SUMMARY

The Constitutional Court in National Credit Regulator v Opperman confirmed the Cape High Court's decision in Opperman v Boonzaaier to declare section 89(5)(c) of the National Credit Act unconstitutional. Therefore, the forfeiture to the state of an unregistered creditor provider's right to claim restitution of monies advanced in terms of an unlawful (and void) credit agreement, was held to amount to an arbitrary deprivation of property in contravention of section 25(1) of the Constitution – the property clause. The provision in effect prohibited courts from deviating from the common law's strict par delictum rule in as far as the effects of unlawful contracts are concerned, the result being that creditors could not retrieve any of the amounts extended to the debtor, despite there being no turpitude or bad faith present. The purpose of this provision was to discourage the concluding of unlawful credit agreements – for instance, agreements concluded by unregistered credit providers – so as to protect consumers against unscrupulous behaviour. Although the broad purposes of the Act are undeniably valid, the Court held that there was no "sufficient reason" for the effects that the Act had in this case, since the credit provider in question was not guilty of the behaviour that the Act tried to combat. In other words, the effects of the Act were over-broad and not proportionate to its stated purposes. This case note comprehensively analyses these decisions in view of interpreting the "confused and confusing" wording of section 89(5)(c), with a specific focus on the application of the section 25(1) non-arbitrariness test.

Reference is also made to the earlier judgments in the matter of Cherangani Trade and Investment 107 (Edms) Bpk v Mason. The Opperman decisions illustrate well

* Reghard Brits. BComm LLB LLD (Stellenbosch). Postdoctoral Fellow at the South African Research Chair in Property Law, Stellenbosch University. Email: reghard@sun.ac.za. For reading and commenting on this contribution, thank you to Prof AJ van der Walt and Dr Zsa-Zsa Boggenpoel.
how the non-arbitrariness test should be conducted in constitutional property cases generally but particularly also in the credit context. Of significance is the fact that the Court for the first time recognised that personal rights sounding in money (an enrichment claim in this instance) should qualify as "property" for constitutional property law purposes. In certain circumstances, therefore, credit regulation may involve deprivation of property such as must satisfy the requirements of the property clause. It is contended that recognising the role of section 25 in the credit context is a positive development that can be explored further. The constitutional provision also calls for lawmakers to draft legislation in such a way that regulatory mechanisms are rational and sufficiently proportionate to its stated goals.

**KEYWORDS:** National Credit Act; Constitution; property; arbitrary deprivation; forfeiture; restitution claim; unregistered credit provider; unlawful credit agreement.