

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Gendrie Verspreiders (Pty) Ltd (NCT/156562/2020/57(1)) [2021] ZANCT 3 (16 March 2021) [2021] ZANCT 3

COURT

National Consumer Tribunal

BEFORE

P A Beck, H Alwar, A Potwana

CASE / FILE NUMBER

NCT/156562/2020/57(1)

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Source record**IN THE NATIONAL
CONSUMER TRIBUNAL
HELD AT CENTURION**

Case number: NCT/156562/2020/57(1)
In the matter

between: NATIONAL CREDIT
REGULATOR
APPLICANT
and
GENDRIE
VERSPREIDERS (PTY) LTD T/A GOLDEN POT CASH LOANS
RESPONDENT

Coram: Ms
P A Beck – Presiding
Tribunal member
Ms H Alwar –
Tribunal member
Mr A Potwana –
Tribunal member
Date of hearing –
10 March 2021
Date of judgment –
16 March 2021
Final date of
receipt of further submissions and audio -17 March 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. Mr M Vardalia, who is a senior legal adviser in the Applicant's Investigations and Enforcement Department, represented the Applicant at the hearing of this application.
3. The Respondent is Gendrie Verspreiders (Pty)Ltd t/a Golden Pot Cash Loans (the Respondent). It is a company duly registered in terms of the company laws of the Republic of South Africa under registration number 2019/401034/07 with its registered physical address at 471 Myburgh Street, Capital Park, Pretoria, 0084.
4. The Respondent is a registered credit provider in terms of section 40 of the Act with registration number NCRCP8029.
5. The Respondent did not oppose the application and the Respondent did not attend the hearing of the application.

JURISDICTION

6. Section 150 of the Act empowers the Tribunal to make orders in relation to a registrant who contravenes the Act or fails to comply with a condition of its registration as a credit provider. More specifically, Section 150 gives to the Tribunal the power to make an appropriate order in relation to prohibited or required conduct in terms of the Act or the Consumer Protection Act,
2008. This power includes declaring conduct to be prohibited in terms of the Act and imposing an administrative fine in terms of Section
- 151 with or without making an additional order in terms of Section 150 of the Act.

7. 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

8. This application is in terms of Section 57(1) to cancel the Respondent's registration as a credit provider.[2]

9. 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 determine whether to impose an administrative penalty on the Respondent and to appoint an auditor to conduct an audit into the Respondent's practices as a credit provider.
10. The allegations of prohibited conduct will become apparent in the course of this

judgment.

RESPONDENT'S FAILURE TO OPPOSE THIS APPLICATION

11. On 9 March 2019, the Applicant filed this application with the Tribunal; and sent it by registered post to the Respondent at 471 Myburgh Street, Capital Park, Pretoria, 0084; the Respondent's elected postal address on the Respondent's conditions of registration as a credit provider (the conditions of registration) in terms of Rule 30(1)(b) of the Rules. The Applicant also attempted to serve the application on the Respondent, via courier on the same address.
12. On 13 March 2020; the office of the Registrar of the Tribunal (the Registrar) issued a notice of filing.
13. That notice records that the Respondent may oppose the application by serving an answer within 15 business days of receipt of the application.
14. On 10 June 2020; according to the track and trace report, the application was uplifted from the Post Office and signed for by G. Brandt.
15. On 8 October 2020; the Registrar issued a notice setting this application down for hearing on 10 March 2021. The Registrar sent the notice by e-mail to the Applicant at litigation@ncr.org.za, the Respondent's e-mail addresses at goldenpotcash2@gmail.com;neverstopgw@gmail.com and per registered mail to 471 Myburgh Street, Capital Park, Pretoria, 0084.
16. The Tribunal was satisfied that the sequence of events shows that:
 - 16.1 The Applicant served the application papers via registered mail and courier;
 - 16.2 The application served by registered post was collected from the Post Office; and
 - 16.2 The Registrar notified the Respondent that it had 15 (fifteen) business days from the date of receiving the application papers to file an answering affidavit and it did not do so.

17. Despite these attempts to afford the Respondent an opportunity to answer the serious allegations the Applicant makes against him, the Respondent elected to remain silent, did not oppose the application; and did not attend the hearing of this application. The Tribunal is satisfied that the service requirements as set out in Rule 30(1)(b) were met. Consequently, the Tribunal proceeded to hear this application in the Respondent's absence.

FACTUAL

BACKGROUND

Introduction

18. Carien du Plooy is the manager in the Applicant's Investigations and Enforcement Department.
19. She stated in the Applicant's founding affidavit that the complaint stems from information received from the South African Social Services Agency (SASSA) regarding the business practices of certain credit providers in the Pretoria area, who were identified as allegedly overcharging consumers on interest and extending credit recklessly in contravention of the Act.

Initiation of a complaint

20. On 8 October 2019, the Applicant initiated a complaint in terms of Section 136(2) against the Respondent for allegedly conducting business as a credit provider in contravention of the Act. On 10 October 2019, the Applicant appointed two inspectors in terms of Section 25 to investigate the Respondent's activities.

Initial investigation

21. On 15 October 2019, the inspectors informed the Respondent of the investigation when they conducted an onsite inspection at the Respondent's business premises situated at 479 Sannie Street, Hercules, Pretoria West. The inspectors assessed ten (10) credit agreements handed to them by Benita de Beer ("de Beer") who identified herself as the Respondent's consultant. The investigation uncovered serious contraventions of the Act, detailed in the inspector's report, which led the Applicant to believe that the Respondent was systemically contravening the Act.
22. The Tribunal turns to consider the contraventions arising out of the inspection report.

CONTRAVENTIONS OF THE ACT

Contravention 1:

Failure to conduct proper affordability assessments and reckless credit granting

The Act

Reckless credit

23. Section 81 deals with the prevention of reckless credit. Section 81(2)(a)(ii) and (iii) read together with Regulation 23A of the National Credit Regulations, 2006 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. Regulation 23A sets out the criteria to conduct an affordability assessment. The Tribunal is aware of Regulation 23A(4) being set aside by the High Court in March 2018.[4]
24. Section 80 deals with reckless credit. Section 80(1) provides that a credit agreement is deemed to be reckless if, at the time when the agreement is concluded, the credit provider failed to conduct an assessment in accordance with Section 81(2) read with Regulation 23A, irrespective of what the outcome of the assessment might have been at the time. Section 81(3) specifically prohibits a credit provider from entering into a reckless credit agreement with a prospective consumer.
25. 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 that indicated that the consumer did not understand the consumer's risks, costs or obligations under the proposed credit agreement.
26. Section 80(1)(b)(ii) renders the credit agreement reckless if entering into it would make the consumer over-indebted.
27. 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. 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).
28. 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. 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.

Alleged contravention

29. The Applicant alleges that the Respondent concluded credit agreements with consumers without first taking reasonable steps to assess the consumer's debt repayment history; and other existing financial means, prospects and obligations. The Respondent also did not conduct credit bureau checks on the consumers to ascertain the consumer's debt obligations when entering into the credit agreements; and when the Respondent did so, the Respondent

conducted the credit bureau checks after the Respondent had already extended credit to consumers.

30. The Applicant alleges that as a result of the Respondent not conducting proper affordability assessments as is required by Section 81(2), the Respondent extended credit recklessly to consumers in contravention of Section 81(3) read with Section 80(1)(a) of the Act. The Applicant further alleges further, that despite the preponderance of information available to the Respondent at the time the credit agreement was entered into, that entering into another credit agreement with the consumer would make the consumer over-indebted, the Respondent continued to conclude credit agreements with consumers in contravention of section 80(1)(b)(ii).
31. Examples of the Respondents conduct is evident in the following consumer files. In the case of consumer Mantsi the consumer's only source of income was from a child support grant totalling R1 260,00 (R420.00 per child) per month. On this fact alone the Respondent should have refused to grant credit to the consumer because the child support grant is intended for the maintenance of the child/children. The Respondent also did not obtain any information of the consumer's monthly living expenses; and the consumer's credit bureau check shows that the consumer was already in arrears for nine (9) months under a prior credit agreement concluded. In extending credit to this consumer the Respondent was making the consumer further over-indebted.
32. In the case of consumer Bester the Respondent assessed that this consumer had a net monthly income of R30 000.00 per month. However, the consumer's bank statement and pay slip indicated that the consumer had a net monthly income of R6 930.68. The Respondent assessed the consumer's debt obligations as zero (0) whereas the credit bureau report taken a few weeks after the Respondent extended credit to the consumer showed that the consumer had debt obligations of R4 347.00.
33. Based on the aforementioned, the Applicant submits that the Respondent repeatedly and over a period of time entered into credit agreements with consumers without first taking reasonable steps to assess consumers' debt repayment history and existing financial means, prospects and obligations. Thus the Respondent contravened Section 80(1)(b)(ii); 81(2); and Section 81(3) of the Act read with Regulation 23.

Analysis

34. The Tribunal is satisfied that the Respondent contravened Section 80(1)(a); Section 80(1)(b)(ii); Section 81(2)(a)(ii) and (iii) read with Regulation 23A; and Section 81(3) read with Section 80(1)(a.) There is no evidence before the Tribunal that the Respondent calculated the consumers' discretionary income, nor that the Respondent considered the consumers' debt repayment obligations under other credit agreements. Moreover, there is no evidence before the Tribunal that the Respondent utilised the minimum expense norms table to calculate the consumer's existing financial obligations. The Tribunal is further satisfied with

the evidence presented by the Applicant that each consumer file did not contain a credit bureau report; and that where a credit report was obtained, the information was not assessed in terms of the requirements of the Act and Regulations; alternatively; was not assessed because the credit bureau report was obtained after the loan was already granted to the consumer.

35. It is clear from the evidence led by the Applicant that the Respondent entered into credit agreements with at least one consumer where the preponderance of information available to the Respondent should have demonstrated that entering into the credit agreement would make the consumer over-indebted. Nonetheless, the Respondent entered into credit agreements with this consumer despite the consumer's disposable income reflecting a deficit after the loan amount was included on the Respondent's income and essential expenditure table. In doing so, the Respondent contravened Section 81(3) of the Act which clearly instructs credit

providers not to enter into reckless credit agreements with prospective consumers.

36. Accordingly, the Tribunal finds that the failure outlined above is deemed reckless credit granting by the Respondent and a contravention of Section 81(3) of the Act.

Contravention 2: Cost of Credit:

Contravention of Section 100(1)(b); 101(1)(c); read with Regulation 44

37. Sections 100 and 101 respectively deal with prohibited charges and the cost of credit. Section 100(1)(b) provides that a credit provider must not charge an amount to, or impose a monetary liability on the consumer in respect of an amount of a fee or charge exceeding the amount that may be charged consistent with the Act.
38. Section 101(1)(c)(iii) provides that a credit provider may charge a service fee which may not exceed the maximum amount prescribed by the Regulations. Regulation 44 sets the maximum fee at R60.00; and the Regulation further provides that a service fee must be pro-rated if the credit agreement does not endure for an entire calendar month. Our courts have recently dealt with the interpretation of regulation 44 (4).[5]
39. The Credit Life Insurance Regulations [6] stipulates the maximum costs that a credit provider may charge a consumer in relation to credit life insurance referred to in Section 106(1)(a), including the cost of commission, fees or expenses related to insurance.
40. In all but one of the credit agreements sampled the Respondent charged a standard total service fee of R120,00 in instances where the Respondent was only entitled to charge between R54.00 and R62.00, respectively. Examples are: In the case of Consumer Mantsi the Respondent charged a service fee of R120.00 when the Respondent was only entitled to charge a fee of R54.00. In the case of consumer du Plessis the Respondent charged a service fee of R120.00 when the Respondent was only entitled to charge a service fee

of R56.00.

41. In the case of the Credit Life Insurance; the Respondent charged an amount in excess of R4.50 per R1000.00 which amount must be

calculated either on the deferred amount at inception of the credit agreement; or on the deferred amount from time to time under the credit agreement. By way of example, in the case of the credit agreement marked Annexure D7 annexed to the investigation report,[7] the amount charged exceeded the prescribed maximum. Furthermore the Respondent did not provide any of the consumers with credit life policies.

42. Accordingly, the Tribunal is satisfied that the Respondent repeatedly contravened Section 100(1)(b) and Section 101(1)(c)(iii) of the Act read with Regulation 44. The Tribunal is also satisfied that the Respondent repeatedly contravened Section 106(5)(c) of the Act.

Contravention 3: Excessive Interest Section 100(1)(c) and 101(1)(d)

43. The Applicant withdrew this contravention at the hearing.

Contravention 4 The ALLPS Promissory Note and its compulsory charges

Contravention of Section 101(1)(c)(iii) and 105(1)(b) read with Regulation 44.

44. Section 101(1)(c)(iii) precludes a credit agreement from requiring the consumer to pay money or other consideration, except a service fee which must not exceed the prescribed amount relative to the principal debt. Section 105(1)(b) states that the Minister may prescribe the method of calculating the maximum fee that may be charged by a credit provider.
45. Regulation 44 deals with maximum service fees. It sets the maximum monthly service fee, prescribed in terms of Section 105(1), at R60.00. Regulation 44(4) provides that “a service fee 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.”
46. It is alleged that the Respondent directly or indirectly requires and or induces consumers to enter into an ALLPS Promissory Note agreement at the same time as entering into a credit agreement with the Respondent. The ALLPS agreement contains a transaction processing fee which is levied to the consumers together with the costs of credit.
47. The ALLPS promissory Note agreement is an integral part of the credit agreements because this agreement authorises Information Technology Consultants (Pty)Ltd (Intecon) to process the recovery of funds due to the Respondent under the credit agreement; and simultaneously levies fees due to Intecon for processing the transaction referred to as a “Promissory fee” in the ALLPS Promissory Note agreement. This Promissory fee is collected over and above the service fees paid by the consumer, which service fees are specified in the Pre-agreement statement and quotation.

48. In terms of Regulation 44(3) the monthly service fee charged in terms of the credit agreement is intended to cover the cost of administering a credit agreement which is the operational costs of the Respondent such as the processing of repayments; and any other costs related to the administration of a credit agreement. Thus the services rendered by Intecon and the costs thereof are part of the costs of administering the credit agreement; and must be covered under the service fee chargeable in terms of section 101(1)(c).
49. The ALLPS Promissory Note fee on its own or when added to the service fee quoted in the pre-agreement statement and quotation exceeds the maximum permissible service fee which is charged.
50. This was the case in all of the files sampled and referred to in Annexure D1 to D10 of the investigation report.[8]
51. Consequently, the Tribunal is satisfied that the Respondent contravened Section 101(1)(c)(iii) and Section 105 of the Act read with Regulation 44.

Contravention 5:

Failure to notify the Applicant of its conversion to a private company

Contravention of Section 52(5)(c) read with General Condition 6 of the Respondents Conditions of Registration

52. Section 52(5)(c) read with general condition 6 of the Respondent's conditions of registration[9] state that the Respondent is obliged to report to the Applicant any significant change in its shareholding, ownership and or company

structure.

53. On 12 August 2019; the Respondent converted from a close corporation to a private company. To date the Respondent has failed to notify the Applicant of this change to its structure.
54. The Tribunal is satisfied that the Respondent contravened section 52(5)(c) read with general condition 6 of the Respondent's conditions of registration.

CONCLUSION

55. The Tribunal is satisfied that the Respondent engaged in prohibited conduct by repeatedly contravening the Sections and Regulations in the preceding paragraphs.
56. The Tribunal proceeds to consider an appropriate order.

CONSIDERATION OF THE APPROPRIATE RELIEF

The Applicant's requested orders

57. In addition to finding that the Respondent has repeatedly contravened the Act and Regulations; the Applicant requests the Tribunal to make an order:-

57.1 Cancelling the Respondents registration as a credit provider;

57.2 Imposing an administrative fine on the Respondent that is the greater of R1 000 000.00 or 10% of the Respondent's annual turnover during the preceding financial year;

57.3 Declaring that the Respondent has repeatedly contravened the following sections of the Act and Regulations:

57.3.1. Section 81(2)(a)(ii) and (iii) of the Act read with Regulation 23A;

57.3.2. Section 81(3) read with Section 81(1)(a) of the Act;

57.3.3 Section 81(3) read with Section 80(1)(b)(ii) of the Act;

57.3.4 Alternatively to the above, Section 170 of the Act read with Regulation 55(1)(b)(iv) of the Act;

57.3.5. Section 100(1)(b) and Section 101(1)(c)(iii) of the Act read with Regulation 44;

57.3.6. Section 106 (8) of the Act read with Regulation 3(1) of the Credit Life Insurance Regulations;

57.3.7. Section 106(5)(c) of the Act;

57.3.8 Section 101(1)(c)(iii) and Section 105(1)(b) read with Regulation 44 of the Act; alternatively Section 91(2) read with Section 101(1)(c)(iii) and Section 105(1)(b) and Regulation 44; and

57.3.9 Section 52(5)(c) of the Act read with general condition 6 of the general conditions of registration as a credit provider;

57.4 Declaring the conduct of the Respondent to be in contravention of the relevant Sections of the Act and Regulations referred to in paragraph 57.3 above, as prohibited conduct in terms of Section 150(a) of the Act;

57.5 Interdicting the Respondent from in future engaging in prohibited conduct; and

57.6 Ordering the Respondent to: Within 30 days of this judgment to appoint an auditor to conduct an audit to identify all credit agreements concluded by the Respondent in the past three (3) years to determine whether any consumers were overcharged on service fees including Promissory fees paid under the ALLPS Promissory Note agreements and or credit life premiums; to order refunds to the consumers identified; and to identify all the credit agreements the Respondent entered into with the Respondent without conducting proper affordability assessments in terms of Section 81(2)(a)(ii) and or (iii) of the Act.

CONSIDERATION OF AN APPROPRIATE ORDER

Cancelling the Respondent's registration as a credit provider

58. General condition 1 of the conditions of registration requires the Respondent to, amongst other things; comply with all legislation that relates to the business operations of a credit provider, which includes the Act and Regulations. Since the Tribunal has found that the Respondent has contravened the Act and Regulations it follows that the Respondent has also contravened the conditions of registration. In the Tribunal's view, these contraventions are sufficiently serious to justify cancelling the Respondent's registration as a credit provider.

Imposition of an Administrative Fine

59. The Applicant has requested the Tribunal to impose an administrative fine. 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. The Act was introduced into the South African legislation to curb precisely the type of conduct 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.
60. Section 151 (3) sets out the factors the Tribunal must consider when determining an appropriate fine. The Tribunal proceeds to consider each in turn.

The nature, duration, gravity and extent of the contravention

61. The inspection report reveals that the Respondent's approach when granting credit appears to be an on-going and common practice. The Respondent has been registered as a credit provider since 2007. Nevertheless, the Respondent failed to oppose this application and take the Tribunal into its confidence concerning the steps it may have taken to improve its business practices to bring them within the ambit of the Act. The Respondent's contraventions are serious and appear to go to the heart of the Respondent's business practices; and indicate a disregard for the rights of consumers. The Respondent has repeatedly and over an extended period of time, continuously committed contraventions. The Respondent's failure to conduct proper affordability assessments is a serious contravention because it leads to over-indebtedness. This type of conduct undermines the express purposes of the Act which is to avoid over-indebtedness; and to create a sustainable credit market. The Respondents practice of overcharging on fees in the majority of credit agreements sampled demonstrates that the Respondent has no regard for the Act; or the impact of his conduct on the credit industry.

Loss or damage suffered

62. The Applicant did not place specific evidence before the Tribunal concerning the actual loss or damage consumers suffered. An audit will determine the precise extent of the damages suffered by consumers. However, the Respondent's failure to conduct proper affordability assessments means that the Tribunal may reasonably conclude that consumers obtained loans that they were in all likelihood unable to afford. It is reasonable then to expect that

many consumers have suffered loss when they entered into credit agreements with the Respondent without the Respondent conducting proper affordability assessments. This failure of the Respondent to take reasonable steps to ensure that a consumer is able to afford the loan results in reckless credit granting which is far reaching and damaging to a consumers economic status when that further loan further results in a consumer becoming over-indebted. Consumers have further suffered direct financial losses due to the Respondent overcharging on service fees and insurance premiums.

Behaviour of the Respondent

63. The Applicant submitted that there is no plausible reason for the Respondent not to be aware of its statutory obligations. The Respondent's conduct of producing evidence of a credit report obtained subsequent to a loan being granted to a consumer demonstrates a cavalier attitude on the part of the Respondent towards its obligations as a registered credit provider. The Respondent's behaviour is nonchalant in having failed to oppose this application; and ignoring the notice setting this application down for hearing.

Market circumstance in which the contraventions took place.

64. The contraventions occurred in a vulnerable market segment of low income consumers some of whom were SASSA grant beneficiaries. The Applicant submitted that the market circumstances in which the contraventions occurred are one in which consumers are trapped in a cycle of on-going credit and repayments and find they are desperate for and reliant on the services such as those provided

by the Respondent. The Applicant made submissions on the statistical return of the Respondent for the period 1 January 2018 to December

2018. In this period; the Respondent granted 1140 loans and rejected zero applications. Of the 1140 credit agreements entered into, 902 credit agreements were entered into with consumers earning less than R7 500.00 per month which constitutes 79% of all credit agreements concluded during that time period. Thus the Respondent impacted through its conduct some of the most vulnerable consumers.

The level of profit derived from the contraventions

65. The Applicant did not place specific evidence before the Tribunal concerning the level of profit the Respondent has derived from the contraventions; and the Applicant therefore cannot determine the extent of the profit. Nevertheless, it is reasonable for the Tribunal to conclude that the Respondent derives profit from its business practices that contravene the Act.

Degree of co-operation between the Respondent and the Applicant

66. The Tribunal considered that the Respondent provided the inspectors with the information they required and co-operated with them during the investigation.

Prior Contraventions committed by the Respondent

67. The Tribunal has also considered that the Respondent has not previously been the subject of an investigation nor have findings been made against the Respondent.

The amount of the fine

68. The Applicant did not produce evidence concerning the Respondent's financial turnover during the previous financial year. This means that the Tribunal may impose a fine that is limited to a maximum fine of R1 000 000.00.
69. The preamble to the Act states that the Act was specifically introduced to, amongst other things, promote a fair and non-discriminatory marketplace for access to consumer credit; prohibit certain unfair credit and credit marketing practices; promote responsible credit granting and use; and prohibit reckless credit granting. It follows that protecting vulnerable consumers and ensuring that credit providers act fairly runs to the heart of the Act.
70. Although the Respondent appears to be a relatively small credit provider, the Tribunal is persuaded that a strong message must be sent to all credit providers, including smaller credit providers that they cannot escape complying with the Act.
71. These considerations persuade the Tribunal that it is appropriate to impose an administrative fine of R20 000.00.

ORDER

72. Accordingly, the Tribunal makes the following order:

72.1 The Respondent's conduct is declared to be prohibited conduct in terms of Section 150(a) of the Act;

72.2 The Respondent has repeatedly contravening the following Sections of the Act read with the Regulations:

72.2.1 Section 81(2)(a)(ii) and (iii) of the Act read Regulation 23A;

72.2.2 Section 81(3) read with section 80(1)(a) of the Act;

72.2.3 Section 81(3) read with section 80(1)(b)(ii) of the Act;

72.2.4 Section 100(1)(b) and Section 101(1)(c)(iii) of the Act read with Regulation 44;

72.2.5 Section 106(8) of the Act Read with Regulation 3(1) of the Credit Life Insurance Regulations;

72.2.6 Section 106 (5)(c) of the Act;

72.2.7 Section 101(1)(c)(iii) and Section 105(1)(b) read with Regulation 44 of the Act; and

72.2.8 Section 52(5)(c) of the Act read with general condition 6 of the general conditions of registration as a credit provider;

72.3 The Respondent's registration as a credit provider in terms of Section 57 of the Act is cancelled.

72.4 The Respondent is to pay an administrative fine of R20 000.00 (twenty thousand Rand) into the National Revenue Fund referred to in Section 213 of the Constitution of the Republic of South Africa, within 30 business days of the issuing date of this judgment. The Banking Account details of the National Revenue Fund are:

Bank Name: The Standard Bank of South Africa

Account Holder: Department of Trade and Industry

Branch Name: Sunnyside

Branch Code: 05100

Account Number: 370 650 026

Reference Number: NCT/156562/2020/57(1) and name of person or business making the payment.

72.5 The Respondents credit agreements with the consumers referred to in Annexures D1 to D10[10] of the Investigation Report are declared as reckless in terms of Section 80(1)(a) of the Act;

72.6 The consumers credit obligations under the credit agreements referred to in 72.5 above are set aside and the Respondent must at its own cost:

72.6.1 refund all the costs of credit charged and recovered from consumers under all such credit agreements;

72.6.2 refrain from taking any enforcement action against such consumers and, to the extent that the Respondent may already have taken enforcement action which is pending against any such consumers, the Respondent shall formerly withdraw such action, and tender payment of the consumers legal costs where the action is defended or opposed;

72.6.3 take all such steps as may be reasonably necessary in order to ensure that:

- (i) any adverse credit bureau records that may have arisen as a result of the consumer having concluded such a credit agreement with the Respondent are removed; and
- (ii) any civil judgments taken by the Respondent against such consumers in respect of such agreements, are rescinded or, if rescission is not possible abandoned;

72.7 The Respondent is also ordered:

72.7.1 Within 30 days of the date of issue of this judgment to appoint an independent auditor at its own cost, who is registered as a Chartered Accountant, whose appointment shall be subject to the written approval of the Applicant, to identify all the credit agreements concluded by the Respondent in the last three years to determine if any consumers were overcharged on service

fees, including Promissory fees paid under the ALLPS Promissory Note agreement; and/or credit life insurance premiums; and provide a list of such consumers as well as the amount by which each consumer was overcharged;

72.7.2 Once the aforesaid auditor has complied the above-mentioned report, the Respondent will, within 30 days of the date of the independent auditor's report refund each consumer all amounts which exceeded the prescribed maximum amounts permitted in terms of the Act;

72.7.3 take the same steps as set out in 72(6)(1); 72(6)(2) and 72(6)(3) above in respect of all such consumers who were overcharged as identified in the audit report;

72.7.4 Once the refunds have been made as stated above, within 120 days of the date of issue of this judgment, the Respondent is to furnish the independent auditor's report and the Respondent's written report to the Applicant that details the consumers' identities and the refunds made to the consumers; and the further steps taken as contemplated in 72(6)(1); 72(6)(2) and 72(6)(3) above;

72.7.5 The independent auditor is to identify and include in the independent auditor's report, all the Respondent's credit agreements still in force (which have amounts due to the Respondent) and concluded without the Respondent having conducted proper affordability assessments in terms of Section 81(2)(a)(ii) and (iii) of the Act;

72.7.6 The Applicant may, upon receipt of the independent auditor's report, apply to the Tribunal for an order declaring the agreements in paragraph 72.7.1 as reckless in terms of section 80 (1) (a) and setting aside the consumers' obligations under those agreements; and

72.7.7 There is no order as to costs.

Thus done and handed down in CENTURION on this 17th day of March 2021

[Signed]

Ms P A Beck

PRESIDING TRIBUNAL MEMBER

With Tribunal members Ms Alwar and Mr A Potwana 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] Truworths Limited and Others v Minister of Trade and Industry and Others (4375/2016) [2018] ZAWCHC 41; 2018 (3) SA 558 (WCC) (16 March 2018)

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- [5] Micro Finance South Africa and another v National Credit Regulator and others, High Court of South Africa (Gauteng Division, Pretoria) Case No: 64646/2016 dated 14 August 2020, which declared that the pro rata charging of a service fee in terms of a credit agreement in terms of regulation 44 (4) applies only to the first calendar month during the course of which the agreement was concluded and the monthly service fee is not required to be charged on a pro rata basis for the calendar month in which the agreement terminates.
- [6] GN 103 in GG 40606 of 9 February 2017
- [7] Pg 70 of the Bundle
- [8] Investigation Report Pg 61-75
- [9] Annexure FA4 Conditions of Registration submitted to the Tribunal via e-mail on the date of the hearing.
- [10] Investigation Report Pg 61-75 of the bundle
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