

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Botshabelo Cash Loans CC (NCT/321451/2024/57(1)) [2024] ZANCT 48 (3 October 2024) [2024] ZANCT 48

COURT

National Consumer Tribunal

BEFORE

C Sassman, S Hockey, MC Peenze

CASE / FILE NUMBER

NCT/321451/2024/57(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT/321451/2024/57(1)

In the matter between: NATIONAL CREDIT REGULATOR APPLICANT and BOTSHABELO CASH LOANS CC RESPONDENT

Coram:

Adv C Sassman

- Presiding Tribunal member

Mr S Hockey

- Tribunal member

Dr MC Peenze

- Tribunal member

Date of the hearing:

- 26 September 2024

Date of judgment:

- 3 October 2024

JUDGMENT AND REASONS

THE PARTIES

1. The applicant is the National Credit Regulator (the applicant), an organ of the 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 Thabo Majoro, the applicant's junior legal advisor.
3. The respondent is Botshabelo Cash Loans CC (the respondent), a registered credit provider with registration number NCRCP2071.
4. At the hearing, the respondent was represented by Adv Tiro Makgatho, instructed by Gumbo and Co Inc.

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 Act Regulations, 2006 (the regulations).[1]
7. A reference to a form refers to a form prescribed in the regulations.
8. A reference to a condition refers to the respondent's general conditions of registration as a credit provider.

APPLICATION TYPE

9. This is an application in terms of section 57(1) whereby the applicant seeks an order cancelling the respondent's registration as a credit provider. The applicant further seeks several orders declaring that the respondent has repeatedly contravened certain provisions of the NCA and relief in respect thereof.

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 alleged contraventions of the NCA.

BACKGROUND

11. The applicant received a request from the Consumer Affairs Office to participate in a World Consumer Rights Day project to create consumer awareness in the North West Province. During the project, the applicant sought to educate consumers on the provisions of the NCA and identify credit providers operating contrary to its provisions. One of the applicant's inspectors identified the respondent's premises and made an anonymous enquiry into its cost of credit. One of the respondent's employees indicated that the respondent offered

consumers payday and short-term loans at an interest rate of 30% per month. The applicant then confirmed with its Compliance department that the respondent had not submitted its financial and statutory returns as required.

12. This gave rise to a reasonable suspicion that the respondent was conducting its business in a manner which was not in accordance with the provisions of the NCA and its regulations. On 19 May 2023, the applicant initiated a complaint against the respondent in terms of section 136(2) and authorised an investigation into the respondent's conduct in terms of section 139(1)(c). The applicant's Chief Executive Officer appointed an inspector to investigate the respondent's business practices.
13. On 12 October 2023, the inspector conducted an investigation at the respondent's premises. The respondent's employees assisted him and answered his questions. He further requested copies of ten approved credit agreements with all supporting documentation. Upon completing the investigation, the applicant's investigator compiled an investigation report. The investigation included the ten randomly selected consumer files attached to the report and marked as annexures C1 to C10. The report 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.

THE APPLICANT'S

SUBMISSIONS

14. The applicant submitted that its investigation concluded that the respondent has repeatedly and continuously failed to conduct its business in a manner consistent with the purpose and requirements of the NCA. In this regard, the applicant asserts that the respondent has exhibited serious contraventions of the NCA and its conditions of registration. The respondent has contravened the NCA in the following ways.
15. The respondent failed to provide consumers with pre-agreement statements and quotations or with credit agreements in the prescribed form

The applicant alleges that by failing to provide consumers with a pre-agreement statement and quotation in the prescribed form, the respondent has contravened section 92(1) read with regulation 28(1)(b) and Form 20. This failure means that the respondent further failed to provide adequate disclosure of a consumer's credit cost multiple, and in this regard, the respondent also contravened regulation 23A(15)(a). According to regulation 42(1)(b), the interest rate on short-term credit transactions must be disclosed as a monthly interest, which the respondent failed to do. The applicant further alleges that the respondent failed to provide consumers with credit agreements in the prescribed form, which contains all the information as reflected in Form 20.2. In failing to do so, it has contravened section 93(2) read with regulation 30(1) and Form 20.2.

16. The respondent charged consumers a rate of interest which 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 which exceed the maximum prescribed rates contained in the NCA. The respondent admitted to charging consumers 30% interest per month on loans. The respondent has therefore contravened sections 100(1)(c) and 101(1)(d) read with regulations 40 and 42(1) and 42(1)(b).

17. The respondent included an unlawful provision in its credit agreements

The applicant alleges that the respondent included a clause in its credit agreements authorising it to charge a rate of interest in excess of the prescribed maximum rate of interest and is therefore unlawful in the context of sections 90(1) and 90(2)(b)(iii) read with section 101(1)(d)(ii) and regulation 42(1).

18. The respondent failed to keep records as required

In terms of the credit agreements marked C1 - C10, the only documents in relation to loans are acknowledgements of debt and debit order scan receipts. In addition, the respondent has signed a confirmation that it has submitted all supporting documents in relation to the sample credit agreements provided to the applicant's inspector. There are no supporting documents, such as proof of income, credit bureau reports or bank statements, in the sampled files. The absence of the documents indicates the respondent's failure to retain them. Therefore, the applicant submits that the respondent has failed to maintain records in the prescribed manner and form and for the prescribed time in contravention of section 170 read with regulations 55(1)(b)(vi) and 55(5).

19. The respondent failed to conduct any affordability assessments or, in some instances, conducted the assessments improperly

The applicant alleges that the respondent entered into credit agreements with consumers, without conducting any affordability assessments or conducting the assessments improperly. There is no evidence of any assessments contained in the sampled files. The respondent, by failing to take reasonable steps to assess consumers' existing financial means, prospects and obligations together with their debt repayment histories, has contravened section 81(2)(a)(ii) and (iii) read with regulation 23A(3), 23A(8) and 23A(12)(a) and (b). At the hearing, the applicant abandoned the allegation of the contravention of regulation 23A(9) as contained in its application.

20. The respondent offered credit recklessly

The applicant alleges that as a result of the respondent's failure to conduct affordability assessments or take reasonable steps to assess the proposed consumers' debt repayment histories and their existing financial means, prospects and obligations, the respondent has extended credit recklessly to consumers and has consequently repeatedly contravened section 81(3) read with 81(2)(a)(ii) and (iii) read together with section 80(1)(a).

21. The respondent failed to submit financial and operational returns

The applicant alleges that the respondent has not filed annual financial statements and operational returns. In the absence of any proof to the contrary, the applicant submits that the respondent contravened section 52(5)(c) and (f) read with general condition 3, read further with regulations 62(1)(c), 65 and 66.

THE RESPONDENT'S

SUBMISSIONS

22. The respondent raised a point in limine by submitting that the applicant filed its application without complying with section 55(1) of the NCA. The applicant failed to provide the respondent with a compliance notice as soon as the applicant became aware of the alleged continuous contraventions of the NCA. The notice should have contained information informing the respondent of its contraventions, details and nature of the non-compliance, any steps required to be taken and the period within which those steps should have been taken. It should further have indicated any penalty that may be imposed in terms of the NCA if those steps were not taken.
23. Therefore, the steps taken by the applicant are premature and prejudicial to the respondent. The respondent was never provided with an opportunity to comply with the NCA, and as a result, the respondent is currently facing a risk of its registration being cancelled. Had the applicant complied with section 55(1), the respondent would have taken the necessary steps to comply with the provisions required upon notification of the alleged contraventions.
24. The respondent further submitted that it never received any training from the applicant on clarifying how it should conduct its business. It operates in a rural part of the country and does not always have access to the internet and certain essential resources. It operated under the assumption that it was compliant with the applicant's requirements and the provisions of the NCA.

APPLICANT'S RELIEF SOUGHT

25. The applicant seeks the following:

25.1 An order declaring the respondent has repeatedly contravened:

- section 92(1) read with regulation 28(1)(b) and Form 20;
- section 91(1) read with regulation 23A(15)(a) and regulation 42(1)(b);
- section 93(2) read with regulation 30(1) and Form 20.2.
- sections 100(1)(c) and 101(1)(d) read with regulations 40 and 42(1) and 42(1)(b);
- sections 90(1) and 90(2)(b)(iii) read with section 101(1)(d)(ii) read further with regulation 42(1);
- section 170 read with regulation 55(1)(b)(vi) read further with regulation 55(5);
- section 81(2)(a)(ii) and (iii) read with regulation 23A(3), 23A(8) and 23A(12)(a) and (b);

· section 52(5)(c) and (f) read with general condition 3, read further with regulations 62(1)(c), 65 and 66;

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25.2 An order declaring the conduct of the respondent to be prohibited conduct in terms of section 150(a);

25.3 An order cancelling the respondent's registration as a credit provider;

25.4 An order declaring all credit agreements identified in the applicant's investigation report as reckless and setting aside the consumers' rights and obligations under those agreements as deemed just and reasonable;

25.5 An order directing the respondent to refund all consumers identified in the applicant's investigation report who were overcharged on interest;

25.6 An order for the respondent to appoint an independent auditor, at its own cost and within 30 business days from the date of this order being issued, to identify credit agreements concluded within the last three years where no proper affordability assessments were conducted. The auditor must conclude an audit report within 120 business days of appointment and present the report and credit agreements to the applicant within 10 business days of its

conclusion.

25.7 In the event that the agreements identified in annexures C1 to C10 have already been repaid in full, an order directing the respondent to refund the cost of credit to the consumers;

25.8 Should any enforcement action have commenced against the consumers identified in annexures C1 – C10, an order for the respondent to consent to the rescission of any judgments obtained against the consumers;

25.9 An order for the respondent to clear with all credit bureaus any adverse listing of judgments against the consumers identified in annexures C1 – C10;

25.10 An order declaring the provision regarding the interest rate charged as unlawful and void from the date it was purported to take effect;

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

25.12 Any other appropriate order required to give effect to the consumers' rights in terms of section 150(i); and

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25.13 Further alternative relief.

CONSIDERATION AND ANALYSIS OF THE EVIDENCE

26. The Tribunal considered the applicant's written submissions regarding the basis upon which it formulated a reasonable suspicion that the respondent was engaging in prohibited conduct. The Tribunal is satisfied that the applicant has provided sufficient argument and basis for establishing that there was reasonable suspicion.
27. After considering the evidence, the Tribunal finds that the respondent has repeatedly contravened the NCA and its regulations. These contraventions amount to prohibited conduct and are serious. The Tribunal views the respondent's conduct in a serious light, as it undermines the NCA, the aggrieved consumers' rights, and the applicant's mandate.
28. The respondent is misguided in its notion that issuing a compliance notice is a pre-requisite to referring the matter to the Tribunal for adjudication. Section 55(1) merely states that the applicant "may" issue a compliance notice. The applicant was not compelled to issue the respondent a compliance notice and was within its legislated right to refer the matter to the Tribunal. Therefore, the respondent's point in limine must fail.
29. The respondent has put forward no valid defence to the allegations of its transgressions. The Tribunal rejects the respondent's submissions that it was unaware of the compliance requirements because the applicant had not provided it with any training. The Tribunal is of the view that a registrant of the applicant who voluntarily undertakes to offer services in a regulated industry is required to ensure that it familiarises itself with the regulatory requirements of the arena in which it operates.
30. On a balance of probabilities, the applicant has proven that the respondent repeatedly contravened the provisions of the NCA, the regulations, and its general conditions of registration, as alleged by the applicant.
31. The evidence before the Tribunal, as averred in the applicant's founding affidavit, the investigation report, its annexures, and the oral submissions points to the respondent's conduct being continuous and repeated. The respondent's continuous and repeated contravention of the NCA constitutes prohibited conduct justifying the cancellation of the respondent's registration as a credit provider and warrants the imposition of an administrative fine as a punitive measure.

ADMINISTRATIVE FINE

32. The applicant requested the Tribunal to impose an administrative fine of R1 000 000.00 (one million rand) or 10% of the respondent's turnover as prescribed in section 151. 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. 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

The evidence clearly shows that the contraventions are serious. They display a total disregard for the NCA and the rights of the consumers, damaging the entire credit industry. The nature and extent of the contraventions warrant serious action against the respondent. The contraventions exposed consumers to over- indebtedness, and 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 caused consumers direct financial prejudice and loss.

The behaviour of the respondent

The respondent 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 provided. These consumers are often 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. However, each loan extended recklessly with 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 and the rules of the Tribunal in opposing the application[2].

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

33. 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 on 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 respondent's turnover. The Tribunal can, however, still impose a fine limited to a maximum of R1 000 000.00 (one million rand).

34. The respondent's conduct has displayed little or no regard for the spirit and purpose of the NCA. The Tribunal finds that a fine of R50 000.00 (fifty thousand rand) will be appropriate.

ORDER

35. Accordingly, the Tribunal makes the following order:

35.1 The respondent is found to have contravened the following provisions of the NCA, its regulations and its general conditions of registration as a credit provider:

- (a) section 92(1) read with regulation 28(1)(b) and Form 20;
- (b) section 91(1) read with regulation 23A(15)(a) and regulation 42(1)(b);
- (c) section 93(2) read with regulation 30(1) and Form 20.2.
- (d) sections 100(1)(c) and 101(1)(d) read with regulations 40 and 42(1) and 42(1)(b);
- (e) sections 90(1) and 90(2)(b)(iii) read with section 101(1)(d)(ii) read further with regulation 42(1);
- (f) section 170 read with regulation 55(1)(b)(vi) read further with regulation 55(5);
- (g) section 81(2)(a)(ii) and (iii) read with regulation 23A(3), 23A(8) and 23A(12)(a) and (b);
- (h) section 52(5)(c) and (f) read with general condition 3, read further with regulations 62(1)(c), 65 and 66;

35.2 The conduct of the respondent is declared prohibited conduct in terms of section 150(a);

35.3 The respondent's registration as a credit provider is cancelled;

35.4 The credit agreements identified in the applicant's investigation report as C1 – C10 are declared as reckless, and all the consumers' obligations under the agreements are set aside;

35.5 The respondent is ordered to refund all consumers identified in the applicant's investigation report who were overcharged on interest;

35.6 The respondent is ordered to appoint an independent auditor who is a chartered accountant, at its own cost, within 30 business days from the date of this order being issued to identify credit agreements concluded within the last three years for which no proper affordability assessments were conducted. The auditor must conclude an audit report within 120 business days of appointment and present the report and credit agreements to the applicant within 10 business days of its conclusion.

35.7 In the event that the agreements identified in annexures C1 to C10 have already been repaid in full, the respondent is ordered to refund the cost of credit to the consumers;

35.8 Should any enforcement action have commenced against the consumers in annexures C1 – C10, the respondent is ordered to consent to the rescission of any judgments obtained against the consumers;

35.9 The respondent is ordered to clear with all credit bureaus any adverse listing of judgments against the identified consumers;

35.10 The provision regarding the interest rate charged in the identified credit agreements is declared unlawful and void from the date it was purported to take effect;

35.11 The respondent must, within ninety days of issuing this judgment, pay an administrative fine of R50 000.00 (fifty thousand rand) into the National Revenue Fund referred to in section 213 of the Constitution^[3] 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[...]

Reference: NCT/321451/2024/57(1) and the name of person or business making the payment; and

36. There is no cost order.

(signed)

Adv C Sassman

Presiding Tribunal member

Tribunal members Mr S Hockey and Dr MC Peenze concur.

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

[2] Published under GN 789 in GG 30225 on 28 August 2007 as amended by GN 428 in GG 34405 on 29 June 2011, GN R203 in GG 38557 on 13 March 2015 and GN 157 in GG 39663 on 4 February 2016.

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

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