

SOUTH AFRICA / JUDGMENT

National Credit Regulator v RCL Micro Finance (Pty) Ltd (NCT/132260/2019/57(1)) [2020] ZANCT 6 (3 April 2020)

[2020] ZANCT 6

COURT

National Consumer Tribunal

BEFORE

T Bailey, M Peenze, J Simpson

CASE / FILE NUMBER

NCT/132260/2019/57(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

Case number: NCT/132260/2019/57(1)

In the matter between:

NATIONAL CREDIT REGULATOR APPLICANT

and

RCL MICRO FINANCE (PTY) LTD RESPONDENT

Coram:

Mr T Bailey – Presiding Tribunal member

Dr M Peenze – Tribunal member

Adv J Simpson – Tribunal member

Date of hearing – 5 March 2020

Date of judgment – 3 April 2020

JUDGMENT AND REASONS

APPLICANT

1. The Applicant is the National Credit Regulator (the applicant), a juristic person established in terms of section 12 of the National

Credit Act, 2005 (the Act) to regulate the consumer credit market and ensure compliance with the Act, with its principal business address at 127 - 15th Road, Randjespark, Johannesburg, Gauteng.

2. Mr Rory Stocker, who is a senior legal adviser in the respondent's Investigations and Enforcement Department, represented the applicant at the hearing of this application.

RESPONDENT

3. The Respondent is RCL Micro Finance (Pty) Ltd (the respondent), a company duly registered in terms of the company laws of the Republic of South Africa under registration number 2013/00 1524/07. The respondent's registered physical address is 1 Van Rooyen Street, Kareedouw, Eastern Cape.
4. The respondent is a registered credit provider in terms of section 40 of the Act with registration number NCRC6884.
5. Ms Lizelle Squirra, who is an attorney at Bosch Marais and Associates, represented the respondent at the hearing of this application.

JURISDICTION

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

TERMINOLOGY

8. A reference to a section in this judgment refers to a section in the Act. A reference to a regulation refers to the National Credit Regulations, 2006 (the regulations).[1] A reference to a condition or general condition refers to the respondent's conditions of registration as a credit provider in terms of section 40 (the conditions).[2] A reference to a form refers to a Form as prescribed in the regulations.

APPLICATION TYPE AND THE RELIEF SOUGHT

9. This application is in terms of section 57 (1) to cancel the respondent's registration as a debt counsellor.[3] The applicant seeks an order:
 - 9.1. Declaring the respondent to have repeatedly contravened the Act, regulations, and conditions;
 - 9.2. The repeated contraventions are prohibited conduct[4] in terms of section 150 (a);

- 9.3. Cancelling the respondent's registration as a credit provider in terms of section 150 (g);
- 9.4. Declaring that the respondent has brought the consumer credit industry into disrepute and disregarded consumer rights generally;
- 9.5. Interdicting the respondent from engaging in future prohibited conduct;
- 9.6. Declaring the respondent's credit agreements with consumers contained in annexures E1 to E10 of the investigation report as reckless in terms of section 80 (1) (a) and setting aside those consumers' obligations in terms of those credit agreements;
- 9.7. Ordering the respondent to appoint an independent auditor with the applicant's prior written approval. The auditor is to determine if the respondent overcharged consumers' fees within the last three years from the date of issue of this judgement and compile a report. The respondent is to reimburse the consumers;
- 9.8. The auditor is also to identify all credit agreements still in force that the respondent concluded without properly conducting assessments in terms of section 81 (2) (a) (ii) and (iii) include them in the report. The applicant may apply to the Tribunal for an order declaring those agreements as reckless in terms of section 80 (1) (a) and setting aside the consumers' obligations under those agreements;
- 9.9. Imposing an administrative fine on the respondent of an amount, which is the greater of R1 000 000.00 or 10% of the respondent's annual turnover during the preceding financial year; and
- 9.10. Granting the applicant such other relief as the Tribunal may consider appropriate to give effect to the consumers' rights in terms of section 150 (i).
10. The allegations of prohibited conduct will become apparent in the course of this judgment.

BACKGROUND

11. It is convenient to set out the parties' material submissions that form the background to this application.

Applicant's

submissions

12. This application stems from information the applicant received from the South African Social Security Agency (SASSA) that credit

providers in the Humansdorp area in the Eastern Cape were retaining SASSA cards belonging to credit recipients.

Scouting exercise and complaint

13. On 29 November 2018, the applicant's inspector, Muhangane Mbedzi (Mbedzi), and SASSA officials conducted a scouting exercise in the Humansdorp area to identify the credit providers who may be retaining SASSA cards. Mbedzi posed as a potential customer to the respondent. She asked the respondent's staff what documents the respondent required from customers to obtain credit from the respondent. According to Mbedzi, the staff informed her that the respondent requires a bank card to ensure that consumers make payment. This information gave rise to a reasonable suspicion that the respondent was contravening the Act.
14. The applicant, therefore, initiated a complaint in terms of section 136 (2) after anonymously receiving information that the respondent had possibly contravened the Act.

Investigation

15. On or about 18 January 2019, the applicant appointed an inspector, Dipuo Mokobane (Mokobane), in terms of section 25 to investigate the respondent's activities. On 1 February 2019, Mokobane, accompanied by members of the South African Police Services (the police), conducted an on-site investigation at the respondent's Humansdorp branch (the branch).
16. Mokobane and the police interacted with the branch manager, Christell Maas (Maas). The police seized 34 SASSA cards.[5] Maas informed Mokobane that the respondent grants consumers short-term loans. The respondent retains consumers' SASSA cards and obtains the personal identity numbers (PINs) for those cards from consumers. The respondent then collects the amounts the consumers owe the respondent in terms of their credit agreements by using the cards to withdraw funds from the accounts linked to the cards.
17. The respondent provided Mokobane with 10 random consumer sample files (the sample files) concerning 10 credit agreements the respondent concluded with consumers. Mokobane found the consumers' SASSA card in each of the 10 sample files, and cash the respondent withdrew using those cards.
18. Mokobane compiled an investigation report (the investigation report), dated 21 February 2019.[6] The investigation report details the alleged contraventions. The 10 sample files are annexed to the investigation report to support the conclusions in the investigation report.[7]

Respondent's

submissions

19. The respondent extends only short-term credit transactions. Humansdorp is a small and mainly Afrikaans speaking town. The employee poorly translated the information into English when communicating with Mbedzi.

20. The respondent requires consumers to have a bank account and to possess bank cards. The respondent utilises the Intecon ALLPS payment systems to swipe the consumer's bank card and load a debit order. Payments are then automatically deducted, saving the consumer having to attend the branch to pay the instalments under the credit agreement. The applicant did not find a single bank card at the branch during the investigation because the respondent does not retain bank cards to enforce payment.

Retention of SASSA cards

21. Since one cannot load a debit order onto a SASSA card, consumers are inconvenienced by having to travel to the branch to pay the instalments. Consumers have advised the respondent that SASSA agents informed them that SASSA would cancel their pension payouts if they opened bank accounts with commercial banks. Several consumers, therefore, insisted on leaving their SASSA cards at the branch because they could not have a debit order loaded on to their accounts and sought to avoid the inconvenience of travelling to the branch. The respondent, therefore, recommends to those consumers to open EasyPay accounts and uses an EasyPay agent to assist them open EasyPay accounts. It is against the respondent's policy to draw payment from the SASSA cards.

Maas

22. Maas was a disgruntled employee, and the respondent has terminated her employment. Her infractions resulted in the respondent's

practices becoming the subject of this application. Upon receiving this application, the respondent immediately launched an investigation into the branch to verify the veracity of the allegations the applicant has made against it.

23. The respondent's investigation has revealed that Maas stole money from the branch. The investigation is ongoing into the

suspicion that Maas adjusted the branch's figures to create the illusion that the branch was performing better than the reality. The branch has not performed to his usual standards, and its turnover halved during the preceding four months. The respondent has opened a criminal case against Maas, who has signed a written confirmation of the funds' shortfall under her supervision. Maas' conduct and the corrective measures the respondent took when it discovered Maas' conduct should serve as mitigating factors to the allegations against the respondent in this application.

CONTRAVENTIONS OF THE ACT

Contravention 1: Contravention of section 133 (1) and (2) read with section 90 (2) (l)

The Act

24. Section 133 deals with prohibited collection and enforcement practices. Section 133 (1) provides that a credit provider must not use a document, number or instrument referred to in section 90 (2)
 - (l) when collecting on or enforcing a credit agreement; or direct or permit another person to do so as its agent or on its behalf.
25. Section 133 (2) provides that a credit provider must not use or rely on, or permit any person to use or rely on, a document, instrument or contract provision, referred to in section 90 (2)
 - (l) when collecting money owed by a consumer under a credit agreement or seeking to enforce a credit agreement.
26. The documents, numbers, or instruments referred to in section 90 (2)
 - (l) are identity documents, credit or debit cards, bank account automatic teller machine access cards, or a similar identifying document or device and personal identification codes or numbers used to access an account.

Alleged contravention

27. The applicant alleges that the respondent used SASSA cards to collect under and enforce the credit agreements it concluded with consumers. The applicant found 34 SASSA cards in the respondent's possession.
28. The applicant linked a SASSA card to each of the ten sample credit agreements (the agreements). Eight of the ten agreements (except for E1 and E10) were current because the final repayment dates were after the day of the investigation. Moreover, the applicant found cash withdrawn from those cards in the respondent's possession with those cards.
29. It is also reasonable to infer that the respondent used the remaining 24 SASSA cards to collect under and enforce credit agreements it concluded with consumers even though copies of those credit agreements were not available.

Respondent

30. The respondent did not deny that consumers left SASSA cards at the branch. However, it denied following a practice of withdrawing funds from those cards. It only became aware that the inspectors found cash alongside the credit agreements and SASSA cards on the day of the investigation. It disputed that cash constitutes evidence that the respondent used the SASSA cards to withdraw the cash.

Analysis

31. The SASSA cards are instruments that fall within the ambit of section 90 (2) (1). Mr Stocker was correct to point out that the respondent's reasons for holding the SASSA cards amount to no more than an explanation and are not a defence to the allegation against it. The respondent was not entitled to hold SASSA cards, whether at a consumer's request or for the sake of convenience.
32. Even if Maas was a disgruntled employee, her explanation to the applicant concerning the retention and use of SASSA cards to collect amounts due to the respondent explains why the applicant found the SASSA cards and cash linked to those cards in the respondent's possession in the sample files.
33. The remaining 24 cards found in the respondent's possession and Maas' explanation concerning the retention and use of the SASSA cards leads to the inescapable conclusion that the respondent used the remaining 24 cards to collect and enforce its credit agreements with those 24 consumers.
34. The Tribunal is, therefore, satisfied that the respondent retained SASSA cards and used them to collect and enforce its credit agreements.
35. Consequently, the respondent contravened section 133 (1) and (2) read with section 90 (2) (1).

Prevention of reckless credit: Assessments

36. Section 81 deals with the prevention of reckless credit. Section 81
- (2) (a) (ii) precludes a credit provider from concluding a credit agreement without taking steps to assess the proposed consumer's debt repayment history. Section 81 (2) (a) (iii) also requires the credit provider to assess the proposed consumer's existing financial means, prospects, and obligations.
37. Regulation 23A sets out the criteria to conduct an affordability assessment. Regulation 23A (4) requires a credit provider to take practical steps to validate a consumer's gross income.
38. Regulation 23A (12) (b) further requires the credit provider to consider all monthly debt repayment obligations in terms of credit agreements, as reflected on the consumer's credit profile held by a registered credit bureau.
39. Regulation 23A (13) also requires the credit provider to consider the consumer's debt repayment history as a consumer under credit agreements.
40. The applicant alleges that the respondent failed to conduct proper assessments in all the sample files before granting credit to the consumers.

Contravention 2: Contravention of section 81 (2) (a) (iii) read with regulation 23A

41. The applicant alleges that the respondent failed to take steps to assess the consumer's existing financial means and prospects.

In all the sample files, the consumers disclosed that they were SASSA grant recipients and the value of the grant. However, the respondent failed to validate the consumer's gross income. It did not obtain bank statements to verify that consumers were receiving the SASSA grants or other kinds of documentary proof of income. Nor did it confirm that the consumers were receiving the grants or the amount of the grants.

42. The respondent acknowledged that it failed to verify the consumer's income because the grant amounts are fixed and verifiable by referring to the SASSA website. Grants are permanent and rarely withdrawn. When concluding the credit agreements, consumers would not have been able to present a valid SASSA card or proof of having a bank account if they were no longer grant recipients.
43. The Tribunal is satisfied that the respondent failed to take steps to determine whether the consumers had the financial means and prospects to pay the proposed credit instalments. It failed to verify the consumers' grant recipient status with SASSA. It appears to have simply assumed that the consumers received the general SASSA grant when the consumers may have been recipients of other SASSA grants, such as the child grant, which is for a lesser amount. The respondent's explanation for not having verified the consumers SASSA grant recipient status does not exonerate it from its legal obligation to have done so. It was, therefore, correct to undertake to ensure in the future that it obtains proof from consumers who are SASSA grant recipients.
44. Consequently, the respondent contravened section 81 (2) (a) (iii) read with regulation 23A (4).

Contravention 3: Contravention of section 81 (2) (a) (iii) read with regulation 23A

(12) (b); and Contravention 4: Contravention of section 81 (2) (a) (ii) read with regulation 23A (13)

45. The applicant alleges that the respondent failed to conduct proper affordability assessments by failing to take reasonable steps to assess the consumer's existing financial obligations. The respondent did not obtain credit bureau reports and take existing

debt obligations into account when calculating affordability.

46. In nine of the 10 sample files,[8] the affordability assessment forms the respondent used to calculate discretionary income record that the consumers do not have existing debt obligations. In the final sample file,[9] the respondent records an existing debt obligation the consumer had towards the respondent under a previous credit agreement. It is highly unlikely that all consumers in a random sample of 10 would not have existing debt obligations with other credit providers.

47. Moreover, the respondent failed to ascertain the consumers' debt repayment obligations in terms of credit agreements. The respondent's file contents did not contain credit bureau reports in five of the sample files.[10] In three of the sample files, the credit bureau reports were dated months after the respondent concluded agreements with the consumers.[11]
48. The respondent submitted that the consumers in all ten agreements are SASSA grant recipients. It was, therefore, entirely likely that they would have no other debt obligations. The respondent's business practice requires the drawing of a credit report immediately before concluding a credit agreement with a prospective consumer. The failure to obtain credit bureau reports is not the respondent's standard practice, but attributable to Maas' conduct disregarding the training the respondent gave her.
49. The evidence shows overwhelmingly that the respondent failed to ascertain the consumers' existing financial obligations. The respondent appears to have routinely recorded that the consumers did not have existing debt obligations. It does not help the respondent's case that the consumers were unlikely to have had existing debt obligations because they are SASSA grant recipients. The respondent's failure in eight cases to obtain credit bureau reports either timeously or at all was manifest. It shows the paucity of the respondent's approach when conducting affordability assessments.
50. The respondent was, therefore, correct to concede that it had failed to conduct proper affordability assessments. It attributed the failure to the conduct of a single employee, Maas, who acted contrary to the respondent's business practices and the training the respondent gave her.
51. Consequently, the respondent contravened section 81 (2) (a) (iii) read with regulation 23A (12) (b) and section 81 (2) (a) (ii) read with regulation 23A (13).

Reckless credit

Contravention 5: Contravention of section 81 (3) read with section 80 (1) (a);

Contravention 6: Contravention of section 81 (3) read with section 80 (1) (b) (ii); and

Contravention 7: Contravention of section 170 read with regulation 55 (1) (b) (vi)

52. Section 80 deals with reckless credit. Section 80 (1) (a) provides that a credit agreement is reckless if, when concluding the

agreement, the credit provider failed to conduct an assessment as required by section 81 (2), irrespective of what the outcome of the assessment might have concluded. Section 81 (3) specifically prohibits a credit provider from entering into a reckless credit agreement with a prospective consumer.

53. Section 80 (1) (b) (ii) provides that a credit agreement is reckless if, when concluding the agreement, the preponderance of information available to the credit provider indicated that concluding the credit agreement would make the consumer over-indebted.
 54. Section 170 requires a credit provider to maintain records of all applications for credit, credit agreements, and credit accounts in the prescribed manner and form, and for the prescribed time.
 55. Regulation 55 (1) (b) (vi) requires a credit provider to maintain a record for each consumer of the documentation to support the steps required of it in terms of section 81 (2).
 56. The applicant alleges that the respondent's failure to conduct proper affordability assessments means that the respondent entered into reckless credit agreements with consumers. The respondent had, therefore, contravened section 81 (3) read with section 80 (1) (a).
 57. The applicant alleged further that the respondent concluded a credit agreement with consumer John van Rooyen (van Rooyen) that would make him over-indebted.[12] The respondent had, therefore, contravened section 81 (3) read together with section 80 (1) (b) (ii).
 58. If the respondent submitted that it conducted proper affordability assessments, then the applicant alleged that the respondent failed to retain the proof of the steps taken to perform the assessments. The respondent's failure to maintain the evidence of the steps it took means that it contravened section 170 read with regulation 55
- (1) (b) (vi).

The respondent

59. The respondent acknowledged that the applicant's founding affidavit reveals that Maas had failed to conduct proper affordability assessments. However, it denied that the respondent had caused any consumers to be over-indebted.
60. The Tribunal is satisfied that the respondent has contravened section 81 (3) read with section 80 (1) (a) by entering into reckless credit agreements with consumers because the respondent failed to conduct proper affordability assessments.
61. The Tribunal is also satisfied that in Van Rooyen's case, the respondent had a credit bureau report showing that van Rooyen had existing debt obligations with monthly instalment obligations totalling R650.00. However, the respondent failed to take those debt obligations into account in its affordability assessment. When considering those debt obligations, van Rooyen's discretionary

monthly income was R145.00. The respondent concluded a credit agreement with van Rooyen that required him to make monthly payments

of R370.66. The respondent thereby rendered van Rooyen over-indebted.

62. Consequently, the respondent contravened section 81 (3) read with section 80 (1) (b) (ii).

63. The applicant only pursued contravention 7 if the respondent submitted that it conducted proper affordability assessments. The

respondent conceded that Maas failed to conduct proper affordability assessments.

Consequently, it is not necessary to deal with

contravention 7 that the respondent failed to maintain the evidence of the steps required of it in terms of section 81 (2).

Pre-agreement statements

Contravention 8: Contravention of section 92 (1) read with regulation 28 and form 20, and contravention of section 93 (2) read with regulation 30 (1) and form 20.2

64. Section 92 (1) and regulation 28 preclude a credit provider from entering into a credit agreement with a consumer without first giving a consumer a pre-agreement statement and quotation in the prescribed form. The prescribed form is form 20.

65. Section 93 (2) and regulation 30 requires a small credit agreement to be in the prescribed form. The prescribed form is form 20.2.

66. Both forms 20 and 20.2 must contain the respondent's full name and NCR registration number.

Alleged contraventions

67. The respondent alleged that in all 10 sample agreements, the respondent's pre-agreement statements and quotations and agreements do not contain the respondent's full name and NCR registration number.

68. The respondent admitted the allegations against it. It attributed its failure to record the necessary information to an administrative

error. It has amended its pre-agreement statements and quotations to reflect the correct information.

69. Since the respondent conceded its non-compliance, it follows that the respondent has contravened section 92 (1) read with regulation 28 and form 20, and section 93 (2) read with regulation 30 (1) and form 20.2.

Cost of credit: Unlawful service fees

Contravention 9: Contravention of section 100 (1) (b) and section 101 (1) (c) (iii) read with regulation 44

70. Sections 100 and 101 respectively deal with prohibited charges and the cost of credit. Section 100 (1) (b) precludes a credit provider from charging an amount to or imposing monetary liability on the consumer concerning an amount of a fee or charge exceeding the amount that may be consistent with the Act.
71. Section 101 (1) (c) (iii) precludes a credit agreement from requiring the consumer to pay any money or other consideration, except a service fee which must not exceed the prescribed amount relative to the principal debt.
72. Regulation 44 deals with maximum service fees. It sets the maximum monthly service fee, prescribed in terms of section 105 (1), at R60.00. Regulation 44 (4) provides that “a service fee must be charged for a calendar month in which it is due and payable and on a pro-rata basis where the credit agreement was concluded during the course of that calendar month”.
73. The applicant submitted that the Tribunal should interpret regulation 44 (4) purposively to mean that the service fee is pro-rated during months other than the month in which the parties concluded the agreement.
74. The respondent had, therefore, charged the following consumers the following service fees that exceed the prescribed amount: Martiens

Meyer - R208.00 instead of R202.00; John van Rooyen - R224.00 instead of R222.00; Joan Randall - R230.00 instead of R224.00; Henry Goliath

- R160.00 instead of R154.00; and Martiens Meyer - R60.00 instead of R42.00 (the five consumers).[13]

75. The respondent denied overcharging the five consumers because regulation 44 (4) prescribes that only the first month's

service fee is calculated on a pro-rata basis. The respondent proposed that this issue be held in abeyance pending the High Court considering this issue later in the year.

76. The High Court litigation is no bar to the Tribunal deciding this issue.[14] The respondent's interpretation is a literal one. The Tribunal must examine the contextual factors to ascertain the intention of the legislature, irrespective of whether or not the words of the legislation were clear and unambiguous.[15]
77. The Tribunal is mindful that the Act seeks to balance the respective rights of consumers and credit providers.[16] Section 2 (1) requires the Tribunal to interpret the Act in a manner that gives effect to the purposes set out in section 3. The dominant purposes are to promote and advance the social and economic welfare of South Africans. And to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective, and accessible credit market and industry, and to protect consumers.

78. The repayment periods in credit agreements are a fundamental strut of credit agreements. A purposive approach results in the monthly fee being pro-rated where the agreement does not endure in a calendar month. The respondent's interpretation leads to unfair, unjust, and unexpected results. For example, if a consumer concludes a credit agreement on the first day of the month to repay the loan on the last day of that month, then that consumer is liable to pay a monthly service fee of R60.00. However, another consumer may conclude the same agreement on the same day to repay the loan on the first day of the following month. On the respondent's interpretation, the other consumer would become liable to pay a contract service fee of R120.00.
79. The respondent's interpretation could, therefore, not have been the legislature's intention. Nor does it accord with the purposes of the Act. The Tribunal is, therefore, satisfied that the respondent overcharged the five consumers for the monthly service fees.
80. Consequently, the respondent contravened sections 100 (1) (b) and 101 (1) (c) (iii) read with regulation 44.

The ALLPS agreements

Contravention 10: Contravention of section 91 (2) read with sections 100 (1) (a) and 101 (1)

81. Section 91 deals with the prohibition of unlawful provisions in credit agreements and supplementary agreements. Section 91 (2)

precludes a credit provider from directly or indirectly requiring or inducing a consumer to enter into a supplementary agreement or sign a document that contains a provision that would be unlawful if included in a credit agreement.

82. The applicant alleges that the respondent when concluding credit agreements with consumers requires or induces the consumers to conclude another agreement, entitled "Application for Services: ALLPS Promissory Note Facility System for Issue Clearing and Settlement of Promissory Notes including authority to debit" (the ALLPS agreement). This agreement contains a provision requiring consumers to pay fees to an entity, known as Information Technology Consultants (Pty) Limited.
83. The applicant submitted that the ALLPS agreement forms part of the credit agreement because the consumer signed the ALLPS agreement at the same time as the credit agreement. The service fees payable under both agreements exceed the prescribed fee. The respondent, therefore, contravened section 101 (1) (c) (iii). The applicant also submitted in the alternative that the respondent contravened section 91 (2) because the respondent induced the consumer to sign the ALLPS agreement, which incorporates a service fee and results in the respondent overcharging service fees to the consumer.

84. The respondent submitted that it was entitled to charge the ALLPS fee. It only did so in the case of consumer Jan Jantjies (Jantjies).[17] In all the other sample files, the consumers signed the ALLPS agreement but did not have to pay a service fee.
85. The applicant referred the Tribunal to a suite of documents the respondent presented to Jantjies for signature. The credit and ALLPS agreements were two such documents. The principal the Act espouses in section 101 (1) (c) (iii) is that the credit provider must not charge a service fee that exceeds the prescribed amount. A service charge that exceeds the prescribed amount is, therefore, unlawful.
86. In Jantjies' case, the credit agreement provides for a total monthly service fee of R200.00. It is not apparent to the Tribunal how the respondent came to charge Jantjies that service fee. The ALLPS agreement provides for payment of a fee of R54.60. Jantjies was, therefore, required to pay a total amount of R254.60. However, given the Tribunal's earlier finding concerning the pro-rating of monthly service fees, the maximum amount the respondent could have charged Jantjies was R248.00.
87. It does not help the respondent that the credit agreement does not contain the ALLPS fee. The ALLPS agreement is a supplementary agreement. The Supreme Court of Appeal has been quite clear that the simple expedient of two agreements can hardly render lawful what would have been unlawful under a single agreement.[18]
88. Consequently, the respondent contravened section 101 (1) (c) (iii) read with regulation 44 (4).

Contravention 11: Contravention of regulations 64 and 66 and general condition 3

The regulations and conditions

89. Regulation 64 deals with statistical returns. Regulation 64 (2) requires credit providers to complete and submit the statistical

return in form 39 to the respondent by 15 February of each year for the period 1 January to 31 December.

90. Regulation 66 deals with annual financial and operational returns. It requires a credit provider to submit an annual financial and operational return in form 40 to the respondent within six months after the registered credit provider's financial year-end.
91. General condition 3 requires the respondent to submit the reports and returns as required in the regulations within the specified period.

Alleged contraventions and respondent's submissions

92. The applicant alleged that the respondent had failed to submit forms 39 and 40 since August 2016. The respondent denied that it had failed to submit the forms, but conceded that it had done so late.

Analysis

and conclusion

93. At the application hearing, the applicant accepted that the respondent submitted the forms outside of the required periods.

Consequently, the respondent contravened regulation 64 (2) by failing to submit form 39 by 15 February for the 2016 and 2017 periods.

CONCLUSION

94. Consequently, the Tribunal is satisfied that the respondent engaged in prohibited conduct by contravening the sections, regulations, and conditions in the preceding paragraphs. The respondent has, therefore, repeatedly contravened the Act.
95. The Tribunal proceeds to consider an appropriate order.

CONSIDERATION OF AN APPROPRIATE ORDER

The applicant's requested orders

96. The Tribunal has set out the applicant's requested orders in paragraph 9 of this judgment. The Tribunal proceeds to consider them.

Cancelling the respondent's registration as a credit provider

97. The applicant requested the Tribunal to order the deregistration of the respondent's registration as a credit provider. The respondent has four branches. The Tribunal has considered that the respondent's contraventions only occurred at one of its four branches. The respondent investigated the allegations when the applicant brought the transgressions to its attention. It also took corrective measures to comply with its obligations in terms of the Act, terminated Maas' employment, and opened a criminal case against her. In these specific circumstances, the Tribunal does not consider it necessary to cancel the respondent's registration as a credit provider.

Administrative fine

98. The applicant has requested the Tribunal to impose an administrative fine. The Tribunal is satisfied that the nature of the respondent's contraventions and the consequent financial implications for consumers justify the Tribunal imposing an administrative fine on the respondent. The Act was introduced into the South African legislative landscape to curb precisely the types of excesses that the Tribunal has found the respondent to have perpetrated. The Tribunal would, therefore, be failing in its duty were it not to send a clear message to the respondent and other credit providers that the Tribunal will not tolerate credit providers contravening the Act.

99. Section 151 (3) sets out the factors the Tribunal must consider when determining an appropriate fine. The Tribunal proceeds to consider each in turn.

Nature, duration, gravity, and extent of the contraventions

100. Reckless lending is a severe contravention of the Act. The respondent's failure to conduct proper affordability assessments place consumers at a severe risk of over-indebtedness. The retention of SASSA cards is also a severe contravention that merits punishment.

Loss or damage suffered as a result of the contraventions just finished's has disc

101. The applicant did not place specific evidence before the Tribunal concerning the actual loss or damage consumers suffered. However, the Tribunal is satisfied that it may reasonably conclude that consumers have suffered loss because the respondent at the very least charged consumers excessive service fees and rendered unlawful charges. The retention of the consumers' SASSA cards would have a profound effect on the consumers' finances.

The respondent's behaviour

102. The respondent co-operated with the applicant during the investigation and took corrective measures to comply with the Act.

Whether Maas was a disgruntled employee, the respondent's failure to comply with the Act cannot rest solely on her. SASSA grant recipients fall within one of the most vulnerable and financially stressed groups in South Africa. There is no excuse for the respondent retaining the consumers' SASSA cards. The respondent has brought the consumer credit industry into disrepute and disregarded consumers' rights.

Market circumstances under which the contraventions occurred

103. The applicant did not place specific evidence before the Tribunal concerning the market circumstances in which the contraventions took place. Nevertheless, it appears that the respondent has simply ignored its obligations in terms of the Act and has been able to do so because it operates in an environment in which consumers are ill-educated about their rights concerning access to credit and that the respondent's practices contravene the Act. That as many as 34 consumers left their SASSA cards with the respondent indicates their level of desperation.

The level of profit derived from the contraventions

104. The applicant did not place specific evidence before the Tribunal concerning the profit the respondent derived from the contraventions.

The applicant placed the respondent's form 39 Statistical Return for the period 1 January 2015 to 31 December 2015, and form 40 Annual Financial Statement Return for the financial year ended 29 February 2016. These forms show that the respondent's total revenue from credit extension for the year ended 29 February 2016 was R4,379,581.00. The respondent concluded 5981 credit transactions during the period 1 January 2015 to 31 December 2015. It received 6000 applications

for credit during the same period, which means that it rejected only 19 applications for credit. Almost all its business, therefore, emanated from poor people. These returns show no more than the respondent's financial position some five years ago. The Tribunal, therefore, attaches limited importance to them.

105. In the absence of more recent returns, the respondent submitted that the branch's turnover had fallen approximately 50% during the first half of the 2020 financial year. The cause of the decline was the subject of an ongoing internal investigation. Nevertheless, it is reasonable to conclude that the respondent enjoys a substantial income across its four branches from its activities as a credit provider.

The degree to which the respondent co-operated with the applicant

106. The Tribunal has considered that the respondent provided the inspectors with the information they required and co-operated with them during the investigation.

The respondent's prior contraventions

107. The respondent has not been the subject of prior investigations or enforcement measures.

The amount of the fine

108. The applicant did not produce evidence concerning the respondent's financial turnover during the previous financial year. Consequently, the Tribunal may impose a fine that is limited to a maximum of R1 000 000.00.
109. Although the respondent appears to be a relatively small credit provider, it is crucial to send a strong message to all credit

providers, including their employees, that they cannot escape complying with the Act. These considerations persuade the Tribunal

that it is appropriate to impose an administrative fine of R200 000.00.

Appointment of an auditor

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

consumer files. The Tribunal has found, amongst other things, that the respondent has extended reckless credit and has charged unlawful service fees. The evidence placed before the Tribunal means that it is not possible for the Tribunal to establish the extent of this practice and whether the respondent only provides short-term credit agreements. It is, therefore, appropriate to appoint an independent auditor to assess the situation and establish the facts.

Other requested orders

111. The applicant requested that the Tribunal make an order interdicting the respondent from engaging in prohibited conduct in the future. The interdict will serve no purpose because the respondent may not, given the provisions of the Act, engage in prohibited conduct.[19]
112. Mr Stocker did not pursue with any vigour that part of the requested order that the respondent had brought the consumer credit industry into disrepute and disregarded consumers rights. It too serves no purpose, and will not form part of the order.

ORDER

113. Accordingly, the Tribunal makes the following order:

113.1. The respondent has repeatedly contravened the following sections of the Act, regulations and conditions:

113.1.1. Section 133 (1) and (2) read with section 90 (2) (l);

113.1.2. Section 81 (2)

(a) (iii) read with regulation 23A (4);

113.1.3. Section 81 (2)

(a) (iii) read with regulation 23A (12) (b);

113.1.4. Section 81 (2)

(a) (ii) read with regulation 23A (13);

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

113.1.6. Section 81 (3) read with section 80 (1) (b) (ii);

113.1.7. Section 92 (1) read with regulation 28 and form 20, and section 93 (2) read with regulation 30 (1) and form 20.2;

113.1.8. Section 100 (1)

(b) and 101 (1) (c) (iii) read with regulation 44;

113.1.9. Section 101 (1)

(c) (iii) read with regulation 44 (4); and

113.1.10. Regulation 64 (2);

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

113.3. The application to cancel the respondent's registration as a credit provider is refused;

113.4. The respondent's credit agreements with consumers contained in annexures E1 to E10 of the investigation report are reckless in terms of section 80 (1) (a) and set aside.

113.5. The respondent is:

113.5.1. Within 30 days of the date of issue of this judgment to appoint an independent auditor, who is registered as a Chartered Accountant, at its own cost to determine and compile a list of all the consumers and the amounts by which the respondent has within the last three years of the date of issue of this judgement overcharged consumers service fees and fees under the ALLPS agreements;

113.5.2. Within 30 days of the date of the independent auditor's report, to refund each consumer appearing on the list the amounts the respondent has overcharged each consumer;

113.5.3. Within 120 days of the date of issue of this judgment, the respondent is to furnish the independent auditor's report and the respondent's written report to the applicant that details the consumers' identities and the refunds made to the consumers;

113.5.4. The independent auditor is to identify and include in the independent auditor's report, all the respondent's credit agreements still in force (which have amounts due to the respondent) and concluded without the respondent having conducted assessments in terms of section 81 (2)

(a) (ii) and (iii) of the Act;

113.6. The applicant may, upon receipt of the independent auditor's report, apply to the Tribunal for an order declaring those agreements as reckless in terms of section 80 (1) (a) and setting aside the consumers obligations under those agreements;

113.7. The respondent is within 90 business days of the date of issue of this judgment to pay an administrative fine of R200 000.00 (two hundred thousand rand) into the National Revenue Fund's following bank account:

Bank: The Standard Bank of South Africa

Account holder: Department of Trade and Industry

Branch name: Sunnyside

Branch code: 05100

Account number: 317 650 026

Reference: NCT/133260/2019/57 (1) and name of person or business making the payment; and

113.8. There is no order as to costs.

Mr T Bailey - Presiding Tribunal member

With Tribunal members Dr M Peenze and Adv J Simpson concurring.

[1] Published under Government Notice R489 in Government Gazette 28864 of 31 May 2006.

[2] Section 40 empowers the National Credit Regulator to impose conditions on the registration of an applicant as a credit provider.

- [3] Section 57 (1) empowers the Tribunal to cancel a registrant's registration if the registrant fails to comply with a condition of its registration; contravenes the Act; or fails to comply with a commitment the registrant made when applying to be registered as a credit provider.
- [4] The Act defines prohibited conduct as an act or omission in contravention of the Act.
- [5] Annexure D of the investigation report.
- [6] Annexure RCL6 of the founding affidavit.
- [7] Annexures E1 to E10 of the investigation report.
- [8] Annexures E1 to E9 of the investigation report.
- [9] Annexure E10 of the investigation report.
- [10] Annexures E1, E 2, E7, E8 and E9 of the investigation report.
- [11] Annexures E3, E5 and E10 of the investigation report.
- [12] Annexure E4 of the investigation report.
- [13] Annexures E3, E4, E8, E9, and E10 of the investigation report, respectively.
- [14] Information Technology Consultants (Pty) Ltd t/a Intecon and Others v National Credit Regulator and Others (22556/2017)
- [2019] ZAGPPHC 1005 (20 November 2019), paragraphs 33 and 34, and 63 to 65.
- [15] University of Cape Town v Bar Council and Another 1986
- (4) SALR 903 AD at 914B.
- [16] Investec Bank Limited v Motloun and Another 2017 5055/2016 [2017] ZA SSHC 36.
- [17] Annexure E1 of the investigation report.
- [18] Barko Financial Services (Pty) Ltd v National Credit Regulator (415/13)
- [2014] ZASCA 114.
- [19] Shoprite Investments Ltd v The National Credit Regulator (509/2017 dated 18 December 2019).

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Prepared on 14 October 2026 · Esheria