

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Sliksam Cash Loans (Pty) Ltd (NCT/127512/2019/140(1)) [2021] ZANCT 43 (5 October 2021)

[2021] ZANCT 43**COURT**

National Consumer Tribunal

BEFORE

T Woker, D Terblanche, T Bailey

CASE / FILE NUMBER

NCT/127512/2019/140(1)

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Source record**IN****THE NATIONAL CONSUMER TRIBUNAL****HELD****AT CENTURION****Case****number: NCT/127512/2019/140(1)****In the matter****between:**

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

Coram:

Prof
T Woker
– Presiding
Tribunal member
Ms
D Terblanche –
Tribunal member
Mr
T Bailey
– Tribunal
member
Date
of hearing – 27 September 2021

Date
of judgment – 5 October 2021

JUDGMENT

AND REASONS

APPLICANT

1. The Applicant is the National Credit Regulator (the Applicant), a juristic person established in terms of section 12 of the National

Credit Act, 2005 (the Act) to regulate the consumer credit market and ensure compliance with the Act, with its principal business address at 127 - 15th Road, Randjespark, Johannesburg, Gauteng.

2. Mr Roy Stocker, who is the Applicant's Senior Legal Advisor, represented the Applicant at the hearing

RESPONDENT

3. The Respondent is Sliksam Cash Loans (Pty) Ltd (the Respondent), a company duly registered in terms of the company laws of the Republic of South Africa under registration number 2015/375980/07.

4. According to the Applicant's application, the Respondent was previously registered as a credit provider in terms of section 40 of the Act

with registration number NCRCP8899 from 1 August 2017 until 31 July 2018, but at the time of the investigation, the Respondent's

registration had lapsed.[1]

5. The Respondent has opposed this application. At the hearing, the Respondent was represented by Mr Kruger Engelbrecht from Kruger

Engelbrecht Attorneys.

JURISDICTION

6. This is a referral in terms of section 140(1) of the Act. In addition to its other powers in terms of the Act, section 150 gives the National Consumer Tribunal (the Tribunal) the power to make an appropriate order concerning prohibited or required conduct in terms of the Act or the Consumer Protection Act, 2008.

7. This judgment is based on the documents before the Tribunal as well as submissions made by the Applicant and the Respondent at the hearing held on 27 September 2021. Due to the Covid 19 pandemic, the hearing took place via a Microsoft Teams video and audio link.

8. The Applicant seeks an order inter alia:

- (1) Declaring the Respondent to have repeatedly contravened the Act, regulations, and its conditions of registration;
- (2) Declaring the Respondent's repeated contraventions as prohibited conduct[2] in terms of section 150 (a) of the Act;
- (3) Imposing an administrative fine on the Respondent of an amount, which is the greater of R1 000 000.00 (one million rand) or 10% (ten per cent) of the Respondent's annual turnover during the preceding financial year;
- (4) Ordering the Respondent to appoint an independent auditor to determine inter alia whether credit has been granted recklessly to consumers and if consumers have been overcharged on interest and credit.

BACKGROUND

9. This application stems from a scouting exercise in Mooi River, KwaZulu-Natal, on 16 October 2018. During the scouting exercise, an Applicant employee became aware of the Respondent's office situated at Shop No 3 Maclins Flats, Midlands, Mooi River, KwaZulu-Natal. The employee inquired about the possibility of obtaining a loan and was informed that a bank card and identity document was required and that the interest rate was 30% on short term loans.
10. From this information, the Applicant concluded that the Respondent was possibly contravening the Act. Therefore it initiated a complaint against the Respondent in its own name in terms of section 136(2) of the Act.
11. On 19 November 2018, Mr Douglas Musandiwa (Mr Musandiwa) was appointed as an inspector in terms of section 25(a) of the Act to investigate the Respondent's activities at Shop No 3 Maclins Flats, Midlands, Moor River, KwaZulu-Natal.
12. On 27 November 2018, Mr Musandiwa successfully applied for a warrant of search and seizure to search the Mooi River premises of the Respondent for prohibited instruments.
13. On 28 November 2018, Mr Musandiwa, with the assistance of the South African Police Services (SAPS) searched the Respondent's Mooi River premises. They found multiple prohibited instruments, including 140 SASSA cards,[3] 154 bank cards, 226 identity documents and five driving licences. An inventory of the items which were collected by the SAPS is attached to the investigation report as annexure "C".

14. Mr Musandiwa also interviewed Ms Thokoane, who introduced herself as the manager, about the business practices of the Respondent. During the interview, Ms Thokoane informed him that the business charges interest of 30% per month. Mr Musandiwa also established that there was no window decal and that the credit provider was displaying an expired registration certificate dated 31 July 2018.

15. During the investigation, Ms Thokoane contacted a Mr Ndlangisa, who advised her to co-operate with the investigation. It was subsequently

established that Mr Ndlangisa is a director of the Respondent.

16. Ms Thokane provided Mr Musandiwa with ten sample files. He assessed the sample files and concluded that the Respondent had repeatedly

contravened the provisions of the Act. He compiled an investigation report (the investigation report), dated 19 December

2018 and attached the consumer files which had been assessed (see "D1" to "D10" of the investigation report).[4]

17. The Applicant's case is stated in its founding affidavit. The deponent is Mrs Jacqueline Peters, who was the manager in the Applicant's

Investigations and Enforcement Department. According to Mrs Peters, the Respondent had been registered as a credit provider with the Applicant from 1 August 2017 until 31 July 2018 under registration number: NCRCP889. The Applicant concluded that the Respondent's

registration had therefore lapsed.

CONTRAVENTIONS OF THE ACT

Reckless credit

The Act

18. Section 80 deals with reckless credit. Section 80 (1) (a) provides that a credit agreement is reckless if, when concluding the agreement, the credit provider fails to conduct an assessment as required by section 81 (2), irrespective of what the outcome of the assessment might conclude. Section 81 (3) specifically prohibits a credit provider from entering into a reckless credit agreement with a prospective

consumer. Regulation 23 (A) sets out the criteria which a credit provider should take into consideration before granting a loan.

Alleged contravention

19. The Applicant alleges that there is no evidence to suggest that the Respondent took any steps to conduct proper affordability assessments. During the investigation, only a "loan book" was available to assess. This loan book functioned as the credit agreements and the

Respondent's record of the loans granted. Credit agreements appear to have been given without the Respondent taking any steps to assess affordability. Consumers were not asked to supply proof of income, and there are no credit bureaux reports. The loan book records the various consumers and their personal identification numbers (PIN) (see "D1" to "D10").

Pre-agreement statements and quotations

20. In terms of section 92 (1) a credit provider must not enter into a small credit agreement unless the credit provider has given the consumer a pre-agreement statement and quotation in the required form. Regulation 28 sets out the information which must be contained in that form (see also Form 20).

The allegations

21. The Applicant alleges that the Respondent failed to provide consumers with pre-agreement statements and quotations, and it failed to provide consumers with credit agreements.

Cost of credit

The Act

22. Section 100 and 101 of the Act respectively deal with prohibited charges and the cost of credit. Section 100 (1) (b) precludes a credit provider from charging excessive interest.
23. Section 101 (1) (c) (iii) precludes a credit agreement from requiring the consumer to pay any money or other consideration, except a service fee which must not exceed the prescribed amount relative to the principal debt.
24. The Applicant submits that it was very difficult to assess what charges the Respondent levied because of the lack of information regarding the various loans. However, when questioned by Mr Musandiwa, the Respondent's Manager indicated that interest was levied at 30% per month.

Prohibited collection methods

25. Section 133 (1) provides that a credit provider must not make use of any document, number, or instrument referred to in section 90 (2)
 - (l) when collecting on or enforcing a credit agreement. Such conduct is a criminal offence under the Act.
26. The Applicant alleges that the Respondent was found to have retained numerous prohibited instruments, and Mr Musandiwa successfully linked these prohibited instruments to the credit agreements obtained from the Respondent. It can therefore be inferred that the instruments were retained for prohibited purposes. The Respondent's Manager was detained by the SAPS and charged under Case Number 84/11/2018.

Failure to keep proper records

27. Regulation 55 (1) requires credit providers to keep proper records for three years.

The allegation

28. The Applicant alleges that the Respondent's record-keeping was substandard and failed to meet the record-keeping obligation placed

on credit providers. There is no evidence to show that the Respondent kept any records that are listed in the regulation.

All the credit agreements were recorded in a "loan book".

THE RESPONDENT'S RESPONSE

29. The Respondent does not dispute any of the allegations regarding prohibited conduct alleged by the Applicant. Instead, the

Respondent explains its relationship or non-relationship with the Respondent's office in Mooi River. Mr Slindelo Cyprian

Ndlangisa, a present director of the Respondent, deposed to the answering affidavit on behalf of the Respondent.

30. The Respondent also disputes that the Respondent was unregistered at the date of the investigation and attached registration certificates for both its Mooi River office and its Howick office dated 1 August 2018 to 31 July 2019.[5]
31. The person who established the Respondent and the initial director, Mr Samson Lamola passed away on 27 March 2018.[6] Mr Lamola operated a micro-lending business in KwaZulu-Natal for some 25 years. This business was formalised in 2015 when Mr Lamola incorporated the Respondent and registered with the Applicant. Mr Lamola operated the Respondent's business from two business premises - one in Mooi River and another in Howick.
32. After Mr Lamola passed away, Mr Slindelo Cyprian Ndlangisa and Ms Latoya Celeste Penniston were appointed as the new directors of the Respondent. Mr Ndlangisa is Mr Lamola's brother, and Ms Penniston is his daughter.
33. Although Mr Ndlangisa has deposed to an affidavit on behalf of the Respondent opposing this application, he states that he cannot answer a large number of questions regarding the matter because he was, at the time, a new director.
34. In particular, he is unable to comment on the business practices of the Respondent at the Mooi River office because, in his view, that office was independently operated by Mr Lamola's life partner, Ms Thokoane. He was only in charge of the office in Howick, and this office, he alleges, is operated in compliance with the Act.
35. He states that the Mooi River office was not authorised or linked to the Respondent's business. The Mooi River office did have access credentials to the formal information management system of the Respondent, but it did not use the system. In addition, the Mooi

River office did not use the administration system of the Respondent. The financial statements were not linked, and neither were the bank accounts. Mr Ndlangisa states that he had no insight into the operations of the Mooi River office. That operation was entirely separate and unrelated to the Respondent, and the Mooi River operation could not bind the Howick operation or the Respondent contractually or otherwise. Mr Ndlangisa alleges that there was no legal nexus between the Respondent and the Mooi River office.

36. The Respondent acknowledges that an NCR certificate was issued for Mooi River, but it was issued with the idea that the Mooi River office would operate under the name and style of the Respondent on the condition that the operation would comply with the instructions of the Respondent, which it alleges was not the case.
37. Mr Ndlangisa confirms that he was called to the Mooi River office by Ms Thokoane when her office was searched but explains that he only did this to advise her and not because he was responsible for the operations of that business.
38. Mr Ndlangisa also acknowledges that he paid a R10 000 fine on 7 March 2019, but states that this was regarding the business practices of the Howick office and had nothing to do with the Mooi River office. He states that he paid this fine on the advice of his attorneys. He further explains that he was a new director of the Respondent, so he had to "catch up fast". He is a layperson and not a sophisticated litigant.
39. Mr Ndlangasi stated in his affidavit that he would be making application to the NCR to withdraw the Mooi River office's certificate, and at the hearing, the Respondent stated that the office in Mooi River had been abandoned and was no longer functioning. It ceased to function from the date of the investigation.

ANALYSIS

40. It must be accepted that this is a rather unusual case. The Respondent was established and operated by a person who passed away shortly before this investigation took place. At the time, the director was operating two outlets – one in Mooi River and one in Howick, KwaZulu-Natal, with the offices being about 40 kms apart. After his death in March 2018, new directors took over the business, and according to their version, they only operated the Howick office and had nothing or very little to do with the Mooi River office. Nevertheless, from the evidence before us, it is clear that this office continued to operate. The only defence the Respondent has raised against the allegations of prohibited conduct is that it denies that it is responsible for the branch investigated by the Applicant.
41. There is very little in dispute between the parties regarding the facts of this matter.
42. It is common cause that the Respondent is an incorporated juristic entity. The Respondent does not dispute that it is registered as a credit provider with the Applicant and that it had two registered offices. The Respondent averred at the hearing that it has two registration certificates for the period 1 August 2018 to 31 July 2019 (the period in which this

investigation took place) – one for Howick and one for Mooi River branch. Therefore, there can be little doubt that the Mooi River office was a registered office of the Respondent and that the Respondent was responsible for the office's business practices.

43. There are thousands of credit providers in South Africa that operate more than one branch. The NCR registers those branches to a credit provider which is then responsible and accountable to ensure that the branches operate within the bounds of the law. It would cause chaos within the national credit market was the Tribunal to accept a defence from the Respondent that it was unaware of what was happening in its branches, and that it can therefore not be held responsible.
44. We accept that the new directors are lay people who may not have been experienced when it comes to operating the business of a credit

provider; however, they were running a business that falls within a regulated environment. The onus was on them to ensure that the Respondent in all its outlets complied with the law, and if they were unhappy with what was taking place at the Mooi River office, they should have reported the matter to the NCR. They could not simply abandon that business and refuse to accept responsibility for the contraventions of the Act which were taking place there.

45. Therefore, we conclude that the contraventions in the Mooi River office are infringements committed by the Respondent.
46. We turn now to consider the various allegations made by the Applicant against the Respondent.

Reckless credit lending

47. We are satisfied that the evidence establishes that the Respondent was operating a very rudimentary system in its Mooi River office.

There was only a loan book in which the names of consumers were recorded with their PIN numbers. There is no evidence that any affordability assessments were conducted before consumers were granted loans. Neither is there evidence that the Respondent

ensured that consumers understood the credit they were applying for or that their repayment history was considered before credit was granted. All this is evidence of reckless credit lending. We find, therefore, that the Respondent contravened section 81(2) (a) read with Regulation 23A and section 81 (3) read with section 80 (1) (a).

Pre-agreement statements

48. There is also no evidence that the Respondent provided consumers with pre-agreement statements, quotations and credit agreements. We are therefore satisfied that the Respondent contravened section 91

- (1) read with regulation 28 (1) (a) (b).

Cost of credit

49. Due to the rudimentary system used by the Respondent in its Mooi River office, there is virtually no evidence of what the Respondent charged consumers for the cost of the credit it provided. The only evidence before us is the inspector's report in which Mr Musandiwa states that consumers were charged an interest rate of 30% per month. Based on this evidence, which is not contradicted, we are satisfied that the Respondent contravened section 100 (1) (d), and section 101 (1) (d)(ii) read with regulation 42 of the Act.

Prohibited instruments

50. The evidence before us establishes that the Respondent had prohibited instruments. Mr Musandiwa was also able to link prohibited

instruments with the ten files which he assessed. The Tribunal takes into account that the Respondent paid an admission of guilt fine for retaining consumers' bank cards and PINS. The Tribunal does not accept the Respondent's version that the admission of guilt fine related to a contravention at the Respondent's Howick branch. There is no evidence before the Tribunal that the NCR investigated the Howick branch or that the SAPS confiscated bank cards and PINS from that branch. The Respondent was also in possession of consumers' PIN numbers. The only inference which can be drawn is that the Respondent was making use of these prohibited instruments to collect its debts. This conduct is a contravention of section 133 read with section 90 (2) (1).

CONCLUSION

51. Consequently, we are satisfied that the Respondent engaged in prohibited conduct by contravening the sections referred to in the preceding paragraphs and has therefore repeatedly contravened the Act and Regulations.

CONSIDERATION OF AN APPROPRIATE ORDER

The Applicant's requested orders

52. The Applicant's requested orders are set out above and do not need to be repeated here. Two aspects of these requested orders require further consideration by the Tribunal:
- (1) A suitable administrative fine; and
 - (2) The appointment of an auditor.

Administrative fine

53. The Applicant has requested the Tribunal to impose an administrative fine in the amount of 10% of the Respondent's annual income or R1million whichever is the greatest.
54. The factors which we must consider when determining an appropriate fine are set out in section 151(3) of the Act. The Applicant

discussed these in its founding affidavit.

55. We have focused on two factors in particular:

- (1) The gravity of the infringements; and
- (2) The market circumstances under which the contraventions occurred.

The gravity of the infringements

56. The Applicant argues that the application contains the best example of a credit provider operating in disregard of the Act. The Respondent effectively contravened every provision, rule and regulation regulating the conduct of a credit provider. In addition, keeping prohibited instruments not only violates the Act but also constitutes a criminal offence. It stands to reason,

therefore, that the contraventions are extremely serious.

Market circumstances

57. From the evidence before us it is clear that the Respondent did business with low income and disadvantaged consumers. This is an exceptionally vulnerable market where consumers are impoverished and often desperate for loans. They suffer hugely due to reckless credit lending and overcharging. These are also consumers who are unaware (or incapable) of protecting their legal rights which often means that they can be exploited with impunity. These are the very consumers for whom the Act was introduced to protect.

58. In addition the Tribunal considered the other factors set out in section 151 (3):

- (1) The loss or damage suffered as a result of the contravention –

consumers were required to hand over important personal instruments which was no doubt extremely inconvenient for them and constituted a criminal offence on the part of the Respondent;

- (2) Behaviour of the Respondent – the Applicant informed us that

the Respondent's manager co-operated with the Applicant during the investigation;

- (3) Level of profit derived from contraventions – there is insufficient evidence before us to establish the level of profit which the Respondent derived from the Mooi River office;

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

the inspector did not encounter any issues with regard to the Respondent's co-operation; and

- (5) Prior contraventions committed by the Respondent – this is the first time that the Respondent has been investigated by the Applicant. The contraventions relate to one office only and there is no evidence before us that the Howick office was contravening the Act.

59. The Tribunal is satisfied that the nature of the Respondent's contraventions and the consequent financial implications for vulnerable consumers justify the Tribunal imposing an administrative fine on the Respondent. We must also send a clear message to all credit providers that the Tribunal takes the conduct of credit providers who contravene the Act very seriously. People must be aware that when they are operating in a regulated environment, the onus is on them to ensure that they comply fully with the law and that there are serious consequences when they fail to do so.
60. However, we must also act fairly, taking into account the evidence. The Respondent has stated that this is a small operation that employs two people only. The Mooi River office has now been closed, and just the Howick office is continuing to operate. The Respondent has made every effort to ensure that the Respondent's business practices are compliant with the Act.
61. Considering all the above circumstances, we believe that a fine of R50 000 is appropriate.

Auditor's Report

62. The Applicant has requested that the Respondent be ordered to appoint an independent auditor to inter alia determine and compile a list of consumers who among other things were charged fees that exceed the prescribed minimum rates for three years from the date of this judgment.
63. In these particular circumstances, the Respondent's office, which was the subject of this application, ceased operating in 2018. As stated above, there is no evidence before us that the Howick office is also contravening the Act. Therefore, we are of the view that it would serve no legitimate purpose to appoint such an auditor and, for this reason, decline to grant the Applicant's prayer in this regard.

ORDER

64. Accordingly, for the reasons set out above, the Tribunal makes the following order:-
- (1) The Respondent has repeatedly contravened the following sections of the Act:
- section 81 (2) (a) read with Regulation 23A;
 - section 81 (3) read with section 80 (1) (2);
 - section 92 (1) read with Regulation 28 (1) (a) and (b);
 - sections 100 (1) (d) and 101 (1) (d) (ii) read with Regulation 42 (1);
 - Section 133 read with section 90 (2) (l); and
 - Regulation 55 (1) (b).
- (2) The Respondent's conduct is declared prohibited in terms of section 150 (a) of the Act.

- (3) The Respondent must pay an administrative fine of R50 000.00 (fifty thousand rand) into the National Revenue Fund referred to in section 213 of the Constitution of the Republic of South Africa, 1996 within 30 days of the date of this judgment. The banking details of the Fund 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: 370650026

Reference: NCT/129036/2019/140(1)

- (4) No order is made as to costs.

DATED ON THIS 5TH DAY OF OCTOBER 2021.

(signed)

Prof T Woker

Presiding Member

With Tribunal Members Ms D Terblanche and Mr Bailey concurring.

- [1] This issue will be elaborated on further in the judgment. At the time of the investigation, the Respondent had two registered offices, one in Howick and one in Mooi River, KwaZulu-Natal. The registration certificate for the Respondent's Mooi River office is attached to the founding affidavit (see FA12 at page 35 of the documents before the Tribunal). This application concerns the conduct of the business at the Mooi River office.
- [2] The Act defines prohibited conduct as an act or omission in contravention of the Act.
- [3] South African Social Security Agency cards which are provided to consumers who receive social security assistance.
- [4] Page 53 of the documents before the Tribunal.
- [5] See pages 182 and 183 of the documents before the Tribunal.
- [6] See death certificate at page 180 of the documents before the Tribunal.

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