

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

Case Number: NCT/8615/2013/57(1)

In the matter between:

THE NATIONAL CREDIT REGULATOR

APPLICANT

and

RUSTMAR CC

RESPONDENT

Coram:

Prof B Dumisa – Presiding member

Adv J Simpson – Member

Prof J Maseko – Member

Date of Hearing – 07 March 2014

JUDGMENT AND REASONS

APPLICANT

1. The Applicant in this matter is the National Credit Regulator, a body established in terms of Section 12 of the National Credit Act, 34 of 2005 (the "NCA" or the "Act") (hereinafter referred to as "the Applicant").
2. At the hearing of the matter the Applicant was represented by Mr Barry Jones of Honey Attorneys. Mr Jones was accompanied by Mr Joseph Selolo, an employee of the Applicant.
3. The Applicant's Founding Affidavit is deposed to by Zwelithini Ronald Zakwe, Senior Legal Advisor in the employ of the Applicant.

RESPONDENT

4. The Respondent (and the Registrant) is Rustmar CC, a close corporation duly incorporated in terms of the laws of the Republic of South Africa, is registered as a credit provider, having been registered by the NCR on 10 July 2007, with registration number NCRCP1870, and trading as such under the name Money Wise in Marikana, North West Province (hereinafter referred to as "the Respondent").
5. There was no appearance by the Respondent or any representative on behalf of the Respondent at the hearing.

APPLICATION TYPE

6. The Applicant avers that the Respondent contravened the NCA in that the Respondent repeatedly contravened the following conditions of its registration:
 - (a) General condition A1;
 - (b) General condition A2;
 - (c) General condition A4; and
 - (d) Specific condition B3.
7. The Applicant further avers that the Respondent repeatedly contravened the Act, more particularly:
 - (a) Section 90(2)(f);
 - (b) Section 90(2)(m);
 - (c) Section 91(a);
 - (d) Section 100(1)(b);
 - (e) Section 100(1)(d);
 - (f) Section 101(b), (c) and (e);
 - (g) Section 105;
 - (h) Regulation 42(2) and
 - (i) Regulation 44.
8. Based on the above averments, the Applicant approached the Tribunal for an order in the following terms:
 - (a) Declaring the conduct of the Respondent to be in breach of the Act;

- (b) Interdicting and restraining the Respondent from future breaches of the Act;
- (c) Ordering the Respondent to refund all of the past and existing consumers all amounts paid to it in contravention of the Act; and
- (d) Ordering the Respondent to pay an administrative fine in terms of Section 150(1) of the Act.

THE HEARING

9. The matter was set down for 7 March 2014.
10. The matter was heard by the Tribunal on a default basis on the following grounds: The Respondent did not appear in person and was not represented at the hearing.
11. At the hearing the Tribunal was informed that the Respondent's Attorney had previously communicated with the Applicant's Attorney regarding a possible postponement of the matter. The Applicant's Attorney informed the Tribunal that no formal application for a postponement had been filed and the Applicant wished to proceed with the hearing. The Attorney further submitted that he had contacted the Respondent's Attorney who informed him that they were unable to attend to the matter any further due to a lack of funds. Although the Tribunal takes note of the interaction between the respective Attorneys, no formal application for postponement was placed before the Tribunal or indeed at any time up until the day of the hearing. The Tribunal was therefore unable to consider any postponement of the matter and proceeded to hear the Applicant on the merits of the application.

BACKGROUND

12. On 18 September 2012, Russel Willoughby and Sphiwe Mashaba ("the inspectors") were appointed by the Applicant to conduct an investigation into the Respondent's business as a credit provider at its Marikana branch. The inspectors visited the premises of the Respondent in October 2012 for the investigation.
13. The investigation revealed that, before concluding credit agreements with the Respondent, the Respondent required consumers to enter into supplementary agreements with Flexible Payment Solutions ("Flexifusion"). Based on the evidence submitted Flexifusion provides a debit order type system of deducting the monthly repayments due on the credit agreement from the consumer's

account and transferring it to the Respondent – in exchange for a fee. The involvement of Flexifusions had the effect of creating additional and / or a duplication of fees payable by the consumers, which is excessive in terms of the NCA.

14. In some cases, the Respondent was found to have engaged in unlawful splitting of loans, in order to charge consumers double on charges such as initiation fees, service fees, credit life and Flexifusion fees.

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

15. The Application was filed with the Tribunal on 24 April 2013. The Registrar of the Tribunal issued a Notice of Complete Filing to both parties on 29 April 2013. The notice called on the Respondent to file its answering affidavit within 15 business days of such notice, therefore by 21 May 2013. The Respondent however failed to file an answering affidavit.
16. Based on the above failure by the Respondent to file an answering affidavit, the Applicant filed an application to the Tribunal for a default order. This application was dated 03 December 2013.
17. In accordance with Rule 13(5) of the Rules of the Tribunal¹ any fact or allegation in the application not specifically denied in the answering affidavit will be deemed to have been admitted.
18. The Tribunal therefore accepts the evidence submitted by the Applicant as being proven on a balance of probabilities.

ANALYSIS OF LEGAL PROVISIONS AND FACTS

19. By requiring the consumers to enter into a supplementary agreement with Flexifusion the Respondent acted in contravention of Section 91(a) of the Act, which states: "*A credit provider must not (a) Directly or indirectly require or induce a consumer to enter into supplementary agreement, or sign any document, that contains a provision that would be unlawful if it were included in a credit agreement*".

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").

20. The Respondent is also in contravention of Section 100(1)(d) of the Act, by charging an additional fee payable to third party (Flexifusion) in respect of a credit agreement. Section 100(1)(d) states: “A credit provider must not charge an amount to, or impose a monetary liability on, the consumer in respect of 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”.
21. The Respondent further contravened section 100(1)(b), section 100(1)(c), sections 101(1)(b) and (c), section 101(1)(e), section 101(2) and section 105 of the Act read with regulation 42(2) and regulation 44, through their practice of the splitting of loans. On the evidence presented the Respondent granted separate loans to the same consumer on the same day which resulted in a duplication of *inter alia* fees charged to that consumer.

CONSIDERATION OF THE ORDERS APPLIED FOR

Declaring the conduct of the Respondent to be in repeated contravention of various provisions of the Act

22. The Applicant has provided adequate evidence to prove various contraventions of the Act, as shown above, especially in the use of Flexifusion. This approach is consistent with the approach followed by the Tribunal in the case of the *NCR v Barko Financial Services (Pty) Ltd*² and in the confirmation of such an approach by the North Gauteng High Court when they dismissed the appeal by the Respondent in *Barko Financial Services (Pty) Ltd v National Credit Regulator and The National Consumer Tribunal* (Case number A499/2011).
23. The evidence submitted further shows that the Respondent granted separate loans to the same consumers on the same day. The Applicant asserts “that a practice of this nature can only be designed for the purpose of charging consumers prescribed fees more than once, on the premise that more than one loan agreement has been concluded, when in fact only one loan has been granted by the credit provider to the consumer”. The evidence therefore supports a finding that the Respondent

² NCT/743/2010/56(1).

contravened section 100(1)(b), section 100(1)(c), sections 101(1)(b) and (c), section 101(1)(e), section 101(2) and section 105 of the Act read with regulation 42(2) and regulation 44.

Interdicting the Respondent from future breaches of the Act

24. Section 150(b) of the Act does provide for "*interdicting any prohibited conduct*". The reported widespread abuse of desperate poor consumers by credit providers does justify not just stopping such credit providers from doing the wrong things they have been doing but also justifies proactive steps being taken to prevent the same wrongdoers from repeating the same contraventions of the Act in the future; instead of expecting the National Credit Regulator to launch fresh applications every time a credit provider repeats same contraventions.

Ordering the Respondent to refund all of past and existing consumers all amounts paid to it in contravention of the Act

25. It was the duty of the Applicant to provide the Tribunal with the complete list of such affected consumers; the Applicant did not provide such a list. In the circumstances, the Tribunal would be put in a better position to make such an appropriate order in cases where there are specific consumers listed, as in the case of the 14 consumers whose files were sampled by the two NCR inspectors. However, confining this particular exercise only to those 200 clients identified from the files found at the Respondent's premises may serve the purpose.

Ordering the Respondent to appoint 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 breaches of the Act

26. In developing workable terms of reference for any auditor to conduct this exercise, it would be better to confine the auditor to the 200 consumer files found at the Respondent's premises by the two inspectors.

Ordering the Respondent to pay an administrative fine in terms of Section 150(1) of the Act

27. The Applicant did not provide the Tribunal with the necessary financial data or other information regarding the factors listed in section 151(3) of the Act to properly determine an appropriate administrative fine.

Ordering the Respondent to pay the Applicant's costs of the application

28. In accordance with section 147(1) of the Act each party must bear their own costs. The Applicant has not placed any evidence before the Tribunal to merit an exception to this provision.

Granting 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

29. The Applicant in its written and oral submissions has covered almost all the possible orders that the Tribunal can make in this case. It is important to note that, whilst the Applicant did allude to the possibility of praying for the cancellation of registration of the Respondent in its Draft Order submitted with its Application for a Default Order, submitted to the Tribunal on 04 December 2013; the Applicant expressly avoided pursuing this type of a prayer both in further written submissions and in further oral submissions. The Tribunal will therefore confine its considerations of appropriate orders within the prayers listed by the Applicant in its Heads of Argument, dated the 6th March 2014.

ORDER

30. Accordingly, the Tribunal makes the following order:

- 30.1 The Respondent is declared to have engaged in repeated prohibited conduct in terms of the Act.
- 30.2 The Respondent is ordered to appoint an auditor, at its own costs, to verify and confirm that the Respondent has accurately calculated the amount owing to each of the 200 consumers whose files were found at the Respondent's premises by the investigators.

- 30.3 At the end of the auditor's verification of the accuracy of amounts owing by the consumers, in compliance with the provisions of the Act; the Respondent is ordered to refund all the affected consumers where amounts paid to the Respondent was in contravention of the Act. These refunds should be paid to each affected consumer within ninety (90) days of the date of this order.
- 30.4 Interdicting the Respondent from any future contraventions of the Act; specifically with regard to splitting of the loans, duplication of fees, charging of fees in contravention of the Act, and / or any other variations of such contraventions of the Act.
- 30.5 No order as to costs.

DATED ON THIS 23rd DAY OF MAY 2014

[signed]

Prof B. Dumisa

Presiding Member

Adv J Simpson (Member) and Prof J Maseko (Member) concurring.

Authorised for issue by the National Consumer Tribunal

Case number NCT/8615/2013/57(1)

Date 2014 10 11
ccyy mm dd

National Consumer Tribunal
Ground Floor Building B
Lakerfield Office Park
272 West Avenue, Centurion 0157
www.tnecct.org.za

