

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Veloz Cash Loans (Pty) Ltd (NCT/214107/2022/57(1)) [2022] ZANCT 17 (12 March 2022)

[2022] ZANCT 17

COURT

National Consumer Tribunal

BEFORE

P A Beck, M Peenze, F Sibanda

CASE / FILE NUMBER

NCT/214107/2022/57(1)

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IN THE NATIONAL CONSUMER

TRIBUNAL

HELD AT CENTURION

Case number: NCT/214107/2022/57(1)

In the matter between: NATIONAL
CREDIT
REGULATOR
APPLICANT
and
VELOZ
CASH LOANS (PTY)
LTD
RESPONDENT
(Registration Number:
2015/357080/07)
(NCR Registration
Number: NCRCP10081)

Coram: Ms P A Beck - Presiding
member
Dr
M Peenze - Tribunal member
Mr F Sibanda - Tribunal
member
Date of hearing - 8 March
2022
Date of judgment -12
March 2022
The hearing was held via
the Microsoft on-line platform

JUDGMENT

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. Ms Lee-Anne Schwartz, who is an employee of the applicant, represented the applicant at the hearing.

RESPONDENT

3. The respondent is Veloz Cash Loans (Pty) Ltd (“the respondent”), a private company with limited liability that is duly incorporated and registered in terms of the company laws of the Republic of South Africa.
4. The respondent is registered with the applicant as a credit provider in terms of section 40 of the Act with registration number NCRCP 10081. Its registered business address is suite 310, Bank Tower Building, 190 Thabo Sehume Street, Pretoria Central, 0002.
5. The respondent did not oppose this application. It also failed to formerly place itself on record.

JURISDICTION

6. Section 150 of the Act empowers the Tribunal to make orders in relation to a registrant who contravenes the Act or fails to comply with a condition of its registration as a credit provider. More specifically, section 150 gives the Tribunal the power to make an appropriate order in relation to prohibited or required conduct in terms of the Act or the Consumer Protection Act, 2008. This power includes declaring conduct to be prohibited in terms of the Act and imposing an administrative fine in terms of section 151 with or without making an additional order in terms of section 150 of the Act.

7. A section in this judgment refers to a section in the Act.

ISSUES TO BE DECIDED

8. The Tribunal is required to determine whether the respondent engaged in prohibited conduct by having repeatedly contravened the provisions of the Act and Regulations; and whether to impose an administrative fine on the respondent.
9. The allegations of prohibited conduct will become apparent in the course of this judgment.

RESPONDENT'S FAILURE TO OPPOSE THIS APPLICATION

10. On or about 14 December 2021, the applicant served this application on the Tribunal. On 13 December 2021 the applicant sent the application to the respondent's registered address, Suite 310, Bank Tower Building, 190 Thabo Sehume Street, Pretoria Central, 0002, being the registered address of the respondent per the Applicant's records; and to the respondent's postal address, 36 Wolmarans

Street, King Ransom Flat, Joubert Park, Gauteng, 2001 being the address on the respondent's CIPC Certificate.

11. As per the track and trace reports submitted to the Tribunal by the applicant, first notifications of the parcels containing the application were sent out to the respondent on 28 December 2021 to the respondent's postal address; and on 4 January 2022 to the respondent's physical address. The applicant further, on or about 28 February 2022, submitted an email to the respondent wherein it enquired as to the respondent's intentions with the application; and wherein it informed the respondent of the date of the set down of the application.
12. Rule 30(1) of the Tribunal Rules stipulates that a document may be served on a party by delivering it to the party, or by sending it by registered mail to the party's last known address. The applicant submits per the track and trace reports, received in terms of both the registered physical and postal address of the respondent that the application was served in accordance with

Rule 30(1) of the Tribunal Rules and that the applicant acted in accordance with its requirements.

13. In the matter *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) the Constitutional Court held that: "the party is obliged to show that the notice actually reached the correct post office". The aforesaid approach was confirmed in *Nedbank Ltd v Binneman* 2012 (5) SA 569 (WCC) where Griesel J, was satisfied when a Section 129 notice was sent by registered post to the mortgaged property and that it actually reached the appropriate post office and accordingly held that the plaintiff had duly provided notice to the consumer as required and the risk of non-receipt therefore rested squarely with the defendant.

14. The applicant submitted therefore that it is clear from the track and trace results that the application reached the correct post office and the first notifications were sent to the Respondent.
15. On 3 January 2022 the office of the registrar of the Tribunal (“the registrar”) issued a notice of filing.
16. That notice records that the respondent may oppose the application by serving an answer within 15 business days of receipt of the application.
17. On 28 January 2022, the registrar issued a notice setting this application down for hearing on 8 March 2022. The registrar sent the notice by email to the applicant at RStocker@ncr.org.za litigation@ncr.org.za; LSchwartz@ncr.org.za; MVarakia@ncr.org.za; to the respondent at Nmatsandze@gmail.com; and to the respondent via registered post at address Suite 310, Bank Tower Building, 190 Thabo Sehume Street, Pretoria Central, 0002. This is the postal address that appears in the respondent’s

conditions of registration.

18. Rule 13(5) of the Tribunal Rules stipulates that any fact or allegation not specifically admitted or denied within an answering affidavit is deemed admitted. Rule 24(1)(b) of the Tribunal Rules empowers the Tribunal to continue with the proceedings in the absence of the respondent or adjourn the hearing if the respondent fails to attend or is unrepresented at the hearing. Section 142 of the Act requires the Tribunal to conduct its hearings as expeditiously as possible and in accordance with the principles of natural justice.
19. The matter at hand proceeded on a default basis as no opposition was received from the Respondent to date and sufficient notice was provided to the respondent in accordance with the Rules.
20. The Tribunal was satisfied that the sequence of events showed that:
 - 20.1 the applicant served the application papers in this application on the respondent at the respondent's chosen postal address as per its conditions of registration;
 - 20.2 the registrar notified the respondent that it had 15 days from the date of receiving the application papers to file an answering affidavit and it did not do so; and
 - 20.3 the applicant at the hearing handed up the track and trace reports from the Post Office, which confirmed that the respondent received the first notification of the registered mail and, in some instances, collected the application from the Post Office. The Track and Trace report shows that the first notification was sent to the address of the respondent at address Suite 310, Bank Tower Building, 190 Thabo Sehume Street, Pretoria Central, 0002.

21. The Tribunal is satisfied that the postal address that the first notification was sent to; and that the confirmation that the application was collected are the same as the conditions of registration of the respondent. Therefore, this would meet the requirements as set out in the Sebola matter and the service requirements as set out in Rule 30(1)(b).
22. Despite these attempts to give the respondent an opportunity to answer the serious allegations the applicant makes against the respondent, the respondent elected to remain silent, and did not place itself on record to oppose the application or file an answering affidavit to place its version or defence, if any, before the Tribunal.
23. However, on the day of the hearing the respondent appeared on the Microsoft on-line platform at approximately 11h51 mid-way through the applicant's submissions. Due to the respondent not having opposed the matter or formerly place itself on record, the respondent was not recognised as a party, the Tribunal proceeded to hear this application by default because the respondent was not on record. The Tribunal however permitted the respondent to remain in attendance of the hearing.

BACKGROUND

24. During July 2020 the applicant's compliance department conducted a compliance monitoring exercise on the respondent in accordance with its functions in terms of section 15(c) of the Act.
25. During the exercise, a few credit agreements as requested by the applicant and provided by the respondent were assessed. The assessment conducted revealed the following contraventions of the act being inter alia-
 - 25.1 non-compliance with the cost of credit in contravention of section 101 of the Act in that the respondent charged interest and service fees in excess of the prescribed maximum amounts;
 - 25.2 non-compliance with reckless lending provisions of the Act in that the respondent failed to conduct proper affordability assessments; and
 - 25.3 non-compliance with statutory reporting in that the respondent failed to submit its annual financial reports and returns within the prescribed time periods.
26. The aforesaid identified contraventions raised serious concerns regarding the business practices of the respondent; and that the respondent is conducting its business and extending credit in a manner that is not in accordance with the provisions of the Act and its Regulations.
27. On or about 25 November 2020, the applicant initiated a complaint against the respondent in terms of section 136(2) of the Act and authorised an investigation into the business practices of the respondent in terms of section 139(1)(c) of the Act.

28. On 4 May 2021 the Chief Executive Office of the respondent appointed inspector Thembinkosi Sabela (“Sabela”) in terms of section 25 of the Act to investigate the respondent's business activities.
29. In accordance with the Covid-19 Regulations the investigation was conducted remotely as agreed with the respondent. On 7 May 2021, a virtual interview was held between Sabela and Matsandze Solomon Ngomana (“Ngomana”) who identified himself as the managing director of the respondent. Ngomana upon request of Sabela provided Sabela with ten (10) sample consumer files for assessment by Sabela. The inspector concluded that

the respondent had repeatedly contravened provisions in the Act and Regulations and thereby committed conduct that is prohibited in terms of the Act. Sabela compiled an investigation report (“the investigation report,”) which the Sabela and Ngomana signed. The investigation report details the alleged

contraventions of the respondent. Ten (10) sample files are annexed to the investigation report to support the conclusions in the report marked as annexures “H1” to “H 10,” respectively.

APPLICANT'S FOUNDING AFFIDAVIT

30. The applicant's Anne-Carien Du Plooy, who is employed as acting manageress of the applicant's Investigations and Enforcement Department, submitted that the respondent has repeatedly failed to conduct its business in a manner that is consistent with the purpose and requirements of the Act and Regulations. In that regard, the applicant asserts that the respondent has exhibited serious contraventions of the NCA, as is fully set out in the investigation report.
31. The Tribunal proceeded to consider the contraventions that are alleged in the investigation report.

CONTRAVENTIONS OF THE ACT

Affordability assessments

The Act

32. Section 81 deals with the prevention of reckless credit. Section 81(2)(a)(ii) and (iii) read together with Regulation 23A of the National Credit Regulations 2006[1], provides that a credit provider may not enter into a credit agreement without first taking reasonable steps to assess the proposed consumer's debt repayment history as a consumer under credit agreements; and the proposed consumer's existing financial means, prospects, and obligations. Should the respondent fail to do so, the credit agreement entered into is deemed reckless. Regulation 23A sets out the criteria to conduct an affordability assessment. The Tribunal is aware of Regulation 23A (4) being set aside by the High Court in March 2018[2] in the Truworths matter.
33. A reference to a Regulation in this judgment refers to the National Credit Regulations, 2006.

Alleged contraventions

34. The applicant alleges that the respondent failed to conduct proper affordability assessments in all the sample files before granting credit to the consumers. There is further no indication of the criteria or mechanism the respondent used to conduct affordability assessments before approving credit to consumers because there is no evidence that:

34.1 the respondent obtained credit bureau reports of consumers prior to entering into credit agreements with the consumers. Thus the respondent failed to assess the consumers' debt repayment history. This is evident in all the sampled files annexed to the investigation report and marked as annexures "H1" to "H10." This failure means that the respondent did not have regard to amongst other things, open loans, adverse credit records and/or arrear statuses of accounts that could assist in assessing a consumer's affordability;

34.2 the respondent failed to obtain current salary advices and/or proof of income of the consumers in the sampled files marked as annexures "H2", "H3", "H5", "H6", "H7" and "H10" annexed to the investigation report. Where salary advices were obtained, they were outdated and would not enable the respondent to determine the true financial position of the consumers at the time of extending credit to the consumers. By way of example, in annexure "H2" the loan was extended on 1 February 2020 and/or the 25th of February 2020, (date not clear) yet the salary advice is dated 25 October 2018. The income of the consumer could also not be determined from the outdated bank statements because the bank statements were obtained on 29 October 2018. In annexure "H3" the loan was extended on 1 April 2021, yet the salary advice obtained is that of September 2018. In Annexure "H6" the loan was extended on the 1 April 2021, yet the salary advices of this consumer are for the months of July, August and September 2020, which is four months prior to the current loan. In annexure "H7" there were no salary advices obtained from or provided by the consumer. The respondent was accordingly not in a position to verify, validate or establish any of the consumers' monthly income;

34.3 the respondent also failed to obtain current bank statements of the consumers in the sampled files marked as annexures "H1", "H2", "H3", "H5", "H6", "H7" and "H10" annexed to the investigation report. Therefore, the Respondent could not have verified, validated or established the income or expenses of consumers in order to determine the current financial position of the consumers at the time of extending credit to the consumers. It is evident that the bank statements that were obtained by the respondent were obtained as a mere tick box exercise and not for assessment purposes. Examples of such conduct is detailed below:

34.3.1 in annexure "H1," the credit agreement was entered into with the consumer on 27 January 2021 and the bank statement is dated 13 May 2021, which date is post the date the loan was entered into;

34.3.2 in annexure "H2," the credit agreement was entered into with the consumer on 25 February 2020. The bank statement is dated 23 July 2018 to 23 August 2018 and was obtained in October 2018, which dates are approximately two years prior to the loan in question;

34.3.3 in annexure “H6,” the credit agreement was entered into with the consumer on 1 April 2021 and the bank statement is for the period November 2020 to December 2020, which dates are approximately four months prior to the loan in question;

34.3.4 in annexure “H7,” the credit agreement was entered into with the consumer on the 26 February 2021 and the bank statement was obtained on 20 May 2021, which is approximately three months after the loan was entered into; and

34.3.5 in annexure “H10,” the credit agreement was entered into with the consumer on 3 May 2021. The bank statement obtained on 1 May 2021 is incomplete and only contains entries for March 2021.

34.4 if regard is had to the respondent’s attempt at an affordability assessment, being the document entitled “Client Budget,” it is evident that the respondent in fact did not conduct affordability assessments at the time of entering into the credit agreements with consumers. In this regard reference is made to specifically Annexures “H1”, “H3”, “H4” and “H5” annexed to the investigation report where the affordability assessments were created and/or signed and/or dated either years prior to or after the credit agreements were entered into. Examples of such conduct are as follows:

34.4.1 in annexure “H1,” the affordability assessment is unsigned and undated; was only created on 18 February 2021, which date is after the credit agreement was entered into on 27 January 2021;

34.4.2 in annexure “H3,” the affordability assessment is signed and dated on 15 December 2018 whereas the credit agreement was entered into on 1 March 2021. The respondent therefore could not have conducted an affordability assessment for the loan extended to the consumer on 1 March 2021;

34.4.3 in annexure “H4,” the affordability assessment is signed and dated 19 January 2020 whereas the credit agreement was entered into with the consumer on 19 January

2021. The respondent therefore could not have conducted an affordability assessment for the loan extended to the consumer on 19 January 2021; and

Analysis

34.4.4 in annexure “H5,” the affordability assessment is signed and dated 25 August 2019 whereas the credit agreement was entered into with the consumer on 25 August

2020. The respondent therefore did not conduct an affordability assessment for the loan extended to the consumer on 25 August 2020.

35. The Tribunal is satisfied that the respondent contravened section 80(1)(a); 81(2)(a)(ii) and (iii); section 81(3) read with regulation 23A(3);(8);(12)(a);(b);(c); and 23A(13); because there is no evidence before the Tribunal that the respondent calculated the consumers' discretionary income, nor that the respondent considered the consumers' debt repayment

obligations under other credit agreements, if any, because there are no credit bureau reports in any of the sampled files. Moreover, there is no evidence before the Tribunal that the respondent utilised the minimum expense norms table to calculate the consumer's existing financial obligations. There was further no evidence of any current payslips and bank statements on any of the consumer files.

Entering into reckless credit agreements with consumers

36. Section 80 deals with reckless credit. Section 80(1)(a) provides that a credit agreement is deemed to be reckless if, at the time that the agreement was entered into, the credit provider failed to conduct an assessment in accordance with section 81(2) irrespective of what the outcome of the assessment might have been at the time. Section 81(3) specifically prohibits a credit provider from entering into a reckless credit agreement with a prospective consumer. Section 81(3), read with section 80(1)(b)(ii), provides that a credit agreement is reckless if the credit provider, having conducted an assessment entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that entering into that credit agreement would make the consumer over-indebted.

Alleged contravention

37. The applicant alleges that the respondent's failure to conduct proper affordability assessments means that the respondent entered into reckless credit agreements with consumers. In addition, in instances whereby the respondent obtained payslips and bank statements, the information was outdated.
38. The Tribunal is satisfied that the respondent contravened section 80(1)(a) read with section 81(3) because the respondent failed to conduct proper affordability assessments. Due to such failure the respondent has repeatedly entered into reckless credit agreements with consumers and repeatedly contravened section 81(3) of the Act.

Failure to retain and maintain records of documentation

39. The applicant abandoned this contravention at the hearing.

Failure to issue pre-agreement statements and quotations and credit agreements in the prescribed form

40. Section 92 deals with pre-agreement disclosures. Section 92(1) prohibits a credit provider from entering into a small credit agreement unless the credit provider has given the consumer a pre-agreement statement and quotation in the prescribed form. Regulation 28(1)(b) requires the pre-agreement statement and quotation to be in the format set out in Form 20 of the Regulations.

41. The applicant alleges that the respondent entered into credit agreements without giving the consumers pre-agreement statements and quotations in the prescribed form, being form 20. As is evident in the sampled files marked as annexures “H1” to “H10” to the investigation report, the respondent’s pre-agreement statements and quotations are not in the prescribed form, being Form 20.1, in that the following critical information is lacking:
- 41.1 the respondent’s registration number with the applicant as is evident in annexures “H2,” “H4,” “H5,” and “H7”;
- 41.2 the consumer’s contact details as is evident in annexures “H5,” “H8,” “H9” and “H10”;
- 41.3 the consumer’s physical address as is evident in annexures “H1,” “H3,” “H5,” “H6,” “H7,” “H8,” “H9” and “H10”;
- 41.4 the correct date the agreement was entered as is evident in annexures “H2” and “H7”;
- 41.5 the first and last day repayment date incorrectly captured in annexures “H1” and “H7.”
42. The respondent has further captured the pre-agreement statement and quotation within one document, which is not in the prescribed form being form 20.2. This is in contravention of section 93(2) read with regulation 30(1) and form 20.2 of the Act.
43. The respondent’s conduct as detailed above contravenes section 92(1) read with Regulation 28(1) and Form 20.1 of the Act. Consequently, the Tribunal is satisfied that the respondent contravened section 92(1) read together with regulation 28(1). The respondent’s credit agreements are for the reasons above furthermore not in the prescribed form, being Form 20.2 in contravention of Section 93(2) read with Regulation 30(1) and Form 20.2 of the Act.

Cost of credit: overcharging on interest charges and prohibited charges

44. Section 100 deals with prohibited charges. Section 100(1) stipulates that a credit provider must not charge an amount to, or impose a monetary liability on the consumer in respect of 100(1)(b) an amount of a fee or charge exceeding the amount that may be charged consistent with the Act. Section 101(1) prescribes the cost of credit which a credit provider may charge in respect of a credit agreement. Section 100(1)(c) prohibits a credit provider from charging a consumer an amount or imposing a monetary liability that exceeds the amount consistent with the Act. In addition, section 101(1)(d)(ii) prohibits a credit provider from requiring the consumer to pay any money or other consideration, except interest which must not exceed the applicable maximum prescribed rate determined in terms of section
105. Regulation 42(1) states that the maximum interest rate for short-term credit agreements is 5% and 3% interest for subsequent loans extended in the same calendar year.

Overcharging on interest

45. The applicant alleges that the respondent charged consumers interest that exceeded the prescribed maximum limit in the Act.

46. The evidence before the Tribunal is that in certain of the sampled files, it was found that the respondent charged an amount of interest on its credit agreements, which amount exceeded the maximum prescribed amount permitted in terms of the Act. The evidence of the overcharge can be found in Annexures “H2,” “H4,” “H5,” “H6,” “H7”

and “H10” annexed to the investigation report. Examples of such overcharge are as follows:

46.1 in annexure “H2” depending on whether the credit agreement was entered into on the 1 February 2021 or the 25 February 2021 (date not clear in the credit agreement) with the repayment date being 26 February 2021, the respondent overcharged interest. The maximum prescribed amount of interest at a rate of 3% amounts to R50.08 (should the agreement have been entered into on the 1 February 2021) or R2.00 (if the agreement was entered into on 25 February 2021). The respondent however charged interest of R51.75 which is an overcharge of either R49.75 or R1.67;

46.2 in annexure “H4” for example the maximum prescribed amount of interest at a rate of 3% amounts to R4.40. The respondent however charged R12.04 for interest, which equates to an overcharge of R7.64. The respondent further appears to have no regard for the number of days the loan was extended over and as such its calculations are flawed;

46.3 in annexure “H5” the maximum prescribed amount of interest at a rate of 3% amounts to R2.40. The respondent however charged R36.64, which equates to an overcharge of R34.24. The respondent again had no regard to the number of days the loan was extended over and as such its calculations are flawed; and

46.4 in annexure “H6” for example the maximum prescribed amount of interest at a rate of 3% amounts to R28.60. The respondent however charged interest of R39.60, which equates to an overcharge of R11.00. The respondent appears once more to have no regard for the number of days the loan was extended over and as such its calculations are flawed.

47. Accordingly, the Tribunal is satisfied that the respondent contravened section 100(1)(b); section 101(1)(d)(ii) read further with regulation 40 and regulation 42(1) of the Act. The Tribunal is further satisfied that the respondent in failing to disclose the aforementioned costs within its pre-agreement statement and quotation, contravened regulation 23A(15) of the Act.

Prohibited charges Alleged contravention

48. The evidence of this contravention is that in the “Authority and Mandate Payment Instructions document” in the sampled file annexed as annexure “H1” the respondent charged a repayment amount of R1 510.00 in respect of the loan. However, the repayment amount in the credit agreement is stipulated as R517.51. There is therefore a difference of R92.49, which amount is unaccounted for and undisclosed. It is therefore deemed a monetary liability on the consumer which is prohibited; and which exceeds the maximum allowed fees as set forth in the Act.

49. Furthermore, the document titled “Paymyaccount Note” referenced to annexure “H1,” the respondent charged a repayment amount of R521.38 in respect of the loan whereas the repayment amount on the credit agreement is stipulated as R517.51. There is therefore a difference of R3.87, which amount is unaccounted for and undisclosed. It is therefore deemed a monetary liability on the consumer which is prohibited and which exceeds the maximum allowed fees as set forth within the Act
50. The applicant submitted that the unaccounted charges as set forth herein above are prohibited charges because it is not a listed cost of credit.
51. The Tribunal is satisfied that the respondent, in failing to disclose the mentioned costs within its pre-agreement statement and quotation contravened section 100(1)(b); and section 101(1) of the Act. The Tribunal is further satisfied that the respondent in failing to disclose the aforementioned costs in its pre-agreement statement and quotation, contravened regulation 23A(15) of the Act.

Unlawful Provisions

52. Section 90(1) of the Act stipulates that a credit agreement must not include an unlawful provision. Section 90(2)(b)(iii) of the Act provides that a provision of a credit agreement is unlawful if it directly or indirectly purports to set aside or override the effect of any provision of the Act. Section 90(2)(f) provides that a provision in a credit agreement is unlawful if it requires a consumer to enter into a supplementary agreement, or sign a document, prohibited by section 91.

The contravention

53. In all the sampled files annexed as annexures “H1” to “H10” in the founding affidavit of the applicant, the respondent’s credit agreements contain a provision (“clause 5”) which stipulates that the document titled “Authority and Mandate for Payment Instructions” constitutes a separate agreement from the loan agreement and authorises additional charges to a third party, at the cost of the consumer. The aforesaid provision is not permitted in terms of the Act. It contradicts the provisions of Section 101, pertaining to the maximum prescribed cost of credit that can be charged in respect of a credit agreement; and further requires consumers’ to enter into supplementary agreements or to sign a document prohibited by section 91 of the Act. The respondent’s conduct is thus in contravention of section 90(2)(b)(iii) and 90(2)(f) of the Act.
54. On the basis of the respondents own credit documentation the respondent requires the consumer to enter into a separate agreement which agreement constitutes a supplementary agreement. Thus, by including undisclosed costs and/or costs of credit not allowed in terms of the Act within the supplementary agreement the agreement itself contains a provision that would be unlawful if it were included in a credit agreement. The same can be said for the “PayMyAccount Note” in annexure “H1” which allows amounts of R0.00 to R9 to be charged as SASSA deductions. Thus the applicant submits the respondent contravened

section 91(2) read with section 90(1) read further with section 90(2)(b)(ii) and section 101(1) of the Act.

55. The respondent's credit agreement further includes a provision at clause 7 (evident in annexure "H3") which requires the consumer to consent in advance to certain charges of fees and scales within which these fees will be charged, prior to even defaulting on the credit agreement. Clause 7 is unlawful in that it expresses, on behalf of the consumer, consent to a pre-determined value of costs relating to the enforcement of the agreement and expresses consent to legal costs for enforcing the credit agreement on an attorney and client scale. This is a pre-determination value of costs is in contravention of Section 90(1) read with Section 90(2)(k)(iv) of the Act.
56. It is further evident in all the sampled files annexed as annexures "H1" to "H10" to the investigation report that the respondent's credit agreements contain a further provision at clause 22 (as evident in annexure "H3") which allows the respondent to provide the consumers' personal information to debt counsellors in the event of a default in payment. Clause 22 is unlawful in that it deprives the consumers of their right to choose whether or not they wish to register for debt review.
57. Further, such a clause override section 86(1) of the Act, which affords a consumer the option to approach a debt counsellor to apply for debt review to be declared over-indebted. It is the consumers' themselves who must personally contact a debt counsellor and not for the credit provider to source the debt counsellor or engage the debt counsellor prior to any applications being made by the consumer. The respondent cannot simply decide that because a consumer has defaulted in payments, that consumer is over-indebted and thus has to be handed over to a debt counsellor, by the respondent.
58. Accordingly, the Tribunal is satisfied that the respondent has contravened section 90(1) read with Section 90(2)(b)(iii) and 90(2)(f) of the Act; section 91(2) read with Section 90(1); read further with Section 90(2)(b)(iii) and Section 101(1) of the Act; section 90(1) read with section 90(2)(k)(iv) of the Act; 90(1) read with section 90(2)(b)(i) and (iii); and read further with section 86(1) of the Act.

Annual Financial Operational Returns

59. Section 52(5)(c) of the Act provides that a registrant must comply with the conditions of registration and the provisions of the National Credit Act. Regulation 62 of the Act obliges each credit provider to submit to the National Credit Regulator its Statistical Returns and Annual Financial and Operational Returns.

Regulation 66 of the Act further provides that the Annual Financial and Operational Return in Form 40 must be submitted to the National Credit Regulator within 6 months after the registered credit provider's financial year end. In terms of General Condition 3 of the respondent's Conditions of Registration, the respondent is required to submit prescribed reports and returns within the prescribed period.

60. The applicant submitted that the records of the applicant demonstrate that the respondent failed to submit a current and complete Annual Financial and Operational Report, Form 40 within the prescribed period or at all. The applicant placed on record that the respondent has submitted the completed Form 40 for 2020.
61. The Tribunal is satisfied that the respondent accordingly contravened Section 52(5)(c) and (f) of the Act read with General Condition 3 of the Conditions of Registration and Regulation 62(1)(c) and read further with Regulation 66 of the Act.

CONCLUSION

62. Consequently, the Tribunal is satisfied that the respondent engaged in prohibited conduct by contravening the sections referred to in the preceding paragraphs and has repeatedly contravened the Act and Regulations.
63. The Tribunal proceeds to consider an appropriate order.

CONSIDERATION OF AN APPROPRIATE ORDER

The applicant's requested orders

64. The applicant persisted with the requests for the orders set out in the Application except for the order pertaining to the contravention withdrawn at the hearing.

Administrative fine

65. The applicant requested the Tribunal to impose an administrative fine on the respondent. 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.
66. Section 151 (3) sets out the factors the Tribunal must consider when determining an appropriate fine. The Tribunal proceeds to consider each in turn.

The nature, duration, gravity, and extent of the contraventions

67. The respondent has been registered as a credit provider since
2018. The respondent failed to oppose this application and take the Tribunal into its confidence concerning the steps it may have taken to improve its business practices to bring it within the ambit of the Act. The respondent's contraventions are extremely serious and appear to go to the heart of the respondent's business practices. The investigation report reveals that the Respondent has repeatedly committed the following egregious contraventions: failing to conduct proper affordability assessments; failing to properly calculate discretionary

income of consumers; extending credit recklessly; overcharging costs of credit; charging prohibited fees; failing to provide pre-agreement statements and quotations and credit agreements in the prescribed form; and including unlawful provisions in its credit agreements. In all of the sampled files, the respondent contravened the Act. This illustrates the respondent's disregard for the Act. The respondent's failure to adhere to the Act indicates disregard for the rights of consumers and, ultimately, the industry within which the respondent conducts its business. The inaccurate information and supplementary documents containing additional and undisclosed expenses is an aggravating factor.

Loss or damage suffered as a result of the contraventions

68. The applicant did not place specific evidence before the Tribunal concerning the actual loss or damage suffered by consumers. 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 interest rates and prohibited fees. Consumers were exploited by the respondent, by entering into loan agreements with the respondent who failed to take proper and appropriate steps to assess a consumer's affordability. The damage to consumers' economic status is far reaching if s/he, as a result of over-indebtedness, applies for and is placed under debt review.
69. In the sampled files assessed the respondent charged costs of credit ("interest") which exceeded the maximum prescribed amounts permissible in terms of the Act. Evidence was presented of undisclosed fees and/or additional fees charged to consumers. The financial gain by the respondent and the prejudice and loss to consumers is clearly evident.

The respondent's behaviour

70. There exists no plausible reason for the respondent to have been unaware of the provisions of the Act and the statutory obligations imposed on it. The very fact that the respondent elected to become a registered credit provider is indicative that the respondent is and was aware of the prescripts of the Act. The respondent's behaviour is aggravated by failing to oppose this application.

Market circumstances under which the contraventions occurred

71. The applicant submitted that the market circumstances in which the contraventions occurred are in those in which consumers are not educated of their rights related to access to credit and are in dire need of financial assistance.

The level of profit derived from the contraventions

72. The applicant did not place specific evidence before the Tribunal concerning the level of profit the respondent derived from the contraventions. Nevertheless, it is reasonable for the Tribunal to conclude that the respondent derives significant profit from its business practices that contravene the Act because each loan extended recklessly is a profit gained by the Respondent. The overcharging of interest reflects additional profits gained by the respondent.

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

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

The respondent's prior contraventions

74. The Tribunal has also considered that the respondent has not previously been the subject of an investigation, nor have findings been made against the respondent.

The amount of the fine

75. At the hearing, the applicant submitted that the respondent has not submitted its Annual Financial Return Form 40 for the year 2021. However, subsequent to the investigation the respondent submitted its Form 40 for 2020 wherein the respondent's revenue is declared as R166 611.00 (one hundred and sixty six Rand, six hundred and eleven Rand.)
76. The preamble to the Act states that the Act was specifically introduced to, amongst other things, promote a fair and non-discriminatory marketplace for access to consumer credit; prohibit certain unfair credit and credit marketing practices; promote responsible credit granting and use, and prohibit reckless credit granting. It follows that protecting vulnerable consumers and ensuring that credit providers act fairly runs to the heart of the Act.
77. These considerations persuade the Tribunal that it is appropriate to impose an administrative fine of R100 000.00 (one hundred thousand Rand) on the respondent.

Appointment of an auditor

78. 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 that the respondent is at the very least charging excessive interest and unlawful charges. 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. In the Tribunal's view, it is therefore appropriate to appoint an independent auditor to assess the situation and establish the true facts. Section 83 provides for a Tribunal or a court to declare credit agreements to be reckless. Therefore, the applicant would need to consider the report by the auditor and bring the matter to the Tribunal for further consideration.

ORDER

79. Accordingly, the Tribunal makes the following order:

79.1 In terms of section 150(a) of the NCA, the respondent is declared to have engaged in prohibited conduct by repeatedly contravening the NCA, the regulations, and the conditions of its registration, and in particular, the respondent is found to have contravened the following provisions of the NCA:

- (a) Section 52(5)(c) read with General Condition 2 of the respondent's Conditions of Registration;
- (b) Section 81(2)(a)(ii) read with Regulation 23A(12)(b) and (13);
- (c) Section 81(2)(a)(iii) read with Regulation 23A(3) and 23A(12)(c);
- (d) Regulation 23A(8) read with Regulation 23A(12)(a);
- (e) Section 81(3) read with Section 80(1)(a);
- (f) Section 92(1) read with Regulation 28(1) and Form 20.1;
- (g) Section 93(2) read with Regulation 30(1) and Form 20.2;
- (h) Regulation 23A(15) of the Act;
- (i) Section 90(1) and Section 90(2)(b)(iii) read further with Section 90(2)(f);
- (j) Section 91(2) read with Section 90(1) and Section 90(2)(b)(iii) read with Section 101(1);
- (k) Section 90(1) read with Section 90(2)(k)(iv);
- (l) Section 90(1) read with Section 90(2)(b)(i) and (iii) read further together with Section 86(1) of the Act;
- (m) Section 100(1)(b) and Section 101(1)(d)(ii) read with Regulation 42(1);
- (n) Section 100(1)(b) read with Section 101(1); and
- (o) Section 52(5)(c) and (f) read with Condition 3 of the Conditions of Registration and Regulation 62(1)(c) read further with Regulation 66 of the Act.

79.2 The respondent's conduct as above is declared to be prohibited conduct in terms of section 150(a) of the NCA.

79.3 The respondent is found to have brought the consumer credit market into disrepute, further and is declared to have acted in disregard for consumer rights generally.

79.4 The respondent is interdicted from engaging in prohibited conduct in the future.

79.5 The respondent's credit agreements with consumers contained in Annexures "H1" to "H10" of the investigation report are declared reckless in terms of section 80(1) of the NCA and all the consumers' obligations under those agreements are set aside; and the respondent is interdicted from collecting on the agreements and/or taking any enforcement steps against the consumers in the event of default in respect of the sampled agreements.

79.6 The respondent is to pay an administrative fine of R100 000.00 (one hundred thousand Rand) into The National Revenue fund account details are as follows:

Bank: Standard Bank of South Africa

Account name: Department of Trade and Industry

Account number: [...]

Account type: Business current account

Branch code: 010645 (Sunnyside) Branch code for electronic payments:051001

Reference: NCT/214107/2022/57(1)(Name of depositor); and

79.7 The respondent must:

79.7.1 Within thirty (30) days of date of this order appoint an independent auditor at its own cost to conduct an audit on all credit agreements extended in the past three (3) years and to identify and establish:-

79.7.1.1 the names and contact details of all consumers who entered into credit agreements where the respondent failed to conduct affordability assessments at the time of the loan and in accordance with Section 81(2) and Regulation 23A of the Act;

79.7.1.2 the names and contact details of all consumers who were overcharged on interest and detailing the amounts of the overcharges;

79.7.1.3 at its own cost and within 30 days of receipt of the auditor's report, refund all consumers who have been identified to have been overcharged on interest;

78.7.1.4 the respondent must, at its own cost and within 30 days of receipt of the auditor's report identifying those credit agreements where proper affordability assessments were not done, refer all such identified agreements to the applicant for a subsequent referral to the Tribunal for a declaration of reckless credit;

78.7.1.5 Once the respondent has complied with 78.7.1.1 to 78.7.1.4 above, the respondent is to provide the auditor's report, together with its own written report, to the applicant, detailing the identity of the consumers, the write-offs and refunds made. These reports are to be provided to the applicant within one hundred and twenty

(120) days after the Tribunal order is issued;

78.7.1.6 The respondent, following the audit, must take all reasonable steps to rescind any judgments it may have obtained against consumers where the credit agreements entered into with consumers were extended without proper affordability assessments having been conducted; and

78.7.1.7 The respondent must take all reasonable steps to also clear any adverse listing/s with all credit bureaus should the respondent have obtained judgments against the aforementioned identified consumers.

79.8 There is no order as to costs.

DATED AT JOHANNESBURG ON THIS 12TH DAY OF MARCH 2022

MS P A BECK

PRESIDING MEMBER

With members Dr. M Peenze and Mr F Sibanda concurring.

[1] National Credit Regulations, 2006 published under Government Notice R489 in Government Gazette 28864 of 31 May 2006

[2] Truworths Limited and Others v Minister of Trade and Industry and Others (4375/2016) [2018] ZAWCHC 41; 2018 (3) SA 558 (WCC) (16 March 2018)

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