

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Dinga Finance CC (NCT/122560/2018/140(1)) [2020] ZANCT 1 (13 February 2020) [2020] ZANCT 1

COURT

National Consumer Tribunal

BEFORE

A Potwana, J Simpson, H Alwar

CASE / FILE NUMBER

NCT/122560/2018/140(1)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

number: NCT/122560/2018/140(1)

In

the matter between:

NATIONAL
CREDIT
REGULATOR
APPLICANT
and
DINGA
FINANCE
CC
RESPONDENT

Coram: Mr
A Potwana – Presiding Tribunal member
Adv
J Simpson – Tribunal member
Ms
H Alwar – Tribunal Member
Date
of Hearing: 13 February 2020

JUDGMENT

AND REASONS

APPLICANT

1. The Applicant in this matter is the National Credit Regulator, a juristic person which was established in terms of section 12 of the National Credit Act.[1] At the hearing, the Applicant was represented by Mr Roy Stocker, its Senior Legal Advisor.

RESPONDENTS

2. The Respondent is Dinga Finance CC, a Close Corporation registered in terms of the Close Corporations Act No. 69 of 1984 of the Republic of South Africa. The Respondent was registered with the Applicant as a credit provider until its registration lapsed due to non-payment of renewal fees.
3. The Respondent filed an answering affidavit, but no-one appeared on its behalf at the hearing.

TYPE OF APPLICATION AND JURISDICTION

4. In this application, the Applicant seeks an order, inter alia, declaring that the Respondent repeatedly contravened various provisions of the NCA; declaring that the Respondent's conduct constitutes prohibited conduct; interdicting the Respondent from future breaches of the NCA; ordering the Respondent to cease engaging in any activity that requires registration in terms of section 150(f) of the NCA; imposing an administrative fine in the amount of R1 000 000.00 or 10% of the Respondent's turnover.
5. In terms of section 27 of the NCA, the National Consumer Tribunal (Tribunal) has jurisdiction.[2]

INTRODUCTION

AND CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

6. This matter has a long history. On 12 December 2018, the Applicant served an application made in terms of section 140(1) of the NCA on the Respondent by email (by consent). The application documents were filed with the Tribunal on 20 December 2018. On 21 December 2018, the Tribunal's Registrar (Registrar) issued a notice of filing. The Registrar served the notice of filing on the parties by email (by consent).
7. In terms of Rule 13(2) of the Tribunal Rules,[3] the Respondent had 15 business days after being served with the application, to serve answering affidavit on the Applicant.[4] The Respondent, however, did not do so. But, the Applicant did not file an application for a default order in terms of Rule 25(2). On 22 February 2019, after the closure of pleadings, the Registrar issued a Notice of Set Down for the matter to be heard on 28 March 2019.
8. On 28 March 2019, the Respondent's consultant, Mr Israel Sibiya, attended the hearing and requested that the hearing be postponed. The Tribunal reluctantly granted the postponement, and ordered the Respondent to lodge a condonation application for the late filing of its answering affidavit and its answering affidavit by no later than 11 April 2019." The Tribunal's ruling was issued on 1 April 2019.
9. On 3 May 2019, the Registrar issued another Notice of Set Down for the matter to be heard on 13 June 2019 and served the same on the parties by email. On 7 June 2019, the Respondent filed an application for condonation together with proof of service. On 11 June 2019, the Registrar issued a Notice of Removal from the Hearing Roll. On the same day, the Registrar issued and served a Notice of Filing on the parties by email.
10. On 23 July 2019, the Registrar issued the condonation ruling granting the Respondent condonation for the late filing of its answering affidavit. The Respondent was ordered to file its answering affidavit within 15 business days of the issuing of the ruling. On 6 August 2019, the Respondent's attorneys, NT Mshengu & Associates, filed the Respondent's answering affidavit together with proof of service by registered mail.
11. On 6 September 2019, the Registrar issued a Notice of Set Down for the matter to be heard on 7 October
2019. On 7 October 2019, the hearing was postponed sine die, to ensure that an interpreter would be present at the next hearing and the Registrar was ordered to procure the services of an interpreter.
12. On 21 November 2019, the Registrar issued a Notice of Set Down for the matter to be heard on 13 February
2020. The Notice of Set Down was served on the parties by email. In terms of Rule 37, the Respondent requested that the matter be heard via Skye or teleconference. The request was not granted.

13. On the day of the hearing, 13 February 2020, the Presiding Tribunal member was satisfied that the application was adequately served on the Respondent, and the hearing proceeded in the absence of the Respondent in terms of Rule 24 of the Tribunal Rules.[5] An official from the Registrar's office informed the Tribunal that an attorney was sent to appear on behalf of the Respondent, but none appeared.

FACTS

The Applicant's case

14. The Applicant's case is stated in its founding affidavit. The deponent is Jacqueline Peters (Ms Peters), a Manager in the

Applicant's Investigations and Enforcement Department. According to Ms Peters, the Applicant received complaints from three

consumers[6] alleging possible contraventions of the NCA. The complaints raised a reasonable suspicion that the Respondent was conducting its business and extending credit in a manner contrary to the provisions of the NCA and its regulations.

15. The Applicant then initiated a complaint against the Respondent in terms of section 136(1) of the NCA and authorised an investigation into the lending practices of the Respondent. The scope of the investigation was to obtain ten credit agreements entered into with the Respondent and investigate whether the Respondent extended credit or charged costs of credit in accordance with the NCA, whether

the Respondent extended credit whilst not registered, and whether the Respondent followed the correct debt enforcement procedures

prescribed by the NCA.

16. On 25 October 2017, the Applicant's inspectors conducted an onsite investigation at the Respondent's physical address being 3rd Floor, United Building, Field Street, Durban. Following the investigation conducted at the Respondent's physical address, one of the Applicant's investigators, Mahobye, compiled a report which was annexed to the application together with Mahobye's confirmatory affidavit.

17. The Applicant alleged that the Respondent failed to operate its business in a manner which is consistent with the purpose and requirements of the NCA. The Respondent's conduct exhibited critical and repeated contraventions of the NCA. The Applicant alleged that:

17.1. the Respondent offered or extended credit without being registered as a credit provider in terms of section 40(1) of the NCA;

17.2. as a result of extending credit without being registered, the Respondent has entered into unlawful credit agreements with consumers;

17.3. the Respondent has thus contravened section 40(3) of the NCA;

17.4. the Respondent entered into credit agreements without conducting affordability assessments as required by section 81(2)(a) of the NCA to assess the consumers' debt repayment history and existing financial means, prospects and obligations;

17.5. the Respondent failed to take practicable steps to assess and calculate consumers' debt obligations at the time of entering into the credit agreements in that the Respondent did not conduct credit bureau checks on consumers;

17.6. in the consumer files extracted by the Applicant's inspectors there were no bank statements or salary advices provided;

17.7. the Respondent failed to take reasonable steps to calculate consumers' discretionary income to determine whether the consumers have the financial means and prospects to pay the credit instalments;

17.8. in failing to conduct affordability assessments when consumers applied for credit, the Respondent contravened section 81(2) read with Regulation 23A and Regulation 55(1)(b) of the NCA;

17.9. as a result of not conducting affordability assessments as required by section 81(2) of the NCA, the Respondent entered into reckless credit agreements and contravened section 80(1)(a) read with section 81(3) of the NCA;

17.10. the Respondent entered into credit agreements with consumers without giving the consumers pre-agreement statements and quotations in the prescribed form;

17.11. as a result of not providing pre-agreement statements and quotations the costs of credit are not disclosed to the consumers for purposes of enabling them to make informed decisions and generally appreciate the risks, costs or obligations under the credit applied for;

17.12. by not providing pre-agreement statements and quotations to consumers, the Respondent has failed to keep records of such documentation as required by Regulation 55(1)(b) of the NCA;

17.13. by not providing pre-agreement statements and quotations to consumers and consequently failing to disclose costs of credit to consumers, the Respondent contravened section 92(1) and section 3(e) read with Regulations 28(1), 23A(15) and 55(1)(b) of the NCA;

17.14. by failing to provide pre-agreement statements and quotations, the Respondent contravened section 93(1) of the NCA;

17.15. the Respondent charged consumers interest in excess of the prescribed rate allowed by the NCA thereby contravening section 101(1)(d) read with section 100(1)(c) of the NCA;

17.16. the Respondent failed to provide defaulting consumers with a section 129 letter and afford the consumers the opportunity to resolve any dispute under the agreements or develop and agree on a plan to bring the payments under the agreement up to date;

17.17. the Respondent obtained Emolument Attachment Orders prior to the expiry of at least ten business days after the delivery of section 129 notices as contemplated in section 129(1) of the NCA.

17.18. in failing to obtain Emoluments Attachments Orders prior to at least ten business days after the delivery of the section 129 notice, the Respondent contravened section 130(1) of the NCA;

17.19. prior to delivering the section 129 notices to consumers, the Respondent obtained Emoluments Attachments Orders thereby contravening section 129(5) of the NCA

18. The Applicant seeks an order declaring that the Respondent has repeatedly contravened the following provisions of the NCA:

18.1. section 40(3) and section 40(4);

18.2. section 81(2) read with Regulation 23A(3) and Regulation 55(1)(b);

18.3. section 80(1)(a) read with section 81(3);

section 92(1) read together with Regulation 28(1), 23A(15) and 55(1)(b);

18.4. section 93(1);

18.5. section 101(1)(d) read with section 100(1)(c);

18.6. section 130(1)(a); and

18.7. section 129(1) read with section 129(5) and section 129(7)(a).

19. The Applicant further seeks an order in the following terms:

19.1. Declaring the conduct of the Respondent in contravention of the relevant sections of the Act as outlined above as prohibited conduct in terms of Section 150(a) of the Act;

19.2. The imposition of an administrative fine on the Respondent in the amount of 10% of the Respondent's annual turnover or R1 000 000.00 whichever is the greater;

19.3. interdicting the Respondent from future breaches of the NCA;

19.4. ordering the Respondent to cease engaging in any activity that requires registration in terms of section 150(f) of the NCA;

19.5. ordering the Respondent to refund consumers the amounts it received in the form of fees, interest or charges it was not entitled

to receive or which exceeded the prescribed maximum amounts allowed by the NCA within 60 days from the date of the Tribunal's

order;

19.6. ordering that all loans extended since the lapsing of the Respondent's registration as a credit provider be declared unlawful and written off;

19.7. ordering that all open loans where no proper affordability assessments were conducted be deemed reckless and that all consumers' rights and obligations under those credit agreements be set aside;

19.8. ordering that the Respondent rescind all consumers' Emolument Attachment Orders obtained prior to the delivery of section 129 notices to consumers and to update consumers' credit records accordingly;

19.9. ordering that the Emolument Attachment Orders against the complainants be rescinded and the extended loans written off;

19.10. Any other appropriate order required to give effect to the consumers' rights in terms of section 150(i) of the NCA; and

19.11. further and/or alternative relief.

20. Regarding the administrative fine, the Applicant submitted that:

Nature, duration, gravity and extent of the contraventions

20.1. Having regard to the small sample of files extracted and the contraventions of the NCA identified from these files, the nature and extent of the contraventions warrant serious action against the Respondent. The contraventions resulted in legal action being taken against consumers without having ensured that the consumer could afford the credit applied for and without following the correct debt enforcement procedure as required by the NCA. In every consumer file sampled, the Respondent breached its obligations in terms of the NCA. This illustrates a disregard for the NCA and the regulated activity which the Respondent undertook.

20.2. The prescripts of the NCA are safeguards to the credit provider; the consumer; and the credit industry. The Respondent's failure to adhere to the provisions of the NCA indicates a complete disregard for the rights of consumers and, ultimately, the industry within which the Respondent conducts business.

Loss or damage suffered as a result of the contraventions

20.3. Consumers have suffered losses and/or damage as a result of the Respondent's conduct in that consumers were exploited by the Respondent by entering into loan agreements with consumers without the Respondent first taking reasonable steps to ensure that consumers could afford the repayments. Consumers have suffered further loss or damage as consumers are caught in a debt-trap.

20.4. The collection and enforcement practice of the Respondent creates an onerous burden on consumers. That may possibly lead to the incurrence of unnecessary legal or other expenses by consumers who want to protect their rights.

Behaviour of the Respondent

20.5. There exists no plausible reason for the Respondent to be unaware of its statutory obligation to adhere to the provisions of the Act.

Market circumstances under which the contraventions occurred

20.6. The Applicant submitted that the conduct of the Respondent illustrates that the market circumstances within which the contraventions occurred are one in which consumers are uneducated about their rights relating to access to credit.

20.7. The fact that the Respondent uses prohibited collection and enforcement practices is a clear indication that consumers are unaware of the unlawfulness of such practices. Consumers are and have been, exploited to the unjust benefit of the Respondent.

Level of profit derived from contraventions

20.8. The Respondent has derived a high profit from the activities undertaken by the Respondent in contravention of the NCA and its Regulations. The Respondent has not submitted their annual statutory returns, and the Applicant is unable to state the profit derived by the Respondent.

Degree of co-operation between the Respondent and Applicant

20.9. The Respondent co-operated with the Applicant's investigation.

Prior contraventions committed by the Respondent

20.10. There are no prior investigations or enforcement action instituted by the Applicant against the Respondent. The nature of the contraventions and the various dates in which the credit agreements were entered into, however, indicate that the conduct of the Respondent has been ongoing for some time prior to the investigation.

21. The Applicant submitted that having regard to the foregoing seven factors, the factual evidence and conduct displayed, it is a reasonable and valid contention in the interest 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.
22. During the hearing, Mr Stocker requested the Respondent be ordered to appoint an auditor who would identify instances where consumers were charged unlawful costs of credit. The relief sought was not canvassed in the Applicant's application papers.

The Respondent's case

23. The deponent on the Respondent's answering affidavit is Dinga Zephaniah Mkhize (Mkhize), the Respondent's director. He averred that the Respondent was registered as a credit provider on 31 August 2007 under registration number 2860. The Respondent had three requirements which determined whether a consumer would get help, namely, a valid South African Identity book; a payslip or pay advice; and a bank statement.
24. Once the Respondent was satisfied that the requirements were met, the next step was to process the application. The application was processed using forms which, were pre-designed and installed in the Respondent's computer by a company known as New Era Franchise. Later the computer designed forms changed and became known as Pro-Loan. This was the name of the company that designed and sold computer programs which were mostly used by credit providers such as the Respondent.
25. The computer program was designed to calculate the interest and monthly repayments automatically. This was intended to alleviate the problems of computing interest and repayment figures as some credit providers are semi-literate. The only thing the Respondent would do was to complete the form by filling in the details of an applicant; the residential and employment addresses; banking institution; and the amount an applicant required.
26. After feeding the computer with a consumer's details, the consumer would then sign the hard copies which were kept at the Respondent's office. The consumer would be given a choice to obtain copies at a nominal cost of R3.50 per page.
27. After registering with the Applicant, the Respondent continued using the same computer program. In 2008 a new computer program called Compuscore was introduced to the Respondent. The Respondent has been using this computer program without fail. After the passing away of the Respondent's auditor, he took the Respondent's files to a company of auditors known as Smart Track.
28. His problems started when the Applicant introduced a new requirement. The new requirement was that renewal fees were going to be based on the annual turnover of a credit provider as confirmed by its auditor or accounting officer by completing NCR Form 2. Unbeknown to the Respondent, this form was forwarded to Smart Track to complete, but Smart Track failed to oblige.
29. Mkhize received a letter from the Applicant deregistering the Respondent. He contacted Smart Track to enquire about the Respondent's registration. He discovered that Smart Track had not completed the form. He terminated their mandate and took the Respondent's files to Charles Reddy, an accountant in Watervall, Hillcrest.
30. The Respondent denied that it failed; neglected or refused to pay the annual registration fees since July

2012. To show commitment and intent, the Respondent paid the renewal fees without fail though they were not accompanied by the new form, NCR Form 2. The Applicant returned and refunded all the payments to the Respondent in June 2019.
31. Mkhize went on to note or deny various allegations made by the Applicant in its founding affidavit. He averred that the Respondent conducted its business in a manner that is consistent with the purposes and requirements of the NCA. He was not aware that Smart Track did not comply with the Applicant's requirements, and that the Respondent was not registered with the Applicant at the time credit was offered or extended.
32. Mkhize denied that the Respondent failed to issue out section 129 letters and stated that the files that were inspected by the Applicant's inspectors had the letters inside them. Whether enough time elapsed before the next step was taken is a procedural issue which could be attributable to oversight or ignorance. He denied that the Respondent undermined the purposes of the NCA. He submitted that an administrative fine would be too harsh and excessive for the Respondent under the circumstances. A corrective and educational sanction will be an appropriate sentence if the Respondent is found guilty of contravening certain sections of the NCA.

ISSUES

TO BE DECIDED

33. The issues to be decided are whether the Respondent repeatedly contravened the provisions of the NCA as alleged by the Applicant; whether such contraventions constitute prohibited conduct, and if so, whether an administrative fine should be imposed; and whether the Respondent should be ordered to refund consumers.

THE LAW

34. Section 40(3) of the NCA provides that a person who should apply to be registered but is unregistered persons must not offer; make available or extend credit; enter into credit agreements or agree to do any of those things.
35. Section 40(4) of the NCA states-
- "A credit agreement entered into by a credit provider who is required to be registered in terms of subsection (1) but who is not so registered is an unlawful agreement and void to the extent provided for in section 89."*
36. 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 of the rights and obligations of a consumer under a credit agreement;
- (ii) debt re-payment history as a consumer under credit agreements;
- (iii) existing financial means, prospects and obligations; and
- (b) whether there is any 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.”

37. Section 80(1)(a) 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) [,] 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.”

38. Section 81(3) of the NCA provides that “A credit provider must not enter into a reckless credit agreement with a prospective consumer.”

39. Section 92(1) of the NCA states-

“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.”

40. Section 93(1) of the NCA states-

“The credit provider must deliver to the consumer, without charge, a copy of a document that records their credit agreement, transmitted to the consumer in a paper form, or in a printable electronic form.”

41. Section 100(1)(c) of the NCA states-

“A credit provider must not an amount to, or impose a monetary liability on, the consumer in respect of an interest charge under a credit agreement exceeding the amount that may be charged consistent with this Act.”

42. Section 101(1)(d) of the NCA states-

“A credit agreement must not require payment by the consumer of any money or other consideration, except interest, which must be

expressed in percentage terms as an annual rate calculated in the prescribed manner.”

43. Section 129(1) of the NCA states-

“If the consumer is in default under a credit agreement, the credit provider-

- (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
- (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before-
 - (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and
 - (ii) meeting any further requirements set out in section 130.”

44. Section 129(5) of the NCA states-

“The notice contemplated in subsection (1)(a) must be delivered to the consumer-

- (a) by registered mail; or
- (b) to an adult person at the location designated by the consumer.”

45. Section 129(7) of the NCA states-

“Proof of delivery contemplated in subsection (5) is satisfied by-

- (a) written confirmation by the postal service or its authorized agent, of delivery to the relevant post office or postal agency; or
- (b) the signature or identity mark of the recipient contemplated in subsection (5)(b).”

46. Section 130(1)(a) of the NCA states-

“Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9), or section 129(1), as the case may be.”

47. Regulation 23A(3) of the National Credit Regulations[7] states-

“(3) A credit provider must take practicable steps to assess the consumer or joint consumer's discretionary income to determine whether the consumer has the financial means and prospects to pay the proposed credit instalments.”

48. Regulation 23A(15) of the National Credit Regulations states-

“A credit provider must:

- (a) disclose to the consumer the credit cost multiple and total cost of credit in the pre-agreement statement and quotation;
- (b) ensure that the credit cost multiple disclosures for credit facilities is based on one year of full utilisation up to the credit limit proposed;
- (c) ensure that the attention of the prospective consumer is drawn to the credit cost multiple and that the cost of credit as disclosed, is understood by the prospective consumer;
- (d) disclose a total cost of credit which includes but not limited to, the following items:
 - (i) the principal debt;
 - (ii) interest;
 - (iii) initiation fee, if any;
 - (iv) service fee aggregated to the life of a loan; and
 - (v) credit insurance aggregated to the life of a loan, as set out in section 106 of the Act.”

49. Regulation 28(1) of the National Credit Regulations states-

“The pre-agreement statement and quotation given to a consumer in terms of section 92(1) of the Act must comply with the following requirements:

- (a) The pre-agreement statement and quotation may be contained in one document or in two separate documents;
- (b) pre-agreement statement and quotation must be in the format set out in Form 20;
- (c) For purposes of electronic or telephone originated pre-agreement statements and quotation for small agreements, the electromagnetic

recording and transcribing of documents will be sufficient, provided that the consumer is supplied with copies of the documents within a reasonable time.”

50. Regulation 55(1)(b) of the National Credit Regulations states-

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

- (a) ...
- (b) Credit providers, in respect of each consumer:
 - (i) application for credit;
 - (ii) application for credit declined;
 - (iii) reasons for decline of application for credit;

- (iv) pre-agreement statement and quote;
- (v) credit agreement entered into with consumer;
- (vi) documentation in support of any steps taken after default by consumer;
- (vii) record of payments made.”

51. Rule 13(5) of the Tribunal Rules states-

“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

52. In support of the allegations made in its founding affidavit, the Applicant annexed several documents. The Respondent, on the other hand, offered bare denials and pleaded ignorance. It blamed Smart Track and the introduction of a new form, NCR Form 2, for its failure to renew its registration with the Applicant. This is inexcusable. It was the Respondent’s responsibility to ensure

that its registration with the Applicant was renewed using the applicable form and in accordance with the Applicant’s conditions of registration.

53. The Applicant’s conduct of offering; making available or extending credit whilst not registered with the Applicant contravenes

section 40(3) of the NCA. In terms of section 40(4) of the NCA, the credit agreements entered into by the Applicant, whilst not as a registered credit provider, are unlawful and void.

54. The Applicant alleged that the Respondent entered into credit agreements without conducting affordability assessments as required by section 81(2)(a) of the NCA to assess consumers’ debt repayment history and existing financial means; prospects and obligations. The Respondent blamed the use of a computer program. This is also inexcusable. It was incumbent upon the Respondent to ensure that the computer program it used would ensure compliance with the provisions of the NCA.

55. In view of the documentary evidence filed by the Applicant, the Tribunal is satisfied that the Applicant has shown, on a balance of probabilities, that the Respondent contravened section 80(1)(a) read with regulation 23A(3) and regulation 55(1)(b) of the NCA.

56. Having found that the Respondent entered into credit agreements without conducting affordability assessments as required by section 81(2)(a) of the NCA to assess consumers’ debt repayment history and existing financial means; prospects and obligations, it follows that the Respondent is guilty of reckless lending as enunciated under 80(1)(a) section read with section 81(3) of the NCA.

57. The Applicant alleged that the Respondent entered into credit agreements without giving consumers pre-agreement statements and quotations in contravention of section 92(1) and section 3(e) read with regulations 28(1); 23A(15) and 55(1)(b) of the NCA and referred the Tribunal to annexures B1 and B2 of the Applicant's investigation report.
58. In response, the Respondent denied the allegation alluded to pre-agreement statements that were attached in the Applicant's investigation report and marked annexures C1; C2 and C3. Clearly, the names of consumers in annexures B1 and B2 (R Sass and X.N.G. Khumalo respectively) are different from the names of consumers reflected in annexures C1; C2 and C3 (I B Khomo; A D Mngoma and N. P. Tyefumani respectively).
59. In view of the documentary evidence filed by the Applicant and the Respondent's failure to adduce evidence to the contrary, the Tribunal is satisfied that the Applicant has shown, on a balance of probabilities, that the Respondent contravened section 92(1) read with regulations 28(1); 23A(15) and 55(1)(b) of the NCA. However, the Tribunal is not satisfied that the Respondent has contravened section 3(e) of the NCA, which stipulates the purposes of the NCA.
60. In response to the allegation that the Respondent failed to provide consumers with copies of credit agreements in contravention of section 93(1) of the NCA, the Respondent submitted that "pre-agreement statements were available for Consumers at a nominal fee of R3.50 per page per copy." [8] The defence raised by the Respondent shows a misapprehension of the allegations levelled against it.
61. Section 93(1) of the NCA deals with credit agreements and not pre-agreement statements as alluded to by the Respondent. In any event, it would have been unlawful for the Respondent to charge any amount for delivering copies of credit agreements to consumers. In essence, the Respondent has not raised any defence against the allegation that failed to provide consumers with copies of credit agreements in contravention of section 93(1) of the NCA. In terms of Rule 13(5) of the Tribunal rules, "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." Accordingly, the Tribunal is satisfied that the Applicant has shown, on a balance of probabilities, that the Respondent contravened section 93(1) of the NCA.
62. In support of its allegation that the Applicant consumers interest in excess of the prescribed rate, the Applicant referred the Tribunal to annexure B2 of the investigation report. [9] In this annexure, a loan of R500. 00 was extended to the consumer and interest of R150. 00 was charged. The interest charged is clearly in excess of the prescribed rate.
63. In addition to the above, the Applicant referred the Tribunal to annexures B3 and C1 to C6 of the investigation report and alleged

that after calculating all costs of credit and subtracting the same from the total amount repayable by consumers, there were amounts that were not accounted for. The Applicant considered the amounts that were unaccounted for to be excessive interest charged.

64. In response to the allegation that it charged excessive interest, the Respondent stated that one of the features of the computer

program it purchased was to calculate the interest amounts automatically. The Respondent believed that the program was designed

in accordance with and in compliance with NCA. The explanation proffered by the Respondent is wholly unsatisfactory and disingenuous.

65. The Tribunal cannot be led to believe that the computer program dictated the interest amounts, and the Respondent or its employees failed to detect that the interest charged exceeded the prescribed maximums. The pre-agreement and quotation documents attached to the Applicant's investigation report show that the Respondent charged annual interest rates of between 180% and 391.34%.[10] This rate far exceeds the permissible rate. The Tribunal finds that in charging excessive interest, the Respondent contravened section 101(1)(d) read together with section 100(1)(c) of the NCA.

66. Based on the documentary evidence filed by the Applicant,[11] and the Applicant's failure to adduce evidence to the contrary, the Tribunal is satisfied that the Respondent failed to provide

consumers with notices contemplated under section 129(1) of the NCA before enforcing credit agreements. Thus, the Tribunal is satisfied

that the Applicant has shown, on a balance of probabilities, that the Respondent contravened section 129(5) read with section 129(7)(a) of the NCA.

67. The Respondent's answer to the allegation that it obtained Emolument Attachment Orders prior to delivering section 129(1) of the NCA notices to consumers was that "these are procedural issues none compliance of which could be attributed to oversight and or ignorance of the legislative time frames." [12] (sic in toto). This explanation is unacceptable and betrays the Respondent's intentional non-compliance and total disregard for the provisions of the NCA. The time frames are clearly stipulated under section 130(1) of the NCA. The Tribunal is satisfied that the Applicant has shown, on a balance of probabilities, that the Respondent contravened section 130(1)(a) of the NCA.

68. Having found that the Respondent contravened the above-cited provisions of the NCA, we declare that the Respondent's contravention of the NCA 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 offence 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.'

69. We now turn to the administrative fine that the Applicant wants to be imposed on the Respondent. The Applicant wants an administrative fine in the amount of R1 000 000.00 or 10% of the Respondent's annual turnover to be imposed on the Respondent. In relation to the provisions of section 151(3) of the NCA, we will consider the following:
70. Nature: Reckless credit granting and the charging of unlawful and excessive interest are two of the most egregious forms of prohibited conduct under the NCA. Consumers were exploited by the Respondent. By extending credit whilst unregistered and engaging in unlawful debt collection or enforcement, the Respondent acted in a manner that undermined the purpose of the NCA and showed a callous disregard for consumers who had Emoluments Attachment Orders issued against them. The Respondent's submissions in this regard are incoherent and irrelevant. The *audi alteram partem* that the Respondent alluded to was afforded to it when the Applicant's application was served to it. In addition, the Tribunal granted it condonation for its failure to file its answering affidavit within the prescribed times on more than one occasion.
71. Duration: According to the Applicant, the Respondent's registration with the Applicant lapsed on 10 November 2015. It appears from the documents filed by the Applicant that the Respondent has been contravening the provisions of the NCA since November 2012. This is corroborated by the dates appearing in the client statement of at least one consumer.[13]
72. Gravity: The Respondent's conduct shows a total disregard for the consumer protection measures provided for in the NCA and the regulated credit industry. Some consumers were charged interest in the rate of 360%.[14]
73. 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.
74. Although the actual loss has not been computed, the evidence presented by the Applicant shows that consumers have suffered losses and/or damages as a result of the Respondent's conduct through the excessive charging of interest and cost of credit by the Respondent.
75. As a previously registered credit provider, the Respondent knew that it had to comply with the prescripts of the NCA but chose to exploit consumers nonetheless.
76. The Tribunal accepts the Applicant's submission that the conduct of the Respondent illustrates that the market circumstances within which the contraventions occurred are those in which consumers are not educated of their rights relating to access to credit. It is the Tribunal's view that the protection of vulnerable consumers is one of the primary reasons for the existence of the NCA.

77. The Applicant alleged that the Respondent derived a high profit from its unlawful activities. But, the Applicant was unable to state what the total amount of profit was as the Respondent did not submit its annual statutory returns.
78. The Respondent co-operated with the Applicant's investigation.
79. There are no prior investigations or enforcement action instituted by the Applicant against the Respondent. However, the Tribunal takes a very dim view of the fact that the Respondent has been found guilty of contravening at least eight provisions of NCA.
80. In *The Competition Commission of South Africa v Federal-Mogul Aftermarket Southern Africa (Pty) Ltd & Others*[15](Federal-Mogul case), the Competition Tribunal held that deterrence is the primary purpose of imposing administrative penalties.[16] The Competition Tribunal further said 'the deterrence element must have some relationship to the harm inflicted by the prohibited practice.' Thus, on a conspectus of the submissions and the evidence tendered by the Applicant, the Tribunal is of the view that an administrative fine of R300 000.00 (three hundred thousand rands) is appropriate in the circumstances.
81. We now turn to the Applicant's request that the Respondent be ordered to appoint an independent auditor, within 30 days of the issuing of this judgment, at its own costs to:
- 81.1. identify all open loans to identify where loans were extended without proper affordability assessments having been done and the cost of credit on all such identified loans to be refunded to the consumers;
- 81.2. identify all open loans to identify where consumers were excessively charged costs of credit. Where costs of credit were excessively charged, the Respondent is to refund consumers the amounts it received in the form of fees or charges within 30 days from the date of appointment of the auditor; and
- 81.3. 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 must be provided to the Applicant within 120 days after the order has been obtained.
82. The above request was not canvassed in the Applicant's application documents but was made orally based on the provisions of
- section 150(i) of the NCA which states that:
- 'In addition to its other 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.'

83. The Applicant did not request the appointment of an auditor in its pleadings. If it did so, then the Respondent would have been able to respond to this request. The Applicant cannot make oral submissions in this regard at the hearing stage. Such an oral request is not in accordance with the audi alteram partem principle. Thus, the Tribunal cannot make the order for the appointment of an auditor.

CONCLUSION

84. The Tribunal finds that the Respondent repeatedly contravened the following provisions of the NCA:

84.1. section 40(3) and section 40(4);

84.2. section 81(2) read with Regulation 23A(3) and Regulation 55(1)(b);

84.3. section 80(1)(a) read with section 81(3);

84.4. section 93(1);

84.5. section 101(1)(d) read with section 100(1)(c);

84.6. section 130(1)(a); and

84.7. section 129(1) read with section 129(5) and section 129(7)(a).

85. The Respondent's conduct stated in paragraphs 86.1. to 86.7 above constitutes prohibited conduct.

86. 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 R300 000.00 (three hundred thousand rands). Hopefully, this will send a strong

message to the Respondent and other credit providers that flagrant disregard of the provisions of the NCA will not be tolerated.

87. The Respondent's repeated and numerous contraventions of the provisions of the NCA and its illegal debt enforcement procedures indicate that the Respondent is a danger to the public and should be interdicted from future breaches of the NCA.

ORDER

88. Accordingly, the Tribunal makes the following order:-

88.1. the Respondent is found guilty of contravening the following provisions of the NCA:

88.1.1. section 40(3) and section 40(4);

2.5cm; margin-bottom: 0cm; line-height: 150%">88.1.2. section 81(2) read with Regulation 23A(3) and Regulation 55(1)(b);

88.1.3. section 80(1)(a) read with section 81(3);

2.5cm; margin-bottom: 0cm; line-height: 150%">88.1.4. section 92(1) read together with Regulation 28(1), 23A(15) and 55(1)(b);

2.5cm; margin-bottom: 0cm; line-height: 150%">88.1.5. section 93(1);

2.5cm; margin-bottom: 0cm; line-height: 150%">88.1.6. section 101(1)(d) read with section 100(1)(c);

2.5cm; margin-bottom: 0cm; line-height: 150%">88.1.7. section 130(1)(a); and

88.1.8. section 129(1) read with section 129(5) and section 129(7)(a).

1.25cm; margin-bottom: 0cm; line-height: 150%"> 88.2. the Respondent's conduct stated in paragraphs 86.1.1 to 86.1.8 above is hereby declared prohibited conduct in terms of Section 150(a) of the NCA;

88.3. the Respondent must pay an administrative fine in the amount of R300 000.00 (three hundred thousand rands) 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 the issuing of this order;

88.4. the Respondent is interdicted from future breaches of the NCA;

88.5. the Respondent must cease engaging in any activity that requires registration with the Applicant;

88.6. the Respondent must refund consumers the amounts it received in the form of fees, interest or charges it was not entitled to receive or which exceeded the prescribed maximum amounts allowed by the NCA within 60 (sixty) days from the date of the Tribunal's

order;

88.7. all credit agreements entered into with the Respondent since the lapsing of the Respondent's registration with the Applicant are hereby declared unlawful and void from the dates the agreements were entered into;

88.8. all loans extended by the Respondent since the lapsing of the Respondent's registration as a credit provider are hereby written off and declared unenforceable;

88.9. all open loans where no proper affordability assessments were conducted are deemed reckless, and all consumers' rights and obligations under those credit agreements are set aside;

88.10. in terms of section 150(f) of the NCA, the Respondent must attend to whatever is necessary to ensure that Emolument Attachment Orders obtained prior to the delivery of section 129 notices to consumers are rescinded, and consumers' credit records are updated accordingly;

88.11. the Respondent must attend to whatever is necessary to ensure that Emolument Attachment Orders obtained prior to the delivery of the section 129 notices against Rosanna Sass (ID Number: [...]89); Xaveria Khumalo (ID Number: [...]88) and Isaac Khomo (ID Number: [...]81) are rescinded; and

88.12. there is no order made as to costs.

Thus, done and signed at Centurion on 17 February 2020.

{signed}

Mr A Potwana

Presiding Tribunal Member

Ms H Alwar (Tribunal Member) and Adv J Simpson (Tribunal Member) concur.

[1] 34 of 2005 as amended (NCA/Act).

[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] GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters

before the National Consumer Tribunal, 2007 (Government Gazette No. 30225), as amended.

[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.”

[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] 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.”

[5] 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] Rosanna Sass (ID Number: [...]89); Xaveria Khumalo (ID Number: [...]88) and Isaac Khomo (ID Number: [...]81).

[7] Published under GN R489 in GG 28864 of 31 May 2006 as amended.

[8] Para 23 of the Respondent's Answering Affidavit at page 230 of the paginated bundle.

[9] Page 90 of the paginated bundle.

[10] Pages 119; 125; 131;136 and 155;159 of the paginated bundle.

[11] Annexures FA13 and FA14 of the Applicant's investigation report.

[12] Para 24 of the Respondent's Answering Affidavit. Page 231 of the paginated bundle.

[13] X G N Khumalo's client statement. Page 94 of the paginated bundle.

[14] I B Khomo and N Ndlovu. Pages 61 and 67 of the paginated bundle.

[15] Competition Tribunal Case number: Case Number: 08/CR/Mar01.

[16] At para 166.

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Prepared on 12 October 2026 · Esheria