

**IN THE NATIONAL CONSUMER TRIBUNAL
HELD VIA THE MICROSOFT TEAMS ELECTRONIC PLATFORM**

Case Number: **NCT/145402/2019/141(1)(b)**

In the matter between:

SUMMIT FINANCIAL PARTNERS (PTY) LTD	FIRST APPLICANT
KISTAMA PILLAY	SECOND APPLICANT
NOMVULA NYEMBE	THIRD APPLICANT
DEBORAH ANN HART	FOURTH APPLICANT
THANDI MABLE TSHABANGU	FIFTH APPLICANT

and

DIRECT AXIS SA (PTY) LTD, A SUBSIDIARY OF FIRSTRAND BANK LIMITED	FIRST RESPONDENT
NATIONAL CREDIT REGULATOR	SECOND RESPONDENT
FIRSTRAND BANK LIMITED	THIRD RESPONDENT
SANLAM PERSONAL LOANS (PTY) LTD	FOURTH RESPONDENT

Coram:

Mr T Bailey - Presiding Tribunal
member Mr C Ntsoane - Tribunal member
Mr A Potwana - Tribunal member

Date of hearing: 9 November 2022

JUDGMENT AND REASONS

APPLICANTS

1. The First Applicant is Summit Financial Partners (Pty) Ltd, a private company that is duly incorporated and registered in terms of the corporate laws of the Republic of South Africa with its principal place of business at Suite 9, 1st Floor, Building 1, 116 Oxford Road, Johannesburg, Gauteng (“the First Applicant”).

2. The Second Applicant is Kistama Pillay, an adult female consumer as defined in section 1 of the National Credit Act 34 of 2005 (“the NCA”) (“Ms Pillay”).
3. The Third Applicant is Nomvula Nyembe, an adult female consumer as defined in section 1 of the NCA (“Ms Nyembe”).
4. The Fourth Applicant is Deborah Ann Hart, an adult female consumer as defined in section 1 of the NCA (“Ms Hart”).
5. The Fifth Applicant is Thandi Mable Tshabangu, an adult female consumer as defined in section 1 of the NCA (“Ms Tshabangu”).
6. Collectively, the Second to the Fifth Applicants will be referred to as “the Consumers”.
7. During the hearing, the Applicants were represented by Ms Mareesa Kreuser, the First Applicant’s regional manager (“Ms Kreuser”). Ms Kreuser is a non-practicing admitted attorney.

RESPONDENTS

8. The First Respondent is Direct Axis SA (Pty) Ltd, a private company that is duly incorporated and registered in terms of the corporate laws of the Republic of South Africa (“Direct Axis”).
9. The Second Respondent is the National Credit Regulator (“the NCR”) a juristic person established in terms of section 26 of the NCA.
10. The Third Respondent is FirstRand Bank Limited, a public company duly incorporated and registered in terms of the company laws of the Republic of South Africa. (“FirstRand”).
11. The Fourth Respondent is Sanlam Personal Loans (Pty) Ltd, a private company that is duly incorporated and registered in terms of the company laws of the Republic of South Africa (“Sanlam Personal Loans”).
12. The Third and Fourth Respondents are registered as credit providers in terms of section 40 of the NCA. During the hearing, the First, Third, and Fourth Respondents were represented by Adv Alasdair Sholto-Douglas SC (“Adv Sholto-Douglas”) who appeared with Adv Johan Engelbrecht on instructions of Dommissie Attorneys.

APPLICATION TYPE AND JURISDICTION

13. The application brought before the National Consumer Tribunal (“the Tribunal”) is in terms of section

141(1)(b) of the NCA. The Tribunal granted the application for leave to refer the matter in a judgment issued on 30 August 2021. The Tribunal now proceeds to consider the merits of the matter.

14. In terms of section 27(a)(i) of the NCA, the Tribunal has jurisdiction to hear this matter.

BACKGROUND

15. This matter has a long and complicated history. Initially, the Applicants delivered an application for condonation for the late filing of their application for leave to refer. Only the First and Second Respondents were cited as respondents. On 6 February 2020, the Applicants delivered a joinder application to join FirstRand and Sanlam Personal Loans as respondents. On 19 November 2020, the Tribunal's Registrar ("the Registrar") issued the Tribunal's ruling joining FirstRand and Sanlam Personal Loans. They filed an answering affidavit opposing the Applicants' application for condonation. On 15 April 2021, the Registrar issued the Tribunal's ruling granting the Applicants' application for condonation for the late filing of their application for leave to refer. Subsequently, Direct Axis, FirstRand, and Sanlam Personal Loans filed their answering affidavit opposing the Applicants' application for leave to refer. This was followed by the Applicants' filing of a condonation application for the late filing of their replying affidavit. Condonation was granted in a ruling issued by the Registrar on 20 July 2021. The Tribunal heard the Applicants' application for leave to refer (in chambers) on 24 August 2021, and the Registrar issued the Tribunal's ruling granting the application for leave to refer in a judgment issued on 30 August 2021.
16. On 30 September 2022, the Applicants filed a notice to amend Form 32¹ and its affidavit in support of its application. Amongst others, the purpose of the amendments was to:
- 16.1. Add FirstRand and Sanlam Personal Loans as respondents.
 - 16.2. State that "*references to Direct Axis should be read and interpreted as referring to Direct Axis, acting as the duly authorised agent of FirstRand Bank and Sanlam Personal Loans respectively.*"
 - 16.3. Deleting paragraph 6.2 of Part 4 of the Form 32 Notice and replacing it with the following:

"To declare the repeated contravention of Section 81(3) of the Act, read with Sections 80(1)(b) and 81(2)(a) by Direct Axis, Alternatively FirstRand Bank and Sanlam Personal Loans, duly represented by Direct Axis, constitutes conduct prohibited under the Act."
 - 16.4. Delete the words "*Direct Axis from paragraph 6.4 of Part 4 of the Form 32 Notice and replacing it with the words "First Rand Bank Bank" to read as follows: "To interdict and restrain FirstRand Bank from granting credit recklessly."*

¹ Form 32 is the prescribed form for referring complaints to the Tribunal if the NCR issued a Notice of Non-Referral in response to a
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complaint.

16.5. Insert the following paragraph as paragraph 6.5 of Part 4 of the Form 32 Notice: *“To interdict and restrain Sanlam Personal Loans from granting credit recklessly.”*

16.6. Delete paragraph 6.5 of Part 4 of the unamended Form 32 Notice (the renumbered paragraph 6.6) and replace it with the following:

“6.6 To declare that FirstRand’s credit agreements concluded with the Second, Third and Fourth Applicants are reckless in terms of Section 83(1) of the Act.”

16.7. Delete paragraph 6.5 of Part 4 of the unamended Form 32 Notice (the renumbered paragraph 6.6) and replace it with the following:

“6.7 To declare that Sanlam Personal Loans’ credit agreements concluded with the Fifth Applicant is reckless in terms of Section 83(1) of the Act.”

16.8. Delete paragraph 6.6 of the unamended Form 32 Notice (the renumbered paragraph 6.8) and replace it with the following:

“6.8 To order FirstRand to write off all amounts still outstanding under the credit agreements concluded with the Second, Third and Fourth Applicants.”

16.9. Insert the following paragraph as paragraph 6.9 of Part 4 of the Form 32 Notice:

“6.9 To order Sanlam Personal Loans to write off all amounts still outstanding under the credit agreements concluded with the Second, Third and Fourth Applicants.”

16.10. Delete the words “Direct Axis” from line two of paragraph 6.7 of the unamended Form 32 Notice (the renumbered paragraph 6.10) and replace it with the words *“FirstRand Bank and Sanlam Personal Loans”* to read as follows:

“To impose an administrative penalty in terms of Section 151(2)(a) of the Act being 10% of FirstRand Bank and Sanlam Personal Loans’ respective annual turnover during the year immediately preceding the date that such an administrative fine is imposed.”

17. The Respondents did not oppose the application to amend. Therefore, the First Applicant seeks an order in the following terms:

17.1. Declaring that Direct Axis, alternatively, FirstRand Bank and Sanlam Personal Loans, duly represented by Direct Axis, alternatively, FirstRand Bank and Sanlam Personal Loans, duly represented by Direct Axis, contravened section 81(3) of the NCA read with sections 80(1)(b) and 81(2)(a);

- 17.2. Declaring that the repeated contravention of section 81(3) of the NCA, read with sections 80(1) and 81(2)(a) by Direct Axis, alternatively, FirstRand Bank and Sanlam Personal Loans, duly represented by Direct Axis, constitutes prohibited conduct under the NCA;
 - 17.3. Declaring that the standardised application of Regulation 23A(11) of the NCA Regulations constitutes prohibited conduct;
 - 17.4. Interdicting and restraining FirstRand Bank from granting credit recklessly;
 - 17.5. Interdicting and restraining Sanlam Personal Loans from granting credit recklessly;
 - 17.6. Declaring FirstRand's credit agreements with Second, Third, and Fourth Applicants reckless in terms of section 83(1) of the NCA;
 - 17.7. Declaring Sanlam Personal Loans' credit agreement with the Fifth Applicant reckless in terms of section 83(1) of the NCA;
 - 17.8. Ordering FirstRand to write off all obligations still outstanding on the credit agreements concluded with *the Second, Third, and Fourth Applicants*;
 - 17.9. Ordering Sanlam Personal Loans to write off all amounts still outstanding under the credit agreements concluded with the Fifth Applicant;
 - 17.10. That an administrative penalty being 10% of FirstRand's and Sanlam Personal Loans' annual turnovers during the year preceding the Tribunal's judgment be imposed; and
 - 17.11. Costs of suit.
18. On 5 October 2021, attorneys for Direct Axis, FirstRand, and Sanlam Personal Loans delivered an application for condonation for the late filing of their clients' answering affidavit. The application was granted, and the Registrar issued the condonation ruling on 30 November 2021. Subsequently, the Applicants delivered their replying affidavit.

FACTS

The Applicants' case

19. At the outset, it is relevant to reflect that the Applicants' case is formulated by the First Applicant. The deponent to the First Applicant's founding affidavit is Mr Clark Gardner ("Mr Gardner"). In his affidavit in support of the main application, Mr Gardner submitted that the affordability mechanisms used by Direct Axis cannot be regarded as fair and objective. The essence of the First Applicant's case is that Direct Axis, acting as an agent of FirstRand and Sanlam Personal Loans, failed to comply with the provisions of section 81(2) and Regulation 23A of the NCA by failing to take reasonable steps to assess the Consumers' affordability prior to granting credit to consumers. In conducting affordability assessments, Direct Axis routinely accepts living expenses that are lower than the minimums set by the Minimum Expense Norms table. This, alleges Mr Gardner, constitutes a violation of Regulation 23A (10) and (11), which state that

a credit provider must use the Minimum Expense Norms Table and that a deviation from the Minimum Expense Norms Table may only be allowed in exceptional circumstances. Mr Gardner submitted that Direct Axis' call centre script is formulated in a manner to prompt consumers to provide answers that would favour credit to be granted. He stated that Direct Axis routinely excludes debt obligations that appear on a consumer's credit bureau report based only on the consumer's indication that a third person pays the instalment without obtaining any further reasonable assessment on this submission. Mr Gardner further averred that Direct Axis does not adequately ensure that consumers understand and appreciate the risks, costs, and obligations of the agreements before concluding the same with consumers. He submitted that all the Consumers had to apply for debt counselling as a result of being over-indebted. Direct Axis was the last lender.

20. Concerning the Consumers, Mr Gardner alleges that:

20.1. On 2 July 2018, Direct Axis granted Ms Pillay a personal loan in the amount of R84 000.00 with a monthly repayment instalment of R2 783.00 over 72 months. If the lawful evaluative procedure was used when conducting her affordability assessment, she would have been left with a deficit of R2 096.00 per month. About a year later, Ms Pillay entered debt counselling, but "*no reckless lending challenge was placed before the court.*"²

20.2. On 27 September 2017, Direct Axis granted Ms Nyembe a personal loan in the amount of R57 999.00 with a monthly repayment instalment of R2 015.00 over 72 months. If the lawful evaluative procedure had been used when conducting her affordability assessment, she would have been left with a deficit of R869.00 per month. Although reckless lending was not adjudicated by the court because Ms Nyembe "*elected to settle with Direct Axis in order to obtain immediate and certain relief.*"³

20.3. On 19 June 2016, Direct Axis granted Ms Hart a personal loan in the amount of R40 000.00 with a monthly repayment instalment of R1 702.00 over 48 months. If the lawful evaluative procedure had been used when conducting her affordability assessment, she would have been left with a deficit of R642.00 per month. On 3 June 2018, Ms Hart applied for debt review and requested that the Direct Axis loan be challenged for reckless lending. However, "*the Magistrate in the matter ruled that the loan concluded between Hart and Direct Axis was not reckless due to Hart's false submissions made regarding her living expenses.*"⁴

20.4. On 7 February 2018, Sanlam Personal Loans granted Ms Tshabangu a personal loan in the amount of R70 000.00 with a monthly repayment instalment of R2 531.00 over 60 months. If the lawful evaluative procedure had been used when conducting her affordability assessment, she would

² Para 37 of Mr Gardner's Founding Affidavit.

³ Para 46 of Mr Gardner's Founding Affidavit.

⁴ Para 55 of Mr Gardner's Founding Affidavit.

have been left with a deficit of R642.00 per month. From the transcripts of Ms Tshabangu's call centre credit application, it is evident that little regard is given to her understanding of the information that Direct Axis was giving. Instead, "*Direct Axis call centre agents rush over important parts of the affordability assessment and steer the consumer away from making statements that would prevent the loan from being granted*" and prompt consumers to provide answers that improve the likelihood of the loan being granted.

21. Ms Tshabangu subsequently applied for debt counselling, and a consent order was granted by this Tribunal on 11 September 2019.
22. In summary, the Applicants allege that Direct Axis acted as the agent of FirstRand and Sanlam Personal Loans in granting credit recklessly to the Consumers by continuously failing to consider and correctly apply the Minimum Expenses Norms Table as per Regulation 23A of the National Credit Regulations, 2006, when assessing consumers' financial means to determine affordability. Instead, Direct Axis continuously used Regulation 23A(11), whereas this regulation is only meant to be applied on an exceptional basis, where justified. The Applicants contend that it is Direct Axis' standard practice that consumers complete the questionnaire referred to in Regulation 23A(11), wherein consumers declare minimum expenses which are lower than those set out in the Minimum Expense Norms Table. As a result, there is continuous under-reporting of consumers' living expenses. This assessment method is the norm rather than the exception. This business model effectively constitutes reckless lending and results in consumers being unable to fulfil their credit commitments and needing to be placed under debt review or become over-indebted.

The First, Third, and Fourth Respondents' case

23. The deponent to the First, Third, and Fourth Respondents' answering affidavit is Michael Addinall who is employed by FirstRand as an operations manager ("Mr Addinall"). According to Mr Addinall, Direct Axis has never operated as a credit provider. It is a separate juristic person which exists independently from the FirstRand Bank. Its business entails, among others, the administration and management of the personal loan business of credit providers such as FirstRand and Sanlam Personal Loans.
24. Mr Addinall averred that the reckless lending complaints have been settled or have been finally determined. The Tribunal has no jurisdiction to entertain these allegations. During the hearing, the respective representatives of the Applicants and Direct Axis, FirstRand, and Sanlam Personal Loans argued this *res judicata* point extensively. Before we proceed any further with this judgment, we must first consider the parties' arguments on this point and make a determination thereon.

The parties' arguments on the point of res judicata

25. According to the Applicants, the issue in respect of which a compromise was reached between Mesdames Pillay, Nyembe, and Tshabangu and FirstRand and Sanlam, respectively, and the issue determined by the Cape Town Magistrate's Court in the case of Ms Hart is not based on the same cause of action as the relief sought in this application. The compromise that was concluded in the instance of Mesdames Pillay, Nyembe, and Tshabangu as well as the judgment that was granted in respect of Ms Hart, arose out of the provisions of sections 86 and 87 of the NCA that deal specifically with reckless lending in the context of debt review. In the present application, the Applicants' cause of action arises out of section 150 of the NCA, and the declaration of reckless lending is sought as ancillary relief in terms of the provisions of section 150(i) of the NCA. This cause of action is separate from the issue that was compromised and pronounced upon by the Magistrates Court. The matter before the Tribunal is the mechanism or practice used by Direct Axis to determine a consumer's ability to afford a loan repayment. The individual loan agreements of the Applicants serve as evidence of this practice. The relief sought is for this practice to be declared prohibited and to interdict Direct Axis from making use of the Regulation 23A(11) exception as part of their general affordability assessment. During the hearing, Ms Kreuser submitted that if the doctrine of *res judicata* is applicable, the Tribunal should consider relaxing the application thereof. She referred the Tribunal to *Molaudzi v S*.⁵
26. According to the First, Third, and Fourth Respondents, the Applicants' application to have the four credit agreements declared reckless should be dismissed as the issue in respect of each of these credit agreements is *res judicata*, alternatively has been settled. Adv Sholto-Douglas argued that a compromise or settlement (*transactio*) is a contract that has as its object the prevention, avoidance, or termination of the litigation. It has the effect of *res judicata* irrespective of whether it is embodied in an order of court, and it is an absolute defence to any action based on the original claim. In support of this argument, he referred to *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd*⁶ and *Gbenga- Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited*.⁷ He argued that a consent order following upon a settlement has the same standing and qualities as any other court order. It is *res judicata* between the parties regarding the matters covered.⁸ In respect of those cases where a debt review order or consent order rearranging the consumer's debt obligations was made, for the reasons held by the Tribunal in *Mohibidu v African Bank Limited*,⁹ the Tribunal does not have jurisdiction to revisit or reconsider such cases. In this regard, the Tribunal held as follows:

⁵ [2015] ZACC 20.

⁶ 1978 (1) SA 914 (A) 922C.

⁷ 2016 JDR 1695 (CC) (at para 24).

⁸ *Moraitis Investments (Pty) Ltd and others v Montic Diary (Pty) Ltd and others* 2017 (5) SA 508 (SCA) (at para. 10).

⁹ 2018 ZANCT 29 / [2019] JOL 43504 (NCT) at para 22.

“22. In the Tribunal’s view, it is evident from the debt re-arrangement order that the applicant has either failed to seek a declaration of reckless credit when he had the opportunity to do so in terms of section 86 of the NCA when he applied for debt review as far back as September 2014. Alternatively, that the debt counsellor had found that none of the four credit agreements were concluded recklessly. The magistrate’s court made the debt re-arrangement order based on the debt counsellor’s recommendation. The respondent was therefore correct to submit that the Tribunal cannot serve as a vehicle to reconsider the magistrates court’s previous adjudication afresh whilst the debt re-arrangement order stands.”

27. In further argumentation of the Applicants’ *res judicata* point, Adv Sholto-Douglas submitted that:
- 27.1. The credit agreement between FirstRand and Ms Pillay was subsequently re-arranged by an agreement between the parties. The original credit agreement between FirstRand and Ms Pillay was accordingly compromised.
 - 27.2. On 2 June 2018, Mr Gardner made an application on behalf of Ms Nyembe for an order, *inter alia*, declaring the loan agreement between Mr Nyembe and FirstRand Bank reckless. That dispute was settled between the parties in terms of a settlement agreement concluded between them on 18 September 2018, with the newly agreed outstanding balance forming part of a debt re-arrangement order. The original credit agreement between FRB and Ms Nyembe was accordingly compromised.
 - 27.3. On or about 27 September 2018, Mr Gardner made an application on behalf of Ms Hart for an order, *inter alia*, declaring the credit agreement between Ms Hart and FirstRand reckless. On 18 April 2019, the Magistrates’ Court for the District of Cape Town delivered judgment for FirstRand and dismissed the application to have the credit agreement declared reckless. The Applicants concede that the appropriate remedy, should Mr Gardner or Ms Hart have wished to challenge the court’s judgment, would have been to file an appeal in the High Court. They elected not to do so. Accordingly, the judgment is final.
 - 27.4. The credit agreement concluded between Ms Tshabangu, and Sanlam Personal Loans was the subject of an application to the Tribunal for a debt re-arrangement order by consent that was initiated and facilitated by Mr Gardner. Pursuant thereto, a consent order was granted by the Tribunal on 11 September 2019.

The Tribunal’s consideration of the point of res judicata

28. As explained in *Molauzdi s S*,¹⁰ *res judicata* is the legal doctrine that bars continued litigation of the same

¹⁰ Supra at note 5.

case, on the same issues, between the same parties.¹¹ It is common cause that at the centre of these proceedings are credit agreements that were entered into by the Consumers and Direct Axis, FirstRand, and Sanlam Personal Loans. Further, it is common cause that the Consumers and FirstRand, and Sanlam Personal Loans resolved the issues relating to these credit agreements through settlement agreements, a court order, and a Tribunal order.

29. Concerning the relaxation of the doctrine and the Applicant's reliance on *Molaudzi v S*, it is significant to note that in *Molaudzi v S*, the Constitutional Court reasoned that "*in the first application this Court was not called upon to adjudicate the substantive merits of the constitutional challenges now raised.*"¹² In this matter, the Tribunal is required to adjudicate the same issues that were resolved through settlement agreements, the Magistrates' Court for the District of Cape Town, and the Tribunal. In all these matters, the First Applicant alleged that all the Consumers had to apply for debt counselling because of the Respondent's reckless lending practices.
30. In our view, within the context of the debt re-arrangement provisions of the NCA, the right moment for a debt counsellor to determine whether credit was granted recklessly is upon acceptance of a debt review application and the subsequent determination "*in the prescribed manner and within the prescribed time whether a consumer appears to be over-indebted and if the consumer seeks a declaration of reckless credit, whether any of the consumer's credit agreements appear to be reckless.*"¹³ Section 86(7)(c) of the NCA states –

"If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that the consumer is over-indebted the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders-

∅ *that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless;*¹⁴ and

∅ *that one or more of the consumer's obligations be re-arranged by-*

(aa) *extending the period of the agreement and reducing the amount of each payment due accordingly;*

(bb) *postponing during a specified period the dates on which payments are due under the agreement;*

¹¹ *Baphalane Ba Ramokoka Community v Mphela Family and Others; In re: Mphela Family and Others v Haakdoornbult Boerdery CC and Others* [2011] ZACC 15; 2011 (9) BCLR 891 (CC) (*Baphalane*) at para 31 referring to *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* [2000] ZASCA 70; 2001 (2) SA 232 (SCA) (*National Sorghum*) at para 2.

¹² At para 18.

¹³ Section 86(6) of the NCA.

¹⁴ Underline added for emphasis.

- (cc) *extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or*
- (dd) *recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6."*

In view of the above, we believe that reckless lending should be raised when a debt counsellor makes an application for debt re-arrangement if a debt counsellor reasonably concludes that the consumer is over-indebted, as alleged in this application.¹⁵ Thus, the debt counsellors should have determined whether there was reckless lending when making the assessment in terms of section 86(6) of the NCA and brought this finding to the attention of the Magistrates' Court in terms of section 86(7)(c) of the NCA. It is not clear why the reckless lending challenge was not placed before the court in respect of Ms Pillay. Although this was done in respect of Ms Nyembe and Ms Hart, Ms Nyembe settled the matter out of court. In respect of Ms Hart, Mr Gardner, the deponent to the Applicant's founding affidavit who was Ms Hart's debt counsellor, sought an order of reckless credit granting but the Magistrates' Court for the District of Cape Town delivered judgment for FirstRand Bank and dismissed the application to have the credit agreement declared reckless. It is not apparent why Mr Gardner did not issue a proposal recommending that the Magistrates' Court declare that one or more of Ms Tshabangu's credit agreements be declared reckless if he, as Ms. Tshabangu's debt counsellor, had concluded that those agreements appeared to be reckless.

CONCLUSION

31. According to the First Applicant, the First, Third, and Fourth Respondents' reckless lending practices that form the basis of this application caused the Consumers to be over-indebted. Thus, the reckless lending issues raised in this application are inextricably linked to the matters that Ms Pillay and Ms Nyembe settled with FirstRand and Sanlam Personal Loans. These matters have been resolved. Concerning extra-judicial agreements such as those entered into by Ms Pillay and Ms Nyembe, in *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited and Another*,¹⁶ the Constitutional Court stated –

"The public, and indeed our courts, have a powerful interest in enforcing agreements of this sort. The applicant must be held bound. When parties settle an existing dispute in full and final settlement, none should be lightly released from an undertaking seriously and willingly embraced. This is particularly so if the agreement was, as here, for the benefit of the party seeking to escape the consequences of his own conduct. Even if the clause excluding access to courts were on its own invalid and unenforceable, the applicant must still fail. This is because he concluded an enforceable agreement that finally settled his dispute with his employer."

¹⁵ See para 19 above.

¹⁶[2016] ZACC 33 at paragraph 24.

32. In respect of Ms Hart, the Magistrates' Court ruled that the loan was not reckless. In respect of Ms Tshabangu whose matter was filed with the Tribunal, the deponent to the Applicants' founding affidavit, Mr Gardner, was Ms Tshabangu's debt counsellor. He chose to file Ms Tshabangu's debt re-arrangement application with the Tribunal instead of filing it with the Magistrates' Court and allege reckless lending thereat as envisaged in section 86(7)(c)(i) of the NCA. Consequently, Ms Tshabangu's matter was resolved through a consent order that was confirmed as an order of this Tribunal.
33. We now turn to Ms Kreuser's plea that if we find that the doctrine of *res judicata* is applicable, we should consider relaxing it and her reliance on *Mulaudzi v S*. We find that unlike in *Mulaudzi v S*, in this matter, the Applicants' cause of action is not different from the one that was resolved through settlements or through the Magistrates' Court for the District of Cape Town and the Tribunal. In all these matters, the First Applicant alleged that all the Consumers had to apply for debt counselling because of the Respondent's reckless lending practices. As stated above, if a debt counsellor believes that a credit agreement is reckless, he or she should seek an order that one or more of a consumer's credit agreements be declared reckless at the time of issuing a proposal to a Magistrates' Court as envisaged in section 86(7)(c)(1) of the NCA.
34. The issues that form the basis of this application have already been resolved. Accordingly, the First, Third, and Fourth Respondents' plea of *res judicata* is upheld. Having upheld the First, Third and Fourth Respondents' plea of *res judicata*, it is unnecessary to consider the merits of the Applicants' application.
35. Concerning costs, we do not believe the costs should follow the result.

ORDER


36. Accordingly, the Tribunal makes the following order:

- 36.1. The application is dismissed; and
36.2. There is no costs order.

Dated on 24 November 2022.

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Presiding Tribunal Member
Mr A Potwana

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national consumer tribunal

Mr C Ntsoane (Tribunal Member) and Mr T Bailey (Tribunal Member) concur.