

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Marang Financial Services (NCT/16157/2014/140(1)) [2015] ZANCT 3 (24 February 2015) [2015] ZANCT 3

COURT

National Consumer Tribunal

BEFORE

FK Manamela, HFN Sephoti, J Maseko

CASE / FILE NUMBER

NCT/16157/2014/140(1)

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IN THE NATIONAL
CONSUMER TRIBUNAL
HELD
IN CENTURION
Case
Number: NCT/16157/2014/140 (1)
In

the matter between:

THE
NATIONAL CREDIT
REGULATOR.....APPLICANT
and
MARANG
FINANCIAL
SERVICES.....RESPONDENT

Coram:

Adv
FK Manamela – Presiding member
Adv
HFN Sephoti – Member
Prof
J Maseko – Member
Date
of Hearing – 21 October 2014

JUDGMENT**AND REASONS****APPLICANT**

1. The Applicant in this matter is the National Credit Regulator, a body established in terms of Section 12 of the National Credit Act 34 of 2005 (the “NCA” or the “Act”) (hereinafter referred to as “the Applicant”).
2. The application was brought in terms of Section 140(1) of the Act by the NCR.

RESPONDENT

3. The Respondent is Marang Financial Services (Pty) Ltd, a company duly registered under the laws of South Africa and a registered developmental credit provider with the National Credit Regulator under registration number NCRCP 3939, trading under the name and style of Marang Financial Services (hereinafter referred to as “the Respondent”) with its principal offices located in both Limpopo and Gauteng.
4. At the hearing of the matter the Applicant was represented by Mr Joseph Selolo, who referred the Tribunal to the founding affidavit deposed to by Nthupang Sarah Magolego, the Manager responsible for Investigations and Enforcement in the employ of the Applicant. There was no appearance on behalf of the Respondent, Marang Financial Services and/or opposing papers filed.

APPLICATION TYPE

5. This application was filed by the Applicant in terms of Section 140 of the Act, for declaring the conduct of the Respondent unlawful and prohibited in terms of the Act. The Applicant further asks the Tribunal for relief as sought for in its founding affidavit, namely:
 - 5.1 Declaring the conduct of the Respondent to be unlawful and prohibited in terms of the Act;
 - 5.2 Ordering the Respondent to refund all consumers who were charged interest and fees that exceeded the maximum allowable amounts prescribed by the Act;
 - 5.3 Imposing an administrative fine not exceeding R1 000 000.00 (One Million Rand); and
 - 5.4 Further and / or alternative relief.

BACKGROUND

6. The Applicant gave a brief exposition of the “modus operandi” of the Respondent as follows:
 - 6.1 The Respondent was registered on 19 May 2009 as a developmental credit provider subject to certain General and Specific Conditions of Registration as shown in the annexures before the Tribunal.

6.2 The Respondent failed, alternatively neglected to submit annual financial statements to the Regulator as required in terms of the Act. It further failed to renew its registration for the financial year 2013 and 2014 due to non-payment of the required renewal fees. Consequently the registration of the Respondent has lapsed hence the section 140(1) application and not a section 57(1), deregistration.

6.3 Following an investigation by the NCR, the investigation report revealed that the Respondent failed to conduct its business in a manner that is consistent with the purpose and requirements of the Act, which includes the non-payment of the renewal fees and a failure to conduct affordability assessments before entering into a credit agreement with a consumer.

6.4 The Respondent's business model indicates that "business group loans" are granted, the criteria being that the "group" should comprise of between five to ten persons and that the "business" should be in operation for at least six (6) months.

6.5 On critical analysis of the model employed by the Respondent, is that the concept of "business loans" is a substantial misrepresentation of the business of the Respondent. The Respondent in fact grants loans to a "group of individuals", each in their personal capacity. The business of granting individuals personal loans is evidenced by information contained on the credit agreement.

6.6 As a result of the foregoing, the provisions of Section 81 of the Act are applicable but were not complied with by the Respondent.

7. The Applicant submitted that the Respondent uses the guise of Section 101(1) (b)(iii) (aa) of the Act to escape the provisions of Section 81(2) of the Act. Pre-agreement statements and quotations and credit agreements are not retained for record keeping in contravention of the Act as well as the format of the credit agreements which did not comply with the requirements of the Act. The Applicant further referred the Tribunal to a Supreme Court of Appeal decision *Commissioner for the South African Revenue Service v NWK Limited* (27/10) [2010] ZASCA 168 (1 December 2010) copies of which were handed up at the hearing.
8. In its conclusion, Applicant made submissions in support of an order as prayed for in its founding papers:
 - (1) Declaring the conduct of the Respondent to be unlawful and prohibited in terms of the Act in light of Sections 81(2)(a)(ii) and (ii); Section 170 read with Regulation 55(1)(b)(vi); Section 90(1), read with Section 91(a) of the Act, amongst others;
 - (2) Ordering the Respondent to refund all consumers who were charged interest and fees that exceeded the maximum allowable amounts prescribed by the Act;
 - (3) Imposing an administrative fine not exceeding R1 000 000.00 (One Million Rand); and
 - (4) Further and/or alternative relief.

9. On 29 April 2013, the Applicant conducted a proactive investigation into the credit provision practices of credit providers in the greater Thohoyandou area in Limpopo, to ascertain if credit practices were compliant with the Act. These investigations were conducted by Claire Morduant, an inspector duly appointed by the Applicant.
10. The investigator's report, which the Applicant had annexed to the bundle of documents, detailing salient aspects of the

contraventions by the Respondent forms the basis upon which the Applicant launches this application, and is marked Annexure "NM3"

of the bundle handed in at the hearing. The Applicant's founding affidavit specifically traverses these allegations as incorporated therein and remain uncontroverted by the Respondent. There was no appearance by the Respondent at the hearing. In any event, the Respondent's registration with the Applicant has lapsed due to non payment of annual fees.

ANALYSIS

OF LEGAL PROVISIONS AND FACTS

16. In order to consider the submissions put before the Tribunal, it is appropriate to consider the following provisions of the Act. The following sections are relevant:
17. Section 90(1) and (2)

Unlawful provisions of a credit agreement

"(1) A credit agreement must not contain an unlawful provision.

- (2) A provision of a credit agreement is unlawful if-
 - (a) Its general purpose or effect is to-
 - (i) Defeat the purposes or policies of this Act ;
 - (ii) Deceive the consumer; or
 - (iii) Subject the consumer to fraudulent conduct;
 - (b) It directly or indirectly purports to-
 - (i) Waive or deprive a consumer of a right set out in this Act ;
 - (ii) Avoid a credit provider's obligation or duty in terms of this Act ;
 - (iii) Set aside or override the effect of any provision of this Act;
 - (iv) Authorise the credit provider to-
 - (aa) do anything that is unlawful in terms of this Act or;
 - (bb) fail to do anything that is required in terms of this Act;

- (c) It purports to waive any common law rights that-
- (i) May be applicable to the credit agreement; and
- (ii) Have been prescribed in terms of subsection (5);
- (d) The provision results from an offer prohibited in terms of section 74(2) and (3);
- (e) It purports to make the agreement subject to a supplementary agreement prohibited by section 91(a) ;
- (f) It requires the consumer to enter into a supplementary agreement, or sign a document, prohibited by section 91(a); or
- (g) ...
- (3) ...”

18. Section 91 (a)

Supplementary requirements and documents

“A credit provider must not

- (a) 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;
- (b) ...”

19. Section 100(1)

Prohibited charges

“(1) A credit provider must not charge an amount to, or impose a monetary liability on, the consumer in respect of-

- (a) A credit fee or charge prohibited by this Act ;
- (b) An amount of a fee or charge exceeding the amount that may be charged consistent with this Act ;
- (c) An interest charge under a credit agreement exceeding the amount that may be charged consistent with this Act; or
- (d) Any fee, charge, commission, expense or other amount payable by the credit provider to any third party in respect of a credit agreement except as contemplated in section 102 or elsewhere in this Act.
- (2) ...”

20. Section 101(1)

Cost of credit

“(1) A credit agreement must not require payment by the consumer of any money or other consideration, except-

- (a) The principal debt, being the amount deferred in terms of the agreement, plus the value of any item contemplated in section 102;
- (b) An initiation fee, which-
 - (i) May not exceed the prescribed amount relative to the principal debt; and
 - (ii) Must not be applied unless the application results in the establishment of a credit agreement with that consumer;
- (c) A service fee, which-
 - (i) in the case of a credit facility, may be payable monthly, annually, on a per transaction basis or on a combination of periodic and transaction basis; or
 - (ii) in any other case, may be payable monthly or annually; and
 - (iii) Must be not exceed the prescribed amount relative to the principal debt
- (d) Interest, which-
 - (i) must be expressed in percentage terms as an annual rate calculated in the prescribed manner; and
 - (ii) must not exceed the applicable maximum prescribed rate determined in terms of section 105;
- (e) cost of any credit insurance provided in accordance with section 106;
- (f) default administration charges, which-
 - (i) may not exceed the prescribed maximum for the category of credit agreement concerned; and
 - (ii) may be imposed only if the consumer has defaulted on a payment obligation under the credit agreement, and only to the extent permitted by Part C of Chapter 6; and
- (g) collection costs, which may not exceed the prescribed maximum for the category of credit agreement concerned and may be imposed only to the extent permitted by Part C of Chapter 6,”

21. Regulation 43

Supplementary conditions on the application of the maximum initiation fee

“The following supplementary conditions shall apply on the application of the maximum initiation fee:

- (1) An initiation fee may be charged at the registration of a replacement mortgage in respect of a transfer from one credit provider to another, without there being a transfer of ownership of the mortgaged property, only if-
 - (a) The transfer is done at the request of the consumer; and
 - (b) The levying of the fee and the amount of the fee has been disclosed to the consumer by the acquiring credit provider before the consumer has agreed to the transfer.
- (2) No initiation fee may be charged on credit agreements as envisaged in section 101(2).
- (3) Initiation fee may never exceed 15% of the principal debt.”

22. Regulation 44

Maximum service fee

“The maximum monthly service fee, prescribed in terms of section 105(1) of the Act, is R 50.

- (1) Where an annual service fee is levied, the applicable limit is
 - (a) The monthly limit on the service fee, multiplied by 12, and
 - (b) Where the period for which the fee is levied is less than 12 months, the monthly service fee multiplied by the number of months in such a period.
- (2) If a service fee is payable on a transaction basis, or on a combination of periodic and transaction basis, the total of such fees may not exceed the monthly or annual limit.”

23. Section 10(1) of the Act provides the following:

“10 Developmental Credit Agreements

- (1) A credit agreement, irrespective of its form, type or category, is a developmental credit agreement if-
 - (a) at the time the agreement is entered into, the credit provider holds a supplementary registration certificate issued in terms of an application contemplated in section 41; and
 - (b) the credit agreement is-
 - (i) between a credit cooperative as a credit provider, and a member of that credit cooperative as consumer, if profit is not the dominant purpose for entering into the agreement, and the principal debt under that agreement does not exceed the prescribed maximum amount
 - (ii).....
 - (iii).....
 - (aa)...
 - (bb)....

(cc).....”

24. Section 140 deals with prohibited conduct and describes it as follows:

“140.

(1) After completing an investigation into a complaint, the National Credit Regulator may-

(a).....

(b) make a referral in accordance with subsection (2), if the National Credit Regulator believes that a person has engaged in prohibited conduct...;

(2) (b) to the Tribunal”

25. Prohibited Conduct is defined as follows:

“ prohibited conduct ” means an act or omission in contravention of this Act, other than an act or omission that constitutes an offence under this Act, by-

(a) an unregistered person who is required to be registered to engage in such an act; or

(b) a credit provider, credit bureau or debt counsellor; ”

26. The Applicant referred the Tribunal to several sections of the Act, detailing out specific areas of contraventions committed by the Respondent. The following sections bear relevance:

26.1 Section 81(2)((a)(ii) - failure to conduct affordability assessments in order to prevent reckless lending. Contravention of this section amounts to prohibited conduct;

26.2 Section 10(1)(b)(iii)(aa) - Respondent is neither a supplementary credit provider nor a developmental credit provider. Respondent uses the guise of this section to escape requirements under section 81(2);

26.3 Section 170 read with Regulation 55(1)(b)(vi) – failure to maintain records;

26.4 Section 92(1) read with section 28(1) – failure to issue pre-agreement statements and quotations;

26.5 Section 93(2) read with Regulation 30(1)- format of formal credit agreement not in the prescribed form required by the Act;

26.6 Section 101(1)(b)-(d)- cost of credit: Respondent levies from consumers fees in excess of what the Act permits;

26.7 Sections 90(1); 91(a) read with section 90(2)(b)(i) and (ii)- Respondent enters into supplementary agreements that would ordinarily have become unlawful in terms of the Act; and

26.8 Section 89(2)(d)- Respondent concludes credit agreements that are unlawful. The Respondent’s registration has lapsed but continues to provide credit to consumers.

27. The Tribunal has considered all the submissions canvassed by the Applicant including relevant provisions of the Act, detailing out specific areas of contraventions by the Respondent.
28. Further, from the reading of sections 10 and 140 of the Act and the conduct allegedly engaged in by the Respondent, it could be determined that Respondent's alleged conduct falls foul of the provisions of section 10 and resultantly exposes itself to conduct prohibited by the Act as defined in section 140, the current application before the Tribunal. The Tribunal is satisfied that the Applicant has engaged in prohibited conduct.

The Applicant further prays for the imposition of an administrative penalty.

CONSIDERATION OF AN ADMINISTRATIVE PENALTY

29. The Applicant alleges that the Respondent is in contravention of the Act, and should be penalised for such conduct. Section 151(1) of the Act is clear that "The Tribunal may impose an administrative penalty in respect of prohibited or required conduct in terms of this Act or the Consumer Protection Act, 2008". It is within its powers that the Tribunal has this discretion, hence the appropriate use of the word "may". The Tribunal, in arriving at a decision whether or not an administrative penalty should be imposed, must consider whether the Applicant addressed all the factors required by the Act in order to impose an administrative penalty. These considerations should also be applied to the present matter.
30. These factors should individually be interrogated in order to make such a decision. When determining the amount of the penalty, the Tribunal must ensure that the penalty imposed is proportional in severity to the degree of blameworthiness of the offending party, the nature of the offence and its effect on the South African economy in general and consumers in particular.
31. In the matter of Harmony Gold Mining Limited; Durban Roodepoort Deep Limited vs. Mittal Steel South Africa Limited, Macsteel International Holdings[1] the Competition Tribunal made it clear that the primary purpose of an administrative penalty is deterrence.
32. Section 151(2) of the NCA states that:-

An administrative fine imposed in terms of the Act may not exceed the greater of –

- (a) 10 per cent of the respondent's annual turnover during the preceding financial year; or
- (b) R1 000 000

33. In the National Credit Regulator v/s Werlan Cash Loans[2], the Tribunal held that even though the Applicant did not present proof of the Respondent's annual return, this factor did not prevent the Tribunal from imposing an administrative penalty. The Tribunal found the Respondent to have engaged in prohibited conduct in the Werlan-matter and imposed an administrative penalty.

34. In the Werlan-matter, the National Credit Regulator (Applicant) brought an application before the Tribunal for the cancellation of the registration of the Respondent as a credit provider in terms of Section 57 of the NCA. The Applicant however duly stated in its founding affidavit that the Respondent is not registered as a credit provider and sought the following order from the Tribunal:
- (a) Declaring the repeated contravention of the NCA by the Respondent in terms of Section 150(a);
 - (b) Declaring the Respondent's non-compliance with the compliance notice an offence in terms of Section 54(5) of the Act;
 - (c) Imposing an administrative fine against the Respondent in terms of Section 151 of the NCA.
35. The Applicant approached the Tribunal NOT for the cancellation of the registration of a registrant (Werlan), but for the imposition of an administrative penalty due to the alleged repeated contraventions of the NCA by the Respondent.
36. The Respondent (Werlan) was not in attendance at such hearing despite being notified of the hearing date. The Tribunal asked the Applicant to determine the Respondent's annual turnover and to also submit written submissions addressing the following points:
- 1. Whether an administrative fine, in terms of section 151 (1) (b) of the National Credit Act can be imposed without reference to the Respondent's annual turnover.
 - 2. The amount of the administrative fine being requested by the Applicant and the factors supporting that amount.
37. As in the present case, the annual turnover of the Respondent was unknown. We will concentrate on section 151(2) (b) which refers to "the penalty not exceeding R1 000 000." What this provision means, is that where the annual turnover is unknown, the option the Tribunal has, is to impose this amount as a penalty. The key word is OR, and has its normal disjunctive meaning. The effect thereof is that the Tribunal may either award a penalty of 10% of the Respondent's annual turnover OR R1 000 000.00 whichever amount is the greatest.
38. The Competition Appeal Court has held that "the imposition of a penalty should not only promote the important objective of deterrence but that sight should not be lost of fairness to the offending party. In particular, a penalty should not be imposed to destroy the business of the offending party, a point confirmed by section 59(2) which places a cap on the amount of a penalty which may be imposed".[3]

39. Section 151(2) as noted above, is similar to section 59(2) of the Competition Act 89 of 1998. Both sections limit the extent of the penalty which may be imposed on an offending party in terms of the relevant Acts. Unfortunately, section 59(2) of the Competition Act provides only that an administrative penalty may not exceed 10% of the firm's annual turnover. No mention is made of an alternative maximum amount such as that appearing in section 151(2) of the NCA.
40. It was held in the matter of *SPC v Competition Commission*[4] referring to section 59(2) of the Competition Act that "The wording of this section is indicative of a clear structure to be followed in the determination of an administrative penalty".

The same can be said of the provisions of Section 151(2).

41. As explained above, where no evidence regarding annual turnover is available, the Tribunal still has the option to award a penalty not exceeding R 1 000 000.00. The question to be dealt with is the considerations to be taken into account when determining the amount that is payable by an offending party. Due to the unique nature of the legislative provisions dealing with administrative penalties, the only similar mandate to consider is that of the Competition Tribunal. As stated, section 59(2) of the Competition Act however only provides that an administrative penalty may not exceed 10% of the firm's annual turnover, no mention is made of an alternative maximum amount such as that appearing in section 151(2) of the NCA.
42. However, the considerations to be borne in mind when deciding on the amount of such a penalty remains the same as those considered by the Competition Tribunal in various matters where penalties were based on annual turnover. In most matters, the Competition Tribunal has considered factors that may lead to a reduction of the penalty that may have been imposed using the 10% of annual turnover-calculation. The Tribunal may also consider those factors.
43. Further, the Tribunal must consider the legislation from which it derives its own mandate and consider the factors in Section 151(3) of the Act, when determining an amount to be imposed as administrative penalty, which provides as follows:
- "(a) The nature, duration, gravity and extent of the contravention;*
- (b) Any loss or damage suffered as a result of the contravention;
- (c) The behaviour of the respondent;
- (d) The market circumstances in which the contravention took place;
- (e) The level of profit derived from a contravention;
- (f) The degree to which the respondent has co-operated with the National Credit Regulator, or the National Consumer Commission, in the case of a matter arising in terms of the Consumer Protection Act, 2008 and the Tribunal; and

(g) Whether the respondent has previously been found in contravention of the Act, or the Consumer Protection Act 2008, as the case may be.

44. The nature, duration, gravity and extent of the contravention:

The Applicant submitted that the nature of the contravention exploits consumers by splitting the fees and the charges from which the Respondent in turn derives substantial benefit by collecting additional interest and service fees from consumers, in direct and flagrant disregard of the law. The period of time relates to April 2009, the period in which the Respondent was registered.

Further, that the Respondent has not adhered to the provisions of the Act relating to the prevention of reckless lending to consumers.

45. The behaviour of the Respondent:

The Applicant submits that the Respondent has no reason to be unaware of the requirements of the Act and /or comply therewith, instead, the Respondent chose to ignore the provisions of the Act.

46. The market circumstances in which the contravention took place:

The Applicant submits that the circumstances and the areas in which these contraventions occurred are areas with vulnerable consumers and areas in which consumers are not educated about their rights relating to access to credit. The splitting of the loans and the conclusion of supplementary agreements are an indication that consumers are unaware of such practices being unlawful and contrary to the legislative prescripts. The Respondent has benefitted at the expense of these vulnerable consumers. The Tribunal would have to consider this, together with the purpose of the NCA that provides specifically for the assistance of vulnerable consumers and specifically people who may be historically disadvantaged as provided for by section 2(6) of the Act. The consumers in these areas are not sophisticated and experienced role players in the economy. This is an aggravating factor to be considered.

47. The level of profit derived from the contravention:

The Applicant submitted that due to the Respondent not being a registered credit provider, the Applicant does not have access to the Respondent's financial statements.

48. The degree of co-operation:

The Applicant submits that the Respondent has cooperated during the time when the investigation was conducted. Staff of the Respondent was helpful and provided all the information the Applicant sought.

49. Whether the Respondent has previously been found guilty of contraventions of the Act

The Applicant submitted that there were no prior investigations or enforcement instituted by the Applicant against the Respondent. It follows that the Respondent had not previously been found guilty of any contraventions of the Act. This consideration may lead to a reduction of the penalty that the Tribunal may wish to impose, as a mitigating factor.

50. It must be clear that the decision to impose an administrative fine should not just be reached for the sake of punishing the transgressors of the Act, but to encourage refraining from future contraventions. For example, it is debatable if there is any merit in imposing an administrative fine on a credit provider who is co-operative and who is remorseful enough to show clear intentions of abiding by the law after being found to be in breach of the law. However, the fact that the Respondent cooperated with the Applicant should not be the sole determinant. In this matter the Respondent took advantage of uneducated rural consumers to achieve its own ends. In *NCR vs Christin Borman*[5], the Respondent had already adapted its credit agreement systems in order to comply with the Act.

51. Applicant in the *Borman-matter supra* conceded that the Respondent had started to comply with the provisions of the Act subsequent to the investigation, though adding

“Unfortunately for the Respondent this does not do away with the flagrant non-compliance with the Act prior to the investigation”. The Tribunal considered the fact that any order imposed for the refunds to consumers does directly punish the transgressors for past breaches of the law, and benefits the actual victims of such past breaches in the interests of the consumers. “On the other hand, it may not necessarily benefit the consumers if the consequences of an administrative fine may be the closure of a small business entity that could have been rehabilitated in the interests of the consumers” the Tribunal concluded. However the case currently before the Tribunal, poses a different picture from the Borman-matter. In the present case, Respondent has displayed a total disregard of the Act by engaging in conduct that renders its actions inexcusable at the ignorance and detriment of unsuspecting consumers. Respondent’s conduct also is unlawful by subjecting consumers to supplementary agreements. The fact that the Respondent’s registration has lapsed, does not exonerate the Respondent from adhering to the provisions of the Act. In fact, the Tribunal views the fact that the Respondent engaged in the activities of a credit provider, whilst not registered as such, as aggravating.

52. The penalty imposed should be proportional in severity to the degree of blameworthiness of the offending party, the nature of the offence and its effect on the South African economy in general and consumers in particular.

53. The cap imposed by legislation such as the Competition Act and NCA is exactly what it purports to be. It is the determination of the maximum penalty that can possibly be imposed. It becomes operative only after the Tribunal has taken account of the factors set out in the legislation and decided upon a penalty.[6]

54. The Tribunal should consider both mitigating and aggravating factors before making a finding.[7]

CONCLUSION

55. The Tribunal has considered all the relevant submissions substantiating the Applicant's prayers in terms of section 140

of the Act. The Respondent has not opposed the allegations levelled against it and did not attend the hearing, nor sent a representative.

The Applicant's version of the alleged contraventions by the Respondent remains unchallenged and/or uncontroverted.

56. The Respondent is found to have engaged in prohibited conduct by contravening the stipulated provisions of the Act, more specifically

overcharging consumers, amounts in excess of the prescribed fees and interest. The Respondent benefitted at the expense of the affected consumers.

57. Turning to the issue of the administrative fine, the Applicant has made out a case for the Tribunal to consider the imposition of an administrative penalty in lieu of the contraventions committed by the Respondent. The Tribunal has the competency to make a determination whether or not to impose a penalty in these circumstances.

ORDER

58. Accordingly, the Tribunal makes the following order:

58.1 In terms of section 150(g) of the Act, the Respondent's repeated contravention of the Act and Regulations is declared prohibited conduct. These contraventions relate to the following specific provisions of the Act:

58.1.1 Section 81(2)(a)(ii) - failure to conduct affordability assessments in order to prevent reckless lending.

58.1.2 Section 10(1)(b)(iii)(aa) - Respondent is neither a supplementary credit provider nor a developmental credit provider. Respondent uses the guise of this section to escape requirements under section 81(2);

58.1.3 Section 170 read with Regulation 55(1)(b)(vi) – failure to maintain records;

58.1.4 Section 92(1) read with section 28(1) – failure to issue pre-agreement statements and quotations;

58.1.5 Section 93(2) read with Regulation 30(1)- format of formal credit agreement not in the prescribed form required by the Act;

58.1.6 Section 101(1)(b)-(d)- cost of credit: Respondent levies from consumers fees in excess of what the Act permits;

58.1.7 Sections 90(1); 91(a) read with section 90(2)(b)(i) and (ii)- Respondent enters into supplementary agreements that would ordinarily have become unlawful in terms of the Act; and

58.1.8 Section 89(2)(d)- Respondent concludes credit agreements that are unlawful. The Respondent's registration has lapsed but continues to provide credit to consumers.

58.2 In terms of section 150(b) of the Act, the Respondent is interdicted from engaging in any further prohibited conduct.

58.3 In terms of section 150(h) of the Act, the Respondent is ordered to refund all of the past and existing consumers all excess amounts charged. This refund is to be paid to each consumer within thirty (30) days of the date of this judgment. The Respondent is ordered to take every reasonable step to locate every affected consumer for the purpose of effecting the payment. Should a consumer not be traced within thirty (30) days of this judgment, the Respondent is ordered to pay all funds earmarked for this purpose to the Applicant, which shall be held in an allocated account by the Applicant, pending the locating of such a consumer.

58.4 The Respondent is ordered to appoint an auditor, at the Respondent's own cost, to verify and confirm that the Respondent has accurately calculated the amounts owing to each consumer who has been affected by the Respondent's breaches of this Act.

58.5 The Respondent is ordered to submit a report to the Applicant within sixty (60) days of this order, detailing the following:

58.5.1 The amount of all repayments made by the Respondent (duly confirmed by the appointed auditor);

58.5.2 The recipients of all repayments; and

58.5.3 The steps taken by the Respondent to locate any consumer which it was unable to locate.

59. The Respondent is ordered to pay an administrative penalty of the sum of R 450 000,00 (Four Hundred and Fifty Thousand Rand) within 60 (sixty) days of the date of this judgment.

60. There is no order as to costs.

Signed and dated on this the 24th Day of February 2015.

[signed]

Adv FK Manamela

Presiding Member

Adv Neo Sephoti (Member) and Prof J Maseko (Member) concurring.

[1] (13/CR/FEB04)

[2007] ZACT 21.

[2] NCT/3867/2012/57.

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- [3] Federal Mogul Southern Africa v Competition Commission [2005] 1 CPLR 50 CPAC at 67.
- [4] Southern Pipeline Contractors and Conrite Walls (PTY) Ltd v Competition Commission (105/CAC/Dec10, 106/CAC/Dec10) [2011] ZACAC 6.
- [5] Trading as Star Pawn Shop NCT/8613/2013/57 (1). Applicant launched an application for the cancellation of the registration of a credit provider.
- [6] Supra.
- [7] Competition Commission v Aveng (Africa) Limited (84/CR/DEC09)
- [2012] ZACT 32.
-

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