HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 64646/2016

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED: YES
DATE 14 August 2020
SIGNATURE Electronically signed

In the matter between:

MICRO FINANCE SOUTH AFRICA First Applicant

THE BANKING ASSOCIATION OF SOUTH AFRICA Second Applicant

and

THE NATIONAL CREDIT REGULATOR First Respondent

THE MINISTER OF TRADE AND INDUSTRY Second Respondent

THE NATIONAL CONSUMER TRIBUNAL Third Respondent

J U D G M E N T

DAVIS, J

[1] Introduction

In this opposed application, the applicants seek declaratory orders relating to two legal aspects over which they claim uncertainty exist for credit providers and which impacts on the short-term unsecured credit industry. The first aspect principally deals with the charging of interest on deferred initiation fees and the second aspect deals with the charging of a full service fee in the final month of a loan-agreement. The respondents raised certain issues *in limine* which, although raised as defences "up front", I find convenient to deal with at the end of this judgment.

[2] The parties

2.1 The first applicant, Micro Finance South Africa, ("MFSA") is a non-profit company which claims to represent some 1 300 micro finance lenders. These lenders subscribe to an industry code of conduct which ensures and facilitates professional, legal and ethical conduct in the market in which they operate, being the short-term and unsecured credit market.

2.2 The Banking Association of South Africa ("BASA") was granted leave to intervene as second applicant by way of an order of this court by Van der Westhuizen, AJ (as he then was) as long ago as 7 April 2017. BASA's members all comprise banks registered in terms of the Banks Act No 94 of 1990. These members act as credit providers to the public, inter alia also in respect of short-term and unsecured credit transactions.

2.3 The members of MFSA and BASA are required to comply with the terms of the National Credit Act 34 0f 2005 (the "NCA") in providing credit to the public.

2.4 The first respondent is the National Credit Regulator (the "NCA"), being the statutory body established in terms of section 12 of the NCA with the responsibility to monitor and investigate compliance by credit providers with the NCA. Its further duty is to report to the second respondent.

2.5 The second respondent is the Minister of Trade and Industry (the "Minister") who is the member of cabinet responsible for consumer credit matters.

2.6 The third respondent is the National Consumer Tribunal, a juristic entity established by section 26 of the NCA and which may, after having conducted the necessary hearings, impose penalties on credit providers who contravene the provisions of the NCA. Sanctions imposed by the National Consumer Tribunal may even lead to the cancellation of a credit provider's registration as such. This has already happened once in respect of a credit provider (who is not a member of either applicants) who had, amongst other things, charged interest on an initiation fee which had been added to a "deferred amount" as part of a debt.

2.7 Only the NCA and the Minister opposed the application. The National Consumer Tribunal abided the decision of the court.

[3] <u>The first issue: interest on initiation fees</u>

3.1 Unfortunately, it generally costs money to borrow money. In the NCA, this is referred to as the "cost of credit". It is limited by section 101(1) of the NCA which provides that "*a credit agreement must not require payment by the consumer of any money or other consideration, except –*

(a) the principal debt, being the amount deferred in terms of the agreement plus the value of any item contemplated in section 102, and

(b) an initiation fee, which –

(i) may not exceed the prescribed amount … and

(c) a service fee … and

(d) interest, which –

(i) must be expressed in percentage terms … and

(ii) must not exceed the applicable maximum … and

(e) costs of any credit insurance; and

(f) default administration charges … and

(g) *collection costs …*"

3.2 The initiation fee provided for in section 101(1)(b) above, may be included in the principal debt deferred under the agreement, in terms of section 102 (1), but only if the credit agreement is an instalment agreement, a mortgage agreement, a secured loan or a lease and if the consumer has been offered and declined the option of paying that fee separately. The remainder of section 102 prescribes which other expenses, such as delivery costs, connection fees, fueling charges and registration fees, may be added to the "principal debt".

3.3 It follows that in respect of the loans under consideration, being unsecured loans, deferred initiation fees may not form part of the principal debt. The same would also be the position where, in the category of credit provided

for in section 102(1), the consumer exercised the option to pay the initiation fee separately.

3.4 But what happens when, in both the instances referred to in paragraph 3.3 above, i.e. an unsecured loan or an exercised option to pay the initiation fee separately, that fee is not paid "up front" or immediately when the credit or loan is taken up, but only later, that is, when payment thereof is "deferred"? Does it then attract interest?

3.5 The section dealing expressly with interest in the NCA (under the heading "Interest"), being section 103, is silent on which amounts a credit provider may levy interest. Section 103(1) simply provides as follows:

> "*Subject to subsection (5), the interest rate applicable to an amount in default or an overdue payment under a credit agreement may not exceed the highest rate applicable to any part of the principal debt under that agreement*".

3.6 Subsections 103(2), 103(3) and 103(4) 103 deal with the timing of calculation of interest and variable rates of interest and are not applicable to the present dispute. Subsection 103(5) provides for the statutory enactment of the *in duplum* – rule and provides no answer to the question of whether deferred initiation fees may attract interest.

3.7 Insofar as section 103(1) refers to separate rates of interest which may be charged on items other than the remainder of the principal debt, it confirms that the concept of interest is an obligation ancillary to the obligation to pay the principal debt.

3.8 Section 103(6) further provides that the Minister may "*make regulations prescribing the manner in which interest is to be calculated and disclosed for the purposes of this Act*".

3.9 The regulations which had been promulgated by the Minister in terms of the NCA, provide in Regulations 39 and 40 as follows under the heading "Interest and fees":

> "*39 In this Chapter [Chapter 5]*
>
> *(1) "Deferred amount" means any amount payable in terms of a credit agreement the payment of which is deferred and upon which interest is calculated, or any fee, charge or increased price is payable by reason of the deferment, and*
>
> *(a) the deferred amount includes …*
>
> *(iii) amounts referred to in section 101(1)(b).*
>
> *Interest calculation*
>
> *40(1) Interest may be calculated daily and may be added to the deferred amount monthly …*" (Other dates and time periods for the calculation of interest are then also provided for).

3.10 In respect of initiation fees, the following is regulated: "*41(1) Initiation fees may be levied on the date stipulated in the agreement but not earlier than the date of approval of the credit application*". Regulation 42(2) prescribes the maximum limits of initiation fees with separate provision for unsecured credit transactions, based on "*the amount of the agreement*" and

where "*the amount of the agreement is the amount deferred in terms of the agreement*".

3.11 Although Regulation 39 appears to be clear on the inclusion of an initiation fee in a "deferred amount" on which interest may be levied, the term "deferred amount" itself is susceptible to other meanings in the NCA. The mention of "deferred amount" in section 101(1) (a) of the NCA clearly implies the loan or credit amount itself, constituting the principal debt. This accords with Regulation 42 above, being the "amount of the agreement" or the "amount deferred in terms of the agreement", being the amount on which the initiation fee is calculated.

3.12 It has therefore rightly been said that "*numerous drafting errors, untidy expressions and inconsistencies make interpreting the Act a particularly trying exercise*". See: Nedbank Ltd v National Credit Regulator 2011 (3) SA 581 (SCA) at para [2] wherein the abolishment of the common-law *in duplum*- rule by section 103(5) insofar as it concerns credit agreements within the ambit of the NCA, was discussed.

3.13 The rules of interpretation of written documents, including legislation are trite. The "*current state of our law*" has been laid down in Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at par [18]; Botha-Batho Transport v S Botha & Seun Transport 2014 (2) SA 494 (SCA) at para [12] and Smyth and Others v Investec Bank Ltd and Another 2018(1)SA 494 (SCA) at paras [28] and [29]. It is this: whilst the starting point of interpretation is the words of the document or section to be interpreted, the process does not stop at the perceived literal meaning of the words used, be it by parties to a contract or by the legislator in enacting legislative provisions but the words must be considered in light of all

admissible and relevant context, including the circumstances in which the document came into being. In addition, every piece of legislation must be purposively interpreted. Such interpretation, in order to be in accordance with section 39(2) of the Constitution, must be in a manner that promotes the spirit, purport and objects of the Bill of Rights.

3.14 Regarding the purpose of the NCA, the NCR pointed out that section 2(1) of the NCA provides that it "*must be interpreted in a manner that gives effect to the purpose set out in section 3*". The NCR further relied on Sebola and Another v Standard Bank of South Africa Ltd 2012 (5) SA 142 (CC) where Cameron J at par [40] acknowledged that the main objective of the Act was to protect consumers. This is, however, not all that Cameron J said. The learned justice continued as follows in the same paragraph (by also referring to Section 3 of the NCA and Nedbank v NCR (supra)):

> "*The main objective is to protect consumers. But in doing so, the Act aims to secure a credit market that is competitive, sustainable, responsible and efficient. And the means by which it seeks to do this embrace balancing the respective rights and responsibilities of credit providers and consumers". These provisions signal strongly that the legislation must be interpreted without disregarding or minimizing the interest of credit providers*".

3.15 The balancing act sought to be achieved is illustrated in this matter by the parties' opposing contentions: on behalf of the NCR it was argued that the adding of interest on deferred payment of initiation fees would make the cost of unsecured credit too expensive for consumers while MFSA argued that by deferring payment of what would otherwise be an upfront charge, namely the initiation fee, without charging interest thereon, would be to

extend free credit into the market which would render the provision of unsecured credit prohibitively unattractive to lenders. This would then impact negatively on the poorest of consumers. No particulars or statistics were provided by the parties, but reading from the Regulations, one must bear in mind that the amounts per individual agreement are low: initiation fees start from R165.00 per agreement with marginal increases thereon per each R1000.00 borrowed, up to a maximum of R1050.00. What is in dispute in this application, is the right to levy interest on the amount of the initiation fee if it is deferred until it is paid. Insofar as balancing of interests go, the monetary implications are therefore rather marginal to each individual consumer but may be substantial for the lender, depending on the volume of consumers to which such credit and deferment is granted. The NCR's one-sided contention is therefore not justified.

3.16 The NCR's interpretation regarding the absence of a right to charge interest on deferred initiation fees, as set out in heads of argument delivered on its behalf, goes like this: in terms of Regulation 39(1) of the NCA, a deferred amount as defined therein, includes "*any obligation of the consumer that is deferred as per section 8(3) and section 8(4) of the Act*". Section 8(3)(b) in turn provides that any charge, fee or interest payable to the credit provider is in respect of "*any amount deferred as contemplated in paragraph (a)(ii)(aa)*". Section 8(3)(a)(ii)(aa) (being the aforesaid paragraph referred to) provides that, in terms of a credit agreement, "*a credit provider undertakes to defer the consumer's obligation to pay any part of the costs of goods and services*". This apparently constitutes the "principal debt". The NCR then argues that the inclusion of deferred fees in the "principal debt" as provided for in section 102 (1) of the NCA is limited to instalment sale agreements, mortgage arguments and secured

loans. The NCA therefore specifically excluded such inclusion in the case of short-term and unsecured loans.

3.17 There are multiple difficulties with this interpretation, which interpretation the NCR has included in a "circular" (with which I shall deal with hereunder) and which interpretation has been adopted in a finding by the National Consumer Tribunal, albeit by way of a default judgment, which was then considered to be one of a number of contraventions of the NCA which resulted in the cancellation of a credit provider's registration (the so-called Nceduluntu – matter pertaining to an unrelated credit provider who is not a member of either applicants). The interpretation does not, for example, address the express inclusion of amounts referred to in sections 101(1)(b) to 101(1)(g) inclusive, in Regulation 39 into the definition of deferred amounts. Furthermore, section 8 of the NCA (which includes section 8(3)(a)(ii)(aa) on which the NCR's argument hinges) deals with the classification and categories of credit agreements. Section 8(1) determines which agreements constitute credit agreements for purposes of the Act, while section 8(3) provides that certain agreements, irrespective of their form, will still constitute credit agreements if, *inter alia*, the payment for goods or services supplied, is deferred and "*any change, fee or interest is payable to the credit provider in respect of any amount deferred as contemplated in section 8(3)(a)(ii)(aa) …*" . The section therefore provides that certain agreements where payments are deferred constitute credit agreements but does not provide any answer to the question at hand, i.e. the levying of interest on a deferred initiation fee.

3.18 In his answering affidavits, the Minister does not expressly deal with the provisions of regulation 39 enacted by him, but argues that regulation 40(2)(b) read with regulation 40(2)(c) suggest an interpretation contrary to

that proposed by the applicants. All that regulation 40(2)(b) says is that interest may be added to the "deferred amount" periodically. Regulation 40(2)(c) provides that "*in the final month of a credit agreement, interest due may be added to the deferred amount on the final day of the agreement*". With all due respect to the Minister, this does not provide an answer to the question at hand. The Minister further expressed support for the interpretation mooted by the NCR and followed by the National Consumer Tribunal. Prior to this litigation, the NCR has set out its view in a "circular" published as circular No 15 of 2016. The relevant portion thereof reads:

> "*It has come to the attention of the National Credit Regulator that some credit providers include initiation fees in the deferred amount of unsecured and short term loans and levy interest on the deferred amount inclusive of the initiation fees. In terms of section 102 of the NCA, an initiation fee may be included in the principal debt deferred under an instalment agreement, a mortgage bond, a secured loan or a lease. Where the consumer is unable to pay an initiation fee up front on an unsecured or short term loan, the credit provider must reflect the initiation fee separately on the credit agreement and not charge interest on the initiation fee*".

3.19 As a result of this view, some of MFSA's members face investigation and possible prosecution, placing their registration as credit providers at risk.

3.20 The circular is, however, only an explanatory note or a non-binding opinion issued by the NCR in terms of section 16(b)(i) of the NCA. It does not determine the law nor is it binding on credit providers or the industry. It

furthermore disavows liability for any loss arising from reliance on its contents.

3.21 The circular correctly reflects that a credit provider may defer payment of the initiation fee, but provides no basis as to why that credit provider may not charge interest on the amount so deferred. The assumption of the respondents appear to the that a credit provider may only charge interest on the "principal debt", to which , in the case of short-term unsecured loans, a deferred initiation fee may not be added. But there is nothing in the NCA which supports this supposed prohibition. The only consequence of section 102 is that the deferred initiation fee must be treated as and remain a separate fee. Treating the deferred fee as separate from the principal debt does not mean that it may not attract interest. There is nothing in the NCA which suggests that it intended to deprive credit providers of interest on deferred amounts. In fact, the NCA permits interest, which is the "life-blood of finance" but seeks to limit and regulate it, by way of, for example, section 101(1)(d) and section 105(1)(a), which empowers the Minister to prescribes maximum rates at which interest may be charged. In my view, regulations 40(2) (providing for the charging of interest on deferred amounts) and 39(1)(a)(ii) (which defines deferred amounts as including initiation fees) put the issue beyond doubt. Initiation fees which are deferred may therefore attract interest.

3.22 Insofar as this interpretation has to be considered "purposively", one should give due consideration to the following: Should credit providers in this market be prohibited from charging interest on deferred initiation fees, they might refuse such deferment. The result would be that only those who can afford upfront payment of initiation fees would be able to procure

short-term or unsecured loans. This would limit the access to credit, one of the NCA's stated objectives.

3.23 Another stated objective of the NCA, set out in section 3(b) thereof, is to ensure consistent treatment of different credit products. The respondents' interpretation would also undermine this objective.

3.24 The interpretation of the NCA and its regulations contended for by the applicants is therefore the interpretation to be preferred in order to give a businesslike and purposive interpretation on the issue of the charging of interest on deferred initiation fees in the context of the NCA as a whole, in respect of short-term unsecured loans.

[4] The second issue: the pro rata issue

4.1 This issue concerns the question whether a credit provider is entitled to the full service fee of a credit agreement for the last month during which an agreement terminates or only a pro rata portion of that fee.

4.2 The starting point is that the NCA permits a credit provider to charge a service fee for a credit agreement. The provider may do so by levying the fee, in terms of section 101(a)(c) on a monthly, annual or per transaction basis.

4.3 These fees are charged in respect of the operational costs of the credit provider, such as rent, labour, communication, banking, processing of payments and other costs relating to the administration of a credit agreement. This is expressly so provided for in section 1 of the NCA read with Regulation 44(3).

4.4 When a credit agreement commences during the course of a month, Regulation 44 (4) provides that "*a service fee must be charged for a calendar month in which it is due and payable and on a pro rata basis where the credit agreement was concluded during the course of that calendar month*" (in terms of the amended formulation of this subrule with effect from 6 November 2015).

4.5 The regulations are silent as to what happens to a fee where the agreement terminates during the course of the last calendar month of the agreement's lifetime. The respondents say the fee must then similarly be pro rated. Furthermore, they argue that once the agreement has terminated, any entitlement by the credit provider to charge a fee, falls away.

4.6 Attractive though the respondents' arguments may be, they are not catered for by the wording of Regulation 44(4) which only deals with commencement or conclusion of agreements, and not with the termination thereof. It does not formulate a general principle of pro rating payment of a services fee. Had that been the intention of the Minister when he formulated the Regulations, there would have been no need to refer to the aspect of commencement of agreements. The reference to commencement only, makes it clear that that is the only time when the prescribed maximum service fee is to be applied pro rata.

4.7 MFSA furthermore indicated that the overhead costs incurred by its members in providing credit, are fixed and do not decrease when a credit agreement is terminated during the course of a month.

4.8 The applicants contend that, after the first month of a credit agreement, their members are entitled to charge the full maximum prescribed service fee per month for the lifetime of the agreement, including the calendar

month during which an agreement terminates. I find that there are no prohibitions against this contention contained in either the NCA or its regulations.

[5] Outstanding issues

5.1 Initially both the opposing respondents in their respective answering affidavits contended that the applicants should not be entitled to claim declaratory orders from the court. At the hearing of the matter, the Minister abandoned those points *in limine* in the interests of attaining clarity and finality. The Minister was commended for this stance by Adv Trengove SC who appeared for BASA, and rightly so.

5.2 On behalf of the NCR it was however still contended that MFSA has no *locus standi*, that neither applicant is entitled to seek declaratory relief in circumstances where there is no existing direct *lis* between the parties and that, in circumstances where neither the NCR's circular nor the National Consumer Tribunals' findings in the Nceduluntu-matter have been taken on review, those decisions or points of view should stand as definitive declarations of law.

5.3 I have dealt with the aspects relating to the NCR's circular and the Nceduluntu-matter above. Neither are binding nor definitive of the questions raised in this application. Where none of the applicants were involved in or parties to the Nceduluntu-matter, they could also hardly be expected to have taken that order obtained by default against another unrelated party on review or rescission. Insofar as *locus standi* is concerned, I am satisfied that both applicants have the necessary *locus standi* to represent their members and are entitled to approach the court to

prevent their members from inadvertently placing their registration as credit providers at risk.

5.4 Regarding the issue of entitlement to seeking declaratory orders: Section 21 (1) of the Superior Courts Act 10 of 2013 provides that a division of a High Court has the power "*in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination*".

5.5 The two-legged enquiry which a court must therefore undertake is to determine, firstly, whether the applicants are persons interested in existing, future or contingent rights or obligations and, secondly whether this application is a proper one for the court to exercise its discretion. See in this regard: Minister of Finance v Oakbay 2018 (3) SA 515 (GP) at [52] – [59].

5.6 As to the first enquiry, the members of both MFSA and BASA have committed themselves to practice credit providing within the parameters of the NCA. There exists a difference of interpretation between MFSA and BASA and its members on the one hand and the respondents on the other hand as to certain existing, future or contingent rights and obligations as permitted or prohibited in terms of the NCA. An example of this difference has lead to adverse consequences for at least one credit provider in similar circumstances as the applicants' members. The applicants, acting on behalf of or in protection of their members clearly are persons interested in obtaining clarity and finality as to the different interpretations. These are not mere legal opinions sought from this court, but declarations of rights which impact, not only on the short-term and unsecured lending market,

but also on the rights of consumers in need of or wishing to participate in that market. The determination of the correct interpretation of the NCA and its Regulations also impact on the NCR's administration of the NCA as well as on the approach of the National Consumer Tribunal in matters relating to loans in this sector of the credit market brought before it. Determination of the different interpretations therefore has a public interest element to it.

5.7 I therefore find that both legs of the enquiry as to the exercise of this court's jurisdiction have been satisfied in respect of the two issues discussed in paragraphs [3] and [4] above. Argument at the hearing also principally concentrated on these issues. In the relief sought by MFSA however, a declaration regarding an entitlement to interest on amounts other than deferred initiation fees is claimed. This is wider than the relief sought by BASA. On the papers there appears uncertainty as to what these other amounts, fees or charges or their extent would be. The Minister accused MFSA of not providing particularity in this regard. The absence of statistics and amounts make it difficult, if not impossible, to determine the impact of these contentions on consumers and the specific credit market. The required "balancing act" referred to earlier cannot therefore be performed. It seems further that the parties were to a large extent at cross-purposes with each other in dealing with this aspect: In the Minister's response to MFSA's founding affidavit, various scenario's were presented as examples of the impact of these contentions. They included calculations of the deferred monthly service costs and the costs of credit life insurance. In reply, MFSA disavowed the applicability of these costs. The costs of credit life insurance did not enter into the picture, it said and furthermore the majority of its customers paid the monthly service fees as they arose. In my view, in those instances where the monthly service fees are not paid on

time, no "deferment" is agreed upon, those payments are simply then in default as contemplated in section 103(1) read with Regulation 44(4). For these reasons, I decline to exercise the court's discretion for the consideration of a declaration in respect of this wider relief.

5.8 Insofar as the applicants are otherwise substantially successful, I find no reason to deviate from the customary rule that costs should follow the event. I also heard limited argument in respect of a previous recusal application which was not before me. There is some paucity of facts relating to that application and its merits and, in the exercise of my discretion, each party should pay its own costs thereof. No formal order is therefore required in that respect.

[6] Order:

1. It is declared that credit providers of short-term and unsecured loans may charge interest upon an initiation fee charged on such loans as allowed by the National Credit Act, 34 of 2005, where payment of such a fee is deferred in terms of a credit agreement.
2. It is declared that the pro rata charging of a service fee in terms of a credit agreement as provided for in Regulation 44(4) of the Regulations to the National Credit, Act 34 of 2005, applies only to the first calendar month during the course of which the credit agreement is concluded and the monthly service fee is not required to be charged on a pro rata basis for the calendar month in which the agreement terminates.

3. The first and second respondents are ordered, jointly and severally, to pay the applicants' costs of the application, including the costs of two counsel where so employed.

(electronically signed)
N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 04 May 2020

Judgment electronically delivered: 14 August 2020

APPEARANCES:

For the First Applicant:	Adv J G Bergenthuin SC
Attorney for the First Applicant:	Cilliers & Reynders Attorneys, Pretoria
For the Second Applicant:	Adv W Trengove SC together with Adv I Goodman
Attorney for the Second Applicant:	Werksmans Attorneys c/o Klagsbrun Edelstein Bosman De Vries incorporated
For the First Respondent:	Adv M C Erasmus SC together with Adv N Mbelle
Attorney for the First Respondent:	Dlamini Attorneys c/o Noko Ramaboya Mason Attorneys

For the Second Respondent:	Adv M S Baloyi SC together with Adv P Jara
Attorney for the Second Respondent:	The State Attorneys, Pretoria