

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Pandero Investments

503 CC t/a Iwita Finance (NCT/113131/2018/57(1)) [2019] ZANCT 50 (11 March 2019) [2019] ZANCT 50

COURT

National Consumer Tribunal

BEFORE

T Woker, J Simpson, B Dumisa

CASE / FILE NUMBER

NCT/113131/2018/57(1)

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

Case number: NCT/113131/2018/57(1)
In the matter

between: NATIONAL CREDIT
REGULATOR
Applicant
And
PANDERO
INVESTMENTS 503 CC T/A IWITA FINANCE
Respondent

Coram: Prof T Woker
- Presiding Tribunal Member
Adv J Simpson
- Tribunal Member
Prof B Dumisa
- Tribunal Member
Date of Hearing
- 20 February 2019
Date of judgment -
11 March 2019

JUDGMENT

1. The Tribunal is asked to determine whether or not the Respondent is in repeated contravention of the National Credit Act, 2005 (the Act) by:
 - 1.1. failing to conduct affordability assessments or failing to maintain documentation in support of affordability assessments; and
 - 1.2. inducing consumers to enter into supplementary agreements.
2. For these contraventions, the Tribunal is asked to impose certain penalties in terms of the Act on the Respondent including that the Respondent be de-registered as a credit provider and that an administrative fine be imposed on the Respondent.

THE PARTIES

3. The Applicant is the NATIONAL CREDIT REGULATOR (“the NCR”); an organ of state and a juristic person within the public administration, established in terms of Section 12 of the National Credit Act 34 of 2005 (“the NCA”). The NCR has its address at 127 Fifteenth Road, Randjespark, Midrand, (“the Applicant”).
4. The Founding Affidavit of the NCR was deposed to by Ms Jacqueline Peters, the Manager for Investigation and Enforcement, in the employ of the Applicant. At the hearing, the NCR was represented by Ms Venugopal and Ms Swartz from the NCR.
5. The Respondent is Pandero Investments 503 CC trading as Iwita Finance, an entity registered in terms of the relevant company laws of the Republic and a credit provider conducting its business at 64 Harvey Road Bloemfontein, Free State. (“the Respondent”). At the hearing the Respondent was represented by Mr Vosloo from Vosloo Attorneys.
6. The Respondent registered with the NCR in 2007 under NCR registration number NCRCP203 and company registration number 2012/055816/07.

APPLICATION TYPE AND THE RELIEF SOUGHT

7. This is an application in terms of section 57(1) of the National Credit Act, Act 34 of 2005 (“the NCA”) for an order in the following terms:
 - 7.1. declaring the Respondent to be in repeated contravention of the following sections of the NCA;
 - Sections 81(2) (a) (ii) – entering into credit agreements without first taking reasonable steps to assess the proposed consumer’s debt re-payment history as a consumer under credit agreements;

- Section 81 (2) (a) (iii) – entering into credit agreements without first taking reasonable steps to assess the proposed consumer's

existing financial means, prospects and obligation;

- Section 81 (3) read with section 80 (1) – entering into reckless credit agreements with consumers;

- Section 170 read with Regulation 55 (1) (b) (vi) – failing to keep records of steps taken when conducting affordability; and

- Section 91(a) and Section 101(1)(c) read together with Regulation 44 – inducing consumers to enter into supplementary agreements that require the payment of a service fee which when added to the service fee exceeds the maximum prescribed amount allowed by the Act;

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

7.3. Cancellation of the Respondent's registration;

7.4. Ordering the Respondent to:

- appoint an independent auditor at its own cost within 30 days to determine and compile a list of all consumers who were overcharged on fees, amounts or charges with the last five (5) years from the date of this judgment;

- refund the amounts it received in the form of fees, charges, which it is was not entitled to receive or which exceeded the prescribed amounts allowed by the Act to each consumer within 30 days from the date of the auditor's report;

- provide a written report to the Applicant detailing the identity of the consumers and the refunds made. This report to be provided to the Applicant within 120 days after the order has been obtained; and

- pay the funds intended for any consumer that the Respondent has been unable to trace in to a trust account held by the Auditor;

7.5. Imposing an administrative fine in the amount of R1 000 000.00 on the Respondent in terms of section 150 of the Act; and /or

7.6. Any other appropriate relief the Tribunal may make under section 150 (i) to give effect to the consumers' rights in terms of the NCA.

JURISDICTION

8. The National Consumer Tribunal ("Tribunal") has jurisdiction to hear this matter and has powers conferred upon it in terms of section 150 of the NCA to make orders in relation to a registrant who allegedly contravenes this Act, or fails to comply with any condition of its registration.

ISSUES

TO BE DECIDED

9. The issues to be decided in this matter include whether or not the Respondent has engaged in prohibited conduct by repeatedly contravening the provisions of the Act; and in view of that, should be de-registered as a credit provider and an administrative penalty be imposed by the Tribunal as prayed for by the Applicant.
10. The Tribunal must also decide whether consumers have been over-charged when it comes to prescribed fees and whether they are due a refund.
11. Further, the Tribunal is tasked to decide on the technical legal points raised in limine by the Respondent. These preliminary points will be dealt with later in the course of this judgment

BACKGROUND

12. On 4 May 2016 a consumer, Mr Kathogile Moeng (“Mr Moeng”), lodged a complaint with the NCR alleging that the Respondent had granted him a loan recklessly, because the Respondent had failed to conduct a proper affordability assessment before it granted him the loan.
13. At the time the complaint was made, the consumer faxed through to the NCR a handwritten complaint together with some supporting documents;^[1] the complainant, Mr Moeng, did not complete the required complaint initiation form.
14. On 24 May 2016 the complaint was then followed up by a call centre agent, identified only as Lebo. Lebo contacted the complainant telephonically and he (the call centre agent) completed the complaint initiation form; the form was signed by Lebo.
15. As a result of having received this complaint, the NCR initiated^[2] a complaint in terms of section 136 (1) of the NCA against the Respondent on 27 January 2017.
16. The Applicant appointed two inspectors, Mr Tladi and Ms Sepuru in terms of section 25 of the NCA to investigate the activities of the Respondent. The certificates of appointment^[3] stated that
“In terms of section 25 of the National Credit Act, this appointment allows the inspector/investigator to perform such functions and exercise such powers as assigned or conferred on an inspector/investigator by the National Credit Act 34 of 2005.”

17. The investigation was conducted on 8 March 2017. During the investigation, the inspectors concluded that the Respondent was contravening certain provisions of the Act. Mr Tladi submitted a detailed report on the investigation to the NCR.[4]

18. As a result of this report the Applicant concluded that the Respondent was in repeated contravention of the Act; the Applicant therefore

filed the application in terms of section 57(1) with the Tribunal.

POINTS IN LIMINE

19. The Respondent raised certain points in limine:

19.1 the Applicant did not have a reasonable suspicion of prohibited conduct on the part of the Respondent in order for it to initiate an investigation, thus rendering the referral unlawful and invalid;

19.2 the scope of the investigation authorised by the Applicant was limited and the inspector Mr Tladi was not authorised to extend his mandate to include other contraventions;

19.3 there was no investigation certificate issued and therefore the investigation was not properly approved;

19.4 the inspector, Mr Tladi, acted beyond the scope of the specific investigation he was empowered to investigate therefore the Tribunal

is not empowered to entertain that part of the report that deals with further contraventions; and

19.5 only an inspector employed by the NCR can be appointed as an inspector and there is no evidence to show that the inspectors who conducted the investigation were employed by the NCR.

Lawfulness of the investigation and referral

20. The Respondent submitted that the decision by the NCR to investigate was not lawfully taken because it did not have a reasonable suspicion of prohibited conduct. The Respondent's submissions in this regard can be summarised as follows:

20.1 the Applicant must be in possession of information which objectively speaking could give rise to a reasonable suspicion that the

Respondent has contravened the Act and granted credit recklessly;

20.2 the NCR must make out the case which the Respondent is called upon to meet in its founding affidavit; and

20.3 the NCR based its investigation and referral of the matter on the complaint received from a consumer, Mr Moeng. However, the

complaint initiation form was not properly completed; this is the core document necessary for the Applicant to establish a reasonable

suspicion. There is no indication on the complaint initiation form what the complaint is or that the complaint is attached to added pages. Hence, the NCR could not have had a reasonable suspicion of prohibited conduct when it initiated the complaint. .

Scope of the Investigation

21. The Respondent submitted that even if the complaint was valid, the investigation process was procedurally incorrect and the referral was therefore invalid. In this regard the Respondent:

21.1 submitted that if there was a valid complaint by a complainant then the NCR should investigate that complaint only;

21.2 questioned whether it is a proper procedure for the NCR to select ten (10) random files in order for the NCR to investigate a single complaint;

21.3 requested the Tribunal to give clarity of the jurisdictional limits and scope of an investigation in terms of section 136(1); and

21.4 argued that in order to proceed properly the inspector should have investigated the single complaint only. Then he should have submitted a report to the NCR and then, if from such a report it appears that the Respondent was transgressing in other areas, on the strength of such a report, which would then probably substantiate a reasonable suspicion, appoint an inspector to investigate such transgressions.

Investigation certificate

22. The Respondent alleged that there was no investigation certificate as required by the Act. In this regard the Respondent argued:

22.1 an investigation certificate is a requirement before the investigation can take place;

22.2 there was no investigation certificate which means that the investigation was not properly approved;

22.3 the certificates in which the investigators were appointed are not investigation certificates, they are certificates of appointment of inspectors;

22.4 there is a clear distinction in the NCA between an inspector and an investigator; and

22.5 there is confusion surrounding the whole procedure of approval of an investigation and the appointment of inspectors and this should be clear from the papers.

Powers of an inspector

23. The Respondent argued that inspectors are only allowed to act within the scope of their appointment as set out in the investigation

certificate. In this regard the Respondent submitted that:

23.1 an inspector is not empowered to act outside the scope of the investigation he needs to perform;

23.2 Mr Tladi's tacit extension of his mandate to include other contraventions was not within his power of appointment as an inspector and he was not legally entitled to act in the manner in which he did; and

23.3 that part of the inspector's report which deals with the further contraventions should not be entertained by the Tribunal.

An inspector must be employed by the NCR

24. The Respondent argued that there was no evidence to establish that the inspectors were employed by the NCR and that only inspectors who are employed by the NCR can be appointed to carry out investigations.

CONSIDERATION OF THE POINTS IN LIMINE

Lawfulness and extent of the investigation

25. The first, second and fourth points in limine all relate to whether or not there was a lawful investigation and what the scope of that investigation should have been.

Therefore, they will be considered together.

26. In this matter a complaint was received from a consumer and on this basis the NCR initiated the investigation. Essentially, what the Tribunal needs to determine is the following –

26.1 whether the NCR was required to confirm the validity of the complaint lodged before it could investigate;

26.2 whether the NCR is restricted to the ambit of the complaint lodged with it and cannot investigate or refer any other contraventions discovered during the course of the investigation;

26.3 if it may investigate and refer other contraventions found; and

26.4 whether a clear and objective basis for the initiation of these contraventions be established.

27. The relevant section of the NCA that prescribes the initiation of investigations is section 136. This section provides that any person may submit a complaint concerning an alleged contravention of this Act to the NCR in the prescribed manner and form. Upon initiating or accepting a complaint in terms of section 136, the NCR may chose a number of different routes including directing an inspector to investigate the complaint as quickly as practicable. [5] After completing an investigation into a complaint, the NCR may again chose a number of different routes including referring the matter to the Tribunal.[6]

28. It is clear from these sections that it was not the intention of the legislature that the complaint must be evaluated or tested in any way. The sections further do not limit the nature of the investigation or the subsequent referral to the Tribunal.[7]
29. In this particular matter, the NCR received a complaint from a consumer, Mr Moeng. Initially that complaint was not on the prescribed form; this was followed up by a call centre employee who then completed the required form, albeit in a rather haphazard fashion. Attached to this form was the handwritten complaint as well as other documents submitted by the complainant. This complaint made allegations relating to prohibited conduct, being reckless lending, on the part of the Respondent. Upon accepting that complaint, the NCR directed an inspector to investigate the complaint. During the investigation, the inspector uncovered other contraventions of the NCR that were also referred to the Tribunal for a hearing into prohibited conduct.
30. The Respondent argued that when the subsequent contraventions were uncovered during the investigation, the proper procedure would have been for the inspector to have alleged such suspicion of this conduct in his report and to request the Applicant to approve an investigation into such misconduct.
31. The Tribunal has already dealt with similar issues in other cases such as the Lewis Stores decision, where it received guidance regarding the interpretation of the NCA from the courts that have interpreted similar legislation in the form of the Competition Act of 2008.
32. The leading case relating to such referrals is that of Competition Commission v Yara (SA) (Pty) Ltd and Others.[8] In Yara the court considered the so called “Referral rule” to determine whether the referral to the Tribunal is in any way limited to the allegations made in the complaint to the Competition Commission.[9] The Court held that if the Commission in the course of its investigations, uncovers further instances of prohibited conduct committed by the Respondent, these activities can be referred to the Tribunal as well. The Court held that by deciding to investigate the additional complaints and by subsequently referring them to the Tribunal, the Commission in effect tacitly initiates the complaints that were not covered by the original complaint.[10] Following the reasoning of the Court in the Yara matter, it follows that the referral by the Regulator of these other complaints was not invalid.
33. The complaint received from Mr Moeng contained sufficient detail to merit the investigation. A consumer is not expected to know the exact terminology applicable to the NCA. A broad description of possible prohibited conduct would be sufficient to merit investigation. The Tribunal finds there was a reasonable basis for the investigation and referral.
34. On the first, second and fourth points in limine raised by the Respondent the Tribunal therefore finds that the investigation and referral to the Tribunal was valid. The points in limine raised by the Respondent are, therefore, dismissed.

Appointment of inspectors

35. The third and fifth points in limine relate to the employment of the inspectors by the NCR as well as their appointments to investigate the complaints in terms of section
25. The Respondent made general allegations that the NCR had not proven each and every element of the appointment process but did not submit any evidence to show that the process was invalid. For example, if the Respondent wishes to allege that the NCR did not prove that the inspector was an employee of the NCR then it should adduce evidence in this regard. The evidence before the Tribunal clearly establishes that the inspectors were appointed to conduct the investigation in terms of section 25 of the Act and the Tribunal is satisfied that these two individuals were employed by the NCR. These points in limine are therefore also dismissed.

CHARGES AGAINST THE RESPONDENT

36. The charges of repeated prohibited conduct put forward by the NCR are as follows –
 - 35.1 that the Respondent contravened section 81(2)(a)(ii) of the NCA by entering into credit agreements without first taking reasonable steps to assess the proposed consumer's debt repayment history as a consumer under credit agreements;
 - 35.2 that the Respondent contravened section 81 (2) (a) (iii) of the NCA by entering into credit agreements without first taking reasonable steps to assess the proposed consumer's existing financial means, prospects and obligations;
 - 35.3 that the Respondent contravened section 81 (3) read with section 80(1) of the NCA by entering into reckless credit agreements with consumers;
 - 35.4 that the Respondent contravened section 170 read with Regulation 55 (1)
 - (b) (vi) of the NCA by failing to keep records of steps taken when conducting affordability; and
 - 35.5 that the Respondent contravened section 91 (a), section 101 (1) (c) read with Regulation 44 by requiring consumers to enter into supplementary agreement that require the payment of a service fee which when added to the service fee exceeded the maximum prescribed amount allowed by the Act.

Reckless credit lending

37. The first three charges relate to reckless credit lending. The NCA requires that credit providers conduct proper investigations into the credit history of consumers before advancing them credit. The credit provider must assess their credit history and it must take into consideration their present financial circumstances in order to assess their ability to repay the further credit that is being granted to them.

38. The NCR contended that in all 10 of the sampled files the Respondent did not take into consideration the debt repayment history and credit bureau obligations that consumers had in order to consider how much disposable income each consumer had to service the debt.
39. The NCR further contended that the credit bureau reports were generated after the credit agreements were entered into.
40. It is only with regard to consumer Pieter Hamman[11] that the NCR alleges that the Respondent failed to verify the consumer's income in that a bank statement only reflected one

salary report was used.

41. It is only with regard to consumer Roseline Chabane[12] that the NCR alleges that there was no record of the consumer's disclosed expenses that were considered in conducting a proper affordability assessment.
42. Alternative to the above contraventions of the NCA, the Respondent is charged with failing to keep proper records of steps that it takes when conducting affordability assessments. This is in contravention of section 170 of the NCA read with Regulation 55 (1) (b) (vi).
43. The Respondent did not offer any specific defence to the charges. It essentially merely denied that it engages in reckless credit lending and that does not take proper steps to assess the consumer's debt repayment history and ability to repay loans. The Respondent merely stated that Mr Reginald Rautenback, the Respondent's manager, does all the assessments personally.

He takes into account all the information provided to him by the consumer and he questions the consumer regarding his income and

expenditure and any other factors that may influence his decision to grant a loan to such consumer. He also deals with the

consumer's current payments towards existing loans which are taken into consideration. However, no evidence was submitted to corroborate these allegations.

44. It seems from the evidence before the Tribunal, that the Respondent was conducting a form of affordability assessment. However, some of those affordability assessments were not complete. The NCR relied on Regulation 23 A(4) which sets out in more specific detail how those affordability assessments should be considered. Credit providers were in terms of that regulation required to obtain three
- (3) bank statements to verify the salary of consumers and in one instance, the Respondent only obtained one bank statement. It is noted that Regulation 23 A (4) has since been reviewed and so at this stage it no longer applies, although it did apply at the time that the Respondent was investigated.

45. The Respondent appears to concede that the evidence regarding credit reports were not on the file at the time the investigation was done but states that he co-operated and provided the evidence when called upon to do so. This evidence was however never submitted.
46. There is evidence before the Tribunal that the Respondent granted loans to consumers who did not have sufficient disposable income to repay those loans. In the case of the complainant, for example, Mr Moeng, the Respondent simply relied on information given to him by the consumer that his debt to African Bank had been written off and that he was not at that stage making any payments towards Capfin – both loans were reflected on his credit report. It appears that the Respondent simply ignored this information and relied on the information given to him by the complainant that he was no longer required to pay these loans.
47. With regard to the consumer, Ms Rudig[13] the affordability assessment does not reflect any of the consumer's debt repayment obligations that appear on her credit profile. If these amounts were taken into consideration the consumer would have been in deficit of R229 and therefore could not afford the loan she was granted.
48. The Respondent alleged that Ms Rudig was well-known to him and that she repaid the debt. However, the fact that she was granted another loan could be an indication that the consumer is being trapped in an ongoing cycle of debt. Her credit profile indicates that she has a judgment against her name for an unpaid loan.[14]
49. In this regard the provisions of section 80 are clear. A credit agreement is reckless if at the time the credit agreement was made,

the credit provider having conducted an assessment as required by section 81(2) entered into the credit agreement despite the fact that the preponderance of the information available to the credit provider indicated that entering into that credit agreement would make that consumer over-indebted.

50. The Tribunal therefore finds that the Respondent did, on at least two occasions, engage in reckless lending; this constitutes prohibited

conduct.

The supplementary agreement

51. The NCR alleges that the Respondent directly or indirectly requires and/or induces its consumers to enter into a supplementary agreement

that provides that the loan be repaid through the Altech NuPay payment system. This supplementary agreement requires consumers to pay a service provider fee, which fee when added to the service fee charged by the Respondent, caused the total service fee to exceed the maximum prescribed amount allowed by the Act. Such supplementary agreement was found in eight of the 10 files inspected.

52. The NCR alleges that this is a contravention of section 91(1) and 101(c) read with Regulation 44 of the NCA. In terms of these sections, a credit provider may only require a consumer to pay a service fee of R50 which together with VAT would amount to R57. Where consumers made use of the NuPay system, they pay an added fee for this service which means that their monthly service fees exceeded the permitted monthly amount.
53. The Respondent denied that the NuPay documents contained in the papers before the Tribunal constitute supplementary agreements. The Respondent alleged that these do not form part of the credit agreement and the credit agreement did not require consumers to make use of such services.
54. The Respondent argued that the NuPay documents read with the credit agreements are clearly distinguishable from those found in the Barko decision[15] because:
- 54.1 the NuPay documents were not supplementary agreements as envisaged by the Act;
- 54.2 the Nu Pay agreement were not required by the credit agreement;
- 54.3 the Nu Pay agreement did not form part of or represent a supplementary agreement to the credit agreement;
- 54.4 the Nu Pay agreement read with the credit agreement was not in contravention of section 91;
- 54.5 the Nu Pay agreement could be cancelled at any time;
- 54.6 the fee contained in the Nu Pay agreement is a fee payable by the consumer to Nu Pay and did not in any way form part of the fees listed in Regulation 44;
- 54.7 the contracting parties in terms of the agreements was the consumer and Nu Pay;
- 54.8 there was no service level agreement between the Respondent and Nu Pay;
- 54.9 consumers were not required or induced to conclude the Nu Pay agreement and the consumer confirmed this in writing under paragraph 4.5 of the Nu Pay agreement; and
- 54.10 the evidence before the Tribunal is that in only eight of the 10 files inspected, consumers entered into Nu Pay agreement for the repayment of their loans.
55. The Respondent did not explain the purpose of having consumers enter into such agreements. So, it is unclear what the benefit to the consumer or the Respondent is. However, what is clear is that this considerably increases the monthly service fees which consumers are required to pay. The purpose of the NCA is to limit these fees to R50 and also to ensure that credit providers do not circumvent these limitations by inducing or encouraging a consumer to enter into another supplementary agreement. No proper explanation was provided by the Respondent as to why certain consumers enter into such agreements but what is clear is that this results in added costs for consumers, something that the NCA is seeking to prevent. The fact that 8 of the 10 consumers signed the agreement

strongly suggests that they were induced to sign these agreements.

56. The Tribunal finds that the Nu Pay agreement is a supplementary agreement and that by adding the Nu Pay documentation to the documentation

which consumers are required to sign, on the balance of probabilities, consumers who were anxious to get their loans would be induced to agree to this supplementary agreement despite what is set out in paragraph 4.5 of the Nu Pay agreement. If this is not an agreement which the Respondent in some way benefits from then why include it at all?

CONCLUSION ON THE MERITS

57. The Tribunal therefore makes the following findings in respect of the NCR's allegations:

57.1 The Respondent is found to have contravened 80(1) of the NCA in that it entered into reckless credit agreements with consumers. This conduct is prohibited in terms of the NCA.

57.2 The Respondent is found to have contravened section 91(1), section 101(c) read with Regulation 44 of the NCA in that it induced

consumers to enter into supplementary agreements with the result that the consumers paid service fees in excess of that permitted in terms of the NCA. This conduct is prohibited in terms of the NCA.

INDEPENDENT AUDIT

58. The NCR prayed for an order that the Respondent pay for an independent audit to be done on all consumers who were charged excess service fees for the last five (5) years from the date of this judgment.

CANCELLATION OF REGISTRATION AND ADMINISTRATIVE FINE

59. The NCR also prayed for the cancellation of the Respondent's registration as a credit provider as well as for the Tribunal to impose an administrative fine as contemplated in section 151(3) of the NCA. The NCR prayed for an administrative fine in the amount of R1 000 000.00 (one million rand) or 10% of the Respondent's annual turnover during the preceding financial year.
60. In order to determine the appropriateness of the imposition of an administrative fine, the Tribunal must consider the provisions of Section 151 of the NCA. In *NCR v Werlan Cash Loans t/a Lebathu Finance*[16] the Tribunal said that it must consider the following factors:
- The nature, duration, gravity and extent of the contravention;
 - Any loss or damage suffered as a result of the contravention
 - The behaviour of the respondent;
 - The market circumstances in which the contravention took place;

- The level of profit derived from contravention;
- The degree to which the respondent has co-operated with the National Credit Regulator and the Tribunal; and
- Whether the respondent has previously been found in contravention of the NCA.

Nature, duration and extent of the contravention

61. One of the main purposes of the NCA is to prevent reckless credit lending and although the Tribunal has not found a substantial number of contraventions in this regard there is evidence in the documents before the Tribunal to indicate that the Respondent is at times ignoring existing debts of consumers and granting them further loans. This has the propensity to ensure that consumers become trapped in a never ending cycle of debt; something the legislation is seeking to prevent. In addition the NCA seeks to limit the fees that consumers are required to pay so as to reduce their over-indebtedness. Ensuring that consumers make their payments via an alternative payment method which requires extra fees is a means by which credit providers seek to avoid the restrictions in the NCA.

Loss or damage suffered as a result of the contravention

62. Whilst the Applicant could not quantify the loss or damage suffered as a result of the prohibited conduct, the Tribunal notes that the extra fees that consumers that enter into the Nu Pay agreement have to pay causes them loss and prejudice.

Behavior of the Respondent

63. The Respondent appears to have co-operated with the NCR during the investigation.

Market circumstances in which the contraventions took place

64. The Respondent appears to have taken advantage of vulnerable consumers who are not well informed about their rights and responsibilities.

Despite the fact that the Respondent argued that most of the consumers (except for the complainant) repaid their loans, the evidence does suggest that consumers are borrowing in order to pay existing loans which is indicative of a never ending cycle of debt.

Something which the NCA is seeking to prevent.

Level of profit derived from contraventions

65. The Applicant could not determine the level of profit derived from the contraventions.

Whether the Respondent has previously been found in contravention of the Act

66. There is no evidence to suggest that the Respondent has previously been found to be in contravention of the NCA.

67. Notwithstanding the limited number of contraventions established by the NCR, these contraventions are of a serious nature, and go to the heart of what the NCA is seeking to prevent. The NCR has prayed that the registration of the Respondent be cancelled. However, taking all the factors into consideration the Tribunal is of the view that cancellation in these circumstances is extreme and that an administrative penalty will serve to deter the Respondent from engaging in such conduct in future and will act as a deterrent to other credit providers.

ORDER

68. Accordingly, for the reasons set out above, the Tribunal makes the following order:-

68.1 The application for the declaration of prohibited conduct is granted; The Respondent is therefore found to have engaged in prohibited conduct;

68.2 The Respondent, at its own cost, must appoint an independent auditor to conduct an audit of all its credit agreements entered into for a period of three (3) years preceding the date of this judgment. The audit will be to determine whether any consumers fall within the prohibited conduct relating to the overcharging of service fees noted above. Any consumers falling within this category must be reimbursed with any excess service fees The consumer's accounts are to be credited with the amount of the excess fees. Consumers who no longer have any open accounts with the Respondent are to be traced and reimbursed with the excess fees;

68.3 The audit must be done within a period of 120 business days of the issuing of this judgment and a complete and detailed report in this regard must be provided to the NCR within 150 business days;

68.4 In terms of section 151 of the NCA, and having considered all the circumstances of this case the Tribunal imposes an administrative

fine of R100 000.00 payable by the Respondent to the National Revenue Fund;

68.5 This fine must be paid by no later than 30 days after the issuing of this judgment; and

68.6 No order is made as to costs.

PROF TA WOKER

PRESIDING TRIBUNAL MEMBER

Adv J Simpson (Tribunal Member) and Prof B Dumisa (Tribunal Member) concurring

[1] See pages 26-43 of the documents before the Tribunal.

[2] As pointed out in the case of Competition Commission v Yara 2013 (6) SA 404 (SCA) the phrase 'initiating a complaint' is an awkward concept (para 21) Using the same reasoning as in the case of Yara the NCR does not really 'initiate' or start a complaint. What it does is start a process by directing an

investigation which process may lead to the referral of that complaint to the Tribunal. It can clearly do this on the basis

of information which is provided to it by an informant or complainant.

[3] See pages 59 and 60 of the documents before the Tribunal.

[4] See annexure FA 6 of the Founding Affidavit.

[5] Section 139.

[6] Section 140.

[7] See National Credit Regulator v Lewis Stores Case Number: NCT/27651/2015/140(1) where the relevant sections relating to investigations and referrals to the Tribunal were discussed in detail.

[8] 2013 (6) SA 404 (SCA).

[9] Although the Competition Act 89 of 1998 may differ from the NCA when it comes to certain specific sections, as pointed out by the Tribunal in the Lewis Stores case, the general principles remain the same.

[10] See para 21

[11] Annexure F of Mr Tladi's report pg 108 of the documents before the Tribunal

[12] Annexure K of Mr Tladi's report pg 213 of the documents before the Tribunal.

[13] Annexure D of the inspector's report see pgs 74 to 83 of the documents before the Tribunal.

[14] See pg 82 of the documents before the Tribunal

[15] Barko Financial Services (Pty) Ltd v National Credit Regulator and Another [2013] ZAGPPHC 538.

[16] NCT 3867/2012/ 57(1)

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