

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Mr Price Group Limited (NCT/81672/2017/140(1)) [2018] ZANCT 140 (10 December 2018)

[2018] ZANCT 140

COURT

National Consumer Tribunal

BEFORE

P A Beck, FK Manamela, A Potwana

CASE / FILE NUMBER

NCT/81672/2017/140(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: NCT/81672/2017/140(1)

In the matter between:

NATIONAL CREDIT REGULATOR APPLICANT

and

MR PRICE GROUP LIMITED RESPONDENT

Coram:

Ms P A Beck

- Presiding Member

Adv FK Manamela -

Member

Mr A Potwana

- Member

Date of Hearing -

22 November 2018

JUDGMENT AND REASONS

THE APPLICANT

1. The Applicant is the National Credit Regulator (“the NCR” or “the Applicant”), a juristic person established in terms of section 12 of the National Credit Act, 2005 (“the Act”), whose offices are situated at 127 Fifteenth Road, Midrand, Gauteng.
2. The Applicant was represented at the hearing by Ms Jacqueline Peters, a Manager in the Enforcement and Investigations Department of the Applicant.

THE RESPONDENT

3. The Respondent is Mr Price Group Limited, a registered credit provider with registration number NCRCP46,[1] whose principal address is 4th Floor, 380 West Street, Durban Kwazulu Natal, (“hereinafter referred to as the Respondent”). The Respondent was represented by Adv Sholto-Douglas SC, Adv Maddison and Ms L Fine of the law firm Norton Rose Fulbright South Africa Inc.

THE APPLICATION TYPE AND RELIEF SOUGHT

4. This is an application in terms of Section 140(1) of the Act[2] for an order declaring that:
 - 4.1 the Respondent is in repeated contravention of specific sections of the Act, namely sections 90; 100; 101(1)(a); and 102(1) of the Act; [3]
 - 4.2 the Respondent engages in prohibited conduct by contravening the said sections referred to in 4.1 above;
 - 4.3 the Respondent be directed to refund all the consumers who were charged club fees by the Respondent from 2007 to date;
 - 4.4 that the Respondent conducts, at its cost, an independent audit of all its consumers who were charged club fees by the Respondent since 2007 to date, in order to identify those consumers who are entitled to refunds, which report must be submitted to the Applicant and Tribunal within 90 days of this order, containing the following information-
 - (i) full details of the consumers; (ii) club fee and the amount thereof for each consumer; and (iii) the statement of account for each consumer to date.

Further that the Tribunal:

- 4.5 issues an order declaring all the clauses or provisions relating to the club fees in the credit agreements of consumers with the Respondent referred to in the investigation report[4], unlawful provisions;
- 4.6 interdicts the Respondent; restraining it from in future, charging consumers a club fee on credit agreements;

4.7 imposes an administrative fine on the Respondent in the amount equalling 10% of the Respondent's annual turnover;

4.8 makes any other appropriate order required to give effect to the consumers' rights in terms of section 150(j) [sic] [5] of the Act.

THE PRE-HEARING CONFERENCE

5. A pre-hearing conference of the matter was held on 17 September 2018. At the pre-hearing conference the parties agreed in principle to a separation of the issues between the merits and the possible sanctions to be imposed. However, agreement could not be reached on which issues related to the merits and which issues related to possible sanctions.
6. After hearing the parties submissions, the Presiding Member ruled on the issues. The Presiding Member ruled that the hearing set down will only be on the facts; and the legal question of whether the club fees constitute prohibited conduct in terms of the Act.[6]
7. Any other issues relating to possible sanctions such as refunds, audits and an administrative fine; will be subject to a further hearing; depending on the outcome of the first hearing on the merits.
8. It was agreed at the pre-hearing that the parties would hand up heads of argument ("the Heads") in support of their submissions at the hearing to each other and to the Tribunal at least 5 business days prior to the hearing.

BACKGROUND

9. The Applicant initiated an investigation into the business affairs of the Respondent. The basis of the Applicant's investigation emanated from a variety of sources which gave the Applicant a reasonable suspicion that the Respondent might be charging consumers a club fee on credit agreements in contravention of sections 100, 101, and 102 of the Act.
10. Firstly, the Applicant conducted an investigation into the clothing retailer Edcon (Pty) Ltd ("Edcon"). The investigation revealed that Edcon charged consumers a club fee on credit agreements in contravention of the Act. This matter was referred to the Tribunal under case number NCT/35378/2015/140(1)(P)NCA. The Edcon case gave the Applicant a reasonable suspicion that other clothing retailers might be charging a club fee under credit agreements in contravention of the Act. Referrals on the contravention

relating to the charging of club fees on credit agreements were further brought to the attention of the Tribunal against retailers

Lewis Stores (Pty) Ltd ("Lewis Stores") and JDG Trading ("JDG") under case numbers NCT/41671/2016/140(1)NCA and NCT/29052/2015/140(1)NCA, respectively.

11. Secondly, the Applicant perused the annual report of the Respondent for the financial year ending March 2015 and discovered that the Respondent reported income generated from club fees.[7] The annual report of the Respondent gave the Applicant a reasonable suspicion that the Respondent was charging consumers a club fee on credit agreements in contravention of the Act.

12. It is on the basis, as set out above that the Applicant proceeded to initiate a complaint in its own name in terms of section 136(2) of the Act and carried out an investigation against the Respondent. Following the investigation, by Mr Godfrey Tladi, an inspector

appointed in terms of section 25 of the Act, the Applicant made a referral to the Tribunal in terms of section 140(1) of the Act.

The basis of the referral is that the Respondent contravened section 90, 100, 101(1)(a) and 102(1) of the Act.

13. The Applicant's case is based on one contention that the Respondent may not charge club fees on credit agreements, because the fee is not provided for in section 101 or elsewhere in the Act.[8]

14. The Respondent admitted that it offers a club service to certain of its credit consumers in exchange for a club fee.[9]

15. The Respondent asserts that the Applicant's allegation that the club fee constitutes a cost of credit is incorrect. The Respondent submits amongst other contentions that the club fee is charged as a stand-alone club membership service; this product is only offered to Mr Price's Milady's customers; the service and related fee is entirely voluntary and optional; customers who elect to become club members receive value-added services and benefits in exchange for payment of the club fee as a consideration; the fact that customers elect to become club members at the time at which they apply for credit and conclude a credit agreement; and the fact that the club fee is recorded in the pre-agreement, does not change the nature of the club fee as a separate stand-alone fee, unrelated to the cost of credit.

16. I shall begin with the Applicant's Heads, as summarised herein below:

SUMMARY OF THE APPLICANT'S SUBMISSIONS

17. At the outset, the Applicant asks the Tribunal to make the following determination: whether or not the club fee charged to consumers is a permitted fee in terms of Section 100,101 and 102 of the Act.

18. The Applicant contends that the club fees are presented to consumers during the credit application process; The fee is presented to consumers in a credit agreement and the fee is essentially an integral part of the credit agreement. The club fee is described in the credit agreement as a fee. It is not described as a "consideration" or "purchase price." The club

fee is not part of or integrated into the principal debt. The club fee is charged separately and independently from the principal debt and reflected separately in the credit agreement. The club fee is charged at R12,50.[10]

19. The Applicant relies on the following provisions of the NCA to support its argument:

19.1 Section 100(1)(a) provides that 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;

19.2 The club fee is essentially an amount charged to consumers by the Respondent as a fee and is prohibited by the Act as contemplated in Section 100(1)(a). Therefore, by including the club fee in consumers credit agreements, the Respondent has imposed a monetary liability on consumers to pay a fee prohibited by the Act as envisaged in section 100(1)(a) of the Act;

19.3 Section 101 lists the monies, the consideration and fees which may be included in a credit agreement. The club fee is not listed in section 101 of the Act. Similarly, the club fee is also not listed in section 100 and 102 of the Act or elsewhere in the Act;

19.4 Section 101 (a)-(g) provides that a credit agreement must not require payment by the consumer of any money or other consideration, except the principal debt; an initiation fee; a service fee; interest; cost of credit insurance; default administration charges and collection costs;

19.5 Section 102(1) provides that if a credit agreement is an instalment agreement, a mortgage agreement, a secured loan or lease, the credit provider may include in the principal debt deferred under the agreement, any of the following items to the extent that they are applicable in respect of any goods that are the subject of the agreement-

- (a) an initiation fee as contemplated in section 101(1)(b), if the consumer has been offered and declined the option of paying that fee separately;
- (b) the cost of an extended warranty agreement;
- (c) delivery, installation and initial fuelling charges;
- (d) connection fees, levies or charges;
- (e) taxes, licence or registration fees; or
- (f) subject to section 106, the premiums of any credit insurance payable in respect of that credit agreement;-

19.6 Section 90(1) which provides that a credit agreement must not contain an unlawful provision;

19.7 Section 90(2)(a)(i) which provides that a provision of a credit agreement is unlawful if its general purpose or effect is to defeat the purposes or policies of the Act;

19.8 Section 90 (2)(b) that provides that a provision in a credit agreement is unlawful if it directly or indirectly; purports to –

- (i) waive or deprive the consumer of a right set out in the Act;
- (ii) avoid a credit provider's obligation or duty in terms of the Act;
- (iii) set aside or override the effect of any provision of the Act;
- (iv) authorise a credit provider to-
 - (aa) do anything that is unlawful in terms of the Act; or
 - (bb) fail to do anything that is required in terms of the Act.

19.9 The Applicant submits that the mere fact that the fee charged is optional and not compulsory for the consumer does not render an otherwise illegal fee to be permissible under the Act.

19.10 Under the heading[11] “whether the club fee is part of the cost of credit due to the fact that it increased the monthly instalments due and payable by consumers under the Respondents credit agreement” the Applicant advances argument describing cost of credit under the NCA, in the following terms:

19.10.1 The Applicant has established that the club fee increases the monthly instalment payable by consumers under credit agreements.

19.10.2 The club fee is also presented to consumers in the credit agreement together with the other items of the cost of credit such as consumer protection plans.

19.10.3 Applying the ejusdem generis rule the club fee should be regarded as part of the cost of credit payable by consumers under a credit agreement.

- 20. The Applicant argues further that the Act does not provide for a club fee to be charged on credit agreements. The club fee is not provided for in sections 100,101,102 of the Act or elsewhere in the Act.
- 21. The inclusion of the club fee in the credit agreement imposes a contractual obligation on consumers to pay the fee. The credit agreement would therefore require the payment of the club fee by the consumer. The determination of whether a fee is permitted to be charged on a credit agreement by the Act does not depend on the underlying products, value, benefits or services to the consumer.

This is an irrelevant consideration or factor.

- 22. The Applicant referred the Tribunal to its judgments in Mortgage Secured Finance (Pty) Ltd v NCR[12], NCR v Bondpro Finance Services (Pty) Ltd[13] and NCR v Tengizak CC[14] as examples of where credit providers sought to justify their illegal fees by explaining the products, value and benefits and services in respect of which the illegal fees were charged. The Applicant also referred the Tribunal to NCR V Edcon Holdings Limited[15] and NCR v

Lewis Stores (Pty) Ltd[16] judgments where in both of these matters the High Court ruled against the NCR.

23. The Applicant also referred the Tribunal to Section 18(4) of the Superior Courts Act 10 of 2013 which states as follows:

“...unless the court orders under exceptional cases otherwise, the operation and execution of a decision which is the subject of the application for leave to appeal or of an appeal, is suspended pending the decision of the application or the appeal.” The Applicant argued that the effect and implementation of the High Court decisions has been suspended.

24. On the basis of this argument, the Applicant concludes that since the Tribunal has already ruled club fees as unlawful in the Edcon matter, it should also rule that club fees in this matter are unlawful; In both the Edcon matter and this matter before the Tribunal, club fees are charged on credit agreements; The Applicant argues that the conflicting judgments of the Tribunal in the Edcon and Lewis Stores matters; and the fact the Supreme Court of Appeal has granted the Applicant special leave to appeal on the grounds that the appeal has prospects of success, demonstrates that there are conflicting interpretations of the application of the Act to club fees.
25. The Applicant has established as a matter of fact that the club fee appears on the Respondent's credit agreements with consumers.

This fact cannot be rebutted by the Respondent as it is evident on its credit agreements. It is also an established fact that there is no fee called a “club fee” in the Act and in particular in Sections 100, 101, 102 of the Act.

26. The Applicant concludes that the Applicant has on a balance of probabilities, proven that:

26.1 the Respondent charges consumers a club fee on credit agreements;

26.2 the club fee is not listed in Sections 100,101,102 of the Act or elsewhere in the Act; and is also not permitted to be charged on credit agreements by the Act; and ‘

26.3 the club fee is part of the cost of credit when applying the ejusdem generis rule, since the club fee is included in the credit agreement with other items in the credit agreement.

27. For these reasons, the Applicant submits that club fees charged by the Respondent forms part of the cost of credit and is not a permitted fee in terms of the Act.

SUMMARY OF THE RESPONDENT'S SUBMISSIONS

28. The Respondent, at the outset admitted that it offers a club service to certain of its credit consumers in exchange for a club fee.[17] It denies that in doing so, it has contravened the provisions of the Act in any way. In summary, the case of the Respondent is that:

28.1 the Club fee is charged in relation to a stand-alone club membership service;

28.2 this product is only offered to Mr Price's Milady's customers;

28.3 this service and related fee is entirely voluntary and optional;

28.4 customers who elect to become club members receive value-added services and benefits in exchange for payment of the club fee as consideration;

28.5 the fact that customers elect to become club members at the time at which they apply for credit and conclude the credit agreement, and the fact that the club fee is recorded in the pre-agreement, does not change the nature of the club fee as a separate stand-alone fee, unrelated to the cost of credit.

29. As mentioned, these points form the crux of the Respondent's defence raised in argument. The Respondent avers in its argument that in two recent judgments of the High Court, on appeal from this Tribunal, the courts have held that the charging of club fees (in similar circumstances) does not constitute a contravention of the provisions of the Act. The Respondent submits that this is the law as it presently stands. The Respondent submits that the judgments of the High Court bind the Tribunal.

THE "FACT IN ISSUE" TO BE DECIDED

30. The Tribunal is required to determine the following as directed by the Presiding Member at the pre-trial hearing;

Whether or not the Club fee charged by the Mr Price Group Limited constitutes prohibited conduct in terms of the Act.

APPLICABLE PROVISIONS OF THE ACT

31. In support of its application the Applicant has relied on the following sections of the Act;

31.1 Section 90(1) which provides that a credit agreement must not contain an unlawful provision.

31.2 Section 90(2)(a)(i) which provides that a provision of a credit agreement is unlawful if its general purpose or effect is to defeat the purposes or policies of the Act.

31.3 Section 90(2)(b) that provides that a provision in a credit agreement is unlawful if it directly or indirectly purports to –

- (i) Waive or deprive the consumer of a right set out in the Act;
- (ii) Avoids a credit provider's obligations or duty in terms of the Act;
- (iii) Sets aside or overrides the effect of any provision of the Act;
- (iv) Authorise a credit provider to –
 - (aa) do anything that is unlawful in terms of the Act and
 - (bb) fails to do anything that is required in terms of the Act;

31.4 Section 100(1)(a) which provides that a credit provider must not charge an amount to or impose a monetary obligation on the consumer in respect of a credit fee or charge prohibited by the Act;

31.5 Section 101 (1) a) to (g) which provides that a credit agreement must not require payment by the consumer of any money or other consideration, except the principal debt, initiation fee, a service fee interest, cost of credit insurance, default administration charges and collection costs.

Section 101 - Cost of Credit, provides:

- (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,
 - (c) A service fee,
 - (d) Interest,
 - (e) Cost of any credit insurance provided in accordance with section 106
 - (f) Default administration charges, 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.

31.6 Section 102(1) provides that if a credit agreement is an instalment agreement, a mortgage agreement, a secured loan or lease, the credit provider may include in the principal debt deferred under the agreement, any of the following items to the extent that they are applicable in respect of any goods that are the subject of the agreement-

- (a) an initiation fee as contemplated in section 101(1)(b), if the consumer has been offered and declined the option of paying that fee separately;
- (b) the cost of an extended warranty agreement;
- (c) delivery, installation and initial fuelling charges; and
- (d) subject to section 106, the premiums of any credit insurance payable in respect of that credit agreement.

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EVALUATION OF THE FACTS AND THE APPLICABLE LAW

32. The disputed issue in this matter is the charging of club fees by the Respondent and whether the club fees form part of the cost of credit.
33. The Tribunal, in determining whether the club fees form part of the cost of credit will rely on evidence presented by the parties by way of affidavits. In this matter, the dispute arises in the application of the law to the facts. The facts are not in dispute. Both parties presented strong arguments in support of their submissions in their affidavits, heads of argument and case law handed up at the hearing.
34. Establishing a club and charging club fees is a controversial issue. It is clearly of enormous concern to the Applicant as can be seen in the Applicant's pursuit of the issue of club fees in a number of matters argued before this Tribunal and currently on appeal to the Supreme Court of Appeal. The Applicant argues that the charging of club fees places an increased monetary burden on consumers, many of whom as is the case in this matter, are pensioners and students who may be regarded as vulnerable and less au-fait with the law.
35. The Respondent admits that it charges Milady's customers who choose to subscribe to the club, a club fee of R12,50 per month. The Respondent denies that the club fee is charged "on a credit agreement" or that it is in contravention of any provisions of the Act. The Applicant argues that the club fees form part of the cost of credit because it is not listed as a permissible charge in sections 100, 101 and 102 of the Act or elsewhere in the Act.
36. This is not the first of the matters related to "club fees" before the Tribunal. The Tribunal has already issued a comprehensive

judgment on a similar issue in *NCR v Edcon Holdings Limited* ("Edcon") NCT 35378/2015/140(1) where the Tribunal found that the club fee did indeed form part of the "cost of credit and as such was an unlawful fee". Edcon turned to the North Gauteng High Court in Pretoria to appeal the finding. Judge Johan Louw upheld the appeal, concluding that the Tribunal erred in finding Edcon engaged in prohibited conduct. The learned Judge stated that the question to ask is whether Edcon's credit agreements require (my emphasis) the payment of club fees. Judge Louw said if this question was asked, the Tribunal would have come to the correct answer. He said further that Edcon's credit agreements do not place any obligation on a customer to pay a club fee. If it did, it would have been against the NCA; however; since the club membership could be cancelled by the customer at any time; the charging of a club fee did not violate the NCA.; For this reason the Edcon (Pty) Ltd appeal was upheld.

37. The Tribunal issued yet another comprehensive judgment in the matter *NCR / Lewis Stores (Pty) Ltd* NCT/41671/2016/140(1). In this matter the majority judgment of the Tribunal concluded that the evidence established that consumers enter into separate

agreements each time they wish to purchase goods and/ or services from the Respondent; and they do not have a credit facility in the form of a store card. There is therefore a separate contract for joining the club and a separate fee is charged for club

membership. This agreement cannot be seen as a credit agreement because no interest is charged and consumers are paying in advance

for a particular service. If they fail to pay for that service, the agreement is terminated. For these reasons the club fees were found not to be a part of the cost of credit. The Applicant lodged an Appeal before the High Court. The nub of the High Court judgment is that the Act does not prevent credit providers from offering their customers a club membership and extended warranties, provided that they are not part of the cost of credit. The court held that club fees in the Lewis Stores matter do not form part of the cost of credit and the retailer may include the cost of an extended warranty as part of its fees.

38. These decisions are not mutually contradictory as the Applicant asserts, but are based on two separate and distinct sets of facts. The Tribunal respects the principle of stare decisis. However, each matter must be decided on its own merits.; It is therefore necessary to evaluate the evidence presented in this matter; to apply the law to this set of facts; before a conclusion can be reached that the Tribunal is bound by a former ruling of this Tribunal.
39. The facts of this matter are that the Respondent conducts business as a retailer of value fashion, sporting and homeware products through various divisions in South Africa and across Africa. The Respondent's divisions are Mr Price apparel; Mr Price Sport; Mr Price Home; Milady's; Sheet Street; and Mr Price Money. Apart from Mr Price apparel, Sport and Home, each division has its own store card and credit application process.[18]
40. Mr Price Money is the financial services division of the Mr Price Group, sells insurance and mobile products. In respect of Mr Price apparel, Sport and Home, consumers can apply for a Mr Price store card that allows them to make purchases at all three stores. Consumers who have a Milady's or Sheet Street account can shop using their store cards at Milady's and Sheet Street, respectively. The Respondent's business is made up of predominantly cash sales, with only approximately 18% of its sales constituting credit sales.
41. The Respondent's club membership product is offered to Milady's customers only and not to credit consumers in any of its other divisions. The club membership offer is apparent from the Milady's credit application form. None of the application forms in respect of any of the Respondent's other divisions contains an option to subscribe to the club.
42. The following services and benefits are provided to Milady's customers, who choose to become club members[19]:
 - 42.1 Club members are entitled to rewards vouchers in terms of which a percentage of the value of the customer's purchases will be credited to the customer in the form of a voucher. These vouchers are issued every four months and are valid for three months;
 - 42.2 A quarterly "inspiration magazine", is sent out in April, July, September and November;
 - 42.3 Free basic alterations on garments sold at their regular price at Milady's;

42.4 Exclusive offers of an additional 10% off selected promotions; and

42.5 Birthday vouchers to the value of R50,00 are sent to club members with their statement in the month of their birthday.

43. In exchange for the aforesaid services and benefits, club members pay a fee for joining this club of R12,50. The Club membership is only offered to credit customers and not to cash customers. Club members can elect to terminate their club membership with immediate effect and once they have notified the Respondent, they will not be charged the club fee the following month. Cancellation of the club memberships has no impact at all on the continuation of the credit agreement between the customer and the Respondent. Club membership is entirely optional. This means that customers who apply for credit and a store card are, if they qualify, eligible for such credit even if they choose not to become club members.
44. The option of joining the club is offered to members when they apply for a store card and, if they select the option to join the club the charge would be reflected on their pre-agreement. Other customers choose to join the club at a later date, after they have received their store cards, either in store or by calling the Respondent's call centre. In respect of the latter category of customers, although they are charged a club fee after they subscribe, the fee never forms part of the pre-agreement. This is an important fact to note.
45. As at the end of April 2017, 61,80% of Milady's account customers were club members. The percentage of club member across all of the Respondent's divisions are 12,74%. The turnover generated by club fees charged to those Milady's customers constitute 0,1% of the Respondent's entire group turnover.[20]
46. In his investigation report,[21] the Respondents inspector Godfrey Tladi ("Tladi") states that he spoke telephonically to Mandy Kirsten, the compliance officer of the Respondent. He requested copies of all credit agreements in the following categories; pensioners; students; and full-time employed consumers. The inspection report confirms that of the 30 credit agreements inspected by Tladi, 26 customers were not charged club fees. Notwithstanding this finding, under the heading Findings, Tladi concludes: "for the reasons set out above it is my opinion that Mr Price has contravened the following sections of the Act." The sections referred to in the report are Sections 100,101,102(1). In as much as Tladi refers to "the reasons set out above" there are no such reasons in the report save for the list of 30 customers credit agreements inspected where only 4 customers were confirmed as being club members. It follows that Tladi has not laid a basis for such a finding.

47. I now turn to the document entitled “Credit facility - Pre-Agreement” of the Respondent. A perusal of this document provides the following information; a heading entitled Credit Provider Details; a heading entitled Customer Details; a heading entitled Account Facility Quotation and finally a heading entitled Insurance Options. The latter section reads as follows: “If you have taken up any of the following options, your maximum monthly instalment will be increased by the amounts reflected below:
- Consumer Protection Plan R0,00;
 - Lost Card Protection R0,00;and
 - Club fees R12,50.
48. A perusal of the credit agreements inspected by Tladi reveal that 4 of the Credit Facility - Pre-Agreement documents have the amount of R12,50 next to the words “club fees” and the other pre-agreement documents inspected have the amount indicated for club fees as R0,00. At the very bottom of the page of this document the following words appear: “this quotation is binding for 5 days.” The document also provided a space for the consumer to sign above the words “I accept this pre-agreement quotation.”
49. The facts established supported by the documentary evidence supports the findings that not all consumers elected to join the club. This is evidenced in the inspection report of Tladi where 26 of the 30 customer agreements inspected by Tladi opted not to join the club and have a nil amount entered as a club fee. This also supports the finding and the case made out by the Applicant that it is optional to join the club.
50. The second page of the document entitled “Credit facility - Pre-Agreement” refers to the customer’s personal details, income and expenses. Regardless of whether the customer opted to be a member of the club or not, there is no reference to the club fee on the second page of the document entitled “Credit Facility – Pre-Agreement.”
51. Other than the reference to the club fee on the first page as described in 47 and 48 above, there is no other reference to the Club or to a club fee in the credit agreement which consumers enter into when they purchase goods in terms of a credit agreement. The Applicant argues that one of the terms contained in the credit agreement provides consumers with an option to agree or not to agree to the club fee. This is indeed the case however, the first page of the document indicates at the bottom of this document that the “quotation is binding for 5 days.”
52. It is understandable that it is at this point where the Applicant’s concern has arisen. At a time when consumers are applying for credit, they will also be asked whether they want to join the Club. The club fee is then added to the quotation along with all the other insurance options such as the customer protection plan and lost card protection The Applicant is therefore of the view that this fee is charged to consumers as part of the cost of credit.

53. The critical issue which the Tribunal must decide on the facts before it is whether the club fee which is included on this credit facility pre-agreement as described in 47 and 50 above is a “cost of credit” or a separate charge for a separate service. It is only if it is actually a cost of credit that the Respondent can be found to have contravened the Act because the Act does not list a Club fee as permissible fee under section 101 or 102. A strict application of these sections would mean that the list of permissible fees is a closed list and unless the fee in question forms part of this list, it is excluded from that which is a permissible charge in terms of the Act. It is also understandable from the Applicant’s argument that it is irrelevant whether the club fee provides any benefits to the consumer; if it is not on the list of fees in Sections 101 and 102 it is unlawful and must be declared as prohibited conduct.
54. On the evidence before me I am unable to conclude that club fees actually constitute a “cost of credit” for the following

reasons:

54(1) Section 101 provides as follows: (1) “A credit agreement must not require payment by the consumer of any money or other consideration, except ...” Consumers do not have to join the club when they apply for credit. There are a number of examples before the Tribunal as documented in Tladi’s investigation report where consumers elected not to join the Club. Tladi’s investigation report itself states that in the examples which it investigated, of the 30 agreements inspected only 4 consumers elected to join the club. Were the club fees a true cost of credit there would be no option to exercise offered to the consumer because the consumer would be required to pay the club fee of R12,50. The evidence led does not support such a finding.

54(2) The Act does not seek to regulate the goods and services which a credit provider offers to its consumers. It only seeks to regulate the fees and charges which can be charged when a consumer elects to pay for goods in accordance with a credit agreement (which includes a credit facility).

54(3) The interpretation of the words in section 101 should be given their ordinary meaning, unless to do so would lead to an absurdity. The ordinary meaning of the word “require” cannot be interpreted to mean that the consumer has an option or a choice as supported by the facts in this case.

55. In the High Court appeal[22] of the Edcon matter it was held as follows;

“in the context of s 101, the word “require” can only be interpreted to mean to demand from a consumer who applies for credit, or to impose an obligation on such consumer to pay for something which is not permitted in terms of the section. Edcon’s credit agreements do not do not place an obligation on a consumer to pay a club fee. The consumer has a choice whether or not to apply for club membership. The club fee charged is clearly not a cost of credit which is extended to the consumer in terms of the credit agreement. The notion of a cost of credit is the cost of lending money of extending a credit facility. The Tribunal correctly found that the fee is for a product that entitles the customer to various benefits. It can therefore not be cost of credit or, as was contended by the Regulator, in consequence of or pursuant to the conclusion of a credit agreement. The fact that membership of the

club can be cancelled by the customer at any time, negates that contention”.[23]

56. Similarly in the Lewis matter the regulator argued that the Club fee charged by Lewis stores constituted a cost of credit as defined in section 101 of the Act.
57. The High Court agreed with and confirmed the Tribunal’s findings that the Act does not prescribe goods and services which a credit provider is entitled to offer consumers; the Act deals with credit and cost of credit and does not prevent a credit provider from offering the services of a club to consumers, provided the services do not form part of the cost of credit.

CONCLUSION

58. In the matter before the Tribunal the evidence establishes that Milady’s consumers entering into a credit agreement to obtain a store card have the option of taking out a club membership of R12,50 fee, lost card protection, client protection plan, a 360 degree protection plan and an A2B Commuter Personal Accident Plan, amongst other insurance products. Some consumers (see the Tladi Report[24]) opted for the club fee with their application for a store card and other customers opted for one of the other insurance products.
59. The Respondent presented extensive evidence of the nature of the club membership offered to consumers and in particular that the club fee was only offered to Milady’s customers at a cost of R12,50 which could be cancelled on notice to the Respondent. This evidence was not disputed by the Applicant. On the Respondent’s own evidence there is nothing before the Tribunal upon which the Tribunal can make a finding that payment of a club fee is an obligation placed on a consumer who applied for credit from the Respondent. In fact the opposite is true that the consumer has a choice of whether to join the club at the time of applying for credit and subsequently to cancel the club membership. It follows that the club fee cannot be demanded or using the words of Section 101 “require(ed)” at any time from the consumer and therefore not be viewed as a cost of credit as argued by the Respondent.
60. Accordingly, the Tribunal finds that, by adding the option of a club fee to the credit agreement or credit facility process, the Respondent has not contravened sections 100, 101,102, of the NCA, in that it added a fee to the credit agreement that is not permitted.

ORDER

61. The Tribunal makes the following order –

61.1 The Applicant’s case is dismissed; and

61.2 There is no order as to costs.

Thus done and handed down on 10 December 2018.

[signed]

P A BECK (Presiding Member)

Adv F Manamela (Member) and Mr A Potwana (Member) concurrin

- [1] See para 7 of the Applicant's Founding Affidavit
- [2] National Credit Act 34 of 2005 as Amended
- [3] See para 41.1 of the Applicant's Founding Affidavit
- [4] Pages 193-198 of the Bundle – Investigator Tladi's report
- [5] The correct citation of the provision is section 150 (i) and not (j)- National Credit Act 34 of 2005 & Regulations, reflecting the law as at 9 September 2016, Published by Juta Law.
- [6] See para 2 bullet point 1 and 2 of the Pre-hearing minute
- [7] See pg 117 of the bundle
- [8] Record p14, para 31 Applicant's Founding Affidavit
- [9] See Para 3 of the Respondent's Heads
- [10] See para 5 of the Applicant's Heads
- [11] See Para 6 of the Applicant's Heads
- [12] NCT/88262/2017/56(1) See Pg 31 of the Applicants Bundle of authorities
- [13] NCT/78958/2017/55(1) See Pg 40 of the Applicant's Bundle of authorities
- [14] NCT/91474/2017(57)(1) See Pg 14 of the Applicant's Bundle of authorities
- [15] NCT/35278/2015/140(1) See Pg 50 of the Applicant's Bundle of authorities
- [16] NCT/41671/2016/140(1) See page 7 of the Applicant's Heads
- [17] See para 3 of the Respondent's heads
- [18] Respondent's heads of argument Pg4
- [19] Respondents Heads Pg 5
- [20] Record p589
- [21] Pg 193-198 of the bundle – Investigator's Report
- [22] A237/17 para 7
- [23] At para (4) of the Edcon High Court Judgment
- [24] Pages 193-198 of the Bundle – Investigator's report

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