REPUBLIC OF SOUTH AFRICA

THE GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: NO

Date Signature

Case no: A289/2021

In the matter between:

THE NATIONAL CREDIT REGULATOR	Appellant
and	
THE NATIONAL CONSUMER TRIBUNAL	First Respondent
MERCEDES BENZ FINANCIAL SERVICES SOUTH AFRICA (PTY) LTD	Second Respondent

In re **CASE NO: A288/2021**

THE NATIONAL CREDIT REGULATOR	Appellant
and	

THE NATIONAL CONSUMER TRIBUNAL	First Respondent
BMW FINANCIAL SERVICES (SA) (PTY) LTD	Second Respondent

In re **CASE NO: A104\2019**

VOLKSWAGEN FINANCIAL SERVICES SA (PTY) LTD	Appellant

and

THE NATIONAL CONSUMER TRIBUNAL	First Respondent
THE NATIONAL CREDIT REGULATOR	Second Respondent

Coram: MALUNGANA AJ, MILLAR J and MOSHOANA J

Heard: 26 October 2022

Delivered: 20 January 2023

Summary: National Credit Act (NCA) sections 100 (1),101(1) and 102 (1), interpretation thereof - effect of these provisions – on credit agreements - whether vehicle finance houses have charged consumers on the road fee in contravention of the provisions of the National Credit Act - financing of the on the road fee in credit agreements does not offend the provisions sections 100,101 and 102 of the NCA.

JUDGMENT

Malungana AJ (Millar J concurring and Moshoana J dissenting)

Introduction

[1] There are four interrelated appeals which have been consolidated into a single appeal for purposes of hearing before us. The appeal arises out of conflicting decisions from the National Consumer Tribunal (the Tribunal) relating to the proper interpretation, and the purported contravention of sections 100,101 102 of the National Credit Act[1] (the NCA) by the vehicle finance corporations. The sections prescribe the types and nature of fees, and/or services which credit providers may charge or not charge consumers in respect of instalment sale, a mortgage agreement, a secured loan or a lease agreement.

[2] The parties involved in these appeal proceedings are three vehicle financiers, namely Volkswagen Financial Services SA (Pty) Ltd (VWFS), Mercedes-Benz Financial Services SA (Pty) Ltd(MBFS) and BMW Financial Services SA (Pty) Ltd (BMWFS), and the National Credit Regulator, In order to avoid confusion, I shall refer to the three vehicle financiers, collectively as 'the financiers'. Pursuant to section 55 of the NCA, the NCR issued compliance notices against the financiers in which they were found to have charged consumers an 'on the road, admin fee and handling fee' on credit agreements, which were disguised and /or inaccurately disguised as service fee and delivery in credit agreements, in contravention of sections 3(e), 89(2) (c),90(1), 90(2)(b)(iv)(aa), 90(2)(e), 90(f), 91(2), 100(1)(a), 101(1), 102(1) and (2) of the NCA.

[3] Aggrieved by the issuance of compliance notices the financiers approached the National Consumer Tribunal (the Tribunal) in terms of section 56 of the NCA to have the compliance notices reviewed and set aside. Having

[1] The National Credit Act, 34 of 2005

adjudicated the matters, the Tribunal issued conflicting decisions in respect of MBFS,BMWFS and VWFS respectively.

[4] It is convenient to set out briefly the facts and circumstances relating to the events which led to this appeal. I shall deal with the facts of each financier in turn.

The background

[5] The relevant facts which are largely a common cause in respect of VWFS can be summarised as follows. Pursuant to investigations into the list of credit agreements concluded in the months of February and March 2017, the NCR issued the report on the 23rd of August 2017.

[6] The relevant portion of paragraph 1 of the report reads:

> "On 1 August 2017 a letter was sent to VWFS in which the following was stated:
>
> Our Compliance Department is conducting a compliance monitoring exercise amongst vehicle financiers on license and registration fees payable by consumers under credit agreements to determine compliance with the provisions of section 102 of the Act."

[7] The relevant portion of paragraph 6.1 reads:

> "However, on the invoice from the dealer (see Annexure "B-2") no such amount is indicated.
>
> What the invoice from the dealer does disclose (amongst others) is the following two (2) costs:
>
> - On the road fee for the amount of R4,446.00
> - Service fee for the amount of R3,990.00

These two (2) amounts total R8,436.00. This is the same amount as disclosed in the agreements under the heading “Serv and Delivery”

[8] On 23 October 2017 the NCR issued a compliance notice in terms of section 55 of the NCA in which VWFS was found to have violated certain provisions of the NCA by charging consumers ‘the on road fee, admin fee and handling fee against the prescripts of sections 100, 101 and 102[2].

[9] In terms of s 55(3) of the NCA, VWFS was required to take the following steps to address the non-compliance with the Act:

“1. From 24 October 2017, Volkswagen Financial Services South Africa (Pty) Ltd must cease the practice and/or conduct of charging consumers the on road fee, admin fee and handling fee on credit agreements, and submit written confirmation to this effect to the NCR by no later than 2 November 2017.

2. By no later than 16 November 2017, Volkswagen Financial Services South Africa (Pty) Ltd is required to submit to the NCR a list of all consumers who were from 2007 charged the on road fee, admin fee and handling fee on credit agreements setting out:

(a) the number of consumers who were charged these fees; and

(b) the total amount of fees charged to all consumers.

3. By no later 14 December 2017, Volkswagen Financial Services South Africa (Pty) Ltd is required to refund all the consumers who were from 2007 charged the on road fee, admin fee and handling fee the amount of such fees together with interest charged thereon and submit to the NCR a report by independent auditors setting out:

(a) the number of consumers who were charged these fees;

[2] Paragraphs 9-13

(b) the number of consumers who were refunded these fees; and

(c) the total amount of these fees refunded to consumers."

[10] On 16 November 2017 VWFS submitted its objection to the Tribunal in terms of s 56 of the NCA. The matter served before a panel of three Tribunal members, who after hearing evidence handed down a judgment and an order in the following terms:[3]

(a) The compliance notice issued by the NCR on 23 October 2017 is confirmed in the following respects:

(i) Paragraph A13(d) thereof is deleted;

(ii) Paragraph B1 thereof to read as follows:

"From 10 April 2019, Applicant must cease the practice and /or conduct of charging consumers 'on road,' admin and handling fees on credit agreements, and submit written confirmation to this effect to the Respondent, no later than the 25th of April 2019."

(b) Paragraph B3 thereof to read as follows:

"Applicant is required to, in respect of all the consumers identified in B2, calculate the total amount of charges, fees or interest levied on the 'on road', admin and /or handling fees and refund all those consumers those charges, fees or interest levied and submit to the NCR a report by an independent auditor setting out-

(a) The number of consumers who were levied those charges, fees or interest;

[3] Judgment of the Tribunal on 04 April 2019 [page 013-4 case-lines]

(b) The number of consumers who were refunded those charges, fees or interest, and

(c) The total amount of charges, fees or interest refunded to consumers."

[11] With regard to MBFS the compliance notice was issued by the NCR on 28 March 2018. The investigations revealed that MBFS was charging consumers an 'on road fee on instalment agreements in contravention of s 100(1(a), 101, 102(1) and (2).The steps which MBFS had to undertake in terms of the compliance notice, save for the dates, are similar to the steps mentioned in VWFS above. Therefore it is not necessary for me to repeat them in this judgment.[4]

[12] Importantly MBFS denied charging consumers 'on road' fees in contravention of the relevant sections of the NCA. In a letter dated the 25th October 2017, MBFS responded as follows to the purported contravention:[5]

> '3. Firstly, the OTR Fee is not a fee charged by MBFS but a fee charged as part of the total cash purchase price of the vehicle by retail sellers of the vehicles (ie vehicle dealers agents and distributors). It is not a fee originated by or originating from MBFS as a credit provider or as credit charge. Importantly the OTR Fee forms part of the purchase price of a vehicle irrespective of whether the customer pays for the vehicle in cash or finances the purchase of the vehicle through a credit provider. As part of the total purchase price of the vehicle, the OTR Fee will therefore be taken into account in determining the principal debt payable in an instalment agreement and is not an additional charge over and above the principal debt.'

[13] In the investigation report dated the 17th October 2017, NCR found that under the heading 'Extras' an amount of R5 500.00 is disclosed by MBFS in the credit agreement as 'on the road fees, whereas on the tax invoice , the

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4 Reports issued by NCR on 10 October 2017 [page 2-178 case lines]. Compliance Notice issued on 18 March 2018, [page 2-195]

5 See page 2-51 on case-line A3071/2021

same amount is disclosed as on the road fees added to the principal debt which attract interests.

[14] Dissatisfied with the notice, MBFS referred the dispute to the Tribunal in terms of section 56 of the NCA. On 31 May 2021 the Tribunal granted an order cancelling the compliance notice issued by the NCR against MBFS.

[15] As regards BMWFS the compliance notice in terms of s 55(1) of the NCA was issued on 4 October 2017. The contraventions allegedly committed by BMWFS were similar to *VWFS* and *BMWFS* above, and therefore it is not necessary for me to repeat the them in this judgment. Suffice to state that the BMWFS launched a successful application in terms of s 56 of the NCA. The Tribunal handed down its judgment on 10 May 2021, and ordered that the compliance notice issued against BMWFS be cancelled.[6]

[16] VWFS, MBFS and BWWFS contended that, 'the on road' fee and other pre delivery services are not charged by the financiers but by the dealer to ensure that the vehicle is delivered to the consumer in a satisfactory manner. Furthermore the fee charged by the retail sellers only forms part of the purchase price. These fees are determined and charged by the dealer to cover the costs of vehicle registration, licensing fees and number plates, fuel and other items in connection with effecting delivery.

Issues for determination

[17] The parties provided a joint practice note to the court in terms of which they described the nature of the appeal serving before us, as well as the issues to be determined.[7] The joint practice note describes the issues to be decided as follows:

'6. ISSUES ON APPEAL IN VOLKSWAGEN CASE

[6] Judgment of the Tribunal, case-lines 001-12 (A104/2019)
[7] See case-lines 013-1(A104/2019)

6.1 In the main appeal, whether the on road fee, administration fee and handling fee charged by Volkswagen Financial Services South Africa (Pty) Ltd ("Volkswagen") is prohibited in terms of the National Credit Act 34 of 2005 ("the NCA"); whether Volkswagen had disguised the nature of these deceptively in the credit agreement; and whether Volkswagen had a legal duty with regard to overreaching by the dealer.

6.2 In the cross -appeal, whether the National Credit Regular ("NCR") is entitled to order that the on road fee be refunded to the consumers, together with any interest levied thereon.

7. ISSUES IN THE MERCEDES-BENZ CASE

7.1 Whether the National Consumer Tribunal erred in its decision to cancel and set aside the compliance notice issued by the NCR to Mercedes-Benz Financial Services South Africa (Pty) Ltd ("Mercedes-Benz").

7.2 Whether Mercedes-Benz contravened the NCA by charging an on the road fee.

7.3 That issue will require a determination of the meaning of the phrase "principal debt" used in section 101(1) of the NCA.

8. ISSUES IN THE BMW CASE

8.1 Whether the financing of on the road fee charged by a vehicle financier to consumer, at the request of the consumer, amounts to charging that fee by the financier as envisaged in the NCA.

8.2 Specifically, who charged the said fee to the consumer, as envisaged in sections 100 to 102 of the NCA.

8.3 Should it be found that the NCA was contravened, whether the compliance notice falls to be set aside as a result of the selective enforcement of the NCA by the NCR.

8.4 Which party is liable to pay the costs of an application launched by BMW Financial Services (SA) (Pty) Ltd ("BMW") for leave to intervene in the Volkswagen appeal, which costs were reserved.'

The relevant sections of the NCA

[18] Section 2 of the NCA provides that the Act, must be interpreted in a manner that gives effect to the purpose set out in section 3.

[19] One of the objects of the NCA as set out in section 3, is to promote and advance the social and economic welfare of South Africans, to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by-

(a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions

(b) ensuring consistent treatment of different credit products and different credit providers;

(c) promoting responsibility in the credit market by-

(i) encouraging responsible borrowing, avoidance of over indebtedness and fulfilment of financial obligations by consumers, and

(ii) discouraging reckless credit granting by credit providers and contractual default by consumers;

(d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers.

[20] Section 100 of the NCA deals with prohibited charges. The section provides that:

> “(1) A credit provider must not charge an amount to, or impose a monetary liability on, the consumer in respect of-
>
> (a) a credit fee or charge prohibited by this Act;
>
> (b) an amount of a fee or charge exceeding the amount that may be charged consistent with this Act;
>
> (c) an interest charge under a credit agreement exceeding the amount that may be charged consistent with this Act; or
>
> (d) any fee, charge, commission, expenses 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.
>
> (2) …”

[21] Section 101 deals with the cost of credit. It provides that –

> “(1) A credit agreement must not require payment by the consumer of any money or other consideration, except-
>
> (a) the principal debt, being the amount deferred in terms of the agreement, plus the value of any item contemplated in section 102;
>
> (b) an initiation fee, which-
>
> (i) may not exceed the prescribed amount relative to the principal debt; and
>
> (ii) must not be applied unless the application results in the establishment of a credit agreement with that consumer.
>
> (c) a service fee, which-

(i) in the case of a credit facility, may be payable monthly, annually, on a per transaction basis or on a combination of periodic and transaction basis; or

(ii) in any other case, may be payable monthly or annually; and

(iii) must not exceed the prescribed amount relative to the principal debt;

(d) interest, which –

(i) must be expressed in percentage terms as an annual rate calculated in the prescribed manner, and

(ii) must not exceed the applicable maximum prescribed rate determined in terms of section 105;

(e) cost of any credit insurance provided in accordance with section 106;

(f) default administration charges, which –

(i) ….

(ii) …

(g) collection costs, which may not …"

[22] In regard to fees or charges, section 102 provides that-

'(1) if a credit agreement is an instalment agreement, a mortgage agreement, a secured loan or a lease, the credit provider may include in the principal debt deferred under the agreement any of the following items to the extent they are applicable in respect of the goods that are the subject of the agreement-

(a) an initiation fee as contemplated in section 101 (1) (b), if the consumer has been offered and declined the option of paying that fee separately;

(b) the cost of extended warranty agreement;

(c) delivery, installation and initial fuelling charges;

(d) connection fees, levies or charges;

(e) taxes, licence or registration fees; or

(f) subject to section 106, the premiums of any credit insurance payable in respect of that credit agreement.

(2) A credit provider must not-

(a) charge an amount in terms of subsection (1) unless the consumer chooses to have the credit provider act as the consumer's agent in arranging for the service concerned;

(b) require the consumer to appoint the credit provider as consumer's agent for the purpose of arranging any service mentioned in subsection (1), or

(c) charge the consumer an amount under subsection (1) in excess of –

(i) the actual amount payable by the credit provider for the service as determined after taking into account any discount or other rebate or other applicable allowance received or receivable by the credit provider; or

(ii) the fair market value of a service contemplated in subsection (1), if the credit provider delivers that service directly without paying a charge to a third party."

Submissions on appeal

[23] It was submitted on behalf of NCR that sections 101(1) and 102(1) contain a closed list of the permissible charges and on road fee is not contained in the list. In contravention of section 90(2)(a)(ii) of the NCA, VWFS has deceived consumers in that the fees described in the dealer's invoice differ from the fees described in the credit agreement. Further, it included the 'service and delivery charges' in Part E of the credit agreement, and in so doing deceived consumers into believing that these amounts are imposed in terms of section 102 of the NCA.

[24] As regards BMWFS, the NCR submitted that the invoice reveals that the latter is the supplier/seller of the vehicle and it sells the vehicle to the consumer, which had been sold to BMWFS for cash. The closed list of items compromises the cost of credit that may be recovered by the credit provider and, on the road fee is not included in the closed list. In its written heads of argument, NCR also submits that on the road fee are charged for the benefit of the owner, and since BWWFS is the owner it receives the benefit of the services for which the consumer is charged.[8]

[25] According to the NCR the consumer would approach the dealer and selects the vehicle which he or she intends to buy. In the process the consumer would select certain extras to be fitted whereupon the offer to purchase is concluded which set out the purchase price payable for the vehicle and any extras fitted to the vehicle as well as an "on road fee" payable for the service es rendered or to be rendered by the dealer.[9]

[26] On behalf of VWFS, Mr Gautshi SC argued that the dealer is independent from the credit provider. Accordingly the close list does not apply to what should be contained in the invoice issued by the dealer. The financier finances the deferred amount as contemplated in section 101.

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[8] Paragraph 4.1.7 and 4.1.8 of the NCR Heads of Argument, case-lines 006-5 [A3062/2021]'BMWFS provides the consumer with a pre-agreement statement and quotation. If the consumer accepts the pre-agreement statement and quotation and signs it, an instalment agreement is concluded between BMWFS and the consumer as defined in the Act.'

[9] Paragraphs 4.1.1-4.12 NCR Heads of Argument *supra*

[27] MBFS on the other hand also argued that ‘the on road’ fee is a fee charged by dealers to consumers and forms part of the purchase price for a vehicle. According to counsel for MBFS, Mr McNally SC, the NCA does not regulate what should be in the invoice issued by the dealer during the preliminary stage of the sale processes. There would be absurd consequences if the financiers were to repay the consumers for services which have already been rendered by the dealer. The amount reflected in the invoice forms part of the principal debt financed by the credit provider. Moreover, the credit provider does not securitise the price which the dealer charges the consumer.

[28] Mr Budlender SC for BMWFS, submitted that on the road fee is charged by the dealer regardless of whether the car is purchased for cash or is financed. The first stage involved in the process is negotiation between the dealer and consumer, followed by the financing stage. If a financier refuses to finance the amount, the liability to pay the dealer remains. There is no double dipping by the financier. Until the agreement is reached with the dealer, there is no financing of the deferred amount. Accordingly the liability to pay the disputed fee does not arise from the granting of credit and is not related to the business or actions of the financier. He argued further that NCR acted without merits, and should pay the costs including the reserved costs in relation to previous applications.

[29] As regards the interpretations of the implicated sections, BMWFS submitted that the ordinary grammatical meaning of the word ‘charge’ used in section 100 of the NCA means to ‘impose liability to pay’ or ‘demand an amount for service rendered or goods supplied’ in *The South African Concise Oxford Dictionary.* The on road fees charged by the dealer does not constitute *consideration* for anything than by the financier or form part of the cost of credit. Moreover, the consumer is aware that the fees are being charged by the dealer, and is open to the consumer whether to pay the fee to the dealer or have it financed by the financier.

Discussion

[30] There are divergent views regarding the interpretation of sections 100,101 and 102 of the NCA. It seems to me that the concepts of ‘prohibited charges’ and ‘cost of credit’ are central to sections 100 and 101 of the NCA. On behalf the NCR it was contended that the financiers have charged consumers the ‘on road fees” in contravention of sections 100,101 and 102, which allegations are denied by the financiers. To resolve the dispute between it is necessary to have regard to the meaning of these concepts. There are several judgements of various divisions dealing with the contravention of these sections in which the import of the NCA has been considered. The interpretations placed on these provisions by those judgments have not been discordant. However, I do not propose to analyse and discuss each of these decisions so as not to burden this judgment.

[31] In *National Credit Regulator v Lewis Stores (Pty) Ltd* (937/18) [2019] ZASCA 190 (13 December 2019), the Court dealt with a claim by the regulator that *Lewis* might have engaged in a prohibited conduct relating to, among other things, extended warranties. *Lewis’s* explanation regarding the extended warranties offered to its customers was to the effect that all goods sold by *Lewis* comes with twelve (12) months warranty which operates from the date of purchase. It offered an extended warranty and maintenance contract , which endures for two years after the expiry of the supplier’s warranty. The terms and conditions of such extended warrant were explained to the customer and it was optional whether the customer accepted the warranty. The Court held that the prohibited charge (envisaged in s 100(1)(a) contended for by the regulator is a charge made in conflict with s 101(1). The material portion of s 101(1) prohibits a credit provider from ‘requiring payment’ by a consumer under a credit agreement of any money or order consideration except the principal debt, being the amount deferred in terms of the agreement, plus value of any item contemplated in s 102.

[32] In the course of his consideration of the above sections, Eksteen J said the following (para 36):

> 'On the undisputed facts set out on behalf of *Lewis*, however, the membership agreement and the club is an agreement unrelated to the credit facility. It deals with a different subject matter. The club fees are payable in advance and do not constitute credit. No interest is raised on the arrears and in the event of them not being paid they are not recovered. In the circumstances it cannot be said that a consumer is 'required' to pay the club fee; nor that it increases the cost of credit; nor can it be said that the club fee, if it is paid, is paid under credit agreement.'

[33] The seminal remarks of Malan JA in relation to the interpretation of the NCA in *Nedbank v National Credit Regulator* 2011 (3) SA 581 (SCA) are instructive. The learned Judge said the following (para 2):

> 'The NCA must be interpreted in a manner that gives effect to these objects. Appropriate foreign and international law may be considered in construing the NCA. Unfortunately, the NCA cannot be described as the 'best drafted Act of parliament which was ever passed, nor can the draftsman be said to have been blessed with the 'draftsman ship of Chalmers'. Numerous drafting errors, untidy expressions and inconsistences make its interpretation a particularly trying exercise. Indeed, these appeals demonstrate the numerous disputes that have arisen around the construction of the NCA. The interpretation of the NCA calls for a careful balancing of the competing interests sought to be protected, and not for a consideration of only the interests of either the consumer or the credit provider.'

[34] In *KwaZulu Natal Joint Liaison Committee v MEC Department of Education, KwaZulu Natal* 2013 (4) SA 262 (CC), the Constitutional Court embraced the approach to statutory interpretation as laid down by Wallis JA in *Natal Joint Municipality Pension Fund v Endumeni Municipality* 2012 (4) SA 593. In essence the courts are no longer required to follow the conventional approach of showing that a word has ordinary meaning that is not absurd, vague and ambiguous. The Courts have also dispensed with the reference to the intention of the legislature. The courts simply have to consider the objective meaning of the word having regard to its context. The reasoning

behind this interpretative methodology is that the process of drafting a legislation is often riddled with difficulties which make it impossible to ascertain the intention of the legislature[10].

[35] There seems to be no doubt that *the text and context* approach in the interpretation of statutes requires that regard be had to the meaning assigned to the words sought to be interpreted and the circumstances under which they are used. In *Endumeni* Wallis JA has warned Judges against the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. He bemoaned the search for legislative intent as unrealistic and misleading.

[36] Reverting now to the interpretation of the concepts which are central to this appeal. It is helpful to begin with the word 'charge' as envisaged in section 100 of the NCA. Nowhere in the NCA is the word 'charge' explained or defined. In determining the meaning of this word, the court should be mindful of the fact that they must be given the meaning the reader would have given them. The objective meaning. That is what the objective reader would have understood of the word 'charge' in the context of section 100. The verb 'charge' in the *Oxford Learner's Dictionary* simply means to 'ask an amount for goods or a service charge something for something.' The secondary word in s 100 to 'impose a monetary obligation on' means 'the state of being forced to do something because is your duty or because of a law.' That liability means the consumer becomes liable for the entire debt of the goods or service provided.

[37] As contended by the financiers the meaning of the words contained in section 100 'charge' or 'impose monetary liability,' demand of the consumer to pay the price charged by the dealer not a credit provider. Properly construed the impression it creates in the ordinary reader is that the consumer is being charged the value of the goods or service rendered by the dealer.

[10] Perumalsamy K "The Life and Times of Textualism in South Africa

[38] There is no vagueness in clause section 100. It prohibits the credit provider from charging or imposing monetary liability upon the consumer. No obligation or financial liability has been imposed by the credit provider when the latter finances the principal debt which has been pre-determined by the dealer. Section 101 will only be triggered if the credit provider were to charge for the goods or services prohibited in s 100 as that would increase the cost of credit. The dealers and financiers perform separate roles which compliments each other in the process leading up to the conclusion of the credit agreement.

[39] Section 101 is also located in Chapter 5 of the NCA. What s 101 prohibits is clear from the text. It prohibits a credit provider from requiring payment by a consumer under the credit agreement of any money or other consideration except the principal debt, being the amount deferred under the agreement, plus the value of any item contemplated in s 102.

[40] The financiers have correctly argued that the NCA does not contain any prohibition on what amounts may be financed by the credit provider at the request of the consumer. In this regard the concept 'defer' must therefore be given its plain, natural and literal meaning within the context of the NCA. In the *Oxford Dictionary* the word 'defer,' means 'to delay or postpone something until a later time."

[41] The word 'except' as mentioned in section 101, refers to the closed list of items which the credit provider is allowed to charge the consumer in the credit agreement. The contextual reading of sections 100 in relation to the 'on the road' fee lends itself to the interpretation that the phrase 'must not charge' means must not demand or require payment of the value of the goods supplied and fee in respect of those items from the consumer. The phrase 'must not require payment' in section 101 means' the credit provider is not allowed to demand payment which will add cost of the credit save for those items contained in the close list, or provided in section 102. The latter section deals with the specific items the credit provider may include in the principal debt referred to in s 101. The section does not give the credit

provider carte blanch of any sort to charge an amount in terms of s 102(1). It contemplates a situation where the credit provider has been appointed as a consumer's agent.

[42] It must be emphasised that the courts cannot lose sight of the actual words used by the lawmakers. The court cannot under the guise of interpreting the meaning of words, impose a view of what the policy or object of legislation is or should be.[11]

[43] In light of the aforegoing, I am persuaded that the financiers have not charged consumers the on road fees when they included these fees and services in the credit agreements. The conundrum in the NCR's interpretation that the financiers becomes the owners of the vehicle upon purchasing the vehicle from the dealer, is that, it is the consumer who negotiate the sale and specifications with the dealer. The NCR concedes that the dealer and the consumer add the extras to the purchase price payable for the vehicle selected by the consumer in the pre-agreement stage. It seems to me that the financier merely finances the principal debt which is constituted the purchase price, and other extras including 'the on the road fee plus other services. The registration of the vehicle in the name of the financier only serves as a security for the fulfilment of the consumer's obligations under the credit agreement. Under the circumstances there is no merits in the NCR's argument that the credit provider had charged consumers 'on the road fees' in contravention of the provisions of the NCA. The dealer imposes the monetary liability on the value of the fees and services which it provides to the consumer at the initial stage of the sale process.

[44] Finally, the accepted interpretational principles require that a meaning must be given to sections 100-102 that is consistent with the object and purpose of the Act. Having regard to the object and purpose of the NCA I am of the considered view that the financing of the 'on the road fee' in credit agreements will enhance accessibility by vulnerable consumers to the credit

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market, within the context of s 3 of the relevant Act. I therefore conclude that the financiers did not contravene the provisions of the implicated sections of the NCA.

[45] The last issue which deserves our attention is that of costs. The NCR has urged us not to grant costs against them in the event of them not being successful in these proceedings in that they are merely fulfilling the statutory obligations. In my view this matter involves legitimate issues of compliance with the NCA which require interpretation of the implicated sections. That places the matter squarely in the sphere of public interest litigation notwithstanding that the parties to litigation are private entities. It is members of the public who buy the products and make use of the services rendered by these entities, and it is in the best interest of the public that the legal dispute surrounding the interpretation of the relevant sections be resolved. The outcome of these proceedings will also have an impact on other entities who find themselves in similar situations. The costs will follow the result.

[46] In the result I propose the following order:

46.1. The appeal lodged by Volkswagen Financial Services in case number A104/2019 is upheld with costs, which costs include the costs, consequent upon the employment of two counsel.

46.2 The cross-appeal by the NCR in the Volkswagen Financial Services in case number A104/2019 is dismissed with costs, which costs consequent upon the employment of two counsel.

46.3 The appeal lodged by the NCR against the decision of the NCT in the Mercedes Benz Financial Services in A289/2022 is dismissed with costs, which costs includes the costs consequent upon employment of two counsel.

46.4 The appeal lodged by the NCR against the decision of the NCT in the BMW Financial Services in case number A288/2021 is dismissed with costs, which costs include costs, consequent upon the employment of two counsel.

P MALUNGANA
ACTING JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED

A MILLAR
JUDGE OF THE HIGH COURT

I DISAGREE

N MOSHOANA
JUDGE OF THE HIGH COURT

MOSHOANA, J (Dissenting)

Summary: Statutory appeal effectively against two conflicting rulings of the National Consumer Tribunal (NCT) as differently panelled. At the centre of the statutory appeals lies the correct and proper interpretation of certain sections of the National Credit Act (NCA). The first ruling involving Volkswagen Financial Services SA (Pty) Ltd (VWFS) and the NCT as well as the National Credit Regulator (NCR) concluded that the so-called "on the road fees" (OTRs) are not allowed to be charged in terms of section 102 of the NCA. As such, VWFS contravened the provisions of the NCA. Resultantly, the compliance notice was confirmed with modifications. Aggrieved by the ruling, VWFS launched an appeal to this Court. The NCR was aggrieved by the modifications and launched a cross-appeal. The second ruling involving Mercedes Benz Financial Services SA (Pty) Ltd (MBFS) and BMW Financial Services SA (Pty) Ltd (BMFS) concluded that OTRs are allowed, and if charged they do not contravene the NCA. Such led to the setting aside of the compliance notice issued by the NCR. The NCR was aggrieved and launched an appeal to this Court. All these appeals were consolidated to be heard by the full Court. Accordingly, this dissenting judgment relates to those appeals.

A statutory appeal takes the form of a special review and the question that arises is whether the Tribunal was correct or not. The provisions of sections 100-102 of the NCA must be given a textual, contextual and purposive interpretation. On proper interpretation of the implicated sections, any fee charged or which the consumer is made liable to pay contrary to sections 100-102 is invalid and amounts to a contravention of the NCA. A ruling made in the VWFS matter is correct and it is upheld by this judgment. A ruling made in the MBFS and BMFS matters is incorrect, and it is not upheld by this judgment.

In this dissenting judgment, the following obtains. Held (1): The appeal in respect of the VWFS matter is dismissed with costs, which include the costs of employing two counsel. Held (2): The cross-appeal in respect of the VWFS

matter is dismissed with costs, which include the costs of employing two counsel. Held (3): The appeal in respect of MBFS and BMFS is upheld with costs, which include the costs of employing two counsel.

Introduction

[1] At the heart of this appeal lies the proper and correct interpretation of statutory provisions. I had the pleasure and benefit of perusing the majority judgment under the hand of the learned Acting Justice Malungana. For reasons outlined below, I beg to differ with the conclusions reached by the majority. What follows hereunder are the reasons for differing with the majority conclusions. This matter involves effectively four separate statutory appeals, which were collapsed into one for the purposes of hearing these appeals. The first appeal was lodged by Volkswagen Financial Services South Africa (Pty) Ltd (VWFS). Annexed to the first appeal is the cross-appeal launched by the National Consumer Regulator (NCR) against the modifications effected to the compliance notice. The other two appeals involving Mercedes Benz Financial Services South Africa (Pty) Ltd (MBFS) and BMW Financial Services (SA) (Pty) Ltd (BMFS) were launched a little later. The two were consolidated into one and later, per court order, VWFS was added to the appeal. All these appeals turn to consider one question, which relates to the proper and correct interpretation of sections 100-102 of the National Credit Act 34 of 2005 [12] (NCA). The cross-appeal is predicated on nuanced footing. All the appeals factually oscillate on the issue of charging of the so-called “on the road fees” (OTRs). On one hand, the contentions from all sides are that when properly interpreted, the implicated sections allow the OTRs to be charged. On the other hand, they prohibit the charging of the OTRs. Two conflicting decisions were handed down by two different panels within the National Consumer Tribunal (NTC). Those conflicting decisions have given rise to the statutory appeals to be decided before this Court. As it shall be observed later in this judgment, this case somewhat serves as a test case. As such, it may not be necessary to

[12] As amended.

provide a full rendition of the facts appertaining to each of the separate appeals. Doing so will serve no beneficial purpose other than to elongate the already long dissenting judgment. Thus, the facts appertaining to the appeal shall be dealt with parsimoniously. It suffices to mention at this stage that although these proceedings are referred to as appeals, veritably they involve the setting aside and/ or not setting aside of compliance notices issued in terms of section 55 of the NCA –exercise of statutory powers – by the NCR. They are all a sequel of a failure or success of an objection process contemplated in section 56 of the NCA – yet another exercise of a statutory function.

Background facts

[2] The factual narration in these appeals shall be divided into three factual matrixes. However, as pointed out earlier, the narration shall purposefully only relate to the essential facts, owing to the central legal question that emerges from these appeals. For convenience, the narration shall take the undermentioned particular order.

The factual matrix appertaining the VWFS matter

[3] It is a common cause in these appeals that VWFS is a credit provider[13]. It provides a credit facility to consumers purchasing mainly Volkswagen motor vehicles. On or about 23 October 2017, in exercising statutory powers emanating from section 55 of the NCA, the Chief Executive Officer (CEO) of the National Credit Regulator (NCR) issued a notice stating that VWFS failed to comply with the provisions of the NCA. The said notice tabulated the basis for the failure to comply with the provisions of the NCA. Pertinent to these appeals, it was brought to the attention of VWFS that an investigation

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13 In terms of section 1 of the NCA, a credit provider in respect of a credit agreement to which the Act applies means, amongst others, the party who extends credit under a credit facility.

conducted by the NCR revealed that VWFS charged consumers OTRs contrary to the provisions of sections 100-102 of the NCA.

[4] On or about 16 November 2017, VWFS lodged an objection in terms of section 56 of the NCA and sought a review of the contravention notice. The sought review was opposed by the NCR. Resultantly, on 19 February 2019, a Tribunal constituted by Dr D Terblanche (Chairperson); Dr M Peenze; and Professor B Dumisa (Panel members) commenced a hearing of the review process, which was terminated on 20 February 2019. Ultimately after hearing the review, the Tribunal as beaconed by Dr Terblanche, on or about 9 April 2019 issued a judgment with the reasons thereof. The Tribunal confirmed the compliance notice issued by the NCR and also modified it.

[5] Aggrieved by the judgment, VWFS launched the present appeal on or before 10 April 2019 seeking an order setting aside the compliance notice. The appeal was duly opposed by the NCR. Additionally, the NCR sought a cross-appeal against certain portions (modification of the compliance notice) of the judgment of the Tribunal. In the cross-appeal, the NCR sought ancillary orders, which encapsulated a refund of the OTRs to the affected consumers.

The factual matrix appertaining the MBFS matter

[6] In a similar vein, MBFS is a credit provider. It provides a credit facility to the purchasers of Mercedes Benz motor vehicles. Similarly, on 29 March 2018, the CEO of the NCR issued a notice contemplated in section 55 of the NCA against MBFS alleging non-compliance with certain provisions of the NCA. On or about 14 May 2018, MBFS objected to the compliance notice within the contemplation of section 56 of the NCA. Unlike the VWFS matter, MBFS did not seek a formal review. Instead, it sought an order setting aside the compliance notice with an appropriate order as to costs. The NCR opposed the order sought by MBFS. Unlike the VWFS matter, the objection was handled as a motion proceeding. *En route* to the impugned decision,

interlocutory rulings were made condoning late filing of affidavits and granting leave to submit further affidavits. Those interlocutory rulings are not impugned before us. Between 25-26 May 2021, the Tribunal panelled by Advocate F Manamela (Presiding member), Professor T Woker and Mr F Sibanda (Tribunal members), heard oral submissions from the parties. On 31 May 2021, the Tribunal issued a judgment buttressed by reasons. The Tribunal granted an application to cancel the compliance notice with no order as to costs.

[7] Disenchanted by the order, on or about 28 June 2021, the NCR launched the present appeal. It sought an order upholding its appeal as well as the dismissal of the quest to set aside the compliance notice; confirmation of the compliance notice; and declaration of conduct of charging consumers OTR in credit agreements to be prohibited by the NCA.

The factual matrix appertaining the BMFS matter

[8] BMFS is also a credit provider. It provides a credit facility to the purchasers of BMW motor vehicles. Similarly, on 4 October 2017, the CEO of the NCR issued a compliance notice against BMFS alleging non-compliance with certain provisions of the NCA. Likewise, BMFS objected to the compliance notice within the contemplation of section 56 of the NCA. BMFS sought an order from the Tribunal setting aside the compliance notice. The Tribunal constituted by Advocate J Simpson (Presiding member) as well as Ms P Beck and Mr T Bailey (Panel members) heard submissions on 4 and 5 May 2021. On 10 May 2021, the Tribunal issued a judgment supported by reasons. In terms thereof, the application to cancel the compliance notice was granted with no order as to costs.

[9] Chagrined by the order, the NCR launched an appeal in the Local Division of this Court, in Johannesburg. In its appeal application, the NCR sought a similar order as was sought in the MBFS matter.

Analysis and evaluation

[10] In this judgment, given the crisp issues that arise in these appeals, it is obsolete to consider each of the grounds of appeal punted for by the respective parties. As indicated above, an answer on a proper and correct interpretation of the implicated sections is an answer to all the grounds punted for by all. As highlighted above, the veritable question is whether there has been compliance or non-compliance with the implicated provisions of the NCA. Given the fact that the cross-appeal is somewhat nuanced, it is ideal for this Court to deal with the cross-appeal launched by the NCR in the VWFS matter first.

The cross-appeal in the VWFS matter

[11] The cross-appeal is directed at the modification order made in paragraph 80.1.3 of the impugned decision. In paragraph 80.1.3, effectively, the Tribunal ordered VWFS to calculate certain monies and submit a report to the NCR which sets out certain aspects. By its nature, this order does not constitute a final order capable of being appealed against. On this limited basis alone, the cross-appeal is bound to fail, in my view.

[12]What the NCR seeks from this Court is to amend the order that was made by the Tribunal. The first difficulty I have is that the NCR did not at the section 56 proceedings require any amendment to its compliance notice – in the nature of counter relief. All it sought was an order from the Tribunal confirming the compliance notice and directing VWFS to comply with the requirements of the notice. It is interesting to note that in terms of section 55 (3), the NCR required the following from VWFS:

"B. In terms of section 55 (3) of the Act, you are required to take the following steps to address the non-compliance with the Act:

1. From 24 October 2017, Volkswagen Financial Services South Africa (Pty) Ltd must cease the practice and/or conduct of charging consumers the on the road fee, admin fee and handling fee on credit agreements, and submit written confirmation to this effect to the NCR by no later than 2 November 2017.

2. By no later than 16 November 2017, [VWFS] is required to submit to the NCR a list of all consumers who were from 2007 charged the on the road fee, admin fee and handling fee on credit agreements setting out;

   (a)The number of consumers who were charged these fees; and

   (b)The total number of these fees charged to all consumers

3. By no later than 14 December 2017, [VWFS] is required to refund all the consumers who were, from 2007, charged the on the road fee, admin fee and handling fee, the amount of such fees together with interest charged thereon and submit to the NCR a report by independent auditors setting out:

   (a) The number of consumers who were charged these fees;

   (b) The number of consumers who were refunded these fees; and

   (c) The total amount of these fees refunded to consumers."

[13] In considering the cross-appeal, this Court must bear in mind that inasmuch as this is referred to as an appeal, it is not an appeal within the contemplation of the Superior Courts Act 10 of 2013 (SCA)[14]. In order to garner an understanding of this type of appeal, it behoves this Court to have regard to the provisions of section 56 of the NCA. In there lies the statutory powers to review the compliance notice. As it shall be demonstrated later, the review contemplated in section 56 is not a review of a judicial kind. Further, once the statutory power to review the compliance notice is performed, the Tribunal is clothed with further discretionary statutory powers to confirm, modify or cancel all or part of the compliance notice[15]. Other than in section 148 of the NCA, which shall be discussed in due course, there is no specific right of appeal afforded to the NCR against objection review applications.

[14] The appeal contemplated in section 148(2)(b) of the NCA is one available to a participant. It is an appeal that is subjected to the Rules of the High Court. Rule 49 of the Uniform Rules of Court deals with civil appeals from the High Court and Rule 50 deals with civil appeals from Magistrates Courts. There are no specified rules designed to deal with statutory appeals emanating from the Tribunal. As it shall later be demonstrated, this type of appeal is in a nature of a review. In terms of section 148, a participant may choose either an appeal or a review. The NRC and the other parties before us chose to lodge an appeal as opposed to a review. The legislature afforded participants a choice between an appeal and a review. Wallis JA in a separate but concurring judgment in *The National Credit Regulator v Lewis Stores (Pty) Ltd* [16], had the following to say:

> "The second point of principle lies in the fact that an appeal within the justice system is clearly a defined process, whereby the correctness of the decision of the court appealed from is assessed within defined boundaries. The appeal proceeds on the record of the proceedings in the lower court and the factual findings of that court and its exercise of discretion in reaching its

[14] Act 10 of 2013 as amended section 16 thereof.
[15] Section 56 (2) of the NCA.
[16] 2020 (2) SA 390 (SCA) at para 51.

> decision are given respect and only departed from on limited grounds. That is by no means true of statutory appeals from tribunals and officials." [Own Emphasis]

[15] As it shall be demonstrated later, the first step in a statutory appeal is to ascertain the nature of the right of appeal conferred by the statute. In other words, the appeal shall be singularly driven and navigated by the statutory provision affording the right of appeal. Pertinent to the present cross-appeal, the question is whether the Tribunal was wrong or right in modifying the compliance notice. As indicated earlier, section 56 empowers the Tribunal to modify a compliance notice. Section 55(4) of the NCA prescribes that a compliance notice remains in force until it is set aside by a court upon appeal. Implied in section 55(4) of the NCA is that upon appeal a court only has powers to set aside the compliance notice. Accordingly, if the compliance notice is not capable of being set aside, then *cadit quaesto*.

[16] On a proper reading of section 148 of the NCA, it seems plain that an appeal will only arise after a hearing by the Tribunal. All the appeals in this matter emanate from a section 56 process and not a referral process contemplated in chapter 7 of the NCA. Section 56(3) suggests that if modification of the compliance notice happens, the next step that should be taken is for the applicant (objector) to comply within a specified time. It seems to be the case that if an objector is still not satisfied, the objector may appeal that the compliance notice as confirmed or modified be set aside. I particularly take a view that the NCR not being an objector cannot appeal or review to set aside the compliance notice (effectively, the compliance notice remains its statutory decision, even in a modified form).

[17]As a further indicator, a compliance notice remains in force until set aside by the Tribunal or a Court of appeal and or review of a Tribunal decision concerning the notice. Owing to the fact that the power to issue a compliance notice lies with the NCR as provided for in section 55(1), it shall be incongruent with the text and the context as well as the purpose of the NCA to still afford the NCR

an opportunity to seek a set aside of its own compliance notice. In my view, the only time when such may happen is in a legality review where the NCR may seek a judicial review of its own decision. The NCR did not present a legality review before us.

[18]In my view, it remains essential that a distinction must be drawn between the review powers of the Tribunal in section 56 and the review powers in section 59 of the NCA. In a section 56 review, the Tribunal possess discretionary powers to (a) confirm; (b) modify or (c) cancel all or part of the notice. In my view, it must have been the intention of the legislature to allow the Tribunal to play a supervisory role over the performance of the statutory functions of the NCR, such that the outcome of the objection process gives rise to a decision by the Tribunal *qua* the NCR. Section 27(c) of the NCA provides that the Tribunal over and above adjudication powers may exercise any other power conferred on it by law. In relation to compliance notices, the NCA empowers the Tribunal to set aside a compliance notice.[17] Further, the Tribunal is empowered to confirm, modify or cancel all or part of a notice. In section 59, the Tribunal deals with the review of decisions of the NCR which affect a person. In such a review, the Tribunal possess discretionary powers to (a) confirm the decision or (b) set aside the decision of the NCR. Similarly, the NCR may not seek a review of its own decision at a Tribunal level. Once a decision is confirmed, the available remedy for the affected person is to lodge an appeal or review as permitted by section 148[18].

[19]In terms of section 136(1) of the NCA, any person may submit a complaint concerning an alleged contravention of the NCA to the NCR. The NCR may decide to initiate the complaint received in its name. Section 137(1) deals with the initiation of applications to the Tribunal by the NCR *qua* complainant. Should the NCR decide not to refer a complaint, the complainant concerned may refer the matter directly with the leave of the

[17] Section 55(4) (a) of the NCA.
[18] Section 59(1) read with section 59 (3) of the NCA.

Tribunal to the Tribunal[19]. The Tribunal must consider the complaint in a hearing[20]. The NCR has a right to participate in such hearings[21]. It is important to note that the hearing contemplated in Part D, in which the NCR may participate, deal with complaints, applications and referrals. It seems to me that the appeal or review contemplated in section 148(2) is reserved for participants at a hearing convened in terms of section 136, applications contemplated in section 137, and referrals contemplated in section 141 of the NCA. It is indeed so if the NCR was a participant in the objection proceedings and not in a complaint, application and referral proceedings contemplated in sections 136, 137 and 141 of the NCA.

[20]Within the contemplation of section 59, it seems that even though technically speaking, issuing a compliance notice amounts to taking a decision, such is not the type of decision contemplated in this section. To think so would create tension between the objections procedure contemplated in section 56 and the review procedure contemplated in section 59. As such, a situation may arise where an affected party has a choice to lodge an objection and at the same time review a decision. In appropriate terms, when the NCR issues a compliance notice, it does not take a decision, but it exercises a statutory enforcement function[22]. It seems to be so, that the review powers in section 59 are aimed at decisions of cancellation of registration[23] and regarding notices in section 54 of the NCA. Ordinarily, in such proceedings, the NCR becomes a respondent because it is its decision that affects a person. It is not the affected person. The right to appeal afforded in section 59 (3) is only available for the decisions of the Tribunal in relation to the registration issues and not regarding objection issues.

[21]I particularly take a view that the decisions of the Tribunal constitute administrative decisions within the contemplation of the Promotion of

[19] Section 141(1) of the NCA.
[20] Section 142 of the NCA.
[21] Section 143 (a) of the NCA.
[22] See section 15 (e) of the NCA.
[23] Section 57 of the NCA.

Administrative Justice Act 3 of 2000 (PAJA). The NCR may self-review under the principles of legality and rationality[24]. The PAJA review is unavailable to the NCR in instances where its own decision is involved.

[22]For all the above reasons, I particularly take a view that the NCR is not entitled to institute an appeal under section 148(2) of the NCA. Thus, for this reason, the cross-appeal must fail. In any event, should VWFS fail to have the compliance notice set aside, the cross-appeal becomes academic since the modified compliance notice will remain in force and must be complied with[25]. Adv Carstensen SC urged that in the event that the cross-appeal fails, this Court must not mulct the NCR with costs. In support of that submission, reliance was placed on the judgment of *National Credit Regulator v Southern African Fraud Prevention Services NPC*[26]. In my view, in launching the cross-appeal, the NCR was not actually fulfilling its statutory mandate. In relation to compliance notices, the statutory obligation of the NCR is to issue the same and not to seek its modification as it now seeks to do. It must have dawned on the NCR that should it successfully argue that the compliance notice is incapable of being set aside on appeal – an act consistent with the exercise of statutory and regulatory duties – to defend compliance notices, then its quest for a cross-appeal is not honest or reasonable. Accordingly, in my view, the NCR is not, in this regard, insulated by the principle developed in *Coetzeestroom Estate and GM Co v Registrar of Deeds*[27] and affirmed in *Competition Commission of South Africa v Pioneer Hi-bred International Inc and Others.*[28] Accordingly, an order as to costs appertaining the cross-appeal must be made against the NCR.

The Merits

[24] See *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) at para 37.
[25] Section 56 (3) read with section 55 (4) of the NCA.
[26] [2019] ZASCA 92.
[27] 9102 TS 216 at 223-224.
[28] 2014 (2) SA 480 (CC) para 24.

[23]The main propulsive force of these consolidated appeals is the proper and correct interpretation of certain provisions of the NCA. Owing to that, it is incumbent on this Court to outline its mandate in terms of the NCA. The primary function of this Court is not to simply interpret the NCA on behalf of the parties before it. In order to appreciate the primary function of this Court, it behoves me to refer to the relevant provisions of the NCA. Just as a reminder, what ignited the litigation that is served before us are two conflicting decisions of the National Consumer Tribunal (NCT), as established in terms of section 26 of the NCA after the issuance of compliance notices by the NCR.

[24]The genesis of the dispute that led to the two conflicting decisions was when the National Credit Regulator (NCR) established in terms of section 12 of the NCA, performed its statutory[29] enforcement function outlined in section 55 of the NCA. In terms of section 55(1)(a)(i)(ii), the NCR may issue a compliance notice in the prescribed form to (a) a person or association of persons whom the NCR on reasonable grounds believes that – (i) has failed to comply with a provision of the NCA, or (ii) is engaging in an activity in a manner that is inconsistent with the NCA. In *casu,* as warranted, the NCR issued compliance notices to the three appellants before us; namely VWFS, BMFS and MBFS (hereafter collectively referred to as the finance houses).

[25]Section 56(1) of the NCA affords any person issued with a compliance notice the right to apply to the NCT in order to review the compliance notice. Sadly, the legislature used the word ‘review’, which at first blush gives the impression that the NCT is clothed with judicial review powers at this stage of an objection. In my view, it is not. The word ‘review’ used in this section must be given its ordinary grammatical meaning. That must be so because section 27 of the NCA sets out the functions of the NCT. Section 27(1)(a) informs us that the function of the NCT is to adjudicate in relation to any application that may be made to it, in terms of the NCA and make any order provided for in

[29] Section 15 (e) of the NCA.

the NCA in respect of such an application. In terms of the Oxford English Dictionary (OED), the word 'review' as a noun means a formal assessment of something with the intention of instituting change if necessary. In terms of the OED, the word 'adjudicate' when used as a verb, means to make a formal judgment on a disputed matter. It follows axiomatically that when a person applies to the NCT, such a person is in dispute with the NCR with regard to the compliance notice issued in terms of section 55. That person would be asking the NCT to assess the compliance notice in order to make a formal judgment on that dispute. As indicated above, in my view, the NCT necessarily performs supervisory functions in this regard.

[26]In contradistinction, a judicial review is a procedure by which a court can review an administrative action by a public body and secure a declaration or an order. Of significance, the NCT, in terms of section 56(2), after considering any representation by the applicant and any other relevant information, may confirm, modify, or cancel all or part of a notice. Generally, the outcome of a review proper is the setting aside of a decision. Confirmation, modification and cancellation are not outcomes consistent with a review proper. In the consolidated appeals before us, it is common cause that in one decision the NCT confirmed the views of the NCR in that there was non-compliance and in the other decisions, it disagreed with the NCR. Be that as it may, it must be noted that the NCT was performing a statutory function on either way of the pendulum swings. Section 31(4) of the NCA specifically provides that a decision birthed out of its proceedings must be in writing and must include reasons.

[27]Part D of the NCA regulates the NCT's consideration of applications, complaints and referrals. For the purposes of this judgment, it must follow that in entertaining the objection outlined in section 56, the NCT is indeed considering an application. Nevertheless, of importance, in the current appeal is the provisions of section 148 of the NCA. It behoves me at this stage to outline the relevant provisions of the section.

"**Appeals and Reviews**

(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*

(b) **Appeal** to the High Court against *the decision* of the Tribunal in that matter, other than a decision in terms of section 138" [Own emphasis]

[28] Regard being had to the above provisions, when faced with a decision of a member of the NCT, an aggrieved person may (a) launch an internal appeal to the full panel. If aggrieved further, (b) may apply to the High Court for (i) a review or (ii) launch an appeal against the decision of the full panel to the High Court. It is not in dispute that in all instances, the impugned decisions involved in this appeal were decisions of a full panel. In *casu*, the parties before us chose an appeal route as opposed to a review pathway. It must be assumed that when a review pathway is chosen, it must be a review in terms of Rule 53 of the Uniform Rules of Court, since as legislated, that review must be subject to the rules of the High Court[30]. As stated, the parties before us chose an appeal process. In other words, the decisions are impugned by way of an appeal.

[29] Ultimately, what serves before us is what is often referred to as a statutory appeal. In such instances, a Court may go wider and in the exercise of its discretion admit further evidence in considering such an appeal. Author Lawrence Baxter[31] observes the following:

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30 Although Wallis JA takes a view that decisions of statutory bodies and official in these matters will constitute administrative action and be subject to judicial review under the provisions of PAJA.

31 Lawrence Baxter, *"Administrative Law"* JUTA (1984).

> "At one end of the spectrum is the so-called 'wide appeal', in terms of which the court is empowered to rehear the matter completely, receiving fresh evidence if necessary, and to decide the issue anew on the merits. Such jurisdiction is most likely to be conferred where judges are as well qualified and in as good a position as the public authority itself to adjudicate upon the matter. If the legislation has not specifically stated that the court may receive fresh evidence and decide the matter afresh, this jurisdiction might be inferred from the fact that: - the legislation expressly requires the appeal court to reach a decision on the merits yet makes no provision for the keeping of a record by the administrative authority.[32]" [Own Emphasis]

There is always difficulty in determining the exact nature of the process where the legislature prescribed an appeal. This difficulty was observed by Trollip J in *Tikly & Others v Johannes, N.O., & others*[33]*,* where he stated that the word "appeal" can have different connotations. Relevant to the matter that was before him, it may have meant (a) wider sense appeal; (b) stricter sense appeal or (c) a review guided by honesty and properness. At the end, he concluded thus:

> "In view, however, of the fact that after the amplified ruling of the revision court was handed in, the proceedings were then directed solely towards determining the correctness or otherwise of that ruling, I think that the best course would be to give an order declaring that that ruling is correct." [34] [Own Emphasis]

Unlike in other legislations[35], which affords a Court of law appeal powers against the decision of a tribunal, section 148 does not prescribe what the Court must do after considering an appeal. The only place to resort to in this legislation is section 55 (4) (a), which provides that a compliance notice, which is what sparked the litigation, remains in force until set aside upon appeal of a Tribunal decision concerning the notice. Thus, in my view, the function of this Court after considering an appeal is to set aside the

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[32] *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111.
[33] 1963 (2) SA 588 (T).
[34] *Ibid* at 591 G-591A.
[35] For an example section 58 (3) of the Mine Health and Safety Act 29 of 1996 provides that "*The Labour Court must consider the appeal and confirm, set aside, or vary the decision*."

compliance notice if incorrectly issued, in an instance where the NCA has not been breached. That must be so because the compliance notice is birthed by the presence of a reasonable belief that there has been a failure to comply with the provisions of the NCA or there is engagement in an activity in a manner that is inconsistent with the NCA[36]. In *Shenker v The Master and Another*[37] De Villiers J A had the following to say:

> "In any case, the word *appeal* in section 107 if and in so far as it relates to sec. 34 (2), is obviously used in an inaccurate and loose sense, and not in its ordinary sense… Now in the case of an appointment of an executor under sect. 34 (2) there is evidently no record of the case upon which an aggrieved party can come into Court, nor does the Act make any provision for the recording of the proceedings. Indeed, there is no case to record and there is no court below. It seems to me for all these reasons that the word *appeal* in section 107, if and in so far as it relates to appointments made under sec. 34 (2) is not used in the sense of, or with the intention of, empowering the Court to retry the merits of an appointment made by the Master under sec. 34 (2) and to exercise afresh the discretion committed to him and him alone by that subsection. In the present case, therefore, if the courts below were ever requested by the appellant so to retry the merits of the appointment made by the Master, they were justified in refusing the request."

The task of a Court where the powers exercised emanates from a statute is to interpret the implicated provisions including their implications in order to decide whether the statutory powers have been duly exercised[38]. In *Rex v Padsha*[39], Kotze J A stated the law as follows:

> "It is a generally accepted rule of universal application that power must be exercised within the prescribed limitations and for the purpose intended and no other. It has been well said by Alexander Hamilton that 'there is no position which depends on clearer principles

[36] Section 55 (1) (a) (i) – (ii) of the NCA.
[37] 1936 AD 136.
[38] *Mustapha & another v Receiver of Revenue Lichtenburg* 1958 (3) 343 (A)
[39] 1923 AD 281

> than that every act of delegated authority, contrary to the tenor of the commission under which it is exercised, is void…And it is equally incontrovertible that it is the peculiar and exclusive province of the courts to declare and expound the law, and to determine whether in any given case, where the authority of a Minister of the Crown, in exercising a power conferred upon him by a statute, is questioned, to test the exercise of this power by the terms in which the Legislature has chosen to confer it." [Own emphasis]

De Villiers J.A, in the same judgment also echoed the following sentiments:

> "The function of the Court is to ascertain what was the intention of the Legislature as expressed in the Act, and then simply to test the Minister's notice in the light of that intention. I agree that the Minister is not to go outside the limits of his powers … As a general proposition it may be laid down that when a person travels outside his powers, the Court will set him right." [Own emphasis]

In *R v Lusu*[40], Centlivers C J stated the following:

> "The principles laid down … apply both to acts which public officials claim to have the right to perform and to regulations which may be made under statutory authority. In each case, the enquiry is whether the matter questioned falls within the authority of the statute concerned…" [Own emphasis]

The decisions referred to above are still useful to this day even though they predate our Constitution. In the current constitutional dispensation, section 1(c) of the Constitution of the Republic of South Africa (Constitution)[41] provides that the Republic is one democratic state founded on the supremacy of the Constitution and the rule of law. Thus, any interpretation of any law must be done within the prism of fundamental rights. In other jurisdictions like Canada[42], the exercise of statutory power is aptly referred to as "statutory

[40] 1953 (2) 484 (A)
[41] Act 108 of 1996 as amended.
[42] The Constitutional Court in *H v Fetal Assessment Centre* 2015 (2) SA 193 told us that foreign law may be used as a tool in assisting the Court in coming to decisions on the issues before it. Recourse may be had to

power of decision". In that jurisdiction, when a right of appeal is afforded in the empowering legislation, the Court's powers are limited to matters of law and jurisdiction. However, the approach of the Courts to appeals from administrative decisions has been strongly influenced by the law governing judicial review. In that process, judicial review supervises statutory decision makers to ensure that the decision is within the legal authority (jurisdiction) of the decision maker and is in accordance with the law. An observation was made that judicial reviews engage the rule of law[43].

[30]This Court must be mindful of the fact that it is not sitting as a Court of appeal against an order of a Court below, but it is sitting as an appeal Court against a decision of an administrative body. Regard being had to the authorities examined above, this Court may admit further evidence other than the record of the proceedings. Thus, ultimately, the function of the Court in this instance is to determine whether the conflicting decisions relating to the compliance notices are right or wrong. The question of whether there has been compliance or non-compliance quintessentially drives this Court to the provisions of the NCA, which are allegedly not complied with in order to determine the correctness of either of the impugned decisions. Interpretation is a question of law as opposed to fact. Distinctively, interpretation is a matter of law and not fact, and is always a matter for the Court and not for the witnesses.

[31]Of particular importance, this Court is to interpret a statute as opposed to a contract or a document of a particular nature.

The correct approach to adopt when interpreting a statute

[32]In my view, the decision in *Cool Ideas 1186 CC v Hubbard and another*[44], is a loadstar and felicitously sets the correct tone and approach when it comes to

comparative law but there is no obligation to consider it. Page 203 at para 28.

43 See *Dunsmuir v New Brunswick 2008 SCC 9* and Professor Lorne Sossin at (CanLII) Admin L.R. (4th) 1.

44 2014 (4) SA 474 (CC) at para 28.

interpreting a statute. The learned Majiedt AJ, as he then was, penned the main or majority judgment in *Cool Ideas*. He stated the law on interpreting a statute as follows:

> "A fundamental tenant of statutory interpretation is that words in a statute must be given their ordinary grammatical meaning unless to do so would result in an absurdity.[45] There are three important interrelated riders to this general principle; namely
>
> (a) That statutory provisions should always be interpreted purposively;[46]
>
> (b) The relevant statutory provision must be properly contextualised;[47] and
>
> (c) All statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."[48] [Own emphasis]

[33] Much more recently, the Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary and Another (UJ)*[49] under the hand of the erudite Khampepe J reaffirmed the law thus:

> "This approach[50] to interpretation requires that from the outset one considers the context and the language together with neither predominating over the other". In *Chisuse*, although speaking in the context of statutory interpretation, this Court held that this "now settled" approach to interpretation, is a unitary exercise. This means that interpretation is to be approached holistically; simultaneously considering text, context and purpose [Own emphasis].

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45 See *SATAWU and another v Garvas and others* 2013 (1) SA 83 (CC); *S v Zuma and others* 1995 (2) SA 642 (CC); and *Dadoo Ltd and others v Krugersdorp Municipal Council* 1920 AD 530 at 543

46 *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* 2014 (3) BCLR 265 (CC) at paras 84-6 and *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) at para 5.

47 *NEF (Pty) Ltd v STD Bank SA Ltd* 2013 (5) SA 1 (SCA); *KPMG CA (SA) v Securefin Ltd and another* 2009 (4) SA 399 (SCA); and *Bhana v Dónges NO and Another* 1950 (4) SA 653 (A) at 664E-H.

48 *Garvas* above at para 37.

49 2021 (6) SA 1 (CC) at para 65.

50 Referring to the approach in the well-known and oft cited *Endumeni.*

[34]Thus, it is by now rested law that the approach is a unitary one which calls for the concomitant consideration of (a) text (language); (b) context; and (c) purpose. It is worth emphasising that the Constitutional Court reaffirmed *Cool Ideas* in *Chisuse and Others v DG of Home Affairs and another*[51]. Most importantly, the Court in *Chisuse*[52] sternly warned judges as follows:

> "Judges must hesitate "to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation" [Footnotes omitted]

[35]In a rather polite and benign manner, the Constitutional Court was simply saying that when it comes to a statute; regard being had to the separation of powers, judges should not introduce their own idiosyncrasies into the text of a statute. The Labour Court in *Ntlokose v Numsa and others*[53], echoing similar sentiments stated that:

> "This Court maintains that trade union constitutions must be interpreted in line with the provisions of the section that allows a trade union to adopt a constitution (section 195 of the LRA)."

[36]A further directive issued in *Chisuse* was that the purposive or contextual interpretation of legislation must, however, remain faithful to the literal wording of the statute[54]. Therefore, in interpreting the relevant sections appertaining this appeal, this Court must show conviction to the text and language employed by the legislature. If no absurdity will arise, words employed by the legislature must be given their ordinary grammatical

[51] 2020 (6) SA 14 (CC).
[52] *Ibid* at para 48
[53] Unreported judgment [2022] ZALCJHB 195 at para 13.
[54] *Chisuse* para 52. See also *Bertie Van Zyl (Pty) Ltd v Minister of Safety and Security* 2009 (1) BCLR 978 (CC) para 22.

meaning[55]. In *University of the North and others v Ralebipi and others*[56], Jafta AJA, as he then was, aptly stated the law as follows:

> "In construing the term great assistance is to be derived from the definition section of the Act, which provides useful guidance to the court regarding the meaning the legislature intended to be attached to each defined term appearing in the body of the Act. As definitions are specifically designed to reveal to courts the meaning preferred by the legislature on particular terms or phrases, effect must be given to its intention by means of applying the defined meaning unless strict adherence thereto contradicts a clearly established intention of the legislature. The defined meaning should be applied even if it leads to hardship or absurdity unless such absurdity is so gross that it could never have been intended by the legislature. The court's aversion to the results of the defined meaning cannot constitute justification for departing from the definition…" [Own emphasis].

[37]Waddington J in *Orlando Fine Foods (Pty) Ltd v Sun International Ltd*[57] had the following to say:

> "…In order to decide whether words in an enactment are inconsistent with a definition, one must consider whether the application of the definition to the clause in question would lead to an injustice, incongruity and absurdity of such dimension that the legislature could never have intended the results". [Own emphasis]

[38]Therefore, defined words must be given their meaning afforded by the legislature.[58] The Constitutional Court in *Road Traffic Management Corporation v Waymark (Pty) Ltd*[59] felicitously stated that considering the textual or ordinary grammatical meaning of a provision is to give that

55 See *Ntlokose* para 14-15.
56 2003 ZALAC 14 at para 12.
57 1994 (2) SA 249 (BGD).
58 See also *Brown v Cape Divisional Council and Another* 1979 (1) SA 589 (A) at 601F-602A.
59 2019 (5) SA 29 (CC)

provision a plain, natural and literal interpretation[60]. With regard to contextual interpretation, it was held that it requires that regard be had to the setting of the word(s) or provisions to be interpreted with particular reference to all the words, phrases or expressions around the word or words sought to be interpreted. That exercise might even require that consideration be given to other subsections, sections or the chapter in which the key word, provision or expression to be interpreted is located.[61] The above analysis sets a scene and lays the table for this Court's task, the task which I immediately turn to. The implicated sections of the NCA in this appeal are sections 100, 101, and 102. Before those sections are interpreted, it is incumbent for this Court to trace the legislative history with regard to credit legislation in South Africa.

Brief legislative history regarding consumer credit laws in South Africa

[39]It is important to state upfront that consumer credit legislation anywhere in the world is heavily influenced by economic, social and political considerations, and South Africa is no exception in this regard.[62] The very first legislation in South Africa on the subject matter was the Usury Act 37 0f 1926[63]. It was later replaced by the Limitation of Disclosure of Finance Charges Act 73 of 1968[64]. Alongside and in between the Usury Act existed the Credit Agreement Act 75 of 1980 (CAA)[65]. Later the Usury Act 42 of 1986 (Usury)[66] was reincarnated. Ultimately, the Usury Act was replaced by the NCA. These old, repealed legislations become helpful in the interpretative exercise. It is interesting to note that the CAA, for instance, defined a *cash price* in relation to a credit agreement to mean the cash price at which the credit receiver may obtain service from the credit grantor. A credit grantor included a dealer or a person who renders services in terms of the credit transaction. A credit receiver meant a purchaser or a person to whom a service is rendered in

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[60] *Ibid* at para 33 of the judgment. See also *Rand Rietfontein Estates Ltd v Cohn* 1937 AD 317 at 321.
[61] *AfriForum v University of Free State* 2018 (2) SA 185 (CC).
[62] Jannie Otto: *The history of consumer credit legislation in South Africa* Unisa Press 257-273.
[63] Now repealed.
[64] Now repealed.
[65] Now repealed.
[66]Now repealed.

terms of a credit transaction. A credit transaction included an instalment sale transaction.

[40]It is important to note the definition of a *principal debt* in terms of the Usury. In relation to a credit transaction, it meant (a) the selling price of the movable property and where applicable, the difference between the selling price and the cash amount paid *plus* if the credit grantor *is authorised in terms of an agreement in writing between himself and the credit receiver*, licence fees which may be payable in connection with the said transaction and which were actually paid or to be paid by the credit grantor.

[41]Regard being had to the above legislative provisions, in particular the Usury, it must be so that a selling price of the movable plus the value of any item contemplated in section 102 makes up the principal debt. Any submission that the value of items contemplated in section 102 is not to be included in the principal debt simply because it is 'charged' by the dealer is absurd and shall be out of context with the entire NCA when read purposively. It must be so that regard being had to the repealed legislations, the legislature presently has nothing to do with the dealer when it comes to credit transactions. It is absurd to then argue that a dealer may affect the principal debt by charging the consumer some OTRs, which charges may be freely added to the principal debt and form a cost of credit contrary to the provisions of section 102 of the NCA.

What then are OTRs?

[42]Before any consideration may be given to the costs of credit as legislated, it is necessary to define what the OTRs are. This appears to be a term of art that was generated in the motor vehicle dealership industry. OTRs are regarded as the following items; namely; (a) pre-delivery inspection/safety check; (b) certificate of road worthiness; (c) delivery fuel; (d) Initial fuel; (e) Hire Purchase Information (HPI) clearance; (f) Administration; (g) FSB fees; and

(h) cleaning or valet costs[67]. What is clear from reading the NCA as a whole, the listed items did not make the "guest list" in section 102. Thus, as a departure point, if added to the cost of credit as defined in section 101, then the NCA would naturally be contravened thereby. It is a common cause before us that all the finance houses before us paid for invoices that included one or all of the OTRs. In the main, the defence of the finance houses is that those items are charged by the dealers, and they derived no benefit from the provision of any of the services. In my view, there is no merit in this defence, as it shall be demonstrated later.

[43]Therefore, when considering the implicated sections the central question would be: can the OTRs form part of the cost of credit or not? Counsel appearing for all the finance houses urged us to consider the opinion expressed by Van Heerden and Renke in their scholarly article[68]. The learned authors opine that although the principal debt is mentioned in subsection (a) of section 101 titled "cost of credit", the principal debt cannot strictly speaking be regarded as a cost of credit but rather the amount on which costs are subsequently levied by the credit provider. With considerable regret, I do not agree. This Court cannot differ from the plain and clear provisions of the section. As it shall later be demonstrated, the provisions of section 101 are lucid and clear. The authors devoted their time to the article drawing a comparison between the NCA and its Regulations. They found some misalignment between the two instruments in the process. In order to consider whether the OTRs are unlawful they considered the provisions of sections 90-93 of the NCA. Ultimately, they presented two scenarios. The one is that although not mentioned by name in section 102, the OTRs form part of the section. The other is that nowhere in the NCA is it explicitly prohibited to charge for OTRs, the charging thereof is not unlawful.

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67 Martin Pretorius; "*On The Road Fees": What does it really mean*? Published 15 July 2022. https:// www.autotrader.co.za. See Also Annual Banking Law Update 2019: Corlia Van Heerden and Stefan Renke: *Cost of credit in terms of the National Credit Act: "On the road fees", administrative fees and/or handling fees*.

68 Corlia Van Heerden and Stefan Renke "*Cost of credit in terms of the National Credit Act: "On the road fees", administrative fees and/or handling fees*".

[44]Sadly, the above seems to be oblivious to the fact that regulations are born out of legislation and cannot trump the provisions of the Act. Section 171(1) of the NCA empowers the Minister to make regulations after having followed a prescribed process. Thus, the regulations are subordinate to the legislation that begets them. Section 172(1) makes it abundantly clear that where there is a conflict with other legislations, the NCA prevails. Accordingly, to the extent that there is conflict as alleged between sections 100-102 and the regulations, the provisions of the Act shall prevail. Therefore, as it shall be demonstrated later if an item is not listed in sections 101 and 102 that item by whatever name it is called cannot and should not be part of the costs of credit, allowed fees or charges. The authors seem to correctly agree that the NCA does not make mention of OTRs. However, if any items labelled as OTRs makes the “guest list” outlined in section 102, they may be added to the cost of credit if the provisions of section 102(2) of the NCA are complied with, failing which they are prohibited by section 100(1)(a). Later in this judgment, I shall devote time to interpret the implicated sections, guided by the principles already outlined above.

The meaning of principal debt

[45]Before us, much was made of the meaning of the phrase *principal debt*. As mentioned in *Ralebipi*[69], this Court is in a fortunate position because the term has been given a special meaning by the legislature. All that remain is to apply the term as defined by the legislature. The finance houses vigorously and in consonance submitted that it is constituted by every item agreed upon between the dealer and the consumer at the stage when a consumer expresses a desire to purchase a motor vehicle (movable property). Since this case involves OTRs, the submission of the finance houses is that if the OTRs are agreed upon between the dealer and the consumer (the so-called first agreement), then when the deal – sale of the motor vehicle transaction, crosses over to the credit world, *via* an invoice issued to the credit provider, the OTRs already added in the first agreement (invoice)[70] becomes irrelevant

[69] *Supra* at fn 46.
[70] Mr Gautschi SC submitted that there are instance where an invoice may constitute an agreement.

and are not hit by the provisions of section 102 of the NCA, purely because they are not ‘charged’ by the credit provider. With considerable regret, I disaccord with that submission. With due respect, it leads to an absurdity and causes unnecessary violence to the plain and natural text used by the legislature.

[46]As indicated above, this Court finds itself in a fortunate platform because the legislature provided a definition for the phrase. In section 1, the legislature refers to section 101 (1) (a) of the NCA for the meaning of the phrase. The section reads:

> “…the *principal debt* being the amount deferred in terms of the agreement, plus the value of any item contemplated in section 102.” [Own emphasis]

[47]Just to reflect, this definition is not far removed from the one provided for by the Usury. First and foremost, the principal debt is an amount of money. That amount of money is deferred in terms of an agreement. So contrary to what the authors opine, the principal debt does not come or is born deferred to a point that it assumes the name ‘deferred amount’ worthy of being defined and to which other costs may be affixed afterwards. It is deferred by an agreement. It must be so that when the legislature refers to an agreement, it refers to what it defined in section 1 of the NCA to be one including an arrangement or understanding between or among two or more parties, which purports to establish a relationship in law between those parties. In the NCA, the legislature refers to various agreements. However, the one contemplated in section 101(1)(a) must be the one that defers the amount, that is the instalment agreement, which is defined as a sale of movable property in terms of which (a) all or part of the price is deferred to be paid by periodic payments. Notably, this time around, the legislature employs the word ‘price’ and not ‘amount’.

[48]It is important to note that the sale that is being referred to is that of movable property. A motor vehicle is movable property. The price contemplated in the

definition must be the price of the movable property. The ordinary meaning of the word 'price' is the amount of money expected, required or given in payment for something. Section 1 of the Consumer Protection Act (CPA)[71] defines the word price to mean (a) in relation to the consideration for any transaction, the total amount paid or payable by the consumer to the supplier in terms of that transaction or agreement, including any amount that the supplier is required to impose, charge or collect in terms of any public regulation. The CPA is a statute in *pari materia*, in relation to the NCA. The price contemplated in the CPA is paid by the consumer to the supplier. The supplier means, in terms of the CPA, a person who markets any goods.

[49] Accordingly, the word 'price' as employed in the NCA must be afforded its ordinary grammatical meaning. Section 23 of the CPA obligates the retailer, being, with respect to any particular goods, a person who in the ordinary course of business supplies those goods to a consumer, to display a price in relation to those goods. For the purposes of that section, a 'unit price' means, amongst others, the price for any goods. Therefore, if a consumer expresses an interest in a second hand car, and if such a vehicle has affixed to it[72] what is normally referred to as 'extras', those extras will be part of the composite price displayed within the contemplation of section 23 of the CPA. However, if it is a new vehicle and a consumer expresses a wish to add extras, all those extras enhance the price of the movable property being the motor vehicle. Thus, if those extras shoot the price up from say R100 000.00 to R105 000.00, then the price of the movable property is R105 000.00. I disagree with the case advanced by VWFS in its written submissions that the cash price that arises as a result of the so-called 'separate cash sale agreement' to which it is not a party becomes what it termed 'the amount deferred' mentioned in section 101(1)(a) in respect of which it has no duties or restrictions under the NCA. In my view, that amount constitutes the price of the movable property.

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[71] Act 68 of 2008 as amended.

[72] To use Mr Gautschi SC's examples, the tape deck.

[50] Returning to the instalment agreement in the NCA, section 101(1)(a) makes reference to the value of any item as opposed to the price. The grammatical meaning of value, used as a verb, is the estimated monetary worth of something. This is a clear indication that the items do not form part of the price of the sale of the movable property. The legislature chose to separate the price of the movable property from the value of the items. It is for that reason that the legislature prescribed how they are to be added to the price, which is the price of the movable property alone. The legislature used the word ‘plus’, notably, not for the first time. The word was used in the Usury. The ordinary grammatical meaning of the word ‘plus’ as a preposition is with the addition of. A closed list of those items that may increase the price is as set out in section 102 (1) (a)-(f). Of particular interest in this matter is item (c) taxes, licence or registration fees. It is common cause that the licence and registration fees are part of the OTRs as outlined above.

[51] Fees relating to licence and registration should not and cannot be part of the price. That is so when regard is had to the provisions of section 23 of the CPA. The retailer is not obligated to display the licence and registration fees on the goods. As an indicator, the legislature employs the word ‘contemplated’ as opposed to charged. The dictionary meaning of the word contemplated is to think about. So, if at the so-called first agreement, the consumer and the dealer think about any of the items listed in section 102, the fees with respect to those items (value) may be added to the price of the movable property. However, if the payment of those fees is to be deferred and payable over a period of time, the law as prescribed in section 102 must be taken into account. It ought to be remembered that a credit agreement is a form of an instalment agreement. Section 8 defines a credit agreement to mean a credit facility, which is an agreement where the credit provider undertakes to supply goods to the consumer and defer the consumer’s obligation to pay for those goods.

[52] Therefore, once a credit facility arises, the instalment agreement becomes a credit agreement. During an argument, Adv Gautschi SC submitted that the so-called ‘deferred amount’ is the principal debt without the fees outlined in

section 102. With considerable regret, I disagree with that submission. In the NCA, nothing is referred to as a ‘deferred amount’. Instead, the NCA defines a principal debt to include the value, certainly the monetary value, of any item listed in section 102. As indicated earlier, if a value of any item contemplated in section 102 is added to the price of the movable asset compositely, a principal debt arises. In a cash sale agreement, there can be no principal debt, and neither can there be a ‘deferred amount’. If the submissions of the finance houses are accepted, a consumer who had concluded an agreement with the dealer on a specific price which may or may not include items contemplated in section 102, such a consumer will be armed with a principal debt that may be an amount that is deferred. The moment, a credit facility is approved by the finance house, the same principal debt is converted into a principal debt defined in the NCA. If the principal debt includes items contemplated in section 102, fees for those items will find their way into the principal debt contrary to section 102 since fees for those items would have been charged by someone else and not the finance house. The absurdity in that permutation is that the fees charged by that someone else would be payable over a period of time since they will form part of the principal debt. What is being suggested by the finance houses is an astute manner of circumventing the law. It allows what is part of the closed list to be married to a principal debt without being hit by the requirements of section 102. In my view, that is not only an absurd interpretation, but it defeats the objective and purpose of the NCA.

[53] As I conclude, the term principal debt is a term well known in the debt financing space. In the context of debt financing, it is the initial amount of money that is borrowed in a loan. It is for that reason that in a cash sale, the word principal debt is a square pack in a round hole. It does not exist. That much, the legislature is expected to know. Regard being had to the text employed by the legislature in the context of debt financing, the purpose of the NCA taken into account, the phrase principal debt constitutes the price of the movable asset plus the value of items contemplated in section 102.

[54] In my view, it is unnecessary to parachute the phrase ‘deferred amount’ into the NCA and seek to advance a case that the legislature failed to afford the phrase any meaning to it. In section 101(1)(a) the legislature employs the phrase ‘being the amount deferred’. This is nothing but a manner to identify the principal debt. Key in this phrase is the word ‘being’. The grammatical meaning of the word being is the state or quality of having existence. As it shall later be demonstrated, deferment can only happen in terms of an agreement. It cannot happen in isolation. What gets deferred in an agreement is the principal debt. It is incongruent to perceive the deferred amount to be the amount invoiced by the dealer. An invoice does not defer an amount and certainly, it is not an agreement contemplated in section 101(1)(a) of the NCA. As indicated earlier, what finds its way into an invoice issued by the dealer does not constitute the ‘cash price’, as contended for by VWFS but it is the price of the movable property to be sold. On the contrary, the payment of the total amount reflected in the invoice from the dealer does not get deferred, it is due and payable by the credit provider. What gets deferred is the amount of money owed by the consumer to the credit provider for having undertaken to supply him or her with the goods (motor vehicle). Once that total amount or part thereof is financed by the credit provider, it transmutes into a principal debt simply because payment of it shall be deferred.

What then is the meaning of section 100?

[55]In order to appreciate the reach of section 102, an understanding of section 100 is required. At the helm of the sections under part C of the NCA is consumer liability. Section 100 is headed *prohibited charges*. However, a proper read of section 100 (1) suggests that the imposition of monetary liability on the consumer is equally prohibited. The monetary liability is in respect of amongst others, any fee or amount ‘payable’ by the credit provider to any third party in respect of a credit agreement except any fee or amount contemplated in section 102. In an attempt to attach meaning to the phrase ‘impose monetary liability,’ authors Van Heerden and Renke suggest that the

gist of section 100 is that the credit provider is prohibited from demanding that a consumer pay certain amounts as specified in the section. Unfortunately, I do not agree[73]. The authors seem to be oblivious to the fact that the legislature used the word *or* between '*charge an amount to'* and *'impose a monetary liability*'. The word *or* when used in a statute is used as a conjunction used to link alternatives. Thus, it is not only a charge that may be demanded by the credit provider but also an imposition of monetary liability, which may be a liability attracted from a third party. The word impose when used as a verb means, amongst other things, to force on someone. The word liability when used as a noun means the state of being legally responsible for something, especially money. What the authors also ignore are the provisions of subsection (1)(d) of section 100. The subsection refers to *any fee*. Key in this subsection is the word '*payable*'. There can be no doubt that the OTRs once incurred, as charged by the dealer, do form part of the principal debt on the version of the finance houses, since it is included in the total amount of the invoice issued by the dealer to the finance houses. In order to supply the goods (motor vehicle) to the consumer, the credit provider must first acquire the goods. In order to acquire the goods, the total amount of the invoice would be payable. Upon receipt of an invoice from a dealer, the liability to pay the monetary value of the invoice arises.

[56]Thus, the fee or charge related to the OTRs once incurred and charged by the dealer becomes payable. Ultimately, the cost of the goods (OTRs) falls on the obligation of the consumer to pay in a deferred manner (section 8(3)(a)(i) of the NCA). On any interpretation, any fee includes all that is in the total invoice amount. That fee is ultimately passed on to the consumer. Therefore, if OTRs are not items contemplated in section 102, as argued by the finance house, then it axiomatically follows that once attracted in the final invoice, it cannot be passed over as a liability on the part of the consumer. It was not the case of the finance houses at the Tribunal hearings that the OTRs are made payable by the consumer before obtaining a credit facility. That being the case, someone must pay for the value of the items incurred. On the

73 *Supra* at fn 58.

version of the finance houses, they pay an invoice that emanates from the dealer and that invoice would be the total amount charged in the invoice. Undoubtedly, if the total amount of the invoice, as it invariably does, includes any items of the OTRs, then the credit provider will be paying a fee in respect of a credit agreement. The grammatical meaning of the word payable as a noun is debts owed by a business liability and as an adjective, is required to be paid; due; or able to be paid. The minute a dealer (third party) raises an invoice and includes the OTRs, that invoice, inclusive of the OTRs charges, is payable by the credit provider. That payable invoice would impose liability onto a consumer, in the circumstances where the OTRs are incurred contrary to section 100 read with section 102 if any of the items are listed in the section. Such also spills over to section 101. That is the section I now turn my attention to.

The prohibition in section 101 (1)

[57]In *Lewis*[74], the learned Eksteen AJA stated that the section places a limitation on what may be contained in the credit agreement. It does not purport to prohibit a credit provider from engaging in other business, unrelated to the credit facility, with the consumer. The section regulates a credit agreement. Put differently, it regulates the legal terms of the agreement. At this stage, it is important to draw a necessary distinction between an unlawful credit agreement and a credit agreement that contains unenforceable or prohibited clauses. This section deals with unenforceable or invalid prohibited terms. The legislature employs the phrase '*must not require*'[75]. In an agreement, one party to an agreement may require another party to do something in the terms of the agreement. Cognitive of the *pacta sunt servanda* principle, the legislature comes in defence of a consumer who may possibly conclude an agreement which contains prohibited clauses. The unlawfulness of the

[74] *Supra* at fn 5.

[75] In *Edcon Holdings Ltd v National Consumer Tribunal and Another* 2018 (5) SA 609 (GP), the Court of this division appropriately beaconed by Louw J and Mdalana AJ interpreted the word 'require' to mean (a) to demand from a consumer who applies for credit, or (b) to impose an obligation on such consumer, to pay for something which is not permitted in terms of the section. This Court makes common cause with that interpretation.

agreement is dealt with elsewhere in the NCA[76]. The legislature employed the phrase "*must not*". This simply implies a prohibition. In other words, a credit agreement that requires payment by the consumer of any money other than the one specified in subsections (1) (a) – (g) is prohibited and unenforceable in law. This section yearns for a symbiotic read with section 102. Before I turn to the provisions of section 102, it is important to acknowledge that any item listed in section 102 may be charged or make the consumer liable for it for as long as the provisions of subsection 102(2) are not offended. Once the provisions of the subsection are offended the outcome is a nullity. Any act punishable by criminal sanction implies that the act must be visited by a nullity.[77] In terms of section 55(3), the NCR may refer the non-compliance with a compliance notice to the National Prosecuting Authority (NPA), only if an offence has been committed. I take a view that including an unenforceable or prohibited term does not amount to an offence but certainly affects the enforceability and validity of the agreement. Accordingly, the submission by BMFS counsel that in interpreting these sections, this Court must bear in mind what was said by the Constitutional Court, should be rejected. That situation is not warranted here. I shall in due course demonstrate why such is the case.

[58]Section 90(3) of the NCA provides that in any credit agreement, a provision that is unlawful in terms of the section is void from the date that the provision is purported to take effect. There is no offence contemplated even. The offences in terms of the NCA are outlined in section 160 of the Act. The penalties prescribed in section 161 are for offences only. This will be addressed further in the judgment.

Application of section 102 and its correct and proper interpretation

[59]It was contended on behalf of the finance houses that section 102 finds no application in this matter because the finance houses did not charge the

76 Sections 89 and 90.

77 See *Lupacchini v Minister of Safety and Security* [2011] 2 All SA 138 (SCA).

consumer any of the items listed in subsection (1) (a) - (f). This submission is made on the basis that the OTRs were charged by the dealer and not the finance houses. This submission is, in my view, invalid. The majority judgment was persuaded by this submission. I remain unpersuaded. This appears to be the singular basis upon which the majority judgment predicates its conclusion that the provisions of the NCA had not been contravened. In my respectful view, this is a short shrift approach to a statutory interpretation approach. Adv Carstensen SC appearing for the NCR submits that the OTRs have been charged by the finance houses since they are passed over to the consumer. There is merit in this submission. Section 102 (1) specifically provides that if the credit agreement is an instalment agreement, the credit provider may include in the principal debt deferred any of the items listed. This subsection, if read in isolation, suggests that all the credit provider may do is include the items in the principal debt. However, if read with subsection (2) a different picture emerges. For those items to be included in the principal debt, those items are required to be charged. They can only be charged by the credit provider regard being had to the definition of the principal debt dealt with above. As already pointed out, it is only in a credit facility situation that one can come across a principal debt. The items, if added to the price constitute a principal debt as defined in section 101. This is because a cost of credit is constituted by amongst others the price plus the value of the items contemplated in section 102, which as a consolidated item is known as a principal debt. Once the OTRs are charged by the dealer, such must not be imposed on the consumer as prohibited by section 100. Logically if an amount is charged by the dealer and imposed on the consumer to be part of the deferred amount, it is as good as it has been charged by the credit provider. When it receives an invoice from a dealer, the credit provider will immediately note that the OTRs are included therein. If the credit provider proceeds to accept liability of the invoice and pay it with the solitary hope that it shall be recovered from the consumer in instalments over a specified period, then the credit provider had effectively charged the consumer or imposed liability on the consumer.

[60]As highlighted earlier, in order to interpret section 102, the starting point is section 100(1)(a). In terms thereof, a credit provider is prohibited to do two things. (a) The credit provider must not charge, and (b) the credit provider must not impose a monetary liability. Considering the text further, these two things that a credit provider must not do to a consumer are in respect of (i) credit fees or (ii) charges prohibited by the NCA. The NCA does not define a credit fee. However, relevant to this matter, credit when used as a noun means a deferral of payment of money owed to a person or a promise to defer such payment. Grammatically, a fee as a noun means a fixed charge for a privilege or professional services. As to charges prohibited by the Act, the NCA spells them out. But what stands out prominently and in a pronounced manner is any fee, charge commission, expense or other amounts payable by the credit provider to any third party in respect of a credit agreement.

[61]Thus, a credit provider is prohibited to charge or impose monetary liability onto a consumer, in instances where the payment of the amount so charged or liability so imposed is deferred or promised to be deferred and in instances where the said charge or monetary liability is payable to a third party in respect of any fee, commission, expense or amount. The said charge or monetary liability must be in respect of a credit facility where the credit provider undertakes to supply the goods to the consumer. Therefore, even in an instance where OTRS were directly 'charged' to the consumer by the dealer, the moment the credit provider advances a credit facility and undertakes to supply the goods (movable property and the OTRs included) and defer the obligation for the consumer for the cost of the goods, a monetary liability is imposed on a consumer in respect of the fees, commission, expense or other amounts payable by the credit provider to a third party (dealer) contrary to the provisions of the NCA.

[62]The only saving grace for the fees, expenses, commission or any other amount payable by the credit provider to a third party, is when in section 102 or elsewhere in the NCA such payment is allowed. Before considering again

the requirements of section 102 of the NCA, the NCA, elsewhere (in section 101(1)(a)-(g)) allows the following costs to be part of the costs of credit; namely (a) the principal debt as defined; (b) initiation fee; (c) service fee; (d) interest; (e) cost of any credit insurance; (f) default administration charges; and (g) collection costs. Anything outside the listed costs or fees by the credit provider is a prohibited payment required from the consumer. The OTRs as defined elsewhere in this judgment fall outside the costs or the fees listed. Accordingly, the credit provider is by law prohibited to require the consumer to pay for the OTRs.

[63]Section 102 provides a window for a credit provider to include in the principal debt, only the following: (a) The initiation fee if the consumer offered and declined to pay the fees separately; (b) costs of extended warranty; (c) delivery, installation and initial fuelling charges; (d) connection fees; levies or charges; (e) taxes, licences or registration fees; or (f) premiums of any credit insurance payable in respect of the credit agreement, if the requirements of section 106 are met.

[64]However, the fees outlined above are not simply a “plug and play” by the credit provider. It may only do so if (a) the credit provider is chosen as an agent to source the services, or (b) the consumer is not compelled as it were to choose the credit provider as an agent. The authors, Van Heerden and Renke argue that OTRs are contemplated in section 102 and capable of being included in the principal debt. That is not necessarily the case, because the list is a closed list. Items like car valet and the like are not listed. Nevertheless, licencing and registration fees is an item contemplated in section 102. But its inclusion into the principal debt is trammelled.

[65]This trammel stubbornly remains even in instances where, in an attempt to circumvent the legal prohibition, the fees are charged by a dealer as opposed to by the credit provider. Such a trammel pronounces itself sufficiently at the stage the credit provider absorbs the liability to pay those fees charged and impose them on the consumer. It is at that point that the

credit provider will realise that it was “fishing behind the net” when the attempt to circumvent the legal prohibition happened. There is no merit in the submission by Adv Budlender SC that imposition of liability means that the credit agreement itself must require payment of any fee above the principal debt. The phrase imposition of monetary liability is lucid and clear, it requires no other meaning other than the clear meaning the legislature provided regard being had to the text and language used. There must be a fundamental difference between charging and selling. It is said that someone is selling when that someone gives or hands over something in exchange for money. It is said that someone is charging when demanding an amount as a price for goods supplied. If the argument of the finance houses is taken to its logical conclusion since the dealer does not demand money there and then, after a car valet, for instance, what it does is sell the car valet in exchange for money it will receive in due course. If the dealer was charging, as contended, it must demand money for the car valet. Accordingly, in my view, a dealer does not charge for the OTRs, but it effectively sells the OTRs to the consumer. A dealer ostensibly does so with full knowledge that the exchangeable money shall be demanded by the credit provider from the consumer over a period of time. Practically, this means that a consumer shall pay an amount of R100 (for the car valet) over a period of 72 months with an added interest over that period. If 8% is charged on the R100 over a period of 72 months, the consumer would at the end of the credit period pay about R676.00 for the car valet. This, in my view, is the mischief that the legislature seeks to curb by introducing a closed list in section 102 of the NCA.

Ambit of interpretation of the NCA provisions

[66]In the preamble of the NCA, what features prominently is the promotion of fairness, prohibition of certain unfair credit and credit-marketing practices, the establishment of national norms and standards relating to consumer credit and the promotion of consistent enforcement framework relating to

consumer credit[78]. Undoubtedly, the NCA is a piece of legislation that is consumer-centric or pro-consumer. Appropriately so because consumers are more vulnerable and need strong legislative protection to ameliorate the vulnerability. Section 2(1) of the NCA impels that the NCA must be interpreted in a manner that gives effect to its purpose as outlined in section 3. Subsection (2) provides that a Court interpreting or applying the Act may consider foreign international law. South Africa is a member of the United Nations (UN). At the United Nations Conference on Trade and Development, the UN adopted guidelines for consumer protection[79]. The general principles in Article 4 and 5 provide that:

> "Member states should develop, strengthen or maintain a strong consumer protection policy, taking into account the guidelines set out below and relevant international agreements. In so doing, each Member State must set its own priorities for the protection of consumers in accordance with the economic, social and environmental circumstances of the country and the needs of its population and bearing in mind the costs and benefits of proposed measures.
>
> The legitimate needs which the guidelines are intended to meet are the following:
>
> (a) …
>
> (b) The protection of vulnerable and disadvantaged consumers;
>
> (c) …
>
> (d) The promotion and protection of the economic interests of consumers;
>
> (e) Access by consumers to adequate information to enable them to make informed choices to individual wishes and needs;
>
> (f) …
>
> (g) …
>
> (h) …
>
> (i) …

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78 In *Waymark* (para49) it was confirmed that the long title of a statute serves as a tool to establish the purpose of a statute.

79 United Nations New York and Geneva 2016.

(j) …

(k) …”

[67]Another general principle, emanating from the guidelines, which requires the exhibition of good business practices is that businesses should not subject consumers to illegal practices or other improper behaviour that may pose unnecessary risks or harm consumers. The interpretation that the financial houses seek to place on the prohibitory sections leaves consumers disadvantaged and vulnerable; does not promote the protection of the economic interests of a consumer, and instead promotes a lack of access to information. Such an interpretation shall, without doubt, compromise the legitimate needs of the guidelines. Section 233 of the Constitution impels that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. It must be so that the guidelines form part of customary international law. In terms of section 232 of the Constitution, customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

[68]Axiomatically, this Court is bound to prefer an interpretation that is consistent with the guidelines outlined above.

[69]Section 3 of the NCA provides that the NCA has as its purpose to promote and advance the social and economic welfare of South Africans, and to protect consumers by promoting certain aspects listed in subsections (3) (a)-(f). Therefore, as legislated, any interpretation must be one that gives effect to the purpose of the NCA. Any interpretation that defeats the purpose – protection of consumers – must not be preferred.

[70]An interpretation aimed at circumventing the clear provisions of the NCA cannot be one that gives effect to the purpose of the NCA, and it is inconsistent with

customary international law. It is a common cause in *casu* that OTRs were added to the principal debt. It is also a common cause that in adding the OTRs, the provisions of section 102 of the NCA have not been complied with. To then interpret the provisions of sections 100, 101 and 102 in a manner that suggests that no illegality has arisen does not only defeat the purpose of the NCA, but it is inconsistent with the customary international law. If the interpretation preferred by the finance houses is accepted, then OTRs may be sneaked into a credit agreement even where the consumer did not agree thereto. In terms of the predecessor of the NCA, the Usury Act, a principal debt in relation to a credit transaction includes the selling price of movable property and if cash is paid the difference between the selling price and the cash paid remains part of the principal debt. Included in the principal debt would be licence fees payable or paid by the credit grantor, only if the credit grantor is authorised in terms of an agreement in writing between the credit grantor and the credit receiver. In relation to licence fees, all that NCA did was removing the written agreement requirement and replacing it with an agency arrangement. However, when regard is had to the repealed Usury Act, the intention of the legislature has always been that the licence fees are paid by the credit grantor under regulated circumstances. It cannot be that this time the NCA should accommodate a situation where the licence fee is paid to a third party, but that liability is passed to a consumer, whom the legislation is purposed to protect, without any checks and balances.

[71]Over and above the interpretative guide provided for by the Constitutional Court, as discussed earlier, it is apparent that the NCA must first and foremost be interpreted in order to give effect to its purpose and to honour customary international law. When purpose and international law are considered, an interpretation favoured by the NCR emerges unscathed with relative ease. On the other hand, the interpretation proffered by the finance houses, if accepted, purpose and international law honour fall by the wayside. Ultimately, when this Court becomes faithful to the text employed by the legislature, as it should and must, the purpose of the NCA is achieved. On application of the unitary approach; namely, (a) text; (b) context; and (c)

purpose, the interpretation that emerges is one that favours the one contended for by the NCR.

[72]Returning to the submissions, Adv Budlender SC forcefully urged us to heed the clarion call made by the learned Cameron J when he penned the majority judgment in *Sebola and Another v Standard Bank Ltd and Another*[80]. The learned Justice cautioned thus:

> "The statute sets out the means by which these purposes must be achieved, and it must be interpreted so as to give effect to them. The main objective is to protect consumers. But in doing so, the Act aims to secure a credit market that is 'competitive, sustainable, responsible [and] efficient". And the means by which it seeks to do this embrace "balancing the respective rights and responsibilities of credit providers and consumers". These provisions signal strongly that legislation must be interpreted without disregarding or minimising the interest of credit providers. So, I agree with the Supreme Court of Appeal that –
>
> "[the] interpretation of the NCA calls for a careful balancing of the competing interests sought to be protected, and not for a consideration of only the interests of either the consumer or the credit provider". [Own emphasis]

[73]The caution issued by Cameron J finds no application in *casu*. Involved herein is not the balancing of interests or a disregarding and minimising of interests. Appropriately put, what is involved herein is the principle of legality, which principle commands itself favourably to the provisions of section 1(c) of the Constitution. In order to buttress the point, the facts in *Sebola*[81] distinguish themselves prominently from the facts in this case. The main issue in *Sebola*[82] was whether the provisions of the NCA that entitle a debtor to a written notice before a credit provider may institute action, require that the debtor actually receive that notice. That limited issue was more of a procedural requirement and was the correct case to seek a balancing of interests. In *casu*, if the interpretation sought by the finance houses is

80 2012 (5) SA 142 (CC) at para 40.
81 *Ibid.*
82 *Ibid.*

adopted at the altar of balancing interests, the principle of legality shall haemorrhage immensely. The net effect would be that floodgates would open a closed list that the legislature deliberately closed. That, in this Court's view, is a recipe for disaster and an open invitation to anarchy. As indicated earlier, the interpretation proposed by the finance houses would make circumvention of the legal prohibition a norm, much to the chagrin of the mischief, the legislature seeks to curb that being the unfair treatment towards the consumer. In order to ensure consumer protection, the legislature found it appropriate to clothe the NCR with the necessary teeth. Section 15 necessitates that the NCR must enforce the NCA by (a) monitoring the consumer credit market and industry to ensure that prohibited conduct is prevented or detected and prosecuted; and (b) issuing and enforcing compliance notices.

[74]Of paramount significance, unlike in *Sebola*[83], this is not a case where a consumer is pitted with a credit provider. It is a case where a statutory body seeks to enforce its statutory function. It cannot be so that the balancing of rights and responsibilities anticipated in section 3(d) of the NCA, sanctions an interpretation which shall bring to the fore anarchy in the credit market industry. Therefore, I remain unregenerate that this case is affected by caution.

[75]Additionally, Adv Budlender SC urged us to adopt the approach endorsed by the majority in the matter of *Democratic Alliance v African National Congress and another*[84] where the erudite Cameron J reverberated the law as follows:

> "…the restrictive interpretation of penal provisions is a long-standing principle of our common law. Beneath it lies considerations springing from the rule of law. The subject must know clearly and certainly when he or she is subject to penalty by the state. <u>If there is uncertainty about the ambit of a penalty provision, it must be resolved in favour of liberty." [Own emphasis]</u>

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83 *Ibid.*

84 2015 (1) SA 232 (CC) at para 130.

[76]Sadly, for this argument, this Court is not seeking to interpret penal provisions. In the *Democratic Alliance* matter, the provisions interpreted were sections 89(1) and (2) of the Electoral Act[85]. Of significance, section 97 thereof provided that any person who contravenes a provision of part 1 of this chapter and other mentioned sections is guilty of an offence. Section 98 provides that any person convicted of any offence in terms of amongst others section 89(1) is liable to a fine or imprisonment for a period not exceeding five years.

[77]*Apropos* this matter, a breach of sections 100, 101 and 102 of the NCA does not amount to a criminal offence. Section 55(6) of the NCA perspicuously provides that if a person fails to comply with a compliance notice as contemplated in the section without raising an objection in terms of section 56, the NCR may refer the matter to the NPA if failure to comply constitutes an offence in terms of the NCA. The offences in the NCA are spelt out in sections 156 to 160 of the NCA. Section 161 deals with the penalties to be imposed. Conspicuously absent in sections 156 to 160 are the statutory prohibitions that occur in sections 100 to 102 of the NCA. Inasmuch as the forceful submissions by Adv Bundler SC were alluring and articulately made, I remain obstinate that sections 100 to 102 must be interpreted in the manner suggested in *Sebola*[86] and *Democratic Alliance*[87]. My conviction remains with the text of the legislature as outlined earlier in this judgment.

[78]For all the above reasons, if I commanded the majority, I would make the following orders:

78.1The appeal lodged by VWFS is dismissed with costs, which costs includes the costs of employment of only two counsel.

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85 Act 73 of 1998 as amended.

86 *Supra* at 70

87 *Supra* at 74

78.2The cross-appeal by NCR in the VWFS matter (A104/2019) is dismissed with costs, which costs includes the costs of employment of two counsel.

78.3The appeal lodged by the NCR against the decision of the NCT in the MBFS matter (A289/2022) is upheld with costs, which costs includes the costs of employing only two counsel.

78.4The compliance notice issued on 29 March 2018 is not set aside and it remains in force.

78.5The appeal lodged by the NCR against the decision of the NCT in the BMFS matter (A288/2021) is upheld with costs, which costs includes the costs of employing only two counsel.

78.6The compliance notice issued on 4 October 2017 is not set aside and it remains in force.

APPEARANCES:

CASE NO:A104/21

FOR THE VWFS (APPELLANT):	ADV S. GAUTSCHI SC ADV M. SAWYER
INSTRUCTED BY:	SMIT, JONES & PRATT ATTORNEYS, JOHANNESBURG.
CASE NO:	**A289/21**
FOR THE NCR (RESPONDENT/APPELLANT)):	ADV P. CARSTENSEN SC, ADV A. LAPAN ADV N. MBELLE.

INSTRUCTED BY:	MALATJI KANYANE INC, SANDTON.
FOR THE MBFS (RESPONDENT):	ADV J P V MCNALLY SC AND ADV D SMIT.
CASE NO:	**A288/2021**
INSTRUCTED BY:	WEBBER WENTZEL ATTORNEYS, SANDTON.
FOR THE BMWFS (RESPONDENT):	ADV S BUDLENDER SC AND ADV WHJ VAN REENEN.
INSTRUCTED BY:	SMIT, JONES & PRATT ATTORNEYS, JOHANNESBURG.
DATE OF HEARING:	26 October 2022
DATE OF JUDGMENT:	20 January 2023