HIGH COURT OF SOUTH AFRICA
(GAUTENG PROVINCIAL DIVISION, PRETORIA)

(1) REPORTABLE: Electronic reporting.
(2) OF INTEREST TO OTHER JUDGES: No.
(3) REVISED.

05.05.2016 ....

Case No. 16746/2016

In the matter between:

MICRO FINANCE SOUTH AFRICA Applicant

and

THE MINISTER OF TRADE AND INDUSTRY First Respondent

THE NATIONAL CREDIT REGULATOR Second Respondent

Summary: Application for an order staying the implementation of those parts of the regulations promulgated by the Minister of Trade and Industry under the National Credit Act 34 of 2005 in Government Gazette No. 39379 Vol. 605 of 6 November 2015 prescribing the maximum rates of interest and service and initiation fees that credit providers are entitled to charge on 'micro loans' pending judicial review of those parts of the regulations - Applicant's right to review the impugned decision of the minister did not require any reservation pendente lite.

JUDGMENT

MEYER, J

[1] This is an urgent application for an order staying the implementation of those parts of the regulations published in Government Gazette No. 39379 Vol. 605 of 6 November 2015 (the new regulations) prescribing the maximum rates of interest and service and initiation fees that credit providers are entitled to charge on 'micro loans' (a credit agreement of less than R8 000.00 and repayable within six months or less) pending judicial review of those parts of the regulations in terms of part B of the notice of motion.

[2] The applicant, Micro Finance South Africa, is a representative body of credit providers operating in the micro finance industry. The applicant has 487 corporate entity members which conduct business at approximately 1190 branches in South Africa. The applicant represents about 30% of the micro finance industry. Several of the largest micro lenders – Bayport Financial Services, Wonga Finance SA (Pty) Ltd and Barko Financial Services (Pty) Ltd – are not members of the applicant. The company secretary of the second respondent, the National Credit Regulator that was established in terms of s 12 of the NCA (the regulator), states that '. . . commercial banks hold by far the greatest majority on average 84% of all unsecured loan agreements entered into, and on average 85% of short term loans, between the fourth quarter of 2012 and the fourth quarter of 2015. In terms of short term loans there has been declining presence of the banks in favour of other credit providers, however as at fourth quarter of 2015 other credit providers only still hold one-third of the credit extended in terms of such short term loan agreements.'

[3] The first respondent, the Minister of Trade and Industry (the minister), promulgated the new regulations under the National Credit Act 34 of 2005 (the NCA). He is appointed as a cabinet minister in terms of s 91 of the Constitution of the Republic of South Africa with the mandate, inter alia, to exercise the executive authority over the Department of Trade and Industry. The regulator is in terms of s 13 of the NCA responsible for conducting research and proposing policy to the minister on matters affecting the consumer credit industry, including proposals on legislative, regulatory and policy initiatives that would improve access to credit for '. . . historically disadvantaged persons, low income persons and communities and remote, isolated or low density populations and communities.' The regulator, in terms of s 18 of the NCA, is enjoined to give advice, make recommendations and report to the minister on matters relating to consumer protection and related consumer credit products, market practices, and so forth.

[4] The NCA was assented to on 10 March 2006 and its commencement date was 1 June 2006. Part C of the NCA, which is pertinent to the present application, only commenced on 1 June 2007. Section 171 of the NCA empowers the minister to '[m]ake any regulations expressly authorised or contemplated elsewhere in this Act, in accordance with sub-section (2).' Section 105 of the NCA affords the minister a discretion, in consultation with the regulator, to prescribe methods for calculating maximum interest rates and maximum fees. Should the minister exercise this discretion, s 105 compels him or her to take certain factors into account.

[5] The minister promulgated regulations relating to part C of the NCA on 31 May 2006 (the old regulations). A maximum interest rate of 5% per month was prescribed for short term credit transactions (micro loans) (reg 42), a maximum initiation fee of R150 per credit

agreement, plus, 10% of the amount of the agreement in excess of R1 000 but never to exceed R1, 000 (reg 42), and a maximum monthly service fee of R50 (reg 44).

[6] The draft new regulations were published for comment on 25 June 2015. The regulator commissioned Price Waterhouse Coopers to conduct a sensitivity study across the credit industry. Once the draft regulations were published the minister had to ensure that they complied with policy standards, which included amongst others consulting with the relevant and interested stakeholders such as non-governmental organisations, local authorities, representatives of the credit industry and civil society and experts who provide advice on technical issues.

[7] The notice inviting public comments to the draft Regulations on Review of Limitations on Fees and Interest Rates was published in Government Gazette No. 38911 on 25 June 2015 under Notice 655 of 2015. About 25 submissions were received from various interested parties. The applicant too has always been involved in the process of reviewing the regulations. According to the minister the issues raised by the applicant in these proceedings were the same issues that were raised in its submissions and all those issues were considered. Even with the newly obtained expert reports, the minister states that the applicant has '. . . not come up with any matter that was not considered prior to the promulgation of the new regulations.' The Department of Trade and Industry also conducted consultative meetings with a wide range of credit providers and other interested parties. Comments were also invited from various consumer groups and academics. The 'ground swell', according to the company secretary of the regulator, '. . . was in support of the regulations, rather than in opposition thereto.' The minister also

states that it is only the applicant who is taking issue with the new regulations. All the other industry stakeholders have not challenged the new regulations.

[8] The minister states that some of the submissions received and in favour of the credit providers were that low interest rates would lead to a situation where it is not economically viable for credit providers to extend loans to high risk consumers and effectively excluding lower income earners who depend on and are able to access short term and unsecured credit; would result in the demise of regulated small and medium sized credit providers and risk pushing them into the unregulated underground market; job losses in the small and medium sized credit providers' space. Some of the submissions received and in favour of the credit receivers included the need to strike a balance of the rights of consumers and those of credit providers; consumers were wedged in a debt cycle payable to micro-financiers due to the high interest rates payable; credit standing of consumers, including adverse judgments and administrative orders and adverse credit listings; the number of consumers with impaired records and their inability to access credit; the inability or difficulty in extinguishing debt due to high fees and interest rates; the adverse effects of over indebtedness on families and on the well-being of children; matters relating to reckless lending; lack of affordability assessment by some of the credit providers; and methods of debt collection.

[9] The minister further states as follows:

'. . . I considered, amongst others, the factors referred to above, all submissions made by stakeholders, the need to make credit available to persons who are historically disadvantaged, low income earners, those from remote or isolated communities, the conditions prevailing in the credit market including the cost of credit in relation to the consumer credit market and the social

impact on low income credit consumers. In applying my mind to the review I took into account different sectors within the credit industry. I established different maximums for credit agreements within each sub-sector of the consumer credit market. I prescribed the methods consistent with the cost of credit as envisaged in section 101(3) of the Act for the allocation of service fees between the provision of credit and the provision of related financial services in circumstances in which a credit provider offers multiple financial services under a single agreement. I also considered the maximum rate of interest and maximum fees applicable to each sub-sector of the consumer credit market. These factors are demonstrated in the new regulations as contained in the schedule. Most importantly, these have been conveyed to the general public and an expectation that they will become effective on 6 May 2016 has been created.'

[10] Once the comments had been received and analysed, the draft regulations were reviewed and on 21 October 2015 the minister authorised the publication of the final Regulations on Review of Limitations on Fees and interest Rates. These final regulations were published on 6 November 2015. The minister states that a reduction of 7.9% was proposed in the published draft regulations which would have resulted in the interest rates for unsecured credit transactions being reduced from 32.65% to 24.78%. But once the input had been received 'the team' (comprising of officials from the Department of Trade and Industry, the regulator and the minister) agreed that a reasonable reduction for unsecured credit transactions would be from 32.65% to 27.75%. It was, according to the minster, agreed that a moderate reduction of 5.65% instead of the 7.9% was reasonable and balanced both the interests of the credit providers and those of the credit consumers.

[11] In terms of the new regulations the maximum prescribed interest rate on short-term transactions is 5% per month on the first loan and 3% per month on subsequent loans within a calender year. The maximum initiation fee prescribed for these credit

transactions is R165 per credit agreement plus 10% of the amount in excess of R1 000 but never to exceed R1 050. The maximum monthly service fee prescribed is R60.

[12] The minister is of the view '. . . that the new regulations are balanced enough to address the needs of all those who are involved in the credit industry.' According to him in enacting the regulations he '. . . took into account all relevant considerations, adequate consultations were held and [his] decision . . . is rational and consistent with the constitutional imperatives.' There is, according to the minister, '. . . a pressing need on the State to ensure that its citizens are not subjected to exorbitant credit fees and interest rates.'

[13] The general view expressed by members of the Trade and Industry Portfolio Committee at its meeting on 10 February 2016 was that the interest rates prescribed in terms of the new regulations '. . . are still too high.' The director of credit law and policy of the Department of Trade and Industry, Mr Siphamandla Kumkani, in response to the committee members' view that interest rates should be lowered further than those prescribed in terms of the new regulations, described the maximum rates as 'work in progress' and said:

'We had to perform a balancing act to ensure that businesses don't close and jobs aren't lost. We've agreed [with industry] on a phased-in approach, but the aim is to bring rates down.'

The company secretary of the second respondent states '. . . that the cost of credit in South Africa remains extremely high, contributing substantially to the over-indebtedness of consumer households.' The Credit Bureau Monitor Report, 1st Quarter, March 2015 reflects that the Credit Bureau holds records of approximately 23.11 million active

consumers of which 12.7 million are classified in good standing and 10.41 million consumers have impaired records.

[14] The applicant contends in these proceedings that prior to the promulgation of the new regulations on 6 November 2015, a period of no less than nine years had passed without them being reviewed. This, according to the applicant, had given rise to an untenable situation. As a result of inflation and certain other additional expenses (such as payment streams) the members of the applicant had found it increasingly difficult to conduct business. When the new regulations were finally promulgated, so the applicant contends, the entire industry was of the hope that these new regulations would remedy a situation and effectively provide a new lease of life for the micro finance industry. However, states the applicant, upon closer scrutiny it became apparent that in issuing the new regulations the minister and the regulator had failed to take into account the effect that these new fees and interest rates would have on the providers of micro loans; failed to conduct proper market research in order to determine if the new fees and interest rates as prescribed would be beneficial to the market as a whole; and failed to consider the views of the members of the applicant or any of the micro financiers in the industry. The net effect of the new regulations, so the applicant contends, is effectively to bring the entire micro loan industry to its knees and make it impossible to conduct business, let alone a profitable business. The applicant contends that legitimate micro financiers will no longer be in business and the public will be forced to obtain finance from unregulated and unregistered sources; thereby increasing the prospects of them being exploited to their detriment.

[15] The applicant presented the opinions of three expert witnesses. They are Dr Penelope Hawkins, an economist who specializes in the field of credit provision; Mr Rob Jeffrey, an economist with Econometrix, who has prior to the promulgation of the regulations and at the stage when public comment was invited, provided a comprehensive report on the effect and impact that the proposed regulations stand to have on the credit industry; and Mr Robert Cameron-Ellis, a forensic chartered accountant, who has undertaken an exercise over a sample of the members of the applicant to calculate the effect on the businesses of the applicants' members.

[16] In conclusion Dr Hawkins expresses the opinion that '[b]ased on the analysis provided . . . it is difficult not to come to one of two conclusions; either, the limitations have been imposed without due regard to all the matters relevant and pertinent to the sustainable and efficient functioning of the credit market or, the limitations have been imposed at such a level to effectively prevent providers from offering such loans.' Mr Jeffrey inter alia expresses the opinion that the new regulations will reduce access to credit for low income and rural credit consumers; focus on the high income individuals with secure employment and income; raise the cost structure of small credit providers; raise the break even point on lines and increase the economic size of loans; lead to a move from low margin products to high margin products; foster potentially unnecessary higher margins – associated product offerings to boost returns; reduce competition amongst registered micro lending operators at the lower end of the market; increase the power of large banking institutions; and stimulate growth in the illegal or unregulated markets. The expert report of Mr Cameron-Ellis is based upon financial figures that were given to him by 196 member branches of the applicant, which were held by 11 corporate

entities. (I have mentioned that the applicant's members comprised of 487 corporate entities with approximately 487 branches.) He concluded that once the new regulations are implemented, only two of the 11 corporate entities will earn an acceptable return.

[17] An applicant that claims an interim interdict must establish (a) a prima facie right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the grant of the interdict; and (d) the applicant must have no other remedy. (See *Setlogelo v Setlogelo* 1914 AD 221.) In *National Treasury and Others v Opposition to Urban Tolling Alliance and others* 2012 (6) SA 223 (CC), Moseneke DCJ said the following:

'[44] The common-law annotation to the *Setlogelo* test is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the executive and the legislative branches of government unless the intrusion is mandated by the Constitution itself.

[45] It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The Setlogelo test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the granting of interdicts in busy magistrates' courts and high courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution.

[46] Two ready examples come to mind. If the right asserted in a claim for an interim interdict is sourced from the Constitution it would be redundant to enquire whether that right exists. Similarly, when a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought.

[47] The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define 'clearest of cases'. However, one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights. This is not such a case.

[48] At the outset the high court had to decide whether the applicants had established a prima facie right, although open to some doubt. It examined the grounds of review and was persuaded that they bore prospects of success and that therefore the applicants had established a prima facie right to have the decisions reviewed and set aside. Two comments are warranted. First, we heard full argument on the merits on the grounds of review. I am unable to say without more that they bear any prospects of success. That decision I leave to the review court.

[49] Second, there is a conceptual difficulty with the high court's holding that the applicants have shown 'a prima facie . . . right to have the decision reviewed and set aside as formulated in prayers 1 and 2'. The right to approach a court to review and set aside a decision, in the past, and even more so now, resides in everyone. The Constitution makes it plain that '(e)veryone has the right to administrative action that is lawful, reasonable and procedurally fair' and in turn PAJA regulates the review of administrative action.

[50] Under the Setlogelo test the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite.'

[18] The applicant contends that it has made out a strong prima facie right on the papers as they presently stand, and thus, the less the need for the balance of convenience to favour it. I disagree. I am reluctant in the present urgent proceedings to resolve whether a prima facie right has been proven. The record of the proceedings sought to be reviewed does not presently form part of the urgent application before me. However, the minister's response and that of the regulator (despite the applicant's criticism of their respective responses) as well as the fact that the expert report of Mr Cameron-Ellis is based upon financial figures that were given to him by only 11 corporate entities out of the applicant's 487 corporate entity members and, moreover, without the applicant presenting confirmatory affidavits from the corporate entities or the branches to verify the accuracy of the financial figures, leads me to the conclusion, at best for the applicant, that it has established a prima facie right open to some doubt. An expert is not entitled, any more than any other witness, to give hearsay evidence as to any fact, and all facts on which the expert witness relies must ordinarily be established during the trial (and in this instance on the affidavits), except those facts which the expert draws as a conclusion by reason of his or her expertise from other facts which have been admitted by the other party or established by admissible evidence. (See: *Coopers (South Africa)*

(Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämp-fung MBH 1976 (3) SA 352 (A) at p 371G; *Reckitt & Colman SA (Pty) Ltd v S C Johnson & Son SA (Pty) Ltd* 1993 (2) SA 307 (A) at p 315E); *Lornadawn Investments (Pty) Ltd v Minister van Landbou* 1977 (3) SA 618 (T) at p 623; *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) at p 772). My acceptance that the applicant has established a prima facie right open to some doubt is not a definitive decision on the question. That decision is best left to the review court.

[19] I am of the view that the balance of convenience is dispositive of the urgent relief which the applicant presently seeks under part A of the notice of motion. In weighing any harm to be endured by the applicant's members if interim relief is not granted, as against the harm the minister, the regulator, other credit grantors and credit receivers will bear if the interdict is granted I am not satisfied that the balance of convenience favours the granting of a temporary interdict.

[20] The applicant has not established that awaiting the determination of the review application would result in the demise of any one of its members. There was a long delay in the applicant launching the present application. The new regulations were promulgated on 6 November 2015 to come into effect on 6 May 2016. The present application was only launched on 1 March 2016. Lengthy periods of delay in launching the application have not been adequately explained. The urgent part of the application (part A) was only heard on Tuesday, 3 May 2016 and judgment is to be handed down on Thursday, 5 May 2016 before the coming into effect of the new regulations on Friday, 6 May 2016. The new regulations have accordingly been in the public domain for a period of six months and their implementation is due in a day's time. The company secretary of the regulator states that '[e]very credit provider will be in the throes of amending their systems to

implement the new interest rates at considerable costs.' The minister states that other stakeholders, the banks, '. . . have reported the extent of progress in preparation for the implementation of the new regulations. They have programmed their systems and have aligned them in terms of the revised fees and regulations.' Furthermore, only 11 of the applicant's 487 corporate entity members furnished relevant financial information to the applicant's expert, Mr Cameron-Ellis, to support the applicant's averments of the adverse effects of the new regulations. The implementation of the regulations is not opposed by the entire micro lending industry. On the contrary, in the words of the company secretary of the regulator, '[t]he ground swell was in support of the regulations rather than in opposition thereto.'

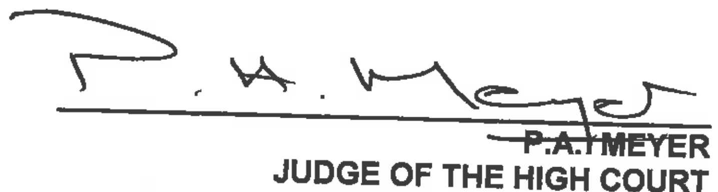
[21] The minister and the regulator will suffer what the Constitutional Court in the *Opposition to Urban Tolling Alliance* case referred to as 'separation of powers harm' if the interim relief is granted. This has not been established to be an exceptional case for the grant of a temporary restraining order against the exercise of the minister's statutory power nor did it make out a strong case for that relief. The minister promulgated the new regulations in the exercise of his statutory power. They should come into effect on 6 May 2016 as promulgated and remain in force unless and until this court set them aside in the review under part B of the applicant's notice of motion. The applicant's right to review the minister's impugned decision does not on the facts before me require any reservation pendente lite.

[22] My conclusion renders it unnecessary to consider the other questions raised in these proceedings, such as the other requirements for an interim interdict, urgency and non-joinder of interested parties. But two matters require mention: First, this application

comprises 1 053 pages, but counsel, through their thorough and most helpful heads of argument, assisted me in preparing for the hearing of the application during the course of the long weekend that immediately preceded the hearing and it enabled the hearing to be finalized within a day, leaving me with a day to write this judgment. Second, I consider the expeditious final determination of the review part (part B) of this application to be in the public interest. The parties will be well-advised to approach the Honourable Deputy Judge President of this division to arrange for case management of that part of the application and for the allocation of a preferential date for the hearing thereof.

[23] In the result the following order is made:

Part A of the Notice of Motion is dismissed with costs, including the costs of two counsel for the first respondent and one senior counsel for the second respondent.



P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	3 May 2016
Date of judgment:	5 May 2016
Counsel for the applicant:	R Michau SC (assisted by J Hershensohn)
Instructed by:	Lewies Attorneys, Menlo Park, Pretoria
Counsel for 1st respondent:	TV Norman SC (assisted by P Jara)
Instructed by:	State Attorney, Pretoria
Counsel for the 2nd respondent:	PL Carstensen SC
Instructed by:	Edward Nathan Sonnenbergs, Sandton C/o Salome Le Roux Attorneys, Menlo Park, Pretoria