

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Blue Magnolia Trading 463 CC (NCT/257512/2023/57(1))

[2023] ZANCT 19 (6 April 2023)

[2023] ZANCT 19

COURT

National Consumer Tribunal

BEFORE

C Sassman, A Potwana, C Ntsoane

CASE / FILE NUMBER

NCT/257512/2023/57(1)

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IN THE NATIONAL CONSUMER TRIBUNAL HELD IN CENTURION

Case Number: NCT/257512/2023/57(1)

In the matter between:

NATIONAL CREDIT REGULATOR APPLICANT

And

BLUE MAGNOLIA TRADING 463 CC RESPONDENT

Coram:

Adv C Sassman - Presiding Tribunal member

Dr A Potwana - Tribunal member

Mr C Ntsoane - Tribunal member

Date of the hearing: - 5 April 2023

Date of Judgment: - 6 April 2023

JUDGMENT AND REASONS

THE PARTIES

1. The applicant is the National Credit Regulator (the applicant), an organ of state and a juristic person established in terms of section 12 of the National Credit Act 34 of 2005 (the NCA) to regulate the consumer credit market and ensure compliance with the NCA.
2. At the hearing, the applicant was represented by Moseamedi Senku (Mr Senku), a junior legal advisor in the applicant's Investigations and Enforcement Department. Mr Senku was assisted by Ms Leanne Swartz, the department's Acting Manageress.
3. The respondent is Blue Magnolia Trading 463 CC (the respondent). The respondent is a close corporation registered as a credit provider with the applicant under registration number NCRCP6856.
4. The respondent was not present or represented at the hearing.

TERMINOLOGY

5. A reference to a section in this judgment refers to a section in the NCA.
6. A reference to a regulation refers to the National Credit Regulations, 2006 (the regulations). [1]
7. A reference to a form refers to a form prescribed in the regulations.
8. A reference to a rule in this judgment refers to the Rules of the Tribunal[2].

APPLICATION TYPE

9. This is an application made in terms of section 57(1) for the cancellation of the respondent's registration with the applicant on the basis that the respondent has allegedly, repeatedly engaged in prohibited conduct. The applicant further seeks additional orders as a consequence of the respondent's alleged prohibited conduct. These are addressed further below.

JURISDICTION

10. The Tribunal has jurisdiction to hear this matter in terms of section 27(a)(ii) and has powers conferred upon it in terms of section 150 to make orders concerning a registrant who allegedly contravenes the NCA or fails to comply with any condition of its registration.

PROCEEDING ON A DEFAULT BASIS

11. On 26 January 2023, the applicant filed the application with the Tribunal. Copies of the application were served on the respondent by registered mail at three of the respondent's known addresses on 25 January 2023. The Tribunal's Registrar (the Registrar) issued a notice of filing to all the parties on 30 January 2023.
12. In terms of rule 13(2), the respondent had 15 business days to serve an answering affidavit and file the same with the Registrar. However, the respondent failed to do so.

13. The applicant did not file an application for a default order in terms of rule 25(2).
14. Due to the pleadings being closed, the Registrar issued a notice of set down to all the parties on 23 February 2023, setting the matter down for hearing on 5 April 2023.
15. During the hearing, the applicant cited case law^[3] supporting its argument that the application documents were properly served on the respondent. The Tribunal was satisfied that the application documents were adequately served on the respondent, and the matter proceeded on a default basis in terms of rule 24.
16. Rule 13(5) states that any fact or allegation in the application or referral not explicitly denied or admitted in the answering affidavit will be deemed admitted by the respondent.
17. 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.

BACKGROUND

18. On 1 June 2022, the applicant was invited by the South African Police Services' Directorate for Commercial, Financial, and Cyber Crime Intelligence (SAPS) in the Northern Cape to participate in an investigation. The project was initiated following a request by the South African Social Security Agency (SASSA). It aimed to combat the unlawful lending of money to SASSA beneficiaries while retaining prohibited instruments by unregistered credit providers. The SAPS provided the applicant with a list of 19 individuals and entities suspected of committing prohibited conduct by SASSA. The respondent, then identified as M Chen, was one of them. This raised a reasonable suspicion that the respondent might be extending credit in a manner that is not in accordance with the NCA and its regulations. As a result, the applicant initiated a complaint against the respondent in terms of section 136(2). On 24 June 2022, the applicant's Chief Executive Officer appointed two inspectors to investigate the business practices of the respondent.
19. On 11 July 2022, the inspectors conducted an on-site investigation at the respondent's place of business. The inspectors were assisted by two SAPS members who had a search and seizure warrant. Upon searching the premises, the inspectors and members of the SAPS found 19 identity documents, 3 Easy Pay cards, 30 bank cards, 37 SASSA cards, 3 Post Bank cards, and 70 consumer files. The files consisted of file sleeves containing pieces of paper with the consumers' names written on them and the consumer's instruments, which the respondent retained.
20. Pinxiang Chen (Mr Chen), the owner and sole director of the respondent, was read his rights in terms of section 139(4), which he confirmed to understand. On being interviewed during the execution of the search warrant, he explained that the respondent offered short-term loans to employed consumers and SASSA beneficiaries at a rate of 40% interest per annum. He maintained that affordability assessments were conducted on each borrower and that he provided them with copies of their credit agreements. However, the inspectors did not find

any documents to support these statements. The applicant proceeded to compile an investigation report which identified several contraventions committed by the respondent. Based on the severity of the contraventions discovered during the investigation, an application in terms of section 57(1) was filed with the Tribunal on 26 January 2023.

THE APPLICANT'S

SUBMISSIONS

21. The applicant submitted that the respondent was found to have repeatedly failed to conduct its business in a manner consistent with the purpose and requirements of the NCA in contravention of section 52(5)(c) read with General Condition 2 of its General Conditions of Registration. In this regard, the applicant asserts that the respondent has exhibited serious contraventions of the NCA, as shown in the applicant's investigation report, in that the respondent has:

21.1 Made use of a document, number or instrument prohibited when collecting on or enforcing a credit agreement

The applicant alleges that the respondent contravened sections 133(1) and (2), which prohibit a credit provider from making use of any document, number or instrument referred to in section 90(2)(l) when collecting on or enforcing a credit agreement. The documents or instruments referred to are stipulated as an identity document, credit or debit card, bank account or automatic teller machine access card, or any similar identifying document or device with a personal identification code or number to be used to access an account. During the investigation, 92 consumer instruments were found and seized on the respondent's premises. It is clear, or at the very least, reasonable to infer that the respondent retains consumers' instruments to secure repayment of their loans.

21.2 Failed to take reasonable steps to assess the consumers' debt repayment histories as consumers under credit agreements

The applicant alleges that the respondent contravened section 81(2)(2)(a)(ii), read with regulation 23A(12)(b), in that the respondent failed to consider the debt repayment history of consumers under their credit agreements and failed to obtain credit bureau reports for each consumer before entering into credit agreements with them. In doing so, the respondent showed no regard for existing credit agreements that consumers may have had at the time. The confiscated consumer files contained no credit bureau reports, and the respondent has not produced any evidence to contradict this allegation.

21.3 Failed to take reasonable steps to assess consumers' existing financial means, prospects, and obligations

The applicant alleges that the respondent contravened section 81(2)(a)(iii) read with regulation 23A(3), (8), (9), (10), (12)(a) and (12)(c) in that it failed to take reasonable steps to assess consumers' existing financial, means prospects and obligations. The confiscated consumer files did not contain evidence of consumers' income and expenses being calculated, and the respondent has not produced any evidence to contradict this allegation.

21.4 Extended credit recklessly by failing to conduct proper affordability assessments before granting credit

The applicant alleges that by failing to conduct assessments as required in terms of section 81(2), the respondent contravened sections 80(1)(a) and 81(3) by granting credit recklessly. The respondent has extended credit recklessly to consumers identified in annexure "C1"[4] annexed to the investigation report and has repeatedly contravened these sections.

21.5 Charged a rate of interest that exceeds the maximum rates prescribed in terms of the NCA and the regulations

The applicant alleges that the respondent, by its own admission, charged consumers interest rates that exceed the maximum prescribed rates contained in the NCA. The respondent admitted to charging consumers 40% interest on short-term loans. The respondent has therefore contravened sections 100(1)(c) and 101(1)(d)(ii) read with regulation 42(1).

21.6 Failed to provide consumers with pre-agreement statements and quotations in the prescribed form and containing the prescribed content

The applicant alleges that by failing to provide consumers with a preagreement statement and quotation in the prescribed form, the respondent has contravened section 92(1) read with regulation 28(1)(b) and Form 20. The confiscated files contained no pre-agreements statements or quotations, and the respondent has not produced any evidence to contradict this allegation.

21.7 Failed to provide consumers with credit agreements in the prescribed form

The applicant alleges that the respondent failed to provide consumers with credit agreements in the prescribed form, and in failing to do so, it has contravened section 93(2) and regulation 30(1). It further asserts that this failure also contravened section 3(e)(i) since the respondent would not have educated consumers regarding their rights. No credit agreements were found in any consumer files confiscated from the respondent's premises, and the respondent failed to produce any credit agreements during the investigation.

21.8 Failed to display a registration certificate at its business premises as required.

In terms of section 52(5)(a), a registrant must post the registration certificate or a duplicate thereof in any premises at or from which it conducts its business. In terms of General Condition 5 of the respondent's General Conditions of Registration, the respondent must display a valid registration certificate at any business premises where the registrant conducts registered activities. The respondent has failed to do so. During the investigation, the respondent provided an expired registration certificate to the inspectors. It was, therefore, not valid and not correctly

displayed at the respondent's premises.

APPLICANT'S RELIEF SOUGHT

22. The applicant seeks the following:

22.1 An order in terms of section 150(a), declaring the conduct of the respondent in contravention of the NCA and therefore prohibited conduct;

22.2 An interdict restraining the respondent from, in the future, engaging in similar prohibited conduct;

22.3 An order for the immediate return of any other consumer instruments the respondent might still have within its possession and which were not found or seized during the investigation. To the extent that the respondent is unable to return those instruments, the respondent is to hand over any such instruments to the SAPS situated in Hopetown;

22.4 An order declaring as reckless all credit extended to the consumers as identified within annexure "C1" annexed to the investigation report and setting aside the consumers' rights and obligations under any such agreements as deemed just and reasonable, alternatively, an order suspending the force and effect of such agreements as contemplated in section 83(2);

22.5 An order interdicting the respondent from attempting to collect on any outstanding payments in respect of credit extended to the consumers identified in annexure "C1" annexed to the investigation report;

22.6 An administrative fine of 10% of the respondent's annual turnover or R1 000 000.00, whichever is greater as contemplated in section 150(c), to be imposed on the respondent;

22.7 Any other appropriate order required to give effect to the consumer's rights in terms of section 150(j); and

22.8 Further alternative relief.

CONSIDERATION AND ANALYSIS OF THE APPLICANT'S EVIDENCE

23. The Tribunal considered the applicant's written submissions regarding the basis upon which it formulated a reasonable suspicion that the respondent was engaged in prohibited conduct. The Tribunal is satisfied that the applicant has provided sufficient argument and basis for establishing that there was reasonable suspicion. The Tribunal is seized only with the applicant's documentary evidence and oral arguments. In terms of rule 13(5), The Tribunal deems the facts alleged by the applicant as admitted because the respondent elected not to attend the proceedings or oppose the matter.

24. After considering the evidence, the Tribunal finds that the respondent has repeatedly contravened the NCA, its regulations, and the conditions of its registration as a credit provider. These contraventions amount to prohibited conduct and are serious. The respondent, by failing to file an answering affidavit and appear at the hearing, has lost the

opportunity to put a proper defence against the allegations levelled against it and has placed itself in the hands of the Tribunal. The Tribunal views all these factors in a serious light, as they have the character of undermining the NCA, its purpose, the aggrieved consumers, and the applicant.

25. The applicant has made out a case against the respondent, and has proven on a balance of probabilities that the respondent has repeatedly contravened the provisions of the NCA, the regulations, and the conditions of its registration, and that it has contravened the following provisions:
- (a) Section 52(5)(c) read with General Condition 2 of its Conditions of Registration;
 - (b) Sections 133(1) and (2) read with section 90(2)(1);
 - (c) Section 81(2)(a)(ii) read with regulation 23A(12)(b) and 23A(13);
 - (d) Section 81 (2)(a)(iii) read with regulation 23(3), 23A(8), 23A(9), 23A(10), 23A(12)(a) and 23A(12)(c);
 - (e) Section 81(3) read together with section 80(1)(a);
 - (f) Section 100(1)(c) and 101(1)(d)(ii) read with regulation 42(1);
 - (g) Section 92(1) read with regulation 28(1)(b) and form 20;
 - (h) Regulation 23A(15);
 - (i) Section 93(2) read with regulation 30(1) and form 20.2;
 - (j) Section 52(5)(a) and section 52(5)(c) read with General Condition 5 of the respondent's Conditions of Registration.
26. The Tribunal is not persuaded that the applicant has proved on a balance of probabilities that the respondent has repeatedly contravened section 3(e)(i).
27. The evidence before the Tribunal, as averred in the applicant's founding affidavit, the investigation report, its annexures, and the oral submissions point to the respondent's conduct being continuous and repeated. The respondent's repeated contraventions of the NCA, constitute prohibited conduct and warrant the imposition of an administrative fine as a punitive measure.

ADMINISTRATIVE FINE

28. The applicant requested the Tribunal to impose an administrative fine on the respondent. The Tribunal is satisfied that the nature of the respondent's contraventions and the consequent financial implications for consumers justify the Tribunal imposing an administrative fine on the respondent. A vital purpose of the NCA is to promote responsible credit granting and to prevent and prohibit reckless credit granting. The types of contraventions perpetrated by the respondent are undoubtedly the type of conduct the NCA

seeks to prohibit. Once it finds the respondent has engaged in prohibited conduct, the Tribunal has a duty to exercise its powers by sending a clear and strong message to the credit industry that such conduct will not be permitted. Section 151(3) outlines the factors the Tribunal must consider when determining an appropriate fine. These are listed and discussed under separate sub-headings below.

The nature, duration, gravity, and extent of the contravention

From the evidence, it is clear that the contraventions are serious, displaying a total disregard for the NCA and the rights of the consumers. This conduct has a damaging effect on the entire credit industry. The nature and extent of the contraventions warrant serious action against the respondent. The contraventions exposed consumers to over-indebtedness. The consumers were victims of the respondent's unlawful conduct.

Any loss or damage suffered as a result of the contravention

Consumers have suffered a loss in that they have been exploited by entering into credit agreements without affordability assessments being conducted, which resulted in reckless credit being granted. The respondent's over-charging of interest and prohibited charges and retaining consumers' bank cards caused consumers direct prejudice and financial loss.

The behaviour of the respondent

As a registered credit provider, the respondent has no excuse for behaving contrary to its statutory obligations. It acted with complete disregard for consumer rights.

The market circumstances in which the contravention took place

The respondent's conduct illustrates that the market within which the contraventions occurred, is one in which consumers are entrapped in a debt cycle of ongoing credit and re-payments. These consumers are desperate for and rely on the type of services the respondent provides. These consumers are also not fully aware of their rights relating to access to credit and are vulnerable to exploitation.

The level of profit derived from the contravention

The applicant could not determine the exact level of profit derived by the respondent. It assumes that a substantial profit has been derived from the activities undertaken by the respondent. Each loan extended recklessly with prohibited charges and excessive interest levied, constitutes a profit gained by the respondent.

The degree to which the respondent has co-operated with the NCR and the Tribunal

The respondent co-operated with the applicant's inspectors during the investigation.

Whether the respondent has previously been found in contravention of the NCA No prior investigations or enforcement was instituted against the respondent.

29. Regarding the abovementioned factors, the factual evidence, and the conduct displayed, it is in the interests of justice for an administrative fine to be imposed against the respondent. The purpose of an administrative fine is, in the circumstances of this application, a punitive measure that is warranted. Regarding the quantum of the administrative fine, section 151(2) provides that an administrative fine imposed may not exceed the greater of 10% of the respondent's annual turnover during the preceding financial year or R1 000 000.00 (one million Rand). The applicant did not submit any evidence of the turnover of the respondent. The Tribunal can, however, still impose a fine limited to a maximum of R1 000 000.00 (one million Rand).
30. The respondent's conduct has displayed little or no regard for the spirit and purpose of the NCA. The respondent's continued participation in the credit market places consumers at substantial risk of further financial harm. The respondent has repeatedly committed these contraventions, which should be considered an aggravating factor.
31. The Tribunal finds a fine of R500 000.00 (five hundred thousand Rand) will be appropriate.
32. An interdict prohibiting the respondent from, in the future, engaging in prohibited conduct would serve no purpose as the legislation on its own prohibits the respondent from doing so.

ORDER

33. Accordingly, the Tribunal makes the following order:

33.1 In terms of section 150(a) of the NCA, the respondent is declared to have engaged in prohibited conduct by repeatedly contravening the NCA, the regulations, and the conditions of its registration, and in particular, the respondent is found to have contravened the following provisions of the NCA:

- (a) Section 52(5)(c) read with General Condition 2 of its Conditions of Registration;
- (b) Sections 133(1) and (2) read with section 90(2)(1);
- (c) Section 81(2)(a)(ii) read with regulation 23A(12)(b) and 23A(13);
- (d) Section 81 (2)(a)(iii) read with regulation 23(3), 23A(8), 23A(9), 23A(10), 23A(12)(a) and 23A(12)(c);
- (e) Section 81(3) read together with section 80(1)(a);
- (f) Section 100(1)(c) and 101(1)(d)(ii) read with regulation 42(1);
- (g) Section 92(1) read with regulation 28(1)(b) and Form 20;
- (h) Regulation 23A(15);
- (i) Section 93(2) read with regulation 30(1) and Form 20.2;

- (i) Section 52(5)(a) and section 52(5)(c) read with General Condition 5 of the respondent's Conditions of Registration;

33.2 The respondent is declared to have engaged in repeated contraventions of the above provisions of the NCA, and such conduct is accordingly declared to be prohibited conduct in terms of section 150(a) of the NCA;

33.3 The registration of the respondent as a credit provider is cancelled with immediate effect in terms of section 57(1);

33.4 The respondent is ordered to immediately return any other consumer instruments the respondent has in its possession to the respective consumers or SAPS situated in Hopetown;

33.5 The credit agreements entered into by the respondent and consumers identified and listed in annexure C1 of the applicant's investigation report are declared as reckless credit in terms of section 80(1)(a), and all the rights and obligations of the consumers in respect of the credit agreements are set aside in terms of section 83(2)(a);

33.6 The respondent is interdicted from collecting on any of its credit agreements identified and listed in annexure C1 of the applicant's investigation report;

33.7 The respondent must, within 90 (ninety) business days of issuing this judgment pay an administrative fine of R500 000.00 (five hundred

thousand Rand) into the National Revenue Fund referred to in section 213 of the Constitution^[5] using the following bank account details:

Bank: The Standard Bank of South Africa

Account holder: Department of Trade and Industry

Branch name: Sunnyside

Branch code: 010645

Account number: 3[....]6

Reference: NCT/257512/2023/57(1)(b) and the name of person or business making the payment; and

33.8 There is no cost order.

[SIGNED]

Adv C Sassman

Presiding Tribunal member

Tribunal members Mr C Ntsoane and Dr A Potwana 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] *Sebola & Another v Standard Bank of South Africa & Another* 2012 (5) SA 142 (CC) and *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC).

[4] See pages 78 – 81 of the file.

[5] Constitution of the Republic of South Africa, Act 108 of 1996.

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