IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: **NCT/6537/2012/99(2) P**

In the matter between:

KAVALAN DORASAMY Applicant

and

MANZISEC CC t/a CASH CONVERTERS Respondent

Coram:

Prof J Maseko – Presiding Member

Prof B Dumisa – Deputy Chairperson / Member

Adv F Manamela – Member

Date of Hearing: 19 June 2013

RULING AND REASONS FOR RULING

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1. THE APPLICANT

(1) The Applicant in this matter is Mr. Kavalan Dorasamy a major male residing in Boksburg ("the Applicant").

(2) At the hearing of 19 June 2013, the Applicant appeared in person unrepresented.

2. THE RESPONDENT

(1) The Respondent is Manzisec CC, a Close Corporation trading as Cash Converters (Boksburg) with registration number 2011/030879/23, with place of business in Boksburg (hereinafter referred to as "the Respondent").

(2) The Respondent is a registered credit provider, with the National Credit Regulator with registration number NCRCP3337.

(3) At the hearing of 19 June 2013, the Respondent was represented by Messrs Angus Findlay of Redfern and Findlay Attorneys and Francois Jooste, in his capacity as a member of the Close Corporation - Respondent.

3. THE ISSUES TO BE DECIDED

This is an application in terms of Section 99(2) of the Act, for compensation from a pawnbroker in lieu of lost property. The Tribunal had not yet dealt with the quantum of the compensation sought by the Applicant by the end of the hearing. Instead three points *in limine* had to be addressed at the commencement of the hearing and these points were:

(1) Whether the Applicant should be granted the condonation sought, to refer the matter after the requisite period?

(2) Whether the application to find that the Respondent engaged in prohibited conduct had been premature before the Tribunal in terms of the provisions of section 140(1) of the NCA? The Applicant had also requested a certificate in terms of section 164(3) of the National Credit Act 34 of 2005 ("NCA") declaring the conduct of the Respondent prohibited conduct in terms of that section.

(3) Whether the section 99(2) application under the NCA made by the Applicant had already been settled and should be dismissed by the Tribunal.

4. RULING ON CONDONATION APPLICATION

(1) At the commencement of the hearing, the Tribunal, having read the submissions of both parties and having noted that the Respondent had not opposed the condonation application, pronounced on this application. The ***ex tempore*** ruling from the Tribunal granted the condonation on the record.

(2) The reasons for this ruling had been that the Applicant had applied to the Tribunal to condone the late filing of the main application. The Applicant had submitted that he endeavoured to settle the dispute with the Respondent until the last meeting on 19 January 2012. From 25 January 2012 to 5 October 2012 he had been liaising with the National Credit Regulator, who only advised him on the latter date to apply to the Tribunal for assistance under section 99(2) of the Act.

(3) In accordance with Rule 34[1] the Applicant may apply to the Tribunal for an order to condone the late filing of the application and the Tribunal may grant the order on good cause shown. The Respondent did not address the application for condonation by the Applicant in its answering affidavit. It had then become necessary for the Tribunal to decide, as a preliminary issue whether there was good cause shown by the Applicant to be allowed to refer the matter late as shown above.

(4) According to Rule 34(1) of the Tribunal Rules, on condonation for late filing and non-compliance with rules, provides that "a *party may apply to the Tribunal in Form TI.r34 for an order to:*

(a) condone late filing of a document or application;
(b) extend or reduce the time allowed for filing or service;
(c) …; or
(d) …".

(5) *According to* Rule 34(2), "*The Tribunal may grant the order* ***on good cause shown****." (our own emphasis).*

(6) The Tribunal, having viewed the activities and attempts of the Applicant that led to the delay alluded to above, concluded that the Applicant had ***shown good cause*** of the delay. The Tribunal also took into account the fact that the Respondent had not opposed the condonation in the exchange of pleadings.

5. BACKGROUND

(1) On 18 October 2011 the Applicant pledged a 22 carat gold chain (26,5g) and borrowed R400.00 from the Respondent.

[1] Regulations published under GN 789 in GG 30225.

(2) The first pre-agreement (dated 18 October 2011), annexed as page 11 to the Applicant's application, confirms the retained property of the Applicant as 'jewellery 22ct' and confirms the amount of R400-00 borrowed. It further indicates an initiation fee of R68-40 and a monthly service fee of R57-00; as well as an annual interest is stated as 28.8%. The settlement date in terms of the first pre-agreement was 17 November 2011 and the Applicant made payment of an amount of R135-00.

(3) The second pre-agreement (dated 16 November 2011), annexed as page 12 to the Applicant's application, again confirms the retained property of the Applicant as 'jewellery 22ct and confirms the amount of R400-00 borrowed. It further again indicates an initiation fee of R68-40 and a monthly service fee of R57-00. In terms of the second pre-agreement an amount of R535-00 was to be paid on 16 December 2011. On 6 December 2011, however, the Applicant settled the full outstanding balance.

(4) Upon settling the full outstanding balance, The Respondent informed the Applicant that the 22 carat gold chain had been lost. The Respondent, at this point, further referred the Applicant to the agreement, between the parties which provides in part E, point 3, that:

> *"I agree that in the event of loss or damage to the security in circumstances beyond your reasonable control, the value of the security will be deemed to be equal to the Total Amount Payable, and your liability will be limited accordingly. I therefore accept that where I consider the Total Amount Repayable to be less than the actual value of the security, the risk of any losses incurred in the circumstances beyond your reasonable control (and the responsibility to insure in relation to such risk), is mine."*

(5) The Applicant avers that the Area Manager, Regional Manager and National Manager of the Respondent, confirmed the above provision of the agreement and refused to assist her. She was advised by the owner, Mr Francois Jooste, that the lost property was reported to the South African Police Services under case number CAS 445/10/2011. The case number indicates that the matter was reported to the SAPS during October 2011. This was about a month before the agreement between the parties dated 16 November 2011. ***This also means that, by the time the parties signed the second agreement, the item had no longer been in the possession of the Respondent***. This also means that by the time the parties signed the second agreement; the Respondent had lost the item and had knowingly misled the Applicant into believing otherwise.

(6) The market value of the property was calculated by the Applicant himself on page 13 of the application and the Applicant consequently alleged the market value to have been R10 886-00 on 6 December 2011, which was the date of payment of the full outstanding balance to the Respondent.

(7) On 2 November 2012, the Respondent, offered to settle the dispute with the Applicant. The Respondent deducted the amount of R400-00 originally advanced to the Applicant from the alleged market value of the property and offered to pay to the Applicant the sum of R10 486.00.

(8) The Applicant responded in writing, on 2 November 2012, as follows:

> *"I would be pleased to settle with the Cash Converters Head Office as soon as possible. Upon confirmation of the bank transfer, I will advise the NCR Management and the Registrar of the NCT, via email, that I have accepted your settlement offer of R10 486 (Market value as at 06 December 2011 less Settlement Amount). My Banking details are ..."*

(9) The Applicant then indicated to the Respondent on 3 November 2012 that he had some time to rethink the matter and wishes to retract his acceptance of the offer. The Applicant states his reason to be the huge possibility of the Tribunal ordering the Respondent to compensate the Applicant for twice the market value, less the settlement value.

(10) The amount of R10 486-00 was paid into the bank account of the Applicant's mother, A Dorasamy, on 13 November 2012.

6. THE REMAINING POINTS IN LIMINE

(1) After having determined the condonation application at the hearing, after a brief adjournment, the Tribunal went on to consider the other two preliminary questions; which were:

(a) Whether the application to find that the Respondent engaged in prohibited conduct had been premature before the Tribunal in terms of the provisions of section 140(1) of the NCA? The Applicant had also requested a certificate in terms of section 164(3) of the National Credit Act 34 of 2005 ("NCA") declaring the conduct of the Respondent prohibited conduct in terms of that section.

(b) Whether the section 99(2) application under the NCA made by the Applicant had already been settled and should be dismissed by the Tribunal.

(2) Regarding the question of whether the first question was premature before the Tribunal, it was common cause between the parties that:

(a) The Applicant had taken the matter to the National Credit Regulator (NCR);

(b) The NCR was still in the process of investigating the matter;

(c) The NCR had not yet concluded that investigation; and

(d) The issue can then not be considered as one that is correctly before the Tribunal. The Tribunal had then also ruled within the hearing that this issue would be premature before the Tribunal given that the NCR would still have to conclude its part before it can be referred to the Tribunal if indeed that is to be from the investigation.

(3) It was the question whether the section 99(2) application under the NCA made by the Applicant had already been settled and should be dismissed by the Tribunal that remained yet to be determined by the Tribunal. And after a lengthy deliberation the Tribunal had reserved the ruling on this question, pending a more thorough consideration of the applicable law. And this written ruling addresses this question in particular.

7. HAS THE SECTION 99(2) MATTER BEEN SETTLED?

(1) Before the Tribunal retired to consider its verdict on this question, on whether the section 99(2) had been settled between the parties, the Tribunal took into account the points that were already common cause, namely that:

(a) The Applicant had proposed an amount determined by him that would be suitable in lieu of the lost item. The parties had agreed for the Respondent to pay the agreed amount into the account of the mother of the Applicant. And that was after the parties had agreed to deduct the debt amount of R400.

(b) A day after the agreement on the settlement amount, the Applicant offered to repudiate the agreement. Without returning the paid settled amount, after payment has been effected into the appointed account, on 13 November 2012. It was further common cause at the hearing that even on the date of the hearing, the settlement amount had still been kept by the Applicant. The Respondent had, however, refused to accept the repudiation of the agreement.

(2) After the Applicant had averred that he had been forced to accept the payment agreed, he later indicated that he had not actually been forced, when the Tribunal had sought further clarity on this ***"force".*** It had then been the contention of the Respondent that this matter of the payment, had been

settled and had prayed for this Tribunal to rule as such. In its Heads of Argument, the Respondent further relied on case law in persuading this Tribunal to come to this conclusion. The most relevant of these cases were presented to the hearing. We deal with these cases under the applicable law section of the ruling below.

8. THE LAW ON THE MATTER

(1) The applicable law on the remaining issue to be decided, on the last of the three points *in limine* above, included both the common law of contract and currently binding case law. And the legal question where contract is concerned is whether at common law, a party may unilaterally repudiate or cancel a contract. In *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd 2001 (2) SA 284 (SCA)* at 294H-I, it was held, in summary, that a party to a contract commits the breach of repudiation when by words or conduct, and without lawful excuse, he / she manifests an unequivocal intention no longer to be bound by the contract.

(2) However, the facts in the issue to be decided, point to the effect that the Applicant had only used words to express the intention but did not follow through in conduct. From the *Datacolor* - case (op cit), it is ***"either words or conduct"*** and not ***"words and conduct"*** that determines the presence of such intention. In *Novick v Benjamin 1972 (2) SA 861*; followed in *Nash v Golden Dumps (Pty) Ltd 1985 (3) SA 1(A) at 22**;*** it was held, in summary, that the act of repudiation as being analogous to an offer to rescind, the breach is fully constituted or completed only when the repudiation is accepted by the innocent party. It was held further that if such repudiation is rejected it is a nullity with no legal effect at all. In *White and Carter (Councils) Ltd v McGregor 1962 AC 413**;*** the court held that a party cannot by his wrongful conduct unilaterally terminate a contract.

(3) It is common cause that the Respondent did not accept the offer to repudiate the agreement between the parties with regard to the payment in question. The Tribunal has considered some of the court decisions supplied by the Respondent. A conspectus of these judgments however shows that they do not really have direct application to the facts at hand. The reason for this conclusion is that one deals with a situation where the one party had made an offer of settlement, while the other was about an issue where payment had been made in accompaniment of an offer which the other party was deemed to have accepted by retaining the payment. This case is different in that the facts are that the parties had an unequivocal agreement. That was a point beyond offer and acceptance. This case is about an offer of repudiation. Therefore, only the abovementioned cases are of direct application.

RULING

In the result and because of the foregoing section of this ruling; this Tribunal concludes that:

(1) The payment agreed between the parties and received and retained by the Applicant, has settled the matter of payment between the parties.

(2) This application is therefore dismissed.

(3) No order as to costs.

Thus done at Centurion, this 20th June 2013.

[signed]

Prof. Joseph M. Maseko
Presiding Member

Prof B Dumisa (Deputy-Chairperson and Tribunal member) and Adv F Manamela (Tribunal member) concurring.