



**Summary:** National Credit Act 34 of 2005 (the NCA) – what constitutes reasonable suspicion for National Credit Regulator to initiate a complaint in terms of s 136 of the NCA – competence of National Consumer Tribunal (the Tribunal) to order the appointment of an independent auditor to assess extent of first respondent’s overcharging – appeal upheld – order of the Tribunal reinstated.

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## **ORDER**

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**On appeal from:** Gauteng Division of the High Court, Pretoria (Neukircher and Teffo JJ, sitting as court of appeal):

- 1 The appeal is upheld with costs.
- 2 The order of the high court is set aside and substituted with the following:

‘The appeal is dismissed with costs.’

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## **JUDGMENT**

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**Nicholls JA (Makgoka and Gorven JJA and Phatshoane and Savage AJJA concurring):**

[1] The central question in this appeal is what constitutes a sufficient trigger for the appellant, the National Credit Regulator (the NCR) to initiate a complaint into alleged contraventions of the National Credit Act 34 of 2005 (the NCA). The NCR has a statutory responsibility to ensure compliance with the NCA. It initiated a complaint against the first respondent, Dacqup Finances CC trading as ABC Financial Services – Pinetown (Dacqup), which is a registered credit provider. It advances micro-loans of up to R8000.

[2] The complaint was considered by the second respondent, the National Consumer Tribunal (the Tribunal), an independent adjudicative body. The Tribunal found that Dacqup had contravened various sections of the NCA and had engaged in repeated prohibited conduct. It ordered Dacqup to pay a fine

and that all Dacqup's credit agreements for a certain period be assessed by an independent auditor. Dacqup successfully appealed against those orders in the Gauteng Division of the High Court, Pretoria (the high court). The high court did not consider the merits of the appeal, as it found in favour of Dacqup on a point *in limine*. The appeal is with the leave of the high court.<sup>1</sup>

[3] It is necessary to place the regulatory environment in context. The NCA came into operation on 1 June 2006, replacing the Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980. At that time, the credit market was characterised by discrimination, lack of transparency, high costs of credit and limited consumer protection. This was particularly prevalent in the micro-financing industry, which capitalised on vulnerable markets characterised by overpriced debt repayments. The major reason for the NCA's enactment was to protect consumers from unscrupulous lenders and to create an accessible and affordable credit market with mechanisms to protect the consumers from reckless credit and over-indebtedness.<sup>2</sup>

[4] It is against this backdrop that the relevant sections of the NCA should be considered. Section 136 provides that any person may submit a complaint of reckless credit, alternatively the NCR may submit a complaint in its own name. Reckless credit is dealt with in ss 80 and 81 of the NCA. Section 81(3) prohibits a credit provider from entering into a reckless credit agreement with a prospective customer. In terms of s 81(2)(a)(i), a credit provider cannot enter

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<sup>1</sup> There was initially some uncertainty as to whether decisions of the high court under s 148(2)(b) of the NCA come to this Court by way of leave granted by the high court or by special leave of this Court. This issue was settled in *National Credit Regulator v Lewis Stores (Pty) Ltd and Another* [2019] ZASCA 190; 2020 (2) SA 390 (SCA); [2020] 2 All SA 31 (SCA) para 56.

<sup>2</sup> See the preamble to the NCA and section 3 of the NCA, which provides for the purposes of the NCA in great detail.

into a credit agreement without first taking reasonable steps to assess the consumer's general understanding and appreciation of the risks and costs of the proposed credit. In terms of s 81(2)(a)(ii), the credit provider is obliged to take into account the debt repayment history of the consumer, and in terms of s 81(2)(a)(iii), the consumer's existing financial means, prospects and obligations. In terms of s 80(1)(a), a credit agreement is reckless if the credit provider failed to conduct an assessment as required by s 81(2), irrespective of the outcome had the proper assessment been made at the time. In terms of s 80(1)(b), a credit agreement is reckless if, having conducted the assessment, the information points to the probability that the consumer did not fully understand and appreciate the risks, or that she would be over-indebted if she entered into the credit agreement.

[5] Importantly, the NCA affords the NCR certain investigative and referral powers. Once a complaint has been initiated by either the NCR or any other person in terms of s 136, the NCR may direct an inspector to investigate the complaint, and appoint others to assist. At any time during the investigation, the NCR may summons a person to appear under oath before the NCR, or subpoena any document, provided that no self-incriminating evidence will be admissible in a criminal trial.<sup>3</sup> As part of its mandatory oversight and enforcement functions, the NCA mandates the NCR to attend to 'monitoring the consumer credit market and industry to ensure that prohibited conduct is prevented or detected and prosecuted'.<sup>4</sup> Pursuant thereto and as part of its monitoring functions, the NCR sends personnel to different parts of the country on so-called 'scouting exercises'.

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<sup>3</sup> Sections 139(3) and (5) of the NCA.

<sup>4</sup> Section 15(c) of the NCA.

[6] It was on one such ‘scouting exercise’ during 2018, that an NCR inspector, Ms Muhanganei Mbedzi, noticed a signboard outside Dacqup’s premises advertising ‘instant loans’. This aroused her suspicion for a variety of reasons. If the loans were ‘instant’, it would be difficult to comply with the onerous affordability assessments required by the NCA. Conversely, if they were not ‘instant’, the advertisement breached the NCA’s prohibition on misleading and deceptive advertising of credit. Posing as a potential customer, the inspector entered the premises to inquire about a prospective loan. Upon enquiry about the interest rate, she was informed that an interest rate of 30% per month was levied on short-term loans, which amount far exceeded the statutory maximum permissible.

[7] The scouting exercise led to the NCR initiating an investigation in its own name into possible contraventions of the NCA by Dacqup. It conducted an on-site investigation, during which ten credit agreements were assessed, where loans of between R510 and R3000 were granted. Following the assessment, a report was compiled, in which it was found that Dacqup had failed to properly assess the financial means of the respective consumers and their debt repayment history. The NCR concluded that the granting of credit had been reckless as defined in s 80 of the NCA. In addition, the NCR found that Dacqup had overcharged on interest and on initiation fees in some instances, and had not provided customers with pre-agreement statements.

[8] On the strength of these findings, the NCR made an application to the Tribunal that Dacqup be deregistered as a credit provider, as well as other ancillary relief. The NCR’s founding affidavit was deposed to by

Ms Jacqueline Peters, the manageress in its Investigations and Enforcement Department. She explained that Dacqup had contravened the NCA in the following respects: (a) by using the phrase ‘instant loans’, Dacqup may not be conducting proper affordability assessments; (b) the phrase may be viewed as misleading and deceptive, as it indicated to consumers that they potentially need not provide the necessary documentation of proof of income; (c) the inspector, on entering the premises, was told that the interest rate was charged at 30% per month, which far exceeded the statutory maximum permissible. The inspector, Ms Mbedzi, confirmed this in a confirmatory affidavit.

[9] The Tribunal found that Dacqup had engaged in repeated prohibited conduct. It further found that Dacqup had merely engaged in a ‘tick box exercise’ to create the impression of complying with the NCA when, in reality, it did not comply with the stringent assessment requirements and did not conduct proper affordability assessments. At the Tribunal Dacqup raised two points *in limine*. Firstly, that the NCR did not have a reasonable basis for initiating a complaint and an investigation. Secondly, that the NCR should have afforded Dacqup an opportunity to respond to the charges before referring the matter to the Tribunal. Both points *in limine* were dismissed by the Tribunal, which declared that all ten sampled agreements amounted to the granting of reckless credit. The Tribunal did not cancel Dacqup’s registration, as requested by the NCR. Instead, it ordered Dacqup to pay an administrative fine of R300 000. In addition, the Tribunal ordered Dacqup to appoint an auditor, at its own cost, to assess all credit agreements for the three years prior to the investigation, and to reimburse overpaid fees and charges to the relevant consumers.

[10] In its appeal to the high court, Dacqup did not appeal the merits. It raised four points *in limine*, two of which were abandoned, including whether the NCR should have afforded Dacqup the right to be heard in its initial investigation. Accordingly, the only issues that the high court was called upon to determine were whether the NCR had a reasonable suspicion to initiate an investigation and whether the order of the Tribunal to appoint an auditor was *ultra vires*. Because the high court found in Dacqup's favour in respect of the first point *in limine*, it did not consider the question of the appointment of an auditor.

[11] Dacqup's argument, which found favour with the high court, was that the words 'instant loans' could not objectively trigger a reasonable suspicion, as the phrase could reasonably be understood to mean that Dacqup acts 'promptly, swiftly or speedily', yet lawfully. Although the high court noted that the words literally meant 'happening or coming immediately', this, it held, reasonably meant nothing more than acting swiftly. The high court further reasoned that if the NCR wanted to establish whether Dacqup's conduct was unlawful, Ms Mbedzi should have requested a loan, posing as a customer. This would have established precisely what was meant by the words 'instant loans', and thus whether an investigation should have been conducted.

[12] The high court accepted Dacqup's argument that the complaint was initiated only on the memorandum of Ms Mbedzi, who conducted the scouting exercise and that the contents of the founding affidavit were not relevant in this regard. Ms Mbedzi's memorandum, dated 23 October 2018, only made mention of two grounds of suspicion: the words 'instant loans' and that she had been told on enquiry that the interest rate was 30%.



[13] Regarding the allegation that Dacqup was charging 30% per month in interest, the high court was of the view that this complaint was not the basis on which the investigation was initiated. However, this is not borne out by the facts. The 30% interest rate was set out both in Ms Mbdezi's memorandum and in another internal memorandum by a junior inspector, dated 18 December 2018, requesting an investigation. This was in addition to the founding affidavit of Ms Peters before the Tribunal. Nonetheless, according to the high court, the complaint was not initiated on the basis of prohibited advertising, nor the 30% interest rate charged on short-term loans, but merely on the advertising board.

[14] On the basis of the above, the high court concluded:

'To allow the NCRA to initiate an investigation, such as the one in this matter, on a mere signage, sets the bar so low that it offends the sensibility of what should be good practice. It also offends the notion of what should constitute a reasonable suspicion. If indeed, a reasonable suspicion is formed objectively then there must be objective facts which support it – such as the inspector attempted to ascertain the procedure by which the loan application would take place and, indeed, how quickly a loan would be advanced. If [Dacqup's] procedures are streamlined, and on the face of it, comply with the provisions of the Act, and the loan is advanced “promptly”, “swiftly” or “speedily” then (objectively speaking) there cannot be a “reasonable suspicion” that the Act is being contravened.'

[15] Accordingly, without considering the merits as to whether Dacqup had contravened the NCA in material respects, the high court upheld Dacqup's appeal with costs.

[16] In this Court, the parties agreed that the appeal hinged exclusively on whether the high court was correct in upholding Dacqup's point *in limine* that

there was no reasonable suspicion to initiate an investigation. If that is answered in the affirmative, the secondary issue is whether the Tribunal had the power to make the audit order.

[17] Before dealing with the main issue, a related submission advanced by Dacqup should be disposed of. This concerned the admissibility of Ms Mbedzi's memorandum. It was contended that the memorandum was inadmissible hearsay evidence which could not be cured by a confirmatory affidavit attached to the founding affidavit of the NCR. This Court in *Competition Commission v Yara*,<sup>5</sup> observed that the initiation of a complaint was an 'awkward concept' which started a process by directing an investigation which may, or may not, lead to a referral of the complaint to the Tribunal. It does so on the basis of information received from an informant; or what it gathers from media reports; or what it discovers in the process of investigating a different complaint. The decision to open a case can be informal or tacit.

[18] It would therefore be wholly incorrect to confine reasonable suspicion to what is set out in the memorandum of Ms Mbedzi. In any event, hearsay evidence is sufficient to ground a reasonable suspicion. Whether the evidence is later found to be inadmissible in a court of law is irrelevant for determining whether an arresting officer had a reasonable suspicion.<sup>6</sup>

[19] The concept of 'reasonable suspicion' is commonplace in our law. Whether the suspicion is reasonable is objectively determined. This Court has

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<sup>5</sup> *Competition Commission v Yara (South Africa) (Pty) Ltd and Others* [2013] ZASCA 107; [2013] 4 All SA 302 (SCA); 2013 (6) SA 404 (SCA) para 21.

<sup>6</sup> *Biyela v Minister of Police* [2022] ZASCA 36 (SCA) paras 31-35.

on a number of occasions<sup>7</sup> endorsed Lord Devlin’s test of reasonable suspicion as:

‘Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; “I suspect but I cannot prove”. Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end.’<sup>8</sup>

[20] While suspicion falls short of actual proof, there must be some factual basis on which the suspicion is grounded.<sup>9</sup> It must be emphasised that the standard of reasonable suspicion is very low – it must be more than a hunch and an unparticularised suspicion.<sup>10</sup>

[21] The initiation of a complaint is an earlier point than the start of the investigation. It merely triggers the investigation, which may or may not result in a referral to the Tribunal. This Court in *Yara*,<sup>11</sup> dealt extensively with what initiating a complaint meant in competition law, and observed:

‘. . . [T]he purpose of the initiating complaint is to trigger an investigation which might eventually lead to a referral. It is merely the preliminary step of a process that does not affect the respondent’s rights. Conversely stated, the purpose of an initiating complaint, and the investigation that follows upon it, is not to offer the suspect firm an opportunity to put [forward] its case. The Commission is not even required to give notice of the complaint and of its investigation to the suspect. Least of all is the Commission required to engage

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<sup>7</sup> *South African Reserve Bank v Leathern N O and Others* [2021] ZASCA 102; 2021 (5) SA 543 (SCA); [2021] 4 All SA 368 (SCA) para 15; *Duncan v Minister of Law and Order* [1986] 2 All SA 241 (A); 1986 (2) SA 805 (A) at 819I; *Minister of Law and Order v Kader* [1991] 1 All SA 256 (A); 1991 (1) SA 41 (A) at 50H-I; *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers’ Union and Another* [1992] ZASCA 85; [1992] 4 All SA 701 (A); 1992 (3) SA 673 (A) at 690G-H; *Powell N O and Others v Van der Merwe N O and Others* [2005] 1 All SA 149 (SCA); 2005 (5) SA 62 (SCA) para 36.

<sup>8</sup> *Shaaban bin Hussien and others v Chong Fook Kam and another* [1969] UKPC 26, [1969] 3 All ER 1626, [1970] 2 WLR 441, [1970] AC 942 at 948B.

<sup>9</sup> *George v Rockett* [1990] HCA 26; 170 CLR 104; 64 ALJR 384; 93 ALR 483.

<sup>10</sup> *Biyela* fn 6 above.

<sup>11</sup> *Competition Commission v Yara (South Africa) (Pty) Ltd and Others* [2013] ZASCA 107; [2013] 4 All SA 302 (SCA); 2013 (6) SA 404 (SCA).

with the suspect on the question whether its suspicions are justified. The principles of administrative justice are observed in the referral and the hearing before the Tribunal.’<sup>12</sup>

[22] From the above, it is apparent that the bar has been set relatively low for the initiation of a complaint in a regulatory environment, such as the area of competition law.<sup>13</sup> Even in the context of search and seizure operations in competition matters, it has been found that there is a low bar required for obtaining a warrant, which is ‘merely one of the starting points of the investigative process’.<sup>14</sup>

[23] The present case deals with the initiation of a complaint in the regulatory environment of the credit provision industry. Moreover, the NCA is social legislation designed to protect the poor and vulnerable against predatory lending practices. There is an argument to be made that in such matters the bar should be set even lower.

[24] Insofar as it may be argued that there is any constitutional impediment to initiating the complaint, the Constitutional Court has recognised that the right to privacy exists on a continuum. On one side is the sanctum of the personal home life, where privacy should be afforded the maximum protection. On the other is the right to privacy in commercial contexts, where the right is considerably attenuated. In this regard, it is trite that ‘[t]he more public the undertaking and the more closely regulated, the more attenuated

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<sup>12</sup> Ibid para 24.

<sup>13</sup> See also *Competition Commission of South Africa v Standard Bank of South Africa Limited*; *Competition Commission of South Africa v Standard Bank of South Africa Limited*; *Competition Commission of South Africa v Waco Africa (Pty) Limited and Others* [2020] ZACC 2; 2020 (4) BCLR 429 (CC) para 19.

<sup>14</sup> *Farmers Trust v Competition Commission of South Africa* [2017] ZAGPPHC 488; 2020 (4) SA 541 (GP) para 30.

would the right to privacy be and the less intense any possible invasion. . . In the case of any regulated enterprise, the proprietor's expectation of privacy . . . must be attenuated by the obligation to comply with reasonable regulations and to tolerate the administrative inspections that are an inseparable part of an effective regime of regulation. The greater the potential hazards to the public, the less invasive the inspection. People involved in such undertakings must be taken to know from the outset that their activities will be monitored'.<sup>15</sup> In fact, participants in closely controlled and regulated industries should expect regular inspections.<sup>16</sup> Consequently, the right to privacy in respect of business activities in the context of a highly regulated environment, such as the credit provision industry, is greatly attenuated.

[25] Turning to consider the facts of this case. Ms Mbedzi saw the sign advertising 'instant loans' and, upon enquiry, was informed by an employee of Dacqub that the interest rate charged was 30% per month. Whether or not this was later found to be factually incorrect does not detract from the fact that she had a suspicion that these practices by Dacqub were contraventions of the NCA. Ms Mbedzi stated this in her report to initiate an investigation, and in the confirmatory affidavit attached to the founding papers. There is nothing to gainsay Ms Mbedzi's suspicion on the basis of the two contraventions that she recorded: the 30% interest rate and the advertisement for 'instant loans'.

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<sup>15</sup> *Mistry v Interim National Medical and Dental Council of South Africa and Others* 1998 (7) BCLR 880 (CC); 1998 (4) SA 1127 (CC) para 27 quoted with approval in *Magajane v Chairperson, North West Gambling Board and Others* [2006] ZACC 8; 2006 (10) BCLR 1133 (CC); 2006 (5) SA 250 (CC); 2006 (2) SACR 447 (CC) para 46.

<sup>16</sup> *Gaertner and Others v Minister of Finance and Others* [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC) para 63.

[26] While the phrase ‘instant loans’ may merely mean ‘swiftly’, it could reasonably be suggestive of a curtailed or less onerous loan application process, as was held by the Tribunal. The meaning of ‘instant’ is defined as ‘happening immediately, without any delay’.<sup>17</sup> Even if one accepts the meaning attributed to the phrase by the high court, it is sufficient that the meaning could have other reasonable connotations. If the meaning ascribed to ‘instant loans’ by Ms Mbedzi was a reasonable one, then it cannot be said that she did not have a reasonable suspicion. In my view, not only was Ms Mbedzi’s interpretation a reasonable one, but a more probable one in the context of the micro-lending industry.

[27] In addition, the approach taken by the high court conflated the notion of a reasonable suspicion with *prima facie* evidence. As our courts have repeatedly stated, a reasonable suspicion contemplates a lesser burden than that of *prima facie* evidence.<sup>18</sup> To require an inspector to actually obtain a loan in order to establish a reasonable suspicion would be tantamount to requiring *prima facie* proof.

[28] In all the circumstances, I am satisfied that the NCR has shown that it had a reasonable suspicion to initiate an investigation into the activities of Dacqub. These suspicions are set out in the memorandum of Ms Mbedzi and amplified in the NCR’s founding affidavit.

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<sup>17</sup> Cambridge English Dictionary online.

Available at <https://dictionary.cambridge.org/dictionary/english/instant> Accessed on 10 June 2022.

<sup>18</sup> *Bruwil Konstruksie (Edms) Bpk v Whitson N O and Another* [1980] 2 All SA 478 (T); 1980 (4) SA 703 (T) at 711A-E.

[29] What remains is the question of whether it was competent for the Tribunal to make an order that Dacqup appoint an auditor to assess the amount that consumers had been overcharged. The high court, having found that there was no reasonable suspicion to initiate a complaint, did not deem it necessary to address this question. Ordinarily, this Court would remit the matter to the high court to consider the issue. However, the issue before this Court has narrowed considerably. As emerged during the hearing, Dacqup now accepts that an auditor should be appointed to assess the extent of overcharging and the amount to be reimbursed to consumers. Dacqup only objects to that part of the order requiring it to bear the cost of the auditor, and contends that the NCR should bear that cost. No purpose would therefore be served by remitting the matter to the high court. The Constitutional Court has found that remittal in certain circumstances would be a waste of judicial resources and inconsistent with the principle that there must be finality in litigation.<sup>19</sup> Because of its narrow ambit, this is such a case.

[30] There are several cases where an order has been made that an entity appoint an independent auditor to ascertain the extent of unlawfully obtained profit.<sup>20</sup> Implicit in these orders is that the relevant entity is to pay the costs of the auditor. There is no reason why cases involving the NCR should be any

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<sup>19</sup> *Spilhaus Property Holdings (Pty) Ltd and Others v MTN (Pty) Ltd and Another* [2019] ZACC 16; 2019 (6) BCLR 772 (CC); 2019 (4) SA 406 (CC) paras 44-46.

<sup>20</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12; 2014 (6) BCLR 641 (CC); 2014 (4) SA 179 (CC); *South African Social Security Agency and Another v Minister of Social Development and Others* [2018] ZACC 26; 2018 (10) BCLR 1291 (CC); *Cash Paymaster Services (Pty) Ltd and Others v Freedom Under Law NPC and Others* [2022] ZACC 2; 2022 (6) BCLR 661 (CC); *IGS Consulting Engineers CC and Another v Transnet Soc Limited* [2022] ZASCA 63 (SCA); *Mining Qualifications Authority v IFU Training Institute (Pty) Ltd* [2018] ZAGPJHC 455 (GJ) para 41.

different, especially bearing in mind the wide-ranging powers afforded to the Tribunal in making any appropriate order in relation to prohibited conduct.<sup>21</sup>

[31] Accordingly, the appeal must succeed. Costs should follow the result. Nevertheless, it is necessary to briefly comment on how the high court dealt with the issue of costs. As mentioned already, it ordered the NCR to pay Dacqup’s costs. It is a long-established principle in our law that where a statutory body is fulfilling its statutory duties, costs should not be awarded against it, even if it acted incorrectly, as long as its conduct was not *mala fide*.<sup>22</sup> The high court failed to observe this salutary principle, as there was no suggestion that the NCR’s conduct had been actuated by malice. Even on the view it took to dismiss the appeal, it should not have ordered the NCR to pay costs.

[32] In the result, the following order is made:

- 1 The appeal is upheld with costs.
- 2 The order of the high court is set aside and substituted with the following:  
‘The appeal is dismissed with costs.’

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C HEATON NICHOLLS  
JUDGE OF APPEAL

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<sup>21</sup> See, in particular, s 150(i) of the NCA.

<sup>22</sup> *National Credit Regulator v Southern African Fraud Prevention Services NPC* [2019] ZASCA 92; [2019] 3 All SA 378 (SCA); 2019 (5) SA 103 (SCA) paras 42-45; *Coetzeestroom Estate and Gold Mining Co v Registrar of Deeds* 1902 TS 216 at 223-224; *Deneysville Estates Ltd v Surveyor-General* [1951] 2 All SA 202 (C); 1951 (2) SA 68 (C) at 81D-H; *Competition Commission of South Africa v Pioneer Hi-Bred International Inc and Others* [2013] ZACC 50; 2014 (3) BCLR 251 (CC); 2014 (2) SA 480 (CC) para 24.



## Appearances

For appellant: M Mbikiwa  
Instructed by: M Incorporated Attorneys, Sandton  
Matsepes Incorporated, Bloemfontein

For first respondent: R Michau SC  
Instructed by: LLR Incorporated Attorneys, Pretoria  
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