

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Sell to
us t/a Pawn My Car (Pty) Ltd and
Another (NCT/326370/2024/140(1))
[2024] ZANCT 59 (4 October 2024)

[2024] ZANCT 59

COURT

National Consumer Tribunal

BEFORE

S Hockey, A Potwana, P Manzi-Ntshingila

CASE / FILE NUMBER

NCT/326370/2024/140(1)

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IN THE

NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number:

NCT/326370/2024/140(1)

In the matter between:

NATIONAL CREDIT
REGULATOR
APPLICANT
and
SELL TO US t/a PAWN MY
CAR SA (PTY) LTD
FIRST RESPONDENT
EASY DRIVE SA (PTY)
LTD
SECOND RESPONDENT

Coram: Mr S
Hockey
- Presiding Tribunal
member
Dr A
Potwana
- Tribunal Member
Ms P
Manzi-Ntshingila
-
Tribunal member
Date of
Hearing
- 8 August 2024
Date of
Judgment
-
4 October
2024

JUDGMENT

AND REASONS

INTRODUCTION

1. The applicant in this matter is the National Credit Regulator (the applicant), a juristic person established by section 12 of the National Credit Act, 34 of 2005 (the NCA). In terms of the NCA, the applicant is responsible for, among other things, monitoring the consumer credit market to ensure prohibited conduct is detected, prevented and prosecuted.
2. At the hearing, the applicant was represented by Mr Mboniseni Mathivha, a legal advisor employed by the applicant.
3. The first respondent is Sell to Us (Pty) Ltd and the second respondent is Easy Drive SA (Pty) Ltd (who are jointly referred to as the respondents), both duly incorporated under the company laws of South Africa. The applicant submits that the respondents trade and advertise their businesses as credit providers. However, they are not registered as such with the applicant under the provisions of the NCA.
4. Neither of the respondents attended or were represented at the hearing of this matter. The respondents having been informed of the date, time and venue^[1] of the proceedings, the hearing continued in their absence.

5. This is an application made to the National Consumer Tribunal (the Tribunal) in terms of section 140(1) of the NCA, whereby the applicant seeks an order declaring that the respondent repeatedly contravened various sections of the NCA and its regulations and that such contraventions be declared prohibited conduct in terms of section 150(a). The applicant further seeks additional orders relating to the alleged contraventions, which will be discussed below.

TERMINOLOGY

6. A reference to a section in this judgment refers to a section of the NCA unless the context provides otherwise.
7. A reference to a regulation refers to the National Credit Act Regulations, 2006[2] (the regulations). A reference to a rule refers to the Rules of the National Consumer Tribunal[3] (the rules).

CONSIDERATION OF THIS MATTER ON AN UNOPPOSED BASIS

8. The applicant served this application on the first and second respondents by registered post to both their business and registered addresses on 20 April 2024. The track-and-trace reports from the South African Post Office show that the registered post reached the correct post offices for the areas where the respondents' registered and business addresses are situated. These reports further show that notifications were sent to the respondents advising that the posts were ready for collection. In terms of rule 30(3)(b) read with rule 30(1)(b), therefore, the applicant has shown that the application was served on the respondents.
9. In terms of rules 13(1) and (2), a respondent to an application or referral to the Tribunal may oppose the matter by filing an answering affidavit within 15 business days of receipt of the application or referral.
10. The respondents failed to file an answering affidavit within the prescribed period or at all, and the matter was accordingly set down for hearing on an unopposed basis.
11. In terms of rule 13(5), any fact or allegation in an application or referral not specifically denied or admitted in an answering affidavit will be deemed to have been admitted. Since no answering affidavit has been filed, the allegations by the applicant must be deemed to have been admitted by the respondents.

BACKGROUND

12. The genesis of this application is a complaint against the first respondent that the applicant received from a consumer in terms of section 136(1). The consumer, Ms Sinehlanhla Noluthando Khathi (Ms Khathi), complained about the exorbitant interest charged on a credit agreement by the first respondent and their unlawful practice of repossessing her motor vehicle without a court order or a warrant.

13. Ms Khati complains that she applied for and was granted a loan by the first respondent but only received R17 500. The balance of R2 500 had been deducted to cover the costs of installing a tracking device in her vehicle that was used as security for the loan. She was allowed to continue using the vehicle. In terms of the credit agreement, she had to pay monthly instalments of R6 000 until the loan of R20 000 was settled in full. She was charged 30% interest on the loan.
14. Ms Khati advised the applicant that after she could not pay the first instalment of the loan, she was granted an extension with an increased instalment amount payable by the end of each month. Before the end of the month, however, the first respondent traced the vehicle to her boyfriend's residence. Persons acting on behalf of the first respondent represented themselves as police officers and informed the boyfriend that the complainant had stolen the vehicle. They took possession of the vehicle and towed it away without following any legal process. Ms Khati communicated with the first respondent several times but was later told that the vehicle had been sold.
15. With the information from Ms Khati, the applicant formed a reasonable suspicion that the first respondent was contravening various provisions of the NCA. The first respondent was suspected of, amongst other things, conducting the business of a credit provider whilst not being registered as such under the NCA, extending credit to consumers without conducting affordability assessments as required under the NCA, charging interest above the maximum rate allowed, and taking unlawful enforcement steps without following due process in terms of the law.
16. As a result of the above, the applicant initiated a complaint against the first respondent in terms of section 136(1) on 25 April 2022 and authorised an investigation into its business activities in terms of section 139(1). Consequently, on 9 May 2022, Mr Matimba Hatlane (Hatlane) was appointed to investigate the first respondent's business activities.
17. On 24 May 2022, Hatlane visited the first respondent's business premises and interviewed the branch manager, Mr J van Wyk (Van Wyk). Van Wyk acknowledged the first respondent's rights, as was explained to him by Hatlane.
18. During the interview, Van Wyk gave an overview of the first respondent's business practices as follows:
 - 81.1. It purchases, sells, leases and rents to own used vehicles.
 - 81.2. It only purchased fully paid-up vehicles.
 - 81.3. It is not registered with the NCR.
 - 81.4. It purchases vehicles from consumers and leases them back to the said consumers after tracking devices have been fitted to the vehicles.
 - 81.5. Ownership of the vehicles changed after purchasing them from the consumers.

81.6. If the monthly lease amounts are not paid, the vehicles are repossessed and/or forcibly removed from the consumers concerned.

19. In terms of the scope of the authorised investigation, Hatlane requested and was provided with ten consumer files (the sampled files) for system purposes. The files marked D1 to D10, are annexed to the investigation report compiled by Hatlane. Ms Khati's agreements with the respondents are attached to the investigation report as annexure A.
20. During the investigation, the NCR received a further complaint from a consumer, Mr Freddy Rethabile Moipatli (Mr Moipatli). Since Hatlane's certificate issued under section 25 had not expired, he was requested to assess Mr Moipatli's complaint, which can be summed up as follows:
 - 20.1. He applied for a loan from the first respondent for R10 000, using his paid-up vehicle as security.
 - 20.2. He was made to sign documents indicating that he was selling his vehicle to the first respondent for R14 000 and leasing the same vehicle from the second respondent. He was told that R2 500 would be used to install a tracking device and R1 500 to renew the vehicle licence. He received R10 000 from the first respondent.
 - 20.3. He was told that he had to pay R18 200 to settle the loan and return the vehicle to his ownership and an additional monthly amount of R4 200 to use the vehicle.
21. From August 2021 until November 2021, he paid R15 700, but at the end of November 2021, the vehicle was taken from him, and he was told that he had to pay R25 000 for its ownership. Mr Moipatli's agreements with the respondents are attached as annexure FA8 to the record.
22. The assessment of the evidence obtained revealed serious contraventions of the NCA by the first respondent. The existence of the second respondent, whom the applicant submits aided the first respondent in activities in contravention of the NCA, also came to light.

THE APPLICANT'S

SUBMISSIONS

23. The applicant submits that the general mode of operation of the respondents is as follows:
 - 23.1. Consumers approach the first respondent for a loan but are required to agree to the terms set by the latter, using the fully paid-up vehicles as security for the loan.
 - 23.2. On the face of it, the first respondent operates a business that purchases vehicles from consumers and, with the assistance of the second respondent, simultaneously leases the vehicles back to the same consumers with an option to cancel the sale and repay the purchase amount within 90 days for the return of the vehicles to the consumers.

23.3. The consumers are required to sign documents stipulating that they are selling the vehicles to the first respondent for the loan amount as the purchase price. Simultaneously, they are required to hand over the vehicle's registration papers to the first respondent. From the sampled agreements, it appears that the documents that the consumers are required to sign are titled a sale agreement for movable assets. It provides for the change of ownership, tracker fitment authorisation and the lease of the asset. In some agreements, a provision is made for the storage of the asset, and a storage fee is payable. In some instances, the agreement to

lease the assets is prepared in the name of the second respondent, who was cited as the lessor.

23.4. The consumers are given a 90-day “cooling-off” period, during which they may cancel the “sale agreement” while leasing the vehicles. Before the cooling-off period expires, they must pay back the loan amount disguised as the purchase price and the cost of credit disguised as a tracker fitment fee and daily rental fee for the vehicles. The buyback amount is the “purchase price”, which is the loan amount and the interest on this amount is concealed as the rental fee, tracker fitment fee and, in some cases, repossession fees.

23.5. If the loan instalments (disguised as a lease amount) are not maintained, the vehicle is repossessed without following any legal processes.

23.6. The documents that the consumers are made to sign, despite their appearances at face value, meet the requirements of the secured loan agreement.

23.7. The majority of the loans entered into exceed R15 000, which is the threshold for small credit agreements and fall below R250 000, which is the threshold for large credit agreements in terms of section 7(1)(b). Therefore, most loans are intermediate credit agreements in section 9(3).

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23.8. The true nature of the contractual arrangements between the respondents and consumers is secured credit agreements. Therefore, the NCA provisions should bind the respondents.

23.9. Consumers are misled that they are entering into pawn agreements with the first respondent, which is not the case. In terms of section 1, a pawn transaction is defined as meaning:

“...an agreement, irrespective of its form, in terms of which—

- (a) one party advances money or grants credit to another, and at the time of doing so, takes possession of goods as security for the money advanced or credit granted; and
- (b) either—
 - (i) the estimated resale value of the goods exceeds the value of the money provided or the credit granted, or
 - (ii) a charge, fee or interest is imposed in respect of the agreement, or in respect of the amount loaned or the credit granted; and

- (c) the party that advanced the money or granted the credit is entitled on expiry of a defined period to sell the goods and retain all the proceeds of the sale in settlement of the consumer's obligations under the agreement".

23.10. Section 99(1)(b) stipulates that a credit provider who enters into a pawn transaction with a consumer must retain until the end of the credit agreement, and at its risk, any property of the consumer that is delivered to the credit provider as security under the credit agreement.

23.11. Consumers, therefore, are misled into believing that they would be entering into pawn transactions, whereas they would be entering into secured loan agreements. Neither respondent retains the consumers' vehicles as required under section 99(1)(b).

24. At this stage, it is necessary to pause and mention that the first respondent trades as "Pawn My Car SA" and, through its website, invites consumers to pawn their vehicles and still drive them. The words "YOU PAWN YOUR CAR, YOU DRIVE IT" and "Get a cash loan on your car now!" are prominently displayed on its website. Under frequently asked questions, the following question and response are displayed:

"How much do I get?"

It's simple, the amount you get is based on the value of your vehicle. You pawn your car for the value of your car. Once value is determined you get instant cash!"

25. The applicant submits that the transactions between the respondents and the consumers concerned are simulated secured loan agreements and argues as follows:

25.1. The respondents make out that the transactions between them and the consumers are sale agreements with the option to lease the asset and to cancel it within a "cooling-off" period, but these are really simulated secured loan agreements and the lease agreements are provided to disguise the agreements as something other than credit agreements to circumvent provisions of the NCA.

26. It is clear that the consumers never intended to transfer ownership of the vehicles to the respondents. The fact that they entered into alleged sale agreements while still using their vehicles is testimony that they required using them.
27. The sampled agreements are not "sale" or "lease" agreements but, in fact, secured credit agreements under the guise of "sale" and "lease" arrangements.
28. The applicant argues that the first and second respondents colluded to attempt to circumvent the provisions of the NCA and that they acted for a common purpose. The Constitutional Court has held that the doctrine of common purpose is a set of rules in common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person the commission of a crime.[4] The court further held that common purpose liability can arise in two instances, namely from "prior agreement, express or implied, to commit a common offence", and where there is no such prior agreement that can be established, liability can arise "from an active association in a

common criminal design with the requisite blameworthy state of mind.”[5]

29. The applicant refers to case law in which our courts held that a person who aids and abets another in committing a delict can be liable. So, in *McKenzie v Van der Merwe*[6], it was held:

“Under the Lex Aquilia not only the persons who actually took part in the commission of a delict were held liable for the damage caused, but also those who assisted them in any way, as well as those by whose command or instigation or advice the delict was committed.”

30. Referring to the above and other cases, the applicant argues that it demonstrated that the second respondent’s role was that it was instrumental in aiding and abetting the first respondent to contravene the NCA. The first respondent presented a suite of documents to consumers, including a rental agreement in the name of the second respondent, intending to persuade the consumers to

enter into lease agreements with the second respondent. This was despite the second respondent having no right to ownership of the consumers’ vehicles. The second respondent, therefore, caused itself to become a party in these agreements and aids the first respondent in contravening the NCA.

DISCUSSION

31. The first respondent invites consumers to pawn their vehicles with it, as its name suggests and as evidenced by its marketing through its website. However, the consumers were made to sign sale agreements in terms of which they purportedly sold their vehicles to the first respondent. In most of the sampled agreements, namely those in D2 to D6 and D8 to D10, the consumers purportedly leased back the vehicle from the second respondent despite the latter having no right to ownership thereto.
32. There can be no doubt that the arrangements between the first respondent and consumers are not pawn transactions, as the requirements for such transactions as set out in section 99[7] have not been met.
33. As for the contention that the vehicles are sold to the first respondent, the circumstances of the arrangements do not support this. If the vehicles were indeed sold to the first respondent, it is questionable why the consumers have to pay for tracking devices to be fitted to them. It cannot be coincidental that in all the sampled agreements the prices for the repurchase of the vehicles by the consumers from the first respondent of the exact amounts that the vehicles were purportedly sold to the first respondent.
34. In *Cipla Medpro (Pty) Ltd v Aventis Pharma SA, Aventis Pharma SA and Others v Cipla Life Sciences (Pty) Ltd and Others*[8] (*Cipla*), the Supreme Court of Appeal referred to the matter of *McKenzie v Van der Merwe*[9], where it was held over a century ago as follows:

“Under the Lex Aquilia not only the persons who actually took part in the commission of a delict were held liable for the damage caused, but also those who assisted them in any way, as well as those by whose command or instigation or advice the delict was committed. To a similar effect is the passage which was quoted from Grotius (3, 32, 12, 13) that everyone is liable for a delict ‘even though he has not done the deed himself, who has by act or omission in some way or other caused the deed or its consequence: by act, that is by command, consent, harbouring, abetting, advising or instigating’.”

35. In Cipla, Nugent JA, who wrote the judgment to which the rest of the full bench concurred, referred to various further authorities and concluded that “it is plain from McKenzie, and the authorities relied upon in that case, that, upon ordinary delictual principles, it is unlawful to incite or aid and abet the commission of the civil wrong, and I do not think it matters whether it is wrong at common law or whether it is a wrong created by statute.”[10]
36. In FCB Africa Proprietary Limited v Bousaada Proprietary Limited and Another In re: Bousaada Proprietary Limited and Another v FCB Africa Proprietary Limited and Another[11] (FCB Africa), the court referred to Cipla, where it held that the question of aiding and abetting had received definitive treatment and concluded:

“The law is settled and clear. Based on ordinary delictual principles, it is unlawful to incite or aid and abet the commission of the civil wrong, irrespective of whether the claim is sourced in common law or in statute.”[12]
37. In the circumstances, and in particular given the submissions made by the applicant, the Tribunal agrees that the true nature of the transactions between the first respondent and consumers are secured loan agreements.
38. The Tribunal also agrees with the applicant's submissions that the second respondent aided and abetted the first respondent in the scheme devised by the first respondent or jointly by them to circumvent the provisions of the NCA.
39. As a result of the above, the first respondent, with the aid and abetting of the second respondent, acted as a credit provider and was duty-bound to comply with the provisions of the NCA, which will be discussed below.

THE ALLEGED CONTRAVENTIONS

Entering into credit agreements whilst not being registered as a credit provider and advertising credit to consumers

40. In terms of section 40(1), the first respondent must apply to be registered as a credit provider, which it failed to do. Section 40(3) prohibits a person who is required in terms of section 40(1) to be registered as a credit provider from offering, making available or extending credit or entering into a credit agreement.

Section 40(1) states that credit providers must apply for registration if they exceed the prescribed threshold. However, the threshold was removed by legislative amendment, meaning that registration is now required for all credit providers, save for certain exceptions that are irrelevant for present purposes.

41. The first respondent, not being registered as a credit provider with the NCR, therefore, repeatedly contravened sections 40(1) and 40(3) read with section 89(2)(d)[13] by extending credit to the two complainants and those consumers in D1 to D10. The second respondent also contravened the aforesaid sections in the agreements contained in D2 to D6 and D8 to D10 and annexure FA8 by having associated itself with the first respondent and allowing itself to act as the lessor of the vehicles to the consumers concerned. In terms of section 40(4), read with section 89(2)(d), all the credit agreements in annexures A, D1 to D10 and FA8 are unlawful and void.
42. In terms of section 76(3), a person required to be registered as a credit provider but who is not so registered must refrain from advertising the availability of credit or goods or services to be purchased or created. Having advertised credit availability on its website, the first respondent has also contravened section 76(3).

The failure to conduct affordability assessments

43. Annexures A and D1 to D8 attached to the investigation report, and annexure FA8 attached to the founding affidavit, reveals that the first respondent failed to conduct affordability assessments in accordance with the provisions of the NCA and its regulations.
44. In terms of section 81(2)(a)(ii), read with regulations 23A(12)(b) and 23A(13), a credit provider must not enter into a credit agreement without first taking reasonable steps to assess a consumer's debt repayment history under credit agreements. All the sample files reveal that the respondents failed to assess the consumers' debt repayment histories, which is evidenced by the absence of any documentation to this effect in the sampled files and annexures A and FA8.
45. Section 81(2)(a)(iii), read with regulations 23A(3) and 23A(12)(c), requires a credit provider to take into account a consumer's existing financial means, prospects and obligations. To this effect, the regulations above require a credit provider to take practical steps to assess the consumer's or joint consumers' discretionary income to determine their financial means and prospects to pay the proposed credit instalments and to take into account the consumer's maintenance obligations and other necessary expenses. There are no documents indicating that the respondents met the requirements of section 81(a)(iii) and regulations 23A(3) and 23(12)(c).
46. The respondents failed to apply the minimum expense norms table or provide any evidence of making the necessary calculations required in contravention of regulations 23A(9) and 23A(10).

47. The sampled files also show that the first respondent failed to calculate the consumers' discretionary income before extending credit to them, in contravention of regulations 23A(8) and 23A(12)(a).

The extension of reckless credit

48. In terms of section 80(1)(a), a credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in the agreement has increased, the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time. Since it is apparent that the first respondent did not conduct the requisite assessments, all the credit agreements in annexure A and the sampled files, including that in FA8, have been recklessly granted.

The failure to provide consumers with pre-agreements and quotations in the prescribed form

49. Section 92(2) provides as follows:

"A credit provider must not enter into an intermediate or large credit agreement unless the credit provider has given the consumer—

- (a) a pre-agreement statement—
 - (i) in the form of the proposed agreement; or
 - (ii) in another form addressing all matters required in terms of section 93; and
 - (b) a quotation in the prescribed form, setting out the principal debt, the proposed distribution of that amount, the interest rate and other credit costs, the total cost of the proposed agreement, and the basis of any costs that may be assessed under section 121 (3) if the consumer rescinds the contract."
50. Regulation 29 sets out the requirements for the pre-agreements and quotations.
51. The credit agreements entered into with consumers in the sampled files and annexures A and FA8 are intermediate credit agreements. There are no indications in any of the files that the first respondent provided the consumers with pre-agreements or quotations as required by section 92(2) read with regulation 29. Therefore, the first respondent contravened these provisions.
52. Section 101(1)(d) states that the credit agreement must not require payment by the consumer of any money or other considerations except interest, which must be expressed in percentage terms as an annual rate calculated in the prescribed manner and must not exceed the applicable maximum prescribed rate. The prescribed rate is set out in regulation 42. Regulation 23A(15) sets out and explains the cost of credit that must be disclosed to consumers by a credit provider. However, having failed to provide quotations and pre-agreement statements to the consumers, the first respondent failed to disclose the cost of credit to them and accordingly contravened section 101(1)(d) read with regulations 23A(14)

and 42.

The failure to provide consumers with credit agreements in the prescribed form

53. In terms of section 93(1), a credit provider must deliver to the consumer, without charge, a copy of the document that records their credit agreement transmitted to the consumer in paper or printable electronic form. Section 93(3) requires that the document that records an intermediate large

agreement be in the prescribed form.

54. The applicant referred the panel to the Tribunal's judgement in *National Credit Regulator v The Loan Company*[14], where the Tribunal stressed the importance of providing the consumer with a copy of the credit agreement. It was held that the information contained in these agreements is essential to enable consumers, amongst others, to pursue claims for redress against the credit provider. The credit agreement, it was held, is the primary reference document for the consumer to refer to regarding any query regarding the terms and conditions of the contract and where to reach the credit provider in the event of a dispute.

55. The applicant sets out the required information that a credit agreement must contain in terms of regulation 31 in paragraph 14.2 of its heads of argument as follows:

"14.2.1 The type of agreement;

14.2.2 Respondent's contact details;

14.2.3 Consumer's contact details;

14.2.4 The amount of any service fee, if any and the basis upon which same is payable;

14.2.5 The rand amount of interest charges over the term of the agreement;

14.2.6 Whether the interest rate is fixed or variable;

14.2.7 The amount of any default administration charges which may be imposed on default by the consumer or the manner in which such charges will be calculated;

14.2.8 The circumstances under which such default administration charges will be imposed;

14.2.9 The amount of any collection costs which may be charged in respect of enforcement of a consumer's monetary obligations in terms of the credit agreement or the manner in which such costs will be calculated;

14.2.10 The circumstances under which such collection costs will be charged;

14.2.11 The sum of the amounts disclosed in respect of initiation fee, service fee, interest and an indication of the method of calculating the amount;

14.2.12 The number of repayments, the frequency of repayments;

- 14.2.13 The frequency with which the consumer will be provided with a statement of account;
 - 14.2.14 The manner in which the statement will be provided;
 - 14.2.15 Details of the implications of default by the consumer;
 - 14.2.16 Details of the process that will be followed on default;
 - 14.2.17 A statement notifying the consumer as comprehensively as reasonably possible about the information sharing practices in credit reporting;
 - 14.2.18 A statement of the consumer's right to contact the credit bureau, have the credit record disclosed and correct inaccurate information;
 - 14.2.19 The right of the consumer to terminate the credit agreement in terms of section 122 of the Act;
 - 14.2.20 The right of the credit provider to terminate the credit agreement in terms of section 123 of the Act;
 - 14.2.21 A statement of the consumer's rights to resolve a complaint by way of alternative dispute resolution, to file a complaint with the National Credit Regulator or to make an application to the Tribunal;
 - 14.2.22 A statement of the consumer's right to apply to a debt counsellor to be declared over-indebted in terms of section 86 of the Act and the process to be followed;
 - 14.2.23 Contact details of the National Credit Regulator and the Tribunal.”
56. The sampled agreements show that the first respondent failed to comply with the requirements of sections 93(1) and 93(3), read with regulation 31, constituting a contravention of these sections and the regulation.

The overcharging of interest

57. The maximum rate the first respondent was permitted to charge for intermediate credit agreements is the prevailing repo rate plus 17% per annum. The documents in the sampled files show that the first respondent did not disclose the interest rate charged to the consumers. Regarding the complainants (Ms Khathi and Mr Moipatli), the applicant obtained information to calculate the extent to which these consumers were overcharged.
58. The permissible charges are regulated in terms of section 100(1)(c), read with section 101(1)(d), and further read with regulations 42(1) and 40(2)(a).
59. In Ms Khathi's case, she had to repay R20 000 in monthly instalments of R6 000 until the loan was fully paid. The loan amount was R17 500, as in accordance with the respondents' scheme, R2 500 was utilised for the installation of a tracking device on the vehicle, which they allege was sold to the first respondent. The repo rate at the time was 4.25%, and the interest that could be charged was, therefore, 4.25% plus 17%, equating to 21.25% per

annum or 1.77% per month. The loan term was for three months, and the maximum monthly interest amount was, therefore, R354 and R1 062 over the three months and not R5 000 as seemingly charged in respect of the loan.

60. Regarding Mr Moipatli, the loan amount was R10 000, repayable over three months. Mr Moipatli had to pay R18 200 over the three months, meaning the total cost of credit was R8 200. The allowable charge was 3.5% (i.e., the repo rate at the time) plus 17%, equating to 20.5%, or 1.7% per month. This means that the maximum interest rate amounts to R170 per month and R510 over the three months, not the R8 200 that was charged.
61. The applicant did not have information to calculate the overcharges in the sampled files, as the first respondent did not disclose the interest rate and cost of credit charged but submitted that the consumers in the sampled files were overcharged by 30 to 50%. Without actual evidence, the Tribunal is not able to determine the extent of such overcharges.
62. The Tribunal agrees with the applicant's contention that, given the nature of the agreements, the respondent could not have reserved charges for service fees or initiation fees, and it can reasonably be assumed that the charges were only in respect of interest charges.

Prohibited charges

63. Section 100(1)(a) prohibits a credit provider from charging or imposing a monetary liability on a consumer in respect of a credit fee or a charge prohibited by the NCA. Section 101(1) sets out a closed list of exceptions to what a credit agreement may not require a consumer to pay.
64. In the credit agreement in annexure A, as well as in those in the sampled files marked D1, D2 and D7, provision is made for the deduction of R2 500 from the loan amount as a deposit in lieu of any obligation placed upon the lease of the asset concerned. According to the applicant, to its knowledge, this amount is not refunded to the consumer should the agreement end. In respect of the agreements in D3 to D6, D8 and D9, a similar amount is retained for any obligation placed upon the lease. Since there is no evidence that the aforesaid amounts are not refunded to the consumers, the Tribunal cannot find that these deductions from the loan amounts are prohibited charges.
65. The applicant also claims that the provision in the credit agreements for storage fees of the assets amounts to prohibited charges. In none of the instances, however, were the assets retained by either of the respondents, and there is no evidence that storage fees were actually charged.
66. Under the circumstances, the Tribunal cannot find contraventions of section 100(1)(a) read with section 101(1) based on the facts discussed above.

Contraventions in relation to the enforcement of the credit agreements.

67. The second respondent repossessed both complainants' vehicles (Ms Khathi and Mr Moipatli). The applicant submits that the provisions of the NCA were not followed when the complainants' vehicles were repossessed.
68. In terms of section 129:
- “(1) If the consumer is in default under a credit agreement, the credit provider-*
- (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
 - (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before-
 - (i) first, providing notice to the consumer, as contemplated in paragraph (a), or section 86(10), as the case may be; and
 - (ii) (ii) meeting any further requirements set out in section 130.
 - (2) Subsection (1) does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order.
 - (3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.
 - (4) A credit provider may not re-instate or revive a credit agreement after-
 - (a) the sale of any property pursuant to-
 - (i) an attachment order; or
 - (ii) surrender of property in terms of section 127;
 - (b) the execution of any other court order enforcing that agreement; or
 - (c) the termination thereof in accordance with section 123.
69. In terms of section 129(5), the notice referred to in section 129 must be delivered to the consumer by registered mail or to a location designated by the consumer.
70. Section 130 is titled “Debt procedures in a Court,” and as its title suggests, it sets out the procedure for enforcing a debt.

71. In *Amardien v The Registrar of Deeds and Others*[15], the Constitutional Court explained the purpose of sections 129 and 130 as follows:

“[56] The purposes of section 129 of the NCA are as follows: (a) It brings to the attention of the consumer the default status of her credit agreement. (b) It provides the consumer with an opportunity to rectify the default status of the credit agreement in order to avoid legal action being instituted on the credit agreement or to regain possession of the asset subject to the credit agreement. (c) It is the only gateway for a credit provider to be able to institute legal action against a consumer who is in default under a credit agreement.

- [57] This section reveals that in the event of the consumer being in default of her repayments of the loan, the credit provider is obliged to draw the default to the attention of the consumer. It prescribes that the notice given to the consumer must be in writing and specifies what the notice must contain. The notice must propose the options available to the consumer who is in financial distress and unable to purge the default. It must point out that the consumer has the option to refer the credit agreement to a debt counsellor, dispute resolution agent, consumer court or ombudsman. The purpose of the referral must also be stated in the notice.
- [58] There are two statutory conditions which must be met before the credit provider may institute litigation under section 129. In peremptory terms, the section declares that legal proceedings to enforce the agreement may not commence before
- (a) providing notice to the consumer; and (b) meeting further requirements set out in section 130.
- [59] The reference to section 130 reveals a strong link between the two Provisions; hence they are required to be read together. When a credit provider seeks to enforce the agreement by means of litigation, it must first show compliance with section 130, which, by extension, refers back to section 129. The application of these sections is triggered by the consumer’s failure to repay the loan. These sections suspend the credit provider’s rights under the credit agreement until certain steps have been taken. The credit provider is not entitled to exercise its rights immediately under the agreement. It is first required to notify the consumer of the specific default and demand that the arrears be paid. If the consumer pays up the arrears, then the dispute is settled.”
72. As the respondents did not follow the requisites of sections 129 and 130, it contravened these sections by repossessing the vehicles of the two complainants.

THE SANCTIONS

73. Before dealing with the sanctions proposed by the applicant to be imposed on the respondents, it is necessary to refer to the purpose of the NCA, which is set out in section 3. Amongst others, the purpose is to promote fair business practices and to protect consumers from unconscionable, unfair, or otherwise improper trade practices and deceptive, misleading, unfair or fraudulent conduct[16]. To realise the purpose of the NCA, section 4(2)(b) requires the Tribunal to promote the spirit and purpose of the NCA and to make

appropriate orders to give practical effect to consumers' right of access to redress, including but not limited to any order provided for in the NCA and any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of the NCA.

74. The applicant asks for declarators that the respondents acted jointly in contravening provisions of the NCA and regulations and that they entered into secured loan agreements with consumers. These have been discussed above, and the Tribunal agrees that such orders are appropriate.
75. The applicant further asks for an order that the respondents contravened various sections of the NCA and regulations as discussed above. The extent to which these sections and regulations have been contravened, the Tribunal agrees that such contraventions should be declared prohibited conduct in terms of section 150(a).
76. The Tribunal agrees that the respondents should be interdicted from entering into any credit agreements whilst they remain unregistered as credit providers and from engaging in any further activities as credit providers as requested by the applicant.
77. Since there were no assessments made in terms of section 81(2) at the time that when the credit agreements contained in Annexure A, D1 to D10 and FA8 were made, these agreements should be declared reckless in terms of section 80(1) and the Tribunal is of the view that the consumers' rights and obligations under them should be set aside in terms of section 83(2)(a). The Tribunal also agrees with the applicant's request that the cost of credit should be refunded to the consumers concerned. Furthermore, all vehicles or assets which are the subject matters of these agreements that have been repossessed must be returned to the consumers. Where the vehicles or assets have been sold, the consumers concerned may apply for a certificate from the Chairperson of the Tribunal in terms of section 164(3)(b), which will serve as conclusive proof of its contents in the event of the consumers commencing actions against the respondents in a civil court for damages.
78. The applicant also asks for an order that the respondents, at their costs, appoint an auditor to identify and establish, amongst others, all credit agreements which the respondent entered into in the past three years, with the names and details of the consumers who entered into such agreements, the loan amounts and the total amounts paid by the consumers, the vehicles that the respondents may have repossessed and those that may have been disposed of by the latter. Once the auditor has compiled its report, the applicant requests that respondents be ordered to return the repossessed vehicles with their registration documentation and attend to the transfer of ownership back to the consumers

and where the vehicles have been disposed of, that the respondents must pay the difference between gross proceeds from the sale of the vehicle and the loan amount advanced by the respondents. The respondents are also to refund the consumers all amounts over and above the loan amounts they paid to the respondents. The Tribunal is of the view that the order to these effects is overly broad, and the findings of the auditor should rather be subject to scrutiny instead of having the status akin to an order. The Tribunal is of the view, therefore, that the auditor should prepare a report as suggested, and the applicant should approach the Tribunal with the findings and ask for further relief based on such findings.

79. Lastly, the applicants request that an administrative fine be imposed on the respondents. This will be discussed under a separate heading below.

ADMINISTRATIVE FINE

80. A vital purpose of the NCA is to promote responsible credit granting and to prevent and prohibit reckless and unlawful credit granting. The nature of the respondents' contraventions of the provisions of the NCA and regulations are in total disregard for these purposes and in flagrant disdain for the rights of consumers. In these circumstances, the Tribunal has a duty to exercise its powers by sending a clear and strong message to the credit industry that such conduct will not be permitted. Section 151(1) empowers the Tribunal to impose an administrative fine in respect of conduct prohibited by the NCA. Such fine may not exceed the greater of 10% of the respondent's annual turnover during the preceding financial year of R1 000 000.00. The Tribunal finds that the imposition of an administrative fine on the respondents is appropriate in the circumstances of this matter. Section 151(3) outlines the factors the Tribunal must consider when determining an appropriate fine. These are listed and discussed under separate sub-headings below.

- a. The nature, duration, gravity and extent of the contraventions.

As submitted by the applicant, the respondents repeatedly contravened various provisions of the NCA and regulations, as is evident from all the sampled files, while not being registered as providers. They acted unlawfully in taking enforcement actions against consumers by repossessing their vehicles or assets, which goes against the purpose of the NCA.

- b. The loss or damages suffered as a result of the contraventions.

Consumers have suffered considerable losses as a result of the respondents' conduct. Various consumers lost their vehicles.

- c. The behaviour of the respondent.

The respondents' structure of the agreements with consumers circumvented provisions of the NCA. The first respondent advertised its services as pawnbrokers, but in practice, it made consumers sign agreements, the terms of which the consumers purportedly sold their vehicles to the first respondent.

- d. The market circumstances in which the contraventions took place.

The respondents' target market is people who find themselves in financial difficulties. The respondents took advantage of these consumers' desperation. Evidently, the consumers had no intention of departing with their vehicles, but many lost their vehicles due to the respondents' unlawful activities.

- e. The level of profit derived from the contraventions

Although the level of profit derived by the respondents from the unlawful activities cannot be accurately determined, it must have been substantial.

- f. The degree to which the respondent co-operated with the NCR

The respondents co-operated with the applicant during the investigation but chose not to participate in the Tribunal's proceedings.

- g. Whether the respondent has previously been found in contravention of the NCA.

There is no evidence that the respondents have previously been found in contravention of the provisions of the NCA.

81. Having considered the above factors, the Tribunal considers an administrative fine of R400 000 against each respondent appropriate.

THE ORDER

82. In the result of the above, the following order is made:

82.1. It is declared that the agreements entered into with the consumers in annexures A and D1 to D10 to the investigation report attached to the founding affidavit and FA8 to the founding affidavit are secured loan agreements as defined in section 1 of the NCA.

82.2. It is declared that the respondents acted jointly in contravening the provisions of the NCA and regulations as outlined in the orders below unless otherwise stated.

82.3. It is declared that the respondents repeatedly contravened:

82.3.1.

Sections 40(1) and 40(3) read with section 89(2)(d).

82.3.2.

Section 76(3) with respect to the first respondent.

82.3.3.

Section 81(2)(a)(ii), read with regulations 23A(12)(b) and 23A(13).

82.3.4.

Section 81(2)(a)(iii), read with regulations 23A(3) and 23A(12)(c).

82.3.5.

Regulations 23A(9) and 23A(10).

82.3.6.

Regulations 23A(8) and 23A(12)(a).

82.3.7.

Section 92(2) read with regulation 29.

82.3.8.

Section 101(1)(d) read with regulations 23A(14) and 42.

82.3.9.

Sections 93(1) and 93(3), read with regulation 31.

82.3.10. Section 100(1)(c), read with section 101(1)(d), and further read with regulations 42(1) and 40(2)(a).

82.3.11. Sections 129 and 130.

82.4. In terms of section 150(a), the contraventions in the preceding paragraph are hereby declared prohibited conduct.

82.5. The respondents are interdicted from entering into credit agreements with consumers while remaining unregistered as credit providers.

82.6. The agreements entered into with the consumers in annexures A and D1 to D10 to the investigation report attached to the founding affidavit and FA8 to the founding affidavit are declared to have been recklessly extended in terms of section 80(1)(a) and the consumers' rights and obligations under these agreements are set aside in terms of section 83(2)(a).

82.7. The respondents are ordered to jointly and severally refund the cost of credit, and any additional amounts paid to them by the consumers above the initial loan amounts in relation to the consumers in annexures A and D1 to D10 to the inspection report attached to the founding affidavit and FA8 to the founding affidavit.

82.8. The respondents must return the vehicles of the consumers in annexures A and D1 to D10 to the inspection report attached to the founding affidavit and FA8 to the founding affidavit within five days of the issuance of this order. Where the vehicles have been sold, the consumers concerned may apply for a certificate from the Chairperson of the Tribunal and claim damages from the respondents.

82.9. Within one month of the issuance of this order, the respondents shall appoint an independent auditor, who is a chartered accountant, as approved in writing by the applicant, at their costs to identify, establish and report on:

82.9.1.

All credit agreements entered into by the respondents in the last three years preceding the issuance of this order, with the names and contact details of the consumers involved.

82.9.2.

The loan amounts advanced under such agreements and the total amounts paid by each consumer to the respondents under such agreements.

82.9.3.

The details of the vehicles the respondents have taken ownership of under such agreements.

82.9.4.

The details of the vehicles the respondent repossessed under such agreements, the details of the vehicles still in their possession, the details of the vehicles thus disposed of, and the values received following such disposals.

82.10. The auditor shall complete the report and submit it to the applicant within four months of the issuance of this order.

82.11. The first and second respondents shall each pay administrative fines of R400 000.00 (four hundred thousand rand) into the bank account of the National Revenue Fund, the details of which are as follows:

Bank: Nedbank

Account holder: Department of Trade, Industry and Competition Branch name:

Telecoms and Fiscal

Branch code: 1[...]

Account number: 1[...]

Reference: N[...]and name of the person or business making the payment.

82.12. There is no order as to costs.

S Hockey (Presiding Tribunal member)

Tribunal members Dr A Potwana and Ms P Manzi-Ntshingila concur

[1] The parties were notified that the hearing would take place via the Microsoft Teams virtual platform and were provided with the

necessary meeting invitation to log in.

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

[3] GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters

before the National Consumer Tribunal, 2007 (Government Gazette No. 30225).

[4] See *S v Thebus and Another* [2003] ZACC 12; 2003 (6) SA 505 (CC) at para 18.

[5] *Ibid* at para 19.

[6] 1917 AD 41.

[7] In terms of section 99(1)(b), for example, a credit who enters into a pawn transaction with a consumer must retain until the end of the credit agreement, and at the risk of the credit provider, any property of the consumer that is delivered to the credit provider as security under the credit agreement.

[8] 2013

(4) SA 579 (SCA).

[9] 1917 AD 41.

[10] *Cipla* at para [39].

[11] (16949/2021)

[2022] ZAGPJHC 210; 2022 BIP 450 (GJ) (1 April 2022).

[12] *Ibid* at para [40].

[13] Section 89(2)(d) provides that a credit agreement is unlawful if the credit provider was unregistered when it was made and the NCA required it to be registered.

[14] Tribunal case number NCT/140518/140(1).

[15] [2018] ZACC, at para 56.

[16] Section 3(1)(d).

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