

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Du Plessis t/a Eagle Cash Loans (NCT/40817/2016/57(1)) [2017] ZANCT 44 (1 February 2017)

[2017] ZANCT 44**COURT**

National Consumer Tribunal

BEFORE

John Simpson, Penny Beck-Paxton, Fati Manamela

CASE / FILE NUMBER

NCT/40817/2016/57(1)

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Source record**IN****THE NATIONAL CONSUMER TRIBUNAL HELD AT CENTURION****Case****Number: NCT/40817/2016/57 (1)****In**

the matter between: NATIONAL
 CREDIT REGULATOR
 APPLICANT
 And
 BURGERT
 WYNAND DU PLESSIS trading
 as
 EAGLE CASH LOANS RESPONDENT

Coram:

Adv
John Simpson -
Presiding Member
Ms
Penny Beck-Paxton - Tribunal
Member
Adv
Fati Manamela -
Tribunal Member
Date
of the hearing: -
23 January 2017

JUDGMENT**AND REASONS****The Parties****APPLICANT**

1. The Applicant in this matter is the National Credit Regulator (NCR), an organ of state and a juristic person within the public administration established in terms of Section 12 of the National Credit Act 34 of 2005 (“the NCA” or “the Act”), having its principal address at 127 Fifteenth Road, Randjespark,

Midrand, Gauteng (“hereinafter referred to as the Applicant”).

2. At the hearing of this matter, the Applicant was represented by Ms Caroline Young, the Senior Legal Advisor in the Investigations and Enforcement Department of the Applicant.
3. The Founding Affidavit of the Applicant is deposed to by Ms Jacqueline Boucher, Manager of Investigations and Enforcement at the National Credit Regulator.

RESPONDENT

4. The Respondent is Burgert Wynand du Plessis trading as Eagle Cash Loans, a registered credit provider with registration number NCRCP 4285 and having its principal place of business at 22 Abegglen Street, Strand, Western Cape, 7139 (“hereinafter referred to as the Respondent”).
5. At the hearing of 23 January 2017, the Respondent was not represented and did not appear at all.

APPLICATION TYPE

6. This is an application to the Tribunal to cancel the registration of a Registrant in terms of Section 57 (1) (a), (b) and (c) of the National Credit Act 34 of 2005, wherein the Applicant seeks an order in the following terms:

6.1 Cancellation of the Respondent’s registration as a credit provider with immediate effect, in terms of section 57(1)(a) of the Act; in that the Respondent has repeatedly failed to comply with the Conditions of its Registration and contravened the Act and the Regulations on the following grounds:

6.1.1 during the period 2014 to date, contravened section 81(2)(ii)(iii) by entering into credit agreements without conducting proper affordability assessments;

6.1.2 contravened section 81(3) read together with section 80(1) by granting reckless credit to consumers

6.1.3 contravened section 92(1) read together with Regulation 28(1) by failing to issue pre-agreement statements and quotations;

6.1.4 contravened section 93 read together with Regulation 30(1) by failing to record credit agreements;

6.1.5 contravened section 101(1)(d) read together with Regulation 42(2) by charging consumers excessive interest;

6.1.6 contravened section 90(2) and section 91(b) by using consumer cards to enforce debt collection

6.1.7 contravened section 133 read together with section 90(2)(l) and section 91(b) of the Act

6.2 declaring such conduct in contravention of the Act, to be prohibited conduct in terms of section 150 of the Act;

6.3 imposing an administrative fine in the amount of R1 000,000.00 or 10% of the Respondent's annual turnover during the preceding financial year and;

6.4 making any other appropriate order required to give effect to the consumer's rights in terms of section 150(i) of the Act

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

7. On 29 March 2016, the Applicant filed the Section 57 application with the Tribunal. A Notice of Complete Filing dated 5 April 2016 was issued by the Registrar to the parties on 15 April 2016.

8. In terms of Rule 13 of the Rules of the Tribunal[1], the Respondent had to respond within 15 days by serving an answering affidavit on the Applicant. The Respondent however failed to do so. On 10 May 2016 the Respondent then lodged with the Tribunal, a Rule 34 application, to condone the late filing of the answering affidavit. Such an application was rendered incomplete by the Registrar of the Tribunal on 13 and 29 June 2016, respectively. The Respondent was advised to file a proper application within 15 days of receipt of the notice, failing which the application for condonation will lapse.

9. Indeed the condonation application lapsed, as forewarned, in that the Respondent failed to comply with the terms and requirements appertaining the launching of the condonation application. The matter

was then set down for hearing on 23 January 2017 after the Registrar informed the parties by email dated 29 November 2016.

10. The Tribunal is satisfied that the parties have been duly informed, and that the matter shall be heard on a default basis.

11. The Applicant did not file a formal application for a default order in terms of Rule 25(2). However, the Applicant canvassed this issue in its oral submissions and requested the Tribunal to hear the matter on a default basis. In any event, (or be that as it may), the Registrar set the matter down for hearing on a default basis due to the pleadings being closed.

11.1 Rule 25(2) and (3) of the Tribunal Rules, empower this Tribunal hear this matter on a default basis. Rule 25(3) effectively provides that:

“The Tribunal may make a default order:

11.1.1.1 after it has considered or heard any necessary evidence; and

11.1.1.2 It is satisfied that the application documents were adequately served.”

12. Rule 13(5) 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”

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.

JURISDICTION

13. The National Consumer Tribunal (“Tribunal”) has jurisdiction to hear this matter in terms of section 57(1) of the NCA. Section 57(1) of the NCA provides that:

“...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 this Act.”

BACKGROUND

14. The Applicant is mandated in terms of section 15 of the Act, to monitor the consumer credit market and industry in order to ensure that prohibited conduct is prevented or detected and prosecuted.

15. It is the evidence of the Applicant, (in its founding affidavit) that it had based its case on an investigation conducted on its behalf, in terms of section 139 of the Act, by one Mr Douglas Musandiwa, an Inspector appointed in terms of section 25 (1) of the Act. An investigation was then conducted between 28 August 2015 and 28 February 2016, accompanied by a search and seizure warrant obtained by the Applicant in terms of sections 153 and 154 of the Act.
16. According to the affidavit and the investigation report, the owner of the Respondent by the name of Burgert Wynand du Plessis (trading as Eagle Cash Loans), contravened certain provisions of the Act and the Conditions of Registration as a credit provider
17. The investigation centred on a sample of ten (10) credit agreements on the books of the Respondent. The documentary evidence of the sampled agreements was attached and made part of the record of the investigation report in the case file. For purposes of this judgment, the report and its annexures will not be covered in detail in this judgment. Suffice to say the Applicant provided substantial evidence of such contraventions in annexures ("Annexures C1-C10"), perpetrated over a period of time, in that the Respondent:

17.1.1 entered into credit agreements with consumers without conducting proper affordability assessments and did not take reasonable steps to assess the proposed consumers' existing financial means, prospects and obligations; in that the Respondent did not collect the consumers' bank statements and proof of income, in contravention of section 81(2)(iii) of the Act; The Respondent did not use proper or prescribed credit agreements. The Respondent used handwritten notes to show the amounts borrowed and the interest payable for each consumer.

17.1.2 Failed to assess the consumers' debt repayment history under the credit agreements by failing to collect the consumers' debt repayment history report, in contravention of section 81(2)(ii) of the Act; There was no indication on the Respondent's files on any form of repayment history having been done on any consumer.

17.1.3 granted reckless credit in contravention of section 81(3) read with section 80(1) of the Act, by not conducting affordability and repayment history assessments;

17.1.4 failed to provide consumers with the prerequisite pre-agreement statement and quotations in that such documents were not found in the sampled documents. This is in contravention of section 92 read with Regulation 28(1) of the Act;

17.1.5 failed to record and deliver to the consumer, a copy of a document that records the credit agreement in a paper form, or in a printable form, in that no such records or documents were found in the sampled documentation. The Applicant avers, the Respondent merely kept a loan book. This, in contravention of section 93 read together with Regulation 30(1) of the Act; the documentation on the files were merely records of the consumer's address and other personal information. There was no record of an actual credit agreement which showed the amounts borrowed, the interest rate, the period of the loan etc.

17.1.6 charged interest in excess of the prescribed amount allowed by the Act, in contravention section 101(1)(d), read together with Regulation 42(2) of the Act;

17.1.7 demanded or requested consumers to give temporary or permanent possession of their identity documents and SASSA cards, other than for the purpose of identification, in contravention of section 91(b) read together with section 90(2)(l) of the Act;

17.1.8 used and/or relied on consumers' SASSA cards when collecting or enforcing a credit agreement, or permitting and/or directing another person to do so, in contravention of section 133 read together section 90(2) and section 91(b) of the Act. The Applicant subsequently, allegedly laid a criminal charge against the Respondent in terms of section 133(3) of the Act, at the Strand Police Station, in Cape Town;

17.1.9 be found to have conducted its business as a credit provider, in a manner that is contrary to the Act and its Regulations; and that the nature, extent, and duration of such contraventions warrant the Tribunal's imposition of an administrative fine on the Respondent.

CONSIDERATION OF APPLICABLE SECTIONS OF THE NCA TO THE FACTS AND TRIBUNAL'S FINDING

18. We have already dealt with sections pertaining to the hearing of the matter on a default basis and the founding of the Tribunal's jurisdiction to hear this matter, in paragraphs 10 and 12 supra.
19. At the centre of this application, are three key issues the Tribunal is asked to determine:(a) whether or not the Respondent is in contravention of the Act, its Regulations and the Conditions of Registration; (b) whether or not the Respondent's registration as a credit provider (the Registrant) should be cancelled on account of such contraventions; and (c) whether or not such contraventions warrant the Tribunal's imposition of an administrative penalty on the Respondent?

The General Condition 1 of the Conditions of Registration referred to, provides that:

"The registrant must comply with all applicable legislation relating to the operation of the business of a credit provider, including but not limited to the Act, the regulations and any subsequent amendment or substitution of the applicable legislation and regulations."

20. At the outset, and without repeating allegations levelled against the Respondent under paragraph 16 above – (paragraphs 16.1.1 to 16.1.9 thereof), the Applicant's version on affidavit remains uncontroverted in view of the Respondent's failure to challenge or oppose these allegations, regard also being had to the fact that the Respondent's request to condone the late filing of affidavits had elapsed. These were dealt with under default considerations of this judgment. The following is noted:

20.1.1 At the hearing, the Applicant handed up to the Tribunal, documentation corroborating the assertion that the hearing will proceed in the Respondent's absence after communicating with the Respondent's attorneys by email between 6 January 2017, and (up to including) 20 January 2017

20.1.2 the Applicant demonstrated the link between the Du Plessis and Eagle Cash Loans, an entity under the control and management of the Respondent and registered as such to provide credit to consumers. The certificate of registration issued by the NCR bears testimony to that. It is on this basis that the Applicant has averred that the Respondent, operating under the license issued by the NCR, has breached certain conditions of its registration. It is recorded that the Respondent's registration with the NCR was still active at the time of this hearing;

20.1.3 that the Respondent charged interest in excess of what is legally permitted by the Act and the Regulations, in that an interest of 30% per month (instead of 5% per month or 60% per annum) in direct contravention of the Act; (see annexures C1-C19 of the paginated bundle). The Respondent used handwritten notes to show the amount borrowed and the sums repayable per month. A simple calculation of the amounts confirmed that 30% interest per month was charged.

20.1.4 during the investigation, 47 SASSA cards were seized by the Applicant. The Applicant demonstrated that the numbers on the cards matched the numbers appearing on the purported credit agreements. The Applicant was therefore able to link the cards to the enforcement of the credit agreement and/or being used to collect consumer debt incidental to the credit agreements. This, in flagrant contravention of, and overriding the provisions of section of 129 requirements, regarding the procedures applicable before debt enforcement. This conduct by the Respondent is prejudicial to consumers and attracts a criminal sanction.

21. The allegations made by the Applicant regarding the Respondent's conduct have not been disputed by the Respondent. The Tribunal finds the allegations made, as proven on a balance of probabilities.
22. The evidence placed before this Tribunal shows that the Applicant has made out a case that the Respondent is in contravention of the Act and consequently engaged in prohibited conduct as envisaged in section 1 of the NCA. Prohibited conduct is defined as an "act or omission in contravention of this Act" [2]
23. Further, the Applicant has established the basis upon which a remedy is sought under the NCA, and the Tribunal is satisfied that the Respondent is in contravention of the following provisions of the National Credit Act:

23.2 sections 81 (2) (ii) and (iii)

23.3 section 90 (2)(1)

23.4 section 91(b)[3]

23.5 section 92 read with Regulation 28(1)

23.6 section 92 read with Regulation 30(1)

23.7 section 101(1)(d) read with Regulation 42(2) and

23.8 section 133

24. These provisions have been well canvassed in paragraph 16 above (parts 16.1.1 to 16.1.9 thereof.)

25. Section 57(1) of the Act states:

“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 S48(1); or
- (c) contravenes this Act”

26. Section 150(g) of the Act states:

“ in addition to its 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- suspending or cancelling the registrant’s registration, subject to section 57(2) and (3)

27. The evidence placed before this Tribunal is that the Respondent committed gross violations of the rights of the consumers deliberately. The manner in which the Respondent conducts its business as a credit provider displays a total disregard for the Act, its Regulations and the interests of consumers in general. The conduct of the Respondent meets the criterion described in paragraph 24 above.

28. The ten files sampled during the investigation, point to the contraventions alluded to in the report and the Applicant’s Founding Affidavit. The nature and extent of these contraventions warrant serious action against the Respondent. The contraventions

amount to inter alia, reckless credit granting and retention of consumers’ personal instruments. The Applicant argues, the gravity of the offence

committed by the Respondent depicts the Respondent’s callous disregard of the legislation that regulates the industry. Having

regard to the afore-going; the probable uncontested evidence, backed by the Applicant’s inspectors’ report and the conduct displayed by the Respondent, it is clear that the Respondent cannot escape a finding of a conduct prohibited by the Act. In view of these transgressions, the Applicant prays for the imposition of the administrative penalty.

CONSIDERATION OF THE ADMINISTRATIVE FINE

29. Among its prayers for the cancellation of the Respondent's registration as a credit provider (in terms of section 150(g) read together with Section 57(2) and (3) of the Act) the Applicant further asks the Tribunal to impose an administrative fine as contemplated in section 151(3) of the Act.
30. In *NCR v Werlan Cash Loans* [4] the Tribunal stated the following in relation to the aspects to consider when considering the imposition of an administrative fine:

"When determining an amount, the Tribunal must consider the legislation from which its own mandate derives and when determining an

appropriate fine the Tribunal must consider the following factors:

- 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 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."
31. In this case, it was further stated that the Tribunal must consider fairness towards both the Applicant and Respondent when considering

what would be a just administrative fine in the relevant circumstances. A careful consideration of the factors listed in

Section 151(3) will result in the achievement of this objective. In the current matter the Applicant has dealt with factors listed in Section 151(3) and placed evidence on record in following terms:

- The nature, duration, gravity and extent of the contravention

31.1 that the nature, duration and extent of the contraventions ranging from reckless lending; charging of excessive interest rates; failure to provide consumers with pre-agreement statements and quotation and the retention of SASSA cards to enforce the credit agreement; is callous and a total disregard of the provisions of the Act warranting serious action against the Respondent

- Loss or damage suffered due to contraventions

31.2 that consumers have been exploited by Respondent charging them additional interest on the credit agreements, such additional interest having been duly received by the Respondent at the expense of the consumers.

The charging of interest above the prescribed legal interest is in itself a contravention of the Act. Consumers are further exploited by entering into credit agreements without proper affordability assessments being conducted and their SASSA cards retained by the Respondent. The Respondent, according to the Applicant, has repeatedly perpetrated this conduct since 2014

- Behaviour of the Respondent

31.3 that the Respondent has no plausible reason to be unaware of the provisions of the Act and its statutory obligation to adhere to those provisions. The Respondent's contravention of the Act, the Applicant argues, is a blatant disregard for the NCR and the Tribunal, merely by its absence from the proceedings.

- Market circumstances under which the contraventions occurred

31.4 that the consumers' ignorance and unawareness of the laws governing credit agreements was exploited by the Respondent when it retained the consumers' SASSA cards to enforce the credit agreement; failure to conduct affordability assessments; the charging of high, illegal interest rates; and failure to provide pre-agreement statements and quotations. The Respondent benefitted financially from the consumers' unawareness of such practices being unlawful and in contravention of the Act;

- Level of profit derived from the contraventions

31.5 that in its unlawful methods of extending credit to consumers, the Respondent has benefitted substantially from such activities. Though such profits could be substantiated by the Applicant, it could only be probable that the length of period the Respondent has contravened the Act, has increased its balance sheet, unlawfully so.

- Degree of co-operation between the Respondent and Applicant

31.6 that the Respondent's employees co-operated with the Applicant's inspector by making availing the requisite information relevant to the investigation, and cooperated with the Applicant's investigation

- Prior contraventions committed by the Respondent

31.7 that there are no prior investigations or enforcement procedures instituted by the Applicant against the Respondent. The Applicant suspects that the nature, extent and duration of these contraventions indicate that the conduct of the Respondent has been going on for a substantial period of time before the investigation. Applicant argues that the conduct of the Respondent, and the factual evidence presented to the Tribunal in respect of these contraventions, and the gravity thereof, warrant the imposition by the Tribunal, of an administrative as a punitive measure. The Applicant argues further that the punitive imposition of the fine

will serve the purpose of this Act and the interests of justice.

CONCLUSION

32. The Tribunal is satisfied that the Applicant, as mandated by section 15 of the Act, to monitor the consumer credit market and industry, was well within its rights to ensure that prohibited conduct is prevented or detected and prosecuted.
33. The Applicant, in representing the affected consumers, has set out the basis for a remedy under the NCA, by establishing the Respondent's

contravention of the Conditions of Registration; the Act and its Regulations.

34. The basis, upon which the Tribunal on the other hand, may grant a remedy and impose a punitive sanction on the Respondent, is apparent from the merits of the case presented to this Tribunal by the Applicant. There is no dispute that the Respondent has grossly contravened the Act.
35. Section 150 of the National Credit Act empowers the Tribunal to make an appropriate order, required to give effect to a right as contemplated in this Act, or the Consumer Protection Act
37. Respondent is found to be in repeated contravention of the provisions of the Act as set out in the Applicant's Notice of Motion and has consequently engaged in prohibited conduct as envisaged in section 1 of the NCA, in that the Respondent:

37.1 entered into credit agreements with consumers without conducting proper affordability assessments and did not take reasonable steps to assess the proposed consumers' existing financial means, prospects and obligations; in that the Respondent did not collect the consumers' bank statements and proof of income, in contravention of section 81(2)(iii) of the Act;

37.2 failed to assess the consumers' debt repayment history under the credit agreements by failing to collect the consumers' debt repayment history report, in contravention of section 81(2)(ii) of the Act;

37.3 granted reckless credit in contravention of section 81(3) read with section 80(1) of the Act, by not conducting affordability and repayment history assessments;

37.4 failed to provide consumers with the prerequisite pre-agreement statement and quotations in that such documents were not found in the sampled documents. This is in contravention of section 92 read with Regulation 28(1) of the Act;

37.5 failed to record and deliver to the consumer, a copy of a document that records the credit agreement in a paper form, or in a printable form, in that no such records or documents were found in the sampled documentation. This is in contravention of section 93 read together with Regulation 30(1) of the Act;

37.6 charged interest in excess of the prescribed amount allowed by the Act, in contravention section 101(1)(d), read together with Regulation 42(2) of the Act;

37.7 demanded or requested consumers to give temporary or permanent possession of their identity documents and SASSA cards, other than for the purpose of identification, in contravention of section 91(b) read together with section 90(2)(l) of the Act;

37.8 used and/or relied on consumers' SASSA cards when collecting or enforcing a credit agreement, or permitting and/or directing another person to do so, in contravention of section 133 read together section 90(2) and section 91(b) of the Act.

38. The Respondent is also found to have conducted its business as a credit provider, in a manner that is contrary to the Act and its

Regulations; and that the nature, extent, and duration of such contraventions warrant the Tribunal's imposition of an administrative fine on the Respondent. The Tribunal has fully considered the Applicant's prayer in respect of the imposition of the administrative fine and the practicality surrounding the payment of such a fine. The cancellation of a Registrant in itself carries a huge sanction on the Respondent, and literally shuts down the operations of the Respondent, completely.

ORDER

39. The Respondent's contravention of the provisions of the Act is declared prohibited conduct;

40. In that regard, and with immediate effect, the registration of the Respondent as a credit provider is hereby cancelled in terms of section 57 (1);

41. The Respondent is ordered to pay an administration fine in the amount of R250 000.00 (two hundred and fifty thousand rand) by no later than 15 March 2017;

42. There is no order as to costs.

Thus done and handed down in Centurion this 1st day of February 2017

[signed]_____

ADV FK MANAMELA

Member

Adv. John Simpson (Presiding Member) and Ms. Penny Beck-Paxton (Tribunal Member) concurring.

[1] GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007 (Government Gazette No. 30225). As amended.

[2] Definition of 'prohibited conduct' substituted by s.1(g) of Act 19 of 2014 (w.e.f 13 March 2015)

- [3] This section has since been amended by section 91 of the updated version of the NCA , reflecting the law as at 9 September 2016. The section is entitled: “prohibition of unlawful provisions in credit agreements and supplementary agreements”- subsections (1) and (2) thereof. The updated version does not have subsection (b)
- [4] NCT/3867/2012/57(1).
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