

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Cash It (Pty) Ltd (NCT/260378/2023/140(1)) [2024] ZANCT 40 (28 October 2024)

[2024] ZANCT 40

COURT

National Consumer Tribunal

BEFORE

C Sassman

CASE / FILE NUMBER

NCT/260378/2023/140(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT/260378/2023/140(1)

In the matter between: NATIONAL CREDIT REGULATOR APPLICANT and CASH IT (PTY) LTD
RESPONDENT Previously known as THE BANK IT (PTY) LTD

Coram:

Adv C Sassman - Presiding Tribunal member

Date adjudicated in chambers – 28 October 2024 Date of judgment – 28 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[1] (NCA) to regulate the consumer credit market and ensure compliance with the NCA.
2. The respondent is Cash It (Pty) Ltd, previously known as The Bank It (Pty) Ltd (the respondent). The respondent is duly registered and incorporated as a private company in line with the company laws of the Republic of South Africa. The respondent is not registered with the applicant as a credit provider.
3. Collectively, the applicant and the respondent are referred to as “the parties”.

TERMINOLOGY

4. A reference to a section in this judgment refers to a section of the NCA, and a reference to a regulation refers to the National Credit Regulations, 2006 (the regulations).[2]
5. A reference to a form refers to a form prescribed in the regulations.

APPLICATION TYPE

6. This is an unopposed application in terms of section 138(1)(b).[3] The parties have entered into a settlement agreement, and the applicant seeks to have the agreement and its terms confirmed as a consent order.

BACKGROUND

7. The applicant received complaints from various consumers alleging that the respondent had contravened the NCA. The complaints detailed that the respondent allegedly offered loans to consumers while using their vehicles as security for the credit. Consumers complained that the respondent charged them exorbitant fees and unlawfully repossessed their vehicles. The applicant investigated the complaints and concluded that the respondent was an unregistered credit provider conducting business in contravention of several provisions of the NCA.
8. In particular, the applicant's investigation concluded that the respondent had repeatedly contravened the following sections of the NCA:
 - (a) Section 40(1) read with section 40(3);
 - (b) Section 76(3) and section 76(4)(c)(ii);
 - (c) Section 81(2)(a);
 - (d) Section 81(2)(a)(ii) read with regulation 23A(12)(b) and 23A(13);
 - (e) Section 81(2)(a)(iii) read with regulation 23A(3) and 23A(12)(c);
 - (f) Regulation 23A(9) and 23A(10);
 - (g) Regulation 23A(8) and 23A(12)(a);
 - (h) Section 80(1)(a) read together with section 81(3);
 - (i) Regulation 23A(15);
 - (j) Section 92(2) read with regulation 29 and Form 20.1;
 - (k) Section 93(1) and section 93(3) read with regulation 31;
 - (l) Section 100(1)(c) read with section 101(1)(d) read further with regulation 42(1) and regulation 40(2)(a);
 - (m) Sections 100(1)(a) and 101(1) and 102;

- (n) Section 123 and 129, read with sections 130 and 131;
 - (o) Section 90(2)(b)(iii) read with regulations 129 and 130;
 - (p) Section 90(2)(j) and section 102(2)(a); and
 - (q) Section 90(1) read with section 90(2)(b)(ii) and (iii) read further with section 99(1)(b).
9. On 25 September 2024, the parties concluded a settlement agreement in which the respondent agreed that it had contravened the above sections of the NCA and that its conduct constitutes prohibited conduct. The parties agreed on specific actions the respondent would take regarding the affected consumers, which included paying an administrative fine and appointing an independent auditor to identify any further transgressions which may have occurred within the five years preceding the settlement agreement. The parties agreed that the settlement agreement may be confirmed as a consent order in terms of section 138(1)(b).

CONSIDERATION

10. Section 138(1)(b) must be read with section 150, which empowers the Tribunal to make any appropriate order relating to prohibited or required conduct. Section 150(d) empowers the Tribunal to confirm a “consent agreement” as an order of the Tribunal.
11. When parties conclude a settlement agreement, they contractually commit to fulfilling its terms.[4] When that agreement is made an order of the Tribunal, the terms become an enforceable order. Section 160 states that a person who contravenes or fails to comply with an order of the Tribunal commits an offence.
12. The NCA does not compel the Tribunal to grant a consent order simply because the parties have concluded a settlement agreement. Section 138(1) states that the Tribunal “may” confirm the agreement as a consent order. A starting point is for the Tribunal to satisfy itself that the parties agree that the terms of their settlement agreement be made part of the consent order.[5]
13. In *Eke v Parsons*, [6] the Constitutional Court held that a court must not be mechanical in its adoption of the terms of a settlement agreement, nor is it obligated to accept anything agreed to by the parties and make it an order. The order can only be granted if it is “competent and proper”. This means that the agreement must relate to an issue or litigation between the parties, and the terms of the agreement must be capable of being included in the order, both from a legal and practical point of view. The terms of the agreement must also not be at odds with public policy and must hold some practical and legitimate advantage. Therefore, the Tribunal has a wide discretion in this regard, which must be exercised judicially and in line with the purposes of the NCA.
14. In paragraph 8 of the settlement agreement, the applicant seeks an order declaring credit agreements concluded between the respondent and consumers as reckless in terms of section 80(1)(a). Although the respondent has agreed to such an order, granting it would not

be possible. It is common cause that the respondent was operating as an unregistered credit provider. In terms of sections 40(4) and 89(2)(d), the credit agreements concluded between the respondent and consumers are unlawful and void. Section 89(5)(a) states that if a credit agreement is unlawful, a court must order that it is void from the date it was entered into. Therefore,

once a credit agreement is deemed unlawful, no further declaration of reckless credit can be made with respect to that agreement since it essentially never came into existence.

15. Similarly, the Tribunal cannot grant an order confirming that the respondent's credit agreements contained unlawful provisions and contravened sections 90(2)(b)(ii) and (iii). Although the parties have agreed to such an order under paragraph 4 of the settlement agreement, if the credit agreements were void from the date they were entered into, they never came into existence and, therefore, cannot contain any unlawful provisions.
16. The NCA's statutory obligations placed on registered credit providers in terms of sections 81(2) or 90(1) cannot automatically be imposed on unregistered persons extending credit. In this case, the credit agreements would remain unlawful and void ab initio even if the respondent had conducted an affordability assessment or omitted the alleged unlawful provisions.
17. Furthermore, in paragraph 16 of the settlement agreement, the parties agree that the order of the Tribunal will apply to credit agreements concluded with consumers dating back up to five years before the date of the settlement agreement. In terms of section 166(1)(a), a complaint may not be referred to the Tribunal for adjudication more than three years after the act or omission that is the cause of the complaint. Although section 150(i) provides for the Tribunal to make any appropriate order required to give effect to consumers' rights when making a finding of prohibited conduct, such authority must be exercised within the boundary of the prescribed three-year period. Therefore, the Tribunal cannot grant such an order.
18. In this instance, the Tribunal, having considered the papers filed, finds that although the respondent has agreed that its conduct is inconsistent with the NCA, the agreement between the parties cannot be enforced legally and practically. Granting the applicant's request will not result in a competent and proper order.

CONCLUSION

19. The Tribunal is persuaded that the settlement agreement concluded on 25 September 2024 contains clauses the parties agreed to but cannot be enforced. The applicant's request for the Tribunal to confirm the settlement agreement as a consent order in terms of section 138(1)(b) cannot be granted, and the application stands to be dismissed.

ORDER

20. Accordingly, the Tribunal makes the following order:

20.1 The application is dismissed; and

20.2 There is no cost order.

[signed]

Adv C Sassman - Presiding Tribunal member

[1] 34 of 2005.

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

[3] Section 138(1)(b) provides that if a matter has been investigated by the National Credit Regulator (NCR), and the NCR and the respondent agree to the proposed terms of an appropriate order, then the Tribunal, without hearing any evidence, may confirm the resolution or agreement as a consent order.

[4] Van Zyl v Van Zyl (2020/31538) [2022] ZAGPJHC 649 (14 September 2022), at para 14.

[5] Ex parte Le Grange and Another; Le Grange v Le Grange (984/2011) [2013] ZAECGHC 75; [2013] 4 All SA 41 (ECG); 2013 (6) SA 28 (ECG) (1 August 2013), at para 15.

[6] (CCT214/14) [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) (29 September 2015), at para 25 - 26.

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