

SOUTH AFRICA / JUDGMENT

Summit Financial Services (PTY) LTD v Lewis Stored (PTY) LTD and Another (NCT/99345/2018/141(1)(b)) [2018] ZANCT 130 (19 August 2018)

[2018] ZANCT 130

COURT

National Consumer Tribunal

BEFORE

TA Woker, H Devraj, A Potwana

CASE / FILE NUMBER

NCT/99345/2018/141(1)(b)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

number: NCT/99345/2018/141(1)(b)

In

the matter between:

SUMMIT
FINANCIAL SERVICES (PTY) LTD
APPLICANT
and
LEWIS
STORES (PTY) LTD
FIRST RESPONDENT
NATIONAL
CREDIT REGULATOR
SECOND RESPONDENT
Coram
Prof
TA Woker - Presiding Member
Ms
H Devraj – Member
Mr
A Potwana - Member
Date
of Hearing – 17 July 2018

Date
of Judgment – 19 August 2018

JUDGEMENT

AND REASONS

THE PARTIES

1. The Applicant in this matter, SUMMIT FINANCIAL SERVICES (PTY) LTD, is a private company duly registered in accordance with the company laws of the Republic of South Africa with its business premises at Block

K, Central Park, 16th Rd, Midrand (“the Applicant”). The Applicant is an alternative dispute resolution agent and a debt counsellor registered with the Second Respondent.

2. The First Respondent is LEWIS STORES (PTY) LTD, a private company duly registered in accordance with the company laws of the Republic of South Africa with its principal place of business at 53A Victoria Street, Woodstock (“Lewis”).

3 The Second Respondent is the NATIONAL CREDIT REGULATOR (“the NCR”); an organ of state and a juristic person within the public administration, established in terms of Section 12 of the National Credit Act 34 of 2005 (“the NCA”). The NCR has its address at 127 Fifteenth Road, Randjespark, Midrand.

4. This Application was opposed by the First Respondent. The Second Respondent stated that it was not opposing the application and that it would abide by the decision of the Tribunal, however it was raising certain procedural points which it believed would assist the Tribunal in reaching its decision.

APPLICATION

5. The application brought before the Tribunal is in terms of section 141 (1) of the NCA. The Applicant received a notice of non-referral in response to a complaint regarding Lewis that it lodged with the NCR. The Applicant has applied for leave from the Tribunal for it (the Applicant) to self-refer the complaint to the Tribunal.
6. In accordance with section 141 (1), only the application for leave to refer is being considered at this stage by the Tribunal.
7. This judgment follows a consideration of the documents filed of record as well as arguments presented by counsel for the parties at the hearing held in Centurion on 23 July 2018.

BACKGROUND

8. On 16 September 2016, the Applicant submitted a complaint to the NCR regarding the delivery fees that Lewis charged its customers. The application is supported by an affidavit deposed to by Clark Gardner (Gardner).
9. The Applicant was of the view that the delivery fees Lewis charged its credit customers were in contravention of section 102 of the NCA. The complaint is as follows:

9.1 Lewis charged compulsory delivery fees, as a condition of sale, for first time buyers, regardless of the type of goods sold. The charging of compulsory delivery fees contravened the NCA in that:

- a. the consumer had no option but to choose Lewis to arrange for delivery of goods purchased on credit and pay the delivery charged in contravention of section 102(2) (a) of the NCA;
- b. Lewis required consumers to appoint them to arrange for delivery in contravention of section 102(2)(b) of the NCA; and
- c. A credit consumer was forced to pay the compulsory delivery fee and was not offered the same discount as cash customers. This treatment of credit consumers was in contravention of section 100(2) of the NCA.

9.2 The fees charged were not at fair market value; in that; the manner in which Lewis calculated and levied compulsory delivery fees; contravened the NCA - as the amount charged had no relation to the size of the goods or distance travelled to deliver those goods. Such conduct contravened section 102(2)(c)(i) and section 102(2) (c)(ii) of the NCA.

10. In support of its complaint, the Applicant submitted an affidavit attested to by David Woollam ("Woollam"), a director of the Applicant; who had carried out certain investigations, as well as certain mystery shopping trips.
11. The NCR issued a Notice of Non-referral in terms of section 139(1)
 - (a) of the Act on 15 November 2017; following an investigation into Lewis's business practices regarding the charging of delivery fees. The NCR stated that the complaint by the Applicant did not allege any facts that, if true, would constitute grounds for a remedy under the NCA.
12. On 14 December 2017, the Applicant applied to refer the matter directly to the Tribunal. The application indicated that the Applicant, should leave to refer be granted, would seek the following relief:

12.1 A declaratory order that Lewis engaged in prohibited conduct related to the delivery fees charged in contravention of the NCA;

12.2 the authorisation of an independent audit to be conducted into all credit agreements entered into by Lewis between 2007 and 2015; to determine which consumers fell within the prohibited conduct; and order that such consumers be reimbursed; and

12.3 the imposition of an administrative penalty on Lewis for contravening the NCA.

13. On 23 December 2017; Woollam deposed to an affidavit in which he indicated that he accepted the NCR's decision to non-refer the matter and did not support the application to self-refer the matter to the Tribunal.

THE APPLICANT'S SUBMISSION

14. The Applicant alleged that:

14.1 Lewis contravened the NCA and that these contraventions constitute prohibited conduct;

14.2 The complaint raises issues of great importance for the parties and the public in general; as the matter pertains to the correct interpretation of the NCA;

14.3 It has prospects of success in the matter; because it has made out a viable complaint under the NCA;

14.4 It was bringing the matter in its own name and not in the name of any consumers, as it was entitled to do; and

14.5 Even though Woollam no longer supported the complaint and the application, this did not change the facts that he had established and attested to on affidavit. The affidavit cannot be withdrawn and it is up to the Tribunal to draw conclusions regarding the facts.

LEWIS'S RESPONSE

15. Lewis argued that:

15.1 The Applicant's approach to the matter was misconceived; because it had included an affidavit in support of its complaint that it was not entitled to file. Until such time as leave to refer was granted; the affidavit should be disregarded. The Tribunal should only consider the merits of the complaint once leave to refer is granted;

15.2 The complaint to the NCR was driven by Woollam. Woollam was the person who deposed to the affidavit in support of the complaint and who conducted the mystery shopping trips. Woollam no longer supported the complaint and has accepted the NCR's decision not to refer the matter to the Tribunal. This means that the Applicant no longer has any direct knowledge of the facts underlying its envisaged complaint; and that the contents of affidavits by Gardner were mostly second-hand and in certain instances involved impermissible hearsay evidence;

15.3 The Tribunal should take into consideration the fact that Woollam (the driving force behind the complaint), Lewis (the object of the complaint) and the NCR (the neutral adjudicator) are now all ad idem that the complaint was without merit and should not be pursued;

15.4 The importance of the matter relates only to the interpretation of certain sections of the NCA, and as far as the Applicant is concerned; how the NCA is interpreted; is merely of academic importance. It will have no bearing on the position of the Applicant;

15.5 The Applicant only lodged the complaint because certain cases lodged in the High Court were found to be excipiable. The complaint of prohibited conduct was therefore designed to regularise a deficient High Court action;

15.6 The Applicant has poor prospects of success – the NCR has found the claims to be baseless and Woollam no longer believes in the complaint;

15.7. Lewis's delivery policy for first-time credit customers prior to 26 August 2015 was justified with reference to section 60 (2) of the NCA;[1]

15.8. The Applicant's allegation that the delivery fee charged by Lewis was in contravention of section 102 (2) (c) of the NCA because it is in excess of market value; is merely speculative. It is apparent from the Applicant's NCR Form 32; that it is not in a position to comment on Lewis's delivery charges or to make informed allegations; as to whether they are in line with the fair market value of the service. They do not provide any facts or data to indicate that Lewis's delivery charges are unreasonable. In Gardner's affidavit; he confirms this when he states that the Applicant cannot comment on the NCR's findings regarding the delivery fees without full disclosure of the NCR's investigation files; [2]

15.9 There is no difference between the prices charged by Lewis to credit customers and cash customers in the ordinary course of business. Lewis offers both kinds of customers identical pricing for goods and services. Customers are at liberty to negotiate discounts on such services and managers are vested with a discretion to entertain such a request; if it is made by a customer; but such discounts would not be "in the ordinary course of business;" and

15.10 The NCR was correct when it found that the Applicant did not allege any facts which, if true, would constitute grounds for a remedy under the Act.

THE NCR's RESPONSE

16. Whilst the NCR did not oppose the application; it wished to draw certain facts to the attention of the Tribunal in order to assist the Tribunal with its decision:[3]

16.1 The complaint had been withdrawn by Woollam;

16.2 The Applicant lacks locus standi to refer the complaint to the Tribunal; because it failed to join or duly represent all consumers who have a direct and substantial interest in the matter;

16.3 The Applicant is not seeking any relief in its own right and for its own benefit. The relief is purely for the benefit of consumers including the administrative penalty; which is punitive and is intended to be a deterrent;

16.4 In order to justify its participation in a suit; a party has to show that it has a direct and substantial interest in the subject matter and outcome of the application. The delivery charges levied on consumers do not involve the Applicant; nor do they concern any rights that the Applicant may have and which may be affected prejudicially by a judgment of the Tribunal;

16.5 In order to bring this application, the Applicant should either have been authorised to litigate on behalf of certain consumers or it should have bought a class action;

16.6 The Applicant's reliance on public interest litigation is misplaced and does not meet the test for such litigation as envisaged in section 38 (d) of the Constitution. For public interest litigation, the public in general must have an interest in the infringement of certain constitutional rights. This matter does not involve constitutional issues;

16.7 The Applicant agreed; as a condition of becoming an Alternative Dispute Resolution (ADR) agent in terms of section 134 of the NCA; that it would not litigate on behalf of consumers; and

16.8 The NCR objected to being joined in these proceedings and would seek a costs order against the Applicant.[4]

THE ISSUE OF LOCUS STANDI

17. The NCR has raised the issue that the Applicant does not have locus standi to bring this application. Before the Tribunal can consider the application for leave to refer; it must be satisfied that in fact the Applicant has locus standi to bring the application.

18 Who has locus standi to refer a matter to the Tribunal must be decided with reference to the NCA.

19. The NCA provides in section 136 (1) that any person may submit a complaint concerning an alleged contravention of this Act to the NCR in the prescribed manner and form.

20. Any person who submits a complaint is then regarded as a complainant; because the definition section (section 1) defines a complainant as a person who has filed a complaint in terms of section 136 (1).

21. Section 140 deals with the outcome of a complaint, and provides in section 140(1); that; after completing an investigation into the complaint; the NCR may issue a notice of non-referral to the complainant; in the prescribed form.

22. When the NCR issues a notice of non-referral in response to a complaint, the complainant may refer the matter directly to the Tribunal, with the leave of the Tribunal.

23. From these provisions, it is clear that any person (which includes a juristic person) is entitled to refer a complaint of prohibited conduct to the NCR, and if the NCR issues a notice of non-referral; that complainant may make an application for the matter to be heard by the Tribunal. Nothing in the NCA precludes the Applicant from making this application. The question that remains is whether the Tribunal, has a discretion to grant leave to refer, and whether it should grant that leave.

THE LAW APPLICABLE TO THE APPLICATION

24. As stated above, the Tribunal is merely assessing whether the Applicant has made out a case that should be considered by the Tribunal.

25. The NCA does not specify the factors which the Tribunal must consider in determining whether an applicant should be granted leave to self-refer the matter. In previous decisions; the Tribunal has referred to *Westinghouse Brake and Equipment (Pty) Ltd*[5] where the court was dealing with the issue of leave to appeal against a judgment. In *Westinghouse* the court held that the relevant criteria are whether the applicant has reasonable prospects of success on appeal; and whether or not the case was of substantial importance to the applicant or to both him and the respondent.
26. The Tribunal, when considering whether to grant an applicant leave to refer, has adopted the same test as applied in the High ; for applications for “leave” ..[6] The Tribunal will therefore consider the following factors:
 - 26.1 whether the matter is of substantial importance to the Applicant; and
 - 26.2 the Applicant’s reasonable prospects of success with the referral.
27. It is clear from the submissions made by the Applicant; that this matter is of substantial importance to the Applicant. In fact; both parties have filed extensive papers raising arguments and counter-arguments related to this matter. The Applicant believes that it is acting in the public interest, or at least in the interests of those consumers who purchased goods from Lewis on credit. It must be accepted that the outcome of the application will not benefit the Applicant in anyway. However; simply because the Applicant will not benefit from this application; does not mean that the Applicant may not bring the application. The NCA does not restrict those who can bring a complaint regarding prohibited conduct. The Applicant is not merely a “meddlesome crank or a busybody who has no legal interest in the matter whatsoever, mischievously intent on gaining access to the court in order to satisfy some personal caprice or obsession”. [7] The Applicant is a debt counsellor and ADR agent that identified, in its view, certain prohibited conduct on the part of Lewis and as such it has referred its concerns to the NCR for investigation as provided for in the NCA. It is not acting on behalf of consumers but the NCA does not require this.
28. The Applicant is required to register as an ADR agent in order to ensure that its functions as an ADR agent are properly regulated by the NCR, however this does not mean it loses its right to do other things. The NCA provides that any person may refer a complaint to the NCR and simply because an entity is registered as an ADR agent cannot mean that this right is taken away from the Applicant.
29. Section 136 (1) specifically provides that any person who is aware of prohibited conduct may inform the NCR of this and if that person is dis-satisfied with the decision of the NCR it may refer the matter to the Tribunal. It is precisely the purpose of section 141 (1) (b) of the NCA to offer the opportunity for a complainant dissatisfied with such a decision of the NCR to apply for leave to refer the matter directly to the Tribunal to test the veracity of that decision.

30. The second question, as to the reasonable prospects of success must be answered, And this must be by considering whether the substance of the Applicant's complaint falls within the ambit of the NCA; without deciding on the merits of the matter. There must be sufficient facts which will bring the complaint within the ambit of the Act, and it cannot be that a matter is referred to the Tribunal; which necessitates a fishing expedition to establish the facts.
31. The essential nature of the complaint relates to the delivery fees charged by Lewis. As far as the costs of those delivery fees are concerned, these are based on speculation; regarding whether those were market related and within normal business practice. The NCR has stated that; following an investigation; it has failed to establish facts that would constitute grounds for a remedy under the Act. The Applicant refuses to accept the findings of the NCR and states that; if the Tribunal grants leave to refer the matter; it will call for the release of the NCR's investigation; in order to establish whether the NCR did a proper investigation, which it alleges that it did not. At this stage; whether or not the Applicant is entitled to a remedy; is purely speculative. However, the first aspect of the complaint relates to compulsory delivery charges levied on first time credit consumers. Such consumers were required to have their goods delivered by Lewis; even in circumstances where the consumer purchased a laptop or a computer and took their goods with them once they had purchased them. This; the Applicant alleges; is a contravention of section 102 (a) and (b) of the NCA; whilst Lewis states that this practice is governed by section 60 (2) of the Act. Therefore, there is no dispute regarding the facts regarding this aspect of the complaint. There is only a dispute regarding how the Act should be interpreted.

CONCLUSION

32. I am of the view that the that the Applicant has satisfied the requirements for granting leave in terms of Section 141(1) of the NCA; regarding whether Lewis contravened section 102 (1) (a) and (b); when it required first time credit consumers to make use of its delivery services, and when it required consumers to have their goods delivered; regardless of the item purchased.
33. Therefore I would make the following order:
- 33.1 The application for leave from the Tribunal is granted with respect to the following:
- a. Did Lewis contravene section 102 (1) (a) and (b) when it required first time credit consumers to make use of its delivery services?
 - b. Did Lewis contravene section 102 (1) (a)
 - (b) when it required first time credit consumers to make use of its delivery services regardless of the goods sold?

DATED 28 JULY 2018

Signed T Woker

Presiding Member

34. The view of the majority of the Tribunal is that leave to refer should also be granted in respect of the alleged contraventions of section 100(2) and section 102(2)(c) NCA. Their reasons and order appear below.

MAJORITY

JUDGEMENT

35. We have considered Prof. Woker's judgement and order. We agree with her on the order granted but hold also the view that leave to refer should also be granted in respect of the alleged contraventions

of section 100(2) and section 102(2)(c) NCA. Our reasons are detailed below.

36. In addition to seeking an order declaring that Lewis engaged in prohibited conduct by charging first-time credit consumers a compulsory delivery fee; the Applicant also seeks an order declaring that Lewis engaged in prohibited conduct by:

36.1 discriminating against credit consumers in contravention of Section 100(2) of the NCA by:

36.1.1 providing discounts on delivery fees only to cash consumers; and

36.1.2 charging compulsory delivery fees to first-time credit consumers but not to first time cash consumers.

36.2 charging consumers unreasonable and excessive delivery fees; having regard to the actual reasonable cost of travel and labour incurred by Lewis, and/or the nature and size of the item being sold, and without regard to the fair market value of the service provided; in contravention of section 102(2)(c) of the NCA.

37. In support of the allegations that Lewis contravened section 100(2) of the NCA, the Applicant alludes to an instance whereby Woollam was quoted a discounted delivery fee; if he paid cash for the item. Lewis simply denied that it charged different prices and submitted that customers have always had the liberty to negotiate discounts on delivery services. However; Lewis did not specifically dispute Woollam's version of events during mystery shopping.

38. It is now opportune to repeat what Prof. Woker stated in paragraph 14.5 of the minority judgement wherein she states that "even though Woollam no longer supports the complaint and the application; this does not change the facts that he had stated in his affidavit. In his affidavit; Woollam clearly stated that he was offered a discounted delivery fee if he paid cash for the item. He did not mention that he had to negotiate for this discount". Accordingly; based on Woollam's undisputed mystery shopping experience; we conclude that the Applicant enjoys reasonable

prospects of proving that Lewis contravened section 100(2) of the NCA.

39. The Applicant also submitted that the delivery fees charged by Lewis are unreasonable.

This is because they have no relation to the actual distance travelled to deliver the items. As an illustration; the Applicant

cited an instance where a consumer who purchased a bed was charged R500.00 in spite of the fact that he lived approximately 300 meters from the store. In another instance; Lewis charged a consumer who purchased a lounge suite, coffee table and a bed was charged

R11000.00 for delivering those goods approximately 3 km from the store.

40. The Applicant attached a quote from the Automobile Association of South Africa which reflects what an average running cost of a similar vehicle would be. The Applicant calculated what a reasonable cost of delivery after factoring in the cost of labour and a profit mark-up of 20% to the running cost. Based on the calculations made by the Applicant; it concluded that there was no reasonable relation between the actual cost of delivery and the delivery fee charged by Lewis.

41. The Applicant also attached affidavits of various persons including an erstwhile Executive Director of Lewis who confirmed that Lewis deliberately pursued additional charges as a matter of corporate

culture or policy and instructs staff accordingly. The Applicant also submitted that the additional delivery charges fall within a broad category which Lewis has given the telling name of "Profit Makers". In this regard; Lewis has set a target of 9% for delivery fees and Lewis' staff are encouraged and disciplined to perform. According to the Applicant; various persons including an ex-regional controller, an internal auditor and an ex-branch manager

of Lewis all confirmed that:

41.1 Lewis aggressively pursues delivery fees for profit;

41.2 Employees were sanctioned for failing to meet targets pertaining to delivery fees; and

41.3 some employees were even instructed to increase delivery fees to meet such targets without any bearing to the fair market value of the services provided.

42. Lewis submitted that the Applicant did not contend that the delivery fees are unreasonable nor did it provide any facts or data which indicated that they were. Lewis also submitted that the Applicant had no basis for concluding that Lewis' delivery fees are in excess of the fair market value and that the complaint is purely speculative and vexatious.

43. Whilst the Applicant has tendered prima facie proof that shows that Lewis' delivery charges were in excess of a fair market value; Lewis has not tendered any evidence to disprove the Applicant's allegations.

44. Accordingly, we find that the Applicant has proved that it has reasonable prospects of success.

ORDER

45. We make the following order:

45.1 Leave to refer alleged contraventions of section 100(2) and section 102(2)(c) of the NCA is granted; and

45.2. At this stage of the leave to refer; no order is made as to costs. A costs order will be considered, if applicable, when the matter is finalised before the Tribunal.

Thus done on this 19th day of August 2018

Ms H Devraj (Tribunal Member) and Mr A Potwana (Tribunal Member) concurring

- [1] Lewis has stated that the practice of charging first time credit consumers compulsory delivery fees ceased on 26 August 2016.
- [2] The Applicant intends to seek full disclosure of the NCRs investigation into the matter should leave to refer the matter to the Tribunal be granted.
- [3] The Tribunal has noted the allegations made by the Applicant regarding the NCT's investigation into the matter and the

Respondents' responses. However, this matter does not turn on these issues and so the Tribunal will not deal with these allegations any further.

- [4] The Applicant alleged that it had joined the NCR as a respondent to allow them to decide whether or not to make submissions. It was not seeking any relief against the NCR .
 - [5] 1986 (2) SA 555 (A)
 - [6] This issue has also been considered by the Tribunal in a number of other decisions , see for example, MV Chauke v Standard Bank et al NCT/4658/2012/141(1)(P), and Coertze and Burger v Young NCTT/7142/2012/73(3)&75(1)(b) CPA and Esther Rhulani Tshwale (obo True Harvest College) v Faitzan Properties NCT/12505/2014/75(1)(b) & (2) CPA.
 - [7] As per the discussion of Pickering J in Wildlife Society v Minister of Environmental Affairs and Tourism 1996
- (3) SA 1095 (TKs).

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