

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Lehaiwas Chashers Pty Ltd (NCT/223356/2022/57(1)) [2022] ZANCT 28 (2 June 2022) [2022] ZANCT 28

COURT

National Consumer Tribunal

BEFORE

J Simpson, T Bailey, N Sephoti

CASE / FILE NUMBER

NCT/223356/2022/57(1)

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IN

THE NATIONAL CONSUMER TRIBUNAL HELD IN CENTURION

Case

number: NCT/223356/2022/57(1)

In

the matter between:

NATIONAL
CREDIT REGULATOR APPLICANT
and
LEHAIWAS
CHASHERS PTY LTD RESPONDENT

Coram:

Adv
J Simpson – Presiding Tribunal member
Mr
T Bailey – Tribunal member
Adv
N Sephoti – Tribunal Member
Date
of Hearing - 1 June 2022
Date
of judgment - 2 June 2022

JUDGMENT**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"), ("the Applicant" or "the NCR").

2. At the hearing, the NCR was represented by Mr M Mathibha, its legal advisor.

RESPONDENT

3. The Respondent is Lehaiwas Chashers Pty Ltd, a registered credit provider with registration number NCRCP 14123 ("Lehaiwas"

or "the Respondent"). Lehaiwas' premises are located at 1173 Phoshane Street, Ramaphosa, Hammanskraal.

4. The Respondent did not file an answering affidavit opposing the application and was not represented at the hearing.

APPLICATION TYPE

5. This is an application for a finding of prohibited conduct against Lehaiwas, in terms of Section 57(1) of the National Credit Act 34 of 2005 ("the NCA").

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

6. On 31 March 2022, the Applicant filed the application with the Tribunal. The Application was served on the Respondent by registered

post on 25 March 2022. The Registrar issued a notice of complete filing to the parties on 31 March 2022. A notice of set down was

issued to all the parties on 9 May 2022.

7. In terms of Rule 13 of the Tribunal Rule[1], the Respondent had to respond within 15 business days by serving an answering affidavit on the Applicant. However, the Respondent failed to do so.
8. The Applicant did not file an application for a default order in terms of Rule 25(2).
9. The Registrar correctly set the matter down for hearing on a default basis due to the pleadings being closed.
10. Rule 13(5) states:

"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."

11. Therefore, in the absence of any answering affidavit filed by the Respondent, the Applicant's application, and the allegations

contained therein, are deemed to be admitted.

12. The Presiding member was satisfied that the application was adequately served on the Respondent. Therefore, the matter proceeded

on a default basis.

BACKGROUND

13. Lehaiwas registered as a credit provider on 15 January 2021. The NCR received a "tip-off" regarding the Respondent charging excess interest and retaining consumer's instruments such as identity cards and bank cards.

14. Based on the "tip-off", the NCR formed a reasonable suspicion of prohibited conduct, initiated a complaint against

Lehaiwas and appointed inspectors to investigate. The NCR obtained a warrant of search and seizure from the Tembisa Magistrates Court. On 28 October 2021, the inspectors and members of the South African Police Force went to the Respondent's premises.

15. The inspectors spoke to Jane Lehaiwa and Bafana Freki Lehaiwa at the premises. Jane Lehaiwa identified herself as the owner of the Respondent and agreed to provide information. She advised that the Respondent grants short term loans at 30% interest. They do not charge service fees or initiation fees. The consumers are required to submit their bank cards or identity documents when credit is granted.
16. The inspectors found a handwritten note listing the names of the consumers, the loan amount and the total amount repayable. There were no credit agreements, records of affordability assessments or credit bureau records found.
17. The inspectors found six SASSA cards, sixteen bank cards and eleven identity documents on the premises. The instruments were linked to the handwritten record reflecting the loans granted to the consumers.
18. The inspectors considered the information available at the premises and found the following contraventions of the NCA –

Failure to furnish consumers with Pre-agreement Statement & Quotation

18.1 In terms of Section 92(1) of the Act, a credit provider must not enter into a small credit agreement unless the credit provider has given the consumer a pre-agreement statement and quotation in the prescribed form. In terms of Regulation 28(1)(b) of the NCA, the pre-agreement statement and quotation must be in the format set out in Form 20;

18.2 The Respondent failed to furnish consumers with pre-agreement statements and quotations before granting credit or entering into credit agreements;

18.3 The Respondent accordingly contravened Section 92(1) read with Regulation 28(1)(b) and Form 20 of the NCA;

Failure to provide Credit Agreements in the prescribed form

18.4 Section 93(2) of the NCA stipulates that a document that records a small credit agreement must be in the prescribed form. Regulation

30(1) stipulates that a document that records a small credit agreement must contain all the information as reflected in Form 20.2;

18.5 There is no evidence of any written credit agreements concluded with the consumers;

18.6 This is a contravention of Section 93(2), read with Regulation 30(1) and Form 20.2 of the NCA;

Failure to conduct proper affordability assessments and granting of reckless credit

18.7 Section 81(3) of the NCA provides that a credit provider must not enter into a reckless credit agreement with a prospective consumer. In terms of Section 80(1)(a), a credit agreement is reckless if, at the time that the agreement is made, 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;

18.8 There is no evidence of the Respondent taking any steps to conduct an assessment. No credit bureau statement or bank statements were evident for any of the loans. The Respondent accordingly contravened Section 81(2)(a)(ii) read with Regulation 23A(12)(b) and 23A(13) of the Act;

Charging costs of credit in excess of the prescribed fees and interest

18.9 The maximum interest rate that the Respondent could charge is 5% per month. The Respondent charged interest at a rate of 30% to 50% per month;

18.10 The NCR submitted examples where an amount of R1450.00 was advanced and an amount of R2 175.00 was repayable.

18.11 Accordingly, the Respondent has contravened Section 100(1)(c) read together with Section 101(1)(d), Section 105(1)(a) and Regulation 42(1) of the Act and Section 100(1) read together with Section 101(1) of the Act;

Conditions of Registration

18.12 The Respondent failed to file prescribed statutory reports with the NCR since the inception of its registration in 2021. Failing to file these returns is a contravention of General Condition 3 of its conditions of registration read with Section 52(5)(c) of the NCA, read with Regulations 62 to 68 of the NCA;

Unlawful possession of consumer's instruments

18.13 The Respondent retained the consumer's instruments such as bank cards and identity documents;

18.14 Section 133(1)(a) of the NCA prohibits the credit provider from making use of any document or instrument mentioned in section

90(2)(l) when collecting or enforcing a credit agreement. Section 133(2) prohibits the credit provider from relying on any instrument.

Section 90(2)(l) prohibits a credit provider from requiring a consumer to deposit an identity document, credit or debit card with

the credit provider; and

18.15 By retaining the consumers instruments, the Respondent contravened sections 133 and 90 of the NCA.

19. The NCR wants the Tribunal to make a finding of prohibited conduct and order the following –

19.1 Cancelling the Respondent's registration with immediate effect;

19.2 Interdicting the Respondent from any further breaches of the NCA;

19.3 Interdicting the Respondent from engaging in prohibited conduct, extending any further credit and collecting on any of its credit agreements;

19.4 Order that all the consumer's instruments be returned to them;

19.5 Declaring the Respondent's credit agreements with consumers, as reflected in the ten sample agreements, reckless in terms of Section 80(1)(a) of the Act;

19.6 Order the Respondent to appoint an independent auditor at its own costs within 30 days to:

19.6.1 Identify the names and contact details of all consumers who entered into loan agreements with the Respondent and where no affordability assessment was conducted;

19.6.2 Determine and compile a list of all the consumers who were overcharged on interest and detail the amounts;

19.6.3 Once the auditor compiled the report, within 30 days thereafter the Respondent must write off all the credit agreements where no affordability assessment was concluded;

19.6.4 Refund all the consumers which have been overcharged on interest;

19.6.5 Once the refunds have been made, the Respondent must provide a written report to the Applicant detailing the identity of the consumers and the refunds made. This report is to be provided to the Applicant within 120 days after the Tribunal order has been obtained;

19.7 The Respondent must be levied a fine of R1 000 000.00 or 10% of the Respondent's annual turnover; and

19.8 In terms of section 150(i) of the NCA, any other appropriate order required to give effect to the consumers' rights in terms of the Act.

CONSIDERATION OF THE EVIDENCE

20. When considering the loans advanced by the Respondent, it is abundantly clear that they are entirely non-compliant with the NCA. No written agreements were concluded, no affordability assessments were done, consumer's instruments were retained and excess interest was charged. The only record of the loans is a handwritten list with names, the loans advanced and the total amount repayable. The Respondent retained the consumer's instruments such as identity documents and bank cards.
21. The calculation of the total amounts repayable result in an overcharging of interest by the Respondent. For example, Annexure E2 of the case file reflects a loan of R1450.00 to Oma Macheke. The total amount repayable is R2175.00. A copy of an Easypay card with her name on it is attached to the record. Calculating the total amount repayable results in an interest rate of 50%, which exceeds the maximum rate of 5% per month for a short-term loan. All the sample agreements exhibit similar exorbitant and unlawful interest rates.

CONCLUSION

ON THE EVIDENCE

22. As the Respondent did not oppose the application, the allegations made against it are uncontested.
23. Based on the evidence, the Tribunal finds that Lehaiwas repeatedly engaged in prohibited conduct by contravening the following sections of the NCA –
 - 23.1 Section 52(5)(f) of the NCA read with Regulations 62 to 68. Failing to submit the prescribed information to the NCR;
 - 23.2 Section 81(2)(a) of the NCA. Failing to conduct proper affordability assessments;
 - 23.3 Section 100(1) read with section 101(1) of the NCA. Charging interest in excess of the maximum permitted;
 - 23.4 Section 92(1) read with Regulation 28(1)(b) and Form 20 of the NCA. Failing to provide pre-agreement quotations;

23.5 Section 93(2) read with Regulation 30(1) and Form 20.2 of the NCA. Failing to provide the prescribed information in credit agreements; and

23.6 Sections 133(1)(a), 133(2) and 90(2)(l) of the NCA prohibiting retention of consumer's instruments.

24. Lehaiwas did not conduct affordability assessments for the ten sampled credit agreements in the matter. In accordance with Section

83[2] of the NCA, the Tribunal declares these agreements as reckless. The consequences of this declaration depend on the specific section that was contravened.

25. The agreements do not exhibit any form of affordability assessment having been conducted. The Tribunal finds that the Respondent

contravened Section 80(1)(a) of the NCA. Therefore, the provisions of Section 83(2)[3] apply. The Tribunal deems it appropriate that all the consumer's obligations under these credit agreements be set aside.

SANCTIONS

26. As Lehaiwas has been found to have engaged in repeated prohibited conduct, it follows that the appropriate sanctions must be

considered.

Deregistration

27. The serious contraventions by the Respondent show a total disregard for consumer's interests and the NCA. There is no good reason for the Respondent to remain registered as a credit provider

Interdict

28. Lehaiwas must be deregistered as a credit provider. Therefore, it is interdicted from engaging in any activities as a credit provider.

Administrative fine

29. The NCR requested that the Tribunal impose a fine on Lehaiwas and made submissions on the factors to be considered in section 151(3) of the NCA.

30. Lehaiwas has benefitted financially from its unlawful operations. Credit providers cannot be perceived as benefitting from contravening

the NCA for as long as possible until they are caught. A strong message must again be sent that contravening the NCA will result in their unlawful financial rewards being forfeited. A fine will, therefore, be imposed in this instance. As the NCR was unable to submit any financial information for Lehaiwas, the maximum fine that the Tribunal can consider in this matter is R1 000 000.00.

31. The Tribunal will consider the prescribed factors for the purposes of imposing an appropriate fine.

31.1 Nature, duration, gravity and extent of the contraventions

Lehaiwas has been registered since 2021 and appears to have been conducting its unlawful activities since its inception. Reckless lending is a serious contravention of the NCA. By not doing affordability assessments, it has placed consumers at severe risk of over- indebtedness;

31.2 Loss or damage suffered as a result of the contravention

Consumers who receive loans they cannot afford results in over- indebtedness that can have far-reaching consequences for their families. The consumers in this matter have been paying exorbitant interest rates they can ill-afford;

31.3 The behaviour of the Respondent

The nature of the prohibited conduct and the evidence submitted illustrates that the Respondent did not make any attempt whatsoever

to comply with the NCA;

31.4 The market circumstances in which the contravention took place

Consumers remain under severe financial pressure. The fact that so many consumers are overindebted and yet still apply for loans with excessive interest rates indicates the level of desperation that exists;

31.5 The level of profit derived from the contravention

Lehaiwas charged consumers with excessive and exorbitant interest rates. It can safely be surmised that it derived a significant profit from these unlawful activities.

31.6 The degree to which the respondent has cooperated with the National Credit Regulator

There is no evidence that the Respondent cooperated with the NCR in any way; and.

31.7 Whether the respondent has previously been found in contravention of this Act

The NCR did not submit any evidence of any prior contraventions.

32. The Tribunal considered all the above factors. The Tribunal finds that an administrative fine of R100 000.00 (one hundred thousand

Rand) is appropriate under the circumstances.

Independent audit

33. The NCR requested that the Tribunal order an independent audit of all the credit agreements to determine instances of overcharging of interest and fees.
34. The Tribunal regards the audit as justified in this matter. Lehaiwas must reimburse consumers who were overcharged.

ORDER

35. Accordingly, the Tribunal makes the following order:

35.1 The Respondent is found to have engaged in repeated prohibited conduct;

35.2 The Respondent's registration as a credit provider is cancelled with immediate effect;

35.3 The Respondent is to pay an amount of R100 000.00 (one hundred thousand) to the National Revenue Fund within 60 business days of the date of issuing of this judgment. The National Revenue fund account details are as follows;

Bank

- Standard Bank of South Africa

Account name - Department of Trade and Industry

Account number - [....]

Account type - Business current account

Branch code - 010645 (Sunnyside)

Branch code for electronic payments - 051001

Reference

- NCT/223356.2022/57 (Name of the depositor);

35.4 The Respondent is interdicted from engaging in any further activities as a credit provider;

35.5 The Respondent is to appoint an independent auditor (who is registered as a Chartered Accountant) at its own costs within 30

business days of the date of issuing of this judgment. The auditor is to assess all the credit agreements entered into by Lehaiwas from the date of registration (15 January 2021). The auditor must assess whether the interest on all the credit agreements was correctly calculated as per the NCA. Excess interest charged must be reimbursed to the relevant consumers. The auditor must identify any credit agreements that do not contain any form of affordability assessment and include these agreements' details in the report to the NCR. The audit is to be completed within 90 business days after the auditor has been appointed. The auditor must provide a final report in this regard to the NCR within 120 business days after being appointed; and

35.6 There is no order as to costs.

DATED ON THIS 2ND DAY OF JUNE 2022

[signed]

Adv J Simpson

Presiding Tribunal member

Adv N Sephoti (Tribunal member) and Mr T Bailey (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] “83. Declaration of reckless credit agreement.—(1) Despite any provision of law or agreement to the contrary, in any court or Tribunal proceedings in which a credit agreement is being considered, the court or Tribunal, as the case may be, may declare that the credit agreement is reckless, as determined in accordance with this Part.”

[3] “(2) If a court or Tribunal declares that a credit agreement is reckless in terms of section 80 (1) (a) or 80 (1) (b) (i), the court or Tribunal, as the case may be, may make an order— (a) setting aside all or part of the consumer’s rights and obligations under that agreement, as the court determines just and reasonable in the circumstances; or (b) suspending the force and effect of that credit agreement in accordance with subsection (3) (b) (i). [Subs.(2) amended by s. 25

(c) of Act No. 19 of 2014.]”

[3] “(2) If a court or Tribunal declares that a credit agreement is reckless in terms of section 80 (1) (a) or 80 (1) (b) (i), the court or Tribunal, as the case may be, may make an order—

(a) setting aside all or part of the consumer’s rights and obligations under that agreement, as the court determines just and reasonable in the circumstances; or

(b) suspending the force and effect of that credit agreement in accordance with subsection (3) (b) (i). [Subs.(2) amended by s. 25

(c) of Act No. 19 of 2014.]”

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