

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

Case number: **NCT/22130/2015/55(6) NCA**

In the matter between:

**THE NATIONAL CREDIT REGULATOR**

**APPLICANT**

And

**CITY FINANCE**

**RESPONDENT**

Coram:

Mrs. H Devraj – Presiding Member

Ms D Terblanche – Panel Member

Adv J Simpson – Panel Member

Date of Adjudication – 2 July 2015

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**JUDGMENT AND REASONS**

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1. The Applicant is the National Credit Regulator, hereinafter referred to as the NCR, 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 City Finance, an unregistered credit provider. It is not a regulated financial institution (hereinafter referred to as “the Respondent”).
3. This is an application in terms of section 55 (6) of the National Credit Act, 34 of 2005 (hereinafter referred to as “the Act”) to enforce compliance with a notice issued in terms

Section 55(1), resulting from the Respondent's alleged failure to comply with a Compliance Notice.

4. The Respondent is subject to the provisions of the Act by virtue of the provision of section 55(1) which empowers the NCR to issue a compliance notice to a person (registered or unregistered) through providing that *"(1) Subject to subsection (2), the National Credit Regulator may issue a compliance notice in the prescribed form to-*
  - (a) **a person or association of persons** (emphasis added) whom the National Credit Regulator on reasonable grounds believes-*
    - (i) has failed to comply with a provision of this Act; or*
    - (ii) is engaging in an activity in a manner that is inconsistent with this Act; or..."*
5. Save for setting out the relief sought in the compliance notice attached to its papers filed with the Tribunal and served on the Respondent, the Applicant did not anywhere else in its papers set out the relief sought. At the hearing, during its address to the Tribunal. The Applicant indicated that it seeks the following relief:
  - 5.1 A finding of prohibited conduct
  - 5.2 The Respondent is to refrain from using the advertisement
  - 5.3 The Respondent to review all its adverts and provide proof of this having been done within one month of the order
  - 5.4 An administrative fine
6. The Applicant issued a Compliance Notice against the Respondent in terms of section 55(1) of the Act, following Applicant's belief that the Respondent contravened section 76(4) read with regulation 21(6)(b) of the Act In that Respondent used prohibited terminology in its advertising that appears in its website and continues to do so.
7. The compliance notice requires that the Respondent no longer submit advertisements in contravention of section 76 and regulation 21 for publication; and will review all advertisements for credit for compliance with the Act prior to submitting the advertisements for publication.

8. The Applicant brought the current application following the Respondent's alleged non-compliance with the compliance notice.
9. The Applicant served notice of the application on the Respondent.
10. The Respondent did not file an answering affidavit to the application.
11. In terms of Rule 13(3) of the Rules for the Proceedings of Matters before the National Consumer Tribunal (hereinafter the Rules) the Respondent was required, if it wished to do so, to file an answer to the Applicant's application within 15 days of being served.
12. Rule 13(5) of the Rules provide that "Any fact or allegation in the application or referral not specifically denied or admitted in the referral affidavit in an answering affidavit, will be deemed to be admitted."
13. In the absence of the Respondent filing an answering affidavit, the Tribunal deems the allegations made by the Applicant as admitted.
14. Rule 25(2)(3) provides as follows:  
  

*"(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".*
15. At the hearing the Applicant submitted a copy of the registered post slip showing that the application was sent to the Respondent by registered post on 19 February 2015. This service complies with Rule 30 (1)(b). The Tribunal is therefore satisfied that the Applicant served the application on the Respondent. An order can thus be made on a default basis.
16. This does not however signal the end of the matter.

17. The Tribunal still has to consider whether the Applicant has made out a case, on the balance of probabilities, that the Respondent did not comply with the compliance notice and that the underlying conduct complained about in the compliance notice in fact constituted prohibited conduct empowering the NCR to issue the compliance notice for the Tribunal to make an order in terms of section 150 of the Act or for any relief sought by the Applicant.

**Does non-compliance with the compliance notice constitutes prohibited conduct**

18. The question is what it is exactly the Applicant referred to the Tribunal for its consideration in terms of section 55(6)? This has to be considered to determine what the remedies are the Tribunal may consider in its final determination of the application before it.
19. Section 55(6)(b) provides –
- “(6) If a person fails to comply with a compliance notice as contemplated in this section without raising an objection in terms of section 56, the National Credit Regulator may refer the matter-*
- (a) ...; or*
- (b) otherwise, to the Tribunal for an appropriate order.”*
20. Section 140(1)(b) provides –
- “(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; or...”*

21. The Applicant complains about the Respondent not confirming in writing that it -
- 21.1 No longer submit for publication advertisements in contravention of section 76 and regulation 21; and
  - 21.2 Will review all advertisements for credit for compliance with the Act prior to submitting the advertisements for publication
22. In respect of the former, by way of proof the Applicant placed two screen shots of Respondents' website marked annexures "A" and "B" before the Tribunal purportedly showing that the contravention they found and the basis on which the compliance notice was issued during August 2014 still existed on 18 February 2015.

**Does the conduct complained about in the compliance notice constitute prohibited conduct**

23. Section 76(4) read with Regulation 21 (6)(b) of the Act provides that:
- “(4) An advertisement of the availability of credit, or of goods or services to be purchased on credit-...
- (a) ...;
  - (b) ...;
  - (c) must not-
    - 
    - (i) ...;
    - (ii) ... ; or
    - (iii) *contain any statement prohibited by regulation; and...*”

Regulation 21(6)(b) provides that -

- (6) Any of the following statements or phrases, or any wording that has substantially the same meaning, may not form part of any advertisement or direct solicitation for credit -
  - (a) "no credit checks required";

- (b) "blacklisted consumers welcome";
- (c) "free credit"

24. Advertisement (as defined in section 1 of the Act) means –  
*“Any written, illustrated, visual or other descriptive material, communication, representation or reference by means of which a person seeks to bring to the attention of all or part of the public the nature, properties, advantages or uses of or condition, or prices of –*  
*(a) Goods to be purchased,, leased or otherwise acquired*  
*(b) Any available service; or*  
*(c) Credit to be granted.”*
25. The advertisement complained about appears in the Respondent's website promoting the Respondent's offerings to consumers and moreover to so-called "blacklisted" consumers.
26. The words contained in the advert are clear and clearly and unambiguously fall within the prohibition contained in section 76 read with regulation 21.
27. The two webpages of July 2014 and February 2015 clearly shows that Respondent contravened the Act and the associated regulations before and after the Compliance Notice was issued. The website contents as in February 2015 evidences the publication of the same advert subsequent to the issuance of the compliance notice in contravention of the Compliance Notice.
28. The Tribunal therefore finds that the conduct of the Respondent namely not complying with the compliance notice and having advertisements on its website in contravention of section 71 read with regulation 21 both constitute prohibited conduct in terms of the Act.

### Considering the relief sought

29. Section 150 empowers the Tribunal to “ In addition to its other powers in terms of this Act, the Tribunal may make an appropriate order in relation to prohibited conduct or required conduct in terms of this Act, or the Consumer Protection Act, 2008, including-
- (a) declaring conduct to be prohibited in terms of this Act;
  - (b) interdicting any prohibited conduct;
  - (c) imposing an administrative fine in terms of section 151, with or without the addition of any other order in terms of this section;
  - (d) confirming a consent agreement in terms of this Act or the Consumer Protection Act, 2008 as an order of the Tribunal;  
[Para. (d) amended by s. 121 (1) of Act 68 of 2008.]
  - (e) condoning any non-compliance of its rules and procedures on good cause shown;
  - (f) confirming an order against an unregistered person to cease engaging in any activity that is required to be registered in terms of this Act;
  - (g) suspending or cancelling the registrant's registration, subject to section 57 (2) and (3); (h) requiring repayment to the consumer of any excess amount charged, together with interest at the rate set out in the agreement; or
  - (i) any other appropriate order required to give effect to a right, as contemplated in this Act or the Consumer Protection Act, 2008.  
[Para. (i) amended by s. 121 (1) of Act 68 of 2008.]  
[S. 150 amended by s. 121 (1) of Act 68 of 2008.]
30. As this appears to be a referral of conduct that could constitute prohibited conduct, the Tribunal can consider imposing an administrative fine once and if it finds that the Respondent committed prohibited conduct.
31. The Act allows for administrative fines in respect of prohibited or required conduct in terms of the NCA or the CPA.<sup>1</sup>

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<sup>1</sup> Section 151 of the NCA.

32. No assertions were put before the Tribunal in respect of the imposition of an administrative penalty.
33. Section 151 provides that  
*“(3) 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 behaviour of the respondent;*  
*(d) the market circumstances in which the contravention took place;*  
*(e) the level of profit derived from the contravention;*  
*(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*  
*[Para. (f) amended by s. 121 (1) of Act 68 of 2008.]*  
*(g) whether the respondent has previously been found in contravention of this Act, or the Consumer Protection Act, 2008, as the case may be.”*
34. None of the factors the Tribunal has to consider is within its knowledge nor can it take judicial notice thereof. If these factors are therefore not placed before the Tribunal for its consideration, it follows that the Tribunal is not placed in a position to consider them hence in a position to impose an administrative fine, quantum of which it would have assessed against the factors set out in subsection 3 of section 151.

#### Order

35. For the reasons set out above the Tribunal makes the following order:
- 35.1 Declaring Respondent's conduct, as described in the compliance notice, to be prohibited in terms of this Act;
- 35.2 Interdicting Respondent from continuing with this prohibited conduct; and
- 35.3 No order as to costs is made.



This done and signed at Centurion on this the 2<sup>nd</sup> day of July 2015.

[signed]

**D Terblanche**

Member

Mrs H Devraj (Presiding Member), Adv J Simpson (member) concurring.