

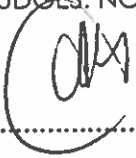
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A440/16

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED
30/08/2019	
DATE	SIGNATURE

In the matter between:

MONEYLINE FINANCIAL SERVICES (PTY) LTD

APPELLANT

and

THE NATIONAL CREDIT REGULATOR

RESPONDENT

JUDGMENT

COLLIS J (et al SENYATSI AJ):

INTRODUCTION

1. On 11 March 2016, the National Consumer Tribunal delivered a majority decision per Ms Devraj together with Professor Maseko.¹ The main dispute before the Tribunal involved the referral of complaints by the respondent to the Tribunal in terms of which the respondent seeks relief against the appellant, including its deregistration as a credit provider and a large administrative fine.
2. The appellant is Moneyline Financial Services (Pty) Ltd, a private company incorporated under the Company Laws of South Africa and a registered credit provider in terms of the National Credit Act.² (*The Act*)
3. The respondent is the National Credit Regulator, a statutory body established in terms of section 12 of the National Credit Act to enforce the provisions of the Act, including the registration of credit providers and ensuring compliance with the conditions of registration.
4. Section 148(2)(b) of the National Credit Act specifically permits a litigant dissatisfied with an order made by the National Consumer Tribunal, to appeal against such decision to a High Court.
5. The relevant section 148(2)(b) reads as follows:
Subject to the rules of the High Court, a participant in a hearing before the full panel of the Tribunal may-
(a)
(b) *appeal to the High Court against the decision of the Tribunal in that matter, other than a decision in terms of section 138 or section 69(2) (b) or 73 of the Consumer Protection Act, 2008 as the case may be.*
6. In the present appeal the points under appeal essentially involve a determination whether the procedure employed by the respondent to initiate complaints, investigate same and referring them to the Tribunal met the requirements of the National Credit Act, specifically section 139(1)(c), section 140(1)(b) and section 140(2) (b). The appellant contends that these

¹ Transcribed record Vol 12 p 960

² Act 34 of 2005

requirements were not met and that this must result in a finding that the referral is invalid and should be set aside. The National Consumer Tribunal is yet to decide on the merits of the referral as the decision impugned in this appeal only relates to *points in limine* raised before the Tribunal.

BACKGROUND

7. By way of background: On 15 May 2013, an article was published in the Sowetan Newspaper implicating the appellant. In the said article it was reported that the Cash Pay Master Services ("CPS"), an entity was involved in the processing of an illegal loan scheme targeting social grant recipients.³ In the said article it was alleged that the appellant approved credit to social grant recipients where social grant was the only source of income.⁴ The appellant was identified as one of the credit providers granting credit to social grant recipients. Following the article mentioned *supra*, the respondent initiated a compliant referencing the article which appeared in the Sowetan Newspaper.⁵ On 22 August 2013, the Chief Executive Officer, approved investigations into the lender Moneyline Financial Services pursuant to the media report.⁶ This was thereafter followed by the issuing of certificates by the Chief Executive Officer appointing two inspectors, namely Koketso Tlou and Russel Willoughby to investigate the activities of Moneyline Financial Services (Pty) Ltd. The appointed investigators conducted their investigations during August to October 2013. It is apposite to mention that the certificates issued to the investigators were issued in the prescribed form in terms of Form 11 of the Regulations promulgated in terms of the Act. On 28 January 2014, one of the appointed inspectors, Mr Koketso Tlou, produced a report wherein, he recommended that appellant be taken to the National Consumer Tribunal and/or the High Court to declare all credit agreements it concluded to be reckless in terms of section 80(1)(a).⁷

³ Transcribed record Vol 1 p 7

⁴ Transcribed record Vol 1 p 27-28

⁵ Transcribed record Vol 4 p 293; Founding Affidavit para 10

⁶ Record Vol 4 p 246

⁷ Record Vol 4 p 46 para 5

8. On or about 3 February 2014, the respondent authorised a supplementary and follow up investigation into the lending practices of the appellant. In this regard and in terms of section 25 of the Act, the investigator appointed was Ms. Claire Laurent Mondaunt.⁸
9. On 2 July 2014, Ms Mondaunt issued her report and in terms of her report it was recommended that the matter should more fully be investigated as it was found that Grindrod Bank, CPS, Net 1 and Moneyline were found to be interconnected and that Moneyline received preferential deductions.⁹ Following this initial investigation, the respondent thereafter made an application to the National Consumer Tribunal to cancel the registration of the appellant (registrant) in terms of section 57 (1) (a) and (c) of the National Credit Act citing repeated contraventions of the Act.¹⁰ This process was embarked upon on 22 September 2014 and in the said application the appellant was invited to oppose the application within 15(fifteen) business days of the date of the notice.
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10. On or about 22 October 2014, the appellant filed its answering affidavit opposing the application for the cancellation of registration of the certificate.
11. What followed next was an application by the respondent to amend the founding affidavit in terms of rule 15 of the Tribunal Rules. This application was ultimately granted and on 17 February 2015, the appellant filed its answering affidavit to the amended rule 15 application. This application was eventually argued and when granted, the appellant proceeded to file an answering affidavit to the supplementary founding affidavit.
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12. Before the Tribunal the respondent persisted with the below mentioned grounds of cancellation:

GROUND OF CANCELLATION

⁸ Record Vol 4 p 8 para 10

⁹⁹ Record Vol 1 p 66

¹⁰ Record Vol 1 p 1

13. The respondent premised its grounds for cancellation of the registrant on the following contraventions:

- 13.1 The appellant contravened section 89(2) (a) of the Act in that the appellant entered into unlawful agreements.
- 13.2 The appellant granted credit without taking reasonable steps to assess the consumer's debt repayment history as is required in terms of section 81 (2)(a)(ii) of the Act.
- 13.3 The appellant entered into credit agreements without taking reasonable steps to assess the consumer's existing financial obligations thereby contravening the provisions of section 81 (2) (a) (iii) of the Act.
- 13.4 The appellant used the social grants received by the consumers as income in order to assess whether they earn an income in order to extend and approve credit and in so doing contravening section 81 (2) (a) (iii) read with section 78 (3)(a) of the Act.
- 13.5 Furthermore, the appellant failed to comply with condition 1 of the General Conditions of registration by contravening section 20 of the Social Assistance Act, 13 of 2004.

THE APPELLANT'S CASE IN OPPOSITION

14. It is the appellant's contention that the respondent was not authorised to investigate the lending practices of the appellant based on a reasonable suspicion that the appellant granted credit in contravention of the Act. This the respondent contends cannot be true as the email (Annexure NM2) is dated 6 December 2013, which is well after the date on which the investigators were appointed. As such the respondent contends that nothing stated in the email could amount to an accusation of any contravention of the provisions of the Act by the respondent, nor could the email content give rise to a reasonable suspicion that the respondent granted credit in contravention of the Act.¹¹

¹¹ Record Vol 3 p 180-181 para 19

15. Furthermore, the respondent contends that no evidentiary weight can be given to the investigation report and that same should be regarded as inadmissible evidence *in toto*.¹²
16. The application to the Tribunal was prepared in the incorrect form. The respondent was required to refer the application to the Tribunal within the terms of section 140(1) of the Act and use Form 32.
17. The respondent further denied that it was or is granting credit to social grant recipients as part of an “illegal loan scheme” in contravention of the Act, the Social Assistance Act or any other applicable legislation.¹³
18. The respondent is required to establish a reasonable suspicion in order to facilitate a complaint in its own name.
19. Furthermore, that in each instance of prohibited conduct, the respondent must initiate a new complaint.
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CONSUMER CREDIT INSTITUTIONS

20. At the outset it should be mentioned that Section 26 of the Act establishes a body known as the National Consumer Tribunal, which is defined as a juristic person appointed by the President consisting of a Chairperson and not less than 10 other women or men appointed by the President. The Tribunal is required to exercise its functions in accordance with the Act and any other applicable legislation.
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21. Section 27 of the National Credit Act stipulates the functions of the Tribunal as follows:
- ‘The Tribunal or a member of the Tribunal acting alone in accordance with this Act or the Consumer Protection Act, 2008 may-
- (a) adjudicate in relation to any:

¹² Record Vol 3 p 182 para 23

¹³ Record Vol 3 p 180 para 18

- (i) application that may be made to it in terms of this Act, and make any order provided for in this Act in respect of such an application; or
- (ii) allegations of prohibited conduct by determining whether prohibited conduct has occurred and, if so by imposing a remedy provided for in this Act;
- (b) grant an order for costs in terms of section 147; and
- (c) exercise any other power conferred on it by law.'

22. From the sections quoted above it is thus clear that the Tribunal is a separate legal entity that functions separately and independently from the National Credit Regulator and the two are consumer credit institutions as provided for in Chapter 2 Part A and B of the National Credit Act.

DECISION OF THE TWO MEMBERS OF THE NATIONAL CONSUMER TRIBUNAL

23. Regarding the matter at hand the National Consumer Tribunal concluded that what was before it, was an application for the cancellation of registration of the appellant in terms of section 57(1) (a), due to its repeated contraventions of the Act. More particularly the Tribunal had found:

23.1 That the respondent could rely in the Sowetan article in order to found reasonable grounds for the initiation of an investigation. Ms Devraj concluded that the appellant "accepted" that the article was the source of the respondent's decision to initiate an investigation and did 'not place this in dispute'; the "acceptance" sufficed for a valid initiation of a complaint.¹⁴

23.2 In the second instance Ms Devraj concluded that the "complaint was initiated" in accordance with the Woodlands and Yara judgments, despite the fact that:

23.2.1 She quoted the very passage of the Woodlands judgment which states that the regulator must at the very least, be in possession of information 'concerning an alleged practice' which objectively

¹⁴ Record Vol 12 p 970 para 55

speaking could give rise to a reasonable suspicion of the existence of a prohibited practice.

23.2.2 She quoted paragraph 21 of the Yara judgment in support of the finding that reasonable grounds existed upon which the investigation was initiated by the respondent, because the initiation of a complaint can be informal.¹⁵

23.2.3 Furthermore, Ms Devraj went on to quote paragraphs 26 of the Yara judgment, which is authority for the proposition that the Competition Act insists on an initiation of a complaint by the Commission as a juristic act which must be understood as a complaint against a specific prohibited practice.

23.3 In the third instance Ms Devraj concluded that the respondent was "...able to show the link between CPS and the Appellant."¹⁶

23.4 In the fourth instance, Ms Devraj concluded that the respondent's application was "not defective" because it was instituted in terms of section 140 (1) (c), read with section 57 of the NCA. In this regard the respondent had argued that the referral should have been made in terms of section 140(1)(b), read with section 140(2) (b) and on the basis of Form 32.

GROUND OFS OF APPEAL

24. The appellant as per the Notice of Appeal had raised in total 19 grounds of appeal¹⁷ against the Majority judgment of the Tribunal. These grounds can be listed as follows:

24.1 In finding that the respondent had established that there was an initiation of a complaint by the appellant in its own name, in terms of section 136(2) of the National Credit Act,

¹⁵ Record Vol 12 p 969 para 52

¹⁶ Record Vol 12 p 970 para 55

¹⁷ Record Vol 12 p 980

- 24.2 In failing to find that section 139(1) of the Act had the effect that a specific complaint had to be initiated and that the respondent was entitled initially to direct an inspector to investigate that complaint.
- 24.3 In failing to find that what the respondent had, in fact, done was to authorise a general investigation into 'lending practices.'
- 24.4 In failing to find that such a general investigation into lending practices was not countenanced under the Act or the Constitution.
- 24.5 In failing to find that the complaint so initiated had to be initiated against an alleged prohibited practice.
- 24.6 In finding that the respondent had established a reasonable suspicion for the initiation of a complaint and the consequent investigation.
- 24.7 In finding that it was not necessary for the respondent to follow the procedure laid down in the Act in relation to a referral to the Tribunal and specifically section 141 (3) read with Regulation 54(2) to the Act and the contents of Form 32(being the prescribed form required to be used).
- 24.8 In finding that the investigation which ensued was valid.
- 24.9 In finding that the resultant investigation reports could be taken into account by the Tribunal.
- 24.10 In finding that there had been a valid referral of each of the complaints in issue to the Tribunal.
- 24.11 In failing to find that the investigation conducted into the affairs of the Respondent should be declared invalid.
- 24.12 In failing to find that the referral of complaints to the Tribunal should be set aside.
- 24.13 In finding that the application was purely an application in terms of section 57 of the Act.
- 24.14 In finding that because it was an application in terms of section 57 the need to show just cause and the requirements relating to how a referral of a complaint to the Tribunal, had no application.
- 24.15 In finding that in light of the fact that the application was brought by the respondent in terms of section 57 the admissibility or not of the investigation report was irrelevant in that a determination of an application in terms of section 57 did not require that the investigation report be regarded as admissible evidence.

24.16 In finding that the principles of “reasonable suspicion” or the initiation process find no application in section 57 in that a section 57 application does not turn on these issues.

24.17 In finding that section 140(1) (c) of the Act had application.

24.18 In failing to find that section 140(1) (b) was the applicable section in relation to the bringing of the application.

24.19 In failing to interpret the respondent's procedural powers strictly and in a manner that least impinges on Constitutional values and rights.

25. In opposing this appeal, the respondent contended that the appeal is meritless and had raised as a *point in limine* the issue of non-joinder.

NON-JOINDER

26. Any objection of non-joinder may be raised where the point is taken that a party who should be before court has not been joined or given judicial notice of proceedings.

27. The substantial test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject-matter of the litigation, which may be affected prejudicially by the judgment of the court in the proceedings concerned.¹⁸

28. In the decision *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657 the Court considered the question of joinder of parties. The relevant portion of the head-note read as follows:

“The fact that, when there are two parties before the Court, both of them desire it to deal with an application asking it to make a certain order, cannot relieve the Court from inquiring into the question whether the order it is asked to make may affect a third party not before the Court and, if so, whether the Court should make the order without having the third party before it.

¹⁸ *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 para 21 “where it was also held that the enquiry relating to non-joinder remains one of substance rather than the form of the claim.....”

If a party has a direct and substantial interest in any order the Court might make in the proceedings or if such order could not be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings, unless the Court, is satisfied that he has waived his right to be joined.

Mere non-intervention by an interested party who has knowledge of the proceedings does not make a judgment in such proceedings binding on him as *res judicata*, nor can such non-intervention after receipt of a notice short of citation be treated as a representation that the party concerned will submit to and be bound by any judgment that may be given so as to set up an estoppel."

29. Ms. Mbele, appearing on behalf of the respondent argued that the Tribunal has a direct interest in the proceedings before this Court as the issue before this Court concerns the interpretation of the Act and the Tribunal Rules. Furthermore, that it has become practice in this Division that where a statutory body has made a decision which is the subject of an appeal (*such as in the present instance*) that such statutory body ought to be cited as a party in the proceedings. In the appeal before us the National Consumer Tribunal has not been cited as a party to the proceedings, even though it has received notification of the appeal.

30. In reply, Mr Milovanovic merely argued that there is no merit on the point of non-joinder. It should also be mentioned that no additional argument in this regard was proffered in the Heads of Argument prepared on behalf of the appellant.

31. The appellant in this appeal, as correctly pointed out by Ms Mbele is challenging a decision of the Tribunal. As referenced above, the Tribunal is a statutory juristic body established in terms of the Act and an entity which acts separately and independently from the National Credit Regulator.

32. In addition to this, it is the decision of the Tribunal which forms the subject-matter of this appeal and it is therefore the Tribunal which may be prejudicially

affected by the judgment of this Court and which will be bound by such judgment. As such it must follow that the Tribunal has a substantial interest in the outcome of this appeal and that the Tribunal is a necessary party to the proceedings. In the present appeal, only the National Credit Regulator has been cited in these proceedings and not the National Consumer Tribunal even though the latter was served with the Notice of Appeal on 5 July 2016.¹⁹

33. The question which thus remains is whether this Court should make an order without having the Tribunal before it or can it be contended that the Tribunal in the present instance has waived its right to be joined.

34. The point to my mind, is not an insignificant *point in limine* raised by the respondent and it follows that the Tribunal as a juristic body ought to have been joined in these proceedings.

35. The failure by the appellant to join the Tribunal to these proceedings is material, however it is not dispositive of the appeal, nor does it of necessity render the appeal defective.

36. Having considered the grounds of the appeal, I am of the opinion that the appellant should be afforded an opportunity to join the Tribunal to these proceedings and to afford the Tribunal an opportunity to present argument if it so wishes before this Court.

ORDER

37. In the result, the following order is made:

37.1 The *point in limine* of non-joinder is upheld.

37.2 The appeal is hereby postponed *sine die*.

¹⁹ Record Vol 12 pa 985

37.3 The Appellant is directed to join the National Consumer Tribunal within 15 court days of date of the order.

37.4 The National Consumer Tribunal will then be permitted, if it so wishes, to file Heads of Argument within 15 court days, of date of being served with the Notice of Appeal and Heads of Arguments filed by both the Appellant and Respondent.

37.5 The appeal may then be enrolled for hearing on a date allocated by the Registrar.

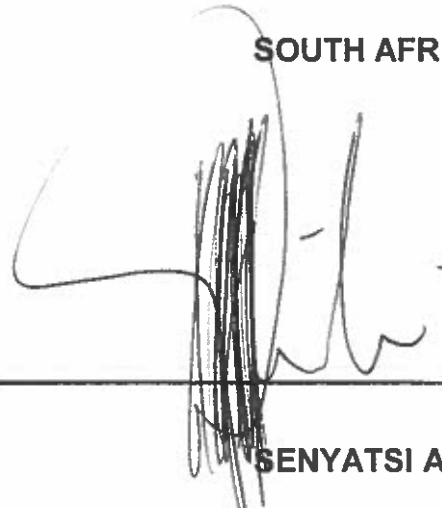
37.6 Costs are to be costs in the appeal.



COLLIS J

**JUDGE OF THE HIGH COURT OF
SOUTH AFRICA**

I agree:



SENYATSI AJ

**ACTING JUDGE OF THE HIGH COURT
SOUTH AFRICA**

Appearances:

For the Appellant : ADV CDA LOXTON SC and A MILOVANOVIC

Attorney for the Appellant : SMIT SEWGOOLAM INCORPORATED

For the Respondent : ADV MBELE

Attorney for the Respondent : HOGAN LOVELLS (SOUTH AFRICA) INC

Dates of Hearing : 04 DECEMBER 2018

Date of Judgment : 30 AUGUST 2019