

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Werlan Cash Loans (NCT/3867/2012/57(1)) [2013] ZANCT 5 (13 February 2013) [2013] ZANCT 5

COURT

National Consumer Tribunal

BEFORE

D Terblanche, X May, P Beck

CASE / FILE NUMBER

NCT/3867/2012/57(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

Case number: NCT/3867/2012/57(1)

DATE:13/02/2013

In the matter between:

NATIONAL CREDIT REGULATOR.....APPLICANT

and

WERLAN CASH LOANS t/a LEBATHU FINANCE.....RESPONDENT

CORAM:

Ms D Terblanche – Chairperson & Presiding Member

Mr X May - Tribunal Member

Ms Penelope Beck - Tribunal Member

JUDGMENT AND

REASONS

The Applicant is the National Credit Regulator (“the Applicant”), an organ of state within the public administration established in terms of section 12 of the National Credit Act, Act 34 of 2005 (“the NCA or “the Act”).

The Respondent is Werlan Cash Loans t/a Lebathu Finance (“the Respondent”).

The Applicant avers that the Respondent contravened the NCA in that the Respondent –

Contravened section 40(1) read with section 40(3), section 40(4) and section 89(2)(d) of the Act:

Contravened regulation 42(1)(b) of the Act: and

Failed to comply with the Compliance Notice issued to the Respondent:

Though the application before the Tribunal is for de-registration of the Respondent in terms of section 57(1), the Applicant at the start of the hearing indicated that it is not seeking an order for Respondent’s de-registration. Applicant submitted that the application is reflected as a de-registration application due to a typographical error.

Respondent was served with the application on 10 February 2012 and was expected to file its answer to the application within 20 (twenty) days. Respondent however did not file an answer to the Applicant’s application.

The matter is heard by the Tribunal on a default basis. The Tribunal considered the application on the basis of the founding affidavit

and the oral submissions made by the Applicant at the hearing and subsequent written submissions in respect of the request by the Applicant for the imposition of an administrative fine.

The brief background as alleged by the Applicant are as follows:

On 28 January 2007 the Respondent applied for registration as a credit provider to the Applicant. The application was received by the Applicant on 6 February 2007.

On 14 March 2007 the Applicant informed the Respondent that the Respondent was temporarily registered as a credit provider subject

to a comprehensive review of the application.

On 17 September 2007 the Applicant’s Registrations’ Department requested the Respondent to furnish its income tax

number, accounting officer’s details, practice number, name of professional body registered with, and copies of identity

documents of its’ directors. According to the Applicant the requested information has not been provided to date of the

application, and as a result the Respondent has not been registered.

On 4 July 2008 the Applicant sent the Respondent a final letter of demand for the outstanding information within 10 business days to complete the processing of the application.

On 22 August 2008 the Applicant sent the Respondent a letter informing the Respondent that its application has been refused as a result of its failure to provide the requested information and that its temporary registration as a credit provider will lapse 20 business days from date of this letter. The letter further informed the Respondent that it must not offer, make available, extend credit or enter into a credit agreement. Any credit agreement entered into after the lapse of the 20 day period will be unlawful and void.

APPLICANT'S

SUBMISSIONS

The Applicant alleges that –

From 17 September 2007 to date of this application the Respondent has failed to register with it as a credit provider under at least 100 credit agreements and has entered into credit agreements which are void and unlawful as they were entered into whilst the credit provider was not registered with the NCR being required to be so registered.

It obtained copies of the Applicants book of credit agreements showing that the Applicant entered into 181 credit agreements in September 2009. In terms of section 40(1) a person must apply to be registered as a credit provider if that person is the credit provider under at least 100 credit agreements.

Further, in terms of section 40(3) a person who is required to be registered in terms of section 40(1), but who is not so registered, must not offer, make available or extend credit, enter into a credit agreement or agree to do any of those things.

The credit agreement entered into by a credit provider who is required to be registered in terms of section 40(1) but who is not so registered is an unlawful agreement and void to the extent provided for in section 89(2)(d).

The Respondent entered into short term credit agreements, expressing the interest in the pre-agreement and quotation statement as 60% per annum as opposed to 5% per month which is in contravention of Regulation 42(1)(b). That, during the period 12 December 2010 to 1 April 2011, the Respondent has failed to express the interest rate on short term credit transactions as a monthly interest rate i.e. 5% per month.

Applicant issued a compliance notice against Respondent on 19 March 2008. From that date to date of the application before the Tribunal, the Respondent has failed to comply with the Compliance Notice. Non-compliance with a Compliance Notice issued in terms of section 54 is an offence in terms of section 54(5) subject to a penalty in terms of section 161(b) of the Act, in particular, being liable to a fine or imprisonment for a period not exceeding 12 months or to both a fine and imprisonment.

ANALYSIS OF LEGAL PROVISIONS AND FACTS

Section 40(1) read with section 40(3), section 40(4) and section 89(2)(d) of the Act provides as follows:

“40 Registration of credit providers

- (1) A person must apply to be registered as a credit provider if -
 - (a) that person, alone or in conjunction with any associated person, is the credit provider under at least 100 credit agreements, other than incidental credit agreements; or
 - (b) the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1).

...

- (3) A person who is required in terms of subsection (1) to be registered as a credit provider, but who is not so registered, must not offer, make available or extend credit, enter into a credit agreement or agree to do any of those things.
- (4) A credit agreement entered into by a credit provider who is required to be registered in terms of subsection (1) but who is not so registered is an unlawful agreement and void to the extent provided for in section 89.

89 Unlawful credit agreements

- (2) Subject to subsections (3) and (4), a credit agreement is unlawful if -
 - (d) at the time the agreement was made, the credit provider was unregistered and this Act requires that credit provider to be registered;...”

The provision of Section 40(1) of the Act is mandatory as is evident from the use of the word “must”. The ordinary dictionary meaning ascribed to the word “must” is “to be obliged to, be compelled to do something because of a rule or law”¹.

In the case of *Minister of Environmental Affairs and Tourism & Another v Pepper Bay Fishing (Pty) Ltd*; *Minister of Environmental Affairs and Tourism & Another v Smith* ² the learned judge Brand stated that

“The general principle is, of course, that the language of a predominantly imperative nature such as “must” is to be construed as peremptory rather than directory unless there are other circumstances which negate this construction”.

And that

“when there is an explicit sanction to non-compliance with the provision, it is indicative of the fact that the word “must” is peremptory”.

Section 40(3) of the NCA imposes a sanction to non-compliance as it states that a person who is not registered in terms of section 40(1) must not offer, make available or extend credit, enter into credit agreement or agree to do any of those things. Non-compliance with this provision may lead to a finding of prohibited conduct being made against a transgressor, a further sanction that can be imposed in the event of non-compliance.

In the Minister of Environmental Affairs and Tourism - matter it was further stated that “where a statute provides for the acquisition of a right or privilege as opposed to the infringement of an existing right or privilege,

compliance with formalities that are prescribed for such acquisition should be regarded as imperative”. In the present matter, being a registered credit provider is a privilege that has not yet been acquired by the Respondent and the word “must” in the NCA stipulates that such registration is peremptory and not merely suggestive.

With reference to the above, it stands to reason that the word “must” where it appears in section 40(1) of the NCA is peremptory and not discretionary and that registration in terms of Section 40(1) of the NCA is therefore mandatory for a person who, alone or in conjunction with any associated person is the credit provider under at least 100 credit agreements.

It means it is mandatory for a person, alone or in conjunction with any associated person is the credit provider under at least 100 credit agreements to be registered.

Respondent was party to 181 credit agreements at some stage, the Respondent has to be registered. These credit agreements were entered into when the Respondent was required to be registered in terms of Section 40(1) of the Act. At this time when the Respondent was required to be so registered, the Respondent was in fact not so registered. Section 89(2)(d) of the Act provides for any credit agreement to be unlawful if, at the time the agreement was made, the credit provider was unregistered but required to be registered. The credit agreements entered into by the Respondent are thus unlawful.

Regulation 42(1)(b) reads as follows:

“(b) The interest rate on short term credit transactions and incidental credit agreements must be disclosed as a monthly interest rate, in such disclosure as is required by the Act and these Regulations.”

Regulation 42(1)(b) has been promulgated in terms of sections 105(1) and 105(3)(a) of the NCA. In terms of Regulation 42(1)(b) of the Act the Respondent is obliged to disclose interest rates on short term credit agreements as a monthly interest rate. It is evident from the copies of the Respondents “PRE-AGREEMENT & QUOTATION FOR SMALL CREDIT AGREEMENTS” (attached as annexures “B” to “K” of Applicant’s Founding Affidavit) that the Respondent reflects

interest at an annual rate which is in violation of Regulation 42(1)(b) under sections 105(1) and 105(3)(a) of the NCA.

A Compliance Notice was issued against Respondent on 19 March 2008 for claiming to be authorized to engage in conducting the business of a credit provider when it was not so authorized; and for conducting a prohibited practice in terms of section 91(b) and 133 of the NCA by retaining borrowers' bank cards and pin codes.

Various follow-up investigations were conducted by the Applicant and on each occasion it was clear that Respondent was not registered as a credit provider but still carrying on the business of a credit provider. There was no evidence though that it was retaining bank cards and pin numbers.

The above therefore constitute contraventions of the NCA and prohibited conduct as defined in the NCA3.

The investigations conducted on 11 June 2008, 7 October 2009 and 29 April 2011 indicates that the Respondent has failed to comply with the Compliance Notice since its issue to date of this application.

If a person fails to comply with a compliance notice, the Applicant may refer the matter to the Tribunal for an appropriate order. This could be for an order to declare the conduct prohibited conduct in terms of section 150(a) of the NCA.

We accordingly find that Respondent –

Contravened section 40(1) read with section 40(3), section 40(4) and section 89(2)(d) of the Act: Contravened section 105(1) and 105(3)(a) of the NCA and the regulation 42(1)(b) promulgated thereunder:

Failed to comply with the Compliance Notice issued to the Respondent:

RELIEF

The Applicant requested the Tribunal to order the following relief:

Declaring the repeated contravention of section 40(1) read with Sections 40(3), 40(4), and 89(2)(d) of the Act by the Respondent prohibited conduct in terms of Section 150(a);

Declaring the repeated contravention of Regulation 42(1)(b) of the Act by the Respondent prohibited conduct in terms of section 150(a);

Declaring the Respondents non-compliance with the Compliance Notice an offence in terms of section 54(5) of the Act and imposing a fine on the Respondent in regard of such offence;

Imposing an administration fine against the Respondent in terms of section 151 of the Act; and/or

Declaring all credit agreements entered into by the Respondents as unlawful and void as the credit provider was unregistered when the Act required the credit provider to be registered when the credit provider entered into those credit agreements in terms of section 40(4) read with section 89(2)(d) of the Act.

Granting the Applicant such further or alternative relief as the Tribunal may consider appropriate to give effect to the consumer's rights in terms of the Act.

With regard to declaring Respondent's non-compliance with the Compliance Notice an offence in terms of section 54(5) our view is that this falls outside the remit of the Tribunal. The Tribunal is empowered to, amongst others, hear applications and referrals of prohibited conduct in terms of section 27 of the NCA. This is consistent with the orders the Tribunal is empowered to make as set out in section 150 of the NCA. The list does not include the power to the Tribunal to declare conduct an offence under the NCA. Reading the above referred to sections with section 55(6)(a) of the NCA reflects a consistency in the legislation in that the legislature clearly intended for alleged offences under the Act to be referred and tested through the criminal courts.⁴

The Tribunal's power to impose an administrative penalty is derived from Section 151(1) of the NCA. Section 151(2) of the NCA provides that:-

"(2) An administrative fine imposed in terms of the Act may not exceed the greater of -

10 per cent of the respondent's annual turnover during the preceding financial year; or

R1 000 000"

Firstly we consider the use of the word "or". The Dictionary of Legal Words and Phrases⁵ defines "or" as follows:

"To read 'or' as 'and' is a violent expedient which ought not to be adopted except in the last resort, for the simple reason that 'or' does not mean 'and', and when the legislature uses 'or' it must, prima facie at all events, be taken to mean 'or' and not 'and' (per BRISTOWE, J in Colonial Treasurer v Great Eastern Collieries Ltd 1904 TS 719); Relborg Holdings (Pvt) Ltd v Galloway 1973 1 SA 530 (RA)

Various case law deals with this aspect including Greyling W C and Erasmus (Pty) Limited v Johannesburg Local Road Transportation Board & Others⁶ where the following was said:

"Certainly it has not been shown that there is any compelling reason why "or" should be read as "and";" and Howard Young and the Company v Port Elizabeth Municipality⁷ in which it was held that "...or" does not normally mean "and".

We are of the view that the word "or", where it appears in Section 151(2) has its normal disjunctive meaning and that it cannot be substituted for "and". The effect thereof is that the Tribunal may either award a penalty of 10% of the Respondent's annual turnover or R 1 000 000,00 whichever is the greater.

The Applicant did not put any evidence before the Tribunal on the Respondent's annual turn-over it being unknown to the

Applicant. Applicant submitted that because they do not have that information it should not be a deterrent to the Tribunal imposing an administrative fine as it would cause a party to simply hide their financial position to avoid administrative fines being imposed. In the circumstances Applicant requested of the Tribunal to impose an administrative penalty of R1000 0000, there being, in the view of the Applicant, not any extenuating circumstances favouring Respondent.

We now turn to whether we may impose an administrative penalty without reference to annual turnover. In terms of the NCA, the Applicant is empowered to take enforcement action against both registered and unregistered entities. Whilst registered entities are obliged to file statutory (financial) returns from time to time there is no such correspondent obligation on unregistered entities such as the Respondent. As a logical outflow of this the Regulator would not have information about an unregistered entity's financial position and its annual turnover would not it be available and accessible to the Regulator in the ordinary course.

It is in line with this in our view that Section 151(2)(b), establishes an alternative to an administrative penalty of 10% of annual turnover. Accordingly, where no evidence regarding annual turnover is available, the Tribunal still has the option to award a penalty not exceeding R 1 000 000.00.

The question that then arises is whether it means that if there is no comparator information to assess which "...is the greater of 10% of annual turnover or R1,000,000, the Tribunal is unable to impose an administrative fine? If the answer to that question is in the affirmative, that will mean that the objects of the NCA could very well be frustrated in that it denies the Regulator of the means to enforce compliance with the NCA against unregistered entities. The cardinal rule as far as the interpretation of statutes is concerned is set out in *Standard Bank v Estate Van Rhyn*⁸. As was held in that matter, the cardinal rule is to get at the intention of the legislature. This rule must be considered together

with the provisions of section 2 of the NCA, which requires the Tribunal to interpret the NCA in a manner that "gives effect to the purposes set out in section 3"

The purpose of the NCA is set out in section 3 and to summarise it, the purposes of the Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry. It is submitted that, should the Act be interpreted in such a manner that the Tribunal is not allowed to impose an administrative fine if there is no comparator information to assess with, the purposes of the NCA as well as the intention of legislature, namely to impose a sanction for non-compliance with the NCA, would not be honoured.

As was held in *Venter v R9* and *Shenker v The Master*¹⁰, “where the language is unambiguous, and its meaning is clear, the court may only depart from such meaning if it leads to absurdity so glaring that it could never have been contemplated by the legislature”. The legislature could not have intended that the absence of evidence relating to the annual turnover of a Respondent would result in that Respondent escaping the imposition of an administrative fine in circumstances where such a fine would be an appropriate and just order.

For this reason we are of the view that the Tribunal may impose an administrative penalty without reference to annual turnover, including to reference to annual turnover for comparator purposes. Accordingly, where no evidence regarding annual turnover is available, the Tribunal still has the option to award a penalty not exceeding R 1 000 000.00.

The Applicant submitted overall that the contraventions have been going on since 2007 and at its last inspection during 2011 it was still carrying on. Further, there are no mitigating factors that can be taken into account in arriving at the final amount of the penalty.

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When determining an amount, the Tribunal must consider the legislation from which its own mandate’s derives and consider the factors listed in Section 151(3) which provides as follows:

“When determining an appropriate fine the Tribunal must consider the following factors:

The nature, duration, gravity and extent of the contravention;

Any loss or damage suffered as a result of the contravention

The behaviour of the respondent;

The market circumstances in which the contravention took place;

The level of profit derived from contravention;

The degree to which the respondent has co-operate 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

Whether the respondent has previously been found in contravention of the Act, or the Consumer Protection Act 2008, as the case may be.”

Section 151 of the NCA does not provide guidance about where the Tribunal should start in making a determination of the amount and what weight

to ascribe to each of the factors listed. It does however clearly mandate the Tribunal to consider the factors laid down and set an upper cap on the administrative fine that may not be exceeded. In these circumstances and where the Respondent’s annual turnover and financial position is unknown the Tribunal considered the amount of R1 000 000, 00 referenced in section 151(2)(b) of the NCA as its point of departure (as it would have considered 10% of annual turnover in section 151(2)(a) of the NCA as its point of departure had the Respondent’s annual turnover been known)

and then applied the factors set out in section 151(3) of the NCA to same.

When the imposing of penalties and sentences are considered from a criminal law point of view, the starting point, specifically with regards to minimum sentencing, is the provisions of the Criminal Law Amendment Act, 105 of 1997 which came into force on 01 May 1998. The Act lists some of the most serious offences such as murder, rape and robbery and described factual situations in which mandatory sentences, including in some situations, life imprisonment, must be imposed, unless “substantial and compelling circumstances” indicating lesser sentences are present.¹¹

The stance of Criminal Courts in determining the appropriate sentence is discussed in the matter of *S v Lunga*¹². The Western Cape High Court referred to *State v Rabie*¹³ in which Holmes JA reminded judicial officers of the importance of being fair to both the accused and to society in handing down

sentence. Justice, it was said, includes the element of mercy which is the hallmark of a civilized and enlightened criminal justice

system. Similarly, the Tribunal must consider fairness towards both the Applicant and Respondent when considering what would be a just administrative fine in the relevant circumstances. A careful consideration of the factors listed in Section 151(3) will result in the achievement of this objective.

In the *Rabie*-matter, at p866 Corbett JA eloquently summarized the approach as follows:

"A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity, nor, on the other hand, surrender to misplaced pity. While not flinching from firmness where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case."

The nature, duration, gravity and extent of the contravention

From the evidence placed before the Tribunal it is clear that the contraventions of the Act by the Respondent, namely to be trading as a credit provider without being registered as such is of a very serious nature. Furthermore, it took place over quite an extensive period of time from 2007 to 2011 and even after the Respondent was warned by the Applicant not to continue transgressing the Act. These specific facts can have an aggravating impact on the amount of the penalty imposed by the Tribunal.

Any loss or damage suffered as a result of the contravention

No evidence is placed before the Tribunal on loss or damages suffered as a result of the contravention save for the Applicant stating that consumers are overcharged on interests rates but not to any quantifiable measure. The transgression that appear most apparent from the record pertain to losses suffered by consumers is the overcharging of interests. Consumers had been grossly overcharged on their small loans to the extent on average of approximately twenty five (25%) percentage points per month.

The behaviour of the respondent

The Tribunal considered that the Respondent has shown a total disregard for the requests and warnings by the Applicant, the various investigations conducted, the issuance of a compliance notice and an instructional letter and finally, the lodging of this application with the Tribunal. These compliance and enforcement actions by the Regulator against the Respondent all constitute aggravating factors impacting the amount of the penalty to be imposed ultimately.

The market circumstances in which the contravention took place

No submissions were made in this regard by the Applicant. As submitted by the Applicant, the Respondent conducts its business in a small farming community with most of its customers low income farmworkers. The fact that Respondent dealt with small loans and mainly workers on farms and as such regarded as vulnerable is considered as aggravating factor.

The level of profit derived from contravention

No submissions were made by the Applicant in this respect. We view the overcharges on interests by the Respondent of practically all its consumers as an aggravating factor.

The degree to which the respondent has co-operated with the National Credit Regulator and the Tribunal.

It was submitted that the Respondent did not co-operate with the Applicant at all. To the contrary, the Respondent has shown contempt for all of the steps taken by the Applicant. This we took into account as an aggravating factor.

Whether the respondent has previously been found in contravention of the Act, or the Consumer Protection Act 2008, as the case may be

The Respondent had been found to be in contravention of the NCA previously by the Applicant resulting in the Applicant issuing a compliance notice to the Respondent. There is no evidence before the Tribunal that the Respondent had been found guilty by the Tribunal or a court.

In light of the fact that for all but one of the considerations the Tribunal has to take into account, they all operated in aggravation of Respondent's conduct the Tribunal is of the view that an administrative fine of R 900 000,00 reflects the seriousness with which the Tribunal views this type of prohibited conduct and disregard of the NCA by a market participant.

In the result the Tribunal makes the following order:

Declaring the repeated contravention of section 40(1) read with Sections 40(3), 40(4), and 89(2)(d) of the Act by the Respondent prohibited conduct in terms of Section 150(a);

Declaring the repeated contravention of Regulation 42(1)(b) of the Act by the Respondent prohibited conduct in terms of section 150(a); Declaring all credit agreements entered into by the Respondent as unlawful and void in terms of section 40(4) read with section 89(2)(d) of the Act. Ordering that Respondent pays an administrative fine of R 900 000,00 by no later than 31 March 2013.

DATED THIS 13th DAY OF FEBRUARY 2013.

[signed]

D Terblanche

Presiding Member

Mr X May (Member) and Ms P Beck (Member) concurring.

1 Oxford English Dictionary 2nd edition at page 494.

2

[2003] 4 All SA 1 (SCA).

3 'prohibited conduct' is defined in section 1 of the NCA as an act or omission in contravention of this Act, other than an act or omission that

constitute an offence under the Act, by – an unregistered person who is required to be registered to engage in such an act; or a credit provider, credit bureau or debt counselor. Section 1 of the NCA

4 Section 55(6) of the NCA provides that – “If a person fails to comply with a compliance notice... the National Credit Regulator may refer the matter – (a) to the National Prosecuting Authority, if the failure to comply constitutes an offence in terms of this Act...”

5 Second Edition Volume 3 at O-46

6 1982 (4) SA 427 AD

7 1965 (2) SA 825 AD

8 1925 AD 266 274

9 1907 TS 1915

10 1936 AD 142

11 South African Law Commission Report, Project 82: Sentencing; November 2000

12 2012 JDR 0236 (WCC)

13 1975

(4) SA 855 (A) at 861-2

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