THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 618/2017

In the matter between:

THE NATIONAL CONSUMER COMMISSION **APPELLANT**

and

UNIVISION SERVICES ASSOCIATION NPC **FIRST RESPONDENT**
VACATION RECREATIONAL SERVICES **SECOND RESPONDENT**
QUALITY TIME MARKETING (PTY) LTD **THIRD RESPONDENT**
QUALITY VACATION CLUB **FOURTH RESPONDENT**
AFRICAN CLUB INNOVATIONS **FIFTH RESPONDENT**
MULTI DESTINATION CLUB **SIXTH RESPONDENT**
LIFESTYLE VACATION CLUB **SEVENTH RESPONDENT**
AFRICAN VACATION CLUB **EIGHTH RESPONDENT**
VIP EXPRESS **NINTH RESPONDENT**
MILCAR DEVELOPMENT CC **TENTH RESPONDENT**
INVESTAGE 192 (PTY) LTD **ELEVENTH RESPONDENT**
THE NATIONAL CONSUMER TRIBUNAL **TWELFTH RESPONDENT**

Neutral citation: *The National Consumer Commission v Univision Services Association NPC* (618/2017) [2018] ZASCA 44 (28 March 2018)

Coram: Navsa, Leach, Seriti and Mocumie JJA and Hughes AJA
Heard: 12 March 2018
Delivered: 28 March 2018

Summary: Complaint to the National Consumer Commission under the Consumer Protection Act 68 of 2008 – complaint referred to the National consumer Tribunal under s 73(2)*(b)* of that Act – s 147 of the National Credit Act 34 of 2005 precluded the Tribunal from granting a costs order against the Commission on it withdrawing the referral.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Thobane AJ sitting as court of first instance):

1 The appeal succeeds, with costs.

2 The order of the court a quo is set aside and substituted with the following:

'The application to review and set aside the order of the Tribunal of 16 November 2015 is dismissed, with costs.'

JUDGMENT

Leach JA (Navsa, Seriti and Mocumie JJA and Hughes AJA concurring)

[1] A finding in regard to costs lies at the heart of this appeal. As a general rule this court declines to hear appeals solely against costs. But that is due to costs of legal proceedings being a matter which lies within the discretion of the court of first instance, a discretion which if exercised judicially brooks no interference. The relief sought in this appeal, however, is not whether a discretion to award costs was properly exercised. It is whether the twelfth respondent, the National Consumer Tribunal (the Tribunal) established under s 26(1) of the National Credit Act 34 of 2005 (the NCA), had the power to make a costs award in the circumstances of this case.[1] That is a matter of law, which

[1] Section 27 of the NCA extends the following functions to the Tribunal:

is appealable. The Gauteng Division of the High Court, Pretoria held that the Tribunal indeed had the power in the circumstances of this case to make such an award, but granted leave to appeal to this Court.

[2] The appellant, the National Consumer Commission (the Commission), was established by s 85(1) of the Consumer Protection Act 68 of 2008 (the CPA) 'as an organ of state within the public administration, but an institution outside the public service'. As appears from what is set out below, at the heart of this appeal is a complaint against the first to eleventh respondents which the Commission had referred to the Tribunal, but subsequently withdrew.

[3] The first to eleventh respondents are all entities conducting business in a particular sector of what is commonly referred to as 'the timeshare industry' in which the holders of so-called 'points' use them to access accommodation at holiday resorts. Those who purchase these points become obliged to pay levies which, in turn, are used to administer and maintain the various resorts. The first to eleventh respondents have made common cause and, for convenience, I intend to refer to them collectively as 'Univision', as did counsel in the appeal.

[4] The Commission received hundreds of complaints from consumers relating to matters such as Univision's advertising, marketing and sale of points and collection of levies. These complaints brought into play the provisions of Chapter 3 (ss 68-78) of the CPA. The statutory matrix relevant to dealing with complaints of this nature, are as follows:

'The Tribunal or a member of the Tribunal acting alone in accordance with this Act or the Consumer Protection Act, 2008 may—

(a) adjudicate in relation to any—

(i) application that may be made to it in terms of this Act, and make any order provided for in this Act in respect of such an application; or

(ii) allegations of prohibited conduct by determining whether prohibited conduct has occurred and, if so, by imposing a remedy provided for in this Act;

(b) grant an order for costs in terms of section 147; and

(c) exercise any other power conferred on it by law.'

(a) Section 4(1) of the CPA provides for various persons who allege that a consumer's rights in terms of that Act have been infringed, impaired or threatened, or that '*prohibited conduct*'[2] has occurred or is occurring, to approach a court, the Tribunal or the Commission.

(b) Section 69 goes on to provide that a person contemplated in s 4(1) may seek to enforce any right in terms of the CPA or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier by, inter alia, filing a complaint with the Commission[3] in accordance with s 71 (which provides for a complaint to be filed in a prescribed manner and form.)

(c) Upon receiving such a complaint, the Commission has various options open to it under s 72. First, depending on the facts, it may issue a notice of non-referral which, subject to the provisions of s 75(1)*(b)* set out below, would be the end of its involvement in the matter. In the event of it not issuing such a notice, the Commission may either refer the complaint to alternative dispute resolution – s 72(1)*(b)* – or to another regulatory authority having jurisdiction – s 72(1)*(c)* – or it may direct an inspector to investigate the complaint as quickly as practicable – s 72(1)*(d)*.

(d) If an investigation is held, s 73 provides that when it is concluded the Commission, once again, may issue a notice of non-referral to the complainant – s 73(1). But if it does not do so, and is of the view that a person may have engaged in prohibited conduct, s 73(1)(*c*)(iii) provides that the Commission may, inter alia, refer the complaint to the Tribunal under s 73(2)*(b)*.

(e) In the event of the Commission issuing a notice of non-referral in the above circumstances, all is not lost for a complainant as s 75(1)*(b)* provides that as long as such notice is not issued on grounds

[2] Defined in s 1 of the CPA as an act or omission in contravention of the CPA.
[3] Section 69*(c)*(iv) of the CPA.

contemplated by s 116, the complainant may refer the matter directly to the Tribunal with its leave.

[5] As is apparent from this, there are two paths by way of which a complaint may be referred to the Tribunal: first, after investigating the complaint, the Commission refers it under s 73(2)*(b)*; second, with leave of the Tribunal despite the Commission having issued a notice of non-referral, the complainant refers it under s 75(1)*(b)*.

[6] In November 2014, the Commission used the first of these paths to refer the complaints it had received against Univision to the Tribunal under s 73(2)*(b)* of the CPA. Section 75(3) required it to do so in the prescribed form, which is set out in the regulations for matters before the Tribunal, promulgated by the Minister of Trade and Industry under s 171 of the NCA[4] (all references hereinafter to regulations are to these regulations). Somewhat unusually for a referral of this nature, the regulations require this to be done by way of a notice of motion in which an order is claimed.[5] In its notice of motion, the Commission sought an order that, inter alia, provided:

'1. That the Marketing; Offering and or Sale of "Points" as "Timeshare/s" in terms of the Property Time-sharing Control Act and or Share Blocks Control Act is declared an unconscionable conduct in violation of Section 40 of the (CPA) and are interdicted.

2. That the agreement; demand and collection of levies from "Points Purchasers" on the basis of an obligation established in terms of the Property Time-sharing Control Act and; Share Blocks Control Act and or Sectional Titles Act amount to false misrepresentation; misleading and deceptive marketing or conduct and therefore a violation of section 41 of the (CPA).

[4] Published under GN 789, GG 30225, 28 August 2007 and amended by GN 428, GG 34405, 29 June 2011.
[5] See the definition of 'Applicant' in reg 1 as read with reg 4 and form TI.r4 appended to the Regulations.

3. That the business; act and or conduct of the Respondents in terms of which the "Points" are sold as Timeshare is declared a "fraudulent Scheme" and therefore in violation of section 42 of the (CPA).

ALTERNATIVELY: and in the event the National Consumer Tribunal finds that it does not have the jurisdiction and or authority to give Orders as prayed for above . . . the Tribunal (makes) . . a finding that the "agreement" in terms of which Points are sold; is a fixed term agreement in terms of section 14 of the (CPA)… and can therefore be terminated in terms of the provisions of section 14 of the CPA.'

…'

[7] The regulations, which refer to proceedings before the Tribunal as 'an application', require the notice of motion to be supported by affidavits and other documentary proof,[6] and provide for the filing of answering[7] and replying affidavits.[8] The founding affidavit in this application, deposed to by a senior investigator of the Commission, Mr Mabuza, was a lengthy affair of some 150 pages and was supported by hundreds of pages of annexures. To this the Univision respondents filed a reply which included a number of points *in limine*. In their final form, the papers in the referral totalled almost 900 pages.

[8] On 1 October 2015, a so-called 'pre-hearing' was held in terms of reg 17. Presided over by a member of the Tribunal, its minutes record that the parties were informed that the Tribunal wished to be addressed on a number of issues at the commencement of the hearing. These included the provisions of the CPA relied upon in support of the relief claimed; the powers of the Tribunal to issue a declaratory order of the nature sought; the powers of the Tribunal to hear an application based on contracts entered into prior to the CPA coming into operation; and the possible application of prescription. It was also agreed that a number of preliminary points would be dealt with at the commencement of the hearing. These included whether Mr Mabuza had the necessary authority to

[6] Regulation 4(2) read with reg 7.
[7] Regulation 13.
[8] Regulation 14.

bring the application on the Commission's behalf; the failure to join various parties having a direct and substantial interest in the outcome; and whether the Commission was only entitled to make a referral after concluding an investigation in accordance with s 73(2) of the CPA.

[9] The matter was set down for hearing by the Tribunal on 9 November 2015. That morning, before the hearing commenced, the Commission served a notice of withdrawal under reg 19(1) which provides that an application may be withdrawn before it has been decided. Regulation 19(2) goes on to provide that a notice of withdrawal 'may include a consent to pay costs, or the other party may apply to the Tribunal for an order for costs'. Not only did the notice of withdrawal not contain a tender of costs, but it specifically recorded that the Commission 'does not consent to pay costs, pending the award of costs by the Tribunal'.

[10] Univision was aggrieved at this turn of events. It felt it had been dragged before the Tribunal at great expense; that the Commission had pursued the matter in a frivolous and vexatious manner; and that, in the circumstances, and in the light of the provisions of reg 25(7), to which I shall refer in due course, the Commission ought to pay its costs on a punitive scale. It immediately applied to the Tribunal for such an order.

[11] There was a substantial obstacle to such an order. The referral had come before the Tribunal under s 73(2)*(b)* rather than s 75(1)*(b)*. Section 147 of the NCA, which applies to hearings before the Tribunal, provides:

'147(1) Subject to subsection (2), each party participating in a hearing must bear its own costs.

(2) If the Tribunal-

(a) has not made a finding against a respondent, the member of the Tribunal presiding at a hearing may award costs to the respondent and against a complainant who referred the complaint in terms of section 141(1) or section 75(1)*(b)* of the (CPA) as the case may be; or
(b) has made a finding against a respondent, the member of the Tribunal presiding at a hearing may award costs against the respondent and to a complainant who referred the complaint in terms of section 141(1) or section 75(1)*(b)* of the (CPA) as the case may be.'

[12] Relying on this section, the Commission argued that the Tribunal could only make a costs award against a party if the matter had been referred to it under s 73(5): that, as the referral had been under s 73(2), and there had in any event not been a finding made against it, the Tribunal was precluded from making a costs award when the referral was withdrawn; and that each party thus had to bear its own costs. In its judgment delivered on 16 November 2015, the Tribunal upheld this argument and ordered accordingly.

[13] Smarting at this, Univision applied to the court a quo for an order reviewing and setting aside the Tribunal's order, and remitting the matter to the Tribunal for it to take a decision on the issue of costs. The Tribunal and the Commission were cited, respectively, as first and second respondents. The Tribunal filed a notice, indicating its intention to abide the decision of the court, but the Commission opposed the review.

[14] In doing so, the Commission contended that the Tribunal had been correct in concluding that s 147 of the NCA precluded a costs award other than each party pay its own costs. In addition, and in response to an allegation that the referral to the Tribunal had been frivolous and vexatious, and an associated allegation that punitive costs were justified, the Commission stated that a fundamental question in the referral had been whether the points system fitted comfortably into a property time-sharing scheme and a time-sharing interest within the meaning of the Property Time Sharing Control Act 75 of 1983. It

described this as a 'controversial question which lay at the heart of the referral' that had been preceded by no less than 281 complaints to the Commission. It went on to state that the referral had 'suffered from a number of technical defects, which was the predominant reason for the withdrawal' and that in these circumstances, even if the Tribunal could award costs, which it denied, there was no basis for it to be ordered to do so.

[15] In reaching its decision on the issue in dispute, the court a quo placed considerable emphasis on regs 19(2), 25(4) and 25(7) which provide:

'19(2) A notice of withdrawal may include a consent to pay costs, or the other party may apply to the Tribunal for an order for costs.

. . .

25(4) The Tribunal may award costs in the circumstances contemplated in section 147 of the Act, in the following terms-

(a) The fees of a single representative may be allowed between party and party;

(b) the costs between party and party must be taxed by the Registrar according to the tariff agreed between the parties or otherwise according to the tariff applicable in the High Court;

(c) the Registrar may tax a bill of costs for services actually rendered in connection with proceedings, and call for any book, document paper or account that in the opinion of the Registrar is necessary to properly determine any matter relating to the taxation.

. . .

25(7) The Tribunal may award punitive costs against any party who is found to have made a frivolous or vexatious application to the Tribunal.'

[16] Reading these regulations together with the provisions of the CPA, the court a quo concluded that s 147 did not preclude a costs order being issued against the Commissioner. In doing so, it said:

'I see no reason why the Tribunal should not, when dealing with an application for an award of costs brought after the matter is withdrawn, adjudicate over the application and determine whether or not an award of costs is warranted in the given circumstances. The same bar, would again in my view, not exist where a party seeks such an award of costs on the basis of

vexatiousness and frivolity, in which event such costs may be punitive in nature. . . . I do not agree with the submission that (the Tribunal) is not empowered to consider an award of costs.I find that in terms of the regulations the (Tribunal) is empowered to consider an award of costs . . . .'

It therefore set aside the Tribunal's decision of 16 November 2015, and remitted the matter back to the Tribunal for it to reach a decision on Univision's application that the Commission pay its costs.

[17] In considering the correctness of this decision, it is necessary to state at the outset that the court a quo overlooked the essential difference between a referral to the Tribunal under s 73 of the CPA, on the one hand, and civil litigation in which costs, as a general rule, follow the event, on the other. The Commission is not an ordinary civil litigant. It is, as I have stated, an organ of state. It serves to protect the economic welfare of consumers, who of course play a vital role in the economy and thereby contribute to the fiscus and development of the country. The Commission functions, inter alia, to prohibit unfair marketing and business practices and to promote a consistent legislative and enforcement framework for consumer transactions. Section 99 of the CPA spells out the various enforcement functions the Commission has to protect consumer rights.[9] In referring a matter to the Tribunal under s 73(2), it does not

[9] Section 99 reads:
'The Commission is responsible to enforce this Act by—

(a) promoting informal resolution of any dispute arising in terms of this Act between a consumer and a supplier, but is not responsible to intervene in or directly adjudicate any such dispute;
(b) receiving complaints concerning alleged prohibited conduct or offences, and dealing with those complaints in accordance with Part B of Chapter 3;
(c) monitoring—
    (i) the consumer market to ensure that prohibited conduct and offences are prevented, or detected and prosecuted; and
    (ii) the effectiveness of accredited consumer groups, industry codes and alternative dispute resolution schemes, service delivery to consumers by organs of state, and any regulatory authority exercising jurisdiction over consumer matters within a particular industry or sector;
(d) investigating and evaluating alleged prohibited conduct and offences;
(e) issuing and enforcing compliance notices;
(f) negotiating and concluding undertakings and consent orders contemplated in section 74;

merely seek redress for a personal infringement of a civil right, but acts in the public interest in pursuance of its statutory obligation to do so in order to enforce consumer rights, not only on behalf of those who have complained to it, but also of the public at large. Consequently, there is no reason for the general rule in regard to costs in civil litigation to apply to referrals made by the Commission to the Tribunal.

[18] On the other hand, the same cannot be said in regard to complainants who refer matters to the Tribunal under s 73(5). Such a referral would have been made in the face of the Commission, the regulatory body with the necessary expertise, having decided that the complaint lacks merit – either on receiving the complaint for the reasons set out in s 72(1)*(a)*, or after investigating the matter. In these circumstances, where a complainant persists in advancing its complaint without the Commission's support, a referral is far more akin to a civil trial. And if the complaint is upheld by the Tribunal, there is every good reason to award costs to the successful complainant. On the other hand, where the complaint is unsuccessful and the outcome vindicates the Commission's issue of a notice of non-joinder, policy considerations justify the Tribunal ordering the complainant to pay the costs.

[19] There is thus every reason for the legislature to have limited the Tribunal's power to award costs as it did in s 147. But more importantly, there is another fundamental flaw in the reasoning of the court a quo. It appears to

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(g) referring to the Competition Commission any concerns regarding market share, anti-competitive behaviour or conduct that may be prohibited in terms of the Competition Act, 1998 (Act 89 of 1998);

(h) referring matters to the Tribunal, and appearing before the Tribunal, as permitted or required by this Act; and

(i) referring alleged offences in terms of this Act to the National Prosecuting Authority.'

have lost sight of the regulations being subordinate to the empowering statute under which they were promulgated, and that it is impermissible to treat them as a single piece of legislation. It is trite that regulations can neither be used as an aid to interpret the statute under which they were made nor be read so as to broaden the scope of the power extended by the statute. As was stated in *Shanahan v Scott* (1956) 96 CLR 245 at 250, a dictum cited with approval by this court in *Bezuidenhout v Road Accident Fund* 2003 (6) SA 61 (SCA) at 65G-I, the power delegated by an enactment:

'(D)oes not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the Statute itself and will cover what is incidental to the execution of its specific provisions. But such a power *will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the Legislature has adopted to obtain its ends*.' (My emphasis)

[20] Consequently, a regulation which does not give effect to a provision in the enabling Act, or seeks to provide powers beyond those envisaged by the Act, would be *ultra vires* and unenforceable. But that is not here the case. Regulations 19(2), 25(4) and 25(7) are compatible with the power extended to the Tribunal under s 147(2) to make a costs award in the circumstances envisaged in that sub-section – ie in cases in which the referral was made by a complainant (not the Commission) under s 75(1)*(b)*. That is no reason to hold that those regulations are of force and applicable in any other circumstances beyond those spelled out in s 147. To do so would be to impermissibly extend to the regulations the force of a statute: indeed in the present case, it would afford them statutory force overriding the specific limitation the legislature imposed upon the Tribunal in respect of its power to award costs.

[21] The court a quo therefore made the basic error in regarding the regulations not as ancillary to s 147(2), but to operate separately and in addition

to that section to broaden the powers extended thereunder. This was impermissible. It ought to have held that the cost provisions in regs 19(2), 25(4) and 25(7) were only of application in cases in which an award of costs was authorised under the CPA, and that unless the present was a matter referred to in s 147(2) – ie one referred to the Tribunal under s 75(1)*(b)* – then by reason of s 147(1) the parties were obliged to bear their own costs.

[22] Counsel for Univision correctly conceded that if regs 19(2), 25(4) and 25(7) had to be read solely with the terms of s 147 of the NCA, the Tribunal was not authorised to make a costs award against the Commission. However, he tentatively suggested that as the withdrawal had been filed before the actual hearing started, and as s 147 envisages parties 'participating in a hearing' bearing their own costs, it was of no application. His lack of enthusiasm for the point was well-founded. It would be absurd to interpret the section in such a way that it only applied to costs incurred once an actual hearing has commenced, denying a party from a costs order from that stage onwards but not before. Clearly the section was intended to apply to all costs associated with a matter once a referral is made to the Tribunal.

[23] The reasoning and conclusion that I set out above is in all material respects precisely the same as that adopted by the Constitutional Court in *Competition Commission of South Africa v Pioneer Hi-Bred International Inc & others* 2014 (2) SA 480 (CC) paras 29 – 40. In that matter, the court was called upon to deal with the effect of s 57 of the Competition Act 89 of 1998 and the regulations thereunder dealing with the Competition Tribunal, all of which are in terms similar to s 147 of the NCA and the regulations in issue in this case. On a parity of reasoning to that in this judgment, the Constitutional Court held that the Competition Tribunal was precluded from making a costs order against the Competition Commission.

[24] For some inexplicable reason neither the Tribunal, nor the court a quo, nor this Court was referred to that judgment which is decisive of the issue between the parties. Be that as it may, it is clear in this case that s 147 of the NCA precluded the Tribunal from granting Univision's application for the Commission to pay its costs when the referral was withdrawn. That being so, the Tribunal correctly refused to make an award of costs against the Commission and the court quo, in turn, erred in setting aside the Tribunal's order. The appeal against the order of the court a quo must therefore succeed. There is no reason for costs not to follow the event.

[25] The following order is made:

1 The appeal succeeds, with costs.

2 The order of the court a quo is set aside and substituted with the following:

'The application to review and set aside the order of the Tribunal of 16 November 2015 is dismissed, with costs.'

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L E Leach

Judge of Appeal

Appearances

For the Appellants:	A Govender
Instructed by:	Gildenhuys Malatji Attorneys, Pretoria
	Honey Attorneys, Bloemfontein
For the First Respondents:	H Epstein SC (with him S Cohen)
Instructed by:	David Feldman Attorneys, Pretoria
	Lovius Block Attorneys, Bloemfontein