

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Aristoscan CC t/a JMK Cash Loans (NCT/128380/2019/140(1)) [2019] ZANCT 103 (1 July 2019)

[2019] ZANCT 103

COURT

National Consumer Tribunal

BEFORE

M. Nkomo, P. Beck, M. Peenze

CASE / FILE NUMBER

NCT/128380/2019/140(1)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

AT CENTURION

Case

No: NCT/128380/2019/140(1)

In

the matter between:

NATIONAL
CREDIT
REGULATOR APPLICANT
And
ARISTOSCAN
CC
Trading
as JMK CASH
LOANS RESPONDENT

Coram: Ms.
M. Nkomo
-
Presiding Tribunal Member
Ms.
P. Beck
-
Tribunal Member
Dr.
M. Peenze
-
Tribunal Member
Date
of Hearing
-
18 June
2019
Date
of Judgment -
01 July
2019

JUDGMENT

AND REASONS

APPLICANT

1. The Applicant is the NATIONAL CREDIT REGULATOR ("the NCR" or "the Applicant"), a juristic person established in terms of Section 12 of the National Credit Act 34 of 2005 National Credit Act, 2005[1][2](the Act" or "the NCA"). The NCR has its address at 127 Fifteenth Road, Randjespark, Midrand, ("the Applicant").
2. At the hearing the Applicant was represented by its employee, Mr. R Stocker.

THE RESPONDENT

3. The Respondent is ARISTOSCAN CC, trading as JMK CASH LOANS, has its physical address at 20 Corner Du Plessis and Main Street, Humansdorp, Eastern Cape province. The Respondent was

previously registered with the Applicant in terms of section 40 of the Act, with registration number NCRCP4819.

4. The Respondent was neither present nor represented at the hearing.

APPLICATION TYPE

5. This is an application in terms of section 140(1) of the NCA. Section 140(1) provides that -

"(1) After completing an investigation into a complaint, the National Credit Regulator may-

- ...;
 - make a referral in accordance with subsection (2), if the National Credit Regulator believes that a person has engaged in prohibited conduct;"
6. The Respondent did not oppose the application.

SUMMARY OF THE APPLICANT'S FOUNDING AFFIDAVIT

7. The Applicant's Founding affidavit is deposed to by Ms. Jacqueline Peters in her capacity as the Manager of the Investigations and Enforcement Department of the Applicant.
8. The Applicant conducted a scouting exercise as a result of information it received from South African Security Agency (SASSA)

officials in the Eastern Cape province, which information pertained to possible contraventions of the Act by the Respondent. The main allegations against the Respondent was that it retained consumer instruments as a means of ensuring timeous repayments of loans by consumers; and that it charged consumers excessive interest rates.

9. During the scouting exercise, the Applicant established that the Respondent charged 30% interest per month on credit agreements; and that the Respondent was in possession of consumers' identity documents.
10. On this basis, the Applicant authorised an investigation into the Respondent's business.
11. The scope of the investigation[3] was to determine whether –

11.1 the Respondent was extending credit without being registered;

11.2 the Respondent was conducting proper affordability assessments as required in terms of section 80(2) of the Act, read with Regulation 23A;

11.3 the cost of credit in respect of credit agreements charged by the Respondent were in accordance with the provisions of sections 101 and 103 of the Act; and

11.4 the Respondent, when collecting repayments under the credit agreements or when seeking to enforce a credit agreement; used, relied on or permitted any person to use or rely on any documents, instruments, or contract provision referred to in section 133 read with section 90(2) (f) of the Act.

12. On 18 January 2018, the Applicant initiated an investigation into the conduct of the Respondent. The initiation was triggered by information obtained from SASSA and from observations made during the scouting exercise which gave the Applicant reasonable suspicion that the Respondent is not granting credit in a manner consistent with the Act.

13. The Applicant appointed an inspector, namely Ms. Muhanganezi Mbedzi (“Mbedzi”) in terms of section 25 of the NCA to investigate the activities of the Respondent. On 01 February 2018, Mbedzi went to the Respondent’s business premises situated at 20 Corner Du Plessis and Main Street, Humansdorp, Eastern Cape province, to conduct an onsite investigation. Mbedzi was assisted[4] by members from the following authorities who were in possession of a Warrant of search and seizure[5]:

13.1 the Commercial Crime Unit of the Hawks;

13.2 the Consumer Protection offices; and

13.3 South African Social Security Agency (SASSA).

14. Mbedzi randomly selected and obtained copies of a sample of 10 (ten) files of consumers’ credit agreements for assessment purposes in accordance with the approved scope assigned to her. Members of the Hawks proceeded to search the business premises of the Respondent, and found and seized consumers’ bank cards and SASSA cards. A copy of the inventory of the seized documents[6] was provided to Mbedzi, and formed part of the Applicant’s evidence.

15. Mbedzi compiled an investigation report[7] after assessing the sample files. Based on the investigation report, the Applicant alleges that the Respondent is in repeated contravention of the provisions of the Act, thereby committing conduct prohibited by the Act.

16. More specifically, the Applicant alleges that the Respondent has repeatedly contravened the following sections of the Act –

16.1 section 40(3);

16.2 section 81 (2) read with Regulation 23A (3), (8), (10) and (12);

1.25cm; margin-bottom: 0cm; line-height: 150%"> 16.3 section 81(3) read with Section 80(1) of the Act;

16.4 section 133 (1) and (2) read with section 90(2)(1);

1.25cm; margin-bottom: 0cm; line-height: 150%"> 16.5 sections 100 (1)(c) and 101 (d)(ii) read with Regulation 42(1);

1.25cm; margin-bottom: 0cm; line-height: 150%"> 16.6 section 92 read with Regulation 28 (1); and

1.25cm; margin-bottom: 0cm; line-height: 150%"> 16.7 section 93 (2) read with Regulation 30(1).

0cm; line-height: 150%">17. The Applicant seeks the following orders:

17.1 declaring the conduct of the Respondent, in breaching the above sections of the Act, as prohibited conduct in terms of section 150(a) of the Act;

17.2 imposing an administrative fine on the Respondent in the amount which is the greater of R1 million or 10% of the annual turnover of the Respondent;

17.3 ordering the Respondent to:

17.3.1 within 30 days of this judgment, appoint an independent auditor at its own cost whose appointment shall be subject to the prior written approval of the Applicant, to determine if any consumers in the past 3 years were overcharged interest, and provide a list of such consumers as well as the amount by which each consumer was overcharged;

17.3.2 Once the aforesaid auditor compiled the abovementioned list, the Respondent will refund the amounts it received in the form of interest, which it was not entitled to receive or which exceeded the prescribed maximum amounts allowed by the Act, to each consumer within 30 days from the date of the auditor's report;

17.3.3 Once the refunds have been made as stated above, the Respondent is to provide the auditor's report together with a written report to the Applicant detailing the identity of the consumers and the refunds made. These reports are to be provided to the Applicant within 120 days after the Tribunal order; and

17.3.4 The appointed auditor must also identify all credit agreements which are still in force and which the Respondent entered into without conducting assessments as required by section 81(2) (a) (ii) and (iii) of the Act. The Applicant may apply to the Tribunal for an order declaring such agreements as reckless in terms of section 80 (1)a and setting aside all of the consumers' rights and obligations under those agreements.

THE HEARING

18. At the hearing of this matter, the Applicant's representative addressed the Tribunal on the issues raised in the Applicant's

founding affidavit.

19. The Applicant handed in evidence of the proof of service of the main application via registered mail.

20. Furthermore, the Applicant addressed the Tribunal on the issue of the lapsing of the Respondent registration as a credit provider. The Applicant's system shows that the Respondent's registration had lapsed.

21. The Applicant confirmed all the issues raised in the founding affidavit, and supported by the investigation report compiled by the Applicant's inspector, namely:

21.1 That the Respondent has repeatedly failed to conduct its business in a manner that is consistent with the purpose and requirements of the Act. In that regard, the Applicant asserts that the Respondent has exhibited serious contraventions of the Act, as shown in the Applicant's investigation report;

21.2 That the Respondent –

21.2.1 Entered into credit agreements whilst being unregistered;

21.2.2 Failed to conduct any affordability assessments;

21.2.3 Used prohibited collection and enforcement practices;

21.2.4 Charged consumers in excess of maximum prescribed rate of interest allowed;

21.2.5 Failed to provide consumers with pre-agreement statements and quotations in the prescribed form; and

21.2.6 Failed to provide consumers with credit agreements which are in the prescribed format, and or contain all the information set out in the prescribed format; and

21.3 That the Applicant seeks the orders as detailed on paragraph 17 above.

ASSESSMENT OF THE EVIDENCE ON A DEFAULT BASIS

22. The Applicant filed the section 140(1) application with the Tribunal on 20 March 2019, and attached a copy of a registered post slip with a tracking number to show that the application was sent to the Respondent's registered address via registered mail as proof of service.

23. Subsequently, a Notice of complete filing ("the Notice") was issued by the Tribunal Registrar to both the Applicant and the Respondent on 22 March 2019. The Notice stated that the Respondent had to file an answering affidavit within 15 business days. The Respondent did not file nor service any answering affidavit or response to the application.

24. The matter was set down on a default basis for 18 June 2019 in terms of Rule 25(2) of the Tribunal Rules[8]. Rules (25)2 and (3) provide that:

"An applicant may make application by way of form T.I.r25(2) for purposes of obtaining a default order, if no response to the application was filed within the time stated in the application.

The Tribunal may make a default order:

(a) After it has considered or heard any necessary evidence; and

(b) If it is satisfied that the application documents were adequately served."

25. The Tribunal is therefore satisfied that the requirements for a default judgment have been met, as the application was adequately

served on the Respondent via mail.

26. In terms of Rule 13(5), any fact or allegation in the application or referral not specifically denied or admitted in an answering

affidavit, will be deemed to have been admitted. Therefore in the absence of any answering affidavit filed by the Respondent, the

Applicant's application and all the allegations contained therein are deemed to be admitted.

27. In *NCR v Vanessa Hewitt*[9], the Respondent failed to file an answering affidavit, and did not appear at the hearing. As a result; the Tribunal having been

satisfied that the service of documents was properly executed; proceeded to hear the matter on a default basis.

ISSUES

TO BE DECIDED

28. The issues to be decided in this matter include whether or not the Respondent has engaged in prohibited conduct by repeatedly contravening the provisions of the Act; and in view of that, an administrative penalty be imposed by the Tribunal as prayed for by the Applicant.

29. The Tribunal has jurisdiction to hear this matter and has powers conferred upon it in terms of section 150 of the NCA to make

orders

in relation to a registrant who allegedly contravenes this Act, or fails to comply with any condition of its registration.

30. Section 150 provides for Orders of the Tribunal, and reads thus:

"In addition to its other powers in terms of this Act, the Tribunal may make an appropriate order in relation to prohibited or required conduct in terms of this Act, or the Consumer Protection Act, 2008, including-

- (a) declaring conduct to be prohibited in terms of this Act;
- (b) ...;
- (c) imposing an administrative fine in terms of section 151, with or without the addition of any other order in terms of this section"

CONSIDERATION OF THE APPLICABLE LAW AND THE TRIBUNAL'S FINDINGS

Registration as a Credit Provider

31. The Applicant alleges that the Respondent has been extending credit to consumers without being registered as a credit provider in terms of the Act. The Respondent's registration has lapsed due to non-payment of its annual renewal fees. On 19 March 2018, the Applicant informed[10] the Respondent that its registration has lapsed due to non-payment of its renewal fees; and that the Respondent is prohibited from engaging in activities that require registration in terms of the Act.

32. The Tribunal is satisfied that the Respondent's registration was no longer in effect due to its failure to pay the annual renewal fee by the due date. This amount to a cancellation of the registration by operation of law. The evidence[11] reveals that despite the lapsing of its registration, the Respondent continued to grant credit.
33. The Tribunal finds that the Respondent has contravened sections 40
- (3) of the Act by entering into credit agreements without being registered. Therefore, to the extent provided for in section 89 of the Act, all the credit agreements the Respondent entered into whilst being unregistered are deemed null and void.

Affordability assessments

34. The Applicant alleges that the Respondent fails to conduct any affordability assessment prior to the granting of a loan. There was no evidence of credit bureau reports and no evidence that the Respondent takes reasonable steps to assess the consumer's existing financial means, prospects and obligations. There was also no evidence to show that the Respondent takes steps to assess the consumer's discretionary income in order to determine whether the consumer has the financial means and prospects to repay the proposed credit instalment. Evidence provided indicated that the Respondent extends credit to consumers who received child support and foster care social grants. This type of income is to be used for the benefit of third parties, and therefore cannot be deemed to be the consumer's income.
35. Therefore, the Tribunal finds that the Respondent has contravened sections 81 and 82 of the Act read with Regulation 23A in that no affordability assessments are conducted by the Respondent before granting loans to consumers.

Prohibited Collection and Enforcement Practices

36. The evidence before the Tribunal establishes that Respondent was found in possession of consumers' bank cards and SASSA cards, as reflected on the inventory list of items seized by members of the Hawks during the inspection. In addition, Annexures E4, E7, E8 and E9 provided by the Applicant prove that the Respondent required consumers to disclose the personal identification numbers (PIN) of the cards which were found in the possession of the Respondent, and held as security for repayment of loans. This conduct is against the provision of the Act.
37. The Respondent is therefore found to have contravened sections 133(1) and (2) read with section 90 (2).

Cost of Credit

38. Based on the evidence obtained by the inspector, it can be concluded that the Respondent is charging an interest rate of 30% (thirty per cent) per month on loans extended. As this interest rate exceeds the prescribed maximum rate of 5% per month for six months for short term credit agreements, the Respondent's conduct is in contravention of section 101 (1) (d) (ii) read with Regulation 42 (1) of the Act.

Pre-Agreement Disclosures

39. The evidence before the Tribunal reveals that the Respondent does not provide pre-agreement statements and quotations, as required by the Act. The Respondent is therefore found to have contravened section 92 (1) read with Regulation 28(1) (b) of the Act.

Credit Agreements

40. The Applicant alleges that the Respondent contravened section 93 (2) read with section Regulation 30 (1) of the Act, by failing to provide credit agreements to consumers alternatively failing to provide credit agreements to consumers that are in the prescribed forms. The evidence before the Tribunal establishes that consumers sign a document titled "Loan Application and Agreement". However, the document does not contain significant information which is required in terms of Regulation 30 (1) of the Act. Form 20.2 is the form which is prescribed for small credit agreements.
41. Accordingly, the Tribunal finds that the Respondent has contravened section 93 (2) read with Regulation 30 (1) of the Act.

CONCLUSION

42. For the reasons set out above, the Respondent is found to have engaged in prohibited conduct in that it has repeatedly contravened

the following sections of the NCA:

42.1 section 40(3) by entering into credit agreements whilst being unregistered as a credit provider;

42.2 section 81(2) read with Regulation 23A (3), (8), (10) and (12); by failing to conduct affordability assessments prior to extending credit;

42.3 section 133(1) and (2) read with section 90(2)(1) by enforcing a credit agreement requiring consumers to deposit their bank cards and disclose their PIN as a security for the repayment of loans;

42.4 sections 100 (1)(c) and 101 (1) (d)(ii) read with Regulation 42(1) by charging consumers interest in excess of that permitted in terms of the NCA;

42.5 section 92 read with Regulation 28 (1) by failing to provide pre-agreement disclosures; and

42.6 section 93(1) and (2) read with Regulation 30(1) by failing to provide credit agreements to consumers which are in the prescribed forms.

CONSIDERATION OF AN APPROPRIATE ORDER

Consideration of an administrative fine

43. The Applicant has requested the Tribunal to impose a fine on the Respondent and has submitted some arguments on the factors listed in section 151 of the Act which the Tribunal must consider.
44. Considering the nature of the contraventions and the importance of this issue for consumers the Tribunal regards a fine as appropriate

and justified. The NCA was specifically introduced to deal with the abuses which have been perpetrated by the Respondent. A clear message must be sent that non-compliance with the NCA will not be condoned.

The nature, duration, gravity and extent of the contravention

45. The approach used by the Respondent as set out above appears to be an on-going and common practice. Although the investigation was conducted in 2018, the evidence reveals that some consumers were granted loans by the Respondent from 2014.[12] It appears from the evidence that no attempt has been made by the Respondent to improve its business practices and to ensure compliance

with legislation. The contraventions of the NCA are extremely serious and seem to go to the core of the Respondent's business practices.

Any loss or damage suffered as a result of the contraventions

46. The Respondent has been charging an interest rate that exceeds what is allowed under the legislation. It is reasonably expected that many consumers have and continue to suffer loss. It can be assumed that consumers entered into loans that they may not be able to afford since no proper assessments are conducted. In addition, the withholding of consumer bank and SASSA cards prevented consumers from accessing their own funds, whilst the disclosure of PINs violated their privacy.

The behaviour of the Respondent

47. According to the inspector's report, the Respondent co-operated during the investigation. However, there is no excuse for the Respondent, a previously registered credit provider, to operate against the provisions of the Act.

The market circumstances in which the contravention took place

48. It appears that the Respondent has ignored the requirements of the Act and exploited consumers who appear to lack knowledge about their consumer rights. Even though the Applicant did not provide specific evidence to the Tribunal, the NCA was introduced to deal with the abuses which are being committed by the Respondent.

The level of profit derived from the contravention

49. Although no specific evidence was provided in this regard, the Respondent must derive significant profit from overcharging consumers

interest on their loans.

The degree to which the Respondent has co-operated with the Commission and the Tribunal

50. According to the Applicant's submissions, the Respondent cooperated with the Applicant's investigator.

Whether the Respondent has previously been found in contravention of this Act

51. The Applicant has submitted that there has been no previous investigation or finding against the Respondent.
52. The Applicant did not submit any evidence of the turnover of the Respondent. The Tribunal can still impose a fine but is then limited to a maximum fine of R1 000 000.00.
53. The NCA was introduced to inter alia, protect vulnerable consumers and to ensure that credit providers act in a fair manner at all times. A strong message must be sent that all credit providers, irrespective of their size, must ensure that they understand and act in accordance with the provisions of the NCA.
54. In light of the above, an administrative penalty of R800 000.00 (eight hundred thousand rand) is appropriate under the circumstances.

Appointment of an auditor

55. Although only ten consumer files were examined by the inspector, it has been proved that the Respondent in the entire population of the sampled files is charging an interest rate that exceeds the amount permitted in the Act. From the sample provided by the Applicant, it can be extrapolated that the Respondent probably charges the excessive interest rate in all its credit granting instances.

Therefore, it is appropriate for an auditor to be appointed to assess and establish the number of consumers who have been overcharged, as well as the quantum thereof.

ORDER

56. Accordingly, the Tribunal makes the following order:

57.1 The Respondent has engaged in prohibited conduct by repeatedly contravening the following sections of the Act:

57.1.1 section 40(3);

57.1.2 section 81 (2) read with Regulation 23A (3), (8), (10) and (12);

57.1.3 section 81(3) read with section 80(1);

57.1.4 section 133 (1) and (2) read with section 90(2)(1);

57.1.5 sections 100 (1)(c) and 101 (1) (c) and (d)(ii) read with Regulation 42(1);

57.1.6 section 92 read with Regulation 28 (1); and

57.1.7 section 93 (2) read with Regulation 30(1);

57.2 The Respondent is interdicted and refrained from contravening the Act as outlined in paragraph 57.1 above;

57.3 The Respondent is to pay an administrative fine of R800 000.00 (eight hundred thousand Rand) into the National Revenue Fund referred to in section 213 of the Constitution of the Republic of South Africa, within 30 business days of the issuing date of this judgment. The Banking Account details of the National Revenue Fund are:

Bank Name:

The Standard Bank of South Africa

Account Holder: Department of Trade and Industry

Branch Name: Sunnyside

Branch Code: 05100

Account Number: 370 650 026

Reference Number: NCT/128380/2019/140(1) and name of person or business making the payment

57.4 The Respondent is also ordered:

57.4.1 Within 30 days to appoint an independent auditor at its own costs, whose appointment shall be subject to the prior written approval of the Applicant, to determine if any consumers in the past 3 years were overcharged interest, and provide a list of such consumers as well as the amount by which each consumer was overcharged;

57.4.2 To refund the amounts it received in the form of interest, which it was not entitled to receive or which exceeded the prescribed maximum amounts allowed by the Act, to each consumer within 30 days from the date of the auditor's report;

57.4.3 Within 120 days after receiving the auditors' report, to provide the Auditor's report together with a written report to the Applicant detailing the identity of the consumers and the refunds that have been made and the details regarding attempts it has made regarding all the consumers it cannot trace; and

57.4.4 The appointed auditor must also report on all credit agreements which are still in force and which the Respondent entered into without conducting assessments as required by section 81(2)(a)(ii) and (iii) of the Act. The Applicant may apply to the Tribunal for an order declaring such agreements as reckless in terms of section 80(1)(a) and setting aside all of the consumers' rights and obligations under those agreements; and

57.5 No order is made as to costs.

Thus done and handed down in CENTURION on this 1st day of July 2019.

[signed]

MS. M. NKOMO

PRESIDING TRIBUNAL MEMBER

With Ms. P. Beck (Tribunal Member) and Dr. M Peenze (Tribunal Member) concurring

[1] Act 34 of 2005

[3] Page 39 of the bundle of documents

[4] Paragraph 3.7 of the Applicant's founding affidavit, on page 11 of the bundle of documents.

[5] Page 42 of the bundle of documents.

[6] The inventory list appears on pages 46 to 52 of the bundle of documents.

[7] The investigation report dated 19 February 2019 appears on page 53 of the bundle

[8] Regulations for matters relating to the function of the Tribunal and Rules for the conduct of matters before the National Consumer

Tribunal, 2007, published under GN 789 in Government Gazette 302252 on 28 August 2007.

[9] NCT/7939/2013/57(1)

[10] Page 27 of the bundle of documents

[11] Ibid pages 83 and 91

[12] For example Annexure E1 on page 78 and Annexure E3 on page 96 of the bundle of documents.

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