



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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National Credit Regulator v Dacqup Finances trading as ABC Financial Services Pinetown and Another (382/21) [2022] ZASCA 104 (24 June 2022)

Today the Supreme Court of Appeal (SCA) handed down a judgment upholding, with costs, an appeal against the decision of the Gauteng Division of the High Court, Pretoria (the high court).

The issue before the SCA concerned the question of what constituted a sufficient trigger for the appellant, the National Credit Regulator (NCR) to initiate a complaint into alleged contraventions of the National Credit Act 34 of 2005 (the NCA).

In 2018, during a 'scouting exercise', an NCR inspector noticed a signboard outside Dacqup's premises advertising 'instant loans'. This aroused the inspector's suspicion for a variety of reasons. If the loans were 'instant', it would be difficult to comply with the onerous affordability assessments required by the NCA. Conversely, if they were not 'instant', the advertisement breached the NCA's prohibition on misleading and deceptive advertising of credit. Posing as a potential customer, the inspector entered the premises to inquire about a prospective loan. Upon enquiry about the interest rate, the inspector was informed that an interest rate of 30% per month was levied on short-term loans, which amount far exceeded the statutory maximum permissible.

Following this, the NCR initiated a complaint against the first respondent (Dacqup), which is a registered credit provider. The complaint was considered by the second respondent, the National Consumer Tribunal (the Tribunal). The Tribunal found that Dacqup had contravened various sections of the NCA and had engaged in repeated prohibited conduct. It ordered Dacqup to pay a fine and that all Dacqup's credit agreements for a certain period be assessed by an independent auditor. Dacqup successfully appealed against those orders in the high court. However, the high court did not consider the merits of the appeal, as it found in favour of Dacqup on a point in limine.

The SCA held that the NCA afforded the NCR certain investigative and referral powers. Once a complaint had been initiated by either the NCR or any other person in terms of s 136 of the NCA, the NCR may direct an inspector to investigate the complaint, and appoint others to assist. Relying on the provisions of the NCA, the SCA held that at any time during the investigation the NCR may summon a person to appear under oath before the NCR, or subpoena any document, provided that no self-incriminating evidence would be admissible in a criminal trial. Moreover, the SCA held that as part of its mandatory enforcement functions, the NCA mandated the NCR to attend to monitoring the consumer credit market to ensure that prohibited conduct was prevented or detected and prosecuted.

Furthermore, the SCA found that the initiation of a complaint was an earlier point than the start of the investigation. According to the SCA, it merely triggered the investigation, which may or may not result in a referral to the Tribunal. The SCA further held that the approach taken by the high court conflated the notion of a reasonable suspicion with prima facie evidence. As our courts had repeatedly stated, a reasonable suspicion contemplated a lesser burden than that of prima facie evidence. Hence, the SCA

held that to require an inspector to actually obtain a loan in order to establish unlawful conduct would be tantamount to requiring prima facie proof.

The SCA held that the concept of 'reasonable suspicion' was commonplace in our law. Whether the suspicion was reasonable was objectively determined. In addition, the SCA held that it would be wholly incorrect to confine reasonable suspicion to what was set out in the memorandum of the inspector. According to the SCA, hearsay evidence was sufficient to ground a reasonable suspicion. These suspicions were set out in the memorandum of the inspector and amplified in the NCR's founding affidavit. As a result, the SCA held that in all the circumstances, it was satisfied that the NCR had shown that it had a reasonable suspicion to initiate an investigation into the activities of Dacqup.

Regarding the issue of appointing an auditor, the SCA held that Dacqup had now accepted that an auditor should be appointed to assess the extent of overcharging and the amount to be reimbursed to consumers. As Dacqup only objected to that part of the order requiring it to bear the cost of the auditor, contending that the NCR should bear the cost, this aspect need not be remitted to the high court for determination.

Relying on case law, the SCA held that there were several cases where an order had been made that an entity appoint an independent auditor to ascertain the extent of an unlawfully obtained profit. The SCA held that implicit in these orders was that the relevant entity was to pay the costs of the auditor. Hence, the SCA found that there was no reason why cases involving the NCR should be any different, especially bearing in mind the wide-ranging powers afforded to the Tribunal in making any appropriate order in relation to prohibited conduct. Finally, the SCA held that the appeal must succeed

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