

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Alpha SCK Mikroleners Bk t/a Alfa Konsultante Cash Loans (NCT/8272/2013/57(1)) [2014] ZANCT 22 (22 March 2014)

[2014] ZANCT 22

COURT

National Consumer Tribunal

BEFORE

J.M. Maseko, H. Devraj, F. Manamela

CASE / FILE NUMBER

NCT/8272/2013/57(1)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

AT CENTURION

Case

No: NCT/8272/2013/57(1)

In

the matter between:

NATIONAL
CREDIT
REGULATOR.....APPLICANT
and
ALPHA
SCK MIKROLENERS BK t/a
ALFA
KONSULTANTE CASH
LOANS.....RESPONDENT

Coram:

Prof.
J.M. Maseko - Presiding Member
Ms.
H. Devraj - Member
Adv.
F. Manamela - Member
Date
of Hearing: 20 March 2014

JUDGMENT**AND REASONS****1. The Parties**

1.1. The Applicant in this matter is the National Credit Regulator (“the NCR”), an organ of state within the public administration established in terms of Section 12 of the National Credit Act, 34 of 2005 (“the NCA” or “the Act”). The NCR is situated in Randjespark, Midrand, (“the Applicant”).

1.2. The Founding Affidavit of the Applicant (dated 25 March 2013) is deposed to by Mr. Obed Tongwane (“Tongwane”), the Chief Operations Officer of the Applicant who claims (at Para 1) in the Affidavit to be duly authorised to act on behalf of the Applicant.

1.3. At the hearing of 20 March 2014, the Applicant was represented by Mr. Joseph Selolo, an employee of the Applicant.

1.4. The Respondent is Alpha SCK Mikroleners BK, a Close Corporation incorporated in South Africa under Registration Number 1999/018179/23 as well as registered as a Credit Provider by the NCR under Number NCRCP 1410 since 25 August 2007.

1.5. The Respondent is situated in Worcester, Western Cape Province.

1.6. The answering submission from the Respondent, dated 13 January 2014, was filed by Ms Ronel de Klerk of Lewies Attorneys, the Respondent’s

Attorneys at the time. Lewies Attorneys later, on 4 February 2014, withdrew from the matter after the Respondent had terminated

their mandate.

1.7. At the hearing of 20 March 2014, the Respondent was represented by Mr. Dirk Calitz.

2. Jurisdiction

2.1. This National Consumer Tribunal (“Tribunal”) has jurisdiction to hear this matter in terms of section 57(1) of the NCA.

2.2. Section 57(1) of the NCA provides that:

“...a registration in terms of this Act may be cancelled by the Tribunal on request by the National Credit Regulator, if the registrant

repeatedly-

- (a) Fails to comply with any condition of its registration;
- (b) Fails to meet a commitment contemplated in section 48(1); or
- (c) Contravenes this Act.”

3.

Issues

to be Decided

3.1. The first issue to be decided in this matter is whether the Respondent has engaged in prohibited conduct under section 150(a) of the Act as alleged by the Applicant.

3.2. The next issue to be decided in this matter is whether the registration of the Respondent should be cancelled by this Tribunal in line with section 57(1) of the NCA as prayed for by the Applicant. And in deciding this question, this Tribunal has to first decide the individual

underpinning claims by the Applicant on whether, during the period between 25 August 2007 and 3 December 2012, the Respondent contravened[1]:

- (a) section 91(b) and (c) read with section 90(2)(l); section 133(1) and (2) of the Act by allegedly unlawfully retaining the instruments and use of prohibited collection methods;
- (b) section 81(2) and (3) read with Regulation 55(1), by allegedly failing to conduct assessments and engaging in reckless lending;
- (c) section 100(1)(a) and (b) and section 101(1)(a) of the NCA, by allegedly charging amounts that are prohibited by the Act and in excess of the principal debt.
- (d) Regulation 44 of the Act, by allegedly charging service fees that exceed the maximum prescribed fee.

3.3. The other issue to be decided in this matter is whether or not the Respondent should be ordered to pay an administrative fine of R600 000.00 (Six Hundred Thousand Rand). This fine was based on the financial statements of the Respondent which were contained between pages 83 and 87 of the Case file.

3.4. The final issue to be decided is the point in limine raised by the Respondent at the commencement of the hearing on 20 March 2014.

4. Point in Limine

4.1. In stating its point in limine, the Respondent submitted documentary evidence indicating that:

- (a) The parties had exchanged correspondence expressing an interest from both sides to conclude a settlement agreement in the matter.
- (b) On 17 May 2013, the Applicant, through its senior legal advisor, Mr. Joseph Selolo, had made a settlement offer to the Respondent.

- (c) The Respondent accepted the offered settlement, signed the settlement agreement and returned it to the Applicant on 20 May 2013. The Applicant further paid an amount of R10 000.00 (Ten Thousand Rand) as per the settlement agreement, into the bank account of the National Credit Regulator on 13 January 2014. The Applicant's representative failed to sign this agreement. The partly signed agreement was distributed at the hearing and confirmed by both parties as the settlement agreement in question.
- (d) On 13 January 2014, when the Applicant had lodged the application with the Tribunal against the Respondent, the former Attorneys of the Respondent objected to the application indicating that the matter had been settled and that the settlement agreement had been binding.
- (e) At the hearing of 20 March 2014, the Respondents then applied, orally, that the Tribunal should find that the agreement between the parties is binding and that the matter should therefore be dismissed by the Tribunal.

4.2. The last paragraph of the settlement agreement, signed by the Respondent on 16 August 2013, states that:

"Therefore parties hereby apply to the Tribunal to confirm and record the terms of settlement as a consent order in terms of section 138(1) of the Act and Rule 20 of the Tribunal Rules."

5.

Background

5.1. The evidence of the Applicant was contained in the founding affidavit deposed to by Tongwane, a supporting Affidavit from Mr. Lesley Odendaal ("Odendaal") and an investigation report by the latter dated 14 January 2013

5.2. In the investigation report, Odendaal indicated, amongst other things, that the Respondent[2] contravened[3]:

- (a) section 90(2)(l) read with section 133 of the Act by allegedly unlawfully retaining the instruments and use of prohibited collection methods;
- (b) section 81(2)(a)(i); (ii); and (iii) of the Act, by allegedly failing to conduct affordability assessments; and
- (c) section 93(2) read with Regulation 30(1) of the Act, by allegedly not using the prescribed format for credit agreements.

5.3. In the investigation report, Odendaal also indicated that by the above commissions and omissions, the Respondent had contravened the sections and Regulations listed in paragraph 3(1) above.

6. The Evidence of the Applicant

6.1. It was the evidence of Odendaal in the investigation report that:

- (a) He had interviewed Mr. S.J. Marais; one of three co-owners of the Respondent, over a period of 13 years, (with the other two owners being C. Marais and D.J. Kallits).
- (b) Mr. Marais had indicated to him that:
 - (i) All applications for loans are accompanied by three months' bank statements, pay slip, identity document and proof of residence.
 - (ii) A compuscan enquiry is done on every applicant with the permission of that applicant;
 - (iii) The maximum duration for the term for the approved loan is 12 months;
 - (iv) The minimum loan amount approved is R500.00 while the maximum is the net income of the given consumer;
 - (v) Consumers pay cash in monthly instalments and in person without the use of any debit orders or other collection methods; and
 - (vi) The Respondent retains the bank cards at the request of the consumers who indicate that their children and great grandchildren steal the bank cards to withdraw cash out of these bank accounts.
- (c) Odendaal had subsequently informed Marais that it was a criminal offence to retain bank cards to enforce credit agreements. Odendaal had subsequently also laid a criminal charge for the contravention of section 90(2)(1) read with Section 133 of the Act at the Worcester Police Station. SAPS Case Number CAS 152/12/2012 was opened against the Respondent.

6.2. After conducting a physical inspection of the premises of the Respondent, Odendaal had found, in summary, that:

- (a) Consumers' bank cards were kept on the premises and were kept in small plastic bags.
- (b) The assessment of a sample of 15 credit agreements found on the premises, had revealed that:
 - (i) The Respondent does not keep pre-agreements for the individual clients and neither are these provided to clients as required by section 92(1) of the Act – evidence of this sample was placed on file;
 - (ii) In contravention of section 90(2)(1) read with 133 of the Act, for each consumer credit was advanced to, there were bank cards retained on the premises. A list of the names with copies of the bank cards were found on the premises and placed in the case file;

(iii) Two of the agreements found on the premises did not even state the interest rate applicable. This was in contravention of section 93(2) read with Regulation 30(1) of the Act in that the Respondent failed to use the prescribed format for credit agreements; and

(iv) In contravention of section 81(2)(a)(i); (ii); and (iii) of the Act, the Respondent had failed to conduct affordability assessments in three of the fifteen sampled consumer files.

7. The Law on the matter

7. The law on the matter is such that:

(a) Section 150(a) of the Act affords the Tribunal the power to declare certain conduct prohibited in terms of the Act.

(b) Section 151(2) of the NCA provides that:-

“An administrative fine imposed in terms of this Act, ..., may not exceed the greater of-

(a) 10 per cent of the respondent’s annual turnover during the preceding financial year; or

(b) R1 000 000”

(c) The word “or”, where it appears in Section 151(2) of the Act has its normal disjunctive meaning and it cannot be substituted for “and”. The effect thereof is that the Tribunal may award a penalty, not exceeding 10% of the Respondent’s annual turnover or R 1 000 000.00.

(d) The General Condition 1 of the Conditions of Registration referred to, provide that:

“The registrant must comply with all applicable legislation relating to the operation of the business of a credit provider, including but not limited to the Act, the regulations and any subsequent amendment or substitution of the applicable legislation and regulations.”

8. Is the Settlement Agreement Binding?

8.1. Before the Tribunal can consider the merits of this matter, the initial question has to be that of deciding the point in limine. And in deciding this point, the Tribunal had to consider the question of when does an agreement become binding between two parties.

8.2. A distinct offer and distinct acceptance are not by themselves requirements for the creation of a contract.[4] Offer and acceptance are facts from which consensus may be inferred[5]. However, the declaration of the offeror must be so clear and set out the terms of the acceptance essential to such a degree that the mere acceptance by the other party renders the legal consequences of the contract certain or ascertainable.[6]

8.3. One of the requirements of a contract is that there must be consensus. The doctrine of culpa in contrahendi accepts the notion that no contract can arise where consensus is lacking due to a mistake between the parties to the agreement. This doctrine qualifies the Will Theory.

8.4. In other instances, it becomes crucial to distinguish whether an offer and acceptance did occur. And questions that help unravel that mystery include the where[7] (place) a contract was concluded and when (time) it was concluded – which deals with when the contract began to generate legal consequences. The Information Theory[8] of acceptance applies here. The information theory[9] works from the premise that the person making the offer or accepting it has the necessary authority to do so at law. [10]

8.5. The one making the offer may prescribe how the acceptance is to be effected by the one accepting, and if that happens, then the

acceptance only takes place at the time, place and when the method so prescribed is used[11]. The “Mirror-image” rule requires that the acceptance must strictly conform to the terms of the offer. [12]

8.6. The essentialia of acceptance is to state the intention to enter into a contract with the offeror; [13]

8.7. The acceptance must consist of a conscious reaction / response to the offer;[14]

8.8. The acceptance must be clear and unambiguous in language;[15]

8.9. The acceptance remains valid even if containing terms in it that were not part of the offer, but are going to be included in the contract by operation of law (ex lege);[16]

8.10. According to section 23(b) of the Electronic Communications and Transactions Act No. 25 of 2002, a message sent electronically is considered as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee.

8.11. In terms of place and time of delivery of an electronic message, the provision of section 23(c) of the Electronic Communications and Transactions Act is that a data message must be regarded as having been sent from the originator’s usual place of business and as having been received by the addressee at the latter’s usual place of business.

8.12. In *Brinkibon Ltd v Stahag Stahl GmbH*[17], Lord Wilberforce[18] stated that the complexities of modern business communication process may in any event render any attempt to formulate a general rule futile and undesirable.[19]

8.13. While Mr. Selolo indicated at the hearing that he had instructions from the Applicant to repudiate the settlement agreement, he could not produce any argument showing that the settlement agreement had been invalid in some way. Instead he had rather confirmed the version of the Respondent which was that:

- (a) The Applicant had drafted the offer and sent it to the Respondent;
- (b) The Respondent had accepted the offer and signed the settlement agreement;

- (c) On receipt of the agreement signed by the Respondent, the Applicant had reneged from signing it and lodged the application to this Tribunal instead.

8.14. The law on the offer and acceptance does not require that agreements be signed for them to be binding, so long as there is the meeting of minds and the parties have expressly agreed to the terms as cited above.

8.15. A party to a contract commits breach by repudiating the agreement when, by words or conduct and without lawful excuse, he or she manifests an unequivocal intention no longer to be bound by the contract or by any obligation forming part of the contract.[20] And regarding the question of whether a party to a contract can unilaterally repudiate such a contract, it was held in at least three cases[21] that the act of repudiation as being analogous to an offer to rescind, the breach is fully constituted or completed only when the repudiation is accepted by the innocent party. And if that offer to repudiate is rejected by the innocent party, the repudiation is a nullity with no legal effect at all. It is the view of the Tribunal then that the attempt by the Applicant to repudiate the agreement in question has not been accepted by the Respondent. This was evident from the point in limine raised at the hearing. The repudiation is therefore of no force and effect.

9. Order

9. Accordingly, the Tribunal makes the following order:

- (a) The settlement agreement between the parties drafted and offered by the Applicant and accepted by the Respondent, is accordingly declared to be binding between the parties.
- (b) In line with the request by the parties, the Settlement Agreement, attached hereto and marked Annexure “A”, is confirmed as an order of this Tribunal, in its entirety.
- (c) There is no order as to costs.

Thus done and handed down on this 22 March 2014.

Prof. Joseph M. Maseko

Presiding Member

Ms. Hazel Devraj (Member) and Adv. F. Manamela (Member) concurring.

- [1] Page 4 of the Case file.
- [2] But in this case correctly or incorrectly referring to Respondent as AKCL.
- [3] Page 34 of the Case file.
- [4] *Titaco (Pty) Ltd v AA Alloy Foundry (Pty) Ltd* 1996 SA 320 (W) 331.
- [5] *Bourbon Leftley v WPK (Landbou) Bpk* 1999 1 SA 902 (C) 916.
- [6] *Benkeinstein v Neisius* 1997 4 SA 835 (C).
- [7] This helps determine the court jurisdiction and the applicable law *R v Nel* 1921 AD 339.

- [8] The information Theory is about the Offeror receiving information that the Offeree has accepted the offer.
- [9] Bloom v The American Swiss Watch Company 1915 AD 100.
- [10] Dietrichsen v Dietrichsen 1911 TPD 486 and Bloom v The American Swiss Watch Company 1915 AD 100.
- [11] Van der Merwe et al, Contract: General principles, 2nd Ed, Juta Law, Landsdowne, 2003:55.
- [12] Butler Machine Tool Co Ltd v Ex Cell-O Corporation (England) Ltd (1979) 1 WLR 401.
- [13] Titaco (Pty) Ltd v AA Alloy Foundry (Pty) Ltd 1996 SA 320 (W) 331.
- [14] Bloom v The American Swiss Watch Company 1915 AD 100.
- [15] Boerne v Harris 1949 1 SA 793 (A).
- [16] Seef Commercial & Industrial Property Holdings (Pty) Ltd v Silberman 2001 3 SA 952 (SCA) at para 9.4.2.
- [17] (1983) 2 AC 34 (HL).
- [18] Van der Merwe et al, Contract: General principles, 2nd Ed, Juta Law, Landsdowne, 2003: 68.
- [19] Van der Merwe et al, Contract: General principles, 2nd Ed, Juta Law, Landsdowne, 2003:68.
- [20] Datacolor International (Pty) Ltd [2000] ZASCA 82; 2001 (2) SA 284 (SCA) at 294H-I; and South African Forestry Co. Ltd v York Timbers Ltd 2005 (3) SA 323 (SCA) at 342E-F.
- [21] Novick v Benjamin 1972 (2) SA 842 (A) at 86; and in Nash Golden Dumps (Pty) Ltd 1985 (3) SA 1 (A) at 22 and in HMBMP (Pty) Ltd v King 1981 (1) SA 906 (N) at 910.

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