THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 937/18

In the matter between:

THE NATIONAL CREDIT REGULATOR **APPELLANT**

and

LEWIS STORES (PTY) LTD **FIRST RESPONDENT**

NATIONAL CONSUMER TRIBUNAL **SECOND RESPONDENT**

Neutral citation: *The National Credit Regulator v Lewis Stores (Pty) Ltd* (937/18) [2019] ZASCA 190 (13 December 2019)

Coram Wallis, Nicholls and Dlodlo JJA and Eksteen and Hughes AJJA

Heard: 11 November 2019

Delivered: 13 December 2019

Summary: National Credit Act, 34 of 2005 (NCA) – interpretation – sections 100, 101(1)(*a*) and 102(1) – cost of credit – extended warranties in respect of goods sold not void by virtue of incomplete or inaccurate testimonial of agreement – charging subscriptions to Lewis Family Club not cost of credit – nature of proceedings before National Consumer Tribunal – appeal to high court in terms of s 148(2)*(b)* of NCA – high court sitting as court of first instance – leave to appeal to SCA in terms of s 16(1)*(a)* of Superior Courts Act 10 of 2013.

ORDER

On appeal from: Gauteng Division of High Court, Pretoria (Janse van Nieuwenhuizen J, Mokose AJ concurring, sitting on appeal from National Consumer Tribunal):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Eksteen AJA (Wallis, Nicholls and Dlodlo JJA and Hughes AJA concurring):

[1] The appellant (the regulator) applied to the second respondent (the tribunal), pursuant to an investigation it had carried out, for a declarator that the first respondent, a national retailer of furniture and electrical appliances (Lewis), had repeatedly contravened ss 90, 91, 100, 101(1)(*a*) and 102(1) of the National Credit Act, 34 of 2005 (NCA) and for certain ancillary relief. The tribunal dismissed the application and a subsequent appeal[1] to the High Court, Gauteng, was unsuccessful. The current appeal is with special leave of this court.[2]

The appeal

[2] In the appeal the regulator contended that:

(a) The charge levied by Lewis for certain 'extended warranties' in respect of goods purchased from it constituted prohibited conduct as envisaged in ss 100, 101(1) and 102(1) of the NCA and that the extended warranties also contravened ss 90 and 91 of the NCA; and

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[1] In terms of s 148(2)*(b)* of the NCA.

[2] See the judgment by Wallis JA below in respect of the procedure for leave to appeal.

(b) The charging of subscriptions for membership of the Lewis Family Club ('club fees') to customers who had entered into credit agreements with Lewis was prohibited conduct as envisaged in ss 100, 101 and 102(1) of the NCA as these fees constituted a prohibited 'cost of credit'.

I will deal with each in turn, but before doing so need to deal with a cocnern regarding the jurisdicion of the tribunal.

Jurisdiction of the tribunal

[3] In consequence of the findings of its investigation the regulator referred the matter to the tribunal, ostensibly in terms of s 140(2)(*b*) of the NCA in which it sought, inter alia, the following relief:

'(a) A declaration that [Lewis] has repeatedly contravened s 90, 91, 100, 101(1)(a) and 102(1) of the NCA;

(b) A declaration that [Lewis's] repeated contravention of s 90, 91, 100,101(1)(a) and 102(1), constitutes conduct prohibited by the NCA.

(c) An order directing [Lewis] to refund all the customers who were, from 2007 to date, unlawfully charged with costs and maintenance agreements by Lewis which ran concurrently with the supplier/manufacturer warranty or had no term or period;

(d) An order directing [Lewis] to refund all the consumers who were, from 2007 to date, unlawfully charged club and membership fees by Lewis.

(e) . . .

(f) An order declaring all the clauses or provisions relating to unlawful maintenance costs in the maintenance agreements with [Lewis] referred to in the investigation report unlawful provisions;

(g) An interdict restraining [Lewis] from, in future, charging consumers with unlawful maintenance costs;

. . .'

[4] I have a concern regarding the jurisdiction of the tribunal to deal with matters arising under the provisions of ss 90 and 91 and accordingly with the power of the tribunal to have entertained the application or to have made orders in the terms sought. The concern arises from the provisions of the NCA, specifically ss 164(1) and 90(4).

[5] The tribunal is a statutory body established by s 26 of the NCA. Its powers are defined by the NCA. The functions of the tribunal are set out in s 27 and include to:

'(*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.'

[6] Section 150 of the NCA empowers the tribunal to make orders:
'(*a*) declaring conduct to be prohibited in terms of this act.
(*b*) interdicting any prohibited conduct;
(*c*) to (*g*) . . .
(*h*) requiring payment from the consumer of any excess amount charged, together with interest at the rate set out in the agreement; or
(*i*) any other appropriate order required to give effect to a right as contemplated in this act or the Consumer Protection Act, 2008.'
'Prohibited conduct' is defined in the NCA as 'an act or omission in contravention of the Act'.

[7] Sections 90 and 91 of the NCA, relied upon by the regulator and referred to in the relief claimed from the tribunal, are contained in part A of chapter 5 of the NCA. Part A of chapter 5 is concerned with 'unlawful' agreements and provisions. Section 90(2) lists a number of provisions which would be unlawful if they were contained in a credit agreement and s 91 is directed at preventing a credit provider from circumventing the provisions of s 90 by recording provisions which would be unlawful if included in a credit agreement in a separate supplementary agreement or unilateral document signed by the consumer. [3]

[8] In s 90(3) the NCA declares a provision which is unlawful in terms of s 90(2) void as from the date that the provision purports to take effect.[4] Notwithstanding this provision, however, s 164(1) of the NCA provides:

[3] Section 91(2) provides: 'A credit provider must not directly or indirectly require or induce a consumer to enter into a supplementary agreement or sign any document, that contains a provision that would be unlawful if it were included in a credit agreement'.
[4] Section 90(3) provides that: 'In any credit agreement, a provision that is unlawful in terms of this section is void as from the date that the provision purported to take effect'.

'Nothing in this Act renders void a credit agreement or a provision of a credit agreement that, in terms of this Act, is prohibited or may be declared unlawful unless a court declares that agreement or provision to be unlawful.'

This, it seems to me, refers back to the provisions of s 90(4), which stipulates:

'In any matter before it respecting a credit agreement that contains a provision contemplated in ss (2), the court must –

(*a*) sever that unlawful provision from the agreement, or alter it to the extent required to render it lawful if it is reasonable to do so having regard to the agreement as whole; or

(*b*) declare the entire agreement unlawful as from the date that the agreement, or amended agreement, took effect,

and make any further order that is just and reasonable in the circumstances to give effect to the principles of s 89(5) with respect to that unlawful provision or entire agreement, as the case may be.'

[9] These provisions of the NCA are not a model of clarity. However, prima facie, it appears that no unlawful provision, as envisaged in s 90(2), contained in a credit agreement would be void, as envisaged in s 90(3), unless and until a court had declared it to be unlawful.[5] If this is correct, the tribunal does not have the jurisdiction to declare any such provision unlawful, because that jurisdiction appears to vest in a court and the tribunal is not a court. Moreover voidness is not automatic because s 90(4) requires a court to alter the offending provision so as to render it lawful if it is just and reasonable to do so. In that event the provision ceases to be unlawful.

[10] By virtue of the conclusion to which I have come on the issues canvassed ina rgument it is not necessary to resolve this issue. It was not raised in the papers and we have not had the benefit of full argument in that regard. Accordingly I refrain from making a conclusive finding in this regard.

The extended warranties

[11] The regulator's investigation[6] into the extended warranties, leading to its complaint initiated in its own name in terms of s 136(2) of the NCA, arose in

[5] Michelle Kelly-Louw *Consumer Credit Regulation in South Africa* at 205.
[6] In terms of s 15(*f*) of the NCA.

consequence of an article published in the newspaper which asserted that Lewis might be engaging in prohibited conduct relating to, amongst other things, extended warranties. The article recorded that information was obtained by a 'mystery shopper' who went to a Lewis outlet to purchase a television set. It proceeded to explain that a number of secret shopping expeditions that were recorded, were conducted at Lewis outlets. The investigator accordingly engaged with Lewis in respect of its extended warranties. One McLoughlin, an accountant in the employ of Lewis, explained that all goods sold by Lewis have a 12 month supplier's warranty which operates from the date of purchase. An 'extended warranty and maintenance contract' (extended warranty), which endures for two years after the expiry of the supplier's warranty, was offered to purchasers in respect of the goods sold. The terms and conditions of the extended warranty were explained to consumers prior to the conclusion of the agreement and it was entirely optional whether the consumer accepted the warranty.

[12] The explanation did not allay the concerns of the regulator. In the conduct of its investigation the regulator inspected a sample consisting of 22 customer files from Lewis's records. It is not clear how many of the consumers were interviewed, but only three affidavits were obtained. The affidavits which were taken are so brief as to be of little assistance. The investigation found no evidence of the conduct alleged in the news article. However, the investigator reported that in five instances consumers said that the 'extended warranty' was not explained to them and had they understood they would not have taken it. Only one affidavit was obtained in support of this allegation. The deponent merely stated that the extended warranty was 'not fully explained'. What was in fact said and understood by the parties, in particular with reference to the period of its operation, was not explored in the affidavit. No mystery shopper was sent to determine first-hand how employees of Lewis conducted themselves and the recordings of the secret shopping expeditions do not appear to have attracted the interest of the regulator.

[13] Instead, the regulator called for copies of a number of credit agreements and extended warranties which Lewis duly provided. The extended warranty was reflected on a pro forma document which provided blank spaces for the insertion of the period of the warranty and the commencement and completion dates thereof. In the sample of documents provided the regulator identified a number of extended warranties where

the sales staff had either not completed the blank spaces or where incorrect dates had been inserted reflecting the purchase date as the commencement date for the extended warranty. In the latter cases, *ex facie* the document, the extended warranty would run concurrently with the supplier's warranty for the first 12 months. The regulator concluded that as a result the incomplete documents were void, as the term of the extended warranty had not been agreed. It said that it would accordingly constitute a contravention of ss 100, 101(1)(*a*) and 102(1) of the NCA to require payment by the consumers in respect of the extended warranties. In instances where the period of the extended warranty reflected on the document coincided with the period of the supplier's warranty the regulator concluded that it constituted a duplication of the supplier's warranty which had no value. Its view was therefore that it unlawfully increased the cost of credit and that the conclusion of the extended warranty agreement in that form constituted a contravention of ss 90 and 91 of NCA.

[14] Lewis, on the other hand, said that this was mistaken on the facts as well as the law. They explained that it was their policy that consumers were informed of the existence of the 12 month supplier's warranty at the time of purchase. They were simultaneously advised of the optional extended warranty which would provide them with an additional two years' cover for repairs or replacement of defective merchandise. The existence of this optional additional two year warranty was advertised both on in-store advertising boards and other point of sale material and Lewis's marketing brochures. The extended warranty, Lewis contended, was incorporated as an integral part of the computer data capturing process of all credit agreements. The start and end dates of every extended warranty was captured on the computer system by reference to the date of the conclusion of the credit transaction and the date of the anniversary following such conclusion at which time the supplier's warranty expired. The commencement and completion dates of the extended warranties were reflected on the consumer's monthly statements and Lewis sent SMS communications to all of its customers who concluded extended warranties advising them of the commencement and end dates. All its customers who opted to take out an extended warranty accordingly enjoyed the benefit of a warranty for a period of two years after the expiry of the supplier's warranty.

[15] Lewis contended further that there was no requirement in the NCA for an extended warranty to be recorded in writing as a mandatory formality. The true agreement between the parties, irrespective of the errors which may have occurred in certain of the documents, was that every consumer who had elected to purchase an extended warranty would receive the benefit of such warranty for the full two year period. The regulator, in its investigation, did not locate any consumer who contended that they had understood it differently or who complained that they did not receive the benefits bargained for. The high water mark of the evidence which the regulator presented was a single affidavit which said that the warranty was not 'fully explained'. The alleged shortcomings in the explanation were not identified. There was accordingly no real dispute of fact in respect of these issues.

[16] I turn to the provisions of the NCA relied upon by the regulator. Sections 100, 101 and 102 are contained in part C of chapter 5 of the NCA. Part C thereof deals with the 'consumer's liability, interest, charges and fees'. The material portion of section 100 provides:

'**Prohibited Charges**

(1) A credit provider must not charge an amount to, or impose a mandatory liability on, the consumer in respect of –

(a) A credit fee or charge prohibited by this Act;

(b) . . . '

Section 101 is directed at the 'cost of credit' and the material portion provides:

'(1) A credit agreement must not require payment by the consumer of any money or other consideration, except –

(a) The principal debt, being the amount deferred in terms of the agreement, plus the value of any item contemplated in s 102;

(b) . . .'

[17] Section 102, in turn, prescribes the fees and charges which may be levied in respect of a credit agreement. The material portion of s 102 provides:

'**Fees and charges**

(1) If a credit agreement is an instalment agreement . . . . the credit provider may include in the principal debt deferred under the agreement any of the following items to the extent that they are applicable in respect of any goods that are the subject of the agreement—

(a) . . .
(b) the cost of an extended warranty agreement;
(c) . . .
(2) A credit provider must not—
(a) . . .
(b) . . .
(c) charge the consumer an amount under ss (1) in excess of—

(i) the actual amount payable by the credit provider for the service, as determined after taking into account any discount or other rebate or other applicable allowance received or receivable by the credit provider; or
(ii) the fair market value of a service contemplated in subsection (1), if the credit provider delivers that service directly without paying a charge to a third party.
(iii) . . .'

Section 102(1) expressly authorises a credit provider to include in the deferred debt the cost of an extended warranty agreement. There is therefore no dispute between the parties in respect of the extended warranties which reflected the correct dates and duration in accordance with Lewis's policy. This raised the question whether the shortcomings contained in the documents embodying the disputed extended warranties, rendered the charges levied in respect thereof prohibited charges. Only in that event would the credit agreements contain unlawful terms.

[18] On behalf of the regulator it was argued that in fact and in law the relationship between the affected consumers and Lewis in respect of the extended warranties was regulated solely by the written agreements, which could not be overridden by extrinsic evidence such as the recordals in the computer system or records of Lewis or even what actually transpired. Resort was had to the parol evidence rule to sustain the argument.

[19] Section 93 of the NCA requires a credit provider to deliver to a consumer a copy of the document that records their credit agreement and it prescribes the form in which various categories of credit agreements are to be concluded. The written document, however, constitutes evidence of the agreement concluded and is not a constitutive requirement for the validity of the contract.[7] Like any other agreement, were a dispute

[7] Compare s 164(1) of the NCA which provides:

to arise *inter partes* relating to the terms of the written document, either party would be entitled to raise rectification of the document. Rectification corrects the document, not the juristic act expressed by the document, and it does not amount to a variation of the contract.[8] The document purporting to reflect the contract must be rectified before the question of compliance with formal requirements can be considered.[9]

[20] By parity of reasoning, where there is no dispute as to the content of the extended warranty agreement (the legal act) in fact concluded between Lewis and the consumers (as opposed to the document evidencing the agreement), logic dictates that regard must be had to the extrinsic evidence in order to determine whether a contravention of the NCA has occurred. In fact, on the papers, there is no evidence of any consumer who was not advised at the time of making the election to purchase an extended warranty that they would enjoy protection in terms of the warranty for two years after the lapse of the supplier's warranty. Lewis has consistently honoured the extended warranty accordingly. In the circumstances I consider that the court a quo correctly concluded that the evidence presented on behalf of Lewis established, that notwithstanding the incorrect dates in some of the extended warranty agreements, the terms of the actual agreements were honoured. Every consumer that entered into a two year extended warranty agreement, received the additional two years upon the expiry of the initial one year manufacturer's warranty.

[21] The disputed documents, notwithstanding the errors, are indeed warranties as envisaged in s 102(1)(*b*). The warranties have consistently been honoured for a period of two years after the lapse of the supplier's warranties and there is no evidence that the amount charged in respect thereof exceeded their fair market value. Had a dispute arisne between a customer and Lewis both parties would have been entitled to claim rectification of the extended warranty document. Even if that were not the case, section 90(4) of the NCA, which is set out earlier, provides for a court considering an

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'**Civil actions and jurisdiction**
(1) Nothing in this Act renders void a credit agreement . . . that, in terms of this Act, is prohibited or may be declared unlawful unless the court declares the agreement . . . to be unlawful'.

[8] See *Spiller v Lawrence* 1976 (1) SA 307 (N) at 310 in respect of the need to distinguish between 'contract' in the sense of a contractual document and 'the contract' in the sense of the agreement constituting the legal act.

[9] See Van der Merwe, Van Huysteen, Reinecke, Lubbe *Contract: General Principles* 4ed (2011) at 157.

agreement which is alleged to contain a clause which is unlawful in terms of s 90(2), to alter the offending provision so as to render it lawful, provided it is reasonable to do so. In order to do so the court would be obliged to consider the interaction between the parties when concluding the agreement. All the evidence which would be admissible in a claim for rectification and any prejudice which any party may suffer if the order is granted would have to be considered. I can conceive of no circumstances in which it would not be more appropriate to alter the term in regard to the duration of the extended warranty than those which prevail in this case. The parol evidence rule cannot apply.

[22] The reliance placed by the regulator on the provisions of ss 90 and 91 flowed from its contentions in respect of ss 100, 101 and 102. Once it is accepted, as I have found, that the errors in completing the document were resolved by the evidence of the actual warranty agreements concluded, the regulator's objections fall away.

Club fees

[23] The investigation embarked upon by the regulator revealed the existence of the 'Lewis Family Club' (the club) and that certain consumers were charged 'club fees' as reflected on their monthly statements. It accordingly initiated a further complaint and extended the mandate of the investigation of extended warranties to include the question of club fees as it postulated that they increased the cost of credit.

[24] In scrutinising the sample of customer files obtained from Lewis the regulator identified positive evidence of two consumers who were being charged club fees reflecting on their monthly statements, but not on the copies of the consumer credit agreements. The investigation by the regulator revealed nothing more. The regulator contended that charging a club fee was part of the cost of credit as the fees were included in the statements of account. It therefore asserted that the mere charging of a club fee to consumers was not permitted by ss 100, 101 and 102(1) of the NCA, whether or not membership of the club was optional.

[25] The club is an association which affords certain benefits to its members including the opportunity to participate in regular draws to win attractive prizes. There

may be some scepticism about the real benefits of belonging to the club, however, that is not an issue in the present matter.

[26] The evidence on behalf of Lewis relating to the nature of the club membership and the charging of fees was uncontradicted. Club membership is open to any person, whether or not they be a credit customer of Lewis. Whilst membership of the club is offered to consumers seeking credit, in the same manner as it is to any other customers, the consumer has the exclusive entitlement to determine whether or not they wish to take up the offer. When a person elects to join the club a completely separate contract is concluded between the parties. Membership is not in any way dependent upon the conclusion of a credit agreement and is open to members of the public, whether or not they are customers of Lewis. The duration of the club membership has no bearing on the duration of any credit agreement concluded and any member is entitled to terminate their membership on 30 days' notice. A subscription fee (club fee), payable in advance, is levied in the amount of R25 per month to all members of the club. Where a member of the club defaults on the payment of the monthly club fees, no interest is charged on arrears and, if they fall into arrears in respect of three months' club fees, their membership is automatically terminated. In such instances the unpaid club fees are written off and are not recovered from the former member.

[27] The monthly statements of account sent to credit consumers reflect the club fee payable separately from the outstanding amounts on any credit agreements and reveal that no interest is levied on arrear club fees. It is accordingly not included in the deferred amount as envisaged in s 101(1).

[28] On behalf of the regulator it was argued that the agreement between consumers and Lewis in respect of club fees was a prohibited supplementary agreement, as envisaged in s 91(2) of the NCA. This was so, so the argument went, as one of the terms contained in the small credit agreement which Lewis concluded with consumers provided consumers with the option to agree to join the club and to pay the club fee.

[29] There are a number of difficulties with this argument. Firstly, in its founding papers the regulator placed no reliance on the provisions of ss 90 or 91 in respect of club fees. Lewis has accordingly not addressed the issue in its answering papers. In *Swissborough Diamond Mines (Pty) Ltd and others v Government of the RSA* 1999 (2) SA 279 (T) Joffe J correctly summarised the requirements for founding papers thus:

'It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issue between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits. In *Hart v Pinetown Drive-Inn Cinema (Pty) Ltd* 1972 (1) SA 464 (D) it was stated at 469C-E that

"where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound."

An applicant must accordingly raise the issue upon which it would seek to rely in the founding affidavit. It must do so by defining the relevant issues and by setting out the evidence upon which it relies to discharge the *onus* of proof resting on it in respect thereof.'[10]

The unlawfulness in terms of ss 90 and 91 accordingly did not arise.

[30] Secondly, the argument was factually incorrect. The small credit agreement provided that the terms and conditions that applied in respect of the credit agreement were contained in the contract folder, which terms and conditions had to be read as forming part of the agreement. The contract folder consisted of: The terms and conditions – small credit agreement, customer protection insurance terms, the certificate of insurance, the notice of disclosure to short term policyholders and the maintenance agreement, if selected. It proceeded to record that:

'The terms and conditions relating to the amount of the principal debt, the number and frequency of instalment payments, the date of the first and last payments and all such other additional charges that the seller may charge to the purchaser are contained in the pre-

[10] *Swissborough* at 323G–324A.

agreement statement and quotation attached thereto, which terms and conditions must be read as forming part of this credit agreement'.

There is no reference to the club fees in the pre-agreement statement and quotation, nor in any of the documents that form part of the agreement. During the credit application procedure, however, a manager's interview sheet is utilised as a checklist to obtain information from the consumer. In the course thereof, as reflected on the sheet, a credit consumer is afforded the option to join the club and, in the event of them electing to do so they are required to confirm that they can afford the monthly fee of R25. This form, reflecting the information obtained from customers, is signed by both the manager and the consumer. It is not, however, the membership contract with the club and no obligation arises from the completion of the document.

[31] Thirdly, a 'supplementary agreement' is not defined in the NCA. The ordinary principles applicable to the interpretation of legislation find application in respect of the NCA.[11] Moreover s 2 of the NCA enjoins a court in interpreting the provisions of the Act to do so in a manner that gives effect to the purposes of the Act set out in s 3 thereof. The overriding purpose of the Act set out in s 3 is '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'.

[32] The starting point in interpreting the legislation, of necessity, is to give consideration 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.'[12] The Shorter Oxford English Dictionary[13] defines 'supplementary' as 'of the nature of, forming, or serving as, a supplement'. 'Supplement', in turn, is defined as 'something added to supply a deficiency; an auxiliary means, an aid;' or 'a part added to complete a literary work or any written account or document.' Giving the term its ordinary English meaning in the context of chapter 5 of the NCA, an agreement can only, in my view, be

[11] The principles are summarised in *Natal Joint Municipal Pention Fund v Endomeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18 and *Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport* (Edms) Bpk [2013] ZASCA 176, 2014 (2) SA 494 (SCA) para 10.
[12] *Natal Joint Municipal Pension Fund* 603 – 604 at para 18.
[13] Shorter Oxford English Dictionary 3rd ed, reprinted with revised etymologies and addenda, A73;

‘supplementary’ if it deals with the same subject matter as the main agreement, ie the regulation of the credit and repayment thereof. Examples of supplementary agreements that spring to mind would be documents acknowledging that no representations had been made to the consumer, a waiver of statutory rights or an acknowledgment of receipt of goods in good order and condition.

[33] I have referred earlier to the provisions of ss 89, 90 and 91 of the NCA. Section 91(2) provides that the credit provider must not directly or indirectly require or induce a consumer to enter into a supplementary agreement or sign any document that contains a provision that will be unlawful if it were included in the credit agreement.

[34] Counsel for the regulator was constrained to acknowledge that the signing of the manager’s interview sheet (or the club membership agreement) did not constitute a supplementary agreement. He contended nevertheless that Lewis, directly or indirectly, induced consumers to sign the document which contained the election to join the club, which he contended would be unlawful if it were included in the credit agreement. The document envisaged in s 91(2) is, however, in the context of NCA, prohibited if it includes a term which is declared unlawful by the provisions of s 90(2). Section 91 is found in part A of chapter 5 of the NCA to ss 89 and 90. It seeks to prevent the circumvention of the provisions of ss 89 and 90 by means of the expedient of separating certain undertakings from the agreement itself. It must nevertheless relate to the same subject matter, being the terms of the credit. The election to join the club is not in any manner related to the terms of the credit facility granted. In these circumstances the argument cannot succeed.

[35] Reverting to the material provisions of ss 100, 101 and 102(1), set out earlier, these provisions are contained in part C of chapter 5 and are concerned with the consumer’s liability, interest, charges and fees in respect of the credit facility. These sections relate to payments and charges made in respect of the credit facility. Section 101 places a limitation on what may be contained in the credit agreement. It does not purport to prohibit a credit provider from engaging in other business, unrelated to the credit facility, with a consumer.

[36] The prohibited charge (envisaged in s 100(1)(a)) contended for by the regulator is a charge made in conflict with s 101(1). The material portion of s 101(1) prohibits a credit provider from 'requiring payment' by a consumer under a credit agreement of any money or other consideration except the principal debt, being the amount deferred in terms of the agreement, plus the value of any item contemplated in s 102. It is common cause that club fees are not an item contemplated in s 102. On the undisputed facts set out on behalf of Lewis, however, the membership agreement between consumers and the club is an agreement unrelated to the credit facility. It deals with a different subject matter. The club fees are payable in advance and do not constitute credit. No interest is raised on the arrears and in the event of them not being paid they are not recovered. In these circumstances it cannot be said that a consumer is 'required' to pay the club fee; nor that it increases the cost of credit; nor can it be said that the club fee, if it is paid, is paid under the credit agreement. The mere fact that some consumers are introduced to the notion of club membership during the credit application process can have no bearing on the interpretation of the provisions of the NCA.

[37] In the result the appeal is dismissed with costs, including the costs of two counsel.

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J Eksteen

Acting Judge of Appeal

Wallis JA (Nicholls and Dlodlo JJA and Eksteen and Hughes AJJA concurring):

[38] I have read the judgment prepared by my colleague Eksteen AJA on the merits of this appeal and concur in the judgment and the outcome. This judgment deals with the question whether the procedure followed to bring this case before this court was correct. It came before us by way of special leave to appeal granted by this court in terms of s 16(1)*(b)* of the Superior Courts Act 10 of 2013 (the SC Act). In the course

of preparation for the appeal it transpired that in previous cases involving appeals to this court against decisions of the high court under s 148(2)*(b)* of the NCA inconsistent approaches to obtaining leave to appeal had been followed. In *Barko*[14] the appeal was brought on the basis of leave granted by the high court under s 16(1)*(a)* of the SC Act, but in *NCR v SAFPS*[15] special leave to appeal under s 16(1)*(b)* of the SC Act was sought and granted. It is desirable to resolve this issue and determine whether it affects the appeal.

[39] Section 16(1) of the SC Act reads as follows:

'(1) Subject to section 15 (1), the Constitution and any other law—

(*a*) an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted—

(i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on the direction issued in terms of section 17 (6); or
(ii) if the court consisted of more than one judge, to the Supreme Court of Appeal;

(*b*) an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal'.

[40] Under ss 17(1) and (2) of the SC Act, the judge or judges who heard the case at first instance may grant leave to appeal, if they are of the opinion that the appeal would have reasonable prospects of success, or that there is some other compelling reason why the appeal should be heard. If the first instance court refuses leave to appeal it may be sought from the SCA, where two judges appointed by the President of the SCA consider the application. If special leave is required in terms of s 16(1)*(b)*, an application must be made to the SCA in terms of s 17(3) of the SC Act for the grant of such leave. Special leave imposes a more stringent test for the grant of leave to

[14] *Barko Financial Services (Pty) Ltd v National Credit Regulator* [2014] ZASCA 114; [2014] 4 All SA 411 (SCA).
[15] *National Credit Regulator v Southern Africa Fraud Prevention Services NPC* [2019] ZASCA 92, 2019 (5) SA 103 (SCA).

appeal. There must be both reasonable prospects of success and compelling circumstances justifying the grant of special leave.[16]

[41] The NCA provides, in s 148(2) that a participant in a hearing before a full panel of the National Consumer Tribunal may:

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

(b) appeal to the High Court against the decision of the Tribunal in that matter, other than a decision in terms of section 138[17] or section 69(2) or 73 of the Consumer Protection Act, 2008, as the case may be.'

The decision of the Tribunal in issue in this case is not one that is excluded from the right of appeal.

[42] The Tribunal is not a court or part of the judicial system set out in s 166 of the Constitution. It does not exercise judicial authority in terms of s 165 of the Constitution. Instead it is an independent and impartial tribunal of the kind contemplated in s 34 of the Constitution. While its role generally is one of adjudication,[18] it is nonetheless a body of an administrative nature in the same way as the CCMA is an administrative body.[19] As such its proceedings are subject to judicial review and this is recognised in s 148(1)*(a)*.

[43] Within the framework of the judicial system, a decision by a court on appeal to it within the meaning of s 16(1)*(b)* of the SC Act is either an appeal from a magistrates' court or an appeal from a high court sitting at first instance. The question raised by this case is whether such appeals are the only appeals with which s 16(1)*(b)* is concerned, or whether it applies equally to statutory appeals from persons, bodies or tribunals falling outside the judicial system.

[44] Statutes other than the NCA provide for appeals to the high court from decisions of administrative bodies or officials. There is a diverse range of such provisions. One

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[16] *Westinghouse Brake and Equipment (Pty) Ltd and Another v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 560E-H; *Van Wyk v S; Galea v S* [2014] ZASCA 152; [2014] All SA 708 (SCA); 2015 (1) SACR 584 (SCA) para 21.

[17] Section 138 deals with consent orders.

[18] Section 27 of the NCA.

[19] *Sidumo and Others v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; 2008 (2) SA 24 (CC) paras 81-88 and 122-141.

instance is the appeal against decisions made by the registrar under s 33 of the Registration of Copyright in Cinematographic Films Act 62 of 1977. The statute provides that an appeal to the high court lies against a decision by the registrar.[20] Other statutes have similar provisions. Under s 20 of the Health Professions Council Act 56 of 1974 an appeal lies to the high court against the decision of the Health Professions Council, a professional board or a disciplinary appeal committee. Under s 24(1) of the Pharmacy Act 53 of 1974 there is a similar right of appeal to the high court against any decision by the South African Pharmacy Council. The decisions thus rendered subject to appeal range from registration issues to disciplinary matters. By no means all are issues of law.

[45] When magistrates conduct enquiries in terms of s 9, read with ss10 or 12, of the Extradition Act 67 of 1962, they are acting in an administrative capacity. Their decision is confined to whether the person concerned is liable to extradition, after which the decision on extradition itself is that of the Minister. In terms of s 13 of the Act the decision of the magistrate is appealable to the high court having jurisdiction. As the magistrate was not sitting as a court this is not the same as an appeal, whether civil or criminal, from a magistrates' court to the high court.

[46] A further example, in what cannot purport to be a comprehensive survey, is provided by s 21(1) of the Films and Publications Act 65 of 1996, which provides that if the Review Board classifies a film as XX or X18, the publisher or distributor, or person who applied for its classification, may appeal to the high court against the decision. The court's decision on the issue of classification is then deemed to be a decision by the Film and Publication Board. This is a decision of a purely administrative nature. So is the decision of the Air Services Licensing Council to grant or refuse a licence to a prospective air services provider in terms of s 16 of the Air Services Licensing Act 115 of 1990. However, it too is the subject of an appeal to the High Court in terms of s 25 of that Act.

[20] The registrar is the Commissioner appointed under s 189 of the Companies Act 71 of 2008 as the head of the Companies and Intellectual Property Commission (the CIPC).

[47] Some statutes are alive to problems that may arise from granting an appeal directly to the high court and address this specifically. Thus under the Patents Act 57 of 1978 decisions by the registrar are appealable to a Commissioner of Patents[21] and, under s 76, decisions of the Commissioner are appealable to the court. Under s 29 of the Copyright Act 98 of 1978, the Commissioner of Patents is also the Copyright Tribunal and decisions by the Commissioner are likewise appealable to the court. However, both statutes provide that the appeal is to be noted and prosecuted 'in the manner prescribed by law for appeals against a civil order or decision of a single judge'. The appeal accordingly starts on the footing that it is dealt with from a procedural perspective as if the Commissioner were a court. That is not surprising given that the Commissioner is a judge or acting judge of the high court. By way of contrast under s 42 of the Designs Act 195 of 1993 a decision by the registrar is appealable to the court and the registrar's decision is deemed to be an order or judgment of a magistrate.

[48] There does not appear to be any authority on the meaning to be accorded the words 'given on appeal to it' in terms of s 16(1)*(b)* or to whether any of these various kinds of appeals fall within those words or are treated when they come before the high court as being heard by a court of first instance. The same words appeared in s 20(4) of the Supreme Court Act 59 of 1959, the predecessor of the SC Act. It read:

'No appeal shall lie against a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of that court given on appeal to it except—

(a) in the case of a judgment or order given in any civil proceedings by the full court of such division on appeal to it in terms of subsection (3), with the special leave of the appellate division;

(b) in any other case, with the leave of the court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the leave of the appellate division.'

[21] The Commissioner of Patents is a judge or acting judge designated by the Judge President of the Gauteng Division of the High Court to perform the functions of the Commissioner. See s 8 of the Patents Act.

[49] This provision confined the need to obtain special leave to appeal under sub-sec *(a)* to cases of an appeal to the full court against a decision by the high court. Statutory appeals did not fall under this section and accordingly, even if they were heard by the full court, that court was entitled to grant leave to appeal to this court under sub-sec *(b)*.[22] For that reason the appeal to this court in *De Beer*[23] proceeded with the leave of the high court that had determined the appeal from the Medical and Dental Council under s 20 of Act 56 of 1974.

[50] In principle there are a number of reasons why s 16(1)*(b)* of the SC Act should be confined to applications for leave to appeal against decisions by the high court given on appeal to it from other courts within the judicial system, that is, the magistrates' courts and full bench appeals from the high court sitting at first instance. The first is that there is a fundamental difference between an appeal from a court and an appeal from a body outside the judicial system. The latter may be an administrative tribunal, or a board or official dealing with purely administrative matters, where the decision in question may have little or no legal content, but may be a matter of administrative discretion. The 'appeal' brings it before the court for the first time. By contrast, once a matter has been heard by a court of first instance and the dissatisfied party has exercised a right of appeal, the right to a further appeal should depend not only on the question whether there are reasonable prospects of success, but also on the existence of some compelling circumstances warranting a further appeal. The reason for such a limitation lies in the principle that there should be finality in litigation.[24] Accordingly the law places a limit on the number of appeals that may be pursued within the court system and empowers appellate courts to regulate the cases that come to them by way of provisions requiring leave to appeal from those courts.

[51] The second point of principle lies in the fact that an appeal within the justice system is a clearly defined process, whereby the correctness of the decision of the court appealed from is assessed within defined boundaries. The appeal proceeds on the record of the proceedings in the lower court and the factual findings of that court and its exercise of discretion in reaching its decision are given respect and only

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[22] *New Balance Athletic Shoe Inc v Dajee NO and Others* 2011 BIP 139 (NG).
[23] *De Beer v Die Raad vir Gesondheidsberoepe* [2006] ZASCA 115; 2007 (2) SA 502 (SCA) para 1.
[24] *Nestle (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) para 16.

departed from on limited grounds. That is by no means true of statutory appeals from tribunals and officials.

[52] The first issue in a statutory appeal is to ascertain the nature of the right of appeal conferred by the statute. In determining that question courts follow the taxonomy laid down by Trollip J in *Tikly v Johannes*.[25] Broadly speaking there are three possibilities. The appeal may be a complete rehearing and fresh determination of the subject of the appeal. It may be an appeal in the conventional sense of a rehearing on the merits, but on the same evidence and information as was before the original decision-maker, subject to the limitation inherent in the decision-maker not necessarily being in the same situation as a court of record. Thirdly the appeal may be a review, involving a limited rehearing, with or without additional information and evidence, to examine not the merits of the decision, but the manner in which it was arrived at. Unlike appeals within the judicial system therefore statutory appeals may have a widely varying nature and involve different types of hearing.

[53] The third point concerns the nature of a statutory appeal and the terms in which the right of appeal is granted. These may, when properly construed, mean that the appeal to the high court is final and not subject to any further appeal at all. That may especially be the case when the statute provides that the decision by the court will stand in the place of or be deemed to be the decision of the original decision-maker.[26] If the appeal to the high court is taken to result in a decision by that court given on appeal to it there will be conflict between the statute conferring the right of appeal and the SC Act. That is manifestly undesirable.

[54] The fourth point is that it is almost inevitable, as recognised expressly in s 148(2)*(a)* of the NCA, that the decisions of statutory bodies and officials in these matters will constitute administrative action and be subject to judicial review under the provisions of PAJA.[27] Such proceedings are conventionally pursued in the high

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[25] *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (W) at 590H-591A.
[26] See for example *The Minister of Labour v Building Workers' Industrial Union* 1939 AD 328 and *Rohrs v Newmarch* 1915 AD 108. Statutory appeals against decisions by officials or boards in licencing cases were held not to raise a *lis* or dispute between the applicant for a licence and the licencing authority. Accordingly decisions by the court given on appeal from the licencing authority were not appealable. See *Maske v The Aberdeen Licensing Court* 1930 AD 30 at 36 and the authorities there referred to.
[27] The Promotion of Administrative Justice Act 3 of 2000.

court before a single judge sitting at first instance. That judge will deal with the question of leave to appeal against the judgment and may direct that it be heard before either a full court or this court, depending on the nature and complexity of the issues raised. It seems anomalous that, if the dissatisfied party was content to proceed by way of an appeal on the record of the administrative decision-maker, any appeal flowing from the judgment would require special leave to appeal from this court, when common experience teaches that there may be considerable overlap between appeal and review grounds.

[55] Finally, I revert to the point made earlier that the test for granting special leave to appeal is more stringent than the test for leave to appeal, Given the fact that restrictions on the right of appeal have been held by the Constitutional Court to constitute a limitation on the right of access to courts under s 34 of the Constitution, it seems to me that we should prefer an interpretation of s 16(1)*(b)* that least restricts the ability of a disappointed litigant to seek relief by way of an appeal within the justice system.

[56] For those reasons I conclude that an appeal from the decision of a high court under s 148(2)*(b)*, whether constituted of a single judge, or two judges, or as a full court, lies with leave of that court sitting as a court of first instance. Such leave should be sought in terms of s 16(1)*(a)* of the SC Act and not by way of an application for special leave to appeal from this court.

[57] That leaves the disposal of this appeal. The parties were understandably anxious that having come this far they should receive a judgment on the merits. They came in good faith having received special leave to appeal from this court, without any query being raised as to the correctness of that approach until shortly before the hearing. To strike the appeal from the roll only for them to retrace their steps through the high court and, if refused leave, back to this court, but against a lesser standard for the grant of leave to appeal, would be a gross technicality and waste of resources. Even more so would be a repeat hearing of an issue that has been fully argued.

[58] It seems to me that this constitutes special circumstances in which the court can in the exercise of its inherent jurisdiction to regulate its own procedure condone

the irregular manner in which this appeal reached us. There are clear indications in the high court's judgment that, had leave to appeal been sought from it, the application for leave would have been dismissed. Inevitably that would have led to an application for leave to appeal to this court and, given that an application for special leave was granted, the conclusion must be that ordinary leave would have been granted. Accordingly in the special circumstances of this case, which will not be repeated, because the issue of the proper approach to the application of s 16(1)*(b)* will be resolved by this judgment, the appeal should be dealt with on its merits in accordance with the judgment of Eksteen AJA.

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M J D WALLIS
JUDGE OF APPEAL

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