

SOUTH AFRICA / JUDGMENT

Volkswagen Financial Services SA (Pty) Ltd v National Credit Regulator (NCT/94937/2017/56(1)) [2019] ZANCT 175 (4 April 2019)

[2019] ZANCT 175

COURT

National Consumer Tribunal

BEFORE

D Terblanche, M Peenze, B Dumisa

CASE / FILE NUMBER

NCT/94937/2017/56(1)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

number: NCT/94937/2017/56(1)

In

the matter between:

Volkswagen
Financial Services South Africa (Pty)
Ltd
Applicant
and
The
National Credit
Regulator
Respondent
Tribunal

Panel: Ms.
D Terblanche -
Presiding Tribunal member
Dr.
M Peenze
-
Tribunal Member
Dr.
Dumisa
-
Tribunal Member
Dates

of hearing: 19
and 20 February 2019

JUDGMENT

AND REASONS

THE PARTIES

1. The Applicant is Volkswagen Financial Services (SA) (Pty) Ltd, hereinafter referred to as the "Applicant" or "VWFS", a company duly incorporated in terms of the company laws of South Africa, with registration number 2013/133698/07. The Applicant is registered with the National Credit Regulator as a credit provider with registration number NCRCP6636 in terms of section 40 of the National credit Act, Act 34 of 2005, hereinafter referred to as the "Act" or the "NCA".
2. The Respondent is the National Credit Regulator, hereinafter referred to as the "Respondent" or the "NCR", an organ of state and a juristic person within the public administration established in terms of Section 12 of the NCA. It operates from its principal address at 127 Fifteenth Road, Randjespark, Midrand, Gauteng.

THE APPLICATION

3. The Applicant has brought an application in terms of section 56(1) of the NCA to the National Consumer Tribunal, hereinafter referred to as the "Tribunal", to review and set aside a compliance notice issued against it by the NCR.
4. The NCA, in section 56(1), provides that a party who is aggrieved by the issuance of a compliance notice may, within fifteen (15) business days after receiving the notice, object to it.
5. Section 56 provides as follows -

"(1) Any person issued with a notice in terms of section 54 or 55 may apply to the Tribunal in the prescribed manner and form to review the notice within-

- (a) 15 business days after receiving that notice; or
- (b) such longer period as may be allowed by the Tribunal on good cause shown.
- (2) After considering any representations by the applicant and any other relevant information, the Tribunal may confirm, modify or cancel all or part of a notice.
- (3) If the Tribunal confirms or modifies all or part of a notice, the applicant must comply with that notice as confirmed or modified,

within the time period specified in it.”

- 6. The Tribunal accordingly has jurisdiction to hear the objection to the compliance notice and "... confirm, modify or cancel all or part of the notice".

BACKGROUND

- 7. The Respondent issued a compliance notice against VWFS, in terms of section 55(1) of the NCA, on 23 October 2017, alleging that the latter failed to comply with certain provisions of the NCA.
- 8. The Respondent alleged that its investigation revealed that the Applicant charged consumers an 'on the road', administrative and / or handling fees on credit agreements, which are disguised as service and delivery fees in credit agreements, in contravention of sections 3(e), 89(2)(c), 90(1), 90(2)(b)(iv)(aa), 90(2)(e), 90(2)(f), 91(2), 100(1)(a), 101(1)(a), 102(1) and (2) of the NCA in that –

8.1 The 'on the road', administrative and / or handling fees are credit fees or charges prohibited by section 100(1)(a) of the NCA;

8.2 The 'on the road', administrative and / or handling fees are not credit fees or charges permitted to be charged on a credit agreement in terms of section 101(1) of the NCA;

8.3 The 'on the road', administrative and / or handling fees are not credit fees or charges that can be included in the principal debt deferred of an instalment agreement or a lease agreement in terms of section 102(1) of the NCA;

8.4 The dealer invoices containing the 'on the road', administrative and / or handling fees are supplementary agreements or documents that contain provisions relating to fees prohibited by sections 100(1)(a), 101(1), 102(1) and (2)(a) of the NCA;

8.5 The 'on the road', administrative and / or handling fees are disguised or inaccurately disclosed as service and delivery fees in credit agreements in contravention of section 3(e) read with section 92(2) of the NCA; and

8.6 The Applicant has charged consumers the 'on the road', administrative and / or handling fees on credit agreements despite not having been chosen by the consumers to act as their agent and arrange for these services. Section 102(2)(a) of the NCA requires that consumers nominate someone as an agent for them to be able to charge such fees.

9. The Respondent required of the Applicant, in part B of the Compliance Notice, to take the following steps to cure the alleged contraventions of the NCA, namely –

9.1 That VWFS ceases and desists from charging consumers the impugned fees by 24 October 2017 and to provide written confirmation to the Respondent that it had done so by the 2nd of November 2017;

9.2 That VWFS submits a list of all the consumers who were charged these fees from 2007 with information relating to –

9.2.1 the number of consumers charged the fees; and

9.2.2 the total amount of the fees charged to consumers; and

9.3 That VWFS refunds consumers who were charged these fees since 2007 with interest and submit a report to the Respondent setting out –

9.3.1 the number of consumers charged the fees; and

9.3.2 the number of consumers who were refunded these fees; and

9.3.3 the total amount of these fees refunded to consumers.

10. The Applicant has formed a view that it has not contravened the NCA and that it is accordingly not obliged to take the required steps. They have objected to the compliance notice in terms of section 56(1) of the NCA.

THE HEARING

11. The matter was enrolled for a hearing on the 19th and 20th of February 2019. On the first day, the Tribunal heard oral evidence led by the Applicant. On the second day, the parties argued the substantive legal issues regarding the alleged contraventions of the NCA and their respective cases.

12. The Applicant raised various points in limine at the start of the hearing.

13. The parties placed on record that-

13.1 They are in agreement with each other relating to the facts placed before the Tribunal;

13.2 Their affidavits and the attachments thereto constitute the evidence to be considered by the Tribunal;

13.3 The oral evidence led by the parties is to be considered by the Tribunal but not replace their founding, answering and replying affidavits;

13.4 The Respondent will not persist with its case that the dealer's invoice is a supplementary agreement as envisaged in section 91(2) of the NCA, which regulates impermissible fees in contravention of sections 100(1)(a), 101(1), 102(1) and (2)(a) of the NCA;

13.5 Due to the importance of the substantive legal issues raised in respect of the alleged contraventions of the NCA to the parties, the Applicant abandoned its point in limine;

13.6 It is common cause between the parties, that –

13.6.1 The Applicant finances motor vehicles for consumers based on invoices it receives from dealers;

13.6.2 The financing is done in terms of credit agreements entered into between the Applicant and consumers;

13.6.3 The credit agreements entered into between the Applicant and consumers are instalment agreements;

13.6.4 The invoice from the dealer includes –

13.6.4.1 an 'on the road' fee;

13.6.4.2 an administrative fee; and/ or a

13.6.4.3 a handling fee; and

13.6.5 The charges in paragraph 13.6.4 above are incorrectly/wrongly/confusingly disclosed, described and/or labelled as " & Delivery Charge" in the credit agreement.

THE PARTIES' CASES

APPLICANT'S CASE

14. The Applicant denies charging consumers in contravention of the NCA. It alleges that the dealer charges the impugned amounts in terms of a separate agreement concluded between the consumer and the dealer.

15. The Applicant submitted in its pleadings and at the hearing in respect of the 'on the road fee', administrative and / or handling fee, that they:

15.1 form part of separate cash purchase and sale agreement between the dealer and the consumer to which VWFS is not a party;

15.2 form part of an amount invoiced by the dealer and as such form part of the principal debt, being the deferred amount, as envisaged in section 101(1)(a) of the NCA;

15.3 had been incorrectly and separately reflected in Part E of the credit agreement as "Service & Delivery Charge" instead of in Part A as part of the principal debt;

15.4 section 102(1) and (2) are not applicable as VWFS, the credit provider, does not charge the fees in accordance with section 102 of the NCA; and

15.5 are not negotiated by VWFS as the consumers' agent.

16. VWFS further submitted that it does not render the services billed for by the dealer and does not get paid for them.
17. The Applicant led the evidence of Mr. Stadtlander, managing director of the Applicant. Stadtlander testified to the process through which the credit agreement comes into existence. He testified that –

17.1 The consumer identifies the product and services he or she wishes to purchase from the dealer;

17.2 The consumer thereafter signs an offer to purchase. The offer to purchase is similar to a quotation. The consumer then decides whether to pay for the goods and services in cash or to finance it with credit obtained from a financier;

17.3 If the consumer decides to pay cash for the goods and services, the consumer gets invoiced directly. If the goods and services are to be financed the invoice is submitted to a financier, such as the Applicant;

17.4 The Applicant is not involved in the discussions between the consumer and the dealer or the conclusion of the offer to purchase, and often does not have sight of the offer to purchase; and

17.5 The dealer invoices the Applicant who, upon receipt of the invoice and proof that the consumer has received the goods and services, pays the dealer on behalf of the Consumer.

18. As the purchase, payment and contracting happen as set out above, the Applicant's view is that it does not charge the consumer as envisaged in the NCA, it merely pays the dealer what the dealer charged the consumer. It (the Applicant) can therefore not be held responsible for charging the fees in contravention of the NCA.

RESPONDENT'S CASE

19. The Respondent's submitted that –

19.1 The only agreement relevant to the matter before the Tribunal is the credit agreement concluded between the Applicant and the consumer. The NCA applies only to that credit agreement, and not the purchase and sale agreement entered into between the consumer and the dealer.

19.2 Since the credit agreement includes an 'on the road' fee; administrative fee; and/or a handling fee described as "Service & Delivery Charge", not listed in sections 101 and 102 of the NCA, the Applicant charged amounts beyond what is allowed in those sections and in contravention

of the NCA.

19.3 The Applicant purchases the vehicles from the dealer for cash at the price set out in the dealer's invoice, issued to the Applicant.

19.4 The Applicant then –

19.4.1 sells the vehicle to the consumer on credit, with the purchase price repayable to the Applicant by the consumer in instalments;

19.4.2 takes delivery of the vehicles from the dealer through the consumer acting as the Applicant's agent;

19.4.3 the Applicant becomes the owner of the vehicle; and

19.4.4 the Applicant retains ownership of the vehicle until the consumer has paid up all the instalments due in terms of the credit agreement.

THE ISSUES FOR DETERMINATION

20. In order to arrive at a determination of the issues between the parties, the Tribunal has to determine –

20.1 The nature and legal consequences of transactions between the respective parties;

20.2 Whether the Applicant charged consumers the 'on the road'; administrative; and/or handling fees in contravention of the provisions of the NCA. Pertinent to determining this question, the Tribunal has to consider and make findings regarding –

20.2.1 The permissible fees, costs and charges pertaining to instalment agreements as provided for by the NCA;

20.2.2 The practical application of the meaning of "principal debt", being the deferred amount, as per the relevant provisions of the NCA;

20.2.3 The application and implications of section 102(1) and (2) regarding the issues between the parties;

20.2.4 Whether the Applicant may recoup fees or charges invoiced by dealer from consumers, in terms of instalment agreements but not provided for in the NCA; and

20.2.5 Whether the 'on the road', administrative and / or handling fees are disguised or inaccurately disclosed as service and delivery fees in credit agreements in contravention of section 3(e) read with section 92(2) of the NCA.

THE RELEVANT SECTIONS OF THE NCA

21. Instalment agreement is defined in section 1 of the NCA as follows:

- (a) "instalment agreement" means a sale of movable property in terms of which-all or part of the price is deferred and is to be paid by periodic payments;
- (b) possession and use of the property is transferred to the consumer;

(c) ownership of the property either-

(i) passes to the consumer only when the agreement is fully complied with; or

(ii) passes to the consumer immediately subject to a right of the credit provider to repossess the property if the consumer fails to satisfy all of the consumer's financial obligations under the agreement; and

(d) interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred;"

22. Section 3(e) provides that-

"... The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by ... (e) addressing and correcting imbalances in negotiating power between consumers and credit providers by ... (i) providing consumers with education about credit and consumer rights; (ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; ..."

23. Section 8(4) which provides that -

"(4) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is-

(a) ...'

(b) ...'

(c) an instalment agreement;

(d) ...,

(e) ..., or

(f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person

to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of-

(i) the agreement; or

(ii) the amount that has been deferred."

24. The other relevant sections are –

24.1 Section 92(2) referred to by the NCR which it claims the Applicant contravened. Section 92(2) provides as follows-

"(2) A credit provider must not enter into an intermediate or large credit agreement unless the credit provider has given the consumer-

- (a) a pre-agreement statement-
- (i) in the form of the proposed agreement; or
- (ii) in another form addressing all matters required in terms of section 93; and
- (b) a quotation in the prescribed form, setting out the principal debt, the proposed distribution of that amount, the interest rate and other credit costs, the total cost of the proposed agreement, and the basis of any costs that may be assessed under section 121 (3) if the consumer rescinds the contract."

24.2 Section 100 which, in respect of prohibited charges, provides that -

"(1) A credit provider must not charge an amount to, or impose a monetary liability on, the consumer in respect of-

- (a) a credit fee or charge prohibited by this Act;
- (b) an amount of a fee or charge exceeding the amount that may be charged consistent with this Act;
- (c) an interest charge under a credit agreement exceeding the amount that may be charged consistent with this Act; or
- (d) any fee, charge, commission, expense or other amount payable by the credit provider to any third party in respect of a credit agreement, except as contemplated in section 102 or elsewhere in this Act.

(2) ..."

(Emphasis added)

24.3 Section 101, in respect the cost of credit, which provides that -

"(1) A credit agreement must not require payment by the consumer of any money or other consideration, except (a) the principal debt, being the amount deferred in terms of the agreement, plus the value of any item contemplated in section 102; (b) an initiation fee,

- (c) a service fee, ...; (d) interest, ...; and (e) cost of any credit insurance provided in accordance with section 106; (f) default administration charges, ... and (g) collection costs, ...

24.4 Section 102 which provides that -

"(1) If a credit agreement is an instalment agreement, a mortgage agreement, a secured loan or a lease, the credit provider may include in the principal debt deferred under the agreement any of the following items to the extent that they are applicable in respect of any goods that are the subject of the agreement-

- (a) an initiation fee as contemplated in section 101 (1) (b), if the consumer has been offered and declined the option of paying that fee separately;
 - (b) the cost of an extended warranty agreement;
 - (c) delivery, installation and initial fuelling charges;
 - (d) connection fees, levies or charges;
 - (e) taxes, licence or registration fees; or
 - (f) subject to section 106, the premiums of any credit insurance payable in respect of that credit agreement.
- (2) A credit provider must not-
- (a) charge an amount in terms of subsection (1) unless the consumer chooses to have the credit provider act as the consumers agent in arranging for the service concerned;
 - (b) require the consumer to appoint the credit provider as the consumer's agent for the purpose of arranging any service mentioned in subsection (1); or
 - (c) charge the consumer an amount under subsection (1) in excess of-
 - (i) the actual amount payable by the credit provider for the service, as determined after taking into account any discount or other rebate or other applicable allowance received or receivable by the credit provider; or
 - (ii) the fair market value of a service contemplated in subsection (1), if the credit provider delivers that service directly without paying a charge to a third party..."

DISCUSSION AND ANALYSIS

The transactions

From the evidence placed before the Tribunal it became apparent that a number of transactions are entered into before the credit agreement is concluded.

- 25. The first and initial transaction is a purchase and sale agreement between the consumer and the dealer. This happens when the consumer and the dealer agree on the goods and services bought and the prices thereof.
- 26. Once the consumer and the dealer agree on the goods, services and prices, the dealer prepares an invoice. The invoice is issued either to the consumer, in the event of a cash sale, or to the Applicant or another financier in the event of a credit transaction. The credit transaction would have been concluded between the consumer and the credit provider.
- 27. If the sale is for cash the matter ends there, save for insurances etcetera which fall outside the consideration of this matter. If the sale is to be financed through credit, the dealer issues the invoice to Applicant or the relevant financier.

28. The consumer as agent of the Applicant or the other financier, takes delivery of the goods and services on behalf of the Applicant / financier. The financier becomes the owner of the goods and services upon paying the dealer's invoice. That is the second transaction. This is a cash transaction and outside the scope of the NCA. The Applicant remains the owner of the goods and services until the consumer has paid the instalments in full and in terms of the instalment agreement it entered into with the Applicant.
29. The financier, in this instance the Applicant, then on-sells the goods and services to the consumer. For the financier to be repaid for the cash outlay it made on behalf of the consumer, for the goods and services, as per the dealer invoice, a third agreement comes into existence between the consumer and the Applicant/financier. In the matter before the Tribunal this is the credit agreement, more specifically an instalment agreement.[1]
30. The following provisions (not contested) of the Applicant's standard credit agreement with consumers bears out the above process. Particularly pertinent are the purchase of the goods and services from the dealer by the Applicant; and the on-sale of the goods and services by the Applicant to the consumer, namely –
- 30.1 Clause 2.1 which provides that "we sell the goods to you on the terms and conditions of this agreement";
- 30.2 Clause 2.2 which provides that "you acknowledge that you have chosen the goods from the supplier";
- 30.3 Clause 1.10 which defines "goods" as meaning "the asset/s described in the quotation I costs of credit";
- 30.4 Clause 1.15 which defines "supplier" as meaning " the party from who you procure the goods"
- 30.5 Clause 2.4 which provides that "if you are satisfied with the goods then you must acknowledge this by signing the Delivery Receipt and acting as our agent by taking delivery of the goods on our behalf";
- 30.6 Clause 4.1 which provides that "we will remain the owner of the goods until you have paid all amounts due under this agreement";
- 30.7 Clause 6.6 which provides that " if the goods is a motor vehicle, the goods will be registered in terms of the National Road Traffic Act 99 of 1996, in our name as "Titleholder" and in your name as owner, and you must keep the goods in a good an roadworthy condition at your own costs";
- 30.8 Clause 20.1.1 which provides that "you hereby choose us as your agent for arranging the services as set out in section 102 of the Act, and you agree that the value of those services are included in the Principal Debt;"
- 30.9 Clause 1.14 that defines “Principal debt” as the amount that we will provide you as set out in Part A of the quotation I cost of credit"; and

30.10 As above set out in paragraph 30.9 clause 1.14 of the standard instalment agreement, entered into between the Applicant and the consumer, defines "Principal debt" as the amount that we will provide you as set out in Part A of the quotation I cost of credit".

31. The Tribunal finds that the agreements the Applicant entered into with the consumers are instalment agreements as defined in section 1 of the NCA and regulated in terms of the NCA. [2]
32. The Applicant is accordingly obliged to adhere to the spirit and the provisions of the NCA and specifically the provisions the Respondent alleges they contravene.

The permissible fees, costs and charges in terms of the NCA pertaining to instalment agreements

33. The permissible fees, costs and charges are carefully structured in the NCA.
34. Section 100(1)(a) sets out a broad prohibition on the credit provider requiring a consumer to pay "...a credit fee or charge prohibited by this Act;..." It is followed by section 100(1)(b) - (d) providing for the quantum of the fees, costs and charges beyond which the credit provider may not go.
35. Section 101 contains a closed list of seven (7) items[3], outside of which, the credit agreement may not require payment from the consumer. The 'on the road', admin and / or handling fees are not included in this closed list of items the consumer might be required to pay for in the credit agreement.
36. The principal debt is one of the seven
- (7) items in this closed list referred to above. Principal debt is defined in section 1 read with section 101(1)(a) and section 102(1) of the NCA. It is defined as "the amount calculated in accordance with section 101(1)(a) of the NCA". Section 101(1)(a) provides "... the principal debt, being the amount deferred in terms of the agreement, plus the value of any item contemplated in section 102..." The term "amount deferred" is not defined in the NCA.
37. The principal debt is in essence "... an amount owed by one person to another. "Payment is deferred and instalments are paid in terms of the an instalment agreement[4] which also forms a basis for levying charges, fees or interest payable to the credit provider.
38. Section 102(1) provides that " ...the credit provider may include in the principal debt deferred under the agreement any of the following items to the extent that they are applicable in respect of any goods that are the subject of the agreement ...". The items are set out in section 102(1) (a) to (f) namely -

"(a) an initiation fee as contemplated in section 101 {1} (b), if the consumer has been offered and declined the option of paying that fee separately;

- (b) the cost of an extended warranty agreement;
- (c) delivery, installation and initial fuelling charges;

- (d) connection fees, levies or charges;
 - (e) taxes, licence or registration fees; or
 - (f) subject to section 106, the premiums of any credit insurance payable in respect of that credit agreement."
39. To "calculate" the principal debt in accordance with section 1 read with section 101(1)(a) and section 102(1), therefore requires adding the items allowed in terms of section 102(1)(a) to (f) to the principal debt.
40. On studying the items listed in section 102(1)(a) to (f), it is apparent that the 'on the road', admin and/or handling fees are not included in this closed list of items the credit provider may include in the principal debt and charge consumers for.

Whether the Applicant "charges" the consumer

41. The Applicant submitted that it paid the amount invoiced by the dealer; that the invoiced amount included the 'on the road', admin and / or handling fees; and that it did not charge these fees to consumers.
42. The Respondent submitted that the Applicant charges consumers amounts which are prohibited and fall outside the closed lists of charges that may legitimately be imposed as listed in sections 101 and 102.
43. In making a determination of the questions above we first deal with the Applicant's contention that it does not charge consumers the 'on the road', admin and/or handling fees, and Applicants directly contrary contention.
44. With reference to paragraphs 28 - 35 above, the Tribunal is of the view that when the Applicant sells the goods and services to the consumer, and the consumer and the Applicant enters into an agreement regarding the repayment of the deferred amount and the charges, fees and interest in respect of the deferred amount, the Applicant charges the consumer within the meaning of section 102(1) and (2) of the NCA. This is moreover so as the charges, fees and interest in respect of the deferred amount do not follow from the invoice but flow from the credit / instalment agreement entered into between the consumer and the Applicant/ financier.

What constitute the principal debt/ deferred amount?

45. Turning to the following question –

45.1 If an item is not listed in section 102(1)(a) to (f) and provided the credit provider meets the requirements of section 102(2), may the credit provider charge the consumer for such items as part of the principal debt / deferred amount? Or stated differently; and

45.2 Does the credit provider have the discretion to include any expense item in the principal debt, as long as it advanced the money to the consumer and deferred the payment thereof?

46. The Applicant's main submission are that –

46.1 the principal debt " ...normally include the cash amount advanced to the consumer or the cash price for the goods and services ... the total purchase price agreed upon between the dealer and the consumer, which will include all the items chosen by the consumer from the dealer...";

46.2 the 'on the road', admin and handling fees are included in the principal debt/ invoiced amount; and

46.3 the invoiced amount is based on the agreement between the dealer and the consumer.

47. The Respondent persisted with its view that the fees charged by the dealer to the Applicant, in terms of the dealer's invoice, are paid by the Applicant when it acquires ownership of the vehicle from the dealer. The Respondent also states the Applicant then charges the same amount to the consumer, including the charges that fall outside the closed list of charges allowed in contravention of sections 101 and 102 of the NCA.

48. In determining this issue, the Tribunal considers the fact that the legislature deemed it fit to enumerate specific items that may be included in the principal debt (once specific requirements have been met) and as costs of credit.

49. This is, in the view of the Tribunal, clearly to give effect to the intent of the NCA, as captured to some extent in section 3(c), where, amongst others, it sets out as follows -

"The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by-

(c) promoting responsibility in the credit market by-

(i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and

(ii) discouraging reckless credit granting by credit providers and contractual default by consumers

50. The Applicant further submitted that it has no obligation, and the NCA does not impose a duty on credit providers regarding interrogating fees and charges in the dealers' invoices. NCR is acting arbitrarily and ultra vires to impute these duties.

51. The Tribunal is in agreement with the Applicant, that the legislature through the NCA, does not impose an obligation on the Applicant to "police" consumers and impose an obligation on it to veto what consumers may or may not buy and may and may not finance in terms of a credit agreement.

52. Having stated the above, the NCA does however impose an obligation on the Applicant, as a registered credit provider, to adhere to the provisions of the NCA and, in terms of section 100(1)(a), to not charge an amount to, or impose a monetary liability on, the consumer in respect of a credit fee or charge prohibited by this Act.
53. In this instance the provisions of sections 101 and 102 specifically are pertinent to this matter in respect of the two main monetary components of a credit agreement, namely the principal debt / deferred amount and the costs of credit. As these are specifically enumerated, the Applicant as a credit provider is obliged to keep the principal debt and the costs of credit within the parameters of these section.
54. This is within the power and ability of the Applicant as credit provider to do so as –
- 54.1 It is the Applicant who gets invoiced the amounts, not the consumer;
- 54.2 It is the Applicant, at that point of invoicing who could interrogate the items in the invoice, not the consumer; and
- 54.3 It is incumbent on the credit provider to ensure that it does not pay a dealer upon invoice for costs, fees and charges proscribed under the NCA and then as a result being forced into recouping them from the consumer in the credit agreement in contravention of the NCA.
55. The evidence before the Tribunal, and conceded by the Applicant, is that it has not included the on the road, admin and / or handling fees in the principal debt –
- 55.1 The Applicant submitted that the 'on the road, administrative and/ or handling fees had been incorrectly reflected separately in the credit agreement as "Service & Delivery Charge" instead as part of the deferred amount.
- 55.2 The admitted fact that these fees have been disclosed in Part E of the instalment sale agreement, and not in Part A of the agreement as part of the principal debt, gives credence to the Respondent's assertions that these fees in fact did not form part of the principal debt.
56. The Tribunal noted the submissions by the Applicant that they do not derive any financial benefit from the payments of the on the road fee, admin fees and handling fee. The Tribunal disagrees with this contention: it might be so that the Applicant pays the invoiced amounts over to the dealer, but the Applicant derives interest income from these deferred amounts over the life of the instalment agreement. Aggregating these amounts over its loan book, the profit to the credit provider could amount to substantial amounts of money.
57. There is a danger that the purposes of the NCA may not be realised if the credit provider may include any / all amounts invoiced by the dealer; pay the dealer and then include them in the credit agreement requiring of the consumer to pay.
- 57.1 Firstly, the danger comes from the potential perverse incentive for the credit provider to not Interrogate the amounts it gets invoiced by the dealer. The inclusion of the impugned fees in the principal debt increases the Applicant's profits from the charges, fees and interest's income.

57.2 Secondly, the danger comes from these items increasing the capital sum owing and deferred and as a result the costs of credit to consumers. Albeit in the overall scheme of the credit agreement, the quantum of these items might be relatively small. However, with charges, fees or interest levied thereon over the term, generally 60 to 72 months, the amounts owing can become substantial. The impact on consumers' indebtedness could potentially even be more severe if those consumers go into debt counselling and get debts re-arranged over a longer period of time.

58. As such it could not have been the intention of the legislature to allow the credit provider carte blanche to add into the principal debt items not listed in section 102(1). This means in the view of the Tribunal, the credit provider is obligated to ensure it meets the prescripts of the NCA and not include certain items beyond those in section 102(1) in the principal debt or deferred amount.
59. Allowing credit providers carte blanche to include any items in the credit agreement on the basis that they had been invoiced for those items by the dealer, and then passing it on to the consumer in the credit agreement, manifestly runs counter to the purpose of the NCA as reflected in section 3(c) i.e. "... encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and discouraging reckless credit granting by credit providers and contractual default by consumers;...
60. Restricting the items that may be included in principal debt / deferred amount; and payments the credit agreement (by extension the credit provider) may not require from consumers; begins to give content to this purpose of the NCA set out in section 3(c) of the NCA.

The Applicant has charged consumers the 'on the road', administrative and handling fees in credit agreements despite not having been chosen by consumers to act as the consumers' agent to arrange for services for which these fees are charged to consumers as required by section 102(2) (a) of the NCA.

61. The Applicant has certain obligations in terms of the NCA, including not charging consumers costs, fees and charges in contravention of sections 100, 101(1)(a) and 102(1) and (2). If it charges in terms of section 102(1) then it should meet the requirements of section 102(2).
62. Section 102(2) provides in relevant part that =-
- "(2) A credit provider must not-
- (a) charge an amount in terms of subsection
 - (1) unless the consumer chooses to have the credit provider act as the consumer's agent in arranging for the service concerned;
 - (b) require the consumer to appoint the credit provider as the consumers agent for the purpose of arranging any service mentioned in subsection (1); or..."

63. In light of the Tribunal's finding above, the Tribunal will not deal with the issue of whether the consumer chose to have the credit provider act as the consumer's agent in arranging for the service concerned.

The 'on the road', administrative and handling fees are disguised or inaccurately disclosed as service and delivery fees in credit agreements in contravention of section 3(e) read with section 92(2) of the NCA

64. It is common cause between the parties that –

64.1 A "Service & Delivery" fee is actually reflected in Part E of the agreement.

64.2 The "Service & delivery" item reflected in Part E of the instalment agreement consist of the 'on the road' fee, admin and handling fee.

64.3 Part A of the "quotation / costs of credit" document excludes the "Service & Delivery" fees.

65. The Applicant submitted that the disclosure of these fees was made in error in Part E of the instalment agreement instead of in Part A.

- 66 The NCR claims that irrespective of the above –

66.1 the 'on the road', administrative and handling fees are disguised or inaccurately disclosed as service and delivery fees in credit agreements in contravention of section 3(e) read with section 92(2) of the NCA; and

66.2 is misleading by, not providing adequate disclosure and standardized information to protect consumers against deception.

67. VWFS' view is that Section 3(e) of the NCA relates to statement of purpose and not capable of being contravened.

68. The Tribunal finds that the Applicant inaccurately and in a misleading way disclosed costs and charges in the instalment sale agreement in contravention of section 92(2) of the NCA. The "Service & Delivery Charge" should have been reflected for what they were, namely on the road, admin and / or handling fees.

69. The Tribunal is of the view that section 3(e) of the NCA cannot be contravened. Section 3 of the NCA sets out the purpose of the NCA, and as such cannot be contravened. As such the text in this section assists the Tribunal in assessing conduct and facts / evidence placed before it, to interpret whether those constitute contraventions of the NCA.

70. Section 3(e) provides that “ ... The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by ... (e) addressing and correcting imbalances in negotiating power between consumers and credit providers by ... (i) providing consumers with education about credit and consumer rights; (ii) providing consumers with adequate disclosure of

standardised information in order to make informed choices; ..."

71. The NCR refers to section 92(2) as the section it claims the Applicant contravened. Section 92(2) provides as follows-

"(2) A credit provider must not enter into an intermediate or large credit agreement unless the credit provider has given the consumer-

- (i) in the form of the proposed agreement; or
- (ii) in another form addressing all matters required in terms of section 93; and
- (b) a quotation in the prescribed form, setting out the principal debt, the proposed distribution of that amount, the interest rate and other credit costs, the total cost of the proposed agreement, and the basis of any costs that may be assessed under section 121 (3) if the consumer rescinds the contract."

FINDINGS

72. The Tribunal accordingly finds that with regard to the practices of the Applicant in general and in this matter in particular-

72.1 The 'on the road', administrative and handling fees are credit fees or charges prohibited by section 100(1)(a) of the NCA;

72.2 The 'on the road', administrative and handling fees are not credit fees or charges permitted to be charged on a credit agreement in terms of section 101(1) of the NCA;

72.3 The 'on the road', administrative and handling fees are not credit fees or charges that can be included in the principal debt deferred of an instalment agreement or a lease agreement in terms of section 102(1) of the NCA; and

72.4 The 'on the road', administrative and handling fees are disguised or inaccurately disclosed as service and delivery fees in credit agreements in contravention of section 3(e) read with section 92(2) of the NCA.

CONFIRMATION OR MODIFICATION OF ALL OR PART OF THE COMPLIANCE NOTICE

The contraventions

73. The NCA, in section 56(2), empowers the Tribunal to "... (2) After considering any representations by the applicant and any other relevant information ... confirm, modify or cancel all or part of a notice."
74. Section 56(3) allows the Tribunal to "... (3) If the Tribunal confirms or modifies all or part of a notice, ..." and "... the applicant must comply with that notice as confirmed or modified, within the time period specified in it."
75. Arising out of the –

75.1 Respondent having abandoned its allegation that the Applicant contravened sections 90(2)(e) and (f) and section 91(2) in respect of the dealer invoices containing the 'on the road', administrative and / or handling fees are supplementary agreements or documents that contain provisions relating to these fees prohibited by sections 100(1)(a), 101(1), 102(1) and (2)(a) of the NCA see paragraph 13.4 above); and

75.2 Tribunal findings in paragraph 72 above, the compliance notice Is modified to the extent that the Tribunal deletes references to contravention of sections 90(2)(e) and (f) and section 91(2).

The steps

76. The Regulator, in Part B of the Compliance Notice, required of the Applicant to –

76.1 Cease and desist from charging consumers the impugned fees by 24 October 2017, to provide written confirmation to the Respondent that it had done so by the 2nd of November 2017;

76.2 Submit a list of all the consumers who were charged these fees from 2007 with information relating to –

76.2.1 the number of consumers charged the fees; and

76.2.2 the total amount of the fees charged to consumers; and

76.3 Refund consumers who were charged these fees since 2007 with interest and submit a report to the Respondent setting out –

76.3.1 the number of consumers charged the fees; and

76.3.2 the number of consumers who were refunded these fees; and

76.3.3 the total amount of these fees refunded to consumers.

77. The Tribunal considered the steps the Regulator required the Applicant to take, specifically with regard to the timeframe, bearing in mind –

77.1 The time that has elapsed since the date the Compliance Notice had initially been issued; and

77.2 The legal implications of the step as reflected in paragraph 83 which requires of the Applicant "... refund all the consumers who were from 2007 charged the on the road fee, admin fee and handling fee the amount of such fees, together with the interest charged thereon ..."

78. With regard to the time lapse –

78.1 It is not possible for the Applicant to adhere to the time-frames stated in Bl of the Compliance Notice as the dates stated there, have come and gone;

78.2 The Tribunal cannot confirm an order for compliance to the NCA with a retrospective date, due to the impossibility adhering to such an order would impose on the relevant party; and

78.3 The Tribunal accordingly modifies Bl of the compliance notice to read as follows

"1. From 10 April 2019, Applicant must cease the practice and I or conduct of charging consumers 'on the road', admin and handling fees on credit agreements, and submit written confirmation to this effect, by no later than the 25th of April 2019."

79. With regard to the practical and legal implications of the step required in paragraph B3 of the Compliance Notice, set out above –

79.1 The repayment of the fees will mean that the consumer will derive a benefit from an amount paid over by the Applicant without the consumer paying for them;

79.2 At the same time the Applicant should not derive financial benefit out of its unlawful levying of charges, fees or interest from 'on the road', admin and handling fees.

79.3 The Tribunal accordingly modifies paragraph B3 of the compliance notice to read as follows-

"3. Applicant is required to , in respect of all the consumers identified in B2, calculate the total amount of charges, fee or interest levied on 'on the road', admin and /or handling fees and refund all those consumers those charges, fees or interest levied and submit to the NCR a report by an independent auditor setting out –

- (a) The number of consumers who were charged those charges, fees or interests;
- (b) The number of consumers who were refunded those charges, fees or interests; and
- (c) The total amount of charges, fees or interest refunded to consumers."

ORDER

80. The Tribunal accordingly makes the following order –

80.1 The compliance notice issued by the Applicant on 23 October 2017, is confirmed as modified in the following respects –

80.1.1 Paragraph A13(d) thereof is hereby deleted;

80.1.2 Paragraph B1 thereof to read as follows;

"1. From 10 April 2019, Applicant must cease the practice and / or conduct of charging consumers 'on the road', admin and handling fees on credit agreements, and submit written confirmation to this effect to the Respondent, no later than the 25th of April 2019."

80.1.3 Paragraph B3 thereof to read as follows:

"Applicant is required to, in respect of all the consumers identified in 82, calculate the total amount of charges, fees or interest levied on the 'on the road', admin and /or handling fees and refund all those consumers those charges, fees or interest levied and submit to the NCR a report by an independent auditor setting out –

- (a) The number of consumers who were levied those charges, fees or interest;
- (b) The number of consumers who were refunded those charges, fees or interest; and

(c) The total amount of charges, fees or interest refunded to consumers."

80.2 No order is made for costs.

Dated at Centurion this 4th day of April 2019.

D Terblanche

Tribunal member

Dr. M Peenze, Tribunal member and Dr. B Dumisa, Tribunal member, concurring.

[1] "instalment agreement" means a sale of movable property in terms of which –

- (a) All or part of the price is deferred and is to be paid by periodic payments;
- (b) Possession and use of the property is transferred to the consumer;
- (c) Ownership of the property either –
 - (i) Passes to the consumer only when the agreement is fully complied with; or (ii) Passes to the consumer immediately subject to a right of the credit provider to repossess the property if the consumer fails to satisfy all of the consumer's financial obligations under the agreement; and
- (d) Interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred;

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- (a) All or part of the price is deferred and is to be paid by periodic payments;
- (b) Possession and use of the property is transferred to the consumer;
- (c) Ownership of the property either –
 - (i) Passes to the consumer only when the agreement is fully complied with; or
 - (ii) Passes to the consumer immediately subject to a right of the credit provider to repossess the property if the consumer fails to satisfy all of the consumer's financial obligations under the agreement; and
- (d) Interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred;

[2] See the definition of "credit agreements" in section 1 of the NCA read with section 3 on application of the NCA and section 8 of the NCA. Section 8 of the NCA provides. "(1) Subject to subsection (2), an agreement constitutes a credit agreement for the purposes of this Act if It is - ...

- (b) a credit transaction, as described in subsection (4); ...
- (4) An agreement, irrespective of its form but not including an agreement contemplated in subsection (21), constitutes a credit transaction if it is- ...
- (f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of -
- (i) the agreement, or (ii) the amount that has been deferred."

[2] See the definition of "credit agreements" in section 1 of the NCA read with section 3 on application of the NCA and section 8 of the NCA. Section 8 of the NCA provides.

"(1) Subject to subsection (2), an agreement constitutes a credit agreement for the purposes of this Act if it is -

...

- (b) a credit transaction, as described in subsection (4);
- (4) An agreement, irrespective of its form but not including an agreement contemplated in subsection (21), constitutes a credit transaction if it is-
- (f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of -
- (i) the agreement, or
- (ii) the amount that has been deferred."

[3] "(1) A credit agreement must not require payment by the consumer of any money or other consideration, except (a) the

principal debt, being the amount deferred in terms of the agreement, plus the value of any item contemplated in section 102; (b) an initial on fee, (c) a service fee, ...; (d) Interest, ...; and (e) cost of any credit insurance provided in accordance with section 106; (f) default administration charges, ... and (g) collection costs, ... (Emphasis added)

[3] "(1) A credit agreement must not require payment by the consumer of any money or other consideration, except (a) the

principal debt, being the amount deferred in terms of the agreement, plus the value of any item contemplated in section 102; (b) an initial on fee, (c) a service fee, ...; (d) Interest, ...; and (e) cost of any credit insurance provided in accordance with section 106; (f) default administration charges, ... and (g) collection costs, ...

(Emphasis added)

[4] See section 8(4) of the NCA which provides that - "(4) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2). constitutes a credit transaction if it is - (a) ... ; (b)... ; (c) an instalment agreement ; (d) ... ;(e) ... ; or (f) ... ,in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of- (i) the agreement , or (ii) the amount that has been deferred."

[4] See section 8(4) of the NCA which provides that -

"(4) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2). constitutes a credit transaction if it is - (a) ... ; (b)... ; (c) an instalment agreement ; (d) ... ;(e) ... ; or (f) ... ,in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of- (i) the agreement , or (ii) the amount that has been deferred."

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