

SOUTH AFRICA / JUDGMENT

Intuitive PDA (Pty) Ltd v The National Credit Regulator (NCT/212225/2021/56(1)) [2022] ZANCT 52 (20 September 2022) [2022] ZANCT 52

COURT

National Consumer Tribunal

BEFORE

J Simpson, C Sassman, N Maseti

CASE / FILE NUMBER

NCT/212225/2021/56(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: NCT/212225/2021/56(1)

In the matter between:

INTUITIVE PDA (PTY) LTD APPLICANT

and

THE NATIONAL CREDIT REGULATOR RESPONDENT

Tribunal Panel:

Adv J Simpson

- Presiding Tribunal member

Adv C Sassman

- Tribunal member

Ms N Maseti - Tribunal member and Deputy Chairperson of the Tribunal

Dates of hearing

- 15 September 2022

Date of judgment

- 20 September 2022

JUDGMENT AND REASONS

THE PARTIES

1. The Applicant is Intuitive PDA (Pty) Ltd ("the Applicant" or "Intuitive"), a company duly incorporated in terms of the company laws of South Africa, with registration number 2007/025383/07. Intuitive is registered with the National Credit Regulator as a Payment Distribution Agent (PDA) (registration number PDA03) in terms of section 44 of the National Credit Act, Act 34 of 2005 ("the Act" or "the NCA").
2. At the hearing, Intuitive was represented by Mr S van der Hoven, an attorney with Wiese and Van Der Hoven Attorneys.
3. The Respondent is the National Credit Regulator ("the Respondent" or "the NCR"), an organ of state and a juristic person established in terms of Section 12 of the NCA. It operates from its principal address at 127 Fifteenth Road, Randjespark, Midrand, Gauteng.
4. At the hearing, the NCR was represented by Ms M Matibe (legal advisor), assisted by Ms N Magolego (senior legal advisor).

THE APPLICATION

5. Intuitive has brought an application in terms of section 56(1) of the NCA to the National Consumer Tribunal ("the Tribunal") to review and set aside a compliance notice issued against it by the NCR.

6. Section 56 provides as follows –

"(1) Any person issued with a notice in terms of section 54 or 55 may apply to the Tribunal in the prescribed manner and form to review the notice within—

- (a) 15 business days after receiving that notice; or
 - (b) such longer period as may be allowed by the Tribunal on good cause shown.
- (2) After considering any representations by the applicant and any other relevant information, the Tribunal may confirm, modify or cancel all or part of a notice.
 - (3) If the Tribunal confirms or modifies all or part of a notice, the applicant must comply with that notice as confirmed or modified,

within the time period specified in it."

7. The Tribunal has jurisdiction to hear the objection to the compliance notice and "... confirm, modify or cancel all or part of the notice".

BACKGROUND

8. The NCR issued a compliance notice dated 8 October 2021, against Intuitive, in terms of section 55(1) of the NCA, alleging that it failed to comply with certain provisions of the NCA.

9. The first contravention in the NCR notice alleges that its audit and monitoring exercise conducted from 1 July to 31 December 2020 and 1 April to 30 June 2021 revealed that Intuitive distributed debt counselling fees in excess of the limits imposed by the NCR guidelines. Letters dated “18 July 2019 and 11 August 2020” were issued to Intuitive, instructing it to implement corrective measures. The measures were not fully implemented, which constitutes a contravention of Section 52(5)(c) of the NCA read with Regulation 10A(9)(e) and its conditions of registration.[1]
10. The second contravention relates to incorrect and inaccurate reporting of related funds. The compliance notice lists seven categories of information that were incorrectly reported, which constitutes a contravention of Section 52(5)(c) of the NCA read with Regulation 10A(9)(e) and its conditions of registration.
11. The Notice requires Intuitive to provide a list of consumers affected by the overpayment to recover the overpaid fees from the debt counsellors and refund the consumers. Timelines for the process are set out in the Notice. The Notice requires an independent audit report of Intuitive's systems to ensure that the errors are fixed and will not reoccur.

POINT IN LIMINE

NCR submissions

12. The NCR raised a point in limine that the Applicant had perempted its right to object to the compliance notice and apply for a review.
13. It argues that if a party acquiesces to a judgment, it will be held to have waived its right to appeal against the judgment. The acquiescence may be express or implied by unequivocal conduct after the judgment that is inconsistent with the intention to appeal. The onus of proving peremption is on the party alleging it.
14. The NCR provided a detailed history of the parties' interactions before issuing the compliance notice. It details the Applicant's ongoing cooperation and commitment to fixing the errors made and ensuring that it does not reoccur. For the purposes of peremption, this history is irrelevant.
15. On 13 October 2021, after issuing the compliance notice, the parties met at the Respondent's request. The Applicant reported its progress with correcting the errors made and committed to adhering to the compliance notice. The NCR submits that this conduct demonstrates an intention to comply with the compliance notice and acquiesce to it.
16. As of January 2022, all the found reporting errors had been resolved to the NCR's satisfaction. The corrective measures in relation to the fee overpayment were 89% complete. A total of R1 218 238.86 relating to fees paid by 486 consumers had been overpaid. A total of R1 089 208.33 relating to 420 consumers had been refunded, and R 129 030.53 relating to 66 consumers was still outstanding.

17. Due to the advanced stage of compliance, the review would have little practical effect. It would not be in the interest of justice to uphold the objection.

Intuitive's submissions

18. The Applicant submits that upon receipt of the compliance notice, it sent a letter to the NCR stating that if the notice were not withdrawn, it would enforce its review rights in terms of section 56 of the NCA. The letter dated 21 October 2021 is annexed to the Applicant's founding affidavit.
19. At all times, before and after issuing the compliance notice, it cooperated with the NCR in varying or amending its systems. However, it never abandoned any of its rights as contained in the NCA.
20. The Applicant asks that the point in limine be dismissed.

Consideration of the point in limine

21. In the matter of South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others [2016] ZACC 38, the Court quoted the following from the matter of Dabner v South African Railways and Harbours 1920 AD 583 –

"The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it."

22. The Court further stated –

"The onus to establish peremption would be discharged only when the conduct or communication relied on does "point indubitably and necessarily to the conclusion" that there has been an abandonment of the right to appeal and a resignation to the unfavourable judgment or order."

23. The first question to be considered is whether the principle applies to a compliance order. All references to the peremption principle apply to court judgments and orders where the parties have been heard, and the Court issues a judgment based on the evidence submitted by the parties.
24. The single exception to this approach is to be found in the matter of President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2018] 1 All SA 800 (GP). The Court considered whether a report by the Public Protector can be equated to a court judgment in the context of peremption and found that it can. The Court held –

"[180] We do not agree with that submission. The Public Protector's remedial action has all the attributes of a judgment. It is binding and has the force of law and its legal consequences must be complied with or acted upon. Compliance therewith is not optional and it has binding effect until properly set aside by a Court of law."

25. A remedial order issued by the Public Protector in terms of the Public Protector Act 23 of 1994 (PPA) has been pronounced by the Constitutional Court as binding on the parties[2].
26. However, a compliance order is issued in terms of section 55 of the NCA[3]. It is issued based on the NCR's reasonable belief that prohibited conduct has occurred. The requirements for the order and its contents are narrowly defined and set out in the NCA. It does not require any form of adjudicative approach. The NCA does not state that the order is binding or has the effect of a judgment.
27. A report by the Public Protector requiring remedial action is based on very broad powers in terms of the PPA. The PPA does not contain any restrictions or requirements for exercising this power. The Constitutional Court has specifically declared the Public Protector's remedial action to be binding on the parties.
28. Based on the clear legislative differences between the two orders, it would require a very large leap of legal interpretation to equate a compliance order to a court judgment or report by the Public Protector requiring remedial action. The Tribunal is not persuaded that a compliance notice meets the requirements of a judgment and that the principle of peremption can be applied.
29. Even if the Tribunal is wrong in its conclusion, the NCR has certainly not proven that Intuitive acquiesced to the compliance order and abandoned its right to review. It continually attempted to comply with the NCR's requirements before and after the notice was issued. There was no change in its approach after the notice was issued. The letter sent to the NCR clearly and unequivocally states that Intuitive intends to apply to have the notice reviewed if the NCR does not withdraw it. Displaying a cooperative approach to resolving an instruction from a regulator is to be commended, not punished by regarding it as an abandonment of rights.
30. The point in limine is dismissed.

INTUITIVE'S

SUBMISSIONS

31. Intuitive is one of only four registered PDA's. It provides payment distribution services for debt counsellors and consumers under debt review, and in 2016 it started implementing and installing new software for its payment processes. Over the years, the process required data migration from the old to the new systems. The process was highly complex and could only be completed in October 2020. Throughout the process, Intuitive maintained a good working relationship with the NCR and cooperated in addressing and correcting any system errors.

The NCR issued informal notices to Intuitive during this period, which it complied with. When the formal compliance notice was issued, Intuitive had no choice but to formally lodge its objection with the Tribunal.

32. Its grounds for objection can be summarised as follows –

32.1 The Notice does not contain sufficient detail of the contraventions to enable the Applicant to consider them. Therefore, the notice does not comply with Section 55(3) of the NCA.

32.2 Although the Applicant does not deny that it did not comply with the guidelines by overpaying some debt counsellors, it does not constitute a contravention of the NCA. Only the Minister can prescribe the fees payable to debt counsellors, not the NCR.

32.3 The Applicant is not tasked with any legal duty or responsibility to monitor the payments made to debt counsellors.

32.4 Although the reporting may have been inaccurate according to the NCR, this was due to the reporting format required by the NCR.

Insufficient detail

33. Intuitive submits that the Notice should have contained a list of the specific debt counsellors, the transactions and the dates describing the alleged overpayments. The Applicant collects and distributes approximately R250m every month, and the overpaid amount only equates to 0.02547% of the monetary value of all the transactions from 2017.

Legal duty to monitor fees

34. The Applicant's registration conditions only require it to ensure that the applicable fees payable to debt counsellors are distributed. It cannot determine the correctness of the fees and can only report on the fees paid. The NCR must regulate the fees and investigate any non-compliance with the NCA, not the PDA.

Reporting requirements

35. The NCR provides a template report that a PDA is required to populate. The report format has not evolved with the industry changes, making it very difficult to report information accurately. The Applicant is currently discussing with the NCR to review the reporting process.

Debt counsellor fee limit is not binding

36. The Applicant does not deny that it is bound by the guidelines issued by the NCR. However, it submits that the NCR has no power to regulate the fees payable to debt counsellors. The fee guideline issued by the NCR is merely a guideline and cannot be elevated to the status of binding legislation. Only the Minister has the power to regulate the fees.

37. Section 16(1)(b)(i) of the NCA states –

"Research and public information.—(1) The National Credit Regulator is responsible to increase knowledge of the nature and dynamics of the consumer credit market and industry, and to promote public awareness of consumer credit matters, by—

- (a) implementing education and information measures to develop public awareness of the provisions of this Act;
- (b) providing guidance to the credit market and industry by—
 - (i) issuing explanatory notices outlining its procedures, or its non-binding opinion on the interpretation of any provision of this Act;"

38. The section only provides for the issuing of guidance regarding the NCR's internal processes and non-binding opinions.

39. Section 45(5)(c) of the NCA states –

"(5) The Minister may prescribe—

- (a)
 - (b)
 - (c) the fees that may be charged by a registrant.
40. The section states that only the Minister may prescribe the fees payable to a debt counsellor. The NCR cannot regulate or prescribe the fees, and any attempt to do so is ultra vires.
41. It follows that paying excess fees to the debt counsellors is not a contravention of the NCA.
42. The Applicant asks that the compliance notice be modified or cancelled.

THE NCR'S SUBMISSIONS

43. The NCR submitted that the section of the compliance notice relating to reporting inaccuracies has become moot. After issuing the compliance notice, the Applicant made changes to its reporting template. Testing was done, and the NCR is satisfied that the reporting now meets the requirements. It submits that no adjudication on this aspect is required, and the NCR is willing to issue a compliance certificate for the reporting part of the compliance notice.
44. The NCR does not require the PDA to regulate or monitor debt counselling fees. It is only required to comply with its responsibility to pay the fees as set out in the guidelines as required by Regulation 10(A)(9)(e) of the NCA.
45. The Notice contained all the information as required by Section 55(3)(c) to (d) of the NCA. The issues raised by the NCR were not new; ongoing discussions regarding the contraventions took place before the Notice was issued.

46. The NCR made numerous submissions regarding the binding nature of its guidelines in relation to debt counsellor fees. For the purposes of this judgment, it is sufficient to reflect that the NCR submits its fee guidelines were never disputed or challenged in any previous cases in the Tribunal or the High Court. The only fee specifically prescribed by the NCA for debt counsellors is the R50.00 fee. This fee is unreasonable considering the amount of work a debt counsellor is tasked with. The fee guidelines were issued to protect both consumers and debt counsellors. The guidelines issued by the NCR are binding in terms of Regulations 10(A)(9)(b) to (e) of the NCA, which state as follows – "Duties and obligations of a payment distribution agent

(9) Payment distribution agent must—

(a) implement, maintain and utilise an electronic payment distribution system that offers the functionality determined by the National Credit Regulator in its conditions of registration and any guidelines that may be issued by the National Credit Regulator from time to time;

(b) comply with the reporting requirements to consumers, credit providers, debt counsellors and the National Credit Regulator in the

manner and form determined by the National Credit Regulator in its conditions of registration and any guidelines that may be issued by the National Credit Regulator from time to time;

(c) on a monthly basis provide a statement to the consumer reflecting the following information —

(i) date of receipt of payment;

(ii) amount of payment received;

(iii) names of the consumer's credit providers who received payments during the relevant month and the actual amounts paid;

(v) undistributed funds;

(vi) outstanding balances under the debt rearrangement plan, Court, or tribunal order as the case may be, reflecting a disclaimer to the

effect that the outstanding balances may be adjusted from time to time after the debt counsellor has provided the payment distribution

agent with updated transactions from credit providers including, interests;

(vii) fees of the payment distribution agent;

(viii) payments made to the debt counsellor; and (ix) payments made to the credit providers.

(d) provide a monthly statement referred to in subregulation 8 (c), in a manner chosen by the consumer which may be in the form of an email, short message service (sms), multimedia messaging service (mms), fax or written statement;

- (e) comply with any other requirements that may be imposed by the National Credit Regulator in its conditions of registration and any

guidelines that may be issued by the National Credit Regulator from time to time;

- (f) deposit monies collected from consumers into a trust account opened at a registered bank and distribute the monies to the credit

providers and debt counsellors;

- (g) distribute monies received within five (5) days of receipt, failure which reasons must be submitted to the National Credit Regulator;

- (h) open a separate trust account with a registered bank into which interest earned on monies collected from consumers is deposited. The National Credit Regulator must—

- (i) open a trust account into which all interest earned on monies held by the payment distribution agent is deposited;

- (ii) transfer interest accrued from these monies to the trust account stipulated in subregulation 10A (9) (h) (i) r; and

- (iii) develop a policy on the usage of trust account funds for approval by the Minister of Trade and Industry. [R. 10A inserted by GNR.202 of 13 March 2015.]"

- 47. The NCR requested that if the Tribunal found that the fee guidelines were unlawfully issued, the order be suspended for a period of time to enable the NCR to regularise the fees. It is presumed that this means the NCR would want the Minister to issue a specific regulation in this regard.

CONSIDERATION OF THE

FACTS

- 48. Based on the submissions made by the parties, there are no disputed facts. There is no dispute that Intuitive overpaid certain debt counsellors. Intuitive does not dispute that certain information was not provided accurately in the reports. The Tribunal notes that the reporting format may have made this process difficult, but the factual situation is not disputed.

- 49. Therefore, the issues the Tribunal needs to consider are purely legal in nature.

CONSIDERATION OF THE LEGAL ISSUES

The detail contained in the Notice

- 50. Section 55 (3) of the NCA prescribes the content for a compliance notice. It states –

"(3) A compliance notice contemplated in subsection (1) must set out—

- (a) the person or association to whom the notice applies
 - (b) the provision, or condition, that has not been complied with;
 - (c) details of the nature and extent of the non-compliance;
 - (d) any steps that are required to be taken and the period within which those steps must be taken; and
 - (e) any penalty that may be imposed in terms of this Act if those steps are not taken."
51. The Notice contains all the information required by Section 55(3) of the NCA. Intuitive did not allege that any information relating to a specific subsection was absent. It is alleged that further information should have been provided based on the many transactions that occurred during the period.
52. The NCR provided all the information as required by the NCA. Further, the information provided would have been reasonably sufficient for Intuitive to investigate and obtain the records of the specific transactions relevant to the contravention. There is no evidence of Intuitive being unable to trace the information. There is no dispute that Intuitive was aware of the transactions before the Notice was even issued.
53. The Tribunal is satisfied that the Notice complied with Section 55(3) of the NCA and contained sufficient detail for Intuitive to respond to it.
54. The parties confirmed that Intuitive is not responsible for regulating debt counsellor fees. There is a vast difference between regulating fees and paying fees in accordance with legal instructions. It is the duty of the NCR to regulate and monitor fees. It did this through the issuing of guidelines which Intuitive was obliged to comply with. At no stage was Intuitive instructed to regulate the fees. Ensuring that the correct fees are paid to debt counsellors does not equate to any unlawful duty to monitor or regulate the fees.
55. The Tribunal is satisfied that Intuitive's duty to ensure that the correct fees were paid to debt counsellors does not constitute an unlawful duty to regulate or monitor the fees.

The reporting requirements

56. As stated previously, Intuitive did not dispute that the information provided in the reports was not entirely accurate and in accordance with the NCR's requirements. It did not raise any allegation that it was impossible to comply with the requirements. It has since provided the information required and is in discussions with the NCR to improve the reporting template.
57. The Tribunal is satisfied that Intuitive was obliged to provide the information required in the reports and did not do so. There is no basis for a finding that it was not required or unable to provide the information required.

58. Whether this issue has subsequently become moot or not is not relevant to the validity of the Notice issued. The Tribunal is required to review the notice and determine whether it should be set aside or varied. If there is no evidence that the reporting contravention is invalid or incorrect, then there is no basis for it to be varied or set aside. The NCR submitted that it was prepared to issue a compliance certificate regarding this aspect of the Notice, which would appear to be the correct course of action if it has been complied with.

The legal validity of the debt counsellor fees

59. The validity of the debt counsellor fees occupied a significant portion of the submissions made to the Tribunal. However, in the Tribunal's view, the entire argument relating to this aspect is misplaced.
60. Section 10A(9)(e) of the NCA makes it clear that a PDA must comply with the NCR's guidelines. As Intuitive itself argued, the PDA is not a regulator and is not empowered to regulate the fees it is instructed to pay. The PDA is merely an intermediary that provides a payment mechanism. At most, it is an interested party in any issues relating to the fees it is required to distribute. There is no clear nexus between the lawfulness of the fees paid to debt counsellors and the interests of the PDA.
61. The only interest Intuitive can illustrate is in avoiding the consequences of the compliance notice by attacking the underlying validity of the fees it distributes. In the Tribunal's view, this interest is not sufficient. It is clear that numerous parties would be directly affected by a challenge to the validity of the debt counsellor fee structure; the debt counsellors themselves would be one obvious example. To consider this issue in isolation without their required participation and joinder would be inappropriate and contrary to the interests of justice.
62. Further, the factual basis of the matter before the Tribunal and the issues raised do not require adjudication of the debt counsellor fee structure.
63. The Tribunal will note that the NCA does not provide any clear power allowing the NCR to issue binding guidelines in relation to fees or, specifically, debt counselling fees. Based on the submissions made by the parties at the hearing, it appears debt counselling fees are the only NCA fees not confirmed by ministerial regulation. It would appear that the NCR should consider the issue carefully and take the required steps to ensure compliance with the NCA if required.

CONCLUSION

64. There is no basis for a finding that the NCR's compliance notice lacked sufficient detail or was unlawfully issued.

ORDER

65. The Tribunal accordingly makes the following order –

65.1 The application to modify or cancel the compliance notice is refused; and

65.2 No order is made as to costs.

Dated at Centurion this 18th day of September 2022.

(signed)

Adv J Simpson

Presiding Tribunal member

Adv C Sassman (Tribunal member) and Ms N Maseti (Tribunal member and Deputy Chairperson of the Tribunal) concurred.

[1].-

[2] Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11

[2] Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v

Speaker of the National Assembly and Others [2016] ZACC 11

[3] 55. Compliance notices.—(1) Subject to subsection (2), the National Credit Regulator may issue a compliance notice in the prescribed form to—

(a) a person or association of persons whom the National Credit Regulator on reasonable grounds believes— (b) has failed to comply with a provision of this Act; or

(c) is engaging in an activity in a manner that is inconsistent with this Act; or

(b) a registrant whom the National Credit Regulator believes has failed to comply with a condition of its registration.

[3] 55. Compliance notices.—(1) Subject to subsection (2), the National Credit Regulator may issue a compliance notice in the prescribed form to—

(a) a person or association of persons whom the National Credit Regulator on reasonable grounds believes—

(b) has failed to comply with a provision of this Act; or

(c) is engaging in an activity in a manner that is inconsistent with this Act; or

(b) a registrant whom the National Credit Regulator believes has failed to comply with a condition of its registration.

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