AN ARBITRARY DEPRIVATION OF PROPERTY?  
THE SOUTH AFRICAN CONSTITUTIONAL  
COURT’S DECISION ON S 89(5)(B) OF THE NATIONAL  
CREDIT ACT, 34 OF 2005, IN CHEVRON (PTY) LTD  
V WILSON’S TRANSPORT  

PJ Badenhorst*  

Abstract  

In Chevron SA (Pty) Limited v Wilson t/a Wilson’s Transport, petroleum products were provided to Wilson, an owner of a truck business, by an unregistered credit provider, Chevron. In terms of the National Credit Act 34 of 2005 (ZA) (“NCA”) an agreement by an unregistered credit provider is void. Section 89(5)(b) of the NCA, in addition, requires a court to order an unregistered credit provider to refund all money paid by the consumer to the credit provider. Section 89(5)(b) of the NCA exposed Chevron to repay R33 million in payments made by Wilson in the years since the NCA came into effect on 1 June 2006. The South African Constitutional Court considered whether s 89(5)(b) of the NCA was inconsistent with the Constitution of the Republic of South Africa, 1996 (ZA) “on the basis that it permits arbitrary deprivation of property in contravention of s 25(1) of the Constitution”. In terms of s 25(1) of the Constitution, property is protected against arbitrary deprivations by law. At issue was also whether the said section was reasonable and justifiable in terms of s 36(1). In terms of s 36(1) of the Constitution, fundamental rights may only be limited in terms of a “law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. The Constitutional Court decided and confirmed that s 89(5)(b) of the NCA is constitutionally invalid as it is inconsistent with ss 25(1) and 36(1) of the Constitution. It was also decided that the availability of an enrichment claim (restitution), namely, the condicio ob turpem causam, to the credit provider did not ameliorate the arbitrariness of the deprivation. The Constitutional Court’s conception of property for purposes of s 25(1) of the Constitution, the issue of whether an arbitrary deprivation of property took place and the non-availability of an enrichment claim will be discussed with a concluding comment about the implications of the decision.

* Associate Professor of Law, Deakin University, Australia. Visiting Professor at Nelson Mandela University, South Africa. Email: Pieter.Badenhorst@deakin.edu.au. I wish to acknowledge the comments and suggestions of the unknown referee.
I. Introduction

In *Chevron SA (Pty) Limited v Wilson t/a Wilson’s Transport*,¹ the Constitutional Court considered whether s 89(5)(b) of the National Credit Act 34 of 2005 (“NCA”) was inconsistent with the Constitution of the Republic of South Africa 1996 (ZA) “on the basis that it permits arbitrary deprivation of property in contravention of s 25(1) of the Constitution”. At issue was also whether the limitation imposed by the said section was reasonable and justifiable in terms of s 36(1) of the Constitution.

The purpose of the NCA is, *inter alia*, to promote an effective and accessible credit market and industry and to protect the interests of consumers that enter credit agreements with credit providers.² In the present context, a credit provider is required to be registered as such.³ If a credit provider is unregistered, a credit agreement concluded with a credit provider is unlawful and void.⁴ If a credit agreement is unlawful, s 89(5)(a) of the NCA enjoins a court “to declare the agreement void as from the date it was entered into”⁵ and s 89(5)(b) of the NCA requires a court to order that the “credit provider must refund to the consumer” the money that was paid (plus interest). A court is, thus, instructed by the legislature to order a credit provider to refund consumer payments for goods or services received or enjoyed, simply because the credit provider is not registered.⁶

The principles underlying ss 25(1) and 36(1) of the Constitution will be discussed, followed by a summary of the *Chevron* decision, a discussion of the court’s decision about the raised issues, and a concluding comment will be provided. The distinction between a deprivation in terms of s 25(1) and an expropriation (and the requirements thereof) in terms of s 25(2) and (3) of the Constitution, however, falls beyond the scope of this review.⁷

---

¹ *Chevron SA (Pty) Limited v Wilson t/a Wilson’s Transport* [2015] ZACC 15 at [1].
² Section 3 of the National Credit Act 34 of 2005 (ZA). “Consumers” and “credit providers” are terms defined in s 1 of the NCA for what would be creditor and debtor. As to the purpose of and background to the NCA, see *Sebola v Standard Bank of South Africa Ltd* [2012] ZACC 11; 2012 (5) SA 142 (CC) at [39]–[41].
³ National Credit Act 34 of 2005.
⁴ National Credit Act 34 of 2005.
⁵ *Chevron SA (Pty) Limited v Wilson t/a Wilson’s Transport*, above n 1, at [7]. This corresponds with the common law position (*National Credit Regulator v Opperman* [2012] ZACC 29; 2013 (2) SA 1 (CC) at [18]).
⁶ See *Chevron SA (Pty) Limited v Wilson t/a Wilson’s Transport*, above n 1, at [32].
II. Sections 25(1) and 36(1) of the Constitution

In South Africa, the right to “property” is a constitutionally guaranteed or fundamental right in terms of s 25 of the Constitution (property clause).8 The property clause has as its object to protect property against unconstitutional interference by the state and a narrower secondary object, namely to allow for flexibility to redress historical property inequities and inequalities incrementally.9 The property clause embodies a negative protection of property.10 In terms of s 25(1) of the Constitution, a deprivation of any person’s property may only take place: (a) in terms of a law of general application; and (b) by law which does not permit arbitrary deprivation of “property”.11

Deprivation of property entails regulatory limitations that are imposed by the state in the public interest on the use, enjoyment, exploitation or disposal of property.12 Initially, the Constitutional Court13 described the term “deprivation” very generally, indicating that “in a certain sense any interference with the use, enjoyment or exploitation of private property” involves some kind of deprivation.14 Subsequently, the Constitutional Court15 expanded the notion of deprivation of property and decided that whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation of the constitutionally-protected

9 See further, PJ Badenhorst, Juanita M Pienaar and Hanri Mostert Silberberg and Schoeman’s The Law of Property (5th ed, Lexis Nexis Butterworths, Durban, 2006) at 521 and 522.
10 First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance [2002] ZACC 5; 2002 (4) SA 768 (CC) at [48].
11 The notion of constitutional property will be discussed below.
13 First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance, above n 10 at [57].
14 Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, above n 8 at [35]; Badenhorst, Pienaar and Mostert, above n 9, at 544.
15 Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng [2002] ZACC 5; 2005 (1) SA 530 (CC) at [32]; Offit Enterprises Pty Ltd v Coega Development Corporation (Pty) Ltd [2010] ZACC 20; 2011 (1) SA 293 (CC) at [39]; National Credit Regulator v Opperman, above n 5, at [66]. The FNB approach was still followed in Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, above n 8, at [35]. For criticism of the Mkontwana approach, see van der Walt, above n 7, at 204-206.
property. At the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society is required for a deprivation.\textsuperscript{16}

A deprivation has to be authorised by a law of general application.\textsuperscript{17} “Law” in this context includes statutes and accompanying legislative regulations, rules of the common law and customary (indigenous) law.\textsuperscript{18} The phrase “law of general application” refers to general publicly accessible rules which generally and equally affect the right of individuals rather than the targeting of specific individuals.\textsuperscript{19} The deprivation must be aimed at protecting a public purpose such as public health and safety.\textsuperscript{20}

A deprivation of property is said to be arbitrary when the law referred to in s 25(1) does not provide sufficient reasons for a particular deprivation or is procedurally unfair.\textsuperscript{21} Arbitrary deprivation of property may thus be substantive or procedural.\textsuperscript{22} These are alternative grounds that can be used to show that a deprivation is arbitrary.\textsuperscript{23} To determine whether there is sufficient reason for a deprivation, it is “necessary to evaluate the relationship between the purpose of the law and the deprivation effected by that law”.\textsuperscript{24} It is procedurally unfair if a court, hearing a matter, is given no discretion when making an order.\textsuperscript{25}

\textsuperscript{16} For instance, a statute which prohibited transfer of ownership of land unless all municipal charges have been paid constitutes a deprivation (\textit{Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng}, above n 15, at [32] – 33]). A mere threat of expropriation by a statutory body with no powers to expropriate does not constitute a deprivation (\textit{Offit Enterprises Pty Ltd v Coega Development Corporation (Pty) Ltd}, above n 15, at [43]–[44]).

\textsuperscript{17} Van Der Walt, above n 7, at 218.

\textsuperscript{18} Hanri Mostert and PJ Badenhorst “Property and the Bill of Rights” in \textit{Bill of Rights Compendium} (LexisNexis, Durban, 2014) at p 3FB7.1.2(a). See further, van der Walt, above n 7, at 233–234.

\textsuperscript{19} Badenhorst, Pienaar and Mostert, above n 9 at 97-98; Van der Walt, above n 7, at 232.

\textsuperscript{20} Van der Walt, above n 7, at 218 and 219.

\textsuperscript{21} First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance, above n 10, at [100]; \textit{Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng}, above n 15, at [34]; see further [51]; \textit{National Credit Regulator v Opperman} above n 5, at [66]. For instance, a statute which prohibited transfer of ownership of land unless all municipal charges have been paid was not an arbitrary deprivation (\textit{Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng}, above n 15, at [53]).

\textsuperscript{22} \textit{Law Society of South Africa v Minister for Transport} [2010] ZACC 25; 2011 (1) SA 400 (CC) at [85].

\textsuperscript{23} See \textit{Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government}, above n 8, at [39].

\textsuperscript{24} \textit{Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng}, above n 15, at [34].

\textsuperscript{25} See \textit{Chevron SA (Pty) Limited v Wilson t/a Wilson’s Transport}, above n 1, at [22]; \textit{National Credit Regulator v Opperman}, above n 5, at [69].
The right to property in s 25(1) is also subject to the general limitation clause of s 36 of the Constitution. In terms of s 36(1) of the Constitution, fundamental rights may only be limited in terms of a “law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. During such determination, the following factors have to be taken into account: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. The enquiry is, however, not restricted to the factors listed under s 36(1) and other relevant factors may also be taken into account.

The right to property is, therefore, not an absolute right in the constitutional order and can be interfered with by the state to facilitate the achievement of social purposes. If an impugned statute or provision of a statute does not satisfy the requirements for a valid deprivation in terms of s 25(1) and/or cannot be justified in terms of s 36(1) of the Constitution, it will be declared unconstitutional.

The facts of, issues raised and the decision of the Supreme Court of Appeal in the Chevron case will now be discussed:

III. Facts Of The Chevron Decision

Chevron granted credit to Wilson for the purchase of petroleum products for his trucking business. In terms of their agreement Chevron provided diesel at its filling stations and Wilson’s business premises. Since 1997 Wilson had made monthly payments to Chevron until 2008 when Wilson contested the accuracy of Chevron’s billing. Chevron brought a suit in the magistrate’s court for payment of the outstanding amount (R3 million). Before the trial Chevron accepted that it was, in fact, not registered as a credit provider as required by the NCA. Section 89(5)(b) of the NCA, therefore, exposed Chevron to repay R33 million of payments that were made by Wilson after the NCA came into effect on 1 June 2006. By agreement between the parties

26 First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance, above n 10, at [110]; Chevron SA (Pty) Limited v Wilson t/a Wilson’s Transport, above n 1, at [14].
28 See further Law Society of South Africa v Minister for Transport, above n 22, at [37].
29 Mkontwana v Nelson Mandela Metropolitan Municipality; Bisett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng, above n 15, at [82]; Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, above n 8, at [33].
30 Van der Walt, above n 7, at 270; Marais, above n 12, at 2985.
31 Chevron SA (Pty) Limited v Wilson t/a Wilson’s Transport, above n 1, at [4].
32 At [4], [5] and [8].
33 At [6].
34 At [8].
the magistrate granted an order declaring that: (a) the agreements between the parties constituted credit agreements as envisaged in the NCA; and (b) the credit agreements were unlawful and void in terms of the NCA.\textsuperscript{35} The trial was postponed indefinitely to enable Chevron to institute proceedings to challenge the constitutional validity of s 89(5) of the NCA.\textsuperscript{36} In proceedings before the Western Cape Division of the High Court,\textsuperscript{37} it was decided that s 89(5)(b) of the NCA is invalid and unconstitutional as it permits an arbitrary deprivation of property which constituted an infringement of s 25(1) of the Constitution and which could not be reasonably justified in terms of s 36 of the Constitution.\textsuperscript{38} When the High Court’s finding of unconstitutionality was referred to the Constitutional Court for confirmation,\textsuperscript{39} the parties agreed that the High Court’s order about the invalidity of s 89(b)(b) of the NCA should be confirmed, albeit it for different reasons.\textsuperscript{40} The impugned section has since been amended and has already taken effect.\textsuperscript{41}

### IV. Issues Raised In The Chevron Decision

The Constitutional Court at the outset accepted that it had to determine whether s 89(5)(b) of the NCA was indeed constitutionally invalid before it could confirm the High Court’s order that s 89(5)(b) is invalid.\textsuperscript{42} This legal question gave rise to the following issues:\textsuperscript{43}

- (a) whether monies paid to a credit provider by a consumer constitute property;
- (b) if they do, whether their repayment by the credit provider to the consumer in terms of s 89(5)(b) amounts to deprivation;
- (c) if it does amount to deprivation, whether the deprivation is arbitrary;
- (d) if available to the credit provider upon repayment of the monies to the consumer, whether an unjustified enrichment claim expunges any arbitrariness that might otherwise exist; and
- (e) whether the limitation is justified in terms of s 36(1) of the Constitution.

\textsuperscript{35} At [9].
\textsuperscript{36} At [9].
\textsuperscript{37} At [7]–[18].
\textsuperscript{38} At [10]–[12].
\textsuperscript{39} Constitution of the Republic of South Africa, 1996, s72(2)(9).
\textsuperscript{40} \textit{Chevron SA (Pty) Limited v Wilson t/a Wilson’s Transport}, above n 1, at [3] and [13].
\textsuperscript{41} At [4].
\textsuperscript{42} At [13].
\textsuperscript{43} At [15].
The court’s decision about the abovementioned issues will now be discussed.

V. The Decision In Chevron

The brief unanimous judgment of Madlanga J\(^{44}\) as to the above issues can be summarised as follows:

(a) Money in hand constitutes a property interest which is protected by s 25 of the Constitution.\(^ {45}\)

(b) Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation of property. At the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society is required for a deprivation.\(^ {46}\)

(c) A deprivation is arbitrary when the “law” referred to in s 25(1) does not provide sufficient reasons for the particular deprivation of property\(^ {47}\) or it is procedurally unfair.\(^ {48}\)

(d) The availability of an unjustified enrichment claim to the credit provider does not neutralise “the arbitrariness of the deprivation to which s 89(5)(b) subjects the creditor.”\(^ {49}\)

(e) Despite it being difficult to conceive of a situation where an arbitrary law or conduct can be reasonable and justifiable\(^ {50}\) it was also assumed that property in s 25(1) may be subject to a limitation in terms of s 36(1).\(^ {51}\) It was accepted that the factors listed in s 36 are not an exhaustive list for purposes of the limitation analysis but key factors to be considered in the overall assessment of whether or not the limitation is reasonable and justifiable in an open and democratic society.\(^ {52}\)

---


\(^{45}\) Chevron SA (Pty) Limited v Wilson t/a Wilson’s Transport, above n 1, at [16]. See further, Van der Walt, above n 7, at 151.

\(^{46}\) See Chevron SA (Pty) Limited v Wilson t/a Wilson’s Transport, above n 1, at [17] citing Mkontuwa v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng, above n 15, at [32].

\(^{47}\) Whether there are sufficient reasons have to be ascertained in a certain way. See, in this regard, First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance, above n 10, at [100].

\(^{48}\) See Chevron SA (Pty) Limited v Wilson t/a Wilson’s Transport, above n 1, at [20] citing First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance, above n 10, at [100].

\(^{49}\) Chevron SA (Pty) Limited v Wilson t/a Wilson’s Transport, above n 1, at [30].

\(^{50}\) See however, Antonie Gildenhuys Onteieningsreg (2nd ed, LexisNexis Butterworths, Durban, 2001) at 24.

\(^{51}\) Chevron SA (Pty) Limited v Wilson t/a Wilson’s Transport, above n 1, at [31].

\(^{52}\) At [34].
The Constitutional Court made the following findings with accompanying reasoning for its decision:

(a) The payment of R33 million to Chevron constituted constitutional property.\(^{53}\)

(b) The repayment of the money by Chevron to Williams would amount to a deprivation of property. The court reasoned that if a creditor is forced by a court order or operation of law to part with payment already received from a consumer, it constitutes “the very essence of a deprivation of property”.\(^{54}\) The interference with or limitation of Chevron’s property is substantial because it is “totally divested of the monies which it received under the credit agreement”.\(^{55}\) It was reasoned that ordering a credit receiver to refund money already received was more of a deprivation than the deprivation of a credit receiver of his enrichment claim, as decided in *National Credit Regulator v Opperman*,\(^{56}\) which decision will be discussed briefly below.

(c) The proscription of unlawful credit agreements was decided not to be arbitrary because it served the crucial purposes of protection of consumers.\(^{57}\) In other words, sufficient reasons were provided for the particular deprivation of property. The operation of s 89(5)(b) of the NCA was, however, procedurally unfair and rendered deprivations under it arbitrary because the section denies a court any discretion to decide on a just and equitable order or to take relevant circumstances into account.\(^{58}\)

(d) The possible availability of an enrichment claim upon repayment of the monies to the consumer, namely, the *condictio ob turpem causam*,\(^{59}\) does not ameliorate or negate the arbitrariness of a s 89(5)(b) deprivation.\(^{60}\) The applicability of the *condictio ob turpem causam* in South African law will be discussed in my commentary below. It was reasoned that repayment of the money in terms of s 89(5)(b) of the NCA to the consumer in exchange for diesel may result in the consumer retaining both or benefiting from the diesel.\(^{61}\) Restitution to the credit provider was perceived as a possible route open to the credit provider due to the availability of the *condictio ob turpem causam*.

\(^{53}\) At [16].
\(^{54}\) At [18].
\(^{55}\) At [18].
\(^{56}\) At [19].
\(^{57}\) At [21].
\(^{58}\) At [22]–[24], [33]; *National Credit Regulator v Opperman*, above n 5, at [18], [69]–[72].
\(^{59}\) The full title of this Roman *condictio* is the *condictio ob turpem vel iniustam causam*. I am following the suggestion by JC Sonnekus *Ongegronde Verryking in die Suid-Afrikaanse Reg* (LexisNexis, Durban, 2007) at 129 n 1, that the full title has become redundant in South African law.
\(^{60}\) See *Chevron SA (Pty) Limited v Wilson t/a Wilson’s Transport*, above n 1, at [27] and [29].
\(^{61}\) At [25].
causam. The Constitutional Court acknowledged that whilst a s 89(5)(b) refund is mandatory, the creditor is only entitled to an enrichment claim if the requirements thereof are proven and the claimant is free from turpitude and has not acted dishonourably. If turpitude is present, the so-called *par delictum* rule applies. This rule means that, when both parties are equally in the wrong (for instance, concluding an unlawful contract), the position of the possessor of the property is stronger. Over the years, the courts have, however, exercised their discretion to relax the operation of the *par delictum* rule to prevent injustice by granting an enrichment claim in order to do simple justice between the parties. Even if the application of the *par delictum* rule is so relaxed, an enrichment claim does not guarantee restitution as the debtor may, for instance, be impecunious or insolvent.

(e) In its limitation analysis in terms of s 36(1) of the Constitution, the Constitutional Court examined whether there is sufficient reason for the deprivation and whether there are no less restrictive measures to achieve the purpose. Determining whether there is sufficient reason for a deprivation, the Constitutional Court was of the view that it is necessary to evaluate the relationship between the purpose of the law and the deprivation caused by that law. It was found that the prevention of, and punishment for, unlawful credit agreements served the important purpose of protecting consumers. The granting of a discretion to a court to grant a just and equitable order was found to be a less restrictive means to achieve the purpose of consumer protection than s 89(5)(b). It was found that the arbitrary deprivation arising from the operation of s 89(5)(b) of the NCA “constitutes an unjustifiable limitation of the property right

---

62 At [26].
63 See VI Critical Discussion of the Court’s Decision in *Chevron* below.
64 *Chevron SA (Pty) Limited v Wilson t/a Wilson’s Transport*, above n 1, at [28].
65 In *National Credit Regulator v Opperman*, above n 5, at [18] it was held that an agreement concluded by an unregistered credit receiver being unaware of the registration requirement is a good example of an unlawful agreement where there is little or no turpitude on the part of the registered proprietor.
66 *Chevron SA (Pty) Limited v Wilson t/a Wilson’s Transport*, above n 1, at [28]; *National Credit Regulator v Opperman*, above n 5, at [16].
67 *Chevron SA (Pty) Limited v Wilson t/a Wilson’s Transport*, above n 1, at [27]; *Jajbhay v Cassim* 1939 AD 537.
68 See *Chevron SA (Pty) Limited v Wilson t/a Wilson’s Transport*, above n 1, at [27]; *National Credit Regulator v Opperman*, above n 5, [17].
69 *Chevron SA (Pty) Limited v Wilson t/a Wilson’s Transport*, above n 1, at [29].
70 At [32] and [33].
71 At [32].
72 At [33].
73 At [33].
contained in s 25(1) of the Constitution”. Madlanga J reasoned that it: 

… is excessive, unfair, inequitable and arbitrary to compel, in all circumstances, an unregistered credit provider to refund monies paid by the consumer for goods or services it actually received or enjoyed, simply because that credit provider is not registered (emphasis added).

The Constitutional Court decided that s 89(5)(b) of the NCA is constitutionally invalid, as it permitted an arbitrary deprivation of property in conflict with s 25(1) and its limitation of property was not justifiable in terms of s 36 of the Constitution. The Constitutional Court confirmed the order of the High Court. It was necessary for the Constitutional Court to confirm the decision of the High Court, even though the impugned section had been amended and took effect, because Chevron’s case was still before the magistrate’s court and was governed by the impugned section. The Constitutional Court held that the unfettered discretion of the courts contained in the amended section does address the deficiency in s 89(5) of the NCA. The order of the High Court was found to be appropriate.

The notion of constitutional property, the availability of the *condictio ob turpem causam* and the notion of a deprivation will be further discussed.

VI. CRITICAL DISCUSSION OF THE COURT’S DECISION IN CHEVRON

It is necessary in every property case to first, as a threshold question, establish whether the right or interest is property for purposes of s 25(1). Section 25(1) of the Constitution does not define “property”, other than stating that it is not limited to land. In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*, the Constitutional Court declined to define property for purposes of s 25 comprehensively, stating that at this stage of the development of South African constitutional jurisprudence it would be practically impossible and judicially unwise to

---

74 At [34]; *S v Manamela* [2000] ZACC 5; 2000 (3) SA 1 (CC) [32].
75 *Chevron SA (Pty) Limited v Wilson t/a Wilson’s Transport*, above n 1, at [33].
76 At [34].
77 At [34].
78 At [14].
79 At [35].
80 At [35].
81 Van der Walt, above n 7, at 85, 112 and 187.
82 *National Credit Regulator v Opperman*, above n 5, at [60].
83 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*, above n 10, at [51]; Mostert and Badenhorst, above n 18, at 3FB6.1.4. The absence of a definition was confirmed in *Law Society of South Africa v Minister for Transport*, above n 22, at [83].
furnish a comprehensive definition of property for purposes of s 25. As a frame of reference, it has subsequently been accepted by the Constitutional Court that a definition of constitutional property should not be too wide to make statutory regulation impracticable and not too narrow to render protection of property worthless.\textsuperscript{84}

The notion of property can either refer to a legal object or a right. As a legal object, it is accepted that both corporeal and incorporeal property enjoy constitutional protection.\textsuperscript{85} The Constitutional Court in \textit{Chevron} accordingly decided that money in hand (an object) constitutes constitutional property.\textsuperscript{86} A rights-based approach to the notion of property is, however, preferred as an act of expropriation (as well as a deprivation) has a right as its object rather than a thing.\textsuperscript{87} In terms of a rights-based approach s 25(1) is said to be aimed at the protection of private property rights against governmental interference.\textsuperscript{88} Real rights, such as ownership of movable\textsuperscript{89} or immovable\textsuperscript{90} (corporeal) property, mineral rights,\textsuperscript{91} usufruct\textsuperscript{92} or the right to temporarily remove gravel from land,\textsuperscript{93} are recognised as constitutional property.\textsuperscript{94} Other private law rights (incorporeal property), such as intellectual property rights,\textsuperscript{95} rights to goodwill\textsuperscript{96} and claims for loss of earning capacity,\textsuperscript{97} also constitute constitutional property.

\textsuperscript{84} \textit{Law Society of South Africa v Minister for Transport}, above n 22, at [83].
\textsuperscript{85} At [83].
\textsuperscript{86} \textit{Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport}, above n 1, at [16]. The court relied on the statement in \textit{Troskie v Von Holdt} [2013] ZAECGH 31 at [37] that “it hardly need be said that the money advanced in terms of the agreements constitutes property” within the meaning of s 25 of the Constitution.
\textsuperscript{87} Gildenhuys, above n 50, at 61-63.
\textsuperscript{88} \textit{Phoebus Apollo Aviation CC v Minister of Safety and Security} [2002] ZACC 26; 2003 (2) SA 34 (CC) [4].
\textsuperscript{89} \textit{First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance}, above n 10 at [51], [55] and [56].
\textsuperscript{90} \textit{First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance}, above n 10 at [51]; \textit{Mkontwana v Nelson Mandela Metropolitan Municipality, Bissett v Buffalo City Municipality, Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng}, above n 15, at 33; \textit{Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government}, above n 8 at [33].
\textsuperscript{91} \textit{Agri South Africa v Minister of Minerals and Energy} [2013] ZACC 9; 2013 4 SA 1 (CC) at [50]. See further, \textit{Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape} [2015] ZACC 23; 2015 (6) SA 125 (CC) at [107].
\textsuperscript{92} See \textit{National Credit Regulator v Opperman}, above n 5, at [61].
\textsuperscript{93} \textit{Du Toit v Minister of Transport} [2005] ZACC 9; 2006 (1) SA 297 (CC) at [54].
\textsuperscript{94} According to Van der Walt, above n 7, at 140, all limited real rights, including servitudes, real security rights, registered long-term leases and mineral rights should be recognised as constitutional property.
\textsuperscript{95} \textit{Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)} 2006 (1) SA 144 (CC) at [17]. See further, Van der Walt, above n 7, at 143 and 148-150.
\textsuperscript{96} \textit{Phumelela Gaming and Leisure Ltd v Grundlingh} [2006] ZACC 6; 2007 (6) SA 350 (CC). See also, Van der Walt, above n 7, at 151.
\textsuperscript{97} It was only assumed to be the case in \textit{Law Society of South Africa v Minister for Transport}, above n 22, at [84].
Some personal rights may also be recognised as constitutional property. In *National Credit Regulator v Opperman* (“the Opperman decision”), the right to claim restitution based upon an enrichment was identified as a personal right which can only be enforced against a person who has been unjustifiably enriched. The Constitutional Court decided that such an enrichment claim was property under s 25(1) of the Constitution. The Constitutional Court in *Opperman* referred to the view of the *court a quo* that an enrichment claim, counted as an asset in one’s estate or patrimony, has monetary value and could be disposed of and transferred to another person. The court reasoned further that its decision is in accordance with other jurisdictions where personal rights have been recognised as constitutional property.

It is submitted that a personal right is acquired by virtue of the fact that undue enrichment took place which provides a remedy, namely a specific enrichment action. The personal right created by the act of unjustifiably enriched constitutes constitutional property rather than the remedy itself. The enrichment claim (as constitutional property) in the *Opperman* decision was distinguished from money (as legal object) in *Chevron*.

State welfare payments and subsidies are generally not regarded as constitutional property. A public law right, namely, a liquor licence to sell wine in a grocery store was recently recognised as constitutional property by a majority of the Constitutional Court.

Despite the above private-law style examples of constitutional property, it must be remembered that the concept of, and range of interest, qualifying as constitutional property and the reasons for constitutional protection are fundamentally different from a private-law right. An interest or right should be regarded as constitutional property if it has been “vested in or been acquired by the holder according to normal law” and constitutes an asset in one’s estate or patrimony. As seen before, constitutional property has the

---

98 See further, Van der Walt, above n 7, at 141-143 and 153.
99 *National Credit Regulator v Opperman*, above n 5, at [61].
100 At [63]. See also [142].
101 At [58].
102 At [63].
103 *Chevron SA (Pty) Limited v Wilson t/a Wilson’s Transport*, above n 1, at [17].
104 See Van der Walt, above n 7, at 162. In *Transkei Public Servants Association v Government of the Republic of South Africa* 1995 (9) BCLR 1235 (Tk) it was noted that constitutional property for purposes of 28 of the interim Constitution 1993 was probably wide enough to include a state subsidy. See further, Van der Walt, above n 7, at 167-168.
105 *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape*, above n 92, at [70], [133], [143] and [147]. Moseneke DCJ, dissenting, did not recognise a liquor licence as constitutional property (at [122]–[130]).
106 Van der Walt, above n 7, at 101-102.
107 At 184.
following features, namely, a monetary value, is capable of disposition and is transferrable to another person.

At common law unlawful contracts are void from the outset and cannot be enforced. A party to an unlawful agreement who wants to claim restitution of money paid or goods delivered cannot do so under the void contract and must make use of an action based on the unjustified enrichment of the receiver. Enrichment law provides a remedy in such an instance. The enrichment actions of classical Roman-Dutch law (condictiones) are still available to a plaintiff in South African law. The appropriate enrichment action is the condictio ob turpem causam. This condictio is available in South African law to recover that which has been so transferred (or the value thereof) under an unlawful agreement. The general or generic requirements for any action based upon enrichment are: (a) the defendant must be enriched and the plaintiff must be impoverished; (b) the defendant’s enrichment must be at the expense of the plaintiff; and (c) the enrichment must be unjustified. The last general requirement means that there must be no sufficient ground recognised by law (causa) to justify the transfer or retention of value which has passed from the plaintiff’s estate to that of the defendant. The specific requirements of the condictio ob turpem causam are: (a) ownership must have passed with the transfer; (b) the transfer must have taken place in terms of an unlawful agreement; and (c) the claimant must tender the return of what he has received. Thus, a credit provider would be able to claim the enrichment caused by the money paid, or goods delivered, to a consumer in terms of an unlawful agreement, provided the general requirements of an enrichment action as well as the specific requirements of the condictio ob turpem causam are met.

If both parties to the unlawful agreement have, however, delivered performance in terms of the unlawful contract, enrichment (or impoverishment) of the parties may be absent and consequently an enrichment claim may not be available. It is submitted that the condictio ob turpem causam would only have been available to the credit provider prior to the grant of a s 89(5)(b) order by a court if the credit provider was indeed impoverished and the consumer was indeed enriched. Because both parties rendered performance this does not seem to be the case as impoverishment of the defendant may be absent. Whether such condictio was indeed available if a s 89(5)(b) order had been

108 National Credit Regulator v Opperman, above n 5, at [14].
109 At [15].
111 National Credit Regulator v Opperman, above n 5, at [15].
112 First National Bank of Southern Africa Ltd v Perry 2001 3 SA 960 (SCA) at [22].
113 McCarthy Retail Ltd v Shortdistance Carriers CC 2001 3 SA 482 (SCA) at [2]; Kudu Granite Operations (Pty) Ltd v Caterna Ltd 2003 (5) SA 193 (SCA) at [17].
114 McCarthy Retail Ltd v Shortdistance Carriers CC, above n 114, at [4].
115 National Credit Regulator v Opperman, above n 5, at [15].
Canterbury Law Review [Vol 22, 2016]

granted was, however, at issue in the *Chevron* decision. It will be shown that this may also not have been the case.

For its decision in *Chevron*, the Constitutional Court relied largely on the *Opperman* decision. Opperman, an unregistered credit provider, lent R7 million to his friend Boonzaaier who was unable to repay the money. As the agreement was unlawful the *condictio ob turpem causam* would have been available to Opperman because he was impoverished and Boonzaaier was unjustly enriched at his expense. At issue before the Constitutional Court was whether another subsection, namely, s 89(5)(c) of the NCA, was “consistent with the right not to be arbitrarily deprived of property, recognised in s 25(1) of the Constitution”. Section 89(5)(c) of the NCA required a court to order the cancellation or forfeiture to the state of all rights of the credit provider to recover money or goods under an unlawful credit agreement, unless it leads to enrichment of the consumer. As the credit agreement was unlawful, Opperman would thus have been barred by s 89(5)(c) to recover the money, either contractually or on the basis of the unjustified enrichment of Boonzaaier. Because of s 89(5)(c), the money paid stays with Boonzaaier. Section 89(5)(c) does not indicate what is to happen if the consumer would indeed be enriched. The primary function of s 25(1) was recognised as “striking a proportionate balance” between the rights of property holders and the interest of the public. Van der Westhuizen J decided that the most plausible interpretation of a badly drafted s 89(5)(c) was that the “courts must declare the agreement void and order either that all rights perceived to follow from the agreement (including the right to restitution) are cancelled or forfeited to the state”. This interpretation recognised the reference to unjustified enrichment in the section. Thus, Opperman would have lost (or been deprived of) a personal right against Boonzaaier. The Constitutional Court held that whether a deprivation has occurred depends on the extent of interference with use, enjoyment and exploitation of the constitutionally-protected property. Van der Westhuizen J, in addition, required that interference must be “significant enough to have a legally relevant impact on the rights of the affected party” to constitute a deprivation. It was accepted as trite law that forfeiture results in deprivation of property which is inconsistent with the Constitution. The unregistered credit provider was found to be

116 At [4].
117 At [15].
118 At [1].
119 At [9].
120 At [18] [22].
121 At [22].
122 At [65].
123 At [55].
124 At [56].
125 At [66].
126 At [74].
127 At [67].
totally deprived of his right to restitution.\textsuperscript{128} A deprivation was perceived by the Constitutional Court as arbitrary if sufficient reasons for the regulatory deprivation were absent or if the deprivation was procedurally unfair.\textsuperscript{129} It was held that s 89(5)(c) results in arbitrary deprivation of property in breach of s 25(1) of the Constitution\textsuperscript{130} and an unreasonable and unjustifiable limitation of property in breach of s 36(1).\textsuperscript{131} The absence of room for judicial discretion under s 89(5)(c) and the taking away of a creditor’s right to restitution were indicated in the analysis of arbitrariness.\textsuperscript{132} The factors listed in s 36(1) were also considered by the Constitutional Court.\textsuperscript{133}

We have seen that the Constitutional Court in \textit{Chevron} accepted that after the grant of a s 89(5)(b) order the consumer may be enriched in the sense that they would have their payments back and would have derived a benefit from the use of the diesel.\textsuperscript{134} By implication, Chevron would be impoverished (supply of diesel and repayment of payments). According to the court, the remedy available to the credit provider would then be the \textit{condictio ob turpem causam}.\textsuperscript{135} I am, however, of the view that upon repayment of the money in terms of s 89(5)(b) of the NCA, the \textit{condictio ob turpem causam} would not have been available to the credit provider to claim restitution (of its repayment). The reason being that the repayment of the money to the consumer would take place in terms of a legal rule,\textsuperscript{136} namely s 89(5)(b). The court order in terms of s 89(5)(b) provides a sufficient ground, recognised by law, to justify the re-transfer of the money to the consumer (assuming, for argument’s sake, that the subsection was valid). In other words, requirement (c) of the general requirements of an enrichment claim has not been met and has been overlooked by the Constitutional Court. A court order in terms of s 89(5)(b) cannot be a source of an enrichment claim in terms of the common law. For a consumer to be able to institute the \textit{condictio ob turpem causam}, the claimant must also tender the return of what he has received (diesel, which no longer exists) or the value of benefit of it. It seems that the \textit{condictio ob turpem causam} was not available to Chevron, as credit provider, due to: (a) the absence of enrichment/impoverishment when both parties rendered performance prior to the court order being granted (which was not the case in \textit{Opperman}, which case was relied upon by the Constitutional Court in \textit{Chevron}); and (b) repayment taking place in terms of a s 89(5)(b) court order is justified by statute. Even if the Constitutional Court erred in the \textit{Chevron} decision in this regard, the unavailability of the \textit{condictio ob turpem causa}

\begin{itemize}
\item \textsuperscript{128} At [70].
\item \textsuperscript{129} At [68].
\item \textsuperscript{130} At [65]–[72].
\item \textsuperscript{131} At [73]–[80].
\item \textsuperscript{132} At [18] [76].
\item \textsuperscript{133} At [79].
\item \textsuperscript{134} \textit{Chevron SA (Pty) Limited v Wilson t/a Wilson’s Transport}, above n 1, at [25].
\item \textsuperscript{135} At [26].
\item \textsuperscript{136} See, Sonnekus, above n 59, at 83.
\end{itemize}
would just have provided more ammunition for the court’s decision that a s 89(5)(b) deprivation was arbitrary.

The Constitutional Court’s formulation in *Chevron* of a “deprivation” and an “arbitrary deprivation” and its findings that an arbitrary deprivation took place appear to have been correct as being in line with recent decisions of the Constitutional Court. The Constitutional Court in *Chevron* adhered to the formulation of a deprivation espoused in *Mkontwana v Nelson Mandela Metropolitan Municipality*, rather than the initial formulation of a deprivation in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*,\(^{137}\) or the additional “impact on rights” test required by Van der Westhuizen J in the *Opperman* decision.\(^{138}\) The Constitutional Court’s decision that a court order in terms of s 89(5)(b) is procedurally unfair and, therefore, arbitrary is correct.

**VII. Concluding Comments**

It is submitted that it was correctly decided in *Chevron* that to compel a court to order an unregistered credit provider under all circumstances “to refund monies paid by the consumer for goods or services it actually received or enjoyed, simply because that credit provider is not registered” constitutes an arbitrary deprivation and an unjustifiable limitation of constitutional property which was inconsistent with ss 25(1) and 36(1), respectively, of the Constitution.

The decision of the Constitutional Court regarding the issues raised has the following implications:\(^{139}\) firstly, “money in hand” (legal object) constitutes constitutional property. Secondly, a right may qualify as constitutional property if it has been vested in or acquired by a holder of the right, constitutes an asset in a holder’s patrimony, has a monetary value and is capable of disposition and transfer to another person. Thirdly, whether there has been a deprivation of constitutionally-protected property depends on whether there is a substantial interference with or limitation of use, enjoyment or exploitation of property that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society. Fourthly, a deprivation of property is arbitrary when the “law” referred to in s 25(1) is procedurally unfair or does not provide sufficient reasons for the particular deprivation of property. Fifthly, the availability of an enrichment claim upon repayment of the monies to the consumer (which was actually not the case) does not expunge the arbitrariness of a procedurally unfair s 89(5)(b) deprivation. Six, if regulation creates a benefit, like, for instance, circumstances giving rise to an enrichment claim, such benefit may be taken into account in the issue

---

139 At 3.
whether a deprivation is arbitrary. Seven, the arbitrary deprivation arising from the operation of s 89(5)(b) of the NCA constitutes an unjustifiable limitation of constitutional property in terms of s 36(1) of the Constitution.

The *Chevron* decision illustrates that, when the constitutionality of legislation, such as s 89(5) of the NCA, is examined within the sphere of constitutional property law, a basic understanding of private law notions such as property, unlawful contracts and common law based claims for enrichment remains relevant and indispensable. In terms of a rights-based approach, which is preferred, it is rather ownership of money or a personal right to claim payment of the money that was deprived and not money in hand (as object). Ironically, the law of unjustified enrichment would have provided a solution to the dispute between the parties in both the *Opperman* and *Chevron* decisions without the need for far-reaching statutory provisions such as contained in s 89(5)(c) and (b), respectively: if unjustifiably enriched, the enrichment of the respective defendants could have been recovered in the case of an unlawful credit agreement. The Constitutional Court should have decided that an enrichment claim would not have been available to *Chevron* (for the reasons advanced in my discussion) upon grant of a s 89(5)(c) order, which would have been a stronger indication of the arbitrariness of s 89(5)(c).

Legislation forcing the courts, in the absence of any discretion at all, to grant an order that will cause a “deprivation of property” will not pass constitutional muster, even if it has the laudable protection of consumers as its object. The *Opperman* and *Chevron* decisions are cases in point. Not only do they illustrate unconstitutional deprivation of property by the legislature but also a deprivation of South African law of well-developed principles of the common law.

---

140 See *National Credit Regulator v Opperman*, above n 5, at [13].