THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 140/2020

In the matter between:

THE NATIONAL CREDIT REGULATOR **APPELLANT**

and

GETBUCKS (PTY) LTD **FIRST RESPONDENT**

MINISTER OF TRADE

AND INDUSTRY **SECOND RESPONDENT**

Neutral citation: *National Credit Regulator v Getbucks (Pty) Ltd and Another* (Case no 140/2020) [2021] ZASCA 28 (26 March 2021)

Coram: PETSE AP, ZONDI and MBATHA JJA and GORVEN and WEINER AJJA

Heard: 2 March 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLI. The date and time for hand-down is deemed to be 09h45 on 26 March 2021.

Summary: Validity – Regulation 44 under the National Credit Act 34 of 2005 – invocation of defensive challenge to deregistration proceedings – period allowed for comment on proposed regulation inadequate – promulgation of regulation non-compliant with National Credit Act – appellant not entitled to rely on regulation in proceedings brought to deregister first respondent.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Davis J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Gorven AJA (Petse AP, Zondi and Mbatha JJA and Weiner AJA concurring)

[1] Regulation 44 (the regulation) promulgated under the National Credit Act[1] (the Act) prescribes maximum monthly service fees.[2] These are fees which a credit provider may charge a consumer. The appellant, the National Credit Regulator, (the NCR) claimed that the first respondent, Getbucks (Pty) Ltd, (Getbucks) overcharged fees and was thus non-compliant with the regulation. It accordingly approached the National Credit Tribunal to cancel the registration of Getbucks under the Act. This prompted Getbucks to approach the Gauteng Division of the High Court, Pretoria on application for, primarily, the following relief:

'1. That it be declared that Regulation 44 of the Regulations GMR489, published in the Government Gazette of 31 May 2006 . . . in terms of the National Credit Act, 34 of 2005 is *ultra vires* and/or void.

[1] National Credit Act 34 of 2005.

[2] The regulation is one of a number promulgated on 31 May 2006 under GN R489/2006 in Government Gazette No. 28864. I shall refer to it as the regulation unless it is necessary to refer to the others promulgated simultaneously. The papers and order of the court of first instance incorrectly refer to 'Regulations GMR 489', but nothing turns on this.

2. Declaring that the [NCR] cannot prosecute [Getbucks] in the Tribunal for an alleged contravention of Regulation 44.'

The NCR and the second respondent, the Minister of Trade and Industry, (the Minister) opposed the application.

[2] After hearing argument, the court of first instance, per Davis J, granted the following order:

'1. It is declared that the First Respondent is barred from prosecuting the Applicant or seeking any relief against it before the National Consumer Tribunal in respect of any alleged contravention of Regulation 44 of the National Regulations GMR 489 published in the Government Gazette of 31 May 2006, prior to its subsequent review and amendment.

2. The Respondents are ordered to pay the Applicant's costs, including costs of two counsel.'

It is against this order that the NCR appeals, with leave of the court of first instance. The Minister took no part in the appeal.

[3] As appears from the order, the regulation was reviewed and amended prior to the date of judgment. As such, any defects which might have existed at the time no longer attend on the regulation. Since the unamended regulation was operative when the application was brought, it remains relevant as to whether Getbucks is or is not subject to deregistration for non-compliance.

[4] The relevant part of the regulation reads:

'The maximum monthly service fee, prescribed in terms of section 105(1) of the Act, is R50.'

And that of s 105(1) of the Act, in terms of which the regulation was promulgated, reads:

'(1) The Minister, after consulting the National Credit Regulator, may prescribe a method for calculating-

. . .

(b) the maximum fees contemplated in this Part,

applicable to each subsector of the consumer credit market, as determined by the Minister.'

[5] The first issue is whether the regulation was promulgated pursuant to s 171 of the Act or under s 11 of Schedule 3 to the Act.[3] The significance of this will become apparent below. The NCR contended that it was promulgated under s 171, while Getbucks contended that it was promulgated under s 11. If the court of first instance correctly held that it was promulgated under s 11, the NCR submitted that the period of 30 days required under that section was afforded or, if not, that the shorter period should have been condoned by the court.

[6] Section 171 of the Act provides:

'(1) The Minister-

(a) may make any regulations expressly authorised or contemplated elsewhere in this Act, in accordance with subsection (2);

(b) in consultation with the National Credit Regulator, may make regulations for matters relating to the functions of the National Credit Regulator, including-

(i) forms;

(ii) time periods;

(iii) information required;

(iv) additional definitions applicable to those regulations;

(v) filing fees;

(vi) access to confidential information; and

(vii) manner and form of participation in National Credit Regulator procedures;

[3] Schedule 3 to the Act deals with transitional arrangements.

(c) in consultation with the Chairperson of the Tribunal, and by notice in the Gazette, may make regulations for matters relating to the functions of the Tribunal and rules for the conduct of matters before the Tribunal; and

(d) may make regulations regarding-

(i) any forms required to be used for the purposes of this Act; and

(ii) in general, any ancillary or incidental matter that is necessary to prescribe for the proper implementation or administration of this Act.

(2) Before making any regulations in terms of subsection (1)*(a)*, the Minister-

(a) must publish the proposed regulations for public comment; and

(b) may consult the National Credit Regulator and provincial regulatory authorities.

(3) A regulation in terms of this Act must be made by notice in the Gazette.'

And s 11 of Schedule 3 to the Act reads:

'On the effective date, and for a period of 60 business days after the effective date, the Minister may make any regulation contemplated in the Act without meeting the procedural requirements set out in section 171 or elsewhere in this Act, provided the Minister has published such proposed regulations in the Gazette, allowing a period of at least 30 business days for comment.'

[7] The draft regulation was published along with the other proposed regulations in General Notice 307 in Government Gazette No. 28531 on 20 February 2006. The notice indicated that these were 'Draft National Credit Regulations to be published in terms of the National Credit Act' and were published for 'General Public Comment'. The Notice gave as the '[c]losing date for submissions 25 March 2006'.

[8] The following is the timeline of relevant events. The proposed regulations were published on 20 February 2006. The Act was assented to on 10 March 2006. The advertised closing date for submissions on the draft regulations was 25 March 2006. The regulations were published on

31 May 2006. The sections of the Act relevant to this appeal came into effect on 1 June 2006. This means that, for purposes of this litigation, the effective date of the Act was 1 June 2006. Getbucks was initially registered as a credit provider under the Act on 22 February 2012. The NCR referred Getbucks to the Tribunal for deregistration on 26 November 2014.

[9] It is common cause that the advertised closing date for submissions was 27 business days after publication. This is short of the minimum period of 30 business days specified in s 11. Regulations made under s 171(1)*(a)* must comply with s 171(2). This requires that they must be published for public comment. Unlike s 11, s 171(2) does not specify a minimum period which must be allowed for the submission of comments. This means that, if the advertised closing date for submissions is the date which governs the minimum 30 day period required for comment under s 11, the regulation could not have been validly promulgated under that item. It could only be valid if it had been promulgated under s 171. On the other hand, if the advertised date for submissions was not the date which governed the 30 day period, the regulation could have been validly promulgated under s 11.

[10] Section 14 of the Interpretation Act 33 of 1957 provides:

'Where a law confers a power-

(a) to make any appointment; or

(b) to make, grant or issue any instrument, order, warrant, scheme, letters patent, rules, regulations or by-laws; or

(c) to give notices; or

(d) to prescribe forms; or

(e) to do any other act or thing for the purpose of the law,

that power may, unless the contrary intention appears, be exercised at any time after the passing of the law so far as may be necessary for the purpose of bringing the law into operation at the commencement thereof: Provided that any instrument, order, warrant, scheme, letters patent, rules, regulations or by-laws made, granted or issued under such power shall not, unless the contrary intention appears in the law or the contrary is necessary for bringing the law into operation, come into operation until the law comes into operation.'

It is the Act itself which grants the Minister the power to promulgate regulations. She did so the day before the Act came into effect on 1 June 2006. This means that she did so when she had not yet been empowered by the Act to do so. Without the provisions of s 14 of the Interpretation Act, the Minister could not have been empowered to make the regulation because the Act had not yet come into effect. Her power to do so, which derives from the Act, had not yet arisen. However, due to the provisions of s 14 of the Interpretation Act, it was competent for the Minister to promulgate the regulation on 31 May 2006. This is so regardless of whether it was made under s 171 or under s 11.

[11] During argument, both parties accepted this. The reason for this provision is obvious. Machinery required to administer the Act had to be in place on the date the Act came into effect. The Act repealed prior legislation and the bodies which had administered it were no longer empowered to do so. But for the provisions of s 14 of the Interpretation Act, there would have been a vacuum with the repealed legislation no longer operative and the Act lacking regulations to administer it. Section 14 accordingly allows for a smooth transition where this is necessary.

[12] As indicated, the regulation came into effect on 1 June 2006, on the same day as the Act. Section 12 of the Act begins '[t]here is hereby

established a body to be known as the National Credit Regulator'. It was accepted during argument that this clearly means that, prior to 1 June 2006, the NCR did not exist. In other words, the NCR came into being at the same time as the regulation came into effect.

[13] It is clear that the regulation dealt with matters regulated by s 105(1) of the Act. This much was conceded by the NCR during argument. The regulation itself makes this plain when it states that '[t]he maximum monthly service fee, prescribed in terms of section 105(1) of the Act, is R50'. And the subject matter falls foursquare under s 105(1) which prescribes 'a method for calculating . . . *(b)* the maximum fees contemplated in this Part'.

[14] Section 105(1) requires that the regulation in question be made 'after consultation with the National Credit Regulator'. This is a procedural requirement. In order for the procedural requirement to have been met, the Minister could only make the regulation 'after consultation with' the NCR. It has been held that 'after consultation with' means that the functionary must have regard to the views of the other functionary but is not bound by them,[4] or must give serious consideration to their views.[5] The obligation to consult does not require exhaustive consultation. In *Minister of Home Affairs and Others v Scalabrini Centre and Others*,[6] Nugent JA said:

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[4] *Premier, Western Cape v President of the Republic of South Africa* [1999] ZACC 2; 1999 (3) SA 657; 1999 (4) BCLR 383 (CC) para 85.
[5] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147; 1999 (7) BCLR 725 (CC) para 63.
[6] *Minister of Home Affairs and Others v Scalabrini Centre and Others* [2013] ZASCA 134; 2013 (6) SA 421; [2013] 4 All SA 571 (SCA) para 43.

'[A]n obligation to consult demands only that the person who is entitled to be consulted be afforded an adequate opportunity to exercise that right. Only if that right is denied is the obligation to consult breached.'

[15] This all means that, if the NCR was not consulted, the obligation to consult in s 105(1) was breached. In such a case, the only way the regulation could be valid was if s 11 was invoked. This allows regulations to be made 'without meeting the procedural requirements set out . . . elsewhere in this Act, provided the Minister has published such proposed regulations in the Gazette, allowing a period of at least 30 business days for comment'. Section 171 does not contain a similar provision doing away with the need to meet procedural requirements in the Act.

[16] When confronted during argument with this proposition, the NCR stood by its contention that the regulation was promulgated under s 171. It said that there was indeed prior consultation. As evidence, it pointed to an affidavit of the Minister of Trade and Industry and one delivered on behalf of the NCR in an interlocutory application. That of the Minister explained that a Policy Framework was set up to chart the process leading to the promulgation of the legislation surrounding the Act. The affidavit explains this as follows:

'Chapter 7 of the Policy Framework highlights that prior to the National Credit Regulator being formed in terms of section 12 of the Act, a cluster known as the Micro Finance Regulatory Council ("MFRC") was established by the Department of Trade and Industry, and subsequently became the institution now known as the National Credit Regulator.'

In support of this assertion, the NCR quoted from the Policy Framework:

'In recognition of the unique experience and expertise gathered by the Micro Finance Regulatory Council (MFRC) over the five years of its operation, it is proposed that the National Credit Regulator will absorb the MFRC, but also the national Usury Act

inspection function within the DTI. The National Credit Regulator will be jointly funded from credit provider registration fees and levies, and an annual transfer from national government.'

In the affidavit delivered in the interlocutory matter it was asserted:

'The MFRC, as is explained by the Minister, was the entity that became the NCR, as provided for in Section 8, Schedule 3 of the NCA.'

[17] It was submitted that consultation with the MFRC was, therefore, consultation with the NCR. This is because it became the NCR on 1 June 2006. There are a number of difficulties with this submission, however. First, as mentioned, s 12 of the Act creates the NCR. Prior to 1 June 2006, it did not exist and could therefore not have been consulted. Secondly, the assertions contained in these affidavits are contradicted by the Policy. The Policy did not say that the MFRC became the NCR. It said that the NCR would 'absorb the MFRC'. The absorption of one body by another does not mean a metamorphosis of the existing body into the new entity. Thirdly, s 8 of Schedule 3 provides:

'As of the effective date—

(a) the assets, liabilities and employees of a regulatory institution designated by the Minister in terms of section 15A of the Usury Act, 1968 (Act No. 73 of 1968), are transferred to and are assets, liabilities and employees, respectively, of the National Credit Regulator; and

(b) any person appointed as an inspector or in any other capacity in terms of the Usury Act, 1968 (Act No. 73 of 1968), may be transferred to the National Credit Regulator.'

A transfer presupposes two different entities. One cannot transfer assets, liabilities or people to oneself. There is thus simply no way around the legal position that, prior to 1 June 2006, the Minister could not have consulted the NCR in order to satisfy the requirements of s 105(1).

[18] Factually, therefore, the regulation could not have been made by the Minister 'after consulting the National Credit Regulator'. The procedural requirement of prior consultation in s 105(1) was thus breached. Section 171(1)*(a)* read with s 172 did not allow the Minister to make regulations without meeting procedural requirements contained in the Act. It could therefore not have been the basis on which the regulation was promulgated. One is driven to the ineluctable conclusion that, in order to do away with the procedural requirement of prior consultation in s 105(1), the regulation could only have been promulgated under s 11.

[19] The next question is whether s 11 was complied with. Section 11 carries with it the requirement of 'allowing a period of at least 30 business days for comment'. The advertised closing date for submissions in the Gazette did not allow 30 business days but only 27. The NCR contended that, because the regulation was promulgated 71 business days after publication of the Notice, the requirement of a minimum of 30 business days was to all intents and purposes satisfied. Uncontradicted evidence was given that submissions received after the advertised closing date would have been, and in fact were, taken into account.

[20] This aspect turns at least partly on the interpretation of s 11. It allows procedural requirements in the Act to be overlooked:

'[P]rovided the Minister has published such proposed regulations in the Gazette, allowing a period of at least 30 business days for comment.'

The issue resolves itself into whether this proviso requires the Gazette to indicate that at least 30 business days is allowed for comment, or the Minister may allow 30 days despite the Gazette giving only 25 business days.

[21] The approach to interpretation is objective:

'The "inevitable point of departure is the language of the provision itself" read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'[7]

The language of the provision talks of 'allowing' that period. On balance, on a grammatical construction, it seems that it is the publication which must allow the period. The context of the provision is that regulations bearing on the operation of the NCA are intended to be made. The provision is aimed at persons interested and affected by those regulations who may wish to comment. It can scarcely be contended that all such persons are aware of the 30 business day period specified in s 11. The clear purpose of the provision is to inform them of the date by which they should submit comments if they are to be taken into consideration. That purpose is not met if, despite the Gazette advertising a closing date for submissions, the Minister, unbeknown to anyone but herself, decides to allow longer. The language, context and purpose of the proviso support the interpretation that the Gazette must allow a minimum of 30 days for the submission of comments.

[22] As a result, this contention of the NCR simply cannot succeed. The clear requirement is that interested and affected persons should be informed by when their comments should be received. The fact that the NCR would have considered all comments, whether or not made within the advertised period, is of no moment. All of this means that the Minister did not comply with the proviso to s 11.

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[7] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18 (references omitted).

[23] The final submission by the NCR is that, because the 27 days allowed was a reasonable period, and was just three days short of the minimum 30 days specified, the court of first instance should have condoned this non-compliance. But this is to misconstrue the proviso to s 11. Section 11 empowers the Minister to promulgate regulations without the need to comply with procedural requirements set out in the Act, 'provided the Minister has published such proposed regulations in the Gazette, allowing a period of at least 30 business days for comment'. If the Minister does not do so, she is not empowered by s 11 to promulgate regulations without meeting the procedural requirements of the Act. This power arises only if the Gazette allows a minimum of 30 business days for comment.

[24] To summarise. The regulation could only have been promulgated under s 11. The requirement was that the Gazette allow a period of at least 30 business days for the submission of comments. This requirement was not complied with. The power of the Minister to make the regulation thus did not arise under s 11. The nett effect of all of this is that the promulgation of the regulation was *ultra vires* the power of the Minister.[8] The regulation was accordingly not validly promulgated.

[25] What, then, is the effect of this on the present matter? In its heads, the NCR said that the application launched by Getbucks was one to review and

[8] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (CC) para 59, where it is made clear that these principles remain operative under the Constitution:
'There is of course no doubt that the common-law principles of *ultra vires* remain under the new constitutional order. However, they are underpinned (and supplemented where necessary) by a constitutional principle of legality. In relation to "administrative action" the principle of legality is enshrined in section 24(a). In relation to legislation and to executive acts that do not constitute "administrative action", the principle of legality is necessarily implicit in the Constitution.'

set aside the regulation. The NCR submitted that, because it was not brought within the requisite period allowed under PAJA, it should have been dismissed on this ground alone. But this is a classic collateral, reactive, or defensive challenge to the regulation. It is available when an attempt is made to coerce an entity by utilising the regulation. The challenge may use as a defence the fact that the regulation was not validly promulgated. The classic exposition of this is found in *Merafong City v Anglogold Ashanti Ltd*,[9] where the Constitutional Court held:

'A subject at risk of criminal conviction or other coercive action by the state may indeed raise a reactive or defensive challenge to the lawfulness of the administrative act on which the prosecution or coercion is based.'[10]

[26] It is clear that the application in question sought to raise a reactive challenge. It was therefore not a review application, whether under PAJA or the common law. The NCR correctly did not press this line of argument during the hearing. As such, it is not necessary to determine whether the promulgation of the regulations in question was administrative or legislative in character. The issue is one of legality. If the regulation does not pass muster, the reactive challenge need not be to administrative action but to any invalid act:[11]

'These provisions imply that a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition – it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law.'

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[9] *Merafong City v Anglogold Ashanti Ltd* [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC).
[10] *Merafong City* para 30.
[11] *Fedsure* para 56. References omitted.

[27] It seems to me to be in the nature of this kind of collateral, or reactive, challenge that it cannot be time-barred as with an attempt to review administrative action. This is because the person raising the reactive challenge might only be subjected to the coercive action by an organ of the state based on the impugned provisions a considerable period of time after they came into effect. That is precisely the situation in the present matter. It cannot be said, accordingly, that the application should have been dismissed due to the time which had passed since the regulation was made.

[28] The court of first instance thus correctly found for Getbucks. It also correctly recognised the challenge raised by Getbucks as being a reactive, defensive, or collateral one. The order granted addressed that coercive action and declared that the regulation could not be used against Getbucks.

[29] In the result, the appeal is dismissed with costs.

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T R GORVEN

ACTING JUDGE OF APPEAL

APPEARANCES

For appellant:	P L Carstensen SC Instructed by: Lebethe Attorneys & Associates Incorporated, Alberton c/o Matsepes Incorporated, Bloemfontein
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