THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 940/2021

In the matter between:

JACOLIEN BARNARD NO **FIRST APPLICANT**

BEATRICE LINDA MILLS NO **SECOND APPLICANT**

and

NATIONAL CONSUMER TRIBUNAL **FIRST RESPONDENT**

NATIONAL CREDIT REGULATOR **SECOND RESPONDENT**

Neutral citation: *Jacolien Barnard NO and Another v National Consumer Tribunal and Another* (940/2021) [2023] ZASCA 121 (18 September 2023)

Coram: MOCUMIE, MBATHA and MABINDLA-BOQWANA JJA and KATHREE-SETILOANE and SIWENDU AJJA

Heard: 16 March 2023

Delivered: 18 September 2023

Summary: Section 148(2)*(b)* of the National Credit Act 34 of 2005 – jurisdictional factor of applicant's participation in hearing before National

Consumer Tribunal absent – High Court therefore had no jurisdiction to entertain the appeal – application for leave to appeal is struck off the roll.

ORDER

On application for special leave to appeal from: Gauteng Division of the High Court, Pretoria (Janse van Nieuwenhuizen J with Potterill ADJP concurring, sitting as a court of first instance):

1 The applicants' failure to timeously apply to this Court for leave to appeal is condoned.

2 The application for leave to appeal is struck off the roll.

3 The applicants are ordered to pay the costs, including those of two counsel where so employed.

JUDGMENT

Mbatha JA (Mocumie JA and Kathree-Setiloane AJA concurring):

Introduction

[1] On 10 March 2017, the National Credit Regulator (the Regulator) initiated an investigation into the business practices of CMR Group (Pty) Ltd (CMR). The investigation focussed on agreements relating to its core business known as the 'Pawn your car and still drive it' scheme (the scheme).

[2] The investigation revealed that CMR advanced funds to consumers against their fully paid motor vehicles, subject to a pawn agreement. The scheme allowed the consumers to borrow between 30 to 50 percent of their respective motor vehicle's market value. The consumers then transferred their respective motor vehicles to CMR's name. The consumers remained in possession of the motor vehicles while renting them from CMR for a period of up to 12 months. The monthly rental was calculated at 25 to 30 percent of the loan amount. The consumers would have to settle the rental and loan amounts at the end of the

contract period to have the respective motor vehicles transferred back to their names. In the event of their failure to comply, the consumers would have to forfeit their respective motor vehicles to CMR.

[3] The Regulator alleged that the scheme was in contravention of s 101(1)*(d)* read with regulation 42 of the National Credit Act 34 of 2005 (NCA) – charging an excessive amount of interest; s 81(2) of the NCA – failing to conduct affordability assessments; and s 100(1)*(a)* of the NCA – imposing a prohibited charge. This prompted the Regulator to seek a declaratory order against CMR for repeated contraventions of the NCA in the National Consumer Tribunal (the Tribunal).

[4] CMR filed an answering affidavit to the Regulator's application, and conceded to the orders sought by the Regulator in the event that the Tribunal found that it was involved in prohibited conduct. CMR furthermore requested the Tribunal to issue an order which *inter alia* provided that CMR be interdicted from any further contraventions of the NCA, and be ordered 'at [CMR's] cost, to submit a report compiled by an independent auditor to [the NCR] in respect of fees which may have been overcharged by [CMR] and that such fees be set off against any amounts validly owed and/or owing to [CMR]'.

[5] In making its order, the Tribunal took into account the proposed concessions made by CMR. The order provides as follows:

'1. [CMR's] registration as a credit provider is hereby cancelled as of the date of issuing of this judgment;

2. [CMR] is interdicted from entering into any further credit transactions with consumers or operating as a credit provider;

3. All the credit agreements entered into between consumers and CMR are declared reckless. All the consumers' obligations in terms of these agreements are set aside. All the

consumers are to be reimbursed with all fees and the charges paid to CMR in terms of those agreements;

4. [CMR] is interdicted from proceeding with any current civil proceedings against consumers under the credit agreements. [CMR] is to rescind any judgments obtained against any consumers.

5. . . . [CMR is ordered to] appoint an independent auditor at its own cost. The auditor must determine all the amounts paid by the consumers under the credit agreements with CMR. All the amounts paid must be reimbursed to all the consumers. The auditor must provide a comprehensive report, regarding the consumers identified and the refunded amounts, to the NCR within 90 days of this judgment being issued; and

6. There is no order as to costs.'

Developments before the hearing

[6] A special resolution was passed to voluntarily wind-up CMR in terms of ss 349 and 351 of the Companies Act 61 of 1973 (the Companies Act). The application lodged by the Regulator was set down for a hearing on 16 April 2019. On 14 February 2019, the high court granted an order that placed CMR in voluntary liquidation and appointed the applicants before us as provisional liquidators of CMR (in liquidation). However, the Regulator only became aware of this on 12 April 2019, when CMR's erstwhile attorneys withdrew as attorneys of record.

[7] This led to the application being postponed to 30 July 2019. The Tribunal sent both CMR and the provisional liquidators a notice of set down. On 24 July 2019, Ms Barnard, on behalf of the provisional liquidators, acknowledged receipt of the notice of set down by email, and confirmed her appointment as liquidator and that she would be appearing before the Tribunal on 30 July 2019.

[8] On 30 July 2019, there was no appearance by either CMR or the liquidators before the Tribunal. In terms of rule 24 of the Rules for the Conduct of Matters

Before the National Consumer Tribunal (the Tribunal Rules),[1] the Tribunal proceeded with the hearing in the absence of CMR. On 12 August 2019, the Tribunal granted the orders set out above.

[9] Aggrieved by the decision of the Tribunal, the applicants, in their capacity as joint liquidators of CMR (in liquidation), noted an appeal in terms of s 148(2)*(b)* of the NCA against certain orders of the Tribunal, to a full bench of the Gauteng Division of the High Court, Pretoria (the high court).

[10] On 22 December 2020, the high court dismissed the appeal with costs. The applicants' application for leave to appeal the judgment and order of the high court met the same fate. Dissatisfied with the decision of the high court, the applicants applied for special leave from this Court. That application was accompanied by an application for condonation, as it was filed out of time. On 29 March 2022, this Court ordered that the application for special leave to appeal and condonation be referred for oral arguments in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013 (the Superior Courts Act). If called upon to do so, the parties were directed to be prepared to address this Court on the merits of the appeal. The application for condonation is unopposed. It need not detain us, as the delay is short and the explanation is reasonable. It, accordingly, succeeds.

[11] In an application for special leave from this Court, the applicant must, in addition to showing the existence of reasonable prospects of success on appeal, show that special circumstances exist for the granting of such leave. Although not a closed list, special circumstances may include that the appeal raises a substantial point of law, or that the prospects of success are so strong that a refusal of leave

[1] Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, GN 789, *GG* 30225, 28 August 2007.

may result in a manifest denial of justice, or that the matter is of great importance to the public or the parties.[2]

[12] Be that as it may, this Court in *National Credit Regulator v Lewis Stores (Pty) Ltd and Another*[3] (*Lewis*), held that an appeal from the decision of the high court under s 148(2) of the NCA, whether constituted of a single judge or two judges or a full court, should be sought in terms of s 16(1)*(a)* of the Superior Courts Act and not by way of an application for special leave to appeal to this Court.

[13] The rationale for arriving at this conclusion was that the decisions of the Tribunal are administrative decisions, and therefore not judgments or orders of court. Thus, leave must be sought in terms of s 16(1)*(a)* of the Superior Courts Act, as the more stringent test required for special leave to appeal, under s 17(3) thereof, would limit the right of access to courts in terms of s 34 of the Constitution. To strike this application from the roll on the basis that the applicants invoked the wrong remedy would serve no purpose. In the exercise of this Court's inherent power to regulate its own processes in terms of s 173 of the Constitution, I consider it to be in the interests of justice to proceed to deal with this application as an application for leave to appeal in terms of s 16(1)*(a)* of the Superior Courts Act.

Proceedings before the high court

[14] The legal issues raised in the high court for determination were: (a) whether the Tribunal, in terms of its statutory mandate under s 150 of the NCA, was empowered to grant the orders against CMR after the granting of the provisional

[2] *Cook v Morrison and Another* [2019] ZASCA 8; [2019] 3 All SA 673 (SCA); 2019 (5) SA 51 (SCA) para 8.
[3] *National Credit Regulator v Lewis Stores (Pty) Ltd and Another* [2019] ZASCA 190; [2020] 2 All SA 31 (SCA); 2020 (2) SA 390 (SCA) paras 55-56.

liquidation order; (b) whether the granting of such orders infringed the vested rights arising from the *concursus creditorum*; and (c) whether the orders granted infringed upon the powers and duties of the liquidators appointed to wind-up the company.

[15] The high court found that the applicants' grounds of appeal were limited to the following three orders granted by the Tribunal against CMR (in liquidation):

'3. All credit agreements entered into between consumers and CMR are declared reckless. All the consumers' obligations in terms of these agreements are set aside. All the consumers are to be reimbursed with all fees and the charges paid to CMR in terms of those agreements.

4. [CMR] is interdicted from proceeding with any current civil proceedings against consumers under the credit agreements. [CMR] is to rescind any judgments obtained against any consumers.

5. . . . [CMR is ordered to] appoint an independent auditor at its own cost. The auditor must determine all the amounts paid by the consumers under the credit agreements with CMR. All the amounts paid must be reimbursed to all consumers. The auditor must provide a comprehensive report, regarding the consumers identified and the refunded amounts, to the NCR within 90 days of this judgment being.'

It is notable that, at the hearing in the high court, the applicants did not seek to withdraw the concessions made by the erstwhile director of CMR, in its answering affidavit, acceding to the granting of the aforesaid orders by the Tribunal.

[16] One of the grounds of appeal raised in the high court by the applicants was a point of law that there was a conflict between the provisions of the NCA and the Companies Act. The high court held that it was entitled to dismiss the appeal on this ground because even if the applicants were, in terms of the common law, allowed to raise a point of law on appeal, the statutory provisions of the NCA militate against such a notion. It held, in this regard, that in terms of s 148(2) of the NCA a party has to participate in the proceedings before the Tribunal to avail

itself of the appeal and review processes provided for in that provision. The high court held that participation in the hearing is a jurisdictional requirement for noting an appeal in terms of s 148(2)*(b)* of the NCA, a threshold which was not met by the applicants. Accordingly, the high court held that the applicants should have followed the rescission procedure envisaged in rule 24A of the Tribunal Rules, and it thus dismissed the appeal on the basis of a lack of jurisdiction.

[17] The application for leave to appeal in this Court is directed at the two findings of the high court referenced above. The Regulator contended that the high court was correct in refusing to determine the point of law, as that issue did not serve before the Tribunal. It also contended that the high court did not err in concluding that it had no jurisdiction to entertain the appeal on the basis that the applicants had not participated in the proceedings before the Tribunal as contemplated in s 148(2) of the NCA.

[18] Should I find that the high court was correct in concluding that it had no jurisdiction to hear the appeal, that would be the end of the matter. There would, therefore, be no need to decide whether the high court erred in not dealing with the point of law raised by the applicants.

Participation in the legal proceedings

[19] Section 148(2) of the NCA, which governs appeals and reviews provides as follows:

'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 or section 69(2)*(b)* or 73 of the Consumer Protection Act, 2008, as the case may be.'

[20] In interpreting the words 'participating in a hearing' as envisaged in s 148(2) of the NCA, the rules of interpretation as articulated by this Court in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[4] apply. There, it was held:

'Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. . . The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[21] FindLaw Legal Dictionary describes 'participant' as 'a person who takes part in something' and 'participation' as 'the action or state of taking part in something'.[5] On a proper interpretation of the words 'participant in a hearing' in s 148(2) of the NCA, they denote physical participation in the hearing by a party or his or her legal representative. In other words, a party must participate in person (or through a representative) in the hearing before the Tribunal in order for it to note an appeal against its decision, to the high court, in terms of s 148(2)*(b)* of the NCA. This interpretation is consistent with the conclusion of this Court in *Lewis*[6] that although the full bench sits as the court of first instance in the appeal in terms of s 148(2)*(b)* of the NCA, this does not mean that the litigant should not first participate in the proceedings before the Tribunal.[7]

[22] An order granted by a competent court may be appealed against as long as the required jurisdictional requirements are met. It is trite that jurisdiction is a

[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.
[5] FindLaw Legal dictionary, available at https://dictionary.findlaw.com.
[6] *Lewis* para 56.
[7] The only exception in terms of which the high court can be directly approached, is where a litigant wants to declare the provisions of the NCA unlawful because that jurisdiction rests with the court and not the Tribunal. In that regard, relief will be granted under the Tribunal Rules even where the alleged irregularity relates to the lack of legal competence by the Tribunal to have made the order.

legal issue and nothing precluded the high court from establishing whether it had competence to deal with the appeal.[8] It is regrettable in this matter that neither the Regulator nor the high court raised the question of its lack of appeal jurisdiction at the hearing. However, this did not prevent the high court from determining whether it had jurisdiction to hear the appeal in terms of s 148(2)*(b)* of the NCA.

[23] Notwithstanding this, the applicants remain adamant that the high court erred in concluding that it had no jurisdiction to entertain the appeal because the applicants did not participate in the hearing before the Tribunal. They submit that a broad meaning should be given to the words 'a participant in the hearing'. They argue that the applicants' participation in the hearing before the Tribunal can be discerned from the notification that Ms Barnard provided to the Tribunal, after CMR filed its answering affidavit, where she indicated that she would attend the proceedings. I disagree, because the notification informing the Tribunal that Ms Barnard would attend the hearing did not equate to her participation in the hearing. Nor, for that matter, did the filing of an answering affidavit by CMR which the applicants associated themselves with.

[24] The words 'a participant in a hearing before a full panel' are clear and unambiguous. The party seeking leave to appeal must have participated either personally or through a representative in the actual hearing before the Tribunal. Section 148(2) of the NCA does not contemplate the consideration of an answering affidavit by the Tribunal, in the absence of a party's (or its representative's) participation in the hearing before it, to constitute participation. Such an interpretation would render the words 'in a hearing' superfluous. That the Tribunal took into account the concessions made by CMR in its answering affidavit before making the orders against CMR also does not amount to either

[8] *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 (2) SA 420 (A).

CMR's (or the applicants') participation in the hearing as envisaged in s 148(2) of the NCA.

The appeal or rescission process

[25] Rule 24(1)[9] of the Tribunal Rules gives two options to a presiding member, where a party who is not an applicant fails to attend or is not represented in the proceedings before the Tribunal. In the exercise of his or her discretion, the presiding member of the Tribunal may continue with the proceedings in the absence of that party or adjourn the hearing to a later date. In exercising his or her discretion, the presiding member must be satisfied, in terms of rule 24(2), that the party who is in default of an appearance had been properly notified of the date, time and venue of the proceedings, before making any decision in terms of rule 24(1)*(b)*(i) or (ii) of the Tribunal Rules. In this case the presiding member was satisfied that this requirement was complied with. He accordingly decided to proceed with the hearing in the absence of the applicants in line with rule 24(1)*(b)*(i).

[26] A party who did not participate in the hearing before the Tribunal has a remedy in terms of s 165 of the NCA, which provides for a rescission or a variation of orders granted by the Tribunal which were, inter alia, erroneously sought or granted in the absence of a party. Section 165 of the NCA provides:

'165. Variation of order

The Tribunal, acting of its own accord or on application by a person affected by a decision or order, may vary or rescind its decision or order-

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[9] Rule 24 provides:

'(1) If a party to a matter fails to attend or be represented at any hearing or any proceedings, and that party-

(a) is the applicant, the presiding member may dismiss the matter by issuing a written ruling, or

(b) is not the applicant, the presiding member may dismiss the matter by issuing a written ruling; or

(i) continue with the proceedings in the absence of that party; or

(ii) adjourn the hearing to a later date.

2 The Presiding member must be satisfied that the party had been properly notified of the date, time and venue of the proceedings, before making any decision in terms of subrule (1).

3 The Registrar must send a copy of the ruling to the parties.'

(a) erroneously sought or granted in the absence of a party affected by it;

(b) in which there is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission; or

(c) made or granted as a result of a mistake common to all the parties to the proceedings.'

[27] The applicants ought to have applied to rescind the order of the Tribunal under s 165 of the NCA as opposed to appealing against it in terms of s 148(2)*(b)* of the NCA. Section 165 read together with rule 24A[10] of the Tribunal Rules puts paid to the applicants' contention that the high court's finding, that it lacks jurisdiction to hear the appeal, impacts on their rights of access to court in terms of s 34 of the Constitution. Importantly, should a rescission application succeed, then the Tribunal will be required to rehear the matter on the merits.

[28] It is important to consider the express language used in s 165 of the NCA. On its plain wording, s 165 provides for the rescission or variation of the Tribunal's order or decision which was erroneously sought or granted in the absence of the party seeking to rescind it. That the Tribunal decided the matter on the merits did not preclude the applicants from seeking to rescind the order in terms of s 165 of the NCA on the grounds that it was erroneously granted in their absence.

[29] The applicants misconstrued their remedy under the NCA. Instead of applying to the Tribunal to rescind its order, they sought to appeal it in terms of s 148(2)*(b)*. The NCA does not give a party a choice on the remedy to adopt in the event of its failure to participate in the hearing.

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[10] Rule 24A(1) provides:
'Variation or rescission of Tribunal orders
(1) An application for the variation or rescission of a Tribunal order must be made within 20 days of the date on which the applicant became aware of -
(a) the Tribunal order which was granted in the absence of the applicant;
(b) the ambiguity, error or omission; or
(c) a mistake common to the parties to the proceedings; or
(d) within such longer period as permitted by the Tribunal.'

[30] The high court correctly found that the 'rescission of an order granted in the absence of a party, facilitates the rehearing of the matter and affords the absent party an opportunity to present its submissions on an issue in dispute. This, in turn, enables the Tribunal to properly consider the issues and deliver a reasoned judgment in respect of each issue'. This is a very low threshold to be met by an applicant seeking to rescind an order erroneously sought or granted in its absence. In this regard, I find that the only route open to the applicants was to apply for a rescission of the Tribunal's order, which was made in default of their appearance at the Tribunal hearing.

Conclusion

[31] In seeking to persuade us that leave should be granted, the applicants made extensive submissions on the merits of the case. The fact remains that they had to cross the jurisdictional Rubicon first, before being able to make any submissions on the merits. That issue is dispositive of the application for leave to appeal.

[32] I have had the benefit of reading my colleagues' dissenting judgment, where they raise the question of whether the liquidators should have been cited or joined as parties to the proceedings before the Tribunal. They contend that notwithstanding that the Tribunal was alive to the liquidation and suspension of legal proceedings, the Tribunal proceeded with the hearing in terms of rule 24(1)*(b)*(i) of the Tribunal Rules. They conclude that the Tribunal erroneously stated that there was no requirement in the 1973 Companies Act that the liquidator be joined or cited in the proceedings. As a result, it was not open to the Tribunal to proceed as if the liquidation order had not been issued, as the liquidation predated the Tribunal proceedings. I have decided to express my views on this issue as it is ancillary to the jurisdictional question which I have extensively dealt with in this judgment.

[33] I reiterate that the liquidation process commenced long after the matter had been set down for hearing before the Tribunal. CMR was then placed in voluntary liquidation by its erstwhile sole director shortly before the commencement of the hearing before the Tribunal. It is common cause that at that stage, the former director, whose company had been legally represented in the proceedings, had conceded to unlawful conduct in terms of the NCA and proffered to make restitution to the concerned consumers. It is not in dispute that when CMR was placed in liquidation, the Regulator immediately complied with the provisions of s 359 of the Companies Act. The Tribunal also furnished the applicants with the pleadings and informed them of a new date for hearing. Ms Barnard, on behalf of the applicants, acknowledged receipt of the documents and confirmed in writing that they would attend the proceedings on the date set down for hearing.

[34] Significantly, the applicants contended upfront during the hearing in the application for leave to appeal in this Court, that they had participated in the proceedings before the Tribunal on the basis that the answering affidavit had been filed with the Tribunal. They submitted that this Court should as a result, give a broad interpretation to the word participation in terms of s 142(2)*(b)* of the NCA. For this contention, they relied on the Constitutional Court judgment *Morudi and Others v NC Housing Services and Development Company Limited and Others*[11]. The applicants never raised the issue of their non-joinder in the application for leave to appeal before this Court as they considered themselves to be parties before the Tribunal by virtue of having received notice from the Tribunal.

[35] I find, with respect, that the contention that the applicants should have been joined in the proceedings at the instance of the Regulator to be gratuitous as it does not accord with provisions of s 359 of the Companies Act. Section 359

[11] *Morudi and Others v NC Housing Services and Development Company Limited and Others* [2018] ZACC 32.

regulates the process that needs to be followed after a company has been placed in liquidation, in the event that the applicant in the legal proceedings wants to proceed with such proceedings. Briefly, it imposes a moratorium on legal proceedings for a limited period until the appointment of a liquidator. Once the liquidator is appointed, any person who having instituted legal proceedings against a company (which were suspended by a winding up) intends to continue with such legal proceedings, is required within a period of four weeks after the appointment of the liquidator to give the liquidator not less than three weeks' notice in writing before continuing with the proceedings.

[36] I must add that the language of s 359(2)*(a)* is specific as to what proceedings it refers to, it states that:

'*(a)* Every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the *company which arose before the commencement of the winding-up*, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.

(b) If notice is not so given the proceedings shall be considered to be abandoned unless the Court otherwise directs.' (emphasis added)

The subsection distinguishes these proceedings from any other proceedings that may arise post the commencement of the liquidation proceedings. The proceedings initiated post the company being placed in liquidation may require that the liquidator be joined to the proceedings. The Tribunal in its judgment correctly found that the application before it was initiated before the commencement of the liquidation and that the old Companies Act did not require that there be a joinder or citation of the liquidators in the proceedings adjourned in terms of s 359 of the Companies Act. Furthermore, it found that s 359 of the Companies Act only required that a notice be given to the liquidator. In that regard

nothing prevented the applicants from substituting themselves as respondents before the Tribunal.

[37] The Constitutional Court in *Chisuse and Others v Director General, Department of Home Affairs and Another*,[12] reiterated the principles of interpretation of statutory provisions by affirming that'(a) the statutory provisions be interpreted purposively; (b) the relevant statutory provision must be properly contextualized; and (c) all statements must be construed consistently with the Constitution...' In applying the aforesaid principles of interpretation, I come to the following conclusions: First, s 359 protects the rights of a creditor who if he fails to give notice to continue with legal proceedings, shall be considered to have abandoned the legal proceedings against the company in liquidation. Secondly, it provides the liquidators of a company in liquidation with time to weigh-up and consider the nature and validity of the claims against the company in liquidation. If they do not agree with them, this affords them an opportunity to challenge the claims. Thirdly, the legislation provides for the continued application of the 1973 Companies Act to winding up and liquidation matters, despite its repeal. The remedy provided in s 359 is an internal remedy provided in terms of the Companies Act. There is, therefore, no need to seek regulatory answers outside the perimeters of the Companies Act. Fourthly, the language of the provision does not expressly or impliedly require that the applicants be joined in the legal proceedings at the instance of the Regulator. In *Umbogintwini Land & Investment Co (Pty) Ltd (in liquidation) v Barclays National Bank Ltd & another*1987 (4) SA 894(A) Viljoen JA said in respect of s 359(2)*(b)*:

'The provision was designed, in my view, to afford the liquidator an opportunity, immediately after his appointment, to consider and assess, in the interests of the general body of creditors,

[12] *Chisuse and Others v Director General, Department of Home Affairs and Another* [2020] ZACC 20; 2020 (10) BCLR 1173 (CC) para 47.

the nature and validity of the claim or contemplated claim and how to deal with it – whether, for instance, to dispute or settle or acknowledge it.'

[38] Once the notice has been given there is no impediment to the continuation of the proceedings and to the issuing of any order that the Tribunal or the court may deem fit. This opens the way for the creditor to lodge and prove a claim in terms of s 44(1) of the Insolvency Act. The wording of s 359(2)*(a)* of the Companies Act confirms that 'there is no legal bar to a litigant to proceed with the claim, once there has been compliance with the notice'.[13]

[39] The s 359 notice gave the applicants adequate time to establish, consider the merits of the claims and to decide on the legal route to be followed. The provisions of s 143 of the NCA read with Rule 11 of the Tribunal Rules also allow any person on application to intervene in the proceedings. I conclude that there was no onus upon the Regulator to formally join the applicants in the proceedings. This is supported by the lack of express provisions to that effect in s 359 of the Companies Act. It was never envisaged that every creditor who had commenced proceedings would bear a further onerous burden of joining the liquidators of the company in liquidation. This would also not be in the best interest of the creditors that the liquidators are forced to come to court, even when they do not have a defence to the action. I accept that the applicants had a direct and substantial interest in proceedings before the Tribunal, but it was incumbent upon them to intervene and participate in the proceedings. They were fully aware of their rights in terms of the law and considered themselves as parties to the proceedings before the Tribunal. As alluded to earlier in the judgment, notwithstanding their non-attendance at the hearing before the Tribunal, they contended that they participated in the proceedings before the Tribunal through associating

[13] *Leipsig v Bankorp Ltd* (377/92) [1993] ZASCA 198; 1994 (2) SA 128 (AD); [1994] 2 All SA 150 (A) para 16-17.

themselves with the answering affidavit which was filed by CMR (the company in liquidation).

[40] The applicants acquiesced in the decision of the Tribunal, as their grounds of appeal are directed at only three of the six orders of the Tribunal. They clearly accepted the remaining orders. In that regard non-joinder cannot be raised as a defence on their behalf. Moreover, that the high court had no jurisdiction to entertain the appeal means that it could not deal with the point of non-joinder even if it was raised by the applicants as a ground of appeal, which it was not. Nor in the circumstances of having no jurisdiction to entertain the appeal, could the high court raise non-joinder *mero motu.*

[41] For these reasons, the application for leave to appeal to this Court falls to be struck off the roll.

[42] In the result, it is ordered:

1 The applicants' failure to timeously apply to this Court for leave to appeal is condoned.

2 The application for leave to appeal is struck off the roll.

3 The applicants are ordered to pay the costs, including those of two counsel where so employed.

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Y T MBATHA

JUDGE OF APPEAL

Mabindla-Boqwana JA and Siwendu AJA (dissenting):

[43] We have read the judgment of our colleague Mbatha JA (the first judgment). We agree that the application before us should be treated as an application for leave to appeal as opposed to an application for special leave to appeal, as explained in the first judgment. We, however, differ with the first judgment as to the approach and the fate of this application. In our view, as a matter of law, the liquidation of CMR impacted materially on the future conduct of the proceedings before the Tribunal. As a result, we are not persuaded that the point of departure is one of jurisdiction under s 148 of the NCA. We say that in declining to entertain the appeal on the grounds of a lack of jurisdiction in terms of s 148(2)*(b)* of the NCA, the high court erred. In our view, there arose a necessary anterior enquiry that ought to have occupied the attention of the high court.

[44] It is apparent from the Tribunal's judgment that it considered the effect of the liquidation of CMR, and whether the rescheduled hearing could have proceeded in the absence of Ms Barnard. Put differently, whether the liquidators ought to have been cited or joined as parties to the proceedings before the Tribunal.

[45] Being alive to the liquidation and the automatic suspension of legal proceedings against CMR, the Tribunal referred to s 359 of the Companies Act 61 of 1973 (the 1973 Companies Act), which provides:

'(1) When the Court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered in terms of section 200–

(a) all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator; and

(b) any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void.

(2)*(a)* Every person who, having instituted legal proceedings against a company which was suspended by a winding-up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.

(b) If notice is not so given the proceedings shall be considered to be abandoned unless the Court otherwise directs.'

[46] Notwithstanding, the Tribunal proceeded on the basis that in terms of rule 24(2)[14] of the Tribunal Rules,[15] '*CMR had been properly notified* of the date of the hearing'. Accordingly, it could proceed with the hearing '*in the absence of CMR* in accordance with Rule 24(1)*(b)*(i)'. (Emphasis added.)

[47] The Tribunal concluded that because the Regulator had sent a copy of the application to the liquidator by registered post and the notice of set down had been emailed to the liquidator, the latter had been given requisite notice in terms of s 359 of the 1973 Companies Act. The requirements of the 1973 Companies Act were thus fulfilled and nothing further was required. The Tribunal thus concluded, erroneously so in our view, that there was no requirement in the 1973 Companies Act that 'the liquidator now be joined in the proceedings or be cited'.

[48] The Tribunal also premised its reasoning for its orders on the grounds that CMR retained its juristic status and identity despite the final order of liquidation.

[14] In terms of Rule 24(2), the Presiding member must be satisfied that the party had been properly notified of the date, time and venue of the proceedings, before making any decision in terms of subrule (1).

[15] Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, GN 789, *GG* 30225, 28 August 2007.

It called in aid the decision of *Richter v ABSA Bank Limited*[16] (*Richter*), where this Court stated:

'The correct position is that upon the final order of liquidation being granted the company continues to exist, but control of its affairs is transferred from the directors to the liquidator who exercises his or her authority on behalf of the company.'

[49] However, the Tribunal misconceived the effect of *Richter* in concluding that '[t]he status of CMR has therefore not changed in anyway. It remains a juristic entity and it remains a credit provider in terms of the NCA. The Tribunal is therefore still empowered to adjudicate on the application brought against CMR'. Such an approach cannot be supported. The status of the CMR had obviously changed – it was now under the legal disability of a winding-up order. This impacted in a direct and substantial way on its status.

[50] In our view, it was not open to the Tribunal to proceed as if the liquidation order had not issued. The Tribunal thus erred in regard to the material effect of the liquidation on the proceedings before it, and this error permeated the approach by the Regulator, the high court and the parties in the application for leave to appeal before us.

[51] The liquidation order pre-dated the Tribunal hearing. The effect of the liquidation order was that the management of the business of CMR was transferred into the hands of the applicants as its liquidators. Even though the Tribunal correctly referred to *Richter*, which affirms a long-standing principle that upon liquidation, the management of the affairs of CMR vested in the applicants, it overlooked its full import. The effect of a liquidation order is to establish a *concursus creditorum*.[17] In *Walker v Syfret NO*,[18] this Court stated:

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[16] *Richter v ABSA Bank Limited* [2015] ZASCA 100; 2015 (5) SA 57 (SCA) para 10.
[17] *Muller NO and Another v Community Medical Aid Scheme* [2011] ZASCA 228; 2012 (2) SA 286 (SCA); [2012] 2 All SA 252 (SCA) para 7.
[18] *Walker v Syfret NO* 1911 AD 141 at 166.

'The object of the Insolvent Ordinance is to ensure a due distribution of assets among creditors in the order of their preference. And with this object all the debtor's rights are vested in the Master or the trustee from the moment insolvency commences. The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.'

[52] The orders of the Tribunal impacted on the statutory powers and duties of the liquidators to take possession of and administer CMR's affairs.[19] The starting point, accordingly, was not whether the liquidators were given 'notice' of the proceedings, but whether the liquidators were a *necessary party* and had a *direct and substantial interest* in the Tribunal proceedings. If they were necessary parties, then they were entitled to be joined. This is especially so because the Tribunal proceeded to issue orders against the applicants, as if they were indeed parties to the proceedings.

[53] It is trite that '[a] third party who has, or may have, a direct and substantial interest in any order the court might make in proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party, is a *necessary* party and should be joined in the proceedings, unless the court is satisfied that such person has waived the right to be joined'.[20] (Emphasis added.)

[54] As was held in *Matjhabeng Local Municipality v Eskom Holdings Limited and Others*:[21]

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[19] Section 386 of the 1973 Companies Act deals with the powers of the liquidators.
[20] A C Cilliers et al, *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (2009) ch6-p209; *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).
[21] *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) para 92.

'No court can make findings adverse to any person's interest, without that person first being a party to the proceedings before it. The purpose of this requirement is to ensure that the person in question knows of the complaint so that they can enlist counsel, gather evidence in support of their position, and prepare themselves adequately in the knowledge that there are personal consequences . . . .'

[55] In *Judicial Service Commission and Another v Cape Bar Council and Another*,[22] this Court held that joinder is only required as a matter of necessity as opposed to a matter convenience. And indeed, when such person is a necessary party the court will not deal with the issues without a joinder being effected (unless the waiver thereof), and no question of discretion or convenience arises.[23] Importantly, mere notice of the proceedings to the third party is not sufficient.[24] Particularly here where relief ultimately issued against the applicants that had not been foreshadowed in the application. In the circumstances, it was necessary for a formal application to be filed on notice to the applicants setting out the revised relief that would be sought against them consequent upon the winding-up of the company and their appointment as liquidators. A proper joinder was thus necessary given the nature of the orders that ultimately issued, which operated against the liquidators. Absent their joinder and absent an application for relief against them, it was not permissible for the Tribunal to issue orders against the applicants. Indeed, if it appears *ex facie* the papers that a person has a direct and substantial legal interest in the matter before the court entitling it to be heard, the court may *mero motu* take steps to safeguard its rights.[25]

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[22] *Judicial Service Commission and Another v Cape Bar Council and Another* [2012] ZASCA 115; 2012 (11) BCLR 1239 (SCA); 2013 (1) SA 170 (SCA); [2013] 1 All SA 40 (SCA) para 12.
[23] *Khumalo v Wilkins* 1972 (4) SA 470 (N) at 475A–B.
[24] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) 659-660 and 661-663.
[25] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

[56] As pointed out in *Rosebank Mall (Pty) Ltd & Another v Cradock Heights (Pty) Ltd*:[26]

'There is a distinction between the case of a party whose rights are purely derived from "the right which is the subject-matter of the litigation" and in which he has no legal interest, on the one hand, and the case where the third party has a right acquired *aliunde* the right which is the subject-matter of the litigation and which would be prejudicially affected if the judgment and order made in the litigation to which he was not a party, were carried into effect.'

[57] The applicants, as liquidators, had a different role to play as regards the affairs of CMR, to that of the company prior to liquidation. Furthermore, as the orders by the Tribunal demonstrate, the relief sought against CMR in liquidation would not be the same as was the case prior to liquidation.

[58] A liquidator acts in pursuance of powers vested in him or her, inter alia, by the 1973 Companies Act.[27] In issuing some of its orders the Tribunal appears to have incorrectly assumed that it had the power to instruct the liquidators on the management of the liquidation when it noted that:

'The Tribunal considered the imposition of an administrative fine *but considering the fact that CMR is now under liquidation,* it would not be appropriate. It would be more appropriate for the liquidator to use whatever assets the company may have to reimburse consumers.' *(emphasis added.)*

[59] It should have been clear to the Tribunal that its judgment was likely to impact on the applicants' functions. Distilled to its essence the Tribunal orders effectively 'attach' the assets of CMR, notwithstanding the prohibition in s 359(1)*(b)* of the 1973 Companies Act.[28] Moreover, the orders of the Tribunal if complied with by the liquidators, may well result in the beneficiaries of those orders being preferred to the other creditors of the company in winding-up. To

[26] *Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W); [2003] 4 All SA 471 (W) para 37.
[27] See s 386 of the 1973 Companies Act.
[28] See for example *Rennie NO v South African Sea Products Ltd* 1986 (2) SA 138 (C) at 143.

that extent, it may well be that the orders of the Tribunal cannot simply co-exist with the winding-up order and the insolvency regime under the Insolvency and Companies Acts. The Tribunal appears to have unwittingly created a new order of preference not countenanced by those Acts to the prejudice of the general body of creditors. To the extent that the orders of the Tribunal have that effect, they may well be nullities, offending as they do, the insolvency regime ordained by the legislature. In the event, the approach of the high court in non-suiting the applicants would leave them without a remedy.

[60] We therefore conclude that the applicants were necessary parties to the proceedings before the Tribunal. Their non-joinder is fatal. The matter accordingly could not have proceeded to finality in their absence.

[61] As to the question of 'participation' in the hearing before the Tribunal, a jurisdictional basis upon which the high court non-suited the liquidators: If it is accepted, as we have shown, that as a matter of law, the hearing could not proceed without their joinder, the issue of non-participation in terms of s 148(2)*(b)* of the NCA does not arise. In any event, to the extent that participation is relied upon, it seems that the notice was only sent to one of the liquidators, Ms Barnard, the first applicant. It follows that all of the orders of the Tribunal, having been issued in the absence of the liquidators, cannot stand. Likewise, the high court erred in dismissing the appeal. In the result, the application for leave to appeal should succeed and the appeal upheld.

[62] As to costs, the second respondent is a statutory body in terms of the NCA, which did not act unreasonably in opposing the matter at various stages of this case. It will accordingly not be just to award costs against it.[29]

[29] *National Credit Regulator v Southern African Fraud Prevention Services NPC* [2019] ZASCA 92; [2019] 3 All SA 378 (SCA); 2019 (5) SA 103 (SCA) para 45.

[63] In the result, we would issue the following order:

1 The application for leave to appeal succeeds.

2 The appeal is upheld.

3 The order of the high court is set aside and replaced with the following:

‘(a) The appeal is upheld.

(b) The order of the Tribunal is set aside.

(c) The proceedings before the Tribunal are stayed for a period of three months pending the joinder of the liquidators of CMR.

(d) The three months shall be reckoned from the date of this order.’

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N P MABINDLA-BOQWANA

JUDGE OF APPEAL

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N T Y SIWENDU

ACTING JUDGE OF APPEAL

Appearances

For the applicants:	M Louw (with D Hewitt)
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For the second respondent:	L Kutumela (with M Nguta)
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