IN THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

Case No: NCT/4671/2012/60(3) & 101(1) (P)

In the matter between:

CLIENTELE GENERAL INSURANCE LIMITED **Applicant**

and

THE NATIONAL CONSUMER COMMISSION **Respondent**

CORAM:

MS. P A BECK (PRESIDING)
PROF J MASEKO (MEMBER)
ADV N SEPHOTI (MEMBER)

JUDGMENT AND REASONS

INTRODUCTION

1. The Applicant is Clientele General Insurance Limited ("the Applicant") a private company with limited liability incorporated in South Africa.

2. The Respondent is the National Consumer Commission (hereinafter referred to as "the Respondent"), an organ of state within the public administration established in terms of Section 85 of the Consumer Protection Act 68 OF 2009, ("CPA").

3. At the hearing of this matter, the Applicant was represented by Adv Itsikowitz.

4. The Respondent did not attend the hearing nor did the Respondent comply with the relevant time frames within which to respond to the application, hence the matter is decided on a default basis.

5. The Applicant brought an application to the National Consumer Tribunal (Tribunal) to have a compliance notice issued against it by the Respondent, reviewed and cancelled in terms of section 101(1) of the CPA.

6. The National Consumer Tribunal (Tribunal) has jurisdiction to hear this matter in terms of section 101(1) of the CPA. This section provides that a person issued with a compliance notice in terms of section 100 may apply to the Tribunal in the prescribed manner and form for its review.

7. This judgement follows the hearing of this matter on 2 October 2012 at the offices of the Tribunal in Centurion. This judgment is based largely on written submissions of the parties as well as oral argument of the Applicant. From the Applicants submissions it became clear that the Applicant based its review on several grounds being mainly jurisdictional issues and issues related to the merits of the matter.

THE FACTS

8. On 12 March 2008 the complainant, David Seko Segobela (complainant) contracted with the Applicant for a legal protection plan with policy number LE500781277 (hereinafter "the policy"). The policy covers legal expenses and provides legal advice either orally or by an external legal advisor appointed by the Applicant. The policy includes advice for civil, criminal and labour related matters including unfair dismissal.

9. On 3 March 2010 the complainant was dismissed from his employment and on the same day the complainant requested legal representation from the Applicant and spoke to Peter Nkoana ("Nkoana"), a legal advisor of the Applicant.

10. The complainant advised Nkoana that he would be attending a disciplinary hearing. Nkoana advised the complainant to attend the hearing and thereafter to advise Nkoana of the outcome of the hearing.

11. Following the disciplinary hearing on 15 March 2012, the complainant was dismissed from his employment. The complainant informed Nkoana of his dismissal and was told to attend a consultation on 17 March 2010. At the consultation the complainant was advised by Nkoana that legal representatives were not allowed at conciliation proceedings at the CCMA and that the Applicant would represent him once the matter reached arbitration proceedings.

12. On 12 April 2010 the Applicant received a notice of set down. Nkoana advised the complainant of the date of the hearing, informing the complainant that he should attend the hearing and that attorneys are not allowed at conciliation proceedings. The matter was not settled at conciliation. On 4 May 2010 the complainant contacted the Applicant and advised that the matter was not settled and that the date for arbitration proceedings would be set down by the Metal and Engineering Industries Bargaining Council (MEIBC).

13. On 17 May 2010 the complainant received a notice of set down for an arbitration hearing for 7 June 2010. On 20 May 2010 the complainant was informed by the Applicant of the said date. The Applicant informed the complainant that it would not be able to provide him with legal representation because he did not pay the May 2010 insurance premium, a term of his insurance policy.

14. On the complainant's version of events as set out in the compliance notice the complainant was informed by the attorney due to represent him that the Applicant had not given him the file and that as a result he could not proceed to represent the complainant in the matter. On the Applicant's version of events, the attorney was in possession of the complainant's file and upon advising the complainant of his limited prospects of success, the complainant requested

the attorney not to represent him. The complainant attended the hearing, without legal representation, where the Arbitrator found against him.

15. The Respondent alleges that on 11 October 2011, it forwarded a complaint to the Applicant. The Applicant alleges that it has no record of this complaint. A follow-up letter was sent by the Respondent on 1 November 2011 to the Applicant in terms of which the Applicant was given seven working days to respond to the complaint. The Applicant responded on 17 November 2011.

16. The Respondent was not satisfied with the failure by the Applicant to respond fully to the complaint and the matter was set down for conciliation for 1 February 2012. The Applicant attended the conciliation hearing and was represented by Christine Bezuidenhout ("Bezuidenhout"), supervisor of risk and compliance of the Applicant, who submitted to the conciliator that the Respondent did not have jurisdiction in the matter. Furthermore, that the attorney had informed the complainant that he had limited prospects of success in the matter.

17. On or about 7 March 2012 the complainant reported the matter to the Ombudsman of Short-Term Insurance. On or about 16 March 2012 the Applicant decided to refund to the complainant the sum of R1 420.00 (one thousand four hundred and twenty rand).

18. On or about 20 March 2012 the Applicant contacted the complainant regarding the refund and the complainant agreed to the refund in full and final settlement of the dispute arising from the complaint. On or about 26 March 2012, the Applicant made payment to the complainant in the amount of R1 420.00 (one thousand four hundred and twenty rand) (claiming it to be the total amount of premiums paid by the complainant).

19. On or about 4 April 2012 the Ombudsman of Short-Term Insurance referred the complaint to the Ombud for Financial Services Providers (appointed in terms of the Financial Advisory and Intermediary Services Act[1] ("the FAIS Ombud"). On or about 25 April 2012 the Applicant

[1] Act 37 of 2002

received notice of the complaint from the FAIS Ombud. On or about 11 May 2012 the Applicant responded to the FAIS Ombud.

20. The Applicant was issued with a Compliance Notice on 15 May 2012 which compliance notice was dated 20 March 2012. In terms of the Compliance Notice the Respondent was directed to refund the complainant an amount of R2 300.00 (two thousand three hundred rand).

21. On or about 17 May 2012 the Applicant received a notice from the FAIS Ombud informing the Applicant that the complaint had been dismissed.

22. On 22 May 2012, the Applicant paid the complainant the remainder of the refund, imposed by the Respondent, in the amount of R 880.00 (eight hundred and eighty rand).

23. On 31 May 2012 the Applicant filed an application for review and cancelation of the Compliance Notice issued to the Applicant by the Respondent.

ISSUE TO BE DECIDED

24. The issue which the Tribunal must decide is whether the compliance notice was issued in accordance with law.

25. The Applicant asserted that there are three main grounds upon which the compliance notice should be reviewed and set aside. These are as follows:

- the respondents lack of jurisdiction in the matter ;
- the limited application of the CPA to the insurance industry and
- the limited retrospective effect the CPA.

Jurisdiction

26. The Applicant submitted that none of the directives issued against it in the Compliance Notice are competent and are based upon errors of fact and law. If the directives are given effect to,

they would severely prejudice the interests and rights of the Applicant given the Respondent's lack of jurisdiction, the limited application of the CPA to the insurance industry, and the limited retrospective effect of the CPA.

Jurisdiction of the industry bodies and the Respondent

27. The Applicant submitted that the CPA contains provisions relating to the jurisdiction and powers of the Respondent and other dispute resolution bodies. As such the Respondent did not have the jurisdiction to decide the matter for the following reasons:

> ***"69 Enforcement of rights by a consumer"***
>
> *A person contemplated in section 4 (1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by-*
>
> *(a) referring the matter directly to the tribunal, if such a direct referral is permitted by this Act in the case of the particular dispute;*
>
> *(b) referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;*
>
> *(c) if the matter does not concern a supplier contemplated in paragraph (b)-*
>
> *(i) referring the matter to the applicable industry ombud, accredited in terms of section 82 (6), if the supplier is subject to any such ombud; or*
>
> *(ii) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law established or governing that consumer court; referring the matter to another alternative dispute resolution agent contemplated in section 70; or*
>
> *(iv) filing a complaint with the Commission in accordance with section 71; or*
>
> *(d) approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted."*

28. The CPA recognises two kinds of ombud with jurisdiction, namely, a 'statutory ombud' appointed for an industry in terms of any national legislation and an ombud for a 'financial institution' as defined in the Financial Services Ombud Schemes Act[2] (hereinafter "the FSOS Act").

29. The Ombudsman for Short-term Insurance has been granted recognition in terms of the FSOS Act and all personal short-term insurers have agreed to abide by the Ombudsman's decisions. As such the Ombudsman for Short-term Insurance is appointed by industry and not statute. The Ombudsman for Short-term Insurance does however meet the definition of 'ombud with jurisdiction' being an accredited ombud for a financial institution.

30. Section 69(c) of the CPA provides for a complaint to be filed with the Respondent in accordance with section 71 of the CPA "*if the matter does not concern a supplier contemplated in paragraph (b)*". The Applicant is a supplier 'subject to the jurisdiction of the Ombudsman for Short-term Insurance'.

31. The Applicant submits that the wording of section 69 of the CPA is unambiguous and clear. If a matter falls within the jurisdiction of the Ombudsman for Short-term Insurance the Respondent should not deal with the matter.

32. Further, a consumer may not enforce his rights by referring the matter to the Respondent, but rather to the Ombudsman for Short-term Insurance in terms of section 69(b) of the CPA.

33. In terms of section 69 of the CPA, as the matter fell within the jurisdiction of the Ombudsman for Short-term Insurance, the Respondent should not have dealt with the matter and the complainant was not entitled to enforce his rights by referring the matter to the Respondent, but should have referred the matter to the Ombudsman for Short-term Insurance (which the Complainant subsequently did) and whose decision the Applicant abided by thereby resolving the matter.

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2 Financial Services Ombud Schemes Act 73 of 2004.

Application of the CPA to the Insurance Industry

34. The Applicant submits that the CPA has limited application to the insurance Industry for the following reasons:

> *service' includes, but is not limited to-*
>
> *(a) any work or undertaking performed by one person for the direct or indirect benefit of another;*
>
> *(b) the provision of any education, information, advice or consultation, except advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act 37 of 2002);*
>
> *(c) any banking services, or related or similar financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service-*
>
> *(i) constitutes advice or intermediary services that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act 37 of 2002); or*
>
> *(ii) is regulated in terms of the Long-term Insurance Act, 1998 (Act 52 of 1998), or the Short-term Insurance Act, 1998 (Act 53 of 1998)"*

35. Sub-items (i) and (ii) should be read to mean that if the services provided by the supplier is 'advice' or 'intermediary services' as defined in the Financial Advisory and Intermediary Services Act[3] (hereafter "the FAIS Act") or is a service regulated in terms of the Insurance Acts, these services will not be regulated by the CPA, but by the FAIS Act or the Insurance Acts respectively, to the extent that these Acts regulate these services (financial services and the undertaking or assumption of risk).

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3 Financial Advisory and Intermediary Services Act 37 2002.

36. The Applicant submits that in accordance with Item 10 of Schedule 2 of the CPA the insurance industry had until 30 September 2012 to review the provisions in the Insurance Acts, the Rules and the Regulations to ensure that these measures are aligned with the consumer protection measures of the CPA. Should the Acts be so aligned, the CPA will then apply fully to the insurance industry.

37. The services that constitute the assumption or undertaking of risk will therefore be regulated by the Short-term Insurance Act[4] (hereinafter "the STIA") and any 'advice' or 'intermediary services' will be regulated by the FAIS Act and not the CPA (until the deadline is met).

38. Although there is no blanket exclusion for the insurance industry from the CPA under section 5(3), the submission of the Applicant is that the 'carve-out' of the definition of service makes it clear that the undertaking or assumption of risk is not a service as that term is defined in the CPA.

Retrospective jurisdiction of the Commission

39. The Applicant submitted that generally the CPA does not have retrospective effect. However, certain provisions do apply retrospectively to the limited extent provided for in Item 3 of Schedule 2 to the Act.

40. The Respondent would only have had the retrospective jurisdiction to hear the complaint if there had been a contravention of a specific provision of a repealed law in terms of Item 8 of Schedule 2 to the CPA.

41. Item 8 of Schedule 2 to the Act provides:

> "***8 Continued application of repealed laws***
>
> *(1) Despite the repeal of the repealed laws, for a period of three years after the*

4 Short-term Insurance Act 53 of 1998.

general effective date the Commission may exercise any power in terms of any such repealed law to investigate any breach of that law that occurred during the period of three years immediately before the general effective date.

(2) In exercising authority under sub item (1), the Commission must conduct the investigation as if it were proceeding with a complaint in terms of this Act."

42. The following laws have been repealed in section 121 of the Act:

"121Consequential amendments, repeal of laws and transitional arrangements

(2) Subject to subsection (3) and the provisions of Schedule 2, the following Acts are hereby repealed:

(a) Sections 2 to 13 and sections 16 to 17 of the Merchandise Marks Act, 1941 (Act 17 of 1941);

(b) Business Names Act, 1960 (Act 27 of 1960);

(c) Price Control Act, 1964 (Act 25 of 1964);

(d) Sale and Service Matters Act, 1964 (Act 25 of 1964);

(e) Trade Practices Act, 1976 (Act 76 of 1976); and

(f) Consumer Affairs (Unfair Business Practices) Act, 1988 (Act 71 of 1988).

(3) The repeal of the laws specified in this section does not affect the transitional arrangements, which are set out in Schedule 2."

43. The Applicant submits that in terms of Item 8 of Schedule 2 to the Act, the Respondent, may until 31 March 2014, exercise any power in terms of, *inter alia*, the Trade Practices Act and the Consumer Affairs Act to investigate any breach of these Acts that occurred during the period 31 March 2008 to 31 March 2011. The Respondent may investigate unfair business practices (in terms of the Consumer Affairs Act) and false or misleading advertisements (in terms of the Trade Practices Act).

44. The Applicant concludes that the complainant has not alleged any contravention of the Trade Practices Act nor the Consumer Affairs Act and neither does the compliance notice make any reference to any such contravention.

45. The facts giving rise to the complaint occurred wholly before the general effective date of the Act and no averment was made that a specific provision of a repealed law was violated. Accordingly, it is the submission of the Applicant that the compliance notice stands to be cancelled on the above three grounds.

46. In as much as the Applicant focussed on the above three main grounds the Applicant also raised the following additional three issues in the Applicants founding affidavit, which the Tribunal deems necessary to consider.

Failure to consult with the regulatory authority

47. The Applicant submits that in terms of section 100(2) of the Act, the Respondent must, before issuing a compliance notice to a regulated entity, consult with the regulatory authority that issued the licence to that regulated entity. In contravention of 100(2) the Respondent has, to the Applicant's knowledge, failed to consult with the Registrar of Short-term Insurance appointed under the STIA Act prior to issuing the compliance notice.

48. Failure of the Applicant to consult stands to have the compliance notice set aside.

Incorrect Party - Compliance Notice directed to Clientele Life Assurance Company

49. The Applicant submits that the Respondent has cited the incorrect party in the compliance notice. The party to whom the compliance notice was delivered, Clientele Life Assurance Company (CLAC), had not issued the policy but instead the policy was issued by the Applicant, Clientele General Insurance Limited.

50. The Applicant submits that it was improper of the Respondent to cite the CLAC as the respondent to the Compliance Notice considering that the Policy was issued by the Applicant.

Directives are void for vagueness:

51. The Applicant submits that the directions given in a compliance notice must be absolutely clear as the punitive provisions threaten either criminal prosecution or a significant fine imposed upon the Respondent (in the compliance notice). The Respondent (in the compliance notice) thus has to be absolutely sure of what is required of it.

52. The Applicant in the compliance notice is directed to refund the complainant an amount of R2 300.00 (two thousand three hundred rand) without any basis given for such calculation. To the Applicants knowledge it only received a total amount of R1 420.00 (one thousand four hundred and twenty rand) from the complainant for premiums in terms of the insurance policy.

53. The compliance notice states that the directive above must be implemented within 15 days from date of issue of the compliance notice and that this date is on or before 30 May 2012.

54. The Applicant submits that the compliance notice was delivered to it on or about 15 May 2012 and as a result it is consequently entitled to respond to the compliance notice on or about 4 June 2012.

55. In as much as this was the case, on 26 March 2012, the Applicant refunded the complainant the amount of R1 420,00 (one thousand four hundred and twenty rand) and subsequently, on the directive of the ombud on 22 May 2012, a further amount of R880,00 (eight hundred and eighty rand).

56. Accordingly, the matter was resolved.

Application of law to the facts

Does the Respondent have jurisdiction in the matter?

57. The Tribunal firstly considers whether the Respondent has jurisdiction in the matter. In doing so the Tribunal must have regard to sections 69, 85, 92 and 99 of the CPA.

58. Section 69 of the CPA allows for a consumer to enforce a consumer's rights by referring a matter directly to the Tribunal if permitted by the CPA and/or refer the matter to the applicable ombud with jurisdiction if the supplier is subject to the jurisdiction of such ombud.

59. Section 69 of the CPA provides for the enforcement rights of the Respondent as follows:

"69 Enforcement of rights by consumer
A person contemplated in section 4 (1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by-

(a) referring the matter directly to the Tribunal, if such a direct referral is permitted by this Act in the case of the particular dispute;

(b) referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;

(c) if the matter does not concern a supplier contemplated in paragraph (b)-

(i) referring the matter to the applicable industry ombud, accredited in terms of section 82 (6), if the supplier is subject to any such ombud; or

(ii) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court;

(iii) referring the matter to another alternative dispute resolution agent contemplated in section 70; or(iv) filing a complaint with the Commission in accordance with section 71; or

(d) approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of National legislation have been exhausted.

60. The CPA further recognises two kinds of ombud with jurisdiction, namely, a 'statutory ombud' appointed for an industry in terms of any national legislation and, an ombud for a 'financial institution' as defined in the Financial Services Ombud Schemes Act[5] (hereinafter "the FSOS Act").

61. The Ombudsman for Short-term Insurance has been granted recognition in terms of the FSOS Act and all personal line short-term insurers have agreed to abide by the ombudsman's decisions. The Applicant is a supplier 'subject to the jurisdiction of the Ombudsman for Short-term Insurance.

62. The Applicant has correctly submitted that the wording of section 69 of the CPA is unambiguous and clear. If a matter falls within the jurisdiction of the Ombudsman for Short-term Insurance the Respondent should not deal with the matter. Further, a consumer may not enforce his rights by referring the matter to the respondent but should instead refer the matter to the Ombudsman for Short-term Insurance in terms of section 69(b) of the CPA, which the complainant correctly did yet the Respondent saw fit to nonetheless confer authority upon itself to also deal with the matter.

63. Section 85 deals with the establishment of the Commission as follows:

> ***"85 Establishment of National Consumer Commission***
>
> *(1) The National Consumer Commission is hereby established as an organ of state within the public administration, but as an institution outside the public service.*
>
> *(2) The Commission –*
>
> *(a) has jurisdiction throughout the Republic;*
>
> *(b) is a juristic person;*
>
> *(c) must exercise the functions assigned to it in terms of this Act or any other law, or by the Minister, in-*
>
> *(i) the most cost-efficient and effective manner; and*

[5] Financial Services Ombud Schemes Act 73 of 2004.

(ii) in accordance with the values and principles mentioned in section 195 of the Constitution."

64. Section 92 of the CPA contains general provisions concerning the National Consumer Commissions functions as follows:

92 General provisions concerning Commission functions

(1) The Commission is responsible to carry out the functions and exercise the powers assigned to it by or in terms of this Act or any other national legislation.

(2) In carrying out its functions, the Commission may-

(a) have regard to international developments in the field of consumer protection; or

(b) consult any person, organisation or institution with regard to any matter relating to consumer protection.

(3) In respect to a particular matter within its jurisdiction or responsibility, the Commission may exercise its responsibility by way of an agreement contemplated in section 97 (1) (b).

(4) The Minister must prescribe at least two official language to be used by the Commission in any documents it is required to deliver in terms of this Act, for all or any part of the Republic, to give maximum effect to the requirements set out in section 6 (3) and (4) of the Constitution."

65. The enforcement functions of the Respondent are contained in section 99 of the CPA:

"99 Enforcement functions of the Commission

The Commission is responsible to enforce this Act by-

(a) Promoting informal resolution of any dispute arising in terms of this Act between a consumer and a supplier, but is not responsible to intervene in or directly adjudicate any such dispute;

(b) Receiving complaints concerning alleged prohibited conduct or offences, and dealing with those complaints in accordance with Part B of Chapter 3;

(c) monitoring-

(i) The consumer market to ensure that prohibited conduct and offences are prevented, or detected and prosecuted; and

(ii) The effectiveness of accredited consumer groups, industry codes and alternative dispute resolution schemes, service delivery to consumers by organs of state, and any regulatory authority exercising jurisdiction over consumer matters within a particular industry or sector;

(d) Investigating and evaluating alleged prohibited conduct and offences;

(e) Issuing and enforcing compliance notices;

(f) Negotiating and concluding undertakings and consent orders contemplated in section 74;

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

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

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

66. In terms of section 92(1) the Respondent is responsible to carry out the functions and exercise the powers assigned to it by or in terms of the CPA (or any other national legislation). Thus the Respondent is only empowered to act in terms of the provisions of the CPA or other specific legislation. In terms of Section 99 (b), the Respondent is responsible to enforce the CPA by receiving complaints concerning alleged prohibited conduct or offences and then dealing with these complaints in accordance with Part B of Chapter 3.

67. The CPA defines prohibited conduct in Section 1 as "*an act or omission in contravention with this Act*".

68. It is therefore clear that the Respondent is tasked with investigating complaints relating to contraventions of the CPA. The Respondent may not proceed outside the boundaries laid down in the CPA, as this will result in *ultra vires* action.

69. The term *ultra vires* means "beyond the power". This phrase is used for acts which purport to be done by virtue of a certain authority, but which are really in excess of such authority, or for acts which are otherwise unauthorised.

70. The *ultra vires*-doctrine is tied to constitutional fundamentals associated with the Westminister system: the separation of powers, parliamentary sovereignty and the rule of law. Its essence is that the legislature, in conferring powers (vires) on administrators, sets statutory boundaries for the exercise of those powers. The legislature is the supreme law-maker, while the function of the courts is to apply the law made by it. The courts are thus required to see that the intention of the legislature is carried out, and that administrators act *intra vires* – that they remain within the boundaries of the powers granted to them.

71. Innes CJ[6] described this common-law review power as follows:

> *"Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of this duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature; it is a right inherent in the court"*

72. In *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa*[7], where near-legislative action was in issue, it demanded that the exercise of public power should not be arbitrary or irrational. Chaskalson P said:

> *"It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action."*

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6 In Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 TS 111 at 116
7 2000 (2) SA 674 (CC)

73. When the above is considered and the provisions of section 99 as quoted above are re-visited, it is apparent that the legislature had a specific intention with the different subsections. It appears that the Respondent may promote informal dispute resolution, but may not in such circumstances intervene in or directly adjudicate on a dispute. The other option available to the Respondent is to deal with complaints received in accordance with Part B of Chapter 3.

74. When the Respondent elects to deal with a complaint in accordance with Part B of Chapter 3 of the Act (as provided for by section 99(b)), it may issue a compliance notice which must set out the following information required by Section 100(3) of the CPA:

(a) "The person or association to which the conduct applies;
(b) The provisions of the Act that has not been complied with;
(c) Details of the nature and extend of non-compliance;
(d) Any steps that are required to be taken and the period within which those steps must be taken..."

75. When considering the content of a compliance notice and specifically the steps that are required to be taken, and whether the Respondent is entitled to prescribe such steps, one has to look at the purpose of a compliance notice. It would appear that a compliance notice is directed at showing a certain person where it failed to comply with the Act, describing to such person why its actions are in contravention of the Act, prescribing to that person certain steps that must be taken in order to remedy its non-compliance and identifying a penalty in the event of non-compliance of the notice.

76. The purpose of the compliance notice is therefore to remedy non-compliance with the CPA and to regulate future conduct through placing a further duty on the Respondent (in a compliance notice) to ensure that his future conduct is in line with the provisions of the CPA.

77. The issuance of a compliance notice would be the correct step to take where the Respondent (in a compliance notice) to a complaint has engaged in conduct that is prohibited in terms of the Act but in circumstances where such conduct did not result in another party suffering damages. The reasoning behind this is that, where a consumer wishes to claim damages from such Respondent (in a compliance notice), he/she would have to obtain a certificate of prohibited conduct from the Chairperson of the Tribunal as provided for in Rule 29[8]. By issuing a compliance notice the Respondent in fact closes this door to consumers affected by the conduct of the Applicant and this was obviously not the intention of the legislature.

78. It would therefore not be correct for the Respondent to make use of a compliance notice to actually award damages to a complainant and it should not be allowed to do so. The respondent has no mandate to award damages, and this is in effect what it does when ordering repayment of the total premiums, in this particular instance.

79. Furthermore, Section 150 of the NCA provides the Tribunal with a mandate to "*requiring repayment to the consumer of any excess amount charged, together with interest at the rate set out in the agreement.*" No similar provision exists that gives the NCC the authority to order repayment to a consumer. It is evident that had this been the intention of the legislature such authority would have been specifically provided for in the Act, which is clearly not the case.

80. As indicated above, the CPA is not applicable to this matter and accordingly the Respondent had no valid complaint in terms of the CPA to investigate and to proceed with or to order repayment in respect of and the actions of the Respondent is therefore ultra *vires* its powers.

81. It stands to reason then that the Respondent lacks jurisdiction in the matter and that the compliance notice stands to be set aside on this jurisdictional ground alone.

Does the CPA apply to the insurance industry?

82. In order to determine the CPA's application to the services provided by the insurance industry the Tribunal must consider the definition of 'service'.

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8 Rules for the Conduct of Matters before the Tribunal

" ***'service' includes, but is not limited to-***

(a) any work or undertaking performed by one person for the direct or indirect benefit of another;

(b) the provision of any education , information, advice or consultation, except advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act 37 2002);

(c) any banking services, or related or similar financial services, or undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service-

(i) constitutes advice or intermediary services that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act 37 of 2002); or

(ii) is regulated in terms of the Long-term Insurance Act, 1998 (Act 52 of 1998), or the Short-term Insurance Act, 1998 (Act 53 of 1998);

83. Consideration of the above definition indicates that any banking services, or related or similar financial services, or undertaking, underwriting or assumption of any risk by one person on behalf of another is defined as a 'service' for purposes of the CPA. These are defined as services but not when they constitute advice or intermediary services that is subject to regulation in terms of the FAIS Act, or the Long-term Insurance Act (LTIA) or the STIA Act.

84. As the Applicant provided the complainant with services which constituted the assumption or undertaking of risk, in terms of the CPA, the Applicant is regulated by the STIA. The service is not considered as a service for purposes of the CPA, to the extent that the Applicant provided the complainant with any advice or intermediary services (which is regulated by the FAIS Act).

85. Item 10 of Schedule 2 to the CPA provides for the exclusion of the STIA and the LTIA for a period of 18 months from the commencement of the CPA. Within the 18 month period the STIA and the LTIA have to be aligned with the consumer protection measures as provided for

in the CPA. If upon the expiry of the 18 month period the STIA and LTIA is not so aligned as aforesaid the provisions of the CPA will begin apply.

86. Item 10 of Schedule 2 to the CPA provides as follows:

> "***10 exclusion of certain laws***
> *The exclusion of the Short Term Insurance Act, 1998 (Act 53 of 1998), and the Long Term Insurance Act, 1998 (Act 52 of 1998), is subject to those sector laws being aligned with the consumer protection measures provided for in this Act within a period of 18 months from the commencement of this Act, failing which, the provisions of this Act will apply.*"

87. In terms of Item 10 of Schedule 2 to the CPA it is clear that the provisions of the CPA do not apply to industries falling to be regulated by the STIA and the LTIA. As the Applicant's services falls to be regulated by the STIA and/or the FAIS Act it is thus excluded from the provisions of the CPA.

88. In light of the definition of services and the provisions of Item 10 of Schedule 2 to the CPA it is clear that the Applicant is regulated by the STIA Act and the FAIS Act.

89. Accordingly, the CPA does not currently apply to the insurance industry and accordingly the compliance notice stands to be set aside on this ground alone.

Retrospective Application of the Act

90. The Respondent has not placed any legal argument before the Tribunal to consider whether a law has been breached in terms of Item 8 of Schedule 2 to the CPA, nor even mentioned a possible contravention of a repealed law.

91. The alleged contravention took place in June 2010 which falls within the three year period prior to the effective date in terms of Item 8 of Schedule 2 to the CPA.

92. It should be considered whether the Applicants' alleged conduct, forming the basis of the compliance notice, can be said to have contravened any of the repealed laws. If so found, it can be said that the Applicant has breached a repealed law in terms of Schedule 2, Item 8 of the Act.

93. The repealed laws are found in section 121 of the CPA as follows:

> *"121 Consequential amendments, repeal of laws and transitional arrangements*
> *(2) Subject to subsection (3) and the provisions of Schedule 2, the following Acts are hereby repealed:*
> *(a) Sections 2 to 13 and sections 16 to 17 of the Merchandise Marks Act, 1941 (Act 17 of 1941);*
> *(b) Business Names Act, 1960 (Act 27 of 1960);*
> *(c) Price Control Act, 1964 (Act 25 of 1964);*
> *(d) Sale and Service Matters Act, 1964 (Act 25 of 1964);*
> *(e) Trade Practices Act, 1976 (Act 76 of 1976); and*
> *(f) Consumer Affairs (Unfair Business Practices) Act, 1988 (Act 71 of 1988)"*

94. It appears to the Tribunal that none of the repealed Acts apply and hence the Respondent erred in assuming jurisdiction to issue a compliance notice to the Applicant.

Having dealt with the main reasons advanced for the application to cancel the compliance notice the Tribunal now turns to deal with additional issues raised by the Applicant, which in our view are pertinent in dealing with the matter as a whole.

Compliance Notice issued against the incorrect party

95. The compliance notice was issued against CLAC. The application to review the compliance notice is brought by Clientele General Insurance Limited Clientele General Insurance Limited is a subsidiary of its holding company Clientele Limited. Clientele General Insurance Limited

"*Provides Legal cover with superior legal services covering civil, criminal and labour-related matters.*" Further, "Clientéle Legal is a division of Clientéle General."[9]

96. As the policy was issued by Clientele Legal (a division of Clientele General), which is evident from the Personal Policy Schedule contained in the file, it would seem that the Respondent should have issued the compliance notice against Clientele Legal or Clientele General. The compliance notice was however issued against CLAC. The Applicant alleges that the policy was not issued by CLAC but by Clientele General Insurance Limited (which is evident from the Personal Policy Schedule).

97. The Tribunal fails to understand the rationale of the Respondent to issue the compliance notice to such subsidiary.

98. The issue of different entities was duly considered by the Tribunal in the matter between *MTN and NCC*[10] and in *Vodacom v NCC.*[11]

99. The Tribunal found in the *MTN*-matter that in a Regulatory environment the entity to whom a license was issued by a Regulator cannot, through its choice of how to provide its services, absolve itself from the responsibilities for those services leaving consumers vulnerable and with no redress against either itself or the other company. The Tribunal further held that if the corporate veil was not pierced in these matters, it would in effect mean that "*a regulated entity can successfully circumvent and jettison its responsibilities in the terms and conditions of their license by sublicensing to another person. This could clearly have not been intended by the legislature and would undermine the consumer protection and regulatory measures put in place particularly to protect the poor and vulnerable.*" [12]

100. In the *Vodacom*-matter the Tribunal further clarified this issue, by confirming that the general rule would be that separate legal entities should be treated as such. In this matter specifically,

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9 Clientéle Limited website <https://www.clientele.co.za/about-clientele/group-companies> (accessed 28 September 2012)
10 NCT/2738/2011/101(1)
11 NCT/2793/2011/101(1)
12 MTN v NCC NCT/2738/2011/101(1) paragraph 33

the Tribunal found that the licencing – conditions of Vodacom had no bearing on the matter with Vodacom Service Provider (Pty) Ltd and accordingly it was not necessary to pierce the corporate veil as was done in the *MTN*-matter. It would appear from reading the two decisions on this matter jointly, that the corporate veil may be pierced to the regulated entity in circumstances where the regulated entity can utilise its separate legal persona to absolve itself from its responsibilities in terms of the legislation, which in turn would leave consumers vulnerable. The general legal principle is however still that separate legal entities must be treated separately and that the corporate veil can only be pierced in very specific circumstances.

101. Section 101(1) of the CPA provides as follows:

> *"(1) Any person issued with a notice in terms of section 100 may apply to the Tribunal in the prescribed manner and form to review that notice within-*
>
> *(a) 15 business days after receiving that notice;*
>
> *(b) Such longer period as may be allowed by the Tribunal on good cause shown."*

102. The effect of this provision is that a party to whom a compliance notice was issued may institute proceedings before the Tribunal for the review thereof.

103. "Issued" is defined in the Dictionary of Legal Words and Phrases[13] as follows:

> *"In s82 of the Bills of Exchange Act 34 of 1964 to be construed as in definition thereof in s1. Therefore it means first delivery thereof which confers rights on person so taking. See Orlando Fine Foods (Pty) Ltd v Sun International Ltd 1994 2 SA 249 (B)"*

"Issue" is also discussed in the Dictionary of Legal Words and Phrases[14] and the following meaning can be attributed to it:

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13 Lexis Nexis, 2ed, Vol2 at I-119

14 Lexis Nexis, 2ed, Vol2 at I-118

"(1) The issue of a postal order within the meaning of s103 of Act 10 of 1911, means its first delivery whereby a liability upon the post office is created..."

104. It is evident that, in order to be issued with a document, the document does not need to be addressed to you, but merely delivered to you. The compliance notice was delivered to the Applicant.

105. Furthermore, as a general rule the requirements for *locus standi* are as follows[15]:

The plaintiff/applicant for relief must have an adequate interest in the subject matter of the litigation, which is not a technical concept but is usually described as a direct interest in the relief sought;

1. The interest must not be too far removed;
2. The interest must be actual, not abstract nor academic;
3. The interest must be a current interest and not a hypothetical one.[16]

106. The duty to allege and prove *locus standi in judicio* rests on the party instituting proceedings.[17] When these factors are considered, it is evident that the Applicant does in fact have *locus standi* in this matter as all of the above requirements are met.

107. It is also evident that the compliance notice was issued against the incorrect party and stands to be set aside on this ground alone.

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15 Jones and Buckle Magistrate's Court Rules of Court Rule 6-17 [Service 24,2009]

16 Cabinet of the Transitional Government for the Territory of South West Africa v Eins 1988 (3) SA 369 (A) at 388A-H; Jacobs v Waks 1992 (1) SA 521 (A) at 533J-534A; Bophutatswana Transport Holdings (Edms) Bpk v Matthysen Busvervoer (Edms) Bpk 1996 (2) SA 166 (A) at 173B-F; Kolbatschenko v King NO 2001 (4) SA 336 (C) at 346F-H; Pick and Pay Stores Ltd v Teazers Comedy and Revue CC [2002] 3 All SA 147 (W) at 160b-f; Voget v Kleynhans 2003 (2) SA 148 (C) at 151E; Judin v Wedgwood 2003 (5) SA 472 (W) at 475H-476A.

17 Mars Incorporated v Candy World (Pty) Ltd 1991 (1) SA 567 (A) at 575H-I; Trakman NO v Livschitz 1995 (1) SA 282 (A) at 287B-F; Kommissaris van Binnelandse Inkomste v Van den Heever 1999 (3) SA 1051 (SCA) at 1057G.

Failure to consult with the regulatory authority.

108. The Applicant submitted that where a supplier is subject to an ombud with jurisdiction the complainant should approach this ombud with jurisdiction first.

109. The Financial Services Board (FSB) is the regulatory authority under which the Applicant falls to be regulated. In terms of Section 7 of FAIS, a person may not act or offer to act as a financial services provider unless such person has been issued with a licence under section 8.

110. A financial services provider is defined in FAIS as follows:

> ***"financial services provider"*** *means any person, other than a representative, who as a regular feature of the business of such person—*
> *(a) furnishes advice; or*
> *(b) furnishes advice and renders any intermediary service; or*
> *(c) renders an intermediary service;"*

111. Financial products furthermore includes the following:

> ***"financial product"*** *means, subject to subsection (2)—*
> *(a)*
> *(b)*
> *(c) a long-term or a short-term insurance contract or policy, referred to in the Long-term Insurance Act, 1998 (Act No. 52 of 1998), and the Short-term Insurance Act, 1998 (Act No. 53 of 1998), respectively;*
> *(d) ..."*

112. It is a procedural requirement that before a compliance notice is issued the respondent must consult with the regulatory authority which in this case is the FSB because the FSB issued a licence to the Applicant to furnish advice and render intermediary services in relation to insurance products.

113. The Tribunal has discussed the issue of consultation extensively in the recent decision it handed down in *Multichoice Africa Ltd v The National Consumer Commission.* The issue of what constitutes a proper consultation was thoroughly canvassed with particular reference to decided cases.

114. Whether or not there was meaningful consultation must be decided on the basis of fact and the basis of law. Accordingly, the Respondent failed to provide evidence to establish the jurisdictional fact required by Section 100(2) of the CPA.

Directives void for vagueness

115. The Applicant submits that on 20 March 2012 the Applicant contacted the complainant telephonically. During this telephone conversation it was agreed that the matter would be settled between the parties by the Applicant refunding to the complainant all premiums in the amount of R1 430.00 (one thousand four hundred and thirty rand) paid by him to the Applicant in full and final settlement of the dispute.

116. This settlement was concluded by the Applicant to the complainant effecting the refund payment on 26 March 2012. Flowing out of the intervention of the ombud, a further amount of R 880.00 (eight hundred and eighty rand) was refunded to the complainant bringing the total refund to R 2 300.00 (two thousand three hundred rand).

117. *Hubbard v Mostert 2010 (2) SA 391 (WCC)* points out the law in relation to settlement agreements. A settlement (or offer to compromise) must be strictly interpreted and must be clear and unambiguous. The effect of an accepted settlement offer will be to compromise the claim of the Plaintiff. In this matter the complainant was refunded the amount of R 1 420.00 (one thousand four hundred and twenty rand) which amount according to the Applicant, represented the total amount of premiums paid by the complainant. Indeed subsequently the Applicant paid the complainant a further amount of R880,00 (eight hundred and eighty rand)

flowing out of the intervention of the ombud bringing the total amount paid to the complainant to the sum of R2 300,00 (two thousand three hundred rand).

118. The effect thereof would be that the underlying complaint is extinguished and the Tribunal fails to understand the rationale of the NCC of proceeding to issue a compliance notice in a matter that is clearly settled by agreement between the parties.

119. For all of reasons set out above the Tribunal concludes that:

1. The respondent did not have a reasonable belief that the applicant was engaged in prohibited conduct;
2. The compliance notice was issued to the incorrect party;
3. The compliance notice was issued for a reason not authorised in terms of the Act;
4. The respondent did not consult with the Regulatory authority before issuing the compliance notice; and
5. The issuing of the compliance notice was not lawful, reasonable or procedurally fair.

COSTS

120. The awarding of costs is governed by section 147 of the National Credit Act, 2005 (NCA). Section 147 provides for the awarding of costs in very limited circumstances where a complainant refers a matter to the Tribunal after having received a notice of non-referral from the National Credit regulator and the National Consumer Commission. If the circumstances do not fall within this exception the general rule that each party bears its own costs must be observed. This interpretation is unavoidable because section 147(1) uses the word "must" and not "may" indicating that the Tribunal is not granted discretion in this circumstances.

121. The Tribunal's rules also deal with the awarding of costs. Rule 25(7) of the Tribunal rules provides:

The Tribunal may award punitive costs against any party who is found to have made frivolous or vexatious applications to the Tribunal.

122. Therefore, just as with section 147, punitive costs can only be awarded in very narrow circumstances

123. In summary, the Tribunal cannot extend its powers to award costs beyond the power which is given to it by statute for to do so would be contrary to the rule of law

ORDER

Accordingly, the Tribunal makes the following order:

1. The Compliance notice issued by the Respondent is cancelled.
2. No order as to costs is made.

DATED ON THIS 15TH DAY OF APRIL 2013.

Authorised for issue by the National Consumer Tribunal
Case number
Date: 2013 / 04 / 16
Ccyy / mm / dd

National Consumer Tribunal
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{signed}

P A BECK
PRESIDING MEMBER

Prof J Maseko and Adv N Sephoti concurring