IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: A355/18

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

10/09/2019
DATE

SIGNATURE

In the matter between:

LEWIS STORES (PTY) LTD	Appellant
and	
SUMMIT FINANCIAL PARTNERS (PTY) LTD	First Respondent
THE NATIONAL CONSUMER TRIBUNAL	Second Respondent
THE NATIONAL CONSUMER REGULATOR	Third Respondent

Neutral citation: Lewis Stores (Pty) Ltd v Summit Financial Partners (Pty) Ltd and Others

Coram: Molefe J and Khumalo AJ

Heard: 30 July 2019

Delivered: 10 September 2019

Summary: Appeal – National Consumer Regulator and Tribunal - Self referral of complaint in terms of S141 National Credit Act 34 of 2005 - Contravention of S102 of the National Credit Act - Appealability of section 148 (2) (b) of the NCA – Legal standing to prosecute in

terms of Section 136(1) of the NCA – Is the granting of leave to refer a 'decision'? - Test to be applied for leave to refer.

JUDGMENT

MOLEFE J

[1] This is an appeal by the appellant, Lewis Stores (Pty) Ltd ('Lewis'), against the whole decision by the National Consumer Tribunal ('the Tribunal'), to grant the first respondent, Summit Financial Partners (Pty) Ltd ('Summit'), leave to self-refer a complaint to the Tribunal in terms of section 141 (1) (b) of the *National Credit Act 34 of 2005* ('NCA')[1], save for the order as to costs.

Background

[2] On 16 September 2016, Summit laid various complaints against Lewis at the National Credit Regulator ('the Regulator'). The nature of the complaint was described on the prescribed form as being *'Charging delivery fees in contravention of the NCA'.*

[3] On 14 November 2017, and in terms of section 139(1)(a)[2] of the NCA, the Regulator issued a notice of non-referral in respect of Summit's aforesaid complaint. Summit then applied to the Tribunal for leave to refer the complaints. The Tribunal heard the application on 23 July 2018, and on 19 August 2018, granted Summit leave to refer the complaints to it.

[4] The Tribunal delivered a split decision. The majority made the following order:

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[1] "141 Referral to Tribunal – 1) If the National Credit Regulator issues a notice of non-referral in response to a complaint other than a complaint concerning section 61 or an offence in terms of this Act, the complaint concerned may refer the matter directly to –
(a). . .
(b) the Tribunal, with leave of the Tribunal".

[2] 139.(1) Upon initiating or accepting a complaint in terms of section 136, the National Credit Regulator may –
(a) issue a notice of non-referral to the complainant in the prescribed form, if the complaint appears to be frivolous or vexatious, or does not allege any facts which, if true, would constitute grounds for a remedy under this Act.

"45.1 Leave to refer the alleged contravention of section 100 (2) and section 102 (2) (c) of the NCA is granted; and

45.2 At this stage of the leave to refer, no order is made as to costs. A costs order will be considered if applicable, when the matter is finalized before the Tribunal"[3].

[5] The complaints that were levelled by Summit against Lewis and the reasons why the Regulator refused to refer these complaints to the Tribunal are as follows:

Complaint 1: contravention of section 102 (2) (a) and (b)

5.1 Lewis charges first-time credit consumers a compulsory delivery fee as a condition of entering into the credit agreement, regardless of the type of goods purchased[4]. This is a contravention of section 102 (2) (a) and (b) of the NCA as the consumer has no option but to choose Lewis to arrange for delivery of goods purchased on credit, and to pay its delivery fee.

5.2 The Regulator confirmed that it was compulsory for all first-time credit consumers to pay the delivery fee. This was allegedly justified in terms of section 60 (2) of the NCA, in that it formed part of Lewis' risk mitigation strategy. It was further decided that the consumer had a choice of whether or not to enter into the credit agreement[5].

Complaint 2: contravention of section 100 (2)

5.3 Lewis discriminates against credit consumers by forcing them to pay a delivery fee, and by only offering discounts on delivery fees to cash customers, and this is in contravention to section 100 (2) of the NCA.

5.4 The Regulator found that Lewis did not charge cash and credit customers different prices.

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[3] Record page 512, para 45.
[4] Record, Volume 1, pages 16 and 17
[5] Record Volume 1, pages 12 and 13

Complaint 3: contravention of section 102 (2) (c) (i) and (ii)

5.5 Lewis' delivery fees are unreasonable and not in accordance with the fair market value of service. The manner in which Lewis calculates and charges delivery fees has no relation to the size of goods, the distance travelled, the costs to Lewis or the actual service rendered. This is in contravention of sections 102 (2) (c) (i) and (ii) of the NCA.

5.6 The Regulator found that in assessing fair market value, regard should be had to the running costs of a motor vehicle, labour and delivery service[6].

[6] This appeal involves primarily a consideration of the following issues:

6.1 Is the granting of leave to refer the complaints appealable?[7]

6.2 Does Summit have the necessary standing?

6.3 What test should be applied for leave to refer and does Summit have reasonable prospects of success?

Appealability – section 148 (2) (b) of the NCA

[7] Section 148(2)(b) is germane in the present context as it deals with appeals from hearings conducted by full panels of the Tribunal. The relevant part of this section provides:

"(2) Subject to the rules of the High Court, a participant in a hearing before a full panel of the Tribunal may -

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[6] Record Volume1, pages 12 and 13

[7] When Lewis lodged the appeal, Summit launched an application in terms of rule 30 of the Uniform Rules of Court to declare the Notice of Appeal an irregular step and to have it set aside. By agreement between the parties, this application was withdrawn and it was agreed that the issues of whether an appeal is competent would be argued at the hearing of the appeal. The costs of the rule 30 application would be dealt with at the appeal.

(a) . . . or

(b) appeal to the High Court against the decision of the Tribunal in that matter, other than a decision in terms of section 138 or section 69 (2) (b) or 73 of the Consumer Protection Act, as the case may be".

[8] The right to appeal a decision of the Tribunal is thus unqualified, other than in respect of a decision in terms of section 138 of the NCA (consent orders)[8], or the two specified sections of the *Consumer Protection Act 68 of 2008*, neither of which is relevant in the present context.

[9] Summit's counsel submitted that in granting leave to refer, the Tribunal made no final determination on the merits of the matter, and in this regard, he referred us to paragraph 24 of the judgment:

> "The Tribunal is merely assessing whether the applicant has made out a case that should be considered by the Tribunal[9].

Counsel argued that there has been no final determination of any issue in this matter, and that during the eventual hearing of the complaints, and only after evidence and argument have been presented, will the final determination be made. Consequently, Lewis is not entitled to appeal against the granting of leave to refer in terms of an order issued on 23 August 2018, as the proceedings on 23 July 2018 (for leave to refer) were not a hearing, but merely a consideration of whether a hearing should be allowed.

[10] It was further argued that the granting of leave to refer is not a 'decision'. Counsel referred us to *Herbert Porter and Another v Johannesburg Stock Exchange*[10] wherein it was stated:

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[8] Although consent orders would appear to be appealable if granted by a single member of the Tribunal pursuant to section 142 (3) (b).

[9] Volume 6, page 507, line 21.

[10] *1974 (4) SA 781 (WLD) at page 794 A-B.* See also *Rikhoto v East Rand Administration Board 1983 (4) SA 278 (WLD) at 287 D-F*

"In Words and Phrases Legally Defined, vol.2 at p33, s.v. "decision", the following extract from a judgment is given which I think, respectfully is very apt:

'The word 'decision' implies the exercise of judicial determination as the final and definite result of examining a question' ".

Counsel for Summit contends that as there had not been a final determination in the current matter, the granting of leave to refer to Summit is not a 'decision' for purposes of section 148 (2)(b). In our view this contention is misconceived.

[11] Section 148(2)(b) of the NCA gives a clear and express wording of when an appeal is permissible. An appeal lies against a decision of the Tribunal, provided only that (i) the appellant was a participant in a hearing before a full panel of the Tribunal, and (ii) there is a decision of the Tribunal. Those are the only two jurisdictional requirements for the prosecution of an appeal under section 148(2)(b), and in our view, both requirements are manifestly fulfilled in the present case.

[12] The decision of the Tribunal, which is the subject matter of this appeal, is as a fact, final in nature and not preliminary. The question of whether Summit is to be permitted under section 141(1)(b) to self-refer the complaint which the Regulator had decided not to refer, is final and binding. The decision cannot be reconsidered or revisited at a later hearing. In our view, it is a 'decision' as there was an exercise of judicial determination, as the final and definite result of examining a question[11]. That decision could also not be undone at a later stage as the hearing of the complaint would have taken place. We are therefore satisfied that the decision of the Tribunal to grant leave to Summit to self-refer a complaint to the Tribunal, is appealable as prescribed by section 148(2)(b) of the NCA.

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[11] *Herbert Porter supra*

Does Summit have the necessary standing and/or legal interest to prosecute the complaint?

[13] Section 136(1) of the NCA states:

> "Any person may submit a complaint concerning an alleged contravention of this Act. . . to the National Credit Regulator in the prescribed manner or form".

[14] In terms of section 141(1), where a notice of non-referral is issued, 'the complainant concerned' may refer the matter directly to the Tribunal, with leave of the Tribunal. 'Complainant' is defined as 'a person who has filed a complaint in terms of section 136 (1)'.

[15] Counsel for Lewis argued, that leave to refer should not have been granted because Summit does not have a direct and substantial interest in the prosecution of the complaint. It was further argued that Summit is unable to show the sufficiency and directions of its interest in the proceedings, and the claim it seeks to prosecute. Furthermore, as Summit accepts that the matter does not affect its rights, it must demonstrate that it is acting on the authority of the entity (or person) with rights, or has acquired its (or their) rights. It is argued that Summit is unable to show any of this. Lewis contends that the question is whether in all circumstances, Summit should be granted leave to prosecute the complaint before the tribunal.

[16] Summit's submission is that it prosecutes the complaint in order to vindicate the public interest or at least in the interests of the public at large.

[17] The Tribunal in paragraph 23 of its judgment stated as follows:

> "From these provisions, it is clear that any person (which includes a juristic person), is entitled to refer a complaint of prohibited conduct to the NCR, and if the NCR issues a notice of non-referral, that complainant may make an application for the matter to be heard by the Tribunal. Nothing in the NCA precludes the applicant from making this application. The question that

remains is whether the Tribunal has a discretion to grant leave to refer, and whether it should grant that leave".

[18] In its heads of argument, Lewis has a lengthy argument relating to Summit's standing and its reliance on authorities dealing with the common law as it applies in civil actions in our courts. In particular, Lewis argued that, the NCA must be construed to retain the common law position that requires a complainant to demonstrate a direct and substantial interest in the proceedings it seeks to institute. In our view, the presumption that legislation does not alter common law any more than it is necessary, simply does not arise. Sections 136 and 141(1) of the NCA, read in their statutory context, provide the answer to Lewis' attack on Summit standing.

No personal interest

[19] It is undisputed, and was thus correctly found by the Tribunal that the outcome of the complaint will not benefit Summit's own interest in any way. Summit is not a customer or a potential customer of Lewis or any other similar retailer. It is a private company which has been registered as an alternative dispute resolution (ADR) agent under section 134A or the NCA.

[20] Counsel for Lewis argued that Summit cannot therefore sustain a case for standing in its own interest, whether under the common law nor under the Constitution of South Africa. The outcome of the complaint referral in relation to Summit, it is argued, would be abstract and academic.

Importance of the matter

[21] When Summit motivated its application for leave to self-refer, it contended that the matter '*will have far-reaching implications on credit providers and consumers alike*' and, because Lewis consumers are middle to low income earners, '*will have a direct impact on historically disadvantaged consumers*'.

[22] Lewis submitted in its heads of argument that, Summit is neither a creditor provider nor a consumer and contended that the fact that Summit is certified as an ADR agent, it is precluded from pursuing this matter by its ADR certification, which provides that Summit must not initiate or participate in any court litigation on behalf of consumers. In our view, this contention is without merit. Summit has not initiated or participated in any court litigation on behalf of consumers. It has done so in its own name, as a complainant in terms of the NCA.

Non-joinder of parties with direct and substantial interest

[23] Lewis also argued that no actual customer of Lewis has been cited in the application, and that the parties with direct and substantial interest in a matter should have been joined, as it is inappropriate to allow a complainant, with no personal interest in the outcome of the complaint, to prosecute the complaint in the absence of the persons or entities actually affected. It was argued that doing so would expose the credit provider to the potential of a multiplicity of claims, and that Lewis would not be able to rely on the principles of *res judicata* or issue estoppel as the *lis* would not be between the same parties. In this regard counsel for Lewis relied on *Prinsloo No and Others v Goldex 15 (Pty) Ltd and Another*[12].

[24] In our view, the argument based on mis-joinder is misguided. There is no requirement of joinder in the NCA in the circumstances in question. The provisions of the NCA dealing with procedural matters indicate that the Tribunal is largely in control of the process before it, and various parties as set out in section 143 have a right to participate in the hearing.

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[12] *2014 (5) SA 297 (SCA) at para 23, where Brand JA stated as follows: "In our common law the requirements of res judicata are three fold: (a) same parties; (b) same cause of action; (c) same relief. The recognition of what has become known as the issue of estoppel did not dispense with this threefold requirement. But out courts have come to realise that rigid adherence to the requirements referred to in (b) and (c) may result in defeating the whole purpose of res judicata. That purpose, so it has been stated, it to prevent repetition of lawsuits between the same parties, the harassment of the defendant by a multiplicity of actions and the possibility of conflicting decisions by different courts on the same issue. (See e.g. Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A) at 835 G). Issue of estoppel therefore allows a court to dispense with the two requirements of same cause of action and same relief, where the same issue has been finally decided in previous litigation between the same parties".*

[25] It is not in dispute that the 'NCA has cast the net so widely so as to allow any person to lodge a complaint'[13]. This conclusion is consistent with the clear language of section 136 (1). It would be artificial to then limit the application of sections 136 and 141(1)(b) in the manner proposed by Lewis. Furthermore, as the NCA is a creature of statute, it is not empowered to add jurisdictional requirements that do not appear in its enabling statute.

[26] Once it is conceded that Summit could initiate a complaint, and that Summit as the complainant concerned can then apply for leave to refer, then there is no basis on which it could be argued that, the leave to refer should not be granted because Summit does not have a direct and substantial interest in the prosecution of the complaint. This 'third' requirement (direct and substantial interest), does not appear in the NCA. If the legislature contemplated a direct and substantial interest to prosecute a complaint, being the third requirement to be considered in terms of section 141(1)(b) of the NCA, then the legislature would have said so.

Reasonable Prospect of Success and Test to be Applied

[27] It has been held in numerous decisions that the Tribunal, in order to grant leave, must be satisfied that:

27.1 there are reasonable prospects of success for the referral; and

27.2 the matter is of substantial importance to the parties[14].

[28] This test was imported from the judgment in the Appellate Division in *Westinghouse Brake Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*[15] ('Westinghouse'). This matter dealt (*inter alia*) with the requirements for an application for leave to appeal. The

[13] Appellant's heads of argument, para 76 and record volume 5, page 434.
[14] *Makkink v Accordian Investments (Pty) Ltd NCT/8473/2013/75; Chauke v Standard Bank of South Africa Ltd NCT/4658/141 (1) (b); Mojela v Vodacom Ltd NCT/27635/2015/75 (1) (b) CPA*
[15] *1986 (2) SA 555 (A) (in particular 560G-560J and 561F-561G)*

requirements for an application for leave to appeal are obviously different from the requirements for an application for leave to refer a complaint to the Tribunal.

[29] Counsel for Lewis submitted that the Tribunal, in considering the question as to whether Summit enjoyed reasonable prospects of success, applied the incorrect test and that this argument is based on the Tribunal judgment that stated as follows in this regard:

> "The second question, as to the reasonable prospects of success must be answered. And this must be by considering whether the substance of the applicant's complaint falls within the ambit of the NCA: without deciding on the merits of the matter. There must be sufficient facts which will bring the complaint within the ambit of the Act, and it cannot be that a matter is referred to the Tribunal; which necessitates a fishing expedition to establish the facts"[16].

[30] Lewis agrees that any complaint must relate to the NCA and also reflect sufficient facts to be capable of sustaining a claim against the respondent. However, it argues that a determination of whether the substance of the complaint falls within the ambit of the NCA is not a determination of reasonable prospects of success, as it involves a lower and much lighter test, concerned simply with the Tribunal's jurisdiction. It is submitted that in determining Summit's referral application, the Tribunal therefore adopted the incorrect test.

[31] It is further contended that in fact, Summit has poor prospects of success on the various issues that, had the Tribunal applied the correct test, it would have held as much.

[32] In essence, the Tribunal in its application of *Westinghouse*, has redefined 'prospects of success' to be a determination as to whether the complaint under consideration is a cognisable claim which may be adjudicated by the Tribunal. Thus the discretion in granting leave to refer is narrower than what was contemplated in *Westinghouse*, and a detailed examination of the merits is not required.

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[16] Record volume 6, page 508, para 30

[33] Before the Tribunal can fully consider the merits of the complaint, it must first grant leave to refer to the complainant. Only thereafter, can it proceed to hear and consider the merits of the complaint. When the Tribunal considers an application for leave to refer, it does so, without access to all of the evidence that will eventually be considered at the actual hearing.

[34] However, in the application for leave to appeal, the presiding judge who must determine the application for leave to appeal, has already heard all the evidence, considered all the legal argument and written a considered judgment on the matter. Only thereafter, and having impartially considered all the above-mentioned aspects, then the Judge determines whether or not there are 'prospects of success' in a subsequent application for leave to appeal[17].

[35] It is obvious that the position of a Judge hearing an application for leave to appeal is markedly different from the position of the Tribunal considering an application for leave to refer.

[36] The process it that the complainant files a complaint with the NCR in terms of section 136 of the NCA. Should the NCR not regard the matter as frivolous, vexations or without merit in terms of section 139(a), the NCR may choose to investigate the complaint. During the course of the NCR's investigation, the credit provider will inevitably make oral and written representations to the NCR, and provide further evidence, in an attempt to convince the NCR not to refer the complaint to the Tribunal. Upon completion of the investigation, the NCR may refer the matter to the Tribunal, issue a notice of non-referral or refer the matter to the National Prosecuting Authority. Should the NCR after completion of its investigation, be of the view that the complaint is not sustained, as was the case in this matter, it must issue a certification of non-referral.

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[17] Record volume 4, page 322, para 5.4.

[37] Throughout this entire process, the NCR is not required to consult or inform the complainant of the evidence that the NCR obtained, nor the submissions made by the credit provider. The NCR is not obliged to provide disclosure of the facts upon which the notice of referral is based.

[38] In our view, it is procedurally unfair to allow an opportunity for a credit provider, with the assistance of his legal representatives, to consider and to respond fully to the complaint and the investigation of the NCR, but not provide the complainant with the right to reply. This is not consistent with the rules of natural justice. The only way that this procedural unfairness can be addressed is by accepting that the 'prospect of success' must be narrowly interpreted. If a cognisable claim has been presented, then leave to refer should be granted.

[39] The term 'cognisable claim' is defined as 'one that meets the basic criteria of viability for being tried or adjudicated before a particular tribunal'[18]. The test of a cognisable claim has been applied by implication by the Tribunal, in numerous decisions under the guise of 'prospect of success'. The Tribunal's past enquiries into the prospect of success (or cognisable claim), were in fact evaluation of complaints on the basis of their viability. Such evaluations did not entail a qualitative assessment into the merits. This is evident from the following decisions:

39.1 *Makkink v Accordian Investments (Pty) Ltd; Mojela v Vodacom and Papier Trading v Buildmart Trading*[19], where it was held that there were no prospects of success because the CPA was not applicable to the transaction in question. Simply put, the Tribunal did not have jurisdiction to adjudicate on the matter.

39.2 *Shadrack v House and Home*[20] where it was held that there were reasonable prospects of success because the *Consumer Protection Act*[21] ('CPA') was applicable

[18] Oxford English Dictionary
[19] NCT/8473/2013/75/ 1 at page 16 para 49
[20] NCT 33263/2015/75 (1) (b) CPA at para 34
[21] Act No 68 of 2008

and the Tribunal was satisfied that the applicant had laid a foundation for a complaint.

39.3 *Motswai v House and Home,*[22] where the reasonable prospects of success were found to be non-existent as the referral to the NCC was made after the three year period referred to in section 116 of the CPA.

[40] Despite relying on *Westinghouse* again[23], the actual approach by the Tribunal cannot be faulted. It is clear that the Tribunal *in casu* was actually focused on whether a cognisable claim existed or not. We are satisfied that the Tribunal applied the correct test in determining Summit's reasonable prospect of success. Before a Tribunal can hear the merits of the application brought in terms of section 141(1) of the Act, it first makes a determination whether to grant the complainant leave to refer the matter directly to it or not. Once this has been determined, then the Tribunal can proceed to hear the merits of the matter.

[41] We now turn to consider the complaints against Lewis.

Complaint 1 – Compulsory Delivery Fees

[42] Summit takes issue with the fact that Lewis' delivery fees were '*mandatory for first-time credit consumers as a means to manage their risk. . . by confirming the consumers' address*', and that a compulsory delivery fee for first-time credit consumers contravened sections 102(2)(a) and (b) of the NCA,[24] and also not justified by section 60(2) thereof (on which Lewis has relied.

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[22] NCT 33263/2015/75 (1) (b) at para 45

[23] Record volume 6, page 507, para 25

[24] "102 Fees or charges

(1) . . .

(2) A credit provider must not –

(a) Charge and amount in terms of subsection (1) unless the consumer chooses to have the credit provider act as consumer's agent in arranging for the service concerned;

(b) Require the consumer to appoint the credit provider as the consumer's agent for the purpose of arranging any service mentioned in subsection (1); or

[43] In terms of section 102(2)(a) of the NCA, a credit provider cannot charge a delivery fee, unless the consumer has chosen the credit provider to arrange for delivery. The entitlement of a credit provider to charge a delivery fee is subject to the *proviso* in terms of section 102(2)(b), in terms of which the credit provider cannot force the consumer to appoint the credit provider to arrange for (and consequently perform) delivery. Consumers should not be obliged to purchase ancillary services from third parties from whom the credit provider earns commission at the consumer's expense.

[44] Lewis in its reply to the NCR, relies on section 60(2) of the NCA, which permits a credit provider to refuse to enter into a credit agreement with any prospective credit consumer on reasonable commercial grounds. Counsel for Lewis argued that the Tribunal did not address or even consider whether on the undisputed facts, Summit had made out a case for an alleged contravention of sections 102(2)(a) and (b). There was no consideration whatsoever of whether Summit's interpretation of section 102 and 60 (2) was sustainable let alone had prospect of success.

[45] Section 60(2) applies to "prospective consumers", which means that any right of refusal (and protection afforded by section 66), applies at the pre-contractual stage. It does not apply to actions and considerations that occur after the agreement has been entered into. A credit provider can refuse to provide credit where it considers that person to be a credit risk. It does not entitle a credit provider to make the granting of credit, conditional upon contracting for a compulsory service, such as delivery fee to minimize that risk.

[46] The consideration of a consumer's credit risk, forms part of the affordability assessment that a credit provider must conduct prior to entering into a credit agreement[25]. The confirmation of a consumer's residential address would form part of this assessment and process. The verification of the address could realistically take place only after the

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(c) . . . "

[25] The failure by a credit provider to conduct an affordability assessment would render the extension of credit automatically reckless in terms of section 80 (1) of the NCA

contract has already been concluded. This would mean that, Lewis, having entered into the credit agreement, would have waived its 'right to refuse credit' in terms of section 60(2).

[47] Lewis' argument that the delivery fees are not compulsory, as a first time credit consumer has a choice as to whether he/she wants to enter into a contract or not, is in our view fundamentally misconceived. It ignores the protection afforded to the customer by the NCA, and also ignores the interaction between section 60 (2) and 66 (which prohibits a credit provider from discrimination directly or indirectly against a consumer who seeks to uphold a right afforded to it in the NCA).

[48] In our view, once the complaints are referred to the Tribunal, it will provide clarity on this practice of charging compulsory delivery fees and the Tribunal will properly consider the interpretation of sections 102, 100, 60 and 66 of the NCA insofar as they pertain to the conduct of Lewis.

Complaint 2 – delivery fees in excess of fair market value

[49] Section 102(2)(c) of the NCA states that a credit provider must not charge a consumer an amount in excess of the fair market value of the service.

[50] Summit contended that Lewis' delivery fees were in excess of the fair market value of the service and therefore in contravention of section 102(2)(c). Summit submitted that the delivery fees that is charged by Lewis, has no conceivable relation to the size of the item to be delivered, the distance travelled to deliver the goods, the cost incurred to deliver the goods and the ancillary services that are provided as part of the delivery.

[51] The reason given by the NCR for not referring this complaint is simply stated:

> "The Act does not prescribe the maximum amount that may be charged for delivery, but only that it must be based on the fair market value if the service is provided by the credit provider directly without paying a third party. In assessing the fair market value, consideration should

be given to issues such as the running costs of a motor vehicle, the labour involved in operating the vehicle and the delivery service. The investigation did not reveal that Lewis was charging its cash credit consumers different delivery fees"[26].

[52] Counsel for Summit argued that there is no indication that the NCR conducted its own investigation on *'the running costs of a motor vehicle, the labour involved in operating the vehicle and the delivery service'*, nor any indication that this is in fact how Lewis calculates its fair market value. Summit further submitted that Lewis' delivery fees are immensely profitable and are referred to as 'profit maker', and are aggressively marketed to consumers as the delivery fees make massive profits for Lewis. It is on this basis that it is argued that the delivery fees are inconsistent with a fair market value.

[53] Lewis's contention is that, the fact that the presiding member of the Tribunal in the minority judgment, was unwilling to grant leave to self-refer the complaint related to delivery fees purportedly charged in excess of market value, indicates that the complainant failed to advance facts to support this allegation. It is argued that Summit's complaint in this regard, is simply speculative and vexatious and that the costs calculation of the delivery service is complex.

[54] In our view, the NCR's failure to provide any meaningful finding in respect of this complaint, coupled with the "complexity of the costs calculation", shows Summit at the very least, have a cognisable claim. As set out above, Summit at this stage, only has to demonstrate a cognisable claim, and we are satisfied that it did.

Complaint 3 – discrimination against credit customers

[55] Summit contended that credit customers were discriminated against in contravention of section 100(2) of the NCA, by virtue of being charged a delivery fee while cash customers are not.

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[26] Record volume 1, page 13 para 10

[56] Lewis contends that if discounts were given, then it would not be in the ordinary course of business[27]. In the same breath, Lewis stated that both cash and credit customers are entitled to negotiate a discount on delivery fees and have on occasion, granted discounts for both cash and credit customers. It is strange that on the one hand Mr. Woollam had provided evidence of discounts being provided on delivery fees taken up by cash customers. Lewis on the other hand, failed to provide any example of a credit customer having been given a discount on the compulsory delivery fee.

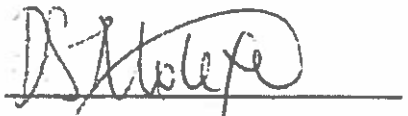
[57] The purpose of section 100(2) is to prevent credit providers from artificially increasing the cost of credit. It is imperative that the Tribunal should consider the alleged contravention of section 100(2), as there are sufficient facts to justify a conclusion of discrimination in terms of section 100(2) of the NCA.

[58] For the reasons stated above, the appeal should be dismissed.

[59] I therefore make the following order:

1. *The appeal is dismissed with costs, including costs of two counsel.*

2. *Wasted costs occasioned by the withdrawn rule 30 application to be awarded to the appellant.*



D S MOLEFE

JUDGE OF THE HIGH COURT

[27] Record, volume 3, page 292, para 30.5

I agree.

M P KHUMALO

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Appellant	:	Adv. Paul Farlam SC
	:	Adv. Doron Goldberg
Instructed by	:	Friedland Hart Solomon & Nicolson
Counsel on behalf of 1st Respondent	:	Adv. John Newdigate SC
	:	Adv. H Naude' de Wet
Instructed by	:	Fritz Attorneys
Date of Hearing	:	30 July 2019
Date of Judgment	:	10 September 2019