

FINANCE AND BANKING ALERT

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CREDIT PROVIDERS - WHO NEEDS TO REGISTER AND WHAT ARE THE CONSEQUENCES OF FAILING TO REGISTER?

We are often asked by credit providers whether they are required to register with the National Credit Regulator. The answer is not as straightforward as one might imagine.

Section 40(1) of the National Credit Act, No 34 of 2005 (Act) provides that a person must apply to be registered as a credit provider if that person, alone or in conjunction with any associated persons, is the credit provider under at least 100 credit agreements, other than incidental agreements; or the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds R500,000.

The term 'credit agreement' is defined in the Act. However, the Act is not applicable to every credit agreement. It is only applicable to credit agreements that meet the criteria set out in s4 of the Act. The Act does not apply, for example, to credit agreements concluded between persons who are not dealing at arm's length.

The question then arises whether the 'credit agreements' referred to in s40(1) are simply credit agreements as defined, or credit agreements to which the Act applies. The Act is not clear in this regard.

In our view, to interpret s40(1) of the Act as including those credit agreements that fall outside the ambit of the Act would be illogical, and not in keeping with the purpose of the Act. Requiring the advancers of credit under credit agreements falling outside the scope of the Act to register as credit providers would amount to bringing an excluded agreement within the Act's purview. This approach would result in the application of the Act to consumers the legislature did not seek to protect.

If a credit provider is required to register under the Act, but does not, a credit agreement concluded by it constitutes an unlawful credit agreement under s89(2)(d) of the Act. The consequences of a credit agreement being unlawful, as provided for in s89(5), are severe.

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A court must order that:

- the agreement is void;
- the credit provider refunds to the consumer any money paid by the consumer under that agreement, plus interest, and;
- all the credit providers rights under the agreement to recover money paid or goods delivered are either cancelled (unless the court concludes that to do so would unjustly enrich the consumer) or forfeit to the State (if the court concludes that cancelling those rights would unjustly enrich the consumer).

The constitutionality of s89(5)(c) was recently challenged. In its judgment handed down on 10 December 2012, in the matter of *The National Credit Regulator v Opperman and Others*, (CCT 34/12) [2012] ZACC 29, the Constitutional Court confirmed the order of the Western Cape High Court that declared s89(5)(c) of the Act constitutionally invalid as it constitutes an unlawful deprivation of property and is therefore inconsistent with s25(1) of the Constitution.

The practical implication of this is that a credit provider that is required to register under the Act but fails to do so, will have to repay any interest and charges paid to it by the consumer, but may however be able to recover the original loan amount from the consumer on the basis of a claim for unjustified enrichment.

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