THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 415/13
Reportable

In the matter between:

BARKO FINANCIAL SERVICES (PTY) LIMITED **APPELLANT**

and

NATIONAL CREDIT REGULATOR **FIRST RESPONDENT**

THE NATIONAL CONSUMER TRIBUNAL **SECOND RESPONDENT**

Neutral citation: *Barko Financial Services (Pty) Ltd v National Credit Regulator* (415/13) [2014] ZASCA 114 (18 September 2014)

Bench: Ponnan, Shongwe, Wallis, Mbha JJA and Mocumie AJA

Heard: **18 August 2014**

Delivered: **18 September 2014**

Summary: National Credit Act 34 of 2005 – consumer paying service fee in excess of the maximum prescribed by the Act pursuant to a supplementary agreement – whether supplementary agreement induced as contemplated by s 91*(a)* – power of National Consumer Tribunal to order repayment.

ORDER

On appeal from: North Gauteng High Court, (Pretoria) (Pretorius J (Hughes and Vorster AJJ concurring) sitting as a court of appeal in terms of s 59(3) of the National Credit Act 34 of 2005.

The appeal is dismissed with costs such costs to include those consequent upon the employment of two counsel.

JUDGMENT

Ponnan JA (Shongwe, Wallis, Mbha JJA and Mocumie AJA concurring):

[1] On 24 June 2010 the first respondent, the National Credit Regulator (the NCR),[1] issued the appellant, Barko Financial Services (Pty) Ltd (Barko), a registered credit provider, with a compliance notice in terms of s 55 of the National Credit Act 34 of 2005 (the NCA). The essential issue giving rise to the issuance of the compliance notice was whether it was legitimate in terms of the NCA for persons to whom Barko lent money to agree to pay, in addition to the statutorily prescribed fees and interest, a further fee for the successful processing of the repayments of their indebtedness. The NCR regarded this as a breach of the NCA. Barko contended that this additional fee was paid to a third party (NuPay) in terms of a separate agreement and did not contravene the NCA. For a proper appreciation of the issues raised by the appeal it is

[1]The NCR is a juristic person established in terms of s 12 of the NCA.

necessary to consider the relevant provisions of the NCA and the agreements that formed the basis for Barko's business practices and contentions.

[2] Section 55(1)*(a)* of the NCA authorises the NCR to issue a compliance notice in the prescribed form to a person or association of persons whom the NCR on reasonable ground believes has failed to comply with a provision of the NCA or is engaging in an activity in a manner that is inconsistent with the NCA. The compliance notice issued to Barko read:

'A. In terms of section 55(1)(a) and (3) of the Act your attention is drawn to the fact that you have failed to comply with the provisions of the Act, in that:

1. Barko requires consumers to enter into an agreement, in terms of which consumers are required to pay a fee to NuPayment Solutions (Pty) Ltd ("NuPay") which is,

(i) not listed as a permissible charge under a credit agreement, in contravention of section 100(1)(a) read with section 101(1) of the Act, and/or

(ii) exceeds the maximum service fee of R50.00 that may be charged, in contravention of section 100(1)(b) read with sections 101(1)(c) and 105(1)(b) and regulation 44 of the Act, and/or

(iii) not a permissible fee, charge, commission, expense or other amount as contemplated in section 100(1)(d) of the Act.

2. Barko requires or induces consumers to enter into credit agreements which contain a provision in terms of which an additional monetary liability, not permitted by the Act, is imposed on the consumer which is unlawful, in contravention of section 90(1) read with section 90(2)(a) and (b) of the Act, in that

(i) their general purpose or effect is to defeat the purposes or policies of the Act;

(ii) they purport to set aside or override the effect of provisions of the Act;

(iii) they purport to waive or deprive a consumer a right set out in the Act;

(iv) they authorise the credit provider to do anything unlawful in terms of the Act.

3. Barko requires or induces consumers to enter into supplementary agreements or sign a document that contains a provision that would be unlawful if it were included in the agreement or Barko permits NuPay to require or induce consumers, to enter into such agreements in contravention of section 91(a) or (c), read with sections 90(1), (2)(a) and (b) of the Act.'

[3] The compliance notice required Barko to take the following steps to address its non-compliance with the NCA:

'1. With immediate effect, cease requiring consumers to pay the NuPay service provider fee;

2. Within 30 business days of the date of this notice, reimburse all consumers who have been required to pay the NuPay service provider fee;

3. Within 45 business days of the date of this notice furnish the NCR with a written affidavit, by Jacobus Ignatius De Wet [who describes himself as the sole director and shareholder of Barko], to the effect that such amounts were refunded, attaching a list of the names and the amounts of refunds made;

4. Within 60 business days of the date of this notice, require that the auditor of Barko furnish the NCR with a certificate providing assurance, and setting out the procedures underlying such assurance that:

(i) the practice of charging service provider's fees has been terminated and the date of such termination;

(ii) the calculation of the service provider fees which were unlawfully imposed is correct, and

(iii) such service provider fees have been repaid by Barko.'

[4] Barko lodged an objection to the compliance notice with the second respondent, the National Consumer Tribunal (the Tribunal). The Tribunal declined to set aside the compliance notice but modified it to read:

'THAT BARKO:

52.1. With immediate effect, cease requiring consumers to pay the Nupay service provider fee where such fee, if added to the service fee charged by Barko, would increase the service fee payable under credit agreements to an amount above the prescribed maximum service fee of R50.

52.2. Within 60 business days of the date of this judgment, cause its auditor to provide the NCR with a list of all consumers who have paid the NuPay service provider fee on credit agreements entered into on or after 1 June 2007 where such fee, if added to the service fee charged by Barko, increased the service fee payable under the credit agreements to an amount above the prescribed maximum service fee of R50, and the amounts paid.

52.3. Reimburse all such consumers as contained in the list provided to the NCR under 52.2 of the amount of the service provider fee paid by such consumers on credit agreements entered into on or after 1 June 2007 where such fee, if added to the service fee charged by Barko, increased the service fee payable under the credit agreements to an amount in excess of the prescribed maximum service fee of R50 within 60 business days of the provision of the list to the NCR.

52.4. Furnish the NCR with a written affidavit to the effect that the amounts paid by its consumers in excess of the prescribed maximum service fee of R50, in respect of credit agreements entered into on or after 1 June 2007, have been refunded.

52.5. Cause its auditor to furnish the NCR with a certificate providing assurances, and setting out the procedure underlying such assurances that:

(a) The practice of charging service provider fees which increases the service fees under credit agreements to an amount above the prescribed maximum service fee of R50, has been terminated and the date of such termination;

(b) The calculation of amounts due to consumers paid by them in excess of the prescribed maximum service fee of R50 which in terms of this judgment were unlawfully imposed is correct; and

(c) Such amounts due to consumers paid by them in excess of the prescribed maximum service fee of R50 in terms of this order have been repaid by Barko to its consumers.'

[5] Barko thereupon appealed to the North Gauteng High Court (Pretoria) in terms of s 59(3) read with s 148 of the NCA. The high court (Pretorius J (Hughes and Vorster AJJ concurring)) dismissed the appeal but granted leave to Barko to appeal to this court. Although cited as the second respondent, the Tribunal, having filed a notice of intention to abide the decision of this court, took no part in the appeal. Micro Finance South Africa (MFSA), a company not for profit representing some 1700 credit providers who are registered with and subject to the jurisdiction of the NCR, sought and obtained leave from the President of this court to intervene as an *amicus curiae*. Pursuant to that order, MFSA filed heads of argument and instructed counsel to address argument to us at the hearing of the appeal.

[6] In its founding affidavit filed with the Tribunal in support of its objection to the compliance notice in terms of s 56 of the NCA, Barko explained:

'6.3 As a background I must explain that on the 17 April 2009 the Applicant received a request for information from the NCR indicating that the NCR had identified a number of areas in respect of which the Applicant`s compliance with the NCA would be assessed . . . The Applicant complied with the request and furnished the information.

. . .

6.5 On 7 September 2009 the Applicant received an email from the NCR addressed to Bernard de Wet (the Applicant`s General Manager) in which the NCR made enquiries

regarding the fee charged by Altech NuPayment Solutions (Pty) Limited ("NuPay") for the rendering of payment deduction in terms of AEDO ("service provider fee"). In particular, the NCR requested confirmation in respect of the section of the NCA being used by the Applicant to charge service provider fees pursuant to the NuPay Service Agreement which is concluded between NuPay and consumer ("the NuPay Service Agreement") . . .

6.6 The Applicant responded to the NCR confirming that the NuPay Service Agreement is an agreement between NuPay and the consumer and is not part of the credit agreement and therefore not regulated by the NCA.

6.7 During 2010 the NCR requested that the Applicant furnish it with its credit agreement and the NuPay Service Level Agreement presently in place between the Applicant and NuPay with which request the Applicant duly complied. At the same time the Applicant was informed that an investigation was being conducted by the NCR and that legal opinions were being sought. The Applicant furnished the NCR with the requested documents.

. . .

9.1.1 In formulating the objection of the Applicant to the Compliance Notice I will attempt to respond to each of the allegations of non-compliance alleged by the NCR. In support thereof I have annexed sample documentation pertaining to an agreement of loan entered into between the Applicant and one of its consumers. The aforesaid set of documentation is marked as **Annexure "D1"** to **"D11"** and includes:

9.1.1.1 Quotation & Pre Loan Agreement reflecting the loan amount as R500.00 (five hundred rand) and the total amount repayable as R637.94 (six hundred and thirty seven rand and ninety four cents). (**Annexure "D1"** hereto);

9.1.1.2 Credit Agreement, reflecting the loan amount as R500.00 (five hundred rand) and the total amount repayable as R637.94 (six hundred and thirty seven rand and ninety four cents) (**Annexure "D2"** hereto);

9.1.1.3 Loan Application & Agreement (**Annexure "D3"** hereto);

9.1.1.4 Loan Affidavit (**Annexure "D4"** hereto);

9.1.1.5 NuPay Service Agreement concluded between NuPay and the consumer, reflecting the combined value of the total monthly consumer payment on the loan and the NuPay service provider fee in the amount of R652.49 (six hundred and fifty two rand and forty nine cents) being the amount of the single payment instruction to be processed by NuPay and debited to the consumer`s nominated account (**Annexure "D5"** hereto);

. . .

9.2 Before dealing with the alleged grounds of non-compliance I shall briefly set out the background and process followed by the Applicant and NuPay in relation to the provision of AEDO services by NuPay based on **Annexures "D1" to "D11"** (AEDO means: "Authenticated Early Debit Order"). I understand that this is a system designed by BankServ specifically for the micro lending industry on request of the Reserve Bank. The system is highly accurate and fraud is limited because it is confirmed that the consumer's details are correct and that with the information provided by the consumer the bank concerned will be able to secure a successful transaction):

9.2.1 the Applicant has been making use of the payment system services of NuPay since October 2001. One of the services provided by NuPay consists of a payment deduction in terms of an AEDO system. Through the AEDO system, NuPay provides a secure and effective payment solution to the benefit of both the credit provider and the consumer. The payment solution is only available from other AEDO payment service providers and is not currently available directly through any banking or financial institution because their systems do not make provision for AEDO payment services. To the best of my knowledge and belief, there are only three companies in South Africa who can assist a credit provider with AEDO payment services, of which NuPay is one;

9.2.2 a consumer wishing to enter into a Credit Agreement with the Applicant ("the Credit Agreement") has the option of simultaneously entering into a NuPay Service Agreement ("NuPay Service Agreement") which is separate to the Credit Agreement;

9.2.3 should the consumer choose to effect payment in respect of the Credit Agreement by utilizing the NuPay systems, the consumer concludes the NuPay Service Agreement. It is

important to note that the consumer can pay in cash, by cheque (in which case there would be fees payable in respect of the cheque), by EFT, by means of the service offered by NuPay or any other means. NuPay makes its service available to the consumer should the consumer wish to avail itself of such service and the fee charge by NuPay is not within the control of the Applicant and does not accrue to the Applicant. The fee charged by NuPay could therefore never be said to constitute a charge which is inextricably linked to the credit offered by the Applicant as it is not within Applicant's control;

9.2.4 in terms of the NuPay Service Agreement, NuPay charges the service provider fee in consideration for the AEDO services conducted by it on behalf of the consumer as set out in the NuPay Service Agreement with the consumer. The service provider fee is levied only on successful transactions to the consumer`s account. This fee is calculated as a percentage of the successful value of the transaction; . . . .'

[7] Against that backdrop two broad issues arise for determination, namely: whether there was an agreement between NuPay and the consumer as contended by Barko; and whether the Tribunal had the power under the NCA to order Barko to repay to the respective consumers the NuPay service provider fee. Each of those issues will be considered in turn.

[8] Barko's case is that in each instance three distinct agreements, each with its own purpose, find application, namely: (a) a credit agreement between it and a consumer (the credit agreement); (b) a service level agreement between it and NuPay (the SLA); and (c) Annexure D5 to Barko's founding affidavit, allegedly an agreement concluded between NuPay and the consumer (Annexure D5). These agreements must be construed in order to determine the correctness of the parties' respective contentions. The SLA determines the relationship between Barko and NuPay. The

credit agreement sets out the relationship between Barko and the consumer. The key issue is the nature and status of Annexure D5 and whether it is part of the agreement between Barko and the consumer or is a separate transaction between the consumer and NuPay. I stress that we are not concerned with the individual transaction. The documents are analysed because they were said by Barko to contain and illustrate the contractual relationships between itself, the consumer and NuPay.

[9] The credit agreement stipulates in clause 11.3 that '[t]he maximum monthly service fee is the amount of R50.00 monthly payable in terms of regulation 44, plus VAT'. In terms of the SLA, which regulates the relationship between Barko and NuPay, the former is obliged to pay a successful transaction processing fee to the latter in respect of the management services rendered to it. Thus clause 6.1.1 provides that 'NuPay will be entitled to charge a fee for the Management Services provided as follows: a successful transaction processing fee that will be collected by the relevant bank'. That fee, at Barko's election, was either 2,5% or 2% 'per successful transaction', which Barko was obliged to pay without deduction and/or set off by debit order every month.'

[10] The last of the trilogy of agreements, Annexure D5, which is headed 'NuPay Service Agreement' and lies at the heart of the present controversy, provides to the extent here relevant:

'1.1 The Consumer has entered into a Credit Agreement (identified by the Credit Agreement reference), with the Credit Provider and has instructed NuPayment Solutions (Pty) Ltd ("NuPay") to process the Consumer's Payment Obligation in terms of the Credit agreement for the benefit of the Credit Provider.

1.2 NuPay is entitled to a Service Provider Fee for the processing of every Payment Obligation and the Consumer has agreed to the payment of the Service Provider Fee, subject to the terms and conditions set out below.

2. TERMS AND CONDITIONS

2.1 The Consumer acknowledges and agrees that –

2.1.1 the Service Provider Fee is due to NuPay and has not been included in the cost of credit charged by and due to the Credit Provider;

2.1.2 in order to save bank charges, the Service Provider Fee due to NuPay and the relevant Payment obligation of the Consumer in terms of the Credit Agreement will be processed as a single payment instruction and the Total Amount as indicated above will be debited to the Consumer's nominated account;

2.1.3 service charges levied by the Consumer's bank are not governed by this agreement.

. . .

4. The consumer hereby authorises NuPay to process the Service Provider Fee due to NuPay and the Payment Obligation due to the Credit Provider as a single payment instruction and to deliver the payment instruction for collection at the Consumer's bank. . . .'

[11] Matters, certainly as far as the various agreements are concerned, did not rest there. To that suite of documents must be added what Barko termed an addendum to the SLA that it attached to its replying affidavit. Barko explained:

'6. I refer to an Addendum to the Service Level Agreement entered into between NuPayment Solutions (Pty) Ltd ("NuPay") and the Applicant, entitled "Service Provider Fee Facility" on 29 April 2009, which I annex hereto marked **"J"** ("the Addendum"). The Addendum was inadvertently omitted from the founding affidavit for which I apologise. The terms of the Addendum, I respectfully submit, clarify the relationship between NuPay and the Applicant, and deal with the Regulator`s concerns.'

Paragraph 1.2 of the addendum (Annexure J) reads:

‘This agreement governs the collection of the service provider fee due to NuPay, which is processed by NuPay together with the consumer’s payment obligation due to the Credit Provider in terms of the credit agreement as a single payment instruction (“Service Provider Fee Facility”), subject to the terms and conditions below.’

In clause 2.1 of Annexure J, Barko acknowledges and agrees that:

‘2.1.3 the service provider fee shall not be included in the cost of credit charged by the Credit Provider; and

2.1.4 the service provider fee, even though processed together with the payment obligation of the consumer in terms of the credit agreement as a single payment instruction, and credited to the nominated account of the Credit Provider, is due and payable to NuPay.’

And clause 3 provides:

‘The Credit Provider hereby authorises NuPay to submit payment instructions for collection to the Credit Provider’s bank and the Credit Provider hereby authorises its bank to debit its nominated account . . . with the amounts due in terms of this agreement.’

[12] Quite how Barko could characterise Annexure D5 as a contract between NuPay and the consumer is difficult to comprehend. On the face of it, Annexure D5 does not purport to be an agreement between the consumer and NuPay, as contended by Barko. It was signed by the borrower in person and on behalf of Barko as the lender and recorded that the conditions contained therein were accepted by the lender and the borrower. Clause 1.2 records that NuPay *is entitled* to the payment of a Service Provider Fee, that is, that it already had an entitlement to payment of such a fee. But that entitlement could only have arisen under the SLA, which provided for Barko to pay such a fee. In those circumstances Annexure D5 is quite clearly an agreement between Barko and the consumer in which the consumer authorises the fee payable in terms of the SLA by Barko to NuPay to be met from the consumer`s bank account.

Consequently, the purpose of that agreement is not to enable Barko`s customers to discharge their obligations to NuPay, but to enable Barko to ensure that its obligations to NuPay are discharged by its customers. It is no doubt for that reason that the NuPay agreement is signed by the consumer and Barko and not by the consumer and NuPay.

[13] The characterisation by Barko of Annexure D5 as an agreement between NuPay and the consumer was plainly untenable. Undaunted, however, it persisted in its replying affidavit with that characterisation by stating:

'16. The Regulator`s compliance notice is premised upon the Regulator`s contention that the Applicant is requiring consumers to enter into agreements in terms of which consumers are required to pay charges or fees not permitted under the NCA. In the first instance, the Regulator fails to appreciate the identity of the contracting party with whom the consumer concludes a service agreement in the form of annexure "D5" to my founding affidavit. There can be no dispute that such agreement is one concluded between the consumer and NuPay and the Applicant is not a party to that agreement, nor does it receive payment of any amount payable by the consumer under that agreement, which is payable to NuPay for the services it renders to the consumer directly.'

What is more is that that was said after Barko had earlier in that self-same affidavit introduced Annexure J for the first time in order to address the NCR's concerns.

[14] Annexure J, however, did nothing of the sort and, far from allaying the NCR's concerns, may well have heightened them. It will be recalled that the SLA provides expressly in clause 6.1.1 for Barko to pay to NuPay a successful transaction processing fee in respect of the management services rendered to it by the latter. There was nothing in Annexure J that purported to modify or extinguish that obligation

of Barko to NuPay. That obligation thus remained unaltered. It is that obligation that Barko sought to pass on to the consumer. It is not disputed that the NCA precludes Barko from passing on to the consumers to whom it lends money its own obligations to pay fees to the service provider it had contracted to recover payment on its behalf by means of the ADEO system of processing bank payments.

[15] I may add that even if Annexure D5 could rightly have been characterised as an agreement between NuPay and the consumer it would be hit by the provisions of S 91*(a)* of the NCA. Section 91*(a)* reads:

'A Credit Provider must not –

(a) directly or indirectly require or induce a consumer to enter into a supplementary agreement, or sign any document, that contains a provision that would be unlawful if it were included in a credit agreement; . . .'

[16] It is undisputed that the general practice of Barko is to present a suite of documents, including Annexure D5, to its customers. It is also so that the vast majority of those customers when being presented with Annexure D5, sign it. That Annexure D5 is a supplementary agreement as envisaged in s 91*(a)* was conceded by counsel for Barko. He rather took issue with two of the other requirements contained in s 91*(a)*, namely: (a) whether it could be said that Barko had induced the consumer to conclude Annexure D5; and (b) that Annexure D5 contained a provision that would be unlawful if it were included in the credit agreement. As to (a): What is at issue is the ordinary meaning of the word 'induce' - that which it bears in ordinary speech. The normal and permissible method available to a court to ascertain the ordinary meaning of words is to turn to authoritative dictionaries for aid (*Association of Amusement and Novelty Machine Operators v Minister of Justice* 1980 (2) SA 636 (A) at 660F-G). To 'induce',

according to the *Shorter Oxford English Dictionary* 6 ed, is to succeed in persuading or leading someone to do something. In presenting the suite of documents to the consumer, it is Barko's employees who explain the advantages to the consumer of Annexure D5. That exercise, no doubt, is intended to persuade the consumer that it is in their best interests to sign that agreement. The stress laid in the affidavits on the advantages of the ADEO system from the perspective of the consumer would undoubtedly have been at the forefront of the presentation to prospective customers and informing them that ADEOs were less expensive than other forms of payment would clearly be directed at inducing them to agree to use this system. In view of the benefits to Barko of that system it is inconceivable that it would adopt a neutral stance in regard to the use of an ADEO in preference to some other means of payment. The fact that a consumer may have been free to decline to conclude the agreement is, in my view, thus irrelevant to the question whether or not they were induced to do so. As to (b): The 'transaction processing fee' in the SLA is, on the face of it, a fee in respect of the same services encompassed by the 'service fee' in the credit agreement. And as R50 is the maximum amount permitted by Regulation 44,[2] any additional fee in that regard is prohibited by the NCA. Appreciating, it would seem, that it would have been impermissible for a transaction processing fee to have been levied in addition to a service fee in a single agreement, Barko concluded a further agreement with the consumer. It was in terms of that agreement (Annexure D5) that Barko purported to pass on to the consumer the transaction processing fee for the management services rendered to it by NuPay in terms of the SLA. But the simple expedient of two agreements could hardly have rendered lawful what would have been unlawful in terms of a single agreement.

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[2] Regulations promulgated in terms of the National Credit Act, GNR 489, GG 28864, 31 May 2006.

[17] I now turn to the second issue, namely, whether the Tribunal is empowered to order repayment: According to s 55(3) of the NCA a compliance notice issued by the NCR must set out: 'any steps that are required to be taken and the period within which those steps must be taken' (subsec *(d)*); and 'any penalty that may be imposed in terms of this Act if those steps are not taken' (subsec *(e)*). The compliance notice issued by the NCR required Barko to 'within 30 business days . . . reimburse all consumers who have been required to pay the NuPay service provider fee'. That was clearly a step that the notice required Barko to take. The argument on its behalf suggested that some limitation not apparent from the text needed to be read into this provision.

[18] Section 56(2) of the NCA empowered the Tribunal [a]fter considering any representations by the applicant and any other relevant information . . . [to] confirm, modify or cancel all or part of a notice'. The Tribunal, acting pursuant to that provision, modified the compliance notice by requiring Barko to [r]eimburse all such consumers . . . [with] the amount of the service provider fee paid by such consumers on credit agreements . . . where such fee, if added to the service fee charged by Barko, increased the service fee payable under the credit agreements to an amount in excess of the prescribed maximum service fee of R50 within 60 business days'. It is immediately apparent that the modification effected by the Tribunal extended the period for the repayment from the 45 days set by the NCR to 60 days and, unlike the NCR, restricted the repayment only to that amount paid in excess of the maximum of R50 prescribed by the Act.

[19] Section 56(3) provides that: ‘If the Tribunal confirms or modifies all or part of a notice, the applicant must comply with that notice as confirmed or modified, within the time period specified in it’. It is difficult to comprehend why Barko contends that the Tribunal is not empowered to order repayment. Here, aggrieved by the decision of the NCR to issue it with a compliance notice, Barko invoked s 56 of the NCA when it sought to have the compliance notice set aside, alternatively modified. That immediately brought into play sections 142 to 147 of the NCA. Those sections, inter alia, (a) require the Tribunal, in general, to conduct its hearings in public, to make an order permitted by the NCA and to furnish written reasons for its decision (s 142); (b) afford persons a right to participate in a hearing before the Tribunal either in person or through a representative, to put questions to witnesses and examine books, documents and other items presented at the hearing (s 143); (c) oblige witnesses to answer questions (s 146); (d) empower the member of the Tribunal presiding at the hearing to (i) summon persons, question persons under oath or affirmation and direct persons to produce books, documents or any item necessary for the purposes of the hearing (s 144); (ii) determine any matter of procedure with due regard to the circumstances of the case and the requirements of the applicable sections of the NCA (s 145); and (iii) award costs in certain circumstances (s 147). To those provisions may be added sections 59(3) and 150*(h)*. The former renders the decision of the Tribunal subject to appeal or review by the high court to the extent permitted by s 148. And the latter, headed ‘Orders of Tribunal’, empowers the Tribunal to make an appropriate order ‘requiring repayment to the consumer of any excess amount charged, together with interest at the rate set out in the agreement’.

[20] If one assumes, as one must for the purposes of this enquiry, that the Tribunal was correct in its finding that the recovery of the NuPay fee from the consumer is unlawful because it constitutes a contravention of the NCA, then it ought to follow logically that it is for Barko to set matters to right by repaying the relevant amounts. It would be astonishing if, having correctly found that the NuPay service fee is not payable by the consumer and that its repayment by the consumer was unlawful, for the Tribunal to have simply shrugged its shoulders in circumstances where it is empowered by the NCA to make 'an appropriate order . . . including, ... requiring repayment to the consumer of any excess amount charged . . .' (s 150*(h)*). Particularly so, where s 2(1) of the NCA requires it to be interpreted in a manner that gives effect to the purposes set out in s 3, the most dominant of which are:

[T]o promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by –

. . .

(e) addressing and correcting imbalances and negotiating power between consumers and credit providers by –

. . .

(ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and

(iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux; . . . '

[21] In the ultimate analysis the insuperable difficulty that confronts Barko is that it sought in its affidavits to advance a version that oftentimes was entirely at odds with the various agreements relied upon by it. It approached the enquiry as if the parol

evidence rule was no longer a part of our law. But as Harms DP pointed out in *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (4) SA 399 (SCA) para 39 the parol evidence rule remains part of our law. No doubt mindful of the quandary in which it found in itself, Barko submitted that the version advanced by it, albeit at odds with the various written agreements, should be preferred because it furnished the necessary 'context'. But, as *KPMG* makes plain, a litigant cannot through the invocation of context adduce extrinsic evidence to contradict, add to or modify the meaning of a document where such document was intended to provide a complete memorial of the jural act, as Barko has sought to do in this case. That disposes of Barko`s case.

[22] Turning to the amicus: In terms of the order of this court the amicus was admitted in terms of SCA rule 16. In particular, the order directed the amicus to observe rules 16(7) and (8), which read:

(7)*(a)* An *amicus curiae* shall have the right to lodge written argument, provided that such written argument does not repeat any matter set forth in the argument of the other parties and raises new contentions which may be useful to the Court.

(b) The heads of argument of an *amicus curiae* shall not exceed 20 pages unless a judge, on request, otherwise orders.

(8) An *amicus curiae* shall be limited to the record on appeal and may not add thereto and, unless otherwise ordered by the Court, shall not present oral argument.'

[23] That notwithstanding, the initial approach of the amicus as foreshadowed in its heads of argument was:

'4. MFSA, in participating in the appeal as amicus curiae, does so for purposes of placing before the Appeal Court relevant and material facts that are not adequately dealt with or traversed in the appeal record.'

In that it unacceptably disregarded the order of this court.

[24] The crux of the matter for determination by this court was whether the contracts concluded between Barko and the consumer breached the provisions of the NCA. The core submission advanced by the amicus in its heads of argument, however, is that micro lenders should not be obliged to repay the moneys charged in contravention of the NCA. Underpinning that contention is the suggestion that certain provisions of the NCA are inappropriate and that the application of those provisions will have dire consequences for micro lenders in particular and the micro lending industry in general. Fortunately none of those submissions were pressed in argument before us.

[25] From the bar in this court counsel for the amicus restricted himself to the following submission: In terms of the South African Reserve Bank Act 90 of 1989 read with the National Payment System Act 78 of 1998, the South African Reserve Bank (the SARB) is required to, inter alia, implement such rules and procedures as may be necessary to regulate and supervise payment, clearing or settlements systems in the Republic of South Africa. Acting pursuant to those powers the SARB issued Directive No. 2 of 2007.[3] That Directive required that:

'3.1 Any person acting as a system operator shall: . . .

3.1.2 have a written agreement with each person to whom the services are rendered in terms of which it is appointed as a system operator . . . . '

Accordingly, so the submission ran, that directive had not been complied with. The short answer to the submission however is that here the systems operator, NuPay, did in fact have in place a written agreement, namely the SLA, with Barko, to whom it was rendering services. There was thus compliance with the directive of the SARB. For the

[3]GNR 1111, *GG* 30261, 6 September 2007.

reasons already given it did not have agreements with the individual consumers nor did it need to have them in order to comply with the Directive.

[26] It follows that the appeal must fail and in the result it is dismissed with costs such costs to include those consequent upon the employment of two counsel.

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V PONNAN

JUDGE OF APPEAL

APPEARANCES:

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