

**IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION**

Case number: **NCT/9152/2013/140(1)**

In the matter between:

NATIONAL CREDIT REGULATOR

APPLICANT

and

CAPITEC BANK LIMITED

RESPONDENT

Coram:

Prof T Woker – Presiding member

Ms H Devraj – Member

Adv J Simpson – Member

Date of Hearing: 13 and 14 March 2014

JUDGMENT AND REASONS

[1] Application in terms of Section 140(1) of the National Credit Act, Act 34 of 2005 (“the Act”) for an order declaring that the Respondent engaged in prohibited conduct, imposing an administrative penalty and other ancillary relief.

[2] Where the investigation was initiated entirely by the Applicant and was not based on any specific complaint or information received – Where the investigation lodged was of a general nature to determine whether the Respondent complied with the Act – Where the Applicant did not have any reasonable basis for initiating the complaint or lodging the investigation into the Respondent’s activities as a credit provider.

[3] The Tribunal found that the Applicant did not initiate a valid complaint or investigation.

[4] The Tribunal found that the Applicant's subsequent referral to the Tribunal was invalid.

[5] Application dismissed. No order as to costs.

APPLICANT

1. The Applicant in this matter is the National Credit Regulator ("the NCR" or "the Applicant"), a juristic person established in terms of section 12 of the National Credit Act, 34 of 2005 ("the Act").
2. At the hearing the Applicant was represented by Mr C Loxton S.C assisted by A Govender and L Choate of the Johannesburg Bar.

RESPONDENT

3. The Respondent is Capitec Bank Limited, a limited liability company duly registered in accordance with the company laws of the Republic of South Africa with registration number 1975/002526/06 (hereinafter referred to as "the Respondent").
4. The Respondent is also registered with the Applicant as a credit provider with registration number NCRCP13, with its registered place of business in the Western Cape.
5. At the hearing the Respondent was represented by Mr Trengove SC, assisted by Mr C Cilliers.

APPLICATION TYPE

6. This is an application in terms of Section 140(1) of the Act for an order declaring that the Respondent engaged in prohibited conduct, imposing an administrative penalty and for certain other ancillary relief as set out more fully in the Applicant's notice of motion.

APPLICATIONS TO CONDONE NON COMPLIANCE WITH THE TRIBUNAL RULES

7. Prior to the hearing both the Applicant and Respondent filed applications to condone the late filing of their respective answering and replying affidavits. The applications were jointly considered in a comprehensive written judgment issued by Tribunal member Ms Devraj during January 2014. The applications by both parties were granted.

SUMMARY OF THE APPLICANT'S FOUNDING AFFIDAVIT

8. The Applicant's Founding Affidavit is deposed to by Mr Lesiba Jacob Mashapa, in his capacity as Company Secretary of the Applicant.
9. On 21 January 2011, the Applicant appointed Gobodo Forensic and Investigative Accounting (Pty) Ltd ("Gobodo") and in particular Mr Deon van Dyk ("Van Dyk") to conduct an investigation into the unsecured and micro-lending practices of the Respondent.
10. Van Dyk was assisted in the investigation by Vassilis Pashou ("Pashou") and Mark Whale ("Whale").
11. Van Dyk and Whale were mandated to attend the head offices of the Respondent and take a random sample of 60 credit agreements, which agreements were spread across the following categories:
 - 10.1 20 short-term credit agreements;
 - 10.2 10 small credit agreements;

- 10.3 10 intermediate credit agreements; and
 - 10.4 20 credit agreements in default.
12. The Applicant alleges that these sample agreements are typical of the standard form agreements concluded by the Respondent.
 13. The investigation culminated in the production of a forensic report by Gobodo dated 17 October 2011.
 14. The alleged conduct of the Respondent falls within five categories:
 - 14.1 The first category relates to certain standard terms and conditions that the Respondent imposes on customers in relation to small, short-term and intermediary credit agreements, in contravention of section 90 of the Act;
 - 14.2 The second category relates to the pre-agreement disclosure made by the Respondent to its customers with regard to its intermediate credit agreements, which disclosure is in contravention of section 92, read with Regulation 29, of the Act;
 - 14.3 The third category relates to the Respondent's charging of interest in terms of its small credit agreements, which is in contravention of Regulation 42(1)(b) of the Act;
 - 14.4 The fourth category relates to what the Respondent refers to as its Multi-Loan Product ("multi-loan"). The objectionable conduct is the levying of an initiation fee for each and every withdrawal by the consumer from the multi-loan;
 - 14.5 The fifth category also relates to the multi-loan. The objectionable conduct is the inadequate assessment of a consumer's ability to repay the credit, in contravention of section 81(2) of the Act.
 15. The Applicant referred the Respondent's conduct to the Tribunal for an order in the following terms:

- 15.1 Declaring the conduct of the Respondent to be in contravention of the identified provisions of the Act and therefore prohibited;
- 15.2 Declaring that the Respondent is liable to repay to its customers the sum found to be charged as an initiation fee for each withdrawal by a customer in respect of the Multi-Loan Product;
- 15.3 Interdicting the Respondent from continuing with such conduct;
- 15.4 Imposing an administrative penalty upon the Respondent as contemplated by Section 151 of the Act; and
- 15.5 That the Respondent is ordered to pay the costs of this referral.

SUMMARY OF RESPONDENT'S ANSWERING AFFIDAVIT

16. The Respondent's answering affidavit is deposed to by Christian George van Schalkwyk, in his capacity as Risk Management Executive for the Respondent.

Introductory submissions

17. The Respondent submits that the Gobodo report was not disclosed to it for comment. The Applicant further failed to afford the Respondent a meaningful opportunity to respond to or engage with the Applicant on the issues.
18. The Applicant unlawfully mandated Gobodo to embark on a fishing expedition by a wide-ranging investigation of the Respondent's affairs and to *'inspect and report on any contraventions of the NCA that you may come across'*.
19. The Respondent submits that the referral is unlawful and invalid.

Respondent's mission and business model

20. The Respondent avers that it was founded in 2001 with the avowed purpose of making business services accessible to all South Africans. It currently has 574 branches countrywide, extending to remote rural settlements. The Respondent's workforce consists of 87% previously disadvantaged South Africans. At branch level, the number is 94%.
21. The Respondent's products are designed to meet the needs of ordinary people. Its transactional fees are the lowest in the market and are generally fixed in order to make it transparent and easier for consumers to understand.
22. The Respondent provides credit to ordinary people who are generally unable to raise credit because they do not have assets to offer as security.
23. The Respondent employs processes to serve its customers and these processes are designed to meet the customers' needs. The Respondent achieves a one-stop customer service by the use of cutting-edge technology. The elimination of unnecessary paperwork and administration also reduces the costs of serving the customer, which cost-savings are passed on to the customer. The Respondent for example provides credit insurance to the customers to whom it extends credit, at no cost to the customer.
24. The Respondent's customer base has grown from 350 000 in 2005 to 4.7 million in 2013.

The Respondent's commitment to compliance

25. The Respondent submits that, at industry level, it is a member of the Banking Council of South Africa and regularly engages with the Applicant on a range of matters including compliance with the Act and its Regulations.
26. At head office level, the Respondent has staff tasked with the responsibility of ensuring that the Respondent complies at all times with the requirements of the Act and its Regulations.

27. The Respondent's programmed processes have all been designed to ensure compliance with the Act and its Regulations.
28. The Respondent's branch consultants receive a two week induction course at the Respondent's head office in state-of-the-art branch simulation environment, which is also preceded and followed by in-branch training.
29. The Respondent submits that the Act and its Regulations are most complex, sometimes obscure and even contradictory. It refers to the matter of *ABSA Bank Limited v Petersen*¹ in which the following was held:

"The judgment added to the growing volume of jurisprudence that has been produced in the course of the courts' grapples with the inept draftmanship of many provisions of the NCA, which have taken up an extraordinary amount of space in the law reports in the last few years and given rise to what one might have hoped the National Credit Regulator and the Department of Trade and Industry would by now acknowledge to be an embarrassment of conflicting judicial interpretations of a number of important provisions of the statute."

30. The Respondent further submits that mistakes are inevitable. However, when errors are brought to the Respondent's attention, they are immediately rectified. The Applicant failed to afford the Respondent such opportunity and rushed to the Tribunal. The Respondent is of the view that such an approach is unfair and entirely inappropriate.

The referral is unlawful

31. The Respondent submits that the Applicant may only refer a matter, in terms of section 139(1)(c) of the Act, after completing an investigation into a complaint, or in terms of section 136 of the Act, subsequent to a complaint having been submitted to or initiated by the Applicant.
32. The Respondent is of the view that an initiated complaint should relate to an alleged contravention of the Act as specifically contemplated by an applicable provision thereof. The

¹ 2013 (1) SA 481 (WCC) para 10.

Respondent refers to the matter of *Woodlands Diary v Competition Commission*² in which the Supreme Court of Appeal held that an initiation, in terms of a complaint, requires the same particularity or clarity as a summons. It was also held that, because the complaint triggers invasive powers of investigation, it must be based on information which gives rise to a reasonable suspicion of a contravention of the Act.

33. The Applicant merely instructed Gobodo to conduct '*an investigation into the unsecured and micro-lending practices of Capitec*' and that concerns have been raised. The mandate concludes by indicating that '*You are not limited to the above and may inspect and report on any contraventions of the NCA that you may come across*'. The Gobodo report confirms that the Applicant '*did not supply us with any specific complaints regarding Capitec*'.

The complaint was not investigated by an inspector

34. The Respondent contends that the investigation in this matter was conducted by Gobodo and not by an investigator of the Applicant, as envisaged in section 140(1).
35. Section 25(1)(a) of the Act only permits employees of the Applicant and of the state to be appointed as inspectors. Gobodo's mandate illustrates that it was not deemed inspectors within the meaning of the Act.
36. Section 139(2) of the Act permits the Applicant to designate one or more persons to assist the inspector conducting the investigation, however not appoint such outsider to conduct the investigation.

The Applicant did not refer a complaint

37. The Respondent refers to section 141(1) and section 141(3) of the Act, and submits that the absence of a complaint leads to the conclusion that there could also not be a valid referral.

² 2010 (6) SA 108 (SCA).

The Applicant acted unfairly

38. The Applicant, in referring the matter to the Tribunal, takes administrative action which must be procedurally fair in terms of section 33 of the Constitution and section 3 of the Promotion of Administrative Justice Act, 3 of 2000.
39. On 22 February 2013 the Applicant allegedly addressed a letter to the Respondent, which is attached to the answering affidavit and marked as Annexure “CVS1”, with vague and unsubstantiated accusations against the Respondent. The Respondent was requested to enter into a consent agreement in terms of section 38(1)(b) of the Act.
40. The Respondent responded to the letter on 28 February 2013, which letter is attached to the answering affidavit and marked as Annexure “CVS2”. The Respondent requested particulars of the accusations and indicated its willingness to cooperate. The Respondent placed on record that it cannot fully consider the charges against it, until it has been informed of what the charges are. The Respondent requested an engagement on the issue.
41. The Applicant failed to respond to the above.
42. On 11 March 2013 the Applicant indicated in writing, which letter is attached to the answering affidavit and marked as Annexure “CVS3”, that it decided to refer the matter to the Tribunal as it received no response to its letter of 22 February 2013.
43. More correspondence was exchanged between the parties, the Applicant persisting that the Respondent contravened the Act and the Respondent persisting with its request for particulars of the accusations and requesting an engagement.

Submissions regarding the prohibited conduct alleged by the Applicant

44. The Respondent went on to address each allegation regarding the prohibited conduct on each section of the Act. For the purposes of this judgment it is not necessary to summarise the arguments.

Concluding submissions of the Respondent

45. The Respondent submits that, in terms of section 147(1) of the Act, the Tribunal does not have the power to make a cost order in favour of the Applicant.
46. The Respondent submits that the Applicant, in numerous instances as indicated above, misread and overlooked certain provisions of the Act.
47. The Respondent therefore prays for an order:
 - 47.1 Declaring that the Applicant's referral of this matter is unlawful and invalid; and
 - 47.2 Dismissing the Applicant's application.

THE HEARING

48. Both parties provided the Tribunal with heads of argument.
49. At the hearing the Tribunal decided to separate the hearing into two parts - the first part being the validity of the investigation and referral as raised by the Respondent and the second part being the alleged prohibited conduct by the Respondent. The Tribunal requested the Respondent to proceed first as it was the originator of the submissions relating to the validity of the investigation and referral.
50. After hearing argument from both parties the Tribunal reserved judgment and allowed the parties to proceed on the main application regarding prohibited conduct. After hearing argument from both parties on the main application, the matter was adjourned for written judgment to be issued.

ISSUE TO BE DECIDED

51. The Respondent has raised a number of points *in limine*. Points *in limine* must be addressed and answered first before the main allegations regarding the prohibited conduct can be considered.

52. For the purposes of this judgment the Tribunal will confine itself to considering the circumstances under which the Applicant initiated the investigation and whether the referral to the Tribunal was lawful.
53. The Tribunal must first consider what the facts are relating to the initiation of the investigation against the Respondent. Once the facts have been established then the Tribunal must consider whether the *Woodlands* matter is applicable to these facts and the application before the Tribunal.

Consideration of the facts

54. The Applicant's application form states that *"The matter which the Applicant refers to the Tribunal flows from an investigation initiated by the Applicant into the conduct of the Respondent in the consumer credit market."*³
55. The Applicant's founding affidavit deposed to by Lesiba Jacob Mashapa states that *"The matter which the NCR hereby refers to the Tribunal flows from an investigation initiated by the NCR into the conduct of Capitec in the consumer credit market"*.⁴
56. The Applicant's replying affidavit deposed to by Lesiba Jacob Mashaba states that *"In the present matter the NCR initiated its own complaint. The complaint is articulated at page 36 of the founding papers, where the NCR states that concerns have been raised relating to the provision of unsecured credit and short term loans by Capitec. The ensuing investigation is aimed at, in broad terms, establishing whether Capitec is acting in compliance with the Act."*⁵
57. The document titled "Mandate for Investigation" submitted by the Applicant states that *"Concerns have been raised relating to the provision of unsecured credit and short term loans by Capitec Bank."*⁶ The document goes on to state that the scope of the investigation is *"In order to check compliance with the Act you must ascertain whether the correct processes were followed*

³ Paragraph 1 on page 4 of the indexed bundle provided by the Applicant.

⁴ Paragraph 4.1 on page 15 of the indexed bundle provided by the Applicant.

⁵ Paragraph 14.4 on page 530 of the indexed bundle provided by the Applicant.

⁶ Subsection 1 of section 1 on page 36 of the indexed bundle provided by the Applicant.

*regarding the granting of credit, pre-agreement disclosure, credit marketing practices and related matters.*⁷ The document goes on to describe the various requirements of the Act under the headings of pre-agreement disclosure, interest rates, fees, costs and other charges, affordability assessments, reckless credit and finally marketing and advertising.

58. The Applicant did not call any witnesses or adduce any further evidence regarding the initiation of the investigation by the NCR. Based on the evidence contained in the application the Tribunal can therefore only conclude that the investigation was initiated entirely by the NCR and was not based on any specific complaint or information received. The investigation lodged was further of a general nature to determine whether the Respondent complied with the Act.

59. The Tribunal must then consider the application of the relevant law to these facts.

CONSIDERATION OF THE APPLICABLE LAW

60. Section 136(2) of the Act states that the NCR may initiate a complaint in its own name. On a plain reading of this section it would appear that the NCR is therefore entitled to initiate an investigation in its own name without any prior complaint having been received by any other party or person.

61. The wording used in this section is similar to section 49B(1) of the Competition Act 89 of 1998 which states that the Competition Commission may initiate a complaint against an alleged prohibited practice or an alleged implementation of a merger.

62. In the matter of *Woodlands Dairy v Competition Commission*⁸ the Supreme Court of Appeal considered the powers of the Competition Commission to initiate a complaint and whether there were any requirements linked to the exercise of this power.

63. The *Woodlands Dairy*-matter was an appeal from the Competition Appeal Court ('CAC') consequent to the granting of special leave to appeal. The appellants were Woodlands Dairy

⁷ Section 3 on page 37 of the indexed bundle provided by the Applicant.

⁸ 2010 (6) SA 108 (SCA).

(Pty) Ltd and Milkwood Dairy (Pty) Ltd. They purchase raw milk from dairy farmers for resale, presumably after processing and packaging. They, and a number of other major players in the field, stood accused before the Competition Tribunal of 'cartel activities', more particularly, contraventions of certain provisions of s 4(1) of the Competition Act 89 of 1998. The Competition Commission initiated an investigation into the industry by issuing a summons to the various parties involved. The court was required to adjudicate on whether the Competition Commission acted lawfully by initiating the complaint and issuing summons.

65. The SCA held that whilst the commissioner has exclusive jurisdiction to initiate a complaint under s 49B(1), he would at the very least, have been in “.....possession of information ‘concerning an alleged practice’ which, objectively speaking, could give rise to a reasonable suspicion of the existence of a prohibited practice. Without such information there could not be a rational exercise of the power.”

66. The SCA further stated the following:

“I do not accept the submission on behalf of the commission that these far-reaching invasive powers may be used by the commissioner for purposes of a fishing expedition without first having initiated a valid complaint based on a reasonable suspicion.”

“The CAC did not take into account that the initiation must at least have a jurisdictional ground by being based on a reasonable suspicion. The initiation and subsequent investigation must relate to the information available or the complaint filed by a complainant.”

“This does not mean that the commission may not, during the course of a properly initiated investigation, obtain information about others or about other transgressions. If it does, it is fully entitled to use the information so obtained for amending the complaint or the initiation of another complaint and fuller investigation.”

“Without the invalid complaint initiation and subsequent investigation these complaints against the appellants would not have seen the light of day. It follows that by applying the approach in Pretoria Portland Cement Co Ltd v Competition Commission⁹ the consequent

⁹ 2003 (2) SA 385 (SCA) paras 71-73.

referral should have been set aside, unfortunate as the result might be in the circumstances.”

67. The SCA subsequently found that the Competition Commissions' initiation of the complaint was not valid and the appeal was upheld.
68. Although the Competition Commission and the National Credit Regulator are separate institutions, the powers they are able to exercise, in accordance with their respective enabling legislation, are very similar. Both institutions have far-reaching powers to initiate complaints, appoint investigators and to issue summons. Although differences can be found in the specific wording used in their respective legislation the principles as described by the SCA in the *Woodlands*-matter can be applied with equal merit to the present matter.
69. If one had to summarise the general principle set out in the *Woodlands*-matter as it finds application to the present matter, it would be that the Applicant must have had a reasonable basis for believing a complaint against the Respondent was justified before it lodged an investigation. The Applicant could further not have initiated a complaint and lodged an investigation purely as a fishing expedition as such, to establish whether the Respondent complied with the Act.
70. In the present matter, the Applicant instructed Gobodo to conduct an investigation into the *'unsecured and micro-lending practices of Capitec'* and mentioned that concerns had been raised. Gobodo's mandate was not limited to the aforesaid and was entitled to inspect and report on any contraventions of the NCA that it came across. The Gobodo report confirms that the Applicant did not supply it with any specific complaints regarding Capitec.
71. As stated previously, the Tribunal found that the the investigation was initiated entirely by the NCR and was not based on any specific complaint or information received. The investigation lodged was further of a general nature to determine whether the Respondent complied with the Act.
72. If one applies the principles from the *Woodlands*-matter to the facts, it is clear that the Applicant did not initiate a valid complaint or investigation in this matter.

73. The Applicant argued that in the matter of *Competition Commission v Yara (SA) (Pty) Ltd and Others*¹⁰ the court differed from the decision in the *Woodlands*-matter. The Applicant made various submissions in this regard and contended that the approach followed in the *Yara*-matter should be applied to the present matter.
74. The Tribunal considered the *Yara*-matter but could not find a reasonable basis to conclude that it disagreed with the principles set out in the *Woodlands*-matter. In the *Yara*-matter the court had to decide whether the Competition Commission could be barred from including other parties, who were not named in the original complaint, in a referral to the Competition Tribunal. The court found that the Competition Commission could initiate a complaint tacitly and did not need to specifically name or advise the party that would be the subject of the referral to the Tribunal beforehand. The court found that the Competition Act 89 of 1998 did not prescribe any formal requirements for the Commission's decision to initiate a complaint and it could therefore be done informally.
75. In the *Yara*-matter the court specifically stated "*On the other hand, this judgment should not be understood to authorise a formal investigation without a complaint initiation, nor the initiation of a complaint without reasonable grounds, nor to absolve the commission of its obligation to provide those grounds when challenged to do so.*"
76. The court further clearly stated that the parties in the *Yara*-matter did not challenge the grounds on which the commission decided to initiate and refer the new complaints.
77. In the Tribunal's view the *Yara*-matter does not support a finding that the Applicant may initiate a complaint and investigation without any reasonable basis and may lodge an investigation purely to determine whether a credit provider is possibly contravening the Act.

CONCLUSION

78. The Tribunal finds that the Applicant did not have any reasonable basis for initiating the complaint or lodging the investigation into the Respondent's activities as a credit provider.

¹⁰ 2013 (6) SA 404 (SCA) F.

79. In accordance with the principles set out in the *Woodlands*-matter, the Applicant's investigation and subsequent referral to the Tribunal was invalid.
80. As the investigation and referral was invalid the Tribunal is unable to consider the merits of the allegations against the Respondent regarding prohibited conduct.

ORDER

81. Accordingly, the Tribunal makes the following order:

81.1 The application for a finding that the Respondent engaged in prohibited conduct and all other ancillary relief is denied; and

81.2 There is no order as to costs.

DATED ON THIS 9th DAY OF APRIL 2014

[signed]

Adv J Simpson

Member

Prof. Tanya Woker (Presiding member) and Ms H Devraj (member) concurring.