

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

Case No: NCT/18703/2014/56(1)(P)

In the matter between:

CASH PAYMASTER SERVICES (PTY) LTD

APPLICANT

And

NATIONAL CREDIT REGULATOR

RESPONDENT

Coram:

Ms Diane Terblanche - Presiding Member

Dr Bonke Dumisa - Member

Ms Hazel Devraj - Member

Date of Hearing: 27 February 2015

JUDGMENT AND REASONS

PARTIES

- 1 The Applicant in this matter is Cash Paymaster Services (Pty) Ltd, ("CPS") a company registered as such in terms of the company laws of the Republic of South Africa (Registration Number 1998/020799/07) ("the Applicant").

- 2 The Respondent is the National Credit Regulator, (“the NCR” or the Respondent”) a juristic person established in terms of section 12 of the National Credit Act, No 34 of 2005. (“The Act”).
- 3 This is an application in terms of section 56(1) of the Act for the review and setting aside of a Compliance Notice issued by the Respondent against the Applicant.
- 4 The Respondent subsequently issued a Compliance Certificate to the Applicant. The Applicant asserted that the Compliance Certificate is of no force and effect as the Compliance Notice which it purports to cancel was wrongfully issued.

BACKGROUND

- 5 The Respondent issued the Compliance Notice against the Applicant on 23 September 2014.
- 6 In the Compliance Notice -
 - 6.1 The Respondent sets out that “...3. *Cash Paymaster Services (Pty) Ltd provides information about social grant beneficiaries to Moneyline Financial Services (Pty) Ltd in breach of section 68(1) of the Act.*”
 - 6.2 The Respondent requires of the Applicant to show ‘...that it has stopped providing information about social grant beneficiaries to Moneyline Financial Services (Pty) Ltd” and “...to submit a report by independent auditors to the NCT confirming that it has stopped providing information about social grant beneficiaries to Moneyline Financial Services (Pty) Ltd.”

APPLICANT'S CASE

7 The Applicant's case rests on four main pillars. These are –

7.1 That the Act and therefore section 68(1) of the Act does not apply to the Applicant. In this respect the Applicant submitted that -

7.1.1 Section 68(1) applies to "... *any person under the Act*" but that "... *any person under the Act*" does not apply to the Applicant as it is not a registrant nor is it an unregistered person required to be registered under the Act

7.1.2 Furthermore it is submitted that the Applicant does not receive information under the Act whether for its own purpose or for any other party.

7.1.3 In sum the Respondent requires of the Applicant to comply with something that it does not have to comply with.

7.2 That no reasonable grounds have been established that the Applicant contravened section 68(1) of the NCA. In this respect the Applicant submitted that the reports used in support for the investigators' conclusion that the Applicant contravened section 68(1) does not contain any admissible evidence to that effect.

7.3 The Compliance Notice itself is defective and does not meet the requirements of the Act. More particularly, it asserts that the Respondent has not set out the nature and the extent of the contravention that the Applicant stands accused of. In this respect specifically, the Applicant submitted that the Compliance Notice does not contain details of the circumstances of the alleged contravention, how it occurred, what kind of information was received, what makes it confidential, etcetera.

7.4 The Compliance Certificate issued by the Respondent to the Applicant is null and void and does not have the effect of cancelling the Compliance Notice as provided for in the Act, in section 55(4) because -

7.4.1 The Applicant could not be charged with a contravention of section 68(1) as the Act does not apply to it.

7.4.2 Even if the Act applies to the Applicant there is no evidence to support the conclusion reached by the Respondent that the Applicant contravened section 68(1).

7.4.3 The KPMG Report, conceded to by the Respondent, stated that the alleged contraventions did not take place.

7.4.4 In the result, if there was no contravention then there cannot be compliance and as a Compliance Certificate can only be issued after the compliance requirements have been met, it cannot be issued in this instance.

7.5 The Applicant points to the serious consequences that may result, if the Compliance Certificate is allowed to stand in these circumstances. It pointed out that as a corporate entity with national and international reporting requirements, it will create the impression that it contravened the Act. Furthermore, if the Compliance Notice is allowed to stand it means that it will be taken into account as a previous contravention should any action be brought against it in future under the Act and visited with heavier penalties, etcetera.

RESPONDENT'S CASE

8 The Respondent submitted that it –

8.1 Had a basis for issuing the Compliance Notice against the Applicant and that it is contained in the investigators' reports and in evidence contained in another application brought by the Respondent against another party before the Tribunal.

8.2 It rightfully issued the Compliance Notice against the Respondent. In this respect the Respondent referred to -

8.2.1 Section 55(1) which allows the Regulator to issue a Compliance Notice "*... to any person or association*"

8.2.2 Section 68(1) which prescribes "*.....any person under the Act*"

8.2.3 Section 4(1)(d) in that the Applicant and Moneyline are wholly owned subsidiaries of Net1 and that therefore brings the Applicant within the ambit of the Act

8.3 Section 55(4) provides for a Compliance Notice to remain in force until, it is set aside by the Tribunal or when the NCR issues a Compliance Certificate. In this case, the Respondent issued a Compliance Certificate to Applicant in terms of section 55(4) and therefore there is no Compliance Notice before the Tribunal to exercise its powers under section 56 of the Act to confirm, vary or set aside the Compliance Notice - it is simply no longer in existence.

ANALYSIS OF THE LAW AND THE FACTS

JURISDICTION

- 9 The Tribunal has powers in terms of sections 56 and 59 of the Act to hear and make rulings in respect of review applications.
- 10 The Tribunal, on the strength of these provisions, has jurisdiction to hear and pronounce on this matter. The Compliance Notice issued by the Respondent, stated that the Applicant has not complied with section 68(1) of the Act.
- 11 Section 68(1) of the Act deals with the right to confidential treatment and provides the following:

“68. Right to confidential treatment.- (1) Any person who, in terms of this Act, receives, compiles, retains or reports any confidential information pertaining to a consumer or prospective consumer must protect the confidentiality of that information, and in particular, must-

- (a) use that information only for a purpose permitted or required in terms of this Act, other national legislation; and*
- (b) report or release that information only to the consumer or prospective consumer, or to another person-*
 - (i) to the extent permitted or required by this Act, other national legislation or applicable provincial legislation; or*
 - (ii) as directed by-*
 - (aa) the instructions of the consumer or prospective consumer; or*
 - (bb) an order of a court or the Tribunal.”*

- 12 The purpose of section 68 is to ensure that “...any person who, in terms of this Act, receives, compiles, retains or reports any confidential information pertaining to a consumer or prospective consumer ...”

- 13 With regard to the point taken on lack of jurisdiction of the Act over the Applicant, the parties' arguments and submissions on this aspect set out above refer and which we do not intend regurgitating here. The Tribunal have considered these submissions carefully and finds that the Act and section 68(1) does not apply to the Applicant. The application of the Act is confined to parties and activities circumscribed in the Act. Albeit the phrase "...any person" is used in section 68(1) and section 55(1) of the Act, it cannot be read as each and every person but a person that is fulfilling some activity regulated under the Act.
- 14 This is clear from the extent of section 68(1), where it applies to a person with an obligation under the Act and the Compliance Notice that can flow from that against a person who has breached such an obligation. In this instance there is no evidence before the Tribunal that CPS receives any information under the Act.
- 15 With regard to the Respondent's reliance on section 4(2)(d) and the fact that NET1 has control over both CPS and Moneyline, it appears to the Tribunal that this section goes no further than providing further clarity with regard to which juristic persons the Act applies to. It does not make the Act applicable to persons who fall outside the ambit of the Act.
- 16 We now turn to whether a basis has been laid for the conclusion that a contravention took place.
- 17 From the reports placed before the Tribunal, there appears to be no evidence to support the Respondent's conclusion that CPS committed a contravention of section 68(1) of the Act.
- 18 This was borne out by the KPMG report that stated there was no contravention. The KPMG report was conceded to by the Respondent and

formed the basis upon which the Respondent issued the Compliance Certificates to CPS and Moneyline.

- 19 The Tribunal has to reject the invitation by the Respondent to consider evidence in documents not before the Tribunal in the current matter. Furthermore, the Applicant has not had sight of it. The case of the Respondent is based on the reports, and its annexures, annexed to its founding papers and that constitute the extent of the evidence put forward to be considered in this matter.
- 20 Section 55(3)(c) of the Act provides that details of the nature and extent of the contravention has to be provided. The Compliance Notice in that respect states that "... *Cash Paymaster Services (Pty) Ltd provides information about social grant beneficiaries to Moneyline Financial Services (Pty) Ltd in breach of section 68(1) of the Act.* The statement refers to "information" whereas the contravention pertains to "confidential information". Furthermore, the nature and details of the information that is alleged to be shared is not provided.
- 21 Further no details are provided on when and how CPS shared information about grant beneficiaries or the extent of the information sharing.
- 22 The Tribunal therefore finds that the details provided in the Compliance Notice falls short of the amount of details that have to be provided on the nature and extent of the contravention as required in terms of the Act.
- 23 Section 55 of the Act deals with Compliance Notices, and provides the following in subsection (4) thereof:

"(4) subject to section 59, a compliance notice issued in terms of this section remains in force until-

- (a) *it is set aside by the Tribunal, or a court upon appeal or review of a Tribunal decision concerning a notice; or*
- (b) *the National Credit Regulator issues a compliance certificate contemplated in subsection(5)."*

Subsection(5) provides:

" if the requirements of a compliance notice issued in terms of subsection(1) have been satisfied, the National Credit Regulator must issue a compliance certificate."

- 24 On the evidence before it, the Tribunal concluded that there was no reasonable basis upon which to conclude that the Applicant engaged in contravention/s of section 68(1). There is no dispute that the KPMG report, obtained through the directive of the Respondent and standing uncontroverted by the Respondent, vindicated the Applicant from wrongful conduct as alleged in the Compliance Notice.
- 25 After receiving the report from KPMG that the Applicant did not engage in the conduct complained of, the Respondent sought to "*resolve the matter amicably*". The Respondent instead, issued a Compliance Certificate. This is contrary to the provisions of section 55, subsection (4). The Applicant has not been found to be engaging in an activity in a manner that is inconsistent with this Act. It stands to reason that in the circumstances, the Compliance Certificate is not the correct route to follow, and is in that respect, unlawful administrative action.
- 26 The Compliance Certificate can only be issued if the requirements of a Compliance Notice issued in terms of subsection (1) have been satisfied (see *section 55(5)*). Other than that, it will be a fruitless exercise to issue a certificate. The correct route to follow will then be to approach the Tribunal for an order cancelling or setting aside the Compliance Notice. The effect of an

order of the Tribunal in cancelling the Compliance Notice, renders the Compliance Certificate materially non-existent.

COSTS

- 27 The Applicant argued for a cost award in its favour.
- 28 The Tribunal's powers to award costs are set out in section 147 of the Act.
- 29 This matter is not one of the types of matters where the Tribunal may award costs in terms of section 147.

ORDER

The Tribunal therefore issues the following order -

- (a) The Compliance Notice is hereby set aside; and
- (b) No order is made as to costs.

Authorised for issue by the National Consumer Tribunal

Case number

Date: 2015 / 03 / 17
Ccy / mm / dd

DATED THIS 16th DAY OF MARCH 2015

National Consumer Tribunal
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[signed]

Ms Diane Terblanche
Presiding member

Dr Bonke Dumisa (Member) and Ms Hazel Devraj (Member) concurring.