

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Hua Xiang Cash Loans CC (NCT/76166/2017/57(1)) [2017] ZANCT 94 (27 July 2017)

[2017] ZANCT 94**COURT**

National Consumer Tribunal

BEFORE

L. Best, X. May, T. Woker

CASE / FILE NUMBER

NCT/76166/2017/57(1)

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Source record**IN THE NATIONAL
CONSUMER TRIBUNAL
HELD****AT CENTURION****Case****No: NCT/76166/2017/57(1)****In****the matter between:****NATIONAL
CREDIT REGULATOR
APPLICANT
And
HUA
XIANG CASH LOANS CC
RESPONDENT****Coram:****Dr L. Best
-
Presiding Member
Mr X. May
- Member
Prof
T. Woker
- Member**

JUDGMENT**AND REASONS****INTRODUCTION**

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, Act No 36 of 2005 (the Act).
2. The Respondent in this matter is Hua Xiang Cash Loans cc (Registration number 2004/126618/23) a close corporation duly registered as such in terms of the company laws of the Republic of South Africa, and a registered credit provider (Registration number NCRCP 3505).
3. The Applicant is applying to cancel the registration of the Respondent, with immediate effect, in terms of section 57(1) of the Act, and declaring the conduct of the Respondent in contravention of the Act, as prohibited in terms of section 150(a) of the Act.
4. In addition, the Applicant is seeking the following orders:
 - 4.1 Ordering the Respondent to refund all past and present consumers any amounts which the Respondent received in the form of fees and/or interest, which it was not entitled to receive or which exceeded the prescribed maximum amounts allowed by the Act.
 - 4.2 The imposition of an administrative fine on the Respondent in the amount which is the greater of R1 000 000.00 or 10% of the annual turnover of the Respondent.
 - 4.3 In terms of section 150(i) of the Act, imposing any other appropriate order or relief the National Consumer Tribunal (the Tribunal) may consider appropriate to give effect to the consumer's rights in terms of the Act.

BRIEF FACTS OF THE MATTER

5. On 26 January 2016, the Applicant initiated a complaint in terms of Section 136(2) of the Act by way of a memorandum wherein the

Respondent was identified during a general monitoring exercise by the Applicant in terms of Section 15 of the Act as a credit provider that may have been engaging in prohibited conduct in contravention of the Act.

6. The Applicant appointed investigators and obtained a Warrant of Search and Seizure in terms of Section 153 and 154 of the Act. An

investigation was carried out which included visiting the place of business of the Respondent and interviewing a representative of the Respondent.”.

7. During the search of the Respondent's premises, 177 South African Social Security Agency (SASSA) and bank cards; 16 cellular phones and 145 identity documents were found and confiscated. In addition, 10 of the Respondent's credit agreements with consumers linked to the SASSA cards that had been found were obtained to assess the Respondent's general compliance with the Act. A detailed investigation report was compiled, and formed the basis of the Applicant's submission to the Tribunal for deregistration of the Respondent as a credit provider.

LEGAL PRINCIPLES

8. Section 57 (1) (c) of the Act states....

.....a registration in terms of this Act may be cancelled by the Tribunal on request by the National Credit Regulator, if the registrant repeatedly....

- (c) contravenes this Act

9. Section 150(a) of the Act, the Tribunal may make an appropriate order in relation to prohibited conduct, including.....

..... (a) declaring conduct to be prohibited in terms of the Act.

10. Section 151 (1) of the Act empowers the Tribunal to....

.....impose an administrative fine in respect of prohibited or required conduct in terms of this Act.....

11. In terms of section 151(3) of the Act, when determining an appropriate fine, the Tribunal must consider:

(i) the nature, duration, gravity and extent of the contravention;

(ii) any loss or damage suffered as a result of the contravention;

(iii) the behaviour of the respondent;

(iv) the market circumstances in which the contravention took place;

(v) the level of profit derived from the contravention;

(vi) the degree to which the respondent has cooperated with the National Credit Regulator, and the Tribunal; and

(vii) whether the respondent has previously been found in contravention of this Act.

12. These legal principles will inform the Tribunal in the assessment of the facts before it in this matter.

CONSIDERATION OF FACTS

13. At a hearing of the Tribunal on 27 July 2017 the legal representative of the Applicant, Mr Groom, presented to the Tribunal a summary of interest rates charged to consumers by Respondent, as extracted from the credit agreements. Whilst various versions exist in different credit agreement contracts with interest being split across interest; initiation fees and service fees, whichever way this is attempted to be presented in the agreements, in reality the actual interest rate charged is 30%. This vastly exceeds the legally allowable interest rate of 5%, and as such is a contravention of section 100(1)(c) and section 101(1)(d).
14. Regarding entering into reckless credit agreements in contravention of section 81(3), the fact that during the investigation the Respondent was unable to provide any documentation to prove that reasonable steps had been taken to assess debt re-payment history; existing financial means, prospects and obligations is a self-evident indication that these legal obligations were not performed by the Respondent before granting consumers credit and entering into credit agreements.
15. Similarly the inability of the Respondent to provide copies of pre-agreement statements and quotations to consumers indicates clear contravention of section 92(1), whilst a review of any of the credit agreements between the Respondent and consumers in and of themselves indicates that these are not in the prescribed form as per section 93(2).
16. It is clear from the Applicant's submissions that the Respondent failed to conduct its business in a manner which is consistent with the purposes and requirements of the Act and the National Credit Regulations (2006).
17. Specifically, the investigation by the Applicant into the business practices of the Respondent revealed multiple, continuous and repeated contraventions of the following sections of the Act:
 - 17.1 Section 81(2)(a)(ii) and (iii);
 - 17.2 Section 81(3);
 - 17.3 Section 92(1) read with Regulation 28(1)(b);
 - 17.4 Section 93(2) read with Regulation 30;
 - 17.5 Section 100(1)(b);
 - 17.6 Section 100(1)(c);
 - 17.7 Section 101(1)(b) read with Regulation 42(2);
 - 17.8 Section 101(1)(c) read with Regulation 44;
 - 17.9 Section 101(1)(d) read with Regulation 42(1); and
 - 17.10 Section 133 read with Section 90(2)(1).

18. The Respondent, represented by Mr Gouws, did not deny that the conduct exhibited by the Respondent constitutes critical contraventions in the terms of the Act, nor that these occurred repeatedly as detailed in the investigation report and the Applicant's submissions

during the hearing.

19. The Respondent did not oppose the application to cancel the registration of the Respondent, in terms of section 57(1) of the Act.

20. The Applicant prayed for a fine of R1 000 000 or 10% of the Respondent's annual turnover during the preceding financial

year.

21. In terms of section 150(3) of the Act, when determining an appropriate fine, the Tribunal considered the following factors:

21.1 Nature, duration and extent of the contravention

The contraventions by the Respondent are of a serious nature and occurred over a considerable period of time, illustrating a callous disregard for legislation by the Respondent as a regulated entity in terms of the Act, and for the rights of consumers. The Tribunal views dimly conduct that seeks to exploit consumers in general and in this case vulnerable consumers dependent on social security grants.

21.2 Loss or damage suffered as a result of the contravention

Consumers have suffered as a result of the prohibited conduct by the Respondent firstly by not taking reasonable steps to ensure that the loans were affordable to consumers; secondly by deploying collection and enforcement practices that created an onerous burden on consumers; and thirdly by the excessive interest charged resulting in financial losses to the consumers affected.

21.3 Behaviour of Respondent

The Respondent appears to have co-operated with the Applicant during the investigation. The Respondent has also admitted to the prohibited conduct and is not opposing cancellation of its registration as a credit provider. However, the very fact that the Respondent

elected to become a registered credit provider is indicative that the Respondent was aware of the prescripts of the Act, and blatantly

disregarded these in how the Respondent conducted business.

21.4 Market circumstances in which the contravention took place

The Respondent appears to target vulnerable consumers, many of whom are dependent on social security grants. Under these market circumstances, the consumers may not have been educated about their rights relating to access to credit, and related regulatory provisions.

21.5 Level of profit derived from contraventions

Unaudited financial information for the 2016/17 financial year showed that the Respondent received income of R2 294 685, and with expenses deducted had a nett income of R1 900 796.16. No further evidence was presented regarding the turnover and profits which the Respondent derived from the contravention.

21.6 Degree to which Respondent has cooperated with the National Credit Regulator

The Respondent appears to have cooperated with the Applicant.

21.7 Whether the Respondent has previously been found in contravention of the Act

There is no evidence to suggest that the Respondent has previously been found to be in contravention of the Act. The nature of the contraventions, however, indicate that the conduct of the Respondent has been ongoing for a substantial period prior to the investigation and thus affecting many poor consumers.

22. After due consideration of these factors, the Tribunal is of the view that a fine of R1 000 000.00 (One Million Rand) is appropriate in the circumstances.

ORDER

23. Accordingly, for the reasons set out above, the Tribunal makes the following order:

23.1 The Respondent's repeated contravention of the Act and Regulations is declared prohibited conduct.

23.2 The Respondent's registration as a credit provider is cancelled with immediate effect as from the date of the hearing (27 July 2017).

23.3 The Respondent is to appoint a registered auditor at its own costs within a period of three months of the date of this judgment to assess all past and current credit agreements for the charging of excess interest. The audit is to be completed within a period of three months after the auditor has been appointed. The consumers are to be refunded with the additional interest charged within three months after the audit has been completed. The Applicant must be provided with a status report on the entire process on a monthly basis.

23.4 The Respondent is ordered to pay an administrative penalty of R1 000 000.00 (One Million Rand) to the Applicant for payment into the National Revenue Fund within 60 (sixty) days of the date of this

judgment.

23.5 There is no order as to costs.

Signed on this 27th day of July 2017

{signed}

Dr Laura Best

Presiding Member

Mr May (member) and Prof Woker (member) concurring

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