IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: A58/2021

REPORTABLE: YES
OF INTEREST TO OTHER JUDGES: YES
REVISED
4 August 2022

In the matter between:

DIRK CORNELIS UYS N.O.	First Appellant
CARL ALEXANDER GREATOREX N.O.	Second Appellant
HESTER SOPHIA UYS N.O.	Third Appellant
(Cited in their capacities as trustees for the time being Of the Cornelis Family Trust, IT number: 1524/2004)	

And

THE NATIONAL CREDIT REGULATOR	First Respondent
THE NATIONAL CONSUMER TRIBUNAL	Second Respondent

JUDGMENT

POTTERILL J

[1] The first appellant, Dirk Cornelis Uys N.O., the second appellant Carl Alexander Greatorex N.O., and Hester Sophia Uys N.O., the third appellant, are trustees of the Cornelis Family Trust IT 1524/2004 and are for ease of reference referred to collectively as *"the trust"* and for purposes of the appeal as *"the appellants"*. The appellants are seeking the review and setting aside of the findings and sanctions imposed by the second respondent, the National Consumer Tribunal [the Tribunal] established in terms of s26 of the National Credit Act, 34 of 2005 [the Act]. The first respondent, the National Credit Regulator [the Regulator] is a juristic person established in terms of s12 of the Act. Its function is *inter alia* to monitor the consumer market ensuring that prohibited conduct is detected, or prevented, and where necessary prosecuted. The Regulator in essence must ensure that the main objective of the Act, to protect consumers, is fulfilled.

The complaints

[2] On 21 May 2018 the Regulator received a complaint from Mr Seabi against a company, Loans Acceptable Funding. This complaint referenced the Appellants and the Regulator in terms of s139 of the Act then initiated an investigation into the affairs of the Appellants. The Regulator before commencing with its investigation received a further complaint against the Appellants from Ms Slabbert.

[3] It is common cause that the Appellants bought these two complainants' respective properties under market value and the properties were registered in the name of the Appellants. Simultaneously with the sale agreements the complainants signed lease agreements with the Appellants to lease the same sold properties. In the lease agreements an option clause was inserted affording the complainants the right to repurchase the property with specified purchase prices from the appellants during the term of lease, on condition that the monthly rental was not in arrears.

Findings of the Tribunal

[4] The Tribunal found that when stripping the titles of the sale and lease agreements and upon a reading of the contracts together the substance and form of the agreements constituted credit transactions in terms of s8(1)(b) read with s8(4)(f) of the Act. It was conceded by the Appellants that the complainants were seeking *"finance"* and in reality the complainants were seeking loans with their properties serving as security.

[5] The Tribunal found that the Appellants contravened the following sections of the Act:

- sections 40(1),40(3) and 89(2)(d) of the NCA; the Appellants failed to register as credit provider;

- section 81(2) read with Regulation 23A; the Appellants failed to conduct an affordability assessment;

- section 81(3) read with section 80(1)(a) the Appellants entered into reckless credit agreements;

- section 90(1) read with section 90(2)(a)(i); the Appellants contravened the sections in that their agreements contained unlawful provisions in a credit agreement.

Must the findings of the Tribunal be reviewed and set aside?

[6] I do not find it necessary to expand on the reasoning of the Tribunal in finding that the contracts of sale and lease together constituted impermissible credit agreements. The reason for this is, although counsel for the Appellants did not abandon his argument that the agreements were not simulated transactions due to the facts not bearing out the simulation test, he did not argue this point, but rather persisted with the appeal against the sanctions. It is fair to accept that the Tribunal was correct that the contracts concluded with the complainants were simulated loan agreements disguised to appear as agreements of sale and rental and that the complained off relevant provisions of the Act were contravened. The real substance

and commercial sense of the transactions were the two complainants' financial distress and the sale and rental agreements were in fact simulated in providing the complainants finance. If the transaction was simulated, it is dishonest, no matter the intention or motives of those who concluded the transaction.[1]

[7] Counsel for the Appellants relied on *Sasol Oil Proprietary Limited v Commissioner for the South African Revenue Service* (923/2017) [2018] ZASCA 153; [2019] 1 All SA 106 (SCA) as support for his submission that there had to be a common intention to simulate and at best the complainants were misled. Reliance on this matter is misplaced because the majority decision found that on the facts before that court a quo, the court a quo had rejected the evidence led without any basis to do so, especially where there was no evidence led by the Commissioner to gainsay the evidence that was led. The Court however, also took into account the written agreements and found on the probabilities for the agreements to have been a sham it would have required the most extensive and elaborate fraud stretching over many years. The Court referred to the *NWR- and Bosch*-matters cited above and reiterated the principles set out there in that if the transaction was simulated it is dishonest, no matter the intentions or motives of the parties.

Could the findings be made on affidavit?

[8] In the matter before us no evidence was led before the Tribunal and the argument was that there were *bona fide* factual disputes on the papers requiring the application of the *Plascon-Evans*[2] principle. The denials in the answering affidavit did not raise *bona fide* factual disputes affecting the real substance and the commercial sense of the transactions. The complaints of the two complainants, the founding affidavit of the Acting manageress: Investigations and Enforcement: National Credit Regulator, the answering affidavit of the Appellants, the contracts and the unusual features of the contracts, as well as the surrounding circumstances were sufficient for the Tribunal to come to the conclusion it did without resort to oral evidence.

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[1] *Commissioner for South African Revenue Service v NWR Ltd* 2011 (2) SA 67 (SCA) par [55] and *Commissioner for South African Revenue Service v Bosch and another* 2015 (2) SA 174 (SCA) par [40]

[2] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

The sanctions

[9] I find it necessary to quote the sanctions imposed:

> *"55.1. The Trust is interdicted from entering into any further credit transactions with consumers or operating as a credit provider while it is not registered as a credit provider;*
>
> *55.2 All the credit transactions entered into between consumers and the Trust are declared reckless All the consumer's obligations in terms of these agreements are set aside. All the consumers are to be reimbursed with all payments made to the Trust in terms of those transactions;*
>
> *55.3 The Trust is interdicted from proceeding with any current civil proceedings against consumers under the credit agreements. The Trust must rescind any judgments obtained against any consumers under those agreements.*
>
> *55.4 The Tribunal further orders that the Respondents appoint an independent auditor at its own cost within 30 days of the issuing of this judgment. The auditor must be registered as a Chartered Accountant. The auditor must determine whether any further credit transactions (besides the six transactions identified) were concluded within the last five years. All the amounts paid by any consumers under those credit agreements must be reimbursed. If the Trust sold any property (which was the subject of a credit agreement), the sale value must be reimbursed to the relevant consumer (this includes the amount paid by Mr Seabi to buy-back his property). The auditor must provide a comprehensive report, regarding the consumers identified and the refunded amounts, to the NCR within 120 days of this judgment being issued;*
>
> *55.5 The Respondent is to pay an administrative fine of R200 000.000 into the National Revenue fund within 30 days of this judgment being issued. The National Revenue fund account details are as follows;*

Bank - *Standard Bank of South Africa*

Account name - *Department of Trade and Industry*

Account number - *[....]*

Account type - *Business current account*

Branch code - *010645 (Sunnyside)*

Branch code for electronic

payments - *051001*

Reference - *NCT/142671/2019 (Name of depositor); and*

55.6 There is no order as to costs."

[10] The appeal of the sanctions is in the main against the sanctions imposed in paragraphs 55.2 and 55.4 and this court must decide whether these sanctions were lawful and appropriate.

The auditor sanction

[11] The Tribunal regularly includes a sanction that the offending party must appoint an independent auditor at its own cost. Often such audit sanction is couched in similar vein to the audit sanction herein, but not with the vagueness and ambiguity of the formulation of this sanction.

[12] The sanction herein can be interpreted in no other way as that the Tribunal is deferring the Regulator's duty to an auditor. It is akin to a Court instructing an accused to appoint a registered private investigator to investigate if the accused had committed other offences; deferring the police's duty. The question is whether this is permissible in the context of the Act and regulations.

[13] In terms of s15(j) the Tribunal can order the Regulator to deal with any matter referred to it by the Tribunal. The Tribunal can accordingly order the Regulator to appoint an auditor, if in its discretion it found it just and equitable to do so. In the founding affidavit on behalf of the Regulator the audit sanction is proposed, but no reasons are forwarded as to the basis for this. Nowhere is it set out that the Regulator had a reasonable apprehension that the Appellants had not disclosed all the transactions it concluded in a similar vein. The only averment is that the *"nature and duration of the contraventions dictate that the conduct of the Trust has been ongoing prior to the investigation."* The Regulator did not set out why, despite this suspicion, they did not investigate any further. It is not set out that the Regulator did not have the capacity or the means to do such an investigation. The question is whether without any such motivations by the Regulator there is a ratio for granting a sanction delegating the powers of the Regulator to an auditor.

[14] But, not only does this sanction cater that the auditor fulfils the Regulator's duty, the auditor must also function as a Court or Tribunal effectively deciding and finding whether further agreements in fact constituted credit agreements. When the auditor had made this decision he or she must then report on the amounts that were repaid.

[15] In par 11.9.3 of the founding affidavit it was placed on record that the Tribunal would be requested to order the Appellants to provide their management and audited financial statements to determine a fine. This was not done. A similar order for audited statements for a 5-year period could have been requested. The Regulator could have investigated these statements and could have obtained an auditor's input to analyse same, if they did not have the capacity. Or, as often ordered by the Tribunal, an auditor can be appointed to investigate further transactions and file a report. The transactions identified therein by the auditor to be submitted to the Regulator for assessment and referral to the Tribunal for declaration as reckless credit, if it did constitute reckless credit. The auditor cannot declare a transaction void and determine the amounts to be repaid and inform *"the NCA"* thereof by means of a report. This sanction provides exactly that; the auditor must decide and report on the *"refunded amounts"*. Only the Tribunal can decide on the report of the auditor whether reckless credit was granted. If the intention of the sanction was that the

auditor must just file a report for the Regulator to consider and present to the Tribunal with the Tribunal to make a declaration it most definitely does not convey it.

[16] Sanctions must be formulated in unambiguous language. The five-year period is uncertain; is it prior to the investigations of the Regulator, or does it include the period investigated by the Regulator, or does the five years start to run from the date of the findings of the Tribunal backdated five years, or is it financial year ends and from when? The fact that the sanction included that the amount of the sale value paid by Mr Seabi to repurchase his home has to be calculated would indicate that the five-year period included the period investigated by the Regulator.

[17] The audit sanction in paragraph 55.4 is too wide and delegated the powers of the Regulator and Tribunal to an auditor. Nothing in the Act prevents an auditor from being appointed. The auditor can investigate transactions and report thereon opining as to the nature of the transactions, but the Regulator must apply its mind and submit its conclusions to the Tribunal and only the Tribunal can make a finding as to whether there was non-compliance with the Act. This sanction must be set aside and replaced.

The setting aside sanction

[18] The Appellants submitted that the setting aside sanction made applicable to **all** the transactions was done without resort to any evidence of the transactions placed before the Tribunal. This in turn led to a disguised class action on behalf of consumers who did not complain, were not notified or were even aware of these proceedings. Consumers had no option to opt in or opt out.

[19] Two complaints were received and investigated by two inspectors. The Regulator put evidence to the Tribunal under oath pertaining to the findings of the investigation pertaining to these two transactions, and the Tribunal found the agreements to be simulated with the Appellants accordingly contravening various sections of the Act. The Regulator also instituted its own investigation against the Appellants, i.e. not based on complaints, as it is entitled to do. The question is what evidence was put before the Tribunal pertaining to the Regulator's own investigation?

[20] The inspectors did not do any independent investigations pertaining to the other transactions or *"all"* transactions. They had an interview with the Appellants and the Appellants provided them with information of 7 transactions of which 1 transaction was indeed a sale agreement [not simulated] and the other two related to the complaints of Seabi and Slabbert. Pertaining to the other 4 transactions only the following is noted on the NCR investigation memorandum [Annexure 5]:

> *"7.2* ***AMURTHAM THYAGAVATHI GOVENDER – Annexure "C2"***
>
> ***Documents contained in consumer file:***
>
> - *Deed of sale – 10 March 2017*
>
> *Erf 1727 Lenasia South*
> *8 Hawk Crescent*
> *Johannesburg*
>
> - *Purchaser: The Cornelis Family Trust*
> - *Seller: AT Govender*
>
> - *Lease Agreement – 10 March 2017*
>
> *Erf 1727 Lenasia South*
> *8 Hawk Crescent*
>
> *Johannesburg*
>
> - *Lessor: Cornelis Family Trust*
> - *Lessee: AT Govender*
>
> - *Lease Agreement – 01 August 2018*
>
> *Erf 1727 Lenasia South*
> *8 Hawk Crescent*
>
> *Johannesburg*
>
> - *Lessor: Cornelis Family Trust*
> - *Lessee: AT Govender*

Affordability Assessment Mechanisms:

None

Cost of credit

None

Purchase Price: *R425 000.00*

Rental fee *(Lease Agreement 1): R7 000.00*

Rental fee *(Lease Agreement 2): R8 000.00*

Assessment by the Inspector: *In this instance, the Trust is the purchaser of the property. No supporting documentation is attached to the agreement.*

No reasons are contained in the documentation for the reasons behind the sale and subsequent lease by the consumer."

[21] Paragraph 7.3 related to a Fatima Fredricks and reads exactly as paragraph 7.2. does. Paragraph 7.4 relates to a Henrick Mashoa Matome and it reads exactly as paragraph 7.2. As do paragraphs 7.5 relating to Mr and Mrs Roos and paragraph 7.6 relating to a Mr van den Berg.

[22] In the report of the inspectors no mention at all is made of these consumers. In the findings the only reference is to C7 and C8, Mr Seabi and Ms Slabbert.

[23] In the founding affidavit there is no specific reference made to any of the transactions of the other consumers with the only evidence pertaining to other consumers being *"sample"* contracts. In application proceedings the affidavits constitute the pleadings and the evidence. The only evidence before the Tribunal was the contracts of sale and lease. There was no evidence from complaints, no

findings by the inspectors made pertaining to these consumers, no surrounding circumstances or any other evidence. On that evidence alone the Tribunal could never make a finding on the other 4 transactions.

[24] The question is whether the answering affidavit of the Appellants setting out the detail of the sale and rental agreements, thus on the totality of the evidence, rendered the Tribunal's decision pertaining to these decisions non reviewable. These 4 transactions seemingly followed the exact same pattern as the transactions complained off by Mr Seabi and Ms Slabbert. I am thus satisfied that despite the paucity of the investigations and the lack of specific evidence in the founding affidavit pertaining to these 4 transactions the Tribunal's finding that these transactions also constituted unlawful credit transactions is correct and are not to be set aside. I am accepting that an auditor can also prepare a report on these 4 transactions as to what amounts must be reimbursed to the consumers.

[25] If the sanction in paragraph 55.2 with the word *"all"* refers to the two complaints of Mr Seabi and Ms Slabbert including the other 4 transactions set out above, then that sanction should stand. If, however the word *"all"* relates to transactions that the auditor has to uncover then once again the sanction is too wide. The Regulator would have to put the evidence before the Tribunal and the Tribunal will have to declare such transactions reckless before the obligations of those consumers can be set aside. Once again an example that Tribunal's must carefully word sanctions as not to have it set aside due to vagueness.

[26] I accordingly propose the following order:

26.1 The findings of the Tribunal are confirmed.

26.2 The sanctions in paragraphs 55.1, 55.3, 55.5 and 55.6 are confirmed.

26.3 The sanction in paragraph 55.2 is set aside and replaced with the following:

"The six credit transactions referred to in the papers entered into between consumers and the Trust are declared reckless. All the consumer's obligations in terms of these agreements are set aside. All the consumers are to be reimbursed with all payments made to the Trust in terms of those transactions. The auditor is to in his/her report set out comprehensively what amounts are to be repaid to the consumers."

26.4 The sanction in paragraph 55.4 is set aside and replaced with the following:

"The Tribunal further orders that the Respondents appoint an independent auditor at its own cost within 30 days of the issuing of this judgment. The auditor must be registered as a Chartered Accountant. The auditor must investigate whether any further similar transactions (besides the six transactions identified) were concluded within the last five years from the date of the Tribunal's finding. The auditor must within 120 days submit a comprehensive report regarding such transactions and the amounts that could be reimbursed to the Regulator for assessment and referral to the Tribunal for a decision as to whether such transactions constituted reckless credit and whether reimbursement would be just and equitable.

S. POTTERILL
JUDGE OF THE HIGH COURT

I agree

M.P.N. MBONGWE
JUDGE OF THE HIGH COURT

I agree

M.P. KUMALO
JUDGE OF THE HIGH COURT

CASE NO:	A58/2021
HEARD ON:	11 May 2022
FOR THE APPELLANTS:	ADV. S. BUDLENDER SC ADV. P. BOTHMA ADV. Y. PEER
INSTRUCTED BY:	B Karolia Inc.
FOR THE RESPONDENTS:	ADV. M.C. MAKGATO
INSTRUCTED BY:	Lebethe Attorneys & Associates Inc.
DATE OF JUDGMENT:	4 August 2022