

SOUTH AFRICA / JUDGMENT

National Consumer Regulator v Aganangunite Financial Services and Loans (Pty) Ltd (NCT/140485/2019-140(1)) [2021] ZANCT 1 (22 March 2021)

[2021] ZANCT 1

COURT

National Consumer Tribunal

BEFORE

F Sibanda, MC Peenze, B Dumisa

CASE / FILE NUMBER

NCT/140485/2019-140(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Virtually Via Zoom

Case Number: NCT/140485/2019-140(1)

In the matter between:

NATIONAL CREDIT REGULATOR

APPLICANT

AND

AGANANGUNITE FINANCIAL SERVICES AND LOANS (PTY)(LTD)

t/a AGANANGUNITE FINANCIAL SERVICES AND LOANS PRETORIA

RESPONDENT

Coram:

Mr. F Sibanda - Presiding Tribunal member

Dr MC Peenze - Tribunal member

Prof B Dumisa - Tribunal member

Date of hearing

- 12 March 2021

Date of Judgment

- 22 March 2021

JUDGMENT AND ORDER

APPLICANT

1. The Applicant in this matter is the National Credit Regulator ("the NCR"), a juristic person established in terms of section 12 of the National Credit Act ("the NCA" or "the Act")[1], with its offices situated at 127 Fifteenth Road, Randjespark, Midrand, in the Gauteng Province. At the hearing, Mr. Linda Mhlongo, the Applicant's Legal Advisor: Investigations and Enforcement, represented the Applicant.

RESPONDENT

2. The Respondent is Aganangunite Financial Service and Loans (Pty) Ltd t/a Aganangunite Financial Services and Loans Pretoria, incorporated and registered in terms of the Republic of South Africa's company laws, operating from Shop 006, Steyns Place, 274 Francis Baard, Pretoria, in the Gauteng Province. The Respondent is registered with the Applicant as a credit provider NCRCP11048.
3. The Respondent did not file an answering affidavit, and the matter had been set down on an unopposed basis.
4. At the hearing, the Respondent attended with their attorney Mr. Raymond Thoka who mentioned that he was here to ask for the postponement of the case.
5. Having carefully listened to the Respondent's legal representative and having clearly explained that the legal representative's submissions did not convince the Tribunal, the Tribunal decided to proceed on a default basis, on the grounds that no answering affidavit had been filed, and no condonation application had been properly lodged.

TYPE OF APPLICATION AND JURISDICTION

6. In this Application, the Applicant seeks an order declaring the Respondent to be in repeated contravention of various provisions of the Act and of having engaged in reckless lending.
7. In terms of section 27 of the National Credit Act 2005 ("the Act" or "NCA"), the National Consumer Tribunal (Tribunal) has jurisdiction.[2]

FACTORS CONSIDERED BEFORE THE TRIBUNAL DECIDED TO PROCEED WITH THE HEARING ON A DEFAULT BASIS

8. On 30 September 2019, the Applicant served the Application on the Respondent by email. In an email addressed to qingli862@gmail.com, the email read: "With reference to the above-mentioned matter as well as the telecom between writer and yourself. Kindly confirm

whether AGANANGUNITE FINANCIAL SERVICE consents to be served the NCR's Application by email and the subsequent pleadings that may be exchanged between ourselves and yourself to the above-mentioned Application. To consent to service by email, simply reply stating that "I consent to the service of your application and all subsequent pleadings by email."

9. On 30 September 2019, the Respondent consented to be served by email by simply typing "I consent to the service of your application and all subsequent pleadings by email."
10. The Applicant filed the Application with the Tribunal's Registrar ("Registrar") on 30 September 2019. On 02 October 2019, the Registrar issued a notice of filing and served it on the Applicant and Respondent by email.
11. In terms of Rule 13 (2) of the Regulations for matters relating to the functions of the Tribunal and Rules for the Conduct of Matters before the Tribunal ("the Tribunal Rules"),[3] the Respondent had 15 business days after being served with the Application, to serve an answering affidavit on the Applicant.[4] The Respondent did not file an answering affidavit or opposing papers.
12. On 22 November 2019, after the closure of pleadings, the Registrar issued a Notice of Set Down for the matter to be heard on 26 March 2020 and served the same on the parties by email. Unfortunately, Covid-19 coronavirus infections started in South Africa in March 2020. On 15 March 2020, President Cyril Ramaphosa placed the country under the State of Disaster under the Disaster Management Act 57 of 2002. The Disaster Management Act measures imposed a new concept of "social distancing," which changed how the Tribunal conducts its hearings.
13. The number of South Africans who contracted Covid-19 coronavirus infection increased significantly after the first reported cases at the beginning of March 2020. On 22 March 2020, President Ramaphosa officially announced that South Africa would be placed under National Lockdown with effect from 27 March 2020. The national lockdown measures were effectively going to shut down most businesses'

operations, including the Tribunal.

14. On 25 March 2020, the Registrar issued a Notice of Removal of this matter from the Hearing Roll. The Registrar served the same on the parties by email.
15. On 09 September 2020, the Tribunal set down this matter for a virtual hearing, via Zoom, on 09 October 2020.
16. The hearing scheduled for 09 October 2020 had to be postponed sine die because of disagreements between the Applicant and the Respondent.

17. The matter has since been set down for hearing on a default basis because the Respondent did not file any answering affidavit.
18. The Respondent attended this hearing with his legal representative, who hinted he wanted to request a postponement because the Respondent had just briefed him.
19. The Applicant opposed the request for postponement, outlining that the Respondent was aware of the obligation to file an answering affidavit for over a year. The Applicant cautioned the Tribunal about an abuse of process. He acknowledged that it might be in the interest of fairness to hear the Respondent but argued that consumers would suffer prejudice if the Tribunal postponed the matter.
20. Having listened to both parties, the Tribunal noted that the Respondent was represented by an attorney who should be aware of the Tribunal Rules. The Tribunal panel confirmed that it was satisfied that there was proper service of all pleadings. The Respondent was also adequately notified of the date, time, and venue of the proceedings.
21. While the Tribunal has the discretion to grant a postponement, good and sound reasons should be provided for a postponement. The Tribunal found the Respondent's argument vague and unconvincing.
22. Despite having had ample time to file an answering affidavit or condonation application, the Respondent did not do so until the day before the hearing. The Respondent also did not file a postponement application in terms of the Tribunal Rules but merely turned up on the hearing's date to request a postponement.[5]
23. The panel found the Respondent's explanation, namely that it did not process any opposing papers due to its failure to understand the Tribunal process, as unsatisfactory. The Tribunal believed the Respondent attempted to take advantage of regulatory bodies by claiming ignorance, especially since the Respondent had been in operation as a credit provider for thirteen years. Further, the Tribunal communicated clearly to the Respondent what its responsibilities were and the timeframes applicable to oppose the matter. The Respondent had enough time to consider and file its condonation application and answering affidavit over the last year but chose not to do so.
24. As the Tribunal could not find a basis for postponing the matter, it ordered that it continue on a default basis, satisfied that the Respondent was duly served with the Application as required in terms of Rule 25 (3) of the Tribunal Rules. Subsequently, the legal representative of the Respondent excused himself from the hearing. The hearing proceeded in the absence of the Respondent in terms of Rule 24 of the Tribunal Rules.[6]

APPLICANT'S

SUBMISSIONS

25. The Applicant's case is stated in its founding affidavit. The deponent is Anne-Carien du Plooy (Ms Du Plooy). Ms. Du Plooy is an acting manageress in the Applicant's Investigations and Enforcement Department. According to Ms. Du Plooy, the Respondent is registered as a credit provider with the Applicant under registration number NCRCP11048.
26. The referral to the Tribunal originates from a complaint initiated by the Applicant in terms of section 136
- (2) of the NCA. The complaint emanates from the Applicant's information from the South African Social Security Agency (SASSA) and an anonymous tip-off to the effect that, among other things, the Respondent allegedly charged excessive interest rates under its credit agreements and was granting credit recklessly to consumers.

As a result of the information, the Applicant formed a reasonable suspicion that the Respondent was engaged in prohibited conduct.

27. On 29 May 2019, the Applicant's Chief Executive Officer appointed Muhanganei Mbedzi ("Mbedzi") and Dipuo Makobane ("Makobane") as inspectors for purposes of investigating the Respondent's business practices. The scope of investigation for these inspectors was that they select at least ten samples of consumer files at the Respondent's place of business and assess the Respondent's business

practices to determine the following:

27.1 Whether the Respondent granted credit recklessly in terms of Section 80 of the Act;

27.2 Whether the Respondent entered into credit agreements without first taking reasonable steps as required in terms of Section 81(2) of the Act;

27.3 Whether the Respondent complied with Regulation 23A when conducting affordability assessments;

and

27.4 Whether the cost of credit levied in terms of the credit agreement complied with the allowable amount to be charged in terms of the Act.

28. On 18 June 2019, the inspectors visited the Respondent's principal place of business at Shop 006, Steyn's Place, 274 Francis Baard, Pretoria.

28.1 At the Respondent's place of business, the inspectors found three consultants, including one Thato Leso ("Leso");

28.2 These Respondent's consultants were not willing to co-operate with these inspectors;

28.3 Leso called Respondent's owner, Qing Li, to explain the visit by these inspectors, to which Qing Li tasked Leso with speaking to the inspectors; and

28.4 The inspectors duly produced their certificates, in terms of Section 25 of the Act; and further explained the provisions of Section 139(4) of the Act which entitles the inspectors to question the Respondents.;

29. During the investigation, Leso offered the following information about the Respondent's business practices:

29.1 The Respondent has only this one branch;

29.2 They only offered loans to the working class and only SASSA beneficiaries who received their grants via a bank;

29.3 On Application for a credit agreement, the consumer must submit three months' bank statements, the latest payslip, and an identity document;

29.4 They conducted affordability assessments by obtaining credit histories through the Compuscan system;

29.5 The consumers are provided with pre-agreement statements and quotations;

29.6 They levied the total interest at a rate of 28 percent per month, which is inclusive of the initiation fee and service fee; and

29.7 They make use of NuPay to swipe consumers' cards to load debit orders. No extra fees are associated with this service.

30. Mbedzi and Mokobane requested Leso to provide them with copies of ten consumer files approved during 2019. The inspectors emphasized to Leso that each file must contain the following document:

30.1 Pre-agreement statements and quotations;

30.2 Credit agreements;

30.3 Bank statements and salary advice;

30.4 Consumer's disclosed monthly expenditures;

30.5 Consumer's credit profiles;

30.6 Mechanisms used to conduct affordability assessments; and

30.7 Credit life insurance agreements where applicable.

31. The inspectors assessed the selected files and compiled an investigation report.

Based on the inspectors' report, the Applicant alleges that the Respondent contravened the following provisions of the NCA:

31.1. Section 81 (1) (a) (ii) and (iii) of the NCA, read with regulation 23, in that the Respondent failed to take reasonable steps to assess the debt repayment history of the consumer under credit agreements as well as the consumer's existing financial means, prospects and obligations;

31.2. Section 81 (3) of the NCA, read together with Section 80 (1) (a), in that the Respondent has extended credit recklessly to consumers;

31.3. Section 81 (3) of the NCA, read together with Section 80 (1) (b) (ii) of the NCA, in that the preponderance of information available to the Respondent at the time the credit agreements were entered into, indicated that entering into those credit agreements would make the consumers over-indebted; and

31.4. The interest charged on all consumer files exceeded the maximum amounts allowed in terms of the Act. As a result, the Respondent

contravened Section 100(1)(c) and Section 101(1)(c) and (d)(ii) read with Regulation 42(1) of the Act.

APPLICANT'S PRAYERS

32. The Applicant seeks an order declaring that the Respondent's repeated contraventions of the provisions of the following Sections

of the Act:

- (a) Section 81(2)(a)(ii) read with Regulation 23A(13);
- (b) Section 81(2)(a)(iii) read with Regulation 23A(12)(a) and (b) of the Act;
- (c) Section 81(3) read with Section 80(1)(a) of the Act;
- (d) Section 81(3) read together with Section 80(1)(b)(ii) of the Act;
- (e) Section 170 read together with Regulation 55(1)(b)(vi);
- (f) Section 100(1)(c) and Section 101(1)(d)(ii) read with Regulation of the Act; and
- (g) Regulations 64 and 66 as well as Section 52(5)(c) of the Act read with condition A3 of the Respondent's conditions of registration.

33. Declaring the Respondent's conduct in contravention of the relevant Sections of the Act outlined above as prohibited conduct in terms of Section 150(a) of the Act.

34. Interdicting the Respondent from future breaches of the NCA.

35. Imposing an administrative fine upon the Respondent in the amount of R1 Million or 10% of the Respondent's annual turnover, whichever

is greater.

36. Declaring the Respondent's credit agreements with consumers as reckless in terms of Section 80 (1) (a) of the NCT and setting aside

all of the consumers' obligations under those agreements.

37. Further to the above, the Applicant wants the Respondent to be ordered to:

37.1. Within 30 days, appoint an independent auditor at its own cost, whose appointment shall be subject to the prior written approval of the Applicant, to identify all credit agreements concluded by the Respondent in the past year to determine if any consumers were overcharged on interest and/or service fees, and provide a list of such consumers as well as the amount by which each such consumer was overcharged;

37.2. Once the auditor mentioned above has compiled the above-mentioned report, within 30 days from the date of the auditor's report, refund

the consumers all the amounts which exceeded the prescribed maximum amounts allowed by the Act;

37.3. Once the refunds have been made as stated above, provide the auditor's report and a written report to the Applicant detailing the

consumers' identity, the refund made, and the further steps taken. These reports are to be provided to the Applicant within 120 days after the Tribunal order has been obtained; and

37.4. Appoint an independent auditor to determine and compile a list of all the consumers who were charged fees that exceeded the prescribed

maximums and by which amounts the Respondent has overcharged these consumers. Once the auditor has compiled the list, the Respondent

must refund the amounts to each consumer. Once the refunds have been made, the Respondent must provide a written report to the Applicant detailing consumers' identity and the refunds made.

38. The last prayer that the Applicant seeks is further or alternative relief as the Tribunal may consider appropriate to give effect to the consumers' rights under the NCA as per section 150 (i) thereof.

PENALTY

39. As motivation for the appropriate penalty, the Applicant submits as follows:

Nature, duration, gravity, and extent of the contraventions

39.1. The Applicant extracted a sample of ten credit agreements concluded by the Respondent and found that every one of those agreements had been concluded recklessly by the Respondent;

39.2. Reckless credit granting and levying excessive costs of credit are serious contraventions of the Act. Consumers risk becoming over-indebted by the Respondent granting credit without taking reasonable steps to determine the consumer's ability to afford the credit repayments. The conduct of the Respondent cannot be benevolently considered because of the gravity and regularity of the offenses committed by the Respondent have the potential to cause consumers extreme prejudice;

39.3. Although all the credit agreements sampled were concluded in June 2019, it is clear that the contraventions arise from a systemic flaw in the Respondent's credit granting practices. Thus it is reasonable to infer that most, if not all of the Respondent's credit agreements concluded since its inception, were and are reckless; and

39.4. The full extent and effect of the Respondent's conduct will most likely negatively affect consumers who have to make provisions to

repay another credit agreement with the Respondent. This may have long-term effects on consumers' financial well-being.

Loss or damage suffered as a result of the contraventions

39.5. The Respondent's conduct has severely prejudiced consumers, and they will most likely suffer enormous financial hardships if they are not refunded the cost of credit paid to the Respondent. All the consumers who have been granted reckless credit and overcharged by the Respondent are entitled to refunds.

The behaviour of the Respondent

39.6. There is no plausible reason for the Respondent to be unaware of the provisions of the Act and its statutory obligation to adhere to all of the Act's provisions. The very fact that the Respondent elected to become a registered credit provider is indicative that the Respondent is aware of the prescripts of the Act; and

39.7. The Respondent's behavior, which is of particular concern, is how it merely pays lip service to its duty to grant credit responsibly – i.e., pretends to follow the prescribed procedure for conducting affordability assessments without really conducting proper

affordability assessments. The Respondent completed the affordability assessments forms, and the Respondent obtains credit bureau reports merely to create the appearance of compliance. However, the conduct's substance shows that the reasonable steps required to conduct proper affordability assessments were not taken.

Market circumstances under which the contraventions occurred

39.8. It is submitted that the Respondent's conduct illustrates that the market circumstances within which the contraventions occurred are one in which consumers are not educated about their rights relating to access to credit. Many of the consumers are exploited to the unjust benefit of the Respondent.

Level of profit derived from contraventions

39.9. A substantial profit was likely derived from the unlawful activities undertaken by the Respondent. However, the Applicant is unable to provide detailed information as to the level of profit derived by the Respondent due to the Respondent's failure to submit prescribed financial and statistical reports to the Applicant; and

39.10. The Applicant places on record that it will request that the Tribunal orders the Respondent to provide copies of its management accounts and audited annual financial statements over the relevant period so that the appropriate level of profit may be determined the turnover for purposes of determining of a fine.

Degree of co-operation between the Respondent and Applicant

39.11. The Respondent co-operated with the Applicant during the investigation.

Prior contraventions committed by the Respondent

39.12. There are no prior investigations or enforcement action instituted by the Applicant against the Respondent. However, the contraventions' nature and duration indicate that the Respondent's conduct has been ongoing before the investigation.

40. The Applicant submitted that regarding the preceding factors and gravity of the Respondent's contraventions, the Applicant wants the Tribunal to impose an administrative fine on the Respondent.

ISSUES TO BE DECIDED

41. The issues to be decided include whether the Respondent repeatedly contravened the NCA provisions as alleged by the Applicant. If so, whether an administrative fine should be imposed on the Respondent, and the amount of the administrative fine, if any.

THE LAW

42. Only those provisions of the main statute, the NCA, and the provisions of Regulation 55 (1) (b) (vi) of the NCA regulations that

the Applicant relies on will be stated hereunder. Also, the provisions of Rule 13 (5) of the Tribunal Rules will be noted.

43. Section 3 (e) (ii) of the NCA states-

"The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent,

competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by addressing and correcting imbalances in negotiating power between consumers and credit providers by providing consumers with adequate disclosure of standardised information in order to make informed choices."

44. Section 80 (1) of the NCA states-

"A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119 (4)-

- (a) the credit provider failed to conduct an assessment as required by section 81 (2), irrespective of what the outcome of such an assessment might have concluded at the time.
- (b) the credit provider, having conducted an assessment as required by section 81 (2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that -
 - (i) the consumer did not generally understand or appreciate the consumer's risks, costs, or obligations under the proposed credit agreement; or
 - (ii) entering into that credit agreement would make that consumer over-indebted."

45. Section 81 (2) of the NCA states-

"A credit provider must not enter into a credit agreement without first taking reasonable steps to assess -

- (a) the proposed consumer's-
 - (i) general understanding and appreciation of the risks and costs of the proposed credit, and the rights and obligations of a consumer under a credit agreement;
 - (ii) debt repayment history as a consumer under credit agreements;
 - (iii) existing financial means, prospects, and obligations; and
- (b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful if the consumer has such a purpose for applying for that credit agreement."

46. Section 81 (3) of the NCA states-

"A credit provider must not enter into a reckless credit agreement with a prospective consumer."

47. Section 101 of the NCA states-

"(1) A credit agreement must not require payment by the consumer of any money or other consideration, except-

- (a) the principal debt, being the amount deferred in terms of the agreement, plus the value of any item contemplated in section 102;
- (b) an initiation fee, which-
 - (i) may not exceed the prescribed amount relative to the principal debt; and

- (ii) must not be applied unless the Application results in the establishment of a credit agreement with that consumer;
- (c) a service fee, which-
 - (i) in the case of a credit facility, may be payable monthly, annually, on a per transaction basis or on a combination of periodic and transaction basis; or
 - (ii) in any other case, maybe payable monthly or annually; and
 - (iii) must not exceed the prescribed amount relative to the principal debt;
- (d) interest which-
 - (i) must be expressed in percentage terms as an annual rate calculated in the 25 prescribed manner; and
 - (ii) must not exceed the applicable maximum prescribed rate determined in terms of section 105;
- (e) cost of any credit insurance provided in accordance with section 106;
- (f) default administration charges, which-
 - (i) may not exceed the prescribed maximum for the category of credit agreement concerned; and
 - (ii) may be imposed only if the consumer has defaulted on a payment obligation under the credit agreement, and only to the extent permitted by Part C of Chapter 6; and
- (g) collection costs, which may not exceed the prescribed maximum for the category of credit agreement concerned and may be imposed only to the extent permitted by Part C of Chapter 6.
- (2) A credit provider who is a party to a credit agreement with a consumer and enters into a new credit agreement with the same consumer that replaces the earlier agreement in whole or in part may charge that consumer an initiation fee contemplated in subsection (1)
 - (b) in respect of that second credit agreement, only to the extent permitted by regulation, having regard to the nature of the transaction and the character of the relationship between the credit provider and consumer.
- (3) If a credit facility is attached to a financial services account, or is maintained in 45 association with such an account, any service charge in terms of that account-
 - (a) if that charge would not have been levied if there were no credit facility attached to the account, is subject to the prescribed maximum contemplated in subsection (1) (c); and
 - (b) otherwise, is exempt from the prescribed maximum contemplated in subsection (1) (c)."
- 48. Section 150 (a) of the NCA states-

"In addition to its powers in terms of this Act, the Tribunal may make an appropriate order in relation to prohibited conduct or required conduct in terms of this Act, or the Consumer Protection Act, 2008, including declaring conduct to be prohibited conduct in terms of this Act."

49. Section 150 (g) of the NCA states-

"In addition to its powers in terms of this Act, the Tribunal may make an appropriate order in relation to prohibited conduct or required conduct in terms of this Act, or the Consumer Protection Act, 2008, including suspending or cancelling the registrant's registration, subject to section 57 (2) and (3)."

50. Section 150 (i) of the NCA states-

"In addition to its powers in terms of this Act, the Tribunal may make an appropriate order in relation to prohibited conduct or required conduct in terms of this Act, or the Consumer Protection Act, 2008, including any other appropriate order required to give effect to a right, as contemplated in this Act or the Consumer Protection Act, 2008."

51. Regulation 55 (1) (b) (vi) of the NCA Regulations states-

"In addition to any records that must be kept in terms of the Act, a registrant must maintain the following records relating to its registered activities, which records may be kept in an electronic format:

(a) ...

(b) Credit Providers, in respect of each consumer:

(i) ...

(vi) documentation in support of any steps taken in terms of section 81(2) of the Act."

52. Rule 13(5) of the Tribunal Rules states that "Any fact or allegation in the application or referral not specifically denied or admitted in an answering affidavit will be deemed to have been admitted."

ANALYSIS OF THE EVIDENCE

53. From the contents of Ms. Du Plooy's affidavit and the documentary evidence filed by the Applicant, it is evident that:

53.1. in contravention of section 80 (1) and 81 (2) of the NCA, the Respondent failed to take reasonable steps to assess the debt repayment histories of consumers, to examine bank statements properly, to read and apply credit bureau reports available, or to obtain the most recent credit bureau reports for purposes of assessing prospective consumers' debt repayment histories before entering into credit agreements with consumers;

53.2. in contravention of Regulation 55 (1) (b) (vi) of the NCA, the Respondent failed to retain copies of the credit bureau reports utilised to assess prospective consumers' debt repayment histories before entering into credit agreements with the consumers;

53.3. in contravention of sections 101 of the NCA read with Regulation 23A of the NCA, the Respondent failed to disclose the total cost of credit to consumers before entering into credit agreements with them;

53.4. in contravention with Regulation 64 (2) of the NCA, the Respondent failed to complete and submit a statistical return (Form 39) by 15 February each year. The Respondent last submitted a Form 39 in February 2014 for its activities for the 2013 calendar year,

meaning that it has failed to submit its Form 39 for all the years 2014 through to 2019; and

53.5. in contravention with Regulation 66, the Respondent failed to complete and submit an annual financial and operational return (Form

40) to the Applicant within six months after the Respondent's financial year. Since its registration in 2007, the Respondent has

not once submitted a Form 40 to the Applicant.

54. Given the averments that Ms. Du Plooy made in her affidavit, the documentary evidence annexed to the Applicant's founding affidavit, the Respondent's failure to adduce evidence refuting the Applicant's allegations, and the provisions of Rule 13 (5) of the Tribunal Rules, the Tribunal is satisfied that the Applicant has shown, on a balance of probabilities, that the Respondent breached its conditions of registration and repeatedly contravened the above-cited provisions of the NCA.

55. The Applicant has presented sufficient evidence for the Tribunal to declare that the Respondent repeatedly contravened various provisions of the NCA. As envisaged under section 150 (a) of the NCA, the Respondent's contravention of various NCA provisions constitutes prohibited conduct. Prohibited conduct is defined under section 1 of the NCA as "an act or omission in contravention of this Act other than an act or omission that constitutes an offense under this Act, by-

(a) an unregistered person who is required to be registered to engage in such an act; or

(b) a credit provider, credit bureau or debt counsellor."

56. Having found that the Respondent repeatedly contravened various provisions of the NCA, it follows that the Applicant has established a clear basis for the cancellation of Respondent's registration with the Applicant in terms of section 150 (g) of the NCA. In terms of section 150 (b) of the NCA, the Tribunal may make an order interdicting the Respondent from any further breaches of the NCA.

ADMINISTRATIVE FINE

57. We now turn to the administrative fine that the Applicant wants to be imposed on the Respondent. In its application documents, the Applicant stated that it wants an administrative fine in the amount of R1 000 000.00 or 10% of the Respondent's annual turnover, whichever is the greater.
58. Per the provisions of section 151 (3) of the NCA, in determining the appropriate administrative fine, we will consider the following:
59. Nature: Reckless credit granting is one of the most egregious forms of prohibited conduct under the NCA. The Respondent exploited consumers. By extending credit without conducting proper affordability assessments, the Respondent acted in a manner that undermined the NCA's purpose and showed a callous disregard for consumers.
60. Duration: The evidence presented to the Tribunal shows that contraventions took place over many months.
61. Gravity: The Respondent's conduct shows a total disregard for the consumer protection measures provided for in the NCA and the regulated credit industry.
62. Extent: The fact that the Applicant found contraventions of the NCA in all the files its inspectors extracted from Respondent shows that the Respondent generally conducted its business illegally.
63. Although the actual loss has not been computed, the Applicant's evidence shows that consumers have suffered losses and/or damages due to the Respondent's conduct through the excessive costs of credit.
64. As a registered credit provider, the Respondent knew that it had to comply with the NCA's prescripts but chose to exploit consumers nonetheless.
65. The Tribunal accepts the Applicant's submission that the Respondent's conduct illustrates that the market circumstances within which the contraventions occurred are those in which consumers are not educated on their rights relating to credit access. The Tribunal views the exploitation of vulnerable consumers with contempt.
66. The Applicant was unable to state what the total amount of profit was.
67. The Respondent co-operated with the Applicant's inspector.
68. There are no prior investigations or enforcement action instituted by the Applicant against the Respondent. However, the Tribunal takes a very dim view that the Respondent has been found guilty of contravening numerous provisions of NCA.

69. In *The Competition Commission of South Africa v Federal-Mogul Aftermarket Southern Africa (Pty) Ltd & Others*[7] (Federal-Mogul case), the Competition Tribunal held that deterrence is the primary purpose of imposing administrative penalties.[8] The Competition Tribunal further said, "the deterrence element must have some relationship to the harm inflicted by the prohibited practice."

CONCLUSION

70. Based on the evidence presented to it, the Tribunal finds that the Respondent repeatedly contravened the following provisions of the NCA:
- 70.1. Sections 81 (2) (a) (ii) and (iii) read with Regulation 23A;
- 70.2. Section 81 (3) read together with Section 80
- (1) (a);
- 70.3. Section 81 (3) read together with Section 80
- (1) (b) (ii);
- 70.4. Section 106 (8) read with Regulation 3 (1) of the Credit Life Insurance Regulations;
- 70.5. Sections 101 (1) (c) (iii) and 105 (1) (b) and Regulation 44 of the Act; and
- 70.6. Regulation 64 and 66 and Section 52 (5) (c) read with condition A3 of its registration conditions as a credit provider.
71. The Respondent's conduct stated in paragraphs 54 to 56 above constitutes prohibited conduct. The Respondent's repeated and numerous contraventions of the Act's provisions conclusively demonstrate that the Respondent is a danger to the public and should be interdicted from future breaches of the Act.
72. Having found that, in all the sampled files, the Respondent failed to conduct proper affordability assessments as envisaged in section 80 (1) (a) of the Act, the Tribunal declares that all the credit agreements contained in the sampled files reckless. In terms of section 83 (2) (a) read with the provisions of section 150 (i) of the Act, the Tribunal finds that it is just and reasonable to set aside consumers' obligations to pay the cost of credit in respect of the credit agreements contained in annexures of the Applicant's founding affidavit.
73. On a conspectus of the evidence tendered by the Applicant, the Tribunal is of the view that the Respondent's disdain for the law that is meant to protect consumers and its callous treatment of consumers warrants the imposition of an administrative fine in the amount of R100 000.00 (One Hundred Thousand Rand).
74. The Tribunal believes it is imperative to appoint an independent auditor, within 30 days, at the Respondent's own cost, who must determine and compile a list of all the consumers who were charged fees that exceeded the prescribed maximums, and by which amounts the Respondent has overcharged these consumers. Once the auditor has compiled the list, the

Respondent must refund the amounts to each consumer within 30 days from the date of the auditor's report. Once the refunds have been made, the Respondent must provide a written report to the Applicant detailing consumers' identity and the refunds made. This report must be provided to the Applicant within 120 days after the order is made.

ORDER

75. The Tribunal makes the following order: -

75.1. The Respondent is found guilty of repeatedly contravening the following provisions of the NCA:

75.1.1. Sections 81 (2) (a) (ii) and (iii) read with Regulation 23A;

75.1.2. Section 81 (3) read together with Section 80 (1) (a);

75.1.3. Section 81 (3) read together with Section 80 (1) (b) (ii);

75.1.4. Sections 101 (1) (c) (iii) and 105 (1)

(b) and Regulation 44 of the Act; and

75.1.5. Regulation 64 and 66 and Section 52 (5) (c) read with condition A3 of its registration conditions as a credit provider.

75.2. The Respondent's conduct stated in paragraphs 75.1.1 to 75.1.5 above is hereby declared prohibited conduct in terms of Section 150

(a) of the NCA.

75.3. The credit agreements entered into between the Respondent and the following consumers:

75.3.1. Mabitsela SL,

75.3.2. Kganyao SL,

75.3.3. Mmolawa KL,

75.3.4. Muthavhaedzi J,

75.3.5. Bildokwe VN,

75.3.6. Tapala MS,

75.3.7. Phiri M,

75.3.8. Revhavhu G,

75.3.9. Makakoa PM, and

75.3.10. Thupi L

are hereby declared reckless;

75.4. The obligations of the consumers mentioned in paragraph 75.3.1 to 75.3.10 above to pay the costs of credit are set aside;

75.5. The Respondent must refund to the consumers mentioned in paragraph 75.3.1 to 75.3.10 of this order all the costs of credit, including the interest amounts it charged these consumers within 30 (thirty) ordinary days from the date of issuing this order;

75.6. The Respondent must appoint an independent auditor at its own costs within 30 days of issuing this order who must identify all credit agreements concluded by the Respondent in 2019 to determine if any consumers were overcharged on interest and/or service fees.

75.7. Once the auditor has compiled the report as mentioned above, the Respondent must, within 30 (thirty) days from the date of the auditor's report:

75.7.1. Refund the consumers all amount which exceeded the prescribed maximum amounts allowed by the Act;

75.7.2. Take all such steps as may be necessary in order to ensure that:

(i) Any adverse credit bureau records which may have arisen as a result

of the consumer having been overcharged as identified in the auditor's report are removed;

(ii) Any civil judgments taken by the Respondent against such consumers in respect of such overcharged amounts are rescinded or, if rescission is not possible, abandoned; and

75.7.3. Refund the excessive amounts to each consumer within 30 days from the date of the auditor's report.;

75.8. Once the refunds have been made, the Respondent must provide a written report to the Applicant detailing the consumers' identities

and the refunds made. This report must be provided to the Applicant within 120 days after the order is made;

75.9. The Respondent must pay an administrative fine in the amount of R250 000.00 (Two Hundred and Fifty Thousand Rand) into the following bank account;

Bank Name: Standard Bank

Account Holder: The Department of Trade and Industry

Account Number: 370650026

Account Type: Business Current Account

Branch: Sunnyside

Branch code: 010645

Branch Code (electronic payments): 051001

SWIFT Address: SBZA JJ

in terms of section 151 (5) of NCA within 60 (sixty) ordinary days of issuing this order;

75.10. The Respondent is interdicted from any further breaches of the NCA;

75.11. The Respondent is prohibited from enforcing any credit agreement that was entered without proper affordability assessments having been done; and

75.12. There is no order made as to costs.

Thus, done and signed at Centurion on 24 March 2021.

{signed}

Prof B Dumisa

Tribunal Member

Mr. F Sibanda (Presiding Tribunal Member) and Dr. M Peenze (Tribunal Member) concurring.

[1] Act 34 of 2005 as amended.

[2] Section 27(a)(i) of the NCA provides that: “The Tribunal or a member of the Tribunal acting alone in accordance with this Act or the Consumer Protection Act, 2008 may adjudicate in relation to any application that may be made to it in terms of this Act in respect of such an application.”

[3] Published under GN 789 in GG 30225 of 28 August 2007 as amended by General Notice 428 in Government. Gazette 34405 of June 2011 (published in terms of the Consumer Protection Act 88 of 2008). GN R203 in GG 38557 of 13 March 2015 and GN 157 in GG 39663 of 4 February 2016.

[4] Rule 13 of the Tribunal Rules states - “(1) Any Respondent to an application or referral to the Tribunal may oppose the application or referral by serving an answering affidavit on:

(a) the Applicant; and

(b) every other person on whom the application was served.

(2) An answering affidavit to an application or referral other than an application for interim relief must be served on the parties and filed with the Registrar within 15 business days of the date of the application.” [5] Also see *National Credit Regulator v Good Friends Cash Loans (Pty) Ltd* (NCT-112957/2018/57(1)) [2018], whereby the Tribunal refused a postponement application and stated that the Respondent’s counsel should have been aware of the Tribunal Rules.

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- [5] Also see *National Credit Regulator v Good Friends Cash Loans (Pty) Ltd* (NCT-112957/2018/57(1)) [2018], whereby the Tribunal refused a postponement application and stated that the Respondent’s counsel should have been aware of the Tribunal Rules.
- [6] Rule 24 of the Tribunal Rules states- “(1) If a party to a matter fails to attend or be represented at any hearing or any proceedings, and that party—
- (a) is the applicant, the presiding member may dismiss the matter by issuing a written ruling; or
 - (b) is not the applicant, the presiding member may—
- (i) continue with the proceedings in the absence of that party; or (ii) adjourn the hearing to a later date. (2) The Presiding member must be satisfied that the party had been properly notified of the date, time and venue of the proceedings, before making any decision in terms of subrule (1). (3) The Registrar must send a copy of the ruling to the parties.”
- [6] Rule 24 of the Tribunal Rules states-
- “(1) If a party to a matter fails to attend or be represented at any hearing or any proceedings, and that party—*
- (a) is the applicant, the presiding member may dismiss the matter by issuing a written ruling; or
 - (b) is not the applicant, the presiding member may—
- (i) continue with the proceedings in the absence of that party; or
 - (ii) adjourn the hearing to a later date.
- (2) The Presiding member must be satisfied that the party had been properly notified of the date, time and venue of the proceedings, before making any decision in terms of subrule (1).
- (3) The Registrar must send a copy of the ruling to the parties.”
- [7] Competition Tribunal Case number: Case Number: 08/CR/Mar01.
- [8] At para 166.

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