imbalances and for example to prevent and remedy over-indebtedness.¹⁷⁰ Many of these interventions unavoidably burden or limit the credit provider’s position, but the courts have been adamant that this does not mean that creditors’ interests can be ignored.¹⁷¹

Two kinds of credit cases have reached the constitutional court thus far: (1) ones where the constitutionality of a provision in the act was challenged, and (2) ones where the court was called upon to interpret a provision in the act. Relatively speaking, instances where the validity of a provision is challenged are less problematic than those where a provision must be interpreted. This is largely because the methodology for constitutionality challenges in South African law is relatively settled, even if there might be differences in opinion on whether a right is infringed and whether the infringement is justifiable. In the context of the act the *Opperman* case is a good example of a challenge under the property clause. However, regarding challenges brought under the equality clause, it seems that there is some confusion on how the concepts of differentiation and unfair discrimination apply to legislation like the act.¹⁷² For now, my only remark on this issue is that one must not be too quick to accuse a statute of discriminating merely because different categories of persons are treated differently when it comes to levels of regulation or protection.

¹⁶⁶ the *Nkata* case (n 1) par 94 (my emphasis).

¹⁶⁷ par 95.

¹⁶⁸ par 96, citing the *Sebola* case (n 1) par 36.

¹⁶⁹ the *Nkata* case (n 1) par 96, citing the *Sebola* case (n 1) par 36.

¹⁷⁰ Over-indebtedness – a central focus of consumer credit law in South Africa – is clearly a social ill with numerous negative consequences for the socio-economic well-being of individuals and families. In this respect Renke, Roestoff and Bekink (n 4) 95 raise the interesting argument that “since over-indebtedness could encroach upon a person’s constitutionally protected rights, there seems to be a constitutional duty on the state, including the legislative authority within the state, to take appropriate measures that would combat over-indebtedness in South African society”.

¹⁷¹ See eg the *Rossouw* case (n 111) par 17; *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 (SCA) par 2; the *Sebola* case (n 1) par 40; the *Kubyana* case (n 1) par 20-21; and also the *Jaftha* case (n 44) par 42, 51.

¹⁷² See eg Kok (n 83).

In contrast to the relatively straightforward examples of constitutionality challenges, there remains far greater uncertainty surrounding the interpretation of legislation in a manner that promotes the spirit, purport and objects of the bill of rights. Despite providing some impressive discourses on how the ideals of the act are linked to constitutional values, in my opinion the constitutional court regrettably has not given us much to go on methodologically. After studying judgments like those in the *Sebola* and the *Nkata* cases, I cannot say that I clearly see the link between the interpretation adopted and the values of the bill of rights. This is not to say that the relevant interpretation is necessarily wrong, just that there is an inadequate indication of why that particular interpretation is constitutionally the more correct one.

It is trite that if a provision can be interpreted in more than one way, the option which is most in line with the bill of rights must prevail. Although this is a good guideline, it is not always easy to apply. The credit act is not one-sided, so to say that one must adopt the interpretation that most favours the consumer is too superficial and does not take account of the balance which both the act and the bill of rights seek to maintain. One must consider that the act implicates not only the rights of one category of persons against the state. Instead, it implicates the rights and obligations of opposing contracting parties as against each other. And these rights include not only contractual rights and obligations but also constitutional rights and obligations.

In what follows I briefly summarise some of the main constitutional rights that are relevant when dealing with the act. Of course, these are not the only relevant aspects, but these are the main perspectives that have come to light from the case law discussed throughout this article.

6.2 Equality

In most of the constitutional court judgments the court drew a link between the purposes of the act and the constitutional value of equality. Indeed, it is fairly easy to see the link between equality and consumer protection – and theoretically this is probably the main hook on which to hang consumer law in general and consumer credit law in particular.

It is trite that one of the main reasons for consumer protection is the unequal bargaining power that often exists between suppliers and consumers. This inequality is a social and economic reality that is particularly sharp in the credit industry, where a consumer's desperate desire for funds often places the financier in such a powerful position that the temptation to abuse the situation is hard to resist.¹⁷³ Attempts to address this situation through consumer legislation are not new to South African law,¹⁷⁴ but the act has clearly taken statutory intervention to an elevated level. In broad terms, this intervention seeks to ensure that inequality in bargaining power, which is a practical reality, does not undermine the substantive equality before the law that the constitution strives for. The idea is that the content and consequences of consumer credit relationships should reflect not only the result

¹⁷³ Even the common law recognises this problem and has developed rules to counteract it in certain situations. An example is the prohibition against forfeiture clauses (*pacta commissoria*) in mortgage and pledge agreements. This prohibition was introduced already in Roman law (see *C* 8 34(35) 3), continued in Roman-Dutch law (see *Voet Commentarius ad Pandectas* 20 1 25) and received into South African law (see *eg Mapenduka v Ashington* 1919 AD 343 351-352, 358; *Graf v Buechel* 2003 4 SA 378 (SCA) par 12-16). See further Brits (n 36) 164-170.

¹⁷⁴ For a historical account, see Otto "The history of consumer credit legislation in South Africa" 2010 *Fundamina* 257.

of contractual bargaining (which can be distorted) but also the values that the bill of rights espouses.¹⁷⁵

6.3 Housing

A central constitutional perspective in the consumer credit context is the protection of housing rights, since most mortgage agreements regulated by the act involve the consumer's home. Indeed, a significant portion of consumer debt is based on home loans. For most people their home is their biggest asset and their home loan their biggest liability, which means that the stakes are very high. Therefore, it is only natural that mortgage agreements will feature prominently in consumer credit law. The importance of the act for mortgage bonds is also evidenced by the cases that have reached the constitutional court. The *Sebola*, *Kubyana*, *Ferris* and *Nkata* cases all involved mortgage agreements where the consumer's home was at stake, even though the housing clause did not play a direct role in the court's analysis.

The interpretation and application of provisions like section 129 can clearly have a significant impact on the enforcement of a mortgage agreement.¹⁷⁶ One of the purposes of the default notice is to seek ways to avoid normal debt enforcement. If achieved, this will save the consumer's residential property. Similarly, a purpose of the reinstatement mechanism is to allow a consumer to undo the consequences of default, which will stop the foreclosure process and save the home. Properly applied, both of these initiatives can save a consumer's home, while preferably keeping the imposition on the credit provider's rights to a minimum.¹⁷⁷

Hence, in every instance where the interpretation and/or application of a provision in the act could lead to the loss of the consumer's home, the housing clause must be considered. This does not necessarily mean that a "pro-home" outcome must always be preferred, since it could be justifiable for a home to be lost if this is the only reasonable option to give effect to the credit provider's legitimate rights.¹⁷⁸ The point is that the act should ideally facilitate a process and provide a solution that avoids the unnecessary and unjustifiable infringement of the consumer's section 26 rights, while being sensitive to the reasonable enforcement of the creditor's rights.

6.4 Access to courts

One of the main ways in which the right of access to courts (s 34 of the constitution) has manifested is in the requirement of judicial oversight over the debt enforcement and execution processes. The constitutional principle has been established in constitutional court judgments like the *Chief Lesapo* and *Stellenbosch Legal Aid* cases (and, with reference to housing rights, in the *Jafitha* and *Gundwana* cases). Moreover, it seems clear that the act does not permit debt enforcement to take place

¹⁷⁵ See especially the *Nkata* case (n 1) par 94 (quoted in par 5.5 above).

¹⁷⁶ See the *Sebola* case (n 1) par 2 (the last sentence). See also par 47 for one of the arguments of the NCR, characterising "the notice as a vital safety valve designed to prevent unnecessary litigation and premature foreclosure on consumers' assets"; as well as par 59, where the court acknowledged the argument by SERRI and the NCR that "one of the statute's core innovations is significantly consumer-friendly and court-avoidant procedures" and that "these procedures are designed to help debtors to restructure their debts, or find other relief, before the guillotine of cancellation or judicial enforcement falls".

¹⁷⁷ See Brits (n 47) par 7.2 for arguments on how the constitutional property rights (s 25) of mortgage creditors and the housing rights (s 26) of mortgage debtors can be balanced through the application of legislation like the act.

¹⁷⁸ See the *Jafitha* case (n 44) par 57-59; the *Gundwana* case (n 45) par 53-54.

without complying with the procedures set in the act, therefore largely abolishing things like *parate executie* and self-help in this context.¹⁷⁹ Of course, judicial oversight is not an end in itself, but a means to ensure that disputes are resolved in a just manner and, importantly, that all relevant considerations are taken into account before a judgment is granted or executed.

In addition to serving the interests of the consumer, the right of access to courts is also relevant for the credit provider. It has been held that section 34 entrenches the state's duty to assist persons in the enforcing of private law rights.¹⁸⁰ Hence, section 34 is implicated if, as a consequence of the protection afforded to consumers, a credit provider is restricted in the judicial enforcing of its contractual and proprietary rights.¹⁸¹ By and large these limitations are justifiable in view of the act's purposes, but section 34 can function as a check to ensure that the restrictions on the enforcement of creditors' rights do not become unreasonable and disproportionate. The act acknowledges this perspective when it for instance stipulates that normal debt enforcement may continue if the consumer defaults on his obligations under the debt-rearrangement order¹⁸² and that the credit provider has the right to terminate the debt-review process after a certain time has lapsed.¹⁸³

6.5 Property

Another useful human rights perspective in the credit context is protection of property rights in section 25(1) of the constitution. If a restriction on a credit provider's rights is classified as a "deprivation of property", then the arbitrariness test can serve as a normative standard against which to measure whether or not a regulatory interference goes too far. First, as in the *Opperman* and the *Chevron* cases, it may be that a certain provision imposes on the credit provider's rights to such an extent that it is declared invalid. Secondly, the arbitrariness test can be used in instances where a court must exercise a discretion to determine the extent with which an interference with a creditor's rights should be allowed. The most obvious example is the granting of a debt-rearrangement order, which clearly interferes with the creditor's right to receive payment in accordance with the original contract. This "deprivation of property" is permissible in view of the important purpose that is sought to be achieved by debt review, but it is vital that the content of the order does not go too far. In this respect the non-arbitrariness test can function as a yardstick to help inform the most optimal content of the debt-rearrangement order. Accordingly, as long as the interference with the creditor's rights does not amount to an arbitrary deprivation of property, the order is constitutionally acceptable.¹⁸⁴

The protection of creditors' rights (particularly property but also access to courts) is reflected in the purposes of the act, where it is stated that mechanisms for the resolving of over-indebtedness is "based on the principle of satisfaction by the consumer of all responsible financial obligations"¹⁸⁵ and that "the system of debt restructuring, enforcement and judgment" must prioritise "the eventual satisfaction

¹⁷⁹ Brits (n 42).

¹⁸⁰ *Ivorat Properties (Pty) Ltd v Sheriff, Cape Town* 2005 6 SA 96 (C) par 40, relying on the *Chief Lesapo* case (n 33) par 13.

¹⁸¹ See eg *FirstRand Bank Ltd v Olivier* 2009 3 SA 353 (SE) par 14; the *Sebola* case (n 1) par 21; the *Jili* case (n 154) par 30.

¹⁸² s 88(3) of the act. See par 5.3 above.

¹⁸³ s 86(10) of the act.

¹⁸⁴ See further Brits (n 47) ch 6.4.

¹⁸⁵ s 3(g) of the act.

of all responsible consumer obligations under credit agreements".¹⁸⁶ In other words, although creditors' rights are often interfered with, modified or postponed, it is not the purpose of the act that a credit provider should lose any of its monetary claims.¹⁸⁷

7 Conclusion

The relationship between consumer credit law and human rights law is still relatively unexplored¹⁸⁸ – and not only in South Africa.¹⁸⁹ Therefore, in this regard I have sought to provide some preliminary thoughts, particularly in response to the cases discussed above. My general thesis is that any analysis of consumer credit regulation must be done within a paradigm that considers not only the private-law rights and duties of the parties but also the protection and justifiable limitation of the constitutional rights of both credit providers and consumers. Essentially there are two levels of rights – common-law rights created under the credit agreement and fundamental rights endowed by the constitution. The system of fundamental rights serves as a standard that (1) indicates the ideals to which consumer credit law should strive and (2) indicates the points beyond which regulatory interferences with rights are not permitted to go.

The National Credit Act promotes certain rights and values, mostly in favour of the consumer, but this will often extend the credit provider's duties and/or limit its rights beyond that which was contractually agreed upon. Although consumer protection may be constitutionally justified or mandated, the corresponding burden or limit imposed on the credit provider may also have constitutional implications. Therefore, the general contention is that the advancing of the consumer's position may only go as far as does not unjustifiably limit or burden the creditor provider's position. Stated in another way, the limitation of the creditor's contractual, proprietary and procedural rights should not go further than what is necessary to achieve the legitimate consumer protection purposes of the act.

SAMEVATTING

DIE NASIONALE KREDIETWET EN DIE HANDVES VAN MENSEREGTE: OP PAD NA 'N KONSTITUSIONELE BENADERING TOT DIE REGULERING VAN VERBRUIKERSKREDIET

Gedurende die laaste paar jaar het geskille rondom die Nasionale Kredietwet 34 van 2005 'n verbasend aantal kere die konstitusionele hof gehaal. Die hoogste hof beskou dan ook kwessies rondom die toepassing en uitleg van hierdie wet as spesifiek grondwetlike aangeleenthede, maar wat presies beteken dit? Die doel van hierdie artikel is om 'n reeks uitsprake waarin die verhouding tussen die handves van menseregte en die Kredietwet ter sprake was, onder oë te neem om sodoende sekere tendense en perspektiewe te identifiseer.

Dit blyk byvoorbeeld dat die grondwetlike regte tot gelykheid, toegang tot howe, behuising en eiendom gereeld ter sprake kom in die kredietreg, maar die kans is goed dat vele ander regte en waardes relevant kan wees. Om konteks te skep, ondersoek die artikel ook 'n aantal konstitusionele uitsprake wat nie met die Kredietwet as sulks te doen gehad het nie, maar waar die grondwet 'n impak op aspekte van die breër kredietreg gehad het. Alhoewel die fokus op uitsprake van die konstitusionele hof is, word daar kortliks ook na 'n paar interessante uitsprake van laer howe verwys om die bespreking te verryk.

¹⁸⁶ s 3(i).

¹⁸⁷ See *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA) par 19.

¹⁸⁸ Rare examples from South African scholarship include Vessio (n 4) 132-146; Renke, Roestoff and Bekink (n 4).

¹⁸⁹ See eg Ondersma "A human rights approach to consumer credit" 2015 *Tulane LR* 373.

Die uiteindelijke oogmerk van die outeur van die artikel is om 'n paar treë te neem op pad na 'n sistematiese konstitusionele benadering tot die regulering van verbruikerskrediet. Nadat sekere tendense en perspektiewe geïdentifiseer word met verwysing na die relevante regspraak, word 'n paar voorlopige gedagtes gedeel aangaande die tipe denkwysse wat gehandhaaf sou moes word as geskille rondom die kredietwet nie bloot vanuit 'n privaatregtelike perspektief gesien sou word nie, maar ook vanuit 'n oogpunt wat die fundamentele regte van beide kredietverbruikers en kredietverskaffers in oorweging neem.

'n Basiese argument word uitgemaak dat grondwetlike standaarde kan dien as 'n riglyn vir die mate waartoe verbruikers beskerm behoort te word, maar ook as 'n aanduiding van die grense van sodanige beskerming wanneer dit die inkorting van die kredietverskaffer se belange tot gevolg het. Met ander woorde, die regte van verbruikers behoort slegs deur wetgewing bevorder te word tot sodanige mate dat dit nie onregverdigbaar inbreuk maak op die grondwetlike regte van kredietverskaffers nie.

GREED OF LAWYER COLOURS EGREGIOUSNESS OF EXTORTIONATE CONDUCT

"This behavior may not have reached the level of extortion or duress in their technical legal sense – it was surely not criminal extortion – but it was, as we said, extortionate. And though absence of financial hardship to *Sufrin* may have weighed against the award of punitive damages, *Hosier's* greed weighed in favor of it: here was a lawyer who was receiving hundreds of millions of dollars in attorneys' fees yet thought it appropriate to commit a tort in order to squeeze what to him was an almost nominal amount of money from a former partner. *Hosier* bragged about his aggressiveness and the jury was entitled to consider that in determining the egregiousness of his tortious conduct. In these circumstances, a rational jury could conclude that *Hosier* did not merely commit your garden-variety intentional-interference tort, which as we have seen would not be enough to warrant awarding punitive damages, but an aggravated form of the tort, as in other intentional-interference cases in Illinois in which punitive-damages awards have been upheld" (*Sufrin v Hosier* US CA 7th Circ nos 97-1132 and 97-1241 27 Oct 1997 per Posner CJ).