

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Christin Borman T/A Star Pawn Shop (NCT/8613/2013/57(1)) [2014] ZANCT 46 (8 December 2014)

[2014] ZANCT 46

COURT

National Consumer Tribunal

BEFORE

B Dumisa, H Devraj, F Manamela

CASE / FILE NUMBER

NCT/8613/2013/57(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT/8613/2013/57(1)

DATE: 08 DECEMBER 2014

In the matter between:

THE NATIONAL CREDIT REGULATOR.....APPLICANT

And

CHRISTIN BORMAN t/a STAR PAWN SHOP.....RESPONDENT

Coram:

Prof B Dumisa – Presiding member

Ms H Devraj – Member

Adv F Manamela – Member

Date of Hearing – 25 February 2014 and 26 June 2014

JUDGMENT AND

REASONS

APPLICANT

1. The Applicant in this matter is the National Credit Regulator, a body established in terms of Section 12 of the National Credit Act 34 of 2005 (the “NCA” or the “Act”) (hereinafter referred to as “the Applicant”).
2. At the hearing of the matter the Applicant was represented by Mr Barry Jones of Honey Attorneys.
3. The Applicant’s Founding Affidavit is deposed to by Zwelithini Ronald Zakwe, Executive Senior Legal Advisor in the employ of the Applicant.

RESPONDENT

4. The Respondent is Christin Borman, trading as a pawn broker under the name and style of Star Pawn Shop in Marikana, in the North West Province (hereinafter referred to as “the Respondent”).

APPLICATION TYPE

5. This application was filed by the Applicant in terms of Section 57 of the Act. A Section 57 application provides for the cancellation of a registrant’s registration. The Applicant further asks the Tribunal to impose an administrative fine on the registrant in terms of section 151 (1) and prays for certain or other related relief as set out more fully in the Applicant’s notice of motion.
6. The Applicant averred that the Respondent repeatedly contravened the Act, more particularly-
 - (a) Section 40;
 - (b) Section 92;
 - (c) Section 93(2);
 - (d) Section 99(1)(b);
 - (e) Section 100(1)(c); section 101(1)(d)
 - (f) Section 105;
 - (g) Regulation 30 and
 - (h) Regulation 42(1).
7. Based on the above averments, the Applicant approached the Tribunal for an order in the following terms:
 - (a) Declaring the Respondent to be in repeated contravention of the Act, as specified under paragraph 6 above, and that such conduct be declared prohibited;
 - (b) Interdicting and restraining the Respondent from future breaches of the Act, as set out in paragraph 6;

- (c) Ordering the Respondent to refund all of the past and existing consumers all amounts paid to it in contravention of the Act; and that such refunds should be paid to each consumer within 30 (thirty) days of the date of the Order, if any, of the Tribunal.
- (d) Ordering the Respondent to appoint an auditor, at the Respondent's own cost, to verify and confirm that the Respondent has accurately calculated the amount owing to each consumer who has been affected by the Respondent's breaches of the Act, as aforementioned.
- (e) Ordering the Respondent to submit a report to the Applicant within 60 (sixty) days of the date of the Order, if any, of the Tribunal, detailing the amount of all repayments made by the Respondent (duly confirmed by the appointed auditor); the recipients of all repayments; and the steps taken by the Respondent to locate any consumer which it was unable to locate.
- (f) Ordering the Respondent to pay an administrative fine in terms of Section 150(i) of the Act.
- (g) Ordering the Respondent to pay the Applicant's costs of this application.
- (h) Granting the Applicant such further and or alternative relief as the Tribunal may consider appropriate to give effect to the consumers' rights in terms of the Act.

THE HEARING

- 8. The matter was initially set down for 25 February 2014; but the proceedings had to be adjourned sine die at the Respondent's request. The Respondent had appeared in person, claiming lack of understanding and knowledge in respect of the Rules of the Tribunal[1]. The matter was thus postponed in order to allow the Respondent to get acquainted with and comply with the Rules of the Tribunal and specifically to allow the Respondent the opportunity to file an Answering Affidavit.
- 9. The matter was later set down for hearing again on 26 June 2014 (this hearing).

BACKGROUND

- 10. The Applicant conducted an investigation into the activities of the Star Pawnshop, an unregistered credit provider, in the Marikana area.
- 11. On 21 November 2012, Koketso Tlou and Sphiwe Mashaba ("the Inspectors") were appointed to conduct this investigation; and these two inspectors visited the premises of the Respondent on 27 November 2012 for such investigations.
- 12. The inspectors discovered that the Star Pawn Shop is owned by the Respondent and that it was not registered with the Applicant as a pawn broker.
- 13. They discovered that the Respondent charges 30% fees with every pawn transaction. They alleged that these fees are disclosed to consumers upfront and that they do not charge any service fees, initiation fees, storage and / or handling fees.

14. The Respondent disclosed to the Inspectors that they require consumers to give their identity numbers, residential addresses, vehicle registration numbers, and hand over the goods, when such consumers come for pawn transactions.
15. The Respondent further disclosed to the Inspectors that the pawn agreement expiry date is included on the slip that is given to the consumers.
16. Upon expiry of the pawn agreement the consumer is given 7 days to pay, or an option of paying interest and extending the agreement to the following month.
17. The Respondent maintains a register of all the goods and this book is inspected by the South African Police Services.

CONDONATION

18. As per the directives of the Tribunal, at an earlier hearing on 25 February 2014, the hearing on the 26th June started by first considering an application for condonation by the Respondent, for late submission of her answering affidavit.
19. The Respondent did not file a formal application for condonation. At the hearing, the Respondent submitted, inter alia, that she did not just ignore the Applicant's application documents served on her. She sought legal advice, but alleges she was not properly advised on how to respond to the application in an appropriate manner which is in compliance with the Act.

APPLICABLE RULES OF THE TRIBUNAL

20. Rule 34

“Condonation of late filing and non-compliance with rules

“(1) A party may apply to the Tribunal in Form TL.r34 for an order to:

- (a) condone the late filing of a document or application;
 - (b) extend or reduce the time allowed for filing or serving;
 - (c) condone the non-payment of a fee; or
 - (d) condone any other departure from the rules or procedures.
- (2) The Tribunal may grant the order on good cause shown.

LEGAL PRINCIPLES OF A CONDONATION APPLICATION

21. The Rules provide the Tribunal with a discretion to grant condonation on “good cause shown”.

22. The discretion to condone non-compliance with the rules on the basis of “good cause” has been dealt with in numerous court decisions. In *Mofokeng v Attorney General*,^[2] for example, the court had to consider the meaning of “good cause” in Rule 94(1) of the Rules of Court and held that this meant substantially the same as “sufficient cause” in Rule 12 of the Appellate Division.
23. This issue was dealt with by the Appellate Division (now the Supreme Court of Appeal) in the case of *Melane v Santam Insurance Company Limited*.^[3] In this case the court stated the following:

“The approach is that the Court has discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degrees of lateness, the explanation therefor, the prospects of success and the importance of the case. These facts are inter-related: they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is: that without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused....cf Chetty v Law Society of the Transvaal 1985(2) SA 756 (A) at 765 A-C; National Union of Mineworkers and Others v Western Holdings Gold Mine 1994 15 ILJ 610 (LAC) at 613E.

24. From this judgment it can be seen that the Tribunal must consider the facts of this particular matter; it must act fairly to both parties and it must take a number of factors into consideration including inter alia the degree of lateness, the explanation therefor and the prospects of success regarding the merits of the matter.^[4]
25. The court held that these factors are interrelated and should not be considered separately.^[5]
26. The Rules of the Tribunal do not circumscribe the Tribunal’s discretion and therefore, as with the courts, the Tribunal has a wide discretion in these matters.
27. The onus is on the Applicant (Respondent in the main matter) and in this instance Borman to show that it is entitled to condonation.^[6]

FACTORS TO BE CONSIDERED BY THE TRIBUNAL IN CONDONATION APPLICATIONS

28. In *Cairns’ Executors v Gaarn*^[7] the court stated that it is impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the

granting of indulgence and that any attempt to do so would merely hamper the exercise of a discretion which the Rules have purposely

made very extensive. The court held that it is highly desirable not to abridge the court’s discretion. The Applicant for condonation must show something which entitles him to ask for the indulgence of the court and what that something is, depends on the circumstances of each particular application.

29. For the purposes of this judgment the Tribunal has considered the following factors:

- a. The degree of lateness;
- b. The explanation therefor; and
- c. The prospects of success of the Applicant's matter.

The degree of lateness and explanation therefor

30. The courts do not usually grant condonation unless they are satisfied that the Applicant has shown that the degree of lateness or

non-compliance with the prescribed time frame is not excessive and that the applicant has provided an explanation for every aspect of the period of the lateness or the failure to comply with time frames. It was held in *Saloojee & Another NNO v Minister of Community Development*[8] that an excessive delay would require an extraordinarily good explanation.

31. In *Independent Municipal & Allied Trade Union obo Zungu v SA Local Government Bargaining Council & Other*,[9] the court held that in explaining the reason for delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one.

32. The court in *General Accident Insurance Co SA Ltd v Zampelli*[10] held that the “circumstances or ‘cause’ must be such that a valid and justifiable reason exists why compliance did not occur and why non-compliance can be condoned” and in *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd*[11] the court stated that:

“It is well established that an applicant for any relief in terms of Rule 27 has the burden of actually proving, as opposed to merely alleging, the good cause that is stated in Rule 27(1) as a jurisdictional prerequisite to the exercise of the court’s discretion: Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352G. The applicant for any such relief must, at least, furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about and to assess his conduct and motives (Silber v Ozen Wholesalers (supra at 353A). Where there has been a long delay, the Court should require the party in default to satisfy the Court that the relief sought should be granted: Gool v Policansky 1939 CPD 386 at 390.

33. Briefly, the notice of complete filing was issued by the Office of the Registrar on 29 April 2013. The notice informed the Respondent to oppose the application by serving an answering affidavit within 15 days of the date of the notice. Further that the answering affidavit must comply with the Rules of the Tribunal.

34. Rule 13 of the Rules of the Tribunal provides that the Respondent may oppose the application by serving an answering affidavit on the Applicant and file same with the Registrar within 15 days of the date of the application.

35. Further that the Respondent must file proof of service with the Registrar in accordance with Rule 30(3) of the Rules of the Tribunal for persons mentioned in the application.
36. The Respondent did not comply with the Rules of the Tribunal.

Prospects of Success

37. In the Melane case the court stated that even if a good explanation for the delay is provided, an application for condonation should be refused in circumstances where there are no prospects of success.[12]
38. It is also important to note that when dealing with prospects of success it is necessary for the Tribunal to consider the merits of the matter.
39. In *Penrice v Dickinson*, [13] for example, the Appellate Division held that in an application for condonation the merits of the appeal may in some cases be an

important factor and that if there is sufficient information before the court to enable it to decide whether the appeal has or does not have a reasonable prospect of success, it had to decide the question because if the appeal is hopeless, the “great expense of prosecuting it would be a mere waste of money”. This view was reiterated in *Melane v Santam Insurance Co Ltd* where the court stated that “if there are no prospects of success there would be no point in granting condonation”.

40. The merits of this matter show prospects of a good defence in the main case and the issue whether or not the Applicant would succeed in the main matter remains to be seen when the Tribunal finally concludes its proceedings. It would then be prejudicial to the Applicant to refuse condonation of the late filing of the papers, regard being had to the fact that a satisfactory explanation has been provided thereto.
41. The amount of time that has elapsed has not in anyway prejudiced any of the parties, the Applicant in particular, and thus the condonation will not adversely affect the parties in this matter. Furthermore, the Applicant did not oppose the submissions made by the Respondent regarding condonation.
42. The Tribunal therefore grants the condonation and proceeds with the hearing on the merits of the main application in terms of section 57.

ANALYSIS

OF LEGAL PROVISIONS AND FACTS IN THE MAIN APPLICATION

43. This matter is about the cancellation of a registrant’s registration in terms of section 57 of the Act. In its application, the Applicant refers to a section 57 application, but prays for orders in terms of section 140. The Applicant further prays for an order declaring the Respondent’s conduct prohibited and for the Tribunal to impose an administrative fine on the Respondent.

44. Section 57: Cancellation of registration

“(1) Subject to subsection (2), a registration in terms of this Act may be cancelled by the Tribunal on request by the National Credit

Regulator, if the registrant repeatedly-

- (a) fails to comply with any condition of its registration;
- (b) fails to meet any commitment contemplated in section 48(1); or
- (c) contravenes this Act.”

45. It follows from the reading of this section that any considerations that the Tribunal should make in terms of (a) and

(b) above, whether or not to cancel a registration, can only be made in respect of a registrant. A registrant, for the purposes of this matter, is defined under section 1 of this Act, as “a person who has been registered in terms of this Act”. It follows further that, if a person is not registered in terms of this Act, an application to cancel a registration in terms of section 57, will not succeed. The rest of the considerations that the Tribunal should make are allegations of contraventions of the Act under (c) above, as acts of engaging in prohibited conduct.

46. It is clear from the papers that the Applicant launched this application in terms of Section 57 but that the prayers of the Applicant do not relate to a cancellation of a registrant, but to prohibited conduct. The Respondent is not registered in terms of this Act. It may well be that the Applicant approached the Tribunal on the erroneous application of the section in question. On the other side, the Respondent’s non-registration with the Applicant (NCR), does not grant the Respondent the license to contravene the provisions of the National Credit Act. Put differently, the Respondent is not absolved from complying with the Act on account of its non registration with the Applicant.

47. Rule 38 of the Rules of the Tribunal provides the following:

- (1)
- (2) If a prescribed form of words or expression is used in conjunction with other information in a document the document must be designed in such a manner that the prescribed form or words or expression are:
 - (a) clearly distinguishable from the other information in that document; and
 - (b) at least as prominent, in respect of size and legibility as the other information in that document
- (3)
- (4) If a form is prescribed by these Rules-

- (a) It is sufficient if a person required to prepare such document does so in a form that satisfies all the the substantive requirements as to content and design of the prescribed form; and
- (b) Any deviation from the prescribed form does not invalidate the document unless the deviation-
 - (i) fails to satisfy the requiremets set out in paragraph(a);
 - (ii) negatively affects the substance of the document; or
 - (iii) is deceptive or misleading.

48. Rule 38 must also be read in conjunction with Rule 4 of the Rules of the Tribunal which provides the following:

“4. Proceedings before the Tribunal

- (1) An Applicant must comply with the requirements set out in Table 2 if the rules for the type of application being made, in respect of -

(a).....

(b) the form to be used;

(c)

(d).....

(e)....., and

(f).....”

49. From the reading of Rule 4 and Rule 38, there seems to be some contradiction. Rule 4 makes it peremptory from its ordinary reading that an Applicant must comply with the requirements set out in Table 2 of the Rules for the type of application being made in respect of the form to be used.

50. In the same vein, Rule 38(4)(b)(ii) states that if a form is prescribed by these Rules any deviation from the prescribed form does not invalidate the the document unless the deviation negatively affects the substance of the document. In this case before the Tribunal, the Applicant launched an application for the cancellation of the Respondent’s registration as a credit provider but prays for orders in terms of section 140 in that the Applicant believes that a person has engaged in prohibited conduct. It follows therefore that, should the Tribunal find in the Applicant’s favour, such a conduct as alleged by the Applicant, should be declared to be prohibited conduct. This deviation from the Rules regarding the form used by the Applicant cannot on this basis

be found to be affecting the substance of the allegations in the document. The Tribunal is therefore competent to consider this

application even though a deviation from the prescribed form is established.

COMMON CAUSE

51. It is common cause that the Respondent is a pawn broker. In terms of Section 8(1)(b) of the Act “an agreement constitutes a credit agreement ...if it is a credit transaction, as described in subsection (4)”. In terms of Section 8(4), “an agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is – (a) a pawn transaction or discount transaction”. Based on this legal provision, the Respondent is regarded as a credit provider, albeit, an unregistered one.
52. The Applicant’s referral of the matter to the Tribunal in terms of section 57 is erroneous by reason of the foregoing. The Tribunal’s finding notwithstanding, must not be interpreted to condone the Respondent’s conduct of allegedly contravening the provisions of the Act. The Applicant further approaches the Tribunal for an order to declare the Respondent’s conduct, prohibited. Accordingly, Rule 38 applies.
53. The Tribunal will not consider the merits of the cancellation application by reason of the fact that the Applicant launched this application (in terms of section 57) against an unregistered credit provider thereby rendering the referral to the Tribunal, erroneous. The Tribunal is aware of the fact that the appropriate section the Applicant would have had invoked or pursued is section 140 of the Act. This provision deals with prohibited conduct and describes it as follows:

“140.

- (1) After completing an investigation into a complaint, the National Credit Regulator may-
- (b) make a referral in accordance with subsection (2), if the National Credit Regulator believes that a person has engaged in prohibited conduct,.....
- (2)
- (b) to the Tribunal;”

54. Prohibited Conduct is defined as follows:

“prohibited conduct” means an act or omission in contravention of this Act, other than an act or omission that constitutes an offence under this Act, by-

- (a) an unregistered person who is required to be registered to engage in such an act; or
- (b) a credit provider, credit bureau or debt counsellor; ”

55. The Respondent conceded during the hearing that she “does not have more than 100 credit agreement clients” albeit asserting she does not conclude more than 100 credit agreements per month. The Applicant’s investigation report, however, concluded that it is apparent from their investigations that more than 100 transactions were concluded during the course of November 2012 alone, that is, the month during which they conducted the investigations. In

terms of Section 40(1)(a) of the Act, “a person must apply for registration as a credit provider if ...that person, alone or in conjunction with any associated person, is the credit provider under at least 100 credit agreements, other than incidental credit agreements.” Based on this legal provision, the Respondent should have registered with the NCR as a credit provider.

56. Section 9 of the Act defines a pawn transaction as a small credit transaction. This means transactions concluded by the Respondent are subject to Section 92(1) which says “A credit provider must not enter into a small credit agreement unless the credit provider has given the consumer a pre-agreement statement and quotation in the prescribed form”. The Respondent does not use the prescribed Form 20 when concluding its agreements with the consumers; this means the Respondent does not conclude pre-agreement disclosure processes as prescribed by the Act.
57. The pawn agreement used by the Respondent stated that the Respondent accepts no responsibility for the items which are the subject of the pawn transaction in the event of theft, break-ins or fires. This is contrary to the obligations placed on the pawn broker by the Section 99(1)(b) of the Act which obliges the pawn broker to maintain the property of the consumer at the risk of the pawn broker.
58. The other consequence of the Respondent’s non-registration with the NCR is that their pawn transaction receipts and other documents they use do not necessarily comply with the requirements of the Act. This means the Respondent’s documents / files are not in line with the requirements of Section 93(2) read with the contents of Regulation 30 as well as Form 20.2, which all specify the type of information that must be kept on record by the credit provider, including information which should be given to the consumers by the credit provider with regards to the consumers’ rights under the credit agreement.

CONSIDERATION OF OTHER ORDERS APPLIED FOR

59. Declaring the conduct of the Respondent to be in breach of various provisions of the Act, as illustrated above. The Applicant has provided adequate evidence to prove various contraventions of the Act by the Respondent, as shown above.
60. Regulation 39(2)(c) of the Act defines a pawn transaction as a short term credit transaction; and Regulation 42 prescribes the maximum rate of interest for such short term transactions as 5% per month. This implies that the 30% per month charged by the Respondent for each pawn transaction is not only excessive; but also constitutes a prohibited charge in terms of Section 100(1)(c), and may not be in compliance with Section 105 of the Act. During the hearing the Respondent conceded that she applied 30% per pawn transaction.
61. Interdicting the Respondent from future breaches of the Act. Section 150(b) of the Act does provide for “interdicting any prohibited conduct”. As already stated, the Respondent’s 30% monthly interest rate charged constitutes a prohibited charge in terms of Section 100(1)(c); This fact alone does constitute grounds for interdicting the Respondent from continuing charging such excessive interest rates in the future. There are other reasonable grounds for

interdicting the Respondent from any future breaches of the Act, as dealt with under paragraphs 22– 27 above.

62. Ordering the Respondent to refund all of past and existing consumers all amounts paid to it in contravention of the Act. The Applicant did not provide a list of consumers affected by the Respondent's conduct. This poses a challenge on the part of the Tribunal to make a proper assessment in cases where there are specific consumers listed, as in the case of those consumers whose names appear in the "SP4" file, as referred to by the Respondent. The difficulty that comes with this process is that there may be a necessity for verifying Respondent's assertions that the "SP2" and "SP3" lists are not credit agreement lists; the Applicant has not challenged this assertion by the Respondent.
63. Ordering the Respondent to appoint an auditor, at the Respondent's own costs, to verify and confirm that the Respondent has accurately calculated the amount owing to each consumer who has been affected by the Respondent's breaches of the Act.
64. Ordering the Respondent to pay an administrative penalty in terms of section 150(i) of the Act.
65. Ordering the Respondent to pay the Applicant's costs of the application. In terms of Section 147(2) the Tribunal can make an award to costs in very limited circumstances. Section 147(2) (b) states " If the Tribunal has made a finding against a Respondent, the member of the Tribunal presiding at a hearing may award costs against the respondent and to a complainant who referred the complaint in terms of Section 141(1) or section 75(1) (b) of the Consumer Protection Act, 2008, as the case may be. This application was not brought in terms of Section 141(1). Therefore section 147(1) would apply, in that each party participating in a hearing must bear its own costs.
66. Granting the Applicant such further and / or alternative relief as the Tribunal may consider appropriate to give effect to the consumer's rights in terms of the Act. The Applicant in its written and oral submissions has covered almost all the possible orders that the Tribunal can make in this case.

CONSIDERATION AND ANALYSIS OF THE ISSUES

67. The Applicant, in its written submissions, depicts the Respondent as one of those many credit providers who decided to exploit the vulnerability of workers who were desperately in need of loans during the notorious Lonmin strike in Marikana. The Applicant concludes that "This should be of grave concern".
68. The Respondent, in its answering affidavit, pleads ignorance of the law, writing under para 4.1 thereof:

"I was led to understand that under section 40(1) and section 42(1) I was not obligated to register at the National Credit Regulator

because Star Pawn Shop did not process more than 100 credit agreements a month, and not more than R500 000 per annum. I never did a follow up on the application I sent to the NCR, for that reason believing that I did not fall in the category to register. I never processed more than 100 agreements and my total amount was nowhere near the R500 000 per annum”.

It is an established legal principle that ignorance of the law is never a valid excuse for breaches of the law. The mere fact that the Respondent did send an application for registration to the NCR is proof enough that the Respondent did know about this obligation to register. At the hearing, the Respondent failed to explain where she got her “not more than 100 credit agreements per month” registration criteria from.

69. Similarly, the Respondent acted unlawfully in not using the prescribed forms, as prescribed in terms of Section 93 of the Act read with Regulation 30. Her submission that she did not know that the law required of her business to adhere to the requirements of the Act, as she is not registered with the NCR, cannot be accepted for the very same reasons as above, that ignorance of the law is not an excuse. On this, the Applicant made written submissions, stating in para 10.5.3 of its final Heads of Argument “The behaviour of the Respondent has in many respects totally ignored the provisions of the Act and has chosen to conduct its business contrary to the provisions of the Act. The real potential prejudice to consumers should be apparent”.
70. The Tribunal is satisfied that the Applicant has shown substantial contraventions of the Act by the Respondent, constituting prohibited conduct

CONSIDERATION OF AN ADMINISTRATIVE PENALTY

71. When determining an amount to be imposed as Administrative Penalty, the Tribunal must consider the legislation from which it derives its own mandate and consider the factors in Section 151(3) of the Act which provides as follows:
- “(a) The nature, duration, gravity and extent of the contravention;*
- (b) Any loss or damage suffered as a result of the contravention;
- (c) The behaviour of the respondent;
- (d) The market circumstances in which the contravention took place;
- (e) The level of profit derived from a contravention;
- (f) The degree to which the respondent has co-operated with the National Credit Regulator, or the National Consumer Commission, in the case of a matter arising in terms of the Consumer Protection Act, 2008 and the Tribunal; and
- (g) Whether the respondent has previously been found in contravention of the Act, or the Consumer Protection Act 2008, as the case may be.

72. Section 151(1) is clear that “The Tribunal may impose an administrative penalty in respect of prohibited or required conduct in terms of this Act or the Consumer

Protection Act, 2008”. The Applicant accepts that the Tribunal has this discretion; hence the appropriate use of the word “may”. The Applicant,

however, then deliberately misconstrues the Act in its written submissions where it states that, in considering the Section 151(3)

factors, when determining an appropriate fine, “What is important in considering these factors is that these factors are NOT important in determining whether an administrative fine should be imposed or not, but instead what the appropriate amount of the

administrative fine should be”. It is clear from the reading of the Act that the drafters of this legislation intended those who make decisions on the issue of

administrative fines to consider many factors before arriving at the decision to impose an administrative fine.

73. The nature, duration, gravity and extent of the contravention:

The Applicant submitted that the period of time relates to November 2012. Further, that the Respondent has not adhered to the provisions of the Act relating to the prevention of over-indebtedness of consumers.

74. The behaviour of the Respondent:

The Applicant submits that the Respondent chose to ignore the provisions of the Act.

75. The market circumstances in which the contravention took place:

The Applicant submits that inspection of the files of the Respondent emanated from the time that the now notorious Lonmin strike was taking place. Further that at the time, persons were desperate to obtain money and that this should be of grave concern.

76. The level of profit derived from the contravention:

The Applicant submitted that due to the Respondent not being a registered credit provider, the Applicant does not have access to the Respondent’s financial statements.

77. The degree of co-operation:

The Applicant submits that the Respondent appears to have cooperated during the investigation conducted.

78. Whether the Respondent has previously been found guilty of contraventions of the Act:

The Applicant submits that there is no evidence to this effect.

79. However, the Applicant has not been able to successfully counter the Respondent's assertions that her business does not have an annual turnover of over R500 000. The Applicant also failed to counter the Respondent's assertions that many of the transactions cited by the Applicant are not necessarily credit agreements, as those transactions that fall under "SP2"

are purportedly a register of second-hand goods obtained by the dealer for resale purposes; and that those that fall under "SP3"

are purportedly just a list of stock inventory in the store room. The Applicant also did not challenge the Respondent's assertions

that they are just a small second hand goods dealer, in a small town, who mostly buys and sells second-hand goods that they buy from auctions; and that the Respondent only engages on credit transactions to a very limited extent.

80. The Applicant in its final Heads of Argument, dated the 25th of June 2014, which were filed on the day before this hearing, concedes that the Respondent co-operated with the Applicant during

the investigation.

81. The Applicant could not provide any evidence that the Respondent had ever been found guilty before of any contraventions of the Act. Applicant's prayer for the imposition of an administrative fine cannot on this and/or other basis persuade the Tribunal to make a finding of the imposition of an administrative penalty against the Respondent.

82. It must be argued that the decision to impose an administrative fine should not just be reached for the sake of punishing the transgressors of the Act, but to encourage refraining from future contraventions. For example, it is debatable if there is any merit in imposing an administrative fine on a credit provider who is co-operative and who is remorseful enough to show clear intentions of abiding by the law after being found guilty of any breach of the law. The Respondent has in this case already adapted its credit agreement systems in order to comply with the Act. The Applicant does concede that the Respondent has started to comply with the provisions of the Act subsequent to the investigation, though adding "Unfortunately for the Respondent this does not do away with the flagrant non-compliance with the Act prior to the investigation". It may be argued here that any order imposed for the refunds to consumers does directly punish the transgressors for past breaches of the law, and benefits the actual victims of such past breaches in the interests of the consumers. On the other hand, it may not necessarily benefit the consumers if the consequences of an administrative fine may be the closure of a small business entity that could have been rehabilitated in the interests of the consumers.

CONCLUSION

83. The application for the cancellation of the Respondent's registration cannot succeed, simply on the basis that the Respondent is not a registrant in terms of this Act. The Tribunal is mindful of the fact that the Applicant has asked for prayers in terms on section 140 of the Act, and has therefore considered this application in terms of the relevant section.
84. The Respondent is found to have engaged in prohibited conduct by contravening the stipulated provisions of the Act, more specifically overcharging consumers amounts in excess of the prescribed fees and interest.

ORDER

85. Accordingly, the Tribunal makes the following order:

85.1 In terms of section 150(g) of the Act, the Respondent's repeated contravention of the Act and Regulations is declared prohibited conduct.

85.2 In terms of section 150(b) of the Act, the Respondent is interdicted from engaging in any further prohibited conduct.

85.3 In terms of section 150(h), the Respondent is ordered to refund all of the past and existing consumers all excess amounts charged. This refund is to be paid to each consumer within thirty (30) days of the date of this judgment. The Respondent is ordered to take every reasonable step to locate every affected consumer for the purpose of effecting the payment. Should a consumer not be traced within thirty

(30) days of this judgment, the Respondent is ordered to pay all funds earmarked for this purpose to the Applicant, which shall be held in an allocated account by the Applicant, pending the locating of such a consumer.

85.4 The Respondent is ordered to appoint an auditor, at the Respondent's own cost, to verify and confirm that the Respondent has accurately calculated the amount owing to each consumer who has been affected by the Respondent's breaches of this Act.

85.5 Pursuant to the order contained in 85.3 above, the Respondent is ordered to submit a report to the Applicant within sixty (60) days of this order, detailing the following:

85.5.1 The amount of all repayments made by the Respondent (duly confirmed by the appointed auditor);

85.5.2 The recipients of all repayments; and

85.5.3 The steps taken by the Respondent to locate any consumer which it was unable to locate;

85.6 There is no order as to costs.

Dated on this 8th day of December 2014

[signed]

Prof B Dumisa

Presiding Member

Ms H Devraj (Member) and Adv F Manamela (Member) concurring.

- [1] For the Conduct of Matters before the National Consumer Tribunal published under GN789 in GG30225 of 28 August 2007 as amended by GenN428 in GG34405 OF 29 June 2011 (hereinafter “the Rules of the Tribunal”).
- [2] OFS 1958 (4) SA (O).
- [3] 1962 (4) SA 531 (A) at 532C-F.
- [4] See *Mbutuma v Xhosa Development Corporation Ltd*, 1978 1 SA 681 (A) where the Appellate Division held that condonation could be granted under the Rules of the Appellate Division if the applicant satisfied the Court that sufficient cause had been established for granting him relief from the operation of the Rules; and, in deciding whether sufficient cause had been shown, the Court would consider all the relevant facts and circumstances of the particular case, such as the degree of non-compliance with the Rules, for example, the length of the delay, the explanation therefor, the importance of the case, the prospects of success, the respondent’s interests in the finality of his judgment and the avoidance of unnecessary delay in the administration of justice. In *Nedcor Investment Bank Ltd v Visser* NO 2002
- (4) SA 588 (T) at 591 Patel AJ (as he then was) referred to rule 27(3) which requires ‘good cause’ to be shown by the plaintiff and stated that the Court has a wide discretion. See also *C Du Plooy v Anwes Motors (Edms) Bpk* 1983
- (4) SA 212 (O) at 216H-217A.
- [5] *Melane v Santam Insurance Company Limited*.
- [6] See for example *Cairns’ Executors v Gaarn* 1912 AD 181.
- [7] 1912 AD 181 at 186.
- [8] 1965 (2) SA 135 (A) 141 B-H.
- [9] (2010)31 ILJ 1314(LC) para 13.
- [10] 1988 (4) SA 407(C) at 410I-J.
- [11] 2002
- (3) SA 87 (W) at 93. See also *Sanford v Haley* NO 2004 (3) SA 296 © at 302. *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) [2002] 4 B All SA at [6].
- [12] See also *Immelman v Loubser and Another* 1974

- (3) SA 816 (A) where the court, in dealing with the failure to note an appeal timeously, stated that a reasonable prospect of success on appeal is also an important consideration.

[13] 1945 AD 6.

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