IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

NCT CASE NO: NCT/127619/201/57(1)

CASE NO: A333/19

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

[redacted]

8 JANUARY 2021
DATE

SIGNATURE

In the matter between:

DACQUP FINANCES CC First Applicant

ABC FINANCIAL SERVICES PINETOWN Second Applicant

and

THE NATIONAL CREDIT REGULATOR First Respondent

THE NATIONAL CONSUMER TRIBUNAL Second Respondent

NEUKIRCHER J:

1] This is an appeal against the findings made by the Presiding Tribunal member in a judgement dated 24 September 2019. For convenience sake, the First

Respondent in this appeal will be referred to as the NCR, and the Second Respondent as the Tribunal.

THE FACTS

2] On 18 October 2018 the NCR conducted a scouting exercise in the Mooiriver area of KwaZulu Natal and went to appellant's premises in Pinetown. There the scout (a Mr Mbedzi) saw a board which advertised "instant loans". This created the suspicion that the appellant may not be conducting the affordability assessments it is required to do in terms of the National Credit Act No 34 of 2005 (the Act). Mr Mbedzi then decided to pose as a customer and an employee informed him that the interest rate applicable to loans is 30% per month. This then resulted in the complaint and the subsequent investigation.

3] The Memorandum dated 23 October 2018, which set into motion the investigation in terms of s136(2) of the Act, reads as follows:

"During a scouting exercise conducted on the 18th October 2018 in Pinetown KwaZulu Natal, I became aware of ABC Financial Services.

The scouting exercises confirmed that Corpclo 538 CC trading as ABC Financial Services was trading as a credit provider at Shop 30, Pine City Centre, Pinetown, KwaZulu Natal[1].

It was noted that advertising material attached hereto on the premises made use of the words "instant loans" which raised a suspicion that the entity is not conducting affordability assessments.

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[1] The issue regarding the name of the CC was clarified in a later CIPC search and nothing turns on this as it is common cause that appellant was the entity under investigation and the name of the CC was later amended to that of the appellant

Further to this, it was established that the entity charges 30% interest on short term loans which is in contravention of the Act.

No window decal was noted on the premises.

In light of the abovementioned I request that an investigation in terms of Section 136(2) of the National Credit Act "the Act" 34 of 2005 be initiated against Corp clo 538 trading as ABC Financial Services."

4] The investigation was set into motion and on 28 December 2019 a memorandum was provided where it is clear that the manageress of the particular branch was interviewed by one Dipuo Mokobane (Mokobane), a Junior Inspector: Investigations and Enforcement.

5] Ten sample credit agreements were provided to Mokobane and the information provided by the manageress was that:

5.1 appellant grants short term loans to a maximum of R8,000;

5.2 consumers are required to submit three months bank statements, identity documents and payslips when applying for the loans;

5.3 appellant charges 3% interest and does conduct affordability assessments.

6] Of the ten assessments conducted it was found that in seven the consumers were overcharged in the interest or initiation fee and components in amounts ranging from R54.83 to R513.88 and that the affordability assessments were conducted on "out-dated" salary advices and "only" three months bank statements. The inspector also states

"Therefore there is no indication that the credit provider considered existing obligations reflected on the Bank Statement and the consumer's credit history when conducting affordability assessment."

7] In three of the samples, the affordability assessments conducted by the inspector found the credit advanced to be reckless.

8] The investigation thus concluded that:

8.1 sections 80(1)(a)[2], s80(3)[3] and 81(2)[4] of the Act were breached;

8.2 the cost of credit charged (i.e. the interest) was not in line with s101 and 103 of the Act;

8.3 the Appellant's advertising material was not in compliance with Section 76, read with Regulation 21 of the Act *"in that the advertising material(s) made of words "low interest" and "fast approval"* ";

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2 *80. (1) A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119(4)-*
(a) the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time; …"

3 *(3) When making a determination in terms of this section, the value of-*
(a) any credit facility is the credit limit at that time under that credit facility;
(b) any pre-existing credit guarantee is-
(i) the settlement value of the credit agreement that it guarantees, if the guarantor has been called upon to honour that guarantee; or
(ii) the settlement value of the credit agreement that it guarantees, discounted by a prescribed factor; and
(c) any new credit guarantee is the settlement value of the credit agreement that it guarantees, discounted by a prescribed factor."

4 "*(2) A credit provider must not enter into a credit agreement without first taking reasonable steps to assess-*
(a) the proposed consumer's-
(i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;
(ii) debt re-payment history as a consumer under credit agreements;
(iii) existing financial means, prospects and obligations; and
(b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement."

8.4 the Appellant does not provide consumers with pre-agreement statements as required in terms of Section 92(1) and (2) of the Act.

9] In its answering affidavit before the Tribunal, the Appellant took the following points *in limine:*

9.1 that the NCR did not have a *"reasonable suspicion"* to institute the investigation and the words *"instant loans"* does not indicate that appellant is not conducting proper affordability assessments. The argument was that the words *"instant loans"* may reasonably be interpreted to refer to the efficiency with which the appellant processes credit applications and the prompt disbursement of monies to the consumer, once a loan is approved;

9.2 the NCR failed to comply with due process in referring the matter to the Tribunal.

10] As the due process compliant was not argued before us, it is unnecessary to deal with it – it was in fact (and in my view correctly) abandoned.[5]

11] At the end of the hearing the Tribunal dismissed the appellant's points *in limine* and made the following findings:

"15. In the Tribunal's view, it is well-known that the NCA introduced a far more rigid and onerous process on a credit provider when assessing and approving loans. Any reasonable person would expect a loan application process to take some time and require the submission of

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5 Competition Commission v Yara (SA)(Pty)Ltd and Others 2013 (6) SA 404 (SCA) at par [24]

numerous documents. The phrase "instant loan", in an advertisement from a credit provider, conveys a very different impression of the credit provider's process. The phrase creates a distinct impression that the loan application process may be curtailed or less onerous in some way. The impression immediately creates a basis for being suspicious of the application process and whether it complies with the NCA.

16. The inspector confirmed on oath that he was told a 30% interest rate was charged. Whether or not this was the truth is not relevant to whether there was a reasonable basis for the investigation. No evidence was submitted to show that this evidence was false. Be that as it may, the advertisement already created a reasonable suspicion of possible wrongdoing by the credit provider…"

12] At the end of the hearing the Tribunal granted the following order:

12.1 the appellant was found to have engaged in repeated prohibited conduct;

12.2 it was fined R300,000;

12.3 it was ordered

"…to appoint an independent auditor (who is registered as a Chartered Accountant) at its own costs within 30 business days of the date of issuing of this judgement. The auditor is to assess all credit agreements entered into by ABC within the last three years from the date of issuing of the judgement. The auditor must assess whether the interest fees and charges on all credit agreements were correctly calculated as per the NCA. Only the credit agreements entered into in

the last three years from the date of this judgement must be assessment. Overpaid fees and charges must be reimbursed to the relevant consumers. The audit is to be completed within 90 business days after the auditor has been appointed. The auditor must provide a final report in this regard to the NCR within 120 business days after being appointed..."

13] It is against this order that the appeal lies. The grounds of appeal consist of four points *in limine*. Points two and three were abandoned by Mr. Michau at the outset and it is common cause that a finding on either of points one or four would end the appeal.

14] The two points are, succinctly put:

14.1 that there was no reasonable suspicion upon which an investigation could have been initiated; and

14.2 the order granted, as set out in 12.3 (supra) exceeds the powers of the Tribunal set out in the Act and thus, in effect, is *ultra vires*.

15] As a point of housekeeping it is noted that the Notice of Appeal was served one day late. An application for condonation was filed. The Respondent then advised that the correct procedure was to "reinstate" the appeal as s148(2)(b)[6] of the Act provides for an automatic right of appeal.

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6 "***Appeals and reviews***
148. (1) A participant in a hearing before a single member of the Tribunal may appeal a decision by that member to a full panel of the Tribunal.
(2) Subject to the rules of the High Court, a participant in a hearing before a full panel of the Tribunal may –
(a) apply to the High Court to review the decision of the Tribunal in that matter; or

16] Given that the hearing of the appeal (whether it be reinstated or condoned) is not an issue before us as respondents are not opposing this relief, and given the important of the appeal as a whole, I am of the view that it is in the interest of justice to grant condonation and reinstate the appeal.

DID THE INSPECTORS HAVE A REASONABLE SUSPICION:

17] Section 76(4)(c)(ii) of the Act states:

"(4) An advertisement of the availability of credit, or of goods or services to be purchased on credit –

(c) must not –

(ii) be misleading, fraudulent or deceptive; …"

18] According to the Inspector, the words *"instant loans"* raised the suspicion that the Appellant *"may not be conducting proper affordability assessments and consequently, was contravening the Act."*

19] And so, the question arises as to the meaning of *"a reasonable suspicion"*.

20] In Duncan v Minister of Law and Order[7] it was described thus:

"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; "I suspect but I cannot prove'. Suspicion arises at or near the

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(b) appeal to the High Court against the decision of the Tribunal in that matter, other than a decision in terms of section 138."

7 1986 (2) SA 805(A) at 819 I, approving the test laid down in Shaaban Biq Hussain & Others v Chong Fook Kam & Another [1969] 3 ALL ER 1626 (PC) at 1630

starting point of an investigation of which the obtaining of prima facie proof is at the end."

21] Flemming DJP in Philip Business Services CC v De Villiers and Others[8] stated

"It is common cause that the 'reasonable grounds' may be proved even if the evidence does not constitute prima facie evidence. The yardstick is not facts which, if proved, will prove the further elements of entitlements but facts which are adequate to justify a suspicion, i.e. a view which has a prospect of turning out to reflect the truth, even it there is a possibility that the suspicion may also turn out to be wrong."

22] In regards to the reference in the Philip matter supra, Flemming DJP referred to the decision of Le Roux J in Bruwil Konstruksie (Edms) Bpk v Whitson NO & Another[9] where the provisions of s69 of the Insolvency Act formed the subject matter of the debate. There, Le Roux J found:

"It seems to me that the purpose of the section is clearly to enable the liquidator or trustee to obtain speedy possession of goods belonging to an estate which he suspects or believes on reasonable grounds, to be assets of the estate. The safeguard to the ordinary public lies in the word "reasonable" belief, or "reasonable" grounds for suspecting… in my view, it contemplates a lesser burden that a prima facie case in a court of law, otherwise there would hardly be any purpose in the section… It seems to me that the words "reasonable grounds" imply an investigation of some kind. The question is how far does he have to go in his investigation? It also seems clear that the

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8 1991 (3) SA 552 (W) at 554A-B
9 1980 (4) SA 703(T) at 711A-E

reasonable suspicion which must exist must be an objective and not a subjective one…"

23] In Farmer's Trust v Competition Commission[10] Tolmay J stated the following in dealing with warrants granted under s46(1) of the Competition Act 89 of 1998 and a reconsideration of a warrant granted *ex parte*:

"[27] The Commission, in order to succeed, needed to demonstrate that from the information on oath were reasonable grounds to believe that: (a) a prohibited practice has taken place, is taking place or is likely to take place on or in these premises; or (b) anything connected with an investigation in terms of this Act is in the possession of, or under the control of, a person who is on or in those premises."

And

[29] If one considers the aforesaid the Commission needed to prove that the information provided to Court demonstrated that there were reasonable grounds to believe that a prohibited practice was taking place and that there may be materials in possession or under the control of the Respondent, which may be of assistance in the investigation.

[30] Counsel for the Commission argued that the Act seems to keep the bar low for the attaining of the warrant as this step is merely one of the starting points of the investigative process. This makes perfect sense in the context of an investigation into the possibility of prohibited practices, which the Act seeks to prevent. Despite Farmers Trust's

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10 2020 (4) SA 541 (GP)

protestation against the fact that it was not given notice or be given an opportunity to be heard such notice is not required.

[31] The Commission had, on perusal of the facts, reasonable grounds to believe that the Respondents were engaging in prohibited practices, including, amongst other, price fixing or giving of trading conditions in the market. This believe (sic) resulted in the necessity of an investigation to determine whether future action should be taken and the application for a warrant in terms of Section 46."

24] Thus it is clear, in my view, that the *"reasonable suspicion"* that the Inspector held that the provisions of the Act were being contravened had to be an objective suspicion.

25] The question then is whether or not the words *"instant loan"* could, objectively, be said to constitute the trigger a *"reasonable suspicion"*.

26] In my view, the answer is "no". The word *"instant",* means *"happening or coming immediately*"[11] and synonyms for the word include "*on the spot, prompt, direct, swift and speedy".*

27] The appellant submits that the words *"may reasonably be interpreted to refer to the efficiency with which the Respondent processes credit applications and the prompt disbursement of monies to the customer once a loan is approved. Any other conclusion is unreasonable."*

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11 www.bing.com - as an adjective

28] Whilst I do not agree with the last sentence of the above quote, I do agree with the remainder.

29] In any event, to establish this would have been easy enough: all the Inspector had to do would be to pose as a potential customer and attempt to apply for a loan. If it were so that the provisions of the Act were not applied, then indeed there would have been the presence of *"reasonable suspicion"* and there would have been grounds for the ensuing investigation.

30] I also agree with Mr Michau's submission that when the investigation itself was initiated, all that was before the NCR was the original memorandum dated 23 October 2018[12] and therefore this is all that was used as the basis to commence the investigation. The affidavits that were eventually placed before the Tribunal did not form part of the initial memorandum and cannot be used to decide whether there were grounds for a "reasonable suspicion" at the outset.

31] This seems also to be confirmed in The National Credit Regulator v Capitec Bank Ltd & Another[13]

"[10] The NCR in initiating a complaint exercises a public power which must comply with the Constitution, which is the supreme law and the doctrine of legality, which is part of that law (Pharmaceutical Manufacturers Association of SA and Another: In regard Ex parte

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12 See par 3 supra

13 (Case A440/2014) [2016] ZAGPPHC 125, Full Bench

President of the Republic of South Africa and Others 2000(2) SQA 674 (CC) / 2000(3) BCLR 241; [2000] ZACC 1) para 20). The NCR accordingly cannot arbitrarily, without a reasonable suspicion, initiate a complaint, generally against what it perceives to constitute a prohibited practice. The sanctioning thereof will widely open the doors to all kinds of abuse.

[11] It is clear from the provisions of S136 of the NCR that the compliant must be initiated against 'an alleged prohibited practice'. The investigation by the NCR following upon the initiation of a complaint must be focussed on the complaint in respect of which a reasonable suspicion is held or relate to the information available to the NCR in respect of which a reasonable suspicion exists. It is that complaint which will be referred to the tribunal. As is the case with the Commission, the NCR's far reaching powers may not be abused:

'For purposes of a fishing expedition without first having initiated a valid complaint based on a reasonable suspicion. It would otherwise mean that the exercise of power would be unrestricted because there is no prior judicial scrutiny as is the case with a search warrant.'

(per Harms DP in Woodlands[14], para 20 with reference to Sappi Fine Paper (Pty) Ltd b Competition Commission and Another [2003] 2 CPLR 272 (CAC) ([2003] ZACAC5) paras 35 and 39)"

32] In the Woodlands matter the question was

"… whether there were any jurisdictional requirements for the initiation of a complaint by the commissioner… The complaint referral 'is (subject to s51) a

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

jurisdictional fact for the exercise of the tribunal's powers in respect of prohibited practices'," and

[13] … A complaint has to be 'initiated'. The commissioner has exclusive jurisdiction to initiate a complaint under s49B(1). The question then arises whether there are any jurisdictional requirements for the initiation of a complaint by the commissioner. I would have thought, as a matter of principle, that the commissioner must at the very least have been in possession of information concerning an alleged practice which, objectively speaking, could give rise to a reasonable suspicion of the existence of a prohibited practice. Without such information there could not be a rational exercise of power. This is consonant with the provisions of s49B(2)(a) which permit anyone to provide the commission with information concerning a prohibited practice without submitting a formal complaint."

33] In Competition Commission v Yara (SA) (Pty) Ltd and Others[15] Brand JA stated:

"On the other hand, this judgement should not be understood to authorise a formal investigation without a complaint initiation, nor the initiation of a complaint without reasonable grounds, nor to absolve the commission of its obligation to provide these grounds when challenged to do so."

34] Mr Mbikiwa argues that the mere signage *"instant loans"* was sufficient to rouse a *"reasonable suspicion"*. He argues that:

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15 Supra at fn 5

34.1 if the loans offered by the Appellant truly were “instant”, then there was a reasonable suspicion that the appellant was not conducting proper affordability assessments and was then contravening the Act; and

34.2 if the loans offered by the Appellant were not “instant”, then the advertisement did not mean what it said, and there was a reasonable suspicion that the advertisement breached the Act’s prohibition on misleading, fraudulent or deceptive advertising of credit.

35] However, bearing in mind the NCR’s memorandum as set out in para 3 supra, the complaint was not initiated on the grounds set out in par 32.2 supra, but rather in respect of 32.1.

36] The issue of whether or not the Appellant did, in fact, charge 30% interest was also not the basis on which the investigation was initiated.

37] To allow the NCR to initiate an investigation, such as the one in this matter, on a mere signage, sets the bar so low that it offends the sensibility of what should be good practice. It also offends the notion of what should constitute a reasonable suspicion. If indeed, a reasonable suspicion is formed objectively then there must be objective facts which support it - such as that the Inspector attempted to ascertain the procedure by which the loan application would take place and, indeed, how quickly a loan would be advanced. If the Appellant’s procedures are streamlined, and on the face of it, comply with the provisions of the Act, and the loan is advanced “promptly”, “swiftly” or “speedily” then

(objectively speaking) there cannot be a "reasonable suspicion" that the Act is being contravened.

38] Given the manner in which this investigation was initiated I am of the view that the Appellant must succeed and given this it is unnecessary to discuss the second point *in limine*.

39] Thus the order that is granted is the following:

39.1 The appeal is upheld with costs.

39.2 The order of the Tribunal is set aside *in toto* and replaced with the following:

"The application is dismissed."

NEUKIRCHER J
Judge of the High Court
Gauteng Division

I agree

Judge of the High Court
Gauteng Division

Date of hearing: 3 December 2020
Date of judgment: 8 January 2021

Hearing conducted via videoconferencing

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 8 January 2021.

Counsel for applicant: Adv Michau SC
Instructed by: LLR Incorporated
Counsel for respondent: Adv Mbikiwa
Instructed by: M-Incorporated