IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: **NCT/17884/2014/57(1)**

In the matter between:

THE NATIONAL CREDIT REGULATOR APPLICANT

and

MONEYLINE FINANCIAL SERVICES (PTY) LTD RESPONDENT

Coram:

Ms. H Devraj – Presiding member

Prof. T Woker – Member

Prof. J Maseko – Member

Date of Hearing – 27 November 2015

JUDGMENT

MAJORITY JUDGMENT: MS H DEVRAJ

INTRODUCTION

1. The Applicant in this matter is the National Credit Regulator (NCR), a juristic person established in terms of section 12 of the National Credit Act 34 of 2005 (the Act). One of the functions of the Applicant is to register credit providers in terms of the Act and to regulate their conduct.[1]

2. The Respondent is Moneyline Financial Services (Pty) Ltd, a limited liability company and a registered credit provider.

3. This is an application to the National Consumer Tribunal to cancel the registration of the Respondent in terms of section 57 (1) (a) and (c) of the National Credit Act 34 of 2005 (the Act).

[1] See sections 14 and 15 of the Act.

BACKGROUND

4. This application has a long history.

5. On 22 September 2014 the Applicant commenced proceedings before the National Consumer Tribunal for an order to cancel the registration of the Respondent in terms of section 57 of the Act.

6. The application was opposed by the Respondent and on 22 October 2014 the Respondent served and filed its answering affidavit.

7. Following the serving of the answering affidavit on the Applicant, the Applicant briefed Hogan Lovells, a firm of attorneys, to represent it in this matter.

8. On 31 October 2014, Hogan Lovells informed the Respondent that it intended to launch an application to the Tribunal in order to amend and supplement the Applicant's papers in terms of Rule 15 of the Tribunal Rules. Because of its intention to launch this application, the Applicant informed the Respondent that it would not file a replying affidavit to the Respondent's answering affidavit.

9. The application in terms of terms of Rule 15 was not forthcoming and, on 18 November 2014 and in accordance with its Rules, the Tribunal set the matter down for a hearing on 8 December 2014.

10. On 24 November 2014 the Applicant filed an application in terms of Rule 15 and requested that the matter be removed from the Tribunal's roll of 8 December 2014.

11. The Tribunal rules do not provide that a matter be removed from the roll (even in circumstances where there is agreement between the parties) and the Applicant was advised that it was necessary to make a formal application for an adjournment of the matter.

12. The Applicant filed an application for an adjournment of the matter on 3 December 2014 on the basis that the main application could not be dealt with because certain amendments were required. The hearing into the application for a postponement proceeded on 8 December 2014. The hearing dealt with (1) the issue of a postponement and (2) whether or not the Tribunal could make an order in terms of which the Applicant would be instructed to pay the Respondent's wasted costs including the costs of council.[2]

[2] The Applicant initially tendered to pay the wasted costs of the Respondent but this offer was later withdrawn which necessitated a hearing into the matter. The Tribunal subsequently held that it is not empowered to make an order as to costs in these circumstances as it only has the power to order costs in very limited circumstances.

13. After a consideration of the issues, the Tribunal decided that the matter had to be adjourned as it is an extremely serious matter involving the deregistering of a credit provider which could have significant consequences for the Respondent, its employees and its debtors. There was therefore a need to ensure that the issues were properly presented to the Tribunal. Although the Applicant filed an application in terms of Rule 15 to amend its application to de-register the Respondent, it did not provide details regarding the required amendments.

14. The matter was then postponed *sine die* in order to give the Applicant an opportunity to file an application for an amendment in terms of Rule 15 of the Tribunal Rules.

15. The Tribunal stated that the Applicant must place full details before the Tribunal and before the Respondent to enable to the Respondent to establish very clearly the case it was being required to meet. The Tribunal also stated that the Respondent would then be given an opportunity to object to the amendment and that this application would be heard as "a case within a case" before the Tribunal would proceed to consider the merits of the matter.[3] The Tribunal would make a decision as to whether or not to allow the amendment once it had heard the parties on the matter.

16. A judgment regarding the issue of costs was subsequently issued by the Tribunal.[4]

17. The Applicant subsequently filed its application to amend in terms of Rule 15. In this application, the Applicant sought an order from the Tribunal which *inter alia* condoned the applicant's failure to set out the facts surrounding the initiation of its complaint against the respondent in its own name as contemplated by section 136 (2) of the Act. It also sought an order allowing it to set out the facts surrounding its direction of an investigation of the complaint against the respondent as contemplated in section 139 (1) (c) of the Act.

18. This application to amend was opposed by the Respondent and the matter was set down for hearing on 21 May 2015 for the Tribunal to adjudicate only on the Rule 15 applications.

19. The Tribunal heard extensive argument from both parties regarding the application but shortly before it was due to issue a judgment on the matter, the parties (on 2 June 2015) evoked the recent amendment to Rule 15 which allows parties to consent to amendments.

20. Although the Respondent had initially opposed the amendments which the Applicant was seeking, it decided that it would agree to these amendments in the interests of moving matters forward.[5]

[3] Record p435 lines 19-21.
[4] Judgment issued on 8 January 2015
[5] See judgment issued by the Tribunal on 8 July 2015.

21. The Applicant subsequently amended its papers and the Respondent filed an answering affidavit to these amended papers.

22. In its founding affidavit in its original form the deponent, Ms Nthupang Magolego (Ms Magolego) alleged that the Applicant authorised investigations into the lending practices of the Respondent based on a reasonable suspicion that the Respondent was granting credit to consumers of social security grants in contravention of the Act.[6]

23. Ms Magolego further alleged that the reasonable suspicion formed by the Applicant was based on information which it had received which was attached to the affidavit in the form of annexure NM2.

24. Annexure "NM2" was an email which was written on 6 December 2013 by Ms Leoni van Pletzen to the Applicant on behalf of Micro Finance South Africa. Ms van Pletzen expressed concern that certain micro finance lenders where being allowed to deduct repayments directly from the Grinrod Bank accounts of social security grant recipients. This she argued, gave them preference and a commercial advantage over other micro lenders.

25. In its answering affidavit, the Respondent pointed out to the Applicant that this annexure could not have constituted the basis for the alleged reasonable suspicion because the certificates authorising the inspectors to investigate the Respondent were signed before 6 December 2013.

26. The Applicant subsequently amended its papers and stated that it was in fact a newspaper article published in the *Sowetan* attached to the founding affidavit marked "NM3" which gave rise to the Applicant's investigations into the lending practices of the Respondent.

27. In its answering affidavit and in argument before the Tribunal at the various hearings, the Respondent indicated that it intended to raise certain points *in limine* relating to the validity of the investigation and the admissibility of the inspectors' reports.

28. After considering all the documents filed in this matter, the Tribunal *mero motu* took the decision to deal with these points *in limine* first as the Tribunal was of the view that it would serve little purpose to continue into a lengthy hearing on the merits of the matter if the Tribunal determined that the investigation and the application had not been conducted in accordance with the law.

[6] See paragraph 6 of the founding affidavit.

29. In accordance with Rule 17 (6) of the Rules of the Tribunal a presiding member may direct that the Registrar set down a point of law for adjudication by the Tribunal if the presiding member considers it would be practical to resolve any point of law before proceeding with a pre-hearing conference.

30. The parties were advised that they were required to prepare argument on the following two points of law which were raised as points *in limine* on the papers:

    30.1 Whether the investigation by the Applicant was conducted without cause and not in accordance with the National Credit Act 34 of 2005 and

    30.2 Whether the investigation report should be regarded as inadmissible evidence.

THE HEARING

31. The points in limine were argued before the Tribunal on 27 November 2015.

32. Both parties supplied the Tribunal with heads of argument

33. The Respondent proceeded to argue first as it was the originator of the submissions relating to the validity of the investigations and the subsequent referral of the matter to the Tribunal.

34. After hearing argument from both parties the Tribunal reserved judgment and the matter was adjourned *sine die*.

The Respondents arguments

35. The thrust of the Respondent's argument is twofold

    35.1 The Appellant failed to follow the correct procedure as prescribed by the Act when it authorised an investigation into the lending practices of the Respondent; and

    35.2 When it referred the complaint to the Tribunal for a hearing it relied on the incorrect form.

36. As far as the first argument is concerned the Respondent argued that, as set out in section139 of the Act which deals with investigations, prior to appointing an investigator to investigate any conduct of the Respondent the Applicant must either have received a complaint regarding prohibited conduct or it must itself have initiated a complaint about prohibited conduct. The investigator must then be appointed to

investigate that complaint. After completing an investigation into that complaint, the Applicant may refer the matter to the Tribunal, if the complaint concerns a matter that the Tribunal may consider.

37. In this particular instance, the Applicant did not identify prohibited conduct under the Act and initiate a complaint regarding that particular conduct. Instead Ms Magolego authorised an investigation into the lending practices of the Respondent based on a reasonable suspicion that the Respondent was granting credit to recipients of grants in terms of the Social Assistance Act 13 of 2004 in contravention of the Act." The Respondent argued that granting credit to recipients of grants in terms of the Social Assistance Act does not constitute a contravention of the Act and that by failing to act in the manner prescribed by the legislation the Applicant was acting contrary to the Constitution of South Africa.

38. The Respondent argued that the powers of the Applicant are far-reaching and invasive and could have severe consequences for the Respondent including, closing down the business. The Applicant therefore had to act in accordance with its empowering legislation.

39. Following the amendments to the founding affidavit by the Applicant, the Respondent was prepared to accept that the article which was published in the *Sowetan* caused the Applicant to take action. The Respondent agreed that this should be so and that no responsible regulator could ignore such an article. However although the Applicant had conceded in its first Rule 15 application that the application needed to be amended in order to set out the facts regarding the initiation of the complaint, the Applicant had failed to amend its application appropriately and therefore, argued the Respondent, the application was inchoate.

40. The Respondent argued that the article which in its heading referred to an illegal loan scheme, did not establish any loan scheme illegal or otherwise. The report referred to money lenders who were operating illegally since they did not have permits or certificates and that this could not apply to the Respondent because the Respondent is registered. The report did refer to CPS which was allegedly deducting repayments automatically from monthly grants but that this conduct, even if it was true would not be a contravention of the Act. The report does not refer to the Respondent and so it is not clear how the Respondent was said to be involved in the scheme.

41. As far as the second leg of the Respondent's argument is concerned, the Respondent argued that the Act prescribes the process which must be followed once the Applicant decides to refer a matter to the Tribunal having completed an investigation. This is prescribed by section 141 (3) of the Act. This section states that a referral to the Tribunal, whether by the NCR (the Applicant) or by a complainant in terms of subsection (1) must be in the prescribed form. The use of the word must in this section indicates that the use of the form is mandatory and the Respondent argued that it was correct that this should be so because the form (form 42) sets out the information which must be contained on the form and which must

accompany the form. The Respondent argued that the Applicant's failure to use this form and to rely instead on form T57 which is used in an application under section 57 of the Act is on its own sufficient to find that the present application to the Tribunal is fundamentally flawed.

The Applicant's arguments

42. The Applicant submitted that the hearing into the points of law should not proceed because there is a dispute of fact between the parties and therefore the Applicant must be given an opportunity to lead oral evidence in order to prove the events leading up to its initiation of a complaint in its own name against the Respondent. The Applicant submitted that it had good cause to initiate a complaint against the Respondent and to subsequently investigate the Respondent.

43. The Applicant set out the chronology of events as follows:

43.1 On 22 September 2014 the Applicant served an application for the cancellation of the registration of the Respondent as a credit provider in terms of the provisions of section 57 (1) (a) and (c) of the Act.

43.2 The Respondent filed an answering affidavit on 21 October 2014 stating inter alia that the investigation was conducted without cause and not in accordance with the Act.

43.3 The above allegation was based on the fact that the Applicant could not have had a "reasonable suspicion" that the respondent was participating in an illegal loan scheme following receipt of an email from the Micro Finance South Africa (MFSA) dated 6 December 2013 since the Applicant had already authorised an investigation into the lending practices of the Respondents in August 2013.

43.4 On 6 June 2015 and by agreement between the parties, the Applicant filed an amended application and supplementary affidavit wherein the Applicant corrected the chronology of events and stated that the *Sowetan* newspaper article (Annexure "NM3" to the main application) gave rise to the Applicant's investigation.

43.5 This article was published on 15 May 2013 and it identified CPS, Net1 And Friedland 035 Investments (Pty) Limited as the entities participating in an illegal loan scheme.

43.6 On 21 May 2013 and based on the said newspaper article, the Applicant initiated a complaint in terms of the provisions of section 136 (2) of the Act against CPS, Net 1 (parent company of the

Respondent) and Friedland 035 Investments (Pty) Limited which was a company which was taken over by the Respondent.

43.7 Subsequent to the newspaper article, the Respondent was identified by the Applicant as one of the credit providers participating in the scheme and granting credit to social grant recipients.

43.8 Having identified the Respondent as participating in the scheme the Applicant then initiated a complaint in its own name against the Respondent and CPS.

43.9 In support of its contentions the Applicant filed a document which was a memorandum from Gideon Mashamaite, (a Manager: Investigations and Enforcement of the Applicant) in which he was requesting certain certificates from Nomsa Motshegare (the CEO of the Applicant). The memorandum indicated that a number of investigations were submitted to and approved by the MECC. One such investigation was the investigation into the Respondent and the document gave the reason for the investigation as being "Pro-Active investigation whereby information was received from the media. This credit provider is a subsidiary of CPS".[7]

ISSUES TO BE DECIDED BY THE TRIBUNAL

44. The Respondent has raised certain points in limine. These points must be addressed and answered first before the main allegations regarding the prohibited conduct can be considered.

45. For the purposes of this judgment and as accepted by the Respondent, the Tribunal will decide these points *in limine* based on the facts submitted by the Applicant regarding the initiation of the complaint.

46. The point of law to be considered was as follows:

46.1 Whether the investigation was conducted without cause and not in accordance with the National Credit Act 34 of 2005; and

46.2 Whether the Investigation Report should be regarded as inadmissable evidence.

Initiation of a complaint

47. The argument raised by the Respondent is that the Applicant had not initiated a complaint by the CEO or his delegate prior to the investigation. The Respondent further submits that in terms of Section 139(1), the Applicant may direct an inspector to investigate that (Respondent's emphasis) complaint and that the

[7] The Applicant disputed that such document should be admissible at the hearing however for the purposes of this judgment the document provides useful insight into the processes followed by the Applicant.

"authorisation" of a general investigation into "lending practices" is not counternanced under the NCA. The Respondent further argues that there was no initiation of a complaint, but only the authorisation of a general investigation and this therefore does not constitute a juristic act and as such there can be no investigation and no referral. The further issue raised is that even though there was such an alleged contravention identified under the Social Assistance Act, it was not in terms of the National Credit Act. The Respondent submitted that the complaint can only relate to an alleged contravention, otherwise the Commission would be acting beyond its jurisdiction as set out by the CAC.

48. The Respondent refers to paragraphs 19 and 20 of *Woodlands Diary (Pty) Ltd v Competition Commission*[8] in support of its argument that the "prohibited conduct" of the Respondent that allegedly emerges from the article is not apparent and that the Respondent is not even mentioned in the article. Paragraphs 19 and 20 of the Woodlands-matter states the following:-

[19] The complaint must be initiated against 'an alleged prohibited practice'. In this regard the CAC has held in Sappi that 'the Commission is not empowered to investigate conduct which it generally considers to constitute 'anti-competitive behaviour' and that a complaint can relate only to 'an alleged contravention of the Act as specifically contemplated by an applicable provision thereof by that complainant'. Otherwise, the CAC said in that case, the commission would act beyond its jurisdiction. No one submitted that this approach is in any respect incorrect.

[20] It is only during this investigation ('an investigation in terms of this Act') that the commissioner may summon persons for purposes of interrogation and production of documents (s 49A(1) read with s 49B(4)). 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. It would otherwise mean that the exercise of this power would be unrestricted because there is no prior judicial scrutiny as is the case with a search warrant under s 46.

49. The Applicant's response to this is that on 21 May 2013, based on the Sowetan newpaper article, the Applicant initaited a complaint against CPS, Net 1 (parent company of respondent) and Friedland 035 Investments (Pty) Limited (company taken over by Respondent). The Applicant has submitted a memorandum marked as Annexure D, which shows the link between Moneyline Financial Services as a subsidiary of CPS and the memorandum states that the proactive investigation into the Respondent was approved and this was a request for the inspectors' certificates. Evidence of the Sowetan article was submitted as Annexure A.

[8] 2010 (6) SA 108 (SCA)

50. The Applicant argues that in the *Yara* - judgment[9] an initiation may be informal or even tacit and that the Applicant has provided evidence of the memorandum reflecting the proactive investigation into the Respondent and the lending practices of the Respondent. The Applicant submitted that the decision to look into the lending practices was based on the Sowetan-article making reference to loans being granted. Furthermore, the Applicant argued that the article would not have been able to identify the specific contraventions of the Act.

51. The Tribunal's findings:

In the *NCR v Capitec* matter[10] the Tribunal stated:

"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 (own emphasis) .

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."

52. Paragraph 13 in the *Woodlands* - judgment states that :-

"A complaint has to be 'initiated'. The commissioner has exclusive jurisdiction to initiate a complaint under s 49B(1). The question then arises whether there are any jurisdictional requirements for the initiation of a complaint by the commissioner. I would have thought, as a matter of principle, that the commissioner must 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."

53. The *Yara* - judgment then went on to state the following in paragraph 21:-

"A vital consideration in evaluating the cogency of the CAC's equation of the two complaint forms is that, with regard to formalities, the legislature draws a clear distinction between a complaint initiated by the commission (in terms of s 49B(1)) and a complaint submitted by a E private person (in terms of s 49B(2)(b)). While the latter has to be in the 'prescribed form', no formalities are prescribed for the former.

[9] Competition Commission v Yara (SA) (Pty) Ltd and Others 2013 (6) SA 404 (SCA
[10] National Credit Regulator v Capitec Bank Ltd NCT/9152/2013/140(1).

Taken literally, 'initiating a complaint' appears to be an awkward concept. The commission does not really 'initiate' or start a complaint. What it does is start a process by directing an investigation, which process may lead to the referral of that complaint to the tribunal. And it can clearly do so on the basis of information submitted by an informant, like Mrs Malherbe F in the Glaxo case; or because of what it gathers from media reports (Own emphasis); or because of what it discovers during the course of an investigation into a different complaint and/or against a different respondent. Since no formalities are required, s 49B(1) seems to demand no more than a decision by the commission to open a case. That decision can be G informal. It can also be tacit. In argument counsel for Omnia informed us that, in practice, the initiation usually takes the form of a memorandum. I have no doubt that for the sake of good order and certainty, that would be so. But it is not a requirement of the Act. "

54. In the *Woodlands* - judgment it was stated:-
[34] *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.*

55. I therefore find that the Sowetan article provides the reasonable grounds upon which the investigation was initiated. The Respondent as stated above accepted this article and it was not placed in dispute. While the Sowetan article makes reference to Illegal Loans schemes and High interest rates, the Applicant has argued that the investigation was into the lending practices of the Respondent. The Applicant was also able to show the link between CPS and the Respondent.

56. Section 139 (1) (c) states *" Upon initiating or accepting a complaint in terms of Section 136, the National Credit Regulator may direct an inspector to investigate the complaint as quickly as practical, in any other case*" and the Applicant acted in accordance with this. On a balance of probabilities, the Respondent's submissions that an investigation was not initiated is not accepted. The investigation was initiated within the Applicant's jurisdiction and is in accordance with the principles as set out in *Woodlands* and *Yara*.

Initiating complaints for each prohibited conduct

57. The Respondent also argued that according to *Yara* that once the investigation has commenced, if you find other prohibited conduct, you can only investigate that prohibited conduct, if you initiate a complaint. So the Regulator has to initiate a complaint every time they come across prohibited conduct.

58. The Applicant argued that in *Yara* the court made a distinction between a complaint that was initiated in its own name as well as a complaint submitted by a complainant and therefore this argument is not correct. The Applicant submitted that as long as there were reasonable grounds to initiate an

investigation, then if there are other issues that are discovered, they can be included in the contraventions.

59. I find that *Yara* supports this line of argument by the Applicant in paragraph 30 and 31 which states the following:-

'The commission has investigated the complaints [submitted by Nutri-Flo] and concluded that they have substance. The commission has F accordingly resolved to refer the complaints to this tribunal in terms of this referral. In addition, the commission has in the course of its investigations, uncovered further instances of anti-competitive conduct committed by the respondents, more fully described below. These activities are referred to the tribunal herewith as well.'

G [31] By deciding to investigate the additional complaints and by subsequently referring them to the tribunal, the commission in effect tacitly initiated the complaints not covered by the original Nutri-Flo complaint. It is not suggested that the commission did not have reasonable grounds to initiate and refer these new complaints. It follows, in my view, that the H referral by the commission was not invalid and that its striking-out by the CAC was therefore unwarranted. Moreover, counsel for Omnia conceded, rightly in my view, that the amendments sought by the commission constituted no more than further particulars to complaints already covered by the referral and that if the referral were to be held valid, the amendment application must inevitably succeed. The outcome of the I views that I hold is therefore that the tribunal was right in the first place with regard to both facets of its order and that the appeal against the CAC's judgment to the contrary must be upheld.'

60. The *Yara* judgment went further, where it disagreed with the Commissions argument that Section 50(3)(1)(iii) allows the Commission to new complaints which were not included in the initial complaint , without requiring that the new complaint be separately initiated. In *Yara* it was therefore stated in paragraph 33 of the judgment as follows:

"[33] I do not agree with this line of argument. As was said in Woodlands, the Act insists on an initiation of a complaint by the commission as a E juristic act — by way of a decision to set the process in motion — before there can be a formal investigation into that complaint. As I see it, the same goes for s 50(1) which provides that the commission may refer a complaint to the tribunal 'after initiating the complaint'. When s 50(3) refers to 'a complaint as submitted by the complainant', it must be understood as a complaint against a specific prohibited practice submitted F by a complainant. Adding particulars means no more than further information to support that complaint. It cannot mean a new complaint about a different prohibited practice not raised by the original complaint. And I can find nothing in s 50(3) as a whole which would justify any different conclusion."

61. The Tribunal therefore finds that the paragraphs 30 and 31 support the view that if further contraventions are identified during the investigation they can be included in the referral. Paragraph 33 relates to a

process when a complainant submits a complaint and that adding "particulars" by the Commission does not extend further to including new complaints.

The Requirements for the referral were not met

62. The Respondent argued that the referral did not follow the peremptory procedures as per Section 141(3) of the Act, which states that Section 141(3) provides that a referral to the Tribunal by the NCR "must" (Respondent's emphasis) be in the prescribed form. The prescribed form that the Respondent refers to is Form 32.

63. The Applicant's response to this is that the matter was not a referral to the Tribunal, but rather an application for a de-registration, under Section 57 of the Act.

64. The Tribunal therefore finds that the application filed by the Applicant did meet the requirements as set out in the Act. Section 140(1)(c) states:-
"After completing an investigation into a complaint, the National Credit Regulator may make an application to the Tribunal if the complaint concerns a matter that the Tribunal may consider on application in terms of any provision of this Act".

65. The Applicant met all the filing requirements of a section 57 application in requesting the Tribunal to cancel the registration of the Respondent as allowed for in terms of section 57 of the Act and this application is therefore not defective.

66. In the circumstances mentioned, the Tribunal finds that the investigation process that was followed by the Applicant was in accordance with the Act and that the application met all the formal requirements. Furthermore there is therefore no reason not to accept the investigation report as inadmissible evidence. This matter should be set down to consider the merits in the main matter.

DATED THIS 11TH DAY OF MARCH 2016

Signed
Ms H Devraj
Member

Concurring Judgment: Prof J Maseko

67. Without reiterating the extensive background and factual aspects of the case as covered by the judgments of my esteemed colleagues, Ms. Devraj and Prof Woker above and below, I concur with the view that this ruling should confine itself to the points of law debated and raised *in limine*; at the Pre-hearing session of 27 November 2015.[11] Rule 17(6) of the Rules of the Tribunal empowers the Tribunal with discretion to direct the Registrar to set down a point of law for adjudication by the tribunal if the presiding member considers that it would be practical to resolve any point of law before proceeding with a pre-hearing conference.

68. Discussion of the substantive issues of the case is, therefore, of no relevance on the issues to be decided. I will, therefore, confine my view on this matter to the issues that stand to be decided. And as pointed out already in the judgment of Ms Devraj, these issues centre around:

    (a) Whether the investigation by the NCR into the conduct of the Respondent, was conducted without cause and not in accordance with the National Credit Act 34 of 2005; and

    (b) Whether the Investigation Report should, in the result, be regarded as inadmissable evidence.

69. The understanding of the parties and the Tribunal on this matter was that as soon as these points of law have been determined, the matter can either go forward to the merits of the case or be dismissed on the basis of the points raised.

The View of the Respondent

70. The points of law were raised by the Respondent in the case, who argued, from the onset of the pre-hearing session that the NCR had to make out its case based on its Founding Affidavit, or be refused an audience of the Tribunal.

71. The Respondent highlighted for the Tribunal that the provisions of section 150 of the NCA are Draconian and allow for punitive measures on a Respondent having been investigated by the Applicant. As a result of this situation, the constitutional issues of rights come into play. I concur with this view.

72. The Respondent further submitted that there was no relation between the article in the Sowetan mentioned, charges against the Respondent and the attacks only flow out of a subsequent letter from Leone, for the Applicant. Also the complaints covered in the Application came out of the investigation, and

[11] In the Gauteng Consumer Affairs Court (court room- venue) convened for this purpose.

not the Sowetan article which triggered the investigation. However, in the view of the Respondent there was no reasonable suspicion deriving from the Sowetan article relied upon by the Applicant.

73. The Respondent further submitted that section 57 of the NCA deals with de-registration, but not based on prohibited conduct. Form 32 is about prohibited conduct only and not anything else. One notes that Form 32 is a referral form from the NCR to the Tribunal based on a complaint as it so indicates on Part 2 of that form. Section 140(1) of the NCA is about referring a matter to the Tribunal which matter is based on a complaint received by the NCR under section 136 of the NCA. This is about section 136 (of the NCA) which is about submission of a complaint by *"any person"* to the NCR.

74. The Respondent further submitted that failure on the part of the NCR to use Form 32, which refers matters that have been triggered off by complainants, is ***fatal*** to the case of the NCR. But in the facts of the matter that are common cause; there was no complaint lodged with the NCR that would justify the NCR referring it to the NCT. The Respondent placed reliance on the decision in the ***Woodlands case***[12] in asserting the said fatality. The Respondent also generously availed a copy of this case and argued that the provision in the NCA is ***"on all fours"*** with the statutory provision of the Competition Act 89 of 1998 (especially section 49B (1), the Tribunal has to place reliance on the ***ratio decidendi*** of the Woodlands case. The Tribunal had also held the same in ***National Credit Regulator v Capitec Bank Ltd NCT/9152/2013/140(1)***.but now the question is about the relevance of this argument on a section 57 application. It appears that the existence of issues that would lend themselves to a complaints being laid or initiated, is used to attack a section 57 application.

75. The summary of the Woodlands case has already adequately been canvassed in the judgments of Ms Devraj and Prof Woker above and below. I will not repeat that summary here. But it is imperative to highlight, even if in reiteration, the ***ratio*** central to the point in this part. In the *Capitec Bank Ltd* case, the Tribunal had concluded that *"the Applicant had not had any reasonable basis for the initiating or lodging the investigation into the Respondent's activities as a credit provider.*" The Tribunal had then gone on to find that the investigation in that case was invalid and that the referral was also invalid. But in this case, it also appears that the issue of initiating an investigation by the NCR was at the core of the challenge.

76. The Respondent finally argued that the NCR should **not** have applied to de-register the Respondent on the bases of an article in the Sowetan Newspaper. It should at least have initiated a complaint first, before conducting an investigation.

[12] Woodlands Dairy (Pty) Ltd and Another v Competition Commission 2010 (6) SA 108 (SCA)

The view of the Applicant

77. The take of the Applicant at the pre-hearing; hinged on the assertions that; the points of law should have been parked; and not dealt with at the pre-hearing point. But the Tribunal had proceeded anyway on the basis that the session had been convened specifically for both aspects.

78. In its assertions, the Applicant pointed out what it saw as the *"absurdity of inferring requirements prior to conducting an investigation"*. It is clear that this argument was not questioning the investigation dealt with in section 140 and 136 of the Act. The Applicant went on to point out details of the internal appointments with all the authorisations from management to the various investigators. The Applicant was confining itself to section 57 prerequisites to referring a matter to the Tribunal, not the section 140 or 136 bases. The parties may have thrown the Tribunal of the track of the issue by debating the investigation requirements under a section 57 application.

79. The Applicant also argued that the assertions of the Respondent should be disregarded because they were based on papers supplied by the Applicant and the Respondent should therefore, not be allowed to rely on these, but instead, be required to produce its own evidence. I do not quite agree with this view. The reason for this is that the Applicant is, after all, the ***dominus litis*** party in this case. It has the burden to make out its case on a balance of probabilities. And, since this is a case that is civil in nature, then an equivalent of ***absolution from the instance*** may be raised; if the prime moving party has a defective case or if this can be argued. However, that is still not to say the matter of the prerequisites of a section 57 application are then disposed with as yet.

80. The Applicant also argued that section 136 of the NCA was silent on the forms to be used. It argued further that even section 55(1) of the NCA also does not prescribe any form to be used, and hence the Applicant follows an informal system to trigger off investigations. There appears to be merit in this argument, given the fact the Act carries ample provision for complaints received from consumers and those initiated by the NCR. But that still does not assist with a section 57 prerequisite.

81. The Applicant also referred the Tribunal to the findings in *Competition Commission v Yara (SA) (Pty) Ltd and Others 2013 (6) SA 404 (SCA)*; it was held (at Para F) that:
"Complaints submitted by private persons had to be distinguished from those initiated by the Commission. While there was a good reason to follow a strict referral in the former case; the latter required no more than an informal decision by the Commissioner, and it made no sense in these circumstances to require that the referral be confined to the parameters of the original complaint." (My own underlining)

82. In its reply, the Respondent stated that due process is crucial at the very initiating stage of the complaint. The Respondent further averred that the Act answers the question of who should initiate an own complaint on the part of the NCR. The Respondent submitted that it is the CEO - s23 (3) (d) of the NCA, even though the latter may also delegate these functions to other mangers in terms of section 23(4) of that Act.

83. Needless to say, all these arguments for and against, still detract from the issue of a section 57 l Application by the NCR. This case is not one of a referral of prohibited conduct in terms of Section 140(1), but in fact an application in terms of Section 57 of the NCA. The pre-requisites for the applications are different and it would be incorrect to super-impose the requirements of the one onto the other. The Competition Commission and the NCR exercise very similar powers to initiate complaints, appoint investigators and to issue summons. The, difference, however, is that the NCA allows for procedures to be utilised by the NCR should it wish to cancel the registration of a registrant on the grounds as allowed for in the NCA. This position differs for the Competition authorities, as there are no registrants in terms of the Competition Act.

84. The Respondent's arguments in relation to the investigation and the initiation thereof before or after a complaint was initiated are irrelevant, as it does not find application in relation to a section 57 application. The requirements for a Section 57 application is repeated failure to comply with conditions of registration, repeated failures to meet commitments in terms of Section 48 or repeated contraventions of the Act.

Analysis of the Arguments from both sides

85. From the two versions of the parties considered, at the centre of the attack of the investigation of the Applicant, is the act of actually initiating a complaint, which would then justify an authorised investigation. The Respondent made very compelling points in this regard, but as indicated above, these points, although compelling, are red herrings. They do not relate to the requirements of the application before the Tribunal. The Applicant appeared to rightly argue away from the main points of attack. Proof; on the part of the Applicant, that the investigators were duly authorised, missed the real point of attack and served to assist in the temptation to follow the rabbit trails laid by the Respondent; as did the attack of the Respondent that they required such authorisation as they would in a section 136 and 140 complaint. In its arguments, the Respondent went to the very foundation of how the CEO of the NCR should ***initiate*** a complaint before commissioning an investigation. These and other arguments raised around the investigation and the process of initiating a complaint, are irrelevant in considering the relevant application before the Tribunal.

86. The argument by the Respondent to the effect that "the Applicant's failure to use this form and to rely instead on form T57 which is used in an application under section 57 of the Act is on its own sufficient to

find that the present application to the Tribunal is fundamentally flawed", is itself flawed. The reason for this is that this **is** a section 57 application. And the fact that the Respondent had added other issues including those carried in the investigation report, cannot detract from the fact that this is indeed a section 57 application.

87. The question now is whether then the NCR needed to initiate an investigation or await a complaint to be able to bring a section 57 application. And to this end, it appears conclusive that the Applicant misdirected its attack on the validity of the investigation. The validity of the investigation would have possibly found relevance in the advent that the application was about repeated prohibited conduct. But this is not the case

88. The challenge again with all of this is its relevance to a section 57 application. There appears to be no connection whatsoever.

Conclusion

89. With regard to the question whether the investigation by the NCR into the conduct of the Respondent, was conducted without cause and not in accordance with the National Credit Act 34 of 2005; it appears that the answer has to be in the negative. But then the resulting question is whether this should even matter for a section 57 application as the Act still stands? And this answer to that question appears to be in the negative.

90. With regard to the question whether the Investigation Report should, in the result, be regarded as inadmissable evidence; I am of the view that the irrelevance of this admissibility requirement to a section 57 application compels one to answer in the negative.

91. I am appreciative of the Constitutional imperatives hazarded by the Respondent, in this case. Should the Applicant base its application on repeated instances of prohibited conduct, it would still have to provide the Tribunal with sufficient evidence that the conduct complained of is prohibited in terms of the Act and that there were repeat instances of the conduct complained of. This position has been crystalised in various decisions of the Tribunal. It is true that the NCA provides for punitive measures to a Respondent who is found to be in breach of certain parts of the Act. However, as a creature of Statute, this Tribunal cannot extend its decisions to cover issues of excision or reading in of sections of an Act. This is the domain of the superior courts and that of Parliament (to amend the Act) where it may fall short as is argued by the Respondent.

92. The principles of "reasonable suspicion" or the initiation process find no application in a section 57 as a section 57 Application does not turn on these issues. **The difficulty, for this Tribunal, is that the**

Respondent mounts its defense and its points *in limine* on the basis that section 57(1) does not allow for a de-registration application based on allegations of prohibited conduct. This incorrect launch-pad for its *points in limine* is central to its application of irrelevant sections of the NCA to this application. That was patently done to bring in section 136(2) and its requirements into the section 57 deregistration application before the Tribunal. Section 57(1)(c) allows for a de-registration application based on repeated contraventions of the Act such as prohibited conduct. If de-registration based on repeated prohibited conduct is what the legislature had intended for the regulator to proof and after an initiation of an investigation on the basis of reasonable suspicion my respectful view is that the legislature would have made that clear. This writer is of the view that, only the legislature or the court with inherent jurisdiction has the ability to read into or excise a section of Act. These requirements can most certainly not be read into the Act by the Tribunal for a section 57(1) application. The difficulty of the Tribunal is also that, from the side of the Respondent, the requirements of another section [Section 136(2)] would be superimposed on the application brought under section 57(1) in order to render it inchoate.

93. In the result, I rather concur with the judgment of Ms Devraj in this case; for the reasons canvassed in my portion of the judgment. The abovementioned *points in limine* are therefore, dismissed, and the matter should be set down for hearing of the merits of the case.

DATED THIS 11TH DAY OF MARCH 2016

Signed
Prof J Maseko
Member

Dissenting Judgment: Prof T Woker

94. I agree with my colleagues on the background information setting out what transpired in this matter, the various amendments to documents and the issues raised at the hearings. Where we differ is in regard to the interpretation of the arguments raised by the parties.

95. Also for the purposes of this dissenting judgment the Tribunal will confine itself to considering whether the Applicant followed the correct procedures as prescribed by the Act when it initiated the investigation into the Respondent and whether the subsequent referral to the Tribunal was lawful.

THE LAW

96. At the outset of its arguments the Applicant implored the Tribunal to bear in mind the purposes of the Act and the fact that the Applicant has been established to protect the interests of consumers.

97. The Tribunal is always mindful of the concerns expressed by the Applicant, however, the actions of the Applicant qualify as administrative action. That being so, the procedures followed by the Applicant must be lawful, reasonable and procedurally fair. In *DA v Ethekwini Municipality*[13] the Court held (at 160D) that a fundamental principal derived from the rule of law itself, is that the exercise of all public power, be it legislative, executive or administrative is only legitimate when it is lawful. "This tenet of constitutional law which admits no exception, has become known as the principle of legality" (Per Brand JA). The principle of legality requires that decision must satisfy all legal requirements and procedures.

98. The procedures which the Applicant is required to follow are set out in sections 136 (initiating a complaint to the NCR); 139 (investigations by the NCR) 140 (outcome of complaint) and 141 (referral to the Tribunal).

99. Section 136 (2) of the Act provides that the Applicant may initiate a complaint in its own name. For the purposes of this judgment it is accept that the Applicant can initiate a complaint even if it receives information through the media and this information can then lead to an investigation and a subsequent referral to the Tribunal.

100. As pointed out by the Tribunal in the case of *NCR v Capitec Bank Limited*[14] the wording used in this section is similar to section 49(B) of the Competition Act[15] which states that the Competition Commission may initiate a complaint against an alleged prohibited practice. The Tribunal also pointed out that the Competition Commission and the NCR exercise very similar powers to initiate complaints, appoint investigators and to issue summons. Therefore the principles described by the SCA may also be applied to matters where the NCR initiates complaints and conducts investigations.

101. The critical wording here is "the initiation of a complaint" and what this means. These words were considered by the Supreme Court of Appeal when it considered the powers of the Competition Commission to initiate a complaint in the case of *Woodlands Diary (Pty) Ltd v Competition Commission.*[16] The Court held that the Act insists on the initiation of a complaint by the commission as a juristic act – by way of a decision to set the process in motion – before there can be a formal investigation into that complaint.

[13] 2012 (2) SA 151 (SCA).
[14] NCT/9152/2013/140(1)
[15] 89 of 1998
[16] 2010 (6) SA 108 (SCA)

102. In other words the Applicant must have identified conduct which constitutes prohibited conduct before it can decide to hold an investigation. The investigator is then directed to investigate *that complaint* (as per section 139 (1) (c) and once it has concluded its investigation *that complaint* is referred to the Tribunal for a hearing (as per section 141 (3)).

103. The Applicant must refer the matter to the Tribunal by way of form 32 and in that form it must set out the date of the complaint, a description of the complaint, reasons why that complaint is referred to the Tribunal and other required information.

104. So from the start of the process to the end, the conduct which was identified by the Applicant as prohibited conduct is at the forefront of the process. In *Woodlands Diary* the SCA held that the Commission is not empowered to investigate conduct which it generally considers to constitute anti-competitive conduct and the commission may not use its far-reaching invasive powers to conduct a fishing expedition without first having initiated a valid complaint based on a reasonable suspicion.

105. In this matter, the evidence before the Tribunal clearly indicates that before the investigators were appointed the Applicant did not identify the conduct which was to be investigated. Instead it authorised an investigation into the lending practices of the Respondent. The Act requires the Applicant to be more specific about the conduct which it requires the investigators to investigate. Prior to authorising the investigation, the Applicant should have identified which lending practices it was concerned about and how these lending practices constituted prohibited conduct under the Act.

106. In the circumstances I find that the process which was followed by the Applicant was not in accordance with the Act and that the referral to the Tribunal was not lawful.

107. I would therefore set aside the referral to the Tribunal.

DATED THIS 11TH DAY OF MARCH 2016

Signed
Prof. T. Woker
Member