

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Phase 2 CDS Investments CC (NCT/71733/2016/57(1)) [2017] ZANCT 83 (8 July 2017)

[2017] ZANCT 83

COURT

National Consumer Tribunal

BEFORE

B.C. Dumisa, T. Woker, X. May

CASE / FILE NUMBER

NCT/71733/2016/57(1)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

Number: NCT/71733/2016/57(1)

In

the matter between:

THE
NATIONAL CREDIT REGULATOR
APPLICANT
and
PHASE
2 CDS INVESTMENTS CC
RESPONDENT

Coram:

Prof
B.C. Dumisa –
Presiding
member
Prof
T. Woker
–
Member
Mr
X. May
–
Member
Date

of Hearing
–
23 February
2017

**JUDGEMENT
AND REASONS
APPLICANT**

1. The Applicant in this matter is the National Credit Regulator (NCR), a body 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”). Two of the functions of the Applicant are
 - 1.1 To register credit providers in terms of Section 14 of the Act; and
 - 1.2 To regulate their conduct in terms of Section 15 and other provisions of the Act.
2. At the hearing the Applicant was represented by Ms Leanne Schwartz.
3. The Applicant’s Founding Affidavit is deposed to by Ms Jacqueline Peters: Manager for Investigations and Enforcement in the employ of the Applicant.

RESPONDENT

4. The Respondent (and the Registrant) is PHASE 2 CDS INVESTMENTS CC, a close corporation incorporated in terms of the South African laws under Registration Number CK/2005/038956/07, with its address at Unit 4, Bush Hill Office, San Frederick Avenue, Randpark Ridge, in the Gauteng Province.
5. The Respondent is registered as a Credit Provider, with the Applicant, with Registration Number NCRCP4168.
6. The Respondent did not attend the hearing.
7. The Tribunal was satisfied that the Applicant did properly serve the necessary documents to the Respondent through the registered post sent to both the postal address and the trading address of the Respondent. The Applicant submitted track and trace reports to the Tribunal indicating that the owner of the Respondent (Ms Julie Bekker nee’ Wesson) signed for the documents.

HEARING AND APPLICATION TYPE

8. This is an application to the National Consumer Tribunal for the cancellation of registration of the Respondent in terms of Section 57(1)(a) and (c) of the Act.

9. The Tribunal will also be required to make an informed decision whether this particular transaction, complained of, does qualify as a credit agreement in terms of Section 4 of the Act.

BACKGROUND

10. The Applicant received a formal complaint against the Respondent from a consumer, Eirin Lankwarden, in terms of Section 136(1).
11. The complaint can be summarised as follows:
 - (1) The complainant borrowed an amount of R170 000 from the Respondent.
 - (2) The Respondent failed to adhere to the provisions of the Act, in that :
 - (a) No copy of the credit agreement was provided;
 - (b) This agreement was not registered with the credit bureaux;
 - (c) No affordability assessment was conducted; and
 - (d) The Respondent extended credit recklessly to the complainant.
12. The Applicant formally appointed Kgadi Sepuru (herein after referred to as “Sepuru”), in terms of Section 25 of the Act, to conduct an investigation into the Respondent’s business practices.
13. The Respondent’s initial and persistent line of defence was and still is that this was not a credit agreement, in terms of Section 4(1) of the Act, because the Respondent’s member and the complainant are blood relatives. The Respondent’s member and the complainant’s mother are sisters; hence the complainant is the Respondent’s nephew.
14. The Respondent is however a registered credit provider and therefore the Applicant decided to continue with the inspection.
15. Sepuru visited the Respondent’s business premises on or about the 29th of September 2014, where he discovered, inter alia, that :
 - (a) There were no copies of credit agreements on the premises and the Respondent failed to produce copies of credit agreements when summoned to do so;
 - (b) The Respondent failed to produce pre-agreement quotations in terms of Section 92 of the Act;
 - (c) The Respondent failed to conduct affordability assessments in terms of Section 81(2)(a) of the Act;
 - (d) The Respondent failed to submit the necessary credit information, on the prescribed forms, in terms of Section 93 and other provisions of the Act. The Respondent was asked by the Applicant to submit the statutory returns in terms of Section 62; and the Applicant’s

submissions are that they (the Applicant) even went to an extent of demonstrating to the Respondent how the forms should be completed. According to the Applicant, the Respondent indicated that its accountant would get back to them (the Applicant) with the required information but did not do so, hence no statutory returns were received.

16. Sepuru established that the complainant has signed two acknowledgements of debt which were acknowledgments of debt to the Respondent itself i.e. the registered credit provider and not the member of the Respondent.

ISSUES

TO BE DECIDED BY THE TRIBUNAL

17. The Applicant submits that the Respondent repeatedly contravened the Act, more particularly that:
 - (a) The Respondent contravened Section 81(2) of the Act, by entering into credit agreements with consumers without conducting affordability agreements;
 - (b) The Respondent contravened Section 81(3), read with Section 80(1) of the Act, by engaging in reckless lending.
 - (c) The Respondent contravened Section 92(1) read with Regulation 28(1) of the Act, by entering into unlawful credit agreements;
 - (d) The Respondent contravened Section 170 read with Regulation 55(1)(b)(vi) of the Act, by not keeping the consumer records in the prescribed manner and form.
 - (e) The Respondent contravened Section 93(2) read with Regulation 30 of the Act, by entering into credit agreements with consumers using agreements which are not in the prescribed form;
 - (f) The Respondent also contravened Regulations 29(1)(a); 30(1); 31; 32; 33(1)(b)(iv);
 - (g) The Respondent contravened Section 90(2)(k)(iii) by making the consumer to sign in advance an acknowledgement of debt that also relates to enforcement of a credit agreement ; and
 - (h) The Respondent contravened Section 158 when failing to present herself and / or the required information when summoned to do so.

CONSIDERATION OF THE ORDERS APPLIED FOR

18. The Applicant conducted an investigation into the business of the Respondent because it had received a complaint from a consumer regarding reckless credit lending.
19. The Respondent is a registered credit provider.

20. The Respondent however took the view that the loan to the consumer was not a credit agreement because the parties were not dealing at arms-length with each other.
21. The Respondent therefore failed to provide any information as requested by the inspector appointed in terms of section 25 of the Act to conduct an investigation into the Respondent.
22. Regardless of the relationship between the Respondent and the complainant, the complainant signed acknowledgment of debts which acknowledgments were signed with the Respondent itself and not with the member of the Respondent.
23. The inspector's report also reveals that the Respondent is failing to adhere to the requirements of the Act.
24. The Respondent did not co-operate with the inspector and had to be summonsed to produce the necessary books, records, or documents as required for the investigation. The Respondent failed to supply these.
25. It seems to the Tribunal, that the Respondent is of the view that it does not need to co-operate with the Applicant, because the loan which was granted to the complainant did not constitute an arms-length transaction. However the acknowledgments of debt clearly indicate that the loan was granted by the Respondent and not the member of the Respondent in her personal capacity.
26. In addition, it is the role of the Applicant to regulate registrants and to request information regarding the performance of their functions under the Act. See, for example, section 50 which provides that it is a condition of registration that registrants must permit the Applicant or any person authorised by the Applicant to enter their premises and to conduct reasonable enquires for compliance purposes.
27. In view of the fact that the Respondent has failed to respond to any of the requests by the Applicant for information or to provide its statutory returns as required by Section 62 the Tribunal concludes that the Respondent is not complying with its statutory obligations under the Act and is engaging in prohibited conduct.
28. The Applicant also prayed that the Respondent be ordered to pay an administrative fine in terms of Section 150(1) of the Act. The Applicant has not provided the Tribunal with the necessary financial data that is necessary for the determination of an appropriate administrative fine. However, the Applicant explained that it was unable to provide this information because the Respondent has failed to submit the required statutory returns.
29. The Tribunal was previously faced with similar issue in *NCR v Werlan Cash Loans t/a Lebathu Finance* (NCT/3887/2012/57(1)(P)) where the Applicant did not put any evidence before the Tribunal on the Respondent's annual turn-over it being unknown to the Applicant. In that case, the Tribunal held that where there is no basis for calculating the "10 per cent of the respondent's annual turnover during the preceding financial year" in line with Section 151(2) (a), the Tribunal has the option to simply follow Section 151(2)(b) by

imposing an administrative fine not greater than or equal to R1 000 000 (one million rand). Section 151(3) will thus be important to consider when determining an appropriate fine, if any.

30. The factors to be considered include:

- (a) The nature, duration, gravity and extent of the contravention;
 - (b) Any loss or damage suffered as a result of the contravention;
 - (c) The behaviour of the respondent;
 - (d) The market circumstances in which the contraventions took place;
 - (e) The level of profit derived from the contravention;
 - (f) The degree to which the respondent has co-operated with the National Credit Regulator, or the National Consumer Commission, in the case of a matter arising in terms of the Consumer Protection Act, and the Tribunal; and
 - (g) whether the respondent has previously been found in contravention of the Act, or the CPA, as the case may be.
31. From the above facts and the applicable law, the Tribunal accepts that the Respondent has repeatedly contravened the Act and has engaged in prohibited conduct.

ORDER

Accordingly, the Tribunal makes the following order:

- 32. The Respondent is declared to have engaged in prohibited conduct in terms of the Act.
- 33. The Respondent's registration as a credit provider is hereby cancelled with immediate effect.
- 34. An administrative fine of R18 000 (eighteen thousand Rand) is imposed, payable within three months of the date of this judgement.
- 35. No order as to costs.

DATED ON THIS 8th DAY OF JULY 2017

Prof B. Dumisa

Presiding Member

Prof T Woker (Member) and Mr X May (Member) concurring

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