

SOUTH AFRICA / JUDGMENT

NCR v Johann Voigt t/a cash loans (NCT/129036/2019 140(1) NCA) [2021] ZANCT 31 (12 September 2021) [2021] ZANCT 31

COURT

National Consumer Tribunal

BEFORE

T Woker, K Moodaliyar, T Bailey

CASE / FILE NUMBER

NCT/129036/2019

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT/129036/2019 140(1) NCA

In the matter between:

NATIONAL CREDIT REGULATOR APPLICANT

And

JOHANN VOIGT t/a

CASH LOANS HENNEMAN (SOLE PROPRIETOR) RESPONDENT

Coram:

Prof T Woker – Presiding member

Prof K Moodaliyar –Tribunal member

Mr T Bailey – Tribunal member

JUDGMENT AND REASONS

APPLICANT

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, 2005 (“the NCA” or “the Act”) Mr R Stocker, a senior legal advisor employed by the Applicant, represented the Applicant at the hearing.

RESPONDENT

2. The Respondent is Johann Voigt, a natural person who traded as Cash Loans Henneman as a sole proprietor ("the Respondent" or "Mr Voigt"). Advocate AJ Nel instructed by Lee and McAdam Attorneys, represented the Respondent at the hearing.

BACKGROUND

3. Mr Voigt was a registered credit provider with registration number NCRCP 4789; however, his registration lapsed in August 2013 when he failed to pay his annual registration fees.
4. The NCR initiated an investigation into the business practices of the Respondent in terms of section 136(1) of the NCA after receiving a consumer complaint.
5. The investigation was conducted on 11 November 2016.
6. Following this investigation, the Applicant concluded that the Respondent had contravened the Act in that he failed to conduct affordability

assessments and charged excess interest on credit agreements.

7. The Applicant is asking for a fine to be imposed, an independent audit, and consumers to be refunded.
8. Mr Voigt does not dispute the allegations against him; however, he seeks to explain why the transgressions occurred and, in particular, asks for a reduced fine.
9. This judgment is based on the documents before the Tribunal and submissions made by the Applicant and the Respondent at the hearing

held on 6 August 2021.

JURISDICTION

10. Section 150 of the Act empowers the Tribunal to make an appropriate order in relation to prohibited or required conduct in terms of the Act or the Consumer Protection Act, 2008. This power includes declaring conduct to be prohibited in terms of the Act and imposing an administrative fine in terms of section 151 with or without making an additional order in terms of section 150 of the Act.

APPLICATION TYPE AND THE RELIEF SOUGHT

11. The Applicant seeks an order:

Declaring the Respondent to have repeatedly contravened the Act and regulations;

Declaring the Respondent's repeated contraventions as prohibited conduct^[1] in terms of section 150(a);

Ordering the Respondent to appoint an independent auditor within 30 days of this order. The auditor is to determine if the Respondent overcharged consumers on interest or costs of credit within the last five years from the date of issue of this judgement and compile a report. The Respondent is to reimburse the consumers the costs of credit that exceeded the prescribed maximum amount allowed by the Act within 30 days from the auditor's report;

Ordering the Respondent to provide a written report to the Applicant detailing the identity of the consumers and the refunds made within 120 after the order has been obtained;

Ordering the Respondent to pay any funds intended for consumers who cannot be traced into an account held by the Applicant;

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 percent) of the Respondent's annual turnover during the preceding financial year; and

Granting the Applicant such other relief as the Tribunal may consider appropriate to give effect to the consumers' rights in terms of section 150 (i).

THE APPLICANT'S ALLEGATIONS

12. On 7 September 2018 the Applicant filed an application in terms of section 140 (1) of the Act. The Applicant's Jacqueline Peters, who was employed as a Manager in the Investigation and Enforcement Unit of the Applicant, submitted an affidavit that the Respondent repeatedly contravened the provisions of the Act as is fully set out in the investigation report.

13. At the hearing, the Applicant focused on four specific aspects, namely:

Failure to conduct proper affordability assessments which is a contravention of section 81(2) read with Regulation 23A;

Failure to provide credit agreements in the prescribed form, which is a contravention of section 93(2) read with Regulation 30(1);

Entering into credit agreements without being registered as a credit provider (because the Respondent's registration had lapsed) which is a contravention of section 40(3) of the NCA; and

Overcharging of interest which is a contravention of section 100 (1) (c) and section 101(1)(d)(ii) read with Regulation 42(1). In this regard Mr Stocker took the Tribunal through one specific agreement[2] where he demonstrated how the calculations done by the Respondent when it came to the charging of fees and interest led to the overcharging of interest. The credit agreement did not specify the interest to be charged but instead referred to the interest rate (60% per annum); it included an initiation amount, insurance and a final balance to be repaid. The service fee was recorded as 0. When the specified amounts (for the initiation fee and insurance) are deducted from the final balance to be repaid, it is established that the consumer was charged excessive interest. The amount of overcharging was R47,25. The Respondent explained this by submitting that the extra amount was an administrative fee. Mr Stocker argued this could not be true

because the credit agreement stated that the service fee was 0. Mr Stocker pointed out that the Tribunal had dealt with a similar issue in the matter of NCR v Yipin Trading CC NCT149060/2019/57(1) 8 July 2021. The Tribunal concluded that when the credit agreement states that the service fee is 0, then the credit provider cannot argue that the extra amount is for an administrative fee. Mr Stocker informed the Tribunal that the same approach was found in all the credit agreements that the inspector had examined.

THE RESPONDENT'S RESPONSE

14. As stated above, for the most part, the Respondent did not deny that he had transgressed the NCA and rather sought to explain his conduct. He explained that he did not know that the non-payment of annual renewal fees would automatically lapse his registration as a credit provider. The Respondent accepted that he did not do proper credit checks when he was dealing with repeat customers and, he acknowledged that he did not have all the information correctly stated on his credit agreements in that he did not set out the credit insurance to be paid and he did not include the required details about himself as a credit provider.
15. As far as the allegation of excessive interest is concerned, the Respondent initially, in his replying affidavit, disputed that he had overcharged consumers. However, at the hearing and, after having access to the Tribunal judgment in the Yipin matter, the Respondent acknowledged that he was not entitled to charge an administrative fee when the credit agreement stated that

the service fee was 0. He, therefore accepted that he had overcharged consumers interest.

CONSIDERATION OF THE MERITS

16. The Respondent did not resist the charges against him. Based on the evidence presented by the Applicant and the admissions made by the Respondent, the Tribunal is satisfied that the Respondent engaged in prohibited conduct.
17. The Tribunal finds that the Respondent repeatedly contravened section 81(2) read with Regulation 23A; section 40(3); section 93(2) read with Regulation 30(1) and sections 100(1)(c) and 101(1)(d)(ii) read with Regulation 42(1) which constitutes prohibited conduct in terms of the Act.
18. The Tribunal proceeds to consider the appropriate relief.

CONSIDERATION OF APPROPRIATE RELIEF

19. The Applicant's requested orders are set out above and therefore do not need to be repeated here. Two aspects of these requested

orders

require further consideration by the Tribunal:

- a. A suitable administrative fine; and
- b. The appointment of an auditor.

Administrative fine

- 20. The Applicant has requested the Tribunal to impose an administrative fine of R1million on the Respondent. The factors which the Tribunal 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.
- 21. At the hearing, the Applicant focused on two factors in particular:
 - a. The gravity of the contraventions; and
 - b. The market circumstances under which the contraventions occurred.

The gravity of the contraventions

- 22. The Applicant argued that the Respondent had engaged in the most serious contraventions of the Act, namely reckless credit lending when he failed to conduct proper credit checks and the overcharging of interest. This conduct undermines the very purpose for which the Act was introduced.

Market circumstances

- 23. The Respondent did business with low income and previously disadvantaged consumers. This is an extremely vulnerable market where consumers are poor and suffer due to reckless credit lending and overcharging.
- 24. The Respondent allowed his registration as a credit provider to lapse, and so for all these reasons, the Applicant argued the Tribunal should impose a substantial penalty.

- 25. In reply, the Respondent submitted that this was a small micro-lending business with a turnover of about R100 000 per quarter. The Respondent granted consumers small loans that were repaid within one month. The Respondent ceased trading as a micro-lender in 2017 and since then, the Respondent has no longer been the proprietor or director of any micro-lending business. The Respondent argued that an appropriate fine in these circumstances would be in the region of R90 000. This sum was arrived at by taking into consideration 10 per cent of the Respondent's annual turnover of R300 000.00 (R30 000.00) for a period of three years when the Respondent had continued to operate without being registered.[3]

26. 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. The Tribunal 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.
27. However, the Tribunal must also act fairly, taking into account the evidence, the Respondent's admissions, and the degree to which the Respondent has co-operated with the Applicant and the Tribunal.
28. Although this matter has been ongoing for a substantial period of time and there have been a number of postponements, the Tribunal accepts that the Respondent was trying to settle the matter and avoid litigation. Further, the Respondent did not waste the Tribunal's time on the day of the hearing and, when informed of the Yipin decision, readily conceded that his approach to the calculation of interest and the inclusion of an administrative fee when the credit agreement stated that the service fee was 0 was incorrect.
29. Taking all the above circumstances into consideration, the Tribunal believes that a fine of R100 000 is appropriate.

Auditor's Report

30. 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 were charged fees that exceed the prescribed minimum rates for a period of 5 years from the date of this judgment.
31. Where a credit provider is still in operation, the Tribunal usually appoints an auditor to examine the fees charged for a period of 3 years from the date of judgment.
32. In these particular circumstances, the Respondent ceased operating in
2017. Therefore, the Tribunal is of the view that it would serve no legitimate purpose to appoint such an auditor and for this reason declines to grant the Applicant's prayer in this regard.

ORDER

33. Accordingly, for the reasons set out above, the Tribunal makes the following order:-
 - a. The Respondent has repeatedly contravened the following sections of the Act:
section 81(2) read with Regulation 23A; section 40(3); section 93(2) read with Regulation 30(1) and sections 100(1)(c) and 101(1)(d)(ii) read with Regulation 42(1).
 - b. The Respondent's conduct is declared to be prohibited conduct in terms of section 150(a) of the Act.

- c. The Respondent must pay an administrative fine of R100 000.00 (one hundred 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)

- d. No order is made as to costs.

DATED ON THIS 12TH DAY OF AUGUST 2021.

(signed)

Prof T Woker

Presiding Member

With Tribunal Members Prof Moodaliyar and Mr Bailey concurring.

- [1] The Act defines prohibited conduct as an act or omission in contravention of the Act.
- [2] See page 127 of the documents before the Tribunal
- [3] The Respondent received a letter from the NCA in September 2014 indicating that its registration had lapsed hence the Respondent was of the view that he had operated without being registered for 3 years (2014-2017). The Applicant pointed out however that the Respondent had allowed his registration to lapse in August 2013, hence he operated without being registered for a period

of 4 years.

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