
SOUTH AFRICA / JUDGMENT

National Credit Regulator v Capitec Bank Ltd and Another (A440/2014) [2016] ZAGPPHC 125 (23 March 2016) [2016] ZAGPPHC 125

COURT

North Gauteng High Court, Pretoria

BEFORE

FHD van Oosten, DS Molefe, MM Jansen

CASE / FILE NUMBER

A440/2014

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A440/2014

DATE: 23/3/2016

Reportable

Of interest to other judges

Revised

In the matter between

THE NATIONAL CREDIT REGULATOR APPELLANT

and

CAPITEC BANK LTD FIRST

RESPONDENT

THE NATIONAL CONSUMER TRIBUNAL SECOND

RESPONDENT

JUDGMENT

VAN OOSTEN J:

- [1] At issue in this appeal are the powers and duties of the appellant, the National Credit Regulator (the NCR), under the provisions of the National Credit Act 34 of 2005 (the NCA).
- [2] In 2011 the NCR ‘initiated’ a complaint against the first respondent, Capitec Bank (Capitec) followed by an investigation into its activities as credit provider, through the agency of Gobodo Forensic and Investigative Accounting (Pty) Ltd (Gobodo). Capitec was engaged and co-operated in the investigation. Gobodo eventually submitted a report to the NCR in which certain contraventions of the Act and the Regulations were identified, which the NCR referred to the second respondent, the National Consumer Tribunal (the tribunal), in terms of s 140(1) and (2) of the NCA. The relief sought in the referral was for a declarator that Capitec had engaged in ‘prohibited conduct’, an interdict to restrain Capitec from continuing ‘such conduct’, the imposition of an administrative fine, as contemplated in s 151 of the NCA, and costs. A full set of affidavits was filed in which both the validity of the referral and the merits of the charges were extensively canvassed and dealt with. At the hearing of the matter before the tribunal both these aspects were addressed in argument. The tribunal, in a judgment handed down on 22 May 2014, upheld Capitec’s challenge to the validity of the referral and concluded that it was therefore unable to consider the merits of the charges. An order was added that ‘The application for a finding that the respondent engaged in prohibited conduct and all other ancillary relief is denied’. No order as to costs was made.
- [3] The NCR appeals against the judgment and order of the tribunal, in terms of s 148(2)(b) of the NCA. The tribunal has not entered the fray and abides the decision of this court.
- [4] Before dealing with the merits of the appeal it is necessary to briefly dispose of an argument, advanced by counsel for Capitec, which is that the tribunal in making the order I have referred to, effectively dismissed the NCR’s application on the merits with the result that the appeal can only succeed in toto if this court holds that the tribunal should have found in favour of the NCR on the merits. I do not agree with this argument. The finding of the tribunal that the referral was invalid in effect ousted its jurisdiction to adjudicate the merits of the charges. As much is conveyed in the finding that, because of the invalid referral, the tribunal was unable to consider the merits of the charges. The order that followed, albeit somewhat tautologous, simply means that due to an absence of jurisdiction the application

on the merits could not be heard. This court, accordingly, is confined to a consideration of the validity of the referral, which

lies at the heart of the appeal.

- [5] I turn now to the merits of the appeal. The point of departure is first, to examine the NCR’s initiation of the complaint against Capitec and then to analyse the nature of the investigation that followed. Against that background the validity of the referral will be considered.

- [6] It is at the outset necessary to refer to the statutory framework within which the NCR operates in the initiation, investigation and referral of complaints. It is the NCR's case is that it 'initiated' a complaint against Capitec, in terms of s 136 (2). Section 36 provides for a complaints procedure (ss (1)), on the one hand, and the initiation of a complaint by the NCR, in its own name (ss (2)), on the other. Only the latter is relevant for present purposes. Upon initiation of the complaint the NCR is empowered, in terms of s 139(1)(c), to direct an inspector to investigate the complaint in respect of which the powers and procedures provided for in ss (3) to
- (6) apply. After completion of the investigation into the complaint the NCR may inter alia refer the matter to the tribunal (s 140(1) and (2)(b)). The hearing before the tribunal and aspects relating thereto are governed by s 142 to 147 in Part D.
- [7] The NCA does not define the concept of 'initiation'. Nor is there any authority directly on all fours on the interpretation of the word used in the NCA. Useful assistance and guidance are to be derived from the judgment of the Supreme Court of Appeal in *Woodlands Dairy (Pty) Ltd and Another v Competition Commission* 2010 (6) SA 108 (SCA), which was confirmed and qualified in *Competition Commission v Yara (SA) (Pty) Ltd and Others* 2013 (6) SA 404 (SCA). Both judgments were extensively dealt with by the tribunal and relied on in argument in this court. It must be borne in mind

that the SCA in both cases was concerned with the interpretation and application of the Competition Act 89 of 1998 (the CA) containing

similar provisions and on which the NCA was modelled. Of relevance, for purposes of the present matter, is the parallel use of the concept of initiation, a power exclusively conferred on the commissioner under s 49B(1) of the CA. The question Harms DP, writing

for the court in *Woodlands*, posed was whether there were any jurisdictional requirements for the initiation of a complaint by the commissioner. The question likewise arises in the circumstances of this case. The complaint referral by the commission, Harms DP held, 'is (subject to s 51) a jurisdictional fact for the exercise of the tribunal's powers in respect of prohibited practices', and continued (para [13]:

'A complaint has to be 'initiated'. The commissioner has exclusive jurisdiction to initiate a complaint under s 49B(1). The question then arises whether there are any jurisdictional requirements for the initiation of a complaint by the commissioner. I would have thought, as a matter of principle, that the commissioner must at the very least have been in possession of information 'concerning an alleged practice' which, objectively speaking, could give rise to a reasonable suspicion of the existence of a prohibited practice. Without such information there could not be a rational exercise of the power. This is consonant with the provisions of s 49B(2)(a) which permit anyone to provide the commission with information concerning a prohibited practice without submitting a formal complaint.'

[8] In Yara, Brand JA, writing for the court, with reference to Woodlands, confirmed that there can be no investigation in terms of the CA without a complaint submitted by a complainant or initiated by the commission against an alleged prohibited practice and that a complaint can only be initiated by the commission on the basis of a reasonable suspicion. The learned judge of Appeal referred to 'loose statements' in Woodlands which he cautioned ought not be subjected to the formal process of interpretation, and concluded:

'On the other hand, this judgment should not be understood to authorise a formal investigation without a complaint initiation, nor the initiation of a complaint without reasonable grounds, nor to absolve the commission of its obligation to provide those grounds when challenged to do so.'

[9] It has accordingly become firmly established, at least as for initiation of a complaint in terms of the CA, that a reasonable

suspicion is a jurisdictional requirement for the validity of the ensuing investigation and referral. Only a valid complaint triggers

an investigation and determines the scope thereof. In my view, the self-same principles apply, with equal force, in respect of the NCR's initiation of a complaint. I do not consider it necessary to attempt to define the nature and contents of the reasonable suspicion requirement. It is true, as pointed out by counsel for the NCR, that the nature of the reasonable suspicion was refined, or perhaps qualified in Yara to include a tacit complaint and that it was held that initiation constitutes a preliminary step in a process that does not affect the rights of the suspect (Yara, para 24) which does not require a strict correlation between the complaint and the referral (para 28 of the judgment). In the present matter the crucial issue for determination is whether the NCR's initiation was based on any suspicion at all in initiating the complaint, which obviates the need to have regard to the further considerations referred to in Yara. What remains as the common golden thread in both judgments of the SCA, is that the initiation must be based on a reasonable suspicion.

[10] The NCR in initiating a complaint exercises a public power which must comply with the Constitution, which is the supreme law and the doctrine of legality, which is part of that law (Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SQA 674 (CC) (2000 (3) BCLR 241; [2000] ZACC 1) para 20). The NCR accordingly cannot arbitrarily, without a reasonable suspicion, initiate a complaint, generally, against what it perceives to constitute a prohibited practice. The sanctioning thereof will widely open the doors to all kinds of abuse.

[11] It is clear from the provisions of s 136 of the NCA that a complaint must be initiated against 'an alleged prohibited practice'.

The investigation by the NCR following upon the initiation of a complaint must be focussed on the complaint in respect of which a reasonable suspicion is held or relate to the information available to the NCR in respect of which a reasonable suspicion exists. It is that complaint which will be referred to the tribunal. As is the case with the Commission, the NCR's far reaching powers may not be abused:

'[F]or purposes of a fishing expedition without first having initiated a valid complaint based on a reasonable suspicion. It would otherwise mean that the exercise of power would be unrestricted because there is no prior judicial scrutiny as is the case with a search warrant.'

(per Harms DP in Woodlands, para 20, with reference to Sappi Fine Paper (Pty) Ltd v Competition Commission and Another [2003] 2 CPLR 272 (CAC) ([2003] ZACAC 5) paras 35 and 39).

[12] This brings me to the complaint which is the subject matter of this appeal. In its founding papers the NCR made no attempt at all to either refer to or deal with the reasonable suspicion requirement. The validity of the initiation was challenged in Capitec's

answering affidavit. In reply thereto the NCR did not avail itself of the opportunity of elaborating on the information in its possession, if any, or the reasons for having a suspicion but contented itself with merely reiterating that it initiated the complaint in its own name and in referring to the mandate for the investigation given to Gobodo. The mandate notably was not signed by the NCR, but by the manager and senior inspector of investigations and enforcement at Gobodo. Three inspectors were appointed by the NCR, in terms of s 25 of the Act. Each certificate of appointment reflects that the inspector's 'appointment is for the investigation of the activities of Capitec Bank'. In the background section of the mandate, where it plainly should have set out and dealt with the complaint, it is merely stated that 'Concerns have been raised relating to the provision of unsecured credit and short term loans by Capitec Bank'. In the NCR's replying affidavit this sentence is referred to as the basis and reason for the investigation but nothing more is added thereto. It is immediately and without more ado, abundantly clear that the statement does not, even by the wildest stretch of imagination, comply with the requirement of a reasonable suspicion or, any suspicion for that matter. Nor were any facts set out, either in the mandate read as a whole or in the NCR's affidavits, from which a reasonable suspicion can be inferred. On the contrary, the facts alluded to by the NCR show beyond all doubt that it intended nothing other than a fishing expedition.

[13] The terms of reference attached to the mandate letter, authorises Gobodo to conduct an investigation which 'is aimed at establishing whether Capitec Bank complies with the correct procedures and processes in terms of the NCA in respect of the granting of credit, pre-agreement disclosure and credit marketing practices'. It is significant that the mandate is couched in the widest possible terms manifestly absent any reference to a complaint. The further powers given to Gobodo in the proposed

investigation underscores as much: it is instructed to 'interview various senior staff members/managers and get from them a detailed description of policies and procedures relating to the granting of credit, pre-agreement disclosure, credit marketing practices and related matters' and

‘to obtain, if available, a copy of Capitec Bank’s policies and procedures relating to the granting of credit, pre-agreement disclosure, credit marketing practices and related matters’. The mandate then extensively and in considerable detail sets out the methodology to be employed by Gobodo in the investigation, once more in the widest possible terms. Finally, any doubt that may have existed in regard to the scope of the investigation, finally dissolves in the concluding sentence of the mandate, informing Gobodo that ‘you are not limited to the above and may inspect and report on any contraventions of the NCA that you may come across’. Further, dispelling any suggestion to the contrary, is Gobodo’s express confirmation in its report, submitted to the NCR after conclusion of the investigation, that ‘the NCR did not supply us with any specific complaints regarding Capitec’.

[14] The facts of this matter accordingly do not show that a complaint existed which could have triggered an initiation and investigation.

The initiation by the NCR in terms of s 136(2) of the NCA was not in respect of a complaint therefore rendering it invalid. The

investigation that followed was not an investigation into ‘the complaint’ as is required by s 139(1) (c) of the NCA and it, likewise, suffers the same fate. So too does the referral.

[15] The second leg of the enquiry concerns the fairness of the investigation once the NCR’s report was made available.

Prior thereto Capitec co-operated with and assisted Gobodo in its investigation. Capitec offered to assist the NCR but was confronted

with a rigid and uncompromising attitude insisting that Capitec enters into a consent agreement in terms of s 138(1)(b) of the NCA. Capitec then requested further particulars to the charges. The NCR however, did not respond and pressed on to have the matter heard by the tribunal.

[16] In argument before us counsel for the appellant sought to criticise Capitec for having asked further particulars to the charges ‘as if this were a civil trial’. I do not think the criticism is justified. The NCR was established in terms of s 12 of the NCA. Its independency is confirmed in ss (1)(c) ‘subject only to the Constitution and the law’. The NCR further ‘must be impartial’ and is required to perform its functions ‘in as transparent a manner as is appropriate having regard to the nature of the specific function’ and ‘without fear or favour’ (ss (f) and (g)). In addition as I have already briefly referred to, the NCR exercises a public power in regard to which the principle of rationality applies: the exercise of power and performance of the function to initiate, investigate and refer a complaint to the tribunal must be rationally related to the purpose sought to be achieved by the exercise of it (*Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) para 49; *Democratic Alliance v President of the RSA and Others* 2013

- (1) SA 248 (CC) para 27). The purpose sought to be achieved is to be found in s 3 of the NCA. In summary, and of relevance for present purposes is that the NCR acts as a watchdog in order to promote equity in the credit market. In doing so the NCR exercises a discretion requiring the balancing of the rights and responsibilities of credit providers as well as consumers. Within this framework the NCR is required, as far as reasonably possible, to achieve the correction of non-compliance with the provisions of the NCA by credit

providers, impartially, while at all times observing audi alteram partem up to the stage that the unresolved issues inevitably are to be referred to the tribunal. A unilateral fault finding mission with the sole purpose of securing a hearing by the tribunal, as has happened in this case, is at odds with Constitutional values and

principles and is therefore to be deprecated. I have no doubt that had the perceived transgressions by Capitec, that were discovered in Gobodo's investigation, been addressed by mutual co-operation and in the spirit of bettering the interest of the credit consumer industry as a whole (as articulated in s 3(a) of the NCA), a hearing before the tribunal could have been averted.

- [17] One last aspect needs to be addressed. The question arises whether ex post facto the entire process, including the referral to the tribunal, ought to be set aside in view of the fact that the merits of the charges were fully dealt with both in the papers and in argument before the tribunal. Counsel for the NCR, rather belatedly in reply, relying on s 140(1)(b) of the NCA, submitted that it contains the only jurisdictional requirement in respect of the hearing by the tribunal. That would merely require the NCR, after completion of an investigation, to believe 'that a person has engaged in prohibited conduct'. The argument is short-lived and flounders in its premise. The requirement of a valid complaint for initiating the complaint, as counsel for Capitec correctly pointed out, constitutes a pre-condition for the legality of all procedures in consequence thereof, including the referral to the tribunal. I should add that this court in any event will not approve a procedural step which flows from an unlawful premise.

- [18] It remains to deal with one aspect concerning the costs of the appeal. Counsel for Capitec has asked for the costs of three counsel. I am not satisfied that the matter is of sufficient complexity to justify the appointment of three counsel.

- [19] In the result the following order is made:

1. The appeal is dismissed.
2. The appellant is ordered to pay the costs of the appeal, including the costs consequent upon the employment of two counsel.

FHD VAN OOSTEN

JUDGE OF THE HIGH COURT

Concur:

DS MOLEFE

MM JANSEN

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