IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION

Case No: NCT/17994/2014/59(1)(T)

In the matter between:

BRIDGE TAXI FINANCE (PTY) LTD **Applicant**

And

THE NATIONAL CREDIT REGULATOR **Respondent**

Case No: NCT/17982/2014/59(1)T

And in the matter between

RUEWELL INVESTMENTS (PTY) LTD **Applicant**

And

THE NATIONAL CREDIT REGULATOR **Respondent**

Coram:

Mr FK Sibanda	-	Presiding Member
Ms D Terblanche	-	Member
Adv F Manamela	-	Member

Date of Hearing:	3 February 2015
Date of Judgment:	3 March 2015

JUDGMENT AND REASONS

PARTIES

1. The Applicants in this matter are Bridge Taxi Finance (Pty) Ltd (Bridge), a company registered in terms of the company laws of the Republic of South Africa (registration number 2013/126320/07) and Ruewell Investments (Pvt) Ltd (Ruewell), a company registered in terms of the company laws of the Republic of South Africa (registration number 2013/173045/07).

2. At the hearing the Applicants were represented by ARG Mundell, SC of the Johannesburg Bar, instructed by PS Rath of Brooks and Luyt Attorneys.

3. The Respondent is the National Credit Regulator, ("the NCR" or "the Respondent") a juristic person established in terms of section 12 of the National Credit Act, No 34 of 2005 ("The Act").

4. At the hearing the Respondent was represented by T Nyandeni of the Johannesburg Bar, instructed by R Stocker of Mothle Jooma Sabdia Inc.

INTRODUCTION

5. The Applicants applied to the National Consumer Tribunal ("the Tribunal") in terms of section 59(1) of the Act, seeking the review and setting aside, in whole, of the decision taken by the Respondent to refuse to register the Applicants individually as developmental credit providers as contemplated in section 41, read together with section 40 of the Act.

6. Section 59(1) of the Act provides that –

> *"A person affected by a decision of the National Credit Regulator under this Chapter may apply to the Tribunal to review that decision, and the Tribunal*

may make an order confirming or setting aside the decision in whole or in part"

7. The Tribunal has jurisdiction to hear this matter in terms of section 59(1), read with section 27(a)(i) of the Act, which provides that the Tribunal may adjudicate in relation to any application made to it in terms of the Act, and make any order provided for in this Act in respect of such application.

8. Furthermore section 6 of the Promotion of Administrative Justice Act, No 3 of 2000, ("PAJA") provides that –

> *(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action."*

9. The matter was heard on 3 February 2015.

10. At the hearing the Applicants requested that their applications be heard together due to the fact that both matters are based on the same facts. In terms of Rule 16(1) of the Rules of the Tribunal, a Presiding member may combine any number of persons either jointly, jointly and severally, separately, or in the alternative, as parties in the same proceedings, if their rights to relief depend on the determination of substantially the same questions of law or fact.

11. The Tribunal granted the request in accordance with Rule 16(1) and the two applications were heard as one, although areas of difference were highlighted during the hearing and will also be highlighted in this judgment, where necessary.

BACKGROUND

12. On 24 October 2013 Gullsure Investments (Pty) Ltd ("Gullsure"), submitted an application to the Respondent for registration as a developmental credit provider.

13. Subsequently, Gullsure changed its name to Bridge Taxi Finance (Pty) Ltd ("Bridge"), and re-submitted its application under the new name on 26 February 2014.

14. The Respondent wrote to Bridge on 28 October 2013, 11 November 2013, and 25 February 2014 requesting additional information, raising concerns and seeking clarity on the application.

15. Bridge responded on 7 November 2013 and 25 November 2013.

16. Various emails were then exchanged between Bridge and the Respondent dealing with the queries raised by the Respondent.

17. The last communication received by Bridge from the Respondent regarding the processing of the application consisted of an email dated 02 June 2014, from Sydney Ntimane, a Supervisor in the Registrations Department of the Respondent, addressed to Mr Gerhardt van Wyngaardt of the Applicant, stating that –

> *"The application for Bridge Taxi Finance was presented to the committee for consideration however, the committee decided to defer the application as they require clarity on certain matters pertaining to the application. We will forward a letter requesting for further information in due course."*

18. No letter requesting further information was received by Bridge. Instead, on 3 September 2014 the Respondent wrote to Bridge, refusing its application and citing as a reason for the refusal the fact that –

> *"...Mr Martin Bezuidenhout, while he was the Chief Executive Officer of SA Taxi, acted with disregard for consumer rights generally as contemplated in section 46(3)(e)(iii). In terms of section 47(2) a juristic person or an association of persons may not be registered as a credit provider if any natural person who would be disqualified from individual registration in*

terms of section 46(3) exercises general management and control of that person or association, alone or in conjunction with others…
In terms of section 59(1) a decision of the National Credit Regulator may be referred to the Tribunal for review…"

19. Ruewell submitted to the Respondent on 17 April 2014 an application for registration as a developmental credit provider.

20. In its founding affidavit Ruewell contends that its application was guided by the information sought and requests advanced by the Respondent in the context of Bridge's application and therefore believes that its application was complete and met the requirements of sections 40 and 41 of the Act.

21. Unlike Bridge, Ruewell did not receive any further communication from the Respondent prior to the rejection of its application.

22. On 3 September 2014 the Respondent wrote to Ruewell, refusing its application and citing as a reason for the refusal the fact that –

"…Mr Martin Bezuidenhout, while he was the Chief Executive Officer of SA Taxi, acted with disregard for consumer rights generally as contemplated in section 46(3)(e)(iii). In terms of section 47(2) a juristic person or an association of persons may not be registered as a credit provider if any natural person who would be disqualified from individual registration in terms of section 46(3) exercises general management and control of that person or association, alone or in conjunction with others…
In terms of section 59(1) a decision of the National Credit Regulator may be referred to the Tribunal for review…"

23. On 26 September 2014 the Applicants applied to the National Consumer Tribunal ("the Tribunal") to review the decision of the Respondent.

ISSUES TO BE DECIDED

24. The Tribunal must decide whether:

(i) The Respondent had to afford the Applicants an opportunity to make representations first before making a decision to refuse their applications, in accordance with PAJA.
(ii) The Respondent created a legitimate expectation on the part of the Applicant.
(iii) The Respondent's decision was materially influenced by an error of law.
(iv) There are any grounds to set aside the decision of the Respondent in whole or in part, in accordance with section 59(1) of the Act.

APPLICANTS' CASE

Administrative justice and legitimate expectation

25. The Applicants' founding and replying affidavits were deposed to by Mr Martin Allan Bezuidenhout, a director of the Applicants.

26. The Applicants applications are similar in all material respects except on the question of legitimate expectation highlighted below.

27. The Applicants aver that the Respondent's decision, being that of an administrative body, must comply with the prescripts of section 3 of PAJA which provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

28. Section 3(2)(b) of PAJA provides that –

"In order to give effect to the right to procedurally fair administrative action, an administrator, subject to sub-section (4) must give a person referred to in sub-section (1) –

(a) adequate notice of the nature and purpose of the proposed administrative action;
(b) a reasonable opportunity to make representations;
(c) *a clear statement of the administrative action"*

29. Since section 3(2)(b) of PAJA is written in imperative terms, using the word 'must', the Respondent's position that its decision to grant or refuse registration is not one which entitles the party affected thereby to a hearing as a matter of course, is untenable.

30. In its last email communication to the Bridge, dated 2 June 2014[1], before sending the letter of refusal, the Respondent had promised that a further letter would be forwarded to the Bridge requesting further information, in due course.

31. It must be noted that no similar email was sent to Ruewell, promising that a further letter would be sent in due course requesting further information.

32. This promise by the Respondent to Bridge, the Applicants contend, created a legitimate expectation, thereby triggering the requirements of section 3(1) of PAJA.

33. In *Administrator, Transvaal and Others v Traub and Others*[2] it was held that a legitimate expectation might arise from at least one or two sources:

> *"(i) From an express promise given by the authoritative body; or*
> *(ii) A regular practice which the claimant to a legitimate expectation can reasonably expect to continue."*

34. By disregarding the Bridge's legitimate expectation, the Respondent's impugned decision amounted to administrative action that was procedurally unfair and as such stands to be set aside by the Tribunal.

Error of law

35. According to the Applicants, the Respondent's decision was based on an error of law by taking a view that the personal behaviour on the part of Mr Bezuidenhout which

[1] pp 64.
[2] 1989 (4) SA 731 (A).

falls within the description in section 46(3)(e)(iii) disqualifies him, in his personal capacity, from being registered as a credit provider.

36. Section 46(3) disqualifies a natural person from being personally registered as a credit provider for various reasons that are listed in sub-sections (a) to (f).

37. According to the Applicants, the Respondent's view[3] that personal behaviour on the part of Mr Bezuidenhout which falls within the description in Section 46(3)(e)(iii) disqualifies him in his personal capacity from being registered as a credit provider and therefore triggers Section 47(2) which disqualifies the Applicants from registration is incorrect.

38. In terms of section 46(3)(e), the disqualification arises in consequence of an entity having acted with disregard for consumer rights generally. The additional requirement for that disqualification is that the natural person must have been a director or member of that entity at the relevant time.

39. Therefore in order to invoke the disqualification provided for in section 46(3)(e)(iii) of the Act, the Respondent should have demonstrated that:

    (i) Mr Bezuidenhout had been a director of a juristic person; and
    (ii) Such juristic person had acted with disregard for consumer rights generally.

40. The Applicants then referred the Tribunal to the Respondent's submission that two investigations were carried out into certain practices of SA Taxi Securitization (Pty) Ltd ("SATS"), a registered credit provider of whom Bezuidenhout had been a director until his registration on 12 July 2010. The Respondent's submission is further discussed below.

41. However, there is no suggestion by the Respondent that any finding has ever been made against SATS by the Tribunal or any consumer court[4].

[3] para 30, pp.79-80.
[4] Para 38.1 pp 83-84.

RESPONDENTS' CASE

42. The Respondent's opposing affidavit was deposed to by Mr. Lesiba Jacob Mashapa, the Company Secretary of the Respondent.

43. The Respondent argues that it has a responsibility to regulate the consumer credit industry by registering credit providers, amongst others.

44. Section 41 of the Act provides that a credit provider that has applied for registration as a developmental credit provider may do so if *inter alia,* the entity does not employ any person in a controlling or managerial capacity who would be disqualified from individual registration.

45. As such, the Applicants are disqualified from registration due to the fact that Mr. Bezuidenhout who was employed by the Applicant (sic) in a controlling or managerial capacity acted with disregard for consumer rights during his tenure at SA Taxi.

46. The Respondent also argues that the nature of the decision to register or not is not one that requires the right to be heard as a matter of course.

47. Further, the reason for refusal was explained in the letters dated 3 September 2014, addressed to the Applicants[5]. The Applicants were further advised, in the same letters, of its right to review the said decision.

48. In this regard the Respondent contends that the procedure followed was procedurally fair.

[5] pp 25 & 26.

49. Insofar as the allegation made by the Applicants is concerned, that the Respondent's decision was based on an error of law, it is the Respondent's contention that section 46 (3)(e)(iii) has to be read in conjunction with section 47(2).

50. Section 46(3)(e)(iii) provides that-

> *"A natural person may not be registered as credit provider or debt counsellor if that person---- (e) has ever been a director or member of a governing body or entity at the time that such entity has---(iii) acted with disregard for consumer rights generally."*

51. Section 47(2) provides that---

> *"Subject to subsection (4), a juristic person or an association of persons may not be registered as a credit provider or credit bureau if any natural person who would be disqualified from individual registration in terms of section 46(3) exercises general management or control of that person or association, alone or in conjunction with others."*

52. Mr Bezuidenhout was the Chief Executive Officer of SA Taxi Finance (Pty) ("SATF") and a managing director of SATS between 2008 and 2010 during which period the Respondent conducted investigations for noncompliance with the Act.

53. The Respondent however did not to refer the findings of non-compliance to any consumer court or the Tribunal.

54. The Respondent contends that its findings following investigations into the activities of SATF and SATS constituted flagrant disregard for the rights of consumers as contemplated in the provisions of the Act.

55. The Respondent further contends that at all material times when non-compliance with the Act was found by the Respondent, Mr. Bezuidenhout had general management and control of SATS.

ANALYSIS OF THE LAW AND THE FACTS

Administrative justice

56. It is common cause that the Respondent is an administrative body as contemplated in PAJA.

57. In terms of section 3(1) of PAJA, administrative action which materially and adversely affects the rights and legitimate expectations of any person must be procedurally fair.

58. Section 3(2)(b) of PAJA then outlines the requirements of procedurally fair administrative action, and these are –

    (i) Adequate notice of the nature and purpose of the proposed administrative action;

    (ii) A reasonable opportunity to make representations;

    (iii) A clear statement of the administrative action;

    (iv) Adequate notice of any right of review or internal appeal, where applicable; and

    (v) Adequate notice of the right to request reasons in terms of section 5.

59. There is no indication that these steps should be followed or applied at all cost. Rather, section 3(2)(a) provides that a fair administrative procedure depends on the circumstances of each case.

60. Moreover, in terms of section 3(4), administrative bodies may depart from any requirements referred to in section 3(2)(b) if it is reasonable and justifiable in the circumstances.

61. Again, section 5 of PAJA states that:

> *"Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure."*

62. Be that as it may, there is no indication that the Respondent relied on any of the exceptions provided for either in section 3(4) or 3(5) of PAJA to depart from the requirements of subsection 2 thereof.

63. Despite the provisions of subsection (5), and this case aside, it may be good practice for the Respondent, taking into account efficiency and the effective use of resources, in instances where its decisions adversely affect any person to afford such a person the opportunity to make representations.

64. The question that remains to be answered is whether the Respondent erred by not following the requirements of section 3(2)(b) of PAJA, specifically by not giving the Applicants an opportunity to make representations before making an adverse decision on the application.

Grounds for Review of the decision of the NCR

65. The grounds for judicial review of an administrator's decision are set out in section 6 of PAJA which states as follows:

> ***"6. Judicial review of administrative action***
> *(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.*
> *(2) A court or tribunal has the power to judicially review an administrative action if*

(a) the administrator who took it –

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken –

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself –

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to –

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator'

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful."

66. According to the Applicants, the Respondent's administrative action was procedurally unfair; it was materially influenced by an error of law and it took into account irrelevant considerations.

67. In the case of *Pharmaceutical Manufacturers Association of South Africa & Another: In re: Ex parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC) at para 85 the Constitutional Court per Justice Chaskalson P, held that:-

> "*Decisions [of administrative bodies] 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.*"

However, Justice Chaskalson P warned at paragraph 90 that:-

> "*The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately.*"

68. When regard is had to section 46 of the Act, it is clear that it contains automatic disqualifications for a natural person to be registered as a credit provider or debt counsellor, by stating that –

> ***"46 Disqualification of natural persons***
> *(1)....*

(2) A natural person may not be registered as a credit provider if that person is an unrehabilitated insolvent.

(3) A natural person may not be registered as a credit provider or debt counsellor if that person-

(a) is under the age of 18 years;

(b) as a result of a court order, is listed on the register of excluded persons in terms of section 14 of the National Gambling Act, 2004 (Act NO. 7 of 2004);

(c) is subject to an order of a competent court holding that person to be mentally unfit or disordered;

(d) has ever been removed from an office of trust on account of misconduct relating to fraud or the misappropriation of money, whether in the Republic or elsewhere;

(e) has ever been a director or member of a governing body of an entity at the time that such an entity has -

(i) been involuntarily deregistered in terms of a public regulation;

(ii) brought the consumer credit industry into disrepute; or

(iii) acted with disregard for consumer rights generally; or

(f) has been convicted during the previous 10 years, in the Republic or elsewhere, of-

(i) theft, fraud, forgery or uttering a forged document, perjury, or an offence under the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), or comparable legislation of another jurisdiction;

(ii) a crime involving violence against another natural person; or

(iii) an offence in terms of this Act, a repealed law or comparable provincial legislation, and has been sentenced to imprisonment without the option of a fine unless the person has received a grant of amnesty or free pardon for the offence.

69. The National Credit Regulations of 2006 published under GN 489 as amended state the following at Regulation 5:

"5. *Disqualification of Natural Persons from Registration*

If a natural person who exercises general management or control over the registrant, whether alone or in conjunction with others, becomes disqualified from individual registration in terms of section 46(3) of the Act, that person must provide the National Credit Regulator and the registrant with notification by completing form 6 and submitting it within 30 days of becoming disqualified."

70. It could not have been the intention of the legislature that where an application for registration by a natural person is refused on account of the disqualifications in section 46, that there should be a hearing of the matter when the criteria used is an objective one or in loose parlance is a 'tick box' exercise.

71. It is submitted that an individual is automatically disqualified from registering as a credit provider or debt counsellor if that natural person is, among other things, under the age of 18 years, is listed on the register of excluded persons following a court order in terms of the gambling legislation, is mentally unfit or disordered, has been removed from an office of trust, has been convicted of theft, fraud, forgery, has been sentenced to imprisonment without the option of a fine or has exercised general management or control of an entity that has acted with disregard for consumer rights generally.

72. The Respondent provided reasons for the refusal to register the Applicants as developmental credit providers and also informed the Applicants of their right to take the decision of the Respondent on review at the Tribunal.

Legitimate Expectation

73. The Applicants argue that the Respondent's email communication to Bridge dated 2 June 2014, promised that a further letter would be forwarded to Bridge requesting for further information, in due course, thus creating a legitimate expectation, and thereby triggering the requirements of section 3(1) of PAJA.

74. The Applicants make it clear that Bridge had a legitimate expectation *"that it would be asked for the additional information referred to by the Regulator prior to an adverse decision being made"*[6].

75. Since Ruewell did not receive similar communication sent to Bridge by the Respondent promising that a letter would be sent in due course requesting further information, no legitimate expectation was raised on the part of Ruewell.

76. According to Hoexter[7] in order to rely on the doctrine of legitimate expectation, one has to prove that a legitimate expectation existed. Further, Hoexter states that:

> *"On one hand it seems unjust (unfair in the looser sense) not to give effect to promises and practices on which people have relied; on the other hand the Courts are understandably reluctant to enforce promises and practices where this would undermine the basic requirements of legality or where it would have the effect of fettering the future exercise of an agency's discretion. "*

77. In the seminal case of *Administrator of Transvaal and Others v Traub and Others*[8] it was stated that:

> "*The legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned would reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken".*

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[6] Para 25, Applicant's heads of argument

[7] Hoexter, C. 2007. Administrative Law in South Africa. Juta and Company Ltd, page 382.

[8] Administrator, Transvaal v Traub 1989 (4) SA 731 (A).

78. Relying on the above case, among others, the Supreme Court of Appeal (SCA) in *Duncan v The Minister of Environmental Affairs and Tourism*[9] stated that :

> *"In its original role the doctrine of legitimate expectation has been recognised as affording no more than the right to a fair hearing before an adverse decision is taken.*

79. In this regard, the SCA set out what has to be proven in order to rely on the doctrine of legitimate expectation as follows:

> *"(i) representations inducing expectations must be clear, unambiguous and devoid of any relevant qualifications,*
>
> *(ii) the expectations must be induced by the decision maker,*
>
> *(iii) the expectations must be reasonable, and*
>
> *(iv) the expectations must be competent and lawful for the decision maker to make.*

80. In order to determine whether a legitimate expectation was created in this regard, the events preceding the Respondent's adverse the decision are instructive.

81. Upon receipt of the application by the Respondent, various correspondences were exchanged between Bridge and the Respondent, mainly seeking clarity and requiring further information from Bridge, which information was furnished.

[9] Duncan v The Minister of Environmental Affairs and Tourism (2/2009) [2009] ZASCA 16.

82. The last communication before an adverse decision was made by the Respondent promised that further information will be sought from Bridge.

83. However, this communication cannot be viewed as triggering a legitimate expectation within the meaning of section 3(1) of PAJA. It contains neither a promise for a prior hearing nor an indication that a favourable decision will be made.

84. That no further information was sought from Bridge assumes that the Respondent had all the information it needed to make a decision, the reasons of which were duly communicated to the Applicants.

85. It is thus not clear to this Tribunal how a legitimate expectation within the meaning of section 3(1) of PAJA was created.

Error of law

86. The Respondent's letter of refusal states as follows:

> *"Mr Bezuidenhout, while he was the Chief Executive Officer of SA Taxi, acted with disregard for consumer rights generally as contemplated in section 46(3)(e)(iii)."*

87. This position is persisted with in the Respondent's affidavit in para 11.4, which states that:

"11.4 The Applicant is disqualified from registration due to Bezuidenhout, who has acted with disregard for consumer rights during his tenure at SA Taxi..."

88. The Respondent, wrongly so, takes a view that it is Mr Bezuidenhout, in his personal capacity who acted with disregard for consumer rights generally, as contemplated in section 46(3)(e)(iii) of the Act and therefore, for that reason, the Applicants are disqualified from being registered as credit providers.

89. That interpretation is untenable since section 46(3)(e)(iii) of the Act rather states as follows:

(3) *"A natural person may not be registered as a credit provider or debt counsellor if that person –*

(a) ...

(e) *has ever been a director or member of a governing body of an entity at the time that such an entity has –*

(i)...

(ii) ...

(iii) *acted with disregard for consumer rights generally..."*

90. Section 47(2) of the Act then further provides that –

"A juristic person or an association of persons may not be registered as a credit provider or credit bureau if any natural person would be disqualified from individual registration in terms of section 46(3) exercises general

management or control of that person or association, alone or in conjunction with others."

91. All that was required of the Respondent is to do a two-step analysis that establishes whether:

(i) Mr Bezuidenhout had been a director of a juristic person; and
(ii) Such juristic person had acted with disregard for consumer rights generally.

92. The Respondent tried to correct this error during the hearing and in its heads of argument, by pointing out that it is SATS that acted with disregard for consumer rights generally. That being the case, the second step still needed to be established, and we turn to that point next.

93. It is common cause that Mr. Bezuidenhout, a director of the Applicants, was the Chief Executive Officer of SATF and a director of SATS between 2008 and 12 July 2010. SATS was at the time and still is a registered credit provider in terms of the Act.

94. It is also common cause that the Respondent undertook investigations into the activities of SATS which culminated in undertakings being made by SATS in a letter dated 5 March 2009[10] addressed to the Respondent.

95. Another investigation was conducted by the Respondent, starting from 17 November 2011, following a complaint against SATS in terms of section 136 of the Act.

96. Subsequent to that investigation SATS was issued with a Compliance Notice dated 27 November 2013[11], by the Respondent, in terms of section 55 of the Act. The

[10] pp 104.

Compliance Notice dealt with conduct by SATS which occurred between 2007 and 2010, during which time Mr Bezuidenhout was still a director of SATS.

97. The said Compliance Notice was challenged by SATS at the Tribunal. However, the parties, that is, SATS and the Respondent, reached a settlement agreement before the Tribunal could hear the matter and in terms of which the Compliance Notice was withdrawn.

98. Thus, the first step of the two-step analysis establishes that Mr Bezuidenhout was indeed in a director position of SATS and SATF, but the second fact that needs to be established is whether the entities in which Mr Bezuidenhout was a director or a member of the governing body, ever acted with disregard for consumer rights generally.

99. Whilst there is objective criteria with respect to the factors listed in section 46(3)(a) to (e)(i) as well as (f), subsection (3)(e)(iii) talks about acting with disregard for consumer rights generally.

100. Chapter 4 Part A of the Act is headed 'consumer rights'. There are various other provisions in the Act and its regulations that deal with consumer rights. It can reasonably be inferred therefore that a breach of Chapter 4 Part A of the Act or any other provision relating to consumer rights would constitute acting with disregard for consumer rights.

101. The question that remains is who is empowered or authorised to make a finding that an entity has acted with disregard for consumer rights generally.

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[11] pp166.

102. In its opposing affidavit, the Respondent contends that its findings into the activities of SATF and SATS constituted a flagrant disregard for the rights of consumers as contemplated in the Act.

103. However, taking into account the provisions of section 140 of the Act, the Respondent, after completing an investigation into a complaint, may –

(a) Issue a notice of non-referral to the complainant in the prescribed form;

(b) Make a referral in accordance with subsection (2), if the National Credit Regulator believes that a person has engaged in prohibited conduct;

(c) Make an application to the Tribunal if the complaint concerns a matter that the Tribunal may consider on application in terms of any provision of this Act; or

(d) Refer the matter to the National Prosecuting Authority, if the complaint concerns an offence in terms of this Act.

104. Flowing from section 140 of the Act, the Respondent cannot out of its own accord make a finding, following an investigation, that an entity has acted with disregard for consumer rights generally. That finding has to be tested in a competent forum, such as the Tribunal.

105. However, apart from following section 140 pursuant to an investigation, the Respondent can also follow section 138 (1) of the Act which provides as follows –

"If a matter has been-

(a) .....

(b) investigated by the National Credit Regulator, and the National Credit Regulator and the respondent agree to the proposed terms of an appropriate order, the Tribunal or a court, without hearing any evidence, may confirm that resolution or agreement as a consent order.

106. In this matter the Respondent did not follow the provisions of either section 138 or 140 of the Act. Instead it appears that the Respondent accepted the undertakings made by the SATS in a letter dated 5 March 2009. In that letter SATS states clearly that –

> *"Although there exist a difference of opinion between the National Credit Act (there being little or no precedent by the Courts to guide credit providers) we are firmly of the view that a prudent approach dictates that an antagonistic resolution of those differing views does not serve the interests of the parties or consumers. In a genuine attempt to implement a business model or process which carries with the approval of the National Credit Regulator, SA Taxi* Securitization *is willing to furnish the following undertakings which we confidently believe will bring about the successful conclusion of the current investigation."*

107. Various undertakings were then made by the SATS, including the fact that Senior Counsel would be appointed to furnish the parties with an opinion on whether various sections of the Act were contravened or not and that auditors would be appointed to undertake a review of the matters raised by the Respondent.

108. To the extent that the Respondent accepted these undertakings, which it did[12], including seeking legal opinion on the alleged non-compliance, it means that the Respondent also accepted that there was uncertainty regarding its findings of non-compliance by the SATS.

[12] Para37-38, pp 83 – 84.

109. Needless to say, some of the undertakings made by the SATS were not followed through and there is no indication that the Respondent took issue with that.

110. Instead, a second investigation was instituted in 2011 culminating with the issuance to the SATS of a Compliance Notice dated 27 November 2013.

111. This Compliance Notice, as already indicated above, was never enforced because the SATS approached the Tribunal to set it aside in terms of section 59 of the Act. Subsequently, a settlement agreement was reached by the parties before the Tribunal could hear the matter and in terms of which the Compliance Notice was withdrawn.

112. At the hearing, the Respondent attempted to introduce into the record a new letter/Compliance Notice pertaining to an investigation against SATS currently underway. The Tribunal however advised the Respondent to follow the normal procedure of applying to the Tribunal in order to introduce this new aspect to the matter. The Respondent subsequently abandoned this attempt.

113. As matters stand, there has not been any finding by the Tribunal or any competent court pointing to the fact that SATS has acted with disregard for consumer rights generally.

114. It is therefore incorrect for the Respondent to rely on section 47(2) of the Act in refusing to register the Applicant as a developmental credit provider.

115. Therefore, the decision taken by the Respondent was materially influenced by an error of law as contemplated in Section 6(2)(d) of PAJA.

CONCLUSION

116. Whilst the Respondent is an administrative body within the meaning of PAJA, the Tribunal makes no finding on whether it had to follow the requirements of section 3(2)(b) of PAJA in this specific case since sections 46 and 47 of the Act relied upon to make an adverse decision contain automatic disqualifications.

117. The Tribunal is not convinced that the Respondent's email of 2 June 2014 created a legitimate expectation that triggered the application of section 3(1) of PAJA.

118. The Tribunal finds that the Respondent misapplied itself to the law and therefore made a decision materially influenced by an error of law in that section 47(2) requires that a natural person must have been a director of an entity that acted with disregard for consumer rights generally, not that the natural person in his or her personal capacity must have acted as such.

119. However, even if the Respondent is given the benefit of the doubt, as it tried to rectify this error in its heads of argument, there has not been a finding by a competent body against SATS, the registered credit provider in which Mr Bezuidenhout exercised general management or control, that it had ever acted with disregard for consumer rights generally.

ORDER

120. The decision of the Respondent is set aside in whole.
121. The decision of the Respondent is remitted to the Respondent for re-consideration.
122. No order is made as to costs.

DATED THIS 3RD DAY OF MARCH 2015

[signed]

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Mr FK Sibanda

(Presiding Member)

Ms D Terblanche (Member and Chairperson of the Tribunal) and Adv FK Manamela (member) concurring.

Authorised for issue by the National Consumer Tribunal
Case number NCT/17982/2014/59(1) & NCT/17994/2014/59(1)
Date 2015/04/21
Ccyy mm dd

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