Honoré Daumier *The Legislative Belly* (1834)

ELITES AT ODDS OVER STATISM

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A society's laws should be in harmony with its values. Laws typically reflect various preferred values baked into them. As such it is a cultural product. In this way, a country's common law especially, based as it is on historical decisions of several years' standing, reveals the people's view of legal prudence.

In **Wingaardt and Others v Grobler and Another 2010 (6) SA 148 (ECG)** Alkema and Jones JJ quote Thirion J in **Clarke v Hurst 1992 (4) SA 630 (D) at 652H – I** stating : *"… law is but a translation of society's fundamental values into policies and prescripts for regulating its members' conduct, …"*.

Common law doctrines, legislation and precedent are founded on underlying values and assumptions, in short, on the received wisdom and ideology of that society. If the law feels natural, neutral and objective to a person, that person is steeped in its ideology and values.

Froneman J, thus remarked as follows in a book review [2014 (131) SALJ 474 at 478] of a publication honouring Professor JC de Wet, widely acknowledged as an architect of the South African law of contract and one of its foremost authorities:

> *"The conceptual framework constructed by De Wet is not in its construction value free or neutral, nor can it be in its application. It proceeds from the moral premise that personal autonomy and individual responsibility in private affairs like contracts is sufficient guarantee for ethically acceptable results and that judicial interference with that is unnecessary and uncalled for."*

In the same vein, Davis J and Le Roux in Lawfare : Judging Politics in South Africa (Jonathan Ball, 2019 at 302) regard *"the ideology of the judiciary"* as one of several factors that will determine the dominant trajectory of our constitutional journey. They refer to the spectrum of possible meanings that might be ascribed to the supposed innocuous term *"freedom"* in the Constitution, and suggest that *"a libertarian conception of freedom"* would not be compatible with a commitment to a society based on substantive equality (as favoured by them).

The values and ideology of the citizens, the legislature and the judiciary thus play a cardinal role in the formation of law.

It is in this context that some observations in **Du Bruyn v Karsten 2019 (1) SA 403 (SCA)** [Nicholls AJA, with Shongwe ADP, Makgoka JA, Schippers JA and Mokgohloa AJA concurring], a decision concerning Section 40 of the National Credit Act, 2005 (***"the NCA"***), are telling.

To appreciate the observations, some context is needed.

The NCA commenced in 2006 with s 40 thereof requiring that a person must apply to be a registered credit provider if that person is a credit provider under at least 100 credit agreements, or if the total principal debt owed to that person under all outstanding credit agreements exceeds a threshold set by the Minister (initially R500,000.00). Concomitantly s 40(3) provided that a person not so registered (if required) may not extend credit and s 40(4) declared credit agreements by an unregistered credit provider unlawful and void. It further directed in s 89(5) that a

court must order that any instalments paid by a lender / consumer under a void credit agreement, be refunded by the credit provider, and that all the rights of such delinquent credit provider for repayment of money lent be cancelled, or forfeited to the State (unless in doing so the consumer would be unjustly enriched).

These last-mentioned parts of ss 89(5)(b) and (c) regarding refunding, cancelling and forfeiture were declared to amount to an unconstitutional deprivation of property in **National Credit Regulator v Opperman 2013 (2) SA 1 (CC)** and **Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport 2015 (10) BCLR 1158 (CC)** .

The effect of s 40 on credit agreements resulted in a flurry of cases, the most important of which was the Full Bench decision in **Friend v Sendal 2015 (1) SA 395 (GP)** [Legodi, J, with Fabricius and Kubushi JJ concurring] to the effect that the section was only aimed at *"participants in the credit market"* and did not impinge on once-off agreements. At least three courts [Murphy J in **Van Heerden v Nolte 2014 (4) SA 584 (GP)**, Makgoka J in **Naude v Wright [2017] ZAGPPHC 646** and Unterhalter AJ in **Potgieter v Olivier 2016 (6) SA 272 (GP)**] were uncomfortable with **Friend**, but from August 2012 **Friend** held sway. However, Molefe J, in **Maepi v Abrahams [2017] ZAGPPHC 17** opined that the Constitutional Court had in **Opperman** overruled **Friend**. In **Kruuse v Hillhouse [2015] ZAECGHC 96** Plasket J was in agreement with the interpretation given to s 40 in **Friend**, and followed that decision.

"The SCA slavishly enforced the text and intent of s 40 while apologetically pointing to an error which obviously does not exist."

In **February 2015,** the National Credit Amendment Act, 2014 came into operation. It amended s 40 to read as follows:

> "(1) 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 Section 42(1)."

At the same time ss 89(5)(b) and (c) were deleted and substituted with a new s 89(5)(a) which reads as follows:

> "If a credit agreement is unlawful in terms of this section, despite any other legislation or any provision of an agreement to the contrary, a court must make a just and equitable order including but not limited to an order that:
>
> the credit agreement is void as from the date the agreement was entered into."

The Minister on 11 May 2016 prescribed R0 as the threshold, with the effect that s 40 struck all credit agreements. Were it not for **Friend,** everybody (save of course for the s 4 exceptions regarding certain juristic persons and large credit agreements) who thereafter granted credit had to be registered, otherwise such agreements were unenforceable. Loans by mothers, fathers, uncles, grannies and all their Chihuahuas were affected.

Du Bruyn v Karsten concerned once off credit agreements (to enable the sale of three businesses) signed on 26 April 2013 (in other words after **Friend**, but before the 2014 Amendment Act) with the credit provider (Mr Karsten in person) not registered (possibly as a result of **Friend**) at the date of conclusion. The consumer defaulted, Karsten sought for repayment (specific performance), and the consumer pleaded that the agreements were null and void due to non-compliance with s 40 of the NCA. Mavundla J, in the court *a quo* **[2017] ZAGPPHC 473 (31 March 2017)** granted judgment in favour of Karsten (bound by **Friend**) but granted leave to appeal. The SCA was thus squarely confronted with the question *"under what circumstances is registration as a credit provider in terms of the NCA obligatory?"*.

In essence the question was whether private individuals needed to be registered as credit providers in terms of the NCA, in order to be allowed to legally extend credit (against interest) to another person.

The SCA decided that on a plain reading of s 40(1)(b) - as it read in 2013 when the agreements were signed – a person had to be registered to lawfully extend credit. The appeal succeeded and the application for payment was dismissed. The agreements between Du Bruyn and Karsten were declared unlawful. I presume Karsten lost three businesses and Du Bruyn scored three businesses without payment. I presume prescription (ousting an enrichment claim) set in before final judgment in the application for specific performance.

In the process **Friend** was overruled.

There are three features of note regarding the decision:

Firstly, the apologetic mood in which the SCA worded its decision is unique. It is revealing as to how indignant the court was with the conclusion to which it had to come based upon the plain wording of s 40. It applauded **Friend** but simultaneously felled it. It described the decision in **Friend** as *"reasonable, and indeed eminently sensible"*. It lamented that a decision that once-off transactions do not resort under s 40, would be *"attractive and sensible"*, and agreed that s 40 *"is justifiably seen as regulatory overreach"*. It *"readily accepted"* its decision (to leave the matter in the hands of Parliament) as an *"imperfect solution"* and it implied that the wording of s 40 is a drafting error that needs correction.

Secondly, there is the oddity that there is no drafting error in s 40. This is evident from the way s 40 was kept by Parliament between 2005 and 2014, and especially by the way it was again worded in 2014. The intention clearly is to outlaw all private credit agreements (on which interest is to be paid) if the credit provider is not registered and does not pay the registration fee. The SCA slavishly enforced the text and intent of s 40 while apologetically pointing to an error which obviously does not exist.

Thirdly, it reveals a gulf of difference between Parliament and the SCA, that is between the political elite and the legal elite, regarding the proper role of the State in private transactions. On the ideological front, a penchant for central state control, statism and deep intrusion into private affairs, was pitched against personal autonomy and individual responsibility in private affairs, most notably the freedom of individuals to enter into contractual relations free from State interference. The section intrudes deep into the basic notion of freedom. The earning of interest on capital is outlawed if the State is not paid (in form of statutory fees payable by registered credit proviiders). The State receives part of the *"interest"* by way of a registration fee in exchange for the legality of the transaction. You cannot lawfully use your own money for otherwise perfectly innocuous private purposes without having accounted to a government institution.

The revealed difference between the elites as to what is prudent signifies a country still determining its future direction.