

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Modiscore CC trading as Cash Express (NCT/116726/2018/57(1)) [2019] ZANCT 27 (19 March 2019) [2019] ZANCT 27

COURT

National Consumer Tribunal

BEFORE

J Simpson, L Best, F Manamela

CASE / FILE NUMBER

NCT/116726/2018/57(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: NCT/116726/2018/57(1)

In the matter between:

NATIONAL CREDIT REGULATOR

APPLICANT

and

MODISCORE CC trading as CASH EXPRESS

RESPONDENT

Coram:

Adv J Simpson – Presiding Tribunal member

Dr L Best –

Deputy Chairperson of the Tribunal

Adv F Manamela – Tribunal Member

Date of Hearing - 11 March 2019

Date of judgment - 19 March 2019

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”), (hereinafter referred to as “the Applicant” or “the NCR”).
2. At the hearing the NCR was represented by one of its employees, Ms Du Plooy.

RESPONDENT

3. The Respondent is Modiscore CC, trading as Cash Express, a registered credit provider with registration number NCRCP 5784 (hereinafter referred to as “Cash Express” or “the Respondent”). Cash Express has 5 separate registered branches in Middelburg, Somerset-East (2 branches), Grahamstown and Fort Beaufort. The NCR alleges that Cash Express operates one other unregistered branch in Grahamstown. All the branches operate under the single registration number of Modiscore CC trading as Cash Express with registration number NCRCP 5784.
4. At the hearing, Ms L Squirra from Robin Twaddle and Associates Attorneys appeared on behalf of Cash Express.

APPLICATION TYPE

5. This is an application for deregistration of Cash Express as a registered credit provider in terms of Section 57(1) of the National Credit Act 34 of 2005 (“the NCA”).

BACKGROUND

6. It appears from the application documents that Cash Express was registered as a credit provider on 14 June 2012[1].
7. The NCR received an anonymous tip-off regarding Cash Express. The tip-off alleged that Cash Express was retaining bank cards and overcharging interest, amongst other prohibited conduct. Inspectors were appointed by the NCR during May 2018 to investigate. On 1 June 2018 the NCR sent an inspector to each of the 6 branches of Cash Express. The inspectors were accompanied by members of the South African Police Services in some instances. Search and seizure warrants had also been obtained by the police services. The inspectors interviewed the respective managers of the branches and inspected 20 randomly selected files from each branch. Each inspector compiled a report on what they found. The contents of the reports are all supported by confirmatory affidavits by the respective inspectors.
8. The inspectors found the following contraventions of the NCA –

8.1 At three of the branches Cash Express failed to display the NCR decal. This is a contravention of General Condition 5 of its conditions of registration read with Section 52(5)(c) of the NCA.

General Condition 5[2] reads as follows –

“The registrant must display a registration certificate at any business premises at or from which the registrant conducts registered activities and must prominently display a window decal supplied by the National Credit Regulator at the entrance to each such business premises.”

Section 52(5)(c) states –

“Certificate, validity and public notice of registration.—

- (5) A registrant must
 - (a)
 - (b)
 - (c) comply with its conditions of registration and the provisions of this Act;”

8.2 Cash Express failed to file prescribed statutory reports with the NCR. This is a contravention of General Condition 3 of its conditions of registration read with Section 52(5)(f) of the NCA and Regulations 62 to 68 of the NCA.

General Condition 3 reads as follows –

“The registrant must submit the reports and returns as required in the regulations applicable to the registrant, within the specified time period.”

8.3 All six branches were found to have entered into credit agreements without taking the necessary steps to assess the consumer’s

existing financial means prospects and obligations accurately (Did not conduct proper affordability assessments). This is a contravention of Section 81(2)(a), read with Section 80(1), 81(3), Regulation 23A, Section 170 and Regulation 55(1)(b)(vi) of the NCA.

Section 81 states -

“Prevention of reckless credit.—(1) When applying for a credit agreement, and while that application is being considered by the credit provider, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section.

- (2) 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.
- (3) A credit provider must not enter into a reckless credit agreement with a prospective consumer.”

The provisions of 23A of the regulations require a credit provider to obtain payslips or bank statements when assessing a credit application. It is noted that the requirements in terms of 23A were set aside by the High Court in the matter of Truworths Limited and Others v Minister of Trade and Industry and Others (4375/2016) [2018] ZAWCHC 41; 2018 (3) SA 558 (WCC) (16 March 2018). The NCR submitted that the requirements were still applicable to the credit agreements at the time. However, a perusal of the dates on the various agreements shows that the agreements were entered into after March 2018 and were therefore not subject to the requirements in terms of regulation 23A;

8.4 All six branches were found to have entered into credit agreements despite the fact that it would make the consumers over-indebted

(Granting of credit recklessly). This is a contravention of Section 81(1)(b)(ii) read with Section 79(1) of the NCA.

Section 79 states -

“Over-indebtedness.—

- (1) A consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer’s—
 - (a) financial means, prospects and obligations; and
 - (b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer’s history of debt repayment.
- (2) When a determination is to be made whether a consumer is over-indebted or not, the person making that determination must apply the criteria set out in subsection (1) as they exist at the time the determination is being made.”

8.5 Five of the branches were found to have charged interest on the credit agreements which exceeded the maximum permitted by the NCA. This is a contravention of Section 100(1)(c) of the NCA.

Section 100(1) states -

“Prohibited charges.—

- (1) A credit provider must not charge an amount to, or impose a monetary liability on, the consumer in respect of—
 - (a) a credit fee or charge prohibited by this Act;
 - (b) an amount of a fee or charge exceeding the amount that may be charged consistent with this Act;
 - (c) an interest charge under a credit agreement exceeding the amount that may be charged consistent with this Act; ...”

8.6 In its application the NCR alleged that Cash Express had contravened the NCA by splitting loans. During the hearing the NCR stated that it was abandoning this charge against Cash Express;

8.7 Three of the branches were found to have levied charges which were not disclosed in the pre-agreement statement. This is a contravention of Section 100(1)(b) read with Section 3(e)(ii) of the NCA;

8.8 None of the credit agreements at any of the branches contained the NCRCP number of Cash Express. This is a contravention of Section 93(2) read with Regulation 30(1) of the NCA.

Section 93(2) states -

“Form of credit agreements.—

- (1)
- (2) A document that records a small credit agreement must be in the prescribed form.”

Regulation 30(1) states -

“30. Prescribed form for small agreements.—(1) A document that records a small credit agreement must contain all the information as reflected in Form 20.2.”

Form 20.2 specifically prescribes that the name of the credit provider and its NCRCP number must be reflected on the agreement.

8.9 Four of the branches were found to have retained bank cards and South African Social Security Agency (SASSA) cards as a means to enforce the credit agreements. This is a contravention of Section 133(1) and

- (2) read with Section 90(2)(l) of the NCA.

Section 133 states –

“Prohibited collection and enforcement practices.—

- (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, instrument or contract provision referred to in section 90 (2) (1).
- (3) A person who contravenes this section is guilty of an offence.

Section 90(2)(1) states –

Unlawful provisions of credit agreement.—

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

- (l) it expresses an agreement by the consumer to—
 - (i) deposit with the credit provider, or with any other person at the direction of the credit provider, an identity document, credit or debit card, bank account or automatic teller machine access card, or any similar identifying document or device; or
 - (ii) provide a personal identification code or number to be used to access an account;” and

8.10 Cash Express was found to have acted in a manner that disregards the NCA and the purposes of the NCA. This is a contravention of clauses 1, 2 and 4 of its General Conditions of Registration.

9. The NCR wants the Tribunal to order the following –

9.1 Cancel the registration of Cash express;

9.2 Impose an administrative fine;

9.3 Interdict Cash Express from future breaches of the NCA; and

9.4 Order Cash Express to appoint an independent auditor to determine all overcharged fees and to reimburse all its consumers.

DEFAULT HEARING

- 10. Cash Express did not file an answering affidavit to the application.
- 11. Rule 13(5) of the Rules[3] provide that “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.”
- 12. In the absence of the Respondent filing an answering affidavit, the Tribunal therefore deems the allegations made by the Applicant as admitted.

13. Rule 25(2)(3) of the Rules provides as follows:

“(3) 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.”
14. At the hearing held on 11 March 2019 Ms Squirra appeared on behalf of Cash Express. She requested a postponement of the matter to enable Cash Express to make a settlement offer to the NCR. In the event that the matter was not settled the Respondent would file an answering affidavit and application for condonation.
15. The NCR opposed the application for postponement. The NCR submitted that the matter was postponed previously for the exact same reason but there had been no attempt by the Respondent to contact the NCR or settle the matter.
16. Ms Squirra confirmed that no one from her firm had been able to meet with a representative of Cash Express as yet and had not taken any instructions. She stated that this was due to the owner’s location which made it difficult to arrange a meeting.
17. The Tribunal considered the submissions made by the parties and ex tempore refused the application for postponement. Reasons would follow in the main judgment, as they now do. Ms Squirra was then excused from the proceedings.
18. The Tribunal noted that the attorney for Cash Express had filed a notice of appointment on 2 October 2018. Due to the absence of any answering affidavit being filed, the matter was set down for a default hearing on 6 December 2018. The matter was removed from the roll based on apparent attempts by the parties to settle. Due to nothing further being filed on the matter, it was again set down for hearing on 11 March 2019. Ms Squirra confirmed that they have still not met with the client and have still not received any instructions. There is no indication of Cash Express taking the matter seriously and making any bona fide attempt to defend the matter or settle it. The Respondent has not provided any just cause for the matter to be postponed yet again. In the circumstances the request for a postponement is refused.
19. The Tribunal is satisfied that the Application was adequately served by personal service on the Respondent’s attorneys on 28 September 2018.
20. The Tribunal therefore proceeded with the matter on a default basis.

THE HEARING

21. At the hearing the NCR orally submitted the basic contents of the application in a summarised format. For the purposes of this judgment

it is not necessary to reflect the facts of every report and the 120 files presented in the application. Examples will be sufficient:

21.1 All the credit agreements used by the branches appear to be based on the same template. None of the agreements reflect the NCRCP number of the credit provider. The space next to the phrase “NCR Reg No:” is empty on all the agreements. The agreements were all entered into between March and April of 2018;

21.2 All the credit agreements state that the interest charged is 5% per month. For the loan agreement of FA Faku at the Somerset East branch the overcharged interest amount was 0.17 cents[4]. For the loan of M Mali at the Somerset East branch the overcharged amount was R6.73[5]. The NCR was unable to explain why Cash Express would have calculated the interest correctly in some instances and in others not. Based on the small amounts in question, it appears that Cash Express may have used the incorrect number of days in certain instances to calculate the interest amount due. Regulation 40(2)(b) requires the number of days in the specific month to be used to calculate the interest due;

In some instances the credit provider appears to have even undercharged on the amount of interest payable[6]. All the reports however consistently record a clear trend of Cash Express charging incorrect amounts in interest. It must be noted however that the actual rand value of the amounts in question are relatively small. They rarely exceed more than a few Rand;

21.3 All the amounts charged for initiation and service fees appear to be in accordance with the NCA;

21.4 At the Fort Beaufort branch the inspectors found 203 SASSA and bank cards belonging to consumers on the credit agreements. They further found 12 identity documents. At the Somerset East branch, 325 SASSA and bank cards were found. At the other Fort Beaufort branch 84 SASSA and bank cards were found. It appears no cards were found at the three other branches. The inspectors were able to link the SASSA cards to existing credit agreements. One example of this is the credit agreement of S Xolelwa at the Fort Beaufort branch;[7] and

21.5 The reports provide varying instances of affordability assessments that were not properly conducted. In the credit agreement of Mjuza at the Somerset East branch[8]; the consumer’s net salary after deductions is reflected as R780. However, the total income is reflected as R4580. It is this amount that is then incorrectly used as the income of the consumer. There were no payslips, credit bureaux checks or bank statements on the file. This type of artificially inflated income appears to be used throughout loan agreements at this branch. The information relating to the expenses of the consumers are also very scant. Most consumers are reflected as only having one or two expenses at most. This causes the amount available to service the loan to be artificially inflated. There is no evidence of the minimum expense amount being used at any stage. There is clear evidence in this regard that Cash Express did very superficial affordability assessments on consumers. Especially when SASSA or bank cards were retained.

22. The evidence presented by the NCR in this matter stands uncontested. The Tribunal therefore accepts the evidence as proven on a balance of probabilities.

23. The Tribunal therefore finds that Cash Express engaged in repeated prohibited conduct on all the counts as set out in paragraph 8 above.

SANCTIONS

24. As Cash Express has been found to have engaged in repeated prohibited conduct, it follows that the appropriate sanctions must be considered.

Deregistration

25. The NCR has requested that Cash Express be deregistered as a credit provider. Considering the extreme nature of the prohibited conduct

across all the branches of the Respondent this appears to be an appropriate and suitable sanction. A strong message needs to be

conveyed that the retaining of SASSA cards will not be condoned or tolerated.

Interdict

26. It further follows that Cash Express must be interdicted from continuing its operations as a credit provider.

Administrative fine

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

28. The following factors are considered when imposing a fine –

28.1 The nature, duration, gravity and extent of the contravention

Reckless lending is a serious contravention of the NCA. By not doing proper affordability assessments the Respondent has placed consumers at severe risk of over-indebtedness;

The retaining of SASSA and bank cards is also a very serious contravention that merits a severe punishment;

28.2 Loss or damage suffered as a result of the contravention

There is no direct evidence of the extent of the loss or damage suffered by consumers. There would however be no doubt that the retaining of the consumer's SASSA cards would have a profound effect on the consumer's finances;

28.3 The behaviour of the respondent

The Respondent cooperated with the NCR during the actual investigations. However, after the matter was filed with the Tribunal the Respondent did not respond or engage with the process in any way. The NCR submitted that the branches are still continuing to operate as before;

28.4 The market circumstances in which the contravention took place

Consumers remain under severe financial pressure. The fact that so many consumers were forced to submit their SASSA cards is an indication of the level of desperation that exists;

28.5 The level of profit derived from the contravention

No specific evidence was submitted in this regard. It must however be noted that the NCR submitted a Form 40 NCR Annual Financial Statement Return for the 2016/17 financial year[9]. This form was submitted to the NCR by Cash Express as part of its required submissions as a registered credit provider. The form states that its total revenue from NCA credit extension was R9 988 859.64. After expenses and tax the nett income was R3 170 182.33.

This is a clear indication that the Respondent enjoys a very substantial income from its activities as a credit provider;

28.6 The degree to which the respondent has co-operated with the National Credit Regulator

The factors being considered in this regard are similar to those in paragraph 25.3 above; and

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

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

29. Taking all the above factors into account. The Tribunal finds that an administrative fine of R800 000.00 (eight hundred thousand Rand) is appropriate under the circumstances.

Independent audit

30. The NCR requested that the Tribunal order an independent audit of all the credit agreements to determine instances of overcharging of interest and reckless lending. In the Tribunal's view the determination of reckless lending is a judicial one that cannot be exercised by an auditor. The Tribunal will therefore not make an order in respect of an audit of reckless lending.
31. A finding has however been made that Cash Express did not calculate interest correctly in all instances and consumers are entitled to a refund in this regard.

ORDER

32. Accordingly, the Tribunal makes the following order:

32.1 The Respondent's registration as a credit provider is hereby cancelled as of the date of issuing of this judgment;

32.2 The Respondent is interdicted from entering into any further credit transactions with consumers or operating as a credit provider;

32.3 The Respondent is to pay an amount of R800 000.00 (eight hundred thousand) to the National Revenue Fund within 60 business days of the date of issuing of this judgment;

32.4 The Respondent is to appoint a registered independent auditor at its own costs within a period of 30 business days of the date of issuing of this judgment. The auditor is to assess all credit agreements entered into within the last three years from the date of issuing of the judgment. The auditor must assess whether the interest on any of the credit agreements was incorrectly calculated as per the NCA. All relevant consumers must be reimbursed. The audit is to be completed within a period of 90 business days after the auditor has been appointed. The auditor must provide a final report in this regard to the NCR within 30 business days after the audit has been completed; and

32.5 There is no order as to costs.

DATED ON THIS 15th DAY OF MARCH 2019

[signed]

Adv J Simpson

Presiding Tribunal member

Dr L Best (Tribunal member) and Adv F Manamela (Tribunal member) concurring.

- [1] General Conditions of Registration document. Annexure FA2 Page 48
- [2] Annexure FA2 on page 48 of the application
- [3] 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).
- [4] Annexure FA4. Page 59 of the application
- [5] Annexure FA4. Page 64 of the application
- [6] Table marked as Annexure A1. Page 165 of the application
- [7] Annexure FA8. Page 289 of the application
- [8] Annexure C1. Page 94 of the application
- [9] Annexure B. Page 940 of the application

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