

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

Case number: **NCT/8619/2013/140(1)(NCA)**

In the matter between:

NATIONAL CREDIT REGULATOR

APPLICANT

and

HOSIA DEDRICK KWAPE T/A PHAKAMISA FINANCIAL SERVICES

RESPONDENT

Coram:

Adv J Simpson – Presiding member
Ms H Devraj – Member
Mr Fungai Sibanda – Member

Date of Hearing: 08 April 2014

JUDGMENT AND REASONS

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 Mr BM Jones from Honey Attorneys.

RESPONDENT

3. The Respondent is Hosia Dedrick Kwape t/a Phakamisa Financial Services conducting business from Rustenberg and Marikana (hereinafter referred to as "the Respondent").
4. The Respondent is not a registered credit provider in terms of the Act.
5. There was no appearance by the Respondent or a representative at the hearing.

APPLICATION TYPE

6. The Applicant initially filed an application in terms of Section 57(1) of the Act and subsequently filed an application to amend its papers. The amended papers related to an application in terms of Section 140(1)(b) of the Act.
7. The application in terms of Section 140(1)(b) of the Act is for an order declaring that the Respondent engaged in prohibited conduct, interdicting and restraining the Respondent from any further breaches of the Act and the repayment of excess amounts charged to consumers.
8. The Applicant also filed a default application in terms of Rule 25(2) of the Rules of the Tribunal¹.

SUMMARY OF THE APPLICANT'S SUBMISSIONS

9. The Applicant's Founding Affidavit is deposed to by Adv ZR Zakwe, in his capacity as Senior Legal Advisor of the Applicant.
10. On 18 September 2012, the Applicant appointed and mandated Mr Sphiwe Mashaba as an inspector to conduct an investigation into the activities of the Respondent.

¹ For the Conduct of Matters before the National Consumer Tribunal published under GN789 in GG30225 of 28 August 2007 as amended by GenN428 in GG34405 OF 29 June 2011 (hereinafter "the Rules of the Tribunal").

11. The investigation at the premises of the Respondent was conducted by Mr Mashaba and Mr Willoughby on 10 October 2012 at the Rustenburg offices.
12. During the investigation, the manager of Phakamisa Financial Services alleged that the Respondent had filed an application to be registered with the Applicant. However, there was no evidence put forward by the Respondent to support this claim. The Applicant alleged that it had subsequently ascertained that the Respondent is not required to be registered with the Applicant. At the point in time that the investigation was conducted, the Respondent had less than 20 credit agreements and at no stage was more than R1500 loaned for more than a one month period to any consumer. The Applicant therefore concluded that the Respondent was not required to be registered in terms of Section 40 of the Act.
13. The Applicant alleges that the Respondent contravened the following sections of the Act:-
 - 13.1 Whilst the Respondent is not required to be registered in terms of Section 40 of the Act, compliance with the provisions of the Act is still a requirement in the circumstances as the Respondent conducts the business of a credit provider.
 - 13.2 The Respondent failed to comply with Section 170 of the Act, in that inadequate records have been kept, alternatively the credit agreements concluded by the Respondent fall short of the prescribed form (as prescribed in terms of Section 93(2) and Section 101(1)(d)(i) of the Act, read with Regulation 30 and Form 20.2).
 - 13.3 No affordability assessments had been conducted by the Respondent, as prescribed by Section 81(2) of the Act. The Respondent is also bound by the provisions of Regulation 55(1)(b)(vi) which directs credit providers to maintain records relating to the pre-assessment conducted prior to the conclusion of the credit agreement.
 - 13.4 The Respondent has breached the provisions of Section 90(2)(k)(iii) of the Act in that acknowledgement of debt agreements are concluded prior to any default under the credit agreement on the part of the consumer.

- 13.5 Very little of the prescribed information as required in terms of Form 20.2 is provided to the consumer. The Act required the information to be included in the credit agreement in order to allow the consumer to be aware of the rights which are bestowed by the Act. This defeats the purpose of the Act.
- 13.6 No pre-agreement statement is concluded as required by Section 92(1) of the Act, read with Regulation 28 and Form 20.
- 13.7 The interest rates levied by the Respondent are in excess of the prescribed rate and are therefore in contravention of the provisions of Section 100(1)(c), Section (101(1)(d), Section 105 of the Act and Regulation 42(1).

THE HEARING

14. There was no appearance by the Respondent or a representative at the hearing.
15. The Applicant provided the Tribunal with heads of argument.
16. At the hearing the Applicant made the following submissions which are summarised below:-
 - 16.1 The Applicant highlighted the areas of contravention as set out in the founding affidavit and heads of argument.
 - 16.2 The Applicant further addressed the Tribunal on the amendment to its papers and stated that there is no prejudice to the Respondent as the Respondent did have ample time to oppose the matter. Furthermore, the Applicant indicated that the amendment is merely to change the number of the form, from a T.57(1) to that of an application in terms of Section 141(c) and that the content of the application remains unchanged.
 - 16.3 The Applicant indicated to the Tribunal that, with regard to the excess interest charged, the Respondent has not made any reference to an initiation fee or a service fee and therefore the amounts reflected are deemed to be for the interest charged.

17. The Applicant prayed for the following orders to be granted:-
 - 17.1 Declaring the Respondent to be in repeated contravention of the Act and Regulations.
 - 17.2 Declaring the repeated contraventions to be prohibited conduct in terms of Section 150(a) of the Act.
 - 17.3 That the Respondent is interdicted and restrained from any future breaches of the Act.
 - 17.4 That the Respondent refunds all past and existing consumers all amounts paid to it, where the receipt of such funds amounts to a contravention of the Act.
 - 17.5 That the Respondent appoints an auditor at the Respondent's own costs, to verify and confirm that the Respondent has accurately calculated the amount owing to each consumer who has been affected by the Respondent's breach of the Act.
 - 17.6 That the Respondent pays the Applicant's cost for this application.
 - 17.7 That the Tribunal grant the Applicant such further and/or alternative relief as the Tribunal may consider appropriate to give effect to the consumer's rights in terms of the Act.

ISSUE TO BE DECIDED

18. The Tribunal must first consider whether the Application for amendment to the papers can be granted.
19. The Tribunal must determine whether the requirements for default judgment have been met.
20. The Tribunal must consider whether the conduct of the Respondent constitutes prohibited conduct.
21. The Tribunal must further consider whether the contraventions of the Act warrant the relief sought by the Applicant.

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

22. On 24 April 2013, the Applicant filed the main application with the Tribunal. Subsequently, a Notice of Complete Filing was issued by the Registrar to both the Applicant and the Respondent on 29 April 2013.
23. In terms of Rule 13 of the Rules of the Tribunal, the Respondent had to respond within 15 days from the notice of complete filing, by serving an answering affidavit on the Applicant. The Respondent however failed to do so.
24. The Applicant filed an application for a default order in terms of Rule 25(2) on 23 August 2013.
25. 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”

26. 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 FACTS

27. The Applicant formerly applied for an amendment to its papers and this application was also served on the Respondent on 20 March 2014. There is a courier waybill on record supporting the proper service of the documents. The Respondent did not oppose the Application for amendment.
28. The Applicant submitted that the Respondent has less than 20 credit agreements and that, at no stage, was more than R1500 loaned for more than a one month period to any consumer. The Applicant was of the view that the Respondent was therefore not required to be registered in terms of the Act.

29. The Applicant submitted that the Respondent did not keep individual files for all their clients. There were loan application forms and acknowledgment of debt/undertaking forms that were kept in a lever arch file.

30. The Applicant provided evidence based on the 15 consumer forms that were randomly selected during the investigation. 10 of these documents related to acknowledgment of debt/undertaking forms and 5 related to loan applications. The evidence reflects the following:-
 - 30.1 In the case of consumer MP Disetlhe there is no initiation fee charged. The loan amount is R1000 plus R550 for interest. The total amount payable in one instalment is R1550.00. The actual application form is marked as Annexure "B1" of the record. This evidence also relates to 4 other consumers with the same supporting evidence. The interest that is charged is excessive.

 - 30.2 In the case of consumer J Thamba and 9 other consumers, the acknowledgement of debt/undertaking form was completed by the consumer. The consumer acknowledges being indebted for an amount, but the document that the consumer has signed, has a blank space for the interest rate that the consumer is liable for as well as the breakdown of the amount of the instalment. Evidence of the acknowledgement of debt/debt undertaking forms are marked an Annexure "B6"- "B15" of the record.

31. The Applicant also determined the following during the investigation:
 - 31.1 That the Respondent does not have copies of the consumer's pre-agreement statements or quotations, or credit agreements.

 - 31.2 The forms used by the Respondent do not meet the requirements for a small credit agreement in terms of Form 20.2. .

 - 31.3 The Applicant submitted that not all consumers completed application forms when applying for credit. Some consumers only signed an acknowledgment of debt.

- 31.4 The Applicant could not find any evidence of the Respondent conducting a proper affordability assessment. There were no assessment forms wherein a consumer discloses his/her obligations. A loan application is assessed only by reviewing a consumer's payslip.
- 31.5 The Applicant has submitted a schedule of the sample of consumers that have been overcharged on interest. Evidence is marked "Table A" of the record.
32. As stated previously, the Respondent did not submit an answering affidavit and did not appear at the hearing. The evidence submitted by the Applicant is therefore uncontested. The Tribunal accepts the evidence placed before it as proven on a balance of probabilities.
33. The Tribunal must then consider the application of the relevant law to these facts.

CONSIDERATION OF THE APPLICABLE LAW AND THE TRIBUNAL'S FINDINGS

Amendment of documents

34. With regard to the amendment of documents, Rule 15 of the Rules of the Tribunal allows the parties to amend their papers any time prior to the conclusion of a hearing into a matter, by way of a formal application. The Rule further states that a party affected by an amendment may respond within a time allowed by the Tribunal.
35. The Tribunal is satisfied that the Respondent was properly served with the application to amend the Applicant's documents and that the Respondent has not responded to the application. The Tribunal is satisfied that the Respondent was provided with sufficient time within which to oppose the Application. The Tribunal is satisfied that the amendment of the Applicant's documents relates to the mere changing of a number of a form and the content of the Application did not change. The Respondent is therefore not prejudiced by the amendment sought by the Applicant.

Application for a default judgment

36. *Rule 25(2)(3) provides as follows:*

"(2) An applicant may make application by way of form T.1 r25 (2) for purpose of obtaining a default order, if no response to the application was filed within the time stated in the application.

(3) The Tribunal may make a default order-
(a) After it has considered or heard any necessary evidence and
(b) If it is satisfied that the application documents were adequately served. "

37. The Applicant has submitted evidence in its founding affidavit and the Tribunal heard further evidence during the hearing. Paragraphs 22 and 23 of the judgment provide details of the Respondent not filing an answering affidavit. The Tribunal is satisfied that the Respondent was properly served with the main application as per the signed waybill dated 24 April 2013. It is therefore submitted that the requirements for a default judgment have been met.

Jurisdiction

38. Section 136(2) of the Act provides for the National Credit Regulator to initiate a complaint in its own name.

39. Section 140 of the Act relates to the outcome of a complaint received by the Regulator and details the process to be followed by the Regulator, should the Regulator be of the view that a person has engaged in prohibited conduct and that the matter should be referred to the Tribunal. The relevant portion states the following:

"(1) After completing an investigation into a complaint, the National Credit Regulator may –
(a) ...
(b) make a referral in accordance with subsection (2), if the National Credit Regulator believes that a person has engaged in prohibited conduct;
(c) make an application to the Tribunal if the complaint concerns a matter that the Tribunal may consider on application in terms of any provision of this Act.
(d) ...
(2) In the circumstances contemplated in subsection (1)(b), the National Credit Regulator may refer the matter –
(a) ...
(b) to the Tribunal."

40. The Tribunal derives its jurisdiction to hear this matter based on the above sections in the Act.

Sections relating to registration and applicability of the Act

41. Section 40 of the Act states that " A person must apply to be registered as a credit provider if
- (a) that person, alone or in conjunction with any associated person, is the credit provider under at least 100 credit agreements, other than incidental credit agreements;or
 - (b) the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of Section 42(1).
42. Section 4 of the Act states the following:
- "(1) Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except:-*
- (a) a credit agreement in terms of which the consumer is-
 - (i) a juristic person...
 - (ii) the state; or
 - (iii) an organ of state;
 - (b) a large agreement as described in section 9(4)...
 - (c) A credit agreement in terms of which the credit provider is the Reserve Bank of South Africa;
or
 - (d) A credit agreement in respect of which the credit provider is located outside the Republic, approved by the Minister on application by the consumer in the prescribed manner and form.
43. The Act further defines a credit provider as " in respect of a credit agreement to which this Act applies, means- ...
- (h) the party who advances money or credit to another under any other credit agreement;.."*
44. The Tribunal has considered the above mentioned sections and it is satisfied that whilst the Respondent may not be required to register in terms of the Act, the Act is still applicable to the Respondent and as such the Respondent needs to comply with the relevant sections of the Act

applicable to credit agreements. The Act makes specific reference to sections that Registrants must comply with under the Act, and in other sections, reference is made to credit providers. The Tribunal is therefore only considering those sections of the Act which the Respondent, as a credit provider (not as a Registrant), is required to comply with.

Sections pertaining to documents to be provided to consumers and record keeping

45. Section 92(1) states that “ A credit provider must not (own emphasis) enter into a small credit agreement unless the credit provider has given the consumer a pre-agreement statement and quotation in the prescribed form.” Read with Regulation 28 which provides the following:-

“28(1) The pre-agreement statement and quotation given to a consumer in terms of Section 92(1) of the Act must comply with the following requirements:

- (a) The pre-agreement statement and quotation may be contained in one document or in two separate documents;*
 - (b) The pre-agreement statement and quotation must be in the format set out in Form 20;*
 - (c) For purposes of electronic or telephone originated pre-agreement statement and quotation for small agreements, the electromagnetic recording and transcribing of documents will be sufficient, provided that the consumer is supplied with copies of the documents within a reasonable time.*
- (2) If any section of the pre-agreement statement and quotation as prescribed in this section does not apply to the particular type of credit agreement, such section may be omitted from the statement.*
 - (3) If any category of fee or charge that is provided for is not levied by the credit provider, or if no security, insurance or similar requirements are made by the credit provider, the sections dealing with such matters may be omitted.*
 - (4) The following definitions will apply to Form 20, in respect of credit facilities that meet the criteria for small agreements...”*

46. Section 170 of the Act relates to the keeping of records by the credit provider. This section states: “A credit provider must (own emphasis) maintain records of all applications for credit, credit agreements and credit accounts in the prescribed manner and form and for the prescribed time.”

47. Section 93(2) states: “A document that records a small credit agreement must (own emphasis) be in the prescribed form”. This section must be read with Regulation 30, which states that:
“30(1) A document that records a small credit agreement must (own emphasis) contain all the information as reflected in Form 20.2.
(2) The information listed in Form 20.2 may be disclosed in the order of choice of the credit provider.”
48. It is clear from the evidence put forward by the Applicant, that the Respondent failed to comply with the requirements of ensuring that the consumers were provided with pre-agreements and quotations. Further, the Applicant has shown that the information the Respondent kept in an arch lever file was their own format of a loan application form and an acknowledgement of debt/undertaking form that does not meet the requirements of the Act.

Sections relating to unlawful provisions of credit agreements

49. Section 90(2)(k)(iii) states:-
“A provision of a credit agreement is unlawful if it expresses, on behalf of a consumer an undertaking to sign in advance any documentation relating to enforcement of the agreement, irrespective of whether such documentation is complete or incomplete at the time it is signed.”
50. The Applicant has provided evidence of the Acknowledgement of debt agreements that are signed by the consumers, prior to any default under the Act.

Sections relating to affordability assessments

51. Section 81 of the Act states that:
“(1)
(2) A credit provider must not (own emphasis) 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 re-payment 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 defence to an allegation that a credit agreement is reckless if-*
 - (a) *the credit provider establishes that the consumer failed to 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."*
- 52. Regulation 55(1)(b)(vi) further supports the requirement of conducting the pre-assessment as well as retaining the required supporting documentation as it states that "*In addition to any records that must be kept in terms of the Act, a registrant must (own emphasis) maintain the following records relating to its registration activities, which records may be kept in electronic format: (b) Credit Providers, in respect of each consumer: documentation in support of steps taken in terms of Section 81(2) of the Act."*
- 53. The Applicant's evidence in this regard is that there were no assessment forms completed by consumers, but rather that the Respondent granted loans on the basis of considering the consumers' payslips. In the absence of any formal assessments being found during the investigation, the conclusion reached by the Tribunal is that the Respondent has not complied with the sections relating to affordability assessments.

54. The Applicant's investigation revealed that there were no records on the files that met the requirements of Regulation 55, thus the Respondent has not met the requirement to keep proper records as required by the Act, in conducting a pre-assessment.

Sections relating to excess interest rates

55. Section 100(1)(c) of the Act states :
"A credit provider must not (own emphasis) charge an amount to, or impose a monetary liability on, the consumer in respect of an interest charge under a credit agreement exceeding the amount that may be charged consistent with this Act."
56. Section 101(a) of the Act states:
"A credit agreement must not (own emphasis) require payment by the consumer or 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 in section 102;"
57. Section 101(1)(d) of the Act further states that *"A credit agreement must not (own emphasis) require payment by the consumer of any money or other consideration, except interest, which must be expressed in percentage terms as an annual interest rate calculated in the prescribed manner; and..."*
58. Regulation 42 states the calculations for the maximum interest rate that can be charged for the different types of agreements"

"(1) The following maximum rates of interest will apply:

Sub-sector Maximum Prescribed Interest Rate	Sub-sector Maximum Prescribed Interest Rate
<i>Mortgage agreements $[(RR \times 2.2) + 5\%]$ per year</i>	<i>Mortgage agreements $[(RR \times 2.2) + 5\%]$ per year</i>
<i>Credit facilities $[(RR \times 2.2) + 10\%]$ per year</i>	<i>Credit facilities $[(RR \times 2.2) + 10\%]$ per year</i>
<i>Unsecured credit transactions $[(RR \times 2.2) + 20\%]$ per year</i>	<i>Unsecured credit transactions $[(RR \times 2.2) + 20\%]$ per year</i>
<i>Developmental credit agreements</i>	

	<i>for the development of a small business</i>	<i>for the development of a small business</i>
	<i>[(RR x 2.2) + 20%] per year</i>	<i>[(RR x 2.2) + 20%] per year</i>
<i>Short term credit transactions per month</i>	<i>5%</i>	<i>Short term credit transactions per month</i>
<i>Other credit agreements</i>	<i>[(RR x 2.2) + 10%] per year</i>	<i>Other credit agreements</i>
<i>Incidental credit agreements</i>	<i>2% per month</i>	<i>Incidental credit agreements</i>
		<i>2% per month</i>

Where,

- (a) RR indicates the reference rate, being the ruling SA Reserve Bank Repurchase Rate,
- (b) The interest rate on short term credit transactions must be disclosed as a monthly interest rate, in such disclosure as is required by the Act and these regulations."

59. The Applicant in the documentary evidence in the pleadings marked " Table A" shows the interest rates charged by the Respondent as 51%, 52%, 55% and 70% respectively. This evidence highlights the Respondent's contravention of Section 101(a)-(c); 101(a) and(d) and Regulation 42.

Prohibited conduct

60. The Act defines prohibited conduct as "*An act or omission in contravention of this Act, other than an act or omission that constitutes an offence under this Act*".

61. Based on the evidence and the above discussion, the Tribunal concludes that the Respondent has contravened various sections of the Act as well as the Regulations.

62. In such instances where a determination has been made by the Tribunal on prohibited conduct, Section 164(3)and (4) is applicable to the affected consumers. Section 164(3) states:
"A person who has suffered loss or damage as a result of prohibited conduct or dereliction of required conduct-

- (a) may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has consented to an award of damages in a consent order;or*
- (b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the registrar or clerk of the court a notice from the Chairperson of the Tribunal in the prescribed form-*

- (i) *certifying that the conduct constituting the basis for the action has been found to be a prohibited or required conduct in terms of this Act;*
 - (ii) *stating the date of the Tribunal's finding; and*
 - (iii) *setting out the relevant section of this Act in terms of which the Tribunal made its finding.*
- (4) *A certificate referred to in subsection (3)(b) is conclusive proof of its contents and is binding on a civil court."*

63. In light of the above sections, it is therefore important that a list of consumers that have been affected by the conduct of the Respondent be compiled. This requires the appointment of an independent auditor to accurately verify the identity of all affected consumers on the list and calculate the amount owing to each consumer who has been affected by the Respondent's breaches of the Act.

ORDER

64. Accordingly, the Tribunal makes the following order:

- 64.1 In terms of section 150(g) of the Act, the Respondent's repeated contravention of the Act and Regulations is declared prohibited conduct. The Respondent has contravened sections 81(2), 170, 90(2)(k)(iii), 92, 93(2), 100(1)(c), 101(1)(d)(i) of the Act and Regulation 28, 30, 42(1) and 55(1)(b)(iv).
- 64.2 In terms of section 150(b) of the Act, the Respondent is interdicted from engaging in any further prohibited conduct as stated in Paragraph 64.1 above.
- 64.3 In terms of section 150(h), the Respondent is ordered to refund all of the past and existing consumers all excess amounts charged. This refund is to be paid to each consumer within thirty (30) days of the date of this order. The Respondent is ordered to take every reasonable step to locate every affected consumer for the purpose of effecting the payment. Should a consumer not be traced within thirty (30) days of this order, the Respondent is ordered to pay all funds earmarked for this purpose to the Applicant, which shall be held in an allocated account by the Applicant, pending the locating of such a consumer.

- 64.4 The Respondent is ordered to appoint an auditor, at the Respondent's own cost, to verify and confirm that the Respondent has accurately calculated the amount owing to each consumer who has been affected by the Respondent's breaches of this Act.
- 64.5 Pursuant to the order contained in 64.3 above, the Respondent is ordered to submit a report to the Applicant within sixty (60) days of this order, detailing the following:
- 64.5.1 The amount of all repayments made by the Respondent (duly confirmed by the appointed auditor);
 - 64.5.2 The recipients of all repayments; and
 - 64.5.3 The steps taken by the Respondent to locate any consumer which it was unable to locate;
- 64.6 There is no order as to costs.

DATED ON THIS 12th DAY OF MAY 2014

[signed]

Ms H Devraj

Member

Authorised for issue by the National Consumer Tribunal

Case number

Date 20/11/14
ccyy mm dd

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Adv J Simpson (Presiding member) and Mr F Sibanda (Member) concurring.