

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Malinga t/a MJ Cash Loans (Pty) Ltd (NCT/91476/2017/57(1)NCA) [2018] ZANCT 2 (2 January 2018)

[2018] ZANCT 2

COURT

National Consumer Tribunal

BEFORE

D Terblanche, N Maseti, K Moodaliyar

CASE / FILE NUMBER

NCT/91476/2017/57(1)NCA

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case Number

NCT/91476/2017/57(1)

NCA

IN

THE MATTER BETWEEN:

THE NATIONAL
CREDIT
REGULATOR
APPLICANT
and
MJ MALINGA T/A
MJ CASH LOANS (PTY)
LTD
RESPONDENT
Tribunal

panel:

D
Terblanche - Presiding
N
Maseti - Member
K
Moodaliyar - Member
Date

of hearing: 4
December 2017

JUDGMENT

AND REASONS

APPLICANT

1. The Applicant is the NATIONAL CREDIT REGULATOR (hereinafter the “Applicant” or the “Regulator”), a juristic

person established in terms of section 12 of the National Credit Act 34 of 2005 (the “Act” or the “NCA”) as amended.

RESPONDENT

2. The Respondent is cited by the Applicant as MJ Malinga t/a MJ Cash Loans (PTY) LTD (hereinafter “Malinga” or the “Respondent”). MJ Cash Loans (PTY) LTD is registered as a credit provider with the Applicant under registration number NCRCP8775.

TYPE OF APPLICATION

3. This is an application by the Regulator for the de-registration of the Respondent and various other orders for relief in terms of sections 57(1), 150 and 151 of the NCA.
4. The Applicant bases its application on the Respondent’s alleged repeated contraventions of the NCA, and the Regulations promulgated

thereunder.

BACKGROUND

5. A complaint was lodged with the Regulator during June 2016 in connection with alleged prohibited conduct the Respondent engaged in during 2013.
6. Based on the above complaint the Applicant decided to initiate an investigation into the Respondent’s affairs as a credit provider.
7. The investigation, authorised on 2 February 2017, was initiated in terms of section 136(1) of the NCA.
8. After the start of the investigation, another complaint was lodged with the Regulator by another consumer in connection with alleged prohibited conduct the Respondent engaged in during 2012. This complaint was also investigated during the course of the investigation.

9. Based on the outcome of the completed investigation, the Applicant decided to refer various instances of prohibited conduct against the Respondent to the Tribunal.
10. The Applicant filed the application on 29 September 2017, dispatched the notice of the application, the application and the supporting

documents to the Respondent on 3 October 2017 via registered mail. The notice and the attachments thereto were delivered to the

Respondent on 17 October 2017, according to the packages' track and trace reports

11. The Respondent's answering affidavit was due on 7 November 2017, fifteen (15) days from the date of receipt of the application by the Respondent in terms of Rule 13(2) of the Regulations for matters relating to the functions of the Tribunal and Rules for the Conduct of matters before the National Consumer Tribunal (hereinafter the "Rules").^[1]
12. To date of the hearing, the Respondent had not filed any opposition to the Regulator's application for its de-registration, the imposition of an administrative penalty and the other relief sought.

THE HEARING

13. The application was set down to be heard on a default basis for 4 December 2017.
14. The Applicant appeared at the hearing represented by Ms K Germishuys.
15. The Respondent, albeit not having indicated at any stage prior to the hearing date that he wished to oppose the application, arrived at the hearing represented by Counsel, Mr Oberholtzer, instructed by Wessels and Smith Attorneys.
16. As a concession to the Respondent, the Tribunal allowed him to make submissions from the Bar through his Counsel without being placed

formally on record. The Respondent indicated, through his counsel that he -

- 16.1. did not wish to formally enroll his opposition to the application,
 - 16.2. was willing to concede the contraventions he had been charged with,
 - 16.3. was agreeable to his de-registration as a credit provider, and
 - 16.4. wished to take issue and make submissions with regard to the amount of the administrative penalty the Tribunal might consider imposing.
17. As Counsel for the Respondent had not received instructions to formally and on the record oppose the application or to seek condonation to formally enroll Respondent's opposition to any aspect of the application before Tribunal, the Tribunal determined that the matter be proceeded with on a default basis.

ALLEGATIONS IN THE FOUNDING AFFIDAVIT ARE DEEMED TO BE ADMITTED

18. The Respondent did not file an answering affidavit nor opposed the deregistration application and the relief sought by the Applicant,

save for its comments made from the Bar on the day of the hearing as set out above.

19. As none of the facts nor allegations put before the Tribunal by the Applicant in its founding affidavit have been specifically denied or admitted in the answering affidavit, they are deemed to have been admitted. This is provided for in Rule 13(5) of the Rules.[2]

CONSIDERATIONS FOR DEFAULT JUDGMENT

20. The deemed admission of the allegations in the founding affidavit do not end the inquiry for the Tribunal into the application.

21. Rule 25(3), in parts relevant to a default judgment application of this nature, provides that -

“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.”(Emphasis added)

22. In determining whether the documents were adequately served on the Respondent, the requirements for service of documents in terms of the Rules are pertinent. Rule 30 states:

- (1) A document may be served on a party by—

- (i) delivering it to the party; or

- (ii) sending it by registered mail to the party’s last known address.

- (2) parties may expedite service by sending notices and documents by fax or e-mail, provided that this is followed within 3 business days with service in accordance with rule 30 (1) (a). Parties to proceedings may agree in writing to service of notices and documents by way of fax or e-mail only, in which event service in terms of rule 30 (1) will not be required.

- (3) proof of service in terms of rule 30 (1) (a), must be by—

- (i) ...; or

- (ii) ...;

- (iii) rule 30 (1) (b), must be the postal agent’s receipt with the tracking code of the document;

- (iv) rule 30 (2), must be a copy of the transmission report, to be followed subsequently with proof in terms of rules 30 (3) (a) or (b)...”

23. From documents placed before the Tribunal, it appears that notice of the application was sent to the Respondent via registered mail in accordance with Rule 30(3)(iii) and received by the Respondent.

24. Having considered and accepted that proper service was effected, the Tribunal is further obligated to satisfy itself “after it has considered or heard any necessary evidence...” that the Applicant has made out a case on the uncontroverted papers that entitles it to the declarations and relief sought.

APPLICABLE SECTIONS OF THE ACT

25. The Applicant claims that the Respondent contravened the provisions of the NCA, reproduced below for ease of reference.
26. Section 80(1) of the NCA 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 risks, costs or obligations under the proposed credit agreement; or
- (ii) entering into that credit agreement would make the consumer over-indebted.”

27. Section 81(2) of the NCA 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 repayment 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.”

28. Section 52(5)(e) provides that -

“A registrant must --- keep any prescribed records relating to its registered activities, in the prescribed manner and form;...”

29. Section 92(1) provides that -

“A credit provider must not enter into a small credit agreement unless the credit provider has given the consumer a preagreement.”

30. Section 130(1) of the NCA provides that -

“130. Debt procedures in a Court.—

(1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and—

(a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86 (10), or section 129 (1), as the case may be;

(b) in the case of a notice contemplated in section 129 (1), the consumer has—

(i) not responded to that notice; or

(ii) responded to the notice by rejecting the credit provider's proposals; and

(c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127....”

31. Section 133 of the NCA (making use of a document, number of instrument referred to in section 90(2)(i) when collecting on or enforcing a credit agreement) which provides that -

“(1) A credit provider must not—

(a) make use of any document, number or instrument referred to in section 90 (2) (1) when collecting on or enforcing a credit agreement; or

(b) direct or permit any other person to do anything contemplated in this subsection on behalf, or as an agent, of the credit provider.

(2) When collecting money owed by a consumer under a credit agreement or when seeking to enforce a credit agreement, a credit provider must not use or rely on, or permit any person to use or rely on, any document or instrument or contract provision referred to in section 90 (2) (1).

(3) A person who contravenes this section is guilty of an offence....”

32. Section 90(2) (a)(i) of the NCA provides that -

“A provision of a credit agreement is unlawful if—

(a) its general purpose or effect is to—

(i) defeat the purposes or policies of this Act;...”

33. Section 93(1) - (2) read with regulation 30(1) provides that -

“Form of credit agreements.—

(1) The credit provider must deliver to the consumer, without charge, a copy of a document that records their credit agreement, transmitted to the consumer in a paper form, or in a printable electronic form.

(2) A document that records a small credit agreement must be in the prescribed form.”

34. Section 90(2)(k)(iii) read with regulation 32 provides; with regard to unlawful provisions of credit agreement that -

“A provision of a credit agreement is unlawful if...

it expresses, on behalf of the consumer...

an undertaking to sign in advance any documentation relating to enforcement of the agreement, irrespective of whether such documentation is complete or incomplete at the time it is signed;...”

APPLICANT’S

SUBMISSIONS

35. The Applicant submitted that the Respondent was registered as a credit provider on 24 January 2017 up to 17 February 2018.

36. From the investigation report, the following appears -

36.1. The Applicant received a complaint from a certain Matlosa on 4 April 2016 against the Respondent arising out of interactions Matlosa had with the Respondent in and during May 2015. The complainant alleged that the Respondent was not registered as a credit provider then, that it was not his (the complainant’s) signature on the acknowledgement of debt and that he was overcharged on interest;

36.2. During the course of the investigation the Regulator received a further complaint from a certain PF Thebe arising out of an acknowledgment of debt she signed with the Respondent on 29 July 2012. Thebe alleged that she was overcharged on interest, did not receive a copy of the credit agreement and was required to sign a consent to judgment and emolument attachment order before defaulting on her payments;

36.3. During the course of the investigation the Applicant’s investigators requested ten (10) consumer files from the Respondent for the period between June 2016 and January 2017. They were not given the requested files. At the inquiry which the Respondent was summoned to by the Applicant, the Respondent handed over only four (4) consumer files, claiming they were the only persons he extended credit to;

36.4. Having examined the consumer and complainants' files, the investigators allegedly found that -

36.4.1. the credit agreements were not in the prescribed form. Each consumer file had an acknowledgment of debt in respect of the loan extended;

36.4.2. the costs of credit were not disclosed;

36.4.3. there was no indication of an affordability assessment on the files, save for three months' bank statements; and

36.4.4. consumers signed enforcement documents - consent to judgment and emoluments attachment orders - before any breach occurred; and

36.5. The investigators attempted to contact the consumers but were not successful in doing so.

37. From the above, the investigators concluded that the Respondent contravened various provisions of the NCA. They are -

37.1. sections 80(1) and 81(2) with regard to the reckless credit provisions of the NCA which requires that, amongst others, affordability assessments be conducted;

37.2. section 52(5)(e) relating to failure to keep records;

37.3. section 92(1) in that he did not provide pre-agreement disclosures and quotation in the prescribed form;

37.4. section 130(1) of the NCA as Respondent utilised court process documents to enforce a credit agreement at a time when the consumer was not in default under the credit agreement; and

37.5. section 133(1) of the NCA as Respondent made use of a document, or instrument referred to in section 90(2)(i) when collecting on or enforcing a credit agreement.

38. From the founding affidavit of Peters, a manager in the employ of the Applicant, it appears that the Regulator brought out additional

contraventions based on the investigation report. They are -

38.1. section 93(2) read with regulation 30(1) and section 93(3) read with Regulation 31 - that the Respondent had not provided copies of the credit agreement to his credit receivers / consumers; and

38.2. section 90(2)(k)(iii) read with regulation 32 - in that the Respondent precipitately and unlawfully enforced credit agreements.

DISCUSSION OF THE LAW AND THE EVIDENCE BEFORE THE TRIBUNAL

39. The evidence placed by the Applicant before the Tribunal in respect of the alleged contraventions is in the form of a founding affidavit

deposed to by J Peters, the Manager of its Investigations and Enforcement Department (hereinafter referred to as “Peters”),

with the investigation report and various extracts from files attached thereto as annexures.

40. Kgadi Sepuru, one of the investigators and authors of the investigation report, deposed to a confirmatory affidavit in respect of the matters where Peters referenced her in the founding affidavit.
41. The factual allegations made in the affidavit, according to Peters, are pursuant to her perusing the investigation report and its supporting evidence and from interviewing the investigator. Peters, therefore, does not have and does not claim to have personal knowledge of the facts she deposed to in the affidavit.
42. This question, where affidavits have been deposed to by employees of corporations who do not have personal knowledge of the facts deposed to but relied on company records and reports, have been dealt with extensively in respect of summary judgment applications in the high court, with numerous conflicting judgment on this issue.
43. In *Investec Bank Ltd v Rees and Another In re: Investec Bank Ltd v Rees and Others* [2013] ZAGPJHC 35 (GSJ) Hutton AJ found that the deponent "was a person with requisite knowledge required by Rule 32(2)" as she acquired knowledge of the plaintiff's claim in the ordinary course of her duties as a recoveries officer in the employ of the plaintiff, and because the records, accounts and other relevant documents were as such in her possession and under her control." Hutton AJ concluded by stating that "This, in my view, is not a borderline case and the affidavit of Ms Ackermann in support of the application for summary judgment passes muster by a comfortable margin."
44. The Supreme Court of Appeal in *Investec Bank Ltd v Rees and Another In re: Investec Bank Ltd v Rees and Others* Case No. 330/2013 weighed in on this issue. It puts its weight behind the views of Hutton AJ's judgment above and held that to "have knowledge of every fact which goes to make up the applicant's cause of action is not required, and where the applicant is corporate

entity, the deponent may well legitimately rely on records in the company's possession for their personal knowledge of at least certain of the relevant facts and the ability to swear positively to such facts".

45. The Tribunal accordingly finds that Peters can legitimately depose to the founding affidavit on the basis set out.
46. The next inquiry is then whether the information contained in the investigation report constitutes evidence before the Tribunal

sufficient to establish the contraventions alleged, particularly since they could contain findings and conclusions that are not based upon the investigators' personal knowledge, but on statements made and documents provided to them and in fact amount to hearsay evidence.[3]

47. The investigation report in this instance, dated 28 April 2017, was authored by Kgadi Sepuru and Leslie Odendaal, inspector and senior inspector respectively of the Applicant. They based the analysis and conclusions in their investigation report on interviews they conducted with the Respondent and his lawyer as well as files of documents provided to them by same.

48. For the Tribunal to consider and accept the information as evidence depends on the admissibility of the information qua evidence measured against the rules of evidence.

49. In South Africa a key piece of legislation in regard to documentary evidence is the Civil Proceedings Evidence Act 25 of 1965 as amended by Law of Evidence Amendment Act, Act 45 of 1988. Section 3 provides in respect of hearsay evidence -

“(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to-

(I) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.”

50. Section 34 of Civil Proceedings Evidence Act 25 of 1965 deals with the admissibility of documentary evidence as to facts in issue and provides that -

“(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible as evidence of that fact, provided -

- (a) the person who made the statement either -
 - (i) had personal knowledge of the matters dealt with in the statement; or
 - (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with therein are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had or might reasonably have been supposed to have personal knowledge of those matters; and
- (b) the person who made the statement is called as a witness in the proceedings unless he is dead or unfit by reason of his bodily or mental condition to attend as a witness or is outside the Republic, and it is not reasonably practicable to secure his attendance or all reasonable efforts to find him have been made without success.
- (2) The person presiding at the proceedings may, if having regard to all the circumstances of the case he is satisfied that undue delay or expense would otherwise be caused, admit such a statement as is referred to in sub-section
 - (1) as evidence in those proceedings”[emphasis added]
- 51. On the basis of section 34(1)(a)(ii) the Tribunal is satisfied that the investigation report and the extracts of documents attached to it may be admitted as evidence in the proceedings before the Tribunal.
- 52. The Tribunal finds and accepts the evidence by the Applicant that, with regard to the files examined:
 - 52.1. the credit agreements were not in the prescribed form and each consumer file had an acknowledgement of debt in respect of the loan extended;
 - 52.2. the costs of credit were not disclosed as the acknowledgments of debt contained none of that information;
 - 52.3. there is no indication of an affordability assessment on the files, save for three months’ bank statements;
 - 52.4. consumers signed enforcement documents - consents to judgment and emoluments attachment orders - before any breach occurred. In fact there is evidence to the effect that they sign the enforcement documents on the same date as the acknowledgements of debt; and
 - 52.5. Respondent precipitately enforced the credit agreements in contravention of Section 130(1) of the NCA in that it put consents to judgments and emoluments attachment orders in front of consumers at the date of providing the loan / signing of the acknowledgment of debt.
- 53. There are a number of relevant dates and periods appearing from this application impacting on -

53.1. the Tribunal's determination of which matters it may consider that have not prescribed due to the operation of section 166 of the NCA which provides that -

“(1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after—

- (a) the act or omission that is the cause of the complaint; or
- (b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.”

53.2. the Respondent's culpability in respect of the alleged prohibited conduct he is charged with specifically relating to the –

53.2.1. period when he was not registered as a credit provider, i.e. before 17 February 2017, as the complaints of Motlosa and Thebe relate to this period;

53.2.2. period after he became a registered credit provider, i.e. after 17 February 2017, as the consumer files analyzed pertain to this period;

53.2.3. period when he was required to be registered as a credit provider but was not so registered - the complaint of Motlosa relate to this period i.e the date, 26 February 2015, from when the NCA amendments requiring of all credit providers to be registered came into operation until February 2017, when the Respondent became registered; and

53.2.4. the implications on the determination of whether Respondent can be held liable for conduct he engaged in over those periods and the impact of those on considering the relief sought.

- 54. This means that the Thebe complaint, that arose in and during 2012, more than three (3) years before the application to the Tribunal, cannot be considered by the Tribunal as it had become prescribed.[4]
- 55. The matter before the Tribunal is limited to the other five (5) files in respect of consumers Matlosa (22 May 2015); Mpakanyane (6 Jan 2017); RN Maraba (28 October 2016); SKT Maraba (3 October 2016) and Mofokeng (5 July 2016).
- 56. The Respondent was required in terms of the National Credit Amendment Act to be registered as a credit provider from February 2015. He only registered in February 2017, approximately six (6) months after he was informed by the Applicant of the Matlosa complaint.
- 57. From the extracts of the files placed before the Tribunal it appears that, save for one consumer file, the relevant credit agreements were entered into from May 2015 to January 2017, during a period the Respondent was required to be registered as a credit provider in terms of the NCA amendment Act of 2015 but was not so registered.

58. During the hearing, the Tribunal invited submissions from the Applicant whether an unregistered credit provider (such as the Respondent at the time when he entered into the majority of the credit agreements) can be held liable for contraventions of the provisions of the NCA the Applicant alleges the Respondent contravened.
59. The Applicant submitted in response to the Tribunal's inquiry that only a registered credit provider can be held liable for contravening those provisions.
60. We understood the Applicant's submission on this point to mean that the Tribunal has no powers in terms of the Act to condemn the conduct of the Respondent merely because of it not being a registered credit provider.
61. Section 40 of the NCA provides in subsections (3) and (4) as follows;

"(3) 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.

- (4) A credit agreement entered into by a credit provider who is required to be registered in terms of subsection (1) but who is not so registered is an unlawful agreement and void to the extent provided for in section 89."

62. Insofar as enforcement powers of the Applicant are concerned, Section 89(2) provides –

".....a credit agreement is unlawful if –

- (e) the credit provider was subject to a notice by the National Credit Regulator or a provincial credit regulator requiring the credit provider –
- (i) to stop offering or make available or extending credit under any credit agreement, or agreeing to do any of those things; or
- (ii) to stop offering, making available or extending credit under the particular form of credit agreement used by the credit provider,

Whether or not this Act requires that credit provider be registered, and no further appeal or review is available in respect of that notice".

63. The section clothes the Applicant with enforcement powers to a court in respect of credit providers who are required to be registered but are not and have entered into credit agreements with consumers.
64. Section 89(5) empowers the Tribunal to declare agreements entered into by unregistered credit providers as unlawful. This section further allows the Tribunal to make a just and equitable order including but not limited to an order that –

"... the credit agreement is void as from the date the agreement was entered into"

65. The purpose of the NCA, amongst others, being “(c) promoting responsibility in the credit market by—(i) encouraging responsible borrowing, avoidance of overindebtedness and fulfilment of financial obligations by consumers; and (ii) discouraging reckless credit granting by credit providers and contractual default by consumers;
- (d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;” suggests that the legislature intended to capture both registered and unregistered credit providers in the net. As unregistered credit providers were allowed to extend credit to consumers it would be inconsistent with the provisions of the NCA not to hold them to the same standards as registered credit providers.
66. In the light of section 40 read with section 89 and paragraph 65 above we disagree with the Applicant that the Respondent can escape culpability under the NCA due to its non-registered status.
67. The Tribunal accordingly finds that the Respondent contravened sections 81(2)(a) read with regulation 28(1)(b); section 92(2) read with regulation 29(1)(a); section 170 read with regulation 55(1)(b)(iv); section 92(3) read with Regulation 30(1); Section 93(3) read with regulation 31; section 90(2)(k)(iii) read with regulation 32 and section 91(b) of the NCA of the NCA.

PROVISIONS RELATING TO THE RELIEF SOUGHT

68. 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...contravenes this Act ...”

69. Section 150(a) of the Act provides that the Tribunal may make an appropriate order in relation to prohibited conduct, including.....and order “(a) declaring conduct to be prohibited in terms of the Act.”
70. 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.....”
71. 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.

RELIEF SOUGHT BY THE APPLICANT

72. With regard to the imposition of an administrative fine the Tribunal considered and accepted the factors placed before the Tribunal by the Applicant.

73. Additionally, the Tribunal considered that the Respondent -

73.1. contravened the NCA in respect of each of the complainants and in respect of the four (4) consumers whose files were provided to the Regulator;

73.2. was extremely unhelpful during the investigation and had to be summonsed to appear before he came forward with consumer files and information. Even then it appears he tried to hide information from the Regulator in producing only four consumer files. It seems unlikely that Respondent only has 4 customers. It is more likely that he is hiding more egregious contraventions of the NCA from the Regulator;

73.3. showed extreme disregard for the rights of consumers and judgment debtors through requiring of consumers to sign court process documents at the time of extending the loans breaches an essential safeguard that is built into the process, to ensure that a judgment debtor have the means to maintain him and his dependants through confirming at the time and stage in the debt collecting process that "... after satisfaction of the emolument attachment order, he/she will have sufficient means for my own and my dependants maintenance."

demonstrated a general disregard to the provisions of the NCA and its purpose. In this regard his failure to familiarise himself with his responsibilities under his registration and to comply with those is particularly noteworthy

74. This is a matter where deregistration of the Respondent seems entirely apt. Before the Respondent was registered he contravened the NCA. This did not change after his registration, he simply continued on the path of conducting himself without regard of the NCA and his obligations to consumers.

ORDER

75. The Tribunal accordingly makes the following order -

75.1. Respondents conduct, in contravention sections 81(2)(a) read with regulation 28(1)(b); section 92(2) read with regulation 29(1)(a); section 170 read with regulation 55(1)(b)(iv);

section 92(3) read with Regulation 30(1); Section 93(3) read with regulation 31; section 90(2)(k)(iii) read with regulation 32 and section 91(b) of the NCA, is declared as prohibited conduct;

75.2. Respondent's registration as a credit provider is cancelled with immediate effect;

75.3. Respondent is ordered to, within ten (10) days of this order, surrender all his client files to the Applicant;

75.4. Respondent makes payment of an administrative fine in the amount of R 100 000 within ninety (90) days of date of this order; and

75.5. No order is made for costs.

DATED AT CENTURION THIS 29th DAY OF JANUARY 2018.

(signed)

MS D TERBLANCHE

TRIBUNAL MEMBER

Ms Maseti (Member) and Prof Moodaliyar (Member) concurring.

[1] Published under GN 789 in GG 30225 of 28 August 2007 as amended by GenN 428 in GG 34405 of June 2011 (published in terms of the

Consumer Protection Act 68 of 2008). GN R203 in GG 38557 of 13 March 2015 and GN 157 in GG 39663 of 4 February 2016

[2] “(5) Any fact or allegation in the application or referral not specifically denied or admitted in an answering affidavit, will be deemed to have been admitted.” Published under GN 789 in GG 30225 of 28 August 2007 as amended by GenN 428 in GG 34405 of June 2011 (published in terms of the Consumer Protection Act 68 of 2008). GN R203 in GG 38557 of 13 March 2015 and GN 157 in GG 39663 of 4 February 2016)

[2] “(5) Any fact or allegation in the application or referral not specifically denied or admitted in an answering affidavit, will be deemed to have been admitted.”

Published under GN 789 in GG 30225 of 28 August 2007 as amended by GenN 428 in GG 34405 of June 2011 (published in terms of the Consumer Protection Act 68 of 2008). GN R203 in GG 38557 of 13 March 2015 and GN 157 in GG 39663 of 4 February 2016)

[3] 'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence; section 3(4) of the Law of Evidence Amendment Act, Act 45 of 1988

[4] See in this regard *Ross vs African Bank Limited and Residual Debt Services Ltd* NCT/60756/2016/141(1) where the Tribunal found that that where “The parties agreed that the agreements were entered into in and during 2010 for the credit card and in the period between August 2012 and February 2013 for the other loans. “ that “It is clear therefore that the “act or omission that is the cause of the complaint arose more than three (3) years before the Applicant filed his application with the Tribunal.” and therefore “In the circumstances the Tribunal is constrained from hearing the matter and making any

determination in respect thereof, as the NCA clearly proscribes an Applicant from bringing such an action before the Tribunal after the three (3) years.”

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