THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 475/2024

In the matter between:

THE NATIONAL CREDIT REGULATOR **APPELLANT**

and

FIRST GROUP INVESTMENT HOLDINGS (PTY) LTD **FIRST RESPONDENT**

THE NATIONAL CONSUMER TRIBUNAL **SECOND RESPONDENT**

Neutral citation: *National Credit Regulator v First Group Investment Holdings (Pty) Ltd and Another* (475/2024) [2026] ZASCA 67 (11 May 2026)

Coram: MAKGOKA, MOKGOHLOA, MATOJANE, GOOSEN and KATHREE-SETILOANE JJA

Heard: 25 August 2025

Delivered: 11 May 2026

Summary: National Credit Act 34 of 2005 – nature of proceedings before National Consumer Tribunal – appeal from the Tribunal to the high court in terms of s 148(2)*(b)* of the Act

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Millar J and Ally AJ concurring, sitting as court of appeal in terms of s 148(2)*(b)* of the National Credit Act 34 of 2005):

1 The appeal is upheld with no order as to costs.

2 The order of the High Court is set aside and replaced with the following:

'The appeal is struck from the roll.'

JUDGMENT

Makgoka JA (Goosen concurring):

[1] The appellant, the National Credit Regulator (the Regulator), appeals against an order of the Gauteng Division of the High Court, Pretoria (the High Court). The High Court upheld an appeal to it by the first respondent, First Group Investment Holdings (Pty) Ltd (First Group). First Group's appeal to the High Court was against an order of the second respondent, the National Credit Tribunal (the Tribunal), which dismissed First Group's preliminary defences. The appeal is with the leave of this Court.

The parties

[2] The Regulator is a statutory juristic body established under s 12 of the National Credit Act of 34 of 2005 (the NCA). Its enforcement functions are outlined

in s 15 of the Act. It must, among other duties: (a) promote informal resolution of disputes arising under the NCA between consumers, on the one hand, and a credit provider or credit bureau, on the other; (b) receive complaints concerning alleged contraventions of the NCA; and (c) investigate alleged contraventions of the Act. In terms of s 15(*i*), the Regulator may refer matters to the Tribunal, and appear before it pursuant to s 15(*j*).

[3] The Tribunal is a statutory adjudicatory body established under s 26 of the NCA. In terms of s 27 of the NCA, the Tribunal is empowered to: (a) adjudicate applications referred to it regarding allegations of 'prohibited conduct' by determining whether such conduct has occurred. Upon considering such applications, the Tribunal may make any orders provided for in the NCA.

[4] First Group is registered as a credit provider with the Regulator. It operates a holiday-time sharing or shared vacation ownership scheme. It owns or has the rights to use holiday or leisure properties such as hotels, resorts, and lodges. Consumers can access these properties for vacation purposes by joining a 'holiday club' established by First Group, which they can do by paying certain fees. The agreements concluded between First Group and consumers pursuant to this time-share scheme are subject to the NCA.

Factual background and litigation history

[5] The Regulator's compliance department conducted a routine compliance monitoring exercise on First Group's credit-granting business activities. It provided the Regulator with information that First Group was likely engaged in prohibited conduct as envisaged in the NCA. 'Prohibited conduct' is defined in s 1 of the NCA

as ‘an act or omission in contravention of this Act, other than an act or omission that constitutes an offence under this Act, by –
(a) an unregistered person who is required to be registered to engage in such an act; or
(b) a credit provider, credit bureau or debt counsellor . . .’.

[6] Based on this information, the Regulator investigated First Group's business activities. It then referred the matter to the Tribunal in terms of s 140(1)*(b)* read with s 140(2)*(b)* of the NCA (the referral application). The sections, in essence, provide that after completing an investigation, the Regulator may refer the matter to the Tribunal if it believes that the person or entity investigated has engaged in prohibited conduct.[1]

[7] The Regulator filed, amongst others, the prescribed NCR Form 32, an investigator’s report compiled by Mr Thinandavha Phalanndwa, and an affidavit deposed to by Ms Leanne Schwartz. In her affidavit, Ms Schwartz described her position as the Regulator’s Acting Manageress in the Investigations and Enforcement Department. She stated that she had been authorised by the Regulator’s Chief Executive Officer to make the referral to the Tribunal. In her affidavit, she alleged that First Group had engaged in multiple acts or omissions, in contravention of the NCA. These included that First Group had likely: (a) failed to conduct proper affordability assessments on the consumers as prescribed in the NCA and its

1.Section 140 of the NCA stipulates in relevant parts as follows:
‘Outcome of complaint
(1) After completing an investigation into a complaint, the National Credit Regulator may-
(b) make a referral in accordance with subsection (2), if the National Credit Regulator believes that a person has engaged in prohibited conduct;
(2) In the circumstances contemplated in subsection (1)(b), the National Credit Regulator may refer the matter-
(b) to the Tribunal.’

regulations; (b) levied costs of credit that exceeded the prescribed maximum allowed in terms of the NCA and its regulations; and (c) levied unlawful fees and failed to comply with the statutory reporting requirements.

[8] Consequently, the Regulator sought an order from the Tribunal that First Group had engaged in reckless lending. As a sanction for the alleged contraventions, the Regulator requested the Tribunal to impose an administrative penalty on First Group. In substantiation of its case, the Regulator relied on an investigation report by Mr Phalanndwa, which was attached to the founding affidavit in the referral application. It also relied on attachments to that report, which essentially documented ten instances in which First Group approved credit agreements.

[9] First Group opposed the referral and delivered an answering affidavit in which it asserted that: (a) neither the deponent to the founding affidavit in the referral nor the referral itself were authorised (the authorisation issue); (b) the referral was premised on unconfirmed and inadmissible hearsay evidence (the admissibility issue); (c) the Regulator lacked a reasonable suspicion, or any suspicion, that First Group had engaged in prohibited conduct; (d) the investigator exceeded the scope of the authorised investigation; and (e) the investigator's report was materially incomplete and defective.

[10] The Regulator did not deliver a replying affidavit within the time allowed under the Rules for the Conduct of Matters Before the National Consumer Tribunal (the Tribunal rules). The replying affidavit was only delivered on 28 November 2022, five days before the hearing on 5 December 2022. As a result, it was not part of the papers before the Tribunal. The Regulator's replying affidavit was only

furnished to the Tribunal members on the day of the hearing. It was accompanied by a condonation application for the late filing thereof.

[11] The Regulator sought a postponement of the hearing of the main application pending the determination of the condonation application for its late filing of the replying affidavit. This was made from the bar, with no substantive application. First Group objected to the postponement application. Having heard the parties on the application, the Tribunal dismissed the Regulator's application for a postponement. The Tribunal went on to consider First Group's defences as set out above, and dismissed each one of them with no order as to costs.

In the High Court

[12] First Group appealed the dismissal of its defences to the High Court in terms of s 148(2) of the NCA. With regard to the authorisation issue, the High Court found that nothing in the documents before it established that Ms Schwartz was authorised to bring the referral. The court also pointed out that there was no affidavit from the Regulator's CEO confirming that such authority was delegated to Ms Schwartz. It further found that, because the Tribunal dismissed the shortcomings in Ms Schwartz's affidavit as a failure to comply with Rule 4(3), an application for condonation of that failure should have preceded the hearing before the Tribunal.

[13] In respect of the admissibility issue, the High Court held that the NCR 32 Form was 'an abridged notice of motion'. On that footing, the High Court held that by appending an affidavit to it, the proceedings before the Tribunal were conducted as motion proceedings, to which ordinary rules for such proceedings applied. The court further held that because there was no confirmatory affidavit by the author of the investigation report, the report constituted inadmissible hearsay evidence. The

High Court reasoned that since the Regulator had not indicated that the author of the report would be called to confirm the contents of the report, the admissibility issue had to be decided in favour of First Group.

[14] Regarding the third, fourth and fifth points, the High Court held that since the investigator's report was inadmissible, it was not necessary to determine these, as they were dependent on the admissibility of the report. The High Court held that the Regulator had failed to: (a) establish a proper basis for its allegations of prohibited conduct; and (b) meet the required procedural and evidentiary standards, rendering its referral application to the Tribunal invalid. Accordingly, it upheld First Group's appeal and ordered the Regulator to pay the costs.

In this Court

[15] The Regulator submitted that the High Court adopted an impermissibly rigid approach to the proceedings before the Tribunal. This, it argued, influenced the High Court's conclusions on First Group's defences, which the Regulator challenged. The Regulator further submitted that the Tribunal's dismissal of First Group's defences was not appealable. For its part, First Group supported the High Court's order and the reasoning underpinning it, both in respect of the approach to the Tribunal proceedings and the upholding of the defences. Concerning the appealability issue, First Group argued that the Tribunal's orders were definitive of the parties' rights and final in effect. At the start of the hearing, counsel for the parties were invited to first address the matter of appealability. Ultimately, counsel addressed us on the merits of the appeal.

[16] The conundrum in this appeal arises from the orders of the Tribunal and the High Court. As regards the Tribunal, after considering First Group's defences, it dismissed all five of them and granted the following order:

'59.1 The main application may proceed;

59.3 The Registrar must set the application down for hearing after the adjudication of the [the Regulator's] condonation application . . .'.

[17] The problem with the order is the following. It appears that the Tribunal intended that, once the application for condonation was ripe, it would determine it, and later consider all or some of First Group's preliminary points. It should be recalled that the condonation application was for the late filing of the Regulator's 'replying affidavit'. It was envisaged that the said affidavit could answer some of First Group's preliminary points. However, the Tribunal dismissed the preliminary points. Once it had done so, it became *functus officio* and no longer had the power to revisit them.

[18] As regards the High Court, it upheld First Group's appeal and granted the following order:

'1. The appeal is upheld.

2. The decision of the [Tribunal] is set aside and replaced with the following:

[1] [First Group]'s 5 points in limine are upheld;

[2] *The application is dismissed with costs* . . .'. (Emphasis added.)

[19] The emphasised part of the order signifies that the Regulator's entire referral to the Tribunal was dismissed, thereby finally disposing of it, without the merits of the referral being investigated. As I demonstrate later, this order resulted from the High Court misconceiving the proceedings before the Tribunal.

Nature of the proceedings in the Tribunal

[20] At the outset, it is necessary to clarify the proper approach to proceedings in the Tribunal. This must be considered in light of the NCA's objectives. Those objectives are outlined in s 3 as being 'to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market, industry, and to protect consumers.'

[21] Of direct relevance here is s 142(1), which sets out the powers and obligations of the Tribunal in conducting proceedings before it. It states:

'(1) The Tribunal must conduct its hearings in public -

(a) in an inquisitorial manner;

(b) as expeditiously as possible;

(c) as informally as possible; and

(d) in accordance with the principles of natural justice.'

[22] The informal and inquisitorial nature of the proceedings before the Tribunal is further buttressed by s 145 of the NCA, which states that:

'Subject to the rules of procedure of the Tribunal, the member of the Tribunal presiding at a hearing may determine any matter of procedure for that hearing, with due regard to the circumstances of the case and the requirements of the applicable sections of this Act.'

In addition, rule 21(1) of the Tribunal rules provides that a hearing before the Tribunal 'must be informal and follow procedures determined by the Presiding member . . .'.

[23] What these provisions indicate is that, in its proceedings, the Tribunal should, where possible, adopt a less formal and adversarial approach than a court would in a civil matter. When the Tribunal considers complaints, the primary goal should

always be to achieve the NCA's objectives. This can be achieved by ensuring that allegations of prohibited conduct by credit providers are judged on their merits rather than on technical or legal points.

[24] Naturally, all of this must be fair to a credit provider whose conduct is being investigated, in accordance with the rules of natural justice. It must be emphasised that the Tribunal is not merely a referee in these proceedings. Although it performs an adjudicative function similar to that of a court, it is not a court of law. It is an active participant in an inquisitorial role to ensure that the NCA's objectives are met. To that extent, the rules of procedure in motion court proceedings and legal technicalities should not be allowed to stifle its proceedings.

[25] The Regulator's referral of a complaint to the Tribunal is regulated by rule 38(4) of the Tribunal rules. The rule stipulates that the referral is made by completing the prescribed NCR Form 32. This is a simple form comprising four parts. Part 1 requires the applicant's particulars and contact numbers. In Part 2 the applicant is required to furnish the referral details about: (a) the section of the NCA the referral applies to; (b) the reason for the referral; (c) the order or relief sought; and (d) where applicable, whether the leave of the Tribunal had been obtained, and if so, the details thereof. Part 3 requires the applicant to: (a) declare that the information contained in the application is accurate and complete; (b) state the date of the application; (c) sign the form; and (d) provide the name of the signatory authorised to act on behalf of the Regulator. Part 4 provides a list of attachments. In the case of a referral to the Tribunal by a complainant, the form requires that a resolution authorising the signatory to sign the application form on behalf of the complainant be attached.

[26] The High Court held that, because an affidavit accompanied the NCR 32 Form, the rules of procedure governing motion proceedings in courts applied. It said that the NCR 32 Form constituted an 'abridged notice of motion'. For this holding, the High Court relied on *Edcon v National Consumer Tribunal* (*Edcon*).[2] There, it applied the well-known *Plascon-Evans* rule[3] to the Tribunal proceedings:

'The proceedings before the Tribunal were brought by way of affidavit. The Regulator could therefore only succeed if the facts averred in its founding affidavit which were admitted by Edcon together with the facts alleged by Edcon justified the order made.'[4]

[27] There is no indication in the *Edcon* judgment that the court had any regard to either of s 142(1), s 145, rule 38(4) of the Tribunal rules, or the information required in NCR 32 Form. In any event, I do not understand the quoted passage to suggest that once affidavits are filed before the Tribunal, the discretion accorded to the Tribunal in s 142(1) is eroded. If this is what it holds, it is clearly wrong. The filing of the affidavits does not transform the informal nature of the proceedings before the Tribunal into motion-court proceedings. The proceedings remain subject to the NCA, especially s 142(1), which, as mentioned, provides for an informal, inquisitorial approach. Thus, in the present case, even without the affidavit, the referral would have been complete and valid. Whatever the Tribunal needed to adjudicate the complaint was contained in the NCR 32 Form and the investigation report. The filing of the affidavit was thus surplusage. The High Court misconceived the nature of the proceedings before the Tribunal.

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[2] *Edcon Holdings Ltd v National Consumer Tribunal and Another* [2018] ZAGPPHC 372; 2018 (5) SA 609 (GP).

[3] The principle enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A) at 634E-635C, is this: in motion proceedings where disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavit, which have been admitted by the respondent together with the facts alleged by the respondent, justify such an order. This is so, unless the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.

[4] *Edcon* para 4.

[28] To sum up, the High Court adopted a formalistic approach. That approach is at odds with the express provisions of s 142(1) and the related provisions of the NCA. The High Court was enjoined to adopt an approach that promotes, rather than hinders, the Regulator's primary duty and the NCA's objectives.

The issues

[29] The issues which the parties argued before us are thus the following, namely whether: (a) the orders of the Tribunal dismissing First Group's defences are appealable; (b) the Regulator's referral of the complaint to the Tribunal was authorised (the authorisation issue); (c) the investigation report constituted inadmissible hearsay evidence (the admissibility issue); (d) the NCR lacked a reasonable suspicion, or any suspicion that First Group had engaged in prohibited conduct; (e) the investigator exceeded the scope of the authorised investigation; and (f) the investigator's report was materially incomplete and defective. Properly considered, First Group, in essence, raised only three substantive defences, namely: (a) authorisation issue; (b) reasonable suspicion issue; and (c) admissibility issue. The defences in (e) to (f) are subsets of, and dependent on, the admissibility issue. I consider the issues, in turn.

Is the Tribunal's order appealable?

[30] Of its own accord, the High Court raised with the parties the appealability of the Tribunal's order and directed them to make submissions on the issue, which the parties did. In its judgment, the High Court did not expressly pronounce on the appealability issue, but simply considered the merits of the appeal. While the High Court did not explicitly state that the Tribunal's order is appealable, it is clear that it regarded it as such since it considered the merits of the appeal. Had it viewed the

matter differently, it would have simply struck the appeal from the roll. Instead, it upheld First Group's preliminary points and issued an order, among other things, dismissing the application.

[31] Appeals and reviews under the NCA are regulated by s 148, which reads:

'(1) A participant in a hearing before a single member of the Tribunal may appeal a decision by that member to a full panel of the Tribunal.

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

(a) apply to the High Court to review the decision of the Tribunal in that matter; 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.'

[32] The majority judgment by Matojane JA holds that the Tribunal's order dismissing First Group's defences was not a 'decision' susceptible to appeal to the High Court under s 148(2)*(b)* of the NCA. The second judgment relies on *Lewis v Summit Financial Partners* (*Lewis*)[5] for this conclusion. However, that judgment concerns a different issue and is not relevant to this matter. In that case, a debt counsellor lodged a complaint against a credit provider with the Regulator in terms of s 136. After investigating the complaint, the Regulator declined to refer it to the Tribunal. The debt counsellor sought leave from the Tribunal to refer the complaint directly to it in terms of s 141(1)*(b)*, which the credit provider opposed. The Tribunal granted leave, and the credit provider unsuccessfully appealed the ruling to the High Court in terms of s 148(2). The question on appeal was whether the Tribunal's decision to permit a direct referral under s 141(1)*(b)* of the NCA is appealable under s 148(2) of the NCA. After examining the purpose of the NCA, this Court observed:

[5] *Lewis Stores (Pty) Ltd v Summit Financial Partners (Pty) Ltd and Others* [2021] ZASCA 91; 2022 (1) SA 377 (SCA).

'[S]ection 141(1)*(b)* does not contemplate *a formal application*, or *a public hearing.* It involves merely a reconsideration of the ruling by the Regulator.'[6] (Emphasis added.)

[33] For these reasons, this Court concluded that the Tribunal's ruling in terms of s 141(1)*(b)* to refer a complaint directly to it is not appealable in terms of s 148 of the NCA.

[34] The present case is the opposite of *Lewis*. In this instance, the Regulator chose to refer the complaint to the Tribunal in terms of s 140(1)*(b)* read together with s 140(2)*(b)*, which is in the nature of a formal application. As a result of the referral, there was a formal hearing presided over by a full panel of the Tribunal. It follows that, depending on the nature of the defences raised, the decisions made by the Tribunal following upon such a hearing are susceptible to an appeal.

[35] The second judgment adopts a rigid stance that, regardless of the nature of the preliminary defence raised, no appeal can be made from the dismissal of such a defence. Such an approach undermines the entire purpose of raising declinatory preliminary defences. It would also mean that a party choosing to raise only declinatory preliminary defences without intending to address the merits would not be allowed to appeal against an order dismissing those defences. This is clearly absurd.

[36] The second judgment also holds that the Tribunal's order is not appealable because it concerns points *in limine* (preliminary defences). The majority judgment's fixation on the labels, rather than the nature and substance of the defences, leads it

[6] Ibid para 16.

astray. In *National Director of Public Prosecutions v King*,[7] this Court cautioned against elevating the distinction between appealable and non-appealable orders to a matter of principle. The majority judgment fails to recognise this. It also overlooks that some preliminary defences may be dispositive of the main issues between the parties without any regard to the merits. This issue warrants further elucidation.

[37] Preliminary defences can be categorised into two broad categories: dilatory and declinatory. In the first category are defences that aim to delay the hearing until an event occurs that makes it appropriate for the case to proceed. An example is when an attorney's mandate to act on behalf of a party is disputed. This can be rectified by the attorney filing a power of attorney. An order upholding such a defence is usually not appealable. The second category consists of defences intended to dismiss the cause of action without determining the merits. An example is a defence alleging that the court lacks jurisdiction to hear the matter. An order upholding a defence in this category effectively quashes the application entirely and would typically be appealable.

[38] In the present case, the preliminary defences are based on: (a) alleged authorisation to refer the complaint to the Tribunal; (b) the Regulator's alleged lack of reasonable suspicion to initiate an investigation, and (c) the admissibility of the evidence underpinning the report on which the complaint is based. These are all clearly preliminary defences of a declinatory nature. Upholding any or all of them would result in the halting of the Tribunal's referral in its entirety, rather than merely causing a delay. This would lead to a prompt resolution of the real issues between the parties and obviate the need to traverse the merits of the complaint against First

[7] *National Director of Public Prosecutions v King* [2010] ZASCA 8; 2010 (2) SACR 146 (SCA); 2010 (7) BCLR 656 (SCA); [2010] 3 All SA 304 (SCA); 72 SATC 195 para 51.

Group. This is consistent with this Court's more flexible and pragmatic approach in these matters. For example, in *Beinash v Wixley*[8] it was observed that 'the emphasis is now rather on whether an appeal will necessarily lead to a more expeditious and cost-effective final determination of the main dispute between the parties and, as such, will decisively contribute to its final resolution.'

[39] The purpose of declinatory preliminary points is to remove defective proceedings from the roll of an adjudicative body without incurring unnecessary costs by traversing the merits. Ordinarily, if such a point is upheld, it brings proceedings to a halt. The majority judgment renders this purpose nugatory in Tribunal proceedings. This is so because, on its approach, no preliminary point would ever halt referral proceedings, and the referral must proceed to the merits, irrespective of the substance of such a point.

[40] Take, for example, a point by a credit provider that the Regulator lacked reasonable suspicion to initiate an investigation against it under the NCA. This goes to the heart of the referral. If sustained, it would mean that the referral and the procedure that preceded it were unlawful from the outset. But on the majority's approach, the Tribunal must nevertheless consider the merits of the referral, and a credit provider can only appeal after the merits have been determined. This is evidently untenable, for no credit provider should be subjected to an unlawful referral. They are entitled to halt it at a preliminary stage without entering the merits of the referral.

[8] *Beinash v Wixley* 1997 (3) SA 721 SCA at 730C.

[41] It is on these considerations that I conclude that the Tribunal's order dismissing First Group's defences has all three attributes identified in *Zweni v Minister of Law and Order* (*Zweni*).[9] It is: (a) final in effect and not susceptible to alteration by the Tribunal; (b) definitive of the rights of the Regulator and First Group; and (c) dispositive of the defences raised by First Group. Once the Tribunal dismissed these defences, it became *functus officio* in respect of them, and no longer had the power to consider them again, despite its purported order to the contrary.

[42] However, as emphasised in *UDM v Lebashe*[10] an interim order may be appealable even if it does not possess all three *Zweni* attributes if the interests of justice so demand. This would be the case if, among other things, the order disposes of any issue or portion of the issue in the main action or suit, or if the appeal would lead to a prompt resolution of the real issues between the parties.[11]

[43] In any event, the authorisation issue and the Regulator's alleged lack of reasonable suspicion to initiate an investigation, have been previously considered by this Court, respectively, in *Ganes v Telecom Namibia* (*Ganes*)[12] and *National Credit Regulator v Dacqup Finances* (*Dacqup*).[13] In *Ganes*, this Court considered a request in the appellants' heads of argument that leave be granted to them to appeal against the finding by the High Court that the proceedings were duly authorised and that their delay in applying for such leave be condoned. This Court declined the

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[9] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I-533A; [1993] 1 All SA 365 (A) at 368. Although the *Zweni* test has undergone some modifications over the years, those relate mainly to whether, in a particular case, the order is appealable.

[10] *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* [2022] ZACC 34; 2022 (12) BCLR 1521 (CC); 2023 (1) SA 353 (CC).

[11] Ibid para 48.

[12] *Ganes and Another v Telecom Namibia Ltd* [2004] 2 All SA 609 (SCA); 2004 (3) SA 615 (SCA); (2004) 25 ILJ 995 (SCA).

[13] *National Credit Regulator v Dacqup Finances CC t/a ABC Financial Services - Pinetown and Another* [2022] ZASCA 104.

application, not on the basis that the order is not appealable, but rather on the ground that the application was late and the appellants had offered no explanation for their delay in applying to this Court for leave to appeal against that finding. It is therefore implicit in that finding that the court considered the issue to be appealable, and would have considered its merits, had leave been sought timeously and granted.

[44] In *Dacqup*, this Court accepted the finality, and thus the appealability, of an order dismissing the defence that the Regulator lacked reasonable suspicion to initiate an investigation under the NCA. It accordingly considered the merits of the defence. It is noteworthy that in that case, the Regulator accepted the appealability of an order in respect of this defence.

[45] *Ganes* and *Dacqup* are therefore binding on us because of the principle of horizontal *stare decisis*. Departure is warranted only where the Court is satisfied that the earlier decision is 'clearly wrong'. As the Constitutional Court explained in *Camps Bay v Harrison* (*Camps Bay*),[14] both it and this Court can depart from their previous decisions only when satisfied that a particular decision is clearly wrong.

[46] The second judgment seeks to distinguish *Dacqup* and *Ganes* on the bases that, in the former, the Regulator had conceded the appealability of the Tribunal's order, and in the latter, there was an implicit assumption that a question was arguable. Appealability of an order implicates a court's jurisdiction to adjudicate a matter. Jurisdiction is a matter of law, and not of discretion. A court either has jurisdiction or it does not. It does not assume jurisdiction it lacks because of factors such as the parties' consent to jurisdiction.

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[14] *Camps Bay Ratepayers and Residents' Association and Another v Harrison and Another* [2010] ZACC 19; 2011 (2) BCLR 121 (CC); 2011 (4) SA 42 (CC) para 28.

[47] The majority judgment's suggestion in this regard goes directly against its central thesis that a court is not competent to decide a matter if it lacks jurisdiction. Thus, had this Court in both *Dacqup* and *Ganes* considered the issues not appealable and therefore deprived it of jurisdiction, it would have struck each matter from the roll, instead of considering the merits. We are therefore bound by those authorities, and it is thus not open to the majority to hold a contrary view that the points raised in those cases are not appealable. This Court does not lightly depart from its previous views, even those expressed *obiter*.[15]

Authorisation issue

[48] Rule 4(3) of the Tribunal rules provides:

'If the Applicant is a company or other corporate entity, the officer signing the application must append a copy of the board resolution or other proof of authority to act on behalf of that company or entity.'

[49] There was some debate between the parties about whether the Regulator is bound by this provision. It is not necessary to settle that point here. For present purposes, I am prepared to accept that the Regulator falls within the scope of the provision, at least because of the words 'or other corporate entity'. On that basis, I assume that Ms Schwartz, who signed the NCR 32 Form on behalf of the Regulator, was required to provide proof of her authority to act on its behalf. First Group argued, and the High Court agreed, that this omission was fatal. The High Court relied on several authorities to support the proposition that the referral should be decided on the affidavits.

[15] *Steenkamp v South African Broadcasting Corporation* [2001] ZASCA 110; [2002] 2 All SA 180 (A); 2002 (1) SA 625 (SCA) para 12.

[50] Once again, the High Court erred in treating the proceedings before the Tribunal as if they were court proceedings. The approach governing proceedings before the Tribunal is set out in s 142(1), which is inquisitorial and informal, provided the Tribunal observes the rules of natural justice. Even in ordinary court proceedings, the failure to attach proof of authorisation is not always fatal. It depends on the circumstances of each case. The court must consider whether sufficient material has been placed before it to warrant the conclusion that it is the applicant who is litigating, and not some unauthorised person purporting to act on its behalf.[16] As explained in *Poolquip Industries v Griffin*:[17]

'It is usual and desirable for the resolution of the board of directors of a company, authorising the litigation, to be annexed to and proved by the founding affidavits. When it is not, but the probabilities indicated by the allegations in those affidavits justify the conclusion that the company has authorised that application, in the absence of evidence to the contrary, the failure to annex the resolution need not result in the dismissal of the application.'[18]

[51] In the present case, it is not disputed that the investigation into the affairs of First Group, which gave rise to the investigation report, was authorised by the CEO. The referral to the Tribunal was a natural consequence of that process. The probabilities arising from the allegations contained in Ms Schwartz's affidavit are consistent with that process, and they justify the conclusion that the Regulator had authorised the referral. In this regard, the Tribunal considered the probative value of Ms Schwartz's allegations and concluded that the contents of her affidavit constituted 'prima facie proof that she was duly authorised to do so'. There was

[16] *Mall (Cape) (Pty) Ltd v Merion Ko-Operasie Bpk* 1957 (2) SA 347 (C) at 352A. See also *Graham v Park Mews Body Corporate and Another* [2011] ZAWCHC 370; 2012 (1) SA 355 (WCC); [2012] 1 All SA 167 (WCC) para 21.
[17] *Poolquip Industries (Pty) Ltd v Griffin* 1978 (4) SA 353 (W).
[18] Ibid at 356E-H.

nothing to disturb that prima facie view. The Tribunal exercised the wide discretion conferred on it by ss 142 and 145 of the NCA.

[52] The fact that Ms Schwartz was not copied on any of the emails during the investigation process is immaterial. What is important is that her affidavit makes it clear that she had familiarised herself with the issues at hand. She would not have done so without being properly authorised. The suggestion that she was acting on a frolic of her own is simply unsustainable on the facts. A referral to the Tribunal is a matter of public record. So too is an appeal to the High Court. Both involve briefing attorneys and counsel, which, in turn, requires approval for litigation in the Regulator's name. It is simply inconceivable that all of this could take place without proper authorisation. The Tribunal was accordingly correct to conclude that, on the balance of probabilities, Ms Schwartz was authorised to make the referral to the Tribunal. There was therefore no basis for the High Court to interfere with that finding.

Lack of reasonable suspicion that First Group engaged in prohibited conduct

[53] In its ruling, the Tribunal relied on this Court's judgment in *Dacqup*. In that case, a credit provider took a point in *limine* before the Tribunal that the Regulator had no reasonable suspicion to initiate an investigation. The Tribunal dismissed that point. The credit provider appealed to the High Court, which upheld the point. This Court, on appeal, surveyed the authorities on the concept of 'reasonable suspicion', and concluded that 'it is apparent that the bar has been set relatively low for the initiation of a complaint in a regulatory environment . . .'. This Court accordingly upheld the Regulator's appeal and set aside the High Court's order.

[54] The High Court was bound by *Dacqup*. However, it did not refer to that decision at all in its judgment. It often happens that the High Court's attention is not drawn to the authority of this Court, with the result that it gives its judgment in ignorance of such authority. However, that is not the case here, as the Tribunal cited and relied on *Dacqup* in its ruling. It is therefore concerning that the High Court seemingly ignored this Court's binding precedent. As the Constitutional Court emphasised in *Camps Bay*, unprincipled deviation from s*tare decisis* is an invitation to 'legal chaos'.[19]

[55] The conclusion is therefore that, First Group's first and third defences were properly dismissed by the Tribunal. The High Court erred in reversing the Tribunal's findings.

The admissibility issue

[56] The complaint here was that there was no affidavit confirming the investigation report. This was because the author of that report was no longer employed by the Regulator. First Group took the point that the absence of a confirmatory affidavit rendered the report inadmissible. The Tribunal dismissed this point on the basis that it could be determined during the main application, when the merits are considered, and that the author could be subpoenaed.

[57] This is fortified by the Tribunal's reference to s 3(3) of the Law of Evidence Amendment Act 45 of 1988, which allows hearsay evidence to be provisionally admitted 'if the court is informed that the person whose credibility the probative value of such evidence depends on, will testify in such proceedings'. It appears that the Tribunal intended to rely on this section to provisionally admit the investigation

[19] *Camps Bay* para 28.

report pending the hearing of oral evidence. This was a sound and sensible approach. However, this is not reflected in the Tribunal's order, as it summarily dismissed the point. This summary dismissal rendered the Tribunal *functus officio* in respect of that point. The Tribunal could therefore never competently revisit its order. The order of dismissal is thus clearly appealable.

[58] However, it was wrong for the High Court to uphold First Group's technical point. It should have corrected this error by amending the Tribunal's order to reflect the Tribunal's intention to provisionally admit the report pending the hearing of the merits. The High Court failed to consider that, given the inquisitorial and informal nature of the proceedings before the Tribunal, nothing prevented the Tribunal from subpoenaing witnesses when it considered the merits of the referral. It erred by adopting a rigid approach to those proceedings, particularly by holding that the issues should be determined in accordance with the rules applicable to motion proceedings.

[59] In any event, it is doubtful that the High Court was correct to uphold the point. It must be borne in mind that First Group's complaint on the admissibility issue rested solely on the absence of a supporting affidavit by the author of the investigation report. First Group did not suggest that it would be prejudiced by rebutting the report's contents. The reason it could not make that assertion is that the investigation report was primarily based on documents the investigator obtained from First Group itself. It will have an opportunity to present its submissions on this matter to the Tribunal when it considers the merits of the referral. For these reasons, the High Court erred in upholding First Group's inadmissibility point. Instead, it should have corrected the Tribunal's error as suggested above.

[60] The conclusion on the admissibility issue disposes of First Rand's fourth and fifth defences, namely that: (a) the investigator exceeded the scope of the authorised investigation; and (b) the investigator's report was materially incomplete and defective. These were anchored on the admissibility of the investigator's report. Having found that this issue should be deferred for determination together with the merits of the referral, these two defences should follow suit.

[61] The Tribunal should proceed to consider the merits of the referral. Given the circumstances of this case, the merits should be considered by a differently constituted Tribunal.

Costs

[62] Although the costs order made by the High Court falls away automatically once the appeal is upheld, it is necessary to say something about the costs order that it made against the Regulator. As stated by this Court in *National Credit Regulator v Southern African Fraud Prevention Services NPC*,[20] organs of State pursuing legitimate public interest litigation should not be ordered to pay costs, unless they did not act impartially and reasonably in exercising their statutory duties. There is no suggestion that the Regulator committed any of the above. The High Court paid no heed to this settled principle and the binding authority of this Court. In two recent judgments of this Court, *Dacqup* and *National Credit Regulator v National Consumer Tribunal*,[21] lower courts were criticised for ignoring this principle. That criticism is apt here and worth repeating.

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[20] *National Credit Regulator v Southern African Fraud Prevention Services NPC* [2019] ZASCA 92; [2019] 3 All SA 378 (SCA); 2019 (5) SA 103 (SCA) paras 42-43.
[21] *National Credit Regulator v National Consumer Tribunal and Others and Similar Matters* [2025] ZASCA 132; 2026 (2) SA 455 (SCA) paras 71-77.

Order

[63] Had I commanded the majority, I would have made the following order:

1 The order of the High Court is set aside and replaced with the following:

'1. The order of the National Consumer Tribunal is amended to read as follows:

(a) The respondent's first and third points *in limine* are dismissed;

(b) The investigation report is provisionally admitted, pending the hearing of the merits of the referral;

(c) The respondent's second, fourth and fifth points *in limine* are held over to be determined with the merits of the referral.

(d) The merits of the referral shall be heard by a differently constituted Tribunal.'

2 Save for the above, the appeal is upheld with costs, including costs of two counsel.

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T MAKGOKA

JUDGE OF APPEAL

Matojane JA (Mokgohloa and Kathree-Setiloane JJA concurring):

[64] I have had the benefit of reading the judgment of my colleague Makgoka JA. I regret that I cannot agree with it. My disagreement is limited to the question of appealability. In my view, the order of the Tribunal dismissing the five points in limine raised by First Group is not a 'decision of the Tribunal in that matter' as contemplated in s 148(2)(*b*) of the Act. It is an interlocutory ruling. It is not

susceptible to appeal under that subsection. The High Court ought to have struck First Group's appeal from its roll. The appeal to this Court should succeed on that narrow ground, the order of the High Court being set aside and replaced with an order striking the appeal before it from the roll. It is unnecessary, on that footing, to reach the merits of the preliminary defences.

The text and scheme of s 148(2*)(b)*

[63] The starting point is the text of s 148(2*)(b).* It confers upon a participant in a hearing before a full panel of the Tribunal the right to appeal to the High Court against the decision of the Tribunal in that matter, other than a decision in terms of section 138. Two features of the text warrant attention. The first is the reference to 'the decision of the Tribunal in that matter'. The definite article, read with the phrase 'in that matter', directs the enquiry to the substantive disposition of the referral before the Tribunal, and not to every interlocutory ruling that may be made in the course of those proceedings. The second is the express exclusion of decisions under s 138. That exclusion confirms that the legislature turned its mind to the kind of ruling that is susceptible to appeal, and it militates against a reading that treats every ruling, however incidental, as a 'decision' for the subsection.

[64] The NCA's scheme reinforces that reading. Section 142(1) obliges the Tribunal to conduct its hearings 'in an inquisitorial manner', 'as expeditiously as possible', 'as informally as possible' and 'in accordance with the principles of natural justice'. Section 3 articulates the broader objectives of the NCA, which include promoting an efficient, accessible, and responsible credit market and protecting consumers. A construction of s 148(2)*(b)* that converts every preliminary ruling of the Tribunal into an appealable decision is irreconcilable with those objects. It would enable a party to arrest the Tribunal's proceedings at each threshold, and to

transmute what Parliament designed as an expeditious, informal process into a multi-stage appellate odyssey preceding the merits.

Lewis Stores

[65] This Court addressed the reach of s 148 in *Lewis Stores*. The Court held that the Tribunal's grant of leave to refer a complaint directly to it under s 141(1*)(b)* was not a 'decision' susceptible to appeal under s 148. The reasoning was that the NCA makes provision for 'an expeditious, informal and cost-effective complaints procedure', and that the construction of s 148 must accord with the approach of the courts to appeals generally, which 'militates against appeals which do not contribute to the expeditious and cost-effective final determination of the main dispute between the parties'.

[66] The first judgment seeks to distinguish *Lewis Stores* on the footing that it concerned a determination under s 141(1*)(b)* that did not involve a 'formal application, or a public hearing'. In contrast, the present matter arose from a referral under s 140(1)(*b*) read with s 140(2*)(b)*, followed by a hearing. That distinction, with respect, misses the principle. The ratio in *Lewis Stores* is not confined to the particular procedural vehicle in issue there. It is a principle of construction, grounded in the objects and scheme of the NCA, which disavows piecemeal appellate interference with Tribunal proceedings. Whether the preceding procedure before the Tribunal is classified as formal or informal, the principle applies with equal force. So long as the ruling sought to be appealed does not dispose of the referral, it is not a 'decision' in the sense contemplated by s 148(2*)(b)*.

[67] Applied to this matter, the principle yields a single answer. The Tribunal dismissed certain preliminary objections. It did not dispose of the referral. The merits of the allegations of prohibited conduct have not been investigated. No finding of

liability has been made. No penalty has been imposed. The Tribunal expressly ordered that 'the main application may proceed'. The dismissal of the points in limine is therefore an interlocutory ruling. It is not a 'decision of the Tribunal in that matter'.

The *Zweni* attributes

[68] The first judgment locates the Tribunal's ruling within the three attributes identified in *Zweni:* that a decision is final in effect, definitive of the parties' rights, and dispositive of the relief claimed. In my respectful view, none of the three attributes is met.

[69] First, the ruling is not yet final. The Tribunal remains seized of the referral. It ordered that the main application may proceed and directed the Registrar to set the matter down for hearing. The first judgment acknowledges that, by dismissing the points in limine, the Tribunal became *functus officio* in respect of those points. That circumstance does not elevate the ruling into a final order. It means only that, within the Tribunal's own proceedings, those particular rulings cannot be revisited. The referral itself remains alive. Any supposed tension in the Tribunal's order as to condonation can, if need be, be corrected on an eventual final appeal in terms of s 148(2*)(b)*, once the merits of the referral have been determined. It is not a reason to treat an interlocutory ruling as a 'decision' within the subsection.

[70] Secondly, the ruling is not definitive of the parties' rights. The Regulator's entitlement to pursue the referral and First Group's entitlement to resist it both remain intact. What has been determined is that certain procedural and evidentiary objections do not preclude the Tribunal from adjudicating the referral on its merits. That is the very hallmark of an interlocutory ruling, not a definitive determination of rights.

[71] Thirdly, the ruling is not dispositive of any relief. The Regulator's substantive relief, a declaration of prohibited conduct and the imposition of an administrative penalty, remains to be adjudicated. In no meaningful sense can the dismissal of a preliminary objection be said to 'dispose' of that relief.

[72] The first judgment invokes *Lebashe* for the proposition that an order lacking the Zweni attributes may nevertheless be appealable where the interests of justice so require. That principle cannot be carried to the relief now sought. The interests of justice point the other way. First Group retains the full opportunity to raise, before the Tribunal at the hearing of the merits, the authorisation and evidentiary objections it presses. If the Tribunal ultimately determines the referral against it, First Group may appeal under s 148(2*)(b)*. At this stage, both the preliminary rulings and the merits may be ventilated in a single, consolidated appeal. That course is more consistent with the efficient disposition of the dispute than the fragmented review the first judgment countenances.

[73] The first judgment's central criticism of this judgment is that it adopts 'a rigid stance that, regardless of the nature of the preliminary defence raised, no appeal can be made from the dismissal of such a defence.' This characterisation misrepresents my position. I do not advance a general proposition about preliminary defences. My argument is textual and purposive: it is directed at the meaning of the words 'the decision of the Tribunal in that matter' in s 148(2)(*b*) of the NCA. I hold that the definite article 'the' and the phrase 'in that matter' together confine the right of appeal to the Tribunal's final determination, which concludes the proceedings, rather than to every ruling made in the course of them. That is a different, and considerably narrower, proposition from the one the first judgment attributes to this judgment.

[74] The first judgment's policy argument is that this judgment's approach is 'clearly absurd' because it would deny an immediate appeal to a party raising only declinatory defences, which is misplaced. It assumes that an immediate right of appeal is the appropriate remedy for the dismissal of a potentially dispositive preliminary defence. I address this directly: the affected party's remedy is to engage with the merits before the Tribunal and, if the final determination is adverse, to exercise the rights of appeal and review available under s 148(2) at that stage. Nothing in the NCA's text or structure requires the legislature to have conferred a right of immediate appeal at every stage at which a ruling with potentially final consequences is made.

Ganes and Dacqup

[75] The principal authority for the first judgment's conclusion on appealability is *Ganes and Dacqup*. The first judgment invokes horizontal stare decisis and holds that, because those cases implicitly accepted the appealability of preliminary rulings, this judgment is not free to hold otherwise. This reasoning is open to objection on two distinct grounds.

[74] In *Ganes*, this Court did not decide that an order dismissing an objection to authorisation was appealable. It refused leave to appeal because the application for leave was late and unexplained. Whatever implicit assumption may be inferred from the refusal of leave, the Court did not engage the appealability question, and the point was not argued. An implicit assumption, unaccompanied by reasoning, does not furnish a *ratio* binding on this Court on the appealability issue.

[76] In *Dacqup*, the Regulator expressly conceded the appealability of the Tribunal's ruling. The Court proceeded on that concession. It did not adjudicate its correctness. The first judgment meets that difficulty by observing that jurisdiction is

not a matter of discretion but of law. That observation, though correct, does not advance the analysis. It is well established that the unchallenged assumption of jurisdiction in a particular case, where the point has not been argued or reasoned, does not generate binding authority on the jurisdictional question. It is inconsistent with ordinary principles of stare decisis for a concession, accepted without argument or reasoning, to operate as a precedent binding on a subsequent Court that is squarely confronted with the question. *Dacqup* cannot be read as having decided the appealability of a dismissal of preliminary defences under s 148(2*)(b)*. It proceeded on the unchallenged premise that the ruling was appealable. That premise, though shared by the parties, did not form part of the Court's ratio.

[77] By contrast, *Lewis Stores* engaged the question of appealability directly and decided it. It is the authoritative pronouncement of this Court on the construction of s 148 as it applies to rulings of the Tribunal that do not finally dispose of a referral. It should guide the Court here. The principle of horizontal stare decisis, referenced in the first judgment, as enunciated in *Camps Bay*, operates to bind this Court to the ratio of *Lewis Stores*, not to implicit premises in *Ganes* and *Dacqup* that were never tested.

The dilatory–declinatory distinction

[78] The first judgment introduces a distinction between dilatory and declinatory preliminary defences as the analytical basis for determining appealability. This distinction is not found in s 148(2*)(b)*. It is reasoned that the latter are appealable because, if upheld, they would terminate the proceedings. I am unable to regard that classification as decisive for purposes of appealability under s 148(2*)(b)* of the NCA. The distinction originates in conventional civil procedure and does not readily translate to the Tribunal's specialised, statutory, inquisitorial framework. Under the

Act, the controlling question is whether the impugned ruling constitutes a ‘decision’ within the meaning of s 148(2*)(b)*.

[79] Even as to the classification itself, the defences raised by First Group are not declinatory. The authorisation objection, had it been upheld, could have been cured by the filing of a properly authorised referral. The admissibility objection, as the Tribunal itself was plainly inclined to hold, could properly be revisited at the hearing on the merits, with appropriate evidentiary safeguards, including the investigator's subpoena. The reasonable suspicion objection has, in any event, been answered by this Court in *Dacqup*, where the bar in a regulatory environment was held to be relatively low. The defences would not, upon being upheld, have permanently ended the matter. They are at most dilatory, and certainly not of a character that converts the Tribunal’s ruling into a ‘decision’ for s 148(2*)(b)*.

The broader consequences

[80] The present case itself vindicates the interpretive approach I prefer. The Tribunal's hearing on the merits of the complaint has been suspended for more than three years due to interlocutory proceedings before the High Court and, subsequently, before this Court. This is precisely the outcome that a purposive construction of 'the decision of the Tribunal in that matter' is designed to prevent. The legislature prescribed an expeditious, informal and cost-effective complaints procedure. That purpose is defeated whenever a ruling dismissing preliminary objections creates an immediate right of appeal before the Tribunal has completed its work. The first judgment's construction permits, and the present case exemplifies, exactly that result. The construction pressed by the first judgment ought therefore to be rejected.

Conclusion

[81] I would hold that the order of the Tribunal dismissing First Group's five points in limine is not a 'decision of the Tribunal in that matter' within the contemplation of s 148(2)(b) of the NCA. It is an interlocutory ruling. It is not appealable under that subsection. The High Court had no jurisdiction to entertain the appeal and ought to have struck it from the roll. Its failure to do so was an error in exercising jurisdiction.

[82] It is not necessary, in my view, to consider the merits of First Group's preliminary defences. Those defences will, to the extent necessary, be dealt with by the Tribunal at the hearing of the merits of the referral, in the exercise of its powers under ss 142 and 145 of the NCA.

Order

[83] I grant the following order:

1 The appeal is upheld with no order as to costs.

2 The order of the High Court is set aside and replaced with the following:

'The appeal is struck from the roll.'

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K M MATOJANE

JUDGE OF APPEAL

Appearances

For appellant:	P Carstensen SC (with P Long)
Instructed by:	M Inc., Johannesburg
	Peyper Attorneys, Bloemfontein
For first respondent:	G Amm SC (with B Edwards)
Instructed by:	HSG Attorneys, Durban
	Van Wyk & Preller, Bloemfontein.