CONSTITUTIONAL COURT OF SOUTH AFRICA

The National Credit Regulator v Filippus Albertus Opperman and Others

Case CCT 34/12
[2012] ZACC 29

Date of Hearing: 21 August 2012
Date of Judgment: 10 December 2012

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court delivered a judgment confirming an order of the Western Cape High Court (High Court) that section 89(5)(c) of the National Credit Act (NCA) is constitutionally invalid.

In 2009 Mr Opperman lent Mr Boonzaaier R7 million to assist with property development. He was not registered as a credit provider. When Mr Boonzaaier admitted that he could not repay the debt, Mr Opperman applied for the sequestration of Mr Boonzaaier's estate. During these proceedings concerns about the constitutional validity of section 89(5)(c) arose.

The section provides that a credit provider loses his rights to reclaim money lent to a consumer if he was not a registered credit provider in terms of the NCA at the time he made the loan. The NCA requires a credit provider to register if more than R500 000 is lent out. Failure to register as a credit provider renders the credit agreement unlawful and void.

The High Court found that the provision permits arbitrary deprivation of property, contrary to section 25(1) of the Constitution because it denies the credit provider any claim against the consumer for the repayment of money without leaving a discretion to a court to decide otherwise.

The National Credit Regulator (NCR) and the Minister of Trade and Industry (Minister) both opposed the confirmation of the High Court order of invalidity. In this Court, the NCR argued that the provision, when interpreted in accordance with the Constitution, provides a discretion to a court whether to deny the credit provider a right to recover the money or not. The Minister argued that the section does not infringe section 25(1), as the deprivation provided for is not arbitrary and even if it is, it is a justifiable limitation of the right.

The majority of the Court, in a judgment by Van der Westhuizen J (with whom Mogoeng CJ, Moseneke DCJ, Khampepe J, Nkabinde J and Skweyiya J concur), found the provision to be a punitive measure to protect consumers against unregistered credit providers. The provision compels a court to declare the agreement void and order that the unregistered credit provider's right to claim restitution based on unjustified enrichment of the consumer, be cancelled or forfeited to the state; with no discretion to a court to keep the restitution claim intact.

The Court reasoned that by removing the unregistered credit provider's restitution claim, it deprives him of property. The reason provided for this deprivation was not sufficient and the means used to achieve the purpose of the provision was disproportionate. The Court held that the provision results in arbitrary deprivation of property in breach of section 25(1). The Court further held that the deprivation was not a reasonable and justifiable limitation of the right as there are less restrictive means to achieve the purpose of the provision.

In a dissenting judgment, Cameron J (with whom Froneman J and Jafta J concur) held that the approach of the main judgment involved reasoning that the provision was constitutionally invalid only by leaving out of account words essential to its meaning. Those words were "under that credit agreement". They could not be ignored. But because restitution as a remedy exists only where an agreement has failed, restitutionary rights "under" an agreement cannot exist, legally or linguistically. The words "under that credit agreement" therefore render the provision ineffectual. But to regard the provision as ineffectual, taking into account all its words, is simpler and truer than ignoring some words and then finding the provision unconstitutional.