IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

DATE 21/11/16
SIGNATURE

22/11/16.

Case No: 16746/2016

In the matter between:

MICRO FINANCE SOUTH AFRICA Applicant

and

THE MINISTER OF TRADE AND INDUSTRY First Respondent

THE NATIONAL CREDIT REGULATOR Second Respondent

JUDGMENT

J W LOUW, J

[1] The applicant is a registered non-profit company which represents approximately 500 individuals or corporate entities who are providers of short term credit and who are colloquially referred to as 'micro lenders'. They operate approximately 1190 branches throughout the country. The applicant alleges that it represents about 30% of the micro lending industry in the country. In terms of regulation 39(2)(a) of the regulations published in terms of the National Credit Act 34 of 2005 (the NCA) on 31 May 2006 (the previous regulations), a short term credit transaction is a transaction in respect of a loan not exceeding R8 000.00 which is repayable within a period not exceeding six months.

[2] Section 171(1) of the NCA empowers the Minister of Trade and Industry (the first respondent) to make regulations expressly authorised or contemplated elsewhere in the Act in accordance with ss (2). Sub-section (2) provides that before making such regulations, the Minister must publish the regulations for public comment and may consult the second respondent, the National Credit Regulator (the regulator).

[3] Section 101 of Part C of Chapter 5 of the NCA permits, subject to limitations, the charging of interest, an initiation fee and a service fee in a credit agreement. In terms of s 105(1), the Minister-

after consulting the regulator, may prescribe a method for calculating-

(a) a maximum rate of interest; and

(b) the maximum fees contemplated in Part C applicable to each subsector of the consumer credit market, as determined by the Minister.

Short term credit is one such subsector.

[4] Regulation 42 of Part C of Chapter 5 of the previous regulations prescribed the maximum interest rate, maximum initiation fee and maximum service fee for short term credit transactions. In terms of regulation 45(1), the regulator must perform a review of interest rates and cost factors at intervals of no more than 3 years and advise the Minister of any changes that may be required. It is common cause that this was not done. The regulator's failure to comply with regulation 45(1) led to litigation in terms whereof the regulator and the Minister were ordered to comply with their obligations within a stipulated period of time. They failed to comply with that court order and a further court order, both of which led to contempt applications.

[5] The Minister thereafter, on 26 June 2015, published new draft regulations for public comment. On 6 November 2015, the regulations were promulgated by the Minister to take effect on 6 May 2016. On 1 March 2016, the applicant launched the present application against the

Minister and the regulator. It was contended by Mr Carstensen who appeared on behalf of the regulator that the applicant should be non-suited because it unreasonably delayed the bringing of the application. I disagree. The draft regulations were published on 25 June 2015, but the final regulations were only published on 6 November 2015. The application, which is substantial, was brought within less than 120 days thereafter. Part A of the notice of motion was an urgent application in which the applicant sought to stay the implementation of the regulations pending the review of the regulations which was sought in part B of the notice of motion. The urgent application was heard by Meyer J on 3 May 2016 and was dismissed. In part B of the notice of motion, which is the application now before court, the applicant originally sought an order reviewing and setting aside all of the regulations. It has since decided to limit the relief sought to an order reviewing and setting aside the regulations insofar as they relate to short term credit. The review record was only filed by the respondents on 8 June 2016, whereafter the applicant filed a supplementary founding affidavit. The respondents filed supplementary answering affidavits to which the applicant filed a reply.

[6] Section 105(2) of the NCA provides as follows:

(2) When prescribing a matter contemplated in subsection (1), the Minister must consider, among other things-

(a) the need to make credit available to persons contemplated in section 13 *(a)*[1];

(b) conditions prevailing in the credit market, including the cost of credit and the optimal functioning of the consumer credit market; and

(c) the social impact on low income consumers.

[7] Regulation 45(2) of the previous regulations provided that the regulator must, when making a recommendation to the Minister, consider

(a) ruling interest rates and fees;

(b) cost of providing such credit;

(c) the choice available to consumers in the particular category of credit agreements, between different products and different credit providers; and

(d) the impact upon access to finance for persons referred to in section 13*(a)* of the Act.

[8] The applicant contends that the above mandatory requirements were not complied with by the Minister and the regulator, and that the Minister's decision to publish the new regulations is accordingly reviewable in terms of sections 6(2)(e)(iii) and/or 6(2)(e)(vi) and/or 6(2)(h) of PAJA. In terms of s 6(2)(e)(iii), an administrative decision is reviewable if irrelevant considerations were taken into account or relevant considerations were not taken into account. In terms of s 6(2)(e)(vi), it is

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[1] In terms of s 13(a) the National Credit Regulator is responsible to-

(a) promote and support the development, where the need exists, of a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry to serve the needs of-

(i) historically disadvantaged persons;

(ii) low income persons and communities; and

(iii) remote, isolated or low density populations and communities,

in a manner consistent with the purposes of the NCA.

reviewable if it was taken arbitrarily or capriciously. In terms of s 6(2)(h), it is reviewable if the exercise of the power or the performance of the function authorised by the empowering provision is so unreasonable that no reasonable person could have so exercised the power or performed the function.

[9] The maximum interest rate prescribed in terms of regulation 42 was 5% per month for short term credit transactions, the maximum initiation fee was R150 per credit agreement plus 10% of the amount of the agreement in excess of R1 000, but never to exceed R1 000, and the maximum monthly service fee was R50. In terms of the new regulations, the maximum prescribed interest rate is 5% per month on the first loan and 3% per month on subsequent loans within a calendar year. The maximum initiation fee is R165 per credit agreement plus 10% of the amount in excess of R1 000, but never to exceed R1 050. The maximum monthly service fee is R60.

[10] In the founding affidavit in the urgent application it is stated that prior to the promulgation of the new regulations, a period of no less than nine years had passed without them being renewed. This, the applicant states, gave rise to an untenable situation. As a result of inflation and certain other additional expenses (such as payment streams), the members of the applicant found it increasingly difficult to conduct

business. When the new regulations were finally promulgated the entire industry was of the hope that the new regulations would remedy the situation and provide a new lease of life in the micro finance industry. However, upon closer scrutiny it became apparent that in issuing the new regulations the respondents had failed to take into account the effect that the new fees and interest rates would have on the providers of micro loans; failed to conduct proper market research in order to determine if the new fees and interest rates would be beneficial to the market as a whole; and failed to consider the views of the members of the applicant or any of the micro financiers in the industry. The net effect of the new regulations, the applicant states, is effectively to bring the entire micro loan industry to its knees and make it impossible to conduct business, let alone a profitable business.

[11] The applicant further states that the new regulations do not only affect its members personally, but that there will be an enormous knock on effect on the South African public as a whole. Some 5 to 6 million people make use of micro financiers for funding. It is a niche market which is not served by the traditional banks. By taking a substantial portion of the members of the applicant out of the market, those members of the public that require credit will not be able to obtain credit from legitimate sources and an enormous increase of unregistered credit providers is a real possibility.

[12] Having regard to the above and to the opinions of three experts which the applicant has presented, the applicant contends that the respondents have failed to promote equity in the credit market as required by s 3(d) of the NCA by balancing the respective rights and responsibilities of credit providers and consumers. The applicant states that no account has been taken of the rights, interests and obligations of its members and that, ironically, the individuals who will be most affected are the members of the general public who will be forced to obtain finance from unregulated and unregistered sources, thereby increasing the prospects of them being exploited.

[13] The applicant points out in its supplementary founding affidavit that there is nothing contained in the record which was furnished by the Minister which indicates that any member of the applicant or any of their customers was approached in the assessment which was done and that it was obvious that the entire short term credit industry was, to all intents and purposes, ignored. More particularly, the applicant states, the respondents did not take into account the typical short term credit provider or the individuals which they serve.

[14] Although these allegations are denied by the Minister in his supplementary answering affidavit, he has not provided any evidence to

the contrary. The regulator states in his supplementary answering affidavit that in making the recommendation to the Minister, the balance between the rights of the consumer and the credit providers was considered. He does, however, not give any information of how this was done.

[15] The regulator denies that the interests of the short term credit industry were ignored, and relies in this regard on a report by PricewaterhouseCoopers (PWC) who the regulator commissioned in February 2015 to carry out an assessment of the impact of changing the current maximum interest rates, initiation fees and service fees. There are, however, a number of difficulties arising from the PWC report. The first is that the report itself states that the results for short term credit transactions are based on insufficient responses and can therefore not be relied upon. The applicant further points out that PWC was not instructed to do an analysis of the interest rate as recommended by the regulator and ultimately promulgated. It was only instructed to assess scenarios for interest rates of 5%, 7% and 10%. The regulator admits this, but says that the impact of the proposed interest rate changes had already been researched prior to the appointment of PWC. In support of this statement, the regulator attaches a letter which was addressed to Capitec Bank on 14 August 2014 which it says is an example of numerous letters which were dispatched *inter alia* to Bayport Financial Services (which it

says is a significant player in the short term credit industry) and other banking institutions such as ABSA. It is further stated that engagements with approximately 19 credit providers were undertaken. The regulator goes on to say that the applicant and its members are a small part of the credit industry as a whole, and is not a key player in the short term credit industry. The letter to Capitec Bank states the following:

"1. *In terms of Regulation 45 of the National Credit Regulations, 2006, the National Credit Regulator (NCR) must perform a review of interest rates and cost factors at intervals of not more than three (3) years and advise the Minister of Trade and Industry of any changes that may be required. When making the recommendation to the Minister, the NCR must consider the ruling interest rates and fees, the cost of providing credit, the choice available to consumers in the particular category of credit agreements between different products and different credit providers and the impact upon access to finance for persons referred to in section 13(a) of the National Credit Act.*

2. *The NCR has commenced with work for this review with conceptual scenarios which will ultimately inform the rationale for the regulations to be issued by the dti. The NCR envisages that these regulations will be implemented after extensive consultations with industry stakeholders and testing by selected credit providers to determine their impact on the credit market.*

3. *The NCR hereby invites Capitec Bank to participate in the testing of the different scenarios in relation to this work. Further details will be provided to Capitec Bank once the response to the invitation has been received."*

[16] The regulator does not say whether Capitec or any of the other banking institutions responded to the invitation. It does not give any further information about the research which it says it conducted. The deponent to the applicant's supplementary founding affidavit states that only one short term credit provider provided PWC with any evidence, namely First Rand Bank. This is not denied by the regulator.

[17] In regard to the PWC report, the regulator states that the report must be seen as an impact assessment report and not as an original piece of research to enable it to discharge its statutory duties. The regulator states that the report was considered by it and that its contents were found to be at odds with the envisaged course of action to be recommended to the Minister, a significant portion of which was, *inter alia*, based on consumer interests. As is pointed out by the applicant, there is, however, no evidence or documentation which could justify why the regulator departed from the PWC recommendations. PWC observed in their report that actual costs over a period have increased on an annual basis and that these increases had not been met by corresponding raises

in the maximum fees chargeable. The direct result of this was a gradually widening gap between actual costs on loans disbursed and maximum fees chargeable. In view of the fact that the fees had not been reviewed for such a long period of time, PWC recommended a two-fold solution for the situation. First, that there should be a rebase of the maximum fees chargeable and, second, to prevent the rebased fees from falling behind actual cost increases, that an annual CPI adjustment be applied.

[18] Mr Michau, who appeared for the applicant, *inter alia* referred to the following passages in the judgment of the Constitutional Court in *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others*:[2]

[391] The Pricing Committee seems to have calculated the dispensing fee without any evidence of the breakdown of the income and expenditure of the dispensaries, information they considered to be important for the proper determination of the dispensing fee. They assumed that dispensing subsidises the operations of the front shops of community pharmacies. They have not, however, provided any evidence to support this assertion, which is denied by the Pharmacies. As Dr Stillman points out, it is unlikely that front shops would be operated if they were indeed loss-making ventures. The Pricing Committee does not say what weight was attached to this assumption in the calculation of the dispensing fee.

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[2] 2006 (2) SA 311 (CC). Footnotes have been omitted.

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[393] The Minister and the Pricing Committee do not deal with the impact of the dispensing fee on rural pharmacies. Professor McIntyre says that the Pricing Committee considered the predicament of rural pharmacies which are 'economically disadvantaged, primarily because of a comparatively low turnover and also unfavourable payment conditions from wholesalers'. They concluded, however, that this is the result of 'distortions in the health sector' and that 'an appropriate dispensing fee should be as neutral as possible in respect of such distortions'. No mention is made of what those distortions (if any) are, other than low turnover and adverse payment conditions. Moreover, they do not suggest how these distortions could be overcome, what the impact of the dispensing fee will be on the economically disadvantaged rural pharmacies, and how that will affect access to medicines in rural areas.

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[403] The Pricing Committee has provided no models or other evidence to demonstrate how the dispensing fee was calculated or how the members of the Pricing Committee satisfied themselves that it was appropriate. It has not told us what assumptions it made about the probable SEPs in calculating the dispensing fee, or how it assessed the dispensing fee when it seems to have had no data dealing with dispensary revenue and expenses which it considered to be essential for that purpose. It has not addressed in any meaningful way the contention that the dispensing fee will lead to pharmacy closures that will impair accessibility to health care, particularly in rural areas. The assertions

made by Professor McIntyre and Dr Zokufa about additional revenue sources and the subsidisation of the front shop by the back shop are, at best, flimsy. The failure to make provision for compounding in the dispensing fee is a material misdirection.

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[510] What lies at the heart of the challenge to the dispensing fees is the contention that the dispensing fees as determined in the regulations are not viable for pharmacies and will drive them out of business. In effect the pharmacies contend that, in determining the dispensing fees, the Pricing Committee did not have due regard to the viability of the dispensing fees for pharmacies, as they were bound to do. This contention was upheld by the SCA, which in effect concluded that the fees were not viable for pharmacies. Failure by a decision-maker to take into account a relevant consideration in the making of an administrative decision is an instance of an abuse of discretion. As pointed out earlier, this is a ground of review which is expressed in s 6(2)(e)(iii) of PAJA.

[511] There is obviously an overlap between the ground of review based on failure to take into consideration a relevant factor and one based on the unreasonableness of the decision. A consideration of the factors that a decision-maker is bound to take into account is essential to a reasonable decision. If a decisionmaker fails to take into account a factor that he or she is bound to take into consideration, the resulting decision can hardly be said to be that of a reasonable decisionmaker. It seems to me to follow that if, in determining the dispensing fees, the Pricing Committee was bound to take into consideration the

viability of the fees for pharmacies, but failed to do so properly, the resulting fees can hardly be said to be one that a reasonable Pricing Committee could fix.

[512] As I see it, therefore, the central question in this case reduces to whether the Pricing Committee gave proper consideration to the viability of pharmacies in fixing the dispensing fees. This question raises two separate, but related, questions. The first is whether the Pricing Committee was bound, in fixing an appropriate dispensing fee pursuant to s 22G(2)(b), to have regard to the viability of pharmacies, so that failure to do so amounted to failure to take into account a consideration relevant to the determination of an appropriate fee. The second question, which only arises if the first question is answered in the affirmative, is whether the Pricing Committee gave due regard to the viability of pharmacies.

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[518] As the SCA held, an appropriate dispensing fee must be fair and just. Indeed it can hardly be argued that a dispensing fee that is unjust or unfair is appropriate. The dispensing fee must be fair not only to the public, but also to pharmacies. The fee must not be such that it will render medicines inaccessible to the general public. Nor must it be such that it drives pharmacies out of business. Its determination requires a consideration of conflicting interests of the public, who are entitled to access to affordable medicines, on the one hand, and the interests of dispensers who, in terms of the Act, are essential to the public for the supply of medicines and whose economic viability is implicitly recognised by the Act and is of 'national importance', on the other hand.

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[526] Once it is accepted, as it must be, that pharmacists are crucial to the objectives of the Medicines Act, it must also be accepted that there is a need for them to survive. But those who are involved in the pharmaceutical industry do so for profit. An appropriate dispensing fee must be rationally related to the cost of doing business. It must be such that it makes it worthwhile for pharmacies to remain in business. And the economic viability of pharmacies is implicitly recognised by the Medicines Act. As the Australian Federal Court observed in the context of price fixing for pharmaceuticals in that country.

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[531] The Pricing Committee and the Minister must therefore do more than pay lip service to the viability of pharmacies. They must address the need for pharmacies to exist in a meaningful way when fixing the appropriate fee, and be able to demonstrate that they have done so. This could be done by explaining the manner in which the viability of pharmacies was given effect. They must give an explanation of how the appropriate fee was calculated. This explanation is crucial to the process of determining an appropriate fee. It explains to the public and the pharmaceutical industry the manner in which the fee was arrived at. It discloses the reasoning process of the Pricing Committee. And it enables those who have an interest in the fee to assess whether the Pricing Committee has

properly discharged its statutory duty. This explanation should generally be contained in the report of the Pricing Committee making a recommendation to the Minister.

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[535] What is singularly lacking in the record is an explanation of how the dispensing fees were arrived at. There is no explanation as to why the Pricing Committee chose the figures that it chose. While the Pricing Committee indicated that the fee covers both the professional remuneration and operating costs, it does not explain what was allocated to each of these component parts of the fee. As the SCA observed,

'except for a general statement that all factors were taken into account, there is no evidence or document that shows what those factors were, what weight they bore, whether any calculations were made and, more particularly, whether any regard was given to the viability of the dispensing profession'.

It was this lack of explanation for quantum of the dispensing fees that led the SCA to conclude that there was no rational explanation for the quantum of fees and that therefore the fees were not appropriate. [3]

[19] The requirements which the decision maker in *New Clicks* was found to have to comply with, apply *mutatis mutandis* to the regulator and the Minister in the present matter. Had the recommendations of PWC been followed, the maximum service fee would have been R80.54. Without

[3] My emphasis in all of the quoted passages.

any explanation, the regulator simply suggested an amount of R65.00 to the Minister. The Minister, also without any explanation, reduced the amount to R60.00. Furthermore, the Minister of his own accord and without being advised by the regulator to do so and without any explanation, added a rider that the fee should be calculated *pro rata* the number of days if a credit agreement was concluded during the course of a calendar month. No reason or explanation is given for the reduction of the interest rate from 5% to 3% per month for further loans after the first during a calendar. All that is referred to is a policy to reduce the over-indebtedness of consumers. There is, however, no evidence that the existing initiation fee, service fee and interest rate were the cause of such over-indebtedness.

[20] I have referred above to the requirements of s 105(2) and regulation 45(2) with which the Minister and the regulator have to comply. These include the need to make credit available to historically disadvantaged persons and low income persons and communities, the impact of access to finance for such persons, and the conditions prevailing in the credit market, including the cost of providing credit. Apart from the regulator stating in general terms that research was done, no evidence has been provided of how these matters were investigated or considered. The Minister and the regulator have not addressed in any meaningful way the applicant's contention that the amended fees and interest rates will lead to closures of the businesses of many of the applicant's members and will

impair access to credit by those members of the population who require short term credit provided by the applicant's members.

[21] In view of the aforegoing, I agree with Mr Michau's submission that the Minister's decision to promulgate the regulations insofar as they relate to short term credit is reviewable in terms of either s 6(2)(e)(iii), s 6(2)(e)(vi) or s 6(2)(h) of PAJA.

[22] I therefore make the following order:

[a] The first respondent's decision to promulgate the regulations published in Government Gazette 39379, Vol. 605 of 6 November 2015, is reviewed and set aside insofar as it relates to short term credit.

[b] The first and second respondents are ordered to pay the applicant's costs jointly and severally, such costs to include the costs of senior counsel.

Counsel for applicant: Adv. R Michau SC

Instructed by: Lewies Attorneys, Pretoria

Counsel for first respondent: Adv. T V Norman SC; Adv. P Jara

Instructed by: State Attorney, Pretoria

Counsel for second respondent: P L Carstensen SC

Instructed by Edward Nathan Sonnenbergs, Sandton