

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Engelbrecht (NCT/243378/2022/140(1)) [2023] ZANCT 12 (1 February 2023) [2023] ZANCT 12

COURT

National Consumer Tribunal

BEFORE

MC Peenze, S Mbhele, Z Ntuli

CASE / FILE NUMBER

NCT/243378/2022/140(1)

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Policy

IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

AT CENTURION

Case

number: NCT/243378/2022/140(1)

In

the matter between:

NATIONAL
CREDIT REGULATOR
APPLICANT
and
JACOBUS ADRIAAN SCHALK
ENGELBRECHT RESPONDENT
(Identity
Number: [...]) t/a Sizabantu Cash Loans

Coram: Dr.
MC Peenze -
Presiding Tribunal member
Adv.
S Mbhele -
Tribunal member
Ms.
Z Ntuli
- Tribunal
member
Date
of hearing - 30 January 2023 via the Teams digital
platform
Date
of judgment - 01 February 2023

JUDGMENT

AND REASONS

INTRODUCTION

1. The Applicant brought this application in terms of section 141(1) of the National Credit Act, 34 of 2005 ("the NCA"). The Applicant seeks an order declaring the Respondent in repeated contravention of the Act and its Regulations, and such contraventions are to be declared prohibited conduct.
2. The Applicant further requests a finding of reckless lending because of other transgressions allegedly perpetrated by the Respondent. Based on these and other grounds, the Applicant also seeks an order

imposing an administrative fine on the Respondent.

THE APPLICANT

3. The Applicant is the National Credit Regulator, a juristic person established in terms of section 12 of the NCA to regulate the consumer credit market and ensure compliance with the NCA. The Applicant's principal business address is 127 - 15th Road, Randjespark, Johannesburg, Gauteng.
4. Mr. M Mathivha, a legal adviser in the Applicant's Investigations and Enforcement Department, represented the Applicant at the hearing, assisted by Ms. L Schwartz.

RESPONDENT

5. The Respondent is Jacobus Adriaan Schalk Engelbrecht, a natural person t/a Sizabantu Cash Loans. The Respondent's last known address is 12 Theo Kleynhans Street, White River, Mpumalanga, the physical address where the Respondent engages in credit lending activities.
6. The Applicant filed this application by registered mail on 30 September 2022.
- On 05 October 2022, the Respondent consented to service by e-mail. Subsequently, the Applicant resent the application by e-mail to the Respondent, after which the Respondent indicated in writing, on 05 October 2022, that he would not oppose the application.
7. The Respondent did not oppose the application and failed to appear at the hearing. The Tribunal proceeded to hear the matter in the Respondent's absence in terms of Rule 24(1) of the NCA.[1]

Rule 24 (1) provides:

If a party to a matter fails to attend or be represented at any hearing or any proceedings, and that party-

- (a) ...
- (b) is not the Applicant, the presiding member may-
 - (i) continue with the proceedings in the absence of that party."

TERMINOLOGY

8. A reference to a section in this judgment refers to a section in the NCA. A reference to a Regulation refers to the National Credit Regulations, 2006 ("the Regulations").[2] A reference to a Form refers to a Form as prescribed in schedule 1 of the Regulations.

JURISDICTION

9. The Tribunal has jurisdiction to hear this matter in terms of section 27.
- It has powers conferred upon it in terms of section 150 to make orders concerning a credit provider who allegedly contravenes the NCA. Even though the Respondent is a natural person, he functions as a credit provider in terms of the NCA by extending credit through credit agreements as set out in section 8.

ISSUES TO BE DECIDED

10. This judgment is based on the documents before the Tribunal and arguments presented by the Applicant at the hearing on 30 January 2023.
11. The issues to be decided are:
 - (1) whether or not the Respondent has engaged in prohibited conduct by repeatedly contravening the provisions of the NCA and the Regulations; and

(2) whether the Tribunal can grant the requested relief in the circumstances.

12. Section 150 provides for Orders of the Tribunal:

"In addition to its other powers in terms of this Act, the Tribunal may make an appropriate order concerning prohibited or required conduct in terms of this Act, or the Consumer Protection Act, 2008, including-

(a) declaring conduct to be prohibited in terms of this Act;

(b) ...;

(c) imposing an administrative fine in terms of section 151, with or without the addition of any other order in terms of this section."

13. In deciding these issues, the Tribunal must first consider the individual foundational claims the Applicant set out in its founding affidavit, relating to the alleged contraventions of the NCA. 14. The Applicant alleges that the Respondent contravened the following sections:

(i) Section 40(1) and Section 40(3);

(ii) Section 76(3);

(iii) Section 81(2) read with Regulation 23A;

(iv) Section 81(2)(a)(ii) read with Regulation 23A(12)(b) and 23A(13);

(v) Section 81(2)(a)(iii) read with Regulation 23A(3) and 23A(12)(c);

(vi) Regulation 23A(9) and 23A(10);

(vii) Regulation 23A(8) and 23A(12)(a);

(viii) Section 81(3) read with Section 80(1)(a);

(ix) Regulation 23A(15);

(x) Section 92(1) read with Regulation 28(1)(b) and Form 20;

(xi) Section 93(1) and 93(2) read with Regulation 30 and Form 20.2;

(xii) Section 100(1)(c) read with Section 101(1)(d) and Regulation 42(1);

(xiii) Section 90(1) read with Section 90(2)(b)(iii) read with Sec 101(1)(c), (f) and (g); and (xiv) Section 133(1) and (2) read with Section 90(2)(1).

BACKGROUND

15. The Respondent is not a registered credit provider with the Applicant. The Respondent operates and conducts business as a credit provider under the name and style of Sizabantu Cash Loans. A search of the Companies and Intellectual Property Commission's website using the identity number of the Respondent yielded no results for an entity known as Sizabantu Cash Loans.
16. This referral originates from a complaint initiated by the Applicant in terms of Section 136(2). The Applicant received information from a consumer, Ms. Jane Manda, concerning the activities of an entity known to her at the time as Sizanani Cash Loans. The information received related to credit extended by Sizanani Cash Loans in the amount of R1,600.00 at an interest rate of 30%. The alleged required repayment of her loan amounted to R2,080.00, equating to exactly 30%

of the extended loan amount. At the time of the loan extension, the credit provider allegedly retained the identity document of the consumer. Following her inability to repay the loan, an employee of the credit provider proceeded to repossess Ms. Mande's

property, i.e., the fridge, and required her to make further payments in respect of the loan amount. The credit provider, then known as Sizanani Cash Loans, was conducting its business in the White River area from the premises next to Masibambisane, later identified as Masibambisane Funerals Society.

17. Upon the Applicant attempting to verify the exact address of Sizanani Cash Loans, as per the details provided by Ms. Manda, the Applicant discovered that Sizanani Cash Loans shared the same office premises of Masibambisane Funerals Society and operated under the name of Sizabantu Cash Loans. Further telephonic discussions with Ms Mande concerning the exact name of the entity revealed she had made a mistake about her credit provider's exact name. The Applicant confirmed the trading name as Sizabantu Cash Loans, the Respondent, and not Sizanani Cash Loans.
18. The information described above provided the Applicant with a reasonable suspicion that Sizabantu Cash Loans was:
 - i) Conducting business as a credit provider while not being registered as such in terms of the NCA;
 - ii) Extending credit without conducting proper affordability assessments;
 - iii) Charging interest at a rate in excess of the maximum rate prescribed in terms of the NCA;
 - iv) Retaining consumer instruments as a means to secure or enforce repayment in terms of the agreements entered; and

- v) Taking unlawful enforcement steps in that it unlawfully repossessed consumers' property upon default without following the steps required in terms of the NCA prior to such repossession.
19. The aforesaid identified contraventions raised serious concerns regarding the business practices of the Respondent. The contraventions so identified gave rise to a reasonable suspicion that the Respondent was conducting his business and extending credit in a manner that was not in accordance with the provisions of the NCA and its Regulations and, if found true, would constitute prohibited conduct under the NCA.
20. The Applicant, on or about 31 May 2022, initiated a complaint against Sizabantu Cash Loans in terms of Section 136(2). It also authorized a raid investigation into the Respondent's business practices in terms of Section 139(1)(c).
21. The scope of the investigation was to determine, inter alia:
- i) Whether Sizabantu Cash Loans was conducting business as a credit provider while not being registered as a credit provider in terms of the NCA;
 - ii) Whether, if registered, Sizabantu Cash Loans complied with the requirements of the NCA concerning the display of a window decal and a registration certificate at its business premises;
 - iii) Whether Sizabantu Cash Loans retains prohibited instruments in order to secure repayments in contravention of Section 133, read with Section 90(2)(1);
 - iv) Whether Sizabantu Cash Loans was conducting proper affordability assessments in terms of Section 81(2) read with Regulation 23A;
 - v) To determine the cost of credit Sizabantu Cash Loans charged in respect of its credit agreements and whether same was in line with the provisions of the NCA; and
 - vi) To determine the steps taken by Sizabantu Cash Loans upon default by consumers and whether unlawful enforcement methods, such as unlawful repossession of goods, were used to secure repayments.[3]
22. On or about 01 June 2022, the Applicant appointed Tshilidzi Mugwagwa (“Mugwagwa”), Douglas Musandiwa (“Musandiwa”), and Bongiwe Tuytu (“Tuytu”) as inspectors in terms of Section 25 to investigate the Respondent's business practices.
23. On or about 02 June 2022, the White River Magistrate's Court granted a search and seizure warrant. This warrant entitled the inspectors and members of the African Police Service to search the Respondent and Masibambisane Funeral Society's premises at 12 Theo Kleynhans Street, White River, Mpumalanga. Prohibited instruments were seized, such as consumers' bank cards, identity documents, SASSA cards, loan books, and credit agreements.

24. On or about 02 June 2022, the appointed inspectors and members of the Serious Commercial Crimes Unit of the Hawks in Nelspruit performed a raid exercise. They conducted an onsite investigation at the Respondent's address.
25. Upon arrival at Sizabantu Cash Loans' premises, an interview was conducted with Jacobus Adriaan Schalk Engelbrecht, identified to be the sole owner of Sizabantu Cash Loans. Mugwagwa provided the Respondent with a copy of the warrant and advised him of his rights in terms of Section 139(4).

The Respondent signed an Acknowledgment of Rights Form.

26. A total of eighty-six (86) consumer instruments consisting of twenty-six (26) SASSA cards, thirty-six (36) bank cards, twenty-four
- (24) identity documents, three (3) loan books, ten (10) loan agreements and money to the value of R61,760.00 was located, provided and seized during the investigation. Subsequently, a criminal case was registered under case number 08/06/2022 at the White River Police Station.
27. During the interview, the Respondent confirmed that Sizabantu Cash Loans retains or keeps prohibited instruments as a means or part of enforcing payments. Upon request and for assessment purposes, the Respondent provided Mugwagwa with copies of ten (10) consumer files.
28. After assessing the credit agreements contained in the sampled files, Mugwagwa compiled an Investigation Report ("the Investigation Report") dated 18 July 2022. The Investigation Report details the alleged contraventions.

CONTRAVENTIONS OF THE ACT

Failure to register as a credit provider and unlawful advertising practices

29. Section 40(1) provides that a person must apply to be registered as a credit provider if the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1).
30. Section 40(3) stipulates that a person who is required in terms of subsection (1) to be registered as a credit provider but who is not so registered must not offer, make available or extend credit, enter into a credit agreement or agree to do any of those things.
31. The Respondent is not registered as a credit provider, and by virtue of the service he delivers, he is required to be so registered in terms of Section 40(1).
32. In terms of Section 40(4), any credit agreement entered into by a credit provider who is required to be registered in terms of Section 40(1) but who is not so registered is an unlawful credit agreement and void to the extent provided for in terms of Section 89(2)(d).

33. All agreements entered into between the Respondent and the respective consumers since the inception of the Respondent's credit-granting activities are therefore deemed unlawful and void to the extent provided for in terms of Section 89.
34. By extending credit while not being registered as a credit provider, the Respondent contravened Sections 40(1) and 40(3).
35. Further, with specific reference to the Respondent's advertisement,[4] and because the Respondent is not registered as a credit provider per the NCA, the Respondent contravened Section 76(3).
36. In terms of the aforementioned section, a person who is required to be registered as a credit provider but who is not so registered must refrain from advertising the availability of credit or goods or services to be purchased on credit.

Failure to conduct proper affordability assessments

37. In terms of Section 81(3), a credit provider must not enter into a reckless credit agreement with consumers. In terms of Section 80(1)(a), 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 assessment might have concluded at the time.
38. As appears from the Respondent's files sampled in the Investigation Report, the Respondent failed to conduct proper affordability assessments in that it failed to take steps to assess consumers' debt repayment histories and failed to evaluate consumers' existing financial means, prospects, and obligations.
39. The Respondent, as a credit provider, is compelled, in terms of Section 81(2), to take reasonable steps to inter alia assess the debt repayment history, existing financial means, prospects, and obligations of consumers, prior to entering into credit agreements with consumers.
40. The Applicant submits that the Respondent failed to conduct affordability assessments per the requirements of Section 81(2) and Regulation 23A. The Respondent needed to have assessed the debt repayment history of the consumers and obtain credit bureau reports of the consumers before entering into the credit agreements.
41. The Tribunal noted the absence of credit bureau reports in all Annexures marked "F1" to "O" as annexed to the Investigation Report. The Respondent's failure herein rendered him unable to have regard to, amongst other things, open loans, adverse credit records, or arrear statuses of accounts of consumers. The Respondent accordingly contravened Section 81(2)(a) (ii) read with Regulation 23A(12)(b) and 23A(13).

42. The Respondent further failed to take reasonable steps to assess the consumers' existing financial means, prospects, and obligations in contravention of Section 81(2)(a)(iii) read with Regulation 23A(3) and 23A(12)(c). In this regard, the Tribunal noted the Respondent's failure to obtain current salary slips or proof of income of the consumers in all the sampled files marked as Annexures "F1" to "O" annexed to the Investigation Report.
43. The Respondent also failed to obtain any or current bank statements of the consumers in the sampled files marked as Annexures "F1" to "O" annexed to the Investigation Report. Accordingly, the Respondent was not in a position to verify, validate or establish the income or expenses of consumers.
44. The Respondent did not apply the minimum expense norms table and failed to provide evidence of making the necessary calculations required in terms of Regulation 23A(9) and 23A(10). As all the sampled files displayed this shortcoming, the Respondent contravened Regulation 23A(9) and 23A(10).
45. The Respondent should have calculated consumers' discretionary income before extending the credit to the consumers. The Applicant could not locate such calculations on any of the sampled files provided. The Respondent's conduct in this regard contravenes Regulation 23A(8) and 23A(12)(a).
46. As apparent from its advertisement before the Tribunal, the Respondent extends credit to consumers whose only income is child support grants. This conduct of the Respondent is evident in all the sampled credit agreements.
47. Based on the above, the Tribunal is satisfied that the Respondent repeatedly contravened Sections 81(2)(a)(ii) and (iii) read with Regulation 23A (3), 23A(8), and 23A (12).

Reckless credit granting

48. As the Respondent failed to conduct proper affordability assessments, the Respondent has extended credit recklessly to consumers and has consequently repeatedly contravened Section 81(3), read together with Section 80(1)(a).
49. In terms of Section 83(2)(a), the Applicant seeks an order declaring the credit agreements reckless in terms of Section 80(1)(a). The Applicant further seeks an order setting aside all the consumers' obligations under those agreements.

Failure to provide consumers with pre-agreements in the prescribed form

50. Section 92(1) prescribes that a credit provider must only enter into a small credit agreement if the credit provider has given the consumer a pre-agreement statement and quotation in the prescribed form.
51. Regulation 28(1)(b) informs that the pre-agreement statement and quotation must be in the format of Form 20.

52. Regulation 23A(15)(a) states that a credit provider must disclose the credit cost to the consumer in the pre-agreement statement and quotation. In terms of Regulation 23A(15)(d), a credit provider must disclose the total cost of credit, which includes, amongst other things, the principal debt, interest, initiation fees, and service fees.
53. As is evident in the sampled files marked as Annexures “F1” to “O”, the Respondent failed to provide consumers with pre-agreement statements and quotations in the prescribed Form 20 in that the following critical information is lacking:
- (i) The type of agreement entered into;
 - (ii) The NCR registration number of the Respondent;
 - (iii) The physical address of the Respondent;
 - (iv) The contact number of the Respondent;
 - (v) The ID number of consumers;
 - (vi) The address of consumers;
 - (vii) The contact number of the consumers;
 - (viii) The amount of the cost of credit charged to consumers; and
 - (ix) The annual and monthly interest rates apply to the agreement.
54. The Respondent's failure to provide consumers with pre-agreement statements and quotations is in contravention of Section 92(1) read with Regulation 28(1)(b) and Form 20.
55. By further failing to make the necessary disclosures in terms of the cost of credit related to the agreements in question, the Respondent contravened Regulation 23A(15)(a) and (d).

Failure to provide consumers with credit agreements in the prescribed form

56. Section 93(1) prescribes that a credit provider must deliver to the consumer, without charge, a copy of a document that records their credit agreement in a paper form or a printable or electronic form.
57. Section 93(2) prescribes that a document that records a small credit agreement must be in the prescribed form.
58. Regulation 30 sets out the requirements for a small credit agreement and informs a small agreement to contain all information as reflected on Form 20.2.
59. The Respondent failed to provide consumer credit agreements in the prescribed form. The conduct described above is evident in all the sampled files. The Respondent accordingly contravened Section 93(1) and Section 93(2) read with Regulation 30 and Form 20.2.

Overcharging of interest

60. Section 100(1)(c) prohibits the credit provider from charging or imposing an interest charge under a credit agreement exceeding the amount that may be charged consistent with the NCA.
61. Section 101(1)(d)(ii) informs that interest must not exceed the applicable maximum prescribed rate determined in terms of Section 105.
62. Regulation 42(1) sets out the prescribed maximum prescribed interest rates for each category of credit agreement.
63. According to Regulation 42(1), the maximum prescribed interest for a short-term loan is 5% per month on the first loan and 3% on subsequent loans extended within the same calendar year.
64. The Respondent provides short-term credit extensions. Due to the Respondent's failure to adequately disclose the applicable interest rate on its agreements, the Applicant was unable to calculate whether there was an overcharge in relation to or concerning other credit costs. However, in relying on the affidavit deposed to by Ms. Manda, and in the absence of any evidence to the contrary, the Tribunal finds that there exist reasonable grounds to infer that the Respondent charged interest of 30% in respect of its agreements. This overcharge is in contravention of Section 100(1)(c), read with Section 101(1)(d), read further with Regulation 42(1).
65. Therefore, the Tribunal finds and is satisfied with the evidence that the Respondent contravened the abovementioned Sections.

Including an unlawful provision in a credit agreement

66. An assessment of the credit agreements before the Tribunal revealed that the Respondent's credit agreements contain an unlawful provision, which essentially allows the Respondent to charge consumers penalty service fees in the event of default.
67. A penalty service fee is not allowed in terms of the NCA, nor does it fall within the definition of penalty interest, default administration charges, or collection costs.
68. The Respondent has accordingly contravened Section 90 (2) (b) (iii) read with Sections 101(c), (f), and (g).

Unlawful possession of consumers' instruments

69. Section 133(1)(a) prohibits the credit provider from making use of any document or instrument mentioned in Section 90(2)(1) when collecting on or enforcing a credit agreement.
70. Section 133(2) provides that a credit provider must not, when collecting money owed by the consumer under a credit agreement or when seeking to enforce the agreement, rely on any document, instrument, or contract provision referred to in Section 90(2)(1).

71. In terms of Section 90(2)(1), a provision of a credit agreement is unlawful if it expresses an agreement by the consumer to deposit with the credit provider, an identity document, credit or debit card, bank account, or automatic teller machine access cards, or any similar identifying document.
72. The Applicant found the Respondent in possession of a total of eighty-six (86) consumer instruments consisting of twenty-six (26) SASSA cards, thirty-six (36) bank cards, and twenty-four (24) identity documents, three
- (3) loan books, ten (10) loan agreements and money to the value of R61,760.00.
73. The Applicant linked at least five (5) prohibited instruments to credit agreements extended by the Respondent. As a result of the Respondent's possession of consumers' instruments, the Respondent has contravened Section 133(1) and (2) read with Section 90(2)(1).
74. In terms of the criminal case against the Respondent, the Applicant received information that the Respondent was successfully convicted and sentenced within the White River Magistrate's Court to R20,000.00 or six
- (6) months imprisonment, of which R17,000.00 or five (5) months imprisonment is suspended for five (5) years.
75. The Respondent's conduct in retaining consumer instruments to enforce repayment and with specific reference to the allegations contained within the affidavit of Ms. Manda, confirms that the objective of the employed business practices was to circumvent the provisions of Sections 129, 130 and 131.

CONSIDERATION AND ANALYSIS OF THE APPLICANT'S EVIDENCE

76. The Tribunal considered the Applicant's submissions regarding the basis upon which it formulated a reasonable suspicion that the Respondent engaged in prohibited conduct.
77. There is no opposing view from the Respondent. Accordingly, the Tribunal is satisfied that the Applicant has provided sufficient argument and basis for establishing that the Applicant formulated a reasonable suspicion that the Respondent contravened the Act.[5] The Tribunal is seized only with the Applicant's uncontroverted documentary evidence and oral submissions. The Tribunal deems the

facts alleged by the Applicant as admitted because the Respondent elected not to attend the proceedings to defend himself or to file an answering affidavit.

78. After considering the evidence, the Tribunal finds that the Respondent has repeatedly contravened the NCA and the Regulations as a credit provider. These contraventions amount to prohibited conduct and are serious. The Respondent has forfeited the opportunity to put a proper defence against the allegations levelled against him and has left the matter in the hands of the Tribunal.

79. The Tribunal views the transgressions by the Respondent in a severe light. Such unlawful conduct undermines the purpose of the NCA and causes immeasurable harm to consumers. The Tribunal is satisfied that the Applicant has proven on a balance of probabilities that the Respondent has repeatedly contravened the Sections and Regulations as set out in the preceding paragraphs.
80. The Tribunal proceeds to consider an appropriate order.

CONSIDERATION OF AN APPROPRIATE ORDER

Declaring the Respondent to have repeatedly contravened the NCA and committed prohibited conduct

81. Following the Applicant's request, the Tribunal deems it appropriate to order that the Respondent's repeated contraventions amount to prohibited conduct. The Tribunal proceeds to consider the Applicant's other wide-ranging requested relief.

Administrative penalty

82. The Applicant has requested that the Tribunal impose an administrative fine on the Respondent of R1 000 000.00 (One Million Rand).
83. The imposition of an administrative fine is both a punitive and preventative measure and is necessary to prevent repetitive and similar conduct in the marketplace and credit market. The importance of the administrative fine was highlighted by the Competition

Tribunal in *Competition Commission v Federal Mogul Aftermarket Southern Africa (Pty) Ltd.*^[6] The Competition Tribunal held that the theoretical justification for the punishment of those who violate regulatory law appears to rest firmly on the deterrence theory of punishment. Although fines have a retributive purpose by punishing the transgressing responsible party for illegal conduct, the main purpose of an administrative fine in terms of this theory is to act as a deterrent, both to the offending responsible party and to other responsible parties that may consider engaging in the same type of behaviour in the future.

84. The Applicant submitted that, in this case, there is a clear need for deterrence and example setting. The Applicant argued that recklessly extending credit while not being registered as a credit provider brings the entire consumer credit industry into disrepute. In addition, a sustainable credit market is undermined by the Respondent's failure to conduct affordability assessments, his inclusion of unlawful provisions within credit agreements, his overcharging of interest, and the retention of consumer instruments.
85. From the sampled files, the Applicant submits that the Respondent's conduct has been ongoing since the inception of his business activities as a credit provider.

86. The conduct pertaining to the retention of prohibited instruments is defined as an offence. It is severe as it unfairly prejudices consumers' rights to use or access their bank accounts, claim benefits, and obtain further credit. In all sampled credit agreements obtained, the Respondent contravened the NCA. The Respondent's disregard for the NCA is apparent. The prescripts of the NCA are safeguards for the credit provider, the consumers, and the credit industry. The Tribunal finds the Respondent's failure to adhere to the NCA is indicative of a total disregard for the rights of consumers and, ultimately, the industry in which the Respondent conducts its business.
87. 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.
88. The NCA was introduced into the South African legislative landscape to curb this type of conduct the Tribunal has found the Respondent to have perpetrated.[7] Therefore, the Tribunal would be failing in its duty to not send a clear message to the Respondent and other credit providers that the Tribunal will not tolerate credit providers contravening the NCA.
89. Section 151(3) sets out the factors the Tribunal must consider when determining an appropriate fine.

The Tribunal proceeds to consider each in turn.

Nature, duration, gravity, and extent of the contraventions

90. The contraventions show that the Respondent failed to conduct proper affordability assessments and extended credit recklessly. It also gouged consumers with excessive costs of credit if any default occurred.

Loss or damage suffered because of the contraventions.

91. The Applicant did not place specific evidence before the Tribunal concerning the loss or damage consumers suffered. However, relying on Ms. Manda's information, an overcharge of up to 30% occurred. Ms. Manda further informed the Applicant of her actual property loss upon default.
92. The Tribunal has found that the Respondent exploited consumers by entering into loan agreements without first taking reasonable steps to ensure that the loans were affordable. Therefore, the Tribunal is satisfied that consumers have suffered prejudice and financial loss because of the Respondent's conduct. The damage to a consumer's economic status is far-reaching if they apply for debt review because of over-indebtedness.

Respondent's behaviour

93. There is no plausible reason why the Respondent should not have complied with its obligations as a credit provider. The Respondent has brought the consumer credit industry into disrepute and disregarded consumers' rights.

Market circumstances under which the contraventions occurred

94. The Respondent apparently ignored its obligations in terms of the NCA. It could do so because it operates in an environment where credit providers are expected to educate consumers about their rights concerning access to and the cost of credit. The Respondent's prohibited conduct caused illinformed consumers to get exploited.

Level of profit derived from the contraventions

95. The Applicant has been unable to place evidence before the Tribunal regarding the Respondent's annual turnover because the Respondent has not opposed the matter or explained his behaviour to the Tribunal. However, the Respondent must have been making a profit from its activities in contravention of the NCA and Regulations. The Respondent extended all loans unlawfully, and the prohibited charges constitute a profit gained by the Respondent.

The degree to which the Respondent cooperated with the Applicant

96. The Tribunal considered that the Respondent provided the inspectors with the required information and cooperated with them during the investigation.

Respondent's prior contraventions

97. The Respondent has not been the subject of prior investigations or enforcement measures. However, the nature of the contraventions indicates that the conduct of the Respondent has been ongoing since the inception of the Respondent's activities as a credit provider.

Amount of the fine

98. The imposition of an administrative penalty is an important decision not taken lightly by the Tribunal. It has severe consequences for the Respondent. In this matter, the Tribunal did not benefit from hearing the Respondent's side in mitigating the allegations the Applicant raised at the hearing. The Tribunal, based on the evidence before it and the Applicant's further submissions on an appropriate penalty, finds the Applicant's submissions concerning the contraventions of the NCA compelling and accepts the Applicant's submissions in support of the imposition of an administrative penalty.
99. In *NCR v Werlan Cash Loans t/a Lebathu Finance*[8] the Tribunal, regarding the imposition of an administrative fine, stated the following:

"When determining an amount, the Tribunal must consider the legislation from which its own mandate derives, and when determining an appropriate fine the Tribunal must consider the following factors: the nature, duration, gravity, and extent of the contravention; any loss or damage suffered as a result of the contravention; the behaviour of the Respondent; the market circumstances in which the contravention took place; the level of profit derived from the contravention; the degree to which the Respondent has cooperated with the National Credit Regulator, or the National Consumer Commission, in the case of a matter arising in terms of the

Consumer Protection Act, 2008, and the Tribunal; and whether the Respondent has previously been found in contravention of this Act, or the Consumer Protection Act, 2008, as the case may be."

100. In *NCR v Midwicket*[9] the Tribunal found the following:

"One of the main purposes of an administrative fine is to serve as a means of deterring an offender from engaging in the prohibited conduct again. Where the offender's registration is cancelled and is thus no longer permitted to conduct business as a credit provider, one of the main reasons for the imposition of a fine falls away. The imposition of the fine then becomes purely punitive, which would generally only be warranted in the most extreme of circumstances."

101. The Respondent transgressed the law in every instance sampled, which indicates that the Respondent has little if any, regard for the law and regulatory bodies. Further, the Tribunal accepts the Applicant's argument that the Respondent's decision to grant credit without registration with the Applicant is an aggravating factor when calculating a penalty.²⁸ In *Competition Commission of South Africa v Afrion Property Services CC and Others*²⁹, the Competition Tribunal held that in the absence of any mitigating factors put up by the Respondent, its conduct was found to be an aggravating factor and therefore disregarded the 30% discount proposed by the Commission.
102. Similarly, in this matter, the Respondent has not bothered to take the Tribunal into his confidence and has not put up any mitigating circumstances.
103. However, the Respondent did cooperate with the Applicant during its investigation; it has no prior contraventions, and the Applicant did not quantify the profit generated from the prohibited conduct
104. Considering all these factors, the Tribunal finds that it is appropriate to impose an administrative fine of R800 000.00 (Eight Hundred Thousand Rand) on the Respondent.

Appointment of an auditor

107. The Applicant also requested the Tribunal to appoint an auditor to audit 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. 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.[10]

Request for interdict

108. The Applicant requested the Tribunal to make an order interdicting the Respondent from engaging in prohibited conduct in the future. The interdict will serve no purpose because the Respondent may not engage in prohibited conduct given the NCA's provisions.¹¹ However, as the Tribunal found the sampled credit agreements as reckless, it wishes to prevent the Respondent from collecting on any of its extended credit agreements.

ORDER

109. Accordingly, the Tribunal makes the following order:

109.1 The Respondent has repeatedly contravened the following sections of the NCA and the Regulations:

(xiii) Section 90(1) read with Section 90(2)(b)(iii) read with Section 101(1)(c), (f) and (g); and

(xiv) Section 133(1) and (2) read with Section 90(2)(1).

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109.2 The repeated contraventions are prohibited conduct in terms of section 150 (a) of the NCA;

109.3 The Respondent's credit agreements with consumers contained in annexures "F1" to "O" of the Investigation Report are reckless in terms of section 80 (1) (a) and are set aside;

109.4 The Respondent is interdicted from collecting on any of his extended credit agreements;

109.5 The Respondent is ordered, should he remain in possession of consumer instruments not found during the raid investigation, to immediately return those instruments to their rightful owners, the consumers, or to hand them over to the South African Police Service immediately;

109.6 The Respondent is ordered to:

109.6.1 Within 30 days of the issue of this judgment, appoint an independent auditor, who is

registered as a Chartered Accountant, at his own cost, to determine and compile a list of all the consumers and the amount by which the respondent has within the last 3 (three) years of the date of issue of this judgment extended loans without affordability assessments; and

109.6.2 Refer the independent auditor's report to the Applicant within

150 days of the issue of this judgment, after which the Applicant can refer the extended loans without affordability assessments to the Tribunal to have them declared reckless and for specified relief outlined in Section 83(2) of the NCA;

109.7 The Respondent is within 90 business days of the date of issue of this judgment to pay an administrative fine of R800 000.00 (Eight Hundred Thousand 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: [...]

Reference: NCT/243378/2022/140(1) and name of person or business making the payment; and

109.8 There is no cost order.

[signed]

Dr. MC Peenze Presiding Tribunal member

Tribunal members Adv. S Mbhele and Ms. Z Ntuli concur with this judgment.

- [1] See 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).
- [2] Published under Government Notice R489 in Government Gazette 28864 of 31 May 2006.
- [3] See Annexure "FA4" of the founding affidavit.
- [4] See Annexure "FA1".
- [5] For a discussion of what constitutes reasonable suspicion, see *National Credit Regulator v Dacqup Finances CC trading as ABC Financial Services – Pinetown and Another* (382/21) [2022] ZASCA 104 (24 June 2022).
- [6] Case number 08/CR/Mar01.
- [7] See *NCR v Golden Mile Loans CC t/a Cash 4 U* NCT/158460/2020/57(1).
- [8] NCT/3867/2012/57(1).
- [9] *NCR v Midwicket Trading 525 CC t/a Butterfly Cash Loans* NCT/7962/2013/57(1).
- [10] In *National Credit Regulator v Dacqup Finances CC trading as ABC Financial Services – Pinetown and Another* (382/21) [2022] ZASCA 104 (24 June 2022), the SCA confirmed that the appointment of an auditor in such circumstances is warranted. 11 *Shoprite Investments Ltd v The National Credit Regulator* (509/2017 dated 18 December 2019).

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