

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Comprehensive Financial Services Witbank (NCT/13518/2014/57(1)) [2014] ZANCT 30 (20 August 2014) [2014] ZANCT 30

COURT

National Consumer Tribunal

BEFORE

HFN Sephoti, T Woker, F Manamela

CASE / FILE NUMBER

NCT/13518/2014/57(1)

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IN THE NATIONAL
CONSUMER TRIBUNAL
HELD IN CENTURION

Case**Number:** NCT/13518/2014/57(1)**In**

the matter between:

THE
NATIONAL CREDIT
REGULATOR.....APPLICANT
and
COMPREHENSIVE
FINANCIAL SERVICES
WITBANK.....RESPONDENT

Coram:

Adv
HFN Sephoti – Presiding member
Prof
T Woker – Member
Adv
F Manamela – Member
Date
of Hearing – 14 July 2014

JUDGMENT**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 Ms Deshni Govender, the legal representative and employee of the Applicant.
3. The Applicant’s Founding Affidavit is deposed to by Nthupang Magalego, Manager of the Investigations and Enforcement Department of the Applicant.

RESPONDENT

4. The Respondent is Comprehensive Financial Services Witbank, a Close Corporation trading as CFS Witbank and is registered as a credit provider with the Applicant under registration number NCRCP 1163. Mr Eric G Dold, a major male, is stated as the sole owner of this Close Corporation, , operating in the Province of Mpumalanga (hereinafter referred to as “the Respondent”).
5. The Respondent did not file an Answering Affidavit.
6. At the hearing of the matter, the Respondent did not appear and nor was he represented. Proof was provided to indicate that the Respondent had been properly served with all the necessary documents pertaining to the set-down of the hearing of the matter for 14 July 2014.

APPLICATION TYPE

7. This is an application in terms of Section 57(1) of the NCA for the cancellation of the Respondent’s registration as a credit provider allegedly due to the Respondent’s repeated failure to comply with its conditions of registration and/or repeated contraventions of the Act. This Tribunal derives the jurisdiction to hear this matter, under Section 57(1) of the Act.

BACKGROUND

8. The Respondent was registered by the Applicant, on 25 July 2007, as a credit provider with registration number NCRCP 1163, subject to General and Specific Conditions.
9. An investigation was mandated into the credit provision practices of credit providers in the Witbank area, to ascertain if these practices were being conducted in a manner compliant with the Act;

10. Allan Xaba, an inspector with the Applicant, was duly appointed in terms of Section 25 of the Act, as an inspector, for the purposes of carrying out the investigation into the practises of the Respondent;
11. Mr Xaba conducted his investigation on 07 November 2013 whereafter he submitted his report to the Applicant for further action.

MAJOR FINDINGS OF THE INVESTIGATION ON THE BUSINESS PRACTICES OF THE RESPONDENT

12. The investigation revealed that the Respondent failed to conduct business as a credit provider in a manner that is compliant with the Act and the conditions of its registration as a credit provider;
13. The Respondent failed to operate its business in a manner that complies with all legislation and which is consistent with the purpose and requirements of the Act, as per the General Conditions of Registration, Part A, Clause 1 & 2.
14. The Respondent exhibited conduct which constituted contraventions in terms of the Act, which contraventions occurred repeatedly. The specific contraventions committed by the Respondent included the following:
 - 14.1 The affordability assessment mechanisms utilised by the Respondent are deemed inadequate in arriving at a proper determination of the proposed consumer's financial position;
 - 14.2 The consumer files annexed to the investigation report contain income and expenses schedules completed by each consumer. These are accompanied by a payslip/ salary advice, which is outdated. No additional documentation pertaining to affordability assessments (such as debt repayment history) is contained in the file. In some consumer files, the salary advices are dated September 2005 for a credit agreement concluded in October 2013;
 - 14.3 It should be noted that a payslip/salary advice which is older than 3 (three) months from the date on which the credit agreement is concluded, is deemed as insufficient to adequately determine if the consumer has sufficient income (or an income at all) to service the credit obligations;
 - 14.4 It is submitted therefore that the manner in which the assessments are conducted does not conform to the purpose and intent of section 80 and 81 of the Act, and accordingly the Respondent is found to be in contravention of Section 81(2). If the Respondent solicited documentation from consumers which provided for an adequate affordability assessment, it could not be established from the consumer files perused during the investigation. A lack of record keeping in this regard is a contravention section 170 of the Act read with Regulation 55 (1) (b) (vi);

14.5 The Respondent failed to provide the consumer with pre-agreement statements or quotations prior to the conclusion of new credit agreements. This is a contravention of section 92 (1) read with Regulation 28 (1) (b) of the Act. If pre-agreement statements and quotations were provided, it could not be established from the files perused during the investigation. A lack of record keeping in this regard is a contravention of Section 170 of the Act read with Regulation 55 (1) (b)(iv);

14.6 The Respondent proceeded to issue credit agreements to consumers which were not in the format prescribed by the Act. The agreements do not conform to the format outlined in Form 20.2. Failure to utilise credit agreements in the prescribed format is a contravention of Section 93(2) of the Act read with Regulation 30(1);

14.7 The Respondent further charged interest to consumers in contravention of the Act. The credit clause in the credit agreements stipulated that interest payable is linked to “prime lending rate” which is in contravention of Regulation 42(1) which specifies that a short term credit agreement attracts an interest repayment of 5% (five percent) per month.

14.8 In addition to the above mentioned contraventions, the Respondent concluded supplementary agreements with consumers. The terms of these supplementary agreements, should they have been included in the ordinary course of a credit agreement, would have rendered the agreement unlawful in terms of the Act.

14.9 The supplementary agreement took the form of an acknowledgement of debt and related to premature and unlawful enforcement of the credit agreement. Consumers were made to sign “undertaking to Pay Debt” forms, which were undated and kept on the file.

14.10 The blank, yet signed, acknowledgement of debt form entitled the Respondent to enforce the credit agreement at his own discretion. This is done by obtaining judgment against the consumer without following the procedures prescribed by section 129 and 130 of the Act. By engaging in such measures to prematurely and unlawfully enforce a credit agreement, the Respondent is in contravention of section 91(a) read with section 90(2)(k)(iii);

14.11 The Respondent has repeatedly conducted its business in contravention of the General Condition of Registration, Part A, Clause 4 in that it failed to ensure fair, equitable and transparent treatment of consumers in its credit provision activities. The Respondent induced consumers into signing acknowledgements of debt, which prejudiced consumers and subjected them to unfair treatment.

14.12 Respondent, through his actions, displayed little or no regard for the spirit and purpose of the Act. It is the Applicant’s contention that the Respondent’s continued registration as a credit provider places consumers at substantial risk of financial harm.

PROCEDURAL IRREGULARITIES SET OUT BY THE INVESTIGATION

15. The Respondent is alleged to have contravened the following sections of the Act, over a period of time:

15.1 Contravention of Section 81(2)(a) of the Act: Failure to conduct proper affordability assessments on consumers prior to the granting of credit;

15.2 Contravention of section 92 (1) of the Act read with Regulations 28 and 29: Failure to provide pre-agreement statements and quotations and/or failure to provide pre-agreement and quotations in the prescribed format;

15.3 Contravention of Section 93(2) of the Act read with Regulations 30 and 31: Failure to provide credit agreements as prescribed by Form 20.2. The Respondent continued to use the old MFRC forms and forms drafted in terms of the old Exemption Notice to the Usury Act and not the NCA;

15.4 Contravention of Sections 90(2)(f) and Section 91 of the Act, read with Regulation 32: Inducing consumers to enter into supplementary agreements by having consumers sign undated acknowledgements of debt which are then attached to the consumers' credit agreements;

15.5 Contravention of Sections 100 and Section 105 of the Act, read with Regulation 42: Imposing additional charges and/or charging interest in excess of the prescribed maximum rate to consumers in contravention of the NCA. The forms used do not set out full disclosure;

15.6 Contravention of Sections 129 and 130 of the Act: Failure to make use of required procedures before debt enforcement – Respondent had consumers signing blank acknowledgements of debt and files were handed over to lawyers to enforce same;

15.7 Contravention of Section 170 of the Act read with Regulation 55 (1)(b)(v); (vi) and (vii): Failure to maintain records of registered activities (i.e. credit agreements and the steps taken in terms of section 81 of the Act, as well as documentation in support of steps taken after default by the consumer).

FINANCIAL IRREGULARITIES

16. The Applicant submitted to the Tribunal extracts from files of consumers that were contracted with the Respondent. The files revealed that the Respondent charged consumers interest of between 30 and 35% per month for their transactions:

16.1 V Ngomane : The Respondent charged 35% interest on a loan of R 2 000 payable in 1 month;

16.2 MM Banda: The Respondent charged 35% interest on a loan of R 2 500 payable in 1 month;

16.3 I Makhanya : The Respondent charged 35% interest on a loan of R 2 000 payable in 1 month;

16.4 MD Mandi: The Respondent charged 35% interest on a loan of R 2 000 payable in 1 month;

16.5 BE Maila: The Respondent charged 30% interest on a loan of R 1 500 payable in 1 month;

16.6 AP Mgqarwani: The Respondent charged 35% interest on a loan of R 2 000 payable in 1 month plus a blank acknowledgement of debt signed by the consumer;

17. The Applicant contends that all these transactions are in contravention of the Act and are not in the best interests of the consumers.

CONSIDERATION OF THE PRAYERS BY THE APPLICANT

18. In the light of these repeated contraventions of the Act, the Regulations and the Respondent's Conditions of Registration, the Applicant applied for the following order from the Tribunal:

18.1 Cancellation of the Respondent's registration as a credit provider in terms of Section 150(g) read together with Section 57(1)(a) and (c) of the Act;

18.2 Declaring the Respondent to be in contravention of Section 52(5)(c) of the Act, read with the General Conditions of Registration, Part A, clauses 1,2, and 4;

18.3 In terms of Section 150(i), make any other appropriate order required to give effect to the consumers' rights in terms of the Act.

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

19. A Notice of Complete Filing was issued by the Registrar to both the Applicant and the Respondent on the 10th day of April 2014;

20. The electronic communication to the Respondent failed to transmit on numerous occasions including and up to 23 April 2014;

21. Proof of delivery of a registered letter by the NCR confirmed that the Respondent received and signed for the letters on 19 March

2014. The letter was signed for by E Dold.

22. As at the date of the hearing, the Respondent had not filed any answering affidavit or response to the application.

23. The Tribunal is satisfied that the Respondent was given sufficient opportunity to respond to and / or challenge any of the Applicant's allegations after being officially notified of the Applicant's Application to the Tribunal for the cancellation of its registration as a credit provider.

24. Rule 13(5) of the Rules of the Tribunal[1] provides as follows:

"Any fact or allegation in the application or referral not specifically denied or admitted in the answering affidavit, will be deemed to have been admitted"

25. Therefore, in the absence of any answering affidavit filed by the Respondent, the Applicant's application and all of the allegations contained therein are deemed to be admitted.

CONSIDERATION OF THE EVIDENCE BEFORE THE TRIBUNAL

26. The Applicant's papers and oral submissions at the hearing set out the case of the Applicant which detailed repeated contraventions of the Act and its Regulations as follows:

26.1 The Respondent failed to do a proper assessment on consumers applying for credit from its establishment;

26.2 Respondent induced consumers to conclude undated acknowledgement of debt forms which were then attached to the credit agreements;

26.3 Respondent proceeded to contravene the Act by not using prescribed forms as set out in the Act and Regulations;

25.4 Respondent charged consumers interest in excess of the amount of interest which is permissible in terms of the Act;

26.5 Respondent failed to keep proper records of consumer applications which made a determination of some of the information impossible, which is in contravention of the Act and the general conditions of its registration;

27. In the absence of any contrary evidence placed before the Tribunal it is accepted that the Respondent repeatedly contravened the Act, Regulations and the conditions of its registration as alleged.

CONSIDERATION OF THE ORDERS APPLIED FOR

Cancellation of the Respondent's registration as a credit provider in terms of Section 57(1)(a) of the Act

28. 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 a commitment contemplated in section 48(1); or
 - c. Contravenes the Act.
- (2) ..."

Section 57 thus empowers the Tribunal to cancel a registration made in terms of the Act on request by the NCR if the registrant repeatedly fails to comply with the conditions of registration or contravenes the Act.

29. In considering the evidence before the Tribunal, the Tribunal focused in particular on the interest which consumers were being charged and the incomplete documents which the consumers had to sign before they were granted the loan. In considering this evidence the Tribunal was satisfied that consumers were being charged interest in excess of that which is permissible under the Act. The Tribunal was also satisfied that consumers were being required to sign forms in blank. The Tribunal was satisfied that this conduct was in

contravention of the Act and that consumers were being seriously prejudiced by the conduct.

30. The facts placed before the Tribunal clearly indicate that the Respondent repeatedly failed to comply with the Act and its Conditions of Registration to the prejudice of its clients. The cancellation of the Respondent's registration is therefore warranted and has been substantiated by the evidence of the Applicant.

ORDER

31. Accordingly, the Tribunal makes the following order:

31.1 The Respondent is declared to have repeatedly engaged in prohibited conduct as envisaged in Section 150(a) of the Act.

31.2 The Respondent's registration as a credit provider is cancelled with immediate effect.

31.3 No order as to costs.

DATED ON THIS 20th OF AUGUST 2014

Adv HFN Sephoti

Presiding Member

Prof T Woker (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").

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