

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

Case Number: NCT/17884/2014/57(1)

In the matter between:

THE NATIONAL CREDIT REGULATOR

APPLICANT

and

MONEYLINE FINANCIAL SERVICES (PTY) LTD

RESPONDENT

Coram:

Prof T Woker – Presiding member

Mrs H Devraj – Member

Prof J Maseko – Member

Date of Hearing – 8 December 2014

JUDGMENT AND REASONS

INTRODUCTION

1. The Applicant in this matter is the National Credit Regulator, a juristic person established in terms of section 12 of the National Credit Act 34 of 2005 (the "Act"). One of the functions of the Applicant is to register credit providers in terms of the Act and to regulate their conduct.¹
2. The Respondent is Moneyline Financial Services (Pty) Ltd, a limited liability company and a registered credit provider.

¹ See sections 14 and 15 of the Act.

3. On 22 September 2014 the Applicant commenced proceedings before the National Consumer Tribunal (the "Tribunal") for an order to cancel the registration of the Respondent in terms of section 57 of the Act.
4. This application was opposed by the Respondent and on 22 October 2014 the Respondent served and filed its answering affidavit.
5. Following the serving of the answering affidavit on the Applicant, the Applicant briefed Hogan Lovells, a firm of attorneys, to represent it in this matter.
6. On 31 October 2014, Hogan Lovells informed the Respondent, that it intended to launch an application to the Tribunal in order to rectify and supplement the Applicant's papers in terms of Rule 15 of the Tribunal Rules². Because of its intention to launch this application, the Applicant informed the Respondent that it would not file a replying affidavit to the Respondent's answering affidavit.
7. The application in terms of terms of Rule 15 was not forthcoming and, on 18 November 2014 and in accordance with its Rules, the Tribunal set the matter down for a hearing on 8 December 2014.
8. On 24 November 2014 the Applicant filed an application in terms of Rule 15 and requested that the matter be removed from the Tribunal's roll of 8 December 2014.
9. The Tribunal rules do not provide that a matter be removed from the roll (even in circumstances where there is agreement between the parties), except for when a matter is formally withdrawn by the Applicant. The Applicant was advised that it was necessary to make a formal application for an adjournment of the matter.

² 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 "Tribunal Rules").

10. The Applicant filed an application for an adjournment of the matter on 3 December 2014.
11. Thereafter there was a flurry of communication between the parties, the details of which, for the purposes of this judgment, are not necessary. The most important point to note, for the purposes of this judgment, is that the Applicant initially tendered to pay the wasted costs of the Respondent. However the details regarding the extent of those costs were not finalised. There was a dispute regarding whether these costs would include the costs of counsel. It would appear that the conclusion of the communication between the parties was that the Applicant withdrew its tender to pay the wasted costs of the Respondent.
12. The hearing into the application for a postponement proceeded on 8 December 2014. The hearing dealt with (1) the issue of a postponement and (2) whether or not the Tribunal could make an order in terms of which the Applicant would be instructed to pay the Respondent's wasted costs including the costs of counsel.
13. The adjournment of this matter was granted by the Tribunal and so this judgment deals primarily with the issue of whether the Tribunal has the power to make an order regarding the payment of costs.

The hearing on 8 December 2014

14. The parties had been in negotiation about approaching the Tribunal to adjourn the matter on the basis that it was not yet ready to be heard. As stated above, there was initially a tender by the Applicant to pay the wasted costs of the Respondent but following correspondence between the parties, this tender was withdrawn.
15. The Applicant confirmed at the hearing that it was no longer prepared to pay any costs of the Respondent.

16. The Respondent argued that the payment of costs was a significant issue taken into consideration when it decided initially that it would not oppose the Applicant's application for a postponement. The Respondent argued that an application for a postponement is not granted as of right and should only be granted in circumstances where the Respondent will not suffer significant prejudice. The Respondent further argued that the tender to pay wasted costs goes some way to alleviating the prejudice suffered by a party which does not desire the adjournment. Although the Respondent did not initially intend to oppose the application, it did not want the postponement and therefore, it was argued, the Applicant should be ordered by the Tribunal to pay its wasted costs including the costs of counsel. Alternatively, it was argued the matter should proceed as was originally intended.
17. After a consideration of the issues, the Tribunal decided that the matter had to be adjourned as it is an extremely serious matter involving the cancellation of the registration of a credit provider which could have significant consequences for the Respondent, its employees and its debtors. There is therefore a need to ensure that the issues are properly presented to the Tribunal. Although the Applicant had filed an application in terms of Rule 15 to amend its application to cancel the registration of the Respondent, it had not provided details regarding the required amendments. The Respondent had not yet filed an answering affidavit to the Rule 15 application.
18. Before the application for cancellation of the registration of the Respondent can be dealt with, there must first be a hearing into the Rule 15 application. It was pointed out at the hearing that an application to amend is not granted as of right and the Respondent must be given an opportunity to oppose this application. It was not possible to deal with this on 8 December 2014 because the issues had not been properly ventilated. The Applicant was therefore given until 30 January 2015 to file a complete application for an amendment. The Respondent is then entitled to respond to the application for an amendment as per the Tribunal's Rules. The matter will be set down for a hearing into whether or not the Applicant is entitled to amend its application for the cancellation of

the registration of the Respondent in the manner which it seeks and to hear the submission of both the parties .

19. The only issue which remained for the Tribunal to decide was the issue of costs. As this is an important issue which has implications for all Tribunal matters the parties were informed that the issue would be carefully considered by the Tribunal and a formal judgment would be issued in this regard.

The law regarding costs

20. The issue of costs is governed by section 147 of the Act. Section 147 provides for the awarding of costs in very limited circumstances where a complainant refers a matter to the Tribunal after having received a notice of non-referral from the National Credit Regulator or the National Consumer Commission. If the circumstances do not fall within this exception the general rule that each party bears its own costs must be observed. This interpretation is unavoidable because section 147 (1) uses the word "must" and not "may". This indicates that the Tribunal is not granted a discretion regarding when it may award costs.³
21. The Tribunal's Rules also deal with the awarding of costs. Rule 25(7) of the Tribunal Rules provides:

"The Tribunal may award punitive costs against any party who is found to have made frivolous or vexatious applications to the Tribunal."

22. This rule allows the Tribunal to award punitive costs but only within the context of s147(1) of the Act and in circumstances where a party has made a frivolous or vexatious application. Therefore, just as with section 147, punitive costs can only be awarded in the narrow circumstances provided for by the rules.

³ See also Vodacom Service Provider (Pty) Ltd, Vodacom (Pty) Ltd v NCC NCT/2793/2011/101(1)(P) (23 May 2012).

23. The Tribunal is a creature of statute and as such its powers are limited to those provided for in the statutes that govern it. At this stage the Tribunal is governed by the Act, the Consumer Protection Act, 2008 and its rules. These governing pieces of legislation only provide for the awarding of costs in very limited circumstances. Parties may well agree to pay costs and this is a factor which the Tribunal can take into consideration when deciding whether or not to adjourn a matter. But the Tribunal cannot extend its powers by issuing an order which includes an award of costs outside the power which is given to it by statute. To do so would be contrary to the principle of the rule of law.

24. Accordingly the Tribunal makes the following order:

24.1 There is no order as to costs.

DATED THIS 15th DAY OF DECEMBER 2014

[Signed]

Prof T Woker

Presiding Member

Ms H Devraj (Member) and Prof JM Maseko (Member) concurring.

Authorised for issue by the National Consumer Tribunal
Case number NCT/17884/2014/57(1)
Date 2015/01/08
Cyy mm dd

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