

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Nthatiso (NCT/38746/2016/140(1)) [2016] ZANCT 46 (7 December 2016) [2016] ZANCT 46

COURT

National Consumer Tribunal

BEFORE

J. Simpson, N. Sephoti, P. Beck

CASE / FILE NUMBER

NCT/38746/2016/140(1)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

AT CENTURION

Case

No: NCT/38746/2016/140(1)

In

the matter between:

NATIONAL
CREDIT
REGULATOR
Applicant
and
BONGANI
NTHATISO
Respondent

CORAM: ADV.
J. SIMPSON (PRESIDING)
ADV.
N. SEPHOTI (MEMBER)
MS
P.BECK (MEMBER)
Date
of hearing - 1 June 2016

JUDGMENT

AND REASONS

1. The Parties

1.1. The Applicant in this matter is the National Credit Regulator ("the NCR"); an organ of state within the public administration established in terms of Section 12 of the National Credit Act 34 of 2005 (the NCA). The NCR has its address at 127 Fifteenth Road, Randjespark, Midrand, ("the Applicant").

1.2. The Founding Affidavit of the Applicant is deposed to by Ms. Jacqueline Boucher, Acting Manager of Investigation and Enforcement Unit of the Applicant who claims in the Affidavit to be duly authorised to act on behalf of the Applicant.

1.3. At the hearing, the Applicant was represented by Ms. Mmabatho Senyarelo accompanied by Ms Caroline Young, both of whom are in the employment of the Applicant.

1.4. The Respondent is Bongani Nthatiso, allegedly an adult male residing at House [.....], B., in the Eastern Cape Province of South Africa.

1.5. The Respondent is also alleged to be operating as an illegal credit provider and it is not known how long he has been in the business.

1.6. There was no answering affidavit from the Respondent on file nor did the Respondent make any attempt to attend the hearing held on 1 June 2016.

2. Jurisdiction

2.1. This National Consumer Tribunal (Tribunal) has jurisdiction to hear this matter in terms of section 140(1) of the NCA. Section 140(1) of the NCA provides that:

"After completing an investigation into a complaint, the National Credit Regulator may-(c) ... make an application to the tribunal if the complaint concerns a matter that the Tribunal may consider on application in terms of any provisions of this Act; or ...

3. Issues to be Decided

3.1. The issues to be decided in this matter included whether the Respondent's conduct should be declared prohibited in line with the various contraventions of the NCA that he is alleged to have committed, as prayed for by the Applicant. In deciding this question, this Tribunal had to first decide the individual underpinning claims by the Applicant on:

- (a) Whether the Respondent contravened section 81(2);
- (b) Whether the Respondent contravened section 81(3) read with section 80
 - (1) (a) of the NCA;
- (c) Whether the Respondent contravened section 92 (1) of the NCA;
- (d) Whether the Respondent contravened section 92 read with Regulation 28 of the NCA;
- (e) Whether the Respondent contravened Regulation 55 (1) (b) of the NCA;
- (f) Whether the Respondent contravened section 91 (b) (i) read with section 133 of the NCA;

3.2. In the event that the Tribunal finds that the Respondent did indeed contravene the above sections of the Act, the Applicant further prayed that the Tribunal should therefore:

- (a) Declare that the conduct of the Respondent is prohibited;
- (b) Impose an administrative fine against the Respondent as contemplated in section 151 of the Act; and
- (c) Issue any other appropriate order required to give effect to a right as contemplated in the Act.

4.

Background

4.1. It was the evidence of the Applicant, through its founding affidavit, that it had based its main case on an investigation conducted on its behalf, in terms of section 25 of the Act, by one Tshepo Mahobye. The investigation report is dated 8 December 2014. It is unknown when the actual investigation was done.

4.2. The investigation revealed that the Respondent, an unregistered credit provider, conducted its business in a manner which contravened certain sections and regulations of the NCA in that he:

- a. Failed to conduct affordability assessments prior to granting consumers loans, thus contravening section 81(2);
- b. Having failed to conduct proper affordability assessments, therefore engaged in reckless credit granting thus contravening section 81(3) read with section 80(1)(a);

- c. Failed to provide consumers with pre agreement statements and quotations prior to the conclusion of the credit agreement thus contravening section 92(1);
- d. Failed to keep proper records as required by Section 55(10(b)
- e. Required of consumers to give temporary or permanent possession of instruments such as bank cards and identity books thereby contravening section 91(b) ;
- f. Further uses the bank cards or identity books to collect from or when enforcing a credit agreement thus contravening Section 133 read with section 90(2) (I) of the NCA[1].

5. Default Application

5.1. Although there was no formal application for a default judgment filed by the Applicant to have the matter concluded in the absence of the Respondent. The NCT Registrar set the matter down for a hearing in default as the Respondent had not filed any papers with the Tribunal opposing this matter.

5.2. In accordance with Rule 25(3) of the Rules[2] this Tribunal has satisfied itself that the Respondent has been served, with the application and notice of set down. Proof of service was found on file.

6. Evidence submitted by the Applicant

6.1 The applicant presented evidence through Mr, Tshepo Mahobye, detailing the contraventions that the Respondent is alleged to have committed as was set out in the investigation report and based on his

oral testimony presented at the hearing.

6.2 The Respondent is alleged to have been operating unlawfully as a credit provider, a so called "matshonisa" or from the house in which he was found;

6.3 When the inspectors walked into the house, he introduced himself as Bongani Nthatiso and confirmed that he was not registered as a credit provider as he should be;

6.4 The Applicant alleged that the Respondent allowed them to search the house and they found 17 identity documents, one bank card and 28 SASSA cards in a drawer in the living room; Copies of some of the cards and identity documents were made and attached to the Applicants pleadings.

6.5 The Applicant, took the Respondent at his word that he was Bongani Nthatiso and no further documentation was sought to confirm his identity;

6.6 No form of credit agreement or any other form of documentation was found on the premises. The investigator relied on the Respondent's verbal statement at the time that he gave loans to consumers on an

informal basis.

7 Assessment of the evidence

7.1 The only evidence before the Tribunal that the Respondent was engaged in the business of a credit provider is the verbal statements made by the Respondent to the investigator at the time that the investigator

entered the premises.

7.2 There are no copies of purported loan books any other form of evidence to show that the Respondent was a credit provider.

7.3 The investigator is therefore a single witness in this regard. He can only testify as to what he was told by the Respondent. There is no other form of evidence corroborating the fact that the Respondent was a credit provider.

Although the Tribunal is not strictly bound by formal rules of evidence[3] it cannot reasonably be said that the utterances made by the Respondent constitute conclusive proof on a balance of probabilities that he contravened the sections in question.

7.4 The fact that SASSA cards and Identity Documents were found at the premises of the Respondent also does not provide conclusive proof that the Respondent was a credit provider or that these documents were used to enforce credit agreements. Sec 91(b)(1) of the Act specifically prohibits a credit provider from requesting or demanding

instruments from consumers other than for the purpose of making copies for the purposes of identification. Sec 133(1) of the Act

specifically prohibits a credit provider from make use of any document, number or instrument referred to in section 90(2)(1) when

collecting on or enforcing a credit agreement.

7.5 The NGA did not provide any evidence that any of the cards or documents were required from consumers and used when collecting or enforcing the credit agreement. The Applicant was further unable to provide any evidence that the owners of the cards found had borrowed money from the Respondent at any stage.

8. ORDER

8.1. The application by the NCR is hereby dismissed.

8.2. No further relief is ordered.

8.3. No order as to costs

Thus done and handed down on this 29th day of November 2016

ADV N. SEPHOTI

MEMBER

CONCURRING-

ADV. J. SIMPSON (PRESIDING MEMBER) MS P. BECKER (MEMBER)

Date 2016/12/07

National Consumer Tribunal

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- [1] These instruments consisted of bank cards and identity documents of customers. This led to the Applicant opening a criminal case against the Respondent.
- [2] 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)
- [3] Rule 21(2) The Tribunal will be the judge of the admissibility of any evidence adduced and of its probative value.

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