



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **YES**

Date: **11 November 2022** Signature:

CASE NO: A235/2021

In the matter between:

THE LOAN COMPANY (PTY) LTD

Appellant

And

NATIONAL CREDIT REGULATOR

First Respondent

NATIONAL CONSUMER TRIBUNAL

Second respondent

JUDGMENT

NYATHI J

A. INTRODUCTION

- [1] The Appellant is the LOAN COMPANY (PTY) LTD (the “Loan Company” or the “Appellant”). The Appellant conducts the business of credit provider.
- [2] The First Respondent is the NATIONAL CREDIT REGULATOR (the “NCR”), it was established in terms of the National Credit Act 34 of 2005. The mission of the NCR is to support the social and economic advancement of South Africa by regulating for a fair and non-discriminatory market place for access to consumer credit; and promoting responsible credit granting and credit use, and effective redress.
- [3] The Second Respondent is the NATIONAL CONSUMER TRIBUNAL (the “NCT”), it was established in terms of the National Credit Act 34 of 2005. As an independent adjudicative entity, the Tribunal’s mandate is to hear and decide on cases involving consumers, service providers, credit providers, debt counsellors and credit bureaux. The NCT is also responsible for reviewing decisions made by the National Credit Regulator and the National Consumer Commission.
- [4] The Appellant is appealing against particular orders and parts of the decision and judgment granted by a full panel of the Second Respondent on the 21 July 2021 which was delivered to the parties on the 23 July 2021.
- [5] The appeal is in terms of Section 148(2)(b) of the National Credit Act (“NCA”), which reads:
- “(2) Subject to the rules of the High Court, a participant in a hearing before a full panel of the Tribunal may-*

(a) apply to the High Court to review the decision of the Tribunal in that matter; or

(b) appeal to the High Court against the decision of the Tribunal in that matter, other than a decision in terms of section 138 or section 69(2)(b) or section 73 of the Consumer Protection Act, 2008, as the case may be.”

[6] The decision of the NCT in the present matter was not a decision in terms of the Consumer Protection Act. The decision of the NCT at issue in this case is therefore not one that is excluded from the right of appeal in terms of section 138 or section 69(2)(b) or section 73 of the CPA.

[7] Trollip J indicated in *Tickly & Others v Johannes NO & Others 1963 (2) SA 588 (T) at 590G-591A*, that the word “appeal” can have different meanings, namely:

“(i) an appeal in the wide sense, that is, a complete rehearing of, and fresh determination on the merits of the matter with or without additional or new information...

(ii) an appeal in the ordinary strict sense, that is, a rehearing on the merits but limited to the evidence or information the decision under appeal was given, and in which the only determination is whether the decision is right or wrong....”

[8] This being an appeal from a decision of a tribunal, it is regulated by section 148(2)(b) of the NCA. This means that even though this court is constituted of two judges, it sits as a court of first instance in this appeal. That much was clarified in *National Credit Regulator v Lewis Stores 2020 (2) SA 390 SCA* at Para [56].

[9] The disputes emanating from the notice of appeal primarily concern the proper interpretation of particular sections of the NCA.

B. THE BASIS FOR THIS APPEAL:

[10] This appeal involves prohibited and unlawful conduct by the appellant (“Loan Co”), in contravention of the NCA, wherein it advances funds to consumers in return for them providing their vehicles as security.

[11] It does so without being registered as a credit provider as required by section 40 of the NCA.

[12] These agreements are accordingly unlawful and void in terms of section 40(4) of the NCA.

[13] The Loan Co furthermore contravened the NCA by inter alia by:

13.1 conducting itself as if it were registered with the NCR; and

13.2 levying charges against the consumers that are prohibited in terms of the NCA.

13.3 failing to provide the consumers with the prescribed information and documentation when concluding agreements with them.

[14] Whether the Tribunal, having found the Loan Co to have repeatedly contravened the NCA, issued an appropriate relief to redress the Loan Co’s unlawful conduct by directing it to repay funds that were unlawfully levied.

[15] The Respondent in turn prays for this appeal to be dismissed with costs.

C. SUMMARY OF FACTS

[16] In terms of section 40 of the NCA, credit providers are required to register with the NCR. An agreement that is entered into by a person who is required to register but who fails to do so is unlawful and void.¹

¹ Section 40(4) read with section 89(2)(d)

[17] During February 2017 the NCR became aware of an advertisement that was being circulated by the Appellant, which stated:

“Contact the Loan Company for an immediate solution to your money problems. Instant loans on your car, bikes, bakkies, quads, boats, trailers or any other paid up asset. SMS loan to 0791594389 Visit our website at www.theloancompany.co.za”

[18] The website stated that the company provides *“loan service. Financial Aid Service”*.

[19] Upon becoming aware of this advertisement, the NCR enquired from the Loan Co if it was registered with the NCR and requested its registration number.

[20] In response to this query, the Loan Co stated that *“the Loan Co is registered with the NCR”*.

[21] It however refused to produce the NCR registration number.

[22] An investigation was then conducted into Loan Co’s activities in terms of section 139(1)(c) of the NCA.

[23] During its investigation the NCR noticed that the Loan Co’s website stated that:

23.1 its aim is to provide immediate and flexible short term loan solutions or bridging finance.

23.2 the Loan Company is a registered credit provider.

[24] The website also contained the NCR’s logo thus misrepresenting that it was registered with the NCR.

- [25] The Loan Co made these representations on its website being fully aware that it was not a registered credit provider.
- [26] As part of the investigation, the NCR Inspector interviewed the Loan Co's representative, Mr De Rosnay, who advised that:
- 26.1 Its business model is one of entering into pawn transactions with customers who are owners of valuable assets such as motor vehicles, caravans, trailers, motorbikes and jewellery.
- 26.2 It calculates the loan amount it is willing to offer to a consumer based upon a number of factors including inter alia, trade in value of the motor vehicle, condition of the motor vehicle and age of the motor vehicle.
- 26.3 The loan amount advanced to a consumer would not exceed 50% of the trade in value of the motor vehicle, as calculated by Loan Co.
- 26.4 Between 50% and 40% of all pawned assets were finally sold by Loan Co due to consumers' failure to comply with their obligations in terms of the loan agreement. Any surplus from such sales would be considered as profit by Loan Co and not paid out to the consumer.
- [27] On its own version, Loan Co accordingly enters into Pawn Transactions, which are credit transactions that are regulated in terms of the NCA and which require the credit provider to be registered with the NCR.
- [28] The Inspector was also provided with copies of a random sample of 15 agreements that were entered into between Loan Co and consumers wherein it advanced loans to them.

[29] All the agreements that were considered are similar in material respects and reveal that:

29.1 A loan is advanced to the consumers against a motor vehicle which is used as security.

29.2 The consumer is then required to pay the following charges — Interest, initiation fee; valuation fee; contract drafting fee; provision of bank charges and storage costs.

[30] The agreement then provides at clause 4.3 that the financier will be entitled to sell the items leased as security, immediately and without further notice to the borrower, in case of the borrower not acting in accordance with the provisions of the agreement.

[31] Arising from the investigation, the NCR made a referral to the Tribunal in terms of section 140(1) of the NCA on the basis that Loan Co had engaged in prohibited and unlawful conduct.

D. THE RELEVANT TIME FRAMES

The following facts are common cause between the parties:

[32] On 9 June 2016, after having been investigated by the respondent, the appellant made its application for registration.

[33] On 13 June 2016, the NCR sent the appellant an acknowledgement of receipt letter and requested information and documents to be submitted to it within 15 business days. It then alerted the appellant about the consequences of not complying with this request, and it warned: “If the abovementioned information is not submitted within the prescribed time the NCR may refuse the application in terms of Section 45(2)(b).”

- [34] On 19 September 2016, the NCR reminded the appellant of the outstanding information requested. This letter advised the appellant to submit the outstanding information within 10 business days from date thereof. The letter further reminds the appellant to note that the R550 application fee is not refundable; a reapplication would be treated as an entirely new application. The Appellant Loan Co failed to respond.
- [35] During February 2017, the social media advert by Loan Co was noticed by the respondent and an investigation is launched.
- [36] On 31 March 2017, the appellant is registered as a credit provider.

E. APPELLANT'S CONTENTIONS

Contravention 1: entering into credit agreements before the date of its registration:

- [37] The agreements at the centre of this appeal were concluded between the appellant and consumers before the date of registration on 31 March 2017. This constitutes contravention of section of the NCA.
- [38] Appellant alleges that the tribunal erred in finding that appellant had contravened Section 40(1) read with Section 40(3) of the NCA by entering into credit agreements before the date of its registration, 31 March 2017. The appellant contends that at the time it concluded the credit agreement it had lodged an application for registration with the NCR. It then relies on Section 89(4) to contend that the agreements were not unlawful on account of the pending registration application.
- [39] Appellant denies that and relies on what it calls "a proper interpretation of Section 42(3)(a) of the NCA"² which provides that if a credit provider is

² Notice of Appeal Paragraph 1.3

required to be registered for the first time, that credit provider must apply for registration by the time the threshold determined by the Minister in terms of Section 42 takes effect, and may thereafter continue to provide credit until the time that the National Credit Regulator takes a decision in respect of its application. In this case until the 31 March 2017.

Analysis and findings

[40] The purpose of the NCA is set out in section 3, it is ‘to promote and advance the social and economic welfare of South Africans’ in order to achieve ‘a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers’. Keeping this in mind the NCT found that the provisions of the NCA were meant to regulate those participating in the credit industry and persons who frequently provide credit.

[41] The requirement to register as a credit provider applies to every credit agreement with the exceptions of very few instances.³ These are for example:

41.1 Credit agreement between parties not dealing at arm’s length.

41.2 Where the consumer is a juristic person whose asset value/annual turnover is equal or exceed the threshold, the state or an organ of the state?

41.3 Where the credit agreement is categorised as a “large agreement” in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below the threshold.

³ Section 4 of the NCA.

41.4 Where the credit provider is located outside the Republic of South Africa.

[42] The nature of Appellant's credit agreements with consumers clearly do not fall within the above exceptions. The obligation for Appellant to register is imperative.

[43] The finding by the NCT cannot be faulted.

Second contravention: Appellant advertising the availability of credit before being registered with the NCA (contravention of Section 76(3) of the NCA:

[44] Appellant contends that the tribunal erred in finding the Appellant had been in repeated contravention of the provisions of Section 76(3) of the NCA because Appellant advertised the availability of credit before being registered with the NCA.

Analysis and conclusions

[45] Section 76(3) of the NCA provides that: "A person who is required to be registered as a credit provider, but who is not so registered must not advertise the availability of credit, or of goods or services to be purchased on credit."

[46] Whilst complaints about the poor craftsmanship of some sections the NCA are legion, the above excerpt from section 76 could not be clearer in its purport and meaning.

46.1 Appellant contends that a purposive interpretation of Section 76(3) requires that the section must be interpreted against the NCA in its totality including Section 42(3).

46.2 Further that in terms of Section 42(3)(a) Appellant could enter into credit agreements from the time an application for registration as credit provider had been submitted with Respondent, until a final determination by Respondent in respect of the application.

46.3 That consequently, Appellant could lawfully advertise the availability of credit as a credit provider from 9 June 2016.

[47] Having found that the Appellant has an obligation to be registered as a credit provider, it goes without saying that advertising prior to being so registered would transgress the provisions of the NCA, namely section 42(3).

[48] The findings of the tribunal can thus not be interfered with and they prevail.

Third contravention: repeated contravention of the provisions of Section 93(2) of the NCA and Regulation 28, read with Form 20.2 (paragraph 164.1.4) –Not providing consumers with pre-agreement statements and quotations for small agreements:

[49] The Appellant contends that the tribunal erred in finding that Appellant had been in repeated contravention of the provisions of Section 93(2) of the NCA and Regulation 28, read with Form 20.2 (paragraph 164.1.4) because:

49.1 Further that Regulation 28 and Form 20 relate to pre-agreement statements and quotations for small agreements and are thus irrelevant in so far as Section 93(2) read with Form 20.2 relate to the prescribed form of small credit agreements.

- 49.2 Further that the Tribunal erred in finding that Appellant cannot rely on the protection of Regulation 75(4), requiring merely a form that satisfies all substantive requirements as to content and design of Form 20.2, because Appellant's contract agreements did not, according to the tribunal, substantively satisfy all the content requirements of Form 20.2.
- 49.3 That the Tribunal lost sight of the fact that at the time of entering into the sample agreements, Appellant was unregistered, and no NCR registration number could be inserted in the credit agreements,
- 49.4 In addition to the foregoing all sample agreements were concluded at Appellant's physical address and the relevant consumers could contact representatives of Appellant at the physical address. and
- 49.5 Appellant's name and company number are reflected on the pawn agreements which allow for the establishment of any contact details relevant to Appellant. The fact that no mention is made of default administrative charges in Appellant's agreement simply indicates that no charges are payable.
- 49.6 Section 97(2)(b) and Regulation 34 burden a consumer with an obligation to keep the credit provider informed of the location of relevant goods, and the reference in Form 20.2 to disclose the location of goods (if applicable) does not relate to Appellant as credit provider.
- 49.7 Consequently, Appellant's pawn agreements complied in substance to the requirements of Form 20.2. That this is inter alia borne out

by the finding of the tribunal that Appellant's credit agreements indeed constituted pawn transactions.

Analysis and conclusions

[50] Section 93(2) and Form 20.2 specifically provide that “*a document that records a small credit agreement must be in the prescribed form*”. There is nothing providing for compliance in substance.

[51] Section 93(2) read with Regulation 28, read with Form 20.2 requires certain critical information to be recorded therein; namely: the credit provider's registration number, its contact information and address, default administration charges and information about where the pawned goods are kept.

[52] These details were not included in the agreements that were used by the Appellant. This constitutes non-compliance with the above provisions.

[53] The NCT's findings against the Loan Co cannot be interfered with.

Fourth contravention: Repeatedly charging interest rates in excess of the maximum prescribed rate in contravention of Section 100(1)(c) and 100(1)(d)(ii) read with Regulation 40 (Paragraph 164(1)(5)) of the NCA:

[54] Appellant contends that the tribunal incorrectly found that the Appellant had repeatedly contravened Section 100(1)(c) and 100(1)(d)(ii) read with Regulation 40 (paragraph 164(1)(5)) of the NCA, by charging interest under credit agreements exceeding the maximum prescribed rate and consequently the amount that may be charged consistent with the NCA, notwithstanding the Tribunal's finding that Appellant might charge, as

provided for in Regulation 42(1) item 5, interest calculated at 5% per month (paragraph 122), having regard to the following:

- 54.1 That the pawn agreements investigated by Respondent (“NCR”) were all concluded for a period of 1 month, and interest charged in respect of those agreements amounted to 5 % per month of the loan amount.
- 54.2 Further that Regulation 40(2)(c)(iv) provides for the number of days in a month to be interpreted either as 30, or as the actual number of days in the particular month.
- 54.3 The Tribunal correctly found that Appellant had the option to calculate interest applying 30 days or the actual number of days per month, but then erred in finding that because all the Appellant's agreements reflect a date range Appellant had to calculate the actual number of days in the date range of each of the credit agreements the Appellant entered into with consumers, and to calculate the interest rate based on the actual days (paragraph 123.1.3).
- 54.4 Notwithstanding the date range of each of Appellant's credit agreements, Appellant was entitled in terms of Regulation 40(2)(c) (iv) to interpret the number of days of a month as 30.
- 54.5 Only in two instances where the relevant credit agreements were entered into during the month of February (Annexures “L” and “U”) did the actual month interest that was charged for at 5 % comprise of less than 30 days, but this fact did not prevent that the month of February with 29 days (Annexure “L”) and with 28 days (Annexure “U”) attracted the full 5% per month interest Appellant was entitled to.

54.6 The Respondent did not prove that interest charged by Appellant differed more than 0.1% from interest to be calculated in terms of Regulation 40. 4.7. The Tribunal further erred in finding (paragraph 125) that Appellant contravened the NCA and the Regulations promulgated under the NCA because Appellant calculated and compounded interest daily. Appellant calculated interest when the pawn agreements were entered into for 1 month, being the duration of the agreement, which interest was payable at the end of the loan term, as was stipulated in clause 3 of Appellant's pawn agreements. No evidence revealed that Appellant indeed calculated and compounded interest daily. On a simple calculation the Appellant charged simple interest as opposed to compounded interest which is allowed when considering the definition of a deferred amount in terms of the Regulations.

Analysis and conclusions of the Fourth, Fifth and Sixth Contraventions will be dealt with at once beneath the discussion of the latter Contravention below:

Fifth contravention: Finding that Appellant is not entitled to the proceeds of the sale of the pawned goods in excess of the outstanding amount:

[55] The Appellant contends that the Tribunal correctly categorised the agreements concluded by Appellant as pawn transactions (paragraph 84), and correctly concluded that pawn transactions are not limited to an upper limit of R15 000-00 (paragraph 89), but erred in finding that if the proceeds of a sale of pawned goods exceed the outstanding amount owing in terms of the pawn agreement, Appellant does not have any entitlement to the proceeds in excess of the outstanding amount, and that the

consumer must consequently be refunded the amount Appellant realised for the sale of a pawned asset that exceeds the consumer's obligations under the credit agreement. The incorrect finding by the Tribunal in this regard followed upon an incorrect interpretation of the definition of "pawn transaction" in the NCA, and the Tribunal failed to take into account the following:

- 55.1 In sub-paragraph (c) of the definition of "pawn transaction" found in Section 1 of the NCA the credit provider is entitled if payment of money lent is not made on the expiry of the defined period, to sell the goods and retain all the proceeds of the sale in settlement of the consumer's obligations under the agreement. This is the difference between a pawn transaction and a secured loan as an example, in that in pawn transactions summary execution is allowed. The aforesaid provision clearly stipulates that all proceeds of the sale may be retained, and conspicuously there is no limitation relating to "all the proceeds" which may be retained, without having such entitlement;
- 55.2 The Tribunal's finding that the words under (c) of the definition of pawn transaction "in settlement of the consumer's obligations under the agreement", indeed limit the credit provider's entitlement to retain all the proceeds of the sale (paragraph 141) is incorrect because the definition is not susceptible of an interpretation that the words "all the proceeds of the sale" are restricted to the mere outstanding amount owing in terms of the pawn agreement, and contemplates a situation where the goods are sold for less than the settlement amount, in which event the pawnbroker would not have recourse;

- 55.3 The Tribunal's interpretation of a pawn agreement is in conflict with the common law definition of a pawn transaction, and with the definition and nature of a pawn transaction accepted in South African law up to the commencement of the NCA.
- 55.4 The Tribunal's motivation that the NCA allows for costs, fees and charges to be levied by a credit provider in respect of a pawn transaction (paragraph 143) does not indicate that a refund of such portion of the proceeds as exceed the amount owed to the lender must be made. Paragraph (b) of the definition of pawn transaction in Section 1 provides, on a proper interpretation thereof, for retention of the entire resale value of the pawned goods;
- 55.5 The reasoning adopted by the Tribunal that if a pawned item is sold for less than what is owed in terms of the pawn agreement, no further recourse exists against the consumer (paragraph 146), illustrates that the outstanding amount owed in terms of a pawn transaction is irrelevant if there is default by the consumer to repay. Default by the consumer triggers the sale of the pawned item, with the right of the credit provider to retain all proceeds, with no further recourse against the consumer.
- 55.6 The approach adopted by the Tribunal loses sight of the distinction between a secured loan transaction and a pawn transaction.

The interpretation adopted by the Tribunal would substantially and irreparably damage the Appellant's rights under the agreement of pledge concluded with customers, and would infringe on the Appellant's freedom of economic activity, as entrenched by Section 26 of the Constitution.

Sixth contravention: Charging amounts and imposing monetary liabilities on consumers not allowed in terms of the NCA:

[56] Appellant contends that the tribunal erred in finding that Appellant had been in repeated contravention of the provisions of Sections 100(1)(a) and 101(1) of the NCA (paragraph 164.16) because Appellant charged amounts and imposed monetary liabilities upon consumers not allowed in terms of the NCA when Appellant charged valuation fees, contract drafting fees and storage costs (paragraph 128):

56.1 Although the pawn agreements entered into by Appellant were correctly defined as pawn transactions, pawned transactions can overlap with secured loans, and in the instance of Appellant's pawn agreements same indeed simultaneously constituted secured loans.

56.2 Consequently, the stipulations of Section 102 allowed for the items mentioned in the Section applicable to goods that were the subject of the agreements.

56.3 Although valuation fees, contract drafting fees and storage costs are not mentioned as such in Section 102, those fees and charges are similar to the fees and charges allowed in Section 102, and on a purposive interpretation of the Section Appellant should be allowed to provide for the charges and fees in its contracts.

56.4 Section 99(1)(b) of the NCA upon which the Tribunal founded its finding that Appellant may not charge storage fees, deals with the risk of the property pawned, and does not indicate that storage costs may not be recovered by a credit provider (paragraph 129). A myriad of case law has defined the NCA as a clumsy worded act making it open to a variety of interpretations.

Analysis and conclusions on the Fourth, Fifth and Sixth Contraventions:

[57] The NCA as read with the Regulations prescribes limits on the cost of credit that may be charged by credit providers. The intention of the Legislature was to promote consumer protection by the capping of the cost of credit.⁴

[58] section 101(1) provides a closed list of the type of payments that a consumer may be required to make, namely the principal debt; an initiation fee; a service fee; interest; credit insurance; default administration charges and collection costs. These payments are together referred to as the deferred amount. No money or consideration other than the types of payments listed may be required by a credit provider.

This view about prescribed fees was confirmed in *National Credit Regulator v. Lewis Stores (Pty) Ltd*⁵ where it was held that:

“Section 102, in turn, prescribes the fees and charges which may be levied in respect of a credit agreement. [Sections 100, 101 and 102(1)], relate to payments and charges made in respect of the credit facility. Section 101 places a limitation on what may be contained in the credit agreement. The material portion of s 101(1) prohibits a credit provider from ‘requiring a payment’ by a consumer under a credit agreement of any money or other consideration except the principal debt, being the amount deferred in terms of the agreement, plus the value of any item contemplated in Section 102”

⁴ The in duplum rule: relief for consumers of excessively-priced small credit legitimised by the National Credit Act —J Campbell SA Mercantile Law Journal Vol. 22, No. 1.

⁵ 2019 ZASCA 190 (SCA)

[59] Charges such as valuation fees, contract drafting fees and storage costs are accordingly prohibited costs and may not be levied against the consumers. If the legislature wanted to include these costs in the cost of credit, it would have done so. Right now the list is a closed one.

[60] The Loan Co levies Storage fees against consumers, these are not for a service which accrues to the benefit of the consumers. It relates to the obligations of the Loan Co in holding the vehicles in pledge, as required by the NCA.

First Remedial order by NCT: only a court of law may declare a credit agreement unlawful and void:

[61] The Appellant contends that the tribunal erred “in attempting to declare”⁶ the credit agreements investigated by Respondent unlawful and void (paragraph 164.3) because the Tribunal did not have the power as a creature of statute in terms of the NCA to declare those agreements so unlawful and void:

61.1 That in terms of Section 164(1) of the NCA nothing in the Act renders void a credit agreement or a provision of a credit agreement that in terms of the Act is prohibited or may be declared unlawful, unless a Court declares that agreement or provision to be unlawful. It is only a Court of law that may declare a credit agreement unlawful or void.

61.2 Further that the stipulation of Section 164(1) of the NCA that only a Court, and not the Tribunal, may declare an agreement unlawful

⁶ Notice of Appeal – para 7.

or void is also borne out by Section 89(5), although not applicable to pawn transactions in terms of Section 89(1), which reserves the right for a Court of law to declare a credit agreement void as from the date the agreement was entered into.

61.3 Section 40(4), providing that a credit agreement entered into by a credit provider who is required to be registered in terms of Section 40(1) but who is not so registered, is an unlawful agreement and void to the extent provided for in Section 89, is subject to the stipulation of Section 164(1) reading: *"Nothing in this Act renders void a credit agreement ... unless a Court declares that agreement ... unlawful."*

61.4 Section 27 and Section 17 of the National Credit Amendment Act, No. 7 of 2019 respectively add *"or the Tribunal"* as an alternative to a Court in Section 164(1) and Section 89(5) of the NCA, but a date for the commencement of Act No 7 of 2019 has not yet been proclaimed.

61.5 Section 90(4) similarly allows for a Court, and not the Tribunal to declare an entire agreement unlawful, which Section is similarly subject to Section 164(1).

61.6 Moreover, the credit agreements entered into by Appellant were not unlawful and void because of the stipulation contained in Section 42(3)(a).

Analysis and conclusions:

[62] It is important to highlight the fact that it is not the tribunal that declares the specific credit agreement to be unlawful and therefore void. It is the Act that so declares and the Tribunal merely pronounces. Section 89 lists

instances of unlawful agreements. Whilst the orders of the NCT have the status of the High Court and are enforceable as such, the tribunal itself acts within the constraints of the Act.⁷

Second remedial order by NCT: order to refund consumers all amounts Appellant charged over and above the appellant loaned to the consumers:

[63] The Tribunal's orders that Appellant must refund consumers all amounts Appellant charged over and above the amount Appellant loaned to the consumers, and that Appellant must return repossessed pawn assets to consumers, or where the pawned assets had been disposed of, to pay each consumer the difference between the gross proceeds from the sale of the pawned asset and the loan amount the Appellant advanced, less any amounts the consumer paid to Appellant (paragraphs 164.3.1 and 164.3.2) were premised upon the declaration of the sample agreements to be unlawful and void, and are therefore similarly void.

[64] Similarly, the orders to refund consumers which entered into pawn agreements with Appellant before Appellant was registered, to be established by an auditor (paragraph 164.4) are premised upon the unlawfulness and voidness of those agreements (which unlawfulness and voidness can only be established by a Court of Law), and consequently the orders to refund such consumers (paragraph 164.5) are void.

[65] Moreover, the orders of the Tribunal reflected in paragraphs 164.3.1, 164.3.2 and paragraphs 164.5.2.1 and 164.5.2.2 are premised upon the Tribunal's incorrect contention (paragraph 142) that proceeds of sales of pawned items in excess of the outstanding amount owing by the

⁷ Section 152 of the NCA.

consumer in terms of the credit agreement, are to be refunded to the consumer.

[66] The power of the Tribunal to order payment to consumers in terms of Section 99(2) of the NCA is premised upon an application by the consumer, and cannot justify the order to repayment in the present matter.

Analysis and conclusion:

[67] The appropriateness of the orders that were issued by the Tribunal was explained by the Supreme Court of Appeal in *Bornman v National Credit Regulator [2014] 2 All SA 14 (SCA)*⁸, where it was held that an order to refund all the past and current clients, or consumers, all amounts that had been levied, is entirely appropriate and falls within section 150 of the NCA, as the appellant was never entitled to the collection fee. On this basis, and “*an order for a refund is indeed the only one justifiable*”.

Third remedial order by the NCT: Imposition of administrative fine by the NCT:

[68] The Appellant contends that the tribunal erred in imposing an administrative fine of R250 000-00 upon Appellant:

68.1 The administrative fine imposed was undoubtedly premised upon the incorrect and erroneous findings and orders by the Tribunal, as set out above.

68.2 The decision to impose and administrative fine should not just be reached for the sake of punishing a transgressor of the NCA, but to

⁸ Also [2013] ZASCA

encourage refraining from future contraventions. There is no merit in imposing an administrative fine on a credit provider who is cooperative and who is remorseful enough to show clear intentions of abiding by the law, as directed by the Tribunal. Appellant has started to comply with the provisions of the NCA, and the exercise of a discretion to nevertheless punish Appellant for past breaches of the law, without any benefits to actual victims of such past breaches is not in the interest of justice.

68.3 Respondent could have rectified any transgression by Appellant by issuing a compliance order in terms of Sections 54 and 55 of the NCA, but did not do so. The Tribunal did not take the omission of Respondent in account when imposing the administrative fine.

[69] Appellant therefore seeks an order setting aside the findings by the NCT.

Analysis and conclusion:

[70] Section 151 makes provision for the imposition of an administrative fine by the tribunal. The NCT thus acted within its powers in imposing such fine.

[71] The findings and orders of the National Consumer Tribunal are confirmed. The following order is made:

The appeal is dismissed with costs.

J.S. NYATHI
Judge of the High Court
Gauteng Division, Pretoria

I agree

L.M MOLOPA-SETHOSA
Judge of the High Court
Gauteng Division, Pretoria

Date of Judgment: 11 November 2022

Date of hearing: 31 May 2022

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