

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

Case number: **NCT/7962/2013/57(1)**

In the matter between:

**NATIONAL CREDIT REGULATOR**

**APPLICANT**

and

**MIDWICKET TRADING 525 CC t/a  
BUTTERFLY CASH LOANS**

**RESPONDENT**

**Coram:**

Prof T Woker	–	Presiding member
Ms H Devraj	–	Member
Adv J Simpson	–	Member

Date of Hearing: 5 June 2014

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**JUDGMENT AND REASONS**

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**APPLICANT**

1. The Applicant in this matter is the National Credit Regulator ("the NCR" or "the Applicant"), a juristic person established in terms of section 12 of the National Credit Act, 2005 ("the Act").
2. At the hearing the Applicant was represented by an advocate, Mr E Masombuka of the Johannesburg Bar. His instructing attorney, Mr L P Adonisi, of Msikinya Attorneys & Associates was also present.

## **RESPONDENT**

3. The Respondent is Midwicket Trading 525 CC t/a Butterfly Cash Loans, a Close Corporation duly registered in accordance with the company laws of the Republic of South Africa with registration number 2006/166004/23 (hereinafter referred to as “the Respondent”).
4. The Respondent is also registered with the Applicant as a credit provider with registration number NCRCP2103, with its registered place of business in Bloemfontein. The Respondent has two branches, one located in Colesburg and the other in Philippolis.
5. The Respondent was not present at the hearing and was not represented.

## **APPLICATION TYPE**

6. This is an application in terms of Section 57(1)(a) of the Act for an order to cancel the Respondent’s registration as a credit provider and for the imposition of an administrative fine of R50 000.00 (Fifty Thousand Rand).

## **SUMMARY OF THE APPLICANT’S FOUNDING AFFIDAVIT**

7. The Applicant’s Founding Affidavit is deposed to by Mr Zwelithini Zakwe in his capacity as Manager for Investigations and Enforcement of the Applicant.
8. On 13 March 2012, the Applicant appointed Lesley Odendaal (hereinafter referred to as “the Investigator”) to conduct an investigation into the Respondent’s business as a credit provider.
9. On 22 March 2012 the Investigator visited the Respondent’s business premises in Colesburg.

10. He interviewed the branch manager, Ms Madeleine Genis at the premises. Based on the interview conducted with the manager and the documents she provided to the Investigator, the following was discovered:

10.1 The Respondent issued short term loans at a rate of 5% per month.

10.2 The Respondent retained consumers' pensioner cards, bank cards and identity documents for the purpose of enforcing the credit agreements.

10.3 A sample of 20 credit agreements found on the premises showed the following:

10.1.1 The loans advanced were between R175.00 (One Hundred and Seventy Five Rand) and R900.00 (Nine Hundred Rand).

10.1.2 The agreements were concluded between January 2012 and March 2012.

10.1.3 Additional amounts were charged on the agreements for which there was no provision for in the Act.

10.1.4 The interest rate charged exceeded the maximum rate.

10.1.5 The Respondent induced customers to enter into supplementary agreements with Altech Nupay (Pty) Ltd ("Altech Nupay").

10.1.6 Each agreement file contained an envelope containing an identity document or bank card.

10.1.7 There was no evidence of any affordability assessment being conducted on any of the loan applications.

11. The Applicant submits that the Respondent is guilty of repeated prohibited conduct in that the following sections of the Act have been contravened:

11.1 Contravening Section 133(1)(a), Section 91(b)(i) and (ii) read with Sections 90(2)(l) of the Act in that the Respondent made use of an identity document, bank card or other similar device to enforce the credit agreement.

11.2 Contravening Sections 50(2)(b) and 52(5)(c) of the Act in that the Respondent failed to provide all required annual information to the Applicant in accordance with its registration conditions.

11.3 Contravening Sections 90(2)(a) and (b), 91(a) and 89(2)(c) of the Act in that the Respondent induced some consumers to enter into a supplementary agreement with Altech Nupay.

11.4 Contravening Sections 101(1)(d)(ii) and 105 and Regulation 42(1) of the Act in that the Respondent charged an interest amount exceeding the maximum rate.

11.5 Contravening Sections 80(1)(a) and 81(2)(a) of the Act and Regulation 55(1)(b) in that the Respondent failed to conduct an affordability assessment or to keep records of the assessment done.

11.6 Contravening Sections 170 and 92(1) of the Act in that the Respondent failed to keep records of all consumer applications in particular the pre-agreement disclosure.

12. The Applicant therefore prays for an order in the following terms:

12.1 That the Respondent's Registration as a credit provider be cancelled; and

12.2 That an administrative fine of R50 000.00 (Fifty Thousand Rand) be imposed on the Respondent.

## PREVIOUS POSTPONEMENT OF THE MATTER

13. The matter was initially set down by the Registrar for the hearing to be held on 12 March 2014. On the date in question the Respondent did not appear at the hearing but instead e-mailed an application for a postponement of the matter to the Registrar on 11 March 2014. The application requested a postponement of the matter to enable the Respondent to file an answering affidavit and a request for condonation for the late filing.
14. The Tribunal heard the Applicant's submissions in the hearing and decided to grant a postponement. The Tribunal issued a written order on 12 March 2014 with the following terms:
  - “1. *The Respondent's application for a postponement is granted.*
  2. *The Respondent must file an answering affidavit together with an application for condonation within 15 business days from the date of this order.*
  3. *Should the Respondent fail to file the answering affidavit and application for condonation within 15 business days, the Registrar may issue a notice of set down.”*

## HEARING

15. The Registrar set the matter down for the hearing to be held on 5 June 2014. The Respondent was served with the Notice of set down issued by the Registrar.
16. On 5 June 2014 the Applicant appeared before the Tribunal but there was again no appearance by the Respondent.
17. The Registrar informed the Tribunal that correspondence had been received from the Respondent's attorney purporting to be an application for condonation and an answering affidavit but the forms as required by the Rules had not been used and the correspondence had therefore not been filed. There was further no evidence of the application having been served on the Applicant. The Registrar had informed the Respondent of the problem.
18. The Applicant confirmed that it had not been served with any answering affidavit or condonation application by the Respondent.

19. In accordance with Rule 24(1)(b)(i) the Tribunal continued with the hearing and the Applicant's representative addressed the Tribunal on the merits of the main matter. He further submitted written heads of argument.

#### **CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS**

20. The Applicant filed the Section 57(1) application with the Tribunal on 7 March 2013. The Applicant attached a copy of a registered post slip with a tracking number to show that the application was sent to the Respondent's registered address by courier service on 6 March 2013. Subsequently a Notice of Complete Filing was issued by the Registrar to both the Applicant and the Respondent on 11 March 2013. The notice stated that the Respondent had to file an answering affidavit within 15 business days. As stated previously, the Respondent did not properly file or serve any answering affidavit or a response to the application.

21. The Applicant filed an application for a default order in terms of Rule 25(2) on 8 August 2013.

22. Rule 13(5) provides as follows:

*"Any fact or allegation in the application or referral not specifically denied or admitted in the answering affidavit, will be deemed to have been admitted"*

23. Therefore, in the absence of any answering affidavit filed by the Respondent, the Applicant's application and all of the allegations contained therein are deemed to be admitted.

#### **CONSIDERATION OF THE EVIDENCE**

24. The evidence placed before the Tribunal shows that the Respondent advanced short term loans to consumers on a month to month basis. The loans advanced were repayable within 30 days. There was no evidence of the Respondent doing any form of affordability assessments before granting the loans. The Applicant attached photocopies of the various bank cards belonging to the consumers, which were retained by the Respondent on each of the loan agreements. In two instances the bank cards were shown to be pension cards as provided to recipients of social

grants. The two examples in question were marked as exhibits A and B respectively. The evidence further shows that the Respondent did not submit any of the annual reports as required by the Applicant in accordance with their conditions of registration.

25. The evidence further showed that in at least 3 instances the consumers were required to sign supplementary agreements with Altech Nupay. These agreements held the consumer responsible for the charges associated with the deduction of the instalment from their accounts. The Applicant argued that this agreement constituted a supplementary agreement and the charges were therefore unlawful. In evaluating this aspect the Tribunal considered the *Barko v NCR*<sup>1</sup> decision. The Barko decision was based on a specific set of facts which showed that consumers were induced to sign the supplementary agreement and that the charges resulted in the monthly service fee exceeding the maximum rate of R50.00 (Fifty Rand) per month as prescribed by the Act. In the present matter there is no evidence that the Respondent charges any form of monthly service fee. There is no evidence of any monthly fee being charged which exceeds the maximum of R50.00 (Fifty Rand) per month. There is no evidence of consumers being induced to sign the Altech Nupay agreement. In the circumstances the Tribunal is unable to find that the Respondent contravened the Act on this specific allegation of prohibited conduct.
26. The Applicant prepared a table showing the amount loaned, the correct interest that should have been charged and the actual amounts that were charged to the 20 consumers sampled. The calculations show that the total amounts charged by the Respondent per agreement exceeded the total amount permitted by the Act. The amounts overcharged ranged from R26.00 to R83.00. Even if one were to accept that the Respondent was entitled to charge a R50.00 monthly service fee, initiation fees and interest then there are at least 10 instances where the Respondent charged the consumer more than permitted by the Act.
27. The evidence placed before the Tribunal shows that the Respondent failed to provide the required annual reports from 2012 onwards. The 20 sampled credit agreements were entered into between January and March 2012. The evidence before the Tribunal therefore clearly illustrates repeated conduct by the Respondent.

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<sup>1</sup> NCT/743/2010/53(1).

28. As the Respondent did not provide any answering affidavit and further did not appear at the hearing the allegations made by the Applicant regarding the Respondent's conduct are not in dispute. The Tribunal therefore accepts the evidence submitted by the Applicant as proven on a balance of probabilities.
29. The Tribunal therefore finds that the Respondent engaged in the following repeated prohibited conduct as alleged and referred to in section 57(1) of the Act:
- 29.1 Contravening Section 133(1)(a), Section 91(b)(i) and (ii) read with Sections 90(2)(l) of the Act in that the Respondent made use of an identity document, bank card or other similar device to enforce the credit agreement.
- 29.2 Contravening Sections 50(2)(b) and 52(5)(c) of the Act in that the Respondent failed to provide all required annual information to the Applicant in accordance with its registration conditions.
- 29.3 Contravening Sections 101(1)(d)(ii) and 105 and Regulation 42(1) of the Act in that the Respondent charged an interest amount exceeding the maximum rate.
- 29.4 Contravening Sections 80(1)(a) and 81(2)(a) and Regulation 55(1)(b) of the Act in that the Respondent failed to conduct an affordability assessment or to keep records of the assessment done.
- 29.5 Contravening Sections 170 and 92(1) of the Act in that the Respondent failed to keep records of all consumer applications in particular the pre-agreement disclosure.

#### **CONSIDERATION OF AN ADMINISTRATIVE FINE**

30. The Applicant prayed for an administrative fine of R50 000.00 (Fifty Thousand Rand) to be imposed by the Tribunal and submitted heads of argument in this regard.
31. The Applicant essentially argued that the Respondent's contraventions must be viewed in a serious light as it was taking advantage of poor consumers in a rural area. Some of the consumers were pensioners who were reliant on social grants, the proverbial poorest of the



poor. The Respondent further failed to co-operate with the Applicant by not providing the required annual reports.

32. The Tribunal takes note of the Applicant's arguments and agrees that the prohibited conduct that the Respondent engaged in can be viewed in a very serious light. The prohibited conduct is of such a serious nature that a cancellation of registration is warranted. The cancellation of the registration of a credit provider can be seen as the most severe penalty the Tribunal can impose as it puts an end to the Respondent as a business. The question the Tribunal must consider is whether the specific circumstances of this matter warrant the ending of the Respondent as a business and further imposing an administrative fine as well.
33. When considering the additional imposition of a fine the Tribunal must consider that only a relatively small number of credit agreements were assessed. There is no evidence of how many credit agreements or consumers the Respondent engaged with as a whole. The total of the excess amounts charged on the sample agreements, while significant to the consumers individually, add up to less than R1100.00 (One Thousand One Hundred Rand). If one had to argue that R50.00 (Fifty Rand) of the excess amounts charged could possibly be regarded as being monthly service fees, then the total excess amount charged on the 20 agreements is less than R100.00 (One Hundred Rand). The 20 sample credit agreements were entered into over a period of three months and were from one of the Respondent's two branches.
34. One of the main purposes of an administrative fine is to serve as a means of deterring an offender from engaging in the prohibited conduct again. Where the offender's registration is cancelled and is thus no longer permitted to conduct business as a credit provider, one of the main reasons for the imposition of a fine falls away. The imposition of the fine then becomes purely punitive which would generally only be warranted in the most extreme of circumstances.
35. In the specific circumstances on this matter the Tribunal does not regard the imposition of an administrative fine as warranted.

## CONCLUSION

36. The Tribunal finds that the Respondent repeatedly engaged in prohibited conduct and contravened various sections of the Act.
37. The prohibited conduct is of such a serious nature that immediate cancellation of its registration is justified.

## ORDER

38. Accordingly, the Tribunal makes the following order:

38.1 The Respondent's registration as a credit provider is cancelled as of the date of this judgment; and

38.2 There is no order as to costs.

DATED ON THIS 9<sup>th</sup> DAY OF JUNE 2014

Authorised for issue by the National Consumer Tribunal

Case number

Date 2014 / 9 / 14  
ccyy mth dd

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[signed]

Adv J Simpson

Member

Prof T Woker (Presiding member) and Ms H Devraj (Member) concurring.