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DISPUTE RESOLUTION ALERT

IN THIS
ISSUE

**TO DECIDE RATHER THAN PRESCRIBE:
M DU BRUYN N.O. & OTHERS V ASJ KARSTEN
(929/2017) [2018] ZASCA 143**

The judgment discussed in this article is significant for several reasons. In this discussion we focus on the courts' role as bodies which apply legislation, rather than create law. For a discussion on the practical commercial consequences of this judgment, please see [previous alert](#).

TO DECIDE RATHER THAN PRESCRIBE: *M DU BRUYN N.O. & OTHERS V ASJ KARSTEN* (929/2017) [2018] ZASCA 143

The National Credit Act, No 34 of 2005 (Act), in the words of Nicholls AJA, "is not a model of clarity, has been bemoaned by the High Court, this Court and the Constitutional Court on a number of occasions".

This seemed to change the scope of the section, and therefore the Act, to effectively include any person engaged in any credit transaction, even if it was a once-off transaction, involving any amount, by an individual who was not involved in the credit industry.



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The National Credit Act, No 34 of 2005 (Act), in the words of Nicholls AJA, *"is not a model of clarity, has been bemoaned by the High Court, this Court and the Constitutional Court on a number of occasions"*.

Before the Act was amended in 2014, s40(1)(a) provided that registration as a credit provider was only necessary if a party, alone or in conjunction with associated persons, entered into at least 100 credit agreements (incidental credit agreements as defined in the Act).

Section 40(1)(a) was subsequently deleted, leaving s40(1)(b) to stand alone as the entire clause 40(1), which now reads:

"A person must apply to be registered as a credit provider if the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of s42(1)."

The "threshold" referred to above is R0, as prescribed by the Regulations published on 1 June 2006.

This seemed to change the scope of the section, and therefore the Act, to effectively include any person engaged in any credit transaction, even if it was a once-off transaction, involving any amount, by an individual who was not involved in the credit industry.

The Respondent in this matter before the Supreme Court of Appeal (SCA) relied on the applicability of the controversial judgment of *Friend v Sendal 2015 (1) SA 395 (GP)* (a full bench decision). This judgment interpreted the obligation to register as a credit provider to only apply, irrespective of the amount involved, to those trading in the credit industry, and not to single transactions in which credit was provided.

The decision in *Friend* was founded in the stated purpose of the Act at s3, namely, to:

"promote and advance the social and economic welfare of South Africans" to achieve "a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers."

The SCA commends the *Friend* judgment as "pragmatic" and "making good sense", and as a reasonable and imminently sensible interpretation.

However, in setting aside the decision, the SCA confirmed that the judiciary is bound by the rules of interpretation. These rules state that in the first instance, the words, as they appear in a statute, must be ascribed their "plain" meaning.



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The court found this to be an imperfect solution, “but that it is for the legislature to remedy, rather than for the courts to attempt to accommodate insufficient drafting by attributing meaning” to the section “that is not justified by the wording of the statute”.



The SCA ultimately found that:

“while it may be reasonable, and indeed sensible, to interpret s40 as being inapplicable to once-off transactions where the role players are not participants in the credit market, it is difficult to reconcile this interpretation with the language of the provision, its context and purpose... The legislature has set thresholds that trigger the obligation to register where a single transaction is in excess of the prescribed amount [being R0]”.

The SCA found that to interpret otherwise would justify a perception of “regulatory overreach with judicial overreach”.

The SCA further confirmed that the party obliged to register in terms of s40 must be registered at the time at which the transaction is concluded. Retrospective registration will invalidate the transaction.

The court goes to great lengths to point out the rationality of any interpretation which would favour the narrower application of the act in respect of those engaged in the credit industry, however, due to the unfortunate drafting of the Act, the court is bound by its rules of interpretation to give those words their ordinary meaning as they appear in the legislation.

While this may seem overly formalistic, the reason for this is to be found in the constitutional doctrine of separation of powers between the legislature and the judiciary. The court was as pains to reiterate that the courts must be very careful to avoid crossing the boundaries of the division.

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Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017 – 2018** in the litigation category.



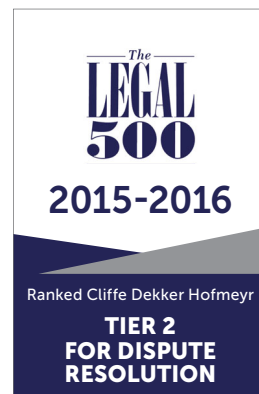

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