

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Circle Way Trading 10 (Pty) Ltd (NCT/158491/2020/57(1))

[2021] ZANCT 7 (16 April 2021)

[2021] ZANCT 7

COURT

National Consumer Tribunal

BEFORE

MC Peenze, T Woker, B Dumisa

CASE / FILE NUMBER

NCT/158491/2020/57(1)

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IN THE NATIONAL
CONSUMER TRIBUNAL
HELD AT CENTURION

Case number: NCT/158491/2020/57(1)
In the matter

between: NATIONAL CREDIT
REGULATOR
APPLICANT
and
CIRCLE WAY
TRADING 10 (PTY) LTD
RESPONDENT
(NCR Registration
Number: NCRCP: 646)
(CIPC Registration
Number: 2007/001 143/07)

Coram: Dr MC
Peenze – Presiding
Tribunal member
Prof T
Woker – Tribunal member
Prof B
Dumisa – Tribunal member
Date of
hearing – 8 April 2021
Date of
judgment – 16 April 2021

JUDGMENT**AND REASONS****APPLICANT**

1. The Applicant is the National Credit Regulator (the Applicant), a juristic person established in terms of section 12 of the National Credit Act, 2005 (the Act) to regulate the consumer credit market and ensure compliance with the Act, with its principal business address at 127 - 15th Road, Randjespark, Johannesburg, Gauteng.
2. At the hearing the Applicant was represented by Ms. Enica Mpete, a Legal Advisor in the employ of the Applicant, assisted by Ms. Leanne Swartz, a Senior Legal Advisor of the Applicant.

RESPONDENT

3. The Respondent is Circle Way Trading 10 (Pty) Ltd, a private company duly registered in terms of the company laws of the Republic of South Africa, with company registration number: 2007/001 143/07 (the Respondent).
4. The Respondent has been registered as a credit provider in terms of section 40 of the Act with the Applicant since 17 January 2017 under the registration number

NCRCP646. The Respondent voluntary liquidated on the 17th of July 2020.

5. However, as per the Applicant's records, the Respondent remains registered with the Applicant, with its registered business address as 25 Flamara Village, 14 Protea Road, Garden View, 2047 and its registered postal address being PO Box 2075, Bedfordview, 2008.
6. There was no appearance by the Respondent or its representative at the hearing.

JURISDICTION

7. In addition to its other powers in terms of the Act, section 150 gives the National Consumer Tribunal (the Tribunal) the power to make an appropriate order concerning prohibited or required conduct in terms of the Act or the Consumer Protection Act, 2008 (the CPA).
8. This power includes declaring conduct to be prohibited in terms of the Act; interdicting prohibited conduct; confirming an order against an unregistered person to cease engaging in an activity that must be registered in terms of the Act; requiring payment to the consumer of an excess amount charged together with interest set out in an agreement, or any appropriate order required to give effect to the Act.

TERMINOLOGY

9. A reference to a section in this judgment refers to a section in the Act. A reference to a Regulation refers to the National Credit

Regulations, 2006 (the Regulations).[1] A reference to a form refers to a Form as prescribed in the Regulations.

APPLICATION TYPE AND THE RELIEF SOUGHT

10. This application is in terms of section 57 (1) to cancel the Respondent's registration as a credit provider.[2]
11. The Tribunal is required to determine whether the Respondent has engaged in prohibited conduct[3] by having repeatedly contravened the Act, and Regulations, and should be deregistered as a credit provider. The Tribunal is also required to impose an administrative penalty on the Respondent and appoint an auditor to conduct an audit into the Respondent's practices as a credit provider.
12. The allegations of prohibited conduct will become apparent in the course of this judgment.

DEFAULT HEARING

13. This matter was set down as unopposed, because the Respondent did not file any answering affidavit. During the hearing, the Applicant confirmed the proper service of its application and argued that the hearing should continue on a default basis.
14. The Applicant served its application via registered post on the 26th of March 2020. The Tribunal issued a notice of filing to both the Applicant and the Respondent's respective email addresses on the 7th of April 2020. Hereafter, the Applicant received correspondence from Mr Landau of Landau Attorneys, who identified himself as the

Respondent's Attorney. Mr Landau advised that the Respondent was not in receipt of the application. Accordingly, the Applicant duly served the application again via email after the parties agreed to service via email.

15. The Respondent's Attorneys acknowledged receipt of the application and informed that the Respondent closed its business and was undergoing voluntary liquidation. They subsequently provided a copy of the certificate of appointment of the provisional liquidators and a letter from the CIPC confirming the Respondent to be undergoing voluntary liquidation. From the certificate of appointment, Mr Harry Kaplan and Karen Keivy were appointed as provisional liquidators.
16. After obtaining consent from the provisional liquidators to service via email, the Applicant served the application again via email on the 15th of September 2020 in accordance with Rule 30 (2) of the Act. The Applicant also served the Application on Mr Leon Naude, the person assigned by the provisional liquidators to receive all correspondence on their behalf.

17. The Tribunal, due the uncertainty pertaining to the COVID pandemic and lockdown regulations, suspended the calculation of pleadings during the lock down period and pleadings were reopened on the 9th of September 2020, from which date the Respondent had 15 business days to file an opposing affidavit. The Respondent did not file any opposing affidavit and a notice of set down subsequently followed on the 8th of October 2020, with the matter being set down for hearing on the 8th of April 2021.
18. The Applicant extended a courtesy to the Respondent by emailing the notice of set down to both Mr Landau and Mr Naude on the 9th of October 2020, informing them of the unopposed application. A further courtesy email followed on the 30th of March 2021, in which the Applicant resubmitted copies of the application and notice of set down to the Respondent's representatives. Also, on the 6th of April 2021, the Respondent made a courtesy telephone call to the liquidators' offices, which was followed by an email confirming that the matter was set down for hearing on the 8th of April 2021.
19. The Applicant submitted that, once it became aware that the Respondent applied for voluntary liquidation, it immediately contacted the Liquidators to advise them of the pending application with the Tribunal. The Applicant proceeded to serve a copy of the application on the liquidators as stated above, together with the notice of set down.
20. The Applicant argued that it duly notified the liquidators of the application and that the hearing would proceed on a default basis if they would fail to oppose the matter.
21. The Tribunal considered the Applicant's submissions and the proof of service provided to the panel. The Tribunal also found that the liquidator's knowledge of the matter was pertinently clear from an email by Mr Naude, received by the Applicant on the 15 September 2020, informing the Applicant that he is dealing with the liquidation process of the Respondent and that correspondence in this regard should be forwarded to him.
22. In addition, Ms Fatima from the liquidators' offices confirmed in an email dated 6 April 2021 that the liquidators received the application and were aware of the hearing. In this email, she also informed the Applicant of the passing of one of the provisional liquidators of the Respondent and that a new liquidator was to be appointed. However, from the information provided to the Applicant, the joint liquidator passed on in January 2021 and there were no submissions why the remaining liquidator could not have attended to the matter before the Tribunal. Also, the Applicant received this information only two days before the hearing. In response to the said email, the Applicant extended further courtesy on the 7th of April 2021 and still advised both the Respondent's Attorney and the liquidators of the correct procedures to follow should they wish to request a postponement. No request for postponement followed.
23. The Tribunal noted that the Respondent voluntarily applied for liquidation on the 17th of July 2020, more than three months after the Applicant filed its application with the Tribunal.

24. The process of requesting provisional liquidation has no bearing on the Tribunal's powers to adjudicate on this matter. Since the application was served, neither the Respondent, its attorney or the liquidators have filed any opposing papers nor a condonation application. More than 9 (nine) months have passed since the application was served on the Respondent's Attorney and more than 5 (five) months since the liquidators were also served.
25. It was the responsibility of the Respondent's Attorney to inform liquidators of the pending proceedings before the Tribunal, as proceedings started before the Respondent applied for voluntary liquidation. The Applicant also advised the liquidators of the date of the hearing, despite the Applicant not being obliged to do so.
26. Section 359 (2) (a) of the Companies Act, Act 1973 as amended, indicates that a mere notice in writing is sufficient notice to a liquidator.[4] It is not the Legislature's intent to request that the liquidator should be given notice in terms of Section 359 (2) of the Act, if the liquidator already had knowledge of the action that has been instituted.
27. Rule 13 (2) further stipulates that an answering affidavit to an application or a referral must be served on the parties and filed with the Registrar within 15 business days of receipt of the application by such party. Despite having had ample time to file an answering affidavit or condonation application, the Respondent did not do so. The Respondent further failed to comply with Rule 34 in that it failed to serve and file a condonation application explaining its failure to serve an answer nor is there any request for an extension of time to file its answer in order for its side to be heard by this Tribunal.
28. The Tribunal noted that the Respondent was represented by an attorney, who should be aware of the Regulations for matters relating to the functions of the Tribunal and Rules for the Conduct of matters before the National Consumer Tribunal (the Tribunal Rules).[5]
29. After considering all the evidence and arguments, the Tribunal was satisfied that the application was adequately served on the Respondent in accordance with Rule 30 of the Tribunal Rules and that the issue of service is therefore moot.
30. Rule 24 (1) (b) of the Tribunal Rules subsequently empowers the Tribunal to continue with the proceedings in the absence of the Respondent, while Section 142 of the Act requires the Tribunal to conduct its hearings as expeditiously as possible and in accordance with the principles of natural justice. Accordingly, the matter proceeded on a default basis.
31. Rule 13 (5) of the National Consumer Tribunal Rules makes it clear that any fact or allegation in an application or referral not specifically denied or admitted in an answering affidavit, will be deemed to have been admitted:

"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."

32. In the absence of an answering affidavit, the Respondent has effectively admitted all the allegations rendered against it and the Applicant's version remains uncontested. Accordingly, the Applicant's application and all of the allegations contained therein were deemed to be admitted.

FACTUAL

BACKGROUND

33. 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.
34. This application flows from an investigation conducted into the business activities of the Respondent. On or about 16 September 2019 the Applicant initiated a complaint in its own name against the Respondent in terms of Section 136 (2) of the Act and subsequently authorised an investigation into the activities of the Respondent in terms of Section 139 (1) (c) of the Act.
35. The complaint was initiated in response to advertising material used by the Respondent on social media, which advertising material came to the Applicant's attention. The Respondent's advertisement contained the words "Blacklisted Welcomed", which statements or words are prohibited in terms of Section 76 read with Regulations 21 (6) and (7) of the Act.
36. The content of the said advert raised serious concerns regarding the business practices of the Respondent and a reasonable suspicion was established that the Respondent may be extending credit to consumers without conducting proper and accurate affordability assessments in accordance with the Act and as such the Applicant had a duty to investigate the Respondent.
37. The CEO of the Applicant duly appointed Jacob Thembinkosi Sabela (Sabela) and Kgadi Sepuru (Sepuru) in terms of Section 25 of the Act as inspectors for the purposes of carrying out the investigation into the Respondent on 29 October 2019.
38. An onsite investigation was conducted by the inspectors on or about the 6th of December 2019 at the Respondent's business premises at Unit 1, 20 Plantation Road, Eastleigh, Edenvale. During the investigation, interviews were conducted with Amy Hopkins ("Hopkins"), identified to be the Personal Assistant of the Respondent and Boitumelo Mukhabela ("Boitumelo") identified to be the Sales Manageress of the Respondent. An interview was conducted with both Hopkins and Boitumelo. A sample of ten (10) consumer files were provided to the inspector for assessment purposes.

39. It was upon these sampled files referred to above that contraventions were identified. The salient points of the investigation report and the findings of prohibited conduct were clearly set out within the Applicant's Founding Affidavit. It sets out facts to support the allegations contained in the investigation report, applies the law to said facts and makes a conclusion where after the applicable relief is sought.
40. Due to the severity of the contraventions, the Applicant requested the conduct of the Respondent to be declared prohibited and to have an administrative fine imposed on the Respondent and its registration with the Applicant cancelled.
41. The Tribunal turns to consider the contraventions arising out of the reports.

CONTRAVENTIONS OF THE ACT

Failure to conduct proper affordability assessments and a pattern of reckless credit

42. Section 81 (3) of the Act provides that a credit provider must not enter into a reckless credit agreement with a prospective consumer.
43. In terms of Section 80 (1) (a) of the Act, a credit agreement is reckless if at the time that the agreement is made, 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.
44. In the sampled files annexed to the investigation report, marked as Annexures "I1", "I4", "I6", "I8" and "I9", the Respondent failed to take into consideration open accounts as listed on the credit bureau

reports, nor were such accounts included in the Respondent's calculations. The Respondent, despite the absence of documentary evidence to support the allegations that loans have been repaid or disputes have been declared, excluded loans from its calculations without a sufficient basis to make such exclusions and without verifying such information and alleged representations. The notes made by the Respondent or its agent are unverified and unsubstantiated.

45. In Annexure "I1"[6] the consumer had the following two open accounts which were not included in the calculations:[7]

- M-Tel service - R299
- Capfin - R1 266

46. In Annexure "I4"[8] the consumer had the following two open accounts:

- Jet store - R951
- African Bank - R447

47. In Annexure "I6"[9] the consumer had the following open account:

- FNB Loan - R4 195

It is evident that the Respondent failed to take into account any of the open accounts at the time of and prior to extending the loan to the consumer.

48. The Applicant submitted that there are no documents to support the allegations that loans have been repaid or that disputes have been declared as per notes made by the Respondent. The Respondent excluded these loans from its calculations without sufficient basis to make such exclusions and without verifying such information and alleged representations. According to Annexure "I3",

the Respondent failed to obtain a credit bureau statement at the time of and prior to extending the loan to the consumer and as such none of the open accounts as per the report was considered. The aforesaid fact is evident if one refers to the date the report was obtained as well as to the enquiry history stipulated within the report.

49. Therefore, the Respondent contravened Section 81 read with Regulation and 23 A (13) of the Act.

50. The Respondent failed to conduct proper affordability assessments in that it failed to make a proper calculation of the consumers' existing financial means, prospects and obligations as envisaged in Sections 81 read with Regulation 23 A of the Act. According to the documentary evidence provided by the Applicant, the Respondent failed to include in its calculations all the monthly obligations as it appears on consumers' bank statements.

51. According to Annexures "12" and "17", the Respondent relied on outdated bank statements. As such, the Respondent could not have been in a position to accurately determine the consumers' current financial position. The following examples were noted by the Tribunal:

- In Annexure "12" credit was granted on 10 October 2019 and the bank statements are for the period July to 10 August 2019; and

- In Annexure "17" credit was granted on 2 October 2019 and the bank statements are for the period May to 24 August 2019 .

52. It also appears that the Respondent relied on unsubstantiated and unverified representations. Further to this, the supposed affordability conducted by the Respondent, merely consists of listed amounts without any calculation of the actual total and or discretionary income available after the loan and as such cannot be considered to be a proper affordability.

Section 81 (2)

- (a) (iii) read with Regulation 23A (3), 23A (8) and 23A (12) (a) and
- (c) of the Act

53. The Respondent failed to utilise the minimum expense norms table in contravention of Regulation 23 A (9) and (10) of the Act and this conduct has been observed in all the sampled files annexed to the investigation report, marked as annexures "I1" to "I10". The aforesaid is evident based on the fact that no such calculation could be observed in any of the sampled files.
54. Further to this, with reference to Annexure "I8", it is clear that the minimum expense norms table was not applied, nor was there any evidence to suggest that the questionnaire referred to in Regulation 23 A (11) was completed, which would have allowed for an amount for less than the minimum expense norms amount.
55. Based on the aforesaid, the Respondent failed to conduct proper or any affordability assessments prior to granting or extending credit or entering into credit agreements with the consumers.
56. By virtue of the Respondent's failure to take reasonable steps as required in terms of Section 81 (2) of the Act, the Respondent has extended or granted credit recklessly or entered into reckless credit agreements with consumers in contravention of Section 81 (3) read with Section 80 (1) (a) of the Act.
57. Further, should the Respondent have conducted proper affordability assessments and utilised the minimum expense norms table, it would have found that the consumers identified in Annexures "I7" and "I8" annexed to the investigation report, was not in a financial position to enter into the credit agreement and by entering into the agreements would have become over-indebted.
58. In Annexure "I7"[10] the consumer's net income is R3,875.00. Should the total disclosed expenses of R2,100.00, the African Bank and Capitec loans of R653.45 and R547.11 be deducted from the net income, the amount remaining is R574.44. If one then merely deducts the Supreme Finance account of R1,145.00 on the credit report, it is evident that there would be a deficit of R1,104.81.
59. In Annexure "I8"[11] the consumer's net income is R21 243.03. Should the minimum expense norms table be applied an amount of R2 517.25 is to be set aside for living expenses. Credit bureau obligations amounts to a total of R1 8 161.00. Should the minimum expenses together with the monthly instalment of R609.25 be deducted from the income amount, there would be a deficit amount of R44.47.
60. In this regard, the Respondent contravened Section 81 (3) read with Section 80 (1) (b) (ii) of the Act.

Reckless Credit

61. The Applicant submitted that, as a result of the Respondent's failure to take reasonable steps as required in Section 81 (2) read with Regulation 23 A of the Act, the Respondent has granted or extended credit recklessly or entered into reckless credit agreements with the consumers. The Respondent accordingly contravened Section 81 (3) read with Section 80 (1) (a) of the Act.
62. In terms of Section 80 (1) (a) a credit agreement is reckless if at the time the agreement was entered into, the credit provider failed to conduct an assessment as required in terms of Section 81 (2) irrespective of the outcome the said assessment might have concluded. Further, Section 81 (3) prohibits a credit provider from entering into a reckless credit agreement with a prospective consumer.

Failure to disclose cost of credit and charging prohibited fees

63. The Respondent charges an additional undisclosed fee of R14.25 on credit agreements. The total amount repayable in the Annexures "I1" to "I10" exceeds what the total should be if one considers the credit advanced together with the initiation and monthly service fees. Interest is charged at a 0% rate. Therefore, the difference between the total repayable and the credit advanced amounts to R14.25, which is undisclosed and prohibited. The Respondent accordingly contravened Section 100 (1)
- (a) read with Section 101 (1) of the Act. For illustration purposes reference is made to the following sample files:

Annexure Loan amount Initiation service charged & fee Instalment Difference I Undisclosed amount

12	R500.00	R95.00	R609.25	R14.25	R750.00	R95.00	R845.00	R14.25	15	RI000.00	R95.00	R1095.00	RI	4.25	16	R500.00	R95.00	R609.25	R14.25	17	R750.00	R95.00	R845.00	R14.25	18	R500.00	R95.00	R609.25	R14.25	19	RI000.00	R95.00	RI	095.00	R14.25	110	R1000.00	R95.00	RI	095.00	R14.25
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Charging service fee in excess of the prescribed fees

64. The Respondent further charged service fees in excess of the maximum prescribed rate. In terms of Regulation 44 (4) service fees must be charged for a calendar month in which it is due and payable and on a pro rata basis where the credit agreement was concluded during the course of that calendar month.
65. The aforesaid overcharge is evident in the following Annexures:
- Annexures "I2"- Loan extended for 18 days (10 October 2019 to 28 October 2019). Service fee charged is R50.00. The Respondent should have charged R36.00 as service fee;
 - Annexure "I4" - Loan was extended for 16 days (9 October 2019 to 25 October 2019) and charged R50.00 for service fee. The Respondent was only allowed to charge R32.00 as service fee;

· Annexure "I6" - Loan was extended for 22 days (9 October 2019 to 31 October 2019) and charged R50.00 for service fee. The Respondent was only allowed to charge R44.00 as service fee; and

· Annexure "I7"- Loan was extended for 15 days (9 October 2019 to 31 October 2019) and charged R50.00 for service fee. The Respondent was only allowed to charge R30.00 as service fee.

66. Accordingly, the Respondent has contravened Section 101 (1) (c) and Regulation 44 and Regulation 44 (4) of the Act.

Failure to furnish consumers with Pre-agreement Statement & Quotation and Credit Agreements in a prescribed form

67. In terms of Section 92 (1) of the Act, 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. In terms of Regulation 28 (1) (b) of the Act, the pre-agreement statement and quotation must be in the Format set out in Form 20.

68. As is evident from annexures "I1" to "I10", the Respondent failed to provide consumers with pre-agreement statements and quotations that are in a prescribed form in that said agreements are not signed by the consumers or the Respondent or the Respondent's duly authorized agent nor are they dated.

69. The Respondent accordingly contravened Section 92

(1) read with Regulation 28 (1) (b) and Form 20 of the Act.

70. Section 93 (2) read with Regulation 30 (1) of the Act provides that the document that records a small credit agreement must be in the prescribed form, being Form 20.2 of the Act.

71. As the pre-agreement statement and quotation also purports to be the credit agreements of the consumers, the Respondent failed to provide consumers with credit agreements in the prescribed form, being Form 20.2. The Respondent accordingly contravened Section

93 (2) read with Regulation 30 (1) and Form 20.2 of the Act by failing to provide consumers with credit agreements in the prescribed

form.

Unlawful provisions in the Credit Agreements

72. In terms of Section 90 (1) a credit agreement must not contain an unlawful provision.

73. A provision is unlawful if:

(i) In terms of Section 90 (2) (a) (i), its general purpose or effect is to defeat the purposes or policies of the Act;

(ii) In terms of Section 90 (2) (b) (ii), it directly or indirectly purports to avoid a creditors obligation or duty in terms of the Act; and

(iii) In terms of Section 90 (2) (b) (iii), it directly or indirectly purports to override or set aside the effect of any provision of the Act.

74. The Respondent's credit agreements contain the following provisions:

"I hereby consent to receive information about services and products supplied by Circle Way Trading 10 (Pty) Ltd."

"This new loan shall depend on your indication that your affordability criteria have not changed since your previous loan. If you consent to the renewal of your loan you are then stating or indicating truthfully that there is no financial reason whatsoever for which Circle Way Trading 10 (Pty) Ltd should not grant you another loan and that in no way will this loan place you in a situation for over indebtedness."

"If you however state or indicate that your financial situation has not remained the same and has changed, Circle Way Trading 10 (Pty) Ltd will then need to conduct a new affordability assessment in order to determine the affordability of the new loan."

"You, as the customer, also understand that all the terms and conditions contained in the previous loan agreement shall remain the same should you consent to the renewal of your loan."

75. The aforesaid provisions defeats the purpose of the Act, waives or deprives consumers of a right set out in the Act, avoids the credit provider's obligations or duty in terms of the Act or sets aside or override the effect of other provisions of the Act.

76. The provision pertaining to marketing options fails to provide consumers with a choice of being excluded from telemarketing campaigns, marketing or consumer lists or mass distribution. This is a contravention of Section 90 (2) (a) (i), 90

(2) (b) (i), (ii) and (iii) read further with Section 74 (6) and Form 20.2 of the Act.

77. The provisions relating to new loans and new affordability assessments only in the event if circumstances have changed, defeats the provisions of Section 79 and Section 81 (2) read with Regulation 23 A of the Act and deprives the consumers of the right to have proper affordability assessments conducted. It also waives the Respondent's obligation to conduct affordability assessments at the time of the consumers entering into the loans. The aforesaid supports the Applicant's arguments that the Respondent has not conducted proper affordability assessments or relied on outdated information. In this regard the Respondent contravened Section 90 (2)

(a) (i) and Sections 90 (2) (b) (i), (ii) and (iii) read with Section 79, read further together with Sections 81 (2) and Regulation 23A of the Act.

Unlawful advertising practices

78. The Respondent's advert identified on social media was annexed to the memorandum initiating the investigation against the Respondent.

79. In terms of the Respondent's advert, the Respondent was advertising itself and its services as a credit provider.
80. The Respondent has been registered as a credit provider with the Applicant since the 31st of July 2007 under the registration number NCRC646 and this remains the status quo. The Respondent has 5 (five) registered branches. The provisions of Section 76 and Regulation 21 apply to the Respondent and its advertisement.
81. In terms of Section 76 (4) of the Act an advertisement of availability of credit, or of goods or of goods to be purchased on credit must comply with this section and must not advertise a form of credit that is unlawful, misleading, fraudulent or deceptive, or contain any statement prohibited by the Regulation.
82. In terms of Regulation 21 (6) (b) of the Act any statement or phrase, or wording that has substantially the same meaning as "No credit checks required" or "blacklisted consumers welcome" may not form part of any advertisement or direct solicitation of for credit.
83. The phrase "blacklisted welcome" appear in the Respondent's advert and such phrases have substantially the same meaning as "No credit checks required" and "blacklisted consumers welcome" which statements and/or phrases are prohibited in terms of Section 76 (4) read with Regulation 21 (6) of the Act.
84. The Respondent's advert accordingly contains prohibited statements or phrases in contravention of the Act and its Regulations. Based on the aforesaid the Respondent's advert clearly contravenes Section 76 (4) read together with Regulation 21 (6) (b) of the Act.

Conditions of Registration

85. In terms of General Condition 1 of its Conditions of Registration as a credit provider, the Respondent must comply with all applicable legislation relating to the operation of the business of a credit provider.
86. In terms of General Condition 2 of its Conditions of Registration, the Respondent must operate its business in a manner consistent with the purposes and requirements of the Act.
87. The Respondent has failed to comply with the applicable legislation relating to the operation of its business as a credit provider. Further, the Respondent has failed to operate its business in a manner consistent with the purpose and requirements of the Act.
88. Based on the aforesaid, it is submitted that the Respondent has contravened its conditions of registration.
89. As a result of the contraventions as discussed above the Respondent is in contravention of General Condition 1 and 2 of its Conditions of Registration read with Section 52 (5) (c) of the Act.

90. By not filing an answer or adequately opposing this matter, the Applicant's version is the only version in front of the Tribunal. By failing to file an answering affidavit, the Respondent admits all allegations made against it in the Founding papers of the Applicant. As no counter arguments were raised to cast doubt in the minds of the panel members, the version of the Applicant and the submissions of the Applicant are accordingly the only facts to be considered in determining whether the Respondent committed the listed contraventions.

Affordability assessments

The Act

Reckless credit

91. Section 80 deals with reckless credit. Section 80
- (1) (a) provides that a credit agreement is reckless if, when concluding the agreement, the credit provider failed to conduct an assessment as required by section 81 (2).
92. Section 80 (1) (b) (i) provides that a credit agreement is reckless if the credit provider concluded the credit agreement despite the preponderance of information available to the credit provider indicated that the consumer did not understand the consumer's risks, costs or obligations under the proposed credit agreement.
93. Section 80 (1) (b) (ii) renders the credit agreement reckless if entering into it would make the consumer over-indebted.
94. Section 88 deals with the effect of debt review or a re-arrangement order or agreement. Section 88 (4) provides that if a credit provider concludes a credit agreement, other than a consolidation agreement, with a consumer who has applied for a debt re-arrangement and that re-arrangement still exists, all or part of the new credit agreement may be declared to be reckless credit.

Prevention of reckless credit

95. Section 81 deals with the prevention of reckless credit. Section 81 (2) (a) (ii) and (iii) read together with Regulation 23A provides that a credit provider may not enter into a credit agreement without first taking reasonable steps to assess the proposed consumer's debt repayment history as a consumer under credit agreements; and the proposed consumer's existing financial means, prospects and obligations. Section 81 (3) precludes a credit provider from entering into a reckless credit agreement with a prospective consumer.
96. Regulation 23A sets out the criteria to conduct an affordability assessment. Regulation 23A (3) requires a credit provider to take practical steps to assess the consumer's discretionary income to determine whether the consumer has the financial means and prospects to pay the proposed credit instalments.

97. Regulation 23A (8) requires a credit provider to calculate the consumer's existing financial means, prospects and obligations as envisaged in section 78 (3) and 81 (2) (a) (iii).
98. Regulation 23A (9) requires the credit provider to utilise the minimum expense norms table in Regulation 23, broken down by monthly gross income when calculating the existing financial obligations of consumers.
99. Regulation 23A (13) requires a credit provider to consider the consumer's debt repayment history as a consumer under credit agreements. The credit provider must do so within seven business days before the initial approval of credit or the increasing of an existing credit limit.

CONCLUSION

100. Consequently, the Tribunal is satisfied that the Respondent engaged in prohibited conduct by contravening the sections and Regulations in the preceding paragraphs. The Respondent has, therefore, repeatedly contravened the Act.
101. The Tribunal proceeds to consider an appropriate order.

CONSIDERATION OF AN APPROPRIATE ORDER

102. In addition to findings of prohibited conduct, the Applicant has requested other wide-ranging relief. The Tribunal proceeds to consider the other relief sought.

APPROPRIATE SANCTION

103. The Applicant requested the Tribunal to impose a fine on the Respondent.
104. The conduct of the Respondent set out above is in breach of the Act and the Regulations. This conduct clearly undermines the purpose of the Act. The Respondent's continued participation in the credit market places consumers at substantial risk of further financial harm.
105. The conduct of the Respondent of not taking into account the consumers' debt repayment history or financial obligations and its failure to do proper affordability calculations exposed consumers to reckless lending and overindebtedness. This is a major shortcoming of the Respondent's business and exposes consumers to reckless credit.
106. Consumers have suffered a loss in that they have been exploited by the Respondent in paying excessive interest and additional fees on credit agreements. The funds were unduly received by the Respondent. The gravity of the aforesaid offence depicts the Respondent's callous disregard of the legislation.

107. The Applicant has sufficiently proven that the contraventions are ongoing and proves the Respondent's continued and/or repeated conduct. A "repeated contravention" in the context of Section 57 (1) of the Act is a contravention that has appeared at least twice, or more than that. Further, a single contravention of different sections of the Act and conditions of registration also constitute repeated contraventions.
108. Section 151 (3) of the Act provides that in considering the imposition of an administrative fine, the Tribunal must consider certain factors. The Tribunal proceeds to consider each in turn.

The nature, duration, gravity and extent of the contraventions

109. Reckless lending and overcharging are severe contraventions of the Act. The Respondent's failure to conduct proper affordability assessments place consumers at severe risk of over-indebtedness.
110. Having regard to the small sample of files extracted and the contraventions identified from that batch, the nature and extent of the contraventions warrant serious action against the Respondent. The contraventions amount to inter alia, improper advertising practices, failure to conduct affordability assessments, granting of reckless credit, overcharging of service fees, charging of prohibited and undisclosed fees, failure to provide pre-agreement statements and quotations and credit agreements in the prescribed form and including unlawful provisions within its agreements.
111. From the sampled files it is evident that the contraventions have been ongoing since at least 2018, however with reference to the registration date of the Respondent it is a valid assumption to make that the contraventions have been on-going since the date of inception.
112. In every single sampled file, it is evident the Respondent breached its obligations in terms of the Act. The prescripts of the Act are safeguards to the credit provider, the consumer, and the credit industry. The Respondent's failure to adhere to the Act indicates a complete disregard for the rights of consumers (opting for alternate, unlawful safeguards) and, ultimately, the industry within which the Respondent conducts business.

Loss or damage suffered as a result of the contraventions

113. The Applicant did not place specific evidence before the Tribunal concerning the actual loss or damage consumers suffered. However, the Tribunal is satisfied that it may reasonably conclude that consumers have suffered loss because the Respondent at the very least charged consumers excessive interest, service and initiation fees and rendered other unlawful charges.
114. Consumers have also suffered a loss in that they have been exploited by entering into credit agreements without proper and or any affordability assessments being conducted or proven to have been conducted. Consumers are prejudiced by the Respondent's conduct.

Behaviour of the Respondent:

- 115. The Respondent co-operated with the Applicant during the investigation.
- 116. There exists no plausible reason for the Respondent as a registered credit provider, to have been unaware of the provisions of the Act and its statutory obligations to have adhered to each of those provisions.

Market circumstances under which the contraventions occurred:

- 117. The Applicant did not place specific evidence before the Tribunal concerning the market circumstances in which the contraventions took place. Nevertheless, it appears that the Respondent has simply ignored its obligations in terms of the Act and has been able to do so because it operates in an environment in which consumers are ill-educated about their rights concerning access to credit and that the Respondent's practices contravene the Act.
- 118. The failure to do affordability assessments, reckless credit granting, the charging of excessive fees and other prohibited charges, the failure to provide pre-agreement statements and present credit agreements in the prescribed format, is a clear indication that consumers are unaware of such practices being unlawful and contrary to legislative requirements. Consumers were therefore exploited to the unjust benefit of the Respondent.

Level of profit derived from the contraventions

- 119. A substantial profit has been derived from the activities undertaken by the Respondent and this is evident if one refers to the overcharged amounts in terms of the agreements.
- 120. The Respondent has submitted the Annual Form 39 Statistical Returns as well as the Form 40 Annual Financial Statement Returns . The form 40 return shows that the Respondent's annual turnover from the credit extensions for the period ending 28 February 2019 is R35,367,349.82.
- 121. Although the Applicant did not place specific evidence before the Tribunal concerning the actual profit the Respondent derived from the contraventions, it is reasonable to conclude that the Respondent enjoys a substantial income from its activities as a credit provider.

Degree of co-operation between the Respondent and Applicant

- 122. The Tribunal has considered that the Respondent provided the inspectors with the information they required and co-operated with them during the investigations.

Prior contraventions committed by the Respondent

- 123. There was previously enforcement action instituted by the Applicant against the Respondent, which resulted in a settlement agreement being made an order of the Tribunal on the 19th of March 2019. In terms of the settlement, the Respondent agreed to prohibited conduct.

124. The fact that contraventions were once again found against the Respondent is deemed to be an aggravating factor.
125. Having regard to the foregoing factors, the factual evidence and conduct displayed, it is a reasonable and valid contention and more especially in the interests of justice for an administrative fine to be imposed against the Respondent. The purpose of an administrative fine is a punitive measure and one which is warranted in this instance.
126. The Respondent's conduct has displayed little or no regard for the spirit and purpose of the Act. The Respondent's continued participation in the credit market places consumers at substantial risk of further financial harm.

The amount of the fine

127. Section 151 (2) of the Act states that an administrative fine imposed may not exceed the greater of 10% of the Respondent's annual turnover during the preceding financial year; or R1m. The form 40 return shows that the Respondent's annual turnover from the credit extensions for the period ending 28 February 2019 is R35,367,349.82.
128. Ten percent of the annual turnover would be equal to R3,537,734.98.
129. The Tribunal is satisfied that the nature of the Respondent's contraventions and the consequent financial implications for consumers justify the Tribunal imposing an administrative fine on the Respondent. Parliament introduced the Act into the South African legislative landscape to curb precisely the types of excesses that the Tribunal has found the Respondent to have perpetrated. The Tribunal would, therefore, be failing in its duty were it not to send a clear message to the Respondent and other credit providers that the Tribunal will not tolerate credit providers contravening the Act.
130. These considerations persuade the Tribunal that it is appropriate to impose an administrative fine of R1,000 000.00.

Appointment of an auditor

131. The Applicant also requested the Tribunal to appoint an auditor to conduct an audit into the Respondent's practices as a credit provider. The Tribunal is aware that the investigation that led to this application comprised a small sample of the Respondent's consumer files. The Tribunal has found, amongst other things, that the Respondent has extended reckless credit, and charged unlawful fees and interest. The evidence placed before the Tribunal means that it is not possible for the Tribunal to establish the extent of this practice and whether the Respondent only provides short-term credit agreements. It is, therefore, appropriate to appoint an independent auditor to assess the situation and establish the facts.

ORDER

132. Accordingly, the Tribunal makes the following order:

132.1. The Respondent has repeatedly contravened the following sections of the Act and Regulations:

132.1.1. Section 52 (5) (c) and General Condition 1;

132.1.2. Section 81 (2) (a) (ii) read with Regulations 23A

(12) (b) and 23A (13);

132.1.3. Section 81 (2) (a) (iii) read with Regulations 23A (3), (8), (12)(a) and (c);

132.1.4. Regulations 23A (9) and (10);

132.1.5. Section 81 (3) read with section 81 (1) (a);

132.1.6. Section 81 (3) read with section 80 (1);

132.1.7. Section 100 (1) (a) and section 101 (1);

132.1.8. Section 100 (1) (b) and Section 101 (1) (c) and Regulation 44;

132.1.9. Section 92 (1) and Regulation 28 (1), read with prescribed Form 20;

132.1.10. Section 93 (2) and Regulation 30 (1), read with Form 20.2;

132.1.11. Section 90 (2) (a) (i) and Section 90 (2) (b) (i), (ii) and (iii) read further with

132.1.12. Section 74 (6) and Form 20.2 of the Act;

132.1.13. Section 90 (2) (a) (i) and Section 90 (2) (b) (i), (ii) and (iii) read with Section 79 read further with Section 81 (2) and Regulation 23A of the Act;

132.1.14. Section 76 (4) read with Regulation 21 (6) of the Act;

132.2. The repeated contraventions are prohibited conduct in terms of section 150 (a) of the Act;

132.3. The Respondent's registration with the National Credit Regulator is cancelled in terms of Section 150 (g) of the NCA;

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

132.5. The Respondent is interdicted from collecting on any of its extended credit agreements;

132.6. The Respondent is ordered to remove its advertisement which contains statements and phrases prohibited in terms of the Act from all media;

132.7. The Respondent's credit agreements with consumers, annexed as Annexures "I1" to "I10" to the Applicant's Investigation Report, are declared reckless in terms of Section 80 (1) (a) of the Act;

132.8 The Respondent is to appoint an independent auditor within 30 days of the date of issue of this judgement to determine and compile a list of all the consumers across all the Respondent's branches and the amounts by which the Respondent has within the last three years of the date of issue of this judgement overcharged consumers service fees, interest or charges;

132.9 Once the aforesaid auditor compiled the abovementioned list, the Respondent will refund the overcharged and prohibited charged amounts to each consumer within 30 days from the date of the auditor's report;

132.10 Once the refunds have been made, as stated above, the Respondent is 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;

132.11 The Applicant may, upon receipt of the independent auditor's report, apply to the Tribunal for an order declaring the agreements in paragraph 139.4.4 as reckless in terms of section 80 (1) (a) and setting aside the consumers' obligations under those agreements;

132.12 The Respondent is within 90 business days of the date of issue of this judgment to pay an administrative fine of R1 000 000.00 (one million rand) into the National Revenue Fund's following bank account:

Bank: The Standard Bank of South Africa

Account holder: Department of Trade and Industry

Branch name: Sunnyside

Branch code: 05100

Account number: 317 650 026

Reference: NCT/158491/2020/57 (1) and name of person or business making the payment; and

132.13 There is no order as to costs.

DATE AND SIGNED ON THIS 16TH day of April 2021.

Dr MC Peenze - Presiding Tribunal member

With Tribunal members Prof B Dumisa and Prof T Woker concurring.

[1] Published under Government Notice R489 in Government Gazette 28864 of 31 May 2006.

[2] Section 57 (1) empowers the Tribunal to cancel a registrant's registration if the registrant fails to comply with a condition of its registration; contravenes the Act; or fails to comply with a commitment the registrant made when applying to be registered as a credit provider.

[3] The Act defines prohibited conduct as an act or omission in contravention of the Act.

[4] Moto Health Care Medical Scheme v HMI Healthcare Corporation (Ptv) Ltd & others 341/2018 [2019] ZASCA 87

[5] 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 [6] Annexure "I1" to the Investigation report: Pages 145 -162 of the application

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- [5] 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
- [6] Annexure "I1" to the Investigation report: Pages 145 -162 of the application
- [7] Annexure "I1" to the Investigation report: Pages 158 of the application
- [8] Annexure "I4" to the Investigation report: Pages 213 to 232 of the application
- [9] Annexure "I6" to the investigation report: Pages 270 to 290 [10] Annexure 'E7" to the investigation report: Pages 291 to 306
- [9] Annexure "I6" to the investigation report: Pages 270 to 290
- [10] Annexure 'E7" to the investigation report: Pages 291 to 306
- [11] Annexure "E8" to the investigation report: Pages 307 to 399
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Prepared on 26 October 2026 · Esheria