

SOUTH AFRICA / JUDGMENT

Tengizak CC v National Credit Regulator (A369/2018) [2020] ZAGPPHC 599 (28 September 2020)

[2020] ZAGPPHC 599**COURT**

North Gauteng High Court, Pretoria

BEFORE

Basson, Meyer, Fourie

CASE / FILE NUMBER

A369/2018

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****(1)****REPORTABLE:**

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

28/9/2020

Case

number: A369/2018

In

the matter between:

TENGIZAK

CC

APPELLANT

And

NATIONAL CREDIT

REGULATOR

RESPONDENT

JUDGMENT

Basson, J (Meyer,J and Fourie, J concurring)

The parties

[1] The appeal in this matter is brought in terms of section 148(2)(b) read together with section 59(3) of the National Credit Act[1] ("the NCA") to a full court. The appeal is against the decision/judgment of the National Consumer Tribunal ("Tribunal")

handed down on 31 August 2018.

[2] The respondent (the National Credit Regulator the applicant before the Tribunal) is a statutory body established in terms of section 12 of the NCA. The appellant (Tengizak CC the respondent before the Tribunal) is a close , corporation established in terms of the company laws of the Republic of South Africa and a registered credit provider in terms of the NCA with registration number NCRCP3986.

[3] Pursuant to a complaint lodged by a consumer (Ms Blondy Mahlangu "the complainant"), an investigation was conducted into some of the business practices followed by the appellant in granting loans to consumers. The investigation concerned small shortterm credit agreements. The investigation into the activities of the appellant was, however, not confined to the complaint lodged by the complainant, but included an assessment of a selection of 10 different credit agreements concluded with consumers during 2016/2017. The investigators reported that the appellant contravened several sections and regulations of the NCA.

[4] The matter then served before the Tribunal in May 2016. The founding affidavit that served before the Tribunal was deposed to by the Manager for Investigations and Enforcement in the employ of the respondent. The appellant filed an answering affidavit deposed to by its management agent. The respondent did not to file a replying affidavit.

[5] The Tribunal considered the matter and concluded that

(i) the appellant transgressed the provisions of section 81(1)[2] of the NGA by granting credit recklessly in failing to conduct proper affordability assessments;

.

(ii) the delivery/pickup fee charged is a prohibited fee in terms of sections 100(1)(a),101(1)(a) to (g) and 90(1) of the NCA,

(iii) the appellant contravened section 92 read with regulation 28(1) of the NCA by failing to use forms in the format set out in Form 20 of the regulations;

(iv) the appellant contravened .section 93 read with regulation 30(1) and section 70 read with regulation 55(1)(b)(vi) of the NCA by failing to keep proper records and by failing to deliver copies of the agreements to the consumer.

[6] Despite the fact that the Tribunal made adverse findings against the appellant on all four of these complaints, the order of the Tribunal is confined to the levying of the pickup/delivery fees. No order is made consequential to the finding that the appellant had transgressed the NCA by granting reckless credit; by failing to keep proper

records and by failing to use forms as prescribed by the NCA. The merits in respect of these three findings have, in my view, become

academic for the following two reasons:

(i) During argument, counsel on behalf of the appellant conceded that the appellant failed to conduct proper affordability assessments, thereby effectively conceding that the appellant engaged in granting reckless credit to consumers. This is a concession well made in light of the fact that no documentation was submitted showing that the appellant had conducted any investigation into the debt repayment history of the consumers concerned. Counsel also conceded that the appellant had failed to keep records as required by the NCA particularly with reference to the fact that no records existed of any investigation into the debt repayment history of the consumers concerned. Lastly, counsel on behalf of the appellant also conceded that the appellant failed to use the forms as

prescribed by the NCA. In light of these concessions, the merits of the aforementioned three complaints against the appellant therefore I became academic.

(ii) An appeal against a decision of the Tribunal, is subject to the Rules of the High Court.[3] It is trite that an appeal lies against an order of court and not the reasons.[4] In light of the fact that the order of the Tribunal is only consequent to a finding in respect of the pickup delivery fees, the

only issue that needs to be considered is whether the appellant transgressed the NCA when it levied pickup/delivery fees.

Background

to the complaint

[7] On 8 July 2016, the respondent received a formal complaint from the complainant in terms of section 136(1) of the NCA.

[8] The complainant informed the respondent that she was approached by an agent of the appellant with an offer for a cash loan in or around October 2015. The said agent completed the pre-agreement quotation wherein it is stated that the complainant requested a loan of R400 totalling a repayment of R590 including credit costs and a delivery fee of R60. The credit agreement was approved and the money was delivered to the complainant on 1 December 2015.

- [9] Repayment of the total loan of R590 was due on 4 January 2015 as per the conditions of the agreement. According to the complainant the appellant went to her work to collect payment on 5 December 2015 but could not find her. The appellant then added a R170 default fee and a R70 pickup fee to the existing total loan of R590. The resultant balance on 5 December 2015 thus went up to R830.
- [10] According to the appellant the complainant was not able to repay the loan and in January 2016 she was given a further loan of R400.
- [11] From the credit application form dated 3 November 2015, it appears that the complainant received a total income (which included grant payments) of R2960 per month. The maximum loan for which the complainant was approved amounted to R800.

The pickup fee

[12] As I have mentioned, the only issue that remains is whether the appellant engaged in prohibited conduct by charging a pickup/delivery fee. This fee relates to the physical delivery and collection of the monies that were lent to consumers. The complainant and the other consumers concerned were given the option of either collecting the loan amount themselves and by paying what was due to the appellant at its or to request that the appellant deliver the money to them and to collect the repayment amounts on the due dates

from them. The complainant and other consumers concerned elected the latter option.

- [13] Clause 6 of each PreAgreement Quotation Form provides that should a borrower require a delivery/pickup service; the borrower agrees that the appellant may charge a market related fee of R70 for such service. The borrower is further informed that it may cancel the requested delivery/pickup fee on 48 hour prior notice to the appellant. The PreAgreement Quotation / Statement form provides for two options: Option A provides for a summary of the "Cost of Loan" and Option B also provides for a summary of the "Cost of Loan" to which total "Additional Charges" are added if the option to use the appellant's "optional pickup/delivery service" is chosen. From these forms it appears that the complainant and the other consumers concerned exercised the option that the loan amounts be delivered to them. Clause 7 of each credit agreement states that the consumer may cancel the "optional pickup/delivery service" upon 48 hours' prior notice to the appellant.
- [14] Does this optional pickup/delivery fee amount to prohibitive conduct in terms of section 101 of the NCA? The appellant submitted that, in light of the fact that the fee is an "optional" fee which the complainant and other consumers concerned elected to add to the total cost of credit voluntarily, the fee does not amount to a cost of credit that is prohibited in terms of section 101 of the NCA. In its judgment, the Tribunal primarily relied on section 100(1)(a) of the NGA which provides that a credit provider must not charge an amount or impose a monetary obligation on a consumer in respect of a credit fee or charge prohibited by the NCA. This section provides as follows:

"Consumer's liability, interest, charges and fees (ss 100106)

"100 Prohibited charges

- (1) A credit provider must not charge^[5] an amount to, or impose a monetary liability on, the consumer in respect of
 - (a) a credit fee or charge prohibited by this Act;
 - (b) an amount of a fee or charge exceeding the amount that may be charged consistent with this Act;
 - (c) an interest charge under a credit agreement exceeding the amount that may be charged consistent with this Act; or
 - (d) any fee, charge, commission, expense or other amount payable by the credit provider to any third party in respect of a credit agreement, except as contemplated in section 102 or elsewhere in this Act.
- (2) A credit provider must not charge a consumer a higher price for any goods or services than the price charged by that credit provider for the same or substantially similar goods or services in the ordinary course of business on the basis of a cash transaction.
- (3) A person who contravenes this section is guilty of an offence."

[15] A similar question was considered in *Edcon Holdings Ltd v National Consumer Tribunal* and another,^[6] with reference to a so-called "club fee" that was charged to clients in credit agreements with Edcon. The NCR argued that the "club fee" was not a cost of credit which was allowed in terms of section 101 of the NCA, hence Edcon engaged in prohibitive conduct. Similar to the present matter, in its credit agreements Edcon afforded consumers the option to apply for membership. The agreement also afforded the customer with an option to cancel the membership at any time. The Tribunal in the Edcon matter held that only the fees listed in section 101 were permitted and because this section nor any other section allowed for a club fee to be levied, Edcon's inclusion of the fee contravened section 101 of the NCA. The High Court concluded that the club fee was not a cost of credit in that the agreement neither demanded nor imposed an obligation that the consumer pay the fee the consumer was given a choice whether or not to apply for club membership. The court concluded that the Tribunal was wrong in finding Edcon engaged in prohibited conduct. On appeal the court agreed with the court a quo and held that, because Edcon's credit agreements do not require the payment of club fees, Edcon did not engage in conduct that is prohibited by the NCA. The appeal was accordingly upheld and the order of the Tribunal set aside:

[6] The Tribunal concluded that , by adding the Club fee to the credit agreement. Edcon contravened s 10 of the NCA. It was submitted by Mr Loxton on behalf of Edcon that this conclusion was erroneous and that it flowed from posing the wrong question, namely whether the NCA allows a credit agreement to "contain" any fee or charge other than that

which is permitted by the NCA. Had it asked the right question, namely whether Edcon's credit agreements require the payment of Club fees, which is the word used in s 101(1), it would have come to the right answer: Edcon's credit agreements do not require the payment of Club fees.

- [7] The submission is clearly correct. In the context of s 101, the word 'require' can only be interpreted to mean to demand from a consumer who applies for credit. or to impose an obligation on such consumer, to pay for something which is not permitted in terms of the section. Edcon's credit agreements do not place any obligation on a consumer

to pay a Club fee. The consumer has a choice whether or not to apply for Club membership. The Club fee charged is clearly not a cost of the credit which is extended to the consumer in terms of the credit agreement. The notion of a cost of credit is the cost of lending money or extending a credit facility. The Tribunal correctly found that the fee is for a product that entitles the customer to various benefits. It can therefore not be a cost of credit or, as was contended by the Regulator, in consequence of or pursuant to the conclusion of a credit agreement The fact that membership of the Club can be cancelled by the customer at any time negates that contention."

- [16] More recently in *The National Credit Regulator v Lewis Stores (Pty) Ltd*, [7] the Supreme Court of Appeal held a similar view in respect of club fees and concluded as follows.

"[35] Reverting to the material provisions of ss 100, 101 and 102(1), set out earlier, these provisions are contained in part C of chapter 5 and are concerned with the consumer's liability, interest charges and fees in respect of the credit facility. These sections relate to payments and charges made in respect of the credit facility. Section 101 places a limitation on what may be contained in the credit agreement It does not purport to prohibit a credit provider from engaging in other business, unrelated to the credit facility, with a consumer.' [8]

- [36] The prohibited charge (envisaged ins 100(1)(a)) contended for by the regulator is a charge made in conflict with s 101(1). The material portion of s 101(1) prohibits a credit provider from 'requiring payment' by a consumer under a credit agreement of any money or other consideration except the principal debt. being the amount deferred in terms of the agreement. plus the value of any item contemplated ins

102. It is common cause that club fees are not an item contemplated in s 102. On the undisputed facts set out on behalf of Lewis, however, the membership agreement between consumers and the club is an agreement unrelated to the credit facility. It deals with a different subject matter. The club fees are payable in advance and do not constitute credit. No interest is raised on the arrears and in the event of them not being paid they are not recovered. In these circumstances it cannot be said that a consumer is 'required' to pay the club fee; nor that it increases the cost of credit; nor can it be said that the club fee, if it is paid, is paid under the credit agreement. The mere fact that some consumers are introduced to the notion of club membership during the credit application process can have no bearing on the interpretation of the provisions of the NCA."

- [17] It is accepted that section 100(1){a} of the NCA provides that a credit provider must not charge an amount to, or impose a monetary liability on, the consumer in respect of the credit fee charge prohibited by the NCA. However, in the present matter, it appears that the delivery and pickup fees are optional fees which the customer applies for or declines. Similar to the Edcon matter, no obligation is placed on the customer to pay the delivery fee the customer is afforded a choice whether or not to collect the loan from the offices of the appellant or whether she wishes to have the loan delivered to her in which case the consumer consents to the pickup/delivery fee.
- [18] It is therefore concluded that the Tribunal erred in finding that the appellant had engaged in conduct which is prohibited by the NCA in charging optional pickup/delivery fees.
- [19] As already pointed out: The only order that was made and penalty imposed by the National Consumer Tribunal were in respect of the pick up/delivery fees. It therefore follows in light of my conclusion that the Tribunal erred in respect of its finding regarding the pickup/delivery fees and its order as it appears in paragraph 63 (including subparagraphs 63.1 63.5) of its Judgment and Reasons, must be set aside.
- [20] In respect of costs, the appellant was substantially successful in setting aside the order that was made against it and is therefore entitled to its costs
- [21] I accordingly make the following order:
1. The appeal is upheld with costs.
 2. The order made by the National Consumer Tribunal in subparagraphs 63.1 63.5 of its Judgment and Reasons is set aside and replaced with the following order:

"The complaint of the National Credit Regulator that the respondent engaged in conduct which is prohibited by the National Credit Act 34 of 2005 in charging pickup/delivery fees is dismissed."

AC BASSON

JUDGE OF THE HIGH COURT

Appearances:

For the appellant: Adv RF de Villiers

Instructed by: Hartzel Bissett Coetzee Attorneys c/o Van Zyl Incorporated

For the respondent:

Adv Tshabalala

Instructed by: Dlamini Attorneys c/o Noko Ramaboya Mason Attorneys

[1] Act 34 of 2005

[2] "81 Prevention of reckless credit

- (1) When applying for a credit agreement, and while that application is being considered by the credit provider, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section
- (2) A credit provider must not enter into a credit agreement without first taking reasonable steps to assess (a) the proposed consumer's (i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement, (ii) debt repayment history as a consumer under credit agreements; (iii) existing financial means, prospects and obligations; and (b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement. (3) A credit provider must not enter into a reckless credit agreement with a prospective consumer. (4) For all purposes of this Act. it is a complete defence to an allegation that a credit agreement is reckless if (a) the credit provider establishes that the consumer failed to fully and truthfully answer any requests for information made by the

credit provider as part of the assessment required by this section; and (b) a court or the Tribunal determines that the consumer's failure to do so materially affected the ability of the credit provider to make a proper assessment."

[2] "81 Prevention of reckless credit

- (1) When applying for a credit agreement, and while that application is being considered by the credit provider, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section
- (2) A credit provider must not enter into a credit agreement without first taking reasonable steps to assess
 - (a) the proposed consumer's
 - (i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement,
 - (ii) debt repayment history as a consumer under credit agreements;
 - (iii) existing financial means, prospects and obligations; and
 - (b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement.
- (3) A credit provider must not enter into a reckless credit agreement with a prospective consumer.
- (4) For all purposes of this Act. it is a complete defence to an allegation that a credit agreement is reckless if

- (a) the credit provider establishes that the consumer failed to fully and truthfully answer any requests for information made by the

credit provider as part of the assessment required by this section; and

- (b) a court or the Tribunal determines that the consumer's failure to do so materially affected the ability of the credit provider to make a proper assessment."

[3] Section 148 of the NCA reads as follows: "Appeals and reviews (1) A participant in a hearing before a single member of the Tribunal may appeal a decision by that member to a full panel of the Tribunal (2) Subject to the rules of the High Court, a participant in a hearing before a full panel of the Tribunal may (a) apply to the High Court to review the decision of the Tribunal in that matter or (b) appeal to the High Court against the decision of the Tribunal in that matter other than a decision in terms of section 138 or section 69 (2) (b) or 73 of the Consumer Protection Act. 2008, as the case may be."

[3] Section 148 of the NCA reads as follows: "Appeals and reviews

- (1) A participant in a hearing before a single member of the Tribunal may appeal a decision by that member to a full panel of the Tribunal

- (2) Subject to the rules of the High Court, a participant in a hearing before a full panel of the Tribunal may

- (a) apply to the High Court to review the decision of the Tribunal in that matter or

- (b) appeal to the High Court against the decision of the Tribunal in that matter other than a decision in terms of section 138 or section 69 (2) (b) or 73 of the Consumer Protection Act. 2008, as the case may be."

[4] *Serengeti Rise Industries (Pty) Ltd and Another v Aboobaker NO and others* 2017 (6) SA 581 (SCA) at para [12]. *Jiba and another v General Council of the Bar of South Africa and another* 2019 (1) SA 130 (SCA) at para [41] and *Tavakoli and another v Bantry Hills (Pty) Ltd* 2019 (3) SA 163(SC A): "[3] The appellants applied for leave to appeal. The court a quo found that they did not have reasonable prospects of success on locus standi and refused leave to appeal on that ground . The court a quo nevertheless granted them leave to appeal against its interpretation of item 40(c) The court a quo erred in so doing. An appeal lies against the order, not the reasons, of a court. Unless the appellants could overcome the attack on their locus standi the dismissal of their application could not be reversed on appeal This court removed the conundrum by granting the appellants leave to appeal on locus standi. The same three issues as were before the court a quo are thus before us".

[5] My emphasis.

[6] 2018 (5) SA 609 (GP). See also *Lewis Stores (Ply) Ltd v Summit Financial Partners (Pty) Ltd and others* case number: A355/18 handed down on 10/9/2019 where a similar view was held "In terms of section 102(2)(a) of the NCA. a credit provider cannot charge a delivery fee,

unless the consumer has chosen the credit provider to arrange for delivery. The entitlement of a credit provider to charge a delivery fee is subject to the proviso in terms of section 102(2) (b), in terms of which the credit provider cannot force the consumer to appoint the credit provider to arrange for (and consequently perform) delivery. Consumers should not be obliged to purchase ancillary services from third parties from whom the credit provider earns commission at the consumer's expense.'

[7] (937/18) [2019] ZASCA 190 (13 December 2019)

[8] My emphasis.

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