

THE SUPREME COURT OF APPEAL  
OF SOUTH AFRICA

**MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL**

From: The Registrar, Supreme Court of Appeal  
Date: 14 May 2014  
Status: Immediate

*Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.*

***Asmal v Essa (38/2013) [2013] ZASCA 62 (14 May 2014)***

The Supreme Court of Appeal today dismissed, with costs, an appeal from the KwaZulu-Natal High Court, Pietermaritzburg. The central issue in the appeal, brought with the SCA's leave, was whether the respondent was obliged to comply with the notice provisions of the National Credit Act 34 of 2005 (the Act) before instituting provisional sentence proceedings based on cheques drawn in his favour in respect of loans he advanced to the appellant.

The cheques were dishonoured when presented for payment by the respondent because the appellant had countermanded payment.

The high court found in the respondent's favour, on the basis that the Act did not apply to the parties' loan agreements mainly because they were not secured loans as defined in the Act. Consequently, the court granted provisional sentence against the appellant in respect of the money claims based on the cheques. The appeal against that judgment is with the leave of this court.

On appeal the appellant argued that the money advanced to him by the respondent constituted loans and the profit share amounts upon which the parties agreed in addition to the repayment of the loan amounts constituted 'a use consideration' for the said loans. Therefore, in light of the Act the loan transactions constituted credit agreements, in the sense that credit was

granted and a 'fee, charge or interest' imposed in respect of the deferred repayment, for the use of the credit. The profit shares qualified as such a 'charge'. As the respondent was not registered as a credit provider in breach of s 89(2)(d) of the Act, the credit agreements were unlawful and thus void. The cheques could not found provisional sentence in the circumstances.

The SCA held that it is clear from the tenor of the Act that one of its overarching objectives is to ensure that the consumer is fully aware of the actual risks and the cost of the proposed credit so as to be protected from any hidden costs that may arise from the credit agreement. Accordingly, the SCA held that it must follow that the indeterminate profit shares agreed upon by the appellant and the respondent, for which no date of repayment was fixed, which were not guaranteed and could well not even have eventuated, and whose value, if any, was to be determined by the appellant at his sole discretion, cannot qualify as 'a charge' under the Act. The high court was thus correct that the loans did not constitute 'secured loans' in terms of the Act.

The SCA concluded that as the Act is not of application to the loans agreements, its notice requirements are not applicable. The respondent was thus fully entitled to invoke the provisional sentence procedure to enforce his claims which were disputed merely on technical grounds.