

SOUTH AFRICA / JUDGMENT

# National Credit Regulator v Option Deals (Pty) Ltd (NCT/128364/2019/140(1)) [2019] ZANCT 151 (15 September 2019) [2019] ZANCT 151

## COURT

National Consumer Tribunal

## BEFORE

B Dumisa, P Beck, H Devraj

## CASE / FILE NUMBER

NCT/128364/2019/140(1)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

number: NCT/128364/2019/140(1)

In

the matter between:

NATIONAL  
CREDIT  
REGULATOR APPLICANT  
and  
OPTION  
DEALS (PTY)  
LTD RESPONDENT

Coram:

Prof  
B Dumisa –  
Presiding Tribunal  
member  
Ms  
P Beck  
–  
Tribunal  
member  
Ms  
H Devraj  
–  
Tribunal

Member  
Date  
of Hearing -  
22 August 2019  
Date  
of judgment -  
15 September 2019

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## 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”), with physical address at 127 15th Road, Randjiespark, Midrand, in the Gauteng Province.
2. At the hearing, the NCR was represented by its employees, Roy Stocker, a Senior Legal Advisor, assisted by Ms Ravashnie Venugopal, a Legal Advisor.

#### RESPONDENT

3. The Respondent is OPTION DEALS (PTY) LTD, a registered juristic person with registration number 2016/400571/07 (hereinafter referred to as “the Respondent”), with its registered address at 1st Floor, Building 4, Quandrum Office Park, 50 Constantia Boulevard, Constantiakloof, Johannesburg, in the Gauteng Province. The Respondent is not a registered credit provider.
4. The Respondent was represented at the hearing by Advocate BC Stoop SC, briefed by V de Klerk of DKM Attorneys.

#### APPLICATION TYPE

5. This is an application in terms of Section 140(1)( c) of the National Credit Act 34 of 2005 (“the NCA”). The Applicant contends that the series of transactions entered into with consumers and which form the basis of the Respondent’s business model; are in fact credit agreements in the form of secured loans.
6. The Applicant’s submission is that the transactions entered into were, in fact, simulated transactions; that were in essence credit agreements. It argued that substance rather than form determines the nature of the transaction (plus valet quod agitur quam quod simulate concipitur).

## BACKGROUND

### The Applicant's Submissions

7. This case was triggered by a complaint by a consumer, Wendy Pamela Catarino. She complained to the Applicant about her motor vehicle that was repossessed by the Respondent without following any legal procedures:
  - 7.1 The complainant alleged that, on or about June 2017, she approached the Respondent for financial assistance;
  - 7.2 She entered into a loan transaction with the Respondent in the amount of R15000 (fifteen thousand rands) repayable over three months, using her motor vehicle which she alleged had a market value of R85000 (eighty-five thousand rands) as security; and
  - 7.3 She alleges that the Respondent repossessed her car, without following any legal procedures, due to late payment.
8. On 23 July 2018, the Applicant appointed Dipuo Mokobane and Godfrey Tladi, in terms of Section 25 of the Act; as inspectors for the purpose of carrying out the investigation into the Respondent. The scope of the investigation was to ascertain:
  - 8.1 the nature of the agreements entered into between the Respondent and the consumers;
  - 8.2 Whether the credit provider conducts proper affordability assessments as prescribed by the Act (on this one, the inspectors were to still to investigate it despite the Respondent's assertions that it is not a credit provider in terms of the Act;
  - 8.3 Whether they were extending credit recklessly; and
  - 8.4 How they were collecting money owed by the consumer under the credit agreement.
9. During or after the course of the investigation, on 30 August 2018, the Applicant received a further complaint from another consumer, Mr Samuel Chukwumenzie.
10. The outcome of the investigation forms the legal basis for this application in terms of Section 140(1), whereby the Applicant wants the National Consumer Tribunal ("the Tribunal") to adjudicate; make appropriate findings; and impose appropriate sanctions against the Respondent on grounds that the latter engaged in prohibited conduct in terms of the Act; The Applicant avers that:
  - 10.1 the Respondent's "Sale Agreement of Movable Assets" and the "Agreement for Lease of An Asset" contracts with the consumers are simply sham (simulated) transactions to hide the true credit agreement nature of such contracts; in that:
    - 10.1.1 The consumer purportedly sells his / her car to the Respondent;
    - 10.1.2 Through this sale agreement, provision is made for the motor vehicle to remain in possession of the consumer; subject to the Respondent's lease agreement;

10.1.3 Where the consumer does not remain in possession of the car; they have to pay a daily storage fee of R100.00 (One Hundred Rand);

10.1.4 The owner of this car is thus afforded a cooling-off period of 90 days within which they may cancel the sale; by refunding the Respondent the purchase price and any other outstanding fees;

10.2 The Applicant's submissions are that the Respondent was ripping the consumers off by buying their cars at unreasonably low prices, always far below their market value, under the pretext that the cars were just being used as a security for a debt, whilst at the same framing their transactions as if they were genuine sale agreements; and

10.3 Consumers, as in the case of the two complainants, lost their cars without the necessary legal processes when they missed a payment on one instalment.

11. The Applicant's submission was that the transactions in question are, in fact, simulated. The actual intention of the Respondent was to circumvent the maximum interest rates prescribed by the NCA. By simulating a lease contract, it was able to charge interest which far exceeds the maximum rates. The Applicant explained how the Respondent's model tries to circumvent the Act by stating that:

11.1 The "purchase price" the Respondent claims to pay car owners is, in reality, the loan funding advanced by the Respondent to consumers;

11.2 The "lease payment amount" is not truly a rental payment, but in reality, constitutes the interest accruing on the loan amount advanced. The Applicant wrote thus on this "The consumer essentially rents and uses his or her own motor vehicle for which he pays a daily lease fee, which when calculated as a monthly fee, amounts to exactly 30% of the purchase amount set out in the Sale Agreement. Taken at face value, the agreements simply do not make sense, from a business rationale perspective. Why would a consumer willingly sell his or her vehicle, which vehicle that consumer already owns outright, for a purchase price far below the market value of the vehicle, only to "rent" the vehicle back from the Respondent, at a huge rental amount";

11.3 Alternatively, where a consumer elects not to remain in possession of the vehicle, the "storage costs" are not what they purport to be, but instead constitute the interest accruing on the loan amount advanced; and

11.4 The vehicle serves as security for the consumer's indebtedness to the Respondent.

12. The Applicant's submission was that the transactions in question were in fact, secured credit transactions. The Respondent was therefore required to conduct an affordability assessment and comply with all the requirements of the NCA when entering into the agreement. The Respondent may not charge more than the prescribed maximum interest rate applicable to secured loans.

13. The Applicant argued that the Tribunal must apply the “plus valet quod agitur quam quod simulate concipitur” principle, meaning, substance rather than form determines the nature of the transaction, in understanding how the Respondent used simulated credit agreements in trying to evade the regulatory effects of the Act.
14. The Applicant is asking for a finding that the Respondent contravened the following sections of the NCA and Regulations–
  - 14.1 Sections 40(1), 40(3) and 89(2)(d), on the grounds that the Respondent was operating as a credit provider, whilst not registered with the Applicant as a credit provider;
  - 14.2 Section 81(2)a(ii) and (iii), on the grounds that the Respondent did not take reasonable steps to assess the consumer’s creditworthiness;
  - 14.3 Section 81(3) read with Section 80(1)(a), on the grounds that the Respondent engaged in reckless lending;
  - 14.4 Section 92(2) of the Act and Regulation 29, on the grounds that Respondent did not adhere to the formal pre-agreement disclosure procedures required by the Act before granting credit to the consumers;
  - 14.5 Section 93(3) of the Act and Regulation 31, on the grounds that the Respondent did not keep proper records in the prescribed form;
  - 14.6 Section 101(1)(d) read together with Regulation 42(1), on the grounds that the Respondent charged excessive interest rates, not in line with the maximum prescribed interest rates as per Regulation 42(1);
  - 14.7 Section 101(1) on the grounds that the Respondent charged fees other than those allowed for under the Act; and
  - 14.8 Section 123, 129, 130, 131 and 127, on grounds that the Respondent engaged in prohibited conduct in the manner in which they terminated agreements with consumers; on how they repossessed cars from the consumers; not following the proper procedures before repossessing cars from the consumers; and not following the proper Court procedures in its debt enforcement procedures.

#### Sanctions Prayed For By the Applicant

15. The Applicant is asking the Tribunal to make the following orders:
  - 15.1 That the conduct of the Respondent be declared prohibited conduct in terms of Section 150(a) of the Act;
  - 15.2 Interdicting the Respondent from entering into any credit agreement whilst it remains unregistered as a credit provider; and

15.3 Interdicting the Respondent from further contraventions, including acting in any way that shows disregard for consumer rights generally;

15.4 Ordering the Respondent to, within thirty (30) days of this issuing of this judgment, appoint an independent auditor, at its own cost, whose appointment shall be subject to the prior written approval of the Applicant, to identify and establish:

15.4.1 All credit agreements which the Respondent entered into in the past three (3) years;

15.4.2 The names and contact details of all consumers who entered into all such credit agreements;

15.4.3 The loan amounts advanced under all such credit agreements, and the total amounts paid by each consumer to the Respondent under all such credit agreements;

15.5 The vehicles which the Respondent has taken transfer of as title holder and / or an owner under all such credit agreements; and

15.6 The vehicles which the Respondent has repossessed under all such credit agreements, the vehicles which the Respondent is still in possession of and which the Respondent has disposed of as well as the value received following such disposals.

16. Once the Auditor's Report has been compiled, the Respondent will, at its own cost and within 30 days of receipt of the Auditor's Report:

16.1 Return all repossessed vehicles to consumers;

16.2 Where the Respondent has already disposed of such vehicles, the Respondent must pay each consumer the difference between the gross proceeds from the sale of the vehicle and the loan amount advanced by the Respondent (less any amounts paid to the Respondent by the consumer);

16.3 Refund all consumers all amounts paid by the consumers to the Respondent over and above the loan amounts advanced by the Respondent to such consumers;

16.4 Transfer the registration as title holder and / or owner of all vehicles back into the names of consumers; and

16.5 Once the Respondent has fully complied with Para 16 above, the Respondent is to provide the Auditor's Report, together with a written report to the Applicant, detailing the identity of the consumers, the refunds made, the vehicles returned, and registrations transferred back to consumers. These reports are to be provided to the Applicant within 120 (one hundred and twenty) days after the Tribunal order has been obtained;

16.6 The imposition of an administrative fine against the Respondent in the amount of 10% of the Respondent's annual turnover, or R1 000 000 (one million Rand), whichever is greater; and

16.7 Any other appropriate order.

## THE RESPONDENT'S SUBMISSIONS

17. The Respondent's position is that it does operate as a credit provider, as defined under the Act.
18. The Respondent submits that their business model is based on the purchasing of second-hand vehicles from vehicle owners at the best possible prices followed by the later resale of such vehicles for a profit.
19. The Respondent confirmed the full details of their business model, as already submitted by the Applicant, albeit with a different twist, stating that:

19.1 Their business of buying and selling cars is operated on a strictly cash basis;

19.2 They claim "This model has the advantage of saving the owner of the vehicle the burden of having to go through the entire tedious process of trying to find a buyer and remove the risk that comes with trying to sell his or her vehicle privately";

19.3 The prospective seller is afforded an optional cooling-off period of 90 days in which he / she may cancel the sale agreement against repayment of the purchase price;

19.4 The seller may remain in possession of the vehicle for the duration of the cooling-off period subject to the conclusion of a lease agreement;

19.5 The seller has an option not to take up the cooling-off option, and just get the purchase price; and

19.6 For those consumers who choose to take up the cooling-off option, the consumer may choose to either lease back that same vehicle from the Respondent at an agreed lease amount or may opt to have the car stored at a flat rate of R100,00 per day irrespective of the value of the vehicle.

20. On the specific complaints lodged by the consumers against the Respondent:

20.1 The Respondent denied that Ms Catarino's motor vehicle had a market value of R85 000;

20.2 The Respondent's submission was that they made no representations to the consumers outside what appears in their standard Sale Agreement.

### The Respondent's Reliance on Case Law

21. The Respondent's main defence is based on the very same legal principle of "plus valet agitur quam quod simulate concipitur", meaning substance rather than form determines the nature of the transaction, that the Applicant also relied on. Legal Counsel for the Respondent approached this from different angles:

21.1 The Roshcon (Pty) Ltd v Anchor Auto Body Builders cc and Others (2014 ZASCA40) case formed the major basis for their defence;

21.2 He said the Tribunal must focus on the facts of the case and not to particular legislation;

21.3 In the Roshcon case, Roshcon bought and paid in full for five custom converted trucks from Toit's Commercial (Pty) Ltd, an authorized dealer in vehicles. They did not, however, take the trucks away immediately because of some delays in the custom conversion of some of them.

21.4 Toit's Commercial (Pty) Ltd bought the original trucks from Nissan Diesel through finance arrangements with Wesbank a Division of FirstRand Bank Limited.

21.5 Wesbank had two separate though interlinked finance agreements on this. They had a supplier agreement with Nissan Diesel, the manufacturer of the trucks. They also had a floor plan agreement with Toit's Commercial (Pty) Ltd. In both agreements ownership in and to the vehicles was reserved for Wesbank until such time that the dealer had paid for the vehicles.

21.6 Unknown to Roshcon, Toit's Commercial had not yet paid Wesbank for the trucks, despite having been paid in full by Roshcon. The latter only became aware of this when they were made aware that Toit's had gone bankrupt, and was being liquidated.

21.7 When Roshcon wanted to take delivery of the five trucks, they were told Wesbank had issued instructions that the five trucks not be released to Roshcon, on the grounds that the trucks belonged to Wesbank.

21.8 Roshcon took the matter to the North Gauteng High Court, claiming to be the true owner of the five trucks. They argued that the supplier and floor plan agreements signed by Wesbank were a disguise or a simulation. It contended that the transaction between

Wesbank and Toit's was a loan against the security of the trucks, without Wesbank having to take possession of the trucks.

21.9 Roshcon contended that Wesbank was securing an advantage which otherwise the law would not allow.

21.10 Roshcon lost the matter at the North Gauteng High Court and appealed it at the Supreme Court of Appeal.

21.11 The SCA, however, dismissed the appeal with costs, ruling "there were good and sound reasons for Nissan Diesel, Wesbank and Toit's to structure their transactions in the way they did. That it looked at the facts of the case and not to particular legislations to find the intention of the parties, it further said that a transaction devised for commercial purposes, if parties honestly intend to have effect according to its tenor, is perfectly legitimate and cannot be said to be a simulation".

21.12 On Para 26 of the SCA judgement on this matter, the Judges of Appeal cited the classic *Dadoo and Others v Krugersdorp Municipal Council*, where Innes CJ said "Parties may genuinely arrange their transactions so as to remain outside a statute's provisions. Such a provision is, in the nature of things, perfectly legitimate".

21.13 The Respondent was thus indirectly conceding that they deliberately chose to use their business model specifically to fall outside the provisions of the Act.

#### CONSIDERATION OF THE EVIDENCE

22. The Applicant alleges that the Respondent is engaged in credit sales provision, whilst the Respondent contends that their business model falls outside the Act.
23. The question that arises is whether the transactions in question are sale agreement transactions or secured credit transactions. If the transactions are, in fact, secured credit transactions, then the fees charged by the Respondent are in excess of the prescribed fees and constitute prohibited conduct. The Respondent will further have failed to do affordability assessments as required by the NCA.
24. The Respondent's defence is that they were perfectly entitled to come up with a business model that kept them outside the provisions of the Act. They cited the Roshcon and the Dadoo case in emphasising their points.
25. The Tribunal will first briefly deal with the points raised by each.

#### Are These Sale Agreements Or Secured Credit Agreements

26. The Respondent's over-reliance on case law, where the Courts seemed to rule in favour of the notion that it is perfectly normal to contract out of legislation, seems to be slightly misplaced. The Respondent did not go further to look at a closely related case of Zandberg v Van Zyl and Dadoo, where Innes CJ looked at the other side of the *plus valet agitur quam simulate concipitur* principle, when he said the real intention of the transaction carries more weight than a fraudulent pretence, hence whether a particular transaction is a simulated transaction, is, therefore, a question of genuineness:

26.1 The factors in the Respondent's case are distinguishable from those on the Roshcon case;

26.2 In the Roshcon case, all the three parties who signed the two contracts which favoured Wesbank seemed to be genuinely of one mind that their two contracts were commercially sound.

26.3 In this present case, the consumers do not seem to have been *ad idem* on the matter of signing a sale and lease agreement:

26.3.1 The consumers claim to have understood the transactions they were signing as secured credit agreements;

26.3.2 Whereas the Respondent conveniently took a position that these were sale agreements and lease agreements;

26.3.3 The element of genuineness addressed by Innes CJ in the Zandberg v Van Zyl and Dadoo case was thus conspicuously missing here.

26.3.4 The Tribunal can thus not accept the Respondent's position that they were acting entirely within their rights in trying to contract out of the Act through these simulated credit agreements.

27. A secured loan is defined in Part 1 of the NCA as “....an agreement, irrespective of its form but not including an instalment agreement, in terms of which a person—

(a) advances money or grants credit to another, and

(b) retains, or receives a pledge to any movable property or other things of value as security for all amounts due under that agreement;

28. The agreements entered into by the Respondent reflect all the requirements of a secured loan, despite the face value appearances of the purported lease agreements:

28.1 The consumer used his or her car as security for a loan (disguised as a purchase price);

28.2 The consumer got a loan (disguised as a purchase price);

28.3 The consumer had to pay back this loan over a set period of time.

29. Based on these clear elements of the transaction between the parties, the transactions were, in fact, secured loans. All the provisions in the NCA relating to secured loans are therefore applicable to the credit transactions entered into by the Respondent.

30. The NCA prescribes that the credit provider must conduct an affordability assessment when receiving an application for a secured loan. The credit provider must further comply with the maximum fees and charges as set out in Section 101 of the NCA.

31. The Respondent did not conduct any affordability assessments in accordance with section 81 of the NCA. It further imposed charges and fees not provided for by the NCA and well in excess of the interest rates prescribed by Regulation 42 read with Section 101 of the NCA.

#### TRIBUNAL ORDER

32. Accordingly, the Tribunal makes the following order:

32.1 The Respondent is declared to have engaged in prohibited conduct in terms of Section 150(a) of the Act;

32.2 The Respondent is declared to have unlawfully operated as a credit provider, in repeated contraventions of Sections 40(1), 40(3) and 89(2)(d);

32.3 The Respondent is interdicted from entering into any further credit transactions with consumers whilst it remains unregistered as a credit provider;

32.4 All the credit agreements entered into between consumers, and the Respondent are declared reckless;

32.5 The Tribunal further orders that the Respondent appoint an independent auditor at its own cost, whose appointment shall be subject to the prior written approval of the Applicant, to identify and establish:

32.5.1 All credit agreements which the Respondent entered into in the past 3 (three) years;

32.5.2 The names and contact details of all consumers who entered into all such credit agreements;

32.5.3 The loan amounts advanced under all such credit agreements, the total amounts paid by each consumer to the Respondent under all such credit agreements (and thereby calculate the total amount paid by each consumer over and above the loan amount advanced to all consumers);

32.5.4 The vehicles which the Respondent has taken transfer of as title holder and / or an owner under all such credit agreements;

32.5.5 The vehicles which the Respondent has repossessed under all such credit agreements and, of such vehicles, the vehicles which the Respondent is still in possession of and which the Respondent has disposed of as well as the value received following such disposals;

32.6 Once the Auditor's Report has been compiled, the Respondent will, at its own cost and within 30 days of receipt of the Auditor's Report:

32.6.1 Return all the repossessed vehicles to consumers or, where the Respondent has already disposed of such vehicles; the Respondent must pay each consumer the difference between the gross proceeds from the sale of the vehicle and the loan amount advanced by the Respondent (less any amounts paid to the Respondent by the consumer);

32.6.2 Refund all consumers all amounts paid by consumers to the Respondent over and above the loan amounts advanced by the Respondent to such consumers;

32.6.3 Transfer the registration as title holder and / or owner of all vehicles back into the names of consumers;

32.7 Once Para 35.6 above has been complied with, the Respondent is to provide the Auditor's Report, together with a written report to the Applicant, detailing the identity of the consumers, the refunds made, the vehicles returned, and registrations transferred back to consumers. These reports are to be provided to the Applicant within 120 one hundred and twenty days after the Tribunal order has been obtained.

32.8 The Respondent must, within one hundred and eighty (180) days after the Tribunal order has been obtained, pay an administrative fine of R1 000 000 (one million Rand) to the bank account of the National Revenue Fund: Banking Details are as follows:

Bank Name: The Standard Bank of South Africa

Account Holder: Department of Trade and Industry

Branch Name: Sunnyside

Branch Code: 05100

Account Number: 370 650 026

Reference: NCT/128364/2019/140(1) and Name of Person or Business making payment

32.9 There is no order as to costs.

DATED ON THIS 15th DAY OF September 2019

[signed]

Prof BC Dumisa

Presiding Tribunal member

Ms P Beck (Tribunal member) and Ms H Devraj (Tribunal member) concurring.

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