

SOUTH AFRICA / JUDGMENT

National Credit Regulator V Handri Financial Services CC t/a Bonus Cash (NCT/183475/2021/57(1)) [2021] ZANCT 48 (13 October 2021) [2021] ZANCT 48

COURT

National Consumer Tribunal

BEFORE

B Dumisa, D Terblanche, T Bailey

CASE / FILE NUMBER

NCT/183475/2021/57(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT/183475/2021/57(1)

In the matter between:

THE NATIONAL CREDIT REGULATOR APPLICANT

and

HANDRI FINANCIAL SERVICES CC t/a BONUS CASH RESPONDENT

Coram:

Prof B Dumisa – Presiding member

Ms. D Terblanche – Member

Mr. T Bailey – Member

Date of Hearing – 15 September 2021

Date of Judgment _

13 October 2021

JUDGEMENT AND

REASONS

APPLICANT

1. The Applicant in this matter is the NATIONAL CREDIT REGULATOR, a juristic person 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”), with offices at 127 Fifteenth Road, Randjiespark, Midrand, in the Gauteng

Province.

2. At the hearing, the Applicant was represented by Mr. Roy Stocker, a senior legal representative employee of the Applicant.
3. The Applicant’s Founding Affidavit is deposed to by Ms. Anne-Carien Du Plooy, Acting Manageress for Investigations and Enforcement in the employ of the Applicant.

RESPONDENT

4. The Respondent (and the Registrant) is HANDRI FINANCIAL SERVICES CC t/a BONUS CASH, a company duly registered as such with Company Registration Number 2002/072274/23, and also registered with the Applicant as a credit Provider under registration number NCRCP2374, with registered offices at Stilfonteinweg, Civic Centre, Shop Number 6, Stilfontein, in the North West Province (hereinafter referred to as “the Respondent”).
5. There was no Answering Affidavit from the Respondent.
6. At the hearing, the Respondent did not appear in person and was not represented. The Applicant provided proof to show the Respondent had been properly served with all the necessary documents pertaining to the set-down for 15 September 2021.

APPLICATION TYPE AND ORDER SOUGHT

7. This Tribunal derives the jurisdiction from hearing this matter under Section 57(1) of the National Credit Act, 34 of 2005 (the NCA). 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.
8. The Applicant sought an order for the Respondent to refund the affected consumers.
9. The Applicant also sought imposition of an administrative fine on the Respondent.

MATTERS TO BE DECIDED

10. The Tribunal has to decide whether:
 - 10.1 The Respondent breached the provisions of the Act as alleged; and

10.2 The appropriate sanction.

BACKGROUND

11. The Respondent was registered by the Applicant as a credit provider with registration number NCRCP 2374, with effect from October 2007, subject to General and Specific Conditions of Registration.
12. On the 28th of July 2020, the Applicant's Compliance Department engaged the Respondent for the purpose of conducting a compliance monitoring

exercise. This was done as part of the Applicant's normal monitoring of the consumer credit market and industry to ensure that prohibited conduct is prevented or detected and prosecuted if need be, as imposed by the Act in terms of Section 15(c) of the Act.

12.1 On the 20th of November 2020, the Applicant's Compliance Department submitted information it had obtained about the Respondent's

credit granting practices to the Applicant's Investigation and Enforcement Department. In terms of the Compliance Monitoring report the Respondent was found to have engaged in prohibited conduct;

12.2 On the 4th of December 2020 the Applicant initiated a complaint in terms of Section 136(2) of the Act and authorized an investigation into the activities of the Respondent in terms of Section 139(1)(c) of the Act;

12.3 On the 9th of February 2021 Ms. Dipuo Mokobane ("Mokobane"), an employee of the Applicant, was appointed in terms of Section 25 of the Act as an inspector for purposes of carrying out an investigation into the conduct of the Respondent;

12.4 On the 16th of February 2021 Mokabane telephonically interviewed the representatives of the Respondent, specifically Johannes De Kock (sole owner). The representatives of the Respondent gave an overview of their credit-granting policy and answered other questions put by the inspector. At the end of the interview, Mokobane requested a list of the credit agreements approved by the Respondent. From this list, the inspector randomly selected 10 credit agreements and requested that the Respondent provide copies of its file contents relating to those 10 approved credit agreements; and

12.5 On the 25th of February 2021, the representative of the Respondent emailed only 8 of the approved credit agreements to Mokobane and the documents

required it utilized before approving credit applications. Mokobane assessed the credit agreements and concluded that the Respondent

repeatedly contravened provisions of the Act, especially those relating to the prevention of reckless credit over a prolonged period.

SUBMISSIONS

BY THE APPLICANT

13. During the investigation, the Respondent is alleged to have repeatedly breached various provisions of the Act, especially with regards to conducting appropriate affordability assessments:

13.1 The Respondent entered into credit agreements with consumers without first taking reasonable steps to properly and accurately assess

consumers' debt repayment history, existing financial means, prospects and obligations;

13.2 The Respondent failed to obtain any credit bureau reports to assess consumers' debt repayment history before entering into credit agreements with the consumers;

13.3 They did not properly use the bank statements, obtained from the consumers, in conducting affordability assessments, and/or inaccurately assessing the consumers' financial position and/or their disposable incomes;

13.4 They exaggerated the discretionary income of the consumers, including ignoring evidence of several returned or unpaid debit

orders reflected on such statements; and

13.5 Based on the above, the Applicant concluded that the Respondent had repeatedly contravened Section 81(2)(a)(ii) and (iii) read with

Regulation 23A by failing to take reasonable steps to conduct an affordability assessment before approving a credit application.

14. The Applicant alleged that the Respondent disregarded the provisions of Regulation 23 of the Act, in that their business conduct amounted to reckless lending.

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

15.1 In terms of Section 150(a) of the Act, declaring the conduct of the Respondent a contravention of the following sections of the Act, Regulations and Conditions of Registration:

- (i) Section 81(2)(a)(ii) and (iii) read together with Regulation 23A, in that the Respondent failed to take proper steps in conducting affordability assessments and/or in the prevention of extension of reckless credit;

(ii) In terms of Section 83(2)(a), the Applicant seeks an order declaring the credit agreements entered into between the Respondent and the consumers to have been reckless lending in terms of Section 80(1)(a);

(iii) If the Respondent submits that it did conduct proper affordability assessments, the Applicant submits that the Respondent failed to retain the proof of the steps taken to conduct the assessment, and thus the Respondent repeatedly contravened Section 170 read together with Regulation 55(1)(b)(vi) of the Act; and

(iv) The Respondent generally failed to retain prescribed records in terms of Section 170 read with Regulations 55 and 56 of the Act.

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

15.3 Declaring that the Respondent has brought the consumer credit industry into disrepute further and/or alternatively declaring that the Respondent has acted with disregard for consumer rights generally;

15.4 Interdicting and restraining the Respondent from in future engaging in prohibited conduct;

15.5 Imposing an administrative fine upon the Respondent, in the amount of R20 000 (twenty thousand Rand); and

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

16. The Applicant also requested the Tribunal to order the Respondent to:

16.1 Within 30 days of the date of this judgment, appoint an independent auditor at its own cost, though subject to prior approval of the Applicant;

16.2 This Auditor must identify all credit agreements concluded by the Respondent in the past 3 (three) years, and identify all the agreements where the Respondent failed to take the steps required in terms of Section 81(2) of the Act; and

16.3 The Applicant will, at the conclusion of this independent auditor's exercise, bring an application to the Tribunal for those agreements declared reckless to be set aside, and all the consumers' obligations under those agreements to be set aside.

APPLICABLE SECTIONS OF THE NCA

17. 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) ...”

THE PROCEEDINGS AT THE HEARING

23. The matter proceeded on a default basis, after the Tribunal panel had satisfied themselves that the Respondent had been properly served.

14.1

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

24. The Respondent did not file any papers, inclusive of an answering affidavit, in response to the Applicant’s founding papers.

25. The matter was thus be heard on a default basis.

26. 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.”

27. The Tribunal was satisfied that the Respondent was given sufficient opportunity to respond to and/or challenge any of the Applicant’s

allegations, during the investigation stage and/or after being officially notified of the Applicant’s Application to the

Tribunal for the Cancellation of their (Respondent’s) Registration as the registrant Credit Provider.

28. 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

29. At the hearing, the Applicant’s representative highlighted some of the transgressions by the Respondent, as fully detailed in their written submissions.

30. The Applicant’s representative spent more time highlighting that the Respondent had mainly totally disregarded all or most of the provisions of the Act.

31. 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 his 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

32. Section 57(1) empowers the Tribunal to cancel the registration of a credit provider where they repeatedly fail to comply with the conditions of registration or contravene the Act.
33. In the matter before the Tribunal, the Respondent has, by their conduct, contravened their conditions of registration.
34. The facts placed before the Tribunal clearly show that the Respondent repeatedly failed to comply with the Act, and this had a serious

impact on the consumers they dealt with. In the circumstances, cancellation of their registration is justified.

Appointment of the Auditor to identify and Assist those consumers negatively affected by the Respondent's breaches of the Act

35. The Applicant requested the Tribunal to order the Respondent to:

35.1 Within 30 days appoint an independent auditor, at its own cost, whose appointment shall be subject to the prior written approval of the Applicant;

35.2 The independent auditor must identify all credit agreements concluded by the Respondent in the past 3 (three) years;

35.3 The independent auditor must identify all the agreements where the Respondent entered into without properly conducting assessments in terms of Section 81(2)(a)(ii) of the Act;

35.4 The independent auditor must compile a report, listing all the Respondent's breaches of the Act and the financial implications thereof, especially those agreements which qualify to be declared reckless agreements in terms of Section 80(1)(a); and

35.5 It is on the basis of this independent auditor's report that the Applicant can approach the Tribunal for the appropriate relief for the consumers who were affected by the reckless lending practices of the Respondent.

IMPOSITION OF AN ADMINISTRATIVE FINE

36. The Applicant requested the Tribunal to impose an administrative fine on the Respondent. We thus need to consider all the factors set out under Section 151(3) in determining an appropriate fine. The Tribunal will consider each of the following factors:

36.1 The nature, duration, gravity, and extent of the contravention;

36.2 Any loss or damage suffered as a result of the contravention;

36.3 The behaviour of the Respondent;

36.4 The market circumstances in which the contravention took place;

36.5 The level of profit derived from the contravention;

36.6 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, Act 68 of 2008; and

36.7 Whether the Respondent has previously been found in contravention of this Act, or the Consumer Protection Act, Act 68 of 2008, as this case may be.

37. The Tribunal, having considered all the factors listed above, is of the opinion that the imposition of an administrative fine on the Respondent is justified, given that the Respondent has been alleged to have repeatedly contravened provisions of the Act, over a longer period of time.

ORDER

Accordingly, the Tribunal makes the following order:

38. The Respondent's registration as a credit provider is cancelled with immediate effect.
39. The Respondent is ordered to appoint an order, at its own cost, in line with Paragraph 35 of this judgment, to identify all the consumers who were negatively affected by the Respondent's reckless lending practices.
40. The Respondent must, within Ninety days (90) days after the Tribunal order has been obtained, pay an administrative fine of R20 000 (Twenty Thousand Rand) to the bank account of the National Revenue Fund: Banking Details are as follows:

Bank Name :

The Standard Bank of South Africa

Account Holder : Department of Trade and Industry

Branch Name : Sunnyside

Branch Code : 05100

Account Number : 370 650 026

Reference : NCT/128364/2019/140(1) and Name of Person or Business making payment

41. There is no order as to costs.

DATED ON THIS 13th DAY OF October 2021

Prof B. Dumisa

Presiding Member

Ms. D Terblanche (Member) and Mr. T Bailey concurring

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