

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

Case number: **NCT/7281/2013/57(1)(P)NCA**

In the matter between:

NATIONAL CREDIT REGULATOR

Applicant

and

LIGHTNING CASH LOANS CC

Respondent

Coram:

D Terblanche - Presiding Member

F Sibanda - Member

N Sephoti - Member

Last date of Adjudication: 17 May 2013 (written submissions)

JUDGMENT

1. The Applicant in this matter is the National Credit Regulator, a body established in terms of Section 12 of the National Credit Act (the "NCA" or the "Act") (hereinafter referred to as "the Applicant").
2. The Respondent is Lightning Cash Loans CC, a close corporation registered in terms of the Close Corporations Act (hereinafter referred to as "the Respondent").

3. Respondent registered with Applicant on 15 October 2007 under NCR registration number NCRCP2082 and company registration number 2004/096597/23.
4. This is an application by the National Credit Regulator (hereinafter the Applicant) for -
 - 4.1. The cancellation of registration of Lightning Cash Loans (hereinafter the Respondent) in terms of Section 57(1)(a) and (c);
 - 4.2. Declaring Respondent's contraventions of -
 - 4.2.1. Its General conditions of registration 1 and 3,
 - 4.2.2. Its Specific condition of registration 1;
 - 4.2.3. Sections 51(1) read with Schedule 2 Table D of the regulations and Contraventions of Section 52(5) read with regulation 62 to 68 of the Act to be prohibited in terms of the Act.
 - 4.3. Imposition of an administrative fine not exceeding the greater of 10% of the Respondent's turnover for the preceding financial year or R1 000 000 on the Respondent in terms of section 151 of the Act; and /or
 - 4.4. Any other appropriate order.
5. The applicant alleges that the Respondent contravened -
 - 5.1. Section 51(1)(c) read with schedule 2 Table D and Section 52(5)(c) and (d) of the Act, alternatively in contravention of general condition 1 of conditions of registration; and
 - 5.2. Regulation 62 to 68 of the Act alternatively in contravention of general condition 3 of the general conditions of registration.

FACTUAL ALLEGATIONS

6. Applicant alleges that –

6.1. The Respondent registered with it on 15 October 2007 under NCR registration number NCRCP2082 and company registration number 2004/096597/23.

6.2. The credit provider's conditions of registration are contained in a "Notice of Proposed Conditions ..." and initialed by the Credit Provider upon acceptance¹.

6.3. The Respondent failed to comply with the Act and his general and specific conditions of registration.² The conditions the credit provider allegedly did not adhere to were requirements of legislation and regulations³ and failure to submit reports and returns⁴ particularly in that it failed to –

6.3.1. Pay the annual registration renewal fee at the anniversary of its registration from the very first anniversary namely for 2008, 2009, 2010 and 2011 years amounting to R7000,00⁵ despite demand.

6.3.2. Submit the below reports and returns as prescribed in regulation 62(1) -

6.3.2.1. Annual compliance reports for 2008, 2009 and 2010 in contravention of regulation 63;

6.3.2.2. Statistical returns for the periods 2008, 2009, and 2010 in contravention of regulation 64;

6.3.2.3. Annual financial statement together with the accounting officer's report for 2008, 2009, 2010 in contravention of regulation 65;

¹ Page 00019 of the record

² General condition of registration 1 and 3 and Special condition of registration 1

³ Condition 1 provides that;

"The registrant must comply with all applicable legislation relating to the operation of the business of a credit provider, including but not limited to the Act, the regulations and any subsequent amendment or substitution of the applicable legislation and regulations"

⁴ Condition 3 provides that:

"The registrant must submit the reports and returns as required in the regulations applicable to the registrant, within the specified period"

⁵ Error with NCR figure 4 years should amount to R6000 not R7000

- 6.3.2.4. Financial and Operational return for 2008, 2009, and 2010 in contravention of regulation 66;
- 6.3.2.5. Assurance engagement report for 2008, 2009, 2010 in contravention of regulation 67 and 68; and
- 6.3.3. Failed to submit a language policy proposal in contravention of specific condition of registration 1⁶.

APPLICABLE PROVISIONS OF THE ACT

- 7. The National Credit Act in section 51(1)(c) provides that the Minister may prescribe an annual registration renewal fee. The fee may differ according to categories.
- 8. The Minister prescribed annual registration renewal fees according to categories and the timeframe for paying them (amongst other matters)⁷.
 - 8.1. The prescribed fee for the category the Respondent falls into is set out in Table D Schedule 2, Item 7 and is an amount of R1500 per annum based on its total principal debt.
- 9. Section 52(5)(c); (d); (e) and (f) oblige registrants to –
 - 9.1. Comply with its conditions of registration and the provisions of the Act;
 - 9.2. Pay the annual registration renewal fee;
 - 9.3. Keep any prescribed records related to its registered activities, in the prescribed manner and form; and
 - 9.4. File any prescribed reports with the National Credit Regulator in the prescribed manner and form.
- 10. The prescriptions relating to the prescribed records and reports related to the credit provider's registered activities are contained in Regulation 62 to 68⁸ i.e. to submit a

⁶ Alleged grounds for cancellation on page 00007 of the record does not include this ground

⁷ "Prescribed timeframes for free credit records and determination of application and registration fees" Regulations published under GN R949 in GG 29245 of 21 September 2006;

compliance report, statistical returns, annual financial and operational return; and assurance engagement report to the National Credit Regulator.

11. Section 52(4)(b) provides that “*A registration – (a) takes effect on the date on which the certificate or duplicate certificate of registration is issued; and (b) subject to timely payment of the prescribed registration renewal fee (emphasis added), remains in effect until – (i) the registrant is de-registered⁹; or (ii) the registration is canceled¹⁰ in terms of the Act*”.
12. Section 57(1) provides for the Tribunal to cancel the registration of a Registrant on request by the National Credit Regulator “*...if the registrant repeatedly fails to comply with any conditions of its registration; fails to meet a commitment in terms of section 48(1); or contravenes this Act.*”
13. Section 89(2)(d) provides that a credit agreement is unlawful if “*...at the time the agreement was made, the credit provider was unregistered and this Act requires that credit provider to be registered*”
14. Section 151(3) provides that, when determining the appropriate fine, the Tribunal must consider the following factors:
 - “(a) *the nature, duration, gravity and extent of the contravention;*
 - “(b) *any loss or damage suffered as a result of the contravention;*
 - “(c) *the behavior of the respondent;*
 - “(d) *the market circumstances in which the contravention took place;*
 - “(e) *the level of profit derived from the transaction;*
 - “(f) *the degree to which the respondent has co-operated with the National Credit Regulator, or the National Consumer Commission, in the case of a matter arising in terms of the Consumer Protection Act, 2008, and the Tribunal; and*

⁸ National Credit Regulations, 2006 published under GN R489 in GG 28864 of 31 May 2006 as amended by GN R1209 in GG 29442 of 30 November 2006 and GN R604 in GG 30713 of 29 May 2008.

⁹ De-register – to remove from register

¹⁰ Cancel 1. to make void; revoke; annul: *to cancel a reservation*. 2. to decide or announce that a planned event will not take place; call off: *to cancel a meeting*. 3. to mark or perforate (a postage stamp, admission ticket, etc.) so as to render invalid for reuse. 4. to neutralize; counterbalance; compensate for: *His sincere apology canceled his sarcastic remark. etcetera's*

(g) *whether the Respondent has previously been found in contravention of this Act, or the Consumer Protection Act, 2008, as the case may be.*"

15. Section 166(1) provides that a complaint in terms of the Act may not be referred or made to the Tribunal or a consumer court more than three years after:
- (a) The act or omission that is the cause of the complaint; or
 - (b) In the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.

FACTUAL BASIS FOR DETERMINATION

16. This matter came to the Tribunal on the basis of a default judgment application.
17. The application was served on the Respondent. The Respondent did not file an answer to the application and the founding affidavit filed therewith by the Applicant.
18. Rule 13 of the Rules¹¹ provides that any allegation not specifically disputed is deemed as admitted.
19. The Tribunal therefore proceeded on the basis that the factual allegations by the Regulator stands uncontroverted, since the Respondent did not file an answering affidavit in respect of the founding affidavit to the application and determined the matter on the facts put forward by the Applicant.

DETERMINATION OF LEGAL ISSUES

20. Applicant seeks an order from the Tribunal for the cancellation of Respondent's registration as a credit provider, declarations of certain conduct as prohibited conduct and the imposition of an administrative penalty on the Respondent.

¹¹ The Rules for the Conduct of Matters before the Tribunal as published under GN 789 in GG30225 OF 28 August 2007 as amended by GenN 428 in GG34405 OF 29 June 2011

Determination of application for deregistration

21. With respect to the cancellation application, the Tribunal has to firstly determine whether there is an existing registration (of a registrant) that can be cancelled in terms of section 57, before considering whether there are grounds for such cancellation.
22. Section 57(1) of the Act provides for the Tribunal to "...**cancel the registration of a Registrant...**". This clearly and unequivocally requires a current "registration" of a "registrant".
23. Section 1 of the Act, defines Registrant as a "*person who has been registered in terms of the Act.*"¹² The Respondent meets this requirement as the undisputed evidence reflects that the Regulator registered it during 2007.
24. Section 52(4) of the Act provides that "A registration – (a) takes effect on the date on which the certificate or duplicate certificate of registration is issued; and (b) **subject to timely payment of the prescribed registration renewal fee (emphasis added), remains in effect until– (i) the registrant is de-registered¹³; or (ii) the registration is canceled¹⁴ in term of the Act**".
25. It appears to the Tribunal that the Respondent's registration did not remain in effect due to Respondent's failure to timely, or as is the case here to not at all, pay the annual registration renewal fee. In this matter the Respondent did not pay its annual registration renewal fees for a number of years consecutively. Of note is that the "*remaining in effect of the registration*" (our phraseology) is subject to only the obligation of payment of the annual registration renewal fee imposed on a registrant in terms of section 52(5)(d) of the Act, and not the other obligations imposed.

¹² Section 1 of the NCA

¹³ De-register – to remove from register

¹⁴ Cancel 1.to make void; revoke; annul: *to cancel a reservation.* 2.to decide or announce that a planned event will not take place; call off: *to cancel a meeting.* 3. to mark or perforate (a postage stamp, admission ticket, etc.) so as to render invalid for reuse 4.to neutralize; counterbalance; compensate for: *His sincere apology canceled his sarcastic remark. etcetera's*

26. The Tribunal find support for this in various other national and international statutes set out below –

26.1. Section 35(1) of the Auditing Professions Act, Act 26 of 2005 provides for automatic lapsing as follows:

“(1) The accreditation of a professional body lapses automatically if-

(a) It ceases to exist; or

(b) It fails to pay any prescribed fee or portion thereof within such period as may be prescribed by the Regulatory Board.

26.2. Section 11(10) of the Electronic Communications Act, Act 36 of 2005 provides that *“An individual licence remains valid until such time as the Authority has made a decision on an application for renewal of such individual licence”*.

26.3. The above does not amount to an automatic lapsing. The wording of this section however differentiates it from the provisions of the National Credit Act, in that it is clear from the portion quoted that it will remain in effect *“until a decision is made”* and not *“unless”* an annual registration renewal fee is paid timeously

27. The NCT is empowered to consider international law in terms of section 2(2) of the NCA which provides that *“any person, court or tribunal interpreting or applying this Act may consider appropriate foreign and international law”*

28. In accordance with the provisions of the UK Patents Act of 1977 the position in the United Kingdom is that patents have to be renewed¹⁵. A renewal fee is payable by the patent holder and if such fee is not paid by the payment due date, the Intellectual Property Office will issue a reminder letter. The patent can still be renewed up to 1 month after the payment due date at no extra charge. A further 5 months is then granted within which a patent can be renewed subject to the payment of a late payment fee for each of these months in addition to the renewal fee. Should the patent not be renewed within this 6 month late renewal period an application for restoration of the patent must

¹⁵ <http://www.ipo.gov.uk/types/patent/p-manage/p-renew.htm>

be brought within 13 months of the expiry of the late renewal period, as the patent would lapse at this stage. In the restoration application, reasons must be provided for failure to pay the renewal fee and that the failure was unintentional.

29. The Scottish Social Services Council¹⁶ prescribes that its members (social workers) must register as social workers and that they must not only pay a fee for applying for initial registration but must also, once registered, pay an annual fee to retain their name on the Register. Failure to pay the annual fee will result in a member's registration having lapsed.
30. This view on the NCA and legislation quoted above, is further supported by South African National case law –
31. In the *University of Pretoria v Registrar of Patents*¹⁷ the learned judge referred to section 40 of the Patents Act and held that, in terms of such section, there is no grace period for a late application for renewal. As a result the court held that the patent had lapsed on the date upon which the registration should have been renewed. The Court furthermore held that Section 40 provides that an extension can only be granted "on good cause shown and on payment of the prescribed fee". By the due date for registration of the patent there was no application for an extension at all, let alone "good cause shown" or a prescribed fee paid. The Court came to the conclusion that the 2004 patent application lapsed on 1 October 2005 so that the appeal in that regard was upheld.
32. In the NCA, we could not identify a similar provision allowing for a grace period after a lapse of registration. This would mean that the lapsing would be immediate on the date of failure to pay the annual registration renewal fee. The Applicant must therefore on this date alter its register in terms of Section 53(1) to reflect the fact that the registration has lapsed.

¹⁶ <http://www.sssc.uk.com/Applying-for-registration/sssc-registration-fees.html>

¹⁷ 2011 JDR 1406 (GNP)

33. In *Jowell v PAA and Others*¹⁸ which was in substance a review of a decision made by the disciplinary committee in terms of the Public Accountants and Auditors Act, No. 80 of 1991, the court held *inter alia* that the Applicant's registration lapsed automatically by reason of his having failed to pay certain prescribed annual fees to the First Respondent in respect of the year 1998 as is prescribed by section 15(7) of the Act.
34. Furthermore in the view of the Tribunal, the above interpretation and approach supports the purpose of the Act "...to promote a fair transparent, competitive, sustainable responsible, efficient, effective and accessible credit market and industry and to protect consumers."
35. In the matter of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*¹⁹ the Constitutional Court gave due consideration to the manner in which legislation (in that matter specifically the provisions of the Marine Living Resources Act, 18 of 1998) should be interpreted. The court held as follows:
- "There can be no doubt that the development objectives of the national government include transformation of the economy. On an overall reading of the provisions of the Act, decision-makers, in allocating fishing rights, must seek to give effect to the objectives of the Act and, in particular, must ensure that a process of transformation takes place... At the very least, some practical steps must be taken in the process of the fulfilment of these needs each time allocations are made if possible..."*
36. On a practical level it will ensure that registrants remain responsible for ensuring they remain compliant and in the result reduce the regulatory burden on the regulator and the costs to the public purse.
37. The question that immediately then comes to mind is how do you prevent a credit provider, with specific reference to the facts of the *Jowell* - case referred to above, from escaping liability for its conduct whilst registered and In respect of conduct after its registration has lapsed?

¹⁸ 2000 JDR 0632 (C)

¹⁹ (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004)

38. In all instances where the credit provider is registered, it remains obligated to perform its obligations as a registrant. Sections 54, 89(5), 161, and 164(1) of the Act, on the other hand provides for the discretion of the Regulator in respect of activities by unregistered entities, and in respect of unlawful agreements.
39. Section 54 provides that activities, which require registration, by unregistered entities constitute offences due to non-compliance.
40. The National Credit Regulator, in terms of section 54, may issue a notice in the prescribed form to such unregistered entity regarding the non-compliance, informing the entity that it constitutes an offence under the Act and that it is punishable in terms of section 161 with a fine or imprisonment.
41. Section 89(2)(d) provides that a credit agreement is unlawful if entered into with an unregistered credit provider (resulting from the lapse of registration) required to be registered and section 89(5) provides that a court can make an appropriate order and declare the agreement void from the date it was entered into and to return money received from and prohibits the recovery of monies from the consumer.
42. The Tribunal carefully considered this and the status and treatment or action to be taken in respect of the credit agreements and the restricted activities of the unregistered entity after the latter's registration has lapsed.
43. In the matter of *National Credit Regulator v Opperman and Others*²⁰ the Constitutional Court *inter alia* confirmed the order of the High Court in as far as it relates to the provisions of Section 40 and 42(1) of the NCA. In this regard it held as follows:

"Section 40 of the NCA requires certain credit providers to register with the NCR. Because Mr Boonzaaier's total principal debt exceeded the R500 000 threshold, prescribed in terms of section 42(1) of the NCA, the High Court held that Mr Opperman was required to register. Since he was

²⁰ (CCT 34/12) [2012] ZACC 29; 2013 (2) BCLR 170 (CC); 2013 (2) SA 1 (CC) (10 December 2012)

not registered, the credit agreement was unlawful. Section 89(5) stipulates how unlawful credit agreements must be dealt with by courts.”²¹

44. In terms of Section 89(5) of the NCA a court must order that the unlawful credit agreement is void from the date it was entered into, the credit provider must refund to the consumer any money paid by the consumer under the agreement to the credit provider and all the purported rights of the credit provider under the credit agreement to recover any money paid or goods delivered to the consumer in terms of the agreement are cancelled.

Determination in respect of claims of prohibited conduct

45. The next matter to consider is whether, on the facts put forward by the Applicant, the Tribunal can make determinations of prohibited conduct. This is an important consideration as the Tribunal is empowered in terms of section 151 of the Act to impose an administrative fine only in respect of “...*prohibited or required conduct*” in terms of the Act.
46. The Applicant requested the Tribunal to declare Respondent's non-payment of the annual registration renewal fee, submission of returns and reports and non-submission of its language proposal, prohibited conduct in terms of the Act.
47. Prohibited conduct is defined in the Act, section 1, as “...*an act or omission in contravention of this Act, other than an act or omission that constitutes an offence under this Act, by – (a) an unregistered person who is required to be registered to engage in such an act, or (b) a credit provider, credit bureau or debt counselor.*”
48. Section 52(5) places an obligation on a “**registrant**” (our emphasis) to “... (a) post the certificate or duplicate registration certificate...; (b) reflect its registered status and registration number..., (c) comply with its conditions of registration and provisions of this Act; (d) pay the prescribed annual renewal fees...; (e) keep any prescribed records relating to its registered activities, in the prescribed manner and form; and (f) file any

²¹ At par 8 of 20 *supra*

prescribed reports with the National Credit Regulator in the prescribed manner and form." This is clearly an obligation on registrants only.

49. We now discuss the application to declare the alleged contraventions prohibited conduct with regard to each alleged contravention

49.1. Non-payment of annual registration renewal fee:

Whether failure to timely pay the annual registration renewal fee amounts to prohibited conduct is in our view closely linked to the status of the Respondent. In this matter the Respondent has not paid its annual registration renewal fee and as a result its registration lapsed after the prescribed date for payment of the annual renewal registration fee passed. Once the prescribed date has lapsed and the fee was not paid, the Respondent is no longer a registrant as defined. Accordingly non-payment of the annual renewal fee by a non-registrant cannot constitute prohibited conduct and cannot be declared as such. Having said this, this does not mean there is no possibility of the Respondent been subjected to a charge of prohibited conduct pertaining to its conduct as a non-registrant when conducting affairs that requires registration. No evidence to that effect has however been put before this Tribunal and we make no finding in respect thereof.

49.2. Failure to submit returns and reports:

Whilst the Respondent was registered it was obligated to submit returns, financial-, operational- and assurance- reports relating to its first year of operations namely the period between its first registration date in 2007 and the first anniversary date in 2008. On a balance of probabilities, on the evidence placed before the Tribunal, this was not done. The failure to do so amounts to an "*...omission ... in contravention of the Act (and Respondent's specific conditions of registration) ...by a ... credit provider...*" and constitutes prohibited conduct.

50. After the first anniversary date of its registration, and upon its failure to pay the annual registration renewal fee by the due date, the registration was no longer in effect. The Respondent accordingly had no further legislative obligations in terms of section 52(5) of the Act. Depending on whether it carried on activities that required registration and the Applicant can show on a balance of probabilities that it is the case, the Respondent

might be liable for prosecution for prohibited conduct for contravention of section 57(8) of the Act.

Claim for outstanding fees

51. The Respondent's registration lapsed in 2008 when it failed to renew its registration timeously. In our view, the Respondent, by failing to pay its renewal fees when it was due, ceased to be a registered entity for purposes of the NCA. The requirement of the payment of the annual registration renewal fee establishes the status of the registrant's as a registered entity in terms of the NCA and does not create a claim for the payment thereof by the Applicant. The Applicant is accordingly not entitled to insist on payment of the annual registration renewal fee, as the effect of non-payment thereof would result in automatic lapsing of the errant registrant's registration.

Limitations of bringing actions

52. Section 166(1) of the Act provides that a complaint in terms of this act may not be referred or made to the Tribunal more than three years after the cause of complaint or conduct has ceased. Based on the findings above the prohibited conduct in this matter relates to complaint of a return that should have been submitted during 2009. The application was made to the Tribunal during January 2013 and accordingly more than three years after the cause of complaint has ceased. In terms of section 166(1) it may not be made to the Tribunal.

Administrative Fine

53. In *NCR v Werlan Cash Loans t/a Lebathu Finance*²² the Tribunal stated the following in relation to the aspects to consider when considering the imposition of an administrative fine:

²² NCT/3867/2012/57(1)

"When determining an amount, the Tribunal must consider the legislation from which its own mandate's derives and consider the factors listed in Section 151(3) which provides as follows:

When determining an appropriate fine the Tribunal must consider the following factors:

- a) The nature, duration, gravity and extent of the contravention;*
- b) Any loss or damage suffered as a result of the contravention*
- c) The behavior of the respondent;*
- d) The market circumstances in which the contravention took place;*
- e) The level of profit derived from contravention;*
- f) The degree to which the respondent has co-operate with the National Credit Regulator, or the National Consumer Commission, in the case of a matter arising in terms of the Consumer Protection Act, 2008 and the Tribunal ; and*
- g) Whether the respondent has previously been found in contravention of the Act, or the Consumer Protection Act 2008, as the case may be.*

- 54. In the current matter the Applicant did not put forward any factors and/or consideration to enable the Tribunal to consider the requirements set out in Section 151(3).
- 55. In the absence of evidence setting out the information as required by Section 151(3), the Tribunal is not in a position to impose an administrative fine as the relevant factors cannot be considered.

Findings

- 56. In the result and for the reasons above the Tribunal makes the following findings:
 - 56.1. Respondent's registration has lapsed in terms of section 52(4)(b) of the Act and accordingly the Tribunal cannot consider an application for the cancellation of its registration.

56.2. Though there is evidence of prohibited conduct in respect of the Respondent's failure to submit returns and reports as detailed above, the Tribunal cannot make a declaration of prohibited conduct in respect thereof as the conduct complained of ceased to exist more than three years before the application was brought to the Tribunal.

56.3. The Applicant has no claim to the payment of the annual registration renewal fees from the date of the lapsing of the Respondent's registration.

56.4. Following on paragraph 58.2 above the Tribunal is not in a position to impose an administrative penalty on the Respondent.

Order

57. The Tribunal accordingly issues the following order:

57.1. The application for the cancellation of the registration of the Respondent is dismissed;

57.2. The application for the declaration of prohibited conduct is dismissed;

57.3. The application for the imposition of an administrative penalty is dismissed; and

57.4. No order is made as to costs.

Dated at Centurion this 24th day of July 2013.

Ms D Terblanche
Presiding Member

Authorised for issue by the National Consumer Tribunal

Case number _____

Date 2013 / 07 / 24
Ccy mm dd

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Adv N H Sephoti (Member) and Mr F Sibanda (Member) concurring.