CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 51/05

AAA INVESTMENTS (PROPRIETARY) LIMITED	Applicant
versus	
THE MICRO FINANCE REGULATORY COUNCIL	First Respondent
THE MINISTER OF TRADE AND INDUSTRY	Second Respondent

Heard on : 28 February 2006

Decided on : 28 July 2006

JUDGMENT

YACOOB J:

Introduction

[1] This application for leave to appeal requires us to consider the status, legality and effect of certain rules (the Rules) that regulate a class of moneylenders who have come to be known as micro-lenders. As the term suggests, micro-lenders make relatively small loans. But this is not the only relevant characteristic of these institutions. They differ from other lending entities in two other material respects. First, they are allowed to lend without being bound by the terms of the Usury Act[1] and, in particular, at finance charges that are much higher than those that all other

[1] Act 73 of 1968.

moneylenders may charge[2] in terms of that Act. Secondly, and perhaps more importantly, their customers are mostly poor people.

[2] The applicant, AAA Investments (Proprietary) Limited (AAA Investments), a micro-lender operating in the Eastern Cape Province, vigorously contests the validity of these Rules. Their genuineness is defended with equal tenacity by the first respondent, the Micro Finance Regulatory Council (the Council) which has become responsible for the regulation of the micro-lending sector. The Council purports to have made the Rules and to administer them in the course of fulfilling this regulatory responsibility.[3] The second respondent is the Minister of Trade and Industry (the Minister) who is joined by reason of the interest of that office in the outcome of this case.

[3] The dispute between AAA Investments and the Council broadly turns firstly on whether the Constitution[4] applies to the Rules or whether the scope of the Rules is so private that the Constitution does not apply to them at all. Secondly, and if the Constitution does apply, we must decide whether the Rules are consistent with it.

[4] The constitutionality of these Rules has been debated in both the Pretoria High Court (the High Court) and the Supreme Court of Appeal (SCA). These judgments

[2] By virtue of an exemption granted in terms of section 15A of the Usury Act which is discussed more fully later in this judgment.

[3] Although the Council has ceased to exist under the new legislative scheme described in para 58-59, its composition and powers are described in the present tense in this judgment because the Council existed at the date of argument in this Court.

[4] The Rules were attacked on the basis that the Council offended the rule of law and the principle of legality in making them and that the Rules themselves infringed the privacy right contained in the Constitution.

are not in harmony. The High Court[5] held that the making of the Rules represents an exercise of public power and that the Rules are constitutionally objectionable because the Council improperly exercised unauthorised public legislative power in making them. It accordingly declared the Rules to be inconsistent with the Constitution. The SCA[6] however concluded that the Rules operated only in the private sphere by reason of a contractual relationship between the Council and those micro-lenders registered with it. That Court found no basis upon which these Rules could be validly impugned, apparently on the basis that the Constitution was not applicable. It accordingly reversed the High Court order. AAA Investments wishes to appeal against this judgment and applies for the necessary leave.

Background

[5] It is universally accepted that money lending transactions are susceptible to abuse mainly because borrowers are usually in a much weaker position than lenders. Moneylenders can therefore easily exploit this vulnerability of the borrower, and some have been guilty of serious impropriety so frequently as to give rise to considerable concern. Moneylending transactions are therefore legitimately subject to legislative control in most parts of the world.

[5] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2004 (6) SA 557 (T).

[6] *Micro Finance Regulatory Council v AAA Investments (Pty) Ltd and Another* 2006 (1) SA 27 (SCA).

[6] South Africa is no exception. Here, all contracts that serve as vehicles for advancing money on loan are tightly controlled by the Usury Act.[7] Some of its important measures are highlighted. The Act extensively regulates three types of transactions aimed at advancing finance, namely, moneylending transactions, credit transactions and leasing transactions.[8] I will refer to these transactions collectively as loan contracts. The annual finance charge levied in a loan contract may not, on pain of punishment, exceed that prescribed from time to time by the Minister[9] and must be disclosed.[10] The Act places limits on the sum that may be recovered in various circumstances[11] and mandates that reduced amounts are payable if there is advance payment as well as in related circumstances.[12] The Usury Act also ensures that overpayments by the borrower are recoverable,[13] that those who advance loans provide certain information[14] to recipients[15] and that recipients of loans receive some protection when faced with court actions for recovery.[16] It is also of significance that the Act provides for certain powers of inspection,[17] for certain information to be furnished to a state official by those advancing loans,[18] as well as for certain penalties

[7] The first version of the Usury Act came into operation for the whole of South Africa as early as 1926, Act 37 of 1926.

[8] Each of these types of transactions is defined in section 1 of the Act.

[9] Section 2 of the Act.

[10] Section 3 of the Act.

[11] Sections 4 - 5A of the Act.

[12] Sections 6 - 6K of the Act.

[13] Section 7 of the Act.

[14] Section 10 of the Act.

[15] These are borrowers, credit receivers or lessees depending on whether the loan contract used as a vehicle is a moneylending transaction, credit transaction or leasing transaction.

[16] Section 11 of the Act.

[17] Section 13 of the Act.

[18] Section 14 of the Act.

to be visited upon lenders who do not comply.[19] Finally the Usury Act expressly exempts certain categories of transactions from its provisions.[20]

[7] I have said earlier that this case is about the validity of Rules aimed at the regulation of micro-lenders. Section 15A of the Act makes it possible for categories of moneylenders to be exempted from its provisions by empowering the Minister to determine the categories of institutions that may be exempted as well as the conditions upon which they may be exempted. The section reads:

> "The Minister may from time to time by notice in the Gazette exempt the categories of money lending transactions, credit transactions or leasing transactions which he may deem fit, from any of or all the provisions of this Act on such conditions and to such extent as he may deem fit, and may at any time in like manner revoke or amend any such exemption."

[8] Section 15A was first introduced into the Act only in 1988.[21] The motivation for this appears to have been that potential borrowers, who were poor and could therefore not provide appropriate security for repayment, found it difficult (if not impossible) to obtain loans under the dispensation provided for by the Usury Act before the introduction of section 15A. Lenders were apparently reluctant to give loans to this category of person because, so they said, the risk of non-payment was so high that lending money to them could not be justified. It was suggested by some lenders that it might become commercially viable for them to advance loans to

[19] Section 17 and 17A of the Act.

[20] Section 15 of the Act.

[21] By section 8 of Act 100 of 1988. It is somewhat different from the section as it now reads, but the differences are not material for present purposes. The present section 15A was introduced by section 6 of Act 91 of 1989.

potential borrowers who were high risk if it was made possible for them to charge higher interest rates.

[9] The first Notice exempting certain categories of money-lending transactions[22] was published four years after section 15A was passed.[23] That Notice exempted a certain category of micro-lenders from all the provisions of the Act subject only to two conditions. The first was that there should be a "cooling off period" of three days within which the transaction could be terminated by the borrower without any adverse consequences.[24] Secondly, the lender was obliged to furnish to the borrower particulars of the amounts of the principal loan and the finance charges respectively.[25] It is fair to conclude that this Notice made it possible for moneylenders to advance small loans (that would largely be required by poor people) free from almost all of the constraints of the Usury Act and unbounded by any finance charge limit at all!

[10] The micro finance industry had been legitimated. It grew exponentially. Many relatively poor people were now able to secure loans from willing lenders; lenders could now make limitless profit, who were subject to very little (if any) control. This brought negative consequences. Unsurprisingly, complaints of abuse arising from micro finance loans were directed by borrowers against lenders with rapidly increasing frequency.

[22] This case is not concerned with credit transactions or leasing transactions and nothing in this judgment must be understood as saying anything about these.

[23] Government Gazette 14498 GN 3451, 31 December 1992 (the first Exemption Notice).

[24] Id Item 2.

[25] Id Item 3.

[11] The office of the Minister began to consult with role players concerning the best way in which the micro-lending industry could be regulated in order to provide much needed protection for poor borrowers. The result of this consultation was the decision that micro-lenders and other role players should have some say in the regulation of this industry jointly with government. The Minister also concluded that some minimal regulation of the industry had to be made compulsory by law.

[12] The upshot of all this was the introduction of a new Exemption Notice (Exemption Notice) in June 1999[26] issued pursuant to section 15A of the Act. As will be seen later, the Council purports to have made the disputed Rules pursuant to this Exemption Notice. This Exemption Notice is much more stringent than its predecessor. It exempts any moneylending transaction where the loan does not exceed R10 000 and which is payable within a period of thirty six months from all of the provisions of the Act except for sections 13, 14 and 17(A).[27] Moneylenders must comply with two conditions in order to qualify for the exemption. They must:

(a) register with a regulatory institution approved by the Minister;[28] and

(b) comply with the Rules contained in Annexure A to the Exemption Notice (the Minister's Rules).[29]

[26] Government Gazette 20145 GN 713, 1 June 1999.

[27] Item 1.2 of the Exemption Notice.

[28] Item 1.5 read with Item 2.1(a) of the Exemption Notice.

[29] Item 1.5 and Item 2.1(b) read with Item 1.7 and Item 1.8.

The Exemption Notice expressly imposes certain duties on the regulatory institution[30] which has to ensure that lenders registered with it comply with the Minister's Rules as well as accreditation criteria approved by the Minister.[31]

[13] It is interesting that as at the date of the publication of this Exemption Notice, the Council had already been formed. The Council was incorporated as a limited liability company not for gain before the Exemption Notice had been promulgated.[32] This followed upon sustained interaction between ministerial representatives and various other role players. Indeed, the Council had already made an application to become a regulatory institution before the date of the publication of the Exemption Notice.[33] The original subscribers to the Council were the Association of Micro Lenders, the Banking Council of South Africa, the Consumer Institute of South Africa, the Department of Trade and Industry, the Housing Consumer Protection Trust, Khula Enterprise Finance Ltd, the Legal Resources Centre, the Micro Enterprise Alliance, the National Housing Finance Corporation Ltd and the South African Reserve Bank. AAA Investments was at all relevant times a member of the Association of Micro Lenders. It is noted that the subscribers to the Council comprised representatives of government, moneylending institutions, and community bodies concerned with consumer protection. The Council's memorandum and articles of association proclaimed the Council as a regulatory institution and authorised it to

[30] Item 1.6 of the Exemption Notice.

[31] Item 1.6(b) of the Exemption Notice. These criteria are discussed in para 17 below.

[32] The Council is a Section 21 company established on 1 December 1998 in terms of the Companies Act 61 of 1973.

[33] On 31 May 1999.

make rules. After its incorporation the Council did make certain Rules (the first set of Rules).[34] These were more extensive than the Minister's Rules. Thereafter the Minister published a Notice declaring that the Council would be the regulatory institution for purposes of the Exemption Notice.[35]

[14] This meant that all micro-lenders who wished to qualify in terms of the Exemption Notice had to be registered with the Council in order to bring themselves within the terms of the exemption. AAA Investments and many other micro-lenders registered with the Council.[36] There were apparently no complaints about the Council or its first set of Rules until the Council began a process of consultation for the adoption of the Rules that are under attack in this case. The applicant opposed the adoption of the Rules by submitting detailed written representations directly to the Council and through the Association of Micro Lenders, a subscriber to the Council of which the applicant was a member. The Council nonetheless adopted the Rules.[37]

The duties imposed on the Council by the Minister

[15] Before these Rules are described, it is appropriate to set out the duties that were imposed upon the Council by the Minister in the Exemption Notice:[38]

> "'Regulatory institution' means a legal entity having a Board of Directors which has, amongst other directors, equal and balanced representation between consumers and

[34] 24 June 1999.

[35] Government Gazette 20307 GN 911, 16 July 1999.

[36] Since its establishment, the Council has registered 1 306 micro-lenders.

[37] On 1 July 2002.

[38] Item 1.6 of the Exemption Notice.

the money lending industry and which is approved by the Minister in writing and published in the Government Gazette as having the capacity and the mechanisms in place effectively to –

(a) manage its business as a regulatory institution with competent management and staff;

(b) register lenders in accordance with accreditation criteria approved by the Minister;

(c) ensure adequate standards of training of staff members interacting with the general public;

(d) require adherence to and monitor and ensure compliance by lenders with this notice;

(e) fund itself from contributions by lenders or other sources;

(f) ensure that complaints from the general public are responded to objectively;

(g) deal with appeals by lenders and borrowers in respect of any decision of the regulatory institution or any committee, ombudsperson or referee instituted by it;

(h) educate and inform the general public and lenders in relation to their rights and obligations under this notice;

(i) annually publish information regarding the money lending industry, the services provided, security and/or guarantees required, types of charges and the average annual charges levied by each lender in a comparable format;

(j) collect and collate information and statistics on lenders and complaints handled by the regulatory institution, including the -

  (i) number of complaints lodged and details of the complainant;

  (ii) number of lenders found in breach of this notice and the reasons therefor;

  (iii) names of lenders against whom substantiated complaints have been lodged and the number and nature of complaints;

  (iv) response time to resolve complaints;

  (v) the number of items monitored under each category;

  (vi) the number of breaches detected through monitoring;

  (vii) the number and nature of sanctions imposed; and

  (viii) the number of decisions appealed against and the outcome thereof;

(k) annually furnish the Minister with a detailed report on lenders, its activities and functions and any other information that the Minister may require;

(l) review its own effectiveness and the effectiveness of this notice and to recommend appropriate changes to the Minister".

The Rules

[16] The Rules are wide ranging in their applicability and effect. They describe their own status at the very outset as comprising part of "the agreement between the Council and the lender".[39] The Rules are defined as including the Minister's Rules.[40] The accreditation criteria, annexed to the Rules, are in effect pre-conditions for registration.[41] It will be remembered that accreditation criteria must be approved by the Minister.[42] It is perhaps as well to repeat that lenders qualify for an exemption in terms of section 15A of the Act only if they are registered with the Council. It will be useful to describe the accreditation criteria and the Minister's Rules before venturing into a short account of the Rules themselves.

[17] The criteria which must be approved by the Minister require that the lender must:

(a) conduct business in the category of money lending transaction exempted;[43]

(b) commit itself to complying with the Exemption Notice and the Rules of the Council;[44]

[39] Rule 1.

[40] Rule 2.1.36.

[41] Rule 2.1.34, Annexure B.

[42] See para 12 above.

[43] Criterion 1.1.

(c) register with the South African Revenue Services;[45] and

(d) ensure that those who are in control of its business operations are fit and proper.[46]

[18] The Minister's Rules impose certain obligations on lenders in relation to the conclusion of moneylending transactions. These Rules concern themselves with the relationship between lenders and borrowers and have very little to do with regulatory institutions. Briefly they pertain to:

(a) obliging the lender to keep certain information received from the borrower confidential unless the borrower consents to disclosure;[47]

(b) disclosure of certain information by the lender to the borrower, the use by the lender of standard agreements containing certain information, and the process of the resolution of disputes between the borrower and the lender;[48]

(c) restrictions on the consideration that may be charged by the lender;[49]

(d) a cooling off period within which the loan agreement may be cancelled by the borrower with impunity;[50] and

(e) the prohibition of inappropriate methods of debt collection.[51]

---

[44] Criterion 1.2.

[45] Criterion 1.5.

[46] Criterion 1.6.

[47] Minister's Rule 1.

[48] Minister's Rule 2.

[49] Minister's Rule 3.

[50] Minister's Rule 4.

[51] Minister's Rule 5.

[19] Before turning to the Rules, we must remind ourselves of the tasks imposed on the Council by the Exemption Notice. It had to ensure that the terms of the Exemption Notice were complied with. To this end, the Council was obliged to have sufficient mechanisms in place to compel compliance with the Exemption Notice and the Minister's Rules. Finally the Council had to ensure that all lenders who wish to register with the Council fell within ministerially approved criteria.

[20] In broad terms the Rules themselves are concerned with:

(a) the registration of membership of lenders and the rights and obligations of both the members and the Council consequent upon registration;[52]

(b) compliance standards in relation to lending activities including the prohibition on reckless lending;[53]

(c) the training, conduct and conditions for the appointment of their employees and agents by lenders;[54]

(d) the obligations of the lender to provide extensive information concerning lending transactions to the National Loans Register and to access information from that Register in the process of the approval of loans;[55]

(e) detailed specifications relating to the accounting and auditing practices of lenders;[56]

[52] Rule 3.

[53] Rule 4.

[54] Rule 5.

[55] Rule 6.

[56] Rule 7.

(f) the submission by the lender of certain statistical and other information to the Council quarterly and annually;[57]

(g) expansive rules for the conduct of disciplinary proceedings arising out of the conduct of lenders[58] and appeals by lenders against findings adverse to them;[59]

(h) limits on finance charges and the way these must be calculated including conditions for compounding;[60] and

(i) certain transitional provisions.[61]

The High Court

[21] AAA Investments contended in the High Court that the Rules were all invalid because the Council, in making them, unlawfully and unconstitutionally assumed and exercised legislative power. It also attacked some specific Rules, particularly those concerned with the National Loans Register,[62] as being inconsistent with the Constitution because they offended the right to privacy of both lenders and borrowers. I have already said that the High Court held that in making the Rules, the Council exercised public power. The Constitution therefore applied to this rule-making power and to the Rules themselves. The High Court then set both the Rules and the first set of Rules aside as unconstitutional on the basis that:

[57] Rule 8.

[58] Rule 9.

[59] Rule 10.

[60] Rule 11.

[61] Rule 12.

[62] Rule 6.

(a) the Council exercised legislative power (a power conferred on the national and provincial legislatures as well as the municipal councils by the Constitution);[63] and

(b) the power to make the Rules had not been properly delegated to the Council by the Notice.[64]

In the circumstances, the High Court found it unnecessary to adjudicate the privacy attack.

[22] It is necessary to focus on the reasoning that led to the conclusion that the Council exercised public power. The High Court observed correctly that private institutions were increasingly being used to perform state functions[65] and, relying on the definition of an organ of state in the Constitution,[66] reasoned that the nature of the functionary was of little consequence. On this basis, the crucial inquiry for the High Court was whether the Council exercised public power because, if this was so, the fact that it was authorised by its memorandum and articles of association would make no difference.[67]

[23] The High Court concluded that the Council exercised public power for the following reasons: first it emphasised that every person or institution who wished to become part of the micro-lending industry had no choice but to register with the

[63] *AAA Investments* above n 5 at 565H-I.

[64] Id at 567I.

[65] Id at 563E-G.

[66] The definition of organ of state is set out at para 30 below.

[67] *AAA Investments* above n 5 at 563F-564A.

Council, that the rules were binding on both lenders and borrowers and that they affected the public in general.[68] Secondly, the court placed reliance on the consideration that the sanction for non-compliance with the Rules included the possibility of the cancellation of the registration of a lending business with the Council; this in turn would result in the inability of that entity to carry on its business as a micro-lender.[69] The third and final basis for the conclusion of the High Court was that the rules were integral to the regulation of the Exemption Notice and are "part of the governmental regulation of micro-loans".[70]

The SCA

[24] The SCA held that the attack on the Rules on the basis that the Council was not authorised to make them was misconceived on the following basis:

(a) the Council is not a "public regulator" that exercises authority unilaterally but is a "private regulator" of lenders who consent to its authority;[71]

(b) to the extent that the consent of the lender might be said to be forcibly extracted, the source of that coercion was not the Council's Rules but the Exemption Notice which obliged micro-lenders to register in order to qualify for the exemption;[72]

[68] Id at 564H-565D.

[69] Id at 565E-G.

[70] Id at 565G.

[71] The *Micro Finance Regulatory Council* above n 6 at para 24.

[72] Id at para 25.

(c) the validity of the Rules are therefore to be determined "with reference to trite principles of company law and in particular, whether it was empowered by its memorandum of association to do so";[73] and

(d) the memorandum did empower the Council to make the Rules.[74]

The SCA too did not consider the privacy attack because, on its reasoning, the Council was not obliged to act consistently with the privacy protection in the Constitution.[75] An important consequence of the reasoning and conclusion of the SCA is that neither the rule of law and the principle of legality, nor the Bill of Rights had any application to the wide ranging Rules made by the Council to regulate the micro-lending industry; Rules that had a profound effect on the activities of lenders and borrowers alike. The Council is, on the SCA judgment, free to make whatever Rules it chooses consistently with its memorandum and articles of association.

The issues

[25] It is apparent that the issues before us are: (a) whether the Constitution, the legality requirement and the privacy protection in particular, applies to the Rules, or to frame the issue in the way in which it apparently came before the High Court and SCA, whether the Council exercised public power or private power in making the Rules; (b) if the Council exercised public power, whether the power exercised was legislative in the sense of the law-making powers exercised by Parliament, the provincial legislatures, and municipal councils; (c) did the Council have the power to

[73] Id at para 26.

[74] Id at paras 10 and 26.

[75] Section 14 of the Constitution.

make the Rules pursuant to the Exemption Notice; and (d) specific issues about whether certain Rules violate the right to privacy.

The interests of justice

[26] This Court will grant leave to appeal only if it is in the interests of justice to do so.[76] There are significant differences between the judgment of the SCA and that of the High Court. The questions whether the Council exercises public or private power in the circumstances of this case, and more importantly, whether the Constitution governs the Rules and acts as a constraint upon the Council, raise constitutional issues of grave importance to our democracy. Both judgments have significant implications for the future. The judgment of the SCA carries the consequence that binding rules made by a private entity governed by a memorandum and articles of association in the process of regulating a sector of the South African commercial enterprise, in accordance with the terms of a ministerial notice (subordinate legislation), will not be subject to the privacy protection in our Bill of Rights or indeed the protection conferred by any of its provisions. This is a far-reaching result. On the other hand, the High Court judgment would render unconstitutional any rule of a public character made in terms of a ministerial notice even if the rule was fully consistent with the

[76] *African Christian Democratic Party v The Electoral Commission and Others* 2006 (5) BCLR 579 (CC) at paras 17-18; *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at paras 7-8; *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) at paras 15-19; *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12; *Moseneke and Others v The Master and Another* 2001 (2) SA 18 (CC); 2001 (2) BCLR 103 (CC) at para 19; *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3; *Fraser v Naude and Others* 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 7; *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) at para 35; *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 32; *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 8.

notice. This conclusion, too, has sweeping implications for the way in which the government may regulate in the public interest. There are therefore compelling reasons for the conclusion that it is in the interests of justice for us to hear the appeal in respect of this aspect of the case.

[27] We must however bring into the equation the question of mootness in the process of deciding the interests of justice issue. By the time this case was heard by the SCA, the Exemption Notice had been replaced by a new Exemption Notice which in effect set out the Rules that had been determined by the Council and which are under attack in this case, as rules prescribed by the Minister.[77] The Council's Rules had become the Minister's Rules. The Council's contention in the SCA that this rendered the issue before that court moot was rejected[78] and not raised again in this Court. However the possibility of the issue in relation to the Rules contested in this Court being moot because they have been overtaken by the new Notice is so strong that this factor must be brought into account in the interests of justice analysis.[79] The issues may well be moot. Nonetheless, there are two conflicting judgments on these issues and, if we do not consider this aspect of the case, the judgment of the SCA with all its implications for future regulation would remain binding. In all the circumstances, I would hold that these issues are so crucial to important aspects of government as well as the rights contained in the Bill of Rights that it is in the interests of justice to grant leave to appeal. Neither the judgment of the SCA nor that

[77] Government Gazette 27889 GN 1407, 8 August 2005.

[78] *Micro Finance Regulatory Council* above n 6 at paras 21-22.

[79] *J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) at paras 15-17.

of the High Court can be said to be unassailable. As will appear from what comes later,[80] different considerations apply in relation to whether we should evaluate the specific rules consequent upon the privacy complaint.

Does the Constitution apply to the Council?

[28] AAA Investments challenged the correctness of the reasoning of the SCA. Its counsel supported the reasoning of the High Court and emphasised that any micro-lender has in reality no choice but to register with the Council. Whatever the source of the coercion might be, they submit that the reality is that there is coercion. They point to the concession by the Council before the SCA that it (the Council) was indeed an organ of state[81] and contend that this concession inevitably leads us to the conclusion that the Council exercised public power.

[29] The exercise of public power[82] is always subject to constitutional control and to the rule of law or, to put it more specifically, the legality requirement of our Constitution.[83] The Council would therefore be bound by this requirement if it exercised public power. Whether the Constitution is applicable to the Rules cannot be determined solely by asking whether the exercise of power in a particular case is a

[80] See paras 58-62 below.

[81] See para 30 above.

[82] It must, however, be borne in mind that the requirement of legality may be more complex in relation to judicial decisions and executive action both of which undoubtedly represent the exercise of public power. It is not the purpose of this judgment to investigate these difficult issues.

[83] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at para 22; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at paras 19-20; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*, 2000 (1) SA (1) (CC); 1999 (10) BCLR 1059 (CC) at paras 132-139; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at paras 40, 56 and 58.

public power. The Constitution is specific about when the Bill of Rights applies. Section 8(1) of our Constitution expressly provides that "[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary, and all organs of state." It is worth remembering that any finding that a rule making entity does not fall within this category may not of itself have the consequence that the Bill of Rights is not applicable to it. Our Constitution also provides that "a provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."[84] It would therefore seem that the SCA may be incorrect in concluding that the privacy attack became irrelevant on the finding that the Council performed a private function in a private sphere. Our Constitution, unlike many others, contemplates that some of the rights in the Bill of Rights may apply horizontally as well as vertically.

[30] We know that the Rules were made by the Council. The capacity in which the Council made these Rules is of some significance. It must be accepted for present purposes that the Council does not constitute or represent the legislature or judiciary. At first blush the inter-related questions appear to be whether the Council made the Rules as an extension of the executive or whether it acted as an organ of state in doing so. In either case the rule of law and the privacy protection in the Bill of Rights applies. It appeared to be common cause in argument that the Council was an organ of state. An organ of state is defined in section 239 of the Constitution as:

[84] Section 8(2) of the Constitution.

> "(a) any department of state or administration in the national, provincial or local sphere of government; or
>
> (b) any other functionary or institution –
>
> (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation,
>
> but does not include a court or a judicial officer."

The meaning and application of section 8(1) of the Constitution read with this definition should in my view be decided after reference has been made to approaches to relevant questions in South Africa and abroad.

Approaches to public power, governmental power and judicial scrutiny

[31] In the pre-constitutional era in South Africa, the nature of institutions and the way in which they exercised their power became relevant in the context of determining whether particular decisions were subject to judicial review. The Court in *Dawnlaan*[85] had to consider whether the decisions of the Johannesburg Stock Exchange (JSE) were subject to judicial review. It was necessary there to decide the correctness of the contention that the decisions of the JSE were not subject to judicial review because the JSE was a private body. The High Court placed considerable emphasis on the fact that the legislation in terms of which the JSE had been established[86] requires a stock exchange (a) to be licensed if it was in the public

[85] *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange and Others* 1983 (3) SA 344 (W).

[86] Stock Exchanges Control Act 7 of 1947 (as amended).

interest;[87] (b) to ensure that its rules safeguard and further the public interest;[88] and (c) to list securities only if that was in the public interest.[89] The relevant legislation imposed upon the JSE a public duty to adhere to these rules and requirements, the court held, and added that the functions of the JSE affected the public and indeed the whole economy.[90] The court concluded that to regard the JSE as a private entity would be to ignore commercial reality and the very public interest that the legislature sought to protect.[91] It ultimately held that the decisions of the JSE are subject to judicial review. The Appellate Division[92] confirmed the correctness of this High Court approach in the *Witwatersrand Nigel* case.[93]

[32] In England, too, the nature of institutions required investigation for the purpose of deciding whether they were subject to judicial review, or to put it within the terms employed in that country, whether the decision of an institution was amenable to "the supervisory jurisdiction of the courts". An appropriate description of the approach adopted in that country is described by the House of Lords in the *Panel on Take-overs and Mergers* case.[94] The Panel on Take-overs and Mergers though not created by or

[87] *Dawnlaan* above n 85 at 361G and 364B-C. See also s 4(d) of the Stock Exchanges Control Act 7 of 1947 (as substituted by s 4(1)(a) of Act 86 of 1971).

[88] Id at pages 361F and 364C-D. See also s 8(1) of the Stock Exchanges Control Act 7 of 1947 (as substituted by s 8(1) of Act 86 of 1971).

[89] *Dawnlaan* at 362D-F. See also s 10(1) of the Stock Exchanges Control Act 7 of 1947 (as substituted by s 10(1)(c)).

[90] *Dawnlaan* at 364H.

[91] *Dawnlaan* at 365A.

[92] The predecessor of the Supreme Court of Appeal.

[93] *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (AD) at 152E-I.

[94] *R v Panel on Take-overs and Mergers, ex parte Datafin plc and another (Norton Opax plc and another intervening)* [1987] 1 All ER 564 (CA).

in terms of any legislation was an extremely powerful body that had determined and enforced a code of conduct to be applicable in relation to take-overs and mergers. It had disciplinary powers and members of the Stock Exchange who broke its rules could be deprived of their membership. In the process of re-stating the relevant factors to be taken into account in considering whether the institution is subject to judicial review the judgment says:

> "[p]ossibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose *sole source of power is a consensual submission to its jurisdiction*"[95] (emphasis added).

The House of Lords concluded that the Panel is subject to judicial supervision because (a) it performs an important public duty; (b) its decisions indirectly affect the general public, some members of whom may be said to have assented in a technical sense; (c) it acts judicially at least in some respects and asserts its purpose to do equity among shareholders; and (d) the bottom line of the source of its power was certain statutory powers exercised by a national government department.[96]

[33] The ultimate question to be answered in the United States of America in any enquiry similar to that with which we are concerned in this case is whether their Constitution, and in particular the human rights protection aspects of it, apply to the actions and decisions of certain institutions. Institutions are bound by the Constitution

[95] Id at 577a-b.

[96] Per Sir John Donaldson MR, id at 577a-d.

in the US if, in the final analysis, they can be said to be "an agency or instrumentality of the United States".[97] The approach of the US Supreme Court in *Lebron*[98] is useful. That case was a result of a decision by the National Railroad Passenger Corporation (Amtrak) preventing the applicant from publishing on a large billboard at a railway station,[99] a certain advertisement. The issue was whether the applicant was bound by and Amtrak could benefit from, the freedom of speech protection of the United States Constitution. The majority in the United States Supreme Court[100] held that "[g]overnment-created and -controlled corporations are (for many purposes at least) part of the Government itself", for "[i]t surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form".[101] It was held that Amtrak, though a private corporation, was bound by the First Amendment on the basis that it was government itself.

[34] The nub of the majority reasoning, in my view, is to be found in the statement that Amtrak

> "is established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees".[102]

---

[97] See generally *Marsh v Alabama* 326 US 501, 505-10 (1946), *Lebron v National Railroad Passenger Corporation* 513 US 374 (1995) at 377.

[98] *Lebron* above n 97.

[99] Pennsylvania Station in New York.

[100] The judgment was delivered by Scalia J.

[101] *Lebron* above n 97 at 397.

[102] Id at 398.

It is apparent from this statement that both the nature of the entity and the nature of the function are relevant. As the majority judgment points out the United States Supreme Court has held once[103] and "said many times" that private action can sometimes be regarded as governmental, but cases in this category have not been consistent.[104]

[35] We now turn to Canada. The relevant question to be answered there is whether the Canadian Charter[105] applies to the action concerned by reason of the provisions of section 32(1).[106] It is trite in that country that the Canadian Charter applies to provincial and national government action, not to private action.[107] It has been held that two types of Charter breaches may be in issue: Charter rights may be violated either by legislation or by action taken under statutory authority.[108] It is well-established that the Charter applies to all the activities of a government entity whether those activities are described as private and that the Charter may also apply to non-

[103] *Burton v Wilmington Parking Authority* 365 US 715, 723-25 (1961) .

[104] Per Scalia J, *Lebron* above n 97 at 378. The minority judgment of O'Connor J dealt with the case on the basis that the question whether Amtrak is a government entity was not before the court and that the issue to be considered (on the footing that Amtrak was not a government entity) was whether its action is nevertheless "attributable to the Government". Id at 400 and 408. In the view of the minority, the Constitution is not applicable to private action that is "fundamentally a matter of private choice and not state action". Id at 409 (footnotes omitted).

[105] The Canadian Charter of Rights and Freedoms.

[106] Section 32(1) of the Charter provides:

> "This Charter applies
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."

[107] See generally *RWDSU v Dolphin Delivery Ltd* [1986] 2 SCR 573, at 593-99.

[108] The distinction is made in paras 20 and 21 of *Eldridge v British Columbia (Attorney-General)* [1997] 3 SCR 624.

governmental entities when engaged in activities that are governmental in nature.[109] In the former category are cases such as *Douglas College,*[110] in which the college in question was held to be founded in terms of a government statute and under government control. Similarly in *Lavigne*[111] it was found that a statutory council was provincial government for the purposes of the Charter because of the degree of provincial government control. In this kind of case the fact that the agency classifies as government is enough. The nature of the function is immaterial.

[36] When it is alleged that the action of a private entity violates the Charter it must be established that the entity, in performing the function, is part of government within the meaning of section 32(1).[112] For example, the majority in *McKinney*[113] held that universities, though acting in terms of a statute were private entities and did not perform governmental action when determining the mandatory retirement age of 65 years, and in *Stoffman*[114] that hospitals too were not hit by the Charter and did not perform governmental action when they determined the mandatory retirement age. On the other hand, because Douglas College was regarded as a government entity, its determination of a mandatory retirement age was held to be subject to the Canadian Charter.

[109] Id at paras 41-42.

[110] *Douglas/Kwantlen Faculty Assn v Douglas College* [1990] 3 SCR 570 at 584-85.

[111] *Lavigne v OPSEU* [1991] 2 SCR 211 at 248-49.

[112] *Eldridge* above n 108, at paras 36 and 42.

[113] *McKinney v University of Guelph* [1990] 3 SCR 229 at 268-75.

[114] *Stoffman v Vancouver General Hospital* [1990] 3 SCR 483 at 516.

[37] *McKinney* and *Stoffman* were cases in which private entities (a university and a hospital respectively) were held to have performed non-governmental functions. However, the case of *Eldridge* demonstrates well how a private institution can be engaged in the performance of a public function. Two deaf people alleged that they were victims of Charter violations because a private hospital did not employ sign language communicators. It was held that the hospital, while undoubtedly a private entity, essentially implemented a government program under government subsidy in the provision of the health service. It was held on this basis that the Charter rights had been violated by the private hospital in not providing sign language communication facilities. Finally it must be emphasised that for Canada it is not mere public service or a public function which is subject to the Charter. The action must be governmental.[115]

[38] The following aspects of the approaches to questions of judicial review of the exercise of power are notable:

(a) The public elements of the power exercised or whether the power is exercised in the public interest or performance of a public duty were relevant in the South African pre-constitutional era and are material in England to the conclusion that the action concerned is subject to judicial review.

(b) The performance of a public service or a public function by a private entity is not subject to Charter review in Canada.

[115] *Eldridge* above n 108 at para 41.

(c) In both Canada and the United States, the issue for determination is essentially whether the entity or the function is governmental.

(d) The apparent narrowness of the concept of "governmental" has given rise to much debate in the course of the courts in Canada in particular attempting to ensure that government does not evade its responsibilities through delegation to a private entity. The judgments in Canada in particular are difficult to reconcile.

The approach in South Africa

[39] I have already said that the exercise of all public power in South Africa is constrained by the legality principle. It is therefore not necessary for the purpose of determining whether the legality principle applies to decide whether the power is governmental.

[40] Section 8(1) of our Constitution renders the Bill of Rights applicable to the judiciary, the executive, the legislature and organs of state. An organ of state is, amongst other things, an entity that performs a public function in terms of national legislation. The applicability of the Bill of Rights to the legislature and to the executive is unconditional as to function; the Bill of Rights is applicable to it regardless of the function it performs.[116] Our Constitution ensures, as in Canada and the United States, that government cannot be released from its human rights and rule

[116] Support is found for this in *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA). See also Hoexter "Contracts in Administrative Law: Life after Formalism?" (2004) 121 *South African Law Journal* 595.

of law obligations simply because it employs the strategy of delegating its functions to another entity.

[41] Our Constitution does not do this, however, by an expanded notion of the concept of government or the executive or by relying on concepts of agency or instrumentality. It does so by a relatively broad definition of an organ of state. This definition renders the legality principle and the Bill of Rights applicable to a wider category of function than the Charter does in Canada. An organ of state is, amongst other things, an entity that performs a public function in terms of national legislation.[117] If the Council performs its functions in terms of national legislation, and these functions are public in character, it is subject to the legality principle and the privacy protection. In our constitutional structure, the Council or any other entity does not have to be part of government or the government itself to be bound by the Constitution as a whole.[118] The way is now open to an investigation of the nature of the Council and the nature of the function it performs.

[42] The nature of the Council as an institution can be disposed of briefly. An organ of state must perform a function in terms of national legislation. The Constitution defines national legislation as including "subordinate legislation made in terms of an Act of Parliament".[119] The Exemption Notice is national legislation and the Council

[117] Section 239(b)(ii) of the Constitution.

[118] The nature of an organ of state is discussed in *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) at para 23.

[119] Section 239 of the Constitution.

does perform its function in terms of that legislation. The next question to be answered is the nature of its function. Does the Council perform a public function?

[43] Section 15A of the Act, in the process of granting the power to the Minister to exempt certain categories of lending transactions from the provisions of the Act, also empowered the Minister to determine the conditions upon which the exemption was to be made. The only purpose of empowering the Minister to determine conditions was to ensure that the activity of moneylending outside the terms of the Act did not go unregulated. The legislative purpose was therefore regulation by government or executive regulation of moneylending transactions that had been exempted from the provisions of the Act. The Minister decided to determine a regime that enabled the Council to regulate this sector of the moneylending industry. The fact that the Minister passed on the regulatory duty means that the function performed must at least be a public function.

[44] The extent of the control exercised by the Minister over the functioning of the Council also shows that the function is public rather than private. The Minister must determine how the Council was to be constituted: the Council was to have a "Board of Directors which has, amongst other directors, equal and balanced representation between consumers and the moneylending industry".[120] The Minister also in effect decides what the criteria for registration would be. This is because he had to approve these criteria. Lenders who did not comply with these criteria could not be registered.

[120] Item 1.6 of the Exemption Notice.

The Minister on behalf of the government determined the tasks of the Council extensively and obliged it to have mechanisms to ensure that each of these tasks was properly performed. Finally the Minister determined certain minimal rules which the Council had to enforce. The Council was obliged to perform the functions necessitated by the ministerial Exemption Notice if it wished to remain a regulator. Any action of the Council inconsistent with the Notice would certainly fall to be declared invalid. The Minister controlled the Council and determined its functions almost exclusively. No function of the Council could fall outside the terms of the Exemption Notice.

[45] The SCA relied on the fact that the memorandum of association empowered the Council to adopt its own rules for concluding that the Council was a mere private entity. This conclusion puts form above substance and disregards the nature of the function that the Council must perform. It ignores the reality of almost absolute ministerial control over the Council's functions. The provisions of the memorandum and articles of association fade into insignificance as an indicator of the nature of the Council in light of the overwhelming evidence of the true nature of the Council's functions. The fundamental difference between a private company registered in terms of the Companies Act and the Council is that the private company, while it has to comply with the law, is autonomous in the sense that the company itself decides what its objectives and functions are and how it fulfils them. The Council's composition and mandate show that although its legal form is that of a private company, its functions are essentially regulatory of an industry. These functions are closely

circumscribed by the ministerial notice. I strain to find any characteristic of autonomy in the functions of the Council equivalent to that of an enterprise of a private nature. The Council regulates in the public interest and in the performance of a public duty. Its decisions and Rules are subject to constitutional control. The Council is subject to the principle of legality and the privacy protection of our Constitution. The SCA's decision therefore cannot be upheld.

Did the Council exercise legislative power not delegated to it?

[46] The High Court found that the Council exercised legislative power and that the power to make the Rules had not been properly delegated to the Council.[121] Each of these propositions must now be examined.

[47] I start with delegation. The High Court held in this regard that while the Minister might have had the power to make rules binding on micro-lenders as a condition upon which the exemption may be granted, the Minister could not in law properly further delegate this power to the Council.[122] Implicit in this finding is the conclusion that the Exemption Notice is invalid. This was put to counsel for AAA Investments who expressly disavowed any contention to the effect that the Exemption Notice or the Notice by which the Council had been approved as a regulatory institution is invalid. AAA Investments has not and does not ask for an order declaring either of these Notices invalid. No manifest invalidity is apparent. In the circumstances, as counsel for AAA Investments rightly conceded, this application and

[121] See para 21 above.

[122] *AAA Investments* above n 5 at 566H-I and 567G-I.

the correctness of the High Court judgment must be determined on the basis of the validity of both Notices. Of course we are concerned here with the Exemption Notice.

[48] If the Exemption Notice is valid, delegation by the Minister in terms of the Exemption Notice must also be taken as valid. It follows that the contention that the Minister had no power to delegate in the Exemption Notice could not have been validly advanced by AAA Investments in the High Court. Nor, absent an attack on the validity of the Exemption Notice, could the High Court have made the finding that the Minister exceeded his power in the Exemption Notice. In the circumstances, the finding that the Minister had no power to delegate cannot stand. This judgment accordingly proceeds on the basis that the delegation achieved by the Exemption Notice is lawful, constitutional and acceptable. Any consideration of whether the Exemption Notice fell squarely within the terms of section 15A is superfluous.

[49] Was the High Court correct in holding that the Council exercised legislative power and thereby usurped the power reserved in the Constitution to Parliament, the provincial legislatures and municipal councils?[123] The Rules are not and do not purport to be national, provincial or local government legislation. They are binding Rules at what may be described as a secondary level. They derive their validity from the Exemption Notice.[124] This judgment holds that the Council exercised public power in terms of the Exemption Notice. This is a rule-making power aimed at

[123] Section 43 of the Constitution.

[124] *Executive Council, Western Cape Legislature and Others v The President of the Republic of South Africa and Others* 1995 (4) SA 877; 1995 (10) BCLR 1289 (CC) at paras 51 and 62.

fulfilling the duties imposed by the Minister. They are legislative. But the Council does not, by making rules, or by exercising legislative power properly delegated to it, usurp national, provincial or municipal legislative power. It makes binding rules authorised by law and with the force of law in the fulfilment of a national legislative purpose as set out in section 15A.

[50] Counsel for AAA Investments made one more submission in relation to the validity of the Rules as a whole. They contended that the Exemption Notice did not empower the Council to make the Rules. In support of this proposition AAA Investments urged that the Council was not authorised to make rules beyond the Ministerial Rules. In other words, they contend that the Exemption Notice contemplates that lenders would be bound by the Ministerial Rules alone. The second leg of the contention that the Rules were not authorised by the Exemption Notice was based on the proposition that there were certain conflicts between the Minister's Rules and the Rules. I do not agree

[51] As I have already said, the legislative purpose of empowering the Minister to set the conditions was, in my view, to make it possible for the Minister to ensure that the micro-lending industry is sufficiently controlled and that borrowers are appropriately protected. The Minister chose to exercise control over the industry through a regulatory institution with which all micro-lenders had to register. The Minister also made certain rules binding on lenders and then imposed upon the regulatory institution the duty to enforce the rules, the obligation to compel

compliance with the registration criteria, and a number of regulatory tasks which the regulatory institution had to perform. It must be stressed that the Notice read together with the Minister's Rules did not put in place any mechanism or process that would facilitate the performance of these tasks or that had to be complied with in their performance.

[52] Now the Council, after it had been approved as a regulatory institution, became obliged to perform these functions. The obligation was consistent with the purpose of the legislation. But it could do nothing to compel compliance. It had been entrusted with a series of important tasks; tasks which could be performed only if a mechanism or set of rules was put in place to enable it to exercise its regulatory function over moneylenders and to exact compliance by sanction should this prove to be necessary.

[53] This may be illustrated by example. The Council must monitor and ensure compliance with the Exemption Notice[125] which of course includes the Minister's Rules. One of these Rules restricts the consideration that a lender may charge[126] while another obliges the lender to allow a cooling off period.[127] Inspection provisions are essential if the Council is to monitor compliance with these Minister's Rules.[128] In addition, disciplinary and appeal procedures extensively described in the

[125] Item 1.6(d) of the Exemption Notice.

[126] Described in para [18](c) above.

[127] Described in para [18](d) above.

[128] Rule 3.11 provides:

> "The lender shall allow the Council and its inspectors or other servants and agents to inspect the business of the lender. Inspections may be performed by the Council at any reasonable time with or without notice and the lender shall provide all reasonable assistance and facilities

Rules are necessary if non-compliance is alleged. The Council is obliged by the Exemption Notice to register lenders in accordance with accreditation criteria approved by the Minister. Registration procedures and inspections are again necessary for the proper fulfilment of this obligation. An examination of the Rules in relation to the duties imposed on the Council shows that the duties cannot effectively be carried out without the Rules.

[54] The Exemption Notice must be interpreted so as to empower the Council to do everything necessary to fulfil the responsibility imposed on it. The Rules apply to a limited category of lenders and are tightly designed for the task at hand. The micro-lending industry cannot be regulated without them. The Rules are within the authority of the Council. It is true that the authority to make Rules is not expressly conferred on the Council but is conferred by necessary implication.[129]

[55] AAA Investments relies upon three alleged conflicts between the Rules and the Minister's Rules to ground the submission that the latter could not have authorised the former:

(a) The first of these, so the submission goes, is between the Minister's Rule[130] that requires debtor information not to be disclosed without consent and the

---

necessary for such inspections and shall allow the Council access to all relevant documentation and records as may be required by the Council, to make copies of all such documentation or to remove such documents for purposes of an investigation. The Council shall provide the lender with a receipt of all documentation removed."

[129] See *Matatiele Municipality and Others v President of Republic of South Africa and Others* 2006 (5) BCLR 622 (CC) at para 50 and the authorities therein cited in footnote 28.

[130] Minister's Rule 1.

Rules[131] to the effect that loans may only be granted to borrowers who consent to the disclosure of certain information concerning the loan. It is said that the Minister's Rule carries with it the consequence that loans may be granted without disclosure of any information and that the Rules conflict with the Minister's Rules because they require disclosure. The Minister's Rule in question has nothing to do with the conditions upon which loans may be granted and cannot carry the implications suggested.

(b) The next alleged conflict is between the Minister's Rule[132] which provides for a three-day cooling-off period and the Rule that requires the lender to send information about the loan to a broker within two days of it being granted. The inconsistency is said to arise because the relevant Rule prevents the borrower from cancelling the agreement on the basis that he does not wish information about himself to be conveyed to a broker. But, as has already been said, the borrower has to consider the issue and consent to the conveyance of information before the agreement is entered into. There is nothing in the Minister's Rules to suggest that information about the borrower should not be sent to any other agency before the expiry of the three-day period. Indeed, information concerning the number of borrowers who cancel agreements before the expiry of the cooling-off period could well be very useful in attaining the purposes of the Exemption Notice and the Minister's Rules.

[131] Rules 6.1 and 6.6.1.2.

[132] Minister's Rule 4.

(c) Finally the suggestion is that the Rules conflict with the Minister's Rule[133] that requires the lender to be given at least 28 days notice before any adverse information about her is sent to a credit bureau. The Rules[134] require certain information about borrowers to be sent to information brokers for the purpose of inclusion in the National Loans Register without the borrower having been given twenty eight days notice. AAA Investments says that one of the information brokers appointed pursuant to the Rules is a credit bureau and the furnishing of information to that entity for inclusion on the National Loans Register without the required notice would be in conflict with the Minister's Rules. This contention does not begin to hold water because on its own terms AAA Investments does not rely on any conflict between the Rules and the Minister's Rules but alleges a conflict between the Minister's Rules and action taken pursuant to the Rules. In any event, as is contended by the Council, the information to be included on the National Loans Register cannot be regarded as adverse. Furthermore, the Minister's Rules could never have contemplated a prohibition of information being sent to an entity for inclusion on the National Loans Register with the express consent of the borrower without notice to that borrower. The Minister's Rule was obviously concerned with preventing adverse information from being sent to a credit bureau gratuitously. It had nothing to do with information that had to be sent in the context of the control of micro-lending transactions in the interests of the borrower and in the public interest.

[133] Minister's Rule 2.11.

[134] Rule 6.3.

[56] There is therefore no basis for upholding the order of the High Court setting aside the whole body of the Rules as being inconsistent with the Constitution. The Court's order setting aside the first set of Rules can also not be upheld. The argument that the Constitution requires us to interpret the delegation of power narrowly also falls to be rejected because, in my view, the only reasonable construction of the Exemption Notice and the Rules is that all the Rules are authorised. I cannot conceive of an alternative reasonable interpretation that would exclude or limit the authority of the Council to make its Rules.

Privacy

[57] The conclusion that the Council did have the power to make the Rules renders it necessary for us to decide whether the privacy argument should be considered. The contention is that certain of the Rules (Rule 6 in particular) offend against the protection of privacy in the Constitution.

[58] It is not, in my view, in the interests of justice to consider this specific attack because the current regulatory regime (as of the date of argument) has been replaced. Counsel for the applicant and for the first respondent told us that new legislation, the Credit Act[135] and a wholly new regulatory regime was to come into operation on 1 April 2006. However a new Credit Act came into force on 1 June 2006.[136]

[135] The National Credit Act 34 of 2005.

[136] In addition the Department of Trade and Industry has published the National Credit Regulations, 2006, Government Gazette 28864 GN 489, 31 May 2006.

[59] The Rules will soon not be in operation. The transitional provisions[137] do not provide for a continuation of the Rules either. The regulatory regime postulated by the new legislation differs fundamentally from that contained in the Usury Act. The Credit Act provides for a regulator whose powers and duties are extensively described in the Act itself.[138] The privacy provisions are very different too. Information about the borrower can be released only if and to the extent required by the Credit Act.[139] There is no longer a National Credit Regulator but the Minister might require the Regulator to establish a single national credit register.[140] Provision is also made for ensuring that credit bureaus have accurate information,[141] for removal of a name from the record of the credit bureaus if the debt is paid,[142] as well as for the borrower to receive appropriate credit information.[143]

[60] What was in the Rules is now contained in the Credit Act. The content also differs from the Rules. In those circumstances, the enquiry into the constitutionality of the Credit Act will be materially different from the enquiry into the constitutional validity of the Rules relating to privacy. A finding in relation to this issue will

[137] Id at Schedule 3.

[138] Id at Chapter 2, Part A, sections 12-18.

[139] Id at Chapter 4, Part B, section 68.

[140] Id at section 69.

[141] Id at section 70.

[142] Id at section 71.

[143] Id at section 72.

therefore be of little practical significance.[144] Unlike the issue in relation to whether the rule-making by the Council constituted private or public power, there are no conflicting judgments in existence on the privacy issue.

[61] In all the circumstances, it is in the interests of justice for this Court not to consider this issue. In that event AAA Investments, any other lender or any borrower will be free to institute proceedings to set aside some of the Rules on the basis that they infringe the privacy right if so advised. This Court would then hear any appeal that might eventuate if this is found to be in the interests of justice.

[62] The order of the SCA setting aside the order of the High Court must accordingly be upheld.

Costs

[63] Although this appeal must be dismissed, this judgment does not uphold any of the reasoning of the SCA or the order of the High Court in favour of AAA Investments. The High Court costs order in favour of AAA Investments cannot stand. The reasons for the dismissal of the appeal are so at odds with the reasoning of the

[144] *City of Cape Town and Another v Robertson and Another* 2005 (2) SA 323 (CC); 2005 (3) BCLR 199 (CC) at paras 76-77; *Uthukela District Municipality and Others v President of the Republic of South Africa and Others* 2003 (1) SA 678 (CC); 2002 (11) BCLR 1220 (CC) at paras 16-17; *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) at paras 9-11; *President, Ordinary Court Martial, and Others v Freedom of Expression Institute and Others* 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 (CC) at para 16; *J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) at paras 16-17.

SCA that it is not fair, in all the circumstances, for the SCA's order in relation to the costs of the appeal in favour of the Council to remain undisturbed. Although AAA Investments has not achieved any success from a practical viewpoint, it has succeeded in its contention that the Council exercised public power. On the other hand, the Council has succeeded in establishing that the Rules as a whole were not outside the powers conferred upon it by the Exemption Notice. Important and complex issues were aired in all three courts and I am of the view that AAA Investments and the Council should each bear their own costs.

Order

[64] The following Order is made:

1. The application for leave to appeal is granted.
2. The appeal is dismissed except in relation to costs.
3. Each party must pay its own costs in the High Court, in the Supreme Court of Appeal and in this Court.

(Moseneke DCJ, Madala J, Mokgoro J, Nkabinde J, Sachs J, Skweyiya J and Van der Westhuizen J concur in the judgment of Yacoob J.)

LANGA CJ:

[65] I have had the benefit of reading the judgments of my colleagues Yacoob J and O'Regan J and, although there is much that I agree with in both judgments, I am

unable to concur fully in the reasoning of either and the outcome they reach. My approach to the issues in this matter is substantially similar to that adopted by O'Regan J and I shall confine myself to those aspects where this judgment takes a different view from hers.

[66] As I see it, the case raises the following issues: first, whether the doctrine of legality applies to the powers exercised by the Micro Finance Regulatory Council (the Council); second, whether the Exemption Notice[1] contains a delegation of power to the Council; and third, if it does, whether that delegation is lawful. Finally, if the Notice does contain a permissible delegation, the question is whether any of the rules made by the Council exceed the ambit of the delegation.

Mootness

[67] I agree with my two colleagues that the matter before the Court is moot but that, because of the importance of the principles involved, it is nonetheless in the interests of justice to grant leave to appeal. I have nothing to add to their comprehensive consideration of the issue.

Legality

[68] This is a matter of the application of the rule of law and the principle of legality which flows from the value of the rule of law enshrined in section 1 of the Constitution. This Court has held that "[t]he exercise of all public power must comply

[1] Government Gazette 20145 GN 713, 1 June 1999.

with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law."[2] The doctrine of legality, which requires that power should have a source in law, is applicable whenever public power is exercised. Private power, although subject to the law and in certain circumstances the Bill of Rights, does not derive its authority or force from law and need not find a source in law. Public power on the other hand can only be validly exercised if it is clearly sourced in law.

[69] What has to be determined firstly is whether the Council exercised a public power when making the rules. In this regard I agree fully and have nothing to add to the position taken by both Yacoob J[3] and O'Regan J[4] that the rules are an exercise of public power.

[70] Moving on from this premise, both the High Court and the applicant argue that this public power is also legislative in nature and that this alone constitutes a separate ground for setting the rules aside as legislative powers may only be exercised by Parliament. However, as noted in the judgment of O'Regan J, legislative powers may be, and often are delegated.[5] It is clear that the mere characterisation of a power as legislative does not automatically render it unlawful for anybody else but the legislature to exercise it. However, as will appear below, the nature of the power,

---

[2] Per Chaskalson P in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 20. See also *Fedsure Life Assurance Limited and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at paras 40 and 56.

[3] At paras 31-45 above.

[4] At paras 119-121 below.

[5] *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at paras 51, 62 and 148.

legislative, executive or administrative, is an important factor in determining the extent to which a power can be delegated.[6]

[71] The real question then is not whether the power was legislative or not, but whether it was validly delegated to the Council. On this my approach differs from that of Yacoob J, who proceeds on the basis that since there was no challenge to the validity of the Notice, the delegation in the Notice, if any, must be taken as valid.[7] For the reasons set out below, I agree with O'Regan J that the first task must be to determine whether any delegation in the Notice, implied or otherwise, "would be unlawful or inconsistent with the Constitution, and if the Notice is open to an interpretation that does not include a delegation then that should be the interpretation attached to the Notice."[8]

[72] It is a fundamental tenet of our constitutional jurisprudence that all law, whether statute, common law, customary law or regulation must be read in a manner that is consistent with the Constitution. This principle is not limited to consistency with the spirit, purport and objects of the Bill of Rights as required by section 39(2), it is an implied principle of the Constitution as a whole that a constitutional interpretation should always be preferred to a non-constitutional interpretation. The principle has been stated by this Court as follows:

[6] See para 86 below.

[7] At para 48 above.

[8] At para 126 below.

> "The purport and objects of the Constitution find expression in s 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution."[9]

These remarks apply with equal force to the interpretation of regulations.

[73] On the assumption that a delegation of power to the Council is unconstitutional, it would not suffice, in my view, to simply state that the validity of the Notice was not challenged. The Notice must be interpreted, if possible, in a manner that avoids such an unlawful delegation. Yacoob J's answer to this approach is to say that no other interpretation is possible and therefore it is unnecessary to determine if the delegation was valid as it would make no difference.[10] However, as will appear below,[11] the Notice is indeed capable of an alternative interpretation that limits the scope of the powers that the Council may exercise. Even if it were not, I consider it nonetheless important that the route of constitutional interpretation should be followed – even if it does not lead to a different result.

Delegation

[74] I turn now to what, in my view, is the crux of the case and that is the question whether there was a valid delegation of power by the Minister to the Council. I agree

[9] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 22.

[10] At para 56 above.

[11] At paras 78-79 below.

with O'Regan J's general approach to this question but regrettably disagree with her application of the principles to the facts of this case.

[75] It will be convenient to deal first with the question whether the Notice contains a delegation of power to the Council and, if so, what the extent of that delegation is. There is no express delegation of rule-making power to the Council in the Notice. It is however clear, as pointed out by my colleague,[12] that the creation of a regulatory institution envisages that it will play an important role in regulating the micro-lending industry and in determining who qualifies for exemptions. It follows that the creation of the Council necessarily implies that it must be allowed to make some rules to fulfil its role as a regulatory institution. It would not be possible for the Council to perform the role allocated to it if it were given no rule-making power at all.

[76] What lies at the very heart of this case, however, is the question whether the role of the Council requires it to simply apply the rules and standards set by the Minister, or whether the Notice envisions a Council that takes it upon itself to construct the conditions and extent of exemption.

[77] It seems to me that the Notice itself can be read either way. Regulation 1.6 which defines a "regulatory institution" could be read, as Yacoob J has done, as conferring a much wider discretion to do "everything necessary to fulfil the

[12] At paras 52-54 above.

responsibility imposed on it."[13] It could however also be read as limiting the Council to the application of the Minister's Rules. It is worth reproducing Regulation 1.6 to show how I come to the latter interpretation which conflicts with that contended for by Yacoob J.

> "1.6 "regulatory institution" means a legal entity having a Board of Directors which has, amongst other directors, equal and balanced representation between consumers and the money lending industry and which is approved by the Minister in writing and published in the Government Gazette as having the capacity and the mechanisms in place effectively to -
>
> (a) manage its business as a regulatory institution with competent management and staff;
>
> (b) register lenders in accordance with accreditation criteria approved by the Minister;
>
> (c) ensure adequate standards of training of staff members interacting with the general public;
>
> (d) require adherence to and monitor and ensure compliance by lenders with this notice;
>
> (e) fund itself from contributions by lenders or other sources;
>
> (f) ensure that complaints from the general public are responded to objectively;
>
> (g) deal with appeals by lenders and borrowers in respect of any decision of the regulatory institution or any committee, ombudsperson or referee instituted by it;
>
> (h) educate and inform the general public and lenders in relation to their rights and obligations under this notice;
>
> (i) annually publish information regarding the money lending industry, the services provided, security and/or guarantees required, types of charges and the average annual charges levied by each lender in a comparable format;
>
> (j) collect and collate information and statistics on lenders and complaints handled by the regulatory institution, including the -
>
> (i) number of complaints lodged and details of the complainant;

[13] At para 54 above.

(ii) number of lenders found in breach of this notice and the reasons therefor;

(iii) names of lenders against whom substantiated complaints have been lodged and the number and nature of complaints;

(iv) response time to resolve complaints;

(v) the number of items monitored under each category;

(vi) the number of breaches detected through monitoring;

(vii) the number and nature of sanctions imposed; and

(viii) the number of decisions appealed against and the outcome thereof;

(k) annually furnish the Minister with a detailed report on lenders, its activities and functions and any other information that the Minister may require;

(l) review its own effectiveness and the effectiveness of this notice and to recommend appropriate changes to the Minister".

[78] The only subsections that are capable of being read as imposing a broader duty on the Council to dictate conditions of exemption are (b), (d) and (j). While requiring registration clearly involves a positive task, the proviso "in accordance with accreditation criteria approved by the Minister" (regulation 1.6(b)) makes it clear that the regulatory institution is to have only an administrative role, not a creative role involving the determination of conditions of registration. Its task is to register as dictated by the Minister. Regulation 1.6(d) does require the Council to ensure that lenders comply with the Notice; it will accordingly need investigation and enforcement procedures to do so. Those procedures should not, however, become extra conditions for exemption. They should remain administrative tools to give effect to the Notice. Finally, many of the rules could be justified as necessary to perform the information-gathering task. However, a careful look at the type of

information that must be collected under regulation 1.6(j) leads us down a different path. It all relates to lenders, their compliance with the Notice, the number of complaints and how they have been dealt with.

[79] In addition, regulations 1.6(k) and (l) suggest very strongly that the correct method for the Council to alter conditions of exemption is through recommendations and reports to the Minister, not by including those conditions it believes necessary in its own rules. On this interpretation of the Notice, the Council would need some provisions to fulfill the limited obligations that the Notice imposes. There is however nothing in regulation 1.6 that suggests that in doing so, the Council must have any power to set new conditions for exemption. The Council remains a central role-player in the regulation of the micro-finance industry, but that role does not extend to the determination of what a lender must do to qualify for exemption.

[80] How should a choice be made between these interpretations? While it is important to give effect to the purpose of the Notice, the choice must, if at all possible, be an interpretation that is constitutionally compatible. That requires a determination as to what powers section 15A of the Usury Act[14] (the Act) allowed the Minister to delegate to the Council. What must be avoided is a reading that would necessitate the delegation of powers if the Act would not allow that delegation. The need for proper delegation is based on the doctrine of legality; it is accordingly not necessary, in my view, to determine in this case whether the power exercised by the Council is

[14] Act 73 of 1968.

administrative, legislative or executive. All public power must be sourced in law. I turn squarely now to the question of delegation.

[81] My starting point is the maxim "delegatus delegare non potest" which

> "is based upon the assumption that, where the legislature has delegated powers and functions to a subordinate authority, it intended that authority itself to exercise those powers and to perform those functions, and not to delegate them to someone else, and that the power delegated does not therefore include the power to delegate. It is not every delegation of delegated powers that is hit by the maxim, but only such delegations as are not, either expressly or by necessary implication, authorised by the delegated powers."[15]

In the context of this case, the question is whether the power conferred on the Minister in section 15A of the Act either expressly or by necessary implication authorises the sub-delegation of the delegated power to exempt. The authorisation, I must stress, must flow from section 15A and not from the Notice. The power to delegate must exist prior to and independently of the manner in which the Minister exercises his powers.

[82] Section 15A reads:

[15] *Attorney-General, O.F.S. v Cyril Anderson Investments (Pty) Ltd* 1965 (4) SA 628 (A) at 639C-D. See also *Aluchem (Pty) Ltd and Another v Minister of Mineral and Energy Affairs and Others* 1985 (3) SA 626 (T) at 631F-G; *SA Freight Consolidators (Pty) Ltd v Chairman, National Transport Commission, and Another* 1987 (4) SA 155 (W) at 164B-C; *SA Airways Pilots Association and Others v Minister of Transport Affairs and Another* 1988 (1) SA 362 (W) at 371C-D; *Veldsman and Others v Overberg Regional Services Council and Another; Martin and Others v Overberg Regional Services Council and Another* 1991 (2) SA 651 (C) at 656E-F; *Chairman, Board on Tariffs and Trade, and Others v Teltron (Pty) Ltd* 1997 (2) SA 25 (A) at 34E; *Government of the Province of the Eastern Cape v Frontier Safaris (Pty) Ltd* 1998 (2) SA 19 (SCA) at 32B-D; *Spier Properties (Pty) Ltd and Another v Chairman, Wine and Spirit Board, and Others* 1999 (3) SA 832 (C) at 846D-E.

> "The Minister may from time to time by notice in the Gazette exempt the categories of money lending transactions, credit transactions or leasing transactions which he may deem fit, from any of or all the provisions of this Act on such conditions and to such extent as he may deem fit, and may at any time in like manner revoke or amend any such exemption."

There is no express power for the Minister to delegate. A sub-delegation of the Minister's powers could only be justified if it is "reasonably necessary" or, to put it differently, "if effect cannot be given to the statute as it stands unless the provision sought to be implied is read into the statute."[16]

[83] In order to determine whether or not the sub-delegation by the Minister to the Council is reasonably necessary, it is appropriate to begin with an examination of the section itself as it appears in the broader context of the Act. There is no textual suggestion of an authorisation to sub-delegate. The section refers specifically to the Minister and his discretion – "as he may deem fit" – as the source of the power to exempt. I agree with the High Court that the fact that section 15A does not specifically provide in clear terms for the delegation of the powers of the Minister while, on the other hand, there are other sections in the Act, for example sections 12 and 12A – which provide for a delegation of the Registrar's powers – strengthens the inference that the legislature did not intend to allow further delegation.[17] To my

[16] *Taj Properties (Pty) Ltd v Bobat* 1952 (1) SA 723 (N) at 129G. See also *D.E.P. Investments (Pty) Ltd v City Council, Pietermaritzburg* 1975 (2) SA 261 (N) at 265H; *South African Medical Council v Maytham* 1931 TPD 45 at 47; *The Firs Investments (Pty) Ltd v Johannesburg City Council* 1967 (3) SA 549 (W) at 557B; *S v Van Rensburg* 1967 (2) SA 291 (C) at 294C-D; Botha *Statutory Interpretation: An Introduction for Students* 4 ed (Juta, Lansdowne 2005) at 107; De Ville *Constitutional and Statutory Interpretation* (Interdoc Consultants, Goodwood 2000) at 132; Devenish *Interpretation of Statues* (Juta, Kenwyn 1992) at 84.

[17] See *Teltron* above n 15 at 35B-C and *Frontier Safaris* above n 15 at 32I-33A.

mind, this points away from permitting any meaningful delegation of the Minister's more policy-driven powers.

[84] While I agree with O'Regan J that Ministers will of necessity have to delegate their powers to other functionaries, this must, in my view, relate to a delegation to officials in the Minister's department, not to a Council which is a private body. It also relates only to powers that do not require the exercise of a political discretion. The powers given to the Minister in section 15A relate to the determination of policy. They are given to him because of his position as an accountable member of government. It seems to me that they should, to the extent that they involve the determination of policy, be exercised by him. The fact that sections 12 and 12A relate to the Registrar's powers also seems to indicate that his powers may be delegated, while the more policy-driven powers assigned to the Minister may not.

[85] The approach above is not only consistent with the textual interpretation of the section, it is an approach which has been developed and regularly applied by the courts over the years. In making this determination, a number of factors may be identified. These include: the nature and impact of the power; the extent of sub-delegation and continued review by the original delegator; practical necessity; and the identity and importance of the delegator and the delegee.[18] I will consider each of these factors in turn.

[18] *Minister of Trade and Industry and Others v Nieuwoudt and Another* 1985 (2) SA 1 (C) at 13 citing with approval Baxter *Administrative Law* (Juta, Lansdowne 1984) at 435. See also Hoexter and Lyster *Volume II: Administrative Law* in Currie (ed) *The New Constitutional and Administrative Law* (Juta, Lansdowne 2002) at 134-6.

[86] From the above it would seem firstly that in general, powers that have far-reaching impact or that involve the exercise of a large degree of discretion or are legislative in nature are less likely to allow for sub-delegation than less important administrative or executive powers that can be mechanically applied.[19] The power to exempt certain transactions from the Act or to set the conditions for exemption is an important and far-reaching power. It is the means of regulating the large and ever-growing micro-lending industry and failure to adhere to the Minister's requirements bears the threat of criminal sanction. It is unnecessary at this stage to decide whether the power is legislative in the strict sense of the word. Suffice to say that it bears many legislative characteristics that point away from reading in the power to delegate. I should note that the above comments apply both to the categorisation of loans and the setting of conditions. I do not see a meaningful difference between the two: they act together to determine who is and who is not entitled to exemption.

[87] Secondly, the total delegation of a power is less likely to be permitted than its partial delegation.[20] In this regard the level of control maintained by the original functionary over the delegated power is very important – the greater the control, the lesser the extent of the delegation. Although in this case it is true that the Council must report to the Minister and that the Minister retains the discretion to remove the Council as a regulatory institution, this is at most indirect control. There is no direct

[19] See *Aluchem* above n 15 at 631H; *Welkom Bottling Co (Pty) Ltd en 'n Ander v Belfast Mineral Waters (OFS) (Pty) Ltd* 1968 (2) SA 61 (O) at 68H-69A; *Catholic Bishops Publishing Co v State President and Another* 1990 (1) SA 849 (A) at 864I-865A.

[20] *SA Freight Consolidators* above n 15 at 165A-168I.

supervision or immediate oversight over the Council and no ability to overrule individual decisions. In their submissions, both the Council and the Minister admit that the Council can take decisions contrary to those of the Minister. The power of the Minister is limited to a disapproval or cancellation of the decision after it has been made. What should also be kept in mind is that it would be extremely difficult for the Minister to remove the Council as a regulatory institution as he would have to find or create a replacement. Compared to the situation where the Minister delegates a power to a lower level functionary in his own department or even another department, the level of control or supervision in this case is substantially lower.

[88] In *Shidiack v Union Government*[21] Innes ACJ held that when "the Legislature has prescribed a test which is to be discharged 'to the satisfaction of the Minister,' … that cannot mean to the satisfaction of anybody else." This must however be tempered by the recognition that it is sometimes impossible for a functionary to exercise all his assigned powers himself.[22] In this context, both Yacoob J and O'Regan J point, quite correctly in my view, to the practical necessity of having a regulatory institution to perform the complex everyday functions of controlling the industry. In my view, however, this does not seem to be what is at stake in section 15A. The section concerns the setting of broad, basic standards and rules which will be applied to all lenders. It is not necessary to have another institution other than the Minister to set those standards and make those rules. A body to enforce them will be

[21] 1912 AD 642 at 649.

[22] See *Nieuwoudt* above n 18 at 14-5. See also Hoexter and Lyster above n 18 at 136 who argue, with reference to English law, (*In Re Golden Chemical Products Ltd* [1976] Ch 300 and *Carltona Ltd v Commissioner of Works and Others* [1943] 2 All ER 560) that *Shidiack* would be decided differently today.

needed, but not to make standards of its own. Indeed, after the decision of the High Court, the Minister himself implemented the Council's rules through regulation. It could not be validly argued, in my view, that the Minister was not capable of enacting the rules himself, even if he were to do so through consultation with the Council. To my mind, "practical necessity" requires no more delegation than what is necessary to enforce the Minister's rules. In this context I am in agreement with the remarks of Streicher JA in his minority judgment in *Frontier Safaris*[23] that if the statutorily assigned body was unable to cope with its task "the Government should have requested the Legislature to reconsider the matter" rather than taking it upon itself to delegate the task to another body.

[89] Fourthly, the nature and importance of the delegator and that of the delegee are also relevant.[24] Before I turn directly to that matter, it is as well to note that accountability is a central value of our Constitution.[25] This means that our law must be developed and interpreted in a manner that ensures that all bodies exercising public power are held accountable. However, to my mind, it also means that courts should be slow to infer the delegation of power to bodies that cannot be held directly accountable through ordinary political processes.

[90] The Minister is a very important member of government. His holds a public position and his interests are solely those of government and the people. He is directly

[23] *Frontier Safaris* above n 15 at 33D.

[24] *Nieuwoudt* above n 18 at 13I; *Aluchem* above n 15. See also Hoexter and Lyster above n 18 at 136.

[25] See *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at paras 73-76.

accountable both to the National Assembly and to the electorate. These considerations, together with his knowledge and experience, seem to be the reason why section 15A assigns this important discretion to him. On the other hand, although the Council exercises public powers and may be classified as an organ of state, it remains a private company. Admittedly, as a section 21 company, the Council is not motivated by profit. In addition, it was created and is structured and governed with the regulation of the money-lending industry in mind. However, although the interests and goals of the Council may regularly coincide with governmental and public interests, the two should not be equated. The Council is not elected nor is it directly accountable to the public. It is only accountable through the very limited control exercised by the Minister. These are differences which should, in my view, not lightly be overlooked.

[91] Finally, it should be noted that a power that is exercised without authority cannot be ratified after the fact.[26] Therefore, if the Council exceeded its powers in any way, this cannot be cured by the Minister's agreement but rather by the valid exercise of the power by the Minister himself.

Foreign Law

[26] In *Mathipa v Vista University and Others* 2000 (1) SA 396 (T) at 401-2 for example, a person was appointed by the incorrect official. The correct official later tried to ratify the appointment. De Villiers J held correctly that it was impossible to ratify an action performed without authority.

[92] Although decisions in foreign jurisdictions should never be slavishly adopted,[27] a brief examination reveals that there is much that is similar between our law on delegation and the decisions of foreign courts. I consider that the manner in which they have dealt with similar issues on this aspect provides helpful guidance. In particular, a large number of common-law jurisdictions have adopted the presumption against sub-delegation contained in the maxim delegatus delegare non potest, subject generally to the exception that Ministers may freely of necessity delegate within their own departments.[28] In England,[29] Australia[30] and New Zealand,[31] the position is that delegation is less likely to be implied if a power is legislative in nature or if the decision involves the exercise of a wide discretion.[32] In Canada the Supreme Court has regularly held that an authority cannot enact regulations that effectively turn the

[27] See for example *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 133 (per Kriegler J); *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at para 33.

[28] This has become known as the '*Carltona* principle'. The English Court of Appeal in *Carltona* above n 22 at 563 held that in order to allow the smooth functioning of government, Ministers are always entitled to have their functions exercised by officials in their departments as it is the Minister that remains responsible to Parliament. This rule is however confined to delegation within government departments. See also *Lewisham Borough Council and Another v Roberts* [1949] 1 All ER 815 at 829 and Wade and Forsyth *Administrative Law* 8 ed (Oxford University Press, New York 2000) at 325.

[29] *King-Emperor v Benoari Lal Sarma* [1945] AC 14; *Jackson, Stansfield and Sons v Butterworth* [1948] 2 All ER 558 at 564-66. See also Craig *Administrative Law* 5 ed (Sweet and Maxwell, London 2003) at 523 and De Smith, Woolf and Jowell *De Smith, Woolf and Jowell's Principles of Judicial Review* (Sweet and Maxwell, London 1999) at 227 and 233.

[30] *R v Lampe and Others; Ex Parte Madalozzo* (1963) 5 FLR 160; *Long v Knowles* [1968] Tas SR 46. See also Pearce and Argument *Delegated Legislation in Australia* 2 ed (Butterworths, Australia 1999) at 269-70 and Skyes, Lanaham, Tracey and Esser *General Principles of Administrative Law* 4 ed (Butterworths, Australia 1997) at 34.

[31] *Geraghty v Porter* [1917] NZLR 554; *Hawke's Bay Raw Milk Producers' Co-operative Co Ltd. v New Zealand Milk Board* [1961] NZLR 218.

[32] The only time the Supreme Court of Canada has considered the sub-delegation of legislative powers was in *Reference as to the Validity of the Regulations in Relation to Chemicals* [1943] SCR 1 where it found that emergency war-time legislation permitted the delegation of regulation-making power. This decision should however be confined to the exceptional circumstances of the case. See Dussault and Borgeat *Administrative Law: A Treatise* 2 ed, Volume I (Carswell, Toronto 1985) at 416. The majority of Canadian authors argue that legislative powers are less likely to be delegated by implication. See id at 416 Jones and De Villars *Principles of Administrative Law* 3 ed (Carswell, Toronto 1999) at 140; Mullan *Administrative Law* 3 ed (Carswell, Toronto 1996) at 194.

exercise of a power that was meant to be dealt with by it through regulation into a discretionary administrative power to be exercised by itself or another body.[33] The extent of delegation and the degree of control retained by the delegator have also been examined.[34] In *Allingham and Another v Minister of Agriculture and Fisheries*[35] for example, a committee had the wartime power to order farmers to grow certain crops on specific fields. With respect to one farmer they left the decision of which field should be used to their executive officer. The exercise of power was held to be invalid, but the Court noted that there would have been no problem if the committee had acted itself on the recommendation of the officer.[36] There are also a number of Canadian and English decisions that suggest that it is impermissible to set as an administrative condition, compliance with the regulations of a private body.[37]

Conclusion

[93] The discussion above leads me to the conclusion that the only powers that can constitutionally be delegated to the Council are those that are reasonably necessary to

---

[33] See *Vic Restaurant Inc v City of Montreal* [1959] SCR 58; *City of Verdun v Sun Oil Company Ltd* [1952] 1 SCR 222; *Brant Dairy Company Ltd et al v Milk Commission of Ontario et al* 30 DLR (3d) 559 (SCC).

[34] See for example *Credite Suisse and Another v Waltham Forest LBC* [1997] QB 362; *Cohen v West Ham Corporation* [1933] Ch 814 at 826-27; *R v Board of Assessors of Rates and Taxes of the City of Saint John* (1965) 49 DLR (2d) 156; *Labour Relations Board of Saskatchewan v Speers and Regina Undertakers Employees Federal Union* [1948] 1 DLR 340. According to Wade and Forsyth "[t]he vital question in most cases is whether the statutory discretion remains in the hands of the proper authority, or whether some other person purports to exercise it." Wade and Forsyth above n 28 at 316.

[35] [1948] 1 All ER 780.

[36] Id at 781.

[37] In *Ellis v Dubowski* [1921] 3 KB 621 it was held that a County Council could not delegate its power to decide whether a film could be shown by declaring that any film approved by the British Board of Film Censors, a private body, could be shown. Similarly, a Canadian Court has held that a by-law requiring owners to build fences around their swimming pools that contained the additional requirement of the consent of neighbouring landowners, impermissibly delegated the municipal council's power to private land owners. *Re Davies and Village of Forest Hill* [1965] 1 OR 240. The court in *Michie v M.D. of Rocky View No 44 et al* (1968) 64 WWR 178 (Alta) at 182-83 declared invalid permits issued on the condition that they complied with requirements set by a private entity. The delegation has been found to be unlawful in each of these cases although the fact that the body is private has never been the reason given for the decision.

apply the rules set by the Minister and to fulfil the limited role prescribed for it in the Notice. The Act neither contemplates nor permits the delegation by the Minister to the Council of the policy-making function of determining categories or conditions of exemption. While the administration of the Minister's Rules will themselves make it more difficult to obtain exemption, there is, in my view, a meaningful distinction to be drawn between rules that implement the Minister's Rules and those that go beyond implementation and create new hurdles for exemption. The difference may be described as one between rules of procedure and rules of substance. The former are valid, the latter are not.

[94] This conclusion means that the general attack on the Council's power to make any rules and the challenge to the original rules must be dismissed. I associate myself with O'Regan J's comments in this regard.[38] The difference in our judgments is, to a great extent, one of emphasis rather than essence. We both agree that the Council can make rules but that particular rules may exceed that authority. The difference arises in the extent of the discretion we believe the Council has to determine how to fulfil its duties under the Notice. Some of the rules which have been challenged may be described as setting a condition rather than implementing the Minister's rules. That exceeds the scope of permissible delegation. O'Regan J on the other hand gives, in my view, too great a latitude to the Council to fulfil its regulatory purpose.

[38] At paras 138 and 143 below.

[95] I should add that, in my opinion, the fact that the Council is obliged to exercise its powers, including the limited rule-making power it has, in accordance with the Constitution and specifically the Bill of Rights, does not alter the position regarding delegation. Delegation is about the existence of powers; the manner in which those powers should be exercised should not affect the question whether they have in fact been given to a particular body. I turn now to consider the validity of specific rules.

Validity of the rules

[96] It is not the Court's task to embark on an examination of each rule to determine its character and validity. The Court need only to look at those rules which the applicant has raised as specific points of concern. If the issue were not moot, this decision would also allow further challenges to specific rules in the future.

[97] The main challenge raised by the applicant is to the validity of the National Loans Register which is dealt with in rule 6. There are a number of detailed provisions regarding the submission of information (rule 6.1), enquiries from the register (rule 6.2), confidentiality (rule 6.10), the obligation to supply information to the borrower (rule 6.8) and the resolution of disputes (rule 6.7). The purpose of the Register is to protect both borrowers and lenders by ensuring that lenders do not lend to borrowers who cannot pay. This is, in itself, a worthwhile goal.

[98] The value of the Register, however, cannot be a factor in determining if its creation is permissible under the limited delegation of power allowed by section 15A.

The crisp question is whether the establishment of the Register is reasonably necessary to give effect to the Minister's rules. It is not. The Register imposes onerous and controversial reporting requirements that go far beyond what is required by the Minister's Rules. The Council's rule 6 begins with the following broad obligation:

> The lender shall submit to an information broker[39] accurate data in respect of all loans granted, for purposes of such data being captured on the national loans register in accordance with this Rule 6.[40]

[99] The remainder of the rule compels a lender to submit information to an information broker at the following times: on the registration (rule 6.3), update (rule 6.4) and closure (rule 6.5) of an account and to the borrower, if requested, if her application for a loan is rejected (rule 6.8).

[100] In contrast, the Minister's Rules impose no duty on lenders to provide information to anyone other than the borrower. While there are references to the submission of information to a credit bureau, there is no obligation. The effect of the Council's Rules is that if a lender fails to submit information their registration with the Council may be cancelled. Registration is a condition for exemption. In a very real sense the submission of information becomes an additional condition to be entitled to exemption, a condition only the Minister can create. The National Loans

[39] 'Information brokers' are defined in rule 2 as "persons appointed by the Council from time to time to manage the national loans register established or approved by the Council".

[40] Rule 6.1.

Register may be a good idea, but the Council did not have the power to establish it. I therefore find that rule 6 is invalid.

[101] This finding makes it unnecessary to consider the other complaints which relate to specific discrepancies between the Minister's Rules and the Council's Rules relating to rule 6. It is also unnecessary to consider the bulk of the privacy challenge which was directed at rule 6. The applicant however also raised privacy concerns about rules 3.9, 3.11 and 7.6. I am however, for the same reasons as my colleagues,[41] of the opinion that the issue is moot and that it is not in the interests of justice to address those challenges at this time.

[102] The applicant also expressed concern about a number of other rules. First, the applicant notes that the rules require an application for registration to be made.[42] This is a necessary administrative step to give effect to the Minister's requirement that lenders be registered with a regulatory institution. It is an implementation of the Notice, nothing more.

[103] Rule 3.6[43] allows the Council to impose additional conditions for registration on specific lenders. There is no indication what these conditions might be. The

[41] At paras 58-61 above and 153-154 below respectively.

[42] Rule 3.1.

[43] Rule 3.6 reads:

> "Review
> The Council may from time to time on application made to it by the lender, or of its own accord, review the conditions pertaining to the registration of a lender or may impose further conditions and may for this purpose inquire into the business of the lender. The Council shall first provide the lender with an opportunity to make representations to it before imposing more stringent conditions."

Council is effectively making compliance with its unlimited discretion a condition for exemption. The effect of this provision is to impermissibly transform a rule-making power to an unfettered administrative discretion.[44] It is true that in exercising that power, the Council would have to act reasonably and that an aggrieved lender could challenge a specific exercise of the discretion. Many of the conditions that the Board imposes may be what I would characterise as the implementation of the Minister's rules. However, those observations cannot determine whether the Council may have that discretion in the first place. It may not. Rule 3.6 imposes a condition for exemption and is therefore invalid.

[44] *Vic Restaurant* above n 33; *City of Verdun* above n 33; *Brant Dairy* above n 33.

[104] The applicant also complains about rules 3.15[45] and 3.16[46] which allow the Council to cancel or suspend a lender's registration, and therefore deny them exemption, for a number of infractions. The list of infractions include breaching any of the rules (rule 3.16.1), acting in a manner which is likely to bring the Council into disrepute (rule 3.16.3), failing to comply with any instruction of the Council (rule 3.16.10), failing to provide the Council with documents within 20 days of request (rule 3.16.8), failing to pay an amount owing to the Council (rule 3.16.7) and on any other reasonable ground (rule 3.16.15). Although cancellation or suspension of

[45] Rule 3.15 reads:

> "Powers of the Council
> The Council may, subject to the provisions of Rule 3.16 below –
> 3.15.1. amend the conditions of the lender's registration;
> 3.15.2. demand compliance with these Rules;
> 3.15.3. impose fines or penalties on the lender in accordance with these Rules;
> 3.15.4. suspend the lender's registration pending compliance with these Rules or an instruction of the Council; or
> 3.15.5. cancel the lender's registration."

[46] Rule 3.16 reads:

> "Grounds for acting in terms of Rule 3.15
> The Council may act in accordance with Rule 3.15 above if the lender –
> 3.16.1. is in breach of any provision of these Rules;
> 3.16.2. fails to comply with any condition of registration;
> 3.16.3. acts in a manner which is likely to bring the money lending industry or the Council into disrepute;
> 3.16.4. ceases to trade or resolves to do so;
> 3.16.5. fails to discharge its debts promptly and in full;
> 3.16.6. is or becomes subject to substantially the same ownership, management or control as a lender whose registration has been cancelled or which is not registered with the Council;
> 3.16.7. fails to pay any amount owing to the Council;
> 3.16.8. fails to respond within 20 (twenty) business days from the date of the recorded delivery of a letter from the Council to the lender;
> 3.16.9. provides any false or materially incorrect information to the Council or fails to disclose any material information to the Council;
> 3.16.10. fails to comply with any instruction of the Council;
> 3.16.11. fails to pay its annual registration fee within 20 (twenty) business days after having been notified that it is due;
> 3.16.12. fails to comply with any penalty imposed by the disciplinary committee;
> 3.16.13. fails to pay a fine before the due date for payment thereof as contemplated in Rule 9;
> 3.16.14. fails to provide any documentation notified by the Council within 20 (twenty) business days after having been requested, or such other reasonable period as notified by the Council in any particular case;
> 3.16.15. the Council has reasonable grounds for doing so."

registration will probably be reserved for the more serious infractions, there is no mechanism in the rules to prevent cancellation for even the most minor infraction or difference of opinion with the Council. This clause vastly extends the conditions of exemption which, as I have noted, is the sole terrain of the Minister. Although there must be some form of sanction for non-compliance with the rules for them to have any meaning at all, rules 3.15 and 3.16 go far beyond what is necessary and permissible. I do not think it is appropriate to separate the good from the bad, it seems preferable to declare the whole of rules 3.15 and 3.16 invalid.

[105] The Council is entitled to amend the rules without the consent of its members.[47] While this may be an onerous provision, there is nothing in it that offends against the limitation on the Council's power that I have described above. The power to amend does not in itself set conditions of exemption. The exercise of the power might result

[47] Rule 3.23 reads:

> "Amendment of Rules
> The Council may from time to time amend these rules by giving written notice to the lender of the proposed amendment, the reasons for the amendment and the date as from when such amendment shall become effective. The Council shall with due regard to the effect of such change ensure that the lender shall be given sufficient notice so as to enable it to comply with any such amendment. The lender's consent shall not be required for any amendment to the Rules for it to be effective. The lender which does not accept any amendment which may materially affect the lender may apply to the Council for the cancellation of its registration."

in unacceptable rules, but that does not make the power to amend invalid. I should explain why this provision is distinguishable from rules 3.6, 3.15 and 3.16. Those rules *in themselves* create new conditions for exemption. Rule 3.23 is not itself a condition, but a method through which new conditions will be made.

[106] In consequence I would make the following order:

1. Leave to appeal is granted.
2. Rules 3.6, 3.15, 3.16 and 6 are invalid and of no force and effect.
3. The respondent is to pay the costs in this court and the Supreme Court of Appeal.

O'REGAN J:

[107] I have had the opportunity of reading the judgment prepared in this matter by my colleague Yacoob J. Although there is much in his judgment with which I agree, I have a somewhat different approach to the case which will appear from what follows. Since preparing this judgment, the Chief Justice has also prepared a judgment. The differences between my judgment and his appear clearly from his judgment.

[108] In my view, there are two key issues to be considered: the first is whether the second respondent, the Micro Finance Regulatory Council (the Council), had the competence to make the revised rules for regulating the micro-finance industry that it

made on 11 July 2002 (the 2002 rules). If it is concluded that the Council did have that competence, the second question that arises is what constitutional obligations, if any, the Council bore when making the 2002 rules, and whether it complied with those obligations. This approach differs from that set out in both paragraphs 3[1] and 25[2] of the judgment of Yacoob J.

Did the Council have the competence to enact the rules?

[109] The applicant asserts that the Council did not have the competence to make the rules on the following grounds: (a) they argue that the rules are legislative in character and therefore, in making them, the Council unconstitutionally usurped legislative power conferred upon the legislative arm of government in our constitutional order; (b) that the rules are inconsistent with the Exemption Notice issued by the Minister because that notice, constitutionally construed, did not delegate (and could not have delegated) to the Council the power to make the rules; and (c) that even if the Council did have the power to make rules, in making the revised rules it unlawfully usurped the Minister's power to determine conditions of exemption under section 15A of the Usury Act 73 of 1968 (the Act) and extended beyond the delegation that permitted it to make rules. The first two of these arguments challenge both the original rules made

[1] In paragraph 3 of his judgment Yacoob J identifies the dispute as relating to whether the Constitution applies to the rules and if it does, whether they are consistent with it.

[2] In paragraph 25, Yacoob J identifies the issues before this Court as being fourfold: (a) whether the Constitution, the legality requirement and the privacy protection in particular applies to the rules and whether the Council exercised public power or private power in making the rules; (b) if the Council exercised public power, whether that power was legislative in character in the sense of the law-making powers exercised by Parliament, the provincial legislatures and municipal councils; (c) did the Council have the power to make the rules pursuant to the Exemption Notice; and (d) the issues arising from the right to privacy.

by the Council and the revised rules it made in July 2002, while the last relates only to the revised rules. Each of the arguments will be dealt with in turn.

Facts

[110] It will be useful briefly to set out the facts again. Section 15A of the Usury Act provides that:

> "The Minister may from time to time by notice in the Gazette exempt the categories of money lending transactions, credit transactions or leasing transactions which he may deem fit, from any of or all the provisions of this Act on such conditions and to such extent as he may deem fit, and may at any time in like manner revoke or amend any such exemption."[3]

The provision clearly gives the Minister wide powers to determine the conditions for the exemption of certain loan transactions. In 1992, the first exemption notice was issued.[4] This notice exempted small loans (up to R 6 000) from the interest rate limits stipulated in the Act in certain circumstances.

[111] The exponential growth in the small loans sector led to a process of investigation as to the manner in which the industry should be regulated. This resulted in the repeal of the earlier notice and its replacement, on 1 June 1999, by Government Notice 713 (the Exemption Notice or Notice).[5] This Notice exempted certain moneylending transactions from most of the provisions of the Act provided that the lenders register with a regulatory institution and comply with the terms of the

[3] Section 15A was inserted into the Act by section 8 of the Usury Amendment Act 100 of 1988 and substituted by section 6 of the Usury Amendment Act 91 of 1989.

[4] The first exemption notice was published in Government Gazette 14498 GN 3451, 31 December 1992.

[5] Government Gazette 20145 GN 713, 1 June 1999.

Exemption Notice.[6] At the time that section 15A was inserted into the Act, there was no definition of "regulatory institution." A definition was added in 2003.[7] The Notice furthermore identified those moneylending transactions which were eligible for exemption as those that did not exceed R10 000 and which provided for repayment within 36 months.[8] The Exemption Notice also contained appended rules which set out the basis on which loan transactions subject to exemption were to take place between borrowers and lenders.

[112] On 16 July 1999, the Minister announced that the Council had been approved as a regulatory institution for the purposes of the Exemption Notice.[9] The Council had been incorporated as a section 21 company (not for profit) by a group of institutions including the Association of Micro Lenders, the Banking Council of South Africa, the Consumer Institute of South Africa, the Legal Resources Centre, the Department of Trade and Industry and the South African Reserve Bank on 16

[6] Item 2.1 of the Notice provided as follows: "The category of money lending transactions is exempted on the conditions that –

(a) the entity concluding the category of money lending transaction is registered as a lender with a regulatory institution; and
(b) the lender shall at all times comply with this notice."

[7] Usury Amendment Act 10 of 2003 s (1)(d) added the following definition: "'regulatory institution' means a legal entity approved as such by the Minister in terms of any regulation or notice promulgated under this Act".

[8] Item 1.2 of the Notice provided as follows: "category of money lending transaction" means a money lending transaction in respect of which the loan amount –

(a) does not exceed R 10 000.00;
(b) together with the total charge of credit which is owing by the borrower, shall be paid to the lender, whether in instalments or otherwise, within a period not exceeding 36 (thirty six) months after the date on which the sum of money has been advanced to the borrower; and
(c) is not paid in terms of a credit card scheme or withdrawn from a cheque account with a bank registered in terms of the Banks Act, 1990 (Act No. 94 of 1990), or a mutual bank registered in terms of the Mutual Banks Act, 1993 (Act No. 124 of 1993)".

[9] Government Gazette 20307 GN 911, 16 July 1999.

September 1998. It had applied for approval as a regulatory institution on 31 May 1999. As part of that process it had presented a business plan, its memorandum and articles of association, the registration criteria it intended to apply and the draft rules that would govern its regulatory processes. Those draft rules were then adopted on 24 June 1999 by its board of directors and are referred to in this judgment as "the original rules". The Council is the only regulatory institution that has been approved as a regulatory institution in terms of the Exemption Notice.

[113] The applicant registered with the Council once it had been approved as a regulatory institution. During June 2001, the Council decided to introduce a revised set of rules. Central to the revised rules was the establishment of a National Loans Register. Under the new rules, lenders are to check the National Loans Register before entering into a money-lending transaction with a borrower. According to the Council, the purpose of this procedure is to reduce the number of borrowers who become over-extended by taking loans from a variety of micro-lenders. The Register should therefore protect the interests of both borrowers and lenders.

[114] The applicant objected to the revised rules, including the establishment of the Register. Despite these objections, the Council adopted the rules with effect from 1 July 2002. The next day, the applicant wrote to the Council arguing that the rules breached constitutional rights, including the right to privacy and the right to administrative justice, and stated that the adoption of the revised rules was beyond the powers of the Council. When the Council failed to respond to its letter, the applicant

approached the High Court for relief. The story of the litigation thus far has been set out in the judgment of Yacoob J and I shall not repeat it here.

[115] One further thing needs to be said at the outset. On 8 August 2005, just before the matter was to be heard in the Supreme Court of Appeal, the Minister repealed the Exemption Notice and issued a new one. The new notice included all the revised rules adopted by the Council.[10] The Council argued before the Supreme Court of Appeal that the matter was accordingly moot but the Court rejected that argument on the basis that the Council may still make further rules in future. This possibility has been removed by the enactment of the National Credit Act which has just come into force.[11] However, given the different approaches taken to this question in the Supreme Court of Appeal and the High Court, and the constitutional importance of these issues, I agree with Yacoob J that it is in the interests of justice, even if the matter is now moot, for us to deal with the substantive issues raised upon the appeal. As the main reason for deciding the matter, despite its being moot, is to resolve the difference of opinion that arose between the High Court and the Supreme Court of Appeal, it is not appropriate or necessary, in my view, to consider in detail all the challenges to the individual rules raised by the applicant. These challenges were considered neither by the High Court nor the Supreme Court of Appeal, and as the rules are no longer in force, no benefit would be obtained from a thorough consideration of the applicant's arguments in this regard.

[10] Government Gazette 27889 GN 1407, 8 August 2005.

[11] Act 34 of 2005. The Act came into operation on 1 June 2006.

(a) Do the rules constitute an unconstitutional usurpation of legislative power?

[116] The applicant attacked both the original rules and the revised rules. The first ground of challenge which is directed at both sets of rules relates to the argument that the rules constitute an unconstitutional usurpation of legislative power. It is this argument that was upheld by the Pretoria High Court in respect of both sets of rules. That Court held that the making of both sets of rules constituted an unconstitutional exercise of public legislative power contrary to the rule of law. The High Court referred to section 43 of the Constitution which provides that the legislative authority in the national sphere of government vests in Parliament, in the provincial sphere in provincial legislatures and in the local sphere in municipal councils.[12] Du Plessis J reasoned further that although the power may be delegated, that delegation must be traced back to the Constitution.[13]

[117] The High Court then analysed the rules and found that the rules are coercive in character in that no person may conduct a micro-lending business without registering with the Council and complying with its rules. It concluded, therefore, that the rules did constitute rules of general application, rather than private rules binding as a result of a contractual relationship between parties. It also dismissed an argument by the Council that it had delegated authority to make the rules on the basis of the principle

[12] Section 43 provides as follows:

> "In the Republic, the legislative authority –
>
> (a) of the national sphere of government is vested in Parliament, as set out in section 44;
> (b) of the provincial sphere of government is vested in the provincial legislatures, as set out in section 104; and
> (c) of the local sphere of government is vested in the Municipal Councils, as set out in section 156.

[13] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2004 (6) SA 557 (T) at 563C.

"delegatus delegare non potest" (a person who is delegated a power to do something may not delegate it further).[14]

[118] The Supreme Court of Appeal, in its turn, disagreed with Du Plessis J that the rules of the Council constituted rules of general application. It held that the premise upon which the High Court had proceeded, that the company is performing a public regulatory function and making rules of general application relevant to that function, was misconceived. On the contrary, it held that the company is "a private regulator of lenders who choose to submit to its authority by agreement".[15] The company does not purport, it held, to be exercising legislative powers. Based on this premise, the Supreme Court of Appeal reached a different conclusion to that of the High Court.

[119] In my view, the High Court's premise is correct. As Du Plessis J noted in his judgment, in analysing the character of the rules and the Council, one should not focus merely on the fact that it is a private company.[16] The question that needs to be answered is whether the rules are relevant to the performance of a public function or are merely a form of private ordering. It is true that no bright line can be drawn between "public" functions and private ordering. Courts in South Africa[17] and

[14] Id at 566D–E.

[15] *Micro Finance Regulatory Council v AAA Investments (Pty) Ltd and Another* 2006 (1) SA 27 (SCA) at para 24.

[16] *AAA Investments* above n 13 at 563E–564A. See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 141.

[17] *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange and Others* 1983 (3) SA 344 (W).

England[18] have long recognised that non-governmental agencies may be tasked with a regulatory function which is public in character.[19] In determining whether rules are public in character, although made and implemented by a non-governmental agency, several criteria are relevant: whether the rules apply generally to the public or a section of the public; whether they are coercive in character and effect; and whether they are related to a clear legislative framework and purpose. This list is not exhaustive, nor are any of the criteria listed necessarily determinative.

[120] I now turn to apply these considerations to the facts of this case. It is clear that the overall purpose of both sets of rules made by the Council must be viewed in the context of section 15A of the Act and the terms of the Exemption Notice. Section 15A confers a power on the Minister to provide for a scheme of exemption from the ordinary terms of the Act. The Exemption Notice provides that the scheme will employ one or more regulatory institutions to further that purpose. The Council is such a regulatory institution and its function is to regulate the micro-lending industry. No one may make small loans of the kind that fall within the terms of the Exemption Notice unless registered with the Council and compliant with both its rules and the rules set out in the Exemption Notice.

[121] In my view, the Supreme Court of Appeal overlooked this clear legislative framework when it concluded that the Council was merely regulating matters

[18] *R v Panel on Take-overs and Mergers, ex parte Datafin plc and another (Norton Opax plc and another intervening)* [1987] 1 All ER 564.

[19] See the discussion in Hoexter, Lyster and Currie *The New Constitutional and Administrative Law* Volume II (Juta, Cape Town 2002) at 98; and De Ville *Judicial Review of Administrative Action in South Africa* (Butterworths, Durban 2003) at 45.

privately. In my view, therefore, it is clear that both the purpose and effect of the rules of the Council, understood in the light of the Council's status as an approved regulatory institution in terms of the Exemption Notice, were to regulate the micro-lending industry and all those borrowers and lenders in that industry. No lender may lawfully operate without registering with the Council; once a lender has registered, it is bound by the terms of the Exemption Notice and the rules of the Council. In that sense, the rules are coercive and general in their effect. I cannot therefore agree with the conclusion of the Supreme Court of Appeal that, properly construed, the Rules are private in character.

[122] On the other hand, the fact that the rules are public in character does not automatically mean that they constitute an unlawful usurpation of legislative power. The power to delegate subordinate legislative authority in a modern state is an important power. No modern state could hope to regulate all its affairs through legislation passed in the national, provincial and local spheres of government.[20]

[123] Courts should therefore be cautious to avoid adopting unduly restrictive rules in this area which will limit the possibility of effective ordering of our society by organisations which may not form part of government. In so doing, a court should bear in mind that where an institution may constitute an "organ of state" as defined in the Constitution, it will be bound by the terms of the Bill of Rights and may not

[20] *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at paras 51, 62 and 148.

unjustifiably limit individual rights. I now turn to the question of whether there was a valid delegation in this case.

(b) Was there a valid delegation of power in this case?

[124] As I have already mentioned, the High Court held that there had not been a valid delegation of power in this case. Section 15A of the Act provided that the Minister "may from time to time . . . exempt the categories of money lending transactions . . . which he may deem fit, from any of or all the provisions of this Act on such conditions and to such extent as he may deem fit". This is a broad power. Its breadth must also be understood in terms of its subject matter. Section 15A permits the Minister to exempt certain types of money-lending transactions from the rules of the Act in circumstances which "he may deem fit". Moreover, his ability to impose conditions and regulate that exemption is also clear. The section provides that the Minister may exempt certain transactions "on such conditions and to such extent as he may deem fit". This provision clearly indicates that the Minister may regulate those transactions on different conditions and to the extent he deems appropriate. In my view, the broad language of section 15A clearly confers a regulatory power on the Minister which is the power he used when he issued the Exemption Notice. The power also permits the Minister to delegate the daily regulation of the exempted loans to an official or institution. It would be quite inappropriate for the Minister to be held personally responsible for the administration of the exemption system.

[125] The next question that arises is whether the terms of the Exemption Notice delegate a similar regulatory power to the Council, and if so, whether they do so lawfully. It is correct, as Yacoob J points out in his judgment, that the applicant did not challenge the lawfulness of the Exemption Notice. It is also correct that the Notice contains no express delegation of power. Counsel for the applicant argued that the terms of the Exemption Notice must be interpreted in the light of the provisions of the Constitution. Counsel further argued that a constitutionally appropriate interpretation would find that the Notice had not delegated the power to issue rules to regulate the industry upon the Council.

[126] The principle of delegatus delegare non potest, in terms of which a person performing a delegated function may not himself or herself delegate the performance of that function to another person or institution, is often referred to in judgments of South African courts.[21] Equally established, however, is the principle that it admits of many exceptions. The question in this case is whether, properly construed, the Notice does lawfully delegate powers to the Council. Applicant's counsel must be correct in asserting that if an implied delegation would be unlawful or inconsistent with the Constitution, and if the Notice is open to an interpretation that does not include a delegation then that should be the interpretation attached to the Notice.

[21] See for example *Attorney-General, O.F.S. v Cyril Anderson Investments (Pty) Ltd* 1965 (4) SA 628 (A) at 639C–D and the discussion in Hoexter, Lyster and Currie cited above n 19 at 98; De Ville cited above n 19 at 45. See also n 15 above and the discussion in Wade and Forsyth *Administrative Law* 9 ed (Oxford, New York 2004) at 312. Wade and Forsyth cast doubt on the legal status of the principle. "In reality there is no such principle; and the maxim plays no real part in the decision of cases, though it is sometimes used as a convenient label." They argue that the rule is secondary to the primary task of statutory interpretation in each case to determine whether, properly construed, the statutory authority permits delegation of the powers it confers or not. However their statement that the principle does not exist cannot be accorded with South African authority. Nevertheless in South African law too it is correct that the overriding issue will always be whether the relevant statutory provisions permit delegation of the powers conferred.

[127] Criteria relevant to determining whether a delegation of a delegated power is acceptable include the following: the character of the original delegation; the extent of the delegation of the delegated power; the extent to which the original delegee continues to review the exercise of the delegated power;[22] considerations of practicality and effectiveness; and the identity of the institutions or persons by whom and to whom power is delegated.[23] To consider whether the applicant's argument has merit, it is necessary to look again at the terms of the Exemption Notice. In particular, it is important to consider the definition of regulatory institution contained in item 1.6 of the Notice:

> "1.6 'regulatory institution' means a legal entity having a Board of Directors which has, amongst other directors, equal and balanced representation between consumers and the money lending industry and which is approved by the Minister in writing and published in the Government Gazette as having the capacity and the mechanisms in place effectively to -
>
> (a) manage its business as a regulatory institution with competent management and staff;
>
> (b) register lenders in accordance with accreditation criteria approved by the Minister;
>
> (c) ensure adequate standards of training of staff members interacting with the general public;
>
> (d) require adherence to and monitor and ensure compliance by lenders with this notice;
>
> (e) fund itself from contributions by lenders or other sources;
>
> (f) ensure that complaints from the general public are responded to objectively;

[22] *SA Freight Consolidators (Pty) Ltd v Chairman, National Transport Commission and Another* 1987 (4) SA 155 (W) at 169B–D.

[23] See the discussion in Hoexter, Lyster and Currie cited above n 19 at 134–138; De Ville, cited above n 19, at 139–148.

(g) deal with appeals by lenders and borrowers in respect of any decision of the regulatory institution or any committee, ombudsperson or referee instituted by it;

(h) educate and inform the general public and lenders in relation to their rights and obligations under this notice;

(i) annually publish information regarding the money lending industry, the services provided, security and/or guarantees required, types of charges and the average annual charges levied by each lender in a comparable format;

(j) collect and collate information and statistics on lenders and complaints handled by the regulatory institution, including the -

(i) number of complaints lodged and details of the complainant;

(ii) number of lenders found in breach of this notice and the reasons therefor;

(iii) names of lenders against whom substantiated complaints have been lodged and the number and nature of complaints;

(iv) response time to resolve complaints;

(v) the number of items monitored under each category;

(vi) the number of breaches detected through monitoring;

(vii) the number and nature of sanctions imposed; and

(viii) the number of decisions appealed against and the outcome thereof;

(k) annually furnish the Minister with a detailed report on lenders, its activities and functions and any other information that the Minister may require;

(l) review its own effectiveness and the effectiveness of this notice and to recommend appropriate changes to the Minister".

[128] This definition makes plain that the functions expected of a regulatory institution are extensive. It must "manage its business as a regulatory institution" (regulation 1.6(a)); register lenders in accordance with the Minister's accreditation criteria (regulation 1.6(b)); require lenders to adhere to and monitor compliance with the terms of the Notice (regulation 1.6(d)); deal with appeals (regulation 1.6(g));

educate the general public in relation to their rights and obligations under the Notice (regulation 1.6(h)); collate information and statistics on its functioning (regulation 1.6(j)); and review its own effectiveness and the effectiveness of the Notice (regulation 1.6(l)).

[129] The scope of these powers makes it clear that the purpose is not only to regulate the industry presently but to continue to analyse and provide information concerning how the industry should be regulated in future. This aspect of the work of the Council is not surprising. The regulation of micro-lending in South Africa is relatively new. It is a difficult area, in that there is a need on the one hand to protect the rights and interests of borrowers, and prevent coercive and unsavoury practices by lenders, while on the other ensuring that decent and fair lenders are able to operate. In the circumstances, ongoing research and review of the manner of regulation seems both sensible and desirable.

[130] Another important aspect of the Notice is that the regulatory institution must report to the Minister regularly (regulation 1.6(k)) and the Minister retains the right to withdraw his or her approval of the regulatory institution should it fail to perform its functions properly.[24] The Minister therefore retains the right of active oversight over the affairs of regulatory institutions and may withdraw their authority to act if they do not perform adequately.

[24] Regulation 3.3 reads as follows:–

> "The Minister may withdraw the approval of a regulatory institution should it fail to fulfill the functions contemplated in paragraph 1.6 . . . and shall publish such withdrawal in the Government Gazette."

[131] A reading of the Notice, in the broad context within which it was enacted, suggests that it conferred the power to make rules to control the process of regulation upon the Council. It is true that the Notice itself contains certain rules which govern this process but they are by no means exhaustive or complete. They do not set out the processes for the registration of lenders, for example, or for the cancellation of registration of lenders (matters both dealt with in the rules of the Council). It seems clear that, to the extent that the Council must register lenders, rules governing the process of registration and cancellation or termination of registration will need to be adopted. In my view, therefore, the Notice, properly construed, must permit the regulatory institutions to issue rules in relation to the performance of its functions.

[132] Once it is clear, however, that the nature of the regulatory institution requires it to make rules and that the Minister was permitted to delegate the regulatory power in terms of section 15A, it seems to me that the Notice should be read to facilitate the work of the Council to perform its duties effectively as a regulator. There are no reasons of constitutional principle which would require the Notice to be given a restrictive reading. The Council will be required to comply with the Bill of Rights in its actions; it is overlooked by the Minister and it is bound by the exemption criteria set by the Minister. The purpose of the Notice is quite clearly to ensure that micro-lenders are regulated comprehensively by the approved regulatory institutions. To permit the practical and efficacious achievement of this purpose, the Notice should be interpreted to permit the Council to make such rules as are necessary and appropriate

to the performance of its function as contemplated by the Notice. Such an interpretation of the Notice, it seems to me, is consistent with the overall purpose of the Notice and should be adopted as long as it is not inconsistent with the Constitution. I leave over the challenges to specific rules until later.

[133] One last issue needs to be considered in this regard. The High Court placed much reliance on section 12 of the Act which provides that the Registrar may delegate and assign his or her duties,[25] but is silent on the question of whether the Minister may do so. Citing *Chairman, Board on Tariffs and Trade and Others v Teltron (Pty) Ltd*,[26] the High Court reasoned that the fact that the legislation provides for delegation in relation to the powers of the Registrar under the Act, but does not do so in relation to the powers conferred on the Minister by section 15A, is a strong indication that the legislature did not intend the section 15A power to be delegated.

[134] In the *Teltron* case, the court was concerned with the power to grant exemptions in respect of surcharges imposed on the importation of goods. In that case, a special system to permit an exemption was conferred by legislation upon the Director-General of Trade and Industry acting on the recommendation of the Board of Trade and Industry. The facts were that the recommendation to refuse the exemption had not been made by the Board at all, but by a small committee and there was no

[25] Section 12 provides:

> "The Registrar may, subject to such conditions as he or she may determine, delegate or assign any power or duty conferred upon or assigned to him or her under this Act to any person, but such delegation or assignment shall not prevent the Registrar from exercising or performing the relevant power or duty himself or herself."

[26] 1997 (2) SA 25 (A).

evidence of any formal delegation of authority to that committee by the Board. There was a provision in the relevant legislation which permitted the Board to delegate other powers to the committee, but no provision authorising the Board to delegate its powers of recommendation in relation to the grant of exemptions to the committee. The Appellate Division held that the failure to grant express authority to permit the power to make recommendations on exemptions to be delegated, together with the fact that, properly construed, the exemption provision indicated that the legislature considered the Board to be the proper institution to recommend to the Director-General whether an exemption should be granted or not, led to the conclusion that the apparent delegation to the committee in this case was unlawful.

[135] The facts of this case are of course different. First, in this case, there is no provision regulating the question of whether the Minister may or may not delegate his powers under the statute. In assessing this, one must bear in mind that inevitably a Minister in the national Cabinet is a busy person who cannot be involved in the daily grant of exemptions. The office of Minister is quite different to an institution such as a Board of Trade and Tariffs set up specifically to monitor the implementation of legislation and the carrying out of administrative tasks. A power conferred upon a Minister to provide widely for exemptions must ordinarily be construed to permit the Minister to delegate any administrative functions in relation to those exemptions to an appropriate person or institution. It would be impractical to expect a Minister to carry out those tasks himself or herself. The fact that the Act does not expressly authorise the delegation of powers conferred upon the Minister, while it does in respect of

powers conferred upon the Registrar, does not seem to me to support a conclusion that the Minister may not delegate those powers, and particularly the administrative implementation necessary for the powers to be fully exercised. Indeed, the converse would seem to me more likely. I cannot accept therefore that the *Teltron* case is weighty authority for the proposition that the Notice should be read in a manner which prohibits delegation of rule-making powers to the Council. Its facts are different and the functionary it is concerned with is different.

[136] The next question to consider then is whether it would be unlawful or unconstitutional for the Minister to have delegated such rule-making powers to the Council in terms of the Notice. In answering this question, it is important to bear in mind that the purpose of the Notice was to provide for regulatory institutions which would regulate the sector of the money-lending industry making loans specified in the Exemption Notice.[27] Such regulatory institutions must have significant capacity and "mechanisms in place" to be able to perform their mandate effectively in terms of the Exemption Notice. The very function which the regulatory institution has to carry out requires it to be able to make rules on a daily basis regulating its tasks. Moreover, given the public character of those tasks, it is desirable, if not necessary, for those rules to be properly made and publicly accessible so that money-lenders and borrowers can gain access to their terms. Again, as with all rules, it would be practical and necessary to review their effectiveness on an ongoing basis and where necessary amend or vary the rules to ensure that they enabled the Council to perform

[27] See Item 1.2 of the Notice, cited above n 8.

its tasks fairly and efficiently. Finally, the Minister must be informed of the activities of the regulatory institutions regularly and fully, as he has the power to terminate their mandate should they not perform their duties properly. In all these circumstances, it seems to me that it is not unlawful or inconsistent with the Constitution for the rules to be interpreted to delegate a rule-making authority upon the Council. Clearly those rules must be consistent with the Notice and the overall purpose of the Act, though there may be challenges to individual rules, as going beyond the scope of the delegation to be implied in the Notice, a matter to which I shall return shortly.

[137] It follows from this conclusion that the applicant's general attack on the rules on the grounds that the Notice must be interpreted to prevent the Minister from lawfully delegating the rule-making power to the Council, must be rejected, as must the applicant's argument that the Council had no power to amend or revise its rules. If the Notice properly construed delegates a rule-making authority to the Council, that must include, as a matter of common sense and practicality, a power to amend those rules.

[138] It also follows from the conclusion that the Notice did permit a delegation of rule-making power to the Council, that the attack on the original rules must be dismissed entirely. It is clear that section 15A of the Usury Act grants wide powers to the Minister to regulate the micro-lending industry. There is no attack by the applicant on the terms of the Exemption Notice. That Notice makes it clear that the Minister may approve regulatory institutions to regulate the industry. That Notice

does, by necessary implication, delegate a rule-making authority upon regulatory institutions approved by the Minister. The Minister approved the Council as such a regulatory institution. At the time that the Minister recognised the Council, it had a set of draft rules which had been disclosed to the Minister, these rules were subsequently approved by the Council. There can be no doubt then that the rules established by the Council received the imprimatur of the Minister as the rules which were to regulate the industry, and similarly, the Council received the same approval. The challenge to the original rules therefore cannot be sustained.

[139] The next issues that arise, accepting that the Minister has delegated rule-making authority to the Council, are the applicant's challenges to specific provisions of the revised rules on the ground that those provisions go beyond the powers of the Council.

Do the rules unlawfully usurp the Minister's power to determine conditions of exemption under section 15A of the Act or otherwise extend beyond the scope of the delegation to make rules?

[140] Section 15A of the Act provides that the Minister may exempt categories of moneylending transactions from any or all of the provisions of the Act on conditions and to the extent he deems fit. The Exemption Notice identifies the categories of money-lending transactions that are exempted. They are loans of less than R10 000, payable within 36 months, but not credit card loans and other bank loans.[28] Nothing in the revised rules affects the Exemption Notice's definition of the category of loans

[28] See Item 1.2 of the Notice cited above n 8.

regulated by the Council. There can be no doubt therefore that it is the Minister and the Minister alone who has determined the scope of the micro-lending industry. This conclusion is an important one for it seems to me that this is a power that is conferred upon the person of the Minister alone. It would be inconsistent with the overall legislative purpose of the Act to conclude that the Minister could delegate this power of categorisation to anyone else. It is a definitional power upon which all subsequent regulation is based and one which a Minister, constitutionally tasked with the formulation of policy,[29] is peculiarly suited to exercise.

[141] The Notice then provides that such loans will be exempted from the provisions of the Act if the lender is registered with a regulatory institution and the lender complies with the terms of the Notice.[30] The applicant's challenge is based on the proposition that the effect of the revised rules is to impose conditions on money-lending transactions in addition to these conditions. It is unavoidable that the rules of the institution will regulate registration (and the process of obtaining it), as well as the conditions and terms upon which registration will be continued. Such rules do not vary the class of moneylending transactions that are exempted from the provisions of the Act, as the applicant argued. They regulate, as the Exemption Notice contemplates, the process of registration. In this regard, the applicants complaints directed at the rules regulating the registration process (rule 3.1, rule 3.6, rule 3.7, rule 3.15 and rule 31.16) must fail.

[29] Section 85(2)(b) of the Constitution provides that the President and members of Cabinet exercise executive authority by "developing and implementing national policy".

[30] See Item 2.1 of the Notice cited above n 6.

[142] The applicant also complains that the rules bind borrowers and others involved in the micro-lending industry as well as lenders on the basis that it is beyond the powers conferred upon the Council. In particular, the applicant points to rules 6.8, 7.7 and 7.8. This complaint is misconceived. Regulating the micro-lending industry will inevitably affect borrowers and others in the industry: that is the nature of regulation. There is nothing impermissible in so doing. In this regard, the applicant seems to be misconceiving the relationship between lenders and the Council as contractual, rather than regulatory, and its complaint must accordingly be rejected. For similar reasons, the complaint that the Council may vary its rules in terms of rule 3.23 without the consent of lenders must be rejected as based on the same misconception that the relationship between the Council and the lenders is contractual. In truth, that relationship is regulatory.

[143] In my view, the applicant's general complaint that the rules of the regulatory institution may not impose any obligation upon lenders other than those expressly provided for in the Exemption Notice, must be rejected. Once it has been accepted, as it has been above, that the Exemption Notice, properly interpreted, necessarily and lawfully delegated a rule-making power to the regulatory institution, the requirement that lenders must comply with those rules must follow inevitably. The Notice requires lenders to register with a regulatory institution; the obvious corollary must be that they must comply with the rules of that institution. In this regard, the general complaint of the applicant fails.

[144] The applicant, however, raises a further specific complaint. This complaint relates to the provisions of the revised rules which establish a National Loans Register to which lenders must send information and which they are obliged to consult prior to making loans available to would-be borrowers.

[145] Now it may well be that as a matter of governance and public administration, the establishment of a scheme such as a National Loans Register should preferably be dealt with in regulations enacted by the Minister directly in terms of section 15A, but that is not the question which concerns us. The question is rather whether the Council, when it provided for a National Loans Register in its rules, went beyond the scope of the powers impliedly conferred upon it by the Notice.

[146] Although I have no doubt that there are limits to the regulatory powers of the Council under the Notice, I am not persuaded that the establishment of a National Loans Register, in the manner provided for in the revised rules, exceeds those limits. The obligations imposed upon lenders are merely to furnish information about loans to the Register and to consult it prior to making loans. The purpose of this is to prevent borrowers from becoming over-extended. There can be no doubt that this is a regulatory purpose directly related to the regulation of the micro-lending industry. The task of the Council as conceived in the Notice is to regulate that industry properly and effectively. Clearly it is this very function which the Council seeks to pursue by establishing the Register. In doing so, it neither impermissibly redefines those loans

which are subject to exemption nor does it impose conditions beyond regulatory conditions that fall outside of its approved mandate.

[147] In its challenge to rule 6 which establishes the National Loans Register, the applicant relies upon 3 perceived conflicts between the provisions of rule 6 and the rules promulgated by the Minister in annexure A to the Exemption Notice. To the extent that there are conflicts, it may be that the individual rules are invalid. That was not the main thrust of the applicant's argument, however. It relied upon the purported conflicts to suggest that the Council exceeded its powers in establishing a National Loans Register. In my view, this argument could only succeed if the Exemption Notice construed as a whole did not permit the establishment of a register. I have already concluded that this is not the case and the applicant's arguments in this regard cannot therefore be upheld. The question of whether there is an unavoidable conflict between the Minister's rules and the Council's rules need not be resolved given the fact that the rules are no longer in operation. In reaching these conclusions on the National Loans Register, I have not considered whether the rules regulating the Register infringed the Bill of Rights. I turn to that issue now.

The right to privacy

[148] The next argument to be considered is whether the Council is bound by the provisions of the Bill of Rights and, if it is, whether the provisions of its revised rules infringe the Bill of Rights.

[149] In order to consider whether the Council is bound by the provisions of the Bill of Rights, it is necessary to consider whether it is an "organ of state". Section 8(1) of the Constitution provides that:

> "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

Section 239 of the Constitution defines an "organ of state" as:

> "(a) any department of state or administration in the national, provincial or local sphere of government; or
> (b) any other functionary or institution–
> (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
> (ii) exercising a public power or performing a public function in terms of any legislation."

[150] I have found at paragraphs 119 - 121 above, that in performing the duties of a "regulatory institution" in terms of the Exemption Notice, the Council performs a public function. The next question that arises is whether the Exemption Notice constitutes "legislation" for the purposes of the definition of "organ of state". The definitions contained in section 239 of "national legislation" and "provincial legislation" include subordinate legislation.[31] Whether the Exemption Notice

[31] Section 239 of the Constitution provides:

> "'national legislation' includes –
> (a) subordinate legislation made in terms of an Act of Parliament; and
> (b) legislation that was in force when the Constitution took effect and that is administered by the national government;
>
> . . . .
>
> 'provincial legislation' includes –
> (a) subordinate legislation made in terms of a provincial Act; and

constitutes legislation as referred to in the definition in section 239, must be determined by the purpose and effect of the Notice itself. It contains rules of general application which regulate the affairs of those to whom it applies. In that sense it is "legislative" in character and falls within the meaning of "legislation" in the definition of "organ of state". I am fortified in this conclusion by the fact that there seems to be no constitutional reason to interpret "legislation" in the definition of "organ of state" narrowly. Its purpose is plain. Those who are performing public functions in terms of legislation must comply with the Bill of Rights. Indeed the provisions of the Bill of Rights also bind private persons and institutions where "applicable",[32] so there is no basis in that regard to attribute a narrow meaning to the definition of "organ of state". In the circumstances, I conclude that to the extent that the Council performs a public function in terms of the Exemption Notice, it is an "organ of state" and is bound by the provisions of the Bill of Rights.

[151] Yacoob J has described some of the jurisprudence from other democratic jurisdictions on issues related to the question of whether the Council is bound by the terms of the Bill of Rights. Like him, I am sure that the experience of other democracies, and particularly the difficulties encountered there in providing predictable and principled rules to identify those who are bound by the provisions of a

---

(b) legislation that was in force when the Constitution took effect and that is administered by a provincial government."

[32] Section 8(2) of the Constitution reads as follows:

"A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

Bill of Rights, informed the drafting of our Constitution and resulted in the definition of "organ of state".

[152] From what I have said, it emerges that where a body or person that does not constitute a department of state or administration in the national, provincial or local sphere of government but nevertheless performs public functions in terms of legislation, it will be bound by the provisions of the Bill of Rights in relation to the performance of those tasks. The Council is such a body.

[153] As to whether the revised rules infringe provisions of the Bill of Rights, Yacoob J has decided that this is an issue which is moot in this case. The reason for his decision is that the National Credit Act which has just come into force regulates the micro-lending industry in a somewhat different fashion to the revised rules. I agree with him that the matter is moot in that sense. The applicant could point to no live dispute between the parties, a determination of which would require us to consider whether the revised rules are consistent with the Constitution or not. In the circumstances, it is now necessary to consider whether it is nonetheless in the interests of justice for us to decide that question or not.

[154] I am of the view that it is not in the interests of justice for us to do so. Paramount to that conclusion is the fact that this is a matter which has not been considered at all by any court other than this one.[33] The questions it raises are

[33] Neither the High Court nor the Supreme Court of Appeal considered this aspect of the argument.

weighty and complex and not suited to determination by this Court without the benefit of consideration by others. In the circumstances, I agree with Yacoob J that we should not consider it now.

[155] For these reasons, I concur, therefore, with Yacoob J in dismissing the appeal against the decision of the Supreme Court of Appeal.

(Ngcobo J concurs in the judgment of O’Regan J)

For the applicant: GJ Marcus SC and AC Dodson instructed by Woolgar Attorneys.

For the respondents: CDA Loxton SC and Ms JA Cassette instructed by Hofmeyr Herbstein & Gihwala Inc.