

Short notes on

BEWARE OF INSTANT CREDIT!

Introduction

The National Credit Act 34 of 2005 (the “Act”) regulates the extension of credit in South Africa and aims to protect consumers against unscrupulous credit providers. The Act provides several mechanisms through which the extension of credit is regulated to avoid reckless lending. In addition, it also establishes the National Credit Regulator (“NCR”).

So, do you need proof to lay a complaint or is a strong suspicion enough?

In a recent case (National Credit Regulator v Dacqup Finances CC trading as ABC Financial Services – Pinetown and Another (382/21) [2022] ZASCA 104 (24 June 2022)), the Supreme Court of Appeal considered this.

Background and Regulation Dealing with Reckless Credit

Section 136 provides that any person may submit a complaint of reckless credit. Alternatively, the NCR may submit a complaint in its name.

Reckless credit is dealt with in sections 80 and 81 of the Act. Section 81(3) prohibits a credit provider from entering into a reckless credit agreement with a prospective customer. In terms of section 81(2)(a)(i), a credit provider cannot enter into a credit agreement without first taking reasonable steps to assess the consumer’s general understanding and appreciation of the risks and costs of the proposed credit.

In terms of section 81(2)(a)(ii), the credit provider is obliged to take into account the debt repayment history of the consumer, and in terms of s 81(2)(a)(iii), the consumer’s existing financial means, prospects and obligations.

In terms of section 80(1)(a), a credit agreement is reckless if the credit provider fails to conduct an assessment as required by section 81(2). This is irrespective of the outcome had the proper assessment been made at the time. In section 80(1)(b), a credit agreement is reckless if the

information points to the probability that the consumer did not fully understand and appreciate the risks or that she would be over-indebted if they entered into the credit agreement.

Facts of the case

Ms Mbedzi saw the sign advertising 'instant loans' and, upon enquiry, was informed by an employee of Dacqup that the interest rate charged was 30% per month. Whether or not this was later found to be factually incorrect does not detract from the fact that she had a suspicion that these practices by Dacqup were contraventions of the NCA. Ms Mbedzi stated this in her report to initiate an investigation and in the confirmatory affidavit attached to the founding papers. There is nothing to gainsay Ms Mbedzi's suspicion based on the two contraventions that she recorded: the 30% interest rate and the advertisement for 'instant loans'.

Finding

While the phrase 'instant loans' may merely mean 'swiftly', it could reasonably be suggestive of a curtailed or less onerous loan application process, as was held by the Tribunal. Accordingly, the meaning of 'instant' is defined as 'happening immediately, without any delay'.

Not only was Ms Mbedzi's interpretation reasonable, but a more probable one in the context of the micro-lending industry.

A reasonable suspicion contemplates a lesser burden than that of prima facie evidence.

In this case, the NCR has shown that it had a reasonable suspicion to initiate an investigation into the activities of Dacqup.

There are several cases where an order has been made that an entity appoints an independent auditor to ascertain the extent of unlawfully obtained profit. These orders imply that the relevant entity is to pay the auditor's costs. There is no reason why cases involving the NCR should be any different, especially bearing in mind the wide-ranging powers afforded to the Tribunal in making any appropriate order concerning prohibited conduct.

Accordingly, the appeal must succeed. Costs should follow the result.

Conclusion

Credit providers should be cautious about the words used in marketing material and ensure that they comply with relevant regulations. Reasonable suspicion could give rise to an investigator and the costs that follow it. Contact an attorney at SchoemanLaw for assistance.

