

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Asalam Business Enterprise (Pty) Ltd and Another (NCT/74699/2017/140) [2017] ZANCT 126 (8 November 2017) [2017] ZANCT 126

COURT

National Consumer Tribunal

BEFORE

A Potwana, FK Manamela, H Devraj

CASE / FILE NUMBER

NCT/74699/2017/140

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

AT CENTURION

Case

Number: NCT/74699/2017/140

In

the matter between:

NATIONAL
CREDIT
REGULATOR APPLICANT
And
ASALAM
BUSINESS ENTERPRISE (PTY) LTD 1st
RESPONDENT
ADZI
CASH
LOANS 2nd
RESPONDENT

Coram: Mr.
A Potwana -
Presiding member
Adv.
FK Manamela - Tribunal Member
Ms.
H Devraj
- Tribunal Member
Date
of Hearing -
22 September 2017

JUDGMENT

AND REASONS

INTRODUCTION

1. The Applicant is seeking an order declaring that the Respondents engaged in prohibited conduct, and for that reason, the Tribunal is asked to impose an administrative fine against the Respondents. This application is before the Tribunal in terms of section 140 of the National Credit Act, 34 of 2005 (“the NCA”) The matter was initially postponed to May 2017 to allow the parties to reach a settlement agreement, or for the Respondent to file a condonation application for the late filing of an answering affidavit in order for the matter to proceed to a hearing later. The Respondents’ condonation application did not succeed. The Tribunal dismissed the application[1]. The Applicant (NCR) is mandated by section 15 of the NCA to monitor the consumer credit market and industry in order to “ensure that prohibited conduct is prevented or detected; and prosecuted.” During the course of its investigation; the Applicant uncovered certain contraventions by the Respondents involving, among others,

the retention of consumer instruments prohibited by the NCA. These instruments were found in the possession of the First Respondent and related to credit agreements entered into by the Second Respondent.

2. The Applicant brought this matter before the Tribunal in one application, as the owners of the First and Second Respondents are spouses. The citation of the parties as First and Second Respondents is for convenience purposes only.

THE PARTIES

3. The Applicant is the NATIONAL CREDIT REGULATOR (“the NCR”); an organ of state and a juristic person within the public administration established in terms of Section 12 of the National Credit Act 34 of 2005. The NCR has its address at 127 Fifteenth Road, Randjespark, Midrand, (“hereinafter referred to as the Applicant”).

4. The Founding Affidavit of the Applicant is deposed to by Ms Jacqueline Peters, the Manager for Investigation and Enforcement in the employ of the Applicant. At the hearing, the Applicant was represented by Ms Katherine Germishuys from the NCR.
5. The First Respondent is ASALAM BUSINESS ENTERPRISE (Pty) Ltd, an unregistered credit provider whose physical trading address is at 17 Matidza Complex, Thohoyandou Limpopo Province. The Respondent also trades under the name and style of Asalam Cash Loan.
6. The Second Respondent is ADZHI CASH LOANS, an unregistered credit provider having its address at Office Number 8 Matidza Complex, Thohoyandou, Limpopo.
7. The Respondents did not attend the hearing, nor was there a representative attending on their behalf. No reasons were furnished for their absence.
8. Under these circumstances, the matter was heard on a default basis[2].

JURISDICTION

9. The National Consumer Tribunal (“Tribunal”) has jurisdiction to hear this matter and has powers conferred upon it in terms of section 150 of the NCA to make orders in line with prayers canvassed in the notice of motion.

BACKGROUND

10. An investigation was initiated by the Applicant into the credit lending practises of credit providers in the Limpopo area. This, after a compliance monitoring exercise was conducted; leading to a reasonable suspicion that credit was being extended in a manner not compliant with the NCA and the Regulations.
11. During the course of the investigation, and at the Respondents residential home, 76 identity documents; 95 SASSA cards; 39 Easy Pay cards and 2 Standard Bank debit cards were found.
12. These instruments were found in the possession of the First Respondent and related to credit agreements entered into by the

Second Respondent. The Applicant interviewed the owner of the First Respondent, one Mpho Ojikutu as well as the owner of the Second

Respondent, Adzhi Ojikutu.

13. Other contraventions reported in the Applicants’ investigation reports are dealt with in these submissions below.

APPLICANT’S

SUBMISSIONS

14. The Applicant's submissions are evidenced from the investigation report it compiled after conducting an investigation into the activities of the Respondent. According to the Applicant, it became apparent during the investigation that the Respondent contravened the Act in various respects. The alleged contraventions are dealt with in more detail hereunder:

Failure to Register as a Credit Provider

15. The First and Second Respondents have granted loans to consumers without being registered to do so, as stipulated in Section 40
 - (1) read with section 42 (1) of the NCA. In terms these provisions, a credit provider must be registered with the Applicant, before granting loans to consumers. The Respondent therefore engaged in offering, making available or extending credit and entering into credit agreements with consumers without being registered to do so. This is a contravention of section 40 (3).
16. Reckless Credit
17. The First Respondent entered into credit agreements with consumers without taking necessary steps to assess their existing financial

means, prospects and obligations accurately. The First Respondent failed to obtain proof of income from consumers at the time of

conducting an affordability assessment[3]. In instances where proof of income of consumers was obtained, earnings were reflected inaccurately and/or erroneously on the affordability assessment conducted by the First Respondent[4]. In none of the consumer's files investigated by the Applicant, was there any evidence which would have indicated that the First Respondent verified the financial obligations of consumers.

18. The failure of the First Respondent to establish the existing financial means, prospects and obligations of consumers at the time of conducting an affordability assessment is a direct contravention of Section 81(2) (a) (iii) read together with Section 82 of the NCA.
19. The First Respondent, at the time of conducting affordability assessments, further failed to take all the expenses reflected on the credit checks of the consumers into account. In that regard, the First Respondent could therefore not determine the consumers' debt repayment history.
20. The First Respondent's failure to accurately establish the debt repayment history of consumers (at the time of conducting affordability assessments) is a contravention of Section 81 (2) (a) (ii) of the Act.
21. The First Respondent entered into Reckless Credit agreements with consumers in contravention of section 81 (3) of the NCA.

22. Failure to Provide Consumers with Pre-Agreement Statement and Quotation
23. Section 92(1) states that a credit provider must not enter into a small credit agreement unless the credit provider has given the consumer a pre-agreement statement and quotation in the prescribed form. The pre-agreement statement and quotation must be in Form 20 in terms of Regulation 28. The First Respondent failed to provide the consumers with pre-agreement Statements and Quotations in contravention of section 92 of the NCA read with Regulations 28.
24. The Applicant further argues that, should the First Respondent contend that it has kept and maintained records of the pre-agreement statements and quotations, then it is in contravention of section 170 read with Regulation 55(1) (b) (iv), as these documents were not available and /or were not furnished during the investigation.
25. Retention of Consumer Instruments
26. Section 91 (b) (i) provides that a credit provider must not request or demand a consumer to give the credit provider temporary or permanent possession of an instrument referred to in Section 90(2) (I)(i) other than for the purpose of the identification or to make a copy of the instrument. During the investigation both Respondents were found to be in possession of bank cards, identity documents as well as SASSA cards. This conduct of the Respondent is in contravention of Sections 91 (b) of the NCA.
27. Prohibited Collection and Enforcement Practices
28. In terms of Section 133(1) (a) a credit provider must not make use of any document, number or instrument referred to in Section 90(2) (I) when enforcing the collection of debt in a credit agreement. The Respondents have requested or demanded consumers to hand in or surrender their identity documents, credit or debit cards, bank account or automatic teller machine access cards for the purpose of using these instruments to collect or enforce the credit agreements.
29. As a result of the conduct being an offence in terms of Section 133 of the NCA, a criminal charge was laid against the First and Second Respondents at the Thohoyandou Police Station under Case reference 102/02/2016. According to the Applicant, the matter is being attended to, by the National Prosecuting Authority.
30. The Credit Agreement of the Respondents
31. Section 93(1) provides that the credit provider must deliver to the consumer, without charge, a copy of the document that records their credit agreement, transmitted to the consumer in a paper form or in a printable electronic form.

32. In terms of Section 93(2), a document that records a small credit agreement must be in the prescribed form. Regulation 30(1) provides that a document that records a small credit agreement must contain all the information as reflected in Form 20.2. The Respondents did not furnish consumers with credit agreements in the prescribed form, in contravention of section 93(2) read with Regulation 30(1).
33. Contraventions Relating to Cost of Credit
34. The amount of interest levied by the First Respondent on credit agreements exceeds the maximum limit allowed by the NCA, to be charged for such agreements. Annexures 'C1 –C9' to the investigation report illustrate that the consumers were levied interest at a rate which exceeds the actual prescribed rate of five (5) % per month on short term loans, to wit, 40%. The conduct of the First Respondent amounts to a contravention of section 100(1) (c) and section 101(1) (d) (ii) read with Regulation 42(1)
35. CONSIDERATION OF THE APPLICABLE LAW TO EVIDENCE ON A DEFAULT BASIS
36. As previously stated, the Respondents did not attend the hearing, nor did they make any representations to the Tribunal. The evidence of the Applicant remains uncontroverted and will be considered on a default basis, referenced against the following provisions of the NCA:
- a. Rule 13 states:-
37. "Any Respondent to an application or referral to the Tribunal may oppose the application or referral by serving an answering affidavit on :-
- i. the Applicant; and
- ii. every other person on whom the application was served".
- b. (2)" An answering affidavit to an application or a referral other than an application for interim relief must be served on the parties and filed with the Registrar within 15 business days of receipt of such party to the application. "
38. Rule 13(5) provides as follows:
39. "Any fact or allegation in the application or referral not specifically denied or admitted in the answering affidavit, will be deemed to have been admitted"
- Therefore, in the absence of any answering affidavit filed by the Respondent, the Applicant's application and all of the allegations contained therein are deemed to be admitted.
40. The allegations made by the Applicant regarding the Respondent's conduct are therefore accepted by the Tribunal as allegations made on the basis of Rule 13(5) which provides that:

- i. “Any fact or allegation in the application or referral not specifically denied or admitted in the answering affidavit, will be deemed to have been admitted.”
- 41. The Applicant provided evidence of the Registrar’s Set Down Notice by email to the Respondent’s attorneys, dated 18 August 2017 as proof of service, and a copy of a registered mail sent to the Respondent. The Respondent has not filed any answering affidavit or a response to the application set down by the Tribunal on even date. As previously stated above, the matter was initially postponed to May 2017 to allow the parties to reach a settlement agreement, or for the Respondent to file a condonation application for the late filing of an answering affidavit, in order for the matter to proceed to a hearing later. The Respondents’ condonation application was dismissed by the Tribunal member adjudicating the application.
- 42. Rule 25(3) provides as follows:
 - i. “(2)
 - ii. (3) The Tribunal may make a default order-
 - a. after it has considered or heard any necessary evidence and
 - b. if it is satisfied that the application documents were adequately served. “
- 43. In *Sebola v Standard Bank of South Africa*[5] , the following statement bears reference:
 - i. “The answer has to be that it applies to a situation where the consumer’s current whereabouts are not known to the credit provider. That is why section 168(b) says that the address to which the notice, order or document must be sent by registered post is his last known address. This means that, if a notice is sent by registered mail to the address that a consumer gave to the credit provider in the agreement as his *domicilium citandi et executandi*, that service will not be proper service where the notice is returned from that address as unclaimed and the credit provider is aware of another address as the consumer’s last known address. In such a case the credit provider would be obliged to send the letter by registered mail to the consumer’s last known address even if that address is not given in the credit agreement as his *domicilium citandi et executandi*”.
- 44. In determining whether the documents were adequately served on the Respondent, one has to consider the requirements for the serving of documents in terms of the Rules. Rule 30 states:
 - a. “30. Service and proof of service of documents.—(1) A document may be served on a party by —
 - i. delivering it to the party; or
 - ii. sending it by registered mail to the party’s last known address.

- b. (1A) any document, application or affidavit served or delivered by a party must contain at the front thereof a filing notice in accordance with form TI.r30A and must be filed at the Tribunal.
- c. (2) parties may expedite service by sending notices and documents by fax or e- mail, provided that this is followed within 3 business days with service in accordance with rule 30 (1) (a). Parties to proceedings may agree in writing to service of notices and documents by way of fax or e-mail only, in which event service in terms of rule 30 (1) will not be required.
- d. (3) proof of service in terms of:
 - i. rule 30 (1) (a), must be by—
 - (i) a signed acknowledgment of receipt by the party, a representative of the party, or a person who is 16 years or older residing or employed at premises occupied or utilized by the party; or
 - ii. (ii) an affidavit by the person who served the document if the person to whom it was delivered refused to sign for it;
 - iii. rule 30 (1) (b), must be the postal agent's receipt with the tracking code of the document;
 - iv. rule 30 (2), must be a copy of the transmission report, to be followed subsequently with proof in terms of rules 30 (3) (a) or (b).
 - e. (4) The Tribunal may serve documents in accordance with rule 31. [Sub-r. (4), substituted by GNR.203 of 13 March 2015.]
 - f. (5) If any party cannot serve a document or notice in accordance with these rules, it may apply to the Tribunal in Form TI.r30 for an order of substituted service.”
- 45. The Applicant further submitted that the evidence before the Tribunal is that the Tribunal had sent the Notice of Complete Filing as well as the Notice of Set down to the Respondents' attorneys. [6]
- 46. The Tribunal is therefore satisfied that the requirements for a default hearing have been met. Furthermore the Tribunal is satisfied with the evidence presented during the hearing and on the papers filed by the Applicant, in order to make an appropriate ruling.
- 47. THE RELIEF SOUGHT - ADMINISTRATIVE PENALTY
- 48. One of the main prayers of the Applicant is for the Tribunal to impose an administrative fine against the Respondent, considering the seriousness and the gravity of the contraventions.
- 49. Section 151(3) of the NCA provides that in considering the imposition of an administrative fine, certain factors must be considered by the Tribunal, as elaborated hereunder by the Applicant:
 - a. 49.1 The nature duration, gravity and extent of the contraventions:

- i. The Applicant argues that the small sample of files extracted from the records kept by the Respondent and the nature and extent of the contraventions identified from that batch, warrants serious action against the Respondents. These amount to, inter alia, reckless credit granting. Consumers are exploited by additional unlawful interest, and the gravity of these contraventions depicts the Respondent's callous disregard of the NCA
- b. 49.2 Loss or damage suffered as a result of the contraventions:
 - i. The Respondents partook in a regulated activity and misrepresented itself as being authorised to conduct such an activity. The result therefore is that the credit agreements concluded with consumers are deemed to be unlawful. Consumers have suffered financial loss by being induced to pay 35% more interest than what is legally permissible. The respondents' ill-begotten profit translated to each consumer's loss. Although the total loss has not been computed but given that it appears to have been the Respondents' modus operandi to charge 40% interest and given the number of Identity Documents that were recovered from the Respondents, it is clear that, collectively, the consumers suffered a huge loss.
- c. 49.3 The behaviour of the Respondents
 - i. Both Respondents are unregistered credit providers who showed no sympathy to their victims. Their actions were aimed at personal enrichment by exploiting consumers in the most selfish and callous manner without any regard to the consumers' personal circumstances.
- d. 49.4 The market circumstances in which the contravention took place:
 - i. The reason submitted by the Applicant for the initiation of the investigation clearly indicates that non-compliance with the provisions of the NCA was prevalent in the Limpopo area where the Respondents' businesses are located. The keeping of the SASSA cards by the Respondents shows that the Respondents exploited vulnerable consumers who are dependent on social welfare.
- e. 49.5 Level of profit derived from the contraventions:
 - i. A substantial profit has been derived from the activities undertaken by the Respondents. The monies received were at the expense of the consumers and substantially benefited the Respondents when they were not entitled to receive it
- f. 49.6 Degree of co-operation between the Respondents and Applicant:
 - i. The Respondents provided the inspector with the requisite information and co-operated during the course of the investigation. However, the Respondents, notwithstanding the seriousness of the contraventions, did not make effort to resolve these issues, or take the Applicant and/or the Tribunal in their confidence by demonstrating their willingness to assist in the resolution of these issues. The Respondents did not even bother to attend the hearing to show their remorse for these activities, nor give reasons why they could not make

representations to the Tribunal.

g. 49.7 Prior contraventions committed by the Respondents:

i. There were no prior investigations or enforcements instituted by the Applicant against the Respondents. The nature and duration of the contraventions however show that the conduct of the Respondents has been going on for a substantial period of time prior to the investigation.

50. According to the Applicant, the gravity of the contraventions perpetrated by the Respondents justifies the Applicant's prayer to have an administrative fine imposed by the Tribunal. Wherefore, in light of the Respondents' repeated contraventions of the NCA the Applicant prays that the Tribunal makes an order in the following terms:

51. Declaring the First Respondent to be in repeated contravention of the following sections of the NCA:

51.1

Section 40(1) read with Section 42(1) and 40(3):

51.2

Section 81(2);

51.3

Section 82(1);

51.4

Section 90(2)(I);

51.5

Section 92 read with Regulations 28;

51.6

Section 93(2) read with Regulations 30(1);

51.7

Section 100(1)(c);

51.8

Section 101(1)(d)(ii) read with regulation 42(1);

51.9

Section 133 (1)(a);

51.10 Section 170 read with Regulation 55(1) (b) (iv)

52. Declaring the Second Respondent to be in repeated contravention of section 133 read with section 90 (2) (I) and 91 (b) (i).
53. Declaring the repeated contraventions referred to above, conduct which is prohibited in terms of section 150(a) of the NCA;
54. Interdicting the Respondents from future breaches of the NCA;
55. Imposing an administrative fine against each of the Respondents in the sum of R1 000 000, 00 (one million Rand) or 10% of the Respondent's annual turnover whichever is the greater;
56. Order the Respondents to:
57. Within 30 days appoint an independent auditor, at its own costs in order to determine and compile a list of all the consumers who were charged interest that exceeded the amount consistent with the NCA by the Respondents;
58. Once the aforesaid auditor has compiled the abovementioned list and made such determinations, the Respondents to refund these amounts to each affected consumer within 30 days from the date of the auditor's report; and
59. Further, once the refunds have been made as stated above, the Respondents are to provide a written report to the Applicant detailing the identity of the consumers and the refunds made. This report is to be provided to the Applicant within 120 days after the order has been obtained;
60. THE TRIBUNAL'S FINDINGS IN CONSIDERATION OF THE EVIDENCE
61. The Applicant alleges that the Respondents are in contravention of the NCA, and should be penalized for such conduct. Section 151(1) of the NCA provides:

61.1.1 "The Tribunal may impose an administrative penalty in respect of prohibited

61.1.2 or required conduct in terms of this Act or the Consumer Protection Act, 2008".

61.2 It is within its powers that the Tribunal has this discretion, hence the appropriate use of the word "may". The Tribunal, in arriving at a decision whether or not an administrative penalty should be imposed, must consider whether or not the Applicant addressed all the factors required by the Act in order to impose an administrative penalty. These considerations should also be applied to the present matter, individually interrogated in order to make the appropriate decision. When determining the amount of the penalty, the Tribunal must ensure that the penalty imposed is proportional in severity to the degree of blameworthiness of the offending party, the nature of the offence and its effect on the South African economy in general and consumers in particular.

62. In the matter of Harmony Gold Mining Limited; Durban Roodepoort Deep Limited vs. Mittal Steel South Africa Limited, Macsteel International Holdings[7] the Competition Tribunal made it clear that the primary purpose of an administrative penalty is deterrence.
63. Section 151(2) of the NCA states -:
- 63.1.1 An administrative fine imposed in terms of this Act or the Consumer Protection Act, 2008, may not exceed the greater of –
- 63.1.2 10 per cent of the respondent's annual turnover during the preceding financial year; or
- 63.1.3 R1 000 000
64. In the National Credit Regulator v/s Werlan Cash Loans[8], the Tribunal held that even though the Applicant did not present proof of the Respondent's annual return, this factor did not prevent the Tribunal from imposing an administrative penalty. The Tribunal found the Respondent to have engaged in prohibited conduct in the Werlan-matter and imposed an administrative penalty. [9]
65. In the present case, the Applicant approached the Tribunal not for the cancellation of the registration of registrants (as in the Werlan- matter), because it is common knowledge that the Respondents are unregistered lenders, but for the imposition of an administrative penalty due to the alleged repeated contraventions of the NCA by the Respondent.
66. As in the present case, the annual turnover of the Respondent is unknown. Section 151(2) (b) which refers to "the penalty not exceeding R1 000 000." provides that where the annual turnover is unknown, the option the Tribunal has, may be to impose this amount as a penalty. The key word is "OR", and has its normal disjunctive meaning. The effect thereof is that the Tribunal may either award a penalty of 10% of the Respondent's annual turnover OR R1000 000.00 whichever amount is the greatest.
67. The Competition Appeal Court has held that "the imposition of a penalty should not only promote the important objective of deterrence but that sight should not be lost of fairness to the offending party. In particular, a penalty should not be imposed to destroy the business of the offending party, a point confirmed by section 59(2) of the Competition Act[10] which places a cap on the amount of a penalty which may be imposed".[11]
68. Section 151(2) of the NCA as noted above, is similar to section 59(2) of the Competition Act. Both sections limit the extent of the penalty which may be imposed on an offending party in terms of the relevant Acts. Unfortunately, section 59(2) of the Competition Act provides only that an administrative penalty may not exceed 10% of the firm's annual turnover. No mention is made of an alternative maximum amount such as that appearing in section 151(2) of the NCA.

69. It was held in the matter of *SPC v Competition Commission*[12] referring to section 59(2) of the Competition Act that “the wording of this section is indicative of a clear structure to be followed in the determination of an administrative penalty”.

The same can be said of the provisions of Section 151(2).[13]

70. As explained above, where no evidence regarding annual turnover is available as in the present case, the Tribunal still has the option to award a penalty not exceeding R 1 000 000.00. The question to be dealt with is the considerations to be taken into account when determining the amount that is payable by an offending party. Due to the unique nature of the legislative provisions dealing with administrative penalties, the only similar mandate to consider is that of the Competition Tribunal. As stated, section 59(2) of the Competition Act however only provides that an administrative penalty may not exceed 10% of the firm’s annual turnover, no mention is made of an alternative maximum amount such as that appearing in section 151(2) of the NCA.
71. However, the considerations to be borne in mind when deciding on the amount of such a penalty remains the same as those considered by the Competition Tribunal in various matters where penalties were based on annual turnover. In most matters, the Competition Tribunal has considered factors that may lead to a reduction of the penalty that may have been imposed using the 10% of annual turnover-calculation. The Tribunal may also consider those factors.
72. Further, when determining an amount to be imposed as administrative penalty, the Tribunal must consider the legislation from which it derives its own mandate and consider the factors in section 151(3) of the NCA. These factors have been dealt with above, as canvassed in the Applicant’s submissions. I do not intend to repeat them.
73. The market circumstances in which the contraventions took place are a critical factor to be considered. The areas where these contraventions occurred are those with vulnerable consumers who may not be aware of their rights relating to access to credit, or are unaware of such practices being unlawful and contrary to the legislative prescripts. The Respondent has benefitted at the expense of these vulnerable consumers. The NCA provides specifically for the assistance of vulnerable consumers and more specifically people who

are historically disadvantaged as provided for by section 2(6) of the Act. The consumers in these areas may not be sophisticated and experienced role players in the credit economy. This, in itself is an aggravating factor to be considered, regard being had to the substantial benefit the Respondent derived, by collecting additional interest from consumers, in direct and flagrant disregard of the law. It must be clear that the decision to impose an administrative fine should not just be reached for the sake of punishing the transgressors of the Act, but to deter them from future contraventions. In this matter the Respondent took advantage of vulnerable rural consumers to achieve its own ends.

74. The Respondent has displayed a total disregard of the NCA by engaging in conduct that renders its actions inexcusable at the ignorance and detriment of unsuspecting consumers. Respondent's conduct also is unlawful by subjecting consumers to illegal credit agreements. The fact that the Respondents are not registered with the NCR, does not exonerate the Respondent from adhering to the provisions of the NCA. In fact, the Tribunal views the fact that the Respondent engaged in the activities of a credit provider, whilst not registered as such, as aggravating.
75. The penalty imposed should be proportional in severity to the degree of blameworthiness of the offending party, the nature of the offence and its effect on the South African economy in general and consumers in particular.
76. The Tribunal should consider both mitigating and aggravating factors before making a finding.[14] The mitigating factors are not present in this case.
- 77.

CONCLUSION

78. The Tribunal has considered all the relevant submissions substantiating the Applicant's prayers in terms of section 140 of the Act. The Respondent has not opposed the allegations levelled against it and did not attend the hearing, nor did it send a representative. The Applicant's version of the alleged contraventions by the Respondent remains unchallenged and uncontroverted.
79. The Respondent is found to have engaged in prohibited conduct by contravening the relevant provisions of the NCA by engaging in reckless lending; retaining consumer instruments; overcharging consumers amounts in excess of the prescribed fees and interest, thereby benefitting at the expense of the affected consumers.
80. Turning to the issue of the administrative fine, the Applicant has made out a case for the Tribunal to consider the imposition of an administrative penalty in lieu of the contraventions committed by the Respondent. The Tribunal is competent to make a determination whether or not to impose a penalty in these circumstances.
81. ORDER
82. Accordingly, the Tribunal makes the following order:
83. In terms of section 150(g) of the Act, the Respondents' repeated contravention of the Act and Regulations is declared prohibited conduct. These contraventions relate to the following specific provisions of the Act:

83.1.1

Section 40(1) read with Section 42(1) and 40(3):

83.1.2

Section 81(2);

83.1.3

Section 82;

83.1.4

Section 82(3);

83.1.5

Section 91(b)(i) read with section 90(2)(I);

83.1.6

Section 92 read with Regulations 28;

83.1.7

Section 93(2) read with Regulations 30(1);

83.1.8

Section 100(1)(c);

83.1.9

Section 101(1)(d)(ii) read with regulation 42(1);

83.1.10

Section 133 (1)(a); and

83.1.11

Section 170 read with Regulation 55(1) (b) (iv)

83.2 the Respondents are hereby interdicted from engaging in the conduct declared prohibited;

83.3 the Respondents are further ordered to:

83.3.1 within 30 days, of receiving this judgment; appoint an independent auditor at their own cost in order to determine and compile a list of all the consumers who were charged interest that exceeded the amount consistent with the NCA;

83.3.2 once the aforesaid auditor has compiled the abovementioned list and made such determinations, the Respondents are to refund these amounts to each affected consumer within 30 days from the date of the auditor's report; and

83.3.3 further, once the refunds have been made as stated above, Respondents are to provide a written report to the Applicant detailing the identity of the consumers and the refunds made. This report is to be provided to the Applicant within 120 days after the order has been obtained;

83.3.4 59.3.4 the Respondents are each directed to pay an administrative fine in the amount of R 500 000, 00 (Five Hundred Thousand Rand) within sixty days of the handing down of this order.

83.4 59.4 There is no order as to costs

84. Thus done and handed down on this 8th day of November 2017.

[signed]

Adv FK Manamela

TRIBUNAL MEMBER

Ms H Devraj (Tribunal Member), concurring.

Minority

Judgement

1. I concur with the majority judgement on all aspects of the judgement save for the amount of the administrative penalty.
2. The Respondents engaged in serious and numerous contraventions of the NCA to the detriment of a large number of consumers. Their actions made mockery of the NCA and its purposes.
3. The Tribunal needs to register its utter contempt for the actions of the Respondents and send out a strong and clear message that failure to register as a credit provider by persons engaged in credit granting and non-compliance with the NCA which includes charging excessive and unlawful interest rates and taking consumers' identity documents, bank cards and SASSA cards will be subjected to hefty administrative penalties.
4. The fact that the Respondents are not registered as credit providers means that there is no risk that an administrative penalty will result in the removal of an effective lawful competitor that benefits consumers.
5. However, the fact that the owners of the Respondents are spouses and co-operated with the Applicant's inspector militates against the imposition of the maximum administrative penalty amount of R1000 000, 00 on each respondent that the Tribunal may impose where evidence of the total annual turnover has not been presented.
6. In the circumstances of this case, an administrative fine in the amount R750 000, 00 by each respondent is appropriate.

Mr. A. Potwana (Tribunal Member)

[1] Condonation ruling handed down by Tribunal member, Ms D Terblanche dated 18 July 2017, page 6, paragraph 19 thereof.

[2] Rule 25 provides: “(2) An applicant may make application by way of form T.I r25 (2) for purposes of obtaining a default order, if no response to the application was filed within the time stated in the application.

(3) The Tribunal may make a default order-

(a) After it has considered or heard any necessary evidence and

(b) If it is satisfied that the application documents were adequately served. “ (underlining, own emphasis)

[2] Rule 25 provides:

“(2) An applicant may make application by way of form T.I r25 (2) for purposes of obtaining a default order, if

no response to the application was filed within the time stated in the application.

(3) The Tribunal may make a default order-

(a) After it has considered or heard any necessary evidence and

(b) If it is satisfied that the application documents were adequately served. “ (underlining, own emphasis)

[3] see Annexures C1-C9 of the Investigation Report compiled by Mr Mojalefa Lekoko, an inspector appointed by the Applicant in terms of section 25 of the National Credit Act, 34 of 2005

[4] ditto

[5] CCT/98/11[2012] ZACC 11.

[6] armadiaattorneys@gmail.com

[7] (13/CR/FEB04) [2007] ZACT 21.

[8] NCT/3867/2012/57.

42. [9] In the Werlan-matter, the National Credit Regulator (Applicant) brought an application before the Tribunal for the cancellation of the registration of the Respondent as a credit provider in terms of Section 57 of the NCA. The Applicant however duly stated in its founding affidavit that the Respondent is not registered as a credit provider and sought the following order from the Tribunal:(a) Declaring the repeated contravention of the NCA by the Respondent in terms of section 150(a); (b) Declaring the Respondent’s non-compliance with the compliance notice an offence in terms of section 54(5) of the Act;(c) Imposing an

administrative fine against the Respondent in terms of section 151 of the NCA.

[10] Act 89 of 1998

[11] Federal Mogul Southern Africa v Competition Commission [2005] 1 CPLR 50 CPAC at 67.

[12] Southern Pipeline Contractors and Conrite Walls (PTY) Ltd v Competition Commission (105/CAC/Dec10, 106/CAC/Dec10) [2011] ZACAC 6.

[13] National Credit Act 34 of 2005

[14] Competition Commission v Aveng (Africa) Limited (84/CR/DEC09)

[2012] ZACT 32.

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Prepared on 11 October 2026 · Esheria