

## **National Credit Regulator wins case against reverse mortgage operator**

*For Immediate Release*

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In a further boost for consumer rights, the Free State High Court has ruled in favour of the National Credit Regulator (NCR) in its case against Brusson Finance (Pty) Ltd, a company which used the so-called “reverse mortgage” system of money lending which resulted in a number of consumers losing their homes.

The NCR instituted proceedings in the Free State High Court, together with two borrowers, Mr and Ms Ditshego, who had lost their home to the scheme, against Brusson. This was as a result of receiving various complaints from consumers in respect of loans concluded with Brusson and an investigation into the company’s business activities.

Adv. Jan Augustyn, Manager for Investigation & Prosecution at the National Credit Regulator said that “the investigation revealed that Brusson was an unregistered credit provider that targeted blacklisted, cash strapped members of the public, who cannot obtain loans and/or financial assistance from reputable credit institutions due to bad credit records. Brusson granted loans on condition that the consumer owns immovable property with substantial equity available in the property”. The Brusson scheme operated as follows:

- Consumers react to Brusson’s advertisements and approach Brusson for a loan;
- Qualifying consumers then have to sign Brusson’s application form as well as blank property transfer documents simultaneously, which consisted of an Offer to Purchase (giving effect to the sale of the consumer’s property to the investor), Deed of Sale (giving effect to the “re-purchase” of the property by the consumer from the investor) and a Memorandum of Agreement (constitutes an agreement between Brusson, the investor and consumer);
- Brusson then source so called investors (this process can take several weeks), with clean credit records and a steady income;
- The investors then apply (with the assistance of Brusson) for a mortgage bond to be registered over the property in question from reputable credit institutions. The new bond amounts includes the following:
  - cancellation amounts of existing bonds plus cost;
  - loan amount required by member of the public;
  - bond transfer and registration cost;
  - arrear rates, taxes and utilities on the property;
  - Generous fee to Brusson and an investor’s fee.
- The borrowers had to make payment of this “re-purchase” price within 24 months, over and above an amount payable as consideration for his occupation of the property at issue. It was always inevitable that the consumers would default in their payments as per the agreements concluded by them.

“When the borrowers inevitably failed in this agreement, a third agreement (Memorandum of Agreement) provided that the investor must proceed to cancel the “re-purchase” agreement with the borrower, and that the investor has to sell the property to Brusson for the original purchase price. Brusson invariably became the owner of the property, after “buying” the property for an amount far less than the actual market value, added Augustyn”.

The NCR sought declaratory relief that the Brusson scheme was contrary to the provisions of the National Credit Act (NCA), and offended the common law in South Africa. Brusson opposed the application and contended, amongst others, that it was permissible to enter into separate agreements, which were linked and interdependent and that it did not mean that an inference could necessarily be made to conclude a credit agreement. Brusson further contended that it was nothing more than a broker and could not be construed as a credit provider as envisaged by the National Credit Act.

However, Mr Justice Jordaan ruled in favour of the NCR and the Ditshego’s and found that:

1. Brusson, in partnership or association with so-called investors, lent money to borrowers;
2. The inter dependent agreements purports to be a valid agreement of sale, but it was clear to be not. The true nature of the agreements was indeed a simulated credit transaction;
3. Brusson therefore provided credit and as such, should have registered with the NCR;
4. The agreements concluded were illegal and void in terms of section 40(4) of the National Credit Act.

The court ordered Brusson to effect transfer of the property back to the Ditshego’s.

“This judgment accords with the NCR’s view that the so called “reverse mortgage” system of money lending falls within the realm of the National Credit Act, and accordingly, consumers are entitled to the protection afforded by the Act when entering into such a transaction,” says Augustyn.

Augustyn said “the NCR applauds the judgment as it reiterates the fact that people or entities involved in these types of schemes do not only face possible criminal investigation and prosecution but also a court order declaring that the agreements concluded are illegal and void in terms of the National Credit Act”.

Subsequent to the court order granted in the Free State High Court the NCR further

successfully intervened, as co-applicant, in the winding-up of Brusson. Both the applications were made on an urgent basis in the North Gauteng High Court. “The court granted an order that Brusson be provisionally wound up, calling upon interested parties to show cause on or before 16 September 2010 at 10h00 as to why Brusson should not be finally wound up”.

“The effect of the court order for consumers is that Brusson will not be able to alienate or deal with assets as the same will fall under control of the Master of the North Gauteng High Court. Provisional trustees will be appointed and they will be able to, amongst others, investigate the affairs of Brusson and deal with claims against Brusson’s estate, added Augustyn”.

“The NCR has now through its actions obtained legal clarity as to the validity of the agreements concluded by the consumers in the Brusson scheme. The Legal Recourses Centre graciously offered to provide further assistance to consumers prejudiced by the Brusson scheme”, concluded Augustyn.

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