

SOUTH AFRICA / JUDGMENT

Southern African Fraud Prevention Service Ltd v National Credit Regulator (NCT168/2009/54(1) (T)) [2010] ZANCT 28 (19 February 2010)

[2010] ZANCT 28

COURT

National Consumer Tribunal

BEFORE

Bonke Dumisa, Neo Sephoti

CASE / FILE NUMBER

NCT168/2009/54(1) (T)

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NATIONAL CONSUMER TRIBUNAL HELD AT

GAUTENG CONSUMER COURT

CASE NO:NCT168/2009/54(1) (T)

DATE:19/02/2010

In the matter between:

SOUTHERN AFRICAN FRAUD PREVENTION SERVICE LTD..... Applicant

And

THE NATIONAL CREDIT REGULATORRespondent

ORDER AND REASONS FOR ORDER

[1] This matter is part of the process by which the National Credit Regulator ('NCR') seeks to stop unregistered activities of South

African National Fraud Prevention Service ('Fraud Service'). The present application is the method for handling an objection to the NCR's Notice to Cease.

[2] It is accepted that s54 of the National Credit Act, 2005 ('the NCA') was the correct section for the NCR to use. It is a specific section standing alongside s55 as a general provision.

Completeness of the papers

[3] Neither party asked to amplify papers, to cross-examine or, subject to an abandoned attempt from Ms Woods, to call oral evidence. The matter is to be decided on the papers as they stand. Mr Bracher appeared for the NCR and Ms Woods for Fraud Service.

Regularity of the papers

[4.1] The Fraud Service objection raised the point that the Notice to Cease did not comply with s54 in that it failed to state the

facts

underlying the NCR opinion that the Fraud Service activities are such that Fraud Service may only continue if it registered as a credit bureau ('cb'). The point is sound.

[4.2] When the point was taken, there should have been at least an application for amendment and for condonation. There was nothing. The NCR as enforcer of the law, a process that sometimes requires adhering to the letter of the law, should be conscientious about heeding the law.

[4.3] Setting aside the notice of cease by reason of that deficiency would be dilatory only. A new notice will follow. That the Tribunal falls in line with the desire of the parties to have the real dispute decided, must not be seen as precedent justifying future slackness.

The onus of proof

[5] With so much being common cause, the initial response of Mr Bracher is understandable that the risk of non-persuasion plays no role. However, there are contested issues of less obvious importance and some facts were not explored. The nature of the present proceedings require that the onus rests upon the NCR and this was accepted as correct by both parties.

The nature of the dispute

- [6] The NCR has no objection against the actual activities of Fraud Service but claims that Fraud Service must register as a cb under s43-1 of the NCA. Fraud Service refuses to register, believing that it is not obliged to register.
- [7] The crucial facts are common cause. That was not apparent to Fraud Service before the answering affidavit was delivered. The applicant took the s54 point and then continued by complaining that the NCR failed or refused to investigate the facts and refused to be swayed by opinions. However, Ms Woods disavowed relying on the natural rules of justice (by e.g. failing to properly consider the matter) or proceeding as if this is a conventional review application. She approached it as a straight issue of what the NCA means and argued that s43 has no application to the facts.

The

facts

[8.1] Fraud Service is a section 21 company. The membership mentioned in the papers does not refer to shareholding in the company but to participating in the operations of Fraud Service.

[8.2] The types of Fraud Service activities are, in oversimplified form, sketched by the following postulated examples:

1 John claims from his short term insurer. He falsifies what really happened to his car; or who really drove it; or when the harm

occurred. The insurer, convinced of fraud, reports John-the-culprit

2 Somebody steals the debit card of John and tries to use it. His representation that he is John is false. The report to Fraud Service

affects John-the-victim.

3 John-in-trouble arises when John has lost his card in any way and reports it to Fraud Service. Fraud Service warns members that the future presenter of the card may perhaps not be John.

Except in illustration 3, reports are made by businesses and the information is available to businesses provided that they are 'members'.

7.2 Actually, apart from John-in-trouble which goes into category 'zero', there were eleven other categories, but number nine was abolished in 2006.

7.3 The activities are done by Fraud Service for the benefit of members. A member has to make annual payment. One substantial debate is whether Fraud Service engages in its activities 'for' payment as is meant in s43-1.

8.1 Perhaps as a result of the failure to comply with s54 Fraud Service paid no attention to matters that are not necessarily mere detail. The answering affidavit fared no better. The results show on some topics.

[8.2.1] Paragraph 20.1 of the answering affidavit states:

'The membership charges are calculated and paid for the purposes described in paragraph 8 namely to "pay an annual membership fee in order to maintain the service as provided by the applicant and to cover only the costs of the operation of the service"'. The underlining is mine. The marked words were taken by the NCR from paragraph 8 of the Fraud Service application. The particular

allegation of Fraud Service was not denied but taken as proving the NCR argument about s43 payment. Nor was there a denial of the

evidence reading: "777© applicant does not receive payment for its services". The answering affidavit shows that the NCR view is relying on the facts placed by Fraud Service before its opinion-givers and that, despite inconsistencies in opinions, the NCR assessed the obligation to register under the NCA on the basis that Fraud Service "seeks to recover the costs of its overhead expenses from its members".

The words now quoted come from one opinion but fairly reflect the basis on which the NCR oral argument proceeded. That it was common cause that applicant only gets the cost of its activity is evident also from paragraph 2 of Mr Bracher's heads of argument. Towards the end of his argument he expressed it as the NCR's case that even on the basis of members paying nothing other than covering expenditure, the passing of money constituted 'money-in, information-out'. If I paraphrase, confirmed in his view by the decisions on which he relied: whatever the Fraud Service approach may be to deciding how much is payable by members, the money was (at least in part) a payment for the service of providing reports.

[8.2.2] I formulate the arguments somewhat differently. The NCR contends that amounts paid are according to Fraud Service's own facts nevertheless a payment for services (activities) and Fraud Service contends it was payment of expenditure. The NCR argument amounts thereto that 'nothing other' (than expenditure) is recoverable, in this case amounts to only 'nothing more' (than the quantum of expenditure). The statutory issue is whether Fraud Service is doing what it is doing 'for payment'.

[8.2.3] The extent to which the NCR relies on Fraud Service opinions is also evident from paragraph 20.2 of the answering affidavit. It refers to annexure A5 as containing a factual statement which is then used to underlie a submission. The abolition of the quid-pro quo service category (category nine) is not of present relevance except in so far as it strengthens the argument that the abolition in 2006 may show that Fraud Service wanted to avoid money-in-accordance-with-service. In form, using an annual fee also weighs against an underlying money-for-service measurement. Whether it succeeds in substance is a distinct question.

[8.3] There was no investigation into how membership fees are handled in bookkeeping and other administration.

[8.4.1] No pertinent evidence was given about the conclusion or terms of the contract that would be underlying the membership and the obligation to pay. The Code of Practice does include an application form and in paragraph 1.1 it states that membership arises from a Board of Directors decision to permit an organisation that shares the concerns expressed in the Preamble and meets the qualifying criteria.

[8.4.2] The replying affidavit must stand on that point despite the NCR, as a matter of contention, talking the Board decision down. Paragraph 45 carries actual evidence and in part reads: 'Admission to membership is strictly controlled and is not open to' any credit provider from amongst the general public" and the applicant has denied membership to several institutions..... 1

[8.5] No focussed evidence was given about the content of a report from a member. From category 10 (para 2.2.10 of the Code) one can learn that the member will see various fields on his computer's screen and also a drop-down menu that permits a few possibilities for selection. The member would provide the name of the person involved, his date of birth and identity number, the category's code, and the code number of the member. On the 'incident screen' the number of the category is chosen and a selection is made from a number of sub-categories as listed on the

pick-list (menu). Fraud Service does not require more than that from members. The NCR despite having entered the web-site¹ did not tell what it saw².

[8.6] There is no specific evidence about what the NCR observed about 'reports' emanating from Fraud Service. The Code indicates that Fraud Service received 'reports' only in the sense that members themselves take the initiative to enter data into the database³. Fraud Service does not create any further report. Fraud Service does not require or make it part of its business to report on more than what is mentioned in paragraph 8.5 above. An enquiring member will open the database file and do a search under something like a name or identity number and if that name is in the database, read what another member had entered in terms of what the Code requires or what was voluntarily added. He might see 'John Citizen, ID number 122, reported in category 1 sub-choice 1 by member 007.' See

paragraph 2.4.3 of the Code. Fraud Service sends out a report by e-mail in which it is only stated what the filing reference number is, the identity number and surname of the individual involved in the incoming report and in what category that report was 'filed'. An enquiring cb will get the same information excluding the category of filing. Paragraph 2.4.2 of the Code. (In passing I note that at least the defined 'consumer' can probably discover the existence of a Fraud Service report up by a cb enquiry.)

[8.7.1] The Code's exposition of compulsory and voluntary filings indicate the very opposite of taking any interest in any 'credit application' or in anything about a 'credit agreement'. It is interested in the fraud and it is for the Fraud Service purposes coincidental if a credit application or a credit agreement is involved. It takes no interest in and requires and receives no information about financial creditworthiness. It gives no report on financial creditworthiness. It is not interested in any personal information mentioned in s70-1 except for the name and identity number. Name and number are in the nature of things necessary to give content to a report. That identifying element is not received relative to worthiness of deferment of payment but relative to honesty. In the case of employees discharged for fraud there is another exception in that it nominally is of the same type as is mentioned in s70-1-c but it is again not of the same character.

[8.7.2] Paragraph 43.1 of the answering affidavit makes the assertion that 'credit applications and credit agreements and consumer credit information is a major part of the

information received..... 'No evidence was produced to substantiate this interpretation of the established facts.

[8.8] In summary, the NCR produced no proof of facts that brings the Fraud Service activities closer to s43 than the Code does. Mr Bracher confirmed that statements about the Code of Conduct appearing in the answering affidavit was not intended to be independent evidence but are comments that rest on an interpretation of that Code.

The relevant sections of the NCA

[9.1] Before coming to any finding, the salient provisions must be investigated.

[9.2.1] The present application is the prescribed way of objection (s56-1) to a s54 notice to either register or to cease.

[9.2.2] The prohibition on activities that the NCR seeks to enforce is found in s43-2;

[9.2.3] That section takes one back to s43-1 which defines who 'must apply' for registration.

[9.2.4] Section 43-1 is partially dependant upon s70-1. See s43-1-a-(iv).

[9.2.5] All of that is not independent from the definition of 'credit bureau' in s1 and 'consumer'.

[9.2.6] Also relevant to interpretation is inter alia s 3. That defines the 3 purposes of the NCA and in the process refers to credit bureaux in one of the means of advancing those purposes. See paragraph e-iii thereof. That is again a method to a sub-purpose viz to 'correct imbalances in negotiating power between consumers and credit providers'. (Credit bureaux are not mentioned in that context).⁴

[10.1] The traditional concept of a cb is that it brings together the blemishes on a person's reliability to strictly comply with

contractual obligations and then, against payment, to supply that information to someone, usually a party who is considering contracting with the particular person. In the WAT it is described as: 'Buro wat inligting oor die kredietwaardigheid van persone en ondernemings versamel, aanteken en op aanvraag beskikbaar stel.....' (and sometimes also traces debtors and does some other additional things).'

[10.2] Even in more encyclopaedic publications it is not strange to see it pointed out as something beyond the traditional if e.g. debtors are traced.

[11.1] Section 43-2 reads:

'A person must not offer or conduct business as a credit bureau OR hold themselves out to the public as being authorised to offer any service customarily offered by a credit bureau unless that person is registered as a credit bureau in terms of this Chapter.'

[11.2] Section 43-2 so refers to two types of persons that, unless registered, may not operate as a cb. In group 1 it is the 'offer or conduct business' that is prohibited. Group 2 prohibits 'holding out to the public' the status of 'being authorised' to offer a 'service customarily offered by a cb.

[11.3] There is rightly no suggestion that Fraud Service falls within the second group. It has not 'held out'. The reporting of only fraudulent incidents is not what cb traditionally did.

[12] The said second alternative can, however, be mentioned first in the list of lack of clarity in the few sections of the NCA that are relevant to this matter.

[13] It will be useful, though, if the parties, before attending to that list, find an answer for themselves to the following question: Why does s43-1 exclude three (divergent) situations? Those situations are:

- (1) a cb that is not paid for engaging in what it does;
- (2) a (registered?) credit provider; and
- (3) a (paid) employee of a credit provider.

[14.1] To prevent a gap between a prohibition of all cb's and the more limited scope of who must register (s43-1), the first occurrence of cb must be understood as lined up with the definition in s1. The second occurrence not. For the third occurrence those definitions or concepts are of no interest because it measures by registration.

[14.2] The singular 'a person' is out of line with the plural 'themselves'. Even awareness of gender non-differentiation cannot explain grammatical discord.

[14.3] 'offer business..... as a credit bureau' is ungrammatical and requires an

understanding dependant on reasoning beyond those words. It probably does not mean offering to dispose of a cb business. There was no reason for statutory interference with trading in businesses. (And if s1 is borne in mind, it means 'offer business as a person required to be registered!!'). It probably does not mean telling a cb 'I offer to become a member or supporter of your cb business'. In both those events it is not Fraud Service that should be the present NCR target but the offeror. It possibly was intended to say 'offer to do business as a cb' despite the words 'to do' not appearing in print. If one bears in mind the extent to which s43-2 follows wording of s54-1-a (where the plural is also inapposite) it may be that the word 'or' is a misnomer for 'to'.

[14.4] On any reading the outcome is that s43-2 will forbid activities that do not require registration. The second alternative group of s43-2 causes that result. Being a cb not for reason of getting paid is a case in point.

[14.5] Section 43-2 demonstrates that the legislature spoke without pausing to properly formulate what it really wants to say and without pausing to ensure that words express that.

[15.1] Section 43-1 shows the same.

[15.2] In s43-1-a it is not made clear whether the first two alternatives are joined to each other and to the rest by the concept of 'and' or the concept of 'or'. There is no word.

[15.3] Subsection 43-1 -b does not make sense. To get to its meaning, disregard the words and reason that (i) means 43-1 or 43-1-a or 43-1-a-(i).

[15.4] Section 43-1-c initially appears to acknowledge that a juristic person can be a 'consumer'. The wording continues!... 'or other natural persons'. If that is an oblique way of limiting 'consumer' to natural persons, the subsection should simply have referred to

'reports regarding natural persons'. Section 43-1 -c that would probably take s43 out of line with the access-to-credit provisions (part A of chapter 4 of the NCA) which is in favour of all persons (and there 'person' includes a juristic person) and not only someone ('consumer*' as defined) who has a history of somewhere having taken deferment of payment. Again the choice of words raises questions.

[15.5] Section 43-1 contains the disputed element of 'for payment' in a way that at least can have more than one signification.

[15.6] The reference to payment is in the following context: 'payment, other than ' One would expect a qualification on 'payment'. Instead the words proceed to refer to persons. The words that follow on 'engage for payment' must fit in somewhere but not where the legislature placed them.'

[15.7] 'Receiving', 'investigating' and 'issuing reports' all have some (unavoidable) pliability. I assume that allowing access to a data base is the same as the traditional statement⁶, specially created on enquiry, as a report about the financial behaviour of a person.

[16.1] Section 70-1 operates only 'in this section' and by virtue of the cross reference also in s43.

[16.2] Subject to the word 'or' after s70-1-c, it is not stated whether the alternatives are disjunctively or conjunctively intended. If such information is included only if all four of the 'alternatives' is covered, it would be possible to avoid application of the statutory provision that turns upon the s70-1 definition by e.g. doing nothing mentioned in s70-1-coreven by omitting only some part thereof. (And the sub-sections all conclude with an indefinable 'and related matters'.) If, on the other hand any sub-part of what is mentioned in s70-1 is adequate to constitute 'consumer credit information', it takes the NCA beyond any fair concept of a cb. A life office that takes down any of (or all of) the information of prospective customers who phoned head office to seek the issue of a policy, in order to pass it on to a broker, is then cb. s70-1-d. A staff placement agency that asks and records nothing more than what is mentioned in s70-1 -d is a cb. So is the policeman who takes down statements from witnesses and the football club who creates a register of members. So is the person who keeps records of financial interests reported by members of parliament. (An individual who performs cb activities is threatened by s43-2 and related sections but in terms of s46-1 may not be registered as a cb. The option of voluntary registration is available only for registration as a credit provider.)

[16.3] Section 70-1 need not be further analysed for present purposes.

[17.1] When it comes to the correct understanding of a specific part of the NCA, it is proper to consider other parts of the NCA and that includes purposes.

[17.2] Section 3 states three purposes of the NCA and nine methods by which the three purposes are to be achieved. One method is to correct the imbalances in negotiating power between 'consumers and 'credit providers'. The NCA goes further than 'consumers' which has a defined meaning when it is used in constellation with 'credit agreement'. The right to apply for credit (and

to be not-refused in some cases) is given to everybody. The said correction of imbalances is to be achieved by the stated means (subsection e-iiii) of 'providing consumers with protection from deception, and the unfair or fraudulent conduct by credit providers and cb'. I am not ware of what 'fraudulent' conduct by cb there was, but that is relatively less important than to study what correction the NCA then did introduce. In line with the experience of the people that found themselves unable to get credit because there was a blacklisting that was wrong in the first place or did not reflect rehabilitation, one finds an expressed right for everyone to be considered for credit (s60). There is a duty of confidentiality (s68). 'Every person' (s72) has a right to be informed. Etcetera. It is probably not correct to argue as the NCR has argued, that s43 requires registration of Fraud Service so that only 'consumers' (as defined as the target of 'protection' i.e. parties to 'credit agreements') has the rights of those sections.

[17.3] The 'purpose' of the NCA or part B of chapter 4 does not give real support the argument of the NCR.

[17.4] Perhaps of some relevance is that the legislature knew of legislative remedies about freedom of information and revision of administrative decisions that would be available against the non-registered cb or a party that does things similar to part only of what a cb would do. It is parliament's privilege to decide where and how a line is drawn and not for interpreters to add glosses. Just as the sections mentioned in 17.2 extend beyond 'consumer' (as defined) protection, so the legislature can decide on a lesser remedy than is conceivable such as giving only selected parts of remedies against someone doing only parts of cb activities.

[17.5] In paragraph 14.1 above the different meanings of 'credit bureau' in one single section was mentioned. If 'cb' does not always convey the defined sense, what foundation is there to assume that 'consumer' as defined is in the foreground or is the target of the 'protection' of s43?. The word is used thrice. Once in s43-1-c where it in the end amounts to 'every natural person'. Secondly, It appears as part of a concept viz the name given to some type(s) of information as is meant in s70-1. Thirdly where a 'consumer' and mere 'prospective consumer' are equated.

[17.6] These considerations sound the warning that it is not correct to argue that once a 'consumer' (as defined) is, amongst other people, in the picture, the other wording of the NCA must be stretched in order that a section of the NCA will apply. This will be revisited. For the moment the relevance of the comments is that there is consistently a need to gather the true meaning of a provision from more thinking than a mere reading the words; that in the NCA words often do not constitute the usual best guide to the correct understanding. What you read in the NCA often does make the meaning patent and what the NCA does intend is not there to be simply read.

[17.7] To put the comments in paragraph 17.6 in context, I mention the NCA argument: Some of the members of Fraud Service are major 'credit providers' so that some of their contracts would be with 'consumers' and the legislature would have wanted those people to have the protection of s 72 and other provisions. I do not think the angle of approach is sound. It therefore can not justify giving s43 on both contentious issues the wider rather than the more natural and narrower meaning. For the 'more natural meaning' I refer to the next paragraph.

Feet on the ground

[18.1] Determining what the wording means and then applying that to the facts is not safe ground in this case. In this case the surest guide to clarity is to start with conceptual clarity and stay there unless the NCA's wording adequately points to the contrary. Conceptual clarity is first illustrated by examples outside statutory possibilities:

[18.2] The difference between sharing expenses and paying for services: Even if I am a travel agent by profession an arrangement between me and 19 friends that we will travel to the World Cup in London and share expenses, and even if my professional skills cause that I do some or most of the arranging, nothing is paid for my service if the contract between friends is correctly applied. I may not include one cent for my services. If the agreement was that I will and may charge nothing that is not actual expenditure, nothing that I do about that tour is done 'for payment'. I do not partake in the scheme of the 20 people 'for payment'. On the other hand, even if I am not a travel agent, if I am permitted to charge something (separately or hidden in an overall charge for some items), I do get (some) payment for my service even if that is on a nominal level. The nature of the payment is not affected by the low level of fees or by motives inspiring low charges for services.

[18.2.1] The distinction is obvious. In the former case money passes not as a reward for a service; on the contrary the contractual position is that I may not claim payment for my activities.

The participator or bystander test

[18.3.1] The second point is as evident. The active party test is of daily common sense application. Ask a man what he is doing and you normally will see clear differentiation that does not require lawyers. During argument I posed the example of a printer who uses metal to print something that has all the appearances of a postage stamp. At an early stage the printer will say that he is printing die proofs (or plate proofs). He prints not to produce stamps but to test the clarity and other qualities of the die. Once the die is re-engraved to the necessary extent, he will print again. He will explain: 'I am printing a colour proof. His only task is to print images that will be used to decide what colour or colours or combinations will be best. On another occasion he will be creating paper proofs. And eventually he will, using the same machine and the same metal, say: 'I am printing stamps'. The man hitting a ball from a bunker on the golf course may be the resident professional testing whether he wants to stock the brand of wedge. He may be demonstrating in the course of giving a lesson. The man will rightly deny that he is playing golf. On another day the same man will say 'I am playing golf.

[18.3.2] Closer to home, postulate the policeman who takes statements from those in the bank when a robbery took place; postulate that it is not known what was stolen and that the witnesses say they can not remember how much they paid but that they paid instalments on contracts. The policeman now seeks identification about the contracts and obtains that from the witnesses. If you ask that policeman the question 'What are you doing?' he will say that he is investigating a crime. Not that he is receiving reports of some 'consumer credit information'. Similarly the detective who takes down full particulars about many credit agreements in the process of trying to find a serial defrauder.

[18.3.3] In real life a down to earth approach is a sound guide to knowing what activity is being carried on. Putting a knife into someone's throat is 'I am stabbing' but it is 'I am operating' or 'I am helping the patient to get air' in other circumstances. You can not describe A as being B because A is identical to or shows similarity with part of B. That is partially what the NCR argument seeks to do.

[18.3.4] Objectivity, while displaying the same practical sense in assessing an activity, such as the objectivity that the Tribunal is obliged to apply, will sometimes find a reason to qualify or differ from the active party's formulation. No such reason has been shown in this matter.

[19.1] On that daily human being approach, Fraud Service can say 'I am a hub for fraud reports. I am receiving reports about fraud; contracts is not the topic of reports to me.' That in a particular report the fraud is related to a credit agreement is a matter of coincidence. Does the NCA require something other than that common sense?

[19.2] That such an approach is applicable to the first three subsections of s43-1-a, is enough reason for it to be applicable to the last subsection. Fraud Service will persist with 'I am getting fraud reports' and deny that 'I am getting reports of (it should have been 'about?') 'customer credit information.' (The wording should have been reports 'about' such information not reports 'of such information?')

[20.1] I turn to the meaning of 'engage for payment'

[20.2] The word 'payment' does not stand in isolation. In a phrase that in turn is used in a context that in turn is part of a specific setting, one can not start with a proposition that 'payment' is any passing of money intended to wipe out an obligation to pay. On the contrary the phrase *prima facie* signifies that the payment is a *quid pro quo* for services as a cb; the reason why Fraud Service engages in its activities must be that it will get paid.

[21.1] The reference to 'engage.... for payment' is at least ambiguous.

[21.2] Ambiguity must in this case be resolved by giving due weight to considerations:

- (a) in favour of altering the pre-existing law to a lesser rather than a greater extent;
- (b) in favour of less interference with the right to free activity - which the Constitution allows to be infringed only on a balance of good reasons;

- (c) Choosing the fair and effective interpretation, bearing in mind the purpose of the relevant statutory provision.

[22.1] When enquiring further about the reason for s43, it is so that the activities of Fraud Service are not imbued with undesirable

characteristics. The NCR in its answering affidavit correctly regards its activities as desirable in our undisciplined and lawless

community. Unless one believes that government simply wants to control everything by administration, it is appropriate at least to ask why the legislature would have wanted control over a desirable activity.

[22.2] It is fair to note that if the old activities were so bad or so much in need of 'protecting consumers' that s43-2 was formulated to strike at those activities, why was the activity excused from control and from 'consumer' rights when a cb acts without 'payment for engaging' in cb business?

[22.3] That a credit provider is excused, must also have some reason. (Enquiring may lead to other questions that need not be decided.) If a credit provider carries on as a cb, he is not confined to getting reports about his own credit agreements. He is not prevented from getting information from extraneous sources. Secondly, the NCR argues that what the credit provider can do on its own, can not be done by two credit providers acting together. Therefore not by the members of Fraud Service clubbing together. Nor by the mechanism of a separate company that is a special purpose vehicle or a full subsidiary, (cf s43-4). And there is the ironic question whether Fraud Service can get the NCR out of its system by doing something to open the way to voluntary or compulsory registration as a 'credit provider').

[23.1] Then there is the factor of the objects of the NCA in broad terms.

[23.2] One is really thrown back on the words of the NCA to get to know the purpose of the NCA or of a specific section or word. Purposive interpretation may often only give the wheel a full turn. It finds its limitation where the words are clear. The result is that it still, as for centuries, operates recognisably there where words are ambiguous in themselves or are for other reasons not clear. There is not much to add to what has been said about s3 in paragraph 17 above.

[23.3] It remains to emphasise that it is Parliament that decides how far a remedy should strike and who is given what rights in regard to the remedy. It is not for a court or a tribunal or 'a person' to recognise a particular aim and then to self-devise limits. The actual creating words and the fact that the interpreter may not legislate a broadening of the remedy must operate. It is not sound to reason that because a particular scheme of things will bring some benefit to (some) 'consumers' that the remedy not only should but does extend that far. The NCA shows the exercise of the legislature's right to select and to draw lines. The treatment of some trusts as compared to others is an example. It is in the nature of legislating to spell out something and that spelling out operates as drawing the lines.

[24.1] Those considerations are relevant also to the approach of the NCR to this matter. It is not disputed that the Fraud Service scheme does not hinge around credit agreements or consumers. Any firm doing business of any type may join. But, the NCR argument goes, because some member does some credit agreements business, there is some 'consumer(s)' lurking in the business arena and Fraud Service must therefore be as much registered as a true (traditional or s43-1 defined) cb.

[24.2] The real question and the proper reasoning is to ask whether there is a clear enough intent disclosed in the NCA to burden Fraud Service with the same obligations as those who are involve themselves about a person's financial creditworthiness.

[24.3] If such intent is disclosed, the gathering of information about moral risk signified by lack of honesty (even of those who seem to be impeccable in financial promptness) must under the statute be dealt with in the same way as a cb which in its nature focuses on risk signified by past payment blemishes. In that case It will not help Fraud Service to argue, as it was sought to do, that it in its own way it caters adequately for the needs that inspired the NCA provisions about cb. Nor can it then be argued that its methods make statutory interference unnecessary or misguided.

[24.4]. On the other hand the fact that those who have suffered or have probably committed falsity would get some advantages if the NCA applies, is no reason in itself to conclude that s43 means something that is not stated. It is only a factor going into the basket with other factors that I have discussed. (The Code of Conduct seems to require proof beyond reasonable doubt.)

[24.5] It is perhaps good to comment on one part the Code that was raised during the hearing. I understand the papers as saying that the Code requires a member never to refuse an application for credit on the grounds that there is a report (or a report in a specific category) with Fraud Service. It may only be used as a factor putting the member on its guard about honesty alongside credit reputation. The member who does refuse a credit application and is asked to state reasons for a refusal must do so and must do so on the grounds of affordability or credit reputation but a data entry with Fraud Service must still never not form part of those concepts of 'affordability' or 'credit reputation'. (After all Fraud Service data do not refer to reputation about credit.

Other arguments

[25] Mr Bracher relied on three court decisions. They relate to statutes that each as its own wording, definition, context and purpose. They do not support the wide proposition that expense-sharing constitutes payment-for-services. In *R v Williams* 1937 CPD 46 there was alongside the expenses a further recognisable but unquantified component of payment for the use of the lorry. In *R v Burger* SALR 1955-4-454-C the sharing of expenses limit operated only within Burger's subjective and undisclosed reasoning towards the two amounts that was stated to the passengers. The true test is objective: In what was spoken between Burger and passengers the service rendered was clear and the basis of payment by them was in one case an amount stated in response to an enquiry 'of ons horn kan vergoed' and in the other case an amount was stated in response to the passenger question 'of hulle horn iets verskuldig is'.

The third decision is *Attorney-General v Arts Theatre of London Ltd* 1832 AER 683. It was held that the payment included an not-circumscribed element of paying for the option to get entertainment at a discount and therefore was subject to entertainment tax. None of the decisions deals with contractual terms that entitle the service provider to nothing other than the total of expenditure.

[26] In listing the advantages (protection) to 'consumers' that they will miss if Fraud Service is not registered, the NCR also mentioned parts of the regulations. Regulations may not be used to determine what the NCA means. The legality, scope and meaning of regulations depend on the statute means.

RETURNING TO INTERPRETATION

[27.1] I return to the question why s43 excuses three parties from the need to register.

[27.2] The first point is that if the need to give a 'consumer' (in any sense of the word) the rights under s68 or s70 or s72 or whatever, no convincing reason has yet been suggested to the Tribunal about why important role players like all credit providers are excused.

[27.3] If the interpreter is not happy with the outcome that 'consumers' (the specially protected) do not have such rights, the answer is to argue that in the said sections the name 'cb' is used in its ordinary sense and refers not only to registered bureau's. The solution is not to stretch s43-1.

[27.4] The reason for excluding a credit provider must be that the NCA is not completely anti-business by being pro-protection. It seeks a fair market arrangement. A credit provider must be allowed to do what is necessary for business and that includes collection of information from court records and newspapers and information that others have, to assess financial risks. And under the NCA the credit provider must assess affordability and recklessness. The exclusion protects within the limits of what is fair and really needed by not extending 'protection' to hundred percent of what could notionally have been done.

[27.5] For similar reasons and the fact that he may not register, the employee is excused from s43-1. [But only the employee of a credit provider. Does the employee of a cb stand in contrast?]

[27.5.1] If the NCA simply wanted interference with business activity, it would make sense to strike also at those who do cb work free.

[27.5.2] The exclusion of the not-for-reward cb is also not a sign of an anti-business bent. It is not that once there is money making on the scene, the State wants control - and then controls many things other than the making of money. (The fee chargeable to the public and hopefully not only for 'consumers' but for all consumers, is controlled.).

[27.5.3] The 'engage for payment' is the key to cutting back the control over the handling of an item listed in s70-1, to those who handle that item in the same context as a real cb does. A true cb collects and reports on a name (or whatever) and gets paid for precisely that. The staff placement agency collects a name (or whatever) but does not get paid for doing that. It gets money for a different service and irrespective of its expenses in information handling. The estate agency gets

paid for introducing a buyer and not for creating a report on prospective buyers and their finances and their contracts and their needs for loans. The reference to getting payment is the distinguishing line of a real cb from people who are busying themselves with other goals (in relation to which they may be paid) and then incidentally comes across inter alia 'credit agreements' (and their 'consumers' and credit histories or personal information), for the attention to which there is no quid pro quo. The estate agent, the motor dealer, the detective, and others may handle information even of a type that is mentioned in s70-1

[27.5.4] To prevent that s43-1 strikes those who also build records of personal facts while having a different object and operations than serving as nerve centre for creditworthiness, is also compatible with the explanation for the exclusion of a 'credit provider' in s43-1-a. (Despite it being anathema in s43-6-a).]

[28.1] In considering how lines should be drawn it is appropriate not to forget balance.

[28.2.1] To the consumer an 'extension' of s43-1 to non-traditional cb's, may me a wind with little or no dust. From all the millions of citizens only a few cb cases come before the tribunal. If those that constitute mere slackness in correcting a data base are excluded, it is minuscule.

[28.2.2] For the NCR there is the satisfaction that its empire encompasses additional types of activity. Its workload will increase.

[28.2.3]

- (a) For Fraud Service there is the registration fee and annual fee (paragraph 1 of schedule 2 of GN 948 of 21 September 2008 interestingly brings payment into play according to the level of reports or information 'provided for payment'.)
- (b) There is the cost of compliance with the bureaucratic requirements (quarterly synoptic reports and others under s70-5). Those

requirements really serve the soundness of the credit market i.e. is the debt in the market too much or too wrong?

- (c) It exposes the Fraud Service business to termination if any part of many laws is breached. s50-1-b. Maybe one unemployment insurance form was handed in late.
- (d) It exposes the cb to closure of its business also if some good cause or standard imposed by the NCR as a condition of registration is not met.
- (e) Fraud Service will become obliged to do the filing of any 'credit information'(although that is not its business).

- (f) It becomes obliged to do so if it is tendered by any credit provider. s70-2-a. While Fraud Service takes care about members being very cautious to verify suspicions, a credit provider with less virtue can undermine the standing of the whole Fraud Service system - hardly fair or desirable, especially in a field wrought by the possibility of actions for injuria and other litigation.
- (g) Applying s70-2-a will pull the plug on the screening of membership mentioned in paragraph 8.4 above, the Board decision becoming irrelevant.

[28.3] It is not a case of 'It is simple to get the NCR off your back; take the easy way out and register'. (These words are not quoted from any source.)

FINDINGS

[29.1] Fraud Service has argued that s 43 covers only a 'business' in the ordinary sense of a profit pursuing concern. The word also bears the ordinary meaning of 'activity'. That is the appropriate meaning in s43.

[29.2] It is held that s43 can apply to a section 21 company.

[30.1] Fraud Service receives money from members only for covering the cost of implementation of its activities.

[30.2] That was common cause on the papers (via acceptance of the opinions on that aspect as basis for NCR actions) and also during argument. That is the undisputed evidence.

[30.3] Fraud Service does not get any reward for what it does and does not 'engage for payment' as is intended by s43-1.

[30.4] The activities of Fraud Service constitutes the 'receiving of reports' on falsity and receiving reports of lost cards, but not the 'receiving reports of any item mentioned in s43-1-a.

[30.4.1] That finding follows from the correct understanding of that s43-1-a in relation to the activities as explained in the opinions and in the founding affidavit having considered the NCA comments and views.

[30.4.2] For the same reason it is found that Fraud Service does not do the 'investigating of any item mentioned in s43-1-a.

[30.5] Fraud Service is not a person who must register as is meant in s 43-1.

ORDER:

- [31] The notice of the National Credit Regulator requiring Fraud Service to register or to cease its present activities is set aside and cancelled as is envisaged by sections 54-4-a and 56-2 of the National Credit Act, 2005.

Handed down on this 19th Day of FEBRUARY 2010

PROFESSOR BONKE DUMISA

ADVOCATE NEO SEPHOTI

1 Para 7.2. of the answering affidavit.

2 A paragraph in the heads of argument did allude.

3 ('filing it' or 'downloading' it)

4 See also paragraph (a).

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Prepared on 13 October 2026 · Esheria