IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN BRAAMFONTEIN

CASE NUMBERS: **NCT/2667/2011/101(1)(P)**
NCT/2081/2011/101(1)(P)

In the matter between:

CITY OF JOHANNESBURG **APPLICANT**

and

NATIONAL CONSUMER COMMISSION **RESPONDENT**

JUDGEMENT

INTRODUCTION

1. The Applicant in this matter is the City of Johannesburg, a high capacity municipality established in terms of the Local Government: Municipal Structures Act 117 of 1998. The Applicant was represented by Adv. M Le Roux instructed by Bowman Gilfillan.

2. The Respondent is the National Consumer Commission established in terms of the Consumer Protection Act 68 of 2008 (the Act).The Respondent was represented by Mr. O.Thupayatlase

3. The Respondent has received numerous complaints from consumers concerning the Applicant. These complaints relate to matters such as the accuracy of billing statements received by consumers,[1] the issuing of pension rebates and rates certificates, failure to receive accounts following property transfers, rates refunds, and the charging of reconnection fees.

[1] The overwhelming majority of the complaints received relate to this problem (see Applicant's Heads of Argument para 21).

4. The Respondent met with the Applicant in order to establish a procedure for resolving the complaints. The Respondent became frustrated with the slow progress being made on the part of the Applicant in resolving complaints. The Respondent concluded that the Applicant had a "cavalier" attitude and that its attempts were "half hearted"[2] and so it served compliance notices on the Applicant in terms of section 100 of the Act.

5. 11 compliance notices were served on the Applicant by the Respondent on 12 August 2011 and 34 compliance notices were served on the Applicant by the Respondent on 25 August 2011.

6. The compliance notices relate to the following:
   a. Thirty one relate to complaints by consumers that accounts sent by the Applicant for electricity and water consumed were inaccurate;
   b. Nine relate to complaints by consumers that they did not receive accounts from the Applicant in respect of services which they had consumed;
   c. Six relate to complaints by consumers concerning refunds which the consumers contend that they are entitled to but did not receive;
   d. One relates to a complaint concerning water and electricity meters; and
   e. One relates to the application for a pensioner's rebate in addition to the fact that an account was not received.

7. The Applicant has brought this application to have the compliance notices reviewed and cancelled in terms of section 101 (1) of the Act.

8. Initially the Applicant brought two separate applications. NCT/2667/2011/101(1)(P) deals with the 11 compliance notices issued on 12 August 2011 and NCT/2081/2011/101(1)(P) deals with the 34 compliance notices issued on 25 August 2011. As all these compliance notices deal

[2] Jeremiah Modiba, Director of Legal Services, National Consumer Commission and Commission Investigator "Prepared Witness Statement". It must be noted that this witness statement is dated 15th day of September August 2011. However this is clearly incorrect as it refers to questions raised by the presiding member of this Tribunal held on 20 January 2012 and clearly relates to matters which are relevant to this matter.

with the same issues the two applications have been consolidated and both applications were argued together on 22-24 February 2012.

9. With some minor variations the compliance notices allege that the Applicant contravened the Act in that its conduct contravened schedule 2 item 8 (1) and (2);[3]section 48 (1) (a) (i) and section 54 (1) (a) and (b) of the Act.[4]

10. The Applicant seeks to have all 45 compliance notices cancelled on the same three grounds:

a. The compliance notices relate to conduct which falls outside the jurisdiction of the Act either because the conduct arose before the introduction of the Act or because the conduct complained of is not governed by the Act therefore it could not constitute prohibited conduct as defined by the Act;
b. The Respondent, in issuing the compliance notices, did not follow the procedures as set out in the Act.
c. The compliance notices do not comply with the requirements of section 100 (3) of the CPA.

11. Despite identifying three grounds on which the application for the review was based, at the hearing, the Applicant stated that its overarching submission was that the procedure prescribed in the Act before compliance notices can be issued was not followed by the

[3] A contravention of this schedule was alleged in every compliance notice except for 5 namely the compliance notices relating to Maleke, Harvey, Pieters, Monnink and Young.

[4] In the Monnink matter it is alleged that the Applicant contravened section 54(1)(a) and (b) only; in the Steyn matter it is alleged that the Applicant contravened schedule 2 item 8(1) and (2) and section 48(1)(a)(i) but under the heading nature and extent of the contravention, schedule 2 item 8(1) and (2), section 48 (1)(a)(i) and section 54 (1) (a) and (b) are set out; in the Young matter it is alleged that the Applicant contravened section 50 (2) (a) (ii) but under the section headed nature and extent of the contravention, the three sections mentioned in the other compliances notices are set out and not section 50 (2) (a) (ii). In the Swart matter it is alleged that the Applicant contravened the schedule and section 48 (1) (a) (i) but under the heading nature and extent of the contravention section 54 (1) (a) and (b) is included. In the Nel matter it is alleged that the Applicant contravened the schedule and section 54(1)(a) and (b). Apart from the 5 compliance notices mentioned in note 3 above, all the other compliance notices alleged a contravention of schedule 2 (8); section 48 (1) (a) (i) and section 54 (1) (a) and (b).

Respondent and that therefore on this basis alone all the compliance notices should be cancelled.[5]

ISSUE TO BE DECIDED BY THE TRIBUNAL

12. Having received these 45 compliance notices, the Applicant must either comply with the compliance notices as they stand (failing which the Respondent may bring an application to the Tribunal for the imposition of an administrative penalty) or it must apply for the review of the compliance notices.

13. The Applicant has made application for the compliance notices to be reviewed and cancelled.

14. Following the review, the Tribunal may confirm, modify or cancel all or part of the compliance notices.[6] If the Tribunal modifies or confirms a compliance notice, section 101 (2) states that the Applicant must comply with that notice as confirmed or modified within the time period specified in it.[7] This section implies that when the Tribunal modifies or confirms a compliance notice, the Applicant will be given a certain period of time within which to comply with the compliance notice.

15. In these particular matters, the Applicant has argued that the compliance notices are not valid at all and, therefore, the Tribunal cannot modify or confirm them; it can only cancel them.

16. The central issue which the Tribunal must decide is whether the compliance notices have been issued in accordance with the law. If these compliance notices have not been issued in accordance with the law, they must be cancelled. If the compliance notices have been issued in accordance with the law, the Tribunal can decide to confirm or modify them.

5 See page 21 of the transcript of 22 February 2012.
6 Section 101(2).
7 Section 101(3).

PRE-TRIAL HEARING

17. A pre-trial hearing was held on 20 January 2011. The purpose of a pre-trial hearing is for the presiding member to confer with the parties in order to, *inter alia*;[8]

    a. *Give direction for the clarification and simplification of issues;*
    b. *Obtain admissions of facts;*
    c. *Set the time within which any evidence must be obtained or preparations for the hearing must be complete; and*
    d. *Determine procedures to be followed at the hearing.*

18. The presiding member pointed out that the two applications brought by the Applicant dealt with the validity of the compliance notices issued by the Respondent. At the point of objecting to the compliances notices there was no application by the Respondent for the imposition of administrative penalties on the Applicant based on the fact that the Applicant had failed to comply with the compliance notices. Therefore the issue of administrative penalties was not an issue which would be dealt with at the hearing.

19. The presiding member identified certain legal issues which the parties were required to consider and argue at the hearing. These legal arguments related in particular to the interpretation of section 72 of the CPA which governs the procedure to be followed by the Respondent following the receipt of a complaint; the interpretation of schedule 2 item (8) which makes provision for certain transitional arrangements, section 48 (1) (a) (i) which governs unfair, unreasonable or unjust pricing and section 54 which governs the right to a quality service. It was agreed that these matters could be argued by the parties based on the affidavits which had been filed with the Tribunal and on the interpretation of the relevant sections of the Act. Therefore there was no need to present oral evidence on these matters.

[8] Pre-trial hearings are governed by rule 17 of the Tribunal Rules published under GN 789 in *Government Gazette* 30225 of 28 August 2007 as amended by GN 428 in *Government Gazette* 34405 of 29 June 2011.

20. However, there appeared to be a dispute of fact regarding the actual procedure which the Respondent had followed prior to the issuing of the compliance notices and, therefore, there was a need to hear oral evidence from those who had participated in this procedure.

21. As far as the procedure to be followed at the hearing was concerned, it was agreed that the legal arguments which had been raised during the pre-hearing would be addressed by the parties first. Thereafter evidence regarding the procedure which was followed by the Respondent prior to the issuing of the compliance notices would be considered.

22. The parties were requested to identify any witnesses whom they might wish to call and to submit short witness statements prior to the hearing.[9]

23. It was also agreed that:

a. The Applicant would prepare a document setting out stated facts, facts agreed to and facts that were disputed.
b. The Respondent would add its comment to the document; and
c. The document would thereafter be filed with the Tribunal.[10]

[9] The Respondent subsequently identified Mr. Jeremiah Modiba, currently the Director of Legal Services at the Respondent but, he informed the Tribunal that, at the time when the compliance notices were issued he was an inspector of the Respondent. A letter written by Mr. Modiba at the time indicates that he was also the manager of the Respondent's Complaints Handling Unit. The relevance of this fact is discussed below. The Applicant identified Ms. K. Brits, Ms. N. Das Neves and Mr. C. Edelstein, all employees of the Applicant, as witnesses. At the hearing the Respondent requested that Ms. P. Moilwa be allowed to give evidence and the Applicant did not object.

[10] One of the issues the Tribunal was concerned about, was whether the complaints were now moot because, the Applicant alleged that, the consumer complaints had been resolved. From the document subsequently filed with the Tribunal, the Respondent agreed that 10 of the issues which consumers were concerned about had been resolved but it did not agree that all the matters had been resolved. In addition, there were certain aspects to the compliance notices which the Applicant alleged it could not comply with even if the actual consumer complaints were resolved. Therefore it could not apply for the issuing of a compliance certificate as set out in section 100 (5). The Applicant also argued that as the compliance notices were invalid, they should be set aside. The Applicant could not ask for a compliance certificate based on a compliance notice which was invalid regardless of whether or not the consumer complaint had been resolved. The issue of whether or not the compliance notices were now moot was therefore not pursued and the hearing focused on their legality.

24. Prior to the hearing, the document outlined in 23 above and the Applicant's heads of argument were filed with the Tribunal. The Respondent handed in its heads of argument during the hearing.

POINT IN LIMINE

25. The hearing was initially set down to take place at the Tribunal offices in Centurion. This venue was subsequently changed to the Braamfontein Recreation Centre.

26. The Respondent took a point *in limine* and objected to this venue *inter alia* on the basis that its office had not been consulted by the Tribunal before the decision to change the venue was madeand because the building was owned by the Applicant.

27. The Respondent argued that the Tribunal and the Applicant must have taken this decision together to the exclusion of the Respondent and that the venue was changed for reasons unknown to the Respondent. The Respondent requested that the venue be changed to another venue that is not owned by a party with an interest in the matter.[11]

28. The Applicant was not opposed to the use of the venue in question and pointed out that none of the representatives of the City who were potential witnesses in the matter were involved in the procurement of the venue.

29. In order to clarify the matter, the Tribunal called Ms. Ntombenhle Mbhele who is employed as the Registry manager at the National Consumer Tribunal. Ms. Mbhele explained that she had received a directive from the head of the Tribunal to find a venue which could accommodate approximately 300 to 400 people. She was also informed that the venue should be accessible to the people of Johannesburg. She stated that it was not her intention to look for a venue

[11] Page 4-5 of the transcript 22 February 2012.

owned by the City of Johannesburg but to look for a venue that met the abovementioned requirements. She considered a number of different venues but for various reasons they were not suitable. She finally approached the Braamfontein Recreational Centre and obtained a quotation. One of the primary reasons for choosing this venue was that it cost in the region of R20 000 to hire the venue for three days whilst other venues had quoted in the region of R459 000. She made the decision to use this venue because it met all the requirements and was cost effective.

30. The parties were given an opportunity to cross-examine the witness but neither party availed themselves of the opportunity to do so in any meaningful fashion.[12]

31. The Respondent indicated that it had no further points *in limine* which it wished to raise.

32. The Tribunal then adjourned to consider the Respondent's point *in limine* and when it returned the presiding member gave a short judgment. In this judgment the presiding member explained that a distinction must be made between the Tribunal (which is made up of the Chairperson and 10 members) and its support staff. The support staff is responsible for the day-to-day operations of the office: this is not a function of Tribunal members. The presiding member also pointed out that the Tribunal has been operating since 2006 when it was established under the National Credit Act, 2005. It has held a number of hearings in different venues throughout South Africa so having a hearing at a venue other than the actual office of the Tribunal is not unusual. As indicated, the relevant staff member received an instruction to find a venue that could accommodate more members of the public than usual because of the unusual public interest in the matter. The Tribunal was satisfied that this was a public venue which was accessible to the public and that making use of this venue did not impact on the impartiality of the Tribunal members to adjudicate in this matter.

[12] The Applicant asked one question relating to the name of the person whom the witness had approached at the Centre

33. The Tribunal therefore directed that the matter should proceed at the Braamfontein Recreational Centre.

THE HEARING

34. The Applicant commenced with legal argument dealing inter alia with the issues which were raised at the pre-trial hearing.

35. The Respondent then presented its legal argument.

36. The following witnesses were called to give evidence regarding the procedure which was followed before the compliance notices were issued -

a. For the Respondent – Mr. Jeremiah Modiba and Ms. Prudence Moilwa

b. For the Applicant – Ms. Karen Brits, Ms. Nicole Das Neves and Mr. Colin Edelstein

THE LAW

37. The actions of the Respondent qualify as administrative action. That being so the serving of compliance notices must be lawful, reasonable and procedurally fair. In the most recent Supreme Court of Appeal decision of *DA v Ethekwini Municipality*[13]the Court held (at 160D) that a fundamental principal derived from the rule of law itself, is that the exercise of all public power, be it legislative, executive or administrative is only legitimate when it is lawful. *"This tenet of constitutional law which admits no exception, has become known as the principle of legality"* (Per Brand JA). The principle of legality requires that decisions must satisfy all legal requirements and procedures and should not be arbitrary or irrational.

38. In order to decide whether the compliance notices are legally valid it is necessary to consider -

(1) The procedure to be followed prior to the serving of the compliance notices; and

[13] 2012 (2) SA 151 (SCA).

(2) The compliance notices.

(1) **The procedure**

39. Part B of Chapter 3 of the Act (section 72-75) deals with the process that is followed when the Respondent initiates a complaint itself or when it receives a complaint from a consumer.

40. Section 72(1)(a) of the Act provides that if the complaint is frivolous, has prescribed or does not allege facts which are governed by the Act, the Respondent may issue a certificate of non-referral which means that the Respondent does not intend to take the matter any further.

41. Alternatively, the Respondent may[14]-

(1) refer the complaint to an alternative dispute resolution agent, a provincial consumer protection authority or a consumer court for the purposes of assisting the parties to attempt to resolve the dispute in terms of section 70, unless the parties have previously and unsuccessfully attempted to resolve the dispute in that manner;

(2) refer the matter to another regulatory authority with jurisdiction over the matter for investigation;[15] or

(3) direct an inspector to investigate the complaint as quickly as practicable in any other case.[16]

42. After concluding an investigation into a complaint, the Respondent has a number of options available to it.[17]The available options include -

(1) Proposing a draft consent order in terms of section 74; or

(2) Issuing a compliance notice in terms of section 100.[18]

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14 Section 72(1)(b).
15 Section 72(1)(c)
16 Section 72(1)(d).
17 Section 73.
18 The Respondent appears to be of the view that the parties must conclude a consent agreement or a compliance notice must be served. This view is expressed in its enforcement guidelines (discussed below) and is also apparent from the correspondence between the parties. A decision on whether or not this approach is correct, that is, the supplier must

43. Reference can also be had to section 99which deals with the enforcement functions of the Commission. The Commission is responsible to enforce the Act by *inter alia* investigating and evaluating alleged prohibited conduct[19] and issuing and enforcing compliance notices.

(2) **The compliance notices**

44. Section 100 of the Act governs the various aspects of compliance notices, specifically the pre-requisites for their - issuance, content, remaining in force, issuance of compliance certificates when satisfied and enforcement in event of non-compliance.

45. ***After concluding an investigation*** (emphasis added) into a complaint, the Commission may issue a compliance notice in terms of section 100.[20] The Commission may issue a compliance notice in the prescribed form to a person or association of persons whom it on reasonable grounds believes has engaged in prohibited conduct.[21]

46. The form of the notice is prescribed in the Regulations[22] to the Act, and the content in section 100(3) which provides that a compliance notice must set out -

a. The person or association to whom the notice applies;
b. The provisions of the Act which have not been complied with;
c. Details of the nature and extent of the non-compliance;
d. Any steps which are required to be taken and the period within which those steps must be taken; and
e. Any penalty that may be imposed in terms of this Act if those steps are not taken.

consent to the signing of a consent order or the Commission will issue a compliance notice, is not necessary for this decision.

19 Section 99(d)
20 Section 73(1)(c)(iv) of the CPA
21 Section 100(1)
22 Regulation 42

EVALUATION OF THE LAW

47. An evaluation of the sections of the Act which deal with investigations by the Commission and compliance notices leads to the conclusion that a compliance notice is issued once an investigation is completed.[23]

48. An investigation is necessary in order to
    a. Establish the facts of the complaint;[24]
    b. Measure those facts against the Act in order to reach the belief on reasonable grounds that the person against whom the compliance notice is to be issued was engaged in prohibited conduct;[25]
    c. Ensure that the compliance notice complies with the prescribed requirements as set out in section 100 (3). The notice must provide details of the nature and extent of the non-compliance.

49. The fact that there must be a ("concluded") investigation before a compliance notice is issued begs the question: what constitutes an investigation?[26]

50. Section 88(1) of the Act provides that an investigation must be conducted by an inspector who has been appointed by the Commissioner but the term "investigation" is not defined in the Act. In the circumstances it is useful to refer to certain decided cases where the word has been dealt with and to dictionary definitions of the term.

51. In *Native Commissioner and Union Government v Nthako*[27] and *Lotzoff v Raubenheimer*[28]the court held that the word "investigation" means the ascertainment of facts.

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23 See paragraph 45 above

24 Without establishing the facts of the complaint first, there can be no basis for arriving at a conclusion that prohibited conduct is involved.

25 A consumer may have a valid complaint against a supplier, but before a compliance notice is issued the complaint must constitute prohibited conduct under the Act.

26 This was one of the issues which the parties were asked by the presiding member to consider at the pre-trial hearing.

52. In the *World Book Dictionary* the word "investigation" is defined as "a search for information or the truth. Investigation emphasizes a careful and systematic search for facts, especially one carried out by officials".[29] The word is also defined as a systematic, minute and thorough attempt to learn the facts about something complex or hidden that is often formal and official.[30]

53. Further assistance regarding what constitutes a 'proper' investigation can be obtained by referring to -

(1) The Respondent's enforcement guidelines;[31] as well as

(2) The Promotion of Administrative Justice Act.[32]

(1) The Respondent's Enforcement Guidelines

54. The Respondent has developed certain enforcement guidelines for the handling of complaints. These guidelines have an extensive section dealing with complaints handling and investigations by the Respondent.[33]

55. These guidelines indicate that when a complaint is received it will be considered by the Manager of the Complaints Handling Unit. There are extensive guidelines dealing with attempts to resolve the issue between the complainant and the service provider. The guidelines provide that if there is no settlement in the matter and the matter involves prohibited conduct then the complaint may be escalated to Consumer Investigations for the purpose of obtaining a compliance notice. The official from the Complaints Handling Unit must provide a

27 1931 TPD 240
28 1959 (1) SA 90
29 See also http://www.thefreedictionary.com (accessed 2 March 2012)
30 http://dictionary.reference.com (accessed 2 March 2012)
31 GN 492 in Government Gazette 34484 of 25 July 2011. The exact legal status of these guidelines is unclear however they do give a useful indication regarding the process which the Respondent has decided to follow when dealing with consumer complaints. The notice states that these guidelines which relate to the internal enforcement functions of the Commission were published in order to give effect to the Act.
32 Act 3 of 2000
33 Part B

short escalation report. The report will then be screened by the Investigations Unit at screening meetings which will be held at least once a week. The guidelines state that critical to the screening is a determination of whether prohibited conduct is occurring. If the weekly screening meeting concludes that a breach of the Act has occurred and that the matter must be investigated by the Respondent, the inquiry will be assigned to the Manager: Investigations. The manager is responsible for assigning the inquiry to an investigator.[34]

56. When a matter is approved for investigation the inspector/investigator must prepare an initial screening report upon receiving the complaint. This screening report must briefly describe the nature of the complaint, identify key issues for initial investigation, and offer a recommendation (if possible) for/against early disposition; investigate the relevant criteria as set by the Respondent; prepare an investigation report with recommendations and table the report with the Commissioner.[35] The guidelines state that if, after an investigation, a referral is not made,[36] there are essentially only two recommendations that an investigator can make:

a. Propose a consent order;

b. Propose a compliance notice.

57. The guidelines state that the purpose of the investigation is to determine *inter alia* whether the supplier has engaged in prohibited conduct[37]and that it is the investigator's task to relate the law to the facts in each matter. Relating the law to the facts means that there must be a comparison of each element of the breach with the facts as revealed throughout the investigation.

58. The guidelines provide some guidance to the investigator regarding some practical steps which should be taken and then it states that "by carrying out this exercise an investigator is

[34] Although the Act makes a distinction between an investigator and an inspector (see section 88) these guidelines seem to use the words interchangeably. Section 72 states that an inspector must be appointed to investigate the matter whereas the guidelines state that the Manager will appoint an investigator

[35] Section 7.

[36] In this instance the guidelines are referring to the situation where the investigator recommends the matter be referred to another body such as an ADR agent, an ombud or consumer court.

[37] Section 8.

immediately alerted to any potential deficiencies in proving any breach. One can then identify further investigation which must be undertaken in order to complete the proof." This is commonly known as a 'liability sheet'.

59. The guidelines further state that if a supplier is suspected of having breached the Act, the allegation should be personally put to the supplier. The guidelines set out the steps to be taken:

- *The supplier's response should be recorded by the use of contemporaneous notes;*
- *If the matter is serious then the supplier should be invited to participate in a formal interview;*
- *Should the supplier consent to a formal interview then it may be conducted on audiotape;*
- *The formal taped record of interview should have appropriate structure and protocols; and*
- *In all cases only one person suspected of committing the breach should be interviewed at a time;*
- *The provisions of the Promotion of Administrative Justice Act[38] (PAJA) must be taken into account.*

60. Once an investigation is completed and an action or a settlement is proposed, a detailed investigation report must be prepared. The primary purpose of an investigation report is to aid the enforcement division of the Respondent in making a decision as to the appropriate action to be taken.[39] The guidelines contain a substantial list of what the final report should contain including the issue or allegation investigated, any other issues or breaches identified, the supplier's response and a legal analysis. The report will also contain a recommendation regarding the appropriate action to be taken.

61. One such recommendation may be the issuing of a compliance notice. The guidelines confirm that a compliance notice can only be issued when the Respondent has reasonable grounds for believing that a person has engaged in prohibited conduct and state that in order to justify or establish a belief on reasonable grounds, the Respondent will need evidence of the breach.

38 Act 3 of 2000.
39 Section 11.

The guidelines state that such evidence will usually be available subsequent to an investigation being concluded.[40]

62. An evaluation of these guidelines indicates that the Respondent intends there to be an extensive investigation prior to the issuing of a compliance notice which involves identifying the prohibited conduct and obtaining a response from the supplier and culminates in the drafting of a report by the investigator which contains certain recommendations.[41]

(2) The Promotion Of Administrative Justice Act (PAJA)

63. The Respondent has referred in its guidelines to PAJA and this Act provides further guidance regarding an appropriate investigation.[42]

64. PAJA provides as follows:

> *"**3. Procedurally fair administrative action affecting any person***
>
> *(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.*
>
> *(2) (a) A fair administrative procedure depends on the circumstances of each case;*

40 Section 13 Part B.

41 The Respondent does make a distinction between non-complex, complex and exceptional matters but even where matters are regarded as non-complex it is expected that the matter will be investigated and that a short report will be drafted for forwarding to the Commissioner. Matters which involve the issuing of a compliance notice are regarded as complex or exceptional. In both cases evidence must be gathered but exceptional matters are matters where summonses are served and warrants to enter premises are obtained.

42 At the pre-trial hearing the presiding member requested the parties to consider this legislation. The Constitutional Court has confirmed the primacy of PAJA as legislation which was enacted to give effect to the constitutional right to fair administrative action and has stated that there is a need to read other legislation together with PAJA where possible. See for example *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) at 622E where the Court pointed out that PAJA was enacted pursuant to the provisions of section 33 of the Constitution (the Constitution of the Republic of South Africa Act 108 of 1996) which "requires the enactment of national legislation to give effect to the right to administrative action". The Court also pointed out that PAJA governs all administrative action in general and that "(a)ll decision makers who are entrusted with the authority to make administrative decisions by any statute are therefore required to do so in a manner that is consistent with PAJA".

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

65. From this it can be seen that a person under investigation is entitled to be informed of the nature of the investigation and is entitled to make representations.

THE FACTS RELATING TO THE PROCEDURE FOLLOWED

66. At the beginning of 2011 Mr. Mavela Dlamini as City Manager received a letter from the Commissioner in which the Commissioner requested a meeting to discuss compliance requirements in terms of the Act.[43] The letter sets out certain general information regarding the Act and its purpose and concludes with the following statement:

> *"The Commission hereby requests a meeting with the City Manager and senior representatives from the Municipality: A representative from my office will be in contact shortly to set up a suitable date and time for the meeting. The objective of the engagement will be to ensure the following:*
> - *Harmonized and synchronized understanding of the purpose and policy of the Act;*
> - *The role of stakeholders in ensuring compliance with the provisions of the Act, primarily in relation to complaints handling, alternative dispute resolution mechanisms, referral and escalation procedures;*
> - *Co-operative relationship in resolving consumers matters.[44]"*

67. A meeting was subsequently arranged by Mr. Modiba on behalf of the Respondent.[45] On 15 April 2011 Mr. Dlamini, Ms. V Shuping, Mr. T Nkgoedi and Ms. K Brits on behalf of the

[43] The letter itself is undated but it has two City of Johannesburg stamps on it, one dated 11 January 2011 and one dated 18 February 2011.

[44] A proposed agenda accompanied the letter which indicated that the meeting was to be of a general nature. Item 4 on the agenda states: Complaints handling process: municipality and item 5 is Co-operative relationship with dispute resolution noted as the first sub-category under item 5.

Applicant met with Ms. M Mohlala, the National Consumer Commissioner, and a number of officials from the Respondent including Mr. Modiba.

68. Although it is common cause that this meeting was held the exact nature and purpose of this meeting is in dispute.

69. Mr. Modiba in his evidence stated as follows: [46]

> *"When I called the first meeting with the City of Johannesburg on the 15th April 2011, I specifically indicated that such a meeting was a fact finding meeting, and the purposes of the meeting was to try and understand the nature of the problem, how it could be dealt with and the Commission's internal mechanism of trying to assist parties to resolve disputes. Attending on behalf of the City of Johannesburg was Mr. Mavela Dlamini and specific undertaking was made in that meeting by the City that six people would be made available to the City for purposes of conciliations which has been set up by the Commission in the spirit of section 99 (a) to try to have the parties reach a solution without having to go the litigious route."*

70. In her evidence on behalf of the Applicant, Ms. Brits explained that the meeting was at an "extremely high level of generality and seemed to serve no purpose other than to advise the Applicant that complaints had been received by the Respondent and that they needed to be responded to and dealt with".

71. Although the exact purpose of this meeting is in dispute, it is common cause that the parties were attempting to agree on a procedure for dealing with complaints which were being received by the Respondent on a regular basis concerning the Applicant.[47] It also appears to

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45 In its heads of argument the Respondent disputes that there was any connection between the first letter and this meeting as the meeting on 15 April was a meeting called to discuss the billing problems. From the evidence presented by the Applicant it is clear that the officials were under the impression that this was a meeting called as a result of the letter received in early January 2011.

46 See Mr. Modiba's prepared witness statement third paragraph on page 4.

47 See also evidence of Ms. Moilwa page 97 of the transcript 23 February 2012 where she explained that the purpose of the meeting held on the 15th April was to "sensitize" the Applicant to the complaints which the Respondent had been receiving. The Respondent explained the powers of the Commission, some of the provisions of the Act and the enforcement guidelines which had been published for public comment regarding the process

be common cause that the parties did not discuss specific consumers and specific consumer complaints.

72. It is common cause that an agreement was reached that complaints would be forwarded to the Applicant and the Applicant would be given seven days within which to respond to the complaints. If it failed to respond within seven days, the Applicant would be afforded a further five days within which to respond. The response could then give rise to a conciliation process with the complainant.

73. There was however a dispute regarding the interpretation of the word "respond". It appears from the responding affidavit of the Respondent and the evidence presented by the Respondent's witnesses, that "respond", for the Respondent, meant that the Applicant would resolve the dispute.[48]

74. The Applicant argued that it could not have given an undertaking to actually resolve the complaints to the satisfaction of the consumers as it would in many instances have been impossible for the Applicant to have dealt with these complaints in such a short space of time. Instead it argued that it undertook to attend to the complaints and to forward a spreadsheet to the Respondent on a regular basis indicating the steps which it was taking to resolve the disputes.

75. Whichever interpretation is given to the word "respond", it is clear that the Respondent became concerned with the lack of progress which the Applicant was making when it came to resolving individual consumer complaints. It continued to forward complaints to the Applicant and the

which would be followed when a complaint was received. The parties also discussed the conciliation process and the Respondent agreed that it would provide six people for this process (page 107 of 23 February 2012). Ms. Moilwa stated that because of the volume of complaints received it was agreed that the complaints would be forwarded to the Applicant and the Applicant would be given 7 days within which to respond.

48 See Mr. Edelstein's prepared witness statement and the Respondent's heads of argument.

Applicant continued to send the spreadsheets, but it seemed to the Respondent that very little progress was being made.[49]

76. On 16 May 2011, the following letter was sent to the Applicant's City Manager[50]

"Dear Sir

SUBJECT: COMPLAINT: CITY OF JOHANNESBURG SERVICE DELIVERY

We refer to the abovementioned matter and notify you of our receipt of the above matter.
We wish to advise that the above complaint was referred to the Complaints Handling Unit (CHU), one of the enforcement unit within the National Consumer Commission. The Complaints Handling Unit engages your business in terms of section 72 (1) (d) and 99 (f) of the Consumer Protection Act 68 of 2008 in an investigation based on allegation(s) of violations of one or some of fundamental consumer rights namely, section 22, 48 read with section 55.

The purposed of this investigation is to facilitate a quick and practical resolution to the complaint between your business and the complaint.

The list of 18 complaints for your attention is as follows:[51]
……
In our approach to facilitate an amicable settlement to this complaint CHU apply the audi alterum partem rule, meaning listen to both sides. It is for this reason we present this matter and offer you an opportunity to reply.

Kindly consider this complaint and revert to the writer with your response by 25th May 2011.

Your co-operation is always appreciated

Kind Regards

Mr. J Modiba
Manager
Complaints Unit"

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49 Both the evidence of Mr. Modiba and Ms. Moilwa indicate a high level of frustration with the Applicant – see testimony given on 23 February 2012 – pages 45 to 118.

50 The letter is marked annexure E of the Applicant's replying affidavit (Case No 2667) and was referred to by Mr. Modiba in his evidence. He explained that letters of a similar nature where sent to the Applicant as a covering letter with a list of complaints for the Applicant's attention.

51 A list of 18 names was attached.

77. On 13 July 2011, the Commissioner sent a letter to the Applicant[52] in which she referred to the agreement which the parties had concluded on 15 April 2011. She pointed out that the complaints had not been resolved within the agreed timelines and that they were "all by far in excess of these timelines". The Commissioner stated further:

> *"While the City has provided the Commission with updates on the matters referred, the Commission notes with concern that the City has to date only formally resolved 15 Complaints by signing the mandatory Consent Agreements. It does appear that most of the complaints have been referred to various business units of the City to implement recommended action. Unfortunately, this is not consistent with the timelines agreed upon at the meeting of 15 April 2011.*
> *In line with the agreed processes the Commission would, with respect, require that complaints forwarded to the City in April, May and June 2011be resolved by 27 July 2011. The Consent Agreements for these resolved complaints be signed by the City Manager or any delegated official by 29 July 2011.*
> *On the other hand, where an internal investigation is underway on disputed charges (water or electricity) the Commission would require an update on the outcome. The Commission would appreciate being informed of the specific instances when the City would require more time to resolve the complaints."*

78. A similar letter which made reference to the complaints which had been received by the Respondent was sent to Ms. Das Neves, from the Applicant's Legal and Compliance Department, on 11 July 2011. This letter dealt specifically with refuse removal complaints. The letter served to confirm that the Commission had not received any concrete and conclusive response to the non-removal of refuse complaints. The Commissioner stated that the Commission required a concrete and conclusive response to these complaints by 28 July 2011, "otherwise the City will leave the Commission with no option but to issue the City with compliance notices for complaints on non-removal of refuse."[53]

79. A number of the emails and letters exchanged between the parties refer to consent agreements which the Respondent required the Applicant to sign. On 19 May 2011, Colin

[52] The letter is marked annexure I in the Applicant's replying affidavit Case No 2667.
[53] Annexure H of the Applicant's founding affidavit. None of the complaints regarding the matters before the Tribunal relate to refuse removal however, this letter is an indication of the process which the Respondent was following in an attempt to resolve the disputes.

Edelstein, a legal adviser with the Applicant, sent an email to the Respondent in which he acknowledged receiving consent agreements under cover of a letter from the commissioner dated 16 May and addressed to the City Manager. He stated that in principle the City had no objection to signing the consent agreements but would like the opportunity to amend the agreements by adding certain information such as the dates the queries were received, the amounts involved in the queries and the full agreement of how the query has been or will be resolved. He also requested an urgent meeting with the Commission in order to specifically consider section 74 (3) of the CPA and also for clarification regarding an issue raised in the covering letter. He concludes the letter stating that "it is our intention to cooperate with you".[54]

80. Mr. Modiba informed the Tribunal that the Respondent was of the view that the Applicant was not really co-operating and that matters were not being resolved quickly enough, if at all. In his evidence Mr. Modiba explained that consumers were becoming very impatient with the Commission and that the Commission was being accused of being a "toothless dog".[55]

81. This led to the Respondent forming the opinion that the only way to adequately resolve the individual consumer complaints was to serve compliance notices on the Applicant relating to those complaints which had not been resolved.

82. After the first batch of compliance notices were issued, the Applicant requested a meeting with the Respondent in order to discuss the matter. This meeting was attended by inter alia Mr. Colin Edelstein, on behalf of the Applicant. In his prepared witness statement Mr. Edelstein explained that

> *"The purpose was to discuss a communications system with the Respondent, to agree a process for the receipt of and response to complaints. The Applicant had, since June 2011, been sending the Respondent, by email, spreadsheets setting out the steps which it was taking to resolve complaints received. The Applicant thought that it was responding to the complaints in the manner which had been agreed with the Respondent but, when*

[54] Annexure D of the Applicant's founding affidavit.
[55] Page 60 of the transcript 23 February 2012.

the first batch of compliance notices were received, realized that this could not be the case."

83. A follow-up meeting was held on 29 August 2011. At this meeting the Commissioner referred to the agreement which was reached with Mr. Dlamini on 15 April 2011 and which had not been adhered to. Mr. Edelstein explained in his oral evidence that there appeared to be a difference of opinion between the parties regarding the interpretation of the word "response."[56] This was clarified at the meeting of 29 August 2011. Mr. Edelstein also explained that Mr. Dlamini who attended the meeting of 15 April 2011 was no longer employed by the Applicant.[57]

EVALUATION OF THE PROCEDURE FOLLOWED BY THE RESPONDENT

84. The Tribunal had some difficulty establishing the exact nature of the procedure followed by the Respondent prior to the issuing of the compliance notices. This is because the affidavits submitted by the Respondent are not clear on this issue. The Respondent also appears to be of the view that section 72 does not need to be followed in all cases although it does also argue that section 72 has been followed.[58]

85. The Respondent deals with section 72 in its opposing affidavits in both matters. In the opposing affidavit in Case No NCT/2667/2011/101/(P) the first paragraph which refers to section 72 reads as follows:

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[56] There was a problem regarding the use of the word "resolved" on the spreadsheets that were forwarded to the Respondent. The spreadsheet might indicate that a particular complaint had been resolved. This could have meant from the Applicant's perspective that the complaint had been forwarded to the relevant entity such Johannesburg Water to be resolved whereas the Respondent expected the Applicant itself to resolve the matter. See Mr. Modiba's evidence and cross-examination page 71ff transcript from 23 February 2012

[57] Although these meetings held subsequent to the issuing of the compliance notices are not relevant to the procedure which was followed prior to the compliance notices being issued, they do serve to illustrate that the parties were approaching the whole matter from different perspectives and serve to corroborate the Applicant's version that it was not aware that it was under investigation for engaging in prohibited conduct.

[58] Because it was difficult for the Tribunal to establish exactly what procedure was being followed by the Respondent, the presiding member requested the parties at the pre-trial hearing to deal with the issue of the procedure in some detail. In particular, the parties were requested to consider the word "may" in section 72.

> *"Respondent has not quoted the full provisions of section 72. I deny that none of the processes set out in the section were not performed. In terms of the CPA, it is not a requirement on our part to appoint inspectors and investigators where complaints originate from consumers as opposed to the National Consumer Commission initiating an investigation of its own accord. Contrary to what Applicant is alleging, we sent representatives to attempt to resolve the complaints. As required by the CPA, where we found non-compliance, notices of non-compliance had to be issued.[59]"*

86. Later on the affidavit reads as follows:

> *"When the National Consumer Commission initiates an investigation in accordance with its powers which derive from the CPA, inspectors and investigators will be tasked with attending at various premises for purposes of gathering information for the investigation. In those instances, they are required to identify themselves whenever they are requested to do so. When, on the other hand, the National Consumer Commission deals with a complaint raised by a consumer (as is the case in this instance) there is no requirement for inspectors to conduct an investigation in some matters such as the one under consideration. Applicant seems to be confusing the two processes.[60]"*

87. A similar point is expressed by the Respondent in Case No 2801. Under the heading Ad paragraph 22.3 of the opposing affidavit[61] the Respondent again states that where the Respondent of its own accord initiates investigations, it is correct to state that inspectors will be required to identify themselves and sometimes state their purpose whenever asked to do so or when they attend at a party's premises. This is not, however, the case when an investigation is conducted as a result of a complaint lodged with the Respondent.[62]

88. It seems from these statements that the Respondent is of the view that it does not have to appoint inspectors to investigate complaints when consumers lay complaints.

89. However, further in the affidavit the Respondent says that it did comply with the steps in section 72. The affidavit reads:

> *"As explained above, we took the necessary steps as provided for in section 72 and inspectors were appointed to investigate the complaints which the Applicant was aware*

59 Ad paragraph 19 of the opposing affidavit of 2667.
60 Ad paragraph 21.3 of the opposing affidavit in Case No 2667.
61 Page 209 of the indexed record.
62 See also Respondent's heads of argument.

> *of. I am not aware of any other reason for employees of the National Consumer Commission to arrange meetings with employees and representatives of the Applicant other than for the sole purpose of ensuring that the complaints were being resolved.*[63]*"*

90. In its opposing affidavit under Case No 2801 the Respondent states that it was engaged in an alternative dispute resolution process. The Respondent states as follows:

> *"The contents of the paragraph are admitted in as far as they paraphrase the provisions of the section 72 of the CPA. I however deny that none of the steps stipulated in section 72 of the CPA were taken. I submit that an alternative dispute resolution process was initiated, which resulted in several meetings being held, as well as an exchange of correspondence between the Applicant and the Respondent.*[64]*"*

91. In its compliance notices the Respondent refers to several informal meetings which were held between the parties and the Applicant comments on these meetings in its founding affidavit in Case No 2667. The Applicant states as follows:

> *"As far as the informal meetings are concerned, these were just that. Informal meetings which were held to discuss general matters concerning the Applicant and the Respondent. The compliance notices concede this. The meetings did not concern specific complaints and could not have done so as this would not be in compliance with the CPA.*[65]*"*

In response to this paragraph the Respondent replies as follows:

> *"I deny the contents of this paragraph. Why would our officials and other employees meet with representatives of the Applicant informally once a formal process, initiated by the issuing of compliance notices, had commenced. The meetings held were nothing other than an attempt to follow up on the compliance notices and matters raised therein. If Applicant's employees and representatives read the purpose of the meeting as anything else, they were wrong to do so and it should not absolve Applicant from its duty to take compliance notices and complaints by customers seriously.*[66]*"*

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63 The difficulty here is that the Respondent is not making a distinction between resolving the complaints and conducting an investigation.

64 Ad paragraph 20 of the opposing affidavit in case No 2801 (page 207 of the indexed record). It must be noted that this affidavit states that it relates to case no 2667 however a perusal of the contents of the affidavit indicate that this case reference is incorrect.

65 Para 21.4 of the founding affidavit in Case No 2667.

66 Ad paragraph 21.4 of the opposing affidavit in Case No 2667. It seems here that the Respondent has misconstrued when these informal meetings were held. These were held

92. However later in the same affidavit, the Respondent states that:

> *"In terms of section 72 (1) (d) Respondent may direct an inspector to investigate a complaint as quickly as practicable. Meetings held with representatives of the Applicant were held in an attempt to investigate and resolve the complaint as quickly as possible. Unfortunately, and due to Applicant's intransigence, the attempt yielded nothing.[67]"*

93. The Respondent's opposing affidavit goes on to state:

> *"The power to afford parties an opportunity to resolve complaints prior to sanctioning them in terms of the CPA is implied in the CPA. It is in this respect that Respondent convened meetings with Applicant in an attempt to allow Applicant to resolve the complaints. Applicant has however been a spectacular failure in taking up constructive meetings and launching delaying proceedings in this Tribunal.[68]"*

94. In the letter dated 16 May 2011 and marked Annexure E[69] the Respondent does state that the Complaints Handling Unit is engaging with the Applicant in terms of section 72 (1) (d) but it also refers to section 99 (f) of the CPA. Section 99 (f) deals with the enforcement functions of the Respondent and provides that the Commission is responsible for enforcing the CPA by negotiating and concluding undertakings and consent orders in terms of section 74. At that point in time, this was what was being discussed between the parties. On the same day the Respondent had sent a number of consent agreements through to the Applicant[70] and Mr Edelstein had responded that the Applicant had no objection to signing the consent orders but he raised certain queries. It must also be noted that the letter referring to section 72 (1) (d) was signed by Mr. Modiba in his capacity as the Manager of the Complaints Unit and not in his capacity as an inspector of the Applicant.

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before the issuing of the compliance notices and the Respondent itself refers to these as informal meetings in the compliance notices.

67 Ad Paragraph 22.1 of the opposing affidavit in case No 2801 (page 208 of the indexed record)

68 Ad Paragraph 22.2 of the opposing affidavit (page 208 of the indexed record.)

69 Page 117 of the indexed record.

70 See Annexure C page 109 of the indexed record.

95. Further information regarding the process that was followed was provided by Mr. Modiba in his prepared witness statement. He explained that when the Respondent picks up a trend it embarks on a process of trying to find a solution to "such general and widespread complaints". He also stated that he would "like to dispel the myth that the Commission has to go to each and every consumer to check the details of his or her complaint and if indeed his or her complaint is true".

96. Mr. Modiba is of the view that all the Commission needs to do is to check the complaint and if "from the complaint the Commission can form a reasonable belief that the person against who the notice is issued has engaged in a prohibited conduct, then it can issue a Notice".

97. Mr. Modiba is also of the view that the Commission can form a reasonable opinion without conducting an investigation.[71]He stated that "If all it takes for the Commission to come to such reasonable conclusion is a desk top investigation which does not require any field work or going to the premises of the Applicant or calling for documents or applying for search and seizures, then it is for the Commission enough to issue a compliance notice".

98. Mr. Modiba explained that the Commission had received so many complaints regarding the Applicant that it was not practically possible to conduct an investigation into each and every complaint. So for practical reasons, and to solve the problem of the complaints, compliance notices were issued. Mr. Modiba explained that he prepared some of the compliance notices whilst others were prepared by other officials of the Respondent.

99. From all of the above it can be seen that no clearly identified process as per section 72 was followed by the Respondent before it issued the compliance notices. In some instances the process that was followed is referred to as an informal procedure with the formal procedure commencing only once the compliance notices were issued. In other instances this is referred to as an alternative dispute resolution process.[72]Although mention is made at times of an

[71] Paragraph 8 page 3 of his prepared witness statement.

[72] Hence the question put to the parties by the presiding member at the pre-trial conference. If the Respondent made use of alternative dispute resolution processes, could the Respondent

investigation, there is no evidence before the Tribunal which clearly indicates that an investigation was being conducted by the Respondent into possible prohibited conduct. From Mr. Modiba's evidence it is clear that a number of different officials were involved in the process of trying to resolve the complaints but it is not clear whether any of them were actually directed to investigate any specific complaint as required by section 72.

100. In addition, it is clear that the procedure which the Respondent has set out in its enforcement guidelines was not adhered to.[73] All the above communications refer to an attempt to reach a solution to the problem. Mr. Modiba was handling the matter and it appears that he was the Manager of the Complaints Handling Unit and that the matter had not yet been escalated to the Investigations Unit. The Applicant was not informed that it was being investigated for prohibited conduct,[74] in particular the relevant sections of the Act were not identified, nor was the Applicant given an opportunity to make representations as is required by both the Respondents enforcement guidelines and by PAJA. No report has been submitted to the Tribunal regarding the nature of the investigation conducted by the Respondent, the parameters of that investigation and the findings of that investigation. This is corroborated by the fact that the Respondent denied that it received spreadsheets from the Applicant.[75] If an investigation had been conducted and a report compiled then the Respondent would have been aware of these spreadsheets. It is noted by the Tribunal that the Respondent stated that

embark on this process itself or should the alternative dispute resolution be conducted by a third party? See question 6.3

73 It must be accepted that these enforcement guidelines do not constitute legislation or regulations and as such their legal status is uncertain, however they are an indication of the process which the Respondent believes it should undertake before issuing a compliance notice and provide guidance to the Tribunal as well as members of the public when the question is asked: what constitutes an investigation.

74 The Applicant states that it was not informed that it was being investigated and it was not given an opportunity to make representations on the issues which were under investigation. To a large extent this evidence of the Applicant is unchallenged. The Respondent does state that if the Applicant had requested the inspector's certificate of appointment this would have been shown to it. In response the Applicant has pointed out that it did not request the inspector's certificate because it did not know that it was being investigated.

75 Ad paragraph 23 of the opposing affidavit.

if it had received such spreadsheets, the matter would not have been escalated to the position where it is now.[76]

101. This then leads to the question: What process was followed by the Respondent before it decided to issue the compliance notices. It seems from all the evidence presented to the Tribunal that the following can be deduced.

The Respondent received numerous complaints regarding the Applicant. It engaged with the Applicant on 15 April 2011 in order to plot a way forward. The intention was for the complaints to be resolved. Regardless of how the parties interpreted the word "respond", the intention must have been that the individual consumer complaints would be attended to and they would be resolved. On 14 May 2011 a dossier of complaints was handed to the Applicant and on a regular basis further complaints which were received from consumers were forwarded to the Applicant under cover of a letter similar to the one sent on 16 May 2011 (marked annexure E). The Applicant responded by sending spreadsheets through to the Respondent on a regular basis. These spreadsheets set out the steps which were being taken but the Respondent became frustrated that the complaints were not being resolved quickly enough. The Respondent was also facing criticism from members of the public and was accused of being "toothless". The Respondent therefore decided to issue compliance notices for each of the unresolved complaints. It is clear from the evidence presented to the Tribunal both in affidavits and as oral evidence, that no individual complaint was ever discussed with the Applicant and complaints were not investigated by the Respondent on an individual basis. Based on the meeting held on 15 April 2011 the Respondent formed the opinion that there were problems with the Applicant's billing systems which was leading to the consumer complaints. Each complaint received from a consumer was thereafter considered in the light of this opinion without further investigation into the matter. Although the Respondent identified certain sections of the Act, which in its view the Applicant was transgressing, it is not clear to what

[76] Ibid. Despite the fact that the opposing affidavit denied that the spreadsheets had been received, both Mr. Modiba and Ms. Moilwa indicated in their evidence that the spreadsheets had been received. They were however not satisfied with the information which the spreadsheets contained.

extent transgressions were ever put to the Applicant. The only mention in writing of specific sections which were being violated by the Applicant was contained in the letter dated 16 May 2011 (marked Annexure E). This letter made mention of section 22, section 48 and section 55. No further explanation was given as to how these sections were being violated by the Applicant. The compliance notices alleged that the Applicant contravened schedule 2 (8), section 48(1)(a)(i) and section 54(1)(a) and (b). [77]

102. It seems therefore that the Respondent went from the complaints handling process, controlled by the Complaints Management Unit to the issuing of a compliance notice without an investigation first being conducted into the complaints.

THE COMPLIANCE NOTICES

103. The Respondent may issue a compliance notice in the prescribed form to a person whom the Respondent believes on reasonable grounds has engaged in prohibited conduct. For the most part the Respondent follows the prescribed form but under details of the nature and extent of the non-compliance certain other headings that are not prescribed are provided. The forms all follow the same format and contain the following:

a. Name of the person or entity to whom the notice applies
b. Address
c. Reference number
d. Date
e. Provision of the Act not complied with
f. The details of the nature and extent of the non-compliance are as follows:[78]
1.1Details of the complainant
1.2The complainant avers
1.3Steps taken

[77] It is noted however that in her evidence Ms. Moilwa indicated that section 54 was drawn to the attention of the Applicant. Ms. Moilwa stated that "during the meeting of the 15th April the Commission made a presentation to the City of Johannesburg about the possible sections that affect the work of the municipalities and also emphasized section 54 to the municipalities. See page 104 of the transcript 23 February 2012.)

[78] This is the section where the respondent has added its own headings as these headings are not prescribed in the Act. The Respondent explained that it did this in order to set out the details regarding the nature and extent of the non-compliance.

1.4 Contravention

- *Details of steps that are required to be taken and the period within which those steps must be implemented.*
- *Penalty that may be imposed in terms of this Act if those steps are not taken.*

104. Under the heading "provisions of the Act not complied with" the Respondent identifies certain sections of the Act. In most compliance notices, as discussed above schedule 2 item (8), section 48 (1) (a) (i) and section 54 (1) (a) and (b) are identified.

105. Under the section headed "the complainant avers" the Respondent sets out the consumer's complaint.

106. Under the section headed "steps taken", the Respondent refers to the steps which it took to resolve these complaints. For the most part the same procedure for resolving complaints is set out in all the compliance notices.[79] This reads as follows:

> *"The Commission conducted a meeting with the Municipality on the 15th of April to discuss the range of complaints received by the Commission in respect of the City of Johannesburg Municipality.*
> *The dossier of complaints was delivered to the City of Johannesburg on the 14th of May 2011.*
> *The City of Johannesburg Municipality was given 7 (seven) working days to provide the Commission was a response. They failed to respond within the stipulated time.*
> *They were given a further five days to respond to the Commission.*
> *They responded to this matter on 16 May and gave the Commission an inadequate response which did not address the substance of the complaints. The Commission subsequently held informal meetings with the officials of the City of Johannesburg Municipality and sent correspondence on 8 April, 16 May and 20 May addressed to the City of Johannesburg, in a concerted effort to elicit a satisfactory response to the substance of the complaints.[80]"*

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79 The Respondent accepts that the steps were identical. See Opposing Affidavit in Case No 2801 AD paragraph 21 (page no 201 of the indexed record). It must be noted that the Case No on this opposing affidavit reads Case No 2667 however a perusal of the contents of this affidavit indicates that it relates to Case No 2801.

80 It must be noted that there are slight differences in the compliance notices regarding the steps taken. Some compliance notices do not contain the date of the original meeting held on 15 April and some compliance notices refer to three correspondences in the form of letters, dated 16 May and 20 May but do not contain the date 8 April. These are very minor differences. The essential essence of the procedure followed by the Commission in each

107. Under the heading "Contravention" the Respondent again sets out those sections of the Act which the Applicant is deemed to have contravened, but in this instance the wording of the section is included (and not just the section number).

EVALUATION OF THE COMPLIANCE NOTICES

108. The complaints which formed the basis of the compliance notices, were referred to the Applicant by the Respondent after the meeting of 15 April 2011,[81]therefore those complaints could not have formed part of the discussion which took place on 15 April 2011. This was an issue which was raised by the presiding member at the pre-trial hearing and the parties were specifically requested to deal with this. A specific example was raised at the pre-trial conference by the presiding member. This related to the compliance notice which was issued in relation to a complaint by a Mr. Stones. In this instance the compliance notice stated that the complaint was lodged by the complainant on 13 July 2011. This is confusing because the compliance notice then proceeds to set out the steps which had been taken to resolve this complaint and these steps referred to the original meeting (of 15 April) and subsequent meetings held in May.

109. In his prepared witness statement Mr. Modiba explained that at the first meeting held on 15 April 2011, it was established that the Applicant was experiencing a "billing crisis" and that the Respondent could tell this as a matter of fact from the number of complaints which it had received and from the media publicity which the billing problems had received. He also stated

compliance notice is the same. It was clarified at the hearing with the Commission's witnesses that all the compliance notices refer to the same procedure.

81 In the case of the Diamond complaint, the complaint was received by the Respondent on 1 April 2011 and forwarded to the Applicant on 9 May 2011. The Pieters complaint was received on 11 April 2011 and forwarded to the Applicant on 9 May 2011. The Dixon complaint was received by the Respondent on 5 May 2011 and forwarded to the Applicant on 16 May 2011. These complaints could therefore have been part of the dossier of complaints which were forwarded to the Applicant on 14 May 2011 although only Dixon appears on the list of names which was attached to the letter marked Annexure E. This list also contains the complaint from Bernard Steyn although the compliance notice issued in respect of Bernard Steyn states that the complaint was received by the Respondent on 2 June 2011.

that the Applicant's failure to adhere to the time lines which were agreed upon at that first meeting constituted an "illegal act on the part of the Commission".[82] He refers to a "desktop investigation" carried out by the Respondent and argues as follows:

> *"If all what it takes for the Commission to come to such a reasonable conclusion (that a breach of the Act has taken place) is a desk top investigation which does not require any field work or going to the premises of the Applicant or calling for documents or applying for search and seizure, then it is for the Commission enough to issue a compliance notice".*

110. Ms. Moilwa also gave evidence in this regard and explained that the reason why the meeting held on 15th April was included in all the compliance notices was because on that date the "super structure" of how to resolve the complaints was put in place.[83] The discussion which took place during that meeting was intended to set a process in place for the resolution of all the complaints which the Respondent received regarding the Applicant, even the complaints which were "received after 15th April or even after June and so on because we were making reference to the standing arrangement concerning all the complaints that would come to the Commission after the meeting of the 15th of April".[84]

111. The compliance notices state that the Applicant is engaged in prohibited conduct because it has contravened schedule 2 (8), section 48 (1) (a) and section 54 (1) (a) and (b). In order to demonstrate the difficulties faced by the Tribunal when assessing the legality of the compliance notices, the relevant sections are discussed.

SCHEDULE 2 (8)

112. The Act came into operation on 1 April 2011 and on that date certain existing statutes were repealed. Under this repealed legislation certain conduct was prohibited. In order to give the

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82 Although the statement refers to the commission here, it is assumed that this is a mistake and that the witness intended to refer to an illegal act on the part of the Applicant.

83 Page 103 of the transcript 23 February 2012.

84 Ibid.

Commission the power to investigate conduct which was governed by this repealed legislation schedule 2 item (8) was enacted. This transitional provisions reads as follows:

> *(1) Despite the repeal of the repealed laws, for a period of three years after the general effective date the Commission may exercise any power in terms of any such repealed law to investigate any breach of that law that occurred during the period of three years immediately before the general effective date.*
> *(2) In exercising authority under subitem (1), the Commission must conduct an investigation as if it were proceeding with a complaint in terms of the Act.*

113. From this it can be seen that schedule 2 item (8) is an empowering provision which gives the Respondent the power to investigate breaches of certain laws, notwithstanding the fact that those laws have been repealed. It is not possible for the Applicant to contravene this section and the fact that the manner in which schedule 2 item (8) was referred to in the compliance notices was incorrect was, in the Tribunal's view, correctly conceded by the Respondent.[85]

114. In the compliance notices, where it was necessary to rely on the transitional provision because the conduct arose before the Act came into operation, the Respondent should have identified which section of which repealed Act it was relying upon. Then in the section headed, nature and extent of the non-compliance, it should have set out the details regarding how the Applicant had contravened the section.

115. In its heads of argument, the Respondent attempted to rectify the problem which it had conceded (as set out in 115 above) by referring to the Consumer Affairs (Unfair Business practice Act).[86] This was one of the Acts which was repealed by the introduction of this Act (the CPA). However, it must be noted that the Consumer Affairs (Unfair Business Practices Act) was an enabling Act and did not on its own prohibit anything. Unfair business practices per se were not prohibited – it was only after a particular practice was identified, investigated and the Minister of Trade and Industry promulgated regulations relating to that particular practice that it became an unfair business practice. The Consumer Affairs Act empowered the

[85] Page 2 of the transcript 23 February 2012.
[86] See also page 3-5 of the transcript 23 February 2012.

Consumer Affairs Committee (Cafcom) to investigate unfair business practices and to make recommendations to the Minister. Therefore before the Respondent can rely on the now-repealed Consumer Affairs (Unfair Business Practices) Act, it would have to identify the particular regulations under which a particular business practice had been declared unfair. The Tribunal is not aware of any regulations which govern the conduct which the Respondent was concerned about.

Section 48 (1)(a)(i)

116. This section of the Act reads as follows:

A supplier must not offer to supply, supply or enter into an agreement to supply any goods or services at a price that is unfair, unreasonable or unjust.

117. The Respondent has relied on this section in order to argue that the use of estimates when it comes to establishing what consumers owed for their consumption of electricity and water constitutes an unfair price or an unfair practice.

118. The opposing affidavits of the Respondent contain the following allegations:

> *"… charging on the basis of estimates is inherently unfair, as it results in inflated amounts.*[87]
> *The CPA prohibits unfair dealing, such as billing on the basis of estimates. Such billing is not transparent and very often far removed from the real billing amounts.*[88]
> *I refer the Applicant to the provisions of section 48 (1) (a) (i) which clearly prohibit unfair business practices and argue that charging on the basis of estimated meter readings amounts to an unfair business practice.*[89]
> *The complaints received by Respondent relate to unfair billing in the sense that estimated meter readings are used to generate bills which Applicant's customers are required to pay; or that inaccurate readings which result in inaccurate invoice amounts are used by Applicant in billing its customers. These constitute unreasonable, unfair or unjust bills by Applicant as they are based on conjecture and not accurate data.*[90]*"*

87 Ad paragraph 26.1 opposing affidavit of Case No 2667 (page 35 of the indexed record).
88 Ad paragraph 27.2 opposing affidavit of Case Number 2667 (page 36 of the indexed record).
89 Ad paragraph 44.2 opposing affidavit of Case Number 2667 (page 43 of the indexed record).
90 Ad paragraph 14 opposing affidavit of Case Number 2801 (page 205 of the indexed record).

119. There are two difficulties with this:

(1) the relevant section deals with an unfair price and not an unfair practice. The Respondent has not explained, in the compliance notices, how the use of estimates constitutes an unfair price; and

(2) the Respondent has concluded that the use of estimates per se is an unfair practice but it has presented no evidence to substantiate this conclusion.[91]

120. In addition, it appears from the evidence submitted to the Tribunal that the first time that the Applicant became aware that the practice of using estimates was being investigated by the Respondent was at the time when the compliance notices were received. The Applicant was therefore not given an opportunity to explain this procedure to the Respondent.

121. Before issuing the compliance notices the Respondent did not take into consideration the provisions of any other legislation or the by-laws which may impact on the practice.[92] The Act specifically makes provision for situations where the Act and other legislation govern a particular practice. Section 2 (9) provides that if there is any inconsistency between any provision of this Act and a provision of any other Act, the provisions of both Acts apply concurrently to the extent that it is possible for both Acts to apply. Where it is not possible for both Acts to apply, then the provision which extends the greater protection to a consumer prevails.

122. Before the Respondent could reach a conclusion that the practice of using estimates per se is a prohibited practice, the Respondent should have conducted an investigation into the practice. It may well be that there comes a point in time when the Applicant does not do a reading for a lengthy period of time or when estimates are clearly out of line with normal domestic consumption that the use of estimates becomes some kind of prohibited practice as specified

91 It must be noted that although in a number of instances the Respondent refers to an unfair practice section 48 (1) (a) governs an unfair, unreasonable and unjust price. The Act does not prohibit unfair practices generally rather it specifies in detail the conduct which is regarded as prohibited conduct.

92 In its replying affidavit, the Applicant indicates that the Local Government: Municipal Systems Act 32 of 2000 as well as certain municipal bylaws apply to this practice (see para 32 of the replying affidavit of Case No 2667 (page 310 of the paginated record)

in the Act. However, these issues have not been explored by way of an investigation by the Respondent and it has not been established whether such conduct amounts to a contravention of some previous repealed legislation or of the Act. The Tribunal is unaware of any legislation or regulation which specifically prohibits the use of estimates.

SECTION 54(1)(a) and (b)

123. Section 54 (1) (a) and (b) reads as follows:

> *"When a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has the right to –*
> *(a) The timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of the services;*
> *(b) The performance of the services in a manner and quality that persons are generally entitled to expect."*

124. The difficulty the Tribunal has with this section is how to relate the compliance notice complaints to this particular section.

125. At the outset it appeared that the conduct which the Respondent was complaining about was the Applicant's failure to provide consumers with accurate accounts or its failure to provide accounts at all.

126. This is certainly the interpretation which the Applicant has placed on the compliance notices when it refers to section 54. In its founding affidavit the Applicant states as follows:

> *"…. The complaints received by the Respondent are not that the Applicant has not provided services of a sufficient quality or in a timely manner. The complaints, properly characterized, are that the invoices which the Applicant has presented to complainants allegedly do not accurately record the number of units of electricity or water consumed or that accounts for services rendered have not been received. There is no complaint about the quality or timeliness of the services which the Applicant supplies. Water and electricity, to which the complaints relate, are in any event not services but are defined by the CPA as goods. Section 54 is accordingly of no application to water and electricity."*

127. It subsequently became obvious from the Respondent's replying affidavit and even more so during the hearing, that the main complaint against the Applicant was its failure to deal with consumer complaints timeously or at all. This, the Respondent argued, meant that the Applicant had failed to provide a proper service to consumers. It was therefore not so much that the Applicant had provided incorrect statements, or failed to give rebates or rates certificates, it was that the Applicant had failed to deal with these problems when consumers lodged their complaints. This is not clear from the compliance notices themselves.

128. Lengthy argument was provided by the Applicant as to why section 54 did not apply to the Applicant's complaints handling process. This had to do, to a large extent with the definition of service, the definition of transaction and the application of the Act as set out in section 5. Because of the ultimate decision of the Tribunal, the Tribunal will not decide this point suffice to say that this is an issue which is worthy of extensive research by the Commission.

129. What is clear, however, is that

a. the compliance notices do not set out that this was the actual prohibited conduct which the Respondent was concerned about; and

b. the Applicant was never informed that it was being investigated for contravening section 54[93] and that its failure to adequately resolve consumer complaints within the time period specified by the Respondent was regarded as prohibited conduct by the Respondent. It was never presented with the facts regarding each complaint and therefore it was never given an opportunity to ascertain and explain why the resolution of certain complaints was taking an inordinately lengthy period of time. In other words the Respondent failed to conduct an investigation into whether by not responding to

[93] It is accepted that Ms. Moilwa gave evidence that the Applicant was informed of possible sections that affect the work of municipalities and she said that section 54 was emphasized (evidence relating to the meeting held on 15th April 2011) but her evidence does not go as far as informing the Applicant that it is under investigation for contravening section 54 and that this is regarded as prohibited conduct by the Respondent. Clearly at this stage the parties were attempting to resolve the disputes.

consumer complaints within a specified period or within the period set out in its own by laws or within a reasonable time, the Respondent was engaged in prohibited conduct.

CONCLUSION

130. The essential question which this Tribunal must consider is whether the Respondent should have conducted an investigation into each complaint before it issued a compliance notice.

131. In these matters, it is clear that the Respondent, based on its previous dealings with the Applicant and the meeting held on 15 April 2011 assumed that the facts as presented by the consumers were correct, and it issued compliance notices based on the averments of these consumers without establishing for itself that the facts were correct.

132. Given the fact that the Applicant has indicated that it has resolved the complaints, it could be argued that it is clear, that even without an investigation, the consumers had valid complaints.[94] However, an investigation is not only important in order to establish that the facts as averred by consumers are correct, an investigation is also important in order to measure those facts against the Act. It is only when the facts are measured against relevant sections of the Act that it can be ascertained that the Applicant was engaged in prohibited conduct.

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94 It is noted that the Applicant has argued that certain facts as alleged by consumers were not correct but that it was never given an opportunity to make representations regarding these incorrect facts. In many instances, for example, consumers alleged that they had made numerous representations to the Applicant but had not received any response. No details regarding these representations appear in the documents although in some instances reference numbers are provided. The Applicant alleges that because it has not received details regarding these complaints it has been unable to follow them up in order to establish whether the consumers are correct or not. See for example para 20.9.1 of the Applicant's replying affidavit Case No 1667 where the Applicant states as follows:

> *The respondent states in paragraph 3.2 of the relevant compliance notice that Mr Elliot contacted the applicant to resolve his complaint and was assigned a reference number, only to be later told that the reference number did not exist. The compliance notice does not state what that reference number was nor when Mr. Elliot contacted that applicant nor how he did so. (the Applicant states that it has email addresses, a call centre and 47 offices where residents can raise queries or lodge complaints) In those circumstances we have been unable to ascertain whether a complaint was received from Elliot concerning this matter,*

133. It must also be noted that the Act clearly defines prohibited conduct. Consumers may have legitimate complaints against suppliers and may be able to take action against suppliers in terms of the law, whether that law be the Act, the common law or some other legislation, but it is only when conduct constitutes prohibited conduct as defined in the Act that the Respondent may issue a compliance notice.[95] The compliance notice must also (in terms of section 100(3)) provide details regarding the nature and extent of that non-compliance.

134. The Respondent, in both its affidavits and through oral evidence provided quite graphic evidence of the problems which the Applicant is experiencing and of the level of frustration faced by consumers. The Tribunal accepts that this is an extremely difficult situation for all concerned, particularly for consumers and the Tribunal is mindful of their stress and frustration. Mr. Modiba in his evidence explained that because of the number of complaints it was necessary to simply do what he called "a desk top investigation" and also because the Applicant appeared to be dragging its heels it was necessary to issue compliance notices. It is clear from his evidence that compliance notices were issued because certain matters were just not getting resolved fast enough.

135. Given the level of consumer complaints and the fact that many of these complaints were resolved following the intervention of the Respondent, it is quite tempting to accept the process

[95] This can be compared to the situation which prevailed under the previous legislation namely the Consumer Affairs (Unfair Business Practices) Act, Act 71 of 1988. The Consumer Affairs Act had a very wide definition of an unfair business practice which empowered the Minister of Trade and Industry to prohibit any conduct which was found by the Consumer Affairs Committee (Cafcom) to be prejudicial to consumers. This Act came under severe criticism and was alleged to be unconstitutional because it did not specify exactly what constitutes an unfair business practice. See for example *Janse Van Rensburg No v Minister of Trade and Industry* 2001 (1) SA 29 CC. See also Woker "Business Practices and the Consumer Affairs (Harmful Business Practices) Act 71 of 1988" 2001 (2) *SA Merc Law Journal* 315. One of the reasons why the Consumer Affairs Act was replaced by the Consumer Protection Act was to specify in some detail the conduct which was prohibited. See Woker "Why the Need for Consumer Protection Legislation: a Look at Some of the Reasons Behind the Promulgation of the National Credit Act and the Consumer Protection Act 2010 (2) *Obiter* 217. This means therefore that before an entity can be found to have engaged in prohibited conduct, its conduct must fall squarely within the conduct prescribed by the Act.

followed by the Respondent and to insist that the Applicant abide by the compliance notices. But that cannot be how things are done or how they should be done.

136. South Africa is a constitutional democracy subject to the rule of law. The legislature has given the Respondent fairly extensive powers to issue compliance notices and a failure to abide by a compliance notice could lead to the imposition of an extensive penalty. For this reason the legislature has also established a process which must be followed before a compliance notice can be issued and the compliance notice must contain certain information which can only be obtained through investigation.

137. The Tribunal is of the view that the Respondent should have conducted an investigation into each complaint before issuing a compliance notice for the following reasons:

a. Section 72 sets out a number of different options which the Respondent may elect to follow when a complaint is received. This applies regardless of whether a consumer or the Respondent initiates the complaint and it is unclear why the Respondent is of the view that there is a distinction between the situation where a consumer lays a complaint and the Respondent itself decides to initiate an investigation. It seems that the Respondent's interpretation of the Act is incorrect on this point.

b. Although section 72 uses the word "may", it concludes with the words 'in any other case' which is a clear indication that the Respondent chooses from one of these four options when it receives or initiates a complaint. It must be noted that this approach is supported by the Respondent itself in the compliance guidelines which it has published.

c. Section 73 states as one of the outcomes of an investigation, that the Respondent may issue a compliance notice in terms of section 100. This compliance notice is issued after an investigation is concluded.

138. Section 100 states that the Commission may issue a compliance notice to a person whom the Commission on reasonable grounds believes has been engaged in prohibited conduct.

139. If all these sections are read together, it seems to the Tribunal that the legislature intended that a compliance notice should be issued after an investigation was completed because only after having conducted an investigation, can an investigator have reasonable grounds for believing that prohibited conduct is involved. If an investigation is not conducted, then the compliance notice will be based on unsubstantiated allegations and assumptions. The Respondent will also not be able to supply details relating to the nature and extent of the non-compliance.

140. It is accepted that the Respondent was faced with an unprecedented level of complaints and that it felt that it had to take drastic action, however this does not mean that it can deviate from the procedure set down by the legislature. In this regard it is useful to refer to *Democratic Alliance v The President of the RSA & others* [96]which dealt with the right of the President of South Africa to appoint the National Director of Public Prosecutions. In making this appointment, the President had to comply with the prescripts of the Constitution and s 9(1)*(b)* of the National Prosecuting Authority Act 32 of 1998. Section 9(1) (b) of this Act, provides that any person to be appointed as National Director, Deputy National Director or Director must be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.' The court held that the President did not undertake a proper inquiry into whether the objective requirements of section 9(1) (b) were satisfied before he made a particular appointment. It did not assist the President that he knew the candidate long before he was called upon to apply section 9 (1) (b). The court held that when the President was called upon to make the appointment he was at that stage called upon to make an objective assessment of the qualities and could not rely on his previous knowledge.

[96] (263/11) [2011] ZASCA 241 (1 December 2011)

141. In the same way it could be argued that when the Respondent receives a complaint from a consumer, that complaint has to be objectively assessed and the fact that the Respondent knows that the Applicant is experiencing difficulties and that many consumers are complaining does not mean that it is entitled to cut corners. It is understandable that this will place a very heavy burden on the Respondent but to use the words of the Supreme Court of Appeal in the abovementioned case: "*To ensure a functional, accountable constitutional democracy the drafters of our Constitution placed limits on the exercise of power. Institutions and office bearers must work within the law and must be accountable. Put simply, ours is a government of laws and not of men or women*". [97]

142. Alternatively the Respondent could have elected to investigate certain practices which were being adopted by the Applicant such as the practice of using estimates as well as its complaints resolution practices. It could then have assessed whether these practices were being conducted contrary to the provisions of the Act. Consumer complaints could then have been used as evidence that certain unacceptable practices were being adopted or that certain prescribed practices were being ignored. This would have resulted in far fewer compliance notices being issued. However it must be stressed that before such compliance notices are issued, the conduct being complained of must fall squarely within the Act as prohibited or required conduct and the person being investigated must be given an opportunity to respond.

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

a. the Respondent did not follow the processes and procedures as set out in the Act which govern the investigation of complaints prior to the issuing of compliance notices; and

b. the compliance notices are defective because they do not comply with the requirements of section 100 (3).

[97] At para 66.

144. In the result the Tribunal makes the following order:

The eleven compliance notices in NCT/2667/2011/101(1)(P) and the 34 compliance notices in NCT/2081/2011/101(1)(P)are hereby cancelled.

DATED THIS 30th DAY OF MARCH 2012

[signed]

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Prof. T Woker
Presiding Member.

Mr. F Sibanda and Ms. P Beck concurring.