

SOUTH AFRICA / JUDGMENT

National Credit Regulator v 5 Star Cash Loans (Pty) Ltd (NCT/320469/2024/140(1))

[2024] ZANCT 22 (18 July 2024)

[2024] ZANCT 22

COURT

National Consumer Tribunal

BEFORE

S Hockey, N Maseti, CJ Ntsoane

CASE / FILE NUMBER

NCT/320469/2024/140(1)

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HELD IN CENTURION

Case

number: NCT/320469/2024/140(1)

In

the matter between:

NATIONAL
CREDIT REGULATOR
APPLICANT
and
5
STAR CASH LOANS (PTY) LTD
RESPONDENT

Coram: Mr
S Hockey
- Presiding Tribunal
Member
Ms
N Maseti
- Tribunal Member
Mr
CJ Ntsoane
- Tribunal Member
Date
of Hearing
- 10 July 2024
Date
of Judgment
-
18 July 2024

JUDGMENT

AND REASONS

INTRODUCTION

1. The applicant in this matter is the National Credit Regulator (the applicant or the NCR), a juristic person established by section 12 of the National Credit Act, 34 of 2005 (the NCA). At the hearing, the applicant was represented by Adv Moosa Vardalia, a legal advisor employed by the applicant.
2. The respondent is 5 Star Cash Loans (Pty) Ltd (the respondent), duly incorporated under the company laws of South Africa. The respondent has been a registered credit provider with the NCR since January 2018 and remains registered under registration number NCRCP 10181. The respondent did not appear and was not represented at the hearing of this matter.
3. This is an application made in terms of section 140(1) of the NCA, whereby the NCR seeks an order declaring that the respondent repeatedly contravened various sections of the NCA and its regulations and that such contraventions be declared prohibited conduct in terms of section 150(a). The NCR further seeks additional orders relating to the alleged contraventions, which will be discussed below.

TERMINOLOGY

4. A reference to a section in this judgment refers to a section of the NCA.
5. A reference to a regulation refers to the National Credit Act Regulations, 2006[1] (the regulations).

6. A reference to a Form refers to a Form as prescribed in the regulations.
7. A reference to a rule refers to the Rules of the National Consumer Tribunal[2] (the Tribunal).

CONSIDERATION OF THIS MATTER ON AN UNOPPOSED BASIS

8. The applicant served this application on the respondent by registered post on 26 March 2024 to both the latter's registered and business addresses. The track-and-trace reports from the South African Post Office show that the registered post reached the correct post offices for the areas where the respondent's registered and business addresses are situated. These reports further

show that notifications were sent to the respondent advising that the posts were ready for collection. In terms of rule 30(3)(b) read with rule 30(1)(b), therefore, the NCR has shown that the application was served on the respondent.

9. In terms of rules 13(1) and (2), a respondent to an application or referral to the Tribunal may oppose the matter by filing an answering affidavit within 15 business days of receipt of the application or referral.
10. The respondent failed to file an answering affidavit within the prescribed period or at all, and the matter was accordingly set down for hearing on an unopposed basis.
11. In terms of rule 13(5), any fact or allegation in an application or referral not specifically denied or admitted in an answering affidavit will be deemed to have been admitted. Since no answering affidavit has been filed, the allegations by the applicant must be deemed to have been admitted by the respondent.

BACKGROUND

12. The NCR's Investigation and Enforcement Department (the department) attended the Consumer Affairs World Consumer Rights Day project in the North West Province with a mandate to assist in creating awareness of the NCA and to identify certain credit providers that may be in contravention of the NCA within the province. Whilst there, employees of the department received information that led them to visit the respondent's business premises in Moruleng Mall.
13. When the aforesaid employees visited the respondent's business premises, no window decal was observed at the entrance of the premises, and no registration certificate could be found on display within the premises.
14. Upon making anonymous enquiries, the department's employees were told by the respondent's employees that the respondent charged 28% interest per credit agreement. The department's employees also received information from others that the respondent retained consumer ID books and bank cards to enforce loan repayments.

15. The aforesaid observations and information received raised a reasonable suspicion with the NCR that the respondent was contravening provisions of the NCA, its regulations, and its conditions of registration. Consequently, the NCR initiated a complaint in terms of section 136(2) and authorised an investigation into the business activities of the respondent. Four of the NCR's inspectors (the investigators) were duly authorised to conduct the investigation.
16. On 10 October 2023, the investigators obtained a search and seizure warrant issued by the Moruleng Magistrate's Court, entitling them to search the respondent's business premises and seize any prohibited instruments and other documentation. The investigators, accompanied by members of the South African Police Service (SAPS), executed the warrant the same day.
17. On their arrival at the respondent's business premises, the investigators found several members of the respondent's staff, including Mr WU Jianchu (Mr Jianchu). The search and seizure warrant was explained to Mr Jianchu, and he was provided with a copy thereof. The investigators and the members of the SAPS proceeded to search the premises and, in the process, found prohibited instruments.
18. During the search, the search team found that the respondent had an updated registration certificate and window decal but failed to display these.
19. Mr Jianchu provided the investigators with an overview of the respondent's business practices, including that;
 - 19.1. the respondent has about eight branches at locations that he could not identify;
 - 19.2. it extended short-term loans only, for one to three months, for amounts ranging from R200.00 to R5 000.00;
 - 19.3. loans were issued to a varied customer base, including employed individuals and SASSA beneficiaries;
 - 19.4. the following documents were required from consumers to facilitate a loan, namely a copy of their ID document, two months' payslips, three months' bank statements, and proof of address;
 - 19.5. no pre-agreement statements and quotations were provided to consumers;
 - 19.6. in a 30-day period, approximately 50 100 loans were extended;
 - 19.7. the current book loan was about R200 000.00 monthly;
 - 19.8. affordability assessments were conducted by perusing the consumers' pay slips, bank statements, and their credit reports;
 - 19.9. interest on loans was charged at 28%, and no service fee was charged;
 - 19.10. no credit life insurance was offered; and

19.11. loan repayments were collected via debit order or cash.

20. The investigators obtained ten consumer files (the sampled files), which were voluntarily handed over. The sampled files are attached to the investigation report, marked annexures “F1” to “F10”. These documents were assessed and considered,

along with other information obtained, culminating in an investigation report. It is from this investigation report that it appeared that the respondent contravened various provisions of the CPA and its regulations. These alleged contraventions will be discussed below.

THE ALLEGED CONTRAVENTIONS

The retaining of prohibited instruments

21. Section 133(1)(a) prohibits a credit provider from making use of any document, number, or instrument referred to in section 90(2)(l)[3] when collecting on or enforcing a credit agreement. Section 133(2) provides that a credit provider, when collecting money owed by a consumer under a credit agreement or when seeking to enforce a credit agreement, must not use or rely on any document, instrument, or contract provision referred to in section 90(2)(l).

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22. During the search and seizure operation, the respondent was found to be in possession of 21 prohibited instruments, including 12 bank cards and nine consumer identity documents.

23. As a result of the above, the Tribunal concludes that the respondent contravened sections 133(1) and (2) read with section 90(2)(l).

Failing to provide consumers customers with pre-agreement statements and quotations, and credit agreements at all

24. Section 92(1) prescribes that a credit provider must not enter into a small credit agreement unless the credit provider has given the consumer a pre-agreement statement and quotation in the prescribed form[4]. Regulation 28(1)(b) requires the pre-agreement statement and quotation to be in the format set out in Form 20.

25. In terms of regulation 23A(15)(a), a credit provider must disclose to the consumer the credit cost multiple and total cost of credit in the pre-agreement statement and quotation. In terms of regulation 23A(15)(d), a credit provider must disclose the total cost of credit, which includes, amongst other things, the principal debt, interest, initiation fees and service fees.

26. In all the sampled files, it appears that the respondent failed to provide consumers with pre-agreement statements and quotations in the prescribed form or at all. Mr Jianchu confirmed this during his interview with the investigators.

27. The failure to provide consumers with pre-agreement statements and quotations contravened section 92(1), read with regulation 28(1)(b) and Form 20.

28. The respondent contravened section 92(2)(a) read with regulation 28(1) and Form 20.2 by failing to make the necessary disclosure in respect of the cost of credit related to the credit agreements.

29. Furthermore, by failing to provide consumers with credit agreements, as is apparent from all the sampled files, the respondent contravened

section 93(2), which requires a credit provider to deliver, without charge, a copy of the document that records a small credit agreement in the prescribed form and regulation 30(1)[5].

Failure to conduct affordability assessments

30. Section 81(2) prohibits a credit provider from entering into a credit agreement without first taking reasonable steps to assess the proposed consumer's:

30.1 general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of the consumer under a credit agreement;

30.2 debt re-payment history as a consumer under credit agreements; and

30.3 existing financial means, prospects, and obligations.

31. Section 170 requires a credit provider to maintain records of all applications for credit, credit agreements, and credit accounts in the prescribed manner and form and for the prescribed time. Regulation 55(1)(b) sets out what records a credit provider must maintain in respect of each consumer, including the application for credit, pre-agreement statement and quote, the credit agreement entered into, and the documentation in support of steps taken in terms of section 81(2).

32. Regulation 23A sets out the criteria for conducting affordability assessments. For present purposes, the relevant sub-regulations are (3), (5), (8), (9), (10), (12), (13), and (15). They provide:

“(3) A credit provider must take practicable steps to assess the consumer or joint consumer's discretionary income to determine whether the consumer has the financial means and prospects to pay the proposed credit instalments.

(5) Where the consumer's monthly gross income shows material variance, the average gross income over the period of not less than three (3) pay periods preceding the credit application must be utilised.

Existing financial obligations

(8) A credit provider must make a calculation of the consumer's existing financial means, prospects and obligations as envisaged in sections 78(3) and 81(2)(a)(iii) of the Act.

(9) The credit provider must utilise the minimum expense norms table below, broken down by monthly gross income when calculating the existing financial obligations of consumers.

- (10) The methodology in the table requires for:
- (a) credit providers to ascertain gross income;
 - (b) statutory deductions and minimum living expenses to be deducted to arrive at a net income, which must be allocated for payment of debt instalments; and
 - (c) when existing debt obligations are taken into account, the credit provider must calculate discretionary income to enable the consumer to satisfy any new debt.

Table 1: Minimum Expense Norms [Table not copied]

- (12) When conducting the affordability assessment, the credit provider must: -
- (a) calculate the consumer's discretionary income;
 - (b) take into account all monthly debt repayment obligations in terms of credit agreements as reflected on the consumer's credit profile held by a registered credit bureau; and
 - (c) take into account maintenance obligations and other necessary expenses.

Debt re-payment history as a Consumer under Credit Agreements

- (13) A credit provider must take into account the consumer's debt repayment history as a consumer under credit agreements, as envisaged in section 81(2)(a) and must ensure that this requirement is performed: -
- (a) within seven (7) business days immediately prior to the initial approval of credit or the increasing of an existing credit limit; and
 - (b) within fourteen (14) business days with regards to mortgages.

Disclosure of the credit cost multiple and the total cost of credit

- (15) A credit provider must: -
- (a) disclose to the consumer the credit cost multiple and total cost of credit in the pre-agreement statement and quotation;
 - (b) ensure that the credit cost multiple disclosures for credit facilities is based on one year of full utilisation up to the credit limit proposed;
 - (c) ensure that the attention of the prospective consumer is drawn to the credit cost multiple and that the cost of credit as disclosed, is understood by the prospective consumer;
 - (d) disclose a total cost of credit which includes but not limited to, the following items:-
 - (i) the principal debt;
 - (ii) interest;

- (iii) initiation fee, if any;
- (iv) service fee aggregated to the life of a loan; and
- (v) credit insurance aggregated to the life of a loan, as set out in section 106 of the Act.”

33. None of the sampled files shows that the respondent conducted affordability assessments as required under section 81(2), read with

the relevant provisions of regulation 23A quoted above. The only documents found in the sampled files are agreements to use electronic

signatures and, in some instances[6], bank statements. Furthermore, handwritten notes with the Rand values of the loans' capital amounts and a file reference number were found in the files.

34. The sampled files did not contain income and expense declarations or credit bureau history reports. The absence of these documents indicates that the respondent did not conduct affordability assessments.

35. The investigators considered the bank statements found in some of the sampled files and concluded that some of the consumers lived from hand to mouth. In respect of Pauline Saakgosing, whose file is marked “F8”, for example, entries in the bank statement show that an amount of R1 800.00 was deposited on 28 September 2023. On the same day, a debit order of R1 586.72 in favour of the respondent was paid. The pattern was repeated when another deposit of R1 800.00 was made into the consumer’s

account, followed by a debit order payment in favour of the respondent for R1 580.08. Similar patterns were found in files F7 and

F10.

36. As a result of the above, the Tribunal concludes that the respondent contravened section 81(2)(a) read with regulation 23A(3), (5), (8), (9), (10), (12),(13), and (15).

Reckless credit

37. Section 80(1)(a) provides that a credit agreement is reckless if, at the time the agreement was entered into, the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of said assessment might have concluded. Section 81(3) prohibits a credit provider from entering into a reckless credit agreement with a prospective consumer.

38. As discussed above, the respondent failed to conduct any affordability assessments in any of the sampled files. As a result, in terms of section 80(1)(a) the credit agreements in these files have been recklessly granted and in contravention of section 81(3).

Overcharging costs of credit

39. In terms of section 100(1)(c), a credit provider may not charge or impose an interest charge under a credit agreement exceeding the amount that may be charged consistent with the NCA. Section 101(1)(d)(ii) provides that interest must not exceed the applicable maximum prescribed rate determined in terms of section
105. The maximum prescribed rate has been determined and provided for in regulation 42(1), being 5% per month on the first loan and 3% per month on subsequent loans within the same calendar year for short-term credit transactions.
40. The NCR submits that the respondent exceeded the maximum interest chargeable on the small loans the respondent extended, based on what Mr Jianchu told the investigators during their interview with him. However, no evidence was found in any of the sampled files that the respondent did, in fact, overcharge consumers interest above what is prescribed.
41. In the result, the Tribunal cannot agree with the NCR that the respondent contravened section 100(1)(c) read with section 101(1)(d) and regulation 42(1).

ADMINISTRATIVE FINE

42. The Tribunal found that the respondent contravened various provisions of the NCA and is of the view that such contraventions must be declared prohibited conduct in terms of section 150(a).
43. In terms of section 151(1), the Tribunal may impose an administrative fine in respect of prohibited or required conduct. Such a fine may not exceed the greater of 10% of the respondent's annual turnover during the preceding financial year or R1 000 000.00.
44. Section 151(3) outlines the factors the Tribunal must consider when determining an appropriate fine. The Tribunal will briefly deal with these factors under their headings below:

44.1 The nature, duration, gravity, and extent of the contraventions.

The Tribunal has found that the respondent failed to conduct affordability assessments in all of the sampled files, contravening section 81(2)(a) read with the relevant provisions under regulation 23A. This is one of the most egregious contraventions of the NCA, and the respondent committed this contravention repeatedly over a period of three years. This is serious as it may lead to over-indebtedness, seriously affecting the economic well-being and lives of the consumers concerned. It also disregards the provisions of the CPA that aim to protect the vulnerable sectors of our society.

44.2 The loss or damages suffered as a result of the contraventions.

The respondent's conduct resulted in consumers being thrown into a cycle of debt. Its failure to provide them with pre-agreements, quotes, or credit agreements left them with uncertainty and no power to plan their finances.

44.3 The behaviour of the respondent.

The respondent has shown a grave disregard for the provisions of the NCA and its regulations.

44.4 The market circumstances in which the contraventions took place.

The respondent operates in the most vulnerable sector of our society. These consumers are mostly unaware of their rights under the NCA, which the respondent exploited.

44.5 The level of profit derived from the contraventions

It is difficult to assess the level of profit the respondent derived from its contraventions, but it must be substantial given that its operations have been ongoing since its registration in 2018. The respondent declared a turnover for the preceding financial year of approximately R2.47 million, which indicated that the operations were not insignificant.

44.6 The degree to which the respondent co-operated with the NCR

The respondent co-operated with the investigators and provided them with all the requested documents. The only criticism that can be levelled against the respondent is that its representatives lied about the reasons for retaining the consumers' prohibited instruments.

44.7 The respondent has previously been found in contravention of the NCA.

There is no indication that the respondent was previously found to have contravened provisions of the NCA.

45. The NCR asked that an administrative fine of 10% of the respondent's turnover during the preceding year, or R1 million, be imposed, as provided for in section 151(2). In support of this, it provided the Tribunal with Form 39, which is the respondent's statistical return for the calendar year from 1 January 2021 until 31 December 2021, and Form 40, which is the respondent's annual financial statement return form for the financial year ending February 2023.
46. The reference to "the respondent's annual turnover during the preceding financial year" in section 151(2) indicates that it is the period for which Form 40 provides for reporting purposes and not the calendar year that is provided for in Form 39.
47. In its submissions in favour of the imposition of a fine of 10% of the respondent's annual turnover, it referred to the amount contained in the respondent's Form 39, where the total Rand value of credit transactions entered into during the reporting period (i.e. the 2021 calendar year), namely R24 742 140.00. It argues that a fine of 10% of this amount be imposed, namely R2,47 million.
48. The NCR is wrong for two reasons. Firstly, the turnover reported for the respondent's preceding financial year, as reported in Form 40, should be considered, not the turnover for the calendar year, as reported in Form 39. Secondly, the NCR failed to consider section 151(4)(a), which provides:

“(4) For the purpose of this section, the annual turnover of -

- (a) a credit provider at the time an administrative fine is assessed, is the total income of that credit provider during the immediately

preceding year under all credit agreements to which this Act applies, less the amount of that income that represents the repayment of principal debt under those credit agreements; . . .”

49. The Form 40 records that the respondent's total revenue for the financial year of reporting was R4 030 555.00. It is not clear that this amount is, in fact, the annual turnover as referred to in section 151(4)(a). The Tribunal is of the view that evidence is needed to conclude that it is. Assuming that this is the annual turnover referred to in section 152(4)(a), then 10% thereof would amount to just over R400 000.00.

50. The Tribunal is of the view that an administrative fine of 10% of the respondent's annual turnover is not appropriate in the

circumstances of this matter. Based on the assumption that 10% amounts to just over R400 000.00, a fine of this magnitude may put

the respondent out of business. The NCR brought this matter under section 140(1) instead of section 57[7]. This indicates that the NCR's purpose is not to have the respondent cease operating. It is noted that it was recorded in Form 40 that the respondent's net income for the financial year reported was R224 859.00, much less than the assumed 10% of its total revenue for the period.

51. In the result of the above and the factors considered in terms of section 151(3) above, the Tribunal is of the view that an administrative fine of R100 000.00 would be appropriate.

THE SANCTIONS

52. The Tribunal has already found that the respondent contravened various provisions of the NCA and its regulations. Such contraventions should be declared prohibited conduct.

53. As for the respondent's failure to conduct affordability assessments properly or at all regarding the credit agreements in the sampled files, such agreements must be declared recklessly granted. Given the vulnerability of the consumers under these agreements and the advantage that the respondent has taken, the Tribunal holds that it is just and reasonable that the rights and obligations of the consumers in those agreements must be set aside in terms of section 83(2)(a).

54. The NCR requested an order that an auditor be appointed at the respondent's costs. The Tribunal agrees that an order to this effect is appropriate to identify credit agreements that may have been recklessly granted so that the NCR can take appropriate actions in respect of those agreements so identified.

55. As for the request for an interdict, the Tribunal is of the view that this will serve no purpose.

THE ORDER

56. In the result, the following order is made:

56.1. It is declared that the respondent contravened:

- (i) Sections 133(1) and (2) read with section 90(2)(l).
- (ii) Section 92(2)(a) read with regulation 28(1) and Form 20.2 and section 93(2).
- (iii) Section 81(2)(a) read with regulation 23A(3), (5), (8), (9), (10), (12), (13), and (15).
- (iv) Section 81(3) read with section 81(1)(a).

56.2. The aforesaid contraventions are declared prohibited conduct.

56.3. It is declared that the credit agreements in the sampled files marked F1 to F10 in the papers have been recklessly granted, and the rights and obligations of the consumers under those agreements are set aside in terms of section 83(2)(a).

56.4. Within 60 days of the issuing of this judgment, the respondent shall, at its own cost, appoint an independent auditor, who is a chartered accountant, to investigate whether any further similar transactions (besides those which form part of annexures F1 to F10) were recklessly granted within the last three years from the date of the issuing of this judgment. Within six months, the auditor must submit a report to the NCR regarding such transactions so that the NCR can assess and possibly refer those transactions to the Tribunal for further relief.

56.5. The respondent shall pay an administrative fine of R100 000.00 within three months of the issuing of this judgment into the bank account of the National Revenue Fund, the details of which are as follows:

Bank: The Standard Bank of South Africa Account holder: Department of Trade and Industry
Branch name: Sunnyside Branch code: 10645 Account number: 3[...] Reference:
NCT/320469/2024/140(1) and name of the person or business making the payment.

56.6. There is no order as to costs.

S Hockey (Presiding Tribunal member)

Tribunal members Ms N Maseti and Mr CJ Ntsoane concur.

[1] Published under Government Notice R489 in Government Gazette 28864 of 31 May 2006.

[2] GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters

before the National Consumer Tribunal, 2007 (Government Gazette No. 30225).

[3] The documents referred to in this section are an identity document, credit or debit card, bank account or automated teller machine card or any similar identifying document or device. These documents or instruments are referred to as the “prohibited instruments”

in this judgment.

-
- [4] The prescribed form is as set out in Form 20 attached to the regulations.
- [5] This regulation provides that a document that records a small credit agreement must contain the information as reflected in Form 20.2 attached to the regulations.
- [6] Namely in F1, F3, F7, F8 and F10.
- [7] This section provides for the cancellation of a registration by the Tribunal on the request of the NCR.
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