

**IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION**

Case No: NCT/18874/2014/56(1)(P)

In the matter between:

MONEYLINE FINANCIAL SERVICES PTY (LTD)

Applicant

And

NATIONAL CREDIT REGULATOR

Respondent

CORAM:

Mr FK Sibanda	-	Presiding Member
Ms D Terblanche	-	Member
Adv F Manamela	-	Member

Date of Hearing: 3 February 2014

JUDGMENT AND REASONS

PARTIES

1. The Applicant in this matter is Moneyline Financial Services (Pty) Ltd, a company registered as such in terms of the company laws of the Republic of South Africa (Registration Number 1998/020799/07), and also with the National

Credit Regulator (NCR) as a credit provider in terms of section 40 of the Act, under registration No NCRCP 633 ("the Applicant").

2. The Respondent the National Credit Regulator, ("the NCR" or the Respondent") a juristic person established in terms of section 12 of the National Credit Act, No 34 of 2005 ("the Act").
3. The Applicant brought an application before the National Consumer Tribunal ("the Tribunal") in terms of section 56(1) of the Act, objecting to the issuing of a Compliance Notice against it by the Respondent. The Applicant asks the Tribunal for an order to have the Respondent's Compliance Notice set aside or cancelled.
4. The National Consumer Tribunal (Tribunal) has jurisdiction to hear this matter in terms of section 27(a)(i) of the NCA. This section provides that the Tribunal may adjudicate in relation to any application made to it in terms of the Act, and make any order provided for in this Act in respect of such application.
5. The matter was enrolled for a hearing on 3 February 2015.

BACKGROUND

6. On 30 January 2015 two (2) days before the hearing of the application the Respondent issued Applicant with a compliance certificate to the effect that the Applicant complied with the steps required of it in terms of the compliance notice thus bringing the compliance notice to an end.
7. At the hearing Respondent submitted that the matter before the Tribunal has become moot on the basis of it having issued the Applicant with a Compliance Certificate.

The Compliance Notice

8. On 23 September 2014, the Respondent issued Compliance Notices to the Applicant, to an affiliate of the Applicant, Cash Paymaster Service. (Pty) Ltd ("CPS"), and to Grindrod Bank Limited ("Grindrod").
9. The Compliance Notice issued to the Applicant accused it of "*having access into the Grindrod Bank Accounts of social grant beneficiaries which enables them (sic) to see the spending patterns of beneficiaries and deposit loan amounts into such accounts in breach of section 68(1) of the National Credit Act 34 of 2005 ("NCA")*". It thus required that the Applicant confirm that it has stopped accessing these accounts and that it submit an independent auditor's report to the respondent confirming that this has stopped.
10. The Compliance Notice issued to CPS accused it of providing "*information about social grant beneficiaries*" to the Applicant in breach of section 68(1). The compliance notice states that section 68(1) of the National Credit Act ("the NCA") has not been complied with.

Applicant's case

11. The Applicant's case rests on two pillars. Firstly, that the Compliance Notice is *defective*, and secondly, that the Compliance Certificate, issued purportedly to certify the Applicant compliant with the NCA, is of no *force and effect*. Both pillars are founded on Applicant's proposition that it never contravened the NCA.
- 12.11. The details provided of the nature and extent of the non-compliance (as are required to be furnished in terms of section 55(3)(c)) are that the Applicant "*has access into the Grindrod Bank accounts of social grants beneficiaries which enables them [sic] to see the spending patterns of beneficiaries and deposit loan accounts into such accounts in breach of section 68(1) of the Act.*" The

Respondent acted without the requisite reasonable grounds for belief required by the empowering provision (section 55) and the notice, on the fact of it falls short of the peremptory requirements (the word "must" is used) set out in section 55(3) and (c), in that: (1) *the details of the alleged non-compliance conflict with the provision set out as that which has allegedly not been compiled with and (2) sufficient details of the nature and extent of the non-compliance are not provided.*

13. The Respondent based its view that Applicant contravened the National Credit Act on a very flimsy basis set out in its investigator's report that found no support anywhere else in any of the documents before the Tribunal. The Respondent argues that it issued notices on reasonable grounds as prompted by the reports compiled by the investigators.
14. The audit report compiled by KPMG, following a directive of the Respondent confirms that the Applicant does not have access to social grant beneficiary accounts or information in the custody of CPS and Grindrod. The procedure followed by the Applicant in processing the loans to beneficiaries, as is set out in the Applicant's Answering affidavit in response to the Respondent's application for deregistration of the Applicant (NCT/17884/2014/57 (1) ("the deregistration application") was furthermore confirmed.
15. The KPMG report, accepted by Respondent, vindicated Applicant and confirms that Applicant did not contravene the NCA. In relevant parts it states that: *"there are no Moneyline employees accessing grant beneficiary account information maintained by Grindrod during the loan application process".*
16. The KPMG report does not serve to satisfy the requirement in the compliance notice to the effect that the conduct has "stopped". To the contrary it confirms that the alleged conduct has not been taking place and accordingly it supports

the assertion from all three accused parties, that there was no basis for the issuing of the Compliance Notices at all in the first place.

17. These Compliance Certificates are thus based on the incorrect assertion that the Respondent was non-compliant and purport to certify that this non-compliance has now been purged. This does not accord with the facts and is a patently unreasonable approach to take in the matter.
18. The Applicant argued that Respondent issuing the Compliance Certificate is thus plainly inappropriate and not in accordance with the provisions of section 55 of the NCA and constitutes unlawful administrative action. The appropriate step in the circumstances would be to withdraw the notices and, in the absence of such withdrawal, that they be set aside.
19. Applicant further argues that the effect of the Compliance Certificate creates a false suggestion that the Applicant was indeed in non-compliance with the provision in question, when in fact this is a false assertion. The Compliance Certificate, according to the Applicant, harms the good reputation of the Applicant and the conduct of its business and to that of its holding company, Net1, a foreign company listed on the NASDAQ.

Respondent's case

- 20.19. The Respondent did not argue the matter at length but contended that the Compliance Notices were issued on reasonable grounds as prompted by the reports compiled by the investigators. The Respondent indicated that the sharing of information took place among the three entities of the Applicant. The Respondent acted in accordance with section 55(3)(b) by "*setting out in the Compliance Notice, the provision, or condition that has not been complied with*".

21. Further that, by virtue of the Respondent issuing a Compliance Certificate to the Applicant, the Compliance Notice does not remain in force. . In that regard, the Respondent argues, there is no need for the Applicant to launch an application setting aside or cancelling the Compliance Notice as there is no longer a Compliance Notice in existence and that the Tribunal has thus no application before them.

22. The Respondent closed its case on this score.

ANALYSIS OF THE LAW AND THE FACTS

JURISDICTION

23. The Tribunal has powers in terms of sections 56 and 59 to hear and make rulings in respect of review applications.

24. The Tribunal, on the strength of these provisions has jurisdiction to hear and pronounce on this matter. The Compliance Notice issued by the Respondent, stated that the Applicant has not complied with section 68(1).

25. Section 68(1) of the Act deals with the right to confidential treatment and provides the following:

“68. Right to confidential treatment.- (1) Any person who, in terms of this Act, receives, compiles, retains or reports any confidential information pertaining to a consumer or prospective consumer must protect the confidentiality of that information, and in particular, must-

(a) use that information only for a purpose permitted or required in terms of this Act, other national legislation; and

(b) report or release that information only to the consumer or prospective consumer, or to another person-

- (i) *to the extent permitted or required by this Act, other national legislation or applicable provincial legislation; or*
- (ii) *as directed by-*
 - (aa) *the instructions of the consumer or prospective consumer; or*
 - (bb) *an order of a court or the Tribunal.”*

26. The purpose of section 68 is to protect confidential information that is provided to a person lawfully and in terms of the Act. This section applies to Credit Bureaus which may have been issued with a notice in terms of section 55, non compliance whereof would constitute an offence.

27. The Compliance Notice issued by the Respondent states that the Applicant has not complied with section 68(1). This begs the question: is there any breach by the Applicant of this provision? The Applicant argues that information pertaining to consumer accounts was accessed. The Applicant has not been accused of sharing the information, according to the Compliance Notice. The Applicant further argues that consumer accounts are generally accessed by providers of credit in order to perform affordability tests as required by the Act.

28. Section 55 deals with Compliance Notices, and provides the following in subsection (4) thereof.

“(4) subject to section 59, a compliance notice issued in terms of this section remains in force until-

- (a) it is set aside by the Tribunal, or a court upon appeal or review of a Tribunal decision concerning a notice; or*
- (b) the National Credit Regulator issues a compliance certificate contemplated in subsection(5)*

Subsection (5) provides:

“if the requirements of a compliance notice issued in terms of subsection(1) have been satisfied, the National Credit Regulator must issue a compliance certificate.”

29. The issue the Tribunal must determine is whether the Applicant has engaged in conduct warranting the issuing of the Compliance Notice by the Respondent in the first place?

30. There is no dispute between the parties that the KPMG report vindicated the Applicant from wrongful conduct as alleged in the Compliance Notice. This report was tabled on the instruction of the Respondent after issuing directives the Applicant had to follow. The directive reads as follows:

“In terms of section 55(3) of the Act you are required to take the following steps to address the non-compliance with the Act:

1. By no later than.....

2. By no later than 17 October 2014, Moneyline Financial Services (Pty) Ltd is required to submit a report by independent auditors to the NCR confirming that it has stopped accessing the Grindrod Bank accounts of all social grant beneficiaries.”

31. At the meeting called by the Respondent, after receiving the report from KPMG which confirmed that the Applicant did not engage in the conduct complained of in the Compliance Notice, the Respondent stated it wished to *“resolve the matter amicably”*. The Respondent subsequently issued a Compliance Certificate.

32. This is contrary to the provisions of section 55, subsection (4). The Applicant has not been found to be engaging in an activity in a manner that is inconsistent with this Act, the National Credit Act. It stands to reason that in the

circumstances, the Compliance Certificate is not the correct route to follow, and in that respect, constitutes unlawful administrative action.

33. Section 33 of the Constitution of the Republic of South Africa requires that an administrative action must be lawful, procedurally fair and reasonable. The Promotion of Administrative Justice Act 3 of 2000 (PAJA), section 6 thereof provides for the review of an administrative action in the following situations:

- *a mandatory and material procedural condition prescribed by the empowering provision was not complied with;*
- *the action was procedurally unfair;*
- *the action was materially influenced by an error of law;*
- *the action was taken for reasons not authorised by the empowering provision;*
- *the action was taken because irrelevant considerations were taken into account*
- *the action is not rationally connected to the information before the administrator, to name but a few.*

34. The Compliance Certificate can only be issued if the requirements of a Compliance Notice issued in terms of ss (1) have been satisfied... (see section 55(5)). Other than that, it will be a fruitless exercise to issue a certificate.

35. The next approach will then be to approach the Tribunal for an order cancelling or setting aside the Compliance Notice.

36. The effect of an order of the Tribunal in cancelling the Compliance Notice, renders the Compliance Certificate materially non-existent.

CONCLUSION

37. The Tribunal is satisfied that the parties had *consensus* following the KPMG's report furnished on 11 December 2014, exonerating the Applicant and two others.

38. The Applicant had shown the Respondent, as directed by the latter in its findings, that no such conduct complained of, ever existed.

39. The Respondent should not have proceeded to issue a Compliance Notice at that stage and under those circumstances.

40. The issuing of Compliance Certificates was also inappropriate and not in accordance with the provisions of section 55 of the Act. It is an improper exercise of administrative power by the Respondent to have proceeded to do so. The correct route to follow would have been to approach the Tribunal for an order cancelling or setting aside the Compliance Notice. The effect of an order of the Tribunal in cancelling the Compliance Notice, renders the Compliance Certificate materially non-existent.

41. ORDER

41.1. 37.1 The Compliance Notice is hereby set aside; and

41.2. 37.2 No order is made as to costs.

DATED THIS 22nd DAY OF APRIL 2015

[SIGNED]

Adv FK Manamela

Member

Ms D Terblanche (Member) and Mr Fk Sibanda (Presiding Member) concurring.

Authorised for issue by the National Consumer Tribunal

Case number

Date: 2015, 05, 05

Ccyy / mm / dd

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