

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Lewis Stores (Pty) Ltd and Another (NCT/27651/2015/140(1)) [2016] ZANCT 33 (9 September 2016)

[2016] ZANCT 33

COURT

National Consumer Tribunal

BEFORE

J Simpson, D Terblanche, H Devraj

CASE / FILE NUMBER

NCT/27651/2015/140(1)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD IN

CENTURION

Case

Number: NCT/27651/2015/140(1)

In

the matter between:

THE
NATIONAL CREDIT REGULATOR
APPLICANT
and
LEWIS
STORES (PTY) (LTD)
1ST
RESPONDENT
MONARCH
INSURANCE
(LTD)
2ND RESPONDENT

Coram: Adv
J Simpson
- Presiding member
Ms
D Terblanche
- Member
Ms
H Devraj
- Member
Date
of hearing – 28 July 2016

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), hereinafter referred to as “the NCR”).
2. At the hearing the Applicant was represented by Ms N. Magolego, assisted by Mr. R Stoker, an attorney from the firm Mothle Jooma Sabdia Inc.

RESPONDENTS

3. The First Respondent is Lewis Stores Pty (Ltd), a registered credit provider with registration number NCRCP47 (hereinafter referred to as “Lewis”). Its registered business address is 53A Victoria Road, Woodstock, Cape Town.
4. The Second Respondent is Monarch Insurance Company. Its registered business address is 53A Victoria Road, Woodstock, Cape Town (hereinafter referred to as “Monarch”).
5. Lewis and Monarch will collectively be referred to as the “Respondents” where applicable.
6. Both Respondents, Lewis and Monarch, were represented by Mr. C.D.A. Loxton SC, assisted by Ms. A. Milovanovic of the Johannesburg bar, instructed by attorneys Edward Nathan Sonnenberg Inc.

BACKGROUND

7. At a pre-hearing conference held in April 2016, it was agreed between the parties and subsequently directed by the Tribunal, that a hearing on the merits of the application would be held and adjudicated on first. A separate hearing would then be subsequently held on the quantum of the administrative fine, if necessary. This judgment therefore only deals with the merits of the application.

8. The Respondents raised a number of points in limine in its answering affidavit. These points were dealt with first at the hearing before argument was heard on the main matter. Judgment on the points in limine was reserved.
9. At the hearing the Tribunal directed that the written judgment issued would consider the points in limine and the merits of the main matter together.
10. In summary, Lewis is a seller of various household goods such as furniture, fridges etc. They offer credit for the purchase of these

items. Monarch is an insurance company that underwrites the insurance policies that are sold with the credit agreements. The Applicant is alleging that the Respondents contravened sections 106(2), 90(1) and 91(1) the National Credit Act 34 of 2005 ("the NCA") by charging loss of employment and disability insurance premiums for pensioners and self-employed consumers. The Applicant is requesting

an order by the Tribunal that the Respondents audit all their consumer accounts to identify these cases, refund the consumers from

2007 onwards, interdict the Respondents from such conduct and impose an administrative fine of R10 million, with an option to increase the fine should the full extent of the conduct become known.

11. In summary, the Respondents concede that the charging of loss of employment insurance for unemployed and retired consumers should not have taken place. It therefore audited all its accounts since 2007 and is in the process of reimbursing all the identified customers with a total of R48.8 million in premiums and R22.8 million in interest. The Respondents however deny contravening the sections of the NCA in question, dispute the validity of the investigation and further dispute that disability insurance was inappropriately sold to customers.

POINTS IN LIMINE

12. The Respondent raised 5 points in limine as follows –

12.1 that no complaint has been initiated against Monarch and that the Tribunal does not enjoy jurisdiction over Monarch;

12.2 that the decision to investigate was improperly taken by the NCR, thus rendering the referral unlawful and invalid;

12.3 that the investigation by the NCR does not qualify as an 'investigation' in terms of the Act, therefore rendering the referral unlawful;

12.4 that there is no rational nexus between the complaint, the investigation and the referral to the Tribunal and that the Referral is accordingly invalid; and

12.5 that the publication of the referral to the Tribunal by the NCR amounted to a gratuitous disclosure of confidential information in breach of section 156 of the Act, effected solely for the purposes of courting publicity and / or causing economic loss to Lewis, which also speaks to the unlawful conduct of the NCR and thus the invalidity of the referral. In the heads of argument the Respondent confirmed that it would not be pursuing this point at the hearing.

13. Points 12.2 to 12.4 will be dealt with together as they all relate to the lawfulness and validity of the investigation and referral.

Jurisdiction over Monarch

14. The Respondents submitted that there is no complaint against Monarch and the Tribunal does not have any jurisdiction over Monarch in terms of the NCA.
15. The undisputed evidence before the Tribunal is that Monarch is an insurance company. It is not a credit provider or a registrant in terms of the NCA. The registered business address for Monarch is the same as that of Lewis. Monarch underwrites the insurance policies issued on the credit agreements between Lewis and its customers. Monarch is a wholly owned subsidiary of Lewis. Although there is a very close business relationship between Monarch and Lewis, they remain separate legal entities.
16. The NCR did not provide a clear basis for citing Monarch as a respondent in the matter. Essentially it appears that the NCR regards Lewis and Monarch as so closely linked that it should be regarded as a single entity. In this regard the NCR submitted that the Tribunal should pierce the corporate veil as such. The NCR further argued that it has a duty in terms of section 16(1)(f) of the NCA to monitor trends relating to the credit insurance industry. By extension, it exercises some (undescribed) form of regulatory powers over insurance companies.
17. The Respondents submitted that the NCA regulates the credit industry and those entities such as credit providers that grant credit. There is however no reference in the NCA whatsoever to the regulation of insurers. Short-term insurers such as Monarch are subject to the Short Term Insurance Act 53 of 1998. The Tribunal is a creature of statute and is bound by the NCA, which does not contain any reference to any form of regulation of insurers.
18. This particular point does not require a detailed examination of the arguments submitted. Monarch is clearly not a credit provider. Even though it has a very close business relationship with Lewis it remains a separate legal entity and has no direct part in the

offering of insurance to consumers. All the sales of insurance policies in relation to the credit agreements are done by Lewis. The NCA does not regulate insurers directly and does not express any intention to do so. There is no rational or legal basis on which the NCR or the Tribunal can exercise any regulatory power or jurisdiction over Monarch or apply the NCA related charges to Monarch.

19. The Tribunal therefore directs that the application in respect of Monarch is dismissed. The matter therefore only proceeds against Lewis. Monarch is not required to participate further in the matter and no order will be made against Monarch.

Lawfulness of the investigation and referral

20. Lewis submits that the decision by the NCR to investigate was not lawfully taken; the investigation did not comply with the requirements of the Act and accordingly the referral is unlawful.

21. The Respondent's submissions in this regard can be summarised as follows -

21.1 The NCR bases its investigation and referral of the matter on the complaint received from Summit Finance. The NCR did not make any

allegation of initiating its own investigation in its founding affidavit and is therefore bound by the ambit of the complaint received. The complaint received only referred to excess fees charged for insurance. This has nothing to do with the subject matter of the application which was referred to the Tribunal. The Respondent referred to numerous sections in the Act which it contends makes it clear that the NCR is restricted to the subject of the complaint when investigating and referring the matter to the Tribunal.

21.2 The complaint lodged must be valid and the entity being investigated must be informed of the subject matter of the investigation, as they need to be able to answer any questions put to them.

21.3 The investigation was conducted within a very short time frame of the complaint being received (two hours). The NCR could not (and did not) apply its mind to the complaint received from Summit, and could not conclude that the complaint was not vexatious within the meaning of section 139(1)(a) of the Act. Had the complaint been evaluated properly it would have been found that the basis for the calculations in the complaint were entirely incorrect.

21.4 Even if the complaint was valid, the investigation process was procedurally incorrect and the referral is therefore invalid.

21.5 The Respondent quoted extensively from the matters of Woodlands Dairy (Pty) Ltd and Another v Competition Commission 2010

- (6) SA 108 (SCA), Competition Commission v Yara (SA) (Pty) Ltd and Others 2013
- (6) SA 404 (SCA) and National Credit Regulator v Capitec Bank Ltd and Another (A440/2014) [2016] ZAGPPHC 125 (23 March 2016) as support for its contentions.

22. The issue in contention does not involve the absence or presence of a reasonable basis for the NCR lodging an investigation. A complaint

was received and on this basis the NCR initiated the investigation. Essentially, what the Tribunal needs to determine is the following –

22.1 Whether the NCR was required to confirm the validity of the complaint lodged before it could investigate.

22.2 Whether the NCR is restricted to the ambit of the complaint lodged with it and cannot investigate or refer any other contraventions discovered during the course of the investigation.

22.3 If it may investigate and refer other contraventions found, must a clear and objective basis for the initiation of these contraventions be established.

23. All these issues have been dealt with by the courts to a certain degree. However mostly in the context of the Competition Act 89 of 1998. While the NCA and the Competition Act are very similar in certain respects there are differences in certain sections. These Acts are different mainly since entities are required to be registered to provide certain services and / or products in terms of the National Credit Act thus vesting the National Credit Regulator with supervisory responsibilities over these “licensees” or in the terminology of the NCA, “registrants”. This is a responsibility that does not vest in the Competition Authorities. Otherwise, the general principles remain the same.

24. The relevant sections of the NCA[1] prescribes the initiation of investigations and states as follows –

Initiating a complaint to National Credit Regulator

136. (1) Any person may submit a complaint concerning an alleged contravention of this Act to the National Credit Regulator in the prescribed manner and form

(2) The National Credit Regulator may initiate a complaint in its own name.

Investigation by National Credit Regulator –

139. (1) Upon initiating or accepting a complaint in terms of section 136, the National Credit Regulator may—

(a) issue a notice of non referral to the complainant in the prescribed form, if the complaint appears to be frivolous or vexatious, or does not allege any facts which, if true, would constitute grounds for a remedy under this Act;

(b) refer the complaint to

(i) a debt counsellor, if the matter appears to concern either reckless credit or possible overindebtedness of the consumer; or

(ii) the ombud with jurisdiction, consumer court or an alternative dispute resolution agent for the purposes of assisting the parties to resolve the dispute in terms of section 134; or

(c) direct an inspector to investigate the complaint as quickly as practicable, in any other case.

Outcome of complaint.—

140 (1) After completing an investigation into a complaint, the National Credit Regulator may—

- (a) issue a notice of nonreferral to the complainant in the prescribed form;
- (b) make a referral in accordance with subsection (2), if the National Credit Regulator believes that a person has engaged in prohibited conduct;
- (c) make an application to the Tribunal if the complaint concerns a matter that the Tribunal may consider on application in terms of any provision of this Act; or

25. A plain reading of the sections in question do not exhibit an intention by the legislature that the complaint must be evaluated or tested in any way. The sections further do not limit the nature of the investigation or the subsequent referral to the Tribunal.

26. Case law has however developed which provide guidance in this regard. The leading case applicable is that of Yara (referred to above). In the matter of Yara the court considered the so called “Referral rule” to determine whether the referral to the Tribunal is in any way limited to the allegations made in the complaint to the Competition Commission. In respect of the general requirements when initiating an investigation the court found the following –

“.....which in turn relies on statements in the decision of the tribunal in Novartis SA (Pty) Ltd v Competition Commission CT22/CR/B Jun01 paras E 35 – 61. What these statements of Novartis make plain is that the purpose of the initiating complaint is to trigger an investigation which might eventually lead to a referral. It is merely the preliminary step of a process that does not affect the respondent's rights. Conversely stated, the purpose of an initiating complaint, and the investigation that follows upon it, is not to offer the suspect firm an opportunity to put its case. The commission is not even required to give notice of the complaint and of its investigation to the suspect. Least of all is the commission required to engage with the suspect on the question whether its suspicions are justified. The principles of administrative justice are observed in the referral and the hearing before the tribunal. That is when the suspect firm becomes entitled to put its side of the case.”

27. In respect of the decision to initiate an investigation the court found the following –

“[28] Once it is appreciated that the initiation by the commission demands no more than an informal and even tacit decision to set the process in motion, it becomes apparent that the enquiry into whether or not the commission can introduce a new complaint by amending a complaint initiated by itself, is inappropriate. All the commission has to do is to decide to initiate a new complaint, to investigate that complaint and, if appropriate, refer that complaint to the tribunal. If the commission already has enough information to warrant a referral, the intervening investigation can be quite cursory, as envisaged by the CAC in Loungefoam. What also seems clear to me is that the concept of an informal initiation — by way of a decision to open a case — leaves no room for the referral rule as applied by the CAC. To demand that the referral correspond with the contents of the complaint simply makes no sense if the complaint, as initiated, consists of nothing more than an informal decision to investigate.”

28. In respect of whether the Commission’s decision to initiate an investigation should be proven or alleged as such, the court stated as follows (Par. 29) –

“Absent any evidence of an express — albeit informal — initiation, the question will be whether a tacit initiation had been established. That will be a matter of inference which depends on the enquiry whether or not it is the most probable conclusion from all the facts that the commission had decided to initiate the additional complaint.”

29. The court concluded this aspect of the matter by stating the following –

The commission has investigated the complaints [submitted by Nutri-Flo] and concluded that they have substance. The commission has accordingly resolved to refer the complaints to this tribunal in terms of this referral. In addition, the commission has

in the course of its investigations, uncovered further instances of anti-competitive conduct committed by the respondents, more fully described below. These activities are referred to the tribunal herewith as well.'

[31] By deciding to investigate the additional complaints and by subsequently referring them to the tribunal, the commission in effect tacitly initiated the complaints not covered by the original Nutri-Flo complaint. It is not suggested that the commission did not have reasonable grounds to initiate and refer these new complaints. It follows, in my view, that the referral by the commission was not invalid and that its striking-out by the CAC was therefore unwarranted.”

30. In the matter before the Tribunal the NCR received a complaint from Summit Finance regarding the charging of excessive insurance premiums on the Respondent's credit agreements. This complaint related to a possible contravention of section 106(2)(b) of the NCA. A decision was then made by the NCR to initiate an investigation into the Respondent's activities. It visited the head office of the Respondent and sampled 23 credit agreement files. During the investigation it found evidence of possible contraventions of the NCA. These contraventions related to section 106(2)(a) of the NCA. The NCR then referred this contravention to the Tribunal. The alleged contraventions referred to the Tribunal do not directly relate to the merits of the original complaint received (although they do still relate to contraventions falling under section 106).

31. For the purposes of clarity the relevant sections of 106 are reflected below –

106. Credit insurance.—

- (1) A credit provider may require a consumer to maintain during the term of their credit agreement—
 - (a) credit life insurance not exceeding, at any time during the life of the credit agreement, the total of the consumer's outstanding obligations to the credit provider in terms of their agreement; and
 - (b) either—

- (i) in the case of a mortgage agreement, insurance cover in respect of the immovable property that is subject to the mortgage, not exceeding the full asset value of that property; or
- (ii) in any other case, insurance cover against damage or loss of any property other than property referred to in subparagraph

(i), not exceeding, at any time during the life of the credit agreement, the total of the consumer's outstanding obligations

to the credit provider in terms of their agreement.

(2) Despite subsection (1), a credit provider must not offer or demand that the consumer purchase or maintain insurance that is—

- (a) unreasonable; or
- (b) at an unreasonable cost to the consumer, having regard to the actual risk and liabilities involved in the credit agreement.

32. Based on the evidence presented, the NCR received, what appeared to be, a legitimate and valid complaint regarding the Respondent's

activities. The decision to investigate the Respondent was therefore not arbitrary or without foundation. The decision to investigate was then initiated by the NCR. The scope and direction of the investigation can proceed in various ways from there within the confines of the NCA. The NCR can decide to gather information by summoning witnesses for example. The NCR could have done various

calculations to determine the accuracy of the allegation made in the complaint but whether or not they chose to do so at the initial stage of the investigation does not detract from the reasonableness of their decision to investigate. As per the finding in Yara, the NCR did not have to present this complaint to the Respondent or even have to explain the basis of the investigation to them.

- 33. While assessing the Respondent's files it found evidence of a possible contravention, also falling within the scope of section 106 of the NCA. Based on the report presented by the investigator the NCR decided to refer this contravention to the Tribunal. This clearly exhibits a tacit decision by the NCR to investigate and refer this contravention to the Tribunal. Even though this tacit decision by the NCR may not have been explicitly stated in its founding affidavit, as per the Yara decision, it can clearly be inferred from the investigation process.
- 34. Flowing from this tacit decision and initiation by the NCR, the fact that the allegation of prohibited conduct brought before the Tribunal differs from the original complaint lodged does not render the entire investigation and referral invalid. The initial basis for the investigation was reasonable; the tacit decision from there to investigate and refer a related contravention flowed validly and reasonably from that basis.

35. Ultimately, the primary aim of ensuring that the investigation and referral process is valid is to prevent administrative bodies from abusing their powers. There must be a rational and reasonable basis for any investigation and ultimately the referral to the Tribunal. The Respondent must not have been exposed to any arbitrary abuse of the NCR's powers. In this matter there is no basis for a finding that the NCR abused its powers or investigated and referred the matter before the Tribunal in an unlawful or invalid manner. The Respondent was not exposed to an investigation and referral which was unreasonable or invalid. It was further presented with the full opportunity to defend its position through the Tribunal process.
36. It must further be remembered that, as per the Yara decision, the Respondent is not entitled to a full exposure to the basis of the investigation so as to answer questions and provide a response to the investigation at that stage. Its rights to defend the matter lie in the referral and Tribunal process.
37. Although the Yara matter made a distinction between complaints initiated by the regulator and those based on a complaint, this does not detract from
- the basic principles outlined above. The reasonable basis for the investigation (based on the complaint lodged) was established. The NCR then found other possible transgressions during the course of their investigation which it then initiated and ultimately referred to the Tribunal.
38. It must finally be considered that the subject matter of the complaint lodged and the contraventions ultimately referred to the Tribunal in any event all relate to contraventions of section 106 of the NCA in respect of the selling of insurance that is unreasonable. The Respondent cannot be said to have been unfairly or unreasonably exposed to an arbitrary use of the regulator's powers.
39. On the second to fourth points in limine raised by the Respondent the Tribunal therefore finds that the investigation and referral to the Tribunal is valid. The points in limine raised by the Respondent are therefore dismissed.

CHARGES AGAINST THE RESPONDENT

40. The charges of repeated prohibited conduct put forward by the NCR are as follows –
- 40.1 That the Respondent contravened section 106(2) of the NCA by offering or demanding that the consumer maintain insurance that is unreasonable or at an unreasonable cost to the consumer, having regard to the actual risk and liabilities involved in the credit agreement.
- 40.2 That the Respondent contravened section 90(1) and 90(2)(a)(ii) of the NCA in that its credit agreement contained a provision that is unlawful as its general purpose of effect was to deceive the consumer.

40.3 That the Respondents contravened section 91(1) of the NCA by directly or indirectly, by false pretences or with the intent to defraud, offer, require or induce a consumer to enter into or sign a credit agreement that contains an unlawful provision as contemplated in section 90.

41. Section 106(2) of the NCA states as follows –

(b) either—

(i); or

(ii)

Loss of employment insurance

42. The NCR contends that it found two instances where loss of employment insurance was sold to consumers who were pensioners or unemployed. It contends that selling loss of employment insurance to these types of consumers is unreasonable.

43. Lewis does not appear to deny that it sold loss of employment insurance to pensioners or unemployed consumers. In this regard it refers to “pensioners” as “retired persons”. It further does not appear to deny that the selling of this type of insurance to these consumers is unreasonable. It concedes that no insurable risk existed in relation to these consumers as they could not claim for loss of employment where no employment existed. It did an internal investigation which found numerous instances where this had occurred since 2007. This resulted in the current process of reimbursing all the identified customers with a total of R48.8 million in premiums and R22.8 million in interest. It has however raised a number of defences to the allegation that its conduct can be declared as prohibited conduct.

44. Lewis argues that the insurance contracts in question were void ab initio. In common law these contracts were therefore a nullity and not a contract at all. As no valid contract came into being there could not have been a transgression of section 106(2).

45. In this regard the provisions of section 106(2) are clear, a credit provider must not offer or demand that the consumer purchase or maintain insurance that is unreasonable or at an unreasonable cost to the consumer, having regard to the actual risk and liabilities

involved in the credit agreement. The section makes the very offer of insurance under these circumstances unlawful. Even if it could be argued that the insurance contract was void, there is no requirement in the NCA that a valid contract come into being.

46. Lewis argues that the NCA does not impose strict liability for a transgression of the Act. It therefore follows that the NCR would

have to prove that the “directing mind” of Lewis (being its management and Board) had the necessary mens rea to commit the transgression in question. In this regard Lewis argues that its employees made the error contrary to the company’s

reasonable attempts to prevent it.

47. The requirement to prove mens rea was considered by the Tribunal in the matter of NCR v Season Star Trading 333 CC t/a De Noon's Cash Loans NCT/6977/2012/57(1)(P) NCA. The Tribunal held that proving mens rea on the part of the Respondent in relation to prohibited conduct was not a requirement. The Tribunal accords with this view and is satisfied that there is no requirement in the NCA that any form of intention or negligence on the part of the Respondent be proven. The NCA further sets out the various defenses which may be raised in relation to an allegation of prohibited conduct. For example, Section 81(4) of the NCA sets out the defenses which a credit provider may raise if a credit agreement is alleged to have been entered into recklessly. This provides a clear intention by the legislature that strict liability in terms of the NCA was envisaged. Any defenses available to an accused person or juristic person for alleged prohibited conduct are provided for in the NCA. Section 106 of the NCA does not provide for any defenses. The circumstances under which the selling of the loss of employment cover took place are therefore irrelevant for the purposes of determining whether prohibited conduct took place. It will only be relevant for the purposes of determining an appropriate administrative penalty.
48. The Tribunal therefore finds that Lewis did offer or demand that consumers who are pensioners/retired or unemployed take out loss of employment insurance. The offering or demanding of this form of insurance from these consumers was unreasonable as described in section 106(2) of the NCA and therefore constitutes prohibited conduct.

Disability insurance

49. The NCR submitted that it found two instances where Lewis sold disability cover to consumers who are pensioners or self-employed. The terms of the insurance policy state the following –

“In the event of your disability arising during the period of cover following accidental bodily injury or illness”

Disability is defined as “Your permanent incapacity to follow your normal occupation or any other occupation for which you are reasonably qualified because of your knowledge, training and experiences.”

In the event of disability the consumer is required to “.....provide us with further details as we may reasonably require, and a letter from your employer confirming the ending of your employment following your disability”.

50. The NCR argues that pensioners no longer work and therefore cannot suffer a disability as defined by the policy conditions. They therefore do not have any insurable interest. Pensioners further cannot obtain a letter from their employer and would therefore be barred from claiming under the policy. The NCR argues that the same principle applies to self-employed consumers. They would be unable to obtain a letter from their employer as such to prove their disability.

51. Lewis argues that, in principle, there is nothing preventing a retired or self-employed person from claiming on the disability portion of the policy. It is argued that a retired person may have been previously employed as a plumber for example, if he should become disabled and be unable to pursue this occupation in future, then he would be entitled to claim under the policy. Lewis submits that the validity of the claim should be separated from the claims procedure and the information required to prove the claim.
52. Lewis further argues that the courts are generally very lenient in finding the existence of an “insurable interest” when it comes to insurance policies. The courts would therefore readily find an insurable interest in relation to retired or self-employed consumers.
53. Firstly, in the Tribunal’s view, the concept of an “insurable interest” must be used with caution in relation to a finding under section 106(2). The NCA does not refer to “insurable interest” and does not purport to tie the principle of “unreasonableness” to “insurable interest” in any way. Whether or not a person would have an insurable interest does not necessarily mean that the credit provider was reasonable in offering or demanding that particular insurance from the consumer. The term “unreasonableness” would generally have a far wider scope and would of course be more nebulous in its application.
54. The term “unreasonable” is used on a few occasions in the NCA but is not defined. The Consumer Protection Act 68 of 2008 also uses the term on a number of occasions but is similarly not defined. The term is generally described in various dictionaries as “lacking in reason or judgment”, being “unfair”, “illogical”.
55. Determining the reasonableness of any action in the context of section 106(2) would therefore require an objective and logical evaluation. When a consumer enters his employment status as a “pensioner” or “retired” the first and foremost reasonable deduction one would make from that statement would be that he/she is not employed and does not intend being employed again. It may be that such a person is still employed or pursuing an occupation in some way but that would not be the normal association one would make. For this type of consumer, the concept of requiring disability insurance, in case they are unable to pursue their usual or any other occupation, would therefore not be a normal or common one. While the Tribunal does not exclude the possibility that such a consumer may require or request disability insurance, it would be unreasonable to make this assumption without further inquiry or clarification. The offering or demanding of disability insurance to retired or pensioned consumers would therefore be unreasonable, unless further inquiry and clarification was obtained and recorded, which makes it clear that the consumer requests this type of cover.
56. Applying the same approach to a self-employed consumer does not yield the same result. A self-employed consumer would quite naturally be regarded as employed and would be regarded as requiring disability insurance. While there may be certain practical challenges in producing a letter from his employer, they are not necessarily unreasonable or insurmountable. As an example, a natural person may be employed by his own company,

which is a separate juristic person. From a legal perspective, he could quite easily write a letter on behalf of his employer as such. The Tribunal does not find that offering disability insurance under these circumstances is necessarily unreasonable.

Intention to deceive the consumer

57. Section 90(1) and 90(2)(a)(ii) states as follows –

90. Unlawful provisions of credit agreement.—

(1) A credit agreement must not contain an unlawful provision.

(2) A provision of a credit agreement is unlawful if—

(a) its general purpose or effect is to—

(i)

(ii) deceive the consumer; or

(3).....

(4) In any matter before it respecting a credit agreement that contains a provision contemplated in

subsection (2), the court must—

(a) sever that unlawful provision from the agreement, or alter it to the extent required to render it lawful, if it is reasonable to do so having regard to the agreement as a whole; or

(b) declare the entire agreement unlawful as from the date that the agreement, or amended agreement, took effect, and make any further

order that is just and reasonable in the circumstances to give effect to the principles of section 89 (5) with respect to that unlawful provision, or entire agreement, as the case may be.

58. The NCR noted this allegation in its application and founding affidavit but did not clarify the content of it in any detail. It appears the NCR is alleging that including unreasonable disability and loss of employment insurance in its credit agreement as a whole has the effect of deceiving the consumer and is therefore unlawful. The exact provision in the credit agreement which falls foul of section 90 is unclear. The effect of the unlawfulness of any provision mentioned in section 90 is dealt with in section 90(4), which is that the court must sever or alter the unlawful provision in question. There is no reference in the section to the Tribunal having this power, only the court. Besides the evidence the NCR did not submit any evidence of the way in which consumers were deceived. The Tribunal has made a finding on section 106(2) and cannot see a clear basis on which the unreasonableness of the disability and loss of employment insurance ties to a specific provision in the credit agreement which has the effect of deceiving the consumer.

59. The Tribunal is therefore unable to make a finding on section 90.

Supplementary agreement

60. This allegation appears to be an alternative to the section 90 allegation. The NCR is essentially arguing that the unreasonable disability and loss of employment insurance that Lewis offered to consumers was contained in a supplementary agreement. The fact that the unreasonable insurance was included in a supplementary agreement still makes it unlawful despite the fact that it was not included in the credit agreement.

61. In respect of this allegation it must be noted that Section 91(1) of the NCA was only introduced by the amendment to the Act which came into operation on 13 March 2015. Prior to the amendment there was no section 91(1). The NCA, prior to the amendment, stated as follows –

Supplementary requirements and documents

91. A credit provider must not-

(a) directly or indirectly require or induce a consumer to enter into a supplementary agreement, or sign any document, that contains a provision that would be unlawful if it were included in a credit agreement;

62. Section 91(1) of the amended NCA states as follows –

91. Prohibition of unlawful provisions in credit agreements and supplementary agreements.—

(1) A credit provider must not directly or indirectly, by false pretences or with the intent to defraud, offer, require or induce a consumer to enter into or sign a credit agreement that contains an unlawful provision as contemplated in section 90.

(2) A credit provider must not directly or indirectly require or induce a consumer to enter into a supplementary agreement or sign any

document, that contains a provision that would be unlawful if it were included in a credit agreement.

63. The NCR has therefore quoted a section in the NCA which did not exist at the time of the investigation or alleged prohibited conduct. Further, the intention of the legislature with section 91 was to prevent credit providers from using additional or supplementary agreements to circumvent the purposes of the NCA. The finding of the Tribunal in respect of section 90 above applies with equal measure here.

64. The Tribunal is therefore unable to make a finding in terms of section 91(1).

CONCLUSION

ON THE MERITS

65. The Tribunal therefore makes the following findings in respect of the NCR's allegations:

65.1 The Respondent is found to have contravened section 106(2)(a) of the NCA in that it offered or demanded that pensioned (retired) and unemployed consumers pay for loss of employment insurance. This conduct is prohibited in terms of the NCA.

65.2 The Respondent is found to have contravened section 106(2)(a) of the NCA in that it offered or demanded that pensioned (retired) consumers pay for disability insurance. This conduct is prohibited in terms of the NCA.

Independent audit

66. The NCR prayed for an order that Lewis pay for an independent audit to be done on all consumers who have taken out insurance through Lewis since 2007 in order to identify all consumers who were affected by the Tribunal's findings.

67. It stands to be noted that Lewis did have an audit done on its accounts so as to make this determination. However this audit was commissioned by Lewis with information specifically provided by Lewis. It therefore cannot be regarded as an independent audit.

68. As noted at the start of the judgment, this judgment only deals with the merits of the application. The matter will be set down for a further hearing on the quantum of the administrative penalty by the NCT Registrar.

ORDER

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

69.1 Lewis is held to have engaged in prohibited conduct in terms of the NCA.

69.2 Lewis is interdicted from offering or demanding that any pensioners (retired) or unemployed consumers pay for loss of employment insurance.

69.3 Lewis is interdicted from offering or demanding that any pensioner (retired) consumers pay for disability insurance.

69.4 An independent audit by an independent auditor must be done of all credit agreements entered into by Lewis since 2007. The audit is to be done at Lewis' costs. The audit will be to determine whether any consumers fall within the prohibited conduct noted in 67.2 or 67.3 above. Any consumers falling within this category must be reimbursed with any premiums paid for this insurance. The consumer's accounts are to be credited with the amount of the premiums and any interest charged on the account as a result of the additional insurance premium. Consumers who no longer have any open accounts with Lewis are to be traced and reimbursed with the premiums and any additional interest charged.

69.5 The audit must be done within a period of 120 business days of the date of this judgment and a complete and detailed report in this regard must be provided to the NCR within 150 business days.

69.6 After 150 business days, once the audit has been completed and the full report provided to the NCR, The NCT Registrar will set the matter down for a hearing on the quantum of the administrative penalty to be imposed on Lewis by the Tribunal.

69.7 No order is made as to costs.

DATED ON THIS 9th DAY OF SEPTEMBER 2016

[signed].

Adv J Simpson

Presiding Member

Ms Terblanche (Member) and Ms H Devraj (Member) concurring

[1] The NCA as it was prior to the amendment on 13 March 2015 is used, as the investigation took place prior to the amendment.

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