
SOUTH AFRICA / JUDGMENT

National Credit Regulator v Pole Position Trading 205 CC (NCT/85013/2017/57(1)) [2017] ZANCT 114 (12 October 2017) [2017] ZANCT 114

COURT

National Consumer Tribunal

BEFORE

J Simpson, M Nkomo, H Devraj

CASE / FILE NUMBER

NCT/85013/2017/57(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT/85013/2017/57(1)

In the matter between:

THE NATIONAL CREDIT REGULATOR

APPLICANT

and

POLE POSITION TRADING 205 CC

RESPONDENT

Coram:

Adv J Simpson - Presiding member

Ms M Nkomo - Tribunal Member

Ms H Devraj - Tribunal Member

Date of hearing – 13 September 2017

JUDGMENT AND

REASONS

APPLICANT

1. The Applicant in this matter is the National Credit Regulator, a juristic person established by section 12 of the National Credit Act 34 of 2005 (“the NCA” or “the Act”), hereinafter referred to as (“the Applicant”).
2. At the hearing the Applicant was represented by Ms C Young, an employee of the Applicant.

RESPONDENT

3. The Respondent is Pole Position Trading 205 CC, a registered Credit Provider with registration number NCRCP3666, hereinafter referred to as (“the Respondent”). Its registered business address is 40 Stegman Street, Randgate, Randfontein.
4. The Respondent was not present at the hearing nor was there a representative from the Respondent present.

APPLICATION TYPE

5. This is an application in terms of section 57(1) of the Act which provides that –
“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 this Act.”

SUMMARY OF THE APPLICANT’S FOUNDING AFFIDAVIT

Background

information to the investigation

6. On 17 August 2015, the Applicant received a complaint from Ngwako Johannes Sepataka (“the Complainant”) about the Respondent. The complaint is attached as per Annexure “FA3” of the record. The Complainant essentially alleged that the Respondent had garnished his salary for R3000 per month and made him sign a “consent to judgment”. He denied owing these amounts to the Respondent.
7. The complaint gave rise to a suspicion that the Respondent was conducting its credit lending practices in a manner which was inconsistent with the Act. Based on this information, the Applicant, on or about 24 February 2016, initiated an investigation into the activities of the Respondent.

8. On 4 March 2016 and 9 March 2016, two duly appointed inspectors, namely K Ratshitali and D Musandiwa conducted an investigation at the Respondent's place of business. On the date of the investigation, K Ratshitai conducted an interview with Ms Christelle

Barnard, who identified herself as the Respondent's owner.

9. During the course of the investigation, 12 credit agreements were assessed.

10. The details of the contraventions alleged by the Applicant can be summarized as follows:

10.1 The Respondent failed to conduct proper affordability assessments. During 2015, the Respondent granted Mr Sepataka two loans of R3000 each, despite the consumer only earning a salary of R3492.08 a month. The Respondent obtained the salary advice and bank statements of the consumer, but no affordability assessment appears to have been conducted as none were found on file. From the 12 credit agreements that were assessed, the Respondent failed to properly assess the existing financial means, prospects and obligations of any of the consumers.

10.2 The Respondent failed to conduct credit checks on the consumers. The Respondent could therefore not determine the consumers'

debt re-payment history.

10.3 By failing to conduct the necessary affordability assessments and credit checks, the Respondent therefore entered into reckless credit agreements.

10.4 Should the Respondent contend that it did conduct the necessary affordability assessments and the credit checks, then in such an

event, the Respondent failed to keep proper records of documentation in support of the steps taken to conduct the affordability

assessments.

10.5 The Respondent charged consumers contract fees and administration fees which are not permitted in terms of the Act. The pre-agreement which is attached to the Loan Agreement captures this fee as an initiation fee. The amount charged is in excess of the prescribed maximum fee.

10.6 The Respondent utilises provisions in the credit agreement which are in direct contravention of the Act, in that it waives the common law rights and remedies available to consumers, which may not be waived.

11. The Applicant alleges that the Respondent is therefore in contravention of:-

11.1 Section 81(2) which relates to entering into credit agreements without conducting a proper affordability assessment.

11.2 Section 81(3) read together with Section 80(1) which relates to the granting of reckless credit.

11.3 Regulation 55(1)(b) which relates to the failure to keep proper records of documentation in support of the steps taken in terms of Section 81(2) and Section 170 of the Act.

11.4 Section 100(1)(b), Section 101(1)(c) and Section 102(1) which relates to charging a fee or charge exceeding the amount allowed or provided for by the Act.

11.5 Section 90 which relates to inserting unlawful provisions in credit agreements.

THE APPLICANT'S PRAYERS

12. The Applicant therefore prays for an order:

12.1 Declaring the Respondent to be in repeated contravention of Section 81(2), Section 80(1) read together with Section 81(3), Section 170 read with Regulation 55 (1)(b)(v) and (vi), Sections 90, 100, 101(1)(a) and 102

(1) of the Act;

12.2 Cancelling of the Respondent's registration as a credit provider, with immediate effect, in terms of Section 57(1)(a),(b) and (c) of the Act;

12.3 Compelling the Respondent, to refund all consumers who were, from 2007 to date, charged administration and contract fees in excess of the prescribed maximum fees;

12.4 Imposing an administrative fine against the Respondent in the sum of R1 000 000 or 10% of the Respondent's annual turnover whichever is greater; and

12.5 Making any other appropriate order required to give effect to the consumers' rights in terms of Section 150(i) of the Act.

THE APPLICANTS SUBMISSIONS AT THE HEARING

13. The Applicant made submissions at the hearing based on its founding affidavit and further referred the Tribunal to specific evidence that was submitted in its founding papers.

Submissions

regarding the default application

14. The Applicant addressed the Tribunal on the issue of the matter being considered on a default basis and went on to prove to the Tribunal that there was proper service of the application on the Respondent.

15. The Applicant handed in "Exhibit A" to "Exhibit E" to the Tribunal.

(1) "Exhibit A" is a letter from the Respondent's legal representative dated 21 July 2017 of an intention to oppose the matter.

- (2) “Exhibit B” is a letter dated 11 September 2017, from the Respondents legal representative. In summary, it states that they were mandated to oppose the application before the Tribunal, but the Respondent has not placed them in possession of the relevant funds to do so. They will not be attending the hearing on 13 September 2017 but would remain on record to receive any further documentation in this matter.
- (3) “Exhibit C” is the registered mail slips of the application being served on the Respondent. The registered mail was sent to the Respondent’s physical address as well as the postal address.
- (4) “Exhibit D” – the Applicant submitted that this is evidence of the track and tracing report which shows that the tracking number responds to that of the registered mail that was sent to the Respondent’s postal address and that a first notification was sent to the Respondent.
- (5) “Exhibit E” relates to the track and tracing report of the registered mail that was sent to the Respondent’s physical address. The Applicant submits that the first notification was not sent to the physical address.
16. The Applicant therefore submitted that there was proper service as the First Notification from the “track and trace report” was sent to Respondent’s postal address, which is the same address as reflected on the Respondent’s Condition of Registration, on page 26 of the case file.

Submissions

regarding the merits of the matter

17. The Applicant’s summarized submission was that:-

17.1 The Respondent fails to conduct affordability assessments. From the sampled files there were no documentation of an affordability

assessment being conducted, except for annexure C8 whereby there was an affordability assessment on file. The Applicant submits that while in some of the files there were loan agreements and salary advices on file, this was compliance at a superficial level as no affordability was conducted using these documents. Therefore the Respondent alleges that these credit agreements were granted recklessly.

17.2 The Applicant abandoned its prayer for the alternative prayer relating to the keeping of records, as this is no longer necessary.

17.3 In order to explain the contraventions relating to the cost of credit, the Applicant referred the Tribunal to Annexure C1, on page 88 of the case file. This is an example of the pre-agreement statement and quotation for a small credit agreement. The Applicant submits that this is the same form that was used on all the files that were sampled. The Applicant argued that in this particular matter, the contract fee was R660 and there was another fee of R465. The total cost is therefore R1125 which is reflected as an initiation fee. The Applicant submits that the in this particular

credit agreement, the initiation fee should have been R490 and it can never exceed the amount of R1000 as per the Regulations. Furthermore, even if one uses the amount of R490 and then adds the maximum monthly service that was allowed at that point in time, which was R50, the maximum service fee would be R100 and the total amount that could be charged would therefore be R590. The Applicant referred the Tribunal to page 48 of the case file, that has a summary of the actual amounts that were charged.

17.4 The Respondent utilizes unlawful provisions in its credit agreements. The Applicant referred the Tribunal to the specific provisions of paragraph 5 of the loan agreement. The applicant argued that these provisions require of the consumer to renounce certain common law exceptions.

17.5 The Applicant finally submitted that an order for the cancellation of registration is warranted in light of the serious contraventions by the Respondent. That the Respondent has not made an attempt to become compliant with the Act and Regulations. The Applicant also submits that an administrative fine is warranted in circumstances whereby consumers have been overcharged fees, granted credit recklessly and deprived consumers of their common law rights.

CONSIDERATION OF THE MATTER ON A DEFAULT BASIS

18. The Applicant filed the Section 57(1) application with the Tribunal on 30 June 2017. The Applicant attached a copy of a registered post slip with a tracking number to show that the application was sent to the Respondent's street address as well as its postal address via registered mail, as proof of service. The Respondent did not file or serve any answering affidavit or a response to the application.

19. The matter was set down on a default basis for 13 September 2017 in terms of Rule 25(2).

Rule 25(2) and (3) provides that:

“An applicant may make application by way of form T.I r25 (2) for purposes of obtaining a default order, if no response to the application was filed within the time stated in the application.

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. “
20. At the hearing, the Applicant submitted further evidence of the “track and tracing reports”. The status of the application that was sent to the Respondent's street address was reflected as still in transit. The street address is the address at which the investigation was conducted as indicated by the Inspector's certificate on page 39 of the case file. The parcel tracking results of the application that was sent to the Respondent's postal address is stated as “Item delivered” dated 18 July 2017.

The postal address as stated on the Registrant's Conditions of Registration on page 26 of the case file is the correct address as reflected on the details of the registered letter. The Tribunal is therefore satisfied that the requirements for a default judgment have been met, as the application was adequately served on the Respondent

21. Rule 13(5) provides that:

"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"

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.

ASSESSMENT OF THE EVIDENCE

22. The applicant submitted copies of some of the sample files that were assessed during the investigation. In the case of consumer NJ Sepataka there is evidence that the Respondent obtained a copy of the consumer's payslip (as per page 63 of the record) and a copy of 3 months bank statement (as per page 73 of the record). However, there is no evidence that this information was used to conduct an affordability assessment. In the case of the consumer NH Mancini, there is evidence of 3 months bank statements (as per pages 91-92 of the record) that was obtained, but there is no evidence of any affordability assessment done based on this information. There is also no record of any credit check being conducted. The Applicant submitted that of the 12 credit agreements, only one relating to the consumer MM Dumisi has a copy of an affordability assessment on file. The evidence before the Tribunal is that of the 12 credit agreements, 2 of these had copies of what purports to be an affordability assessment, namely for consumers MM Dumisi and AJ Potgieter. Furthermore, the contents of the affordability assessments reflected as a document named "Monthly Income and Expenditure", has some information captured for gross salary and some amounts for expenditure. There is no calculation of the total amount available by the consumer and the document is incomplete.
23. From the sample credit agreements before the Tribunal, the Pre-agreement statement and quotation documents refer to a "Contract fee" and "Other Fee". These two amounts, once added up, are reflected as a total as the "Initiation Fee charged upfront". The Applicant has submitted a schedule of the 12 agreements as per page 48 of the case file. This schedule reflects the admin fee and contract fee. These 2 fees, which are reflected as a total, as an initiation fee, range from R225 (two hundred and twenty five Rands) to R2050 (Two thousand and fifty Rands) per credit agreement.
24. The evidence before the Tribunal is that all the credit agreements have a standard loan agreement. Paragraph 5 of the loan agreement has a renunciation clause. The clause states the following:-

“The borrower hereby renounces all benefits arising from the legal exceptions “no value received”, “errore calculi”,

revisions of account, “non cause debiti” and “non numeratae pecuniae”, the full force and effect whereof the borrower acknowledges himself to be fully acquainted with”.

CONSIDERATION OF THE FACTS AND THE LAW

25. Section 81(2) of the NCA provides that –

“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 re-payment 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.”

26. Section 81(3) of the NCA provides that –

“A credit provider must not enter into a reckless credit agreement with a prospective consumer.”

27. Section 80(1) provides that –

“A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119(4)-

(a) the credit provider failed to conduct an assessment as required by section

81(2), irrespective of what the outcome of such an assessment might have concluded at the time; or

(b) the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer

despite the fact that the preponderance of information available to the credit provider indicated that-

(i) the consumer did not generally understand or appreciate the consumer’s; and

(ii) entering into that credit agreement would make the consumer overindebted”.

28. Section 101(b) provides that –

“A credit agreement must not require payment by the consumer of any money or other consideration, except for an initiation fee, which—

- (i) may not exceed the prescribed amount relative to the principal debt; and
- (ii) must not be applied unless the application results in the establishment of a credit agreement with that consumer”.

29. Regulation 42(2) provides that – in relation to short term credit agreements, the maximum initiation fees shall be (a) R150 per credit agreement, plus, 10% of the amount of the agreement in excess of R1,000 but never to exceed R1,000.

30. Section 101 (c) provides that-

“A credit agreement must not require payment by the consumer of any money or other consideration, except a service fee, which

- (i) in the case of a credit facility, may be payable monthly, annually, on a per transaction basis or on a combination of periodic and transaction basis; or
- (ii) in any other case, may be payable monthly or annually; and
- (iii) must not exceed the prescribed amount relative to the principal debt”

31. Section 102(1) provides that –

“If a credit agreement is an instalment agreement, a mortgage agreement, a secured loan or a lease, the credit provider may include in the principal debt deferred under the agreement any of the following items to the extent that they are applicable in respect of any goods that are the subject of the agreement

—

- (a) an initiation fee as contemplated in section 101 (1) (b), if the consumer has been offered and declined the option of paying that fee separately;
- (b) the cost of an extended warranty agreement;
- (c) delivery, installation and initial fuelling charges;
- (d) connection fees, levies or charges;
- (e) taxes, licence or registration fees; or
- (f) subject to section 106, the premiums of any credit insurance payable in respect of that credit agreement”.

32. Section 90 provides that-

“A credit agreement must not contain an unlawful provision”.

33. It is very clear from a plain reading of the relevant Sections of the Act and the Regulations that the Act has peremptory requirements in terms of the affordability assessments, the maximum fees and charges that can be charged and unlawful provisions. A credit provider

therefore must conduct an affordability assessment before the granting of credit, which the Respondent has failed to do. In some instances the Respondent has granted credit which has resulted in judgment being issued against the consumer (NJ Sepataka) and summons issued for the outstanding debt in the case of consumers (G Mancu and MM Dumisi). This has therefore left consumers in a worse position as they were unable to afford to repay the loan amounts. By not conducting proper affordability assessments, the Respondent has granted credit recklessly.

34. While Section 101(b) of the Act sets out the peremptory requirements of the initiation fees. Regulation 42(2) further sets out the details of the calculations for the maximum initiation fees that can be charged. The Regulation sets out that in the case of short term agreements, the maximum amount cannot exceed R1000. While the Applicant has not provided the details of the actual amounts that were overcharged, it is evident that for example in the case of consumers Mancu, Botes and Mentoer, the initiation fees were (R1125, R2050 and R2550) respectively. The intention of the legislature of providing for the maximum amounts that can be charged for initiation fees is to ensure that consumers are not exploited. The Respondent has clearly charged consumers in excess of the maximum fees.
35. The evidence before the Tribunal is clear, that the specific provisions in Paragraph 5 of the Loan agreements waives the common law rights of consumers. It is also in direct conflict with the Act and is an unlawful provision.

CONSIDERATION OF THE APPROPRIATE PENALTY

36. The Applicant has requested in its prayers that an administrative fine be imposed.
37. The Tribunal is well aware of the dire consequences of deregistration of the Respondent and will therefore not make such an order lightly.
38. The Act sets out the factors that the Tribunal must consider when imposing an administrative fine in terms of section 151(3) of the NCA, and these consist of: –
- (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 contravention took place;
 - (e) the level of profit derived from the contravention;
 - (f) the degree to which the respondent has cooperated with the National Credit Regulator, or the National Consumer Commission, in the case of a matter arising in terms of the Consumer Protection Act, 2008, and the Tribunal; and

(g) whether the respondent has previously been found in contravention of this Act, or the Consumer Protection Act, 2008, as the case may be.”

39. The Applicant, motivated for the administrative penalty by submitting that:

(a) Under the nature, duration, gravity and extent of the contraventions

The Applicant submitted that the socio-economic impact of reckless lending must be viewed in a serious light and a sanction that is equal to the gravity of the contravention must be imposed.

(b) Loss or damage suffered as a result of the contraventions

The Applicant submitted that the reckless credit granting interferes with the consumers’ dignity and other socio-economic rights such as an adequate standard of living. This results in South African consumers and households suffering severe over-indebtedness and financial distress. Poor households are rendered most vulnerable in these situations.

(c) Behavior of the Respondent

The Applicant submits the Respondent has caused severe harm to consumers and undermines the purpose of the Act.

(d) Market circumstances under the contraventions occurred

The Respondent has extended credit recklessly and overcharged consumers, in a market where majority of consumers have adverse listings and are debt stressed.

(e) Level of profit derived from the contraventions

The Respondent has derived a profit in that it has charged fees which are not permissible and in excess of the prescribed maximum fee.

(f) Degree of co-operation between the Respondent and Applicant

The Applicant submitted that, during investigation, the inspector interviewed a Ms Christelle Barnard who identified herself as the Respondent’s owner. There is evidence to suggest that the Respondent did co-operate with the Applicant.

(g) Prior contraventions committed by the Respondent

The Applicant has not submitted any information relating to any prior contraventions. However, the Applicant has submitted that consumers should be refunded from 2007 to date as this is the time at which the Respondent came into operation.

The Tribunal has considered the submissions of the Applicant regarding the imposition of an administrative penalty.

40. The rights of the consumers are severely prejudiced by the Respondent's practices and its continued contraventions of the Act. The Respondent entered into credit agreements with consumers, without conducting affordability assessments, charges fees in excess of the prescribed rates and contains provisions in its loan agreements which waive the common law rights and remedies available to consumers. This is severely prejudicial to consumers and is also in direct contrast with the purpose and spirit of the Act.
41. Section 151 of the NCA allows the Tribunal to impose an administrative fine that does not exceed the greater of 10 per cent of the respondent's annual turnover during the preceding financial year; or R1 000 000.
42. The NCR did not provide any evidence as to the annual turnover of the Respondent.

CONCLUSION

43. The Applicant, representing the affected consumers, has set out the basis for a remedy under the NCA, by establishing the Respondent's

contravention of the Act and Regulations.

44. The basis, upon which the Tribunal on the other hand, may grant a remedy and impose a punitive sanction on the Respondent, is apparent from the merits of the case presented to this Tribunal by the Applicant. There is no dispute that the Respondent has grossly contravened the Act.

45. To this end, the Tribunal makes the following finding–

The Respondent is found to be in repeated contravention of the provisions of the Act and Regulations as set out in the Applicant's Notice of Motion and has consequently engaged in prohibited conduct in that the Respondent has contravened the following provisions:-

- (1) Section 81(2) – entering into credit agreements without conducting a proper affordability assessment;
- (2) Section 81(3) read together with Section 80(1)- granting of reckless credit;
- (3) Section 100(1)(b), Section 101 (1)(c) and Section 102(1) – charging a fee or charge in excess of the amount allowed for in the Act; and
- (4) Section 90- inserting unlawful provisions in credit agreements.

46. The evidence submitted by the Applicant, which is uncontested, clearly indicates that the requirements of section 57 have been met in that the Respondent has repeatedly contravened the provisions of the Act. The specific contraventions alleged by the Applicant are supported by documentary evidence.

47. The Respondent is also found to have conducted its business as a credit provider, in a manner that is contrary to the Act and its

Regulations; and that the nature, extent, and duration of such contraventions warrant the Tribunal's imposition of an administrative fine on the Respondent. The Tribunal has fully considered the Applicant's prayer in respect of the imposition of the administrative fine and the practicality surrounding the payment of such a fine. The cancellation of a Registrant in itself carries a huge sanction on the Respondent, and literally shuts down the operations of the Respondent, completely.

48. While the Tribunal can still impose a fine of R1 000 000.00 under these circumstances, on the Respondent, it can impose a lesser fine if warranted. The fine must deter others from committing the same prohibited conduct; it must further punish the offender. In these circumstances the Tribunal has already ordered that the Respondent be de-registered which means that the Respondent will no longer be able to operate. This has severe consequences for the Respondent. The Tribunal therefore finds it appropriate to impose an administrative fine of fifty thousand Rands (R50 000.00).

ORDER

49. The Tribunal makes the following order:-

- (1) The Respondent's contravention of the provisions of the Act is declared prohibited conduct;
- (2) With immediate effect, the registration of the Respondent as a credit provider is hereby cancelled in terms of Section 150(g) of the Act.
- (3) The Respondent is ordered to refund all consumers who were, from 2007 to date, charged administration and contract fees that were in excess of the prescribed maximum fees and to provide proof thereof to the Applicant by no later than 31 December 2017.
- (4) The Respondent is ordered to pay an administration fine in the amount of R50 000.00 (fifty hundred thousand Rands) by no later than 31 December 2017.
- (5) There is no order as to costs.

Thus done and handed down in Centurion this 12 October 2017

[signed].

Ms H Devraj

Member

Adv J Simpson (Presiding Member) and Ms M Nkomo (Tribunal Member) concurring

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