

SOUTH AFRICA / JUDGMENT

Mortgage Secured Finance (Pty) Ltd v National Credit Regulator (NCT/88262/2017/56(1)) [2018] ZANCT 123 (20 September 2018)

[2018] ZANCT 123

COURT

National Consumer Tribunal

BEFORE

D Terblanche, K Moodaliyar, T Bailey

CASE / FILE NUMBER

NCT/88262/2017/56(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: NCT/88262/2017/56(1)

In the matter between:

MORTGAGE SECURED FINANCE (PTY) LTD APPLICANT

And

NATIONAL CREDIT REGULATOR RESPONDENT

Panel:

Ms. D Terblanche

- Presiding member

Mr. T Bailey

- Member

Prof K Moodaliyar

- Member

Date of Hearing: 28 August 2018

JUDGMENT AND

REASONS

THE APPLICANT

1. The Applicant is Mortgage Secure Finance (Pty) Ltd (“the Applicant”), an erstwhile registered credit provider, under registration number NCRCP4865. The Applicant voluntarily deregistered on or about 24 March 2016.

THE RESPONDENT

2. The Respondent is the National Credit Regulator (“the Respondent”), established in terms of section 12 of the National Credit Act, Act 34 of 2005 (“the NCA”), and responsible for, amongst other things, monitoring the credit market to ensure that prohibited conduct is prevented or detected and prosecuted.

TYPE OF APPLICATION

3. The Applicant brought this application before the National Consumer Tribunal (“the Tribunal”) to review a compliance notice, dated 12 September 2016, issued against it by the Respondent, in terms of section 55(1) of the NCA.
4. Section 55(1) of the NCA provides that-
“... the National Credit Regulator may issue a compliance notice in the prescribed form
 - (a) to a person or association of persons whom the National Credit Regulator on reasonable grounds believes—(i) has failed to comply with a provision of this Act; or (ii) 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.”
5. The Applicant has applied to the Tribunal for this notice to be reviewed as provided for in terms of section 56 of the NCA. Section 56 of the NCA provides that any person issued with a notice in terms of section 54 or 55 may apply to the Tribunal for the notice to be reviewed within 15 business days after receiving that notice (section 56 (1) (a)) or such longer period as may be allowed by the Tribunal on good cause shown (section 56 (1)(b)).
6. This matter was enrolled and heard on 28 August 2018.

BACKGROUND

7. During November 2014, the Respondent conducted an investigation into the activities of the Applicant.
8. The investigation followed a complaint to the Respondent by two consumers, Gert and Jennifer Collins (who are jointly referred to as “the Complainants”), regarding certain charges relating to a mortgage bond granted to them by the Applicant.

9. Following the investigation, the Respondent's investigators reported that the Applicant contravened the NCA, in that the Applicant charged consumers for items over and above those allowed for in the NCA.
10. The Respondent alleged that the Applicant charged the following fees in contravention of the NCA –
 - 10.1. Judgment fee - a fee charged to rescind judgments;
 - 10.2. CCA account fee - R300,00 per account for administration;
 - 10.3. Default fee - R950,00 for the removal of each of the consumer's default statuses;
 - 10.4. Monitoring fee - R625,00 per month to monitor the consumer's accounts;
 - 10.5. Debit order handling fee, R150,00 per month for monitoring the consumer's monthly debit orders;
 - 10.6. Investors' raising fee of 7,5% of the loan amount of the credit extended, which in the Complainants' case amounted to R56 035,69; and
 - 10.7. LOXFIN agent's fee - in effect a finder's fee for, amongst other things, finding the consumers, covering travel costs and investigating the consumers' debts.
11. As a result, the Respondent issued a compliance notice against the Applicant in terms of sections 55 (1) of the NCA dated 12 September 2016.
12. The Respondent required of the Applicant to take the following steps to cure its alleged non-compliance –
 - 12.1. Discontinue the charging of the prohibited fees by no later than 15 October 2016; and
 - 12.2. Submit an audit report by 10 November 2016 reflecting that-
 - 12.2.1. The business had been audited;
 - 12.2.2. The fees are in accordance with the law;
 - 12.2.3. Amounts consumers had been overcharged / charged in terms of the prohibited fees; and
 - 12.2.4. Consumers had been refunded / reimbursed for the amounts overcharged / charged in respect of the prohibited fees.

SUBMISSIONS

BY THE PARTIES

APPLICANT

13. The Applicant explained its mode of operating to the Tribunal. It involves the inter-operability of three (3) independent entities,

including the Applicant. The one entity (Loxfin) who recruits clients for the Applicant and sources funding for the loans extended to them; a law firm assisting those consumers with resolving their adverse credit records; and lastly the Applicant itself who enters into the mortgage loan agreements with the consumers. Of the three entities, only the Applicant is registered with the Respondent and subjected to the provisions of the NCA.

14. The Applicant submitted in defence to the compliance notice that it did not contravene section 100(1)(d) of the NCA because the provisions of the section do not apply to it. Its bases for this contention are that the charges the Regulator complained about -

14.1. Are between the consumer and the third parties, not between the Applicant and the third parties and therefore not payable by the Applicant as credit provider to any third party. In their model the third parties are the entity that recruited the consumers for the Applicant and the law firm who resolves these consumers adverse credit records; and

14.2. Accordingly, the charges are not "... fees, charges, charges, commission, expense or other amount payable by the credit provider to any third party in respect of a credit agreement..." (Emphasis added)

15. The Applicant submitted further that the exception to the prohibition in section 100(1)(d), contained in sections 102(2) and (3), does not apply to the Applicant since the prohibition in section 100(1)(d), on its perspective, does not apply to it.
16. Finally, the Applicant submitted that in any event it had complied with the compliance notice. The compliance notice was issued after the Applicant voluntarily de-registered and it had not issued credit since the end of the previous year.

RESPONDENT

17. The Respondent submitted that the Applicant contravened the NCA and more particularly section 101(1).

18. The Respondent referred the Tribunal to a document, to be read with the Applicant's "Breakdown of all monies received / paid" on page 44 of the record. The Respondent submitted that this document shows that the prohibited charges are part of the loan amount

repayable by the Complainants in support of its view that the Applicant is indeed in contravention of section 101 (1) of the NCA.

19. With regard to section 100(1)(d) the Respondent pointed out to the Tribunal that it does not only prohibit the credit provider from

charging an amount but also from imposing a monetary liability on the consumer in respect of any fee, charge, commission, expense or other amount payable by the credit provider to any third party in respect of a credit agreement, except as contemplated in section 102 or elsewhere in the NCA.

20. The imposition of the charges also amounts to the imposition of a monetary liability on the consumer that is prohibited in terms of section 100(1)(d), over and above the charges contravening sections 101 and section 102(1). The impugned charges are -

20.1. Judgment fee – a fee charged to rescind judgments;

20.2. CCA account fee - R300,00 per account for administration;

20.3. Default fee - R950,00 per default status for removal of each of the consumer's default status;

20.4. Monitoring fee - R625,00 per month to monitor the consumer's accounts;

20.5. Debit order handling fee

- R150,00 per month for monitoring the consumer's monthly debit orders;

20.6. Investors' raising fee of 7,5% of the loan amount of the credit extended. In the case of the complainants this amounted to R 56 035,69 and according to the Respondent has the effect of placing a person who is already over indebted in more debt; and

20.7. LOXFIN agent's fee

- in effect a finder's fee for, amongst other things, finding the consumers, travel costs and investigating the consumers' debts.

ANALYSIS

21. The provisions relating to fees and charges relevant to this matter are contained in sections 101, 100(1)(d), 102(1), (2) and (3) of the NCA.

22. Section 101 sets out the extent of the costs of credit, beyond which the credit provider may not charge. It consists of the principal debt, initiation fee, service fee, interest, cost of any credit insurance, default administration charges and collection costs.

23. Section 100(1)(d) sets out the charges that are prohibited. These charges are over and above the cost of credit prescribed in section 101 or elsewhere in the NCA. They comprise any fee, charge, commission, expense or other amount payable by the credit provider to any third party in respect of a credit agreement. However, this prohibition is subject to the fees or charges contemplated in section 102 or elsewhere in the NCA.

24. Section 102(1) allows for certain other charges the credit provider may impose in the credit agreement. These charges may however only be included in the credit agreement if the consumer had appointed the credit provider as his or her agent. There is no allegation or evidence to the effect that the Applicant's consumers had ever appointed it as their agent. Accordingly, the Applicant is proscribed from charging the charges set out in section 102(1).
25. At the hearing, the parties agreed on the fees, charges, commissions, expenses or other amount allowed and those prohibited in terms of the NCA. They also agreed that the charges listed in paragraph 20 above are not allowed by the NCA.
26. The question then remains whether the Applicant is correct in its submission that the prohibition in section 100(1)(d) of the NCA does not apply to it. The Applicant's defence with regard to the charges in paragraph 20 above is that they have been incurred between its consumers and third parties, not between the Applicant and its consumers or between the Applicant and third parties. The Applicant accordingly denies that the charges are payable by the credit provider to any third party in respect of a credit agreement.
27. The Tribunal has considered all the submissions and evidence presented to it at the hearing of this matter. The first documents that require the Tribunal's attention are the "Breakdown of all monies received / paid" and the "Irrevocable undertaking: Consolidation of Debt".
28. It appears from examining the "Breakdown of all monies received / paid" and comparing it to the "Irrevocable undertaking: Consolidation of Debt" that forms part of the credit agreement that the total loan amount ("Amount received from the Investor") is reflected as R260 475,68. This amount is identical to the total amount of the consolidated debt. This amount represents the total of all the charges set out in paragraph 20 above, the settlement amounts of the consumers' credit obligations, and some other charges.
29. Considering this, it appears the mortgage loans that consumers' repay to the Applicant include the impugned charges.
30. On the plain reading of section 101 (1), the Tribunal is satisfied that the inclusion of these charges in the credit agreements is proscribed and amounts to a contravention of the NCA.
31. It is also clear from these documents, despite its remonstrations, that it is the Applicant who makes the payments on behalf of the consumer to the third parties.
32. The Tribunal accordingly finds that the Applicant contravened the provisions of the NCA as set out in the compliance notice.
33. The Tribunal now turns to the compliance notice and the steps the Respondent required the Applicant to take.
34. The Tribunal noted the Applicant's submission that it had not been extending loans since the end of 2015 and had voluntarily

de-registered with the Respondent during March 2016. It further noted that the Applicant still has consumers on its books and is collecting from them in terms of credit agreements entered into prior to its de-registration.

35. Even if the Tribunal accepts that the Applicant stopped extending credit and deregistered well before the issuance of the compliance notice, the compliance notice relates to contraventions predating the Applicant's deregistration. It is therefore probable that that the Applicant has been and still is receiving payments in respect of the prohibited charges it imposed on its consumers.
36. In the Tribunal's view, the Applicant's deregistration does not remedy its actions in having levied amounts in contravention of the NCA. Neither does it as a corollary compensate consumers for the amounts they were unlawfully required to pay to the Applicant. Nor does it amount to compliance with the steps the Respondent required the Applicant's to take in terms of the compliance notice.

ORDER

37. The Tribunal accordingly makes the following order –

37.1. The compliance notice issued by the Respondent against the Applicant dated 12 September 2016 is hereby confirmed;

37.2. The Applicant is ordered to take the following steps to cure its' non-compliance –

37.2.1. Discontinue charging consumers prohibited fees by no later than 30 (thirty) days from the date of receipt of this order;

37.2.2. Submit an audit report by no later than 45 (forty-five) days from the date of receipt of this order reflecting that –

37.2.2.1. The business has been audited;

37.2.2.2. The fees are in accordance with the law;

37.2.2.3. The amounts consumers have been overcharged / charged in terms of the prohibited fees; and

37.2.2.4. Consumers have been refunded / reimbursed for the amounts overcharged / charged in respect of the prohibited fees; and

37.3. No order is made as to costs.

Dated at Centurion this 20th day of September 2018.

Ms. D Terblanche

Prof K Moodaliyar and Mr. T Bailey concurring

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