

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Thuso
Ya Potlako Trading and Projects
(Pty) Ltd (NCT/318853/2024/57(1))
[2024] ZANCT 19 (21 July 2024)

[2024] ZANCT 19

COURT

National Consumer Tribunal

BEFORE

N Maseti, Z Ntuli, MC Peenze

CASE / FILE NUMBER

NCT/318853/2024/57(1)

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IN THE NATIONAL CONSUMER
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Case

number: NCT/318853/2024/57(1)

In

the matter between:

NATIONAL
CREDIT REGULATOR
APPLICANT
and
THUSO
YA POTLAKO TRADING AND PROJECTS (PTY) LTD
RESPONDENT

Coram: Ms
N Maseti
- Presiding Tribunal
Member
Ms
Z Ntuli
- Tribunal Member
Dr
MC Peenze
- Tribunal Member
Date
of Hearing
- 18 June 2024
Date
of Judgment
-
21 July 2024

JUDGMENT

AND REASONS

INTRODUCTION

1. The applicant in this matter is the National Credit Regulator (the applicant or the NCR), a juristic person established by section 12 of the National Credit Act, 34 of 2005 (the NCA). At the hearing, the applicant was represented by Ms Mboniseni Mathivha, the applicant's legal advisor.
2. The respondent is Thuso Ya Potlako Trading and Projects (Pty) Ltd (the respondent), duly incorporated under the company laws of South Africa. Since 18 April 2019, the respondent has been a registered credit provider with the NCR under registration number NCRCP

11992. The respondent has continuously retained its registration.

3. This is an application made in terms of section 57(1) of the NCA whereby the NCR seeks the cancellation of the respondent's registration because the latter repeatedly contravened various sections of the NCA and failed to comply with its conditions of registration. The NCR further seeks additional orders relating to the alleged contraventions of the NCA, including that such contraventions constitute prohibited conduct, interdictory relief against such further conduct, and an administrative penalty.

TERMINOLOGY

4. A reference to a section in this judgment refers to a section in the NCA.

5. A reference to a regulation refers to the National Credit Act Regulations, 2006[1] (the regulations).
6. A reference to a form refers to a form as prescribed in the regulations.
7. A reference to a rule refers to the Rules of the National Consumer Tribunal[2] (the Tribunal).

PROCEEDINGS ON A DEFAULT BASIS

8. The respondent has only one registered branch with the applicant, MLC Micro Loans, whose physical address is 12978 Mositoane Section Lerome Saulspoort, 0318. This application is based on an authorised investigation conducted at this branch. On 20 March 2024, the applicant filed this application with the Tribunal Registrar (the registrar). The applicant served this application on the respondent by registered post on 16 March 2024,[3] and the registrar issued a notice of filing to the parties on 20 March 2024. Subsequently, a notice of set down was issued to the parties on 29 April 2024.
9. Rule 13 (2) requires the respondent to respond within 15 business days of receiving the application by serving an answering affidavit on the applicant. The respondent did not do so. The applicant did not apply for a default order under rule 25 (2). Consequently, the registrar correctly set the matter down for hearing on a default basis because the pleadings had closed.
10. Rule 13 (5) provides that a factual allegation in the application or referral not explicitly denied or admitted in the answering affidavit is deemed to have been admitted. Since the respondent did not file an answering affidavit, the respondent is deemed to have admitted the allegations in the applicant's application.

BACKGROUND

11. As mandated by the NCA, the applicant monitors the consumer credit industry in South Africa and investigates alleged NCA contraventions. Section 136(1) determines that a complaint regarding an alleged contravention of the NCA may be submitted to the applicant, whilst section 136(2) confirms the applicant's authority to initiate a complaint in its own name.
12. The applicant attended the Consumer Affairs Office's World Consumer Rights Day in the North-West Province when residents anonymously tipped off the applicant about the respondent's business practices. The information received from the tip-off was that the respondent granted loans to consumers without conducting an affordability assessment, did not provide consumers with pre- agreement statements, quotations, or credit agreements, and retained the consumer's identity documents and bank cards to ensure repayment of the loans.

13. This information gave rise to a reasonable suspicion that the respondent was conducting its business and extending credit in a manner that was not permitted by the provisions of the NCA and, if found true, would constitute prohibited conduct under the NCA.
14. The applicant, on or about 19 May 2023, initiated a complaint against the respondent in terms of section 136(2) of the NCA and authorised an investigation into the business practices of the respondent in terms of section 139(1)(c) of the NCA.
15. On 9 June 2023, the applicant's chief executive officer duly appointed Luvo Nkone (Nkone), Douglas Musandiwa (Musandiwa), Bongiwé Tyutu (Tyutu) and Riaz Oliphant (Oliphant) as inspectors in terms of section 25 to investigate the respondent.
16. On or about 10 October 2023, a warrant of search and seizure was issued by the Moses Kotane Magistrate's Court. The warrant entitled the inspectors and members of the South African Police Service (SAPS) to search the respondent's premises and to seize any prohibited instruments. On the same day, the appointed inspectors, together with the members of the SAPS from the Mogwase Police Station, performed a raid exercise and conducted an onsite investigation at the respondent's address. A total of 280 prohibited instruments were seized, comprising 197 bank cards, 34 South African Social Security Agency (SASSA) Cards, 49 Identity Documents, and a loan book containing credit extension entries.[4]
17. The inspectors met and interviewed Mmathapelo Ruth Joseph (Joseph), identified as the respondent's cashier, and Potlako Pertunia Gouwe (Gouwe), identified as the respondent's manager. The respondent's representatives were presented with copies of the section 25 certificates before being interviewed, and their rights per section 139(4) were explained.[5]
18. During the interview, Gouwe provided an overview and summary of the respondent's loan-granting practices as follows:
 - 18.1 The respondent is a registered credit provider;
 - 18.2 The respondent started granting loans in 2020 and has one branch;
 - 18.3 The respondent grants small credit transactions ranging from R100.00 to R10,000.00 repayable in one month;
 - 18.4 The respondent grants loans to SASSA recipients, including child grant recipients;
 - 18.5 The respondent does not provide consumers with pre-agreement statements and quotations or credit agreements;
 - 18.6 The interest rate is charged at a fixed rate of 40% on all agreements;
 - 18.7 The respondent provides loans to consumers who are blacklisted and under debt review; and
 - 18.8 Consumer's instalments are also payable by withdrawing the relevant instalments from the consumer's bank or SASSA cards.

19. Members of the Mogwase Police Station subsequently arrested Gouwe for contravening section 133 read with section 90(2)(1), and a criminal case was registered under case no. 140/10/2023.
20. Nkone assessed the evidence provided and concluded the investigation by authoring a report with his findings. These sample consumer files are annexed to the investigators' report, marked annexures Annexure FA6 and the investigators' report is annexed to the applicant's founding affidavit.

ALLEGED CONTRAVENTIONS OF THE NCA AND THE TRIBUNAL'S FINDINGS

21. The respondent conceded to all the alleged contraventions and did not dispute the evidence submitted.

Failure to conduct affordability assessments in terms of the NCA and reckless credit

22. Section 81(2) prohibits a credit provider from entering into a credit agreement with the consumer without, amongst others, first taking reasonable steps to assess the consumer's general understanding and appreciation of the risks and costs of the proposed credit and rights and obligations of the consumer under a credit agreement; the debt repayment history of the consumer under credit agreements; and the existing financial means, prospects, and obligations of the consumer. In terms of section 80(1)(a), a credit agreement is reckless if, at the time that it was made, 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.
23. As pointed out by the applicant, annexures G1 to G13 show that the respondent failed to take the reasonable steps required in section 81(2) concerning any of the consumers in these files.
24. It bears mention that, per section 82(2), the Minister of Trade and Industry (i.e. the Minister responsible for consumer credit matters) made regulations on the criteria to conduct affordability assessments. This is found in regulation 23A. The Tribunal is aware that regulation 23A(4) was reviewed and set aside in *Truworths Limited and Others v Minister of Trade and Industry and Others*[6] (Truworths). The remainder of regulation 23A remains valid and applicable in relation to a credit provider's obligations to conduct affordability assessments. Indeed, in *Truworths*, the court held that the elimination of sub-regulation (4) removes only the specific provisions for validating gross income and does not do away with the need to ascertain gross income as a step towards calculating discretionary income.[7]
25. An assessment of annexures G1 to G13 reveals that the respondent did not comply with the provisions of section 81(2) nor its obligations detailed in the remainder of regulation 23A. For example, it failed to assess the existing financial means and prospects of the consumers concerned, failed to calculate the existing financial means, prospects and obligations and failed to consider the debt repayment history as consumers under credit agreements. As the respondent failed to make the assessments required by section 81(2), the Tribunal finds that

the credit agreements relating to the files marked annexures G1 to G13 are reckless.

Failure to provide consumers with pre-agreements in the prescribed form

26. Section 92(1) prescribes that a credit provider must not enter into a small credit agreement unless it has given the consumer a pre-agreement statement and quotation in the prescribed form. Regulation 28 informs what the agreement statement and quotation must contain and provides that they must be in the format set out in Form 20 of the forms attached to the regulations.
27. Regulation 23A(15)(a) requires a credit provider to disclose to the consumer the credit cost multiple and total cost of credit in the pre-agreement statement and quotation. In terms of regulation 23A(15)(d), a credit provider must disclose the total cost of credit, which includes the principal debt, interest, initiation fee, if any, the service fee relegated to the life of the loan and the credit insurance aggregated to the life of the loan. None of these was provided to the consumers in annexures G1 to G13, and the respondent contravenes these sub-regulations.
28. As the respondent failed to provide the consumers in annexures G1 to G13 with pre-agreement statements and quotations in the prescribed form, the critical information required in Form 20 is lacking, namely:
 - (i) The type of agreement entered into;
 - (ii) The respondent's NCR registration number;
 - (iii) The respondent's physical address;
 - (iv) The respondent's contact number;
 - (v) The ID numbers of consumers;
 - (vi) The addresses of consumers;
 - (vii) The contact numbers of the consumers;
 - (viii) The amount of the cost of credit charged to consumers; and
 - (ix) The annual and monthly interest rates apply to the agreement.
29. To sum up, the respondent is in contravention of section 92(1), read with regulation 28(1)(b) and Form 20, and by failing to make the required disclosures in terms of cost of credit to the agreements in question, in contravention of regulation 23A(15)(a) and (d).

Failure to provide consumers with credit agreements in the prescribed form

30. Section 93(1) provides that a credit provider must deliver to the consumer, without charge, a copy of a document that records the credit agreement in paper or printable electronic form. Subsection (2) prescribes that a document that records a small credit agreement must be in the prescribed form.
31. Regulation 30 requires that a small credit agreement document must contain all the information as reflected in Form 20.2. It is not necessary for present purposes to detail the information contained in Form 20.2, save to state that it includes all the rights and obligations of the consumer under the credit agreement.
32. It is evident from annexures G1 to G13 that the respondent failed to provide consumers with credit agreements in the prescribed form. Consequently, the respondent contravened sections 93(1) and (2) read with regulation 30.

Possession of prohibited instruments

33. Section 133(1)(a) prohibits the credit provider from making use of any document, instrument or personal identification number mentioned in section 90(2)(1) when collecting on or enforcing a credit agreement.
34. Section 133(2) provides that a credit provider must not, when collecting money owed by the consumer under a credit agreement or when seeking to enforce the agreement, rely on any document, instrument, or contract provision referred to in section 90(2)(1). In terms of section 90(2)(1), a credit agreement provision is unlawful if the consumer agrees to deposit an identity document, credit or debit card, bank account automatic teller machine access cards, or any similar identifying document with the credit provider.
35. The respondent failed to adhere to the above-discussed sections of the NCA in that the respondent was found in possession of a large number of consumers' instruments, with at least 13 of them being successfully linked to the information contained in the loan book in violation of the provisions of the NCA. The respondent was found to possess 280 prohibited instruments, comprising 197 bank cards, 34 SASSA Cards, 49 Identity Documents and a loan book.
36. As a result of the respondent's possession of consumers' instruments and pins as observed from the sampled files, for example, the respondent has contravened section 133(1) and (2) read with section 90(2)(1).

Contraventions of General Conditions of Registration.

37. When the applicant registered the respondent as a credit provider, it imposed conditions on the registration as it is entitled to do in section 48. In terms of section 52(5)(c), a registrant such as the respondent must comply with its conditions of registration and the provisions of the NCA.

38. In terms of the respondent's conditions of registration as a credit provider, it is required to display a registration certificate and a window decal, as supplied to it by the applicant, at the entrance of its business premises.
39. When the inspectors visited the applicant's business premises, they observed that no NCR certificate or window decal was displayed as required by the respondent's conditions of registration.
40. The respondent is, therefore, in contravention of its conditions of registration read with section 52(5)(c).

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41. A further condition of the respondent's registration is submitting reports and returns within specified periods to the applicant.
42. Section 52(5)(f) requires that a registrant file any prescribed reports with the respondent in the prescribed manner and form.
43. Regulation 62(1)(b) requires a credit provider to submit statistical returns to the applicant. Regulation 64 sets out the reporting periods for such statistical returns and the due dates for statutory reporting. Regulation 66 requires a credit provider to submit an annual financial and operational return in Form 42 to the applicant within six months after the registered credit provider's financial year- end.
44. The respondent has not complied with any of the sections dealing with statistical returns and financial reporting to the respondent since 2021. Accordingly, it has contravened sections 52(5)(c) and (f) read with its general conditions of registration read further with regulation 62(1)(b) and regulations 64 and 66.

RELIEF SOUGHT

45. The Tribunal already found that the respondent contravened various sections of the NCA and its regulations. It follows that such contraventions should be declared prohibited conduct and that by engaging in such conduct, the respondent has brought the consumer credit industry into disrepute. The cancellation of the respondent's registration is, therefore, justified.
46. As for the credit agreements pertaining to annexures G1 to G13, as already held, these were recklessly granted, and the respondent should be prohibited from collecting on these agreements. Since this relief can only be granted in respect of the sampled credit agreements, an auditor must be appointed, at the respondent's costs, to determine whether loans had been extended recklessly for the past three years from the date of issuing of this judgment for the applicant to make a further application to the Tribunal to have such credit agreements declared reckless.

47. The applicant requested the Tribunal to interdict the respondent from engaging in prohibited conduct in the future and from extending

further credit to consumers. This application is brought in terms of section 57(1) for the deregistration of the respondent. Given the Tribunal's ruling that the respondent is to be deregistered, an interdict would serve no purpose. In any event, the applicant has not addressed the requirements for an interdict to be granted.[8]

48. Lastly, the applicant seeks an administrative fine to be imposed on the respondent. Section 151 provides that the Tribunal may impose an administrative fine in respect of prohibited conduct and that such a fine may not exceed the greater of 10% of the respondent's annual turnover or R1,000,000.00, whichever is the greater. Section 151(3) lists various factors the Tribunal must consider when determining an appropriate fine. These factors are discussed under the sub-headings below:

48.1. The nature, duration, gravity, and extent of the contraventions.

48.1.1. In every credit agreement in the sampled files, the respondent breached its obligations in terms of the NCA concerning the interest and fees charged. Notably, the respondent disregarded its obligations to conduct affordability assessments, thereby disregarding consumers' rights. Furthermore, the respondent disregarded consumers' rights by not supplying them with pre-agreement statements and quotations, and with copies of the credit agreements in the prescribed form. The Tribunal regards these contraventions as serious.

48.1.2 The purpose of the NCA is to encourage responsible borrowing, avoid over-indebtedness, and fulfil obligations by consumers. The NCA furthermore discourages reckless lending by credit providers. The respondent's conduct is in total disregard of these safeguards built into the NCA.

48.2. Loss or damage suffered as a result of the contraventions.

The consumers concerned suffered loss or damage due to the respondent's conduct, which included not being subjected to affordability assessments.

48.3. The behaviour of the respondent.

The respondent co-operated with the applicant during the investigation. However, as a registered credit provider, there is no reason why the respondent should have been unaware of its statutory obligations under the NCA.

48.4. The market circumstances in which the contravention took place.

The respondent extended small short-term loans to consumers in desperate financial circumstances. Undoubtedly, these consumers belong to the most vulnerable sectors of our population, and the provisions of the NCA are specifically designed to protect them.

48.5. The level of profit derived from the contraventions.

Without the benefit of the respondent's financial statements, it is impossible to quantify the level of profit the respondent derived from its contraventions. Although the investigator's report mentioned excessive interest and fees, the applicant did not argue such contraventions before the Tribunal.

48.6. The degree to which the respondent has co-operated with the applicant.

The respondent co-operated with the investigators during the investigation.

48.7. Prior contraventions permitted by the respondents.

The applicant has not shown that prior enforcement actions were instituted against the respondent. It is clear, however, that the contraventions committed by the respondent have been ongoing for some time.

49. Unfortunately, the applicant did not furnish the Tribunal with the respondent's annual financial statements as envisaged in section 151(2). Consequently, it is extremely difficult to quantify an appropriate fine. The Tribunal, however, considers that the respondent is in the business of extending small short-term loans, and there is no indication that its business is extensive. In the circumstances, the Tribunal is of the view that an administrative fine of R100,000.00 is appropriate.

ORDER

50. In the result, the following order is made:

SAP for some just efficiency

50.1 It is declared that the respondent contravened:

50.1.1. Section 81(2)(a)(ii) read with regulation 23A(12)(b) and 23A(13);

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50.1.2. Section 81(2)(a)(iii) read with regulation 23A(3) and 23A(12)(c);

50.1.3. Regulation 23A(9) and 23A(10);

50.1.4. Regulation 23A(8) and 23A(12)(a);

50.1.5. Section 81(3) read together with section 80(1)(a);

50.1.6. Section 52(5)(e) read with section 170 read further with regulation 55(1)(b)(vi);

50.1.7. Section 92(1) read with regulation 28(1)(b);

50.1.8. Regulation 23A(15)(a) and (d);

50.1.9. Section 93(1) and section 93(2) read with regulation 30;

50.1.10.

Section 133(1) and (2) read with section 90(2)(1);

50.1.12.

Section 52(5)(c) read with condition 5 of its conditions of registration;

50.1.13.

Section 52(5)(c) and (f) read with general condition 3 of its conditions of registration, read further with regulation 62(1)(b) and (c) read further with regulations 64 and 66.

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50.2 The contraventions listed in paragraph 50.1 are declared prohibited conduct.

50.3 The respondent brought the consumer credit industry into disrepute through those contraventions.

50.4 It is declared that the sampled agreements in the files marked as annexures G1 to G13 to the investigation report were recklessly granted, and the respondent is prohibited from collecting on those agreements.

50.5 The respondent's registration as a credit provider is cancelled with immediate effect.

50.6 Should the respondent remain in possession of consumer instruments that were not found during the raid investigation, it must return them immediately to their rightful owners, the consumers, or the South African Police Service.

50.7 Within 30 days of the issuing of this judgment, the respondent must, at its own cost, appoint an independent auditor, who is a chartered accountant, to investigate whether the respondent concluded any other similar transactions to those that form part of annexures G1 to G13 within the last three years from the date of the issuing of this judgment. Within six months of the issuing of this judgment, the auditor must submit a report to the applicant regarding those transactions and the amounts that may be reimbursed to consumers for the applicant to assess and possibly refer them to the Tribunal for further relief.

50.8. The respondent must pay an administrative fine of R100,000.00 within three months of the issuing of this judgment into the bank account of the National Revenue Fund, the details of which are as follows:

Bank: The Standard Bank of South Africa Account holder: Department of Trade and Industry

Branch name: Sunnyside Branch code: 10645 Account number: 3[...] Reference:

NCT/318853/2024/57(1) and name of the person or business making the payment.

50.9. There is no order as to costs.

[signed]

DR MC PEENZE

Tribunal member

Tribunal members Ms Z Ntuli and Ms N Maseti (Presiding Tribunal member) concur.

[1] Published under Government Notice R489 in Government Gazette 28864 of 31 May 2006.

[2] GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters

before the National Consumer Tribunal, 2007 (Government Gazette No. 30225).

[3] See pages 162 and 163 of the record.

[4] See inventory list in Annexure H of the investigation report.

[5] See page 81 – 83 of the record.

[6] 2018

(3) SA 558 (WCC).

[7] Truworths at para 67.

[8] The interdict applied for is of a final nature. It is well established that the grounds for a final interdict are (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the lack of an adequate alternative remedy. See *Setlego v Setlego* 1914 AD 221.

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