IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE (1) REPORTABLE: ~~YES~~/**NO** (2) OF INTEREST TO OTHER JUDGES: ~~YES~~/**NO** (3) REVISED DATE: **19 September 2023** SIGNATURE:........................

Case No. A32/2023

In the matter between:

FIRST GROUP INVESTMENT HOLDINGS (PTY) LTD **APPELLANT**

And

NATIONAL CREDIT REGULATOR **FIRST RESPONDENT**

THE NATIONAL CONSUMER TRIBUNAL **SECOND RESPONDENT**

Coram: Millar J *et* Ally AJ

Heard on: 5 September 2023

Delivered: 19 September 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 19 September 2023.

Summary: Appeal against a decision of the National Consumer Tribunal in terms of s 148(2)(b) of the National Credit Act against the dismissal of challenges *in limine* in respect of the authorization of the referral and admissibility of evidence before it – having elected to proceed by way of motion the Regulator was obligated to see the process through and cannot change the process midstream to make up for shortcomings identified in the referral – appellant entitled to fair procedure and to know what that procedure was before engaging – appeal upheld - consequences of possible adverse finding against appellant sufficiently serious to warrant engagement of two counsel and so ordered.

ORDER

It is Ordered:

[1] The appeal is upheld.

[2] The decision of the NCT is set aside and replaced with the following:

"1. The Respondent's 5 points in limine are upheld.

2. The application is dismissed.

3. No order is made as to costs".

[3] The First Respondent is ordered to pay the appellant's costs of the appeal on the scale as between party and party which costs are to include the costs consequent upon the engagement of two counsel.

JUDGMENT

MILLAR J (ALLY AJ CONCURRING)

BACKGROUND.

[1] This is an appeal by First Group Investment Holdings (Pty) Ltd (FGI) against orders by the second respondent, the National Consumer Tribunal (NCT) dismissing 5 points *in limine* that were argued before it. These points were raised in proceedings brought by the first respondent, the National Credit Regulator (NCR) against FGI for an order that it had engaged in what was alleged to be conduct prohibited by the National Credit Act[1] (NCA).

[2] The referral to the NCT was made in consequence, not at the instance of a complaint initiated by a third party, but by a complaint initiated by the NCR itself.

[3] This appeal[2] concerns only the genesis of the complaint, the manner in which it was referred to the NCT and then to the proceedings before the NCT. It is common cause that the NCT did not make any finding in respect of the conduct of FGI, electing instead, to postpone this aspect for hearing to a later date.[3]

---

1 34 of 2005.

2 Brought in terms of s 148(2)(b) of the NCA.

3 The finding of the NCT in this regard was inter alia that *"The main application may proceed".*

THE FINDINGS AND ORDER OF THE NCT.

[4] The findings of the NCT in respect of the points *in limine* and which are challenged in this appeal, are as follows:

> *"(i) There is prima facie proof that the application was duly authorised, and Ms Schwartz was authorised to act on behalf of the Applicant;*
>
> *(ii) Whether the evidence tendered by the applicant constitutes inadmissible hearsay evidence can be determined in the main application;*
>
> *(iii) The Applicant had a reasonable suspicion to investigate the Respondent's alleged engagement in prohibited conduct.*
>
> *(iv) The scope of the investigation was within the authority of the Applicant and the parameters of the NCA; and*
>
> *(v) The report compiled by the Applicant's inspector, Phalanndwa, was materially sufficient to launch this application."*

[5] Having made those findings, the NCT then ordered that:

> *"59.1 The Respondent's 5 points in limine are dismissed;*
>
> *59.2 The main application may proceed;*
>
> *59.3 The Registrar must set the application down for hearing after the adjudication of the Applicant's condonation application; and*
>
> *59.4 No order is made as to costs.*

[6] Insofar as the findings made in each of the points *in limine* are concerned, it is in respect of each of these that this appeal has been brought.

THE COMPLAINT, INVESTIGATION AND SUBSEQUENT REFERRAL.

[7] The NCA was enacted *inter alia* and relevant to the present matter, *". . . to promote a consistent enforcement framework relating to consumer credit . . ."* [4]

[8] Section 136 of the NCA provides that a complaint may be initiated to the NCR in one of two ways –

[8.1] The first is by any person who has a complaint[5] and who must do so "in the prescribed manner and form" in the regulations[6].

[8.2] The second is where the NCR initiates a complaint "in its own name."[7]

[9] In the present case, the NCR initiated a complaint in its own name. On 2 February 2021, an investigation of FGI was authorised and on 9 February 2021, an inspector was appointed to conduct such investigation.[8] On 8 March 2021, the inspector interviewed a representative of FGI and requested certain documents which were subsequently furnished on 29 March 2021. On 23 April 2021, the inspector completed his investigation and submitted a report in which he found *inter alia*, contraventions of the NCA Act.[9]

---

[4] The National Credit Act 34 of 2005, the preamble.

[5] S 136(1).

[6] Regulation 50 which provides that a consumer may lodge a complaint against a credit provider either in writing (Regulation 50(1)(a)) or telephonically (Regulation 50(1)(b)). The Regulation provides that if a written complaint is made on behalf of another person, authority to do so must be furnished, provided however that telephonic complaints may only be made by the complainant themselves.

[7] S 136(2).

[8] S 139(1)(c) provides that the NCR may *"direct an inspector to investigate the complaint as quickly as practicable."*

[9] The specific contraventions were said to be in respect of s 100 and s 101 in that the total cost of credit charged by the credit provider exceeded the maximum amounts allowed; in respect of s 80 and s 81 read with Regulation 23, in that there was a failure to conduct an assessment of consumers and lastly, in respect of s 92(1) read together with Regulation 28(1) and Form 20, in that credit was extended without giving the consumers the requisite pre-agreement statement and quotation in the prescribed form.

[10] In consequence of the investigation, the NCR chose in terms of s 140(1)(b)[10] read together with s 140(2)(b)[11] to refer this matter to the NCT.

[11] The NCT must, once a matter has been referred to it, in terms of s 142(1), conduct its hearings in public and:

"(a) in an inquisitorial manner;
(b) as expeditiously as possible;
(c) as informally as possible and
(d) in accordance with the principles of natural justice."

[12] Importantly for the present appeal, s 145 of the NCA provides that *"Subject to the rules of procedure of the Tribunal, the member of the Tribunal, presiding at a hearing, may determine any matter of procedure for that hearing, with due regard to the circumstances of the case and the requirements of the applicable sections of this [the] Act."* It is self-evident that no matter the exigencies of facilitating an expeditious hearing, that these cannot over-ride the right of any respondent to have the matter conducted in accordance with the principles of natural justice.

[13] The consequences of an adverse finding by the NCT may be grave. In terms of s 151(1) and (2), the NCT may impose an administrative fine which may not exceed the greater of 10% of annual turnover or R1 million.

THE HEARING BEFORE THE NCT.

[14] The hearing before the NCT took place on 5 December 2022. When the hearing took place, the only documents before the NCT were the NCR's referral together with the attached founding affidavit and FGI's answering affidavit.

---

[10] Which provides that after completing an investigation, the NCR may *"make a referral in accordance with subsection (2), if the National Credit Regulator believes that a person has engaged in prohibited conduct."*

[11] In terms of s 140(2), the NCR may either refer the matter to a consumer court (s 140(2)(a)) or to the NCT (s 140(2)(b)).

[15] The NCR had delivered on 28 November 2022, a week before the hearing, a replying affidavit and sought a postponement of the hearing so that an application for condonation for the late filing of the replying affidavit could be heard.

[16] There was no application for condonation before the NCT and having heard argument on the application for postponement, it was refused, and the hearing proceeded on the basis that the points *in limine* only would be argued on what was before the NCT.

THE GROUNDS OF APPEAL.

[17] The NCR chose to submit its referral in the prescribed form accompanied by a founding affidavit. The prescribed form is in its terms an abridged notice of motion.[12] In its answer, FGI raised the following 5 points *in limine* which are also the grounds upon which this appeal is advanced–

[17.1] that the deponent to the founding affidavit and consequently the referral it represented, had not been properly authorised.

[17.2] the referral was predicated on unconfirmed and inadmissible hearsay evidence.

[17.3] the referral failed to meet the threshold of establishing “a reasonable suspicion” or for that matter any suspicion that FGI had engaged in “prohibited conduct”

[17.4] that the inspector upon whose report the referral was advanced, had exceeded the scope of the investigation that had been authorised and

---

[12] Form 32 which provides *inter alia* substantially the same particulars that one would find in a notice of motion in High Court proceedings.

[17.5] the inspector's report was materially incomplete and defective.

[18] The principal argument advanced by FGI was that "*. . . the Regulator, in its referral application to the Tribunal, elected to proceed by way of (motion) application and, as such, is, and was, duty bound to make out its case in its founding papers."* This proposition is well established in our law[13] and confirmed most pertinently, within the present context in *National Credit Regulator v Lewis Stores (Pty) Ltd and Another*[14] *(Lewis 1).*

[19] Having elected to proceed by way of motion, both the NCR who referred the matter and the NCT who subsequently dealt with it as such, must have been mindful of the nature of the proceedings before it.

[20] The NCR argued that the dictum of the Court in *Edcon Holdings Ltd v The National Consumer Tribunal and Another*[15] that: *"The proceedings before the Tribunal were brought by way of affidavit. The Regulator could therefore only succeed if the facts averred in its founding affidavit which were admitted by Edcon together with the facts alleged by Edcon justified the order made"* was distinguishable from the present case inasmuch as that Court did not have regard to the prescribed form for referral and none of the parties had raised it in that matter. So too in the present matter, the NCR brought its proceedings before the NCT by way of affidavit. The NCR having pinned its colours to the mast, it was now obligated to sail under those colours.

[21] In *Venmop 275 (Pty) Ltd and Another v Cleverlad Projects (Pty) Ltd and Another*[16] the court pertinently enunciated that "*In motion proceedings, affidavits*

---

[13] See *Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 635H – 636A; Gold Fields Ltd and Others v Motley Rice* LLC 2015 (4) SA 299 (GJ) at para [121].

[14] 2020 (2) SA 390 (SCA) at para [29].

[15] 2018 (5) SA 609 (GP).

[16] 2016 (1) SA 78 (GJ) at paras [8] – [9].

serve a dual function of both pleadings and evidence" [17] and that *"Deponents to the affidavits are testifying in the motion proceedings."*[18]

[22] It is against the mosaic of the affidavits before it together with s 142(1) of the NCA that the NCT was obliged to conduct itself and consider both the complaint as well as the points *in limine*. I turn now to the grounds of appeal.

FIRST GROUND OF APPEAL.

[23] The first ground of appeal is that the deponent to the founding affidavit, Ms Schwartz, and consequently the referral to which it was attached, had not been properly authorised. On this ground, it was the finding of the NCT that:

> *"There is prima facie proof that the application was duly authorised, and Ms Schwartz was authorised to act on behalf of the Applicant"*

[24] FGI challenged the authority on the basis that she had failed to prove and establish her authority to represent the NCR. It was not in issue that Ms Schwartz had never interacted with any of the representatives of FGI and was not involved in the investigation and compiling of the report.

[25] On the referral (form NCR2) Ms Schwartz describes herself as being *"duly authorised on behalf of the applicant."* She goes further in the founding affidavit in alleging that she was *"duly authorised to depose to this affidavit and to launch this application on behalf of the Applicant, by the Chief Executive Officer."*

[26] It is common cause that there was no document attached to the referral or founding affidavit from which such authorisation could be inferred and furthermore, no affidavit from either the Chief Executive Officer confirming that such authority had been delegated to her. Additionally, it is not in issue that she

---

[17] Ibid at para [8] and to the authorities referred to therein.

[18] Ibid at para [9].

had no personal knowledge of the investigation and was neither involved in the preparation nor finalisation of Mr Phalanndwa's report.

[27] The law on this aspect is clear. In *Kasiyamhuru v Minister of Home Affairs and Others*[19] it was held that:

> *"The fact of a valid delegation must be clearly and satisfactorily be established and an express power of delegation must be interpreted restrictively."*

[28] Furthermore, in *Eveleth v Minister of Home Affairs*[20] and pertinent to this matter, it was held that:

> *". . ., it is incumbent upon the State to produce proof that such officer is duly delegated, directed and authorised to represent it in the proceedings. The* ***mere say so*** *of a departmental officer in an affidavit is no proof of either delegation or authority without submitting acceptable evidence or documentation to substantiate the averments."* [emphasis added].

[29] The NCT recognised this shortcoming in the affidavit of Ms Schwartz but nonetheless dismissed it ostensibly on the basis that it amounted to no more than a procedural irregularity, a failure to comply with Rule 4(3)[21]. Even if it did amount to a procedural irregularity, it was an irregularity that required condonation – something that was not sought by the NCR at the hearing. The NCR for its part argued that Rule 4(3) did not apply to it as it was neither a company nor other corporate entity. This is not the view that was taken by the NCT and did not inform its decision on the point.

---

[19] 1999 (1) SA 643 (W) at page 648I-J. See also *Chairman, Board on Tariffs and Trades and Others v Teltron (Pty) Ltd* 1997 (2) SA 25 (A).

[20] [2004] 3 ALL SA 322 (T) at para [9].

[21] Rule 4(3) provides *"If the Applicant is a company or other corporate entity, the officer signing the application must append a copy of the board resolution or other proof of authority to act on behalf of that company or entity."*

[30] Having decided to proceed to hear the points *in limine* on what was before it, it was not within the remit of the NCT to then disregard its own finding of non-compliance absent an application for condonation. To then, having prejudged that condonation would be granted, for it to dismiss the first point *in limine* was plainly wrong. It was argued by the NCR that FGI had *"no regard for the rules of the Tribunal in relation to the required form of the complaint referral."* This argument however overlooks the fact that once the referral was placed before the NCT in the form that it was, the NCT was required to conduct the proceedings on the basis provided for in s 142(1).[22]

[31] It is simply illogical that the first point in limine would be dismissed on the basis that it was otherwise sustainable, subject to an application for condonation and to then after the dismissal order that the application for condonation should be heard. Put simply, the application for condonation ought to have preceded any consideration of this first point in limine and on this basis alone, the dismissal is impeachable.

SECOND GROUND OF APPEAL.

[32] The second ground of appeal is that the referral was predicated on unconfirmed and inadmissible hearsay evidence. It was the finding of the NCT that:

> "*Whether the evidence tendered by the applicant constitutes inadmissible hearsay evidence can be determined in the main application."*

[33] The proceedings in this matter were conducted as motion proceedings. The affidavit of Ms Schwartz together with the affidavit of FGI and presumably in due course, the replying affidavit, would have constituted the entire body of both allegations and evidence in support as well as FGI's answer to be considered.[23]

---

[22] Para 11 *supra*.

[23] *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 336A-H. See also *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another* 2010 (5) SA 112 (KZP) at 115G-116C.

[34] It was never suggested during the course of the proceedings before the NCT or before the Court, that any witnesses would be called to testify. The NCT took the view that the failure to attach a confirmatory affidavit by Mr Phalanndwa, the author of the investigation report, could be cured in due course by the leading of evidence. In this regard, it referred specifically to s 3(3) and s 3(4) of the Law of Evidence Amendment Act.[24]

[35] In view of the fact that the proceedings were conducted as motion proceedings and that no oral evidence would be led, this too is unsustainable. Were the proceedings to have been a hybrid with both evidence presented on affidavit and orally[25], then chronologically, in any event, no finding could have been made on this point *in limine* unless and until the evidence had actually been led and a ruling made on its admissibility.[26] To have made the ruling in the present matter at the time that it did, offends the principle of natural justice.

[36] If the proceedings were motion proceedings, then what was required was a finding that the evidence was either admissible or it was not. If the proceedings were to be conducted as a hybrid, then FGI was entitled to know – it offends natural justice[27] for a party to be subjected to an ever-changing procedure, the exigencies of which are tailored to accommodate the interests of one of the parties. This finding by the NCT is similarly impeachable.

THIRD, FOURTH AND FIFTH GROUNDS OF APPEAL.

---

[24] 45 of 1988.

[25] S 144 of the NCA provides that the NCT may *inter alia* summon any person to appear, question them under oath or affirmation and order them to produce any book, document or other item necessary for purpose of the hearing.

[26] *McDonald Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Another; McDonald's Corporation v Dax Prop CC and Another; McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Dax Prop CC* 1997 (1) SA 1 (A) at 27D-E in which it was held "*A decision on the admissibility of evidence is, in general, one of law, not discretion.*"

[27] *Deighton v Financial Sector Conduct Authority and Others* 2022 JDR 2006 (GP) at para 70 referring to *John v Rees* [1970] CH 345 at 402C-E.

[37] The third ground of appeal is that the referral failed to meet the threshold of establishing “a reasonable suspicion” or for that matter any suspicion that FGI had engaged in “prohibited conduct”. It was the finding of the NCT that:

> *“The Applicant had a reasonable suspicion to investigate the Respondent’s alleged engagement in prohibited conduct.”*

[38] In regard to the fourth ground of the appeal, it was the finding of the NCT that:

> *“The scope of the investigation was within the authority of the Applicant and the parameters of the NCA”*

[39] In regard to the fifth ground of the appeal, it was the finding of the NCT that:

> *“The report compiled by the Applicant’s inspector, Phalanndwa, was materially sufficient to launch this application.”*

[40] The entirety of the NCT’s reasoning for the dismissal of the third, fourth and fifth points *in limine* was predicated upon the admissibility of what was before it. Absent the admissibility of the Phalanndwa report, there was no case before the NCT for FGI to answer, the content of the report being inadmissible was irrelevant and so too the investigation and findings.[28]

[41] Whether or not the report establishes *“reasonable suspicion”* or that FGI had engaged in “*prohibited conduct*” need not be considered at this juncture. Similarly, also whether or not the investigation was properly authorised or whether it was sufficiently material to have justified the referral, only arise for consideration if the report was admissible.

[42] For the reasons set out above, the dismissal of the third, fourth and fifth points *in limine* are similarly impeachable and the appeal must succeed.

---

[28] *Ibid* para 71 – natural justice demands that if there are findings to be made and penalties to be imposed in consequence of reliance on a report, that report must be admissible and the party in respect of whose conduct the report is tendered, must have a fair opportunity to test that report.

COSTS.

[43] The costs will follow the result. FGI argued that the matter is an extremely important one to it, having regard to the gravity of the complaints against it and the potential consequences of any adverse decision. It was argued that it was prudent to have engaged more than one counsel. I agree and for this reason, make the costs order that follows.

ORDER.

[44] It is ordered:

[44.1] The appeal is upheld.

[44.2] The decision of the NCT is set aside and replaced with the following:

"1. The Respondent's 5 points in limine are upheld.

2. The application is dismissed.

3. No order is made as to costs".

[44.3] The First Respondent is ordered to pay the appellant's costs of the appeal on the scale as between party and party which costs are to include the costs consequent upon the engagement of two counsel.

____

A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

____

I CONCUR **G ALLY**

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON:	5 SEPTEMBER 2023
JUDGMENT DELIVERED ON:	19 SEPTEMBER 2023
COUNSEL FOR THE APPELLANT:	ADV. G AMM
	ADV. B EDWARDS
INSTRUCTED BY:	HSG ATTORNEYS
REFERENCE:	MR. F DAVIDS
COUNSEL FOR THE FIRST RESPONDENT:	ADV. P LONG
INSTRUCTED BY:	M INC. ATTORNEYS
REFERENCE:	MR. K KALPOO

NO APPEARANCE FOR THE SECOND RESPONDENT.