

SOUTH AFRICA / JUDGMENT

**Information Technology Consultants (Pty)  
Ltd v National Credit Regulator and Others;  
In Re: National Credit Regulator v Du Plessis  
N.O. and Another (NCT/8616/2013/57(1)(P))  
[2014] ZANCT 29 (7 August 2014)**

**[2014] ZANCT 29**

## COURT

National Consumer Tribunal

## BEFORE

B. Dumisa

## CASE / FILE NUMBER

NCT/8616/2013/57(1)(P)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT/8616/2013/57(1)(P)

In the Intervening Application of:

INFORMATION TECHNOLOGY

CONSULTANTS (PTY) LTD.....INTERVENING APPLICANT

and

NATIONAL CREDIT REGULATOR.....FIRST RESPONDENT

EWALD DU PLESSIS N.O.....SECOND RESPONDENT

BERNAEDUS GERHARDUS SPANGENBERG N.O.....THIRD RESPONDENT

In the main application between

NATIONAL CREDIT REGULATOR.....APPLICANT

EWALD DU PLESSIS N.O.....FIRST RESPONDENT

BERNAEDUS GERHARDUS SPANGENBERG N.O. ....SECOND RESPONDENT

Coram:

Presiding Member - Prof B. Dumisa

Date of Hearing - 24 June 2014

RULING ON THE APPLICATION TO INTERVENE IN TERMS OF SECTION 143(d) OF THE NATIONAL CREDIT ACT, 34 OF 2005 (“Act”)

APPLICANT (in the Main Matter)

1. The Applicant in the main matter is the National Credit Regulator, a body established in terms of Section 12 of the National Credit Act, 34 of 2005 (the “NCA” or the “Act”) (hereinafter referred to as “the Applicant”).
2. The Applicant’s Founding Affidavit in the main matter is deposed by Zwelithini Ronald Zakwe, Senior Legal Advisor in the employ of the Applicant.

RESPONDENT (in the Main Matter)

3. The Respondents in the main matter are Ewald Du Plessis N.O. and Bernardus Gerhardus Spangenberg N.O. in their capacities as Trustees of the Progress Group Trust which conducts business in Robertson in the Western Cape Province (hereinafter referred to as “the Respondent”).
4. The Progress Group Trust, with Trust Registration Number IT 4997/2006, operates as a registered credit provider, with registration number NCRCP2601; and has been operating as a credit provider since the 10th of July 2007.
5. The Respondent concludes credit agreements with consumers to a maximum of R1000,00 over a total loan period of one month. The Respondent therefore concludes short term agreements with consumers, as defined by Regulation 39(2).

**BACKGROUND**

6. The Applicant brought the main application before the Tribunal to cancel the registration of the Respondent, Progress Group Trust, alleging that the Respondent contravened the Act and its conditions of registration repeatedly, as envisaged in section 57 of the Act.
7. The main matter was set down for a hearing on the 7th of March 2014. At the hearing, Information Technology Consultants (Pty) Ltd (“Intecon”) formally made representations to the Tribunal to be permitted to intervene in the main matter in terms Section 143(d) of the Act, averring that the Respondent in the main application will not adequately represent the material interests of Intecon.
8. Intecon is registered with the Payment Association of South Africa (“PASA”) as a Systems Operator and as a Third Party Payment Provider.
9. The NCR indicated that Intecon’s relationship with the Respondent’s clients constitutes the latter’s entering into supplementary agreements in terms of the NCA provisions. Intecon differs from this approach in that their processes differ significantly from those used by the service providers involved in the Barko case[1] and that any potential or actual negative

outcome of the main application on the Respondent will directly and/or indirectly harm the reputation, name and product branding of Intecon. Any negative finding against the Respondent directly implicates Intecon as an entity conducting illegal business practices.

10. The NCR argued that Intecon had failed to prove that they had a common cause of action or common ground with the Progress Group Trust which could entitle them to intervene in the main matter.

#### THE GROUNDS GIVEN FOR INTECON'S APPLICATION TO INTERVENE

11. Intecon's application to intervene is aimed at providing additional information to the Tribunal. It was explicitly stated in the hearing that they do not wish to be joined as a party to the proceedings. It is common cause that Intecon cannot become a party to the proceedings via a joinder application (to join the matter as Applicant or Respondent) as only the NCR may bring an

application to the Tribunal in terms of section 57 of the Act and, on the other hand, Intecon is not a registrant in terms of the Act and therefore can also not be joined as a Respondent.

12. Intecon argues that they received a non-binding opinion from the NCR on 21 December 2007, wherein the latter is alleged to have declared that the processes followed by Intecon are not in contravention of the provisions of the NCA.
13. Intecon further argues that the NCR is wrong in fact and law in concluding that the relationship Intecon has with the clients of the Progress Group Trust constitute the latter's supplementary agreements in terms of of the NCA provisions. They further argued that their processes differ significantly from those used by service providers involved in the Barko case. They argue that

Intecon is completely separate from the Progress Group Trust; consumers pay Intecon directly and not the Progress Group Trust.

Hence, the approach adopted in the main application, between the NCR and the Progress Group Trust, should be different from that followed in the Barko case and similar cases.

## ANALYSIS

### OF LEGAL PROVISIONS AND FACTS

14. Prior to considering what constitutes material interest, it is imperative to understand the context of section 143(d) and the purpose therefore of a party's participation in a proceeding.

Section 143(d) of the Act provides as follows:

*"Right to participate in hearing*

143. The following persons may participate in a hearing contemplated in this Part, in person or through a representative, and may put questions to witnesses and inspect any books, documents or items presented at the hearing:

- (a) ...;
- (b) ...;
- (c) ...; and
- (d) any other person who has a material interest in the hearing, unless, in the opinion of the presiding member of the Tribunal, that interest is adequately represented by another participant.”

15. Section 143(d) evidently allows for an application by a third party to participate in a hearing, provided that material interest in the hearing is shown.

16. The Rules of the Tribunal[2] clarify this further. It provides as follows in Rule 12:

*“Interventions by application*

- 12. (1) ...
  - (2) The application to intervene must include a concise statement of the nature of the interest of the Applicant in the proceedings and the aspect on which the Applicant will make representations.
  - (3) ...”
17. Rule 12 requires that an intervening party must explicate the nature of its interest in the proceedings as well as the aspect on which representations will be made.
18. Section 143(d) of the Act read with Rule 12 of the Rules of the Tribunal makes it clear that an intervening party may make representations on an aspect in the proceedings. It clearly does not afford that party the right to join the proceedings as an Applicant or Respondent.
19. The definition of ‘party’ in the Rules of the Tribunal’ furthers this distinction in that it defines a ‘party’ to include “...an Applicant, Respondent, intervener, or any party joined in or substituted for another.”
20. The party ‘joined in or substituted’ for another is provided for in Rule 16 of the Rules of the Tribunal and therefore stands separate from the party intervening.
21. An intervening party makes representations on an aspect of the proceedings and is restricted to only the specified aspect/s in accordance with Rule 12.
22. South African courts “are increasingly recognising that certain matters...must necessarily involve the perspectives and voices of organisations or entities that may not have a direct legal interest in the matter...” [3]

23. In *Mazibuko and Others v City of Johannesburg and Others*[4] the intervening party's role was described as crucial as it addressed the court on important issues. Equally crucial was the role played by the intervening parties' in *The Minister of Health and Others v Treatment Action Campaign (TAC) and Others (2)*.<sup>[5]</sup> It was stated that this case is seen as one of the success stories of public interest litigation in South Africa and the role of the intervening party in that success cannot be overemphasized. In passing its judgment, the court held that an intervening party must draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn and in return for the privilege of participating in the proceedings without having to qualify as a party, an intervening party must provide cogent and helpful submissions that assist the court. Arguments already before the court must not be repeated and new contentions must be raised.

#### GUIDELINES IN RESPECT OF AN INTERVENING PARTY'S PARTICIPATION IN A HEARING

24. The following guidelines apply in respect of an intervening party's participation in a hearing:
- (i) The role of an intervening party is to draw the attention of the Tribunal to relevant matters of law and fact to which attention would not otherwise be drawn.
  - (ii) In return for the privilege of participating in the proceedings, without having to qualify as a party, the intervening party must provide cogent and helpful submissions that assist the Tribunal.
  - (iii) The intervening party must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the Tribunal.
  - (iv) Ordinarily it is inappropriate for an intervening party to introduce new contentions based on fresh evidence.

#### CASE LAW IN SUPPORT OF INTERVENING PARTIES

25. In *Fischer and Another v Ramahlele and Others*[6] the Court remarked that there are many bodies that would be affected by or interested in its resolution and which would have been in a position to assist the court with information and legal submissions. It specifically remarked that

courts should not resolve issues of such public importance without affording all interested parties the opportunity to participate in the proceedings so as to ensure that the court is as well-informed as possible about the implications of its decision.

26. The discussion above confirms that the ‘material interest’, as prescribed by section 143(d) of the Act, read with Rule 12 of the Rules of the Tribunal, is not a legal interest in the matter. Following the TAC case, the intervening party participates in the proceedings but does not have to qualify as a party and may make representations, in accordance with the Piero case, on its perspectives without a direct legal interest in the matter...” (Legal interest will be further discussed under joinder applications below.)
27. ‘Material’ is defined in the legal dictionary[7] as necessary, substantial, valuable, worth considering, actual, real, relevant, significant, affecting the merits of a case, sufficiently significant to influence and as opposed to immaterial (totally irrelevant or of such minor importance that the court will ignore it).
28. The Fischer case above provides guidance as to ‘material interest’. It indicates that the intervening party would be either affected by a decision taken, or is interested in the decision or resolution, which enables such a party to make submissions or provide information about the implications of that decision.
29. In the matter at hand, the NCR applied for the cancellation of the Respondent’s registration. One of the grounds on which the allegation of prohibited conduct is based, is the alleged inducing of consumers to enter into supplementary agreements. The Third Party with whom these alleged supplementary agreements are signed, is Intecon. Intecon’s first-hand knowledge of its relationship with the Respondent and the Respondent’s clients enables it to make submissions or provide information to the Tribunal about the law and facts surrounding this issue and advise the Tribunal on the implications of the Tribunal’s decision in the matter.
30. Intecon is evidently an active participant in the credit industry and has a direct interest in the in the outcome of the proceedings in that its core business may be affected by a decision of the Tribunal declaring that the entering into of these alleged supplementary agreements is in contravention of the Act and therefore prohibited.
31. Intecon’s experience, expertise and interest in the outcome of this matter positions it to assist the Tribunal in deciding an aspect of the matter, by providing submissions which are relevant, which will assist the Tribunal, and which would otherwise not be before the Tribunal because the submissions have not been or would not be advanced by the other parties to the matter.
32. Intecon’s interest, in the light of the above, is in all probability necessary, valuable, worth considering, actual, relevant and could affect or influence the outcome of the matter. Intecon’s interest is therefore material and the test is satisfied.

#### SHOULD THE JOINDER RULES APPLY IN THIS CASE

33. The NCR argued that Intecon simply has a financial interest and not a legal interest in the main matter. They argued that a strict test has to be applied if Intecon wants to be enjoined in this case as one of the parties.
34. Intecon maintains it is not applying for a joinder; it is not applying to be enjoined as a party in this case. They assert they just want to intervene and be allowed to make submissions during the hearing, only in respect of the aspect of supplementary agreements.
35. A decision whether this Tribunal can on its own decide to enjoin a party who wants to participate solely as an intervening party will be answered later. At this point it is important that we consider how differently joinder cases are dealt with.
36. The joinder of parties to proceedings before the Tribunal is regulated by Rules 16 of the Rules of the Tribunal, which provides in subrule (1) that “a presiding member may combine any number of persons, either jointly, jointly and severally, separately, or in the alternative, as parties in the same proceedings, if their rights to relief depend on the determination of substantially the same questions of law or fact” and in subrule (2) that “a party to proceedings, on giving notice to the other parties, may apply to the presiding member for an order to substitute a person for a current party.”
37. The Competition Act, 89 of 1998 has similar wording in section 158, but makes specific provision for joinder in the subsection. This was omitted in the Rules of the Tribunal. Section 158 reads as follows:

*“158. Joinder or substitution of parties.*

- (1) The Tribunal, or the assigned member, as the case may be, may combine any number of persons, whether jointly, jointly and severally, separately, or in the alternative, as parties in the same proceedings, if their respective rights to relief depend on the determination of substantially the same question of law or facts.
- (2) ...
- (3) ...
- (4) An application to join any person as a party to proceedings, or to be substituted for an existing party, must be accompanied by copies of all documents previously delivered, unless the person

concerned or that person’s representative is already in possession of those documents.

- (5) ...”

38. The Constitutional Court provided further guidance in respect of criteria to apply in joinder applications, in *Esorfranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and Others*[8]. The Court indicated that it was satisfied that the third party does have standing in the circumstances of the case. The Court referred to the matter of *Giant Concerts CC v Rinaldo Investments (Pty) Ltd & others*[9] in which the principles applicable to standing in this context were summarised as follows:

‘(a) To establish own-interest standing under the Constitution a litigant need not show the same “sufficient, personal and direct interest” that the common law requires, but must still show that a contested law or decision directly affects his or her rights or interests, or potential rights or interests.

(b) This requirement must be generously and broadly interpreted to accord with constitutional goals.

(c) The interest must, however, be real and not hypothetical or academic.

(d) Even under the requirements for common law standing, the interest need not be capable of monetary valuation, but in a challenge to legislation purely financial self-interest may not be enough – the interests of justice must also favour affording standing.

(e) Standing is not a technical or strictly-defined concept. And there is no magical formula for conferring it. It is a tool a court employs to determine whether a litigant is entitled to claim its time, and to put the opposing litigant to trouble.

(f) Each case depends on its own facts. There can be no general rule covering all cases. In each case, an applicant must show that he or she has the necessary interest in an infringement or a threatened infringement. And here a measure of pragmatism is needed.’

39. If a party has a direct and substantial interest in any order the court might make in proceedings and such order cannot be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings[10] unless the court is satisfied that he has waived his right to be joined.

40. Where the party is a necessary party, the court will not deal with the issues until joinder has been effected.[11] The reason for the existence of this power is that the court is able to ensure that persons interested in the subject-matter of the dispute and whose rights may be affected by the judgment of the court will be before the court.[12]

41. Even more clarity is provided in the recent *Randell v Eybers NO and another (Greenwood Primary School and another intervening)*[13] where the Court held that ‘even in those cases where the Court has a discretion where the matter of joinder of a party is raised, it must be shown that that party is a necessary party in the sense that he is directly and substantially interested in the issues raised in the proceedings before the Court and that his rights may be affected by the judgment of the Court.’

42. In the matter of Shapiro v SA Recording Rights Association Limited (Galeta Intervening)[14] the Court held that "...persons may be allowed to intervene as plaintiffs or defendants in the action... because their interests which may be prejudicially affected coincide with those of the plaintiff or of the defendant in the action" and that they have "an interest in the right which is the subject-matter of the litigation and . . . not merely a financial interest which is only an indirect interest in such litigation." Further that "such an interest is referred to as a "legal interest in the subject matter of the action which could be prejudicially affected by the judgment of the Court".
43. It is evident from the above that joinder applications require a legal interest in the subject-matter of the action, which renders the party necessary to the proceedings in that his or her personal rights may be infringed or affected.
44. It is evident from the above discussion that an intervener as envisaged in Rule 12 of the Rules of the Tribunal does not become a full party to a matter and that a decision is in no manner binding on such a party.
45. On the other hand, in a joinder application, the party joined as Applicant/Respondent or Plaintiff/Defendant will attract the rights and responsibilities of a full party to the matter.
46. In this particular case, Intecon made it clear they did not want to be enjoined in the case; we therefore need to use the less restrictive test in granting their participation instead of applying the more restrictive test applied to joinders.

#### CONSIDERATION OF HOW OTHER LEGAL FORUMS DEAL WITH APPLICATIONS FOR INTERVENTION

47. Rule 46 of the Rules of the Competition Tribunal states the following:

*"46. Intervenors*

- (1) At any time after an initiating document is filed with the Tribunal, any person who has a material interest in the relevant matter may apply to intervene in the Tribunal proceedings by filing a Notice of Motion in Form CT 6, which must –
  - (a) include a concise statement of the nature of the person's interest in the proceedings, and the matters in respect of which the person will make representations; and
  - (b) be served on every other participant in the proceedings.
- (2) No more than 10 business days after receiving a motion to intervene, a member of the Tribunal assigned by the Chairperson must either –
  - (a) make an order allowing the applicant to intervene, subject to any limitations –
    - (i) necessary to ensure that the proceedings will be orderly and expeditious; or

- (ii) on the matters with respect to which the person may participate, or the form of their participation; or
- (b) deny the application, if the member concludes that the interests of the person are not within the scope of the Act, or are already represented by another participant in the proceeding.
  - (3) Upon making an order in terms of sub-rule (2), the assigned member may make an appropriate order as to costs.
  - (4) If an application to intervene is granted –
    - (a) the registrar must send to the intervenor a list of all documents filed in the proceedings prior to the day on which the request for leave to intervene was granted; and
    - (b) access by an intervenor to a document filed or received in evidence is subject to any outstanding order of the Tribunal restricting access to the document.”
48. In essence the requirements for a party to intervene are similar to the Rules of the NCT in that material interest is required as well as a concise statement of the nature of the person's interest in the proceedings, and the aspects on which the person will make representations.
49. It does appear that the Competition Tribunal's Rules set out the process for intervening in particular detail.
50. In a matter heard by the Competition Tribunal, Barnes Fencing Industries (Pty) Ltd & another v Iscor Limited (Mittal SA) et al[15], it was held that “it is common cause that the applicants are the complainants in this matter and that they have an interest in the matter. What is not common cause is whether they have an interest that is not adequately represented in this matter by the Commission.” It was held that the complainants have a legitimate concern that the theory of harm that they articulated has not found expression in the Commission's present section 9 referral and that without their intervention this theory of harm - which may prove material in establishing a contravention of the Act, and an appropriate remedy - will not be adequately represented. The Tribunal viewed the case in an intervention application from the complainants' perspective to see if its interest is adequately represented and on the facts found that the complainants have established an interest not adequately represented in this case and they would be prejudiced if they were not allowed to intervene.
51. In Caxton and CTP Publishers and Printers Limited and Naspers Limited & Others [16] Caxton applied to the Competition Tribunal to intervene in merger proceedings. In its founding affidavit Caxton averred that Naspers is the largest publisher of newspapers and magazines in South Africa which fall under the direct control of Media24. Caxton itself is a printer and publisher of books and magazines. It controls one regional daily newspaper and many regional and community newspapers.

Naspers and Caxton are competitors in the print market in as much as they would be competing for subscribers to their respective

publications and for advertisers. According to the allegations made by Caxton, Naspers' dominance in the market place would be considerably enhanced if the merger were to take place.

52. The submission was made that Caxton has a material interest, alternatively even if it does not have such an interest, it possesses the ability to assist the Tribunal in its consideration whether or not to permit the merger. The application was granted. But the aspects to which Caxton was allowed to make representations were clearly defined.
53. The Competition Tribunal evidently deals with these applications in a similar manner as was discussed under the 'material interest' heading and with reference to Constitutional Court decisions cited.
54. The similarities between the Rules of the Tribunal are evident and that of the Competition Laws and the SA Constitution are evident.
55. The acceptance of "Intervening Parties", in competition law cases and in constitutional law cases, as demonstrated above, and in other fields of law not discussed here, has mostly enriched rather than burdened the jurisprudence in those fields of law. It follows that the acceptance of "Intervening Parties" in consumer law and credit law cases may equally enrich the jurisprudence in this field, and give more meaning to the intentions of the legislative drafters of Section 143(d) of the NCA.

#### ORDER

56. Accordingly, the Tribunal makes the following order:

56.1 The Application to Intervene, by Intecon, is granted.

56.2 Intecon may, as an Intervening Party, participate in the main application; directly put questions to witnesses and / or inspect any books or documents presented at the hearing, where the subject of interest has a bearing on the processes or services of Intecon.

56.3 No order as to costs.

DATED ON THIS 7th DAY OF AUGUST 2014

[signed]

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Prof B. Dumisa

Presiding Member

[1] BARKO v National Credit Regulator NCT/743/2010/56(1)(P).

- [2] For the Conduct of Matters before the National Consumer Tribunal published under GN789 in GG30225 of 28 August 2007 as amended by GenN428 in GG34405 OF 29 June 2011 (hereinafter “the Rules of the Tribunal”).
- [3] See Brickhill J and Du Plessis M “Two’s Company. Three’s a Crowd in Investor-State Arbitration (Piero v South Africa)”
- (2011) 27(1) South African Journal on Human Rights 152.
- [4] 2010
- (3) BCLR 239 (CC); 2010 (4) SA 1 (CC).
- [5] 2002
- (5) SA 721; 2002 (10) BCLR 1033.
- [6] (203/2014)
- [2014] ZASCA 88 (4 June 2014).
- [7] <http://legal-dictionary.thefreedictionary.com/material>.
- [8] 40/13)
- [2014] ZASCA 21; [2014] 2 All SA 493 (SCA) (28 March 2014).
- [9] 2013
- (3) BCLR 251 (CC) para 29.
- [10] Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) 659; Henri Viljoen (Pty) Ltd v Awerbuch Bros 1953 (2) SA 151 (O) 166; Erasmus v Fourwill Motors (Edms) Bpk 1975 (4) SA 57 (T); PE Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 801 (T); Standard General Insurance Co Ltd v Gutman 1981 (2) SA 426 (C); Dunlop SA Ltd v Metal & Allied Workers Union 1985 (1) SA 177 (D); Wistyn Enterprises (Pty) Ltd v Levi Strauss & Co 1986 (4) SA 796 (T); Ex parte Sengol Investments (Pty) Ltd 1982 (3) SA 474 (T); Aquatur (Pty) Ltd v Sacks and Others 1989 (1) SA 56 (A). Cf President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC) par 233; Maritz t/a Maritz & Kie Rekenmeester v Walters 2002 (1) SA 689 (C) 699; Transvaal Agricultural Union v Minister of Agriculture & Land Affairs 2005 (4) SA 212 (SCA) par 64. For an encyclopaedic discussion of the case law: Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd [2003] 4 All SA 471, 2004 (2) SA 353 (W). Joinder is permitted in the competition tribunals on a broader basis: Anglo SA Capital (Pty) Ltd v Industrial Development Corp of SA Ltd 2004 (6) SA 196 (CAC). Brunette v Brunette 2009 (5) SA 81 (SE); Investec Bank Ltd v Mutemeri 2010 (1) SA 265 (GSJ); Tongaat Paper Co (Pty) Ltd v Master of the KwaZulu-Natal High Court, Pietermaritzburg and Others [2011] 1 All SA 438 (KZP); Lupacchini NO and Another v Minister of Safety and Security [2011] 2 All SA 138 (SCA); SS ( a minor child) v Presiding Officer of the Children’s Court, District Krugersdorp and Others; In re Children’s Institute v

NCM (a minor child)

[2012] 1 All SA 231 (GSJ) at [8]; Enelon CC t/a Realnet Wilgers & Surrounds v Nortje and Another 2013 (1) SA 525 (GNP) at [43]; City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC) at [44]; City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others 2012 (6) SA 294 (SCA) at [37].

[11] Khumalo v Wilkins 1972 (4) SA 470 (N). However, the right of a party (defendant or respondent) to demand that a third party be joined, is limited: New Garden Cities Incorporated Association not for Gain v Adhikarie 1998 (3) SA 626 (C) 630.

[12] SA Steel Equipment Co (Pty) Ltd v Lurelk (Pty) Ltd 1951 (4) SA 167 (T); Harding v Basson 1995 (4) SA 499 (C).

[13][2014] 1 All SA 107 (ECP).

[14] [2006] JOL 17036 (W).

[15] 08/CR/Jan07.

[16] (72/CAC/Aug

2007) [2007] ZACT 72 (5 October 2007).

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Prepared on 11 October 2026 · Esheria