IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NUMBER: CCT88/14

In the matter between:

CHEVRON SOUTH AFRICA (PTY) LTD	Applicant
and	
DENNIS EDWIN WILSON T/A **WILSON'S TRANSPORT**	First Respondent
THE MINISTER OF FINANCE	Second Respondent
THE MINISTER OF TRADE AND INDUSTRY	Third Respondent
THE NATIONAL CREDIT REGULATOR	Fourth Respondent

APPLICANT'S HEADS OF ARGUMENT

INTRODUCTION

1. The Court below granted an Order declaring that Section 89(5)(b) of The National Credit Act, No. 34 of 2004 (*"the NCA")* was invalid and unconstitutional. That Order was referred to the Constitutional Court for confirmation in terms of Section 172(2)(a) of the Constitution.

2. The facts which led to the granting of the Order in the Court below are set out paragraph 2 of the Judgment of Baartman, J[1] and need not be repeated. The High Court proceedings flowed from an action instituted by Applicant against First Respondent, arising from an agreement concluded between them in terms of which Applicant granted credit to First Respondent for the purchase of petroleum products.[2]. The agreement was void by virtue of the fact that Applicant, who was required to be registered as a credit provider in terms of Section 40 of the NCA was not so registered.

THE CONSTITUTIONAL CHALLENGE

3. The impugned section of the NCA, Section 89(5)(b), provides as follows:-

> *"(5) If a credit agreement is unlawful in terms of this section, despite any provision of common law, any other legislation or any provision of an agreement to the contrary, a court must order that –*
>
> *……..*
>
> *(b) the credit provider <u>must</u> refund to the consumer any money paid by the consumer under that agreement to the credit provider, with interest calculated –*

[1] Record at Volume 3 Pages 224 to 227;

[2] Record at Volume 1 Page 10 at paragraph 23;

> *…(i) at the rate set out in that agreement; and*
>
> *…(ii) for the period from the date on which the consumer paid the money to the credit provider, until the date the money is refunded to the consumer."*

4. Section 89(5)(b) imposes an obligation on Applicant to pay First Respondent approximately R33m, being the amount First Respondent had over the years, paid for petroleum products received and utilized by him.

5. In **National Credit Regulator v Opperman 2013 (2) SA 1**[3] this Court, held that Section 89(5)(b) of the NCA, which extinguished the credit grantor's right to claim restitution based on unjustified enrichment, constituted a deprivation of property within the meaning of Section 25 of the Constitution. By parity of reasoning, Section 89(5)(b), which obligates the credit grantor to refund all monies it has received arising from an agreement made unlawful by reason of Section 89(5), constitutes a deprivation of property.

6. Section 25(1) of the Constitution provides as follows:

[3] At Paragraph 88;

> *(1) No one may be deprived of property except in terms of law of general application[4], and no law may permit arbitrary deprivation of property.*

7. A juristic person, like a natural person, is entitled to the rights enshrined in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.[5] Thus, provided that the juristic person has interests which are being affected by a law of general application and provided further that the interests are recognised as constitutionally protected property, the juristic person, like a natural person, will be entitled to have its rights protected under this section.

8. Any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned.[6] However, as the overriding purpose of the constitutional property clause is to "*strike a proportionate balance between the protection of existing property rights and the promotion of public interest,"*[7] *a* deprivation of property will be

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[4] A law of general application is one which is impersonal in the sense that it imposes a burden on an abstract class. (See: Iain Currie "The Bill of Rights Handbook." (Sixth edition) at page 53 8);

[5] Section 8(4) of the Constitution;

[6] The court in FNB (at paragraph [57])

[7] The courts will seek to strike the required balance between the individual right to property and the public purpose sought to be pursued in or the public interest, the law in question. See: First National Bank Of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service And Another; First National Bank of SA Ltd t/a Wesbank v Minister Of Finance 2002 (4) SA 768 (CC) at paragraph [50]

permissible provided it is not arbitrary, and is carried out in terms of a law of general application[8].

9. As regards the question of whether a deprivation is arbitrary, this Court said the following in **FNB of SA Limited t/a Wesbank v Commissioner, SARS** and **Minister of Finance 2002 (4) SA 788 (CC):**

> *"[65]In its context "arbitrary", as used in s 25, is not limited to non-rational deprivations, in the sense of there being no rational connection between means and ends. It refers to a wider concept and a broader controlling principle that is more demanding than an enquiry into mere rationality. At the same time it is a narrower and less intrusive concept than that of the proportionality evaluation required by the limitation provisions of s 36. This is so because the standard set in section 36 is "reasonableness" and "justifiability", whilst the standard set in s 25 is "arbitrariness". This distinction must be kept in mind when interpreting and applying the two sections.*
>
> *[66]It is important in every case in which s 25(1) is in issue to have regard to the legislative context to which the prohibition against "arbitrary" deprivation has to be applied; and also to the nature and extent of the deprivation. In certain circumstances the legislative deprivation might be such that no more than a rational connection between means and ends would be required, while in others the ends would have to be*

[8] See: Iain Currie "The Bill of Rights Handbook." (Sixth edition) at page 53 8);

more compelling to prevent the deprivation from being arbitrary.

……

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

(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.

(b) A complexity of relationships has to be considered.

(c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.

(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.

(e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation, than in the case when

the property is something different, and the property right something less extensive. This judgment is not concerned at all with incorporeal property.

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(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.

(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with "arbitrary" in relation to the deprivation of property under s 25."

10. The Court concluded that a deprivation of property will be arbitrary within the meaning of section 25 of the Constitution if the law in issue either fails to provide *'sufficient reason'* for the deprivation or is procedurally unfair.[9]

[9] See Yacoob J in Mkontwana v Nelson Mandela Metropolitan Municipality And Another; Bissett And Others v Buffalo City Municipality And Others; Transfer Rights Action Campaign

11. All of the parties, now before the Court, consent to the granting of the Order which was issued by the Court below, and there is thus no dispute between them that the deprivation created by Section 89(5)(b) is indeed arbitrary. As pointed out in the **FNB case** (referred to above), the question of whether sufficient reason for a deprivation of property is established might involve a proportionality evaluation akin to that required by Section 36(1) of the Constitution.

SECTION 36 OF THE CONSTITUTION

12. Section 36 of the Constitution stipulates that a fundamental right may be limited in terms of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account relevant factors including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and less restrictive means to achieve the purpose. As the Constitutional Court said in **S v Makwanyane and Another 1995 (3) SA 391 (CC)[10]:**

> *"The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the*

And Others v MEC Local Government And Housing, Gauteng, And Others; (Kwazulu-Natal Law Society And Msunduzi Municipality As Amici Curiae) 2005 (1) SA 530 (CC) at pages 546-547 at paragraphs [34];

[10] At Paragraph 104;

weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s33(1). The fact that different rights have different implications for democracy and, in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."

LIMITATIONS IN TERMS OF SECTION 36 OF THE CONSTITUTION

13. In determining a proportionality evaluation as required by Section 36(1) of the Constitution and the question of arbitrary deprivation the following aspects are emphasized.

13.1 Section 89(5) (b) has the draconian consequence that the credit grantor is obliged to part with, and is permanently deprived of, monies it received as a *quid pro quo* under the agreement it concluded with the credit receiver;

13.2 The credit grantor deprived of such monies, notwithstanding that it may have fully performed its obligations under the said agreement and given full value to the credit receiver for the payment made by the credit receiver;

13.3 The deprivation takes place without any consideration being given to the conduct to the parties to the transaction, their respective financial positions, their level of business and financial acumen, and the extent to which the credit receiver has profited from the transaction;

13.4 Courts are given no jurisdiction to consider whether, in the circumstances of a particular transaction, an order should be granted which in part or whole ameliorates the harsh consequences flowing from Section 89(5)(b).

14. It is, in the circumstances, submitted that the deprivation which Section 89(5)(b) creates, is an arbitrary deprivation as envisaged in Section 25(1) of the Constitution.

15. To determine whether there is sufficient reason for a permitted deprivation, it is necessary to evaluate the relationship between the purpose of the law and the deprivation effected by that law. As the Court

held in the **Mkontwana** case: [11]

> "*A complexity of relationships must be considered in this assessment including that between the purpose of the provision on the one side and the owner of the property as well as the property itself on the other. If the purpose of the law bears no relation to the property and its owner, the provision is arbitrary*".

16. Even where there exists a connection between the purpose of the deprivation and the property or its owner, there must be sufficient reason for that deprivation otherwise it will be deemed to be arbitrary[12]. The Court held further:

> *"The nature of the relationship between means and ends that must exist to satisfy the s 25(1) rationality requirement depends on the nature of the affected property and the extent of the deprivation. A mere rational connection between means and ends could be sufficient reason for a minimal deprivation. However, the greater the extent of the deprivation the more compelling the purpose and the closer the relationship between means and ends must be."*[13]

17. Section 89(5) is already in itself a drastic remedy imposed on the Applicant. In terms of section 89(5)(b), the Applicant is required,

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[11] **Mkontwana v Nelson Mandela Metropolitan Municipality And Another**; Bissett And Others v Buffalo City Municipality And Others; Transfer Rights Action Campaign And Others v MEC, Local Government And Housing, Gauteng, And Others; (Kwazulu-Natal Law Society And Msunduzi Municipality As Amici Curiae) **2005 (1) SA 530 (CC)**

[12] Mkontwana at page 547 paragraph [35];

[13] Mkontwana at page 547 paragraph [35];

irrespective of the circumstances, to repay to a consumer all amounts that were paid to it by that consumer.

18. In Applicant's case this could mean it having to repay First Respondent approximately R33 million[14] for all fuel products which First Respondent had previously received and paid for and thereafter used for his own benefit[15].

19. The South African financial sector consisted of two disparate sectors, on the one hand, a highly developed, formal financial system, serving primarily middle and high-income predominantly white consumers and large enterprises, serviced by banks and other financial institutions, and on the other hand, a large informal financial market servicing low income and largely historic disadvantage consumers and small and medium enterprises, the servicing been mainly by micro-lenders, loan sharks and pawnbrokers. [16]

20. The purpose of the adoption of the National Credit Act (NCA) was to protect vast numbers of South Africans who enter into credit agreements, most of them at considerable disadvantage in terms of resources, education and legal skills when compared to the credit providers concerned.[17] Furthermore, when adopting the NCA, the Department of

[14] Record Volume 1 Page 24 Paragraph 62;

[15] Record Volume 1 Page 20 Paragraph 50;

[16] Record At Volume 1 page 94 Paragraph 15.1 to Page 95 Paragraph 15.2;

[17] Record at Volume 2 Page 141 Paragraph 14;

Trade and Industry was acutely aware of the size of the micro-lending industry as well, as it is significant growth rate, which was underpinned by the fact that lenders could make limitless profits.[18]

21. Consequently, one of the proposed solutions was that all credit providers should be registered and rather benefit from exemptions from compliance and reporting burdens and that this should be done in accordance with the scope and nature of these providers and the risks these providers present to consumer protection.[19]

22. Although the underlying purpose for requiring credit providers to be registered is laudable, the statutory invalidity provisions found in Section 89(5)(b) draw no distinction between consumers falling into the lower income earning brackets, who are vulnerable and exploitable, and consumers who are wealthy and successful businessman, controlling businesses and assets worth millions of Rands.

23. The type of consumer to whom Applicant supplied goods on credit are by no means financially vulnerable consumers. They are consumers who operate businesses and utilise diesel fuel and other petroleum products supplied by the Applicant. One such consumer was First Respondent who operated a multi-million rand transport business.

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[18] Record at Volume 1 Page 96 Paragraph 18;

[19] Record at Volume 2 Page 104 Paragraph 34.2

24. Furthermore, the Act itself provides a range of measures, including drastic ones, which can be employed against a credit provider who fails and/or refuses to register with the Regulator as required by Section 40 of the Act. Such a party firstly forfeits the right to compel performance of the contract concluded with the consumer and may thus (subject to possible considerations of enrichment) be unable to obtain any *quid pro quo* for the goods of services supplied to the consumer.

25. A party failing to register may be faced with an order issued by the National Consumer Tribunal under Sections 149, 150 or 151 of the Act and may be faced with the criminal sanctions imposed by Section 160(1) should an order issued by the Tribunal be contravened.

26. To compel an unregistered credit provider in the position of the Applicant to refund monies paid by the consumer for product received by that consumer, simply because the credit provider is unregistered makes, in the light of the alternative penalties available in the Act, the imposition of the penalty under section 89(5)(b) excessive.

LEGISLATION IN OTHER JURISDICTIONS

27. There is support to be found in legislation covering consumer credit both in the United Kingdom[20] and in Australia[21] that a Court (or

[20] Record Volume 1 Page 33 paragraphs 90 -91;

appropriate body) should have a discretion when faced by an errant unlicensed credit provider involved in unlawful credit activities.

27.1 In the United Kingdom, the Consumer Credit Act of 1974, Act 39 of 1974 is applicable. Where a business has committed an offence by engaging in activities without a license¸ an agreement concluded by an unlicensed creditor or owner will be *prima facie* unenforceable unless the Director makes an order to the contrary

27.2 If a Director intends not to grant an order he/she is obliged (shall), in terms of subsection (3), to inform the Applicant of the reasons why he is intending to refuse the application and must invite the applicant to send representations in support of his application.

27.3 In Australia, as in the United Kingdom a business wishing to be involved in credit activities must obtain a licence which will allow it to engage in particular credit activities. The relevant legislation covering consumer credit in Australia is the National Consumer Credit Protection Act 2009. A person involved in credit activities without a licence commits an offence.

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[21] Record Volume 1 Page 34 Paragraph 96 -97;

27.4 In terms of section 183 of the Act, a Court has a discretion to relieve a wrongdoer from contravention of a civil penalty where the wrongdoer has acted honestly and, having regard to all the circumstances of the case, the Court is satisfied that the person ought fairly to be excused for the contravention

MOOTNESS

28. In the light that the Amendment Bill has been signed into law and will soon become operational, the potential exists that this challenge will become moot. In **President, Ordinary Court Martial, And Others v Freedom Of Expression Institute And Others 1999 (4) SA 682 (CC)**:

> "[*15] However, where the relevant legislative provision has been repealed after the High Court has made the order of invalidity, but before this Court hears the confirmation or appeal proceedings or before it gives its order, the need for certainty may well fall away. There may, however, be a need for the Court to give a judgment on the appeal or confirmation proceedings in order to resolve the dispute which gave rise to the litigation between the parties, or for other reasons.*[22]
>
> *[16] In my view, however, s 172(2) does not require this Court in all circumstances to determine matters brought to it under that subsection. At least where the provision declared invalid by the High Court has subsequently been repealed by an Act of Parliament, the Court has a discretion to decide whether or not it should deal with the matter. In this regard, the Court should*

[22] Director Of Public Prosecutions, Transvaal v Minister Of Justice And Constitutional Development, And Others 2009 (4) SA 222 (CC) at Page 249 paragraph [61];

consider whether any order it may make will have any practical effect either on the parties or on others".

29. Section 172(2) of the Constitution has two clear purposes: the first is to ensure that it is only the Constitutional Court that has the power to declare provisions in national or provincial legislation invalid on the grounds that they are inconsistent with the Constitution and the second purpose is the constitutional purpose of avoiding disruptive legal uncertainty.

30. Although the Amendment Bill has been signed into law and will soon become operational this does not, however, render the application moot, or unnecessary, because, although the Bill has been signed into law there is no clarity as to when it will be promulgated. Until such time it is promulgated, various customers who received credit from Applicant can argue (thereby causing disruptive legal uncertainty) that as the Amendment Bill has no retrospective operation, any right to repayment which arose prior to the promulgation of the bill remains intact.

CONCLUSION

It is respectfully h submitted that the Order granted by the Court below should be confirmed in terms of section 172(2)(a) with no order as to costs.

A C OOSTHUIZEN SC
Senior Counsel for Applicant
Chambers
18 September 2014

P. A. TORRINGTON
Junior Counsel for Applicant
Keerom Street Chambers
30 September 2014

CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE CCT 88/14

WCHC NO: 5244/13

In the matter between:

CHEVRON SA (PTY) LIMITED Applicant

and

DENNIS EDWIN WILSON t/a WILSON'S TRANSPORT First Respondent

THE MINISTER OF FINANCE Second Respondent

THE MINISTER OF TRADE & INDUSTRY Third Respondent

THE NATIONAL CREDIT REGULATOR Fourth Respondent

THIRD RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

1. The Applicant ("Chevron") instituted these proceedings on or about 9 April 2013.

2. The primary relief sought in its Notice of Motion is a declaratory Order that sections 40(4) and 89(2)(d) of the National Credit Act No. 34 of 2005 ("the

Act") are declared to be inconsistent with the provisions of section 25 of the Constitution. This relief was abandoned in the course of the proceedings. In the alternative, an Order is sought that a discretion is introduced into section 89(5). The Applicant persists with this relief in relation to section 89(5)(b).

3. The impugned provision provides as follows:

> "(5) If a credit agreement is unlawful in terms of this section, despite any provision of common law, any other legislation or any provision of an agreement to the contrary, a court must order that-
>
> ....
>
> (b) the credit provider must refund to the consumer any money paid by the consumer under that agreement to the credit provider, with interest calculated-
>
> (i) at the rate set out in that agreement; and
>
> (ii) for the period from the date on which the consumer paid the money to the credit provider, until the date the money is refunded to the consumer;"
>
> (Own Emphasis)

4. In the proceedings before the Western Cape High Court, the Minister proposed a reformulation of the impugned section. The parties were in agreement that the proposed reformulation removes the Applicant's cause for complaint.

5. On 5 June 2014, the Western Cape High Court granted an Order in terms whereof it declared section 89(5)(b) of the Act to be invalid and unconstitutional

and reformulated the section so as to remedy the defect. It also limited the ambit of its order so that it has no impact on matters in which final judgment has been delivered and in which no application for leave to appeal is pending.[1]

6. The Order was granted pursuant to an agreement between the parties but after the Court heard full argument on the matter.

7. In these proceedings for confirmation of the Order of the Western Cape High Court, we address the following:

7.1. First, we identify the dispute that is currently before this Court.

7.2. Second, we briefly explain the basis for the Minister's stance in this matter.

7.3. Third, we address the nature of the relief that falls to be granted in this matter.

[1] Record: Vol. 3; page 237.

THE DISPUTE

8. In the Minister's Answering Affidavit:

8.1. He contended that sections 40(4) and 89(2)(d) of the Act do not result in a constitutional infringement in that neither of these provisions results in a deprivation of property or indeed an arbitrary deprivation of property as contemplated by section 25(1) of the Constitution.[2]

8.2. He accepted that there is indeed a tension between a consumer's claim for refund of money paid to the credit provider (in terms of section 89(5)(b)) and the credit provider's enrichment claim (under the common law). The obligatory order that a Court must make pursuant to section 89(5)(b) does pose certain difficulties.[3]

8.3. He proposed the following reformulation of section 89(5) of the Act[4]:

> "(5) If a credit agreement is unlawful in terms of this section, despite any provision of common law, any other legislation or any provision of an agreement to the contrary, a court:
>
> (a) must order that the credit agreement is void as from the

[2] Record: Vol. 1; page 90; par 4.1.
[3] Record: Vol. 1; page 90; par 4.2.
[4] Record: Vol. 1; page 90; par 4.2.

date the agreement was entered into;

(b) may order the credit provider to refund to the consumer any money paid by the consumer under that agreement to the credit provider, with interest calculated-

(i) at the rate set out in that agreement; and

(ii) for the period from the date on which the consumer paid the money to the credit provider, until the date the money is refunded to the consumer."

9. The Minister accepts that the obligatory nature of the Order contemplated in section 89(5)(b) does indeed result in a constitutional infringement of section 25 of the Constitution. The Minister's proposed reformulation was aimed at introducing a discretion into section 89(5)(b).

10. Subsequent to the Minister's affidavit having been filed, the National Credit Amendment Act No. 19 of 2014 ("the Amendment Act") was passed. It was assented to on 16 May 2014 and pursuant to section 39 thereof it has not yet come into operation.

11. At this stage it is unclear as to when the Amendment Act will come into operation.

12. Section 27 of the Amendment Act amends section 89(5) of the Act to read as follows[5]:

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

13. It is submitted that as soon as the Amendment Act becomes operational, it will potentially render this challenge moot. [6]

THE CONSTITUTIONAL INFRINGEMENT

14. It is well established that if the government takes the view that it cannot support the legislation which is challenged for constitutionality, then it ought to explain to the Court the reasons for its attitude, and what it considers to be an appropriate order in the circumstances.[7]

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[5] Record: Vol. 3; page 216.

[6] JT Publishing JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others 1997 (3) SA 514 (CC) at par 16 and 17 and President, Ordinary Court Martial v Freedom of Expression Institute 1999 (4) SA 682 (CC).

[7] Ex parte Omar 2006 (2) SA 284 (CC) (2003 (10) BCLR 1087) in para 5; Mabaso v Law Society, Northern Provinces, and Another 2005 (2) SA 117 (CC) (2005 (2) BCLR 129) in paras 13 - 14; Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others 2003 (3) SA 345 (CC) (2003 (4) BCLR 357) in para 11; Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC) (2000 (8) BCLR 837) in paras 15 - 17; Beinash and Another v Ernst & Young and Others 1999 (2) SA 116 (CC) (1999 (2) BCLR 125) in para 27; Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening) 1999 (2) SA 1 (CC) (1999 (2) BCLR 139) in paras 7 - 9 (SA) and 6 - 8 (BCLR); Parbhoo and Others v Getz NO and Another 1997 (4) SA 1095 (CC) (1997 (10) BCLR 1337) in para 5.

15. The Minister has explained that in light of the decision in **National Credit Regulator v Opperman** 2013 (2) SA 1 (CC) there is indeed a tension between the consumer's claim for a refund of money paid to the credit provider in terms of section 89(5)(b) and the credit provider's enrichment claim under the common law.[8]

16. Indeed, in **Opperman** this Court held:

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

17. In addition to the tension referred to, the effect of the impugned section is that the credit provider must refund to the consumer any money paid by the consumer under that agreement to the credit provider, with interest. In other words, this refund occurs irrespective of the particularities of a situation.

18. The question thus arises as to whether the obligatory nature of the refund constitutes an infringement of section 25(1) of the Constitution. The latter section provides as follows:

[8] Record: page 296; par 4.2.

"25 Property

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

19. As regards the question of deprivation, this Court has held that whether there has been a deprivation depends on the extent of interference with the use, enjoyment or exploitation of the constitutionally protected property. According to the Court, interference significant enough to have a legally relevant impact on the rights of the affected party amounts to deprivation.[9] There can be no doubt in our respectful submission that the peremptory refund referred to in section 89(5)(b) amounts to a deprivation of property.

20. Accordingly, the only remaining question is whether the deprivation envisaged by the section is indeed arbitrary. As regards the interpretation of arbitrariness, in **FNB of SA Ltd t/a Wesbank v CSARS; FNB of SA Ltd t/a Wesbank v Minister of Finance** 2002 (4) SA 768 (CC), this Court held as follows:

> "[65] In its context 'arbitrary', as used in s 25, is not limited to non-rational deprivations, in the sense of there being no rational connection between means and ends. It refers to a wider concept and a broader controlling principle that is more demanding than an enquiry into mere rationality. At the same time it is a narrower and less intrusive concept than that of the proportionality evaluation required by the limitation provisions of s 36. This is so because the standard set in s 36 is 'reasonableness' and 'justifiability', whilst the standard set in s 25 is

[9] Opperman at par 66.

'arbitrariness'. This distinction must be kept in mind when interpreting and applying the two sections.

[66] It is important in every case in which s 25(1) is in issue to have regard to the legislative context to which the prohibition against 'arbitrary' deprivation has to be applied; and also to the nature and extent of the deprivation. In certain circumstances the legislative deprivation might be such that no more than a rational connection between means and ends would be required, while in others the ends would have to be more compelling to prevent the deprivation from being arbitrary.

.....

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

(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.

(b) A complexity of relationships has to be considered.

(c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.

(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.

(e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property.

(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation

embraces only some incidents of ownership and those incidents only partially.

(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36(1) of the Constitution.

(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under s 25. ..."

21. In **Reflect-All 1025 CC v MEC for Public Transport, Roads & Works, Gauteng Provincial Govt** 2009 (6) SA 391 (CC) this Court reiterated that an applicant relying on section 25 of the Constitution, will have to show that the impugned provisions are either procedurally unfair, or that insufficient reason is proffered for the deprivation in question, in other words it is substantively arbitrary.[10]

22. It is apparent from the aforegoing, that in determining whether the impugned section results in an arbitrary deprivation of property, a two-fold enquiry must be undertaken:

22.1. Whether the impugned provision is procedurally fair; and

[10] At para 37.

22.2. Whether on a substantive level, there is sufficient reason for the deprivation.

23. This Court has held (though in the context of section 89(5)(c)), that the problem is that the court is denied any discretion to decide on a just and equitable order.[11] This, we submit, clearly results in a procedural unfairness. Equally so, it is submitted, on a substantive level the peremptory wording of the section means that irrespective of whether or not there is sufficient reason for a deprivation, a Court must order a refund.

24. We accordingly submit that both on a substantive and procedural level, the deprivation is arbitrary. This is consistent with the judgment of the Western Cape High Court.[12]

25. The question that follows is whether the deprivation is reasonably justified under section 36 of the Constitution. In our submission, it cannot be so for the following reasons:

25.1. In the first instance, the Minister has not advanced any basis for a limitation of rights in terms of section 36 of the Constitution and nor has he advanced such an argument.

[11] National Credit Regulator v Opperman 2013 (2) SA 1 (CC) at par 69.
[12] Record: Vol. 3; page 229; par 8.

25.2. In the second instance, this Court, while not deciding definitively whether a deprivation of property which is indeed arbitrary, can ever be a reasonable and justifiable limitation in an open and democratic society in terms of s 36(1), has determined that many of the factors employed under the arbitrariness test to determine sufficiency of reasons yield the same conclusion when considering whether a limitation is reasonable and justifiable under section 36. While this observation was made in the context of section 89(5)(c), it is submitted that it yields no different an outcome in relation to section 89(5)(b).

26. The reasoning and conclusion of the Western Cape High Court cannot, in our submission be faulted in relation to section 36 of the Constitution. [13]

THE REMEDY

27. The consequence of the aforegoing, is that this Court must make a declaration of invalidity in terms of section 172(1)(a) of the Constitution.

28. The question that follows is what ancillary order (if any) would serve to be just and equitable for the purposes of section 172 of the Constitution.

[13] Record: Vol. 3; page 229; par 9.

29. We submit that the proposed reformulation adequately responds to the Applicant's complaint.

30. The proposed reformulation is, in our view consistent with the principles established by this Court in respect of a reading in, accepting, as this Court has held, that it should be resorted to sparingly.[14]

31. It is accepted that the proposed reformulation, in effect, requires a "redrafting" of the section. This notwithstanding, the Order as granted by the Western Cape High Court is supported by the Minister for two reasons:

    31.1. First, the proposed reformulation is entirely consistent with the Amendment Act. Accordingly, this leg of the Order would in any event, operate only on an interim basis pending the coming into operation of the Amendment Act. Indeed, as recognised by this Court with an interim reading-in, there is recognition of the legislature's ultimate responsibility for amending Acts of Parliament: reading-in is temporary precisely because the court recognises that there may be other legislative solutions and those are best left to Parliament to contend with.[15]

[14] Gaertner and Others v Minister of Finance and Others 2014 (1) SA 442 (CC) at par 82. See too: Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another 2014 (2) SA 168 (CC) at par 106.
[15] Gaertner and Others v Minister of Finance and Others 2014 (1) SA 442 (CC) at par 84.

31.2. Second, the effect of this leg of the Order is to bring section 27 of the Amendment Act into operation by way of an Order of Court. This section does not require measures to be put in place in order to facilitate its application and operation.

32. As regards any further ancillary Order, the Applicant has not sought any such order. As regards the question of retrospectivity in **S v Bhulwana; S v Gwadiso** 1996 (1) SA 388 (CC)[16] this Court has held that as a "general principle . . . an order of invalidity should have no effect on cases which have been finalised prior to the date of the order of invalidity."

33. In the circumstances, it is submitted that the Order made by the Western Cape High Court falls to be confirmed by this Court.

34. The Applicant does not seek costs against the Minister. Likewise, the Minister does not seek costs against the Applicant. In the circumstances, it is submitted that no costs order should be made in favour of or indeed against the Minister.

KARRISHA PILLAY
Counsel for the Third Respondent

6 October 2014
Chambers
Cape Town

[16] S v Bhulwana; S v Gwadiso 1996 (1) SA 388 (CC) at par 32.

LIST OF AUTHORITIES

1. Beinash and Another v Ernst & Young and Others 1999 (2) SA 116 (CC) (1999 (2) BCLR 125)

2. Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC) (2000 (8) BCLR 837)

3. Ex parte Omar 2006 (2) SA 284 (CC) (2003 (10) BCLR 1087)

4. FNB of SA Ltd t/a Wesbank v CSARS; FNB of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC)

5. Gaertner and Others v Minister of Finance and Others 2014 (1) SA 442 (CC)

6. Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening) 1999 (2) SA 1 (CC) (1999 (2) BCLR 139)

7. JT Publishing JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others 1997 (3) SA 514 (CC)

8. Mabaso v Law Society, Northern Provinces, and Another 2005 (2) SA 117 (CC) (2005 (2) BCLR 129)

9. National Credit Regulator v Opperman 2013 (2) SA 1 (CC)

10. Parbhoo and Others v Getz NO and Another 1997 (4) SA 1095 (CC) (1997 (10) BCLR 1337)

11. Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others 2003 (3) SA 345 (CC) (2003 (4) BCLR 357)

12. President, Ordinary Court Martial v Freedom of Expression Institute 1999 (4) SA 682 (CC).

13. Reflect-All 1025 CC v MEC for Public Transport, Roads & Works, Gauteng Provincial Govt 2009 (6) SA 391 (CC)

14. S v Bhulwana; S v Gwadiso 1996 (1) SA 388 (CC)

15. Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another 2014 (2) SA 168 (CC)

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: 88/14

In the matter between:

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

FOURTH RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

1 This matter concerns the constitutionality of section 89(5)(b) of the National Credit Act 36 of 2005 ("the Act").

2 In the High Court papers, the applicant ("Chevron") initially challenged the constitutionality of sections 40(4), 89(2)(d), 89(5)(a) and 89(5)(b). The challenges to the first three sections were opposed by the National Credit Regulator ("NCR"),[1] amongst others.

3 By the time of the High Court hearing, Chevron had confined its constitutional attack to section 89(5)(b) of the Act and abandoned its remaining challenges. The parties – including the Minister of Trade and Industry ("the Minister") and the NCR – were unanimous that the section was unconstitutional and agreed on what remedy ought to be granted in this regard. The High Court heard argument, declared the section inconsistent with the Constitution and invalid, and granted the remedy supported by all parties.

4 Chevron now seeks confirmation of this order from this Court. The NCR agrees that the section is constitutionally invalid and agrees that the remedy granted was appropriate. It consequently supports confirmation of the High Court order.

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[1] The NCR is established by sections 12 to 25 of the Act. It has various responsibilities in relation to the implementation of the Act.

5 Nevertheless, the NCR is mindful of the fact that, where an organ of state is of the view it cannot defend the constitutionality of a statutory provision, it must explain its reasons for coming to this view and deal with the order it contends should be made.[2] These brief heads of argument are filed with this purpose in mind.

THE PROVISIONS OF SECTION 89(5) OF THE ACT

6 Section 89(5) of the Act prescribes how unlawful credit agreements are to be dealt with.

7 In *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC), this Court concluded that section 89(5)(c) of the Act was unconstitutional. It accordingly declared it invalid. The Court was not called upon to deal with sections 89(5)(b), which is presently at issue.

8 Following the order made in *Oppermann*, section 89(5) of the Act provided as follows:

> *"If a credit agreement is unlawful in terms of this section, despite any provision of common law, any other legislation or any provision of an agreement to the contrary, a court must order that-*
>
> *(a) the credit agreement is void as from the date the agreement was entered into;*
>
> *(b) the credit provider must refund to the consumer any money paid by the consumer under that agreement to the credit provider, with interest calculated-*

---

[2] *Ex Parte Omar* 2006 (2) SA 284 (CC) at para 5; *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 (3) SA 345 (CC) at para 11.

(i) at the rate set out in that agreement; and

(ii) for the period from the date on which the consumer paid the money to the credit provider, until the date the money is refunded to the consumer; and"[3]

9 Subsequent to the institution of the High Court challenge and prior to the judgment of the High Court, the National Credit Amendment Act 19 of 2014 ("the Amendment Act") was passed by Parliament. It was assented to by the President on 19 May 2014.

10 The Amendment Act has not yet been brought into force. It is not clear when this will occur. When it comes into force, section 27 of the Amendment Act will amend 89(5) of the Act to read as follows:

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

[3] Subsection 89(5)(c), prior to being declared invalid by the Constitutional Court, provided as follows:

> "*(c) all the purported rights of the credit provider under that credit agreement to recover any money paid or goods delivered to, or on behalf of, the consumer in terms of that agreement are either-*
>
> *(i) cancelled, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer; or*
>
> *(ii) forfeit to the State, if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer.*"

THE CONSTITUTIONALITY OF SECTION 89(5)(b) OF THE ACT

11 Chevron contends that section 89(5)(b) of the Act permits arbitrary deprivation of property in breach of section 25(1) of the Constitution. This is because the section obliges a court, in all circumstances, to direct that a credit provider must refund the consumer all amounts paid in terms of an unlawful credit agreement, plus interest. Chevron contends that that this constitutional difficulty would be resolved by making the section 89(5)(b) power discretionary, rather than obligatory. The NCR agrees with these contentions.

12 Section 25(1) of the Constitution provides:

> *"No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."*

13 In a series of cases, this Court set out the test for arbitrary deprivation of property contrary to section 25. The following principles apply:

13.1 The meaning of "*property*" in section 25 is to be understood broadly. It includes both corporeal and incorporeal property.[4]

13.2 While this Court initially indicated that a "*deprivation*" of property occurs where there is "*any interference with the use, enjoyment or*

[4] *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 83; *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) at paras 61 - 63

exploitation of private property",[5] it later refined that test somewhat, as follows:

> *"Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation….(S)ubstantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation."*[6]

14 Applying these principles, there can be no serious dispute that section 89(5)(b) of the Act gives rise to a deprivation of property. The section obliges the Court, when dealing with an unlawful credit agreement, to direct in all circumstances that the credit provider repay to the consumer all amounts paid under the credit agreement, together with interest.

15 The only question that requires further consideration is whether the section permits "*arbitrary*" deprivations of property. This Court has held that a deprivation can be arbitrary because it is procedurally unfair or because it takes place "*without sufficient reason*". [7] In determining whether a deprivation is substantively arbitrary, this Court has held that:

> *"A complexity of relations must be considered in testing whether there is sufficient reason for the regulatory deprivation. These include the relationship between the means employed and the ends sought by the legislative scheme; the relationship*

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[5] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at para 57

[6] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) at para 32

[7] *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) at para 68

> *between the purpose of the deprivation and the nature of the property; as well as the extent of the deprivation in respect of that property. The more extensive the deprivation and the stronger the property interest, the more compelling the state's purpose has to be for having the regulatory deprivation at question in place."*[8]

16 There can be no doubting the importance of preventing unlawful credit agreements, especially for the protection of vulnerable consumers. Equally important is ensuring that vulnerable consumers do not suffer losses and harm when unlawful credit agreements come before the Courts.

17 However, what is equally clear is that the reach of section 89(5)(b) extends beyond what is reasonably necessary to protect vulnerable consumers. This is because the section obliges the court to direct a refund of consumers in all cases of unlawful credit agreements.

18 Given the absence of any discretion on the part of the court, at least some of the deprivations permitted by the section are arbitrary. This emerges clearly from the decision of this Court in *Opperman*:

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

[8] *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) at para 68

> ...
>
> *Though one can be sympathetic to the objects of the provision, I am not persuaded that the importance and purpose of the limitation, including deterrence and protection of the public, provide sufficient reason for the deprivation embodied in this provision. Whereas regulated deprivation may be permissible to further compelling interests, the state still has to be constrained in how it may pursue those ends. Given that the extent of deprivation here is far-reaching, the purpose should be stated clearly, and the means chosen to accomplish it must be narrowly framed. In this case the means chosen are disproportionate to the purpose, as is further demonstrated by the less restrictive means analysed below under the justification enquiry.*
>
> *Thus s 89(5)(c) results in arbitrary deprivation of property in breach of s 25(1) of the Constitution."*[9]

THE QUESTION OF REMEDY

19 In fashioning an appropriate remedy to deal with constitutional invalidity, the Courts are entitled to read words into a statute. However, this must be done in a manner that is as faithful to the legislative scheme as possible.[10]

20 In the present case, Parliament has already adopted a measure to remedy the constitutional defect. It did so by enacting the Amendment Act. All that remains is for this measure to be brought into force.

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[9] *National Credit Regulator v Oppermann and Others* 2013 (2) SA 1 (CC) at paras 69 – 71 (emphasis added)

[10] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at paras 74 – 76

21 The High Court remedied the constitutional defect by adopting the wording contained in the Amendment Act. It was correct to do so for three reasons.

21.1 First, this approach complied with the duty to grant a remedy in a manner that is as faithful to the legislative scheme as possible.

21.2 Second, this approach avoided having yet another different section 89(5) regime apply to unlawful credit agreements. It ensures that there the order of invalidity allows for a transition directly to the Amendment Act regime, rather than having a brief and potentially different interim regime.

21.3 Third, it avoided the need for any suspension of the declaration of invalidity.

22 The High Court was also correct to make expressly clear that its order has no effect on already completed cases. This is consistent with the approach of the this Court, which has repeatedly held that "*as a general principle . . . an order of invalidity should have no effect on cases which have been finalised prior to the date of the order of invalidity*".[11]

[11] *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) at para 32; *Engelbrecht v Road Accident Fund and Another* 2007 (6) SA 96 (CC) at para 45

CONCLUSION

23 In all the circumstances, the NCR does not oppose confirmation of the order granted by the High Court.

24 It is submitted that, having regard to the role of the NCR, no costs award should be made in its favour or against it. This approach was accepted as correct in the High Court.

STEVEN BUDLENDER

Counsel for the National Credit Regulator

Chambers, Johannesburg
6 October 2014

TABLE OF AUTHORITIES

Engelbrecht v Road Accident Fund and Another 2007 (6) SA 96 (CC)

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First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC)

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Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae) 2005 (1) SA 530 (CC)

National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC)

National Credit Regulator v Opperman 2013 (2) SA 1 (CC)

Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others 2003 (3) SA 345 (CC)

S v Bhulwana; S v Gwadiso 1996 (1) SA 388 (CC)

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number: CCT 88/14

In the matter between:

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

APPLICANT'S SUBMISSIONS IN RESPONSE TO COURT'S DIRECTIVE

PROCEDURAL ISSUES

1. All four Respondents now before the Court consented to the reading-in order granted by the court below. In the confirmation application now under consideration, First Respondent moreover formally, and as confirmed in its Heads of Argument, abided the decision of this Honourable Court.

2. In response to the directions issued by the Honourable Chief Justice on 21 January 2015, First Respondent has delivered certain written submissions, purportedly because "*the subject matter of the directions directly impact on the First Respondent and the pending court process in the Magistrate's Court, Wynberg, between Applicant and the First Respondent*". Applicant disputes this conclusion and points out that the issues existing between the parties in the Magistrate's Court proceedings will be debated in those proceedings, when they are continued. There is no reason for this Honourable Court to concern itself, to any particular degree, with the said Magistrate's Court action.

3. In paragraph 3 of the First Respondent's written submissions, First Respondent purports to "*update*" the Statement of Facts agreed between Applicant and the other Respondents. Applicant (and, as far as is known, Second, Third and Fourth Respondents) has not agreed to First Respondent's purported update, and the document sought to be introduced by First Respondent is not properly before the Court.

4. It appears from paragraphs 9 to 56 of the First Respondent's written submissions that First Respondent now contends that the reading-in to which it earlier assented is unnecessary. Applicant submits that all of the Respondents, notwithstanding the Court's request for further written submissions, remain bound by their consenting to the order granted in the

Court below and (in First Respondent's case) by its decision to abide the result of the confirmation application.

5. In **Hlatshwayo v Mare and Deas 1912 AD 242** at page 253, the Court said:

> *'"(T)he important question arises as to what is meant by a party to an action acquiescing in the judgment. In my opinion the effect of the authorities on this subject is to show that when once a party to an action has done an act from which the only reasonable inference that can be drawn by the other party is that he accepts and abides by the judgment, and so intimates that he has no intention of challenging it, he is taken to have acquiesced in it."*

6. The following was stated in the Appellate Court in **Standard Bank v Estate Van Rhyn 1925 AD 266** at page 268:

> *"If an unsuccessful litigant, by unequivocal conduct, inconsistent with an intention to appeal, shows that he acquiesces in the judgment, then he cannot continue to prosecute the appeal."*

7. And further (on the same page)

> *"This is the doctrine. If a man has clearly and unconditionally acquiesced in and decided to abide by the judgement he cannot thereafter challenge it."*

8. First Respondent, via his Counsel's written submissions, now seeks leave to file a Statement of Fact and to *"update"* the Statement of Fact previously agreed to and filed by Applicant and the other participating Respondents.

9. The invitation to the parties to deliver further written submissions does not, it is respectfully submitted, alter the aforegoing. There is no reason why First Respondent should not remain bound to its earlier consent to, and acquiescence in, the reading down sought by Applicant.

SECTION 89(5) (C) AND SECTION 89(5) (B) OF THE ACT

10. It is respectfully submitted that the intention of the Legislature, in promulgating Section 89(5)(b) is undoubtedly to impose a punitive measure, aimed at credit providers who enter into agreements that are unlawful on any of the grounds specified in Section 89(2). Such a credit provider must refund to the consumer any money paid by the consumer. It has frequently been pointed out by our courts that, where language of a predominantly imperative nature is used in Legislature, this is indicative of peremptoriness (**R v Busa 1959 (3) SA 385 (A)** at **390C**; **Harrington v Fester 1980 (4) SA 424 (C)** at **429F**).

11. Whatever the ambit of the *par delictum* rule might be, it is respectfully submitted that it should not apply in circumstances which would defeat the clear provisions and intention of the legislation giving rise to the illegality. **Jordan & Another v Penmill Investments CC & Another 1991 (2) SA 430**

(E) is, it is submitted, a case illustrating this factor. In that matter, a lessor sought the eviction of a lessee on the ground that the agreed rental had not been paid. The evidence established that, while the lessee had not paid the agreed rental, they had paid rental in an amount as determined by the Rent Board in terms of the then applicable rent control legislation. The lessor, however, sought to contend that the occupation of the lessee was in any event contrary to the Group Areas Act and Rent Control Act. An important point, on that issue, was that the landlord had been aware of the illegality of the lease when it was concluded. The Court refused to follow the suggestion that the *par delictum* rule should be relaxed, and said the following at **440F**:

> "*To hold that the **par delictum** rule should be relaxed in circumstances such as the present would be to allow unscrupulous landlords to exploit the plight of persons who, desperate for accommodation, dare not exercise their rights in terms of the Rent Control Act for fear of summary ejectment. For this reason, here, the interests of public policy favour enforcement of the **par delictum** rule rather than its relaxation.*"

12. In like manner, it is submitted that acknowledging an enrichment action and the possibility of relaxing the *par delictum* rule would, in respect of Section 89 of the Act, entirely negate what the Legislature sought to achieve by promulgating Section 89(5)(b). Credit providers could, for example, if sued for the return of monies paid, set up the enrichment action by way of a

counterclaim, thereby circumventing the clear wording of the Act which states that amounts received under an unlawful agreement must be repaid.

13. A further indication that the Legislature did not intend common law enrichment action to operate, in regard to an amount repaid under Section 89(5)(b), is that the introductory portion of Section 89(5) states that if an agreement is unlawful then "*despite any provision of the common law*", the consequences set out in Section 89(5)(a) and 89(5)(b) shall ensue. Inasmuch as an enrichment action is part of the common law, the words quoted would appear to intentionally exclude its operation.

14. These factors render it necessary and desirable, it is submitted, to confirm the order of the Court below. The Court dealing with the matter would be afforded a discretion of doing justice to the parties and the circumstances of the case, without being trammelled by the various requirements and limitations which the Roman Dutch law principles upon which the *condictio ob turpem vel iniustam causum* is based, and without having to ignore the words "*despite any provision of the common law*" as found in Section 89(5).

15. The Applicant's remaining contentions relating to the issues raised in the Court's directive are set out in Applicant's Supplementary Heads of Argument dated 3 February 2015.

_____

A C OOSTHUIZEN S.C.

_____

P TORRINGTON
Applicant's Counsel
18 February 2015

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number: CCT 88/14

In the matter between:

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

APPLICANT'S HEADS OF ARGUMENT

A. INTRODUCTION

1. The Court has directed the parties to file supplementary written submissions dealing with:

1.1 The enrichment claim a creditor subject to the National Credit Act, No 34 of 2005 ("*the NCA*") might institute;

1.2 The ambit of a court's discretion to grant such a claim, the extent to which this ameliorates the non-discretionary consequences resulting from the application of Section 89(5)(b) of the NCA and, if so, whether that factor renders Section 89(5)(b) constitutionally valid.

B. THE CREDITOR'S PROSPECTS OF SUCCESS IN AN ENRICHMENT CLAIM

2. It is a well-established principle of our common law that an agreement to commit an unlawful act is not enforceable. Once it is established that an agreement is indeed illegal, for whatever reason, a party to such an agreement cannot sue on the agreement itself[1]. This includes agreements that are unlawful in terms of a Statute.[2]

3. It has, since the judgment of the erstwhile Appellate Division in Nortje en 'n Ander v Pool NO 1966 (3) SA 96 (A), been accepted that a general enrichment claim has not developed in South African law. Notwithstanding suggestions raised in subsequent decisions that this aspect of the law needs to be revisited (see, for example, Rulten NO v Herald Industries (Pty) Ltd 1982 (3) SA 600 (D&CLD) at 606F-607B) that remains the position in our law.

[1] See Visser "Unjustified Enrichment" at page 5; See also Brits v Van Heerden 2001 (3) SA 257 (C);

[2] Ex Parte MS And Others 2014 (3) SA 415 (GP) a t page 422 paragraph [31]

A creditor alleging that a transaction has resulted in the unjustified enrichment of the debtor is obliged to bring that action within the scope and ambit of one of the specific enrichment actions recognised at common law.

4. The *condictio ob turpem vel iniustam causam*,[3] is an enrichment action available to a party to reclaim his performance where he has performed in terms of an agreement but where the *causa* underlying such performance is absent due to the turpitude causing the agreement's unlawfulness.[4]

5. The requirements for a successful claim by a Plaintiff on the basis of the *condictio ob turpem vel iniustam causam* are:

5.1 The amount claimed must have been transferred pursuant to an agreement that is void and unenforceable because it is illegal (i.e prohibited by law);[5]

5.2 The Plaintiff is obliged to tender the return of that which he had received (unless return is excused);[6]

---

[3] "*Condictio ob turpem vel Iniustam causam"* means: *A claim for the return of a transfer which was not owed because it was made in terms of an illegal or otherwise base agreement" [*See Visser "Unjustified Enrichment" at page 5;]

[4] J C Sonnekus "Unjustified Enrichment in South African Law" (LexisNexis 2008) at page 133;

[5] Afrisure CC And Another v Watson NO And Another 2009 (2) SA 127 (SCA) at page 132 Paragraph [5]; See also Daniel Visser "Unjustified Enrichment at page 443;

[6] Albertyn v Kumalo 1946 WPA 529; In MCC Bazaar v Harris & Jones (Pty) Ltd 1954 (3) SA 158 (T) the Court (Rumpff J) held *obiter* that in the application of the *Condictio ob turpem vel Iniustam causam* the plaintiff must, if there is counter performance, tender to return what he has received. (At page 162A)

5.3 The plaintiff in the circumstances must be free from turpitude[7] (i.e. he or she must not have acted dishonourably).[8]

6. The rule of our law that the *condictio ob turpem vel iniustam causam* can only be successfully instituted by a plaintiff, with conduct free from turpitude, is expressed in the maxim *in pari delicto potior est conditio defendentis*[9] (the *par delictum* rule).[10]

7 This rule is based on the notion that the courts ought not to assist those who pursue aims inimical to public policy (the "*clean hands"* argument) and further, that the courts should seek to deter illegality in denying recovery to parties to such transactions[11]. It would be contrary to public policy to render assistance to those who defy the law.[12]

8 In Jajbhay v Cassim 1939 AD 537, the court - while affirming the considerations of public policy underlying the *par delictum* rule - nevertheless

[7] Afrisure CC And Another v Watson NO And Another 2009 (2) SA 127 (SCA) at page 142 Paragraph [39];

[8] National Credit Regulator v Opperman 2013(2) SA 1 (CC) at page 9 paragraph [16];

[9] "*In a case of equal wrong by both parties the defendant is in the stronger position"* – See Sonnekus at page 134 Note 30;

[10] Afrisure CC And Another v Watson NO And Another 2009 (2) SA 127 (SCA) at page 142 Paragraph [39];

[11] Daniel Visser "Unjustified Enrichment" at page 443;

[12] Afrisure CC And Another v Watson NO And Another 2009 (2) SA 127 (SCA) at page 142 Paragraph [39];

decided that it should be relaxed, where *'public policy should properly take into account the doing of simple justice between man and man'*[13].

9 As the *par delictum* rule is not inflexible, where there is participation by the Plaintiff in the alleged turpitude it might, in circumstances where justice called for it, be overlooked[14] and where the circumstances dictate, the *turpitudo* of the parties can be weighed up against each other if it is in the public interest to do so.

10 Subsequent courts have been prepared to relax the *par delictum* rule *"to prevent injustice or to satisfy the requirements of public policy, by taking fairness considerations into account".* As was stated in National Credit Regulator v Opperman And Others 2013 (2) SA 1 (CC):

> "*However, since Jajbhay v Cassim South African courts have been prepared to relax the par delictum rule, to prevent injustice or to satisfy the requirements of public policy, by taking fairness considerations into account."*[15]

11. Section 40(4) of the National Credit Act 34 of 2005 (the "*NCA*") holds that any credit agreement entered into by a unregistered credit provider (who was

[13] Afrisure CC And Another v Watson NO And Another 2009 (2) SA 127 (SCA) at page 142 Paragraph [39];

[14] First National Bank Of Southern Africa Ltd v Perry NO And Others 2001 (3) SA 960 (SCA) page 969 at paragraph [21];

[15] At page 9 paragraph [17]

required to be so registered in terms of subsection 40(1)of the act) is an unlawful agreement and void to the extent provided for in section 89.

12. In National Credit Regulator v Opperman 2013(2) SA 1 (CC) the Constitutional Court highlighted that the agreement concluded by a unregistered credit provider would be both unlawful and void but, provided that the requirements of the action was met, the credit provider would be able to claim successfully from the consumer on the basis of the unjustified enrichment action, the *condictio ob turpem vel iniustam causam*[16].

13. There is, it is submitted, an important point of distinction between Section 89(5)(b) of the NCA and the common law enrichment actions . In an unjustified enrichment action, a creditor seeks to recover monies not yet paid to the creditor, on the basis that the retention of that money by the debtor results in an unjustified enrichment. Section 89(5)(b) has a different consequence. It deals not with the future recovery of an amount which has not been recovered by the creditor, but which has been retained by the debtor. Rather, it statutorily obliges a creditor to refund money already received by the creditor, together with interest thereon. It regulates not the future enforcement or non-enforcement of a contract which is void due to non-compliance with the provisions of the NCA, but the undoing and setting aside of performance already rendered by a debtor under such an agreement. To that extent, it differs from Section 89(5)(c) (the section declared to be invalid

[16] National Credit Regulator v Opperman 2013(2) SA 1 (CC) at page 9 paragraph [15] & page 26 paragraph [85];

by this Honourable Court in National Credit Regulator v Opperman 2013 (2) SA 1 (CC)) and from the enrichment actions developed at common law.

14. This distinction, it is submitted, has a bearing on the question of whether a creditor who is statutorily obliged, under Section 89(5)(b), to refund money already paid to the consumer has any enrichment claim against such consumer.

15. We respectfully submit that considerable doubt must exist as to whether, given the unequivocal provisions of Section 89(5)(b), a creditor who is compelled to pay monies received from a credit receiver pursuant to a void transaction would have any enrichment claim thereafter. We refer, in this regard, to two presumptions frequently utilised in the implementation of statutes. Firstly, there is a presumption that the legislature is familiar with the existing law, and with the court's interpretation of legislation (see, for example, Fundstrust (Pty) Ltd (In liquidation) v Van Deventer 1997 (1) SA 710 (A) at 732A; Casserley v Stubbs 1916 TPD 310 at 312; Van Heerden v Queen's Hotel (Pty) Ltd 1973 (2) SA 14 (RA) 23D – F). Secondly, it is presumed that in statutes that the legislature does not promulgate purposeless provisions. (See, in general, Steyn: "*Uitleg van Wette*", 5th ed, 119 – 124).

16. The question then to be asked is why the legislature would wish to bring about the consequence, admittedly harsh, envisaged by Section 89(5)(b) whereby monies received pursuant to a void transaction must be refunded to the credit receiver, while at the same time significantly negating that consequence by

allowing the credit provider to recover such monies by way of an enrichment action. Recognising such an enrichment action would, it is submitted, largely nullify the intention which the legislature obviously had in promulgating Section 89(5)(b). As a general proposition, it is submitted that an enrichment action should not be applied in a way which negates the manifest intention of the legislature, in promulgating a statute.

17. These problematic consequences are, it is submitted, avoided if the judgment of the court below as regards the reading down of Section 89(5)(b) is confirmed. Section 89(5)(b) was intended by the legislature to constitute a penalty in the form of a deprivation of property. Such penalty imposes consequences that are justifiably harsh and that such harshness would best be cured by granting the court a discretion, as suggested in the rewording of Section 89(5)(b) ordered by the court below. The court is then given a discretion to enforce Section 89(5)(b) to the full extent of the law or, in appropriate circumstances, to make some other order ameliorating the drastic consequences flowing from the implementation of Section 89(5)(b).

C. **AMBIT OF COURT'S DISCRETION**

18. The South African constitutional order recognises the social and historical context of property and related rights[17]. The right to property is a fundamental right deeply ensconced in the Bill of Rights.[18]

[17] City Of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd And Another 2012 (2) SA 104 (CC) at page 117;

19. Section 25 of the Constitution provides that '(*n)o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property*.

20. Deprivation within the context of Section 25 includes the extinguishing a right previously enjoyed,[19] and will always takes place when property or rights therein are either taken away or significantly interfered with. Deprivation relates to sacrifices that holders of private property rights may have to make without compensation[20]

21. In National Credit Regulator v Opperman the Constitutional Court decided that Section 89(5) of the NCA was unconstitutional for constituting an arbitrary deprivation of property in conflict with Section 25(1)[21] of the Constitution.

22. In the process, the court confirmed that a debt qualifies as property for purposes of section 25(1) and that a statutory regulation that prevents a creditor from enforcing a debt qualifies as a deprivation of property and the *condictio ob turpem vel iniustam causa* is available to such an unregistered credit provider.

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[18] Mazibuko And Another v National Director Of Public Prosecutions 2009 (6) SA 479 (SCA) at page 490 at paragraph [24]

[19] Agri SA v Minister For Minerals And Energy 2013 (4) SA 1 (CC) At page 16 paragraph [48]

[20] Agri SA v Minister For Minerals And Energy 2013 (4) SA 1 (CC) At page 16 paragraph [48]

[21] Cool Ideas 1186 CC v Hubbard And Another 2014 (4) SA 474 (CC)

23. Section 89(5) presently imposes a harsh penalty on the Unregistered Credit provider in that a Court, without any discretion, must impose the sanction on the unregistered Credit provider. As stated by the Fourth Respondent: *"The impugned provisions create an effective deterrent for a person who provides credit without registering under the Act and thus evades the consequences of the Act and the protection provided to consumers under it. The provisions do so by creating a position where an unregistered credit provider is at risk of being unable to recover the money loaned to the consumer and even face having to pay back the money repaid by the consumer with interest."*[22]

24. It is respectfully submitted that this Court should not, as part of the order it makes, seek to lay down any list, whether extensive or otherwise, of the factors to be taken into account by the courts when exercising the discretion which they will enjoy if the order granted by the court below is confirmed.

25. The following comment in De Smith, Woolf and Jowell "*Judicial Review of Administrative Action*", 5th edition, p 296 is, it is submitted, apposite:

> "*The legal concept of discretion implies power to make a choice between alternative course of action or inaction. If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion but the performance of a duty. To say that somebody has a discretion presupposes that there is no uniquely right answer to a problem. There may, however, be a number of answers that are wrong*

[22] Record Volume 2 at page 146-147 Paragraph 23.3;

> *in law. And there are degrees of discretion – varying scope for decisional manoeuvre afforded to the decision-maker. This section will consider the limits set by the courts to the exercise of statutory discretionary powers.*" [Emphasis supplied]

26. The factors to be considered by a court, when exercising any discretion conferred under Section 89(5) will, it is submitted, vary from case to case. They may include both the turpitude of the credit provider and the extent to which the credit receiver was aware of the factors rendering the transaction void, the extent to which the credit receiver has profited from the transaction, whether the credit provider has a history of transgressing the provisions of the NCA, which of the categories of unlawfulness stipulated in Section 89(2) are applicable, and considerations of public policy. Later decisions of the court will, if the reading down sought is granted, undoubtedly depend upon and deal with some of the factors which come into play and may include factors overlapping with those which a court, at common law, takes into account when deciding whether the relaxation of the *in pari delictum* rule is warranted, in a particular case. We respectfully submit that it is, however, unnecessary for this Court, in considering the matter now before it, to enumerate in advance what those factors should include, or not include.

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A C OOSTHUIZEN S.C.

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P TORRINGTON

CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE CCT 88/14

WCHC NO: 5244/13

In the matter between:

CHEVRON SA (PTY) LIMITED Applicant

and

DENNIS EDWIN WILSON t/a WILSON'S TRANSPORT First Respondent

THE MINISTER OF FINANCE Second Respondent

THE MINISTER OF TRADE & INDUSTRY Third Respondent

THE NATIONAL CREDIT REGULATOR Fourth Respondent

THIRD RESPONDENT'S SUPPLEMENTARY HEADS OF ARGUMENT

INTRODUCTION

1. These Submissions are filed pursuant to the Directions of the Chief Justice dated 21 January 2015 in terms whereof the parties were directed to address the following issues:

1.1. the considerations that would influence the prospects of success on an unjustified enrichment claim made by a creditor, who is subject to the National Credit Act No. 34 of 2005 ("**the NCA**") in light of the decision of this Court in National Credit Regulator v Opperman and Others 2013 (2) SA 1 (CC). The parties are specifically invited to address the condictio ob turpem vel iniustam and in pari delictum rule; and

1.2. the ambit of the court's discretion, if there be a discretion, on whether to grant an unjustified enrichment claim by a creditor and whether the power of the court to exercise such discretion ameliorates the lack of discretion resulting from the application of section 89(5)(b) of the NCA; and, if it does, whether this is sufficient to render section 89(5)(b) constitutionally valid.

2. The Applicant ("**Chevron**") seeks, in these proceedings to challenge the constitutionality of section 89(5)(b) of the NCA which reads as follows:

> *"(5) If a credit agreement is unlawful in terms of this section, despite any provision of common law, any other legislation or any provision of an agreement to the contrary, a court must order that-*
>
> ....

(b) the credit provider must refund to the consumer any money paid by the consumer under that agreement to the credit provider, with interest calculated-

(i) at the rate set out in that agreement; and

(ii) for the period from the date on which the consumer paid the money to the credit provider, until the date the money is refunded to the consumer;"

(Own Emphasis)

3. As addressed in our main heads of argument, section 27 of the Amendment Act seeks to amend section 89(5) of the NCA to read as follows[1]:

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

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

[1] Record: Vol. 3; page 216.

THE CONSIDERATIONS THAT INFLUENCE PROSPECTS OF SUCCESS OF AN UNJUSTIFIED ENRICHMENT CLAIM

4. The central requirement of the condictio ob turpem vel iniustam causam is that the amount claimed must have been transferred pursuant to an agreement that is void and unenforceable because it is illegal, i.e because it is prohibited by law.[2]

5. The requirements for the condictio ob turpem vel iniustam causam are as follows: (a) ownership must have passed with the transfer; (b) the transfer must have taken place in terms of an unlawful agreement; and (c) the claimant must tender the return of what he or she received.[3]

6. The condictio ob turpem vel iniustam causam can in principle only be successfully instituted by a plaintiff whose own conduct was free from turpitude, i.e. who did not act dishonourably. This rule is expressed in the maxim in pari delicto potior est conditio defendentis ("the par delictum rule"). The principle underlying the par delictum rule is that, because the law should discourage illegality, it would be contrary to public policy to render assistance to those who defy the law.[4]

7. Prior to the judgment in **Jajbhay v Cassim** 1939 AD 537, the par delictum rule was strictly and consistently applied by the Courts. However, in **Jajbhay** while

[2] Afrisure CC v Watson NO 2009 (2) SA 127 (SCA) at par 5.
[3] Opperman at par 15.
[4] Afrisure CC v Watson NO 2009 (2) SA 127 (SCA) at par 39.

affirming the considerations of public policy underlying the rule, the Court decided that it should be relaxed in certain instances and found as follows[5]:

7.1. The rule expressed in the maxim in pari delicto potior est conditio defendentis is not one that can or ought to be applied in all cases, it is subject to exceptions which in each case must be found to exist only by regard to the principle of public policy (which does not disregard the claims of justice between man and man).

7.2. Courts of law are free to reject or grant a prayer for restoration of something given under an illegal contract, being guided in each case by the principle which underlies and inspired the maxim.

7.3. A Court should not disregard the various degrees of turpitude in delictual contracts. When the delict falls within the category of crimes, a civil court can reasonably suppose that the criminal law has provided an adequate deterring punishment and therefore, ordinarily speaking, should not by its order increase the punishment of the one delinquent and lessen it of the other by enriching one to the detriment of the other.

7.4. In cases where public policy is not foreseeably affected by a grant or a refusal of the relief claimed, a Court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment.

[5] At page 537.

8. More recently, the SCA has explained that no definite criteria have been laid down to decide whether the rule should be relaxed or not. According to the SCA, the reason was plain, *viz*: "The issue of relaxation may arise in such an infinite variety of circumstances that it would be unwise for the courts to shackle their own discretion by predetermined rules or even guidelines as to when relaxation of the par delictum rule will be allowed."[6] This reasoning was also referred to by this Court in **Opperman**.[7]

9. Furthermore, this Court clarified in **Opperman** that if section 89(5)(c) is declared invalid (as it was), the common-law position regarding unlawful contracts prevails until the legislature replaces it. What this means is that the unlawful agreement would be void and the credit provider would be able to claim successfully from the consumer on the basis of unjustified enrichment, if the requirements of the action are met. This, according to this Court in **Opperman** could include the consideration of the circumstances of each case and especially the degree of blameworthiness of the unregistered credit provider, in order to reach a just outcome.[8]

10. In our respectful submission, the following considerations would influence the prospects of success on an unjustified enrichment claim made by a creditor, who is subject to the NCA:

[6] Afrisure CC v Watson NO 2009 (2) SA 127 (SCA) at par 13.
[7] At par 17.
[8] At par 85.

10.1. As previously recognised by this Court in **Opperman**, a credit agreement entered into by an unregistered credit provider who was unaware of the requirement to register appears to be a good example of an unlawful agreement where there is little or no turpitude on the part of the credit provider.[9]

10.2. The history and extent of the unregistered credit provider's compliance with the NCA.

10.3. The number of credit agreements that have been concluded by the unregistered credit provider.

10.4. The aggregate value of the credit agreements that have been concluded by the unregistered credit provider.

10.5. The level of education and financial sophistication of the consumer and the extent to which he or she was able to make informed decisions.

10.6. The commitments, if any, made by the credit provider in connection with combating over-indebtedness, including whether the credit provider has subscribed to any relevant industry code of conduct approved by a regulator or regulatory authority.[10]

[9] At par 18.
[10] Section 48(1)(b).

10.7. Despite not having been registered, the extent of the credit provider's compliance with the objectives of the NCA (both in relation to the specific consumer and generally) and in particular those of encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers and discouraging reckless credit granting by credit providers.

10.8. The extent to which the unregistered credit provider's conduct amounts to an "intentional exploitation" of the consumer.[11]

10.9. The relationship between the unregistered credit provider and the consumer, for instance whether they are friends or family as opposed to the credit provider carrying out the business of providing credit.

11. While the above factors provide some guidance, they are by no means exhaustive. Furthermore, it is submitted that the enquiry is an inherently fact specific one (assessed on a case by case basis) and fundamentally underpinned by the public policy considerations at issue.

THE AMBIT OF THE COURT'S DISCRETION

12. We respectfully submit that the power of the Court to exercise a discretion on whether to grant an unjustified enrichment claim by a creditor does not ameliorate the lack of discretion resulting from the application of section

[11] Opperman at par 76.

89(5)(b) of the NCA; and nor is it sufficient to render section 89(5)(b) constitutionally valid.

13. Our submission is premised on the following:

13.1. First, at the level of practice a court would be obliged in terms of section 89(5)(b) to order a refund.

13.2. Second, after a Court has ordered a peremptory refund it would be required to consider and adjudicate a claim for unjustified enrichment. A relevant factor in the exercise of this discretion would be that payment of monies that are the subject of an enrichment claim took place pursuant to a court order in terms of legislation. This would have an inevitable bearing on the question of whether an enrichment claim in relation to the refund is unfounded, unjustified, unauthorised or sine causa.[12]

KARRISHA PILLAY

Counsel for the Third Respondent

5 February 2015

Chambers

Cape Town

[12] Sonnekus, "Unjustified Enrichment in South African Law" (2008) at page 76.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: 88/14

In the matter between:

CHEVRON SA (PTY) LIMITED Applicant

and

DENNIS EDWIN WILSON t/a WILSON'S TRANSPORT First Respondent

THE MINISTER OF FINANCE Second Respondent

THE MINISTER OF TRADE & INDUSTRY Third Respondent

THE NATIONAL CREDIT REGULATOR Fourth Respondent

FOURTH RESPONDENT'S FURTHER SUBMISSIONS

INTRODUCTION

1 The Chief Justice has directed the parties to file further written submissions on the law of unjustified enrichment and its significance for the constitutional validity of section 89(5)(b) of the National Credit Act 34 of 2005 ("NCA").

2 Specifically, the parties are requested to address:

2.1 The considerations that would influence the prospects of success of an unjustified enrichment claim made by a creditor, who is subject to the National Credit Act ("NCA"), in light of the decision of this Court in *National Credit Regulator v Opperman*.[1] These submissions must address the *condictio ob turpem vel iniustam* and the *par delictum* rule.

2.2 The ambit of a court's discretion, if there be a discretion, on whether to grant an unjustified enrichment claim by a creditor and whether the power of a court to exercise such discretion ameliorates the lack of discretion resulting from the application of section 89(5)(b) of the NCA; and, if it does, whether this is sufficient to render section 89(5)(b) constitutionally valid.

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[1] *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC).

3 As outlined in the main written submissions, the National Credit Regulator ("NCR") has not opposed the confirmation of the High Court order declaring section 89(5)(b) to be invalid. This was especially the case in view of Parliament's decision to amend section 89(5).[2]

4 While the NCR does not oppose this order, it remains mindful of its duty to assist the Court by presenting its reasons for taking this position.

RESTORING THE COURTS' POWER TO GRANT JUST AND EQUITABLE RELIEF

5 Before addressing the questions raised in the Chief Justice's directions, it is helpful to canvas how this Court's judgment in *Opperman* partially restored the courts' power to grant just and equitable relief under the common law of unjustified enrichment and how Parliament's amendment of section 89(5) of the NCA (which has been enacted but not yet brought into force) will fully restore this power.

6 Under the common law, any party to an unlawful contract can bring

[2] Discussed further in para 13 below.

an action for the restitution of goods or money transferred to the other in pursuance of that contract. This action is the *condictio ob turpem vel iniustam causam*.

7 As will be discussed in greater detail below, the requirements of this action are:

7.1 There must have been a transfer of ownership;

7.2 The transfer must have taken place in terms of an unlawful agreement;

7.3 The claimant must, ordinarily, tender the return of what he or she received; and

7.4 The claimant must not have acted dishonourably (the *par delictum* rule).[3]

8 Sections 89(5)(b) and (c) of the NCA altered this common law position in respect of credit agreements that fall foul of the NCA's provisions.

9 Section 89(5)(c) deprived creditors of their common law right to

[3] *Opperman* above n 1 at paras 15-16.

launch a claim for restitution where a credit agreement was declared to be unlawful under the NCA. If the consumer was unjustifiably enriched, a court was compelled to order that the creditor's claim against the consumer was forfeited to the state. In *Opperman*, this Court declared section 89(5)(c) to be unconstitutional and invalid as it constituted an arbitrary deprivation of creditors' property rights. The effect of this judgment is that courts again have the power and the discretion to grant creditors relief under the common law of unjustified enrichment where credit agreements are invalidated by the NCA.

10 This Court's decision in *Opperman* did not address the validity of section 89(5)(b) of the NCA. Section 89(5)(b) provides that if a credit agreement is unlawful, a court must order that -

> *(b) the credit provider must refund to the consumer any money paid by the consumer under that agreement to the credit provider, with interest calculated-*
>
> *(i) at the rate set out in that agreement; and*
>
> *(ii) for the period from the date on which the consumer paid the money to the credit provider, until the date the money is refunded to the consumer*

11 The effect of section 89(5)(b) is that courts have no discretion regarding whether to order the return of payments made by consumers to creditors, plus interest. The consumer does not need to bring an unjustified enrichment claim to obtain this refund. Furthermore, a consumer's dishonourable conduct or inability to return goods or money received from the creditor—considerations that would preclude an unjustified enrichment claim—are not obstacles to receiving this refund.

12 In contrast, all creditors are required to refund the consumer for any payments received, plus interest. The creditor is left with a claim under the law of unjustified enrichment for restitution of goods or money transferred to the consumer under the contract. However, there is the risk that this claim will not succeed and, even if successful, that it will be wholly or partially unenforceable if the consumer is a person of straw. As a result, the property of the credit provider (in the form of cash-in-hand) is replaced with a claim of uncertain prospects under the law of unjustified enrichment.

13 Section 89(5)(b) will be swept aside when the National Credit Amendment Act 19 of 2014 ("the Amendment Act") comes into

force.[4] Section 27 of the Amendment Act will amend 89(5) of the Act to read as follows:

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

14 This amendment will restore the common law principles of unjustified enrichment when dealing with the consequences of unlawful credit agreements under the NCA. In so doing, it will fully restore the courts' power to grant the relief that is just and equitable in the circumstances.

15 This case, of course, concerns whether the existing position – prior to the Amendment Act coming into force – is constitutionally permissible.

[4] The President assented to the Amendment Act on 19 May 2014, but it is not certain when it will be brought into force.

CONSIDERATIONS AFFECTING THE SUCCESS OF UNJUSTIFIED ENRICHMENT CLAIMS

16 As indicated above, the *condictio ob turpem vel iniustam causam* is available to a creditor who has paid money or delivered goods in pursuance of an unlawful credit agreement.[5] In *Opperman*, this Court outlined the considerations that will determine the success of this action:

> *[O]wnership must have passed with the transfer; the transfer must have taken place in terms of an unlawful agreement; and the claimant must tender the return of what he or she received.*
>
> *In order to be successful, ordinarily the party who claims on the basis of unjust enrichment must be free of turpitude and show that he or she has not acted dishonourably. This is the par delictum rule. The underlying principle is that the law should discourage and deter illegality; it should not render assistance to those who defy it.*[6]

17 The *par delictum* rule applies only where the creditor has rendered performance dishonourably. The mere fact that the credit agreement was unlawful is not proof of dishonourable conduct.[7] In *Afrisure CC v Watson*,[8] the SCA explained this principle in these terms: "*[w]here payment, even though illegal, was not*

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[5] *Opperman* above n 1 at para 15.

[6] Id at paras 15-16.

[7] Lotz 'Enrichment' in Joubert (ed) *The Law of South Africa* vol 9 (2 ed) at para 215.

[8] *Afrisure CC v Watson*, 2009 (2) SA 127 (SCA).

dishonourable, the plaintiff must succeed".[9]

18 Even where the creditor has acted dishonourably, this is not an "*absolute bar*" to the success of a claim for restitution.[10] Since the Appellate Division's 1939 decision in *Jajbhay v Cassim,*[11] courts have been willing to relax the par delictum rule where this is necessary "*to prevent injustice or to satisfy the requirements of public policy, by taking fairness considerations into account."*[12]

19 There are no strict guidelines for determining whether to relax the *par delictum* rule, as this decision is heavily dependent on the facts of each case.[13] Nevertheless, broad principles have emerged in the case law, including the following which are most relevant for this case:

19.1 Where both parties have received what they bargained for under the unlawful contract, courts will be less willing to

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[9] Lotz above n 7 at para 215.

[10] Opperman above n 1 at para 17. See further Visser *Unjustified Enrichment* (Juta, Cape Town 2008) at 447-453.

[11] *Jajbhay v Cassim* 1939 AD 537 at 544 and 558.

[12] *Opperman* above n 1 at para 17.

[13] Id at para 17; *Afrisure* above note 8 at para 39; *Klokow v Sullivan* 2006 (1) SA 259 (SCA) at para 24.

interfere with this *status quo*.[14]

19.2 Conversely, where one party retains all the money or goods received from the other under the contract and takes back all goods or money that he or she gave to the other party, fairness would allow that other party to pursue a claim for restitution, despite his or her dishonourable conduct.[15]

19.3 Where the rigid application of the *par delictum* rule would frustrate the legitimate purposes of the legislation which invalidated the contract, this rule should be relaxed and the claimant should be entitled to relief.[16]

20 Furthermore, it is trite that considerations of public policy, justice, and fairness under the common law must be informed by the norms and values embodied in the Constitution.[17]

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[14] *Afrisure* id at para 46.

[15] *Klokow* above n 13 at para 26.

[16] *Afrisure* above n 8 at para 47.

[17] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at para 56.

DISCRETION AND THE VALIDITY OF SECTION 89(5)(b)

21 In light of the above, a court has what might be termed a discretion to grant an unjustified enrichment claim by a creditor. In the absence of dishonourable conduct, the creditor is generally entitled to succeed in his or her claim for the return of goods or money transferred to the consumer in pursuance of the contract. The discretion appears to be a discretion in the broad sense, rather than a discretion in the strict sense.[18]

22 However, a court's discretion to grant the creditor relief under the law of unjustified enrichment does not alter the fact that section 89(5)(b) leaves it with no discretion to order the creditor to refund the consumer in full, plus interest.

23 In this light, the fact that the creditor has a claim under the law of

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[18] The SCA recently reiterated the distinction between the two forms of discretion in *Gaffoor and Another NNO v Vangates Inv* (Pty) Ltd 2012 (4) SA 281 (SCA) at para 39:

> *The distinction between the two categories of discretionary power was drawn by EM Grosskopf JA in Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd; and Knox D'Arcy Ltd and Others v Jamieson and Others. The essence of 'a discretion in the narrow or strict sense' involves a choice between two or more different, but equally permissible, alternatives, while 'a discretion in the broad sense' means no more than a power to have regard to a number of disparate and incommensurable features in arriving at a conclusion. It is only when the court exercises a discretion in the narrow or strict sense that an appeal court's powers of interference are said to be limited. With regard to the exercise of a discretion in the broad sense, there is no reason why the powers of an appeal court should be so restricted. Since these matters can be determined equally appropriately by an appeal court, it may substitute its own discretion for that of the trial court if it differs from such court on the merits, and may make the order which it deems just.*

unjustified enrichment does not render section 89(5)(b) constitutionally valid.

24 The Court's discretion to grant the creditor's claim for unjustified enrichment does not change the fact that section 89(1)(b) amounts to a deprivation of property under section 25(1) of the Constitution.

24.1 To constitute a deprivation of property, there must be a "*substantial interference*" with the use, enjoyment or exploitation of property "*that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society*".[19]

24.2 As was argued in the main submissions, requiring creditors to pay back all money received form the consumer, plus interest, clearly constitutes a deprivation of property.

24.3 Replacing this with a possible claim under the law of unjustified enrichment ameliorates the extent of this deprivation, but does not alter the fact that it remains a deprivation.

24.4 This is especially so given that in many cases, the

[19] *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) at para 32.

ameliorative effects of this claim will be limited as the creditor is necessarily compelled to pay the consumer and, in return, only has the possibility of an unjustified enrichment claim, with all the attendant costs and risks associated with the pursuit this claim.

24.5 Furthermore, even if the creditor is successful in pursuing this claim, he or she may not be able to enforce it. For example, where the consumer is insolvent, the creditor would have had to pay back the consumer in full and would then have little hope of receiving all or any of the goods or money transferred to the consumer under the unlawful agreement.

25 The question then is whether "*sufficient reason*" exists for the deprivations concerned. This must be considered by applying the standard first laid down by this Court in *First National Bank*[20] - that is a requirement that is more demanding than the means-ends test of mere rationality and yet less intrusive than the proportionality enquiry involved in section 36.[21] In this regard, the following points bear emphasis:

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[20] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC)

[21] At para 65. See also *Opperman* above n 1 at paras 68 - 71.

25.1 First, section 89(5)(b) deprives courts of the power to give at least two types of just and equitable orders that are available under the common law. In cases where the creditor is innocent and the consumer has acted dishonourably, a court cannot allow the creditor to keep the money received from the consumer. In cases where both parties are at fault, the court also cannot order that the status quo be preserved. For the reasons explained earlier, the potential claim for unjustified enrichment which would then be pursued by the creditor only partially ameliorates these effects.

25.2 Furthermore, while the NCA has the important purpose of protecting vulnerable creditors and deterring unlawful credit agreements,[22] this does not appear to constitute sufficient reason for the deprivation in light of this provision's overbreadth and the availability of less restrictive means to achieve this purpose:

25.2.1 The blunt application of section 89(5)(b) may serve to profit consumers who have acted dishonourably by entering into unlawful credit agreements with full knowledge of their unlawfulness and with the intent of

[22] *Opperman* above n 1 at paras 70-71.

claiming back all money paid to the creditor after enjoying all the benefits of the goods received from the creditor.

25.2.2 Furthermore, the common law presents a less restrictive means of deterring unlawful agreements, as this Court held in *Opperman*:

> *The common law position is less restrictive: unlawful contracts are void and not enforceable and turpitude is taken into account when restitution is claimed on the ground of unjustified enrichment. It does discourage unlawful agreements by unregistered credit providers.*[23]

25.2.3 Importantly, in the present case, no party – including the Minister of Finance – has sought to justify this deprivation as being essential or necessary to achieve the aims of the NCA.

25.2.4 Indeed, Parliament has already apparently taken the view that the rigid approach created by section 89(5)(b) is <u>not</u> necessary to achieve the aims of the National Credit Act. It consequently took the decision to repeal that provision – prior even to the High Court judgment in this matter.

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[23] *Opperman* above n 1 at para 76.

26 In all the circumstances, it is difficult to conclude that the deprivation occasioned by the section has been shown to occur for “sufficient reason”.

CONCLUSION

27 For these reasons, the NCR does not oppose confirmation the High Court’s order.

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5 February 2015

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