national consumer tribunal

IN THE NATIONAL CONSUMER TRIBUNAL, HELD AT PRETORIA

Case No : NCT/08/2008/ 140(1)(P)

In the matter between

The National Credit Regulator	Applicant
and	
Chatspare Pty Ltd	Respondent'

ORDER AND REASONS FOR ORDER OF THE NATIONAL CONSUMER TRIBUNAL

The applicant

1. In this matter the NCR used S140(1)(c) of the National Credit Act ('NCA') to act as pro forma complainant in respect of the complaints of seventeen individuals. No complaint purported to be (or was argued to be) a complaint raised or pursued by the NCR as its own complaint in terms of s136(2) of the NCA.

The respondent

2. It is common cause that respondent was at all relevant times a registered money lender as contemplated under the Usury Act, Act 73 of 1968.

The complaints

3. Sometimes the positions of complainants differed but there were some shared legal questions, most of which were argued separately on 29 May. On that date the NCT abandoned the Mabusela claim. All other matters were dealt with on 17 June by which date settlement had been reached with everyone except Ms Gunpath.

Regularity of the application

4. It was necessary for the respondent to seek condonation for the late filing of affidavits. Applicant did not oppose that relief, so abandoning its stance in the papers. Condonation was reluctantly ordered on 17 June as appropriate. Condonation and rectifying was not sought for other non compliances with the NCT rules but in the interests of finality nothing is made of that.

The pre trial conference

5. A minute was created. One aspect calls for comment.

   The parties were informed in mid April of the dates of a pre-trial conference (15 May) and of 26 May as first day of hearing. However, at the pre-trial conference the unavailability of counsel for 26 and 28 May was announced. The excuse for double dating was the expectation that in terms of Tribunal Rule 17(5)(f) the trial date would be determined only at the pre trial conference. It is not clear that counsel was wrong. Also this rule leaves confusion rather than clarity. The situation was resolved by determining amended dates. It must therefore be left to another occasion to decide whether a pre-trial conference needs to be called with no greater justification, and perhaps despite urgency, than to determine dates of a hearing. The issue seems also to affect consent orders.

Ex post facto authority (jurisdiction) of the National Consumer Tribunal ('NCT').

6. The complaints and the grounds therefore arose before the structure-creating parts of the National Credit Act, 2005, came into operation on 1 June 2006. (GN 28824 of 9 May 2006). That included schedule 3. Paragraph 10 of that schedule has the broad effect that for three years a pre-NCA dissatisfaction may be handled by the NCT as if it were a 'complaint', a concept of the NCA. Thus the validity of the complaints are determined without reference to the NCA; the process of adjudicating validity is (actually 'can be') governed by the NCA; the appropriate relief is dependant, as will be explained, on both the NCA and the Usury Act.

The basis for relief

7. Most orders sought against respondent substantially hinge upon the arising of breaches of one or other 'condition' of one Exemption Notice issued under the Usury Act: GN 713 of 1 June 1999 'GN713'. GN 1407 of 8 August 2005 was (partially) relevant to two complainants. (The page preceding GN 22005 seems indicate that this was only a draft for comment

Changes since the replying affidavit:

8.1 Reliance on Mr Mabusela's dissatisfaction was abandoned and some complaints were settled by agreement. A consent paper was tendered.

8.2 Respondent admitted that all the contracts with complainants were loans.

8.3 Respondent claimed that cessions of insurance policies were outright and none was in securitatem debiti. At the hearing Mr le Roux, managing director of respondent, correctly confirmed that all cessions were in securitatem debiti.

8.4 Despite the replying affidavit, applicant correctly conceded that the NCT may receive hearsay evidence. That was also respondent's view.

8.5 At the pre-trial conference it was directed that certain persons be summoned so that, if the tribunal should decide that it may and should hear oral evidence, the witnesses are available. Due to the settlements and the evidence of Ms Gunpath and Mr le Roux (the only oral evidence) there was a fading of the appropriateness of calling other witnesses e.g. about the approval or not of the contract forms used by the respondent.

<u>Arguments about the law:</u>

9. Inter alia because this is the first matter in which those matters arise, argument was at the pre-trial conference requested on various matters, including some with perhaps obvious answers. The directive to present argument on 29 May on the following issues was determined by what the parties seemed to raise on the papers; without knowledge (Tribunal Rule 14 was not honoured) of what else respondent may choose to rely on; and without knowledge of what the views of the two non-presiding members of the tribunal would be. The following topics were stated:

a. The extent to which oral evidence is required, permissible and appropriate. Counsel correctly agreed that oral evidence may be called if needed to justly and accurately resolve a dispute of fact. There was no criticism of the directive to summons witnesses on(i) the issue whether a contract was explained to the complainant (ii) the issue of approval by the MFRC of contract forms. ('MFRC' is a nebulism for Micro Finance Regulatory Council.)

b. Why interest on repayments should run at 15.5%.
This was eventually not argued but clearly the rate agreed to by the consumer was not made applicable by contract or by law to the recovering of overpayments. It is at best a matter of mora debitoris.

c. The meaning of paragraph 10 of the 3rd schedule to the NCA including the words 'under the Usury Act' and 'under any previous Act';

d. The meaning of the word 'conditions' in the exemption notices;

e. Whether a breach of a 'condition' means that only the relevant contract is governed by the Usury Act or whether it also affects other (1) future or (2) past contracts;

f. What rights Respondent had to debit or to claim administration fees and penalties;

g. Whether it is so that no order for costs can be made. This was agreed to be the case.;

h. What order is authorised and appropriate on an overview of the whole case before the tribunal (including what 'express' authorisation exists for an administrative penalty).

9(1) What is the meaning of,

9.1.1. parate executie

9.1.2 in duplum

9.1.3 pactum commisorium

9(2) how does each operate at common law, and

9(3) how does each operate under the NCA.

This is a terrain that created tantalising questions if a decision had to be made about Gunpath on the basis that the Exemption notice applied to her contract(s). They really find no room in this case where the Usury Act itself applies.

<u>The law as it defines the position and powers of the Tribunal and the considerations that binds or guides it.</u>

<u>The tribunal's expressed and implied powers</u>

10.1 In respect of the powers of the Tribunal and its approach to those powers, Counsel for NCR submitted that the NCT is an administrative body. Whether that is so in some of its tasks or in all thereof does not affect anything in this matter. It is sufficient to point out that at least some of the disputes call for an approach that justifies being called judicial.

10.2 Applicant's Counsel submitted that the Tribunal is an organ of state. That can be taken to be true in so far as the Constitution is concerned. Cf AAA Investments Pty Ltd v MFRC 2006 (2) 1255 (CC). However, in the exercise of his or her duties any individual member of the Tribunal is in no way under the control of the state and to that extent the one element of the Constitutional definition of an 'organ of state' is absent. A Tribunal member is obliged to act in accordance with the rules of natural justice and that includes applying the law as honestly understood. It excludes being influenced by what the State prompts or prefers.

<u>Powers in respect of matters that arose under repealed legislation.</u>

11.1 The third schedule to the NCA contains 'transitional provisions'. The bottom line is to create results that would have arisen in the absence of the schedule.

Observing that such features appear elsewhere in the Act, the third schedule should not be presumed to be free of stating the obvious, sometimes with repetition. That adds uncertainty in the sense that it must also be assessed what is recapitulation and what is really intended to effect change.

11.2 The NCA basically creates no true retrospectivity. In Uitleg van Wette the learned author (Dr L C Steyn) in his scientific analysis of the principles of interpretation, points out that when a statute comes into operation there is no true retrospectivity in so far as that which has arisen in the past is not affected.

11.3 That distinction makes for an easy pattern. What was created in the past survives unaffected; what has yet to come to pass is governed by the new statute. That is the line taken up by the Interpretation Act, Act 33 of 1957. See S12(2) and S11. That background remains for interpreting any uncertainty in the NCA but the Third Schedule itself also shows the said basic pattern.

Paragraph 4(1) of the Third Schedule states that the Act applies to an existing 'credit agreement' (if it would have been under the control of the NCA if it had been a new contract). The impact is detailed along the lines:

(a) what has arisen remains valid (see paragraphs 6 and 7) and para 5 provides for some special (qualified) governance by the pre-existing law. See also para 10. Inter alia paragraph 4-(2) of the schedule takes care that contractual rights are not affected by new requirements or substantially amended requirements, specifically 'reckless credit'.

(b) As a consequence of the generality of paragraph 4(1) [and see the table in para 4(2)] it does affect what is still in the future like becoming over-indebted, rendering of statements of account, cancellation, disputes about bookkeeping entries.

The distinction between ungoverned past events and future events is qualified to a very limited extent and where it occurs, it is because of a special paragraph and not because of paragraph 4(1). Thus paragraph 4(2) qualifies the 'common law approach' inter alia in respect of pawnbrokers and in respect of accounts. Secondly, future amendments of old contracts may bring considerations of reckless credit and about incidental credit into play and, in terms of paragraph 4(5), even the whole Act.

11.3 One transitional measure that does deviate is paragraph 10. It is that paragraph that is now relevant.

In wording and in setting, paragraph 10 does not deviate from the scheme of distinguishing what is in the past from future events that arise in relation to past facts. However, It modifies the continued enforcing of the law that governed (and governs) past events by, for present purposes, bringing the NCT onto the scene alongside courts. The NCT is authorised to deal with dissatisfactions in regard to contracts falling under the Usury Act (or under the other repealed legislation) that were concluded before the repeal. The gist of paragraph 10(b) is that any such matter is to be handled as if a 'complaint'. That concept in the NCA stands in (some) technical contrast to 'offence', 'prohibited conduct' and 'contravention'.

Para 10(b) does more. Apart from introducing a type of three year prescription method, it implicitly accepts (cf paragraph 4(1) of the schedule) that the NCT can make any order within its powers under S150. Therefore a limitation was required. The only S150 orders than can be made are those that a court could have made under repealed legislation. That was clearly intended to avoid greater exposure than what existed prior to the NCA.

11.4 The NCT is not by that provision made a court or given the powers of a court. Its powers are those of (mainly) S150 but they are subjected to a limitation. The reference to a court is the creation of a standard (measure) for limitation. It is not the source of NCT powers and does not make the NCT some type of court.

11.5 An order for the repayment of overpayments, is authorised by the NCA and it could have been made by a court, principally under S7 of the Usury Act.

12 The NCR runs into trouble with many of the other orders that it seeks. Thus a court could not under repealed legislation declare an activity to be 'prohibited conduct' which is technical concept newly created in the NCA.

Other orders

13 Some other orders sought came to grief at least by reason of the fact that the settlements precluded a finding based upon proved facts that respondent made a 'practice' of 'splitting contracts'. Only a few of the 17 complainants had such potentially split loans and it is not known what percentage of the respondent's business that was. As to interdicts, there is the uncontroverted fact that respondent has ceased making loans. That destroys a justified fear of future business.

An administrative penalty

14.1 The preceding comments have been made in awareness of an argument from the NCR about the imposition of an administrative fine. If the NCA had stated in a notional section that for the contravention of that section an

administrative fine could be imposed, any logic of human understanding would know that the authority exists where that authority is created and not where it is not created. The lawmaker's intention stops where words no longer carry it. Lawyers recognise human logic but find it convenient to additionally use shorthand for one form of that reasoning, calling it interpretation ex contrariis. The legislature, in line with the instances in the NCA of 'making sure', emphasised the outcome of such reasoning in section 151 by using the word 'only'. It, unnecessarily to ordinary interpretation, hammered the point in by stating that an administrative fine is authorised only when it is '<u>expressly</u>' authorised.

S151(1) reads: 'The Tribunal may impose an administrative penalty only in the circumstances expressly provided for in this Act'

14.2.1 There is no provision for that penalty in 'this Act'.

142.2 Counsel for the NCR ignored all the normal indicators and, conceding his inability to point to a specific provision (express or otherwise), pushed the argument that there is provision because a court could have imposed a penalty under the repealed legislation. Linked to this was the view that reading such authority in into the NCA, is necessary for effectiveness of the NCA.

14.2.3 The latter argument is wrong. Even if for some reason such a power was sometimes necessary (a contention that would not be valid), it is for the legislature to decide what remedy is chosen for what circumstances and how strong the medicine should be. On counsel's argument the Tribunal will be treading water without knowing where there is firm ground.

14.2.4 The first argument ignores differences in order to build towards a broad (unexpressed) commonality.

The NCT comes to its conclusion on papers (oral evidence being permissible but not the normal method). The 'complaint' can be expressed in a laymen's undefined narratory style. There is no opportunity to simply deny and so put the NCR to proof. Opposing affidavits are obligatory for an 'accused' respondent. There is no right to cross-examine the NCR's complainant - who may even not be a deponent to any affidavit. Proof on a balance of probabilities is adequate (S167).

Under the Usury Act (there is no need to involve the other repealed legislation to point to differences) a penalty could be imposed only in a process initiated by a defining charge sheet; a mere plea (of not guilty) would require the prosecution to call evidence to prove its case; the defence need not give evidence at all; the defence could cross-examine witnesses to demonstrate unreliability; and, above all, the court would have to have no fair doubt about guilt.

14.3 In the event the NCA which does provide for a small number of few offences (and a method to deal with that, the ordinary criminal process) could not have had the criminal law penalties of previous legislation in mind when it formulated S151. If it had, the NCA's creation of punishment beyond 'offences' may well be unconstitutional.

[In passing it may be noted that GN1407 did create punishments. Some of the distinguishing features mentioned above would be lacking in a comparison of the NCA with the Exemption notice. But those penalties would be imposed by the MFRC and not by a court. A power to impose an administrative penalty that is imported by reliance on the previous regime would therefore run head-on into the limitation of paragraph 10(b): Despite S151 the Tribunal can in pre-NCA cases only make an order that a 'court' could have made.]

14.4 Counsel's argument does not lead to a conclusion that influences the conclusions stated in paragraph 14.2.1 above.

15 The exemption notice(s)

15.1 The NCT is bound by the judgment in Lurama Vyftien (Edms) Bpk Ltd v The Minister of Trade and Industry, case 22125/99 (T). Taking that judgment to mean that GN713 was valid but without any limit at all on the cost of borrowing, the question in the case of the present complainants would be whether the Exemption Notice did or did not apply.

15.2 GN713

GN713 states that (subject to exception of three sections) the Usury Act does not apply to the defined (paragraph 1-2) category of lending transactions 'on the conditions set out in the Schedule'. Para 2 creates the conditions that the lender is duly registered and, secondly, 'shall at all times comply with this notice'. 'This notice' in the first place consists of five paragraphs related to obligations but it is also defined as including 'annexure A' which has become known as the Minister's rules.

15.3 In respect of GN713 counsel for both parties were correctly in agreement that 'condition' is not used in its inaccurate sense of 'term'. Breach of a condition as such creates an end to exemption. In view of the consequences of an alternative view and strengthened by the statement in para 3.2 that the Usury Act shall apply because of failure to comply 'in respect of such money lending transaction' counsel also correctly agreed that the exemption is lost only in respect of a contract where a breach of conditions occurred without affecting the exemption of other loans of the lender. It would not help Gunpath to prove a breach of a condition in the loan of another party. A side-effect is that settlement of another complaint does not prejudice Gunpath.

15.4 The same approach should apply in respect of GN1407. That GN1407 is materially different from GN713 includes the fact that GN713 visited breach of a term of the Exemption with the consequence that the exemption did not arise or fell away. The more expansive GN1407 has only penalties only in mind. But clearly a penalty for a breach in respect of one contract would not carry consequences in respect of a distinct loan.

The history has no meaningful bearing upon understanding anything. GN1407 expressly repeals GN713. That limits the room for regarding GN1407 merely as an amendment of terms of 713. Cf para 4 of the transitional arrangements.

<u>16 The inquisitorial power of the NCT</u>

TPM at the pre-trial conference was of the view that the NCR had not covered all grounds of complaint (such as those raised by or on behalf of complainants), not all relevant facts (such as that surrounding complainant Jansen) and not all relevant financial information (to make calculations possible.) Directives to gather evidence were given accordingly. Argument about the legal basis for those directives and the soundness of the exercise of the discretion was called for. In the end these directives made no real difference to the hearing (but perhaps helped towards some settlements). The reasons for the directives are stated to comply with S142(4) of the NCA. The approach to issuing directives was that that initiative was appropriate with a view to exercising the inquisitorial role of the tribunal.

The approach of the NCT should be that subject to the statute, the NCT is guided only by rules of natural justice. In that context the object and test for using the inquisitorial power is not to pursue a point against anyone who is not a consumer as if he were an enemy. The inquisitorial power exists to get to the bottom of facts that are material to reaching a correct finding on a properly raised complaint.

It is a related question to ascertain what the complaint is that was put before the NCT. That must depend on what is stated in the papers. It requires focussed attention from and definition by the NCR whenever the NCR is the applicant.

It so happens that in this case the NCR application was often not clear about what complaint had been put forward. Unless the NCR uses its power to be an originator of a ground of complaint, the Tribunal's inquisitorial powers do not extent to dealing with a complaint from a consumer that the consumer did not raise. The inquisitorial power refers to how a dispute is approached; not with furthering additional grounds. Allowing the NCR to make of facts or statements what it would like, may entail overshooting the actual complaint. (Such overshooting was

recognisable e.g in the invoking of the duplum rule.) Going beyond the complaints on the basis of what legal representatives wish to make of the papers, can cause unfairness, this time unfairness to the respondent. Where that principled approach is less satisfactory to a party, an amendment must be sought so that the party stays within the law. That may be readily allowed if a point is seen that is based on facts that were sufficiently ventilated. There is after all a protective policy that is pursued by the NCA.

In the case of Ms Gunpath there was e.g. no raising of the point that 'illegal collection methods' were used.

Irregular evidence.

17 It was argued that all evidence from Mr Whale should be ignored as having been improperly obtained. He was appointed by the NCR as inspector. There were a number of appointments, each for a specific branch of respondent and each for a limited period of time. He in fact continued beyond the time limit and worked elsewhere than at the addresses mentioned in the appointments. Also by telephone.

Personally we believe that justice requires a need to get the truth that normally overshadows a defect in the manner of acquiring the knowledge. The dominance of justice against the self-interest (or interests) of a party or witness is not universally shared. It is therefore assumed that despite the wide discretion of the tribunal about what shall or shall not be received as affecting or potentially affecting its finding, there is room for excluding evidence at the expense of justice (also to complainants) because evidence was 'unlawfully' obtained.

The evidence of Whale conveys what the 17 complainants told him. (In some cases his hearsay evidence is the only evidence of a complaint to the NCR so that excluding the evidence of Whale will also exclude proof that a complaint was made and what the complaint was.) The so-called 'hearsay' part of his evidence does in fact not purport to prove the facts stated by a complainant except perhaps in so far as the documents identified by him provided proof.

The evidence, secondly, conveys what some managers of respondent told Whale. This is also hearsay but with an element of 'admission' of fact, in particular that respondent's practice was to handle requests for loans of more than R 10 000 by way of several written contracts spread over time, normally weekly. The purpose of presenting such evidence was to bolster the case that a practice was followed to avoid the limits of the Usury Act.

Such evidence would, in view of the informal methods of hearing that are permissible for the Tribunal and its discretion to decide what evidence in its

wide sense to admit (cf S142(1)(c) but ignoring tribunal Rule 27(2), be admissible even if given by someone who is not an employee of the NCR. It is not dependent upon any particular title or status. It is not dependent upon appointment as inspector.

The appointment as inspector is done by the NCR to give a weapon to obtain evidence. The weapon need not be given and if given need not be used. Access to documents or to information can be given voluntarily. Such cooperation may exist after the appointment as inspector has lapsed.

Respondent's counsel argued that the persons to whom Whale spoke were misled. There is no such evidence

The Tribunal therefore decided not to ignore Whale's evidence. The weight given to it is an independent matter.

18. To establish the purpose (and if need be a practice) of loan splitting, the evidence of Mr Whale could be relevant. There are other factors such as probabilities arising from the content of documents (obtained by Mr Whale as inspector or otherwise). However, the settlement of claims have left the specific circumstances of at least some complainants incompletely investigated. An example is that of Mr Jansen. It is his deceased wife who borrowed money. She being addicted to gambling, it may be that some or all of her loans were independent loans inspired by the regular desire to borrow yet again and not by any thought of the Exemption notice.

In the result it is only the Gunpath complaint where a finding can properly be made about 'unlawful splitting of loans.' One case, in the circumstances of the present matter, can not establish a 'practice'. Accordingly the prayers that relate to declarations about a 'practice' of the respondent must be refused.

19 Ms Gunpath

Whale's hearsay at best serves to show a degree of consistency in her version that she verbally gave the Tribunal at the hearing. But consistency need not be proved.

The outline of her story is that she wanted to borrow money from the respondent and she was asked for security. She had a R200 000 investment that she offered as security. Respondent's Manager in Polokwane enquired if she would be interested in selling her investment (a single premium policy) to respondent. She was offered R60 000 for it. She believed that it was worth more than the R 60 000 that respondent offered. She preferred to borrow R 40 000. Ms van Zyl of respondent's Polokwane office agreed. Gunpath understood that her policy would be ceded as security for the loan. Nothing more was explained except that the loan

would be on the basis of four loans of R 10 000 each that would be paid at about weekly intervals into Gunpath's bank account. Gunpath signed two documents at Polokwane. Two more (with the place of signature typed in a Polokwane) were posted to Gunpath who signed them at her home at Thohoyandou at the same time and posted them back together.

The four documents, with concededly some wrong details in Whale's affidavit, showed:

Contract no	date	amount	date of payment
PB 3251	27.10.04	10000	29.Oct
PB 3252	3.11.04	10000	5 Nov
PB 3259	11.11.04	10000	11 Nov
PB 3260	18.4.04	10000	19 Nov

The payment dates are derived from a document (M9.5) apparently created by Marais $ Alcock, presumably accountants.

There is no reason not to accept the statement of Ms Gunpath. Nor to doubt it. In fact, if that had been necessary, one picks up some indicators of correctness. The first two contracts bear numbers that do not fit easily into an office that probably does more than one contract per week. The last two contracts have consecutive numbers despite a purported interval of a week. There is practically precisely a week separation, in line with what was seen in contracts of other complainants and the information to Whale about respondent's policy.

Although that was not explained to Gunpath, the respondent's cut-off point for her and for others at precisely the point where the Exemption notice draws the line, is telling. It shows that the selection of the point was Exemption related.

20 Respondent's counsel argued that four contracts were not used in order to avoid applicability of the Usury Act (and thus in fraudem legis) but to come within the Exemption notice. That sounds true but the only suggested reason for striving to be within the terms of the Exemption notice, is to have the advantage thereof. That implies avoiding the limitations disadvantages of the Usury Act.

Counsel argued that there is nothing wrong with four loans, even if in quick succession, if a client who is informed that respondent only grants loans not exceeding R 10 000, decides to ask for four distinct loans. That may be correct in so far as it goes but that is not what happened in this case. The complainant asked to borrow R 40 000 and it is that request that was acceded to.

Counsel also argued that a party is fully entitled to adapt its policies and methods so that he moves within the Exemption notice. That is again true. However, what respondent did was inspired not by an abstract objective.

The chosen procedure was more than executing a policy that is followed for some business reason or other fair reason - either explained or suggested. The only reason for Gunpath's four contracts was to side-step the limitations on interest of the Usury Act. What was done was not the granting of four distinct request for loans; it was a method of handling a single loan contract for R 40000. The method was employed in circumstances where there was no other reason for not immediately (subject to cession of the policy) contracting for R 40 000 than to contract free of Usury Act limitations.

The finding is made that the signing of four loans was a method unnecessary for the handling of a single granted R 40 000 loan, and was inspired only by the object of avoiding applicability of the Usury Act.

In the context of the protection that the Usury Act seeks to create, the Exemption notice must be interpreted to apply only to loans bona fide not exceeding R 10 000 and not to the loan of R 40 000 to Gunpath, where the splitting had no function in regard to the loan relationship and had a function only in relation to avoiding the limitations of the Usury Act.

21.1 Strictly speaking that finding that the Exemption notice did not cover the Gunpath loan, makes in unnecessary to enquire about other reasons for application of the Usury Act. There are such reasons which serve as alternative justification for this Tribunal's order about repayment.

21.2 On Gunpath's accepted evidence, the contract was not explained to her. Paragraph 2.5 of the Minister's rules require that the lender must 'explain the essentials terms of the money lending agreement to the borrower <u>so as to ensure that the meaning and consequences of the agreement are understood</u>'. There was no evidence that an such an application was given or that Gunpath should have understood or was thought to understand the terms. (I have underlined some words to emphasise that in any event it is not every explanation that will do.)

21.3 It may be that paragraph 2.3 of GN713 was also breached. It requires a contract to 'clearly' reflect inter alia the rights of the lender. Respondent's stance in a letter in reaction to the complainants' complaints (and continuing up to the evidence of Mr le Roux), was that '(the complainant) has sold her policy to ourselves with the option to repurchase'. The policy was allegedly sold outright and the lender therefore had no remaining right to the policy or its proceeds. If respondents has such confidence in the meaning of the written document as creating a sale (with a conditional right to repurchase) there is an argument that the right of the seller to the policy was not clearly spelt out. The right of the borrower to return of the policy or the return of the policy proceeds beyond the amount of the borrower's debt, was not 'clearly' reflected as required by paragraph 2.3.

21.4 Requiring security of payment is not the introduction of a method of collection. Whether threats or intimidation or contravention of the Debt Collectors Act, Act 114 of 1998 or the like is of the same class as selling a policy without entitlement to do so but too cheaply, need not be decided. (In some cases the maturity of the policy caused payment to respondent.)

21.5 The finding has been stated that a breach of any term of GN713 is a breach of the conditions of exemption and so causes the Usury Act to apply to that contract.

22 The appropriate order is basically one of repayment of the cost to Gunpath that exceeds her debt. 'Cost' is for the moment used as a neutral word. How much is the excess?

22 1 On 17 July respondent's counsel made an open tender of R 19 900 without agreement of Gunpath that can not liquidate her claim.

22.2 What Gunpath owed must be calculated on the basis of the maximum rate of interest allowed by the Usury Act.

The calculation of maximum interest should be from the various dates on which payments were made to Gunpath irrespective of the finding that there was only one loan clothed into four documents. Up to 1 December interest ran for 32, 26. 20 and 12 days in each case on R 10000. The amount is easily calculated as 90 days on R 10000 at the prescribed maximum rate for a loan of R 40 000 (18% in terms of GN 110 in Gazette 25968 of 6 February 2004 was reduced to 17% in terms of GN 1100 in Gazette 26809 of 17 September 2004.). The amount of interest is R 419.18.

That amount was paid. Gunpath paid R1000, allocated as R 250 on each loan, on 2 December 2004. It reduced the debt capital debt to R 39 580.82.

Interest on that amount from 2 December 2004 to the 14th March 2005 (103 days) amounts to R 1898.79. On that date, the total debt was R 41 479.61. On 14 March 2005 Respondent received R 62 300 from SI Young or her predecessor That was R20 820.39 more that respondent was entitled to.

However, the contract provided for penalty interest. That must also be calculated at the maximum rate of 17% on 4 x R 500 as follows
On R 2000 from 2 January 2005 to 14 March (72 days)
On R 2000 from 1 February to 14 March (42 days)
On R 2000 from 1 March to 14 March (14days
The additional interest of R119.23 reduces the overcharge to R 20701.16.

That figure may be compared to respondent's tender of R 19 900. The parties were asked to submit their calculations. The basis for that calculation was stated in the request to the registrar and therefore presumably also to

the parties. However, the NCR, coming to R 19 625.40, produced a series of noughts. Respondent suggested total debits of R 1083.33 on the first loan and R 866.07 on each of the other three loans, producing a nett refundable amount of R 18 616.67 if the Usury Act applies. The respondent also did not explain how it calculated.

The maximum can not allow for 'administration costs' because it is not an item that was not contracted for and is therefore not on the scene at all.

The R 62 300 was received as quid pro quo for cession of the policy. Whether is it by way of set-off or another principle, the money was taken in hand as settlement of the Gunpath debt.

On the basis that the cession was given as security (whether so announced or in the form of at 'outright' cession (cf Alexander v Standard Merchant Bros Ltd 1978-4-730-W), it is clear that respondent has some accounting to do. It may be for the said excess or, alternatively for what Gunpath has in mind. In her belief that the policy was worth more than R62 300, respondent must account for the full value of the policy, probably as at 15 March. In that way she suffers no loss as a result of the sale of the policy too cheaply to friend or to foe.

One accepts that a sales agent or other factors raised high expectations with Gunpath. At times things may have been on course. But it is not known whether that was the case on 15 March 2005. By 15 March 2005 the cessionary had to pay R 96 528.78 as loan debt (as a result of Gunpath borrowing R 60 000 against the policy) in order to get cession. That plus the R62 300 purchase price creates some probability of a policy value in excess of R 158 000. That value compares with R 206 743 which it was agreed to be the amount paid out on maturity to S I Young a mere year later. On the other hand an initial investment of R200 000 grew to only R206 743 on regular maturity after five years. Respondent had not bound itself to wait beyond default before liquidating the policy and in March 2005 value depended inter alia on the performance of the underlying investments and the 'penalties' imposable for early redemption.

There would be a case of using the NCT's inquisitorial powers if Gunpath has a claim for more than the said R20 701.16 with which the NCT may deal. That must now be considered.

23 The actual terms of the contract document(s)

Taking document M5 as example, the document, having described itself as 'loan number PB3260', opens its statement of terms rather bluntly:

'Loan amount R10 000.00 + Interest R 17000 (TOTAL CHARGE OF CREDIT) = R 27 000 (TOTAL AMOUNT REPAYABLE). Additional interest being penalty interest will be charged on all overdue instalments at the rate of 10% per month. Nominal annual rate for the charge of credit (COC) 120% per year.'

The next frame reads:

'I declare that the abovementioned policy \ investment have been pledged (outright) to CHATSPARE Financial Services (Pty) Ltd for the purchase price of R 10000.00 provided to you or on your behalf. I reserve the right to repurchase the policy/investment for repayments of R500.00 NUMBER OF INSTALLMENTS 16 MONTHS FIRST INSTALLMENT AMOUNT OF R500.00 DUE ON THE 1 DECEMBER 2004 AND LAST INSTALMENT AMOUNT OF R 19 000.OO DUE ON 1 APRIL 2005 WHICH INCLUDES THE CAPITAL AMOUNT TOGETHER WITH 10% INTEREST THEREON PER MONTH. If in default or payment is more than 3 days late or not made on due date I will forfeit all rights to the said policy\investment and ownership will pass to CHATSPARE which will liquidate the policy and refund client the balance.'

After stating further terms and information, the document was signed by Gunpath as 'borrower.'

25 Parate executie and pactum commisorium

The document unsuccessfully attempting to parade as a sale, is a loan for which security was given. It states that in a situation of (inter alia) default, an agreed result will affect the policy. However, the contract could not arrange for two mutually exclusive alternatives. The policy either purportedly emerges out of the cocoon to stand as ceded without qualification as respondent's property or it retains the role of a 'pledged' asset, respondent being obliged to liquidate the policy. The former is a pactum commissorium and would be void. (**Graf v Buechel 2003-4-378-SCA.** The latter is a term for parate executie and would be valid as it does not affect immovable property.

The last sentence of the portion of the contract that has been quoted justifies the conclusion that parate executie was contracted for. The law

about pacta commissoria need not be dealt with. (If such a pact was the basis of Ms Gunpath's dissatisfaction, her complaint would not be about a contravention of the Usury Act but about the harm suffered as a result of a common law injustice.)

26 The consequences of a term for parate executie

The validity of an agreement that the creditor may without more sell a pledged asset is subject to a consequence expressed in **Osry v Hirsch, Loubser & Co 1922 CPD 537 at 547** as follows:
'(the debtor) can seek the protection of the Court if, upon any just ground, he can show that in carrying out the agreement and in effecting a sale, the creditor has acted in a manner that has prejudiced him in his rights'.

That formulation has since been accepted and approved in eg **Iscor Housing Utility Company v Chief Registrar of Deeds 1971-1-SA613-W and Bock v DuBuroro Investments (Pty) Ltd 2004-2-242-SCA in para 7.**

The 'has' contemplates a past event. The protection by the court is not limited to -and will usually not be - an interdict. The protection must be or include a monetary payment to wipe out the prejudice. The question is about the nature of that claim.

It does not represent the contractual term. That is distinct and would reach only up to the R 62 300 achieved by respondent even if the prejudice lies in the very fact that R 62 300 was too little.

Although it resembles a claim for damages, the claim will not rest upon a breach of an agreed term. The sale was authorised by the contract. Some other 'just ground' must be shown and some causality to prejudice. (Here it is ignored that prejudice to his 'rights' is what was mentioned.).

But what it is not, is a payment by Gunpath.

(a) If she did not pay, she did not 'over-pay'. The insurance company paid. Gunpath would be entitled to money as adjustment for some harm that she suffered.
(b) That harm refers to capital rather than interest.
(c) Respondent did not receive the price of the policy as interest. The first part of the money received would be allocated to interest; a next portion to capital of the Gunpath loan. What was more than was

needed to wipe out that debt for interest and capital (whether it be called payment or set-off), was not received as interest. The overpayment was overpayment of money other than interest.

It accordingly is not related to the Usury Act. An order for payment to set the injustice right would not be made 'under the Usury Act'. For that reason and because the NCT for similar reasoning can not regard it as an overpayment under the NCA, Gunpath has no claim that the NCT can sustain. Gunpath will have to approach a court.

Such is the price of fragmentation of the enforcement of legal rights.

27 The settlement cases

27.1 On 17 June the Tribunal was asked to make an order in the terms of a consent paper that covered all 17 complainants except Gunpath. Apart from the fact that the document did not contain a term about the place for payment that the Tribunal was asked to incorporate, the following problems were raised with the parties:

1. Mabusela has nothing to do with the Usury Act or exceptions thereto and the payment to him, if not already made, is not in the tribunal's field.
2. Jansen was taken to have sufficient locus standi because he was allegedly married in community of property so that he has an interest in repayment and perhaps had an interest in the ceded policy. That does not imply that the excess received by respondent can go exclusively (or at all) to him. It was intimated that the parties had to sort out the proper entitlements. The executor may have to be a party to the settlement and, if permissible, to the consent order.
3. Thomas borrowed money but it is inter alia not known for whose benefit. She ceded a policy of a person who seemingly was or is under guardianship because of disability or youth or both. The overpayment arose because the proceeds of the policy was paid to the respondent. It can not be ordered that Ms Thomas walks away with the payment from respondent without the insured life or his guarding having a chance to lay claim to the money. It was intimated that proof is required from the parties of the lawfulness of Ms Thomas receiving the money. Audi alteram partem applies.

27.2 In Ms Gunpath's case there was consent from respondent to an order for the payment of a named amount and this seems acceptable to the NCR. That is not adequate 'consent' as it is really the complaint of Ms Gunpath, not the NCR, that is in issue.

27.3 The other thirteen claims did not have similar questions about fitting in within the principles of law. But, because it is known from informal discussions that amongst the sixteen persons appointed as members of the tribunal there was an inclination to divergent views, the present panel of members heard submissions on the question whether the tribunal should concern itself with the 'fairness' (towards a complainant) of a settlement.

The making of 'consent orders' by the NTC

28.1 In line with the fact that there is hardly a provision of 'this Act' that does not create some uncertainty, the first question is about the basis of any involvement of the NCT in any settlement.

28.2 The Tribunal is a creature of statute and can do only what the statute authorises. So it seems that involvement can only be if there is consent that an order be made.

28.3 There are two sections that authorise that involvement. The reason for two provisions is not clear but it appears that it has to do with the scheme of the first parts of chapter 7 - which despite its heading is not confined to a 'dispute' in the ordinary sense.

If the dissatisfaction is about a 'contravention' of the NCA (perhaps even if it is an offence?), a person can approach the NCR with what is called a 'complaint': S136. A dissatisfaction of that type (a 'matter' that could have been the subject of a 'complaint') can alternatively avoid the NCR and be taken to a consumer court or an alternative resolution agent in terms of S134. (Certain alternatives are omitted in the interests of simplifying but it may be noted that only in the case of a financial institution is the matter dealt with as if a 'complaint' but there the complaint is a 'complaint' as is envisaged in Act 37 of 2004. It may also be noted in passing that unlike S135, S138 does not refer to the 'rules'. Rule 20 refers only to the S135 matters and now one finds that it is a Rule, not the NCA, that introduces the 'without hearing any evidence' phrase. Yet Rule 20-2 requires 'adjudication'. The difficult to understand Rule 20(3) casts no light)

A S34 case can lead to settlement in which event section 135 may apply. A 'complaint' under S136 can lead to settlement to find that s 138 may apply.

In the former case the agreement is recorded and if the parties agree to the making of an order the dispute resolving agency 'that has assisted' (an indication that he should have been helpful?) in resolving a 'dispute' can seek an order from some or other court or the NCT. If it is a **court** that is approached the order is not made in terms of S135 on its own but 'in terms of S138' - which perhaps changes requirements.

S138 lacks the exclusion of the NCR from the order-making part of events. It expresses what S135 at best implies through cross-referencing: that the consent order may or must be made 'without hearing any evidence'

S138(1)(b) which applies in the present case, bears that phrase. (It may well be asked whether the phrase and what follows - or perhaps everything from the words 'and the respondent agrees' - were not supposed to govern both alternatives of S138). The crucial question is whether the phrase connotes a must or a may. There is little to go by.

The presence and content of S135 is not illuminating.

29 The preferable view is that the phrase conveys only that evidence is not required. That is so in view of the considerations that will be mentioned shortly when discussing the correct approach when a court or the NCA is neither forbidden nor required to hear evidence. After the wide inept compulsion of S141(4), something was required to relieve the NCT from the duty to conduct a hearing if there is a settlement. There is no impressive reason why the NCT should be forbidden from hearing 'any evidence'. On the contrary it is easy to envisage cases where some evidence ought to be given. Some limited support may then be found in the fact that the word 'may' does not precede the said phrase.

30.1 On the basis that the statute does not lay down that the tribunal must not hear evidence, the approach to the discretion must be determined.

30.2 The NCA does not state that evidence must be heard or ought to be heard. Why should the NCT follow an approach to import what is not laid down?

30.3 A contract of settlement is different from capitulation. In its nature it will be for something less or something different from what a claimant or plaintiff alleged or claimed. Its basis is contract; not proof that the claimant is correct. But it is binding and, subject to possible exception, is respected as binding by courts. Courts will enforce such a contract as any other contract. In principle it will do so despite the merits or demerits of the case of any party to the settlement.

30.4 If the NCT were to create a prerequisite that the Tribunal must be satisfied about the 'correctness' of the settlement, it in effect imports a right to veto a contract. It would be testing by its panel member's own views of fairness over that of the claimant. A claimant ought to be allowed to put his own value on delay in getting some money, the risks of litigation, the risk that the respondent is or will become unable to pay more, the unpleasantness of travel and trial, and so forth. Lastly, the Tribunal will have to fully investigate what facts are proved before it knows by what monetary measure the adequacy of the agreed amount is to be tested. If the matter

is thus to be heard before an order is made, there is no place for settlements. All cases will have to be heard.

30.5 It must also be remembered that the paying party in a settlement is paying because of unknown reasons and that true settlement is not proof of liability for the claim or for the amount of the claimant's claim

30.6 Although the financial attractiveness or correctness of the settlements must not be proved, there may be other aspects where the requiring of evidence would not be wrong. In fact, in the present cases that was envisaged in the cases of Mabusela (on the basis of his own information), and Thomas and Jansen (on the information produced). In an appropriate case there may be sufficient information to observe a prima facie case of contracting out of the protection created by the NCA. (Cf S90(2)(b) which is relevant to the general approach by the NCT but the present case is pre-NCA). It is not appropriate to decide what else would be adequate reason for not accepting a settlement as bringing closure to the complainant's displeasure by obtaining yielding to his {claimed) rights to his satisfaction.

31 The authorisation for making a settlement contract executable leaves at least two more queries.

The terms of the order under section 138 must possibly be that the agreement is confirmed. S150 should be adequate to add an order to make payment. A pre-NCA court could have ordered that.

Secondly, S142(3) apparently disables a three member panel to make a settlement order. That must be assigned to a single member. An allocation to The Presiding Member (TPM) was created. The comments about and order about the settlement part of the matter is that of the TPM where appropriate but all views in this document are shared by the three members on the panel.

32 The Registrar must set this matter of each complainant down for continued hearing, when the settlement papers are in for dealing with each such matter on not more than seven days notice. This is intended to be a directive in terms of Tribunal Rule 21(1). Hopefully tribunal Rule 17(6) does not preclude such a separation.

33 In all the circumstances, subject to the separate dealing with the settled matters (and if necessary the complaints of Jansen and Thomas by way of further pre trial and/or hearing) the only order made is the following:

Respondent is ordered to pay to Ms Gunpath or into a bank account nominated by her in writing, the amount of R 20 701.16 with interest thereon at the rate of 15.5% per year from the date when this application was served (19 February 2008) to date of payment

Signed on July 2008

____
H C J Flemming

I agree

____
H C J Flemming
For N Sephoti

I agree:

____
H C J Flemming
for F Manamela

____
D Terblanche
Chairperson
National Consumer Tribunal