IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT/31877/2015/56(1)

In the matter between:

SA TAXI SECURITISATION (PTY) LTD APPLICANT

and

NATIONAL CREDIT REGULATOR RESPONDENT

Coram:

Adv. J Simpson – Presiding Tribunal member
Prof. B Dumisa – Tribunal member
Mr. X May – Tribunal member

Date of hearing – 20 to 22 November 2017

JUDGMENT AND REASONS

THE APPLICANT

1. The Applicant in this matter is SA Taxi Securitisation (Pty) Ltd ("the Applicant" or "SA Taxi"). The Applicant is a registered credit provider with registration number NCRCP 2617.

2. The Applicant was represented by Mr T Mundell S.C of the Johannesburg Bar, instructed by MLB Inc. attorneys.

THE RESPONDENT

3. The Respondent is the National Credit Regulator ("the Respondent" or "NCR"), a juristic person established in terms of section 12 of the National Credit Act 34 of 2005 ("the NCA").

4. The Respondent was represented by Mr C Loxton S.C of the Johannesburg Bar, assisted by Mr A Govender, also of the Johannesburg Bar. They were instructed by MJS Inc. attorneys.

BACKGROUND

5. This matter has a long and convoluted history stretching back to 2007. For the purposes of this judgment only the most relevant issues will be summarised.

6. On 2 November 2011 the NCR received a complaint from an attorney's firm called Dawid Hugo Inc. The complaint was lodged on behalf of 6 complainants. It was alleged that the six complainants had entered into credit agreements with SA Taxi to finance the purchase of minibus taxis. They were charged monthly insurance on the vehicles by SA Taxi. SA Taxi however received a discount from the insurer in return for the annual payment of these premiums. This discount or benefit was however not disclosed or passed on to the complainants. It was alleged that this was a contravention of section 106(5) of the NCA which prohibits a credit provider from adding any surcharge, fee or additional premium above the actual cost of the insurance. The credit provider is further obliged to disclose any fee, commission remuneration or benefit receivable by the credit provider. The Dawid Hugo attorney firm was also simultaneously acting on behalf of the complainants in opposing applications for summary judgment brought by SA Taxi in the High court.

7. During October 2013 the NCR advised SA Taxi of an investigation being done into SA Taxi allegedly charging their clients for monthly insurance while receiving a 15% discount from the insurance company it was paid to. Their clients were not aware of the discount and never received the benefit of the discount. Following an exchange of correspondence, the NCR issued a compliance notice to SA Taxi dated 27 November 2013. The compliance notice essentially called on SA Taxi to refund to its clients all the excess amounts charged for insurance.

8. During December 2013 SA Taxi lodged an application in terms of section 56 of the NCA with the Tribunal objecting to the compliance notice. During April 2014 the parties reached a settlement on the matter. The NCR essentially agreed to a cancellation of the compliance notice on condition that SA Taxi provides them with the documents initially requested in its investigation. The investigation by the NCR would further continue.

9. The investigation by the NCR continued with the summoning of SA Taxi employees to the NCR and further exchanges of correspondence. This resulted in the NCR issuing a further compliance notice to

SA Taxi dated 1 September 2015. For the purposes of this judgment it is necessary to quote the contents of the notice in full –

A. The National Credit Regulator ("NCR") has conducted an investigation in terms of the National Credit Act 34 of 2005 ("the Act") which has led the Regulator to believe that:

1. *Between October 2007 and October 2010 you entered into credit agreements with consumers for the financing of motor vehicles, in particular minibus taxis, and, as a term of those credit agreements required the consumers to maintain for the duration of the credit agreements insurance cover against damage to or loss of the vehicles financed in terms of the credit agreements;*

2. *You proposed to consumers the purchase of particular insurance policies in respect of the financed motor vehicles, including policies with Hollard Insurance Company Ltd ("Hollard") and/or Clarendon Transport Underwriters (Pty) Ltd ('Clarendon');*

3. *In respect of those consumers who purchased the insurance proposed by you, you, or another person or entity acting on behalf or instruction, debited the said consumers' accounts with annual premiums and collected premiums from the consumers on a monthly basis;*

4. *You, or another person or entity acting on your behalf or instruction, paid to Hollard and/or Clarendon on behalf of the consumers annual premiums in respect of those insurance policies arranged by you and placed with Hollard and/or Clarendon;*

5. *As a result of the payment of premiums on the aforesaid insurance policies on an annual basis, you became entitled to and received a 15% discount or rebate on the insurance premiums;*

6. *The 15% discount or rebate on premiums afforded to you was retained by you or by another person or entity who received that discount or rebate on your behalf or with your instruction or consent;*

7. *The 15% discount or rebate afforded to you was not reflected in the monthly insurance premiums charged to and collected from consumers in that consumers paid 15% more than the actual cost of the premium paid by you, or the person or entity acting on your behalf or with your instruction or consent, to the insurer; and*

8. The 15% discount or rebate was not passed onto and disclosed to the consumers by you or by another person or entity acting on your behalf or with your instruction or consent.

B. In terms of sections 55(1) and 55(3) of the National Credit Act 34 of 2005 ("the Act"), your attention is drawn to the fact that you have failed to comply with the following provisions of the Act:

(a) Section 100(1)(d) in that you charged an amount to or imposed a monetary liability on consumers in respect of a fee, charge, commission, expense or other amount payable by you to a third party in contravention of section 102;

(b) Section 101(1)(e) in that you have concluded credit agreements with consumers which credit agreements required payment by the consumers of amounts in excess of the cost of credit insurance provided for in terms of section 106 of the Act;

(c) Section 102(2)(c)(i) in that you have charged consumers an amount of credit insurance as contemplated by section 102(1)(f) in excess of the actual amount paid by you to the insurer for the insurance after taking into account the discount or rebate received by you which discount or rebate was not passed onto consumers;

(d) Section 106(5)(a) in that in respect of the aforementioned insurance policies you have added an additional surcharge, fee or premium above the actual cost of the insurance;

(e) Section 106(5)(b)(i) in that you failed to disclose to consumers the true cost to consumers of the insurance in that it was not disclosed to the consumers that the insurance premiums would be payable monthly but debited annually and that the annual premium so debited would be included in the deferred amount under the credit agreement on which interest would accrue; and

(f) Section 106(5)(b)(ii) in that you failed to disclose to the consumers the premium discounts or rebates received by you in relation to the aforementioned insurance policies.

C. 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:

By no later than 21 September 2015, you are required to:

(a) Provide the National Credit Regulator with a statement of all premium discounts or rebates received or receivable by you or any entity or person acting on your behalf or instruction from Hollard and/or Clarendon between October 2007 and October 2010;

(b) Refund to all consumers falling within paragraph (a) above the premium discounts or rebates received from the insurer on account of all amounts paid by such consumers in respect of insurance premiums in excess of the actual premium payable under the relevant insurance policy after taking into account any discount , deduction or rebate, in respect of such insurance premiums;

(c) Refund to all consumers falling within paragraph (b) above the interest amount charged on such consumers on account of the full credit insurance premiums having been included in the principal debt deferred under their credit agreements;

(d) Provide the National Credit Regulator with a statement of all refunds paid to consumers in terms of paragraphs (a) and (b) above, including the amounts so paid, the basis upon which the amounts paid were calculated, the date on which payment was made, the manner of payment and the identity of the consumer to whom payments were made

(e) Provide the National Credit Regulator with a statement of all refunds owing to the consumers in terms of paragraphs (a) and (b) above but not yet paid, including the amounts owing, the identity of consumers to whom payments are owed and the reasons for non-payment.

D. As required in terms of section 55(3)(e), we would like to bring to your attention that the following orders may be made and penalties may be imposed if the required steps are not taken to rectify the areas of non-compliance:

1. The National Credit Regulator may refer this matter to the Tribunal, which may impose the penalties as per prescribed in section 150 of the Act for each act of non-compliance, including,

(a) declaring any conduct to be prohibited;
(b) interdicting such prohibited conduct;
(c) imposing an administrative fine not exceeding the greater of 10% of the annual turnover during the preceding financial year of R1 000 000 (one million rand);
(d) suspending or cancelling a registration;
(e) any other appropriate order.

2. *Failure to comply with this notice without raising an objection in terms of section 56 may result in the National Credit Regulator referring the matter to the National Prosecution Authority if the failure to comply constitutes an offence in terms of the Act, or otherwise to the National Consumer Tribunal for an appropriate order.*

E. *We wish to bring your attention that you may object to this Notice in terms section 56 of the Act and may request the Nation Consumer Tribunal to review this Notice within 15 business days after receiving this Notice.*

10. SA Taxi lodged an application with the Tribunal in January 2016, in terms of section 56 of the NCA, to have the compliance notice set aside.

SUMMARY OF THE EVIDENCE

11. The very basic facts of the matter do not appear to be in dispute. SA Taxi started granting loans for the purchase of taxi vehicles from at least 2006. As part of the loan agreement it had with its clients, it required the client to have comprehensive insurance in place for the vehicles purchased and financed by SA Taxi. The monthly cost for this insurance was added to the monthly instalment payable on the loan agreement. The insurance cover for these vehicles was provided by Hollard insurance company. For the period of July 2007 until October 2010 SA Taxi paid these insurance premiums to Hollard on an upfront annual basis. Due to the premiums being paid on an annual basis, Hollard paid an amount, equivalent to 15% of these premiums, back to SA Taxi. The clients of SA Taxi were not made aware of this payment to SA Taxi by Hollard and did not receive this 15% payment in any form of discount or refund on the premiums paid. From October 2010 the annual payment arrangement ceased and the premiums were thereafter paid by SA Taxi to Hollard on a monthly basis, as they were received from the clients. No further 15% payments were therefore made by Hollard after that date.

12. The total amount paid back by Hollard to SA Taxi for this period was R109 627 207,02 (One hundred and nine million, six hundred and twenty seven thousand and two hundred and seven rand and two cents).

13. As per their compliance notice, the NCR regards the 15% payments as a contravention of sections 100, 101, 102 and 106 of the NCA.

14. SA Taxi has objected to the notice on numerous grounds but is essentially of the view that the agreement between Hollard and SA Taxi is of an entirely separate nature to the agreement between Hollard and its clients. SA Taxi did not receive any discount or benefit on the premiums. SA Taxi had to borrow money from its bankers to enable it to pay the premiums on an annual up front basis and incurred finance changes in this regard. The repayment of the 15% was merely a reimbursement of these expenses. These payments were treated and recorded as "Premium finance charges" and not as any form of discount.

INITIAL POINTS RAISED BY THE APPLICANT

15. The Applicant raised a number of issues regarding the compliance notice. Although they were not specifically raised as points *in limine* they can be treated as such and dealt with before the main issues in contention are traversed.

Process followed by the NCR

16. SA Taxi submitted that the NCR followed the incorrect process in issuing a compliance notice. It submits that, following the investigation of the complaint lodged by Dawid Hugo, the NCR was supposed to have followed the process set out in section 140 of the NCA. It could not issue a compliance notice. Sections 55 and 140 are very different. Section 55 does not provide for a process whereby a complaint is received and the NCR then issues a compliance notice. Section 140 clearly states that the NCR was required to refer the matter to the Tribunal. The issuing of a compliance notice is not provided for by section 140.

17. The NCR is of the view that there is nothing in the NCA which dictates the process which must be followed by the NCR. It could elect to issue a compliance notice or refer the matter to the Tribunal.

18. A plain reading of both sections 55 and 140 of the NCA do not exhibit any clear prohibition against the NCR issuing a compliance notice in this matter. Section 55 stands on its own and does not refer to section 140 in any way. The only prerequisite for the issuing of a compliance notice is that the NCR must have reasonable grounds for its belief that the registrant is not complying with its conditions of registration. No allegations have been made by the Applicant that these requirements have not been met.

19. It may be that the compliance notice process is intended for situations where the alleged non-compliance is of a less serious or less complex nature, which can be more easily and speedily cured than a referral to the Tribunal. The nature of the allegations made against the Applicant is certainly complex and serious enough that a referral may have been more appropriate. The NCA does not however limit the NCR to any specific course of action or process.

20. The Applicant's objection to the process followed by the NCR in issuing a compliance notice is therefore dismissed.

Fair administrative action

21. The Applicant submits that the decision by the NCR to issue a compliance notice constitutes an administrative action, which therefore falls under the *Promotion of Administrative Justice Act 3 of 2000* (PAJA). In accordance with PAJA the issuing of the compliance notice must therefore have been done in a procedurally fair manner. The Applicant submits that the NCR did not provide the Applicant with a fair opportunity to respond to the new evidence it obtained before issuing the second compliance notice. The Applicant therefore requests that the compliance notice be set aside on this basis.

22. The NCR submitted that the issuing of a compliance notice is not administrative in nature. Section 55 of the NCA clearly provides for a process whereby a party can object to the notice. The Respondent referred to the matter of *Competition Commission v Yara 2013 (6) SA 404 SCA* in which the court stated –

> *"But as I see it, the CAC's motivation conflates the requirements of an initiating complaint and a referral and misses the whole purpose of an initiating complaint. In fact, it is in direct conflict with the judgment of this court in Simelane and Others NNO v Seven-Eleven Corporation SA (Pty) Ltd and Another2003 (3) SA 6* NCT/31877/2015/56(1) *4 (SCA) ([2003] 1 All SA 82) para 17, which in turn relies on statements in the decision of the tribunal in Novartis SA (Pty) Ltd v Competition Commission CT22/CR/B Jun01 paras E 35 – 61. What these statements of Novartis make plain is that the purpose of the initiating complaint is to trigger an investigation which might eventually lead to a referral. It is merely the preliminary step of a process that does not affect the respondent's rights. Conversely stated, the purpose of an initiating complaint, and the investigation that follows upon it, is not to offer the suspect firm an opportunity to put its case. The commission is not even required to give notice of the complaint and of its investigation to the suspect. Least of all is the commission required to engage with the suspect on the question whether its suspicions are justified. The principles of administrative justice are observed in the referral and the hearing before the tribunal. That is when the suspect firm becomes entitled to put its side of the case"* (my underlining).

23. The NCR further argued that the National Consumer Tribunal is not a tribunal as referred to in PAJA and therefore cannot make a finding that PAJA has been contravened.

24. There have been a number of National Consumer Tribunal judgments that have found that PAJA is applicable to the issuing of compliance notices in terms of the NCA and the Consumer Protection Act 68 0f 2008 ("The CPA").

25. It appears that the approach adopted by the Tribunal in the matter of *City of Johannesburg v NCC NCT/2667/2011/101 SAFLII,* involving the National Consumer Commission (NCC), was in part based on the fact that the enforcement guidelines applicable to the NCC contain a reference to the provisions of PAJA which must be taken into account. However, there is no indication of any similar provision in the NCA or the NCA regulations.

26. The Tribunal judgment, *Telsek Investments 1043 CC v NCR NCT/742/2010/56 SAFLII*, which subsequently dealt with a compliance notice issued in terms of the NCA, appears to have merely accepted that PAJA was applicable. The same approach was followed in the matter of *Moneyline Financial Services (Pty) Ltd v NCR NCT 18874/2014/56 SAFLII.* These judgments do not however contain the reasoning for this conclusion reached.

27. In my view the applicability of PAJA to the issuing of a compliance notice in terms of the NCA and whether or not it constitutes administrative action is not as settled as it would appear.

28. For the purposes of this judgment it is however not necessary to consider the provisions of PAJA in detail. It suffices to say that although the *Yara* matter dealt with a referral by the Competition Commission, the principle being expressed by the court is clear, the regulator is not required to engage with the party being investigated and allow them to make representations. Their rights to a fair administrative process are provided for in a hearing before the Tribunal. This principle can be applied equally to the issuing of a compliance notice. Section 55 of the NCA already clearly provides that the compliance notice can only be issued on reasonable grounds and prescribes what it must contain. Section 56 provides for a clear process whereby the aggrieved party can apply to the Tribunal for the compliance notice to be set aside. Therefore the NCA already provides for fair administrative action in this specific regard and the provisions of PAJA are not necessary, even if it were applicable.

29. Even if I am wrong in this, the process which resulted in the second compliance notice being issued took place over a number of years and involved constant interaction and consultation between the parties. The second compliance notice was in all material respects the same as the first. Even if the

NCR had allowed SA Taxi to make further representations prior to the issuing of the second compliance notice there is nothing to suggest that the conclusion would have been any different. There is no basis for a finding that the entire process constitutes an unfair administrative process in terms of PAJA.

30. The Applicant's submissions in this regard are therefore dismissed.

Prescription

31. SA Taxi submits that section 166 of the NCA prevents the Regulator from referring any complaint to the Tribunal which is older than three years. It submits that the complaints by Dawid Hugo were lodged in October 2011 and the second compliance notice was issued in September 2015. The second compliance notice was therefore issued outside the three year period.

32. The NCR submitted that section 166 refers to a referral of a complaint to the Tribunal. It does not refer to sections 55 and 56 which constitute an objection to a compliance notice. The concepts are not the same. Sec 166 is therefore not applicable to the matter before the Tribunal. The NCR further submits that the prohibited conduct of SA Taxi is still ongoing, in that it has not refunded its clients, the time bar can therefore not apply.

33. Section 166 of the NCA states –

> *166. Limitations of bringing action.—(1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after —*
>
> > *(a) the act or omission that is the cause of the complaint; or*
> > *(b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.*

34. Section 166 serves the same purpose as many other similar sections in most legislation. As the court stated in the matter of *Road Accident Fund and Another v Mdeyide (CCT 10/10) [2010] ZACC 18; 2011 (1) BCLR 1 (CC) ; 2011 (2) SA 26 (CC) (30 September 2010)* SAFLII -

> *In the interests of social certainty and the quality of adjudication, it is important though that legal disputes be finalised timeously. The realities of time and human fallibility require that disputes be brought before a court as soon as reasonably possible. Claims thus lapse, or prescribe, after a certain period of time. If a claim is not instituted within a fixed time, a litigant*

may be barred from having a dispute decided by a court. This has been recognised in our legal system – and others – for centuries.

35. The general principle applicable to section 166 is therefore clear, the act or omission, which is the basis of the complaint serving before the Tribunal, may not be more than three years old. The process by which the act or omission may have ended up before the Tribunal is not mentioned in section 166. Considering the purpose of section 166 and similar prescription clauses, whether the complaint was pursued by means of a referral or by a compliance notice is therefore irrelevant. Any differentiation on the applicability of section 166 based on the process by which the complaint was pursued would be entirely artificial. It could never have been the intention of the legislature that one could avoid the consequences of section 166 by merely using a different section of the NCA to pursue a registrant for non-compliance.

36. The act complained of in this matter arose in the period from October 2007 to October 2010. If one applies the clear provisions of section 166, the matter had to be brought before the Tribunal by October 2013. The first compliance notice was however only issued by the NCR on 27 November 2013. Although only a month later, this is outside the legislated 3 year time period. Even if one had to consider the provisions of section 166(1)(b), the date that the conduct ceased was in October 2010 and the same deadline of October 2013 applies.

37. The submission by the NCR that the conduct is continuing, in that SA Taxi refuses to refund its customers, is not persuasive. Section 166 does not contain any provision referring to refunds to consumers. The conduct of SA Taxi ended in October 2010. After this date it did not make any further annual premium payments and it did not receive any further payments from Hollard. This is not disputed. Whether it refuses to refund its clients is not relevant for the purposes of section 166 and does not constitute continuing conduct for the purposes of section 166. The act or omission referred to in section 166 refers to the actions or omissions constituting non-compliance with the provisions of the act. Having to refund consumers may be a possible consequence of non-compliance but cannot itself be an act or omission constituting non-compliance with the NCA and a basis for arguing that the conduct is continuing. If this were the case no claim could ever prescribe until the responsible party actually admits guilt and refunds the amount owed.

38. The Tribunal has made exceptions to a similar prescription provision in the CPA in appropriate circumstances. Such as regarding the three year period as having been interrupted while the complaint was lodged with the regulator[1]. This allowed the complainant to apply to the Tribunal

[1] See - Lazarus and Sarkin v RDB Project Management & Viscose NCT/36112/2016/75(1)(b)(P) SAFLII

for leave to hear the matter after receiving a notice of non-referral from the Regulator. In this matter however there is no basis for regarding the three year period as having been interrupted or suspended. The NCR should have investigated the matter as soon as the complaint was lodged in November 2011 and should have issued a compliance notice by no later than October 2013. When the first compliance notice was issued in November 2013 the complaint had already prescribed in terms of section 166. The subsequent objection filed with the Tribunal by SA Taxi and the subsequent issuing of the second compliance notice in September 2015 did not cure the original prescription of the entire complaint in October 2013. There is nothing in section 166 which allows parties to extend the time period by implied consent or ignorance.

39. The complaint regarding the actions of SA Taxi was lodged with the NCR on 2 November 2011. Both parties made submissions on the prescription period in relation to this date. This date is however not relevant for the purposes of section 166. The reference to "complaint" in section 166 merely relates to the normal process by which a matter would be brought before the Tribunal. Section 166 does not in any way refer to the date on which the complaint was received. It only refers to the date of the act or the omission that is the cause of the complaint. The prescription period therefore runs from the date of the act or the omission or from the date that the act or omission finally ceased. It is undisputed that the date on which the action or omission finally ceased is October 2010.

CONCLUSION

40. It is found that the acts of non-compliance, which the Applicant is accused of committing, took place more than three years before the matter was placed before the Tribunal. In terms of section 166 of the NCA, the act or omission forming the basis of the complaint before the Tribunal, may not be older than three years.

41. Therefore the compliance notice issued against the Applicant must be set aside.

ORDER

42. Accordingly, the Tribunal makes the following order:

42.1 The compliance notice issued against SA Taxi dated 1 September 2015 is hereby set aside

42.2 There is no order as to costs.

Thus handed down; in Centurion; on 3 January 2018.

_[signed]_____

Adv. J. Simpson

PRESIDING MEMBER

Prof B Dumisa (Tribunal member) and Mr X May (Tribunal member) concurring