# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

## JUDGMENT

**Reportable**

Case no: 560/2018

In the matter between:

**NATIONAL CREDIT REGULATOR** **APPELLANT**

and

**SOUTHERN AFRICAN FRAUD PREVENTION SERVICES NPC** **RESPONDENT**

**Neutral citation:** *National Credit Regulator v Southern African Fraud Prevention Services NPC* (560/2018) [2019] ZASCA 92 (03 June 2019)

**Coram:** WALLIS, SALDULKER, ZONDI and SCHIPPERS JJA and EKSTEEN AJA

**Heard**: 22 May 2019

**Delivered**: 03 June 2019

**Summary:** Credit bureau – collection of information pertaining to fraud – whether consumer credit information in terms of s 70(1) of National Credit Act 34 of 2005 (NCA) – whether information constituting an adverse classification of consumer behaviour in terms of Regulation 17 of Regulations under NCA in GN R489 of 31 May 2006 – whether credit bureau required to expunge information within one year.

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**ORDER**

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**On appeal from:** Gauteng Division of High Court, Pretoria (Vuma AJ, Baqwa J concurring, sitting as a court of appeal):

1 The appeal is dismissed with no order for costs.

2 The orders of the high court granting costs against the National Credit Regulator in the appeal and the cross-appeal to that court are set aside.

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**JUDGMENT**

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**Wallis and Schippers JJA (Saldulker and Zondi JJA and Eksteen AJA concurring)**

[1] On 12 March 2015 the appellant, the National Credit Regulator (NCR), acting in terms of s 140(1) of the National Credit Act 34 of 2005 (the NCA), lodged a complaint with the National Consumer Tribunal (the Tribunal), against the respondent, Southern African Fraud Prevention Services NPC (SAFPS). The complaint charged SAFPS, a registered credit bureau, with various contraventions of provisions of the NCA and the regulations made thereunder. Prior to the hearing before the Tribunal the parties concluded an agreement of settlement, which they embodied in a draft order subsequently endorsed by the Tribunal. The agreement disposed of all save one of the alleged contraventions. The Tribunal was left to determine an alleged contravention of s 70(2)(*f*) of the NCA, read with regulation 17, and, if there had been a contravention, whether an administrative fine should be imposed upon SAFPS.

[2] The issue for determination by the Tribunal was whether SAFPS was retaining information for longer than permitted by the NCA, read with certain relevant regulations. The NCR contended that the information in question was consumer credit information as defined in s 70(1) of the NCA and that it could not be retained for longer than one year. SAFPS said that it was what it described as 'fraud information', which was not regulated and which it was entitled to keep for the period determined by it, namely ten years.

[3] The Tribunal upheld the contentions of the NCR that SAFPS had contravened s 70(2)(*f*) of the NCA, read with regulation 17, and made a declaratory order to that effect. It declined to impose an administrative fine. SAFPS appealed to the Gauteng Division of the High Court, Pretoria and its appeal succeeded. This further appeal on both the issue of contravention and the imposition of an administrative fine is with the special leave of this court.

**The facts**

[4] SAFPS was incorporated in 2000 as a non-profit corporation by the four major banks to combat fraud in commerce. Its members include most major credit providers in South Africa, as well as the South African Revenue Service and the Financial Services Board. It is funded by the annual membership contributions of its members. SAFPS initially denied that it was a credit bureau and obliged to register in terms of s 43 of the NCA. The Tribunal upheld its contentions, but Legodi J in the North Gauteng High Court, Pretoria, overruled that decision in a judgment delivered on 26 May 2011. Subsequently SAFPS registered as a credit bureau and it is accordingly obliged to comply with the statutory obligations of a registered credit bureau. The issue is whether it has done

so in regard to expunging the information it collects on behalf of its members.

[5] In terms of the agreement concluded between SAFPS and its members, each member agrees that all fraud detected by it during the normal course of its business will be filed to the SAFPS Shamwari database within two business days of the fraud being detected. All members have access to that database in order to access information applicable to their business requirements and needs. Primarily members will seek information before entering into a variety of commercial transactions or making employment decisions.

[6] The SAFPS code of practice identifies 11 different categories of fraudulent conduct. These are:

(a) False identity, which includes the use of a false name, address or ID number or other false personal detail in an application of some type;

(b) Impersonation, where an applicant impersonates someone else, perhaps by using a false ID book or number, or the particulars of a dead person, or in some other way;

(c) Giving false employment details including an incorrect employer name, address or telephone number or providing a forged or incorrect payslip;

(d) Use of other forged documents;

(e) A victim of impersonation, where it is doubtful whether the person is in fact impersonating someone else or is himself or herself possibly the victim of impersonation. In that event the person is shown under both categories (b) and (e). The latter is said to require the member 'to be extra vigilant when deciding as to the granting of any facility'. After establishing that they have been a victim of impersonation, for example, by someone

using their stolen identity card, a person listed under this category is able to ask for a protective listing;

(f) Misuse of account through fraudulent conduct, which is described as 'deliberately not paying their mortgage or credit card account, especially by guile, trickery or illegitimate presentation of the individual's financial position'. It is said that the category is not to be used unless there was clearly an intention to commit fraud;

(g) Employee fraud or fraud in an employment application. This is an extensive category covering a vast number of possibilities;

(h) Insurance fraud, which relates to dishonest and inflated insurance claims;

(i) Internet fraud;

(j) Business fraud/person unknown, which records information related to fraudulent activities where no person can be identified as responsible;

(k) Suspected fraud (declined). This is a cautionary category where fraud is strongly suspected, primarily in regard to the provision of false information or impersonation of someone else. Accordingly it does not involve a case of proven fraud.

[7] SAFPS referred compendiously to all the information in these various categories as 'fraud information' and we shall do likewise. In each case the primary item of information in its records was a factual statement describing the particular fraud. It stressed the fact that fraud is widespread and perpetrators of fraud are often repeat offenders. In other words, they may repeat fraudulent conduct with several victims or, if unsuccessful in one attempt they may try elsewhere. Perhaps along the lines that the leopard does not change its spots, SAFPS maintained that such information remained relevant for a lengthy period. It accordingly only deletes it from the Shamwari data base after ten years, unless the alleged fraud is clarified

and resolved before that date and the listing removed at the instance of a member.

**The dispute**

[8] The NCR contended that the information obtained by SAFPS from its members constituted consumer credit information as defined in s 70(1) of the NCA. That is information concerning:

'*(*a) a person's credit history, including applications for credit, credit agreements to which the person is or has been a party, pattern of payment or default under any such credit agreements, debt re-arrangement in terms of this Act, incidence of enforcement actions with respect to any such credit agreement, the circumstances of termination of any such credit agreement, and related matters;

*(*b*)* a person's financial history, including the person's past and current income, assets and debts, and other matters within the scope of that person's financial means, prospects and obligations, as defined in section 78(3) and related matters;

*(*c*)* a person's education, employment, career, professional or business history, including the circumstances of termination of any employment, career, professional or business relationship, and related matters; or

*(*d*)* a person's identity, including the person's name, date of birth, identity number, marital status and family relationships, past and current addresses and other contact details, and related matters.'

[9] The first issue between the parties was whether the NCR was correct in contending that the fraud information held by SAFPS was consumer credit information. If it was not, that was an end to the matter. If it was, the second issue was whether and when SAFPS was obliged to expunge the information from its Shamwari database. Section 70(2)(*f*) of the NCA required it to:

'promptly expunge from its records any prescribed consumer credit information that, in terms of the regulations, is not permitted to be entered in its records or is required to be removed from its records'.

That takes one to the regulations promulgated under the Act (the Regulations).[1]

[10] Regulation 17(1) contains a table of different categories of consumer credit information, with a more detailed description and a maximum period from the date of the relevant event for which it can be displayed and used for purposes of credit scoring or credit assessment. No point was made of that latter qualification and we assume that SAFPS accepted that its members use the information in part at least for credit assessment. It was common cause between the parties, and correctly so in our opinion, that the only category of consumer credit information that might be relevant to the information held by SAFPS was category 5 entitled 'Adverse classifications of consumer behaviour'. The appended description is 'Subjective classifications of consumer behaviour' and the period of expungement one year. The second issue was whether the fraud information held by SAFPS fell within this category. If it did, then its retention on the database for ten years was a breach of s 70(2)*(f)* of the NCA.

**Is the SAFPS fraud information consumer credit information?**

[11] The NCR's case before the Tribunal was that a listing relating to fraud or suspected fraud constituted 'consumer credit information' as defined in s 70(1) of the NCA, because consumer behaviour was not limited to payment under a credit agreement but also included the behaviour of a consumer who intended to defraud a credit provider in a prospective credit application. All of this fitted comfortably within the general categories of a person's credit history or their financial history. In

[1] The Regulations were originally published in GN R489 of 31 May 2006 and amended by GN R1209 of 30 November 2006 and further amended by GN R202 of 13 March 2015.

a real sense nothing could be more relevant to a person's credit history than that they had previously committed fraud.

[12] Before us counsel for the NCR advanced essentially the same argument. The data that the SAFPS kept in its database was consumer credit information, because it included information relating to fraudulent, financial or other transactions involving consumers and contained their personal details such as identity numbers, addresses and places of work. The data was inextricably linked to credit applications by consumers to credit providers and used by members of SAFPS when assessing applications for credit.

[13] In construing the relevant provisions of the NCA and regulation 17, the starting point is the accepted approach to statutory construction that when interpreting legislation, what must be considered is the language used, the context in which the provision appears, the apparent purpose to which it is directed, and the background to its production.[2]

[14] The definition of 'consumer credit information' in s 70(1) is extremely broad. It includes all sorts of information of the type that consumers ordinarily furnish in credit applications, about their credit, financial and employment history. In order for it to be meaningful it reflects personal information such as their name, address, identification number and contact details. The breadth of the definition must however be understood in the context in which it appears. That context emerges from other provisions of the NCA. Thus, in s 3*(f)*, one of the purposes of the

[2] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18; affirmed in *Airports Company South Africa Big Five Duty Free (Pty) Limited* & *others* [2018] ZACC 33; [2019] 2 BCLR 165 (CC) para 29;

NCA is to improve consumer credit information and the reporting and regulation of credit bureaux. That appears to serve two purposes consistent with the balance that the NCA seeks to maintain between consumers who need credit and those who provide it. The first is that the information recorded by bureaux should be as accurate and meaningful as possible. The second is that consumers seeking credit should not be burdened by inaccurate or out of date information.

[15] In s 43(1), dealing with the registration of credit bureaux, one finds that they are bodies that for payment engage in the business of receiving reports of, or investigating, credit applications, credit agreements, payment histories or patterns or consumer credit information as defined in s 70 (1). When furnished with consumer credit information they are obliged to verify its accuracy and also to maintain it in their records. In other words, consumer credit information relates to information concerning a person's ordinary track record as a consumer. Its apparent purpose is credit assessment, more specifically whether consumers would be able to comply with their obligations under a credit agreement. SAFPS submitted that the information in the section was confined to this type of information and did not include information about criminal convictions or confirmed incidents of fraud.

[16] A further factor is that the NCA itself appears to recognise that a credit bureau may receive and retain certain information that does not constitute consumer credit information. Section 70(3)*(a)* provides that, in addition to the consumer credit information contemplated in s 70(2), which is the information described in s 70(1), a credit bureau 'may receive, compile and report only other prescribed information in respect of a consumer'. This is something of a double-edged sword. It prohibits credit

bureaux from receiving, compiling and reporting on any information other than information described in s 70(1), but contemplates that there may be such additional information and that this may be kept, if that is prescribed by regulation. So the NCA itself appears to contemplate that there may be information that it is desirable that credit bureaux should keep, falling outside that described in s 70(1).

[17] This rather tangled scheme is given effect by way of the regulations. Regulation 18(3) defines six categories of consumer credit information that may not be kept and must be expunged from a credit bureau's records in terms of s 70(2)*(f)* of the NCA. These categories include information about a consumer's race, political affiliation, medical status, religion, sexual orientation or trade union membership. This is all described as consumer credit information, albeit that it is unclear how some of it at least fits within the definition in s 70(1). The additional information that a credit bureau may keep in terms of s 70(3)*(a)* is then described in regulation 18(6). There are four categories of such information viz:

'*(a)* status and history of outstanding obligations and payments in respect of goods, services, or utilities supplied to consumers;

*(b)* information that is relevant for the purposes of credit fraud detection and prevention;

*(c)* payments made by a consumer in respect of a debt, where the debt has been ceded or sold by the credit provider to another party;

*(d)* information that is not related to and not intended to for the purpose of providing consumer credit, provided that the consumer's consent has been obtained to use the information for such purpose and to submit, compile and report such information'.

[18] Section 70(3)*(a)* describes this as 'other information' in contradistinction to consumer credit information. The difficulty lies in distinguishing the two. Sub-paragraph *(a)*, for example, undoubtedly refers

to information that constitutes part of a consumer's credit history. A consumer's payment history in respect of a debt is a 'pattern of payment or default' under a credit agreement and therefore part of their credit history as defined. Some at least of the information held by SAFPS, such as the identity of consumers and the fact that they had applied for credit and been refused, would constitute part of their credit history and therefore consumer credit information. On the face of it therefore there is an overlap between the information prescribed in regulation 18(6) and consumer credit information in terms of s 70(1).

[19] One way of dealing with this would be, as contended by SAFPS, to ask first whether the information is information that is relevant for the purpose of credit fraud detection and prevention. If the answer to that question is affirmative then, because s 70(3)*(a)* treats information of that type as distinct from consumer credit information as defined, it is automatically excluded from the latter category. On that basis all the information it describes as fraud information would fall outside the scope of consumer credit information and also outside the scope of s 70(2)*(f)* of the NCA, which only applies to the expungement of consumer credit information and not information that does not constitute consumer credit information. The same approach could be taken to the other information referred to in regulation 18(6).

[20] This is an apparently simple way of dealing with the overlap between the fraud information held by SAFPS and consumer credit information defined in s 70(1), such as information relating to personal details, for example, the surname and identity number of a subject; employment, professional or business history; and credit history which includes applications for credit. But it poses problems. In the first place

s 70(1) is the primary provision, contained as it is in the NCA itself, while regulation 18(6) is a regulation made under the NCA that serves a subordinate purpose. It inverts the enquiry to say that the regulation operates to limit the scope of the statutory definition. Secondly, it means that the regulation serves to define the statutory provision, but that is not the purpose of a regulation. In our view therefore the contention that regulation 18(6)*(b)* serves to exclude from the ambit of consumer credit information any information that is relevant for fraud detection and prevention purposes cannot succeed.

[21] There is an alternative argument that may have a similar result. It is that the purpose of s 70(2)*(f)* of the NCA is to empower the Minister to make regulations that remove from the ambit of consumer credit information certain specified information that would otherwise fall within it, given the wide terms of the definition in s 70(1). Accordingly regulation 18(6) serves to excise from consumer credit information in terms of s 70(1) the information specified in the regulation. That construction would overcome the problem that the regulation and the section overlap. It was not, however, developed in argument before us and, as the appeal can be resolved without deciding the point, it is best not to make a firm ruling on it. We turn then to the second issue, which we will approach on the footing that at least some of SAFPS' fraud information is consumer credit information.

**Is SAFPS obliged to expunge its fraud information?**

[22] The obligation to expunge consumer credit information arises under s 70(2)*(f)* of the NCA. A credit bureau must promptly expunge from its records any prescribed consumer credit information that in terms of regulations is required to be removed from its records. The obligation to

expunge information arises in relation to any consumer credit information that is so prescribed. Any information not so prescribed is not subject to compulsory expungement. The issue then is whether the fraud information is so prescribed. In order to determine that it is necessary to have regard to regulation 17(1).

[23] The regulation is headed 'Retention periods for credit bureau information'. It provides that the consumer credit information as per the table to the regulation 'must be displayed and used for purposes of credit scoring or credit assessment for a maximum period from the date of the event, as indicated'. That period is '1 year or within the period prescribed in section 71A', in the case of category 5 – adverse classifications of consumer behaviour. This was the only provision in the table on which the NCR relied in contending that there was an obligation on SAFPS to delete its fraud information.

[24] The term 'adverse classifications of consumer behaviour' is not defined in the Regulations. It has however been defined in s 71A(4)*(a)* of the NCA, in the context of the removal of adverse consumer credit information, as follows:

' "adverse classification of consumer behaviour" means classification relating to consumer behaviour and includes a classification such as "delinquent", "default", "slow paying", "absconded", or "not contactable" …'

That definition was introduced into the NCA with effect from 13 March 2015 in terms of Act 19 of 2014. In view of the fact that the events leading to the NCR's original complaint arose prior to the effective date of the amendment and the regulations had also been amended in that time, the parties were asked whether we were to approach the issues in accordance with the historical provisions of the statute and regulations or on the basis

of the amendments. They confirmed that the case had been argued on the latter basis and, as that was the live dispute between them, that the case should be determined under the current statute and regulations.

[25] In our view, the meaning that must be given to the term 'adverse classification of consumer behaviour' throughout category 5 of regulation 17(1) is the meaning that it is given in s 71A(4)*(a)* of the NCA. Various features support that construction. The first is that its central feature is the failure by consumers to perform their legal and contractual obligations under a credit agreement. It encompasses subjective classifications of that failure and says nothing about fraud. The latter is more usually an objective assessment of the consumer's conduct in the light of the definition of fraud. The expression 'adverse classification of consumer behaviour' appears to be directed at the behaviour of the consumer once credit has been advanced rather than behaviour aimed at defrauding a credit provider in a prospective credit application.

[26] Different meanings cannot be assigned to the expression 'adverse classification of consumer behaviour' in category 5 of regulation 17(1), depending on whether one is concerned with the one year period or the seven day period for expungement. Both periods require information of that class to be expunged. In general it must be expunged after one year. Where the obligation has been discharged it is seven days. In relation to the latter class of cases the statutory meaning of 'adverse classification of consumer behaviour' in s 71A(4)*(a)* is applicable. Regulation 1 makes it clear that any word or expression defined in the NCA bears the same meaning in the Regulations. There is no basis upon which the expression can be given a different meaning when dealing with a situation where the obligation has not been settled, so that the expungement period is one year.

[27] This interpretation is underscored by the fact that in the amending regulations made under GN R1209 of 30 November 2006 the term 'adverse classifications of consumer behaviour' was included in the definition of 'adverse consumer credit information', which provided:

'**"adverse consumer credit information" includes:**

(a) adverse classifications of consumer behaviour, which are subjective classifications of consumer behaviour and include classifications such as "delinquent", "default", "slow paying", "absconded" or "not contactable" …

(b) adverse classifications of enforcement actions, which are classifications related to enforcement action taken by the credit provider, including classifications such as "handed over for collection or recovery", "legal action", or "write off".'

These then formed two of the categories in the table in regulation 17(1). When s 71A was introduced in 2015, these definitions were removed from the regulations and transposed to the statute in s 71A(4), but the categories specified in regulation 17(1) were unchanged. That is a clear indication that the statutory meaning that had always until then governed these categories would continue to do so.

[28] The fraud information held by SAFPS does not fit comfortably in an 'adverse classification of consumer behaviour' as defined in the NCA. That behaviour, which includes 'delinquent', 'default', slow-paying', 'absconded' and 'not contactable', is behaviour in relation to the performance of obligations under a credit agreement, and will not ordinarily include fraud. Where fraud is committed, as in many cases it appears to be, when a consumer is seeking to obtain credit or a job, it stretches the language to describe that as consumer behaviour of the type referred to in the definition.

[29] The fraud information does not involve a 'subjective' classification of consumer behaviour. The reason for expungement of subjective classifications of consumer behaviour in category 5 of regulation 17 is a matter of common sense. It is precisely because the classification by the credit provider as 'delinquent', 'default', 'non-paying', 'absconded' or 'not contactable' is entirely subjective and based on the classifier's own observations or preferences, that the information may not be retained for more than one year. Where the reason for the default is that the consumer has lost their job as a result of illness, one credit provider may treat that as a misfortune, while another may categorise them as in default or delinquent. Such subjective classifications warrant being retained for a shorter period.

[30] By contrast, the types of fraud on the SAFPS database are generally classified on the basis of facts and objective criteria. For example, in the filing category 'false identity', applicants in fact supply false documents about themselves in order to deceive, which is entered in the Shamwari database. Likewise, before a filing is made under the category 'insurance fraud', members of the SAFPS are required to objectively establish that the claimant has completed a claim form containing materially false and misleading information in order to obtain a benefit which would have resulted in a loss to the member. Fraud in relation to credit applications may involve forgery of bank records or pay slips and similar documents.

[31] All of this points to the fraud information held by SAFPS not being subject to the time limit, even if it constitutes consumer credit information, because it is not consumer credit information within any of the prescribed categories in regulation 17. The Tribunal's finding that fraud information 'is the subset of [consumer] credit information that equally impacts the

credit provider's decision whether or not to grant credit to the affected consumer', does not properly address the question whether it falls within one of the categories in regulation 17(1) and is thus incorrect.

[32] Additionally, the NCA and the regulations made under it expressly recognise certain categories of information that credit bureaux are allowed to keep under s 70(3)*(a)* that are not included in the various categories in regulation 17(1). Regulation 18(6) prescribes that 'other' information, ie the information other than consumer credit information that a credit bureau may keep on record. It lists various categories of information of this kind. The relevant provision is s 18(6)*(b)*. It provides:

'(6) In addition to the consumer credit information contemplated in section 70(1) of the Act, a registered credit bureau may receive, compile and report only the following information in respect of a consumer:

(a)…

(b) information that is relevant for the purpose of credit fraud detection and prevention…'

[33] Section 70(2)(g) of the NCA provides that a registered credit bureau must issue a report to any person who requires it for a prescribed purpose or a purpose contemplated in the Act. Regulation 18(4) provides in relevant part:

'The prescribed purposes, other than for purposes contemplated in the Act, for which a report may be issued in terms of section 70(2)*(g)* are:

(a) an investigation into fraud, corruption or theft, provided that the South African police service or any other statutory enforcement agency conducts such investigation;

(b) fraud detection and fraud prevention services …'

[34] These provisions thus expressly recognise that recording and making available fraud information is a proper function of a credit bureau. There is nothing in the various categories in regulation 17(1) to suggest that any of them include fraud information or that it is required to be retained only for a limited period. The endeavour in argument to squeeze fraud information into category 5 without regard to the definition applicable to that category supports the interpretation that it is information of a type that should not be subject to expungement by way of regulation.

[35] The above interpretation is sensible. In *Exxon Corporation*,[3] Oliver LJ said: 'It is not necessary, in construing a statutory expression, to take leave of one's common sense'. A statutory provision must be interpreted in a way that leads to sensible and businesslike results, provided the interpretation does not do violence to the clear meaning of the provision or undermines its apparent purpose.[4]

[36] Section 3 of the NCA states that its purposes are '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 and industry, and to protect consumers' in the respects listed in subsections *(a)-(i)*. None of these subsections suggests that the Act does not purport to regulate the type of fraud combating activities that SAFPS undertakes. Nor do any of them support a construction that would undermine genuine endeavours to combat fraud.

[3] *Exxon Corporation v Exxon Insurance Consultants International Ltd* [1982] Ch 119 at 144.
[4] *Endumeni* fn 2, para 18.

[37] The Tribunal's interpretation of the NCA however was that all information kept by a credit bureau constituted 'consumer credit information' and is subject to expungement under regulation 17(1). That was inconsistent with the fact that when the regulation was amended in 2015 it removed from the table the general catch-all category 'Other'. The construction leads to patently insensible and unbusinesslike results and cuts across the purposes of the NCA – it would undermine the ability of the financial industry to protect itself against fraud and in doing so, protect fraudsters and not the victims of fraud; it would not promote a responsible credit market and industry; and it would not protect consumers. It would require credit bureaux to expunge highly relevant information about fraud on the part of consumers after one year, but oblige them to retain information about maintenance judgments potentially indefinitely (Category 8). Information about sequestration orders could be retained for five years and, once the consumer had been rehabilitated, that fact could be retained for another five years (Categories 9 and 10). No reason was advanced for affording this benevolence to fraud and fraudsters, but withholding it from maintenance defaulters and insolvents, including after their rehabilitation.

[38] The NCR however contended that the behaviour of a consumer intending to defraud a credit provider under a prospective credit application fell within the definition of 'adverse classification of consumer behaviour', as contemplated in the NCA; that this was 'the correct interpretation'; and that otherwise construed, it 'would defeat the purpose of the NCA'.

[39] The contention is both startling and wrong. It is directly at odds with s 81 of the NCA which provides in relevant part:

'Prevention of reckless credit

81(1) When applying for a credit agreement, and while that application is being considered by the credit provider, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section.

…

(4) For all purposes of this Act, it is a complete defence to an allegation that the credit agreement is reckless if–

(a) the credit provider establishes that the consumer failed to fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section; and

(b) a court or the Tribunal determines that the consumer's failure to do so materially affected the ability of the credit provider to make a proper assessment.'

The NCR's contention that the NCA must be read to protect fraudsters is untenable in the light of s 81 and leads to a patently insensible and unbusinesslike result.

[40] For those reasons there was no obligation on SAFPS to expunge the fraud information in its possession and the decision by the high court upholding its appeal was correct. The appeal must therefore be dismissed. That renders the appeal in respect of the imposition of an administrative fine academic, as there was no contravention of the NCA.

**Costs**

[41] Counsel for the NCR submitted that it should not be mulcted in costs because it is no ordinary litigant but a statutory body. It did not institute this litigation and opposed the appeal in the court a quo because it concerned the exercise of the NCR's statutory and regulatory powers.

[42] The principle that a statutory body should not be ordered to pay costs in a case where it has acted impartially and reasonably in exercising its statutory duties, even if it has been shown to have acted incorrectly though bona fide, is well-established.[5] More than a century ago in *Coetzeestroom*,[6] affirmed by the Constitutional Court in *Pioneer Hi-Bred*,[7] Innes CJ said that it was inequitable to mulct an official (the Registrar of Deeds in that case) with costs where his actions, though mistaken, were bona fide, as that was detrimental to the vigilance required of that office in the public interest.

[43] In *Pioneer Hi-bred*,[8] Skweyiya ADCJ stated the principle thus:

'The principle that should inform the CAC's exercise of discretion is that, when the Commission is litigating in the course of fulfilling its statutory duties, it is undesirable for it to be inhibited in the *bona fide* fulfilment of its mandate by the threat of an adverse costs award. This flows from the need to encourage organs of state to make and to stand by honest and reasonable decisions, made in the public interest, without the threat of undue financial prejudice if the decision is challenged successfully.'

[44] There is no suggestion that the NCR's decision to refer the matter to the Tribunal in terms of s 140 of the NCA on the basis that SAFPS had allegedly contravened s 70(2)*(f)* read with regulation 17, was neither honest nor reasonable. That decision was taken in the exercise of its statutory and regulatory duties. The Tribunal ruled in favour of the NCR. Its opposition to SAFPS's appeal against that decision in the court a quo was likewise bona fide and reasonable: the proper interpretation of provisions of the NCA which the NCR was statutorily obliged to enforce,

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[5] See LAWSA, 2 ed, Vol 3 Part 2 p 257 para 367 and the authorities there collected.
[6] *Coetzeestroom Estate and GM Co v Registrar of Deeds* 1902 TS 216 at 223-224.
[7] *Competition Commission of South Africa v Pioneer Hi-bred International Inc and Others* [2013] ZACC 50; 2014 (2) SA 480 (CC) para 24.
[8] Ibid, footnotes omitted.

and which directly impacted upon its powers and functions, were at issue. Fairness, in the light of the particular circumstances of this case and the NCR's statutory duties in regulating the consumer credit industry and enforcing the NCA,[9] dictated that the costs orders issued by the high court against it were not justified, despite its finding that the NCR's actions were mistaken.[10]

[45] Similarly, the NCR's decision to lodge an appeal in this court was bona fide, reasonable and taken in the course of fulfilling its statutory duties. It is a public functionary and required clarity and certainty in relation to the interpretation of the relevant provisions of the NCA. In our opinion, an adverse costs order against the NCR is not justified in the circumstances.

[46] The following order is made:

1 The appeal is dismissed with no order for costs.

2 The orders of the high court granting costs against the National Credit Regulator in the appeal and the cross-appeal to that court are set aside.

MJD WALLIS
JUDGE OF APPEAL

A SCHIPPERS
JUDGE OF APPEAL

[9] Sections 14 and 15 of the NCA.
[10] *Pioneer Hi-Bred* fn 27 para 27.

Appearances

| | |
|---|---|
| For appellant: | T V Norman SC (with her R J Mbuli) |
| Instructed by: | Mothle Jooma Sabdie Attorneys, Pretoria |
| | Matsepe Inc, Bloemfontein |
| For respondent: | W Trengove SC (with him C Steinberg) |
| Instructed by: | Bieldermans Inc, Pretoria |
| | Honey Attorneys, Bloemfontein. |