

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Bondpro Finance Services (Pty) Ltd (NCT78958/2017/55(1))

[2017] ZANCT 80 (22 June 2017)

[2017] ZANCT 80**COURT**

National Consumer Tribunal

BEFORE

D Terblanche, F Manamela, X May

CASE / FILE NUMBER

NCT78958/2017/55(1)

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Source record**IN****THE NATIONAL CONSUMER TRIBUNAL****HELD****AT CENTURION****Case****Number:** NCT 78958/2017/55(1)
IN**THE MATTER BETWEEN:** THE
NATIONAL CREDIT REGULATOR
APPLICANT
and
BONDPRO
Finance Services (Pty) Ltd
RESPONDENT**PANEL:** D
TERBLANCHE - Presiding member
F
MANAMELA - Member
X
MAY - Member
DATE
OF HEARING: 9
June 2017

JUDGMENT**AND REASONS****Parties**

1. The Applicant is the National Credit Regulator, a juristic person established in terms of Section 12 of the National Credit Act 34 of 2007 (“the Act”) and situated at 127 - 15th Road, Randjiespark, Midrand (hereinafter the “Applicant” or the “Regulator”).
2. The Respondent is Bondpro Finance Services (Pty) Ltd. The Respondent was registered with the Applicant as a credit provider. The Respondent is no longer registered with the Applicant. At the date of the hearing the Respondent was an unregistered credit provider. The Respondent’s registration has lapsed due to the non-payment of its annual renewal fees.

TYPE OF APPLICATION

3. This is an application by the Applicant in terms of section 55[1], more specifically section 55(1) read with section 55(6) of the National Credit Act, Act 34 of 2005 (hereinafter the “NCA”)

for the enforcement of a Compliance Notice.

RELIEF SOUGHT

4. The Applicant seeks an order from the Tribunal -
 - 4.1. Compelling the Respondent to comply with the Compliance Notice the Applicant issued against the Respondent on 12 September 2016 in terms of section 55(1) of the NCA;
 - 4.2. Interdicting the Respondent from future breaches of the NCA; and
 - 4.3. Making any other appropriate order required to give affect to the consumers’ rights in terms of the Act.

BACKGROUND

5. The application is based on the Applicant’s allegations that the Respondent failed to comply with the Compliance Notice issued by Applicant.
6. In terms of the Compliance Notice the Respondent was required to, by no later than -
 - 6.1. 15 September 2016, confirm in writing to the Applicant that the Respondent ceased charging and / or imposing a monetary liability on consumers in respect of a credit fee or charge prohibited by the Act; and
 - 6.2. 10 October 2016 submit an audit report to the Applicant confirming that -

6.2.1. Respondent's business had been audited and that the fees charged to consumers are in accordance with Section 100(1)(a);

6.2.2. All consumers that have been overcharged have been identified;

6.2.3. The total amount consumers have been overcharged have been accurately calculated; and

6.2.4. All affected consumers have been reimbursed with the amounts specified.

7. The Applicant further -

7.1. Warned the Respondent in the Compliance Notice that if the Respondent failed to comply with it, that the Applicant would approach the National Consumer Tribunal (the "Tribunal") to impose certain orders in terms of section 150 or an administrative penalty in terms of section 151 of the Act on the Respondent; and

7.2. Informed the Respondent that if it wishes to object to the Compliance Notice, how it could go about doing so.

8. The Respondent did not file any objections to the Compliance Notice.

THE HEARING

9. The matter was set down on a default basis by the Tribunal for a hearing to be held on 9 June 2017 at the Tribunal's offices in Centurion.

10. Ms. Mashaba represented the Applicant at the hearing.

11. The Respondent did not appear.

CONSIDERATION OF RELEVANT LEGAL AND FACTUAL ISSUES

Default order

12. In order to grant an order by default the Tribunal is guided by Rule 25(3) of the Rules for the Proceedings of Matters before the National Consumer Tribunal (hereinafter the "Rules") that provides that -

"(3) The Tribunal may make a default order-

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

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

Service

13. The Applicant submitted that the Respondent has been informed by registered mail to the registrant's post address of the application. Proof of the registered post receipt has been filed with the Tribunal and appears on page 2863-2864 of the record.

14. This service complies with Rule 30 (1)(b) of the Rules of the Tribunal.

15. The Tribunal is satisfied that the Applicant served the application on the Respondent.
16. The Tribunal is accordingly satisfied to continue with the matter on a default basis.

“Necessary evidence”

17. The “necessary evidence” the Tribunal has to hear or consider and found to be proved on the balance of probabilities[2] are -

17.1. Whether the Applicant has made out a case -

17.1.1. That the Respondent has in fact committed prohibited conduct empowering the Applicant to issue the Compliance Notice; and

17.1.2. That the Respondent failed to comply with the Compliance Notice.

18. In terms of Rule 13(3) of the Rules the Respondent was required, if it wished to do so, to file an answer to the Applicant’s application within 15 days of being served with the application.
19. Rule 13(5) of the Rules becomes relevant with regard to the onus the Applicant has to discharge. This Rule provides that -

“Any fact or allegation in the application or referral not specifically denied or admitted in the referral affidavit in an answering

affidavit, will be deemed to be admitted.”

20. As the Respondent did not file an answering affidavit specifically denying or admitting the facts and allegations made by the Applicant in the application, the Tribunal will deem the allegations made by the Applicant as admitted.
21. The Tribunal still however has to determine whether the Applicant had put the “necessary evidence” forward for the Tribunal to grant the relief sought.

DOES THE CONDUCT COMPLAINED ABOUT IN THE COMPLIANCE NOTICE CONSTITUTE PROHIBITED CONDUCT

22. The Applicant sets out in its Compliance Notice issued to the Respondent, that -

“... your attention is drawn to the fact that you have failed to comply (emphasis added) with the provisions of the Act, in that:

1. In terms of Section 100(1)(a) of the Act, a credit provider must not charge an amount to, or impose a monetary liability on, the consumer in respect of a credit fee or charge prohibited by this Act;
2. An investigation conducted by the National Credit Regulator in terms of the Act has shown that Bondpro Financial Services (Pty) Ltd has not complied with the following provisions of the Act:

8.1(sic) Section 100(1)(a) in that Bondpro Financial Services (Pty) Ltd charge consumers an amount in the form of Debt Administration Fee and in doing so impose a monetary liability on consumers in respect of a credit fee or charge prohibited by the Act.”

23. Section 55(1) of the NCA provides that the National Credit Regulator -

“... may issue a compliance notice in the prescribed form to—

- (a) a person or association of persons whom the National Credit Regulator on reasonable grounds believes—
 - (i) has failed to comply with a provision of this Act; or
 - (ii) is engaging in an activity in a manner that is inconsistent with this Act; or
- (b) a registrant whom the National Credit Regulator believes has failed to comply with a condition of its registration.”

24. The power to declare conduct as prohibited conduct is set out in section 150 of the NCA that provides that -

“In addition to its other powers in terms of this Act, the Tribunal may make an appropriate order in relation to prohibited conduct 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;...”

25. Section 55(1) affords the Regulator the discretion to issue a Compliance Notice based on having formed a reasonable suspicion that prohibited conduct had been committed. This is similar to a referral being made by the Regulator to the Tribunal alleging prohibited conduct by parties subject to the Act and for the Tribunal then to make a determination in terms of section 150(a) whether, on the balance of probabilities, prohibited conduct had been committed.

26. Forming a reasonable suspicion of prohibited conduct falls short of a determination of prohibited conduct. Albeit the Regulator stated that the Respondent “... have failed to comply... with section 100(1)(a) of the NCA” it is for the Tribunal to make the determination and declare whether prohibited conduct had been committed or not.

27. As appears from the above, the power to declare conduct prohibited is vested in the Tribunal.

28. Based on the foregoing it would be an anathema to the Tribunal to issue an order enforcing a Compliance Notice without making its own determination as to whether prohibited conduct had been committed or not.

29. The Tribunal accordingly considered the evidence put forward by the Applicant, the onus Applicant had to meet and applied Rule 13(5) to the facts set out, to make the above determination.
30. The evidence put forward by the Applicant against the Respondent have been set out in an investigation report dated 30 October 2014, attached to the application.
31. In summary the report sets out (and incorporated by reference) -
 - 31.1. That an investigator in the employ of the Applicant visited the premises of the Respondent unannounced on 10 June 2014 and interviewed the CEO, a certain Mr. Dawie Botha on the premises.
 - 31.2. That the investigator found that the Respondent contravened section 100(1)(a) of the Act and charged consumers a "Debt Administration Service Charge" in some agreements, also called a "Service Charge", in contravention of section 100(1)(a) of the NCA namely "... charged an amount to, or impose a monetary liability, on the consumer in respect of - (a) a credit fee or charge prohibited by this Act."
 - 31.3. The voluminous documentary evidence in support of its allegations; and
 - 31.4. Other contraventions that the Regulator seemed to not wish to pursue.
32. The allegations and the documentary evidence put forward by the Applicant -
 - 32.1. Provides proof on a balance of probabilities of the allegations made against the Respondent; and
 - 32.2. Stands uncontroverted by the Respondent.

FAILURE TO COMPLY WITH THE COMPLIANCE NOTICE

33. The next inquiry is into the evidence placed before the Tribunal to show that the Respondent failed to comply with the Compliance Notice.
34. The Regulator submitted during the hearing that they did not receive the confirmations from the Respondent by the due dates and to the effect as required namely the undertaking by 16 September 2016 and the audit report by 10 October 2016.
35. The Tribunal is therefore satisfied that there is indeed non-compliance with the steps required of the Respondent in terms of the Compliance Notice.
36. Section 150 empowers the Tribunal to -

"In addition to its other powers in terms of this Act, the Tribunal may make an appropriate order in relation to prohibited conduct 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) interdicting any prohibited conduct;

(c) - (i)”

37. The Tribunal accordingly makes the following order -

37.1. Declaring the Respondent’s conduct in contravention of Section 100(1)(a) of the Act;

37.2. Interdicting the Respondent from future breaches of the NCA;

37.3. Ordering the Respondent to comply with the Compliance Notice issued by the Applicant on 12 September 2016 in terms of section 55(1) of the NCA by no later than 31 August 2017; and

37.4. No order is made as to costs.

Dated at Centurion on 22nd of June 2017.

D Terblanche

Presiding member

F Manamela (member) and X May (Member) concurring.

[1] 55. Compliance notices.— (1) Subject to subsection (2), the National Credit Regulator may issue a compliance notice in the prescribed form to— (a) a person or association of persons whom the National Credit

Regulator on reasonable grounds believes (emphasis added)— (i) has failed to comply with a provision of this Act; or (ii) is engaging in an activity in a manner that is inconsistent with this Act; or (b) a registrant whom the National Credit Regulator believes has failed to comply with a condition of its registration.... (6) If a person fails to comply with a compliance notice as contemplated in this section without raising an objection in terms of section 56, the National Credit Regulator may refer the matter— (a) to the National Prosecuting Authority, if the failure to comply

constitutes an offence in terms of this Act; or (b) otherwise, to the Tribunal for an appropriate order. (emphasis added)

[1] 55. Compliance notices.—

(1) Subject to subsection (2), the National Credit Regulator may issue a compliance notice in the prescribed form to—

(a) a person or association of persons whom the National Credit

Regulator on reasonable grounds believes (emphasis added)—

(i) has failed to comply with a provision of this Act; or

(ii) is engaging in an activity in a manner that is inconsistent with this Act; or

- (b) a registrant whom the National Credit Regulator believes has failed to comply with a condition of its registration....
 - (6) If a person fails to comply with a compliance notice as contemplated in this section without raising an objection in terms of section 56, the National Credit Regulator may refer the matter—
 - (a) to the National Prosecuting Authority, if the failure to comply constitutes an offence in terms of this Act; or
 - (b) otherwise, to the Tribunal for an appropriate order. (emphasis added)
- [2] 167. Standard of proof.—In any proceedings before the Tribunal, or before a consumer court, in terms of this Act the standard of proof is on a balance of probabilities
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