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Court clears confusion on credit debt

No need for credit providers to be registered

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One of the respects in which the National Credit Act has created confusion relates to the obligation to register as a credit provider.

Section 40(1) of the Act provides that a person must apply to be registered as a credit provider if the total principal debt they are owed under all outstanding credit agreements exceeds the prescribed threshold — which has been nil since May 11 2016, and R500,000 before that.

In effect, anyone who concludes a credit agreement in terms of which any amount of money is owed to them, subsequent to May 11 2016, is required to be registered as a credit provider. Any agreement in terms of which (i) the repayment of an amount paid by a credit provider to a consumer, or payment for goods or services, is deferred, and (ii) interest or other charges are payable in respect of such deferment, is a credit agreement.

This covers many transactions between friends, family members and business associates in circumstances where the lender or seller would not be a registered credit provider — with draconian and probably unintended results. The consequence of failure to register is dire: a credit agreement entered into by an unregistered credit provider is unlawful and is void.

In an attempt to introduce a common-sense exception to this requirement, a full bench of the Johannesburg High Court in Friend v Sendal held that the registration requirement was aimed only at participants in the credit market, and found that the credit provider in that case could not be characterised as such on the mere basis of a once-off agreement.

The court reasoned that a credit provider who is party only to a single credit agreement is not required to register, notwithstanding that the total debt owed under that agreement exceeds the prescribed threshold.

In addition to raising logical inconsistencies (why should a credit provider who has only two or three credit agreements be characterised as a "participant in the credit market" for that reason and required to register, while the credit provider who has one agreement is exempt?), Friend is both a misreading of the act and an example of judicial law making: the proviso that a credit provider be a "participant in the credit market" for the registration requirement to apply is not found in the Act.

Although Friend was wrong, it nevertheless created a binding authority that subsequent courts in Gauteng had to grapple with. In Van Heerden v Nolte, the court expressed reservations about the correctness of Friend, and managed to avoid applying it on grounds that Friend was limited to a finding that the registration requirement did not apply to single credit agreements with principal debt exceeding the threshold.

In Van Heerden, the cause of action was constituted by two or three credit agreements. The court accordingly distinguished the facts of Van Heerden from Friend, and held that the credit provider was obliged to have registered, and the failure to have done so left him without any contractual cause of action.

A FULL BENCH ... HELD THAT THE REGISTRATION REQUIREMENT WAS AIMED ONLY AT PARTICIPANTS IN THE CREDIT MARKET

In Potgieter v Olivier and Another, the court, while expressing doubts about the correctness of Friend, declined to deviate from its binding authority, and held that the relevant credit agreement was valid and binding despite the credit provider's failure to have registered.

In De Bruyn NO and Others v Karsten the Supreme Court of Appeal had the opportunity to deal once and for all with the Friend judgment, and did so by overruling it.

The SCA found that while it may be reasonable and indeed eminently sensible to interpret section 40 as being inapplicable to once-off transactions where the role-players are not participants in the credit market, it is inconsistent with the language, context and purpose of the statute.

To have found otherwise would have been "to substitute what is justifiably seen as regulatory overreach with judicial overreach".

With the law now clear, all prospective lenders and sellers should be aware that if their agreement constitutes a credit agreement, they are required to have registered as a credit provider when such agreement is concluded.

Their failure to do so would render the resulting agreement void, leaving them with no alternative but to sue the consumer under the law of unjustified enrichment.

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