

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Orange Cash Loans (Pty) Ltd (NCT/134241/2019/57(1)) [2019] ZANCT 166 (7 November 2019)

[2019] ZANCT 166**COURT**

National Consumer Tribunal

BEFORE

B Dumisa, T Woker, L Best

CASE / FILE NUMBER

NCT/134241/2019/57(1)

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Source record**IN****THE NATIONAL CONSUMER TRIBUNAL****HELD****IN CENTURION****Case****Number:** NCT/134241/2019/57(1)**In****the matter between:**

THE
NATIONAL CREDIT REGULATOR
APPLICANT
and
ORANGE
CASH LOANS (PTY)
LTD RESPONDENT

Coram:

Prof
B Dumisa – Presiding member
Prof
T Worker – Member
Dr.
L Best – Member
Date
of Hearing – 17 September 2019
Date
of Judgment - 07 November 2019

JUDGEMENT**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” or the “Act”)

(hereinafter referred to as “the Applicant”), with offices at 127 Fifteenth Road, Randjiespark, Midrand, in the Gauteng

Province.

2. At the hearing, the Applicant was represented by Mr. Roy Stucker, a senior legal representative employee of the Applicant, and Ms. Mbali Buthelezi, a legal representative employee of the Applicant.
3. The Applicant’s Founding Affidavit is deposed to by Ms. AnneCarien Du Plooy, Acting Manageress for Investigations and Enforcement in the employ of the Applicant.

RESPONDENT

4. The Respondent (and the Registrant) is ORANGE CASH LOANS (PTY) LTD, a private company duly registered as such with Company Registration Number 2005/025246/07, and also registered with the Applicant as a credit Provider under registration number NCRCP1905, with offices at Office 2U, Shoprite Building, Church Street, Rustenburg, in the North West Province (hereinafter referred to as “the Respondent”).
5. There was no Answering Affidavit from the Respondent.
6. At the hearing, the Respondent did not appear in person and was not represented. The Applicant provided proof to show the

respondent had been properly served with all the necessary documents pertaining to the set-down for 17 September 2019.

APPLICATION TYPE AND ORDER SOUGHT

7. This Tribunal derives the jurisdiction from hearing this matter under Section 57(1) of the National Credit Act, 34 of 2005 (the NCA). This is an application in terms of Section 57(1) of the NCA for the cancellation of the Respondent’s registration as a credit provider allegedly due to the Respondent’s repeated failure to comply with its conditions of registration and/or repeated contraventions of the Act.
8. The Applicant sought an order for the Respondent to refund the affected consumers.

9. The Applicant also sought an imposition of an administrative fine on the Respondent.

MATTERS TO BE DECIDED

10. The Tribunal has to decide whether:
- 10.1 The Respondent did breach the provisions of the Act as alleged; and
- 10.2 The appropriate sanction.

BACKGROUND

11. The Respondent was registered by the Applicant as a credit provider with registration number NCRCP 1905, with effect from 03 December 2017, subject to General and Specific Conditions.
12. The complaint emanates from a tip-off from an anonymous source pertaining to the alleged Respondent's business practices, conduct and alleged contraventions of the Act, especially with regards to:
- 12.1 The Respondent's alleged failure to conduct proper affordability assessments;
- 12.2 Extension of reckless credit; and
- 12.3 Unlawful deductions from consumers' accounts.

SUBMISSIONS

BY THE APPLICANT

13. On the 5th of February 2019, the Applicant initiated a complaint in terms of Section 136(2) of the Act and authorized an investigation into the Respondent's business activities in terms of Section 139(1) (c).
14. The Chief Executive Officer of the Applicant, in terms of Section 25 of the Act, duly appointed Tshepo Mahobye (hereinafter referred to as "Mahopye") and Thabo Skosana (hereinafter referred to as "Skosana") as inspectors for the purpose of carrying out an investigation into the business activities of the Respondent.
15. The Applicant's inspectors conducted an onsite investigation, on the 13th of March 2019, at the Respondent's premises situated at Shoprite Building, Church Street, Rustenburg, in the North West Province.
16. Mahobye interviewed one Portia Malane, the Respondent's Branch Manager of this Rustenburg branch.
17. During the investigations, the Respondent is alleged to have repeatedly breached various provisions of the Act, especially with regards to conducting appropriate affordability tests:

17.1 The Respondent entered into credit agreements with consumers without first taking reasonable steps to properly and accurately assess

consumers' debt repayment history, existing financial means, prospects and obligations;

17.2 The Respondent failed to obtain any credit bureau reports to assess consumers' debt repayment history prior to entering into credit agreements with the consumers;

17.3 They did not properly use the bank statements, obtained from the consumers, in conducting affordability assessments, and / or inaccurately assessing the consumers' financial position and / or their disposable incomes;

17.4 They exaggerated the discretionary income of the consumers, including ignoring evidence of several returned or unpaid debit

orders reflected on such statements; and

17.5 They included a "hidden charge of R5.00" on all consumers' credit agreements.

18. The Applicant alleged that the Respondent totally disregarded the provisions of Regulation 23 of the Act, in that their business

conduct amounted to reckless lending.

19. In light of these repeated contraventions of the Act, the Regulations and the Respondent's Conditions of Registration, the Applicant applied for the following orders from the Tribunal:

19.1 In terms of Section 150(a) of the Act, declaring the conduct of the Respondent a contravention of the following sections of the Act, Regulations and Conditions of Registration;

(i) Section 81(2)(a)(ii) and (iii) read together with Regulation 23A, in that the Respondent failed to take proper steps in conducting affordability assessments and / or in the prevention of extension of reckless credit;

(ii) Section 81(3) read together with Section 80(1), in that the Respondent did not pay particular attention in ensuring that the credit agreements they entered into with the consumers would not make those consumers over-indebted;

(iii) Section 100(1)(a) and (b) read with Section 101(1)(a), in that the Respondent charged the consumers some amounts not allowable by the Act;

(iv) Section 100(1)(c), in that they charged excessive interest rates;

(v) Section 101(1)(d)(ii) and Regulation 42(1), in that they charged interest rates not in line with the maximum prescribed interest and initiation fees; and

(vi) Section 170 read together with Regulations 55(1)(b)(vi), in that they failed to keep proper consumer records in line with the provisions of the Act.

19.2 Cancellation of the Respondent's registration as a credit provider in terms of Section 57(1)(a) of the Act; and

19.3 In terms of Section 150(i), make any other appropriate order required to give effect to the consumers' rights in terms of the Act.

20. The Applicant also requested the Tribunal to order the Respondent to:

20.1 Within 30 days of the date of this judgment, appoint an independent auditor at its own cost, though subject to prior approval of the Applicant;

20.2 This auditor to determine if any consumers were overcharged on interest and undisclosed costs of credit and provide a list of such consumers as well as the amounts by which each such consumer was overcharged;

20.3 The Respondent will have to, within 30 days from the date of the auditor's report, refund those consumers who were overcharged; and

20.4 The auditor will have to compile a detailed, comprehensive report summarising who was paid, all amounts still owing, and any current

credit agreements which may fall foul of reckless credit provisions.

21. The Applicant also asked for the imposition of an administrative fine on the Respondent in the amount which is greater of R1 000 000.00

(one million Rand) or 10 percent of the annual turnover of the Respondent.

APPLICABLE SECTIONS OF THE NCA

22. Section 57

Cancellation of registration

“(1) Subject to subsection (2), a registration in terms of this Act may be cancelled by the Tribunal on request by the National Credit

Regulator, if the registrant repeatedly –

- (a) Fails to comply with any condition of its registration ;
 - (b) Fails to meet a commitment contemplated in section 48(1); or
 - (c) Contravenes the Act.
- (2) ...”

THE PROCEEDINGS AT THE HEARING

23. At the hearing, the Applicant was represented by Mr. Roy Stucker and Ms. Mbali Buthelezi.

24. The Respondent was neither present nor represented at the hearing.

25. The matter proceeded on a default basis, after the Tribunal panel had satisfied themselves that the Respondent had been properly served.

14.1

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

26. The Respondent did not file any papers, inclusive of an answering affidavit, in response to the Applicant's founding papers.

27. The matter will thus be heard on a default basis.

28. Rule 13(5) provides as follows:

"Any fact or allegation in the application or referral not specifically denied or admitted in the answering affidavit, will be deemed to have been admitted."

29. The Tribunal is satisfied that the Respondent was given sufficient opportunity to respond to and / or challenge any of the Applicant's

allegations, during the investigation stage and / or after being officially notified of the Applicant's Application to the

Tribunal for the Cancellation of their (Respondent's) Registration as the registrant Credit Provider.

30. Therefore, in the absence of any answering affidavit filed by the Respondent, the Applicant's application and all of the allegations

contained therein are deemed to be admitted.

CONSIDERATION OF THE EVIDENCE BEFORE THE TRIBUNAL

31. At the Hearing, the Applicant's representative highlighted some of the transgressions by the Respondent, as fully detailed in their written submissions.

32. The Applicant's representative spent more time highlighting that the Respondent had mainly totally disregarded all or most of the provisions of the Act.

33. In the absence of any contrary evidence placed before the Tribunal, it is accepted that the Respondent repeatedly contravened the Act, Regulations and the conditions of his registration as alleged.

CONSIDERATION OF THE ORDERS APPLIED FOR

Cancellation of the Respondent's registration as a credit provider in terms of Section 57(1)(a) of the Act

34. Section 57(1) empowers the Tribunal to cancel the registration of a credit provider where they repeatedly fail to comply with the conditions of registration or contravene the Act.

35. In the matter before the Tribunal, the Respondent has, by their conduct, contravened their conditions of registration.

36. The facts placed before the Tribunal clearly show that the Respondent repeatedly failed to comply with the Act, and this had a serious

impact on the consumers they dealt with. In the circumstances, cancellation of their registration is justified.

Appointment of the Auditor to identify and Assist those consumers negatively affected by the Respondent's breaches of the Act

37. The Respondent to appoint an auditor, at its own cost, in line with the details listed under Paragraph 20 of this Judgment.

Imposition of an Administrative fine

38. The Respondent did benefit significantly from breaching the provisions of the Act, in that they overcharged consumers. An imposition of an administrative fine is, therefore, in order.

ORDER

Accordingly, the Tribunal makes the following order:

39. The Respondent's registration as a credit provider is cancelled with immediate effect.

40. The Respondent is ordered to appoint an order, at its own cost, in line with Paragraph 20 of this judgment, to identify and facilitate the refunds to consumers who were overcharged by the Respondent.

41. The Respondent must, within Ninety days (90) days after the Tribunal order has been obtained, pay an administrative fine of R200 000

(Two Hundred Thousand 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

42. No order as to costs.

DATED ON THIS 7th DAY OF November 2019

Prof B. Dumisa

Presiding Member

Prof T Woker (Member) and Dr L Best concurring

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