

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Hartney and Another (NCT/104573/2018/140(1)) [2018] ZANCT 86 (20 July 2018)

[2018] ZANCT 86**COURT**

National Consumer Tribunal

BEFORE

K Moodaliyar, B Dumisa, J Simpson

CASE / FILE NUMBER

NCT/104573/2018/140(1)

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Policy**IN****THE NATIONAL CONSUMER TRIBUNAL****HELD****IN CENTURION****Case****Number: NCT/104573/2018/140(1)****In**

the matter between:

THE
NATIONAL CREDIT REGULATOR
APPLICANT
and
CHENE
HARTNEY
FIRST RESPONDENT
FRED
CECIL
HARTNEY
SECOND RESPONDENT

Coram: Prof
K Moodaliyar
-
Presiding
member
Prof
B Dumisa
-
Tribunal Member
Adv
J Simpson
-
Tribunal Member
Date
of hearing - 11 June 2018

JUDGMENT

AND REASONS

APPLICANT

1. The Applicant in this matter is the National Credit Regulator, a juristic person established by 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 the Applicant was represented by Ms C Young, in the employ of and legal representative of the Applicant.

RESPONDENTS

3. The First and Second Respondents are Chene and Fred Cecil Hartney, a major female and male, respectively, unregistered credit providers

who were alleged to be providing credit to consumers, both residing at physical address [...] Gauteng.

4. The Respondents were not present at the hearing nor was there a representative from the Respondents present.

APPLICATION TYPE

5. This is an application in terms of section 140(1) of the NGA. Section 140(1) provides that-
"(1) After completing an investigation into a complaint, the National Credit Regulator may-

- (a) ... ,
- (b) make a referral in accordance with subsection (2), if the National Credit Regulator believes that a person has engaged in prohibited conduct;"

SUMMARY OF THE APPLICANT'S FOUNDING AFFIDAVIT

Background

information to the investigation

6. On 26 September 2017 the Applicant lodged its complaint with the National Consumer Tribunal against the Respondents.
7. The Applicant received intelligence from the South African Police Service (SAPS) that the Respondents were retaining consumers' SASSA cards and withdrawing monies from consumers' accounts. The Respondent, Fred Cecil Hartney, was arrested by the SAPS after being found withdrawing monies from consumers' SASSA accounts using the SASSA cards found in his possession. Mrs Hartney was also arrested and subsequently questioned by the NCR investigator. A criminal case was thereafter opened against the Respondents after their arrest.
8. The Applicant received the evidence of the SASSA cards found in the possession of the Respondents as well as the police docket supporting
the criminal case opened against the Respondent.
9. The Applicant thereafter authorised an investigation and a duly appointed inspector, namely Mr Lesley Odendaal went to the Respondent's
residence to conduct an investigation. The scope of the investigation was to investigate 10 approved credit agreements/copies of loan books as received by the SAPS.
10. The details of the contraventions based on the 10 credit agreements as alleged by the Applicant can be summarized as follows:
 - 10.1. The Respondents engaged in and conducted or are conducting business as credit providers, and offering and extending credit without being registered as credit providers;
 - 10.2. The Respondents failed to conduct proper affordability assessments. The Respondents entered into credit agreements without assessing the consumers' debt repayment history and existing financial means in that the Respondents did not conduct credit bureau checks at the time of entering into the credit agreements with the consumers;
 - 10.3. By failing to conduct the necessary affordability assessments and credit checks, the Respondents therefore entered into reckless credit agreements;
 - 10.4. In addition the Respondents failed to provide consumers with a pre-agreement statement and quotation in the prescribed form and
failed to disclose the costs of credit;
 - 10.5. The Respondents failed to keep record of documentation and no documentation was provided as proof of the affordability assessment,

consumer bank statements, salary slips and credit profiles for the veracity of the consumers' income and debt obligations;

10.6. The Respondents charged consumers interest in excess of the prescribed amount as allowed for in the Act; and

10.7. The Second Respondent was found in possession of consumers SASSA card and was caught withdrawing monies from consumers' SASSA accounts utilising the instruments retained.

11. The Applicant alleges that the Respondents are in repeated contravention of:-

11.1. Section 40(3); failing to be registered as a credit provider;

11.2. Section 80(1)(a) read with Regulation 23A(3) and Regulation 23A(8);

11.3. Section 81(2) read with Regulation 23A (4);{9}; (12(b);

11.4. Regulation 55(1)(b)(vi);

11.5. Section 90(2)(1) read with Section 133;

11.6. Section 92(1) read together with Regulation 28(1)(b) and Form 20;

11.7. Section 93(2) read with Regulation 30(1) and Form 20(2); and

11.8. Regulation 23A(15).

THE APPLICANT'S PRAYERS

12. The Applicant therefore prays for an order:

12.1. Declaring the Respondents to be in repeated contravention of the Sections of the Act and Regulations as mentioned in paragraph 11 supra;

12.2. Directing the Respondents to desist from future breaches of the Act;

12.3. Imposing an administrative fine against the Respondent in the amount of 10% of the Respondents' annual turnover or R1 000 000 (one million rand) whichever is the greater; and

12.4. Making any other appropriate order required to give effect to the consumers' rights in terms of Section 150 (i) of the Act.

THE APPLICANTS SUBMISSIONS AT THE HEARING

13. The Applicant made submissions at the hearing based on its founding affidavit and further referred the Tribunal to specific evidence that was submitted in its founding papers.

Submissions

regarding the default application

14. The Applicant addressed the Tribunal on the issue of the matter being considered on a default basis and went on to prove to the Tribunal that there was proper service of the application on the Respondent.
15. The Applicant submitted that it served the application via registered mail and a track and trace receipt dated on 24 April 2018 was handed in at the hearing.
16. The Applicant therefore submitted that there was proper service in terms of Rule 25(3)[1].

Submissions

regarding the merits of the matter

17. The Applicant's summarized submission was that:-

17.1 The SAPS retrieved 6 SASSA cards and pin numbers which had no corresponding loan books when the Respondents[2] were arrested on 1 September 2017 and a further retrieved 10 SASSA cards and pins with corresponding loan book were retrieved. A follow-up investigation and interview was conducted by the Applicant's investigator Lesley Odendaal on 7 December 2017. The Applicant, citing the Tribunal's decision of the NCR v Yilwe[3] case, asked the Tribunal to draw an inference that there would have been corresponding loan books for the other 6 SASSA cards retrieved;

17.2 Mr Odendaal's investigator's report revealed: "The cards seized were linked to loans granted that was according a loan book which was found in the possession the first respondent, the wife of the second respondent;"[4] (sic)

17.3 The Applicant argued that Section 133 (1) of the Act specifically prohibits a credit provider from making use of any document, number,

instrument referred to in Section 90(2)(1) when collecting on or enforcing a credit agreement;

17.4 The Second Respondent informed the Applicant that the consumers would request loans from the Respondents. The Respondents would ask the amount their clients could afford to pay per month as part of repaying the loan. The consumer's SASSA card and pin number would then be retained by the Respondents to ensure the consumer pays the loan;

17.5 In addition, the Applicant provided for example, a copy of a SASSA card and a sticker attached to it with name "Suzette" and a 4 digit pin number. This name and pin number is seen on the loan book as well;

17.6 The Applicant alleges that the Respondent charged an interest rate of 50% to their clients, which was excessive. The NCR calculated the interest based on the figures presented in the loan books. For example in one instance, the amount loaned was R2000, a 50% interest of R1000 was added to that and the repayment amount stood at R3000. The Applicant allege that there were no quotations given to clients, and presumably clients did not know their cost of credit;

17.7 The Applicant alleges that the Respondents failed to conduct proper affordability assessments. There were no records such as bank

statements or salary slips to show that an assessment was conducted;

17.8 In order to explain the contraventions of the failure of the Respondent to submit its annual financial and operational returns to the Applicant, the Applicant referred the Tribunal to the requirement as set out in the Respondent's initial conditions of Registration. The Applicant's submission is that Regulation 62(1) (c) establishes a mandatory obligation on the Respondent to submit its statutory

returns and financials; and

17.9 The Applicant finally submitted that an order for an administrative fine is warranted in these circumstances, taking into account the provisions of the Act that have been contravened by the Respondent.

CONSIDERATION OF THE MATTER ON A DEFAULT BASIS

18. The Applicant filed the Section 140(1) application with the Tribunal on 19 March 2018. The Applicant attached a copy of a registered post slip with a tracking number to show that the application was sent to the Respondents' residential address via registered mail, as proof of service. Subsequently a Notice of Complete Filing was issued by the Registrar to both the Applicant and the Respondent on 11 April 2018. The notice stated that the Respondents had to file an answering affidavit within 15 business days. The Respondents did not file or serve any answering affidavit for a response to the application.

19. The matter was set down on a default basis for 11 June 2018 in terms of Rule 25(2).

Rule 25(2) and (3) provides that:

"An applicant may make application by way of form T.I r25 (2) for purposes of obtaining a default order, if no response to the application was filed within the time stated in the application.

The Tribunal may make a default order·

(a) After it has considered or heard any necessary evidence; and

(b) If it is satisfied that the application documents were adequately served."

20. The Tribunal is therefore satisfied that the requirements for a default judgment have been met, as the application was adequately served on the Respondent via registered mail.

21. Rule 13(5) provides that:

"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.

ASSESSMENT OF THE EVIDENCE

22. The Applicant submitted copies of some of the 10 sample files that were assessed during the investigation. From the evidence before the Tribunal, the Respondents attempted to obtain further information after the SAPS arrested the Respondents when they were caught

withdrawing money from client's SASSA cards. The investigation revealed that the Respondents' were providing credit to consumers

without conducting any affordability assessment and there was no evidence to show that they had requested bank statements, salary

slips nor did they obtain any credit bureau records on the consumer files.

23. From the statement of account of the Respondents, as the evidence provided by the Applicant, the Respondents are continuing to engage in this prohibited conduct even after they were arrested.

CONSIDERATION OF THE FACTS AND THE LAW

24. Section 81(2) of the NGA provides that-

"A credit provider must not enter into a credit agreement without first taking reasonable steps to assess-

(a) the proposed consumer's-

(i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;

(ii) debt re-payment history as a consumer under credit agreements;

(iii) existing financial means, prospects and obligations; and

(b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement."

25. Section 81(3) of the NGA provides that-

"A credit provider must not enter into a reckless credit agreement with a prospective consumer."

26. Section 80(1) provides that -

"A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119(4)-

- (a) the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time; or
- (b) the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer

despite the fact that the preponderance of information available to the credit provider indicated that-

- (i) the consumer did not generally understand or appreciate the consumer's; and
- (ii) entering into that credit agreement would make the consumer over- indebted".

27. Section 40 (3) provides that -

"A person who is required in terms of subsection (1) to be registered as a credit provider, but who is not so registered, must not offer, make available or extend credit, enter into a credit agreement or agree to do any of those things."

28. Regulation 62(1) (c) provides that-

"A credit provider must submit the following to the National Credit Regulator - Annual Financial and Operational Return";

29. It is very clear from a plain reading of the relevant Sections of the Act and the Regulations that the Act has peremptory requirements in terms of the affordability assessments. A credit provider therefore must conduct an affordability assessment before the granting of credit. The facts before the Tribunal are that the Respondents do not appear to have conducted any form of an affordability assessment. In conducting the affordability assessment, the Act is clear that the credit provider must also consider the financial means and obligations of the consumer as well as the debt re-payment history of the consumer. However, according to the Applicant there is no evidence of credit bureau records on the files; to consider the debt repayment history of the consumers; and nor were there any consumer files had bank statements or salary slips in them.
30. The Tribunal accepts the evidence put forward by the Applicant, that the 16 SASSA cards retrieved by the SAPS; belonged to the clients of the Respondents, and that the Respondents withdrew monies from those cards; in lieu of payment for the credit loaned to those consumers.

CONSIDERATION OF THE APPROPRIATE PENALTY

31. The Applicant has requested in its prayers that an administrative fine be imposed.
32. The Act sets out the factors that the Tribunal must consider when imposing an administrative fine in terms of section 151(3) of the NCA, and these consist of: -
- (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 the contravention;
- (f) the degree to which the respondent has cooperated 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 this Act, or the Consumer Protection Act, 2008, as the case may be."

33. The Applicant, motivated for the administrative penalty by submitting that:

- (a) Under the nature, duration, gravity and extent of the contraventions

The Applicant submitted that evidenced by the type of loans given, the Respondents were in operation from at least 2016 and 2017 granting these loans and that the loans were given in the most prejudicial way to consumers as there were no credit agreement statements, there was no disclosure of cost of credit or anything like it.

- (b) Loss or damage suffered as a result of the contraventions

The Applicant submitted that the consumers have been exploited and the granting of credit could result in the consumers becoming over-indebted.

- (c) Behaviour of the Respondent

The Applicant submitted that the Respondents still continued engaging in prohibited conduct. The Applicant states that there is no explanation for the Respondents to not be au fait with the National Credit Act. The Respondents have not made any attempt to contact the regulator or become compliant or even in fact register.

- (d) Market circumstances under the contraventions occurred

It is the Applicant's argument that the market circumstances in which the contraventions occurred make them severe; especially relating to the SASSA cards. This is because such contraventions take away the rights of the most vulnerable consumers in society. Those consumers are reliant on pension grants or child grants which the Respondents deprive them from using. The loan books show that the consumers re-enter into the loans with the credit providers and get trapped in a cycle of debt.

- (e) Level of profit derived from the contraventions

While the Applicant argued although they were not able to show any financial records; it can be quantifiable; on the loan book records;

that at least 50% interest on each loan was charged.

(f) Degree of co-operation between the Respondent and Applicant

The Applicant submitted that, the Respondent has cooperated with the regulator during its investigation. However they have made no attempt to become compliant.

(g) Prior contraventions committed by the Respondent

The Respondents have not been found guilty of any previous contraventions.

34. Tribunal has considered the submissions of the Applicant regarding the imposition of an administrative penalty.

35. The rights of the consumers are severely prejudiced by the Respondents' practices and its continued contraventions of the Act. The

Respondents entered into credit agreements with consumers, without conducting proper affordability assessments. The Respondents are engaging in the practices of a credit provider without being registered with the Respondents. The Respondents were further caught withdrawing monies using their clients' SASSA cards. This is severely prejudicial to consumers and is also in direct contrast with the purpose and spirit of the Act.

36. Section 151 of the NCA allows the Tribunal to impose an administrative fine that does not exceed the greater of 10 (ten) per cent of the respondent's annual turnover during the preceding financial year; or R1 000 000.00 (one million rand).

37. The NCR did not provide any evidence as to the annual turnover of the Respondent.

CONCLUSION

38. The Applicant, has set out the basis for a remedy under the NGA, by establishing the Respondents' contravention of the Act and Regulations.

39. The basis, upon which the Tribunal on the other hand, may grant a remedy and impose a punitive sanction on the Respondents, is apparent from the merits of the case presented to this Tribunal by the Applicant. There is no dispute that the Respondents have grossly contravened the Act and Regulations.

40. To this end, the Tribunal makes finding that the Respondents are found to be in repeated contravention of the provisions of the Act and Regulations and has consequently engaged in prohibited conduct in that the Respondents have contravened the following provisions:-

40.1. Section 40(3); failing to be registered as a credit provider:

40.2. Section 80(1)(a) read with Regulation 23A(3) and Regulation 23A(8);

40.3. Section 81(2) read with Regulation 23A (4);(9); (12(b);

40.4. Regulation 55(1)(b)(vi);

40.5. Section 90(2)(1) read with Section 133;

40.6. Section 92(1) read together with Regulation 28(1)(b) and Form 20;

40.7. Section 93(2) read with Regulation 30(1) and Form 20(2); and

40.8. Regulation 23A(15.)

41. The evidence submitted by the Applicant, which is uncontested, clearly indicates that the requirements of Section 140(1) have been met; in that; the Respondents have repeatedly contravened the provisions of the Act. The specific contraventions alleged by the Applicant are supported by documentary evidence.

42. The Respondents are also found to have conducted their business as credit providers, in a manner that is contrary to the Act and its Regulations. The nature, extent, and duration of such contraventions warrant the Tribunal's imposition of an administrative fine on the Respondents. Furthermore, an aggravating factor is that they used clients SASSA cards in contravention of Section 133(1){a}. The Tribunal has fully considered the Applicant's prayer in respect of the imposition of the administrative fine.

43. While the Tribunal can impose a fine of R1 000 000.00 (one million rand) under these circumstances, on the Respondents, it can impose a lesser fine if warranted. While the fine must deter others from committing the same prohibited conduct, it must further punish the offender. The Tribunal therefore finds it appropriate to impose an administrative fine of R100 000.00 (one hundred thousand rands).

ORDER

44. The Tribunal makes the following order:-

44.1 The Respondents' repeated contraventions of the provisions of the Act and Regulations are declared prohibited conduct;

44.2 The Respondents with immediate effect are interdicted from future breaches of the Act and Regulations;

44.3 The Respondents are hereby ordered to pay an administration fine in the amount of R100 000.00 (one hundred thousand Rand) collectively, by no later than 31 December 2018; and

44.4 There is no order as to costs.

Thus done and handed down in Centurion this 20 July 2018

[signed].

Prof K Moodaliyar

Presiding Member

Prof B Dumisa (Tribunal Member) and Adv J Simpson (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] NCR provided a confirmation of Mrs Hartney's arrest by drawing the Tribunal's attention to the SAPS record book. See pg 151-152 of the record

[3] NCT/39821/2016/140(1).

[4] Pg 38 of the Record.

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