

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Khazamola Cash Loan & Holdings (Pty) Ltd (NCT/128377/2019/57(1)) [2019] ZANCT 109 (22 July 2019)

[2019] ZANCT 109

COURT

National Consumer Tribunal

BEFORE

MC Peenze, L Best, T Bailey

CASE / FILE NUMBER

NCT/128377/2019/57(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

Case number: NCT/128377/2019/57(1)

In the matter between:

NATIONAL CREDIT REGULATOR APPLICANT

and

KHAZAMOLA CASH LOAN & HOLDINGS (PTY) LTD RESPONDENT

(Registration Number 2017/186552/07)

(NCR Registration Number: NCRP9688)

Coram:

Dr. MC Peenze – Presiding member

Dr. L Best – Tribunal member

Mr. T Bailey – Tribunal member

Date of hearing – 18 June 2019

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. Ms L Schwartz, an employee of the Applicant, represented the Applicant at the hearing of this application.

RESPONDENT

3. The Respondent is Khazamola Cash Loan & Holdings (Pty) Ltd (the Respondent), a company duly registered in terms of the company laws of the Republic of South Africa under registration number 2017/186552/07, whose physical address is 269 Premium Towers, Corner

van der Walt Street, Pretoria, Gauteng Province.

4. The Respondent is a registered credit provider in terms of section 40 of the Act under registration number NCRP9688.
5. The Respondent did not oppose the application and did not attend the hearing.

DEFAULT APPLICATION

6. The Tribunal was satisfied that the sequence of events shows that:

6.1 The Applicant served the application papers in this application on the Respondent at the Respondent's chosen address;

6.2 The Respondent was notified by the registrar that it had 15 days from the date of receipt of the application papers to file an answering affidavit and did not do so; and

6.3 The Tribunal was satisfied that the service requirements as set out in Rule 30(1)(b) were met.

7. Despite these attempts to give the Respondent an opportunity to answer the allegations the Applicant makes against it, the Respondent elected to remain silent and not to file an affidavit to dispute the contents of the complainants' affidavit. The contents of the complainants' affidavit are therefore undisputed,[1] and the Tribunal accepts those contents.
8. Consequently, the Tribunal proceeded to hear this application by default in the Respondent's absence.

JURISDICTION

9. 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.

10. A section in this judgment refers to a section in the Act.

ISSUES

TO BE DECIDED

11. The Tribunal is required to determine whether the Respondent engaged in prohibited conduct by having repeatedly contravened the provisions of the Act, Regulations and General Conditions of Registration; whether the Respondent should be deregistered as a credit provider; and whether to impose an administrative penalty on the Respondent.
12. The allegations of prohibited conduct will become apparent in the course of this judgment.

BACKGROUND

13. The referral has its origins in a complaint initiated by the Applicant in terms of Section 136(2) of the Act.
14. The complaint emanates from information provided to the Applicant which raised reasonable suspicion of possible contraventions of the Act by the Respondent. The information provided disclosed that Aspis Insurance had contracted with the Respondent to provide the Respondent with credit life insurance cover on loans offered by the Respondent. However, the Respondent continued to offer credit life insurance of Aspis Insurance even though an agreement was later no longer in force between the Respondent and Aspis Insurance.
15. Subsequent to entering into loan agreements with consumers, the Respondent failed to transfer the loan amounts timeously or at all; but continued to collect the monthly repayment amounts from the consumers.
16. On 1 October 2018, the Applicant's Chief Executive Officer authorised an investigation into the Respondent's business in terms of Section 136(2) of the Act. The report, which was compiled following the investigation, outlined various contraventions of the Act by the Respondent.

CONTRAVENTIONS OF THE ACT

Introduction

17. The Applicant asserts that the Respondent has repeatedly contravened the provisions of the Act as is fully set out in the investigation

report. The Tribunal proceeds to consider the contraventions that are alleged in the investigation report and in the complainants'

affidavit.

Reckless credit and the prevention of reckless credit

The Act

18. Section 80 deals with reckless credit. Section 80 (1) provides that a credit agreement is reckless if, at the time the new agreement is made:
- (a) 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; or
 - (b) the credit provider having conducted the assessment as required by section 81 (2), entered into the credit agreement despite the available information having indicated

that:

- (i) the consumer did not understand or appreciate the consumer's risks, costs or obligations under the credit agreement; or

(ii) entering into the credit agreement would make the consumer over-indebted.

19. Section 81 deals with the prevention of reckless credit. Section 81

(2) (a) provides that a credit provider must not enter into a credit agreement without first taking reasonable steps to assess the proposed consumer's:

- a) 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;
- b) debt repayment history as a consumer under credit agreements; and
- c) existing financial means, prospects and obligations (in relation to the credit to be granted).

20. Regulation 23A deals with the criteria to conduct an affordability assessment. Regulation 23A (8) deals with the consumer's

existing financial obligations. It provides that a credit provider must calculate the existing financial means, prospects and obligations as envisaged in section 78 (3) and section 81 (2) (a) (iii).

21. Section 82 (1) provides that a credit provider may determine the mechanisms, models and procedures to be used in meeting its

assessment obligations under section 81, provided that the mechanism, model or procedure results in a fair and objective assessment.

22. Section 81

- (3) precludes a credit provider from entering into a credit agreement that is reckless.[2]
23. Section 170 places obligations on credit providers with regard to record keeping and provides as follows:-
- “A credit provider must maintain records of all applications for credit, credit agreements and credit accounts in the prescribed manner and form and for the prescribed time”.*
24. Regulation 55(1)(b)(vi) provides that credit providers must keep records which demonstrate that they have complied with section 81(2).

Summary of the Applicant’s submissions

25. Ms Schwartz submitted that the Respondent contravened section 80 (1) because the Respondent concluded the agreements without conducting an assessment in accordance with regulation 23A to determine whether the consumers could afford to service their debts under the agreements. As it appears from the Investigation Report, no evidence could indeed be found from the sample of consumer files obtained from the Respondent that it had obtained credit bureau reports to determine the consumers’ ability to repay the loans. More so, the Respondent seemed not to have attempted to ascertain prospective consumers’ current financial obligations in respect of all the consumers through pay slips or bank statements relating to the consumers’ current financial obligations. One exception to this assumption is the presence of bank statements of Mr OA Mabusela’s bank statements in the consumer files.
26. Further, the procedures the Respondent applied to assess affordability did not result in a fair and objective assessment under
- section 82 (1), because the Respondent stated that the consumers had no debts “at the time of” granting the applications for credit, which was not the “true state of affairs”.

Analysis

27. Section 81
- (3) precludes a credit provider from entering into a credit agreement that is reckless. Section 81 (2) imposes an obligation on the credit provider to conduct an affordability assessment to determine whether the credit to be granted would be reckless.[3] When conducting the affordability assessment, the credit provider must take reasonable steps to assess the proposed consumer’s

appreciation of the risks and costs of the proposed credit, and the consumer's rights and obligations under a credit agreement. The credit provider must also assess the consumer's existing financial means, prospects and obligations concerning the credit to be granted. Section 81 (2) is read together with regulation 23A. Regulation 23A (8) requires the credit provider to calculate the existing financial means, prospects and obligations when conducting the affordability assessment.

28. The question to be determined in terms of Section 80(1)(b)(i) is: "Did the consumer generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement?"
29. The affordability assessment must therefore determine whether the consumer will be able to afford the proposed credit and not make the consumer over-indebted.
30. In the Tribunal's view, it is self-evident that the consumers could not have appreciated the risks, costs or obligations of the credit agreements, because the highly prejudicial nature of the agreements that they entered into, required them to pay credit life insurance even while the agreement with the credit life insurance company was not anymore in place. No reasonable person who is over-indebted, seeking debt relief, and made aware of such highly prejudicial terms would agree to concluding such an agreement.
31. Consequently, the Tribunal is satisfied that the Respondent contravened section 80 (1) (b) (i) because it concluded credit agreements with the consumers without ensuring that they understood the risks, costs and obligations under the proposed credit agreements

(when it assessed the proposed consumer's general understanding of the proposed loan agreement as envisaged in section 81

(2) (a) (i)).

32. This means that the Respondent granted credit recklessly and contravened section 81 (3) by entering into a reckless credit agreement with the consumers.
33. The next question is in terms of Section 80 (1) (a): "Did the credit provider first conduct an assessment as required by section 81 (2), irrespective of what the outcome of the assessment might have concluded at the time?"
34. Although a credit provider may under section 82 (1) determine the mechanisms, models and procedures under section 81, these must result in a fair and objective agreement. In the Tribunal's view, the Respondent did not assess affordability fairly and objectively, because the Respondent did not obtain any credit bureau records.
35. The Respondent also granted credit to the consumers without conducting affordability assessments in accordance with the regulations.

Regulation 23A (8) obliges the Respondent to calculate the consumer's existing financial means, prospects and obligations as envisaged in terms of section 78 (3) and 81 (2) (a) (iii). When calculating the consumer's existing financial obligations, the regulations compel the Respondent to utilise the minimum expense norms table contained in the regulations. The regulations oblige the Respondent to follow the methodology when using the table. This includes assessing the consumer's gross income as well as statutory deductions and minimum living and other expenses to calculate the discretionary income for the consumer to satisfy new debt. The consumer's monthly debt repayment obligations in terms of credit agreements that a registered credit bureau may reflect on the consumer's credit profile is included in this calculation.[4]

36. There is no evidence on which the Tribunal can rely that the Respondent calculated the consumers' discretionary income in accordance with the expense norms table. If the Respondent had complied with the regulations when assessing the consumers affordability, it would not have concluded that the consumers qualified for loans.
37. The inspectors also found that all the consumers did not qualify for loans, because their income was less than their monthly obligations when they concluded the agreements. Many consumers were SASSA grant holders of Child Support Grants. The consumers were therefore not debt free and were, in fact, over-indebted.
38. Consequently, the Tribunal is satisfied that the Respondent contravened section 80 (1) (a) because the Respondent failed to
conduct an assessment as required in section 81 (2).

Cost of Credit – Excessive Interest

39. Section 100 deals with prohibited charges. Section 100 (1) (a) provides that a credit provider must not charge an amount to or impose a monetary liability on the consumer concerning a credit fee or charge prohibited by the Act.
40. Section 101 deals with the cost of credit. Section 101 (1) stipulates the fees that a credit provider is permitted to charge, being:
 - 40.1. the principal debt plus the value of any item contemplated in section 102;
 - 40.2. a service fee which must not exceed a prescribed amount;
 - 40.3. interest which must not exceed the maximum prescribed amount;
 - 40.4. credit insurance which may include credit life insurance and insurance cover in respect of immovable property;
 - 40.5. default administration costs; and
 - 40.6. collection costs.

41. Section 102 deals with fees or charges. Section 102 (1) provides that the credit provider may in the instance of a mortgage agreement (amongst others) include the initiation fee, cost of extended warranty, taxes, levies and registration fees and credit premiums.[5]
42. Section 100 deals with prohibited charges. Section 100(1)(c) deals specifically with interest charges and prohibits a credit provider in relation to an interest charge from charging a consumer an amount or imposing a monetary liability that exceeds the amount consistent with the Act. Section 101(1)(d)(ii) prohibits a credit provider from requiring the consumer to pay any money or other consideration, except interest which must not exceed the applicable maximum prescribed rate determined in terms of section
105. Regulation 42(1) provides that the maximum rate of interest for short term credit agreements is 5% per month. Furthermore; Regulation 23A (15) makes it a peremptory requirement for a credit provider to disclose the credit cost and total cost of credit to a consumer.
43. Further, in terms of Section 91(a), a credit provider must not directly or indirectly require or induce a consumer to enter into a supplementary agreement or sign any document that contains a provision that would be unlawful if it were included in a credit

agreement. Section 90(2)(a)(ii) provides that a provision of a credit agreement is unlawful if its general purpose or effect is to deceive the consumer.

The Applicant's submission

44. The Applicant alleges that the Respondent contravened section 100 (1)
 - (a) read together with section 102 (1) by charging fees that are prohibited under the Act.
45. The Respondent has charged consumers interest in excess of the prescribed maximum rate.
46. These credit agreements are "short term credit transactions" as defined in Regulation 39(2). Accordingly, the maximum interest rate that may be charged in respect of such credit agreements is 5% per month. This is further subject to Regulation 40(2)(b) which provides that the rand amount of interest must be calculated as follows: (Deferred amount for the month x interest rate) divided by the number of days in the month. The Respondent exceeded the maximum interest in all instances.
47. The consumers were charged more than the maximum interest rate as prescribed in terms of Regulation as outlined above; not one

particular interest rate, but different interest rates, albeit always above the maximum allowed interest rate as prescribed.

48. Consumers were not always paid on time, which also resulted in overcharges on interest and administrative fees.

49. Consumers paid life insurance which was not paid over to the life insurance company due to a contract which was not in place. The misleading of consumers was evident from the documentary evidence submitted by the Applicant, indicating that the insurance company cancelled the contract.
50. It is self-evident that the Respondent has charged interest that exceeds the prescribed maximum limit whether the initiation fee is included or excluded from the calculation. The Respondent has therefore contravened section 100(1)(c) read and section 101(1)(d)(ii) read with Regulation 42(1). The Respondent has also failed to disclose the cost of credit and has therefore clearly contravened Regulation 23A (15).
51. Consequently, the Tribunal is satisfied that the Respondent has contravened section 100 (1) (a) read together with section 102 (1), by charging interest and fees that are prohibited under the Act.

Failure to retain records

52. Section 170 read with Regulation 55 (1)(b)(viii) respectively provides that a credit provider must maintain records of all applications for credit, credit agreements and credit amounts in the prescribed manner and form for a prescribed period of time. General Condition 2 of the Respondent's Conditions of Registration require of the Respondent to operate its business in a manner consistent with the purpose and requirements of the Act.

Alleged contravention

53. The Applicant submitted that the Respondent has not kept any documentation in support of the steps taken to assess a consumer's

financial position prior to entering into a credit agreement with a consumer.

54. The Respondent has failed to retain documents and has failed to operate its business in a manner that is consistent with the purpose and requirements of the Act; and has therefore contravened General Condition 2 of its Conditions of Registration read with Section 52(5) of the Act.
55. It is clear from the evidence before the Tribunal; that the Respondent was unable to provide any current and relevant documentation or copies of documentation that led to proper affordability assessments having been undertaken by the Respondent. The Tribunal is therefore satisfied that the Respondent has contravened Section 170 read with Regulation 55 (1)(b)(viii); General Condition 2 of its Conditions of Registration read with Section 52(5) of the Act.

CONCLUSION

56. Consequently, the Tribunal is satisfied that the Respondent engaged in reckless lending and other prohibited conduct by contravening the sections referred to in the preceding paragraphs and has therefore repeatedly contravened the Act.
57. The Tribunal proceeds to consider an appropriate order.

CONSIDERATION OF AN APPROPRIATE ORDER

Applicant's requested orders

58. The Applicant requests the Tribunal to make an order in terms of section 150 as follows:

58.1. Declaring the Respondent to be in repeated contravention of the following sections of the Act and Regulations:

- a) Section 81(2)(a)(ii);
- b) Section 81(2)(a)(iii);
- c) Section 81(3) read together with section 80(1)(a);
- d) Regulation 23A(3);
- e) Regulation 23A(8);
- f) Regulation 23A(10)(c);
- g) Regulation 23A(12)(a);
- h) Regulation 23A(12)(b);
- i) Section 101(1)(d)(ii) read together with Section 105 and Regulation 42;
- j) Section 101(1)(b)(i) read together with Section 105 and Regulation 42(2);
- k) Section 92(a); and
- l) Section 170 read together with Regulation 55(1)(b)(vi).

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

58.3 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;

58.4 Order the Respondent to:

- (i) Within 30 days appoint an independent auditor, at its own costs to determine if any consumers in the past 3 (three) years were overcharged on fees, interest and/or charges and provide a list of such consumers;

- (ii) Once the aforesaid auditor compiled the abovementioned list, the Respondent will refund the amounts it received in the form of fees, interest or charges, which it was not entitled to receive or which exceeded the prescribed maximum amounts allowed by the Act, to each consumer within 30 days from the date of the auditor's report;
- (iii) Once the refunds have been made, as stated above, the Respondent is to provide a written report to the Applicant detailing the identity of the consumers and the refunds made. This report is to be provided to the Applicant within 120 days after the order has been obtained;
- (iv) The appointed auditor must also, as part of the report referred to above, identify all credit agreements which are still in force, i.e. where all amounts owing, thereunder have not been paid, and of those agreements the appointed auditor must identify which of such agreements the Respondent entered into without properly conducting assessments in terms of section 81(2)(a)(ii) and/or (iii) of the Act. Once the auditor has identified those agreements and the Applicant has received the auditor's report in this regard, the Applicant may apply to the Tribunal for an order declaring such agreements as reckless in terms of Section 80(1)(a) and setting aside all of the consumers' rights and obligations under those agreements;
- (v) Declaring the Respondent's credit agreements with consumers reckless in terms of Section 80(1)(a) and setting aside all of the consumers' rights and obligations under those agreements;
- (vi) Any other appropriate order required to give effect to the consumers' rights in terms of section 150(j) of the Act; and
- (vii) Further and/or alternative relief.

59. The Tribunal proceeds to consider each request in turn.

Reckless credit

- 60. The Tribunal has found that the Respondent has engaged in reckless credit and is satisfied that it is appropriate to declare that the Respondent has contravened sections 80 (1) (a) and 81 (3).
- 61. The Tribunal is also satisfied that the Respondent contravened section 81 (2) (a) (ii) and 81 (2) (a) (iii) because the Respondent failed to conduct an assessment as required in section 81 (2).

Other prohibited conduct

- 62. The Tribunal has found that the Respondent has engaged in other prohibited conduct and is satisfied that it is appropriate to declare that the Respondent has contravened the relevant sections. These acts of prohibited conduct (as outlined above) include the following:
 - i. The consumers were charged more than the maximum interest rate as prescribed in terms of Regulation;

- ii. Consumers were not always paid on time, which also resulted in overcharges on interest and administrative fees; and
 - iii. Consumers paid life insurance which was not paid over to the life insurance company due to a contract which was not in place. The misleading of consumers was evident from the documentary evidence presented by the Applicant, indicating that the insurance company cancelled the contract.
63. Consequently, the Tribunal is satisfied that the Respondent has contravened section 100 (1) (a) read together with section 102
- (1) by charging interest and fees that are prohibited under the Act.

Appointment of an auditor

64. The Tribunal is aware that the investigation that led to this application comprised a small sample of the Respondent's

consumer files. The Tribunal found that the Respondent is at the very least charging excessive interest. The evidence placed before the Tribunal means that it is not possible for the Tribunal to establish the extent of this practice and whether the Respondent only provides short-term credit agreements. In the Tribunal's view, it is therefore appropriate to appoint an independent auditor to assess the situation and establish the true facts. Section 83 provides for a Tribunal or a court to declare credit agreements to be reckless. Therefore, the Applicant would need to consider the report by the auditor and bring the matter to the Tribunal for further consideration.

Penalty or Fine

65. 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 to protect consumers from the type of conduct perpetrated by the Respondent. The Tribunal would therefore be remiss 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.
66. 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 contraventions

67. 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 2004. Nevertheless, the Respondent failed to oppose this application and take the Tribunal into its confidence about its conduct in assessing a consumer's affordability before entering into credit agreements with consumers; and to demonstrate to the Tribunal that the assessment of a consumers' affordability was not simply a tick box exercise. The

Tribunal finds it aggravating that many of the consumers were receiving SASSA grants.

Loss or damage suffered as a result of the contraventions

68. The Applicant did not place specific evidence before the Tribunal concerning the actual loss or damage consumers suffered. However, the Tribunal is satisfied that it may reasonably conclude that consumers have suffered loss because the Respondent at the very least charged consumers at an interest rate that exceeds the prescribed maximum by various percentages, but consistently; and
69. Moreover, the Respondent's failure to conduct proper affordability assessments means that the Tribunal may also reasonably

conclude that consumers obtained loans that they were likely unable to afford; concluded a credit agreement with a consumer who was already over-indebted and receiving SASSA grants.

The Respondent's behaviour

70. The Applicant submitted that there is no plausible reason for the Respondent not to be aware of its statutory obligations. The Tribunal is persuaded that the Respondent merely conducted a tick box exercise in assessing the affordability of consumers or did not conduct any assessment at all. The Respondent's behaviour is aggravated by having failed to oppose this application; ignoring the notice setting this application down for hearing; and by not providing the inspectors with credit bureau reports. The Respondent cannot therefore begin to suggest that it was unaware of its legal obligations as a credit provider.

Market circumstances under which the contraventions occurred

71. The applicant submitted that the market circumstances in which the contraventions occurred are one in which consumers are in a cycle of on-going credit applications and repayments to the Respondent. Many of these consumers are essentially caught in a debt trap with the Respondent and have to keep borrowing money from the Respondent to service loans extended by the Respondent; and that these consumers would not have qualified for credit had a proper assessment of affordability been undertaken by the Respondent. It therefore appears that the Respondent has simply ignored its obligations in terms of the Act and has been able to do so because it operates in an environment in which consumers are not well informed about their rights concerning access to credit and that the Respondent's practices contravene the Act.

The level of profit derived from the contraventions

72. The Applicant did not place specific evidence before the Tribunal concerning the level of profit the respondent has derived from the contraventions. Nevertheless, it is reasonable for the Tribunal to conclude that the Respondent derives significant profit from its business practices that contravene the Act.

The degree to which the Respondent co-operated with the Applicant

73. The Tribunal has considered that the Respondent provided the inspectors with the consumer files and co-operated with them during

the investigation. However, all the evidence requested could not be obtained.

The Respondent's prior contraventions

74. 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

75. The Applicant did not produce current evidence concerning the respondent's financial turnover during the previous financial

year.

76. 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.

77. 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.

78. These considerations persuade the Tribunal that it is appropriate to impose an administrative fine of R50 000.00 (fifty thousand rand).

79. Although there were no prior investigations or enforcements instituted by the Applicant against the Respondent, the nature of the contraventions and the various dates on which the credit agreements were entered into, indicate that the conduct of the Respondent has been ongoing for a substantial period prior to the investigations. There has also been a substantial profit been derived from the activities undertaken by the Respondent in contravention of the Act and Regulations.

80. Consumers have been subjected to prejudice of having to pay their first monthly instalments prior to receiving the amount loaned from the Respondent as per the credit agreement. This arrangement is both unlawful and unfair.

81. Their further exists no plausible reason for the Respondent to be unaware of its statutory obligation to adhere to the provisions of the Act. The very fact that the Respondent elected to become a registered credit provider is indicative that the Respondent is aware of the prescripts of the Act. It is also clear that the conduct of the Respondent illustrates that the market circumstances within which the contraventions occurred are one in which

consumers are in a cycle of on-going credit and repayment; and find they are desperate for and reliant on the services such as those provided by the Respondent. In these instances, consumers are vulnerable to exploitation.

82. The Respondent's failure to adhere to the Act indicates a complete disregard for the rights of consumers and the industry

within which the Respondent conducts business. Consumers have suffered loss and/or damage as a result of the Respondent's

conduct. Consumers were exploited by the Respondent, by entering into loan agreements with the Respondent without the Respondent first taking reasonable steps to ensure that the loans are affordable to the consumers.

83. The lack of proper affordability assessments results in reckless credit being granted. The damage to a consumer's economic

status is far reaching if s/he, as a result of over-indebtedness, applies for and is placed under debt review.

84. The Respondent's conduct has displayed little or no regard for the spirit and purpose of the Act. The Respondent's continued participation in the credit market, places consumers at substantial risk of further financial harm.

ORDER

85. Accordingly, the Tribunal makes the following order:

85.1 The Respondent has repeatedly contravened the following sections of the Act:

85.1.1 Section 81(2)(a)(ii) and (iii) read with Regulation 23A;

85.1.2 Regulation 23A(3); Regulation 23A(8); Regulation 23A(9); Regulation 23A(10); Regulation 23A(12)(a); (b) and (c); and 23A(13)

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

85.1.4 Section 81(3) read with Section 88(4);

85.1.5 Section 170 read with Regulation 55(1)(b)(vi);

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

85.1.7 Section 101(1)(c)(ii) read together with Regulation 44; and

85.1.8 Section 100(1)(c), Section 100(1)(a), Section 102 and Section 101(1)(d)(ii) read with Section 105, Section 52 and Regulation 42(1).

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

85.3 The Respondent's registration as a credit provider is cancelled with immediate effect.

85.4 The Respondent is to pay an administrative fine of R50 000.00 (fifty thousand rand) into the National Revenue Fund referred to in Section 213 of the Constitution of the Republic of South Africa, 1996 within 30 days of the date of this judgment. The Banking Details of the National Revenue Fund are as follows:

Bank Name

: The Standard Bank of South Africa Limited

Account Holder : Department of Trade and Industry

Branch Name : Sunnyside

Branch Code : 05100

Account Number : 370 650 026

Reference

: NCT/128378/2019/57(1) and Name of Person or Business making payment

85.5 The Respondent is:

85.5.1 Within 30 days the date of this judgment; to appoint an independent auditor at its own cost to determine and compile a list of all the consumers the Respondent has overcharged on interest;

85.5.2 Within 30 days of the independent auditor having compiled the list; to refund the consumers the amounts the respondent received in interest to which it was not entitled or exceeded the prescribed maximum amounts stipulated in the Act;

85.5.3 Within 120 days of the Tribunal's order; to provide a written report to the applicant that details:

- (i) the consumers' identities and the refunds made to the consumers;
- (ii) the funds intended for any consumer that the Respondent was unable to trace and pay, and which must be paid into a trust account to be held by the Auditor; and
- (iii) all open loans as identified by the Auditor, to determine if the respondent conducted proper affordability assessments.

85.6 There is no order as to costs.

DATED AT CENTURION ON THIS 17 JULY 2019

(signed)

DR. MC PEENZE

Presiding Tribunal Member

Mr. T Bailey (Tribunal member) and Dr. L Best concurring.

- [1] Edcon Holdings Ltd v National Consumer Tribunal and Another 2018 (5) 609 (GP) at paragraph 4.
- [2] See also National Credit Regulator v Standard Bank of South Africa Limited (NCT/29041/2015/140(1) NCA) (2017) ZANCT 118 at paragraph 78.
- [3] Standard Bank, Ibid at paragraph 78.2 and National Credit Regulator v Mobimoola Financial Services (Pty) Ltd NCT/18256/2014/140 at paragraph 53.
- [4] Regulation 23A (10) read with regulation 23A (12)
- [5] Section 102 (1) (a)-(f) of the Act.

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