

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Liang Cash Lons CC (NCT/223350/2022/57(1)) [2022] ZANCT 32 (10 June 2022) [2022] ZANCT 32

COURT

National Consumer Tribunal

BEFORE

MC Peenze, T Bailey, T Potwana

CASE / FILE NUMBER

NCT/223350/2022/57(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

Case number: NCT/223350/2022/57(1)

In the matter between:

NATIONAL CREDIT REGULATOR

APPLICANT

and

LIANG CASH LONS CC

RESPONDENT

Coram:

Dr MC Peenze

- Presiding Tribunal member

Mr T Bailey - Tribunal member

Mr T Potwana

- Tribunal member

Date of hearing - the 30th of May 2022

Date of judgment - the 10th of June 2022

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 Rory Stocker, a senior legal adviser in the Respondent's Investigations and Enforcement Department, represented the Applicant at the hearing of this application.

RESPONDENT

3. The Respondent is Liang Cash Loans CC (the Respondent), a close corporation duly registered in terms of the company laws of the Republic of South Africa under registration number 2010/174581/23. The Respondent's registered physical address is Shop 15B, Pine City Centre, Pinetown, Kwa-Zulu Natal, 3370.
4. The Respondent is a registered credit provider in terms of section 40 of the Act with registration number NCRCP5890.
5. The Respondent did not file opposing papers in this matter, and the matter was set down for hearing on a default basis. On the day of the hearing, without prior information to the Applicant or the National Consumer Tribunal (the Tribunal), the Respondent's legal representative, Ms Lizelle Squirra, who is an attorney at Bosch Marais and Associates, appeared on behalf of the Respondent. Ms Squirra requested to be placed on record to request a postponement. The Applicant opposed the request, indicating that the Respondent is not properly before the Tribunal.

CONSIDERATION OF A DEFAULT HEARING

6. The Tribunal provided an opportunity to Ms Squirra to motivate the Respondent's request. Ms Squirra outlined that the Respondent received the notification letters from the post office, indicating that the legal documents pertaining to this matter had to be collected. However, due to an unexplained oversight, the Respondent failed to collect the legal documents from the post office. Ms Squirra outlined that she, by accident, saw that the matter was on the roll due to her involvement in a different case on the same day before the Tribunal. As the Respondent is one of her clients, she then liaised with the Respondent, who instructed her to request a postponement of the matter.
7. Mr Stocker, on behalf of the Applicant, argued with reference to the track-and-trace reports before the Tribunal that proper service of the legal documents occurred. The founding papers were delivered by registered mail to the Respondent's physical and postal registered

addresses. The postal office also informed the Respondent appropriately through its notification letters, as acknowledged by the Respondent. Accordingly, the Applicant submitted that the deliberate failure to collect legal documents constitutes an abuse of the legal process. Further, the Applicant argued that such failure does not constitute a defence in law to the proper service of documents. As proper service of documents occurred, and the Respondent failed to file opposing

papers, the Respondent is not properly before the Tribunal. Accordingly, the Applicant submitted that the hearing should continue

on a default basis.

8. The Tribunal considered the parties' submissions and the proof of service provided to the panel.
9. The Applicant served the application via registered post to the Respondent's registered addresses and also emailed a reminder of the hearing to the Respondent on the 27th of May 2022. The Tribunal panel was satisfied that the Applicant has discharged its statutory obligations in respect of service and that service was effected per Rule 30 (1) of the Tribunal Rules. The Respondent also ignored notices from the Registrar of the Tribunal and has not opposed or filed any answer to the Applicant's application.

10. Rule 25(3) of the Rules of the Tribunal states –

"The Tribunal may make a default order—

- (a) after it has considered or heard any necessary evidence; and
- (b) if it is satisfied that the application documents were adequately served."

11. Rule 30(1)(b) of the Rules of the Tribunal states-

"A document may be served on a party by sending it by registered mail to the party's last known address."

12. The Tribunal noted that the Respondent was represented by an attorney, who should be aware of the Regulations for matters relating to the functions of the Tribunal and Rules for the Conduct of matters before the Tribunal (the Tribunal Rules).[1]
13. After considering all the evidence and arguments, the Tribunal was satisfied that the application was adequately served on the Respondent in accordance with Rule 30 of the Tribunal Rules and that the issue of service is therefore moot. The Applicant cited case law[2] in support of its argument on the service of documents. The Tribunal took judicial notice thereof, but it is not necessary to refer to those cases in this judgment.

14. Rule 24 (1) (b) of the Tribunal Rules subsequently empowers the Tribunal to continue with the proceedings in the absence of the Respondent. At the same time, Section 142 of the Act requires the Tribunal to conduct its hearings as expeditiously as possible and follow natural justice principles. Based on the afore-going, the hearing of the application proceeded on a default basis.
15. Rule 13 (5) of the National Consumer Tribunal Rules makes it clear that any fact or allegation in an application or referral not specifically denied or admitted in an answering affidavit will be deemed to have been admitted:

"Any fact or allegation in the application or referral not specifically denied or admitted in the answering affidavit, will be deemed to have been admitted."

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

JURISDICTION

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

TERMINOLOGY

19. 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).[3] A reference to a condition or general condition refers to the Respondent's conditions of registration as a credit provider in terms

of section 40 (the Conditions).[4] A reference to a form refers to a Form as prescribed in the Regulations.

APPLICATION TYPE AND THE RELIEF SOUGHT

20. This application is in terms of section 57 (1) to cancel the Respondent's registration as a debt counsellor.[5] The Applicant seeks an order:

20.1. Declaring the Respondent to have repeatedly contravened the Act, Regulations, and conditions;

- 20.2. The repeated contraventions are prohibited conduct[6] in terms of section 150 (a);
- 20.3. Cancelling the Respondent's registration as a credit provider in terms of section 150 (g);
- 20.4. Declaring that the Respondent has brought the consumer credit industry into disrepute and disregarded consumer rights generally;
- 20.5. Interdicting the Respondent from engaging in future prohibited conduct;
- 20.6. Declaring the Respondent's credit agreements with consumers contained in annexures D1 to D11 of the investigation report as reckless in terms of section 80 (1) (a) and setting aside those consumers' obligations in terms of those credit agreements;
- 20.7. The auditor is also to identify all credit agreements still in force that the Respondent concluded without properly conducting assessments in terms of sections 81 (2) (a) (ii) and (iii) and include them in the report. The Applicant may apply to the Tribunal for an order declaring those agreements as reckless in terms of section 80 (1) (a) and setting aside the consumers' obligations under those agreements;
- 20.8. Imposing an administrative fine on the Respondent of an amount which is the greater of R1 000 000.00 or 10% of the Respondent's annual turnover during the preceding financial year; and
- 20.9. Granting the Applicant such other relief as the Tribunal may consider appropriate to give effect to the consumers' rights in terms of section 150 (i).
21. The allegations of prohibited conduct will become apparent in the course of this judgment.

BACKGROUND

22. It is convenient to set out the material submissions that form the background to this application.

Applicant's submissions

23. This application stems from information the Applicant obtained in another investigation unrelated to the Respondent.
24. While assessing annexures obtained during such investigation, the Applicant observed that a consumer under debt review had been granted multiple loans whilst still under debt review. An assessment of such consumer's credit profile revealed that he had applied for credit and was approved for credit by certain credit providers, including the Respondent. This information raised a reasonable suspicion that the Respondent approved and extended credit to the consumer recklessly and without taking reasonable steps to conduct an affordability assessment as required in the Act.
25. On the 10th of March 2021, the Applicant initiated a complaint against the Respondent in terms of Section 136

(2) of the Act. An investigation into the credit-granting activities of the Respondent was concurrently initiated in terms of section 139

(1) of the Act.

Investigation

26. On or about the 17th of March 2021, the Chief Executive Officer of the Applicant appointed Muhanganei Mbedzi (Mbedzi), a previous employee of the Applicant, as an inspector in terms of section 25 (1) (a) of the Act. Mbedzi was simultaneously issued a certificate in section 25 (1) (b) in the prescribed Form stating that she has been appointed as an inspector in terms of the Act.
27. Mbedzi prepared an engagement letter informing the Respondent of the Applicant's intention to investigate its credit-granting business activities. The Respondent received the letter, and a virtual investigation was scheduled. At the time, the Applicant had employed measures to safeguard the health of its employees, registrant and the public by reducing the need to attend to an investigation physically. The investigation was therefore conducted virtually via Microsoft Teams on or about the 20th of April 2021.
28. During the virtual investigation, the Respondent was represented by Nicol Astrid Naidoo (Naidoo). During the investigation, Naidoo summarised the Respondent's business practices.
29. Before the investigation, a list of consumer files was requested from the Respondent. These files were received on the 16th of April
2022. Mbedzi subsequently randomly selected ten consumer files for assessment purposes, which were received from the Respondent on or about the 23rd of April 2022.
30. Following receipt of the aforementioned sampled files, Medzi proceeded to compile a report (the investigation report) with findings. Mbedzi is no longer in the employ of the Applicant. However, the Senior Inspector, Douglas Musandiwa, Mbedzi's direct senior, has attested to a confirmatory affidavit, confirming the findings against the Respondent in the investigation report.[7] The investigation report details the alleged contraventions. The 10 sampled files are annexed to the investigation report to support the conclusions in the investigation report. [8]
31. Based on the severity of the contraventions in the sampled files obtained during the investigation, an application in terms of Section 57(1) of the NCA was filed with the Tribunal on the 31st of March 2022.

CONTRAVENTIONS OF THE ACT

Prevention of reckless credit: Assessments

32. Section 81 deals with the prevention of reckless credit. Section 81 (2) (a) (ii) precludes a credit provider from concluding a credit agreement without taking steps to assess the proposed consumer's debt repayment history. Section 81 (2) (a) (iii) requires the credit provider to assess the proposed consumer's existing financial means, prospects, and obligations.
33. Regulation 23A sets out the criteria for conducting an affordability assessment. Regulation 23A (4) requires a credit provider to take practical steps to validate a consumer's gross income. Regulation 23A (12) (b) further requires the credit provider to consider all monthly debt repayment obligations in terms of credit agreements, as reflected on the consumer's credit profile held by a registered credit bureau. Regulation 23A (13) also requires the credit provider to consider the consumer's debt repayment history as a consumer under credit agreements.
34. The Applicant alleges that the Respondent failed to conduct proper affordability assessments in all the sample files before granting credit to the consumers.
35. In support of hereof, the Applicant referred the Tribunal to the investigation report and Annexures "D1" to "D11", where the Respondent failed to consider open loans and adverse credit records, in contravention of section 81 (2)
 - (a) (ii) read with Regulation 23A (12) (b) and Regulation 23A (13) of the Act.
36. The absence of credit bureau reports supports the Applicant's allegations herein. A credit bureau report is the only National Credit Act sanctioned source of information from which a credit provider can ascertain and calculate a consumer's current debt repayment obligations and credit history. Such credit history includes information on credit applications, credit agreements to which the person is or has been a party, pattern of payment or default under any such credit agreements, debt re- arrangement in terms of the Act, incidences of enforcement actions concerning any such credit agreement, the circumstances of termination of any such credit agreement and related information.
37. A credit report must also be obtained to avoid the situation where consumers seek and obtain loans simultaneously from multiple credit providers.
38. During the investigation, the Respondent informed the inspector that they always obtain a consumer's credit bureau report before approving any credit application. However, the reports were not submitted to the Applicant, and the information that should be reflected in the report and utilised in an affordability assessment, does not appear on any of the assessments provided. As per the sampled files, the Respondent recorded all the consumers as having zero debt repayment obligations.
39. The Respondent's failure to obtain or correctly utilise consumers' credit reports constitutes a failure to take reasonable steps to assess affordability. The Respondent did not assess consumers' arrear statuses, actual debt repayment obligations or debt repayment history.

40. The Respondent's failure to obtain or correctly utilise consumers' credit reports constitutes a failure to take reasonable steps to assess affordability, as in the case of consumer TP Nxumalo[9]. This consumer applied for a loan of R500.00, which was approved on the 1st of December 2020. The Respondent recorded that the consumer had zero debt repayment obligations at the time of assessment. A perusal of the consumer's bank statement, which was obtained on the 25th of January 2021 and the 25th of March 2021, a month after the loan was approved, shows that this consumer had debt repayment obligations with Aedo NP-mer2990. The consumer also entered into an agreement and received funds from a credit provider, Shosholoza Finance, on the 27th of November 2020. Further debits appear on the 22nd of December 2022, yet none of these obligations appears on the Respondent's affordability assessment.
41. The Applicant also referred to the approved credit agreement of consumer ML Mnyandu. [10] This consumer applied for a loan of R3,000.00, which was approved on the 26th of February, 2021. The Respondent recorded that, at the time of assessment, the consumer had zero debt repayment obligations. A perusal of the consumer's bank statement obtained on the 25th of February 2021, shows that this consumer had debt repayment obligations with Absa VAF, Absa Life, OMFinance, NPZotha, Preimerid and Liang. None of these obligations appears on the affordability assessment conducted by the Respondent.
42. Similar transgressions were emphasised in the assessments of consumer B Aphane[11] and SB Dlamuka[12]. The Respondent failed to take any reasonable steps to assess and calculate the financial means, prospects and obligations of the consumers in contravention of Section 81 (2) (a) (iii), read with Regulation 23A
- (8) and (12)(c). According to the Applicant, the Respondent has also failed to obtain payslips and bank statements in Annexures "D2", "D3", "D6", and "D11". The Respondent was in no position to accurately determine the consumers' income or monthly obligations or make any calculations in respect thereof.
43. The Tribunal accepts the Applicant's assertion that the conduct of the Respondent described above constitutes repeated contraventions of Section 81 (2) (a) (ii) and (iii) read with Regulation 23A (3) of the NCA. In all the instances sampled, it is clear that the Respondent did not sufficiently question consumers or require them to provide comprehensive and truthful information regarding their living expenses. This transgression is abundantly evident from the affordability assessment document submitted with the credit agreements. Nearly all the consumers have no expenses other than the minimum expense norm amount, which is often reflected as the sole living expense.
44. In Annexures "D1", "D4", "D5", "D7", to "D10", the Respondent seemingly uses a bank statement and a pay slip to determine the consumers' monthly income. Concerning bank statements, it is clear that the respondent did not consider or utilise the contents of consumers' bank statements as part of their assessments. Regarding Annexures "D1", "D4", and "D10", the said statements and payslips are either outdated, obtained after the loan or

contain insufficient entries to be regarded as sufficient to have been able to conduct an assessment. In Annexure "D1", the loan agreement was entered into on the 1st of December 2020. The payslip is for March 2021, and the bank statements were obtained on the 25th of January and March 2021, respectively. All the dates mentioned above are dates after the loan was extended or the credit agreement was dated. In Annexure "D4", the loan agreement was entered on the 21st of December 2020. The payslips are dated the 31st of October 2019, more than a year before the loan was granted. The bank statements were obtained on the 25th of March 2021 and the 14th of April 2021, respectively, on dates several months after the loan was extended or the credit agreement was entered.

45. Similarly, in Annexure "D10", the loan agreement was entered into on the 14th of April 2021. Although the bank statement is dated the 3rd of April 2021, the entries only date to the 14th of February 2021. The bank statement is incomplete and cannot be relied on for assessment purposes.
 46. In Annexures "D2", "D3", "D6" and "D11", the Respondent failed to obtain either a payslip or bank statement and was as such not in a position to establish the income or obligations of the consumers. Also, the Respondent would not have been able to calculate the monthly living expenses of the consumers or accurately calculate the consumers' discretionary income.
 47. The Respondent applied the minimum expense norms in its affordability assessments. However, this was done solely for listing a consumer's minimum expense as determined in the methodology provided in Regulation 23A (9). Therefore, all the consumers are listed as having living expenses equal to their specific income. The Respondent did not consider living expenses as part of its affordability assessments. Accordingly, the Respondent could not have made a reasonably accurate calculation of consumers' discretionary income. It could also not have made a reasonable assessment as to whether the Respondent had the financial means to satisfy the loan repayment under the credit agreements in question.
 48. The Respondent failed to take all the reasonable steps required before approving a credit application, rendering its endeavours to do an affordability assessment defective. The Respondent's failures herein rendered it unable to properly calculate the consumer's discretionary income in contravention of Regulation 23A (3) and 223A
- (12) (a).
49. The Respondent's conduct is consistent across all the randomly selected approved credit agreements and is evident in all the sampled files.
 50. Accordingly, the Tribunal finds that the Respondent repeatedly contravened the provisions of Sections 81 (2)
- (a) (ii) and (iii), read with Regulation 23A.

51. The Respondent's failure to determine consumers' affordability to re-pay their debts and their payment history under a credit agreement, leads to reckless credit granting.

Reckless credit

52. Section 80 (1) (a) provides that a credit agreement is reckless if, at the time the agreement was concluded, the credit provider failed to conduct an assessment as required by section 81 (2) of the NCA, irrespective of what the outcome of the assessment might have concluded. Section 81 (3) prohibits a credit provider from entering into a reckless credit agreement with a prospective consumer.
53. Reckless credit is evidenced in the sampled file in Annexure "D11" of the investigation report. Concerning this consumer, the credit bureau report indicated the consumer has applied for or is under debt restructuring. Similar transgressions are apparent in all the other sampled files.
54. In its analysis, the Tribunal is satisfied that the Respondent has extended credit recklessly to consumers by failing to conduct the prescribed affordability assessments required by the NCA. Consequently, the Respondent has contravened section 80
- (1) (b) (ii) read with section 81 (3).

Pre-agreement statements

55. The Applicant alleges that the Respondent failed to provide consumers with pre-agreement statements and quotations in the prescribed Form (Form 20 in Schedule 1 of the Regulations to the NCA). The Respondent is required in terms of section 92 (1) of the NCA to adhere to the Form and content set out in the said Regulation. The purpose of providing the pre-agreement statements and quotations is to enable consumers to make informed decisions and to appreciate the nature, obligations, and consequences of the transaction they are about to conclude.
56. As is evident from all the sampled files, the Respondent failed to provide pre-agreement statements and quotations in the prescribed form, or which contain the prescribed information in contravention of Section 52 (5) (b) and Section 92 (1) read with Regulation 28 (1) (b) and Form 20. The following transgressions were evidenced:
- 56.1. The Respondent fails to stipulate its NCRCP number on its pre-agreement statements and quotations. The Respondent displays an incorrect NCRCP number, NCRCP5588, on its pre-agreement statements and quotations. The NCRCP number displayed refers to another entity. The Respondent further fails to display its CIPRO registration number on its pre-agreement statements and quotations;
- 56.2. The Respondent fails to stipulate the annual interest rate associated with the agreement; and

56.3. Signatures of the consumers and the Respondent are omitted from the pre-agreement statements and quotations.

57. The Tribunal finds that the required information is amiss on the pre-agreement statements and quotations. Further, and in respect of the incorrect NCRCP number being displayed, the Tribunal finds that the information is misleading and allows for confusion as to which entity is extending the loans. In this regard, the Respondent has further contravened Section 52 (5)

(c) read with General Condition 7 of its Conditions of Registration.

Credit Agreements

58. In terms of Section 93 (2) of the Act, a document that records a small credit agreement must be in the prescribed Form. Regulation 30 (1) of the Act provides that a document that records a small credit agreement must contain all the information as reflected in Form 20.2.

59. As evident from the sampled files, the Respondent failed to provide credit agreements in the prescribed form or which contain the prescribed information in contravention of Section 52 (5) (b) and Section 93 (2) read with Regulation 30 (1) and Form 20.2. Similar to the contraventions relating to the pre-agreement statements, the following transgressions also occurred regarding credit agreements :

59.1. The Respondent fails to stipulate its NCRCP number on its credit agreements. It displays an incorrect NCRCP number on its credit agreements. It further fails to display its CIPRO registration number on its credit agreements;

59.2. The Respondent fails to stipulate the annual interest rate associated with the agreement;

59.3. No marketing option, as referred to in Section 74 (6) of the Act, is included in the credit agreements; and

59.4. Signatures of the consumers and the respondent are omitted from the credit agreements.

60. The Respondent's credit agreements, at clause 8, allow for a penalty service fee. The "penalty service fee" clause refers to a charge that is not allowed in terms of the Act. It does not fall within the definition of penalty interest, default administrative charges or collection costs. This provision directly or indirectly sets aside or overrides the effects of Section 101 (1) (c), (f) and (g) of the Act and is unlawful. The Respondent has accordingly contravened Section 90 (1) read with Section 90 (2) (b) (iii) read further with Section 101 (1) (c), (f) and (g) of the Act.

Annual financial reports and returns

61. Section 52 (5) (c) provides that a registrant must comply with the conditions of registration and the provisions of the Act. Section 52 (5) (f) provides that a registrant must file any prescribed reports with the Applicant in a prescribed manner and form. Regulation 64 deals with statistical returns. Regulation 64 (2) requires credit providers to complete and submit the statistical return in Form 39 to the Respondent by the 15th of February each year for the period between the 1st of January to the 31st of December.
62. Regulation 66 deals with annual financial and operational returns. It requires a credit provider to submit an annual financial and operational return in Form 40 to the Respondent within six months after the registered credit provider's financial year-end.
63. General Condition 3 requires the Respondent to submit the reports and returns as required in the Regulations within the specified period.
64. The Respondent failed to file its current Annual Statistical Return and its Annual Financial and Operational Return within the stipulated periods as per the Act. As per the information received from the Applicant's Compliance Department, the last Statistical Return (Form 39) received by the Applicant's Compliance Department was submitted by the Respondent on the 3rd of March 2021 for the period between the 1st of March 2020 to the 31st of December 2020, which date was post the due date stipulated as per the Act. Further, the submitted Form 39 is incomplete. Therefore, the Respondent contravened Section 52 (5) (c) and (f) of the Act, read with General Condition 3 of its Conditions of Registration, Regulation 62 (1) (b) and (c), Regulation 64 and Regulation 66.

CONCLUSION

65. Consequently, the Tribunal is satisfied that the Respondent engaged in prohibited conduct by contravening the sections of the Act as outlined above, the Regulations, and General Conditions of Registration. The Respondent has, therefore, repeatedly contravened the Act.
66. The Tribunal proceeds to consider an appropriate order.

CONSIDERATION OF AN APPROPRIATE ORDER

The Applicant's requested

orders

67. The Tribunal has set out the Applicant's requested orders in paragraph 20 of this judgment. The Tribunal proceeds to consider them.

Cancelling the Respondent's registration as a credit provider

68. By failing to oppose this matter, the Respondent has lost the opportunity to put a proper defence against the allegations levelled against it; and has placed itself in the hands of the Tribunal. The Tribunal views all these factors seriously, as they have the character of undermining the NCA and its purpose, the aggrieved consumers, and the NCR.

69. One of the specific conditions of registration of a registrant is to “comply and conduct its business according to the Credit Industry Code of Conduct to Combat Over-Indebtedness”, as referred to in section 48 (1) (b) of the NCA, as approved by the NCR, and as it may be amended from time to time. The Respondent’s conduct flies in the face of such a Code and its expected commitment in many respects. This kind of conduct by the Respondent is among those that warrant the cancellation of registration as a punitive measure.

Administrative fine

70. 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 legislative landscape to precisely curb the types of excesses that the Tribunal has found the Respondent to have perpetrated. Therefore, the Tribunal would 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.
71. 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

72. Reckless lending is a severe contravention of the Act. The Respondent's failure to conduct proper affordability assessments places consumers at severe risk of over-indebtedness. The failure to obtain and consider credit bureau reports is a severe contravention that merits punishment.

Loss or damage suffered

73. 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 extended credit to them while being under debt review, thereby seriously jeopardising their debt review. Also, the damage to a consumer’s economic status is far-reaching if they, due to over-indebtedness, apply for and are placed under debt review.

The Respondent's behaviour

74. There exists no plausible reason for the Respondent to be unaware of its statutory obligation to adhere to the provisions of the Act. The Respondent has been registered as a credit provider for nearly ten years and should therefore be aware of the prescripts of the Act.

75. Further, during the investigation, the Respondent attempted to convince the Applicant's inspector that the statutorily prescribed process is followed and that affordability assessments are conducted. Yet, the evidence did not support the version presented during the investigation.

Market circumstances under which the contraventions occurred

76. Most of the sampled credit agreements obtained from the Respondent were entered into during 2020 and the first half of 2021. The contraventions occurred during a difficult period. The covid-19 pandemic put a tremendous strain on consumers' finances, and many had to borrow to cover living expenses. It was, therefore, imperative for the Respondent to ensure that it took the necessary reasonable steps to conduct proper affordability assessments before approving applications for credit, which it failed to take.
77. The Applicant did not place specific evidence before the Tribunal concerning the market circumstances in which the contraventions occurred. Nevertheless, it appears that the Respondent has ignored its obligations in terms of the Act and has been able to do so because it operates in an environment where consumers are unaware of their rights and obligations in respect of credit agreements. These consumers form part of a specifically vulnerable market, open to exploitation.

The level of profit derived from the contraventions

78. The Applicant did not place specific evidence before the Tribunal concerning the profit the Respondent derived from the contraventions. Irrespective, a profit has been derived from the activities undertaken by the Respondent in contravention of the Act and Regulations. The Respondent has recklessly approved 100% of the agreements randomly selected during the investigation, and the cost of credit attributed to these recklessly approved credit agreements should be substantial. Every agreement extended is a profit gained, as such agreements should never have been extended in the first place.
79. According to the Respondent's Form 30 Statistical Returns submitted for the year ending the 31st of December 2020, the Respondent approved 6310 applications for credit during this period and only rejected 225 applications.

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

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

The Respondent's prior contraventions

81. The Respondent has not been the subject of prior investigations or enforcement measures.

The amount of the fine

82. The Applicant did not produce evidence concerning the Respondent's financial turnover during the previous financial year. Consequently, the Tribunal may impose a fine that is limited to a maximum of R1 000 000.00.
83. The purpose of an administrative fine is a punitive measure and one which is warranted in this instance. Similarly, the Tribunal recognises that the prohibited conduct perpetrated by the Respondent is severe and warrants the imposition of a penalty. In *NCR v Midwicket*[13] the Tribunal found the following:
- “One of the main purposes of an administrative fine is to deter 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”*
84. The Respondent transgressed the law in every instance sampled, which indicates that the Respondent has little regard for the law and regulatory bodies. A fine further serves as a deterrent for other credit providers who might conduct themselves similarly. In repeatedly committing the contraventions outlined above, the Respondent's conduct has displayed little or no regard for the spirit and purposes of the Act. The Respondent's continued participation in the credit market places consumers at substantial risk of further financial harm.
85. These considerations persuade the Tribunal that it is appropriate to impose an administrative fine of R200 000.00.

Appointment of an auditor

86. 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 has charged unlawful service 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.

Other requested orders

87. The Applicant requested that the Tribunal 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 Act's provisions.[14]
88. Mr Stocker did not pursue with any vigour that part of the requested order that the Respondent had brought the consumer credit industry into disrepute and disregarded consumers' rights. It, too, serves no purpose and will not form part of the order.

ORDER

89. Accordingly, the Tribunal makes the following order:

89.1. The Respondent has repeatedly contravened the following sections of the Act, Regulations and Conditions:

89.1.1. Section 81 (2) (a) (iii) read with Regulation 23A (8) and 23A (12) (c);

89.1.2. Section 81 (2) (a) (iii) read with Regulation 23A (12) (b) and 23A (13);

89.1.3. Regulation 23A (3) and 23A (12) (a);

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

89.1.5. Section 88 (4) read with section 81 (3);

89.1.6. Section 52 (5) (b) read with Section 92 (1) and Regulation 28 (1) (b) and Form 20;

89.1.7. Section 52 (5) (c) read with General Condition 7 of the Respondent's General Conditions of Registration;

89.1.8. Section 52 (5) (b) read with Section 93 (2) and Regulation 30 (1) and Form 20.2;

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

89.1.10. Section 52 (5) (c) and (f) read with General Condition 3 of the Respondents Conditions of registration read further with Regulation 62 (1) (b) and (c) and Regulation 64 and 66;

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

89.3. The registration of the Respondent as a credit provider is cancelled with immediate effect in terms of section 57 of the NCA;

89.4. The Respondent's credit agreements with consumers contained in annexures D1 to D11 of the investigation report are reckless in terms of section 80 (1) (a) and set aside;

89.5. The Respondent is ordered to:

- (a) within 30 business days after the issuing of this judgment, appoint an independent auditor (a registered chartered accountant), at its own costs, to identify and establish:
- (i) the names and contact details of all consumers who have since the Respondent's registration as a credit provider entered into credit agreements with the Respondent and where the Respondent failed to conduct any affordability assessments; and
- (ii) the names and contact details of all consumers who have, since the Respondent's registration as a credit provider, been overcharged on interest and detailing the amounts of the overcharge;

- (b) Once the aforesaid auditor's report has been compiled, the Respondent will, at its own cost and within 30 business days of receipt of the auditor's report, write off all the credit agreements entered into without conducting any affordability assessment. All identified loans where improper or inaccurate affordability assessments were done to be referred to the Applicant for a subsequent referral to the Tribunal;
- (c) Once the aforesaid auditor's report has been compiled, the Respondent will, at its own cost and within 30 business days of receipt of the auditor's report, refund consumers who have been identified to have been overcharged on interest; and
- (d) Once the Respondent has complied with (b) and (c) above, the Respondent is to provide the auditor's report, together with its own written report, to the Applicant, detailing the consumers' identity, the write-offs, and refunds made. These reports are to be provided to the Applicant within 120 business days after issuing this judgment.

89.6. The Respondent is within 90 business days of the date of issue of this judgment to pay an administrative fine of R200 000.00 (two hundred thousand rands) 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/223350/2022/57(1) and name of person or business making the payment; and

89.7. There is no order as to costs.

Dr M Peenze - Presiding Tribunal member

With Tribunal members Mr T Bailey and Mr A Potwana concurring.

- [1] Published under GN 789 in GG 30225 of 28 August 2007 as amended by General Notice 428 in Government Gazette 34405 of June 2011 (published in terms of the Consumer Protection Act 88 of 2008). GN R203 in GG 38557 of 13 March 2015 and GN 157 in GG 39663 of 4 February 2016
- [2] Sebola & Another v Standard Bank of South Africa & Another 2012 (5) SA 142 (CC); Nedbank Ltd v Binneman 2012 (5) SA 569 (WCC); Munien v BMW Financial Services & 1 Other 16103/08 (2009) ZALZDHC6, 2010
- (1) SA 549 (KZD); Wessels & Another v Brink NO & Others 1950
- (4) SA 352 (T); Kubyana v Standard Bank of South Africa Ltd 2014 (3) SA 56 (CC) – Relying on the main judgment of Mhlantla AJ paragraphs 1 – 69; Wesbank (a division of Firststrand Bank Limited) v Ralushe (1149/2018) [2021] ZAECGHC 78 (31 August 2021)

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- [3] Published under Government Notice R489 in Government Gazette 28864 of 31 May 2006.
- [4] Section 40 empowers the National Credit Regulator to impose conditions on the registration of an Applicant as a credit provider.
- [5] 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 20.1. [6] Ordering the Respondent to appoint an independent auditor with the Applicant's prior written approval. The auditor is to determine if the Respondent overcharged consumers' fees within the last three years from the date of issue of this judgement and compile a report. The Respondent is to reimburse the consumers;
- [7] Annexure FA5 of the founding affidavit.
- [8] Annexures D1 to D10 of the investigation report.
- [9] Annexures "D1" of the Investigation report
- [10] Annexures "D8" of the Investigation report.
- [11] Annexures "D11" of the Investigation report.
- [12] Annexures "D10" of the Investigation report.
- [13] NCR v Midwicket Trading 525 CC t/a Butterfly Cash Loans NCT/7962/2013/57(1)
- [14] Shoprite Investments Ltd v The National Credit Regulator (509/2017 dated 18 December 2019)
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