

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Yon Xing Supermarket (Pty) Ltd (NCT/158492/2020/140(1)) [2022] ZANCT 42 (1 August 2022) [2022] ZANCT 42

COURT

National Consumer Tribunal

CASE / FILE NUMBER

NCT/158492/2020/140(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

CASE NUMBER: NCT/158492/2020/140(1)

In the matter between:

NATIONAL CREDIT REGULATOR Applicant

and

YON XING SUPERMARKET (PTY) LTD Respondent

(Registration Number; 2013/069640/07)

(NCR Registration Number: NCRCP8198)

SETTLEMENT AGREEMENT

THE PARTIES

1. The parties to this agreement are: -

1.1 The NATIONAL CREDIT REGULATOR ("the Applicant"), a juristic person established by Section 12 of the National Credit Act, 34 of 2005 ("the Act"), with physical address at 127 - 15' Road, Randjiespark, Midrand, with postal address PO Box 209, Halfway House 1685 and telephone number 011 5542651 and nominated email address being litigation@ncr.org.za; RStocker@ncr.org.za and MVaralia@ncr.org.za.

1.2. YON XING SUPERMARKET (PTY) LTD, ("the Respondent") trading as "Yon Xing Supermarket (Pty) Ltd" Registration Number: 2013/069640/07, a private

company duly registered as such in accordance with the Company Laws of the Republic of South Africa and a registered credit provider with registration number NCRCP8198, having its registered office as well as its registered postal address, as contemplated in section 25 of Act 69 of 1984 with its registered addresses situated at 40 Scott street, Upington, 8801 and 1220 Tlebebe Section, Luka, Rustenburg, 0300 and postal address PO Box 20471 Protea Park, 0305 with telephone number 083 454 7756 and nominated email address being roudechen96@gmail.com.

WHEREAS

2. Based on information received from the Serious Crime Unit of the SAPS pertaining to the Respondent's conduct and alleged contraventions of the Act, the main allegations raised against the Respondent was that it overcharged interest on its short-term loans and failed to conduct affordability assessments leading to the Respondent being

investigated further. The investigation resulted in the Applicant instituting proceedings in the National Consumer Tribunal, held at Centurion ("the Tribunal") against the Respondent, *inter alia*, for an order in the following terms:-

2.1. Declaring the Respondent to be in repeated contravention of the following sections of the Act:

2.1.1. Section 52(5)(c) of the Act read with General Condition 2 of its Conditions of Registration - failed to operate its business in a manner which is consistent with the purpose and requirements of the Act;

2.1.2. Section 81(2)(a)(ii) read with Regulation 23A(12)(b) and 23A(13); - entering into credit agreements without first taking reasonable steps to assess the proposed consumer's debt repayment history as a consumer under credit agreements;

2.1.3. Section 81(2)(a)(iii) read with Regulation 23A(3), 23A(8), 23A(12)(a) and (c)

- entering into credit agreements without first taking steps to assess the proposed consumer's existing financial means, prospects and obligations

2.1.4. Regulation 23A(8), 23A(9) and 23A(10) - failure to accurately calculate consumers minimum expenses

2.1.5. Section 170 read with Regulation 55(1)(b)(vi) - Failure to keep records of documentation in support of steps taken in terms of Section 81(2);

2.1.6. Section 81(3) read with Section 80(1)(a) and 80(b)(ii) - entering into reckless credit agreements with consumers;

2.1.7. Section 52(5)(c) read with General Condition 3 of its Conditions of Registration read further with Section 52(5)(f) and Regulation 64 and 66 of the Act;

- failing to comply with its conditions of registration by failing to submit to the NCR timeously or at all its annual statistical returns and Annual Financial Statements Form 39 and Form 40.
- 3. Declaring the conduct of the Respondent in contravention of the relevant sections of the Act and Regulations listed above, as prohibited conduct in terms of Section 150(a) of the Act;
- 4. Declaring that the Respondent has brought the consumer credit industry into disrepute further and/or alternatively, declaring that the Respondent has acted with disregard for consumer rights generally;
- 5. Declaring the agreements annexed to the investigation report marked as Annexures "D1" to "D10" to have been recklessly granted;
- 6. Interdicting the Respondent from in future engaging in prohibited conduct;
- 7. Ordering the Respondent to:
 - 7.1. Within thirty
 - (30) days appoint an independent auditor, at its own cost, whose appointment shall be subject to the prior written approval of the Applicant, to identify and establish:-
 - 7.1.1. the names, contact details Of all consumers who entered into credit agreements where the Respondent failed to conduct proper affordability assessments.
 - 7.2. Once the aforesaid Auditor's Report has been compiled, the Respondent will, at its own cost and within 30 days of receipt of the Auditor's Report, write off all the credit agreements that were entered into recklessly;
 - 7.3. Once it has complied with the above, the Respondent is to provide the Auditor's Report, together with its own written report, to the Applicant, detailing the identity of the consumers, the write offs made. These reports are to be provided to the Applicant within one hundred and twenty (120) days after the Tribunal order has been obtained.
 - 7.4. The Respondent, following the audit, to rescind all judgments obtained, against consumers, for all credit agreements entered into without conducting proper affordability assessments; and
 - 7.5. The Respondent to also clear any adverse listing of such judgments obtained with all credit bureaus.
- 8. The imposition of an administrative fine on the Respondent in the amount of R1, 000 000.00 (One million Rand) or 10% of the annual turnover of the Respondent, whichever is greater;
- 9. In terms of Section 150(i), any other appropriate order required to give effect to consumers' rights in terms of the Act;
- 10. Further and/or alternative relief.

AND WHEREAS

11. The Respondent has shown a bona fide attempt to become compliant with the Act and has cooperated with the Applicant during the investigation. The Respondent has undertaken corrective measures in preventing further contraventions of:-

11.1 Section 52(5)(c) of the Act read with General Condition 2 of its Conditions of Registration failed to operate its business in a manner which is consistent with the purpose and requirements of the Act;

11.2. Section 81(2) (a)lil) read with Regulation 23A(12)(b) and 23A(13) - entering into credit agreements without first taking reasonable steps to assess the proposed consumer's debt repayment history as a consumer under credit agreements; 113

11.3. Section 81(2)(a) ili) read with Regulation 23A(3), 23A(8), 23A(12)(a) and (c);

- entering into credit agreements without first taking steps to assess the proposed consumers existing financial means, prospects and obligations

11.4. Regulation 23A(8), 23A(9) and 23A(10) failure to accurately calculate consumers' minimum expenses;

11.5. Section 170 read with Regulation 55(1)(bXvi) in the alternative to the above contraventions;

- Failure to keep records of documentation in support of steps taken in terms of Section 81(2);

11.6. Section 81(3) read with Section 80(1)(a) and 80(b)(li) - entering into reckless credit agreements with consumers;

11.7. Section 52(5)(c) read with General Condition 3 of its Conditions of Registration read further with Section 52(5Xf) and Regulations 64 and 66 of the Act;

- failing to submit timeously or at all, their Annual Statistical Returns and Annual Financial Statements Form 39 and Form 40.

NOW THEREFORE, the Parties are desirous of reaching a settlement in the matter and record the terms and conditions of their settlement, as follows:

12. The Respondent accepts liability and admits to the contravention of the sections of the Act and Regulations mentioned in clauses 11.1 to 11.7 supra.
13. The Respondent accepts and admits that the above-mentioned contraventions set forth in clauses 11.1 to 11.7, supra constitute prohibited conduct, as defined in the Act.
14. The Respondent confirms that it will refund or write off the cost of credit for the consumers annexed to the Founding Affidavit marked as Annexures "D1" to "D10".

15. The Respondent shall, at its own expense, appoint the offices of Bosch Marais & Associates Inc. ("BMA") to conduct a Compliance Audit on all credit agreements concluded by the Respondent during the preceding three (3) years from the date the settlement agreement is made an order of the Tribunal ("the Period"). The compliance audit will be conducted on the above credit agreements concluded by the Respondent with consumers during the Period in order to identify:-
- 15.1. All credit agreements, wherein the Respondent entered into with consumers without first taking reasonable steps to assess such consumers' financial means, prospects, obligations and existing debt obligations;
- 16 In respect of all the credit agreements identified during the Compliance Audit, as contained in clause 15.1, the Respondent agrees, of its own accord, that it will: -
- 16.1 In respect of credit agreements still in force, write off all cost of credit charged but not yet recovered from such consumers;
- 16.2. In respect of credit agreements settled in full, the Respondent undertakes to upon receipt of any consumers' claims that a proper affordability assessment was not conducted, the Respondent will, regardless whether the account is no longer open, refund the consumer(s) in accordance with this settlement agreement by refunding the full cost of credit to said consumers.
- 16.3. Refrain from taking any enforcement action against such consumers and, to the extent that the Respondent may already have taken enforcement action against such consumers, the Respondent shall formally withdraw such actions;
- 16.4. at its own cost, take all such steps as may be reasonably necessary in order to ensure that: -
- 16.4.1. Any adverse credit bureau records which may have arisen as a result of the consumer having concluded such agreements with the Respondent are removed; and
- 16.4.2. Any civil judgments taken by the Respondent against such consumers in respect of such agreements, are rescinded or, if rescission is not possible, abandoned.
17. The Compliance Audit Report, to be submitted to the Applicant will also contain an assessment of the Respondent's current compliance with the Act and the Affordability Assessment Regulations. The Respondent confirms that the finality of the Report and the assessment contained therein is subject to the Applicant's own assessment of the Compliance Audit Report. Any further instances of non- compliance identified by the Applicant will be communicated to the Respondent and the Respondent undertakes to address and take corrective measures upon receipt of such further contraventions identified by the Applicant, within 20 business days and proof thereof shall be submitted to the Applicant and form part of the Compliance Report.

18. The Respondent will submit to the Applicant, as part of the Compliance Audit Report, its own report detailing and verifying that it has complied with all its obligations as contemplated in this agreement. The amounts written off and/or refunded must be verified by way of a certificate signed by an independent auditor, accountant or bookkeeper. The Compliance Audit Report shall contain the following supporting information and documents (which may be provided in electronic form):

18.1. A list of all credit agreements audited;

18.2. A list of credit agreements identified as contemplated in the entirety of clauses 15 to 16;

18.3. The assessment of the Respondent's current compliance as referred to in clause 17 and 18 *supra*.

18.4. A list of proof of write offs made and the identity of each consumer and/or the credit agreement in respect of which said write off was made.

18.5. Confirmation of the refunds or write offs made in respect of Annexures "D1 to "D10" and proof thereof.

19. After the Applicant's assessment of the above-mentioned reports, it will notify the Respondent of any credit agreements which the Applicant believes should have been included as an agreement contemplated under one or more of the sub-clauses in clause 15, but which were not identified as such by BMA. The parties shall negotiate and attempt to reach consensus on such agreements within 120 business days thereafter. If the parties reach consensus that further credit agreements so identified by the Applicant should have been included under clause 15, the Respondent agrees that it will take the applicable remedial action as contained in clauses 15 and 16 and provide proof thereof to the Applicant. Where the parties fail to reach consensus in the aforesaid manner, the Applicant may refer such agreements to the Tribunal to make an order either: -

19.1. Declaring such agreements reckless and setting aside consumers' obligations under those credit agreements.

20. The timeline is detailed as follows: -

20.1. The Respondent must within 5 business days of this agreement being made an order of the Tribunal, appoint BMA to carry out the compliance audit;

20.2. Thereafter, the Compliance Audit Report must be prepared within 90 business days;

20.3. Thereafter, the Respondent must effect all refunds and/or write offs and fully comply with its other obligations as are listed in clauses 15 to 18 above within 30 business days; and

20.4 Thereafter, the Respondent must submit the Compliance Audit Report, the Compliance Assessment and the verification certificate to the Applicant within 30 business days. The whole of the Compliance Audit and the submission thereof to be completed and submitted to the Applicant within 120 days from the date of this settlement agreement being made an order of the Tribunal.

21. The Respondent agrees that it will conduct extensive training of all its personnel in order to prevent future contraventions.
22. The Respondent agrees to pay an administrative fine in the amount of R120 000.00 (ONE HUNDRED AND TWENTY THOUSAND RAND) in six monthly instalments into the National Revenue Fund, the first instalment to be paid by the Respondent within 10 (ten) business days of this settlement agreement being made an order of the Tribunal.
23. The banking details of the National Revenue Fund, as mentioned above, is as follows:

Account Holder: Dept of Trade & Industry

Bank: Standard Bank Current Account

Account Number: [...]

Branch Code: 051001

Reference: NCRCP8198

24. This Settlement Agreement will constitute the full and final settlement between the parties of the pending litigation and, subject to the terms and conditions contained herein, abandon any claims against one another pertaining to the facts placed before the Tribunal in the Applicant's application.
25. The parties agree to settle their own legal costs incurred in this matter and no further claims shall be made in this regard.
26. The Applicant's rights remain reserved, pursuant to the conclusion of this agreement, to conduct pro-active investigations into the business of the Respondent, at any time in future to ensure that credit is being extended in a manner which is consistent with the provisions of the Act and the Regulations thereto.
27. No alteration or variation of this agreements shall be of any effect unless it is recorded in writing and signed by all the parties to this agreement.
28. This agreement contains the entire agreement between the parties and no representation or undertaking, whether express, implied or tacit, not contained in this agreement, may be relied on by either party.

29. The parties agree that this Settlement Agreement shall be made an order of the Tribunal in terms of Section 138(1)b) of the Act. If for any reason the Tribunal refuses to make this agreement an order, then this agreement shall lapse in its entirety.

SIGNED AT MIDRAND ON THIS 1s DAY OF AUGUST 2022.

YONG XING SUPER MARKET (PTY) LTD

THE NATIONAL CREDIT REGULATOR

LEANNE SCHWARTZ

ACTING MANAGERESS: INVESTIGATIONS & ENFORCEMENT

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