

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Wang Sheng Clothing Trading CC t/a Carrefour Cash Loans (NCT/149000/2019/140(1)) [2020] ZANCT 18 (16 September 2020)

[2020] ZANCT 18

COURT

National Consumer Tribunal

BEFORE

P A Beck, T Woker, B Dumisa

CASE / FILE NUMBER

NCT/149000/2019/140(1)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

AT CENTURION

Case

number: NCT/149000/2019/140(1)

In

the matter between:

NATIONAL
CREDIT
REGULATOR APPLICANT
AND
WANG
SHENG CLOTHING TRADING CC
T/A RESPONDENT
CARREFOUR
CASH LOANS
(Registration
Number 2007/119043/23)
(NCR
Registration Number NCRCP 9306)

Coram: Ms
P A Beck – Presiding
Tribunal Member
Prof
T Woker – Tribunal Member
Prof
B Dumisa – Tribunal Member
Date
of hearing – 11
September 2020
The
hearing was held via the on-line platform zoom
Date
of judgment – 16 September 2020

JUDGMENT

AND REASONS

APPLICANT

1. The Applicant is the National Credit Regulator (“the Applicant”), a juristic person established in terms of Section 12 of the National Credit Act, 2005 (“the Act”) to regulate the consumer credit market and ensure compliance with the Act, with its principal business address at 127 - 15th Road, Randjespark, Johannesburg, Gauteng.
2. Ms Lee-Anne Schwartz, who is a Senior Legal Advisor of the Applicant, represented the Applicant at the hearing.

RESPONDENT

3. The Respondent is Wang Sheng Clothing Trading CC t/a Carrefour Cash Loans (“the Respondent”) a close corporation duly registered as such in terms of the Close Corporations Act 69 of 1984; with registration number 2007/119043/23; and registered as a credit provider with registration number NCRCP9306, with its registered address situated at 28 New Main Street, Kimberley.
4. The Respondent was not represented at the hearing.

JURISDICTION

5. 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 to 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.

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

THE APPLICATION

7. This is an application in terms of Section 140(1) of the Act for an order declaring that the Respondent engaged in prohibited conduct and for the imposition of an administrative penalty.

ASSESSMENT OF THE EVIDENCE ON A DEFAULT BASIS

8. The Applicant filed a section 140(1) application with the Tribunal on 19 December 2019. The Applicant attached a copy of a registered post slip dated 19 December 2019; with a tracking number as proof of service of the Application on the Respondent. The track and trace report confirms that the application was sent via registered mail to the Respondent's registered address as stated in the Respondent's conditions of registration as a credit provider ("the conditions of registration,") which was issued in terms of Section 48 of the Act.
9. As per the track and trace reports obtained by the Applicant on 1 September 2020; first notifications were sent to the Respondent on the 30 December 2019 and the documents, sent in four parts to the Respondent, were all delivered to the Respondent on 7 January 2020. As per the track and trace results, the documents were delivered to T Wang, the owner of the Respondent.
10. On 20 December 2019; a Notice of filing ("the Notice") was issued by the Tribunal Registrar to both the Applicant and the Respondent. The Notice stated that the Respondent had to file an answering affidavit within 15 business days of receipt of the application. The Respondent did not file nor serve an answering affidavit or response to the application.
11. On 24 February 2020; the Tribunal received a notice of filing of the appointment of Bosch Marais and Associates Inc. as the Respondent's attorneys of record.
12. On 6 April 2020; after the close of pleadings, the Registrar issued a notice of set down of the matter on a default basis for 26 May 2020 in terms of Rule 25(2) of the Tribunal Rules.[1] Rule (25)2 provides that:

"An applicant may make application by way of form T.I.r25(2) for purposes of obtaining a default order, if no response to the application was filed within the time stated in the application. The Tribunal may make a default order:

- (a) After it has considered or heard any necessary evidence; and

- (b) If it is satisfied that the application documents were adequately served.”
13. The Notice of set down was served by email on the Applicant and on the Respondent’s attorney of record.
14. Prior to the issuing of the notice of set down; on 24 March 2020; the Tribunal’s Chief Operating Officer (COO) issued a statement announcing that due to the pronouncement made by the President of the Republic of South Africa on 23 March 2020 declaring a countrywide lockdown in an attempt to combat the spread of the COVID-19 disease, all matters set down for hearing and falling on days when there is a forced shut down will be postponed.
15. On 14 April 2020; the matter was removed from the hearing roll due to the extension of the national lockdown.
16. On 12 August 2020; the Registrar once again issued a notice of set down via e-mail, advising the parties that the hearing of the matter would be conducted on 11 September 2020 via the on-line platform zoom. At the hearing of the matter on 11 September 2020, the Applicant informed the Tribunal that the Respondent’s attorney of record had on 17 August 2020, served and filed a Notice of Withdrawal as Attorneys of Record.
17. In terms of Rule 13(5), any fact or allegation in the application or referral not specifically denied or admitted in an answering affidavit, will be deemed to have been admitted. Therefore, in the absence of any answering affidavit filed by the Respondent, the Applicant’s application and all the allegations contained therein are deemed to be admitted.
18. The Tribunal is satisfied having regard to the aforementioned, that the service of documents was properly executed; and proceeded to hear the matter on a default basis.

ISSUES

TO BE DECIDED

19. 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.
20. The allegations of prohibited conduct will become apparent in the course of this judgment.

BACKGROUND

21. In this matter the Applicant; on 27 of May 2019; received information from the South African Social Security Agency (SASSA) office in the Northern Cape Province, that the Respondent was failing to disclose any records of its registration with the Applicant to consumers; and that the Respondent was overcharging consumers on interest in contravention of the Act.

22. Based on this information, the Applicant formed a reasonable suspicion that the Respondent may be engaged in conduct in contravention of the Act. The Applicant thus initiated a complaint against the Respondent in terms of Section 136(2) of the Act and authorised an investigation into the activities of the Respondent in terms of Section 139(1)(c) of the Act.
23. On 11 July 2019; the Applicant appointed two inspectors; Dipuo Mokobane (“Mokobane”) and Douglas Musandiwa (“Musandiwa”) as inspectors in terms of Section 25 of the Act to investigate the complaint.
24. On or about 16 of July 2020; an onsite investigation was conducted at the Respondent’s business premises situated at 28 New Main Street, Kimberley, Northern Cape. An interview was conducted with a Mr Tian Sheng Wang (“Wang”) who identified himself as the owner of the Respondent. In accordance with the scope of the investigation, a sample of ten (10) consumer files were provided to the inspector, by Wang, for assessment purposes.
25. The inspectors identified contraventions of the Act from their review of the ten consumer files. The inspectors concluded that the Respondent repeatedly contravened provisions of the Act and thereby committed conduct prohibited in terms of the Act. Following the investigation and subsequent assessment of the credit agreements provided, Mokobane proceeded to compile an investigation report (“the investigation report”) dated 16 July 2019[2]. The investigation report detailed the alleged contraventions.

APPLICANT’S FOUNDING AFFIDAVIT

26. The Applicant’s Anne-Carien du Plooy, who is employed as the acting manageress of the Applicant’s Investigations and Enforcement Department, submitted an affidavit that the Respondent repeatedly failed to conduct its business in a manner that is consistent with the purpose and requirements of the Act and Regulations. She asserts that the Respondent repeatedly contravened

the provisions of the Act as is fully set out in the investigation report.

CONTRAVENTIONS OF THE ACT

Failure to conduct affordability assessments and reckless credit granting

The Act

27. 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 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. 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.
28. Section 80 deals with reckless credit. Section 80 (1) provides that a credit agreement is deemed to be reckless if, at the time when the agreement is concluded, the credit provider failed to conduct an assessment in accordance with Section 81 (2) read with Regulation 23A, 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.

Alleged contraventions

29. The Applicant alleges that the Respondent contravened Section 81(2)(ii) of the Act in that the Respondent entered into credit

agreements with consumers without first taking reasonable steps to assess the debt re-payment history of the consumers; and that the Respondent failed to obtain credit bureau reports to assess each consumer's debt repayment history, before entering into a credit agreement with a consumer.

30. The Applicant submitted that in all of the consumers' files, that form part of the investigation report, there is no evidence in some of the files that the Respondent obtained credit bureau reports for each consumer.
31. In the instances where the Respondent in fact obtained credit bureau reports, the reports were outdated and therefore could not have been used or deemed to have been obtained for the agreements in question. In the case of the credit agreement entered into with Jeffrey Nkosinathi Khuthu ("Khuthu") the credit agreement was entered into on 4th July 2019. However, the credit bureau report was obtained on 16th October 2018. In the case of the credit agreement entered into with the consumer Bongani Mdubeki ("Mdubeki,") the credit agreement was entered into on 12th July 2019 whereas the credit bureau report was obtained on 15th May 2019.
32. The reports in question were therefore clearly obtained in excess of 7 days immediately prior to entering into the credit agreement as required in terms of Regulation 23A(13)(a). Therefore, the Applicant alleges that the Respondent repeatedly contravened Section 81(2) (ii) read together with Regulation 23A(12)(b) of the Act.
33. The Applicant alleges further that the Respondent contravened Section 81(2)(iii) of the Act. The Applicant submitted that the Respondent entered into credit agreements with consumers without first taking reasonable steps to assess the proposed consumers financial means and obligations; that the Respondent obtained salary slips and bank statements

merely as a tick box exercise because there are no calculations to indicate that the Respondent considered the information on the aforementioned bank statements or conducted any affordability assessments to assess a consumers affordability; and the Respondent has further failed to make use of and/or observe the minimum expense norms table in contravention of Regulation 23A(9) of the Act.

34. The Applicant alleges that the Respondent's failure to conduct proper affordability assessments means that the Respondent entered into reckless credit agreements with the consumers, which is a contravention of Section 80 of the Act.

35. Further, in terms of Section 80(1)(b)(ii), a credit agreement is reckless if at the time the agreement was entered into the credit provider, having conducted the affordability assessment as required by Section 81(2), 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.

36. Examples of the Respondent's contraventions as alleged in 29-35 above are:

36.1 With regard to consumers Vincent Thabo Moremi ("Moremi"), Monapule Riet ("Riet") and Ramake Modiroa ("Modiroa,") the Respondent disregarded the debt obligations of the consumers as it appeared on their bank statements. The Applicant in considering all the listed obligations of the aforementioned consumers found that the Respondent, by extending the loans to these consumers, caused the consumers to be over-indebted;-

36.2 In the case of consumer Moremi, the credit agreement was entered into on 24 May 2019. A bank statement of the consumer for the period 24 February 2019 to 24 May 2019 was obtained by the Applicant. The bank statement bears reference to monthly debits on the consumers bank account namely; R180.00 in favour of "Theunlimited Acs"; R810 in favour of "NPCarrefour;" and R1 238.83 in favour of "NP-suprea" which debits amount to R2 228.83. Based on the information on the bank statement, this consumer was earning a salary of R3 351.99 on average over 3 months, the most recent months' salary being R3 439.68;-

36.3 After consideration of these obligations, the consumer remains with an average net monthly income of R1123.16 from which amount the consumer must cover minimum living expenses of R972.25 and payment of the proposed loan instalment of R1176.17. The information provided indicates that the consumer was already over-indebted at the time the credit agreement in question was entered into and entering into another credit agreement with the Respondent made the consumer more over-indebted;

36.4 In the case of consumer Riet, the credit agreement was entered into on 3 June 2019. The bank statement of the consumer for the period 12 February 2019 to 2 May 2019 was obtained by the Applicant. Based on the information on the consumer's bank statement and the salary advice provided, the consumer was earning a salary of R3 500.00 per month. The bank statement reflects

monthly debits R1 998.83 in favour of “Inbnlankm”; R414.00 in favour of “NPCarrefour,” R691.15 in favour of “NP-Suprea;” and R43.00 in favour of “Funeral.” After consideration of these obligations the consumer remains with a net amount of R310.02 from which amount the consumer must cover minimum living expenses of R982.24 and payment of the proposed instalment for the loan of R648.45. The information provided indicates that this consumer was already over-indebted at the time the credit agreement in question was entered into and entering into another credit agreement made the consumer more over-indebted; and

36.5 In the case of consumer Modiroa, the credit agreement was entered into on 5 March 2019. A bank statement of the consumer dated 11 February 2019 was obtained by the Applicant. In terms of the bank statement, the consumer’s income during January was R3 787.28. Several debit orders appeared on the consumer’s bank statement being R950.66 in favour of YPin; R1 334.95 in favour of NP Zenda; and R182.00 in favour of Avbob totalling R2 467.61. After deducting the loan of R414.00, a net amount of R905.67 remains which would be insufficient to cover the consumers’ monthly living expenses of R1001.64. The information provided indicates that by entering into another the credit agreement the consumer became over-indebted.

37. Based on the aforementioned, the Applicant submits that the Respondent repeatedly and over a period of time entered into credit

agreements with consumers without first taking reasonable steps to assess a consumers’ debt repayment history and existing

financial means, prospects and obligations. Thus, the Respondent contravened Section 80(1)(b)(ii); 81(2); and Section 81(3) of the Act.

Analysis

38. The Tribunal is satisfied with the evidence presented by the Applicant that each consumer file did not contain a credit bureau

report; and that where a credit report was obtained, the information was not assessed in terms of the requirements of the Act.

39. The Tribunal therefore finds that the Respondent contravened Section 80(1)(b)(ii); 81(2); and Section 81(3) of the Act in that it failed to obtain credit bureau reports to assess the consumer’s debt repayment history before entering into credit agreements with consumers.

40. The Tribunal finds that the Respondent failed to demonstrate that it adhered to Section 81(2)(a)(iii) to conduct affordability assessments as required by the Act. It failed to submit records to prove that affordability assessments are conducted. The Tribunal is therefore satisfied that the Respondent contravened Section 81(2)(a)(ii) and (iii) read together with Regulation 23A; and Section 80(1)(a) read with Section 81(3) of the Act.

41. It is clear from the evidence led by the Applicant that the Respondent entered into credit agreements; with at least three consumers; where the preponderance of information available to the Respondent, should have demonstrated that entering into the credit

agreements would make the consumers over-indebted. Nonetheless, the Respondent entered into credit agreements with these consumers

despite the consumers' disposable income reflecting a deficit, after the loan amount was included on the Respondent's income and essential expenditure table. In doing so, the Respondent contravened Section 81(3) of the Act which clearly instructs credit providers not to enter into reckless credit agreements with prospective consumers.

42. The Tribunal is satisfied with the evidence presented by the Applicant that the Respondent also contravened Section 81(3) of the Act. Accordingly, the Tribunal finds that the failure outlined above is deemed reckless credit granting by the Respondent and a contravention of Section 81(3) of the Act.

Cost of credit and failure to provide consumers with a pre-agreement statement and quotation in the prescribed form.

43. Regulation 23A(15) of the Act states that a credit provider must disclose to the Consumer the credit cost multiple and the total cost of credit in the pre-agreement statement and quotation.
44. Section 92(1) of the Act states that a credit provider must not enter into a small credit agreement unless the credit provider has given the consumer a pre-agreement statement and quotation in the prescribed form.
45. In terms of Regulation 28(1) of the Act, the prescribed form for a small credit agreement is Form 20.

Alleged Contravention

46. With regard to consumers Mzukisi Kuzana ("Kuzana;") Gaupalelwe Gordon Melato ("Melato;") and Johannes

Ranakedi Modiroa ("Modiroa") the Applicant submits that it is evident that the Respondent failed to provide the consumers

with a pre-agreement and quotation in the prescribed form, being Form

20. Further to this the Respondent failed to disclose the amount charged in respect of initiation fees and interest.
47. The Applicant submits that the Respondent merely set out formulas which cannot be deemed to be proper disclosure in terms of the Act.

48. Accordingly, the Tribunal finds that the Respondent failed to disclose the credit cost multiple; the total cost of credit; and that the Respondent failed to provide consumers with a pre-agreement statement and quotation in the prescribed form.
49. The Tribunal finds for the reasons stated in 46 and 47 above, that the Respondent contravened Regulation 23A(15) by failing to properly disclose the cost of credit; and contravened Section 92(1) read with Regulation 28(1) of the Act by failing to provide pre-agreement statements and quotations in the prescribed form to consumers.

Credit Life Insurance

50. In terms of Section 100(1)(b) of the Act a credit provider must not charge an amount to, or impose a monetary liability on, the consumer in respect of an amount of a fee or charge exceeding the amount that may be charged consistent with the Act.
51. In terms of Regulation 3 of the Credit life Insurance Regulations, the maximum credit life insurance chargeable for a short-term credit agreement is R4.50 per R1000.00 of the deferred amount.
52. The Applicant submits that the Respondent charged the consumers Moremi; Christopher Obakeng Louwberg ("Louwberg;")

and Keegan Mokgele ("Mokgele;") credit life insurance in excess of the prescribed maximum amount as provided for in terms of the Act.

53. In the case of Moremi an amount of R1000.00 was advanced to the consumer. The Respondent charged the consumer R5.27 payable towards credit life insurance. The maximum credit life insurance the Respondent could have charged the consumer was R4.50. The consumer, in this instance, was charged R0.77 above the prescribed limit and was as such overcharged.
54. In the case of Louwberg, an amount of R300.00 was advanced to the consumer. The Respondent charged the consumer R13.60 payable towards credit life insurance. The maximum credit life insurance which could have been charged is R1.35 and the Respondent accordingly overcharged the consumer with an amount of R12.25.
55. In the case of consumer Mokgele, an amount of R1 500.00 was advanced to the consumer. The Respondent charged the consumer R8.14 payable towards credit life insurance. The maximum credit life insurance which could have been charged is R6.75. The consumer in this instance was charged R1.39 above the prescribed limit.
56. Accordingly, The Tribunal finds that the Respondent has contravened Section 100(1)(b) read with Section 106(8) of the Act read with Regulation 3(1) of the Credit Life Regulations

Excessive Interest

57. Section 100 deals with prohibited charges. Section 100(1)(c) deals specifically with interest charges and prohibits a credit provider from charging a consumer an amount or imposing a monetary liability that exceeds the amount consistent with the Act. 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) provides that the maximum rate of interest for short term credit agreements is 5% per month; and 3% per month for subsequent loans. Furthermore; Regulation 23A (15) makes it a peremptory requirement for a credit provider to disclose the total cost of credit to a consumer.

58. The Applicant alleges that the Respondent charged consumers interest in excess of the maximum prescribed interest rate in terms of the Act. The Respondent did so when it extended subsequent loans to consumers and charged consumers interest in excess of the maximum prescribed rate of 3% per month. This conduct is evident with reference to the credit agreements entered into with consumers Riet, Kuzana, Melato and Ranakedi referred to in the Investigation Report.[3] The Applicant submitted that the Respondent accordingly contravened Section 100(1)(c) read with Section 101(1)(d)(ii) and Regulation

42(1) of the Act.

59. In the matter *Micro Finance South Africa and 1 Other vs The National Credit Regulator and 2 Others* heard in the High Court of South Africa, Gauteng Division under case number 64646/2016 (“MFSA Judgment”) where judgment was handed down on 14th of August 2020, the following findings are relevant to the alleged contravention:

59.1 The initiation fee can be included in the deferred amount and interest can be calculated thereon; and

59.2 Service Fees to be prorated in the 1st month only; and the full-service fee can be charged in the subsequent months.

60. The aforesaid judgment rendered the calculations provided within the Applicant’s Founding Affidavit slightly different. However, the Applicant submitted that this has not impacted the case of the Applicant. It is still alleged by the Applicant that despite the inclusion of the initiation fee to the deferred amount, the Respondent has overcharged interest to consumers.

61. In the case of consumer Riet, the Applicant alleges that the Respondent charged the consumer interest of 60% per annum, which

equates to 5% per month. It is evident from the attached bank statement of the consumer that the Respondent had previously extended

another loan to the consumer within the same calendar year of 31 May

2019. For the loan in question, the Respondent advanced an amount of R500.00 to the consumer and charged the consumer interest at 5% per month which exceeds the maximum interest of 3%. The Respondent charged the consumer R20.55 interest for a loan which was extended over 25 days. As per the Applicant's calculations the maximum amount to be charged at the rate of 3% on the deferred amount (initial loan amount of R500.00 + Initiation fee of R75 which totals R575.00) is R14.37.) The Respondent overcharged the consumer on interest by R6.18. This calculation differed slightly from the Founding Affidavit which informed the overcharge to have been R8.05, but remains an over charge.
62. In addition, in the case of consumers Kuzana; Melato; and Ranakedi; the Applicant alleges that the Respondent did not disclose the amount charged and payable towards interest, initiation fees and monthly service fees. Without evidence to indicate whether the initiation fee and service fees were in fact charged to the consumers' the Applicant reasonably assumes that the amount charged in addition to the credit advanced is towards interest. In the absence of any contrary evidence it is submitted that the Applicant's assumptions herein is reasonable and should be accepted by the Tribunal.
63. In the case of consumer Kuzana; a loan amount of R700.00 was extended to the consumer re-payable with a single instalment of R945.00. The Applicant alleges that the difference of R245.00 amounts to 35% interest on the amount advanced to the consumer.
64. In the case of the consumer Melato; a loan amount of R300.00 was extended to the consumer, re-payable with a single instalment of R414.00. The Applicant alleges that the difference of R114.00 amounts to 38% interest on the amount advanced to the consumer.
65. In the case of the consumer Ranakedi; a loan amount of R400.00 was extended to the Consumer, re-payable with a single instalment of R552.00. The Applicant alleges that the difference of R152.00 amounts to 38% interest on the amount advanced to the consumer.
66. Based on these calculations the Applicant submits that the Respondent charged the aforementioned consumers interest of 35% and 38% respectively.
67. The Applicant contends that even if the decision in the recent MFSA Judgment is applied to the facts of this matter; and it is assumed that initiation and service fees are charged to the consumer by the Respondent; the overcharging of interest to the consumer is still overwhelmingly obvious.
68. As per the illustration below, the Applicant herewith set out examples where the cost of credit is calculated in accordance with the Act; and in consideration of the MFSA judgment referenced above.
69. In the case of consumer Kuzana, a loan amount of R700.00 was advanced to the consumer with a repayment of R945.00 in one instalment.

The cost of credit in line with the Act should be calculated as illustrated in the table below. The Respondent alleges that the

Respondent charged the consumer an additional amount of R26.27.

Interest: calculated at 3% as this is a subsequent loan within the same calendar year. The loan endured for 27 days. Deferred Amount (Initial Loan Amount R700 + Initiation costs of R105) equals: $R805 \times 3\%$ divided by the number of days in the month $\times$ the number of days extended over (27) = R21.73 Initiation Fee: calculated at 15% R105.00 Service fee: at a maximum R60 (MFSA judgment – first month prorated and second month full.) 1st month (16 days) $\times$ R2.00 p/d = R32 2nd Month = R60 Total = R92.00 Total Cost of Credit R218.73 Maximum total to be charged R918.73 Respondent total repayment R945.00 Overcharge R26.55

70. In the case of consumer Melato, a loan amount of R600.00 was advanced to the consumer. The re- repayment of R810.00 was payable in one instalment. The cost of credit in line with the Act should be calculated as illustrated in the table below. The Respondent however charged the consumer an additional amount of R13.37.

Interest: calculated at 3% as this is a subsequent loan within the same calendar year. Deferred Amount (Initial Loan Amount R600 + Initiation R90) equals: $R690 \times 3\%$ divided by the number of days in the month $\times$ the number of days extended over

- (27) = R18.63 Initiation Fee: calculated at 15% R90.00 Service fee: 1st month (14 days) $\times$ R2.00 p/d = R28 2nd Month = R60.00 Total = R88.00 Total Costs of credit R196.63 Maximum Total to be charged R796.63 Respondent's total repayment R810.00 Overcharge R13.37

71. In the case of consumer Ranakedi a loan amount of R400.00 was advanced to the consumer. The repayment was R552.00 payable in one instalment. The cost of credit in line with the Act should be calculated as illustrated in the table below. Based on the calculations the repayment should have been R519.04. The Respondent charged the consumer an additional amount of R32.96.

Interest: calculated at 3% as this is a subsequent loan within the same calendar year. Deferred Amount (Initial Loan Amount R400 + Initiation R60) equals: $R460 \times 3\%$ divided by the number of days in the month $\times$ the number of days extended over

- (24) = R11.04 Initiation Fee: calculated at 15% R60.00 Service fee: Service fee: at a maximum R60 or R2 a day over 24 days. R48,001 Month Total Cost of Credit R119.04 Maximum Total to be charged R519.04 Respondent's Total charged R552.00 Overcharged R32.96

72. The Tribunal is satisfied with the evidence presented by the Applicant. Accordingly, the Tribunal finds on the evidence

before it that the Respondent charged an amount of interest that exceeded the maximum prescribed amount allowed by the Act. Accordingly, the Tribunal finds that the Respondent repeatedly contravened section 100(1)(c) read with Section 101(d)(ii) and Regulation 42(1) of the Act.

Excessive Initiation and Monthly Service fees

73. Section 100(1)(b) of the Act states as follows-

“A credit provider must not charge an amount to, or impose a monetary liability on, the consumer in respect of – (b) an amount of a fee or charge exceeding the amount that may be charged consistent with this Act.”

74. Section 101(1)(b)(i) of the Act states as follows-

“A credit agreement must not require payment by the consumer of any money or other consideration, except – (b) and initiation fee, which - (i) may not exceed the same amount relative to the principal debt.”

75. The Applicant alleges that if it is assumed that the initiation and service fees are charged by the Respondent to the consumer, the Respondent charged consumers Kuzana, Melato and Ranakedi excessive initiation fees and monthly service fees.

76. The Respondent charged consumers initiation fees at 16.5% of the loan amounts which is clearly in excess of the maximum prescribed rate in terms of the Regulations.

77. The Respondent in addition charged consumers service fees of R60.00 per month, plus VAT. The Applicant alleges that these charges

indicate that the Respondent did not observe the provisions of Regulation 44(4). The Respondent failed to accurately prorate the

service fee and as such overcharged the consumers Kuzana and Melato in contravention of Section 100(1)(b) read with Section 101(1)(d)(iii) read further with Regulation 44 and 44(4) of the Act. Further, in the absence of evidence pertaining to the Respondent's

Vat Registration status VAT may not be charged to consumers and is deemed prohibited. VAT charges were charged to consumers on all sampled files.

78. Accordingly, the Tribunal finds that the Respondent contravened Section 100(1)(b); Section 101(1)(b)(i) read with Regulation 42(2) and 43(3) and 44(4) of the Act.

Failure to File statistical return and financial annual and operational returns

79. 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.

81. Regulation 64 stipulates that a registered credit provider with disbursements of less than R15 million must submit a Statistical Return to the Applicant by 15 February each year for the period 1 January to 31 December.

82. Regulation 66 stipulates that a registered credit provider must submit to the Applicant on an annual basis an Annual Financial and Operational Return within 6 months after the credit provider's financial year end, this being the Form 40.

83. The Applicant's Compliance Department has no record of any Form 39 and Form 40 submitted by the Respondent. No such reports were received since the Respondent's registration as a Credit Provider with the Applicant.
84. The Respondent has therefore failed to file its Form 39 and Form 40 in contravention of its Conditions of Registration and Regulations 64 and 66 of the Act.
85. Accordingly, as a result of the contraventions as discussed above the Tribunal is satisfied that the Respondent has contravened its Conditions of Registration and Section 52(5)(c) of the Act; and the Tribunal finds that the Respondent has contravened its Conditions of Registration and Section 52(5)(c) of the Act.

CONCLUSION

86. Consequently, the Tribunal is satisfied that the Respondent engaged in prohibited conduct by contravening the Sections of the Act referred to in the preceding paragraphs; and has therefore repeatedly contravened the Act and regulations.
87. The Tribunal proceeds to consider the appropriate relief.

CONSIDERATION OF THE APPROPRIATE RELIEF

The Applicant's requested orders

88. In addition to finding that the Respondent has repeatedly contravened the Act and regulations; the Applicant requests the Tribunal to make an order:-
 - 88.1 Imposing an administrative fine on the Respondent that is the greater of R1 000 000.00 or 10% of the Respondent's annual turnover during the preceding financial year;
 - 88.2 Declaring that the Respondent has repeatedly contravened the following Sections of the Act: Section 81(2)(a)(ii) and (iii); Regulation 23A(3); Regulation 23A(8); Regulation 23A(9); Regulation 23A(12)(b); and (c); 23A(13)(a); Regulation 23A(15); Section 170 read with Regulations 55(1)(b)(vi); Section 81(3) read with Section 80(1)(a); Section 81(3) read with Section 80(1)(b)(ii); Section 100(1)(b); Section 106(8) read with Regulation 3(1) of the Credit Life Insurance Regulations; Section 100(1)(a) read with Section 101(1)(d)(ii) and Regulation 42(1); Section 92 (1) read with Regulation 28(1) and Form 20 of the Act;
 - 88.3 Declaring the conduct of the Respondent to be in contravention of the relevant Sections of the Act and Regulations referred to in paragraph 88.2 above, as prohibited conduct in terms of Section 150(a) of the Act;
 - 88.4 Declaring that the Respondent has brought the consumer industry into disrepute further and or alternatively, declaring that the Respondent has acted with disregard for consumer rights generally; and
 - 88.5 Interdicting the Respondent from engaging in future prohibited conduct.

89. In addition to the relief referred to in 88 above, the Applicant seeks the following further relief from the Tribunal:-

89.1 That the Tribunal orders the Respondent to:

89.1.1. Within 30 days to appoint an independent auditor, at its own cost; whose appointment shall be subject to the prior written approval of the Applicant, to identify:

89.1.1.1 all credit agreements entered into for a period of three (3) years preceding this judgment;

89.1.1.2 the names and contact details of all consumers who entered into such credit agreements;

89.1.1.3 the loan amounts advanced under all such credit agreements; the total amount paid by each consumer to the Respondent under all such credit agreements; and thereby calculate the total amount paid by each consumer over and above the total loan amount advanced to all consumers; and

89.1.1.4 the amounts consumers are to be refunded as referred to in 89.2 below.

89.2 Once the aforesaid auditor has compiled the list, that the Tribunal orders the Respondent, at its own cost; and within 30 days of receipt of the Auditors Report, to refund all consumers all the amounts paid by the consumers to the Respondent over and above the loan amounts advanced by the Respondent to these consumers (i.e. the cost of credit must be refunded);

89.3 Once the refunds are made, that the Tribunal orders the Respondent to provide the Auditors Report, together with its own written report, to the Applicant, detailing the identity of the consumers and the refunds made. These reports must be provided to the Applicant within 120 days after Tribunal order is obtained;

89.4 That the Tribunal declares the Respondents' credit agreements with the consumers who formed part of the investigation report being consumers Moremi; Riet; Louwberg; Mokgele; Khuthu; Louwberg; Mdubeki; Kuzana; Melato; and Ranakedi reckless in terms of Section 80(1)(a) of the Act; that the Tribunal sets aside all of the consumers obligations under those agreements; and specifically orders the Respondent to refund the cost of credit to the identified consumers, specifically those consumers who were found to be over-indebted due to the extension of the aforesaid loans;

89.5 Any other appropriate order required to give effect to a consumer's rights in terms of Section 150(j) the Act; and

89.6 Further and / or alternative relief.

90. The Tribunal proceeds to consider each request in turn.

The Administrative fine

91. The Applicant has 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 to protect consumers from the type of conduct perpetrated by the Respondent. The Tribunal therefore wishes to send a clear message to the Respondent and all other credit providers, that the Tribunal takes the conduct of registered credit providers seriously.

92. 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. Having said the above, the Tribunal must also act fairly, taking into account the evidence as a whole.

93. 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 contravention

94. The inspection report reveals that the Respondents' approach when granting credit appears to be an on-going and common practice. The Respondent is registered as a credit provider since 2017. The contraventions amount to inter alia, failure to disclose cost of credit prior to entering into credit agreements; failure to conduct affordability assessments; granting of reckless credit; overcharging on interest; failure to provide pre-agreement statements and quotations in the prescribed form; excessive initiation and monthly service fees; and failure to file statistical returns and financial annual and operational returns.
95. The Respondent's contraventions are serious; appear to go to the heart of the Respondent's business practices; indicate a disregard for the rights of consumers, the Act; and the industry in which the Respondent operates.

Loss or damage suffered as a result of the contraventions

96. Consumers have suffered a loss in that they have been exploited by entering into credit agreements without affordability assessments

being conducted properly if at all and/or proven to have been conducted. Further to this, excessive interest rates are levied against consumers, which conduct is prohibited in terms of Section 100 and Regulation 42 of the Act.

97. The Applicant submitted that the Respondent's failure to conduct proper affordability assessments means that the Tribunal may reasonably conclude that consumers obtained loans that they were most likely unable to afford. It is aggravating that loans were extended recklessly to three consumers whose disposable income showed a deficit once the loan was extended to these consumers. The damage to such consumers' economic status is far-reaching in that the Respondent's conduct traps these consumers in a cycle of on-going dependency on the Respondent.

98. The Tribunal can therefore only reasonably conclude, based on the evidence before the Tribunal, that the consumers suffered loss as a result of the Respondent overcharging on interest and fees; and that consumers were exploited by the Respondent.

The Respondent's behaviour

99. The Applicant submitted that the Respondent as a registered credit provider had no plausible reason to be unaware of the provisions of the Act; and of the statutory obligation imposed upon the Respondent in terms of the Act. Furthermore, the Respondent failed to oppose this application; failed to take the Tribunal into its confidence concerning the steps it may have taken to improve its business practices once these contraventions were drawn to its attention by the Applicant's inspectors; and to bring them within the ambit of the Act.

Market circumstances under which the contraventions occurred

100. The failure to do affordability assessments; reckless credit granting; the charging of excessive fees and other prohibited

charges; and the failure to present pre-agreement statements and credit agreements in the prescribed format; is a clear indication

that consumers are unaware of such practices being unlawful and contrary to legislative requirements. Consumers are therefore exploited to the unjust benefit of the Respondent.

101. The Applicant submitted that the market circumstances in which the contraventions occurred; are those where the Respondent concluded credit agreements with some consumers who did not qualify to receive finance, yet the Respondent nonetheless concluded a credit agreement with such consumers.
102. The Respondent therefore preyed on desperate consumers steadily increasing the number of over-indebted consumers in the market.

The level of profit derived from the contraventions

103. As result of the nature of the contraventions found against the Respondent, more specifically the over-charging of interest and the reckless granting of credit, it is obvious that a substantial profit has clearly been derived from the activities undertaken by the Respondent. The profits derived from the contraventions can however only be scientifically quantified when the Respondent is audited as per the Applicant's prayers in this application.

The degree to which the Respondent co-operated with the Applicant

104. The Tribunal considered that the Respondent provided the inspectors with the consumer files and co-operated with the Applicant's

inspectors during the investigation. However, the Respondent chose not to place its version before the Tribunal despite being served

with the Application and the notice of set down of the matter.

The Respondent's prior contraventions

105. The Tribunal also considered that the Respondent has not previously been the subject of an investigation; has no prior contraventions;

nor have any findings been made against the Respondent.

The amount of the fine

106. The Applicant did not produce current evidence concerning the respondent's financial turnover during the previous financial year. The Applicant submitted that the principle of the judgment given in *NCR v Werlan Cash Loans*[4] be taken into consideration. In this matter it was argued by the Applicant that the Tribunal should not be deterred from imposing an administrative fine where no Annual Financial Statements are available, as it would simply have the effect of registrants hiding their financial position to avoid an administrative fine.

107. 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.

108. The Respondent has raised no defence to the allegations made against it by the Applicant. The Tribunal is persuaded that a strong message must be sent to all credit providers that they cannot escape complying with the Act. The Respondent's conduct has displayed little or no regard for the spirit and purpose of the Act.

109. 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

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

consumer files. The evidence placed before the Tribunal means that it is not possible for the Tribunal to establish the number of credit agreements entered into by the Respondent, with consumers. 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

111. Accordingly, the Tribunal makes the following order:

111.1 The Respondent has repeatedly contravened the following sections of the Act:

Section 81(2)(a)(ii); Section 81(2)(a)(iii); Regulations 23A(3); 23A(8); 23A(9); 23A(12)(b) and (c); 23A(13)(a); 23A(15); Section 170 read with Regulations 55(1)(b)(vi); Section 81(3) read with Section 80(1)(a); Section 81(3) read with Section 81(b)(ii); Section 100(1)(b); Section 106(8); read with Regulation 3(1) of the Credit Life Insurance Regulations; Section 100(1)(a) read with Section 101(1)(d)(ii) and Regulation 42(1); Section 92(1) read with Regulation 28(1) and Form 20;-

111.2 The Respondent's conduct is declared to be prohibited conduct in terms of Section 150(a) of the Act;

111.3 The Respondent must pay an administrative fine of R100 000.00 (one hundred thousand Rand) into the National Revenue Fund referred to in Section 213 of the Constitution of the Republic of South Africa, 1996 within 30 days of the date of this judgment. The Banking Details of the National Revenue Fund are as follows:

Bank Name

: The Standard Bank of South Africa Limited

Account Holder : Department of Trade and Industry

Branch Name : Sunnyside

Branch Code : 05100

Account Number : 370 650 026

Reference

: NCT/133623/2019/140(1) and Name of Person or Business making payment.

111.4 The Respondent is ordered to:

111.4.1 Within 30 days of the date of this judgment to appoint an auditor at its own cost, whose appointment is subject to the written approval of the Applicant, to identify:

- (i) all credit agreements entered into for a period of three (3) years preceding this judgment;
- (ii) the names and contact details of all consumers who entered into such credit agreements;
- (iii) The loan amounts advanced under all such credit agreements; the total amount paid by each consumer to the Respondent under all such credit agreements; and thereby calculate the total amount paid by each consumer over and above the total loan amount advanced to all consumers; and
- (iv) the amounts consumers are to be refunded as referred to in 111.5 below.

111.5 Once the aforesaid auditor has compiled the list, the Respondent must at its own cost and within 30 days of receipt of the Auditors Report, refund all consumers all the amounts paid by the consumers to the Respondent over and above the loan amounts advanced by the Respondent to these consumers (i.e. the cost of credit must be refunded);

111.6 Once the refunds are made, the Respondent must provide the Auditors Report, together with its own written report, to the Applicant, detailing the identity of the consumers and the refunds made. These reports must be provided to the Applicant within 120 days after the Tribunal order is obtained;

111.7 The appointed auditor must also identify which agreements are still in force; where all amounts under such agreements have not been paid; and identify which of such agreements the Respondent entered into without conducting proper affordability assessments in terms of Section 81(2)(a)(ii) and or (iii) of the Act. Once the auditor has identified those agreements and the Applicant has received the auditors' report, the Applicant may apply to the Tribunal for an order declaring such agreements as reckless in terms of Section 81(1)(a) and setting aside all the consumer's rights and obligations under those agreements; and

111.8 There is no order as to costs.

DATED AT CENTURION ON THIS 16th DAY OF SEPTEMBER 2020.

MS P A BECK

PRESIDING MEMBER

With Members Prof T Woker and Prof B Dumisa concurring.

- [1] Regulations for Matters Relating to the Functions of the Tribunal and Rules for the Conduct of Matters before the National Consumer Tribunal, 2007.
- [2] See The investigation report which is annexed to the Applicant's founding affidavit at Page 42 of the bundle.
- [3] Investigation Report Pg 42-57
- [4] NCT/3867/2012/57(1)[2013]ZANCT 5

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