Hogan Lovells

Ad hoc lenders

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Without Prejudice

The purpose of the NCA is *inter alia* to protect vulnerable consumers from unscrupulous credit providers. However, the registration requirements governed by section 40 lent themselves to abuse by "unscrupulous debtors" who sought refuge behind the draconian consequences associated with failing to register when so required.

The requirements obliged credit providers who granted credit under at least 100 credit agreements or when the total principal debt owed under all outstanding credit agreements was equal to or greater than ZAR500 000 (the threshold) to register.

The registration requirements appear straightforward. However we will examine the developing attitude of our courts in interpreting this provision and assess the shortfalls of the recently implemented NCA Amendment Act, which took effect in March.

In *Opperman v Boonzaaier 2012 (3) SA 416 (WCC)* (Opperman) approximately ZAR7 million was granted in terms of three credit agreements. The credit grantor was not registered as a credit provider, was not in the business of granting credit and was unaware of any obligation to register. The High Court concluded that since the amount of credit exceeded the threshold, the credit grantor was obliged to register.

In *Friend v Sendal 2015 (1) SA 395 (GP)* (Friend), credit of approximately ZAR1.2 million was granted under a single credit agreement. The High Court interpreted the registration requirements in light of the purposes of the NCA and found that the intention of the legislature was to require registration where a person frequently provided credit. The credit grantor was not obliged to register as a credit provider in these circumstances.

After the NCA Amendment Act, a credit provider need only register if the total principal debt owed under all outstanding credit agreements exceeds the threshold. In a futile attempt by the legislature to simplify the registration requirements under the NCA, the legislature has failed to take cognisance of the issues as outlined in Opperman and Friend.

It is of fundamental importance to identify when a credit provider is required to register, particularly considering that credit providers who fail to register when required to do so face

far-reaching consequences.

In terms of section 40(3) of the NCA, credit providers who fail to register may not enter into any credit agreements, offer, extend or make credit available. The credit agreement will be unlawful, must be declared void and the credit provider is obliged to refund all payments made by the consumer, including interest.

Section 89(5)(c) of the unamended NCA provided that all of the credit provider's purported rights to recover the money lent under the agreement would be cancelled or, if the court believed this would amount to unjustified enrichment, forfeited to the state.

The constitutionality of this provision has been challenged in a plethora of case law. In *Cherangani Trade and Invest 107 v Mason and Others 2011 (11) BCLR 1123 (CC)* the applicant lent approximately ZAR2 million to the respondents. This was an ad hoc loan. The court a quo ruled that the credit agreement was unlawful since the applicant was not registered. The court found that section 89(5)(c) was dictatorial and the only discretion available to the court was to decide if the consumer would be unjustifiably enriched by cancelling the credit provider's purported rights. It was decided that there would be unjustified enrichment in the circumstances and the forfeiture order was made. The matter was appealed to the Constitutional Court.

Here, the appellant alleged that section 89(5)(c) should be read in line with section 39(2) of the Constitution, which requires courts to interpret legislation in a way to "promote the spirit, purport and objectives of the Bill of Rights". This must be read in line with section 25(1) to prevent the unlawful deprivation of property. This argument was not raised in the High Court, hence the Constitutional Court refused to make a ruling on this point since it did not want to be the court of first and last instance.

However, the constitutional point was once again raised in *National Credit Regulator v Opperman & Others 2013 (2) SA 1 (CC)* where it was argued that the court must have discretion to make a forfeiture order, otherwise it would amount to arbitrary deprivation of property. The High Court concluded that the courts did not have such discretion.

Though the court recognised that section 89 aimed to prevent unregistered credit providers from taking advantage of vulnerable consumers by providing credit outside the regulated market, it noted that the applicant was not deemed a risk to the public since he was not likely to provide credit indefinitely, and the respondent was not considered a vulnerable consumer. Accordingly, section 89(5)(c) was declared constitutionally invalid.

The matter was referred to the Constitutional Court, where it was stated that the distinction should be made between credit providers who intentionally fail to register when required, versus the ignorant credit provider granting credit on an ad hoc basis. Despite section 89(5)(c) having worthy objectives, the means used to achieve them were disproportionate considering the

availability of less restrictive means, such as the common law *par delictum* rule. The Constitutional Court confirmed the High Court order and ruled that the common law would prevail until the legislature could remedy the provision.

In June, the Constitutional Court delivered judgment in the matter of *Chevron v Wilson t/a Wilson's Transport and Others 2015 JDR 1055 (CC).* The credit provider approached the court on appeal to enforce an agreement with the outstanding balance amounting to approximately ZAR3.3 million. The credit provider was not registered as a credit provider and the agreement was declared void. Section 89(5)(b) required the credit provider to refund all money it had received under the agreement, plus interest, which amounted to approximately ZAR33 million.

The appellant contended that section 89(5)(b) should be declared unconstitutional since it conflicts with section 25(1) of the Constitution and does not provide the courts with a discretion. The Constitutional Court agreed and accordingly declared section 89(5)(b) to fall foul of the constitutional muster.

The legislature has introduced an amended section 89, which provides that if an agreement is unlawful, the *courts must make a just and equitable order* including but not limited to an order contained in section 89(5). This finally affords the courts with much needed discretionary powers.

Although the draconian consequences of section 89(5)(b)-(c) of the National Credit Act 34 of 2005 for failure to register as a credit provider have been correctly addressed by the Amendment Act, it is argued that the requirement for registering as a credit provider necessitates re-examination.

Considering the objective of the NCA is to protect vulnerable consumers and regulate the credit industry, credit grantors who provide credit frequently in the line of business should be obliged to register. It is submitted that all credit providers who grant credit in their line of business should be obliged to register as a credit provider regardless of the amount of credit granted or the amount of credit agreements entered into.

Though it is unfortunate that the amended NCA failed to cater for the registration of credit providers granting credit in the line of business or specifically address instances where one provides credit on an *ad hoc* basis, interesting times lie ahead as to how the courts will deal with these unavoidable issues in the future.

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