

SOUTH AFRICA / JUDGMENT

**National Credit Regulator v Rufus  
Alfonso Financial Consultants CC  
(NCT/7963/2012/57(1)(NCA))  
[2014] ZANCT 25 (16 May 2014)  
[2014] ZANCT 25**

## COURT

National Consumer Tribunal

## BEFORE

PA Beck, F Manamela, LI Best

## CASE / FILE NUMBER

NCT/7963/2012/57(1)(NCA)

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IN

THE NATIONAL CONSUMER TRIBUNAL

Case

No: NCT/7963/2012/57(1)(NCA)

In

the matter between:

NATIONAL  
CREDIT  
REGULATOR.....Applicant  
and  
RUFUS  
ALFONSO FINANCIAL CONSULTANTS  
CC.....Respondent

Coram:

Ms  
PA Beck - Presiding member  
Adv  
F Manamela - Member  
Ms  
LI Best - Member

**JUDGMENT****AND REASONS****ADMINISTRATIVE FINE****INTRODUCTION**

1. The Applicant in this matter is the National Credit Regulator, (“the NCR” or “the Applicant”) a juristic person established in terms of section 12 of the National Credit Act, No 34 of 2005. (“the Act”).
2. The Respondent is Rufus Alfonso Financial Consultants CC, trading as RA Financial Consultants, a close corporation incorporated in accordance with the applicable laws of the Republic of South Africa with registration number 2002/100568/23 and with its principal place of business at Mogwase (hereinafter referred to as “the Respondent”).
3. The Applicant brought an application before the National Consumer Tribunal (“the Tribunal”) for the cancellation of the Respondent’s registration in terms of section 57(1)(a) and (c) of the Act due to the Respondent’s repeated failure to comply with its conditions of registration and repeated contraventions of the Act.
4. This matter was heard on 20 September 2013 and judgment was issued on 23 October 2013. The issue of the administrative penalty was reserved, at the request of the Applicant, for the Applicant’s further submissions pending receipt of a report from the Respondent, as ordered by the Tribunal.
5. The Report, as ordered by the Tribunal, was to be submitted by the Respondent by 5 December 2013 and was to provide the following information:
  - 5.1 The short term credit agreements concluded by the Respondent;
  - 5.2 The capital amounts advanced in terms of such agreements;
  - 5.3. The interest charged thereon;
  - 5.4 The amount of any interest charged in excess of the prescribed rate;
  - 5.5 The date on which interest payments were collected by the Respondent where interest of more than the prescribed rate was charged;
  - 5.6 The amount of all repayments made by the Respondent in terms of paragraph 5 (of the judgment) and the steps taken by the Respondent to locate consumers whom it was not able to trace and
  - 5.7 The names of the recipients of all such payments.

6. Upon receipt of the report referred to above, the Applicant was ordered to return to the Tribunal to make oral submissions alternatively written submissions, referred to in paragraph 4 above, on the issue of the administrative fine, whereafter the Tribunal would make an appropriate order, after considering the Applicant's further submissions and the report submitted by the Respondent.
7. The Respondent did not comply with the Order of the Tribunal in that a report as contemplated by paragraph 6 of the Tribunal order was not filed with the Tribunal. On 17 January 2014 the Applicant made further submissions to the Tribunal on the issue of the administrative fine sought against the Respondent.
8. The Respondent subsequently made submissions on 12 February 2014 addressing the order for an administrative fine sought by the Applicant against the Respondent. Flowing out of the submissions of the Respondent, the Tribunal issued a Directive to the Respondent to file with the Tribunal its audited financial statements for the period March 2012 to October 2012.
9. This is the judgment in respect of the prayer for an administrative fine, sought by the Applicant against the Respondent in the amount of R1 400 000.00 (One Million Four Hundred Thousand Rand) alternatively R1 000 000.00 (One Million Rand).

#### CONSIDERATION OF THE ADMINISTRATIVE FINE

#### APPLICANT'S

#### SUBMISSIONS

10. The Applicant made written submissions to the Tribunal arguing for the imposition of an administrative fine of R 1 400 000,000 (One Million Four Hundred Thousand Rand) alternatively R1 000 000.00 (One Million Rand) against the Respondent in terms of sections 150(c) and 151 of the Act.
11. It is the submission of the Applicant that the Tribunal has regard to each of the contraventions found by the Tribunal to have been committed by the Respondent and that the Tribunal imposes a fine in respect of each instance of prohibited conduct rather than apply a "globular fine" to all of the contraventions found to have been committed by the Respondent.
12. The consumers, submits the Applicant, impacted by the Respondent's conduct are low income earners and most vulnerable to exploitation and in need of the protection of the Act. In reference to these consumers the Applicant submits that the Respondent failed to take the Tribunal into its confidence in that the Respondent restricted itself to bare denials of the Applicant's allegations. The Respondent failed to comply with the Tribunal Order in that it failed to file the report containing the detail referred to in paragraph 5 above and due to this failure by the Respondent the level of profit derived from the contraventions of the Act could not be determined.

13. In as much as there is no evidence of previous contraventions by the Respondent, it is the submission of the Applicant that each finding of prohibited conduct be taken into account as a previous contravention of the Act.
14. The evidence placed before the Tribunal at the hearing of the matter is that of the 20 files analysed, the contraventions spanned from December 2010 to September 2011 and that the extent of the loss suffered by consumers is not known to the Applicant because of the failure of the Respondent to file a report as ordered by the Tribunal on 24 October 2013.
15. Thus the Applicant seeks and order from the Tribunal that imposes an administrative fine as follows:
  - 15.1 Failure to conduct affordability assessments – a fine of R100 000,00 (One Hundred Thousand Rand). The aggravating factors related to the conduct of the Respondent should increase this fine to R150 000,00 (One Hundred and Fifty Thousand Rand).
  - 15.2 Failure to furnish consumers with pre-agreement statements alternatively failure to retain such documents - a fine of R50 000,00  
(Fifty Thousand Rand) increased to R75 000,00 (Seventy Five Thousand Rand) due to aggravating circumstances;
  - 15.3 Unlawful supplementary documents in 95% of cases, more particularly having consumers sign enforcement documents in advance of enforcement proceedings in particular section 29 notices - a fine of R200 000,00 (Two Hundred Thousand Rand) increased to R250 000 (Two Hundred and Fifty Thousand Rand) to take into account aggravating factors;
  - 15.4 Unlawful provisions in credit agreements – a fine of R50 000,00 (Fifty Thousand Rand) increased to R75 000,00 (Seventy Five Thousand Rand) due to aggravating circumstances;
  - 15.5 Excessive interest of 25% charged in excess of the monthly permissible rate - a fine of R350 000,00 (Three Hundred and Fifty Thousand Rand) increased to R400 000,00 (Four Hundred Thousand Rand) due to aggravating circumstances;
  - 15.6 Retention of identity documents, bank cards and PINS – a fine of R350 000,00 (Three Hundred and Fifty Thousand Rand) increased to R400 000,00 (Four Hundred Thousand Rand) due to aggravating circumstances;
  - 15.7 Contravention of General Condition A1 - a fine of R50 000,00 (Fifty Thousand Rand).
16. In the Applicant's concluding submissions the Applicant asks for an administrative fine of R1 400 000.00 (One Million Four Hundred Thousand Rand) but in the event that the Tribunal is of the view that the Tribunal is limited to a maximum fine of R1 000 000.00 (One Million Rand) the Applicant asks the Tribunal to assess each instance of prohibited conduct on its merits and to impose a maximum fine of R1000 000.00 (One Million Rand).

## RESPONDENTS

## SUBMISSIONS

17. The Respondent made submissions as follows-

17.1 The main submission of the Respondent is that an administrative fine of R1 400 000.00 (One Million Four Hundred Thousand Rand) is not justifiable in the circumstances. Whereas the Respondent admits that the Respondent did not comply with the Tribunal order to file a report to assist the Applicant and the Tribunal to assess the turnover of the Respondent and the affected consumers, the Respondent submits that the Tribunal still has a wide discretion to impose an administrative fine. The Respondent concurs with the Applicant that section 151(3) of the Act provides a guideline to the Tribunal in determining whether to impose an administrative fine.

17.2 The Respondent admits the contraventions of the Act as found by the Tribunal in the Tribunal judgment of 23 October 2013. However, the Respondent submits that no evidence of consumers' vulnerability or exploitation by the Respondent was substantiated by the Applicant nor is there any evidence of reckless credit lending or proof that the Respondent "bypassed the judicial process"

notwithstanding the signing of enforcement documents by consumers prior to enforcement procedures commencing against such consumers.

The Respondent admits overcharging consumers the sum total of R2 020.00 (Two Thousand and Twenty Rand) which in the view of the

Respondent is not excessive.

17.3 The Respondent further admitted that it charged 30% interest on short term credit agreements, but avers that what the Applicant

approves for initiation fees, VAT and so forth are above that which the Respondent charged consumers, even at an interest rate of 30% per month.

17.4 The Respondent argued that the Applicant presented no evidence that any "effort was made on the part of the Applicant" that the Respondent understood General Condition A1.

17.5 The Respondent places on record the financial statements of the Respondent wherein the Auditors of the Respondent declare that the turnover of the Respondent for the period March 2012 to October 2012 to be in the amount of R46 075.22 (Forty Six Thousand Seventy Five Rand and Twenty Two Cents.)

17.6 The Respondent submits further that the Respondent ceased to operate the business immediately after the "search and seizure"

of the Respondent's Marikana offices.

17.6 Accordingly, it is the submission of the Respondent that an administrative fine of R4 607.53 (Four Thousand Six Hundred and Seven Rand Fifty Three Cents) being 10% of the Respondent's annual turnover in respect of all contraventions, would be appropriate.

## ANALYSIS

### OF THE LAW

18. The Tribunal's power to impose an administrative fine is derived from section 151 of the Act.

Section 151(1) of the Act provides as follows –

*“The Tribunal may impose an administrative fine in respect of prohibited or required conduct in terms of this Act or the Consumer Protection Act, 2008.”*

Section 151(2) of the Act provides as follows –

*“An administrative fine imposed in terms of the Act may not exceed the greater of-*

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

19. Section 151 of the Act does not provide guidance on where the Tribunal should start in making a determination of the amount nor what weight to ascribe to each of the factors listed. It does however clearly mandate the Tribunal to consider the factors as laid down in the Act and to set an upper cap on the administrative fine that may not be exceeded.

20. When determining an amount, the Tribunal must consider the legislation from which it derives its own mandate and consider the factors in Section 151(3) of the Act which provides as follows:

*“(a) The nature, duration, gravity and extent of the contravention;*

- (b) Any loss or damage suffered as a result of the contravention
- (c) The behaviour of the respondent;
- (d) The market circumstances in which the contravention took place;
- (e) The level of profit derived from a contravention
- (f) The degree to which the respondent has co-operated with the National Credit Regulator, or the National Consumer Commission, in the case of a matter arising in terms of the Consumer Protection Act, 2008 and the Tribunal; and
- (g) Whether the respondent has previously been found in contravention of the Act, or the Consumer Protection Act 2008, as the case may be.

21. In the Werlan-case[1], the Tribunal stated that the Tribunal must consider fairness towards both the Applicant and the Respondent when considering what would be a just administrative fine to impose. The Tribunal will also consider any mitigating factors that can be taken into account in arriving at the final amount of the penalty as well as the evidence before the Tribunal of the Respondent's annual turnover being R441 143.00 (Four Hundred and Forty One Thousand One Hundred and Forty Three Rand). This would be the Tribunal's point of departure and then to apply the factors in section 151(3) of the Act to same.
22. We now turn to whether the Tribunal may impose an administrative fine in this particular matter and in so doing also to section 2 of the Act which requires the Tribunal to interpret the Act in a manner that "gives effect to the purposes set out in section 3." Section 3 of the Act summarised is to promote and advance the social and economic welfare of South Africans, to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market.

The nature, duration, gravity and extent of the contravention

23. From the evidence placed before the Tribunal it is clear that the contraventions of the Act are of a serious nature, namely having

consumers sign enforcement documents prior to being in default, holding PINS and bank cards. Furthermore the transgressions

took place over a period of two years. The Respondent admitted to engaging in such prohibited conduct as declared by the Tribunal in the Tribunal's judgment of 23 October 2013.

Any loss or damage suffered as a result of the contraventions

24. No evidence is placed before the Tribunal on quantifiable loss or damage suffered as a result of the contraventions of the Respondent save for the Applicant to say that consumers are prejudiced because of the overcharging of interest rates but not to a quantifiable measure. The transgression that is apparent is the gross overcharging of interest at thirty percent (30%) per month. The Respondent admits to overcharging consumers in the amount of R2 020,00 (Two Thousand and Twenty Rand) but does not place any evidence before the Tribunal as to how the Respondent arrives at this amount. The Respondent failed to comply with the order of the Tribunal to provide a report as contemplated in para 5 and therefore did not assist to quantify any loss to consumers yet admitted to prohibited conduct more particularly charging consumers 30% interest per month.

The behaviour of the Respondent

25. The Tribunal noted that the Respondent did not attend the hearing. Even if the Tribunal considers the Respondent's explanation that the Respondent was not available on the date of the hearing, no proper application for postponement was put forward by the Respondent on or before the date of the hearing in compliance with the Rules of the Tribunal. The Tribunal also considers that the Respondent did not comply with the Tribunal order dated 24 October

2013 and thus failed to assist the Tribunal to assess the gravity of the impact of the Respondent's conduct on consumers. The Respondent however admitted that the Respondent engaged in prohibited conduct as declared by the Tribunal.

The market circumstances in which the contravention took place

26. Save to deny the vulnerability of consumers and to state that there is no evidence of exploitation of consumers no evidence of this factor was placed before the Tribunal by the Respondent. The Applicant makes submissions of the vulnerability of consumers and the exploitation of consumers but was unable to substantiate these allegations nor to place evidence thereof before the Tribunal.

Level of Profit derived from the contraventions

27. The extent of the loss suffered by individual consumers is not known by the Tribunal because the Respondent failed to file a report as ordered by the Tribunal. The Respondent admitted to overcharging consumers in the amount of R 2 020, 00 (Two Thousand and Twenty Rand) but placed no evidence before the Tribunal in support of this admission. The Tribunal views the overcharging of interest as an aggravating factor.

The degree to which the Respondent has co-operated with the National Credit Regulator and the Tribunal

28. It was submitted by the Respondent that it ceased operating directly after the investigation by the Applicant. However the Respondent failed to take the Tribunal into its confidence by wilfully not complying with the order of the Tribunal to submit a report to the Tribunal. The Tribunal considers this to be an aggravating factor.

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

29. Other than the Respondent being found by this Tribunal to be in contravention of the Act and the Respondent's Specific Conditions of Registration dating back as far as 2008 by this Tribunal and the Respondent admitting to have engaged in prohibited conduct as found by the Tribunal, no further evidence of any additional contraventions are before the Tribunal.

## CONCLUSION

30. In the light of the above factors taken into account by the Tribunal it is the view of the Tribunal that all of the factors operated in aggravation of the Respondents conduct. There is no doubt that the imposition of an administrative fine is appropriate in the circumstances having regard to the evidence led. However, it is also appropriate that the Tribunal applies a rational approach to the amount of the administrative fine to be imposed linking such thinking to any evidence in mitigation, to the conduct of the Respondent, the impact on consumers and the annual turnover of the Respondent. The annual financial statements for the period 31 October 2012 reflect a profit for the year in the amount of R441 143.00 (Four Hundred and Forty One Thousand One Hundred and Forty Three Thousand Rand).

31. It is for these reasons, considering the matter as a whole and the admission of prohibited conduct by the Respondent that the Tribunal imposes an administrative fine of R44 100,00 (Forty Four Thousand One Hundred Rand) to reflect the seriousness with which the Tribunal views this type of prohibited conduct and disregard for consumers and the Act by the Respondent.

#### ORDER

32. In the result the Tribunal makes the following order:

32.1 The Respondent must pay an administrative fine of R44 100,00 (Forty Four Thousand One Hundred Rand) by no later than 31 August 2014.

32.2 No order as to costs is made.

DATED THIS 16TH DAY OF MAY 2014

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P A BECK

PRESIDING MEMBER

Adv F Manamela (Member) and Ms L Best (Member) concurring.

[1] NCR v Werlan Cash Loans NCT/3867/2012/57(1).

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