IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION

Case Number: **NCT/20519/2014/148(1) (P) NCA**

In the matter between:

FAIZAN PROPERTIES (PTY) LTD - **APPELLANT**

And

TRUE HARVEST COLLEGE (PTY) LTD - **RESPONDENT**

Coram:

Ms. P. Beck – Presiding member
Prof. T. Woker – Tribunal Member
Prof. J.M. Maseko – Tribunal Member

Date of hearing – 13 November 2015
Date of Judgment - 14 November 2015

MAJORITY JUDGMENT AND REASONS

APPELLANT

1. The Appellant is Faizan Properties (Pty) Ltd with registration number 2006/026419/07, a company duly incorporated in terms of the Company Laws of the Republic of South Africa and having registered offices at Suite 5, Monpark Building, 76 Skilpad Street Monument Park, Pretoria ("The Appellant"). On the papers instituting this matter, the Appellant is represented by its attorney of record, Alida Hermina Smit, of Van Der Wal Slade Ramabulana Attorneys.

2. At the hearing of the 13th November 2015 the Appellant was represented by Adv. E.A. Lourens instructed by attorneys Slade Van der Wal Ramabulana Inc.

RESPONDENT

3. The Respondent is True Harvest College (Pty) Ltd, with registration number 2008/009215/07, a company duly incorporated in terms of the Company Laws of the Republic of South Africa. The Respondent was represented by Esther Rhulani Tshwale (Mrs Tshwale), an adult female and a director of the Respondent.

4. At the hearing of the 13th November 2015 the Respondent was represented by Mr. Kevin Dam of D.M. Kisch Inc with Ms. Anola Naidoo, both of whom were instructed by the Law Society.

APPLICATION TYPE

5. The Appellant brought an application in terms of Section 148(1) of the Act to the Tribunal, to appeal a decision of a single member of the Tribunal dated 30 September 2014.

6. The decision appealed against granted the Respondent in this case (who was then an Applicant in that case), leave to refer a complaint directly to the Tribunal in terms of section 75(1) of the Consumer Protection Act No 68 of 2008 ("the Act").

JURISDICTION

7. This National Consumer Tribunal ("Tribunal") has jurisdiction to hear the matter in terms of section 148 (1) of the NCA. This section expressly provides that:

> *"A participant in a hearing before a single member of the Tribunal may appeal a decision by that member to a full panel of the Tribunal."*

ISSUES TO BE DECIDED

8. The issues to be decided in this (appeal) case are:

   (1) whether the Judgment issued by single Tribunal Member (Single Member) dated 30 September 2014, should be set aside; and

   (2) Whether the outcome contained in the said judgment should be substituted with an order dismissing the application for leave to appeal by the Respondent which was granted in that judgment.

BACKGROUND

9. Prior to this application for appeal, the Respondent in this appeal, had referred a complaint to the National Consumer Commission (NCC) and received a non-referral notice in terms of section 72(1)() of the CPA.. The NCC has a discretion to issue such a notice, in terms of that section if the complaint:

   (i) appears to be frivolous or vexatious;

   (ii) does not allege any facts which, if true, would constitute grounds for a remedy under this Act; or

   (iii) is prevented, in terms of section 116, from being referred to the Tribunal.

10. In the decision appealed against, the Respondent had approached the Tribunal for leave to refer the complaint; refused by the NCC; directly to the Tribunal in terms of section 75(5)(b) of the CPA. The single Tribunal Member considered that application and granted the leave to refer the matter to the Tribunal. That decision was in Case Number NCT/12505/2014/75(1) (b) & (2) CPA.

11. The Appellant seeks an order to dismiss_the decision of the Single Member to grant the Respondent leave to refer the compliant directly to the Tribunal.

12. The Appellant opposed the application for leave to refer the matter to the Tribunal and raised certain points in limine. It has again raised these points in limine and has argued that the Single Member failed to take these points into consideration when it granted leave for the matter to be referred.

POINTS IN LIMINE

13. The Appellant has raised three points in limine.
    (1) The Single Member erroneously accepted that True Harvest (Pty) (Ltd) possessed the necessary locus standi in the absence of any resolution taken to the affect that Mrs Tshwale had the necessary authority to represent it at the hearing.
    (2) The Respondent, being a juristic person does not qualify as a consumer as defined in section 5 (2) (b) of the CPA.
    (3) The Single Member deprived the Appellant of its right to be heard because the Single Member decided the prospects of success on the merits of the matter as unilaterally advanced by the Respondent without affording the Appellant the opportunity to advance evidence on the merits in rebuttal. Therefore the Appellant argued that these issues stand uncontested.

CONSIDERATION

14. At the time the hearing into the application was held, the Single Member permitted Mrs Tshwale to explain what had happened from the inception of the complaint in order to discern the material aspects relating to the application for leave. The Single Member explained to Mrs Tshwale that the Tribunal would not be making any findings of fact based on her version as this would only be considered should leave be granted and the matter proceed to a full hearing on the merits of the complaint.[1]

15. In his judgment the Single Member considered the requirements for the granting of leave. He drew a comparison with a similar application which can be found in the High Court where an Applicant must apply for leave to appeal a judgment. He referred to the case *of Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) where the court held that:

    > In applications for leave to appeal properly brought before the appropriate court ..... the only relevant criteria were whether the applicant had reasonable prospects of success on appeal and whether or not the case was of substantial important to the applicant or to both him and the respondent."

16. Based on this, the Tribunal in order to decide whether or not to grant leave to refer considered:
    a. Whether the matter is of substantial importance to the Applicant or the Respondent and
    b. The Applicant's (now the Respondent's) reasonable prospects of success.

17. It is not disputed that the matter is of substantial importance to the parties and so the critical issue is the Respondent's **reasonable** prospects of success. It is important to note that the Respondent does not have to show that it will be successful – it must just show that there are reasonable prospects if one considers the facts.

18. It is also important to note that the NCC when it issued its notice of non-referral stated that it declined to refer the matter to the Tribunal because the facts which, **even if they were true**, would not allow the Respondent a remedy under the Act.

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[1] See para 25 of the Tribunal judgment.

19. There are critical facts which are clearly in dispute, that is, whether the Respondent is a consumer under the CPA, whether Mrs Tshwale is authorised to act on behalf of the Respondent and whether the Appellant has engaged in any conduct which is prohibited under the Act. The Appellant has also raised the issue that the Tribunal is not empowered to grant the remedy which the Respondent is seeking, namely the cancellation of a lease agreement and the refunding of monies paid.

20. As stated above and as discussed in detail in Prof Maseko's minority judgment, these issues were raised as points in limine by the Appellant.

21. At the appeal hearing, the Appellant argued that the Tribunal had reached a definitive finding regarding these points and that these were no longer matters of dispute. In particular, the Appellant was of the view that the Tribunal had already made a finding that (1) the Respondent was a consumer under the CPA and (2) Mrs Tshwale was empowered by the Respondent to act on its behalf.

22. However, the Tribunal made it clear that it was not making definitive findings of fact on these issues. The Tribunal was simply considering these issues from the perspective that **if the facts were true**, would this entitle the Respondent to a remedy under the CPA? This is the critical point when deciding whether or not to refer the matter to the Tribunal.

23. In other words, if the Respondent was a consumer under the CPA and if Mrs Tshwale was properly authorised to act on behalf of the Respondent, then did this matter fall within the ambit of the CPA.

24. The hearing into an application for referral is not intended to be a comprehensive hearing at which issues of fact are interrogated and decided. This is clearly evidenced by the fact that the matter is dealt with by a single Tribunal member instead of the normal three member panel.

25. The Single Member found, but only for the purposes of the referral, that the matter did fall within the ambit of the CPA and therefore that the matter should be referred so that it could be considered properly by a three member panel of the Tribunal. At that hearing the Appellant will be afforded a full opportunity to present its case and to challenge the arguments of the Respondent.

CONCLUSION

26. This matter concerns an application for referral only. The purpose of requiring parties to seek leave to refer can only be to ensure that frivolous or vexatious matters or matters which clearly fall outside the ambit of the CPA are not referred by consumers who have no understanding of the legislation. If consumers who received notices of non-referral could simply refer matters to the Tribunal without first seeking leave from the Tribunal, it is highly likely that the Tribunal would receive many matters which should clearly not be before it and this would seriously hinder the effective workings of the Tribunal and waste scarce resources.

27. However the intention of the legislature, by requiring consumers to first seek leave to refer matters to the Tribunal cannot be to cut consumers off before they have even had a chance to present a matter which *prima facie* is governed by the CPA.

28. The legislature has included small business as a consumer under the legislation. Mrs Tshwale has argued that she is authorised to act on behalf of her business (in fact it seems that like many small business people, Mrs Tshwale does not make a distinction between herself and the business – she is the business (see para 17 of Mrs Tswale's replying affidavit to the application for leave to appeal)) and she has presented evidence which suggests that the annual turnover is less than the R2 million threshold set by the Regulations to the CPA.

29. When Mrs Tswale approached the NCC with her complaint she was not represented. The NCC has been established to assist consumers to access redress and the CPA provides for the NCC to investigate such complaints before issuing a certificate of non-referral. It is clear that this matter is not frivolous or vexatious and a proper investigation by the NCC would easily have established the facts relating to the points in limine. It is unclear why the NCC chose not to conduct a proper investigation into this matter (although it clearly did attempt to assist Mrs Tswale and attempted to persuade the Applicant to refund her the monies she had paid). To refuse to allow Mrs Tswale the right to refer the matter to the Tribunal simply on these points because she had not established them before referring the matter to the Tribunal would be an injustice and contrary to the purposes of the CPA.

30. The facts relating to the points in limine, namely that she is authorised to act in this matter and the annual turnover of the juristic person is less than the threshold for small business to qualify as a consumer, were accepted by the Tribunal for the purpose of considering whether this matter should be referred to a three person Tribunal only. The next issue then is whether the matter *prima facie* falls within the ambit of the CPA. This is a dispute about a lease agreement and the Respondent has raised a number of points relating to issues such as unfair contract terms and unconscionable conduct. All these issues clearly fall within the ambit of the CPA.

31. In the circumstances the appeal should be dismissed and the matter referred to the Tribunal. In terms of s150 of the National Credit Act, 2005 which sets out the orders which the Tribunal is empowered to make, the Tribunal may make a number of appropriate orders should it find that a party has engaged in prohibited conduct, including any appropriate order required to give effect to a right as contemplated by the CPA.

Prof Tanya Woker
Tribunal Member

Ms P Beck
Tribunal Member concurring

MINORITY JUDGMENT BY PROF J MASEKO

I have considered the majority judgment in this matter and disagree with its conclusions. The reasons for my decision are set out below:

GROUNDS OF APPEAL

32. According to the contents of the completed Form T.I 148(1) submitted with the appeal application, at Part C (page 2 of the case file), read with the Notice of Appeal (pages 3-6 of the case file); the grounds of appeal are that the single Tribunal Member had not applied his mind and erred in one or all of the listed respects by making the listed mistakes of fact and law.

33. One of the grounds was the claim that the Single Tribunal Member failed to consider three points ***in limine*** raised by the Appellant in which the jurisdiction of the Tribunal to hear the matter was challenged, in the distinct absence of such. This point in limine was that of locus standi. And the attack in this regard was that the Single Member had erroneously accepted that True Harvest College (Pty) Ltd possessed the necessary ***locus standi*** in the absence of any resolution taken to the effect and finding that:

> *"The Appellant has made numerous allegations in the pleadings which appear to relate to her as an individual and others which relate to a company. It is therefore possible that some allegations made are not in respect of a corporate entity and a resolution would therefore not be required."*

(1) The *locus standi* challenge was twofold. On the one hand, the Appellant claims that the Respondent, being a juristic person, did not qualify as a consumer as defined in section 5(2) (b) of the CPA. That section provides that:

> *"This Act does not apply to any transaction...in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister in terms of section 6..."*
>
> And it is trite that this threshold was R2million at the time of referring the case.
>
> The Appellant states that in the first set of financial statements supplied by the Respondent at the hearing under review, showed that the Respondent's annual turnover was above the R2million threshold. Only some unexamined and undiscovered statements were subsequently accepted by the Single Panel Member at the actual hearing, which now purported to prove that the Respondent's annual turnover fell within the R2million threshold.

(2) On the other hand, the Appellant also claims that while the Respondent is a juristic person, its representatives (on 13 August 2015), did not satisfy the requirements to prove *locus standi,* and should, therefore, not have been recognised as representatives of the Respondent. Rule 4(3) of the

Regulations for Matters Relating to the Functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal;[2]provides that:

> *"If the Applicant is a company or other corporate entity, the officer signing the application must append a copy of the board resolution or other proof of authority to act on behalf of the company or entity."*

(3) It is again common cause that the representatives of the Respondent at the hearing under review; did not possess any such proof to comply with Rule 4(3) above. And at the hearing, the Appellant submitted authority to the effect that such a lack of compliance cannot even be cured retrospectively as was held in *South African Milling Co (Pty) Ltd v Reddy 1980 (3) SA 431 (SE) at 436F-437H)*, where Kannemeyer J held that:

> *"I now turn to the 'ratification and confirmation' of Wilkinson's action in launching the application. In my view, it cannot assist the application for two reasons. First, the resolution was passed after the objection to Wilkinson's locus standi had been taken. It forms part of the replying affidavits. In Langeberg Ko-operasie Bpk v Folscher and Another 1950 (2) SA 618 (C) an application was brought by one Whitehead. In his founding affidavit, he described himself as the secretary of the applicant. After an objection has been taken of no locus standi, Whitehead filed another affidavit saying that he had been described as secretary in error and that he was, in fact, the general manager of the applicant...*
>
> *In my view, he (Whitehead) should not be allowed at this stage to amend his first affidavit in such a vital respect, and after the point that he had no locus standi had been taken by respondent... However that maybe, it seems to me (that) to apply for an amendment at this stage is too late, and I am not prepared to accede to the amendment being made in an endeavour to right the question of locus standi."*(My own brackets)

(4) The foregoing challenge on the *locus standi* of the Appellant was, however addressed at the hearing of this Appeal, on behalf of the Respondent by:

(a) Pointing out that the board resolution required by Rule 4(3) had since been filed. And a quick scrutiny of the said Resolution was found on Page 36 of the case file marked as *"Annexure TH1."* It was also noted that while the said Resolution was dated 9 December 2014, the hearing at which the decision appealed against was held on the 13th August 2014. Therefore, taking into account the legal rule against retrospectively producing a resolution in *South African Milling Co (Pty) Ltd v Reddy*; the ground of appeal of the Appellant should, *ceteris paribus*, succeed.

(b) Pointing out that the facts and legal rule established in *South African Milling Co (Pty) Ltd v Reddy*; applied to secretaries and general managers and not directors. In the view of the Respondent, directors are accorded some form of inherent *locus standi* to represent companies

[2] Published in GN 789 in GG 30225 of 28 August 2007 as amended by GenN 428 in GG 34405 of 29 June 2011

in terms of section 66 of the Companies Act. Section 66(1) of the Companies Act No. 71 of 2008 provides that:

> *"The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise."*

(5) This writer notes that section 66(7) (a)-(b) of the Companies Act provides that:

> *"A person becomes a director of a company when that person— has been appointed or elected in accordance with this Part, or holds an office, title, designation or similar status entitling that person to be an ex officio director of the company, subject to subsection (5)(a); and ... has delivered to the company a written consent to serve as its director."*

(6) From the simple reading of the relevant contents of section 66 above, there is a stark indication that notion of an inherent locus standi in representing boards of directors by individual board members, **cannot succeed** in the form proposed on behalf of the Respondent. The reasons for this conclusion are that:

(a) An individual director cannot just embark on a frolic of their own and commit the company by virtue of being a director. It is collective in nature and requires resolution by a defined majority of that board to be binding on the board as a whole.

(b) Section 66(1) of the Companies Act accords the "*authority to exercise all of the powers and perform any of the functions of the company*" on the **board**, and not its individual directors.

(c) Unlike in cases of a partnership, where each member may bind all the other members (loosely speaking); a board should always exercise its authority by resolution even if by ratification – given what the Memorandum of Incorporation / Articles of Association permits.

(d) Section 74(1) and (2) of the Companies Act expressly provides that:

> *"Except to the extent that the Memorandum of Incorporation of a company provides otherwise, a decision that **could** be voted on at a meeting of the board of that company may instead be adopted by written consent of a majority of the directors, given in person, or by electronic communication, provided that each director has received notice of the matter to be decided...A decision made in the manner contemplated in this section is of the same effect as if it had been approved by voting at a meeting."* (My own emphasis)

(7) The other ground of the appeal by the Appellant, is that by the Single member depriving the Appellant of its right to be heard in terms of ***audi alteram partem*** as follows:

(a) By deciding the prospects of success on the merits of the matter as unilaterally advanced by the Respondent and without affording the Appellant the opportunity to advance evidence on the merits in rebuttal and therefore ... hearing the merits *"as if it stands uncontested;"*

(b) By accepting and taking into consideration voluminous bundles of new documentation which had neither been discovered and nor furnished to the Appellant; prior to the hearing of the matter on the points in limine raised and relying thereon *"to come to ... findings;"*

(8) The other ground of the appeal by the Appellant, is that the Single member had erred by finding that:

(a) The legal entity True Harvest College (Pty) Ltd falls within the threshold as prescribed by the Act; and

(b) By allowing new evidence which had not been discovered to the Appellant for consideration and without affording the Appellant, any right of rebuttal and / or cross-examination thereon. This new evidence appears from the judgment to have consisted of a number of voluminous pages, but mainly the financial statements. The Appellant avers that the set of financial statements that were submitted in the documents of the case prior to the hearing showed that the Respondent fell outside the R2million threshold. And the second set presented at the hearing of 13 August 2014, showed that the Respondent's annual; turnover fell within the R2million bracket.

34. It was, however argued, for the Respondent, that the earlier financial statements had been found to be covering a previous financial year, prior to the period covered by the lease complained about to the NCC. The single Member requested, following the inquisitorial approach, the most recent financial information, when it was then supplied ex tempore, during the hearing. The argument on behalf of the Respondent further added that the record of the hearing of the 13th August 2014 would bear this fact out. To this end, the attention of this appeal panel was drawn to page 38 and lines 19-20 of that record. However, a close reading of the transcript of the hearing showed that the argument of the Appellant was advanced even at that hearing. A closer reading of the transcript also shows that the Appellant had rejected the financial statements that had covered the previous period and had not handed them at the hearing on the date of the hearing. This is what led to the Single Member placing reliance on the later version

SURVEY OF THE EVIDENCE

35 Based on the reading of the judgment appealed against, even just on the documentary evidence alone, the attention will now focus on each of the grounds of the appeal. And in the first one, the question to be determined is whether the Tribunal Member did indeed fail to consider the points ***in limine*** raised by the Appellant in which the jurisdiction of the Tribunal to hear the matter was challenged. In answering this question, the points that follow are of some importance.

(1) There are indeed three points in limine that were considered in the judgment under review. And there is indeed one point that was not considered. At paragraph 30 of the judgment, the learned Presiding Member states that:

> *"The third submission related to the jurisdiction of the Tribunal and whether any contravention of the CPA had taken place. The*

> *Tribunal regards this aspect as inherent to the application for leave and will therefore deal with it when it considers the application for leave."*

(2) The above text arouses the need to enquire as to whether this point ***in limine*** should have not been considered and addressed as it was raised and not parked for later consideration when the application is considered. This then begs the legal question of when a *point in limine* should be considered. Black's Law Dictionary defines a point in limine as "***at the outset***"; "***preliminarily; presented to the judge, before or during a trial – a question to be decided in limine.***" It also states that a <u>*preliminary objection*</u> (which is what a point in limine is):

> *"In a case before a ... tribunal, an objection; that, if upheld; would render further proceedings before the Tribunal impossible or unnecessary."*

The Single Member even explained to the hearing of 13 August 2014, at page 56 from line 2—23, that:

> *"It is the end of this particular part of the case. So, now, I'm going to issue a written judgment saying, and in the judgment I will make a decision as to whether we grant leave or not or we're going to hear the matter. If we grant leave, if leave is granted then the Registrar will set the matter down for proper hearing in due course and contact the parties. If I do not grant leave then the matter ends here and it is not going to go further. Alright, obviously any party has a right to appeal the decision."*

<u>It appears clear from the above quote and from the nature of a hearing on an application for leave to appeal, that the Single Member had not been barred by any law or regulation or other authority, to decide the points in limine and close the matter if he agreed with the view of the Appellant. It also is clear that he considered the points *in limine* and decided rather in favour of the Respondents that the matter should proceed before the Tribunal</u>.

(3) From the simple reading of the genetic makeup of a point in limine, then, not even withstanding any jurisprudence on its operation, it appears that the Presiding Member may indeed have erred in parking a point in limine for consideration during the matter, when it has already been raised. The consideration of the other two shows that the Presiding Member could have considered and had the opportunity to consider this point as well. <u>For this reason then, this ground of appeal should succeed.</u>

35. In the next ground of appeal, the Appellant avers that the Presiding Member in the case erroneously accepted that True Harvest College (Pty) Ltd possessed the necessary ***locus standi*** in the absence of any resolution taken to the effect and finding that:

> *"The Appellant has made numerous allegations in the pleadings which appear to relate to her as an individual and others which relate to a company. <u>It is therefore possible that some allegations made are not in respect of a corporate entity and a</u>*

resolution would therefore not be required." (Our own underlining)

36. It is with the underlined text that we (Appeal Panel) are concerned. The paragraph quoted seems to not attempt to distinguish between whether the representatives had the correct ***locus standi in judicio*** to represent the Respondent. The reasons for this conclusion are that:

(1) The Representatives of the Respondent in the case as representatives of the corporate entity and not as individuals. And if then the Tribunal were to accept that they were representing the juristic person, it goes without saying that they should have produced the requisite resolution which gives them the authority to represent. They did not. One view seems to aver that this is because the intention was to allow the panel of three members at a later stage to consider the points in limine. But the only logical conclusion appears to be that these points were considered and disposed of. Re-tabling, them at another forum for further adjudication would have violated the natural justice maxim of *res iudicata*. This point was also made on behalf of the Appellant at the appeal hearing of 13 November 2015.

(2) On the other hand, if the Tribunal were to believe that they were also appearing in their personal capacities, then they would have had to be refused appearance due to the lack of that ***locus standi***, especially as it had already been challenged.

(3) Our learned colleague goes on at paragraph 33 that *"It can further be noted that the Appellant can easily file the necessary proof of authority, should the leave be granted."* This Appeal Panel is of the view that this conclusion could have been reached in error indeed. The Tribunal cannot draw the conclusion that an alleged representative, who cannot produce credentials to prove his / her standing, when it is challenged, can actually do so at a later stage. The fact that the Appellants were grieved by this ruling is therefore understood. And, given the legal rule already canvassed above against the admission of resolutions of boards concluded ex post facto, should definitely annihilate this approach.

(4) In Amler's Precedents of Pleadings[3] states that ***locus standi*** *"concerns the sufficiency and directness of a person's interest in the litigation in order for that person to be accepted as litigating party. Sufficiency of interest depends on the facts of each case…" – Jacobs v Waks 1992 (1) SA 521 (A) 534D*. And, *"the general rule is that it is for the party instituting proceedings to allege and prove its* ***locus standi****; and the onus of establishing that issue rests on that party. It must accordingly appear* ***ex facie*** *the founding pleadings that the parties thereto have the necessary legal standing or* ***locus standi in judicio****."* [4]

(5) At paragraph 31 of the judgment, the Tribunal Member alludes to the fact *"the (Respondent in this appeal case) further tried to submit various documents to the Tribunal relating to the resolution but none of the documents submitted or referred to by the (Respondent in the Appeal case), could be regarded as a resolution."* what appears to be the error, is then the conclusion to allow them to represented the party, despite this finding of fact. And for this reason, this ground of appeal has to succeed.

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[3] Harms LTC; Amler's *Precedents of Pleadings*; 7th Edition, LexisNexis 2009:272

[4] *Mars Inc v Candy World (Pty) Ltd 1991 (1) SA 521 (A) 567 (A) 575* and in *Kommisaries van Binnelandse Inkomste v Van der Heever [1999] 3 All SA 115 (A) para. 10, 1999 (3) SA 1051 (SCA).*

(4) The next ground of appeal stated was that the Presiding Member had deprived the Appellant of its right to be heard in terms of ***audi alteram partem*** by:

(a) deciding the prospects of success on the merits of the matter as unilaterally advanced by the Respondent and without affording the Appellant the opportunity to advance evidence on the merits in rebuttal and therefore ... hearing the merits *"as if it stands uncontested"*; and

(b) Accepting and taking into consideration voluminous bundles of new documentation which had not been discovered and / or furnished to the Appellant prior to the hearing of the matter on the points in limine raised and relying thereon *"to come to ... findings."*

37. The view of this writer, on this foregoing aspect, is that the conclusion could also have been reached in error. The reasons for this conclusion are that:

(1) This was a very difficult hearing. The Single Member had to run a very difficult process of doubling as a translated even to the interpreter in a very unusual way. The record attests to this. And the complication of the legal processes that had to be observed both in law and by the legal rules of evidence seems to have been straddled. The effort of bending over backwards for the Single Member and accommodate the Respondent even when it seemed difficult, is quite admirable from a colleague (this writer).

(2) There is a three step process that seems to have been at play in this case:

(a) The first is that of the complaint to the NCC which was lodged in terms of sections 69(c)(iv) and 71(1) of the CPA. That complaint was not yet before the Tribunal as the Respondent needed leave to refer it to the Tribunal in terms of section 75(1) (b) of the CPA. So, it is out of bounds to be adjudicated or have rulings made upon it up to this point.

(b) The other one is the section 75(1) (b) of the CPA application for leave to refer the matter. This is the step that the Single Member was tasked to handle. This application is a real application and legal as it is statutorily prescribed. This stage does not lend itself to be treated or even handled like an informal pre-hearing conference. A pre-hearing as envisaged in Regulation 17 of the Tribunal Rules. The major difference between them is that in the Pre-hearing conference, the Member may issue directives, but cannot make rulings, even on points that are glaringly disqualifying a referral. It is not an adjudicative stage in both essence and form. But, on the other hand, an application for leave to refer, as contemplated in section 75 of the CPA, is based on the right to seek leave to refer to the Tribunal a complaint that had already been refused by the NCC after receiving such a complaint (an investigating it) under section. There should be no conflation between the pre-hearing conference and the hearing under section 75. And; it is this kind of hearing that this appeal is against. There is no mistaking that this process is formal without being legalistic. Table 2, of the Regulations (on page 411 of the pocket size Act and Regulations) even requires a complainant, for instance, to:

(i) Twenty days is required. This means that if the 20 days is exceeded, the complainant must now apply for condonation. It is strictly prescribed that way. This cannot be

treated in any haphazard or wishy-washy manner as the rights of all the parties in law cannot and should not be sacrificed;

(ii) That complaint must also not fall within section 116 of the CPA. This means that should it fall under that section, there would be no legal right to allow the direct referral to eth Tribunal. This legal and statutory rule can also not be sacrificed;

(iii) The application has to also be made on the prescribed forms T.I73 (3) & 75(1) (b) & (2) of the CPA. Failure to use these forms could end in a successful objection from the other side;

(iv) Even the documents to be included are prescribed by the Rules. And no party should be able to deviate from these in the name of flexibility or informality or inquisitorial mode. At least this writer cannot see how and why in law it would be justifiable to deviate from this meticulously prescribed process. This does not even mean that there has been such deviation. This point is made to show the degree to which certain minimum standards must be adhered to and not sacrificed at the altar of informality essential as informality is for lay parties. This is not even calculated to amount to heavy handedness at all, but observing the minimum standards, which when observed, all the parties will experience justice and fairness;

(v) The prescribed attachments to the application should include the complaint; affidavits; the notice of non-referral from the NCC, grounds for the leave to refer directly, proof of service, relief sought, and citation to all the parties involved etc. This removes any doubt that this is a legal adjudication forum and not an informal gathering of evidence based on narrow issues. I simply cannot see the basis for narrow issues when considering this application as it has to be considered in its entirety.

(c) The third step is that just at the start of the formal section 75 hearing, points in limine were then raised. These points had the potential, if upheld, to make the referral to the Tribunal ***"unnecessary"*** or ***"impossible"*** as already shown above. The other view that seems to command attention is that which says *points in limine* cannot be decided by a Tribunal Member considering an application for leave to refer a matter under section 75 of the CPA. This writer has not been able to be furnished with this bar. And the only logical bar, along these lines would apply in pre-hearing conferences, not in adjudication such as is the case in this application. And., in any case, these points were already considered and some finding on each made. What now remains in concluding the appeal is whether these points in limine were actually handled correctly in law or the grounds of the Appellant should succeed?

38. In *Moodley v Minister of Education & Culture, House of Delegates 1989 (3) SA 221 (A) 235 C – 236 C*, it was held that the Rules of Natural Justice have to apply in all situations, except where specifically excluded by statute. This was with special reference to the oldest Roman-Dutch ***"audi alteram partem"*** Rule. The ***audi principle*** is about hearing the other side[5]. Hosten WJ[6], et al further state that these rules

[5] Hosten WJ, et al; *Introduction to South African Law and Legal Theory*; Butterworths; 1997:30
[6] Ibid at page 1062.

of natural justice apply *"...in any situation where the rights, privileges, and liberties are in issue, whether the administrative act in question is a judicial act (the finding of a judicial administrative body)..."* Hosten WJ[7]also continue to state that:

> *"A cardinal rule of South African civil procedural law ... is that adequate notice of process and proceedings must be brought to the attention of the opposite party who in turn should be afforded an opportunity to present his own side of the matter. This is one of the most basic and an important rule of natural justice and it is encapsulated in the well-known maxim,* ***audi alteram partem.****"*

39. The last ground of appeal to be considered is that alleging that, by finding that the legal entity True Harvest College (Pty) Ltd falls within the threshold as prescribed by the Act. It appear from the body of the judgment (at paras 31-32) that the parties were in dispute over the threshold financial statements that were supposed to qualify the Respondent in the Appeal as a consumer – in terms of section 5(2)(b) of the CPA. From the judgment, the Appellants alluded to different set of statements that had been given to them earlier. The Presiding Member appears to have gone with the version of the Respondents. And this seems to be where the ***audi*** Principle appears to have suffered relegation. This writer further agrees with the challenge of the *"allowing new evidence which had not been provided to the Appellant for consideration and without affording the Appellant any right of rebuttal and / or cross-examination thereon."*

40. It appears that the Single Member deferred the question of the admissibility of the new evidence, when raised at the hearing. This may be blamed on the fact that the Single Member might have by then been of the mind that he was only focussing on ***"narrow issues"*** and the rest of the *points in limine* would be dealt with at another stage - outside the hearing of the leave to refer application. The only contradiction with that possibility would be that; he had gone on to deal with the *points in limine* anyway; and concluded that he should grant the leave sought in the judgment under review. On page 38 (lines 12-20) of the transcript of the record, the Single member addresses the Appellant, thus:

> *"Now what I'm going to ask you to do is, alright, firstly I take note that you are obviously presented with evidence that was not placed before you before. The Tribunal is placed in the same position, and what I's going to ask you to do is obviously address me as best you can on your client's submissions and make your submissions to me on the points in limine and on the decision I have to make in terms of reasonable prospects of success. Should you require a further postponement to prepare further response you may apply for that and then we will obviously address that aspect as and when we come to it, okay?"*

41. What appears to stand out here is that there was no stage at which the hearing adjourned for either the Tribunal or the Appellant could peruse the said documentation (new evidence of documents and pictures) to determine whether there would be a need to prepare and the extent of that preparation. While this would have worked if this was a pre-hearing conference, it could not work in a conclusive hearing such as this where a final binding decision was to be hand down as it indeed was. There can then be no possibility that the parties were both heard on this issue sufficiently enough to formulate a ruling on the admissibility of the financial statements.

[7] Ibid at page 1147.

42. While the Tribunal is allowed by section 142 of the NCA to be:

    (a) Inquisitorial;
    (b) As expeditiously as possible;
    (c) As informal as possible; and
    (d) Accord with the principles of natural justice, when conducting hearings;

    it is worth noting that the principles of natural justice are also enshrined in the statute and cannot be sacrificed in the name of informality and the inquisitorial approach. And to the extent, then that the Appellant was not accorded the opportunity to receive and peruse and prepare to rebut such evidence, this ground of appeal should also succeed.

43. The prospects of success have also been determined as already shown in the decision of the Single Member. The main challenge by the Appellant on this ruling, is that the relief sought by the Respondent, as captured in the complaint refused by the NCC, itself, false outside the jurisdiction of the Tribunal. While this point was reiterated at the appeal hearing, it was also made at the hearing of August 2014. The Appellant had also brought to the attention of the Single Member, the fact that because of jurisdictional issues, the prospects of success were non-existent. Added to the list of points in limine in this regard, at page 41 (lines 23 and page 42 lines 1-21), the Appellant had plainly stated that:

> *"...further, regarding the prospects of success, your attention is referred to the jurisdictional points regarding this tribunal and specifically the relief sought. If I may take you to page 1 of the proceedings, the documents found in the proceedings, the notice of motion appears. In terms of the notice of motion on behalf of the Applicant (as the Respondent then was it says:*
>
> *'kindly take notice that an application will be made to the above honourable Tribunal for the order in the following terms: that the contract signed between the applicant and the respondent on the 1st day of March 2012 be declared null and void, that all monies paid in respect of the contract for the second and third floors be returned to the applicant with interest* ***a tempora mora****."*(My own brackets);

44. At page 42, lines 12-21; the Appellant further stated that:

> *"This constitutes a declaratory order which can only be adjudicated by the ...High Court and does not fall within the ambit the relief that can be provided by the this honourable Tribunal and despite any other submissions made, this application should fail on that ground as well. ... may I please have an indication from you Mr. Chairperson, should you wish for us to lead evidence thereon we can do so. We have earlier made comment that you are not going into the merits of matter but should same be necessary the necessary evidence can be made available for purposes of convenience."*

45. To the above, the Single member had actually responded on the record with:

> *"Ja, look, as I stated before, the applicant was unable to give us a very clear explanation on what basis the Consumer protection Act may have been contravened. Okay and the tribunal then asked her to explain the basic background so that it could possibly be identified from the Act where there could have been a possible transgression…"*

46. Just based on the above exchange alone, it is not clear how then the Single Member could conclude that there are prospects of success in the matter sufficient to warrant granting leave to refer the complaint refused by the NCC to the Tribunal. Surely, this cannot be said to expedite the process as it instead makes a matter that should be stopped at that level, just drag further to another hearing by a full panel. Even if this was not problematic by law, it would still be problematic in passing for expediency and informality. While it is true that the purpose of the Act, at section 3(1) of the CPA, the purpose, of the Act in part is:

> *"to promote and advance the social and economic welfare of consumers in South Africa by—*
>
> (a) *establishing a legal framework for the achievement and maintenance of a 15 consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;*
>
> (b) *reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers—*
>
> *(i) who are low-income persons or persons comprising low-income 20 communities;*
>
> *(ii) who live in remote, isolated or low-density population areas or communities;*
>
> *(iii) who are minors, seniors or other similarly vulnerable consumers; or*
>
> *(iv) whose ability to read and comprehend any advertisement, agreement, 25 mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented;*
>
> *(c) promoting fair business practices…"*

47. There is nowhere in the reading of the above purpose of the Act, where one may read the promotion of injustice against the suppliers of goods and services. It goes without saying, therefore, that the principles of justice would require that both sides of the coin be addressed. There can be no injustice visited on suppliers in the name of protecting or promoting the rights of the consumers.

THE SINGLE MEMBER AND POINTS IN LIMINE

48. The overarching legal rules pertaining to the question whether points in limine should not be heard by a single member in section 75 applications should be considered through the prism of all the applicable legal

rules. The starting point should be that the CPA and NCA do not have monopoly of application in consumer cases. Other legal rules not contained in those statutes apply too by operation of law (*ex lege*). Section 34 of the Constitution of the Republic of South Africa[8], provides; in relation to the right to access to courts and tribunals, that:

> *"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal, or forum."* One cannot interpret "everyone" here to exclude juristic persons.

49. This writer concurs with the view of my learned colleagues, Prof Woker and Ms Beck, that, in summary,

> *"The function of the Tribunal at the s75 stage is NOT to decide the merits of the matter but rather to consider whether this is a matter which prima facie falls under the CPA and which should be heard by the Tribunal. The s75 referral is decided by a single Tribunal member whilst the merits of the matter are decided by a full bench of three Tribunal members."*

50. Where there is a sharp difference from this view, however, is where that view could be made to then infer that deciding *points in limine* amounts to deciding the merits of the matter. The definition and nature of points in limine has already been canvassed extensively in previous sections; that it no longer requires repeat on this part of the judgment. But *points in limine*, by their very nature, can and sometimes do dispose of a matter before it gets to the merits. They are meant for this purpose and best serve this purpose in all situations where an adjudicator or arbitrator is confronted by them. A departure from this legal rule would have to be based on authority, statute, or another overriding legal rule. The section 75 itself is a kind of statutory procedure calculated to strain out any case that may clog the system when by law it should not be placed before the Tribunal. Points in limine also serve a similar purpose and are inherent in our legal system and ingrained in the Roman-Dutch DNA of our law.

51. I also cannot agree with my learned colleagues that:

> *"The issue which the Tribunal member had to decide was whether there is a prima facie matter which **if the facts where to be established as alleged** proves a case under the CPA. So the actual case is not yet before the Tribunal – all the single Tribunal is called upon to consider is this – **if what the applicant says is true**, then does the applicant have a case which the Tribunal is empowered to adjudicate on. So without judging the issue at all, the Tribunal must simply at this stage state – if I accept that what this consumer is saying is true, then do the matter fall under the CPA and the jurisdiction of the Tribunal."*

52. The reason for disagreeing with this interpretation of the section 75 process appears to narrow it to the aspects specified in the above paragraph. I simply cannot establish the basis of this interpretation. It in part is correct, but it overlooks all the other aspects that a judicial officer has to consider in terms of the law –procedurally speaking. If this could be interpreted to remove from the Single member even the

[8] Act 108 of 1996

power to consider points in limine, as they have to be considered by law, then section 75 process itself would not legitimately culminate in a judgment, but rather an administrative screening of a case. And as already pointed out above, this is a fairly legal step that has to be well handled balancing the rules of natural justice with all the laws as required by the Act an not only what members would have preferred were it in the law or rules.

53. Section 27 of the NCA defines the functions of the Tribunal as including the power to "*exercise any other power conferred on it by law.*"The actual provision states that[9]:

> *"The Tribunal or a member of the Tribunal acting alone in accordance with this Act or the Consumer Protection Act, 2008 may-*
>
> *(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;*
>
> *(b) grant an order for costs in terms of section 147; and*
>
> *(c) Exercise any other power conferred on it by law."*

54. It is the any other power conferred by law at s 27 (c) above that one has to make some points. One of these points is that there are other laws such as the laws of procedure and laws of evidence that are inherently part of a process even if this process does not contain such legal rules. This is trite law. The law confers powers for instance, when one is a tribunal (one member or a panel) to handle evidence and legal procedure lawfully – in terms of the law itself.

55. It is evident that both the Constitution and the NCA confer on the Tribunal the power to apply the law. According to the Oxford dictionary, 'law' means 'the system of rules which a particular country or community recognizes as regulating the actions of its members and which it may enforce'. If such rules are therefore contained in jurisprudence, it may be enforced by the Tribunal. And coming closer home, in *Mobile Telephone Networks (Pty) Ltd v National Consumer Commission* (NCT/2738/2011/101(1)(P)) [2012] ZANCT 20 (17 September 2012 it was held that the Tribunal is a creature of statute, having been established in terms of the National Credit Act, Act 34 of 2005 (NCA), with its functions and powers as set out in the NCA, as amended by CPA. **As such the Tribunal is obliged to operate within the confines of its empowering legislation and to observe (take judicial notice of) all the laws that bind the courts, the other two branches and three spheres of government; the population and other Tribunals.**

[9] S. 27 amended by s. 121 (1) of Act 68 of 2008 and date of commencement of s. 27: 1 September 2006.

56. Points in limine in an adjudication forum are therefore an import of how points in limine are to be handled at all other tribunals and courts where binding orders could result. And it is for this reason that the arguments raised by the Respondent in this appeal case cannot succeed. Points in limine are not a preserve of only a panel of three members of the Tribunal but apply even to a single member sitting alone to hear any application brought before that member.

CONCLUSIONS

57. It now remains for the panel to decide on the two questions regarding the relief sought. And for ease of reference, these questions remain:

    (1) Whether the decision of the single tribunal Member in the Case Number NCT/12505/2014/75(1) (b) & (2) CPA, stands to be dismissed as prayed for based on any or all the listed grounds discussed above. *And the answer to this question appears to be on the affirmative.*

    (2) Whether this Panel should declare that *"the Appellant (Respondent in this case), has not satisfied the requirements for the granting of leave in terms of section 75(1)(b) of the CPA."* Again, the answer to this question appears to be on the affirmative.

58. Rule 27(2) of the Regulations for Matters relating to the Functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal;[10] provides that:

    > *"The appeal panel is not restricted to the record of the proceedings before a single member and may:*
    >
    > *(a) Call for additional documentation and representations from the parties on any matter relevant to the complaint; or;*
    >
    > *(b) Produce expert evidence and further research."*

59. It appears fair then to conclude that since the appeal panel is allowed to hear the case ***de novo***; then the Appeal Panel also has the requisite responsibility and authority to then substitute its own findings on the matter as if it were the court of first instance.

JUDGMENT

60. For the above reasons discussed in each section of this ruling, in my view the Tribunal should have ordered that:

    (1) The appeal lodged on the grounds discussed in this judgment be upheld;

    (2) The Respondent in this appeal case, has not satisfied the requirements for the granting of leave sought in terms of section 75(1)(b) of the CPA.

[10] Published in GN 789 in GG 30225 of 28 August 2007 as amended by GenN 428 in GG 34405 of 29 June 2011

(3) The decision of the single tribunal Member in the Case Number NCT/12505/2014/75(1) (b) & (2) CPA, be dismissed.

(4) There be no order as to costs and none has been sought.

Prof. J. M. Maseko
Tribunal Member

Authorised for issue by National Consumer Tribunal

Case Number: NCT/20519/2014/148(1)

Date: 2016 / __ / 26
CCYY / MM / DD

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