IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

Case N2: 22556/2017

20/11/2019

In the matter between:

INFORMATION TECHNOLOGY CONSULTANTS (PTY) LTD t/a INTECON	**First Applicant**
RENE JULIA PIETERSEN N.O. in her capacity as Trustee of STELLAND FINANSIES TRUST IT NO: 3509/06 t/a STELLAND FINANSIES	**Second Applicant**
JACOBUS ODENDAAL PIETERSEN N.O. in his capacity as Trustee of STELLAND FINANSIES TRUST IT NO: 3509/06 t/a STELLAND FINANSIES	**Third Applicant**
JAN PRINS ID NO: [….]	**Fourth Applicant**

and

THE NATIONAL CREDIT REGULATOR	**First Respondent**
THE MINISTER OF TRADE AND INDUSTRY	**Second Respondent**
THE SOUTH AFRICAN RESERVE BANK	**Third Respondent**
THE PAYMENTS ASSOCIATION OF SOUTH AFRICA	**Fourth Respondent**
MERCANTILE BANK	**Fifth Respondent**

JUDGMENT

KOOVERJIE AJ;

A NATURE OF THE PROCEEDINGS

[1] This application emanated after a complaint was lodged with the National Credit Regulator ("NCR'), against Stelland Finansies Trust *("Stelland').* Stelland was charged with contravening various provisions of the National Credit Act, No. 34 of 2005 *("NCA")* and the applicable regulations.

[2] However it was the first applicant ("*lntecon")* who instituted these proceedings. The trustees of Stelland have been cited as the second and third respondents herein. Stelland supports lntecan in these proceedings. Fer the purposes of this judgment the first applicant would be referred to as the *"applicant"* and the first respondent as the "*respondent".*

[3] The NCR conducted an investigation upon receipt of the said complaint in respect of business practices of the applicant and other entities :n the Western Cape area - in particular to ascertain if the credit was being extended in the manner that was compliant with the National Credit Act, No 34 of 2005 ("NGA").

[4] The investigation findings revealed that Stelland contravened various provisions of the NCA. It was alleged that Stelland had *inter alia* breached Section 91 of the NCA in that it directly or indirectly required or induced consumers to enter into supplementary agreements {by virtue of promissory notes issued by the applicant), which contained provisions that would be unlawful if they were to be included in the credit agreement.

[5] Information Technology Consultants (Pty) ltd t/a lntecon *("lntecon")* is cited as the first applicant in this matter. lntecon offers a service, in this instance, where it facilitated the credit agreement payments due to Stelland from the consumers and in so doing, it charged certain fees. The first respondent, the National Credit Regulator opposed this application. lntecon submitted that this

application requires an interpretation of Section 91(2) and Section 100(1) of the NCA and its interplay with the National Payment System) *("NPS')* and the Bills of Exchange Act 34 of 1964 *("BOEA").*

[6] It was upon this basis that the applicant approached this court seeking a declarator on the following basis:

> ***"1. An instruction by the Payer to utilize, the mandating and authorisation of, and the use of financial Instruments as provided for In the NBS to settle debts, where the underlying agreement is a credit agreement, does not constitute a supplementary agreement as envisaged in Section 91 of the NCA."***
>
> ***2. That the promissory note issued by the Fourth Applicant and processed by the First Applicant's system In the NPS, is a financial instrument as envisaged In terms of the Bills of Exchange Act.***
>
> ***3. That the agreements entered Into between the First Applicant and the Fourth Applicant does not fall within the ambit of the regulatory provisions of the NCA.***
>
> ***4. That the charges levied by the First Applicant and the Fifth Respondent to the Fourth Applicant In respect of Issuing, clearing and settlement of financial Instrument in the NPS are not in contravention of section 100(1) of the NCA.***
>
> ***5. That the First and the Second Respondents do not have the authority in terms of the NCA to Interfere in a contractual relationship between the First and Fourth Applicants, or to prevent the First Applicant from entering into agreements with the Fourth Applicant.***
>
> **6. *That the proceedings In the National Consumer Tribunal under case no: NCT/3871812015/149l1 against the Second Applicant is stayed.* "**

[7] The NCR opposed this application on the following grounds namely that; the relief sought equates to the applicant seeking an opinion or legal advice from

the court; the relief sought is premature as the applicants have failed to exhaust the available internal remedies; the credit provider, Stelland Finansies breached the provisions of the NCA; the Barko judgment has already determined the issues and the relief sought is inappropriate and would interfere with the statutory obligations of the NCR

B POINT IN *LIMINE*

[8] At this juncture it would be necessary to firstly dispose of the legal point raised by the respondents, the pertinent issue being that this application is premature. In essence, it was argued that this matter should have been dealt with and finalised before the Tribunal.

[9] Counsel for the respondent argued that there exists a pending application in respect of the very issues in dispute before the National Consumer Tribunal *("Tribunal").* In such application the NCR specifically contended that the promissory notes utilized to manage the repayments from consumers to Stelland resulted in a breach of Section 91, particularly Section 91(2) of the NCA.

[10] Stelland was required to exhaust the internal processes where the matter could be ventilated - on the facts, the specific credit agreements and the wording of the promissory notes entered into between the credit providers, the banks and other service providers.

[11] I note that although the Tribunal hearing was set down for 6 October 2017, the matter was subsequently removed. In principle, lntecon's argument was that since the NCA does not fine application in respect of the promissory notes and the nature of its core business, it was not required to participate in the Tribunal proceedings. In terms of Section4 of the NCA, it would only be required to participate if it was registered with the NCR.

[12] It was further submitted that the applicant could appeal or review the outcome of the Tribunal decision in terms of Section 59(3) which provides that:

> ***"Any decision of the Tribunal is subject to the appeal or review by the High Court."***

C FACTUAL BACKGROUND AND DISPUTE

[13] In order to establish if the Tribunal indeed had the statutory power to consider the issues in dispute, it is necessary to summarize the factual disputes between the parties .

[14] The core dispute was whether Stelland breached *inter alia* Section 91 of the NCA insofar as it directly or indirectly required or induced the consumers to enter into supplementary agreements (the promissory notes), which contained provisions that would be unlawful if they would to be included in the credit agreement.

[15] Counsel for the applicant went at length to explain that the payment facility system of lntecon had its origins prior to the enactment of the NCA. In the case of Stelland the consumer would seek a short term loan from Stelland. An agreement would be entered into with Stelland regarding such loan and monthly repayment terms would be recorded therein. lntecon offers , payment facility to the consumer. If the consumer wishes to settle his payment by virtue of Electronic Debit Orders *("EDO's"),* then he/she would enter into an agreement with lntecon to facilitate such payment. Promissory notes are signed by clients in favour of lntecon ensuring that lntecon would be paid for such service.

[16] It was contended that Stelland was not in a position to properly assess the debt repayment history and the existing financial means, prospects and obligations of consumers, therefore entering into reckless credit agreements of consumers. Consequently in this regard, Stelland was charged with Section 80(1} 82(2){a), 81(3) and 170 read with Regulation 55(1) of the NGA

[17] Stelland was given an opportunity before the Tribunal to make representations that it did not contravene Section 91 and 101(3)(c), read with Regulation 44, - in that it did not require or induce consumers to sign the promissory notes and that such promissory notes presented to clients to sign were not supplementary agreements as defined by the NCA. Moreover that the payment of service providers fees in respect of the promissory notes when added to the service fee charged by Stelland did not cause the total service fee to exceed the maximum amount allowed by the NCA.

[18] Consequently the NCA does not apply to the agreements lntecon entered into

with between the consumers and Stelland. Therefore the NCR cannot prescribe nor regulate the fees and charges imposed by lntecon on the consumers.

[19] The applicant contended that the lntecon system allowed the payer to issue promissory notes in favour of two beneficiaries namely the credit provider in this case, Stelland and lntecon. It was argued that the promissory note is a financial instrument as envisaged in the Bills of Exchange Act. lntecon charges consumers for the presentment of the promissory notes. The Natlonal Payment System Department *("NPSD")* is the regulator of the NPS, and it grants recognition to a payment system management body which manages and regulates the participation of its members in the clearing and settlement system.

[20] The payment system management body is PASA. Section 10(1)(c)(i) of the South African Reserve Bank *("SARB'),* empowers the SARB to oversee and regulate the NPS. The NPS Act provides for the management, the administration, the operation, the regulation and provision of the payment clearing and settlement system in the Republic of South Africa.

[21] As alluded to above, the relevant provision upon which this matter has a bearing is Section 91(2) which provides that:

> ***"A credit provider must not be directly or Indirectly required or Induce a consumer to enter into a supplementary agreement or sign any document that contains a provision which would be unlawful If It were included In the credit agreement."***

[22] It was explained that the agreement entered into between lntecon and the consumer was voluntary; it fell outside the provisions of the NCA and it did not constitute a service fee as envisaged in terms of the NCA, which is a fee charged by the credit provider in connection with the entire routine administration costs of maintaining a credit agreement. It is a fee charged by lntecon in terms of an agreement to facilitate the payment. It is simply a payment for the use of a facility to meet the consumer's financial obligations by way of electronic payments.

[23] Consequently there was no contravention in terms of Section 100(1)(d) of the NCA which states that:

"A credit provider must not charge an amount to, or Impose a monetary liability on or the consumer In respect of any fee, charge, commission or expense or other amount payable by the credit provider to any third party in respect of a credit agreement, except as contemplated In Section 102 or elsewhere In this act."

[24] On this point, it was emphasized by the applicant that the amount charged to the consumer is charged by lntecon and not Stelland. It is not a fee, a charge or a commission or expenses or other amount payable by Stelland to lntecon. Stelland does not impose any monetary liability on consumers with regard to the agreement between lntecon and the consumer.

[25] The respondent pointed out that the consumer does not liase directly with lntecon but obtains lntecon's documents from Stelland, when concluding a credit agreement with the said consumers . The relationship between the first applicant and the credit provider arises due to credit being provided by the credit provider to the consumer and which is enclosed in an agreement. Annexure “FA11” appears to be an agreement between lntecon and Stelland which provides that the credit provider becomes a user of the system to facilitate payment of the user's client. lntecon's promissory note, provided to the consumers, is purely to facilitate a payment of the consumer's obligations and which is supplemented to the credit agreement. It is the credit provider that benefits from the service provided by lntecon, but it is the consumer who is required to pay for these servIces.

[26] Disputing this reasoning, the applicant argued that it is the consumer who buys into the ALLPS system and authorises a credit provider to deduct the additional fees. This promissory note fee is payable in addition to any fees, interest or charges stipulated by the supplier of goods or services. The NCR held the view that the credit provider failed to disclose this additional fee/service in the credit agreement and such conduct therefore constitutes a contravention of Section 91(2) of the NCA. It was obliged to disclose the total costs of the proposed credit, and which would obviously include the facilitation fees in respect of the promissory notes with lntecon. These fees remain in contravention of Regulation 44 as a resultant fee charged to the consumer in

excess of the stipulated fees.

[27] To bolster its position, the respondent premised its argument on the findings of the court in the "Barko matter".[1]

D APPROACH OF COURTS

[28] There is no doubt that the arguments raised by both parties deserve proper consideration. This court is required to be mindful of the legal points raised. The inquiry is simply whether it is appropriate for this court to make findings on the issues in dispute? The applicant submitted that internal processes must be exhausted first, in this instance - the Tribunal hearing. The applicants relied on **Nicol & Another v The Registrar Pension Fund and Others[2]** where the court held:

> ***"Under the common law the mere existence of an Internal remedy was not, by Itself sufficient to defer* access *to judicial review until the remedy has been exhausted. Judicial review would in general only be deferred where the relevant statutory contractual provision, properly* construed, *require that the internal remedies first be exhausted. It Is now compulsory for the aggrieved party in all* cases *to exhaust the relevant Internal remedies unless exempted from doing so by way of* a *successful application under Section 7(2)(a)..."***

[29] It is not only unreasonable to rush to court but it is more expeditious and cost effective to follow due internal resolution processes. The fact that until a final decision was made, any alleged irregularity may still be rectified, and it would therefore be premature to approach courts for relief prior to a final decision having been given. A further factor is the expertise of the administrative institutions against the expertise of the courts[3].

[30] It is trite that even if the Legislature provided for the internal processes, it does not mean that a litigant's right to seek recourse from this court should be

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[1] Barko Financial Services (Pty) Ltd v The National Credit Regulator and Another [2014] 4 All SA411 SCA

[2] 2008(1) 383 SCA at 389 I - 390 B

[3] Ballinger and Another v Hind N.O. and Another 1951(2) SA 8 at page 11 D - E

barred.[4] The court can entertain a matter in exceptional circumstances, and it is not necessary to follow through with the internal processes, for instance when it is not in the interest of justice or when a jurisdictional dispute is raised or if the adjudication of the dispute has reached a point where it would hopeless, and the only recourse would be to approach the court.

[31] In **Welkom Village Management Board v Letemo**[5] the court noted that whenever domestic remedies are provided in terms of statute or regulation, it is necessary to examine the relevant provisions of such statute in order to ascertain how fair it is, if at all, that the ordinary jurisdiction of the court should be excluded or deferred. The intention of the Legislature must be probed in order to establish if the internal processes should be exhausted first.

[32] In so doing the language of the relevant statute should be examined to ascertain whether the Legislature intended that the aggrieved person should be restricted to the remedies provided by the statute in seeking relief.

[33] I find guidance from the decision of **Koyabe**[6] where the court acknowledged that internal remedies are designed to provide immediate and cost-effective relief giving the executive the opportunity to utilize its own mechanisms rectifying irregularities first before the aggrieved parties resort to litigation. Although courts play an important role in providing litigants with access to justice, the importance of more readily available and cost effective internal remedies cannot be discounted. Therein Mokgoro J stated:

> ***"approaching a court before a higher administrative party Is given an opportunity to exhaust Its existing mechanism, undermines the autonomy of the administrative process. It renders* a *Judicial process premature, effectively, usurping the executive role and function. The scope of administrative action* extends *over wide range of circumstances in the crafting of specialist administrative procedure suited to the particular administrative action In question enhances procedural fairness as enshrined in the Constitution. Thus the need to allow Its executive agencies to utilize their own procedures is crucial In administrative action."***

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[4] Golube v Oosthuizen 1955(3) SA 1 Tat 503 B - C
[5] 1958(1) SA 490 A at 502 D
[6] Koyabe and Others v Minister of Home Affairs 2010(4) SA 327 CC at para 35

[34] I further take cognisance of the court's approach in **Bato Star Fishing (Pty) Ltd v Minister of Environment Affairs and Others**[7], where it was acknowledged that the court should take care not to usurp the functions of administrative agencies. Its task instead is to ensure that the decisions taken by the administrative agencies fall within the bounds of reasonableness as required by the Constitution.

O'Regan J stated at paragraph 48:

> ***"In treating the decisions If administrative agencies with the appropriate respect, a court ls recognizing the proper role the executive within the Constitution. A court should be careful not* to *attribute itself superior wisdom in relation* to *matters entrusted to other branches of government. A court should thus give weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent of which* a *court should give weight to these considerations will depend on the character of the decision itself* as *well as the identity of the decision maker... A decision that requires an equilibrium to be struck between a range of competing interests or consideration and which is to be taken by a person or institution or specific expertise in that area must be shown respect by the courts."***

[35] It is common cause that Stelland is a registrant with the NCA and is required to participate in the extrajudicial process. With regard to the applicant the dispute, whether the NCA has jurisdiction, persists. It is not in dispute that lntecon's involvement emanates from the credit agreement between Stelland and the consumers. However nothing prevents lntecon from participating in the proceedings of the Tribunal as it has a material interest in the matter.

[36] Section 148 of the NCA makes provision for a participant in the Tribunal hearing to appeal the decision of the Tribunal to the High Court on either review or appeal. Further in my deliberation, I have had regard to the applicant's reference of Annexure "RA1" (attached to the replying affidavit),

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[7] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004(7) 13 CLR687 CC

which constitutes a list of the nature and type of matters the Tribunal is statutorily empowered to adjudicate upon. It was contended that the Tribunal has no jurisdiction over matters (being an issue such as seeking relief in the form of a declarator), Hence this matter is properly before the court.

[37] It was also submitted that Intecon did not proceed with the Tribunal process as at some point it was advised that the appropriate cause of action was to seek a declarator on the jurisdictional issue - that is - whether the clearing and settlement of the promissory note is contrary of the provisions of the NCA?

[38] Plasket J in **Reed v Master of the High Court [2005] 2 All SA 429 Eat para 25** placed the concept *"internal remedy'* in context and stated:

> ***"The dictionary definitions of the words "internal" and "remedy" that I have cited are in harmony with the way the composite term "internal remedy" is understood In the more specialized context ... when the term is used in administrative law, it Is used to connote an administrative appeal - an appeal, usually on the merits to an official or tribunal within the same administrative hierarchy as the Initial decision-maker-or less common an internal review. Often the appellate body will be more senior than the Initial decisionmaker, either administratively or politically or possess greater expertise. Inevitably the appellate body is given the power to confirm, substitute or vary the decision of the initial decision maker* on *the merits... "***
>
> **(my emphasis)**

E INTECON'S PREVIOUS INTERVENTIONS IN TRIBUNAL PROCEEDINGS:

[39] It was not disputed that Intecon had in previous instances intervened in the Tribunal proceedings . In the *"Progress matter'* Intecon was granted its right to intervene in the Tribunal proceedings. I have been advised that the "Progress *matter"* before the Tribunal did not proceed. Nevertheless in the preparation of this decision, I have had regard to the ruling of the said Tribunal in respect of

Intecon's intervention application.[8]

[40] The issues in dispute therein are similar to the issues in this matter. In the *"Progress matter',* the NCR raised issue with the agreements entered into between Intecon and the consumers. The NCR indicated that it concluded a supplementary agreement as envisaged in Section 91(2) of the NCA.

[41] Upon hearing the matter, the Tribunal acknowledged that Intecon would intervene for the primary purpose of assisting and providing additional information to the Tribunal and make representations *inter alia* that the NCR is wrong in fact and in law on the basis that the relationship Intecon has with clients of the Progress Group Trust constitute supplementary agreements; that their processes differ from Nupay (referred to in the "Barko matter") and that in particular Intecon is separate from the Progress Group Trust and consumers pay Intecon directly and not the Progress Group Trust.

[42] I find it necessary to reiterate an extract of the Tribunal's ruling which will demonstrate that Intecon as an active participant has a direct interest in the matter and is required to place its version before the Tribunal. In the said matter Intecon also argued that the NCR is wrong in fact and in concluding that its relationship with the consumers constitute supplementary agreements as envisaged in the NCA. The statutory prescripts more particularly Section 143(d) makes provision for Intecon's right to participate in the hearing.

> ***"14 Prior* to *considering what constitutes material interest, it is imperative to understand the context of Section 143(d) and the purpose therefore of a party's participation In* a *proceeding.***
>
> ***Section 143(d) of the Act provides* as *follows:***
>
> ***"Right to participate in hearing***
>
> ***143. The following persons may participate in a hearing contemplated in this Part, in person or through* a *representative, and may put questions to witnesses and***

[8] Information Technology Consultants (Pty) Ltd and National Credit Regulator, Case no:

inspect any books, documents or items presented at the hearing:

(a)… ;

(b) ... :

(c) …; and

(d) any other person who has a material Interest in the hearing, unless, in the opinion of the presiding member of the Tribunal, that Interest Is adequately represented by another participant."

15 Section 143(d) evidently allows for an application by a third party to participate In a hearing, provided that material Interest In the hearing Is shown."

16 The Rules of the Tribunal[9] clarify this further. It provides as follows In Rule 12:

"Interventions by application

12. (1) …

(2) The application to intervene must include a concise statement of the nature of the interest of the applicant in the proceedings and the aspect on which the applicant will make representations. (3) ... "

17 Rule 12 requires that an Intervening party must explicate the nature of its interest in the proceedings as well as the aspect on which representations will be made.

18 Section 143(d) of the Act read with Rule 12 of the Rules of the Tribunal makes it clear that an intervening party may make representations on an aspect in the proceedings. It clearly does not afford that party the right to join the proceedings as an applicant or respondent."

NCT/8616/2013/57(1)(d) in the National Consumer Tribunal dated 24 June 2014

[9] Published under GN789 in GG30225 of 28 August 2007 as amended by GN428 in GG34405 of 29 June 2011 (hereinafter "the Rules of the Tribunal').

In its consideration the Tribunal made reference to certain authorities which highlighted the importance of the rule of intervening parties:

"23 In Mazibuko and Others v City of Johannesburg and Others10[10] the intervening party's role was described as crucial as It addressed the court on Important issues. Equally crucial was the role played by the Intervening parties' in The Minister of Health and Others v Treatment Action Campaign (TAC) and Others (2).[11] It was stated that this case Is seen as one of the success stories of public Interest litigation in South Africa and the role of the Intervening party In that success cannot be overemphasized. In passing its Judgment, the court held that an intervening party must draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn and ill return for the privilege of participating in the proceedings without having to qualify as a party, an Intervening party must provide cogent and helpful submissions that assist the court..."

(my emphasis)

[43] The Tribunal's finding in essence was that:

"30 Intecon is evidently an active participant in the credit industry and has a direct interest In the outcome of the proceedings In that its core business may be affected by a decision of the Tribunal declaring that the entering Into of these alleged supplementary agreements is in contravention of the Act and therefore prohibited.

31 Intecon's experience, expertise and Interest In the outcome of this matter positions it to assist the Tribunal in deciding an aspect of the matter, by providing submissions which are

[10] 2010(3) BCLR 239 (CC); 2010(4) SA 1 (CC)
[11] 2002{5) SA 721; 2002(10) BCLR 1033

relevant, which will assist the Tribunal, and which would otherwise not be before the Tribunal because the submissions have not been or would **not** ***be advanced by the other parties to the matter.***

32 Intecon's Interest, in the light of the above, is In all probability necessary, valuable, worth considering, actual, relevant and could affect or Influence the outcome of the matter. Intecon's Interest is therefore material and the test Is satisfied."

[44] It cannot be gainsaid that the jurisdictional point raised is pivotal to the industry and service providers such as lntecon and other institutions offering similar services. It is therefore crucial that the submissions of all affected parties be considered by the Tribunal.

[45] The Tribunal in the said matter acknowledged lntecon's first hand knowledge of its relationship with the respondent, and that it would provide information to the Tribunal about the law and facts surrounding the issue and moreover advise the Tribunal on the implications of the Tribunal's decision in the matter.

[46] Even though lntecon is not a registrant in terms of the NCA and is not bound to exhaust internal remedies, in this instance I cannot ignore the fact that the matter is correctly pending before the Tribunal. The issue in dispute concerns the status of the so-called *Mlntecon Agreement"* with the consumer, and the excess of the charging of fees.

[47] The Tribunal is equipped with the necessary expertise to determine if the charges between lntecon and the consumer are charges envisaged in terms of the NCA.

F THE NCA BEGULATORY_ENVIRONMENT

[48] The importance of the NCR has to be considered earnestly by this court. Amongst the objectives of the NCA are to promote responsibility in the credit market by encouraging responsible borrowing, avoidance of over indebtedness and fulfilment of financial obligations by consumers; providing consumers with education about credit and consumer rights and providing a consistent and accessible system of consensual resolution of disputes arising

from credit agreements. The overarching objectives is to ensure parties to a credit agreement especially the consumer is fully aware of the risk and liabilities of the proposed undertaking.[12]

[49] Section 14 of the NCA provides that:

"The NCR is responsible for the regulation of consumer credit."

The NCR also has a discretion to act in terms of Section 57 of the NCA and to request the Tribunal for an appropriate relief.

[50] The powers of the Tribunal were set out in Section 150 of the NCA which stipulates that the Tribunal may:

"Make an appropriate order...including:

(a) Declaring conduct to be prohibited ...,·

(b) Interdicting any prohibited conduct,·

(c) Imposing an administrative fine... ;

(d) Condoning any non-compliance of its rules and procedures on good cause shown;

(e) Suspending or cancelling the registrant 's registration ...;

(f) Requiring repayment to the consumer of any excess amount charged...;

(g) Any other appropriate order required to give effect to* a *right* as *contemplated In terms of the act."

[51] Further, in **Investec Bank Ltd v Motloung and Another 2017 5055/2016 [2017] ZA SSHC 36.** the court indicated that the NCA seeks to balance the respective rights of consumers and credit providers. It is thus clear that the court may not only take account of the needs of the consumer for protection but must also take note of the credit provider's legitimate right to seek relief.

[52] In interpreting the **NCA,** it is not only giving effect to the purposive interpretation but to the ***careful balancing of the competing Interests sought to be protected, and not for a consideration of only the Interests***

[12] Asmal v Essa 2014(3) All SA 115 SCA at para 10

of either the consumer or the credit provider."[13]

[53] It further cannot be gainsaid that the NCA not only makes provision for a dispute resolution process but also makes provision for intervening parties to participate in the proceedings.

[54] Section 140 of the NCA empowers the NCR with various remedies and in terms of Section 140(c) it can make an application to the Tribunal to consider the matter.

[55] As alluded to above Section 143(d) makes provision for not only registrants in terms of the NCA but other parties to participate in the hearing namely:

> ***"Any person who has a material interest in the hearing unless, In the opinion of the presiding member of the Tribunal, that interest is adequately represented by another participant."***

[56] By virtue of Section 150, the Tribunal may make appropriate orders in relation to the prohibited conduct of the NCA namely:

> ***"That it can declare the conduct to be prohibited in terms of the NCA. It can Interdict any prohibited conduct and impose an administrative fine in terms of Section 151 with or without the addition of any other order In terms of this section. Or It can confirm a consent agreement of the Act or the Consumer Protection Act as an order of the Tribunal."***

[57] In particular Stelland is statutorily bound to make representations to the Tribunal. Stelland remains answerable to the Tribunal on the alleged contraventions. It was alleged that lntecon intervened in previous proceedings before the Tribunal but was advised not to do so in this instance. The payment arrangements vis-a-vis the promissory notes arose as a result of the credit agreement. This fact is common cause between the parties. It has also not been disputed that lntecon is not regulated by the NCA. However the issue in dispute remains whether the fees that lntecon charges constitutes "fees" as envisaged in the NCA?

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[13] Nedbank v The National Credit Regulator 2011(3) SA 581 (SCA); Firstrand v Mvelase 2011(1) SA470 (KZP)

[58] There is no doubt that Intecon's involvement benefits the consumers but at a charge. In interpreting whether such charges form part of Stelland's service fees the Regulator must also be alive to ever changing dynamics involved in the money lending environment and particularly the intervention of third party intermediaries. Such matters must be deliberated in the appropriate forum, (which has the necessary expertise and that has been statutorily appointed to do so) and with regard to the views of all parties who have a material intent of the matter.

[59] Moreover this court is required to grant declaratory relief without having the benefit of Stelland's (credit provider's) full submissions. Consideration must also be given to the "Barko matter" and in respect of the particular facts therein.

[60] The Tribunal was required in this instance to adjudicate on *"allegations of prohibited conduct"* on the part of Stelland. It is trite that the NCA applies to all credit between parties. However in this instance it was contended that the agreement between Intecon and the consumer is not governed by the NCA.

[61] An agreement is a "credit agreement" for purposes of the NCA if it is a credit facility, credit transaction, credit guarantee or a combination thereof. A credit agreement has two elements namely, a credit that is granted and a fee, charge or interest imposed in respect of the repayment.

[62] I note that the term *"fee", "charge"* and *"interest"* are not defined in the NCA but are seen to be of wide input and includes any consideration payable in respect of the use of credit - regardless of the description attached by the parties to such consideration.[14]

[63] The NCA places a statutory obligation on the NCR to regulate the credit industry and has empowered the said Regulator in resolving disputes internally. The Regulator in terms of its statutory obligations referred this matter to the Tribunal.

[64] Therefore as much as this court is eager to make a determination on the issues in dispute, it must exercise deference in not usurping the function and powers entrusted to the Tribunal. As aptly put by Moseneke DCJ in **ITAC v SCAW South Africa (Pty) ltd 2012 (4) SA 618 CC at para 95** I noted the

[14] See Evans v Smith 2011(4) SA 472 wee at para 16 -19

following:

> ***"The primary responsibility of* a *court is not to* make *decisions reserved for or within the domain of other branches of government but rather to ensure that the conceded branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in Issue Is policy laden as well as "polycentric"***

[65] In the *"Bato Star"* matter the court at paragraph 46 made reference to Hoexter's understanding of *"judicial deference"* namely :

> ***"A judicial and willingness to appreciate the legitimate and constitutionally ordained province of administrative agencies, to admit the expertise of those agencies In policy-laden or polycentric issues, to avoid their Interpretations of facts and law due respect and* to *be sensitive In general* to *the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate."***

[66] One of the main functions of the Tribunal is to assess *"prohibited conduct"* on the part of creditors. The NGA makes provision for an internal dispute resolution process. The Regulator is empowered to investigate the matter and may refer the complaint to the Tribunal (Section 140(c)) of the NCA. In the event that Intecon and /or Stelland wish then to contest the decision of the Tribunal, it may approach this court in terms of Section 59 of the NCA.

G <u>COSTS</u>

[67] Counsel for both parties did not raise any particular arguments pertaining to costs. It was essentially submitted that costs should follow the results. In this instance since this application is not successful the applicant bears the costs of this application

[68] In the premises the following order is made:

(1) The application is dismissed with costs.

KOOVERJIE A.J.

ACTING JUDGE FOR THE HIGH COURT

Attorney for applicants: Lewies Attorneys (Pretoria)

Counsel for applicant: Adv R Michau SC

Attorney for respondent (NCR): Ka-Mbonane Cooper Attorneys

Counsel for respondent: Adv PL Carstensen SC