IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: NCT/23181/2015/140(1) NCA

In the matter between:

NATIONAL CREDIT REGULATOR — APPLICANT

and

SOUTHERN AFRICAN FRAUD PREVENTION SERVICES — RESPONDENT

Coram:

Adv F Manamela	–	Presiding member
Prof J Maseko	–	Member
Ms P Beck	–	Member

Date of First Hearing:	-	17 December 2015
Date of Hearing	-	26 May 2016

JUDGMENT AND REASONS

INTRODUCTION

1. This matter dates back to 2010. The National Credit Regulator (NCR) instructed the Southern African Fraud Prevention Services (SAFPS), to register as a credit bureau and to be subjected to the provisions of the National Credit Act (NCA) in the conduct of its business. SAFPS denied that the conduct of its business should be regulated in terms of the NCA, as the information it holds cannot be defined to fall within the prism of what the NCA seeks to regulate. The dispute found its way to this Tribunal in 2010 and on 19 February 2010 the Tribunal issued an order in favour of SAFPS declaring that the latter must not register as a credit bureau. The NCR took the decision of the Tribunal to the High Court for a review. The High Court reviewed and set aside the decision of the Tribunal and declared that *the activities carried on by SAFPS are in contravention of the section 43 of the*

National Credit Act 2005. The High Court went further to direct SAFPA *to lodge with the NCR an application for registration as a credit bureau as envisaged in section 43.1 within 21 days from the dated the judgment, failing which SAFPA is ordered to cease its operations insofar as it relates to information or reports received by it from any credit provider.* This judgment was handed down on 17 June 2011 by Justice Legodi in the North Gauteng High Court, Pretoria.

2. This matter is now back to the Tribunal for the third time around, on a different note, yet the same or part of the same initial substantive issues. The NCR conducted an investigation into the business practices of SAFPA in 2015, and found SAFPA to be in contravention of several provisions of the NCA, including sections 70(2) (c) (f); 72(3) and 72(5) and Regulations 17(1) and 20(2) of the NCA.

3. The parties met at a hearing set down for 17 December 2015, but were not ready to proceed. The matter was stood down, affording the parties an opportunity to discuss the issues, with a view to finding common ground and a possible, amicable solution. Indeed the parties met and presented to this Tribunal a settlement agreement which will be referred to later in this judgment.

The Parties

APPLICANT

4. 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, 2005 ("the Act").
5. The Applicant was represented at the hearing by Ms K Germishuys, assisted by Mesdames N Magolego and J Boucher.

RESPONDENT

6. The Respondent is Southern African Fraud Prevention Services NPC, an entity registered as such in terms of the laws of the Republic of South Africa having its physical address in Meyersdal, Johannesburg, hereinafter referred to as the Respondent. The Respondent was represented by Advocate P Louw SC, instructed by Bieldermans Attorneys, Incorporated.

THE CURRENT APPLICATION

7. This is an Application in terms of Section 140(1) (b) of the Act for an order declaring that the Respondent:
   7.1 is in contravention of specific sections of the Act, the Regulations and conditions of its registration;
   7.2 engages in prohibited conduct and must be interdicted from continuing with such conduct;
   7.3 be directed to pay an administrative penalty in view of such contraventions.

THE SETTLEMENT AGREEMENT

8. The matter was set down for hearing on 26 May 2016 after it was postponed on 17 December 2015. The parties handed up a draft settlement agreement, detailing out issues which they have agreed on and asking the Tribunal to confirm the agreement as an order of the Tribunal. The draft settlement agreement addresses the alleged contraventions the Applicant had levelled against the Respondent in the Applicant's Notice of Motion, following the investigation conducted into the business practices of the Respondent during January 2015. Briefly, the parties agreed to the following:

   8.1 the Respondent undertakes to verify the accuracy of listings by its Members and the evidence that the Respondent obtains of such listings comply with the requirements of sections 70(2) (c) of the National Credit Act 34 of 2005;

   8.2 The Respondent undertakes to suspend the listings of challenged matters as set out in the proposed amendment of the Code of Practice of the Respondent and that the procedure complies with the provisions of section 72(5) of the Act;

   8.3 Further that the Respondent must within 60 days of this agreement being made an order of the Tribunal, supply the Applicant with a compliance report to address the contraventions;

   8.4 The Applicant agrees that the Respondent will continue in the services and registered activities of a credit bureau, subject to the provisions of this agreement;

   8.5 The Respondent undertakes that, pursuant to this agreement being made an order of the Tribunal, will abide by this said agreement and any breach of same constitutes an offence;

   8.6 The Applicant's rights remain reserved, pursuant to the conclusion of this agreement, at any time in the future, to ensure compliance with the Act; and

   8.7 Further that this agreement resolves the dispute between the parties relating to the complaint as set out in Part 3, paragraph 2(a)(i);(ii);(iii)(iv) and (vi) of the Application. The Tribunal is called upon to determine the Respondent's alleged contravention of Section 70(2)(f) as read with Regulation 17 (paragraph 2(a)(v) of the Application) and if found to be in contravention, the imposition of administrative fine the Tribunal deems appropriate.

9. The Tribunal considered the signed draft deed of settlement dated 24 May 2016 and was satisfied to confirm it as an order of the Tribunal. This judgment records that the draft order is a competent order of this Tribunal as aforesaid.
10. The Tribunal is now called upon to adjudicate a dispute arising from paragraph 8.7 above, in part, namely: *the Respondent's alleged contravention of section 70 (2) (f) read with Regulation 17, of the Act.*
11. The parties handed up heads of argument ("the Heads") in support of their submissions. I shall begin with the Applicant's Heads, as summarised herein below:

SUMMARY OF THE APPLICANT'S SUBMISSIONS

12. The Applicant intends to have the conduct of the Respondent, declared a breach of Section 70(2) (f) and Regulation 17, a contravention of the Act. The Applicant further intends to have the Respondent interdicted from continuing with such conduct;

13. That the Respondent has deviated materially from the provisions of the NCA; the Regulations and the Conditions of Registrations imposed upon the Respondent when it was registered with the Applicant as a credit bureau on 16 October 2013;

14. Specifically, the Applicant argues that the Respondent is in breach of section 70(2)(f) which requires the Respondent to promptly expunge from its records, any prescribed consumer credit information that, in terms of the Regulations, is not permitted to be entered in its records or required to be removed from its records. The Respondent, according to the Applicant's Investigation Report, paragraph 6.2.1.9, page 35 thereof, retains consumers' adverse listings for a period of 10 years;

15. Further that such act or omission contravenes the Act, the Regulations and the Conditions of Registration, and therefore qualifies to be declared prohibited conduct;

16. That the North Gauteng High Court has declared in the judgment of Justice Legodi in June 2011,that the Respondent is in contravention of certain provisions of the Act. In this judgment, the High Court reviewed and set aside the decision of the Tribunal and declared that *the activities carried on by SAFPS are in contravention of section 43 of the National Credit Act 2005;*

17. The Applicant further prays for the imposition of an administrative penalty, in view of the seriousness of the alleged repeated contraventions. In its argument for the imposition of this sanction, the Applicant left the issue to be determined by the Tribunal, with due consideration of the Tribunal's earlier decision in the NCR *versus* Werlan Cash Loans matter;

18. The Applicant referred the Tribunal to cited case law and certain provisions of the constitution, in support of its argument.

THE RESPONDENT'S SUBMISSION

19. The Respondent concedes that the dispute concerns the question whether or not certain information has to be expunged from the records of SAFPS in terms of section 70(2)(f) and Regulation 17(1);

20. The Respondent argues that Regulation 17(1) does not require the expungement of fraud information *eo nomine.* For that reason, the reading (application) and proper interpretation of these two provisions are, according to the Respondent, in dispute. Further that Section 70(2) (f) and Regulation 17 can simply not apply to fraud listings. The Respondent elaborated further as follows:

    20.1 The Applicant's perspective that the Respondent deals with credit consumers who are entitled to protection under the Act; who are innocent of any fraud; and whose identity has been used by a fraudster may be affected adversely by the listing, is misguided. The Respondent avers that all persons, including innocent consumers, to be listed as fraudsters by the SAFPS are notified prior to the listing and have the right to

challenge the listing; and/or raise objection whenever they become aware of the listing. The SAFPS will then suspend the listing, giving the disputant the opportunity of disputing the listing;

20.2 that approximately one percent of persons who are to be listed, respond to the notices of intention to list sent by SAFPS, and query the listings. This is a very minimal percentage, the Respondent argues, to warrant the removal of fraud listings within one year;

20.3 that there is a deep and fundamental difference between credit information and fraud information in that some of the SAFPS members are also credit providers. The Respondent argues that these credit providers, from time to time make adverse listings against consumers with commercial credit bureaus in terms of the NCA , and it is this information listed as such, that must be expunged within the period provided by Regulation 17. When the same entities report fraud to SAFPS, they do so as victims of fraud or attempted fraud. The Respondent argues, different rules must then apply because fraud operates on a completely different level;

20.4 that the SAFPS cannot perform its important function of preventing fraud if it were to be obliged to remove non-challenged listings after arbitrary periods. Such a move, according to the Respondent, shall have the effect of assisting rather than preventing crime. In our view, this is problematic for two reasons: (a) some consumers may not have received the notification, (b) others may not have the means to dispute such listing. In both these respects, they may be adversely affected and/or prejudiced.

ISSUES TO BE DECIDED

21. The following must be decided by the Tribunal:

21.1 The Tribunal must consider whether the Respondent is in contravention of the Act and the Regulations, by retaining consumers' record for a period of ten years;

21.2 The Tribunal must also consider whether the conduct of the Respondent constitutes prohibited conduct and;

21.3 The Tribunal must further consider whether the contraventions of the Act warrant the relief sought by the Applicant.

CONSIDERATION OF FACTS AND THE APPLICABLE LAW

22. The Tribunal lauds the parties for having entered into a settlement agreement which is now an order of this Tribunal, albeit in part. The balance of the prayers sought by the Applicant, namely, the alleged contravention of section 70 (2) (f) read with Regulation 17 (1), puts us at this juncture.

Section 70(2)(f) deals with Credit Bureau information, and provides that a registered Credit Bureau must:

"Promptly expunge from its records any prescribed Consumer Credit information that, in terms of the regulations, is not permitted to be entered into its records or is required to be removed from its records."
(underlining, my own emphasis)

23. Section 43 (2) provides that:

> *"A person must not offer or conduct business as a credit bureau or hold themselves out to the public as being authorised to offer any service customarily offered by a credit bureau, unless that person is registered as a credit bureau in terms of this chapter".*

This section was the critical subject of a judgment handed down by Justice Legodi in the review application lodged with the High Court by the Applicant in 2011. This matter was finally decided on its own merits by a competent court having jurisdiction, and this reminds me of our fundamental common law doctrine of *res iudicata- "a matter [already] judged", meaning, there is already a final judgment on this matter, and is no longer subject to appeal.* The Respondent, according to the said judgment, is a credit bureau and should conduct its business according to the rules governing such entities.

24. In its founding affidavit, the Applicant, in pages 14;15;and 16 states that:

> *"A listing related to fraud or suspected fraud contains consumer credit information as defined in section 70(1) of the Act and also constitutes a subjective classification of the behaviour of the consumer which is adverse in terms of Regulation 17(3) of the National Credit Regulations, 2006. A classification of the consumer's behaviour is not limited to the behaviour of the consumer relating to payment under a credit agreement, but also includes the behaviour of the consumer intended to defraud a credit provider under a prospective credit application. The definition of the adverse classification of consumer credit behaviour in Regulation 17(3) is thus not exhaustive and limited to the classes of behaviour set out therein.*
>
> *Accordingly, the Respondent can only retain a consumer's fraud listing on its records for a period of one year as an adverse classification of consumer behaviour.*
>
> *Alternatively, the Respondent can only retain consumer's fraud listings on its records for a period of two years under Regulation 17(1) under the category "other information"*
>
> *According to Ms McLachlan, since June 2012, the Respondent selected to retain consumers' adverse listings for a period of ten (10) years. This retention period is not provided for in Regulation 17(1) and is therefore unlawful.*
>
> *It is thus the Applicant's submission that the Respondent has contravened section 70(2) (f) with Regulation 17(1) of the Act."*

25. The Respondent argues that the information held by SAFPS should be treated differently from consumer credit information that must be expunged from the records. The Respondent's view is that the "exception to the rule principle" must apply when it comes to the delisting of fraud information. The Applicant, in the preceding paragraph states that the Respondent has the option under information categorised as *"other information"* to keep in its records fraud listings for a period two years in terms of Regulation 17(1). The Respondent still objects to such legal requirement and insists fraud information may not be removed at all.

26. In its heads, the Respondent submits that the essential dispute [*of whether or not the information it keeps in its records is of such a nature of credit information*] between the parties concerns the correct classification of the

information held by SAFPS. I disagree. The fundamental issue is: *whether or not information kept by a credit bureau should be expunged within a period required by the law governing entities registered as credit bureaux?* The second question is: *what kind of information categorised as, should be expunged?* We will deal with answers to these questions later in this judgment. I do not intend to deal with other aspects of the Respondent's averments to the extent that they refer to the issue of registration as a credit bureau in terms of section 43, or the Respondent's alleged discussions with Mr Augustyn, a former employee of the Applicant, as these issues remain unsubstantiated and are now history. The Respondent chose to not challenge the high court decision.

27. The Tribunal adjudicates matters within the purview of the law that establishes it. Unlike the High Court, the Tribunal does not possess inherent powers to determine issues falling outside of the parameters of the Act establishing it. If it does, it will be acting *ultra vires*.

CONSIDERATION OF THE APPLICABLE LAW AND THE TRIBUNAL'S FINDINGS

Registration as a Credit Bureau

28. At the outset, Section 43 of the Act is the starting point in this part of the judgment and provides as follows:

" a person must apply to be registered as a credit bureau if that person engages for payment, other than as a credit provider, or an employee of a credit provider, in the business of—

(a) Receiving reports of, or investigating—
  (i) credit applications;
  (ii) credit agreements
  (iii) payment history or patterns; or
  (iv) consumer credit information as defined in section 70(1),

relating to consumers or prospective consumers, other than reports of court orders or reasons for judgment or similar information that is in the public domain;

(b) compiling and maintaining data from reports contemplated in subparagraph(1); and

(c) issuing reports concerning consumers or other natural persons based on information or data referred to in this paragraph.

29. The High Court has pronounced on this matter. The SAFPS is a credit bureau (*a registrant in terms of the NCA*) and must comply with the conditions of registration and the provisions of this Act,[1]

30. **Section 50 : Authority and standard conditions of registration**

Section 50(2)(b)(i) of the Act provides that:

> *"It is a condition of every registration issued in terms of this Act that the registrant must...comply with every applicable provision of this Act..."*

[1] section 52 (5) (c)

31. It follows therefore that the SAFPS has an obligation, without exception, to adhere to the rules and regulations governing the game: the credit bureau business, as the law stands now.

Returning to the question raised in paragraph 24 above, of *whether or not information kept by a credit bureau should be expunged within a period required by the law governing entities registered as credit bureaux?* The answer to this question is in the affirmative. The Respondent's assertion that such records must not be expunged is incompatible with the general principles of what the law wants to regulate, namely: *"the Respondent can only retain a consumer's fraud listing on its records for a period of one year as an adverse classification of consumer behaviour.*

Alternatively, the Respondent can only retain consumer's fraud listings on its records for a period of two years under Regulation 17(1) under the category "other information"[2]

32. The rest of the argument advanced by the Respondent regarding the subjective and objective classifications of consumer behaviour is welcome. However; it has no persuasive value to change the current legal position. The issue of who a fraudster is, is a difficult one, in that it could be an innocent consumer whose identity document has been stolen and is used to perpetrate fraud in that unsuspecting consumer's name. The problem is, the listing should not have happened in the first place, but for the stolen identity.

APPLICABLE REGULATIONS OF THE NCA

33. The provisions of regulation 17 titled: "Retention periods for credit bureau information" have been cited. The Applicant relies on category 5 and alternatively category 12 of the table referred to in the Regulations. The Respondent's assertion in paragraph 33 of its heads that the Applicant punts for category 12 which is non-existent; and that such reference is misguided, is a valid point. These regulations describe the information as *"other information"* being "*any other information not included in any category above*", the maximum period of which could be retained for a period of "*2 years*"[3].

GENERAL CONDITIONS OF REGISTRATION

General Conditions: Part A, Clause 1

34. The Respondent was registered as a credit bureau after the High court ruled in 2011 that the SAFPS conducts a business of a credit bureau. The Applicant imposed certain conditions for registration dated 26 March 2013. Principal to the rest of the conditions is the following clause:

> *"The registrant must comply with all applicable legislation relating to the operation of the business of a credit bureau, including but not limited to the Act,*

[2] see Applicant's founding affidavit, in pages 14;15;and 16

[3] Page 23 of Regulation Gazette No. 10382 Vol. 597 of Government Gazette No 38557 dated 13 March 2015- National Credit Regulations, Chapter 4 thereof, titled: Credit Information, Amendment of Regulation 17 of the Regulations: Retention periods for credit bureau information. (The amended Regulation 17 does not include category 12 as the Applicant claims. It appears the Applicant relied on the old version of 2006, GN R202 under the title: "verification, review and removal of Consumer Credit Information Regulations and amendments to the National Credit Regulations)

the regulations and any subsequent amendment or substitution of the applicable legislation and regulations" (underlining, own emphasis)

35. The meaning of *"must"* can perhaps be described in a Latin phrase: *res ipsa loquitur*- "the thing speaks for itself", and makes the provision peremptory. The word "must" connotes an *obligation* (have to) to do something, expressing "*necessity*". There is no discretion to do something. It imposes an obligation or a *requirement* to do it[4]. The Tribunal is satisfied that the requirements, both in the conditions of registration of the registrant (the Respondent in this matter) and the legal requirements spelt out in the Act are clear and applicable to the entity the Respondent is described as.

36. It is clear from the evidence put forward by the Applicant that the Respondent failed to comply with the obligation of *expunging the records within a prescribed period*, as a legal requirement. The Tribunal has no powers to deviate from this finding. The Respondent has attempted to influence the amendment of the legal requirement, without any success, perhaps the only appropriate route to be taken. In the absence of any change in law to accommodate the Respondent, the current requirement remains.

37. The Tribunal considered the element of prohibited conduct on the part of the Respondent. The Act defines prohibited conduct as *"an act or omission in contravention of this Act, other than an act or omission that constitutes an offence under this Act"*. The Applicant made submissions that the Respondent retained consumer records classified as fraud information for a period of ten years, the act of which is unlawful and prohibited by the Act.

38. Based on the evidence before the Tribunal, the Tribunal concludes that the Respondent has contravened the Act as well as the Regulations. In such instances where a determination has been made by the Tribunal on prohibited conduct, section 150 kicks in. The Tribunal has already exercised its powers in terms of section 150 (d), by confirming a settlement agreement in respect of certain parts of the contraventions levelled against the Respondent.

CONSIDERATION OF THE ADMINISTRATIVE FINE

39. The Applicant made submissions to the Tribunal, arguing for the imposition of an administrative fine of R1 000 000,00 (One million rand) in terms of Section 151 of the Act.
The Tribunal's power to impose an administrative fine is derived from section 151 of the Act.

40. Section 151(1) of the Act provides as follows –

> The Tribunal may impose an administrative fine in respect of prohibited or required conduct in terms of this Act or the Consumer Protection Act, 2008."

[4] Oxford Dictionaries

41. Section 151(2) of the Act provides as follows –

"An administrative fine imposed in terms of the Act may not exceed the greater of-

(a) 10 per cent of the respondent's annual turnover during the preceding financial year; or

(b) R1 000 000".

42. Section 151 of the Act does not provide guidance on where the Tribunal should start in making a determination of the amount nor on the weight to ascribe to each of the factors listed. It does however clearly mandate the Tribunal to consider the factors as laid down in the Act and to set an upper cap on the administrative fine that may not be exceeded. When determining an amount, the Tribunal must consider the legislation from which it derives its own mandate and consider the factors in Section 151(3) of the Act which provides as follows:

"(a) The nature, duration, gravity and extent of the contravention;

(b) Any loss or damage suffered as a result of the contravention

(c) The behaviour of the respondent;

(d) The market circumstances in which the contravention took place;

(e) The level of profit derived from a contravention

(f) The degree to which the respondent has co-operated with the National Credit Regulator, or the National Consumer Commission, in the case of a matter arising in terms of the Consumer Protection Act, 2008 and the Tribunal; and

(g) Whether the respondent has previously been found in contravention of the Act, or the Consumer Protection Act 2008, as the case may be.

43. In the Werlan-case NCT/3867/2012/57(1) the Tribunal stated that the Tribunal must consider fairness towards both the Applicant and the Respondent when considering what would be a just administrative penalty to impose. The Tribunal will also consider any mitigating factors that can be taken into account in arriving at the final amount of the penalty as well as the evidence before it, of the Respondent's annual turnover. This would be the Tribunal's point of departure and then to apply the factors in section 151(3) of the Act to same.

44. We now turn to the question, whether or not the Tribunal may impose an administrative penalty in this particular matter and in so doing, also to consider section 2 of the Act which requires the Tribunal to interpret the Act in a manner that "gives effect to the purposes set out in section 3." Section 3 of the Act seeks to promote and advance the social and economic welfare of South Africans, to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market.

45. In summary, and without attempting to burden this point, no evidence was placed before the Tribunal on the extent, quantifiable loss or damage suffered by the consumers as a result of the contraventions of the Respondent, save for the Applicant to say that consumers are prejudiced because of the keeping of information for a period of ten years. The Applicant failed to provide a convincing argument in order to assist the Tribunal to find in its favour. In all respects, the Respondent attempted to resolve the dispute. Other than the Respondent being found by this Tribunal to be in contravention of the provisions of the Act and the Respondent's Specific

Conditions of Registration, there is no further evidence of any additional contraventions placed before the Tribunal. The settlement agreement by itself mitigates the seriousness of the contraventions.

46. It also appears common cause between the parties that the Respondent is not in business in the same way that a credit provider would be, for instance. It is said to be an association that is formed by its members and is a non-profit entity as its name also attests. This further diminishes the likelihood of the basis of an administrative penalty being concluded.

CONCLUSION

47. In the light of the above factors, it is the view of the Tribunal that the conduct of the Respondent and the impact of its contravention of the Act on consumers, operated in mitigation of the Respondent's conduct, in determining the imposition of the administrative penalty. There is no doubt that the imposition of an administrative penalty will be inappropriate and unfair in the circumstances having regard to the factors at hand. However, it is also appropriate that the Tribunal applies a rational approach when considering the imposition of the administrative penalty, linking such thinking to all the arguments presented to the Tribunal. The Tribunal is concerned about the Respondent (SAFPS) giving a consumer (a supposedly innocent consumer) a tag of a fraudster in the absence of a criminal prosecution process. Fraud information is the subset of credit information and equally impacts the credit provider's decision whether or not to grant credit to the affected consumer. This falls under Regulation 17, category 5.[5]

ORDER

48. In the result, the Tribunal makes the following order:

48.1 In terms of section 150(a) (b) of the Act, the Respondent's contravention of the Act and the Regulations is declared to be prohibited conduct in terms of the Act;

48.2 The Respondent is found to be in breach of the conditions of its registration

48.3 The Respondent is declared to be in contravention of sections 70 (2) (f) read with Regulation 17(1) of the Act

48.4 The Respondent is required by law and directed by this Tribunal to expunge from its records any prescribed Consumer Credit information that, in terms of the regulations, is not permitted to be entered into its records or is required to be removed from its records.

48.5 The Respondent is further directed to cease from carrying this conduct of retaining consumer credit information in its records, for a period in excess of the one prescribed by the Act

48.6 The Applicant's prayer for the imposition of an administrative penalty fails.

48.7 There is no order as to costs.

[5] See Chapter 3: Consumer Credit Policy (Regs 17-27): Retention periods for credit bureau information, page 240 -241 thereof

DATED THIS 29th DAY OF JULY 2016

ADV F MANAMELA

PRESIDING MEMBER

Ms P BECK (Member) and PROF J MASEKO (Member) concurring.

Authorised for issue by National Consumer Tribunal

Case Number: NC/123181/2016/14016

Date: 5/9/2016

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