

IN THE NATIONAL CONSUMER TRIBUNAL
HELD VIRTUALLY IN CENTURION
Via MS Teams

Case Number: **NCT/158481/2020/57(1)**

In the matter between:

THE NATIONAL CREDIT REGULATOR

APPLICANT

and

HZ FINANCE (PTY) LTD

RESPONDENT

Coram:

Prof B Dumisa – Presiding member

Ms D Terblanche – Member

Mr A Potwana – Member

Date of Hearing – 20 June 2022

Date of Judgment – 12 July 2022

JUDGEMENT AND REASONS

APPLICANT

1. The Applicant in this matter is the **NATIONAL CREDIT REGULATOR**, a juristic person established in terms of Section 12 of the National Credit Act 34 of 2005 (the “NCA” or the “Act”) (hereinafter referred to as “the Applicant”), with offices at 127 Fifteenth Road, Randjiespark, Midrand, in the Gauteng Province.
2. At the hearing, the Applicant was represented by Mr. Roy Stocker, a senior legal representative employee of the Applicant.

3. The Applicant's Founding Affidavit is deposed to by Ms. Anne-Carien du Plooy, Acting Manageress for Investigations and Enforcement in the employ of the Applicant.

RESPONDENT

4. The Respondent (and the Registrant) is **HZ FINANCE (PTY) LTD**, a private company duly registered as such with Company Registration Number 2017/011742/07, and also registered with the Applicant as a credit Provider under registration number NCRCP9433. The Respondent has 18 (eighteen) branches registered with the Applicant, trading under the name "African Brother Cash Loans". Its registered office, as contemplated in Section 23 of the Companies Act 71 of 2008, is situated at 22 Villa de Sol, Vaalpark, Sasolburg, in the Gauteng Province (hereinafter referred to as "the Respondent").
5. The Respondent is currently being liquidated.
6. There was an Answering Affidavit from the Respondent, deposed by Ms Honghui Zhuang, the director of the Respondent.
7. At the hearing, the Respondent did not appear in person and was not represented. The Secretariat at the Tribunal and the Applicant provided proof to show the Respondent had been properly served with all the necessary documents pertaining to the set-down for 20 June 2022.
8. On the date of the Hearing, on Monday 20 June 2022, at 08h07, Ms Nadia Pretorius, of Tswelopele Trustees (the entity responsible for the liquidation of the Respondent), wrote to the Tribunal to say that the Respondent would not be attending the Hearing, without making any further written submissions.

APPLICATION TYPE AND ORDER SOUGHT

9. This Tribunal derives the jurisdiction for hearing this matter under Section 57(1) of the National Credit Act, 34 of 2005 (the NCA). This is an application in terms of Section 57(1) of the NCA for the cancellation of the Respondent's registration as a credit provider allegedly due to the Respondent's repeated failure to comply with its conditions of registration and/or repeated contraventions of the Act.

- 9.1 The Applicant sought an order for the Respondent to be in repeated contravention of various Sections of the NCA and Regulations;
- 9.2 Declaring the contraventions referred hereinabove to be prohibited conduct in terms of Section 150(a) of the NCA;
- 9.3 Declaring that the Respondent has brought the consumer credit industry into disrepute further and/or alternatively, declaring that the has acted with disregard for consumer rights generally;
- 9.4 Interdicting and restraining the Respondent from in future engaging in prohibited conduct;
- 9.5 Imposing an administrative fine upon the Respondent, in the amount of R1 million or 10% of the Respondent's turnover, whichever is the greater;
- 9.6 Declaring some of the Respondent's specific credit agreements with consumers, as mentioned in the Investigation Report, as reckless in terms of Section 80(1)(a) of the NCA. Where such a declaration of reckless lending has been made:
 - 9.6.1 all the consumers' obligations under those agreements should be set aside;
 - 9.6.2 ordering the Respondent to, at its own costs, refund all the costs of credit charged and recovered from consumers under all such agreements; and
 - 9.6.3 taking all the steps as may be reasonably necessary to ensure that all the adverse enforcement actions against such consumers are reversed, including removal of such adverse credit bureau records, and rescission of any civil judgments taken by the Respondent against such consumers in respect of such agreements.
- 9.7 Ordering the Respondent to, within 30 days appoint an independent auditor, at its own cost, to investigate further areas of non-compliance by the Respondent and take appropriate actions where necessary;

9.8 In terms of Section 150(i), imposing any other appropriate order required to give effect to consumers' rights in terms of the NCA; and

9.9 Imposing an administrative fine on the Respondent.

MATTERS TO BE DECIDED

10. The Tribunal has to decide whether:

10.1 The Respondent breached the provisions of the Act as alleged; and

10.2 The appropriate sanction.

BACKGROUND

11. The Respondent was registered by the Applicant as a credit provider with registration number NCRCP 9433, with effect from 1 July 2017, subject to General and Specific Conditions of Registration.

12. On or about the 30th of July 2019 a South African Social Security Agency ("SASSA") official addressed an email to the Applicant wherein it alleged that a credit provider trading from the Kagiso Mall was engaging in prohibited conduct.

13. A joint investigation by the Applicant, together with the Directorate for Priority Crimes Investigation (also known as the Hawks), the Department of Home Affairs, and the South African Police ("SAPS") led to an entity operating under the name "African Brother Cash Loans" at the Kagiso Mall. Further investigations revealed that this was a branch of the Respondent.

14. On the 23rd of August 2019 the Applicant initiated a complaint in terms of Section 136(2) of the NCA and authorized an investigation of the Respondent in terms of Section 139(1)(c) of the NCA.

15. The Applicant's Chief Executive Officer appointed Thinandavha Phalandwa ("Phalandwa") and Dipuo Makobane ("Makobane"), both employees of the Applicant, as inspectors in terms of Section 25(1)(a) of the NCA.

16. On the 22nd of October 2019 the inspectors conducted the onsite investigation at the premises of the Respondent situated at the Kagiso Mall, Entrance 1, in Krugersdorp. These were the contraventions discovered:
 - 16.1 The records and files kept were not compliant with the NCA;
 - 16.2 The Respondent does not draw up formal written and signed loan agreements, instead it keeps a “loan book”. The Respondent did not provide credit agreements in the prescribed forms;
 - 16.3 The Respondent failed to provide the consumers with a pre-agreement statement;
 - 16.4 The Respondent failed to conduct affordability assessments prior to approving applications for credit;
 - 16.5 The Respondent charged excessive fees that exceeded the maximum amounts that can be charged in terms of a small credit agreement;
 - 16.6 The Respondent induced consumers to also enter into another agreement with Information Technology Consultants (Pty) Ltd through the “ALLPS Promissory Note” which contains additional processing fees;
 - 16.7 The Respondent repeatedly violated Regulations 64 and 66 of the NCA, in that it failed to submit to the Applicant the Prescribed Form 39 statistical return as well as the prescribed Form 40 annual financial and operational return; and
 - 16.8 The Respondent engaged in reckless lending.

SUBMISSIONS BY THE APPLICANT

17. The Applicant alleged the Respondent repeatedly breached various provisions of the Act, especially when conducting appropriate affordability tests:

- 17.1 The Respondent entered into credit agreements with consumers without first taking reasonable steps to properly and accurately assess consumers' debt repayment history, existing financial means, prospects, and obligations;
 - 17.2 The Respondent failed to obtain any credit bureau reports to assess consumers' debt repayment history prior to entering into credit agreements with the consumers;
 - 17.3 They did not properly gather the necessary income information and the bank statements from the consumers, in conducting affordability assessments, and/or inaccurately assessing the consumers' financial position and/or their disposable incomes; and
 - 17.4 Based on the above, the Applicant concluded that the Respondent had repeatedly contravened Section 81(2)(a)(ii) and (iii) read with Regulation 23A by failing to take reasonable steps to conduct an affordability assessment prior to approving an application for credit.
18. The Applicant alleged that the Respondent totally disregarded the provisions of Regulation 23A of the Act in that their business conduct amounted to reckless lending.
 19. In light of these repeated contraventions of the Act, the Regulations, and the Respondent's Conditions of Registration, the Applicant applied for the following orders from the Tribunal:
 - 19.1 In terms of Section 150(a) of the Act, declaring the conduct of the Respondent a contravention of the following sections of the Act, Regulations, and Conditions of Registration:
 - (i) Section 81(2)(a)(ii) and (iii) read together with Regulation 23A, in that the Respondent failed to take proper steps in conducting affordability assessments and/or in the prevention of extension of reckless credit;
 - (ii) In terms of Section 83(2)(a) the Applicant seeks an order declaring the credit agreements entered into between the Respondent and the consumers to have been reckless lending in terms of Section 80(1)(a);

- (iii) In the event that the Respondent submits that it did conduct proper affordability assessments, the Applicant submits that the Respondent failed to retain the proof of the steps taken to conduct the assessment, and thus the Respondent repeatedly contravened Section 170 read together with Regulation 55(1)(b)(vi) of the Act; and
- (iv) The Respondent generally failed to retain prescribed records in terms of Section 170 read with Regulations 55 and 56 of the Act;

19.2 The Applicant has abandoned their prayer for the Cancellation of the Respondent's registration as a credit provider in terms of Section 57(1)(a) of the Act, on the ground that the Respondent voluntarily deregistered as a credit provider;

19.3 Declaring that the Respondent has brought the consumer credit industry into disrepute further and/or alternatively declaring that the Respondent has acted with disregard for consumer rights generally;

19.4 Interdicting and restraining the Respondent from in future engaging in prohibited conduct;

19.5 Imposing an administrative fine upon the Respondent, in the amount of R20 000 (twenty thousand Rand); and

19.6 In terms of Section 150(i), make any other appropriate order required to give effect to the consumers' rights in terms of the Act.

20. The Applicant also requested the Tribunal to order the Respondent to:

20.1 Within 30 days of the date of this judgment, appoint an independent auditor at its own cost, though subject to prior approval of the Applicant; and

20.2 This Auditor must identify all credit agreements concluded by the Respondent in the past 3 (three) years, and identify all the agreements where the Respondent failed to take the steps required in terms of Section 81(2) of the Act; and

20.3 Once the Auditor has compiled this report, the Respondent will, within 30 days from the date of the Auditor's report:

20.3.1 Refund the consumers all costs of credit which exceeded the prescribed maximum amounts allowed by the Act;

20.3.2 The consumers identified to have been overcharged by the Audit report must also be refunded; and

20.3.3 The Auditor must also identify all credit agreements that were entered into recklessly in terms of Section 81(2) of the Act, and once so identified, declare those agreements as reckless and set aside all the consumers' obligations under those agreements.

SUBMISSIONS BY THE RESPONDENT (on the answering affidavit only)

21. The Respondent filed an answering affidavit where they responded in the following way to the Applicant's founding affidavit:

21.1 The Respondent requires all first-time applicants/consumers to provide the latest three months' bank statements, a pay slip, and their bank card. The bank card is used for activating the debit order as repayment of the loan instalment, a copy of their ID, and proof of address;

21.2 They use the Loan Management System, LMS, called the Delfin system to automatically do the consumers' affordability assessments;

21.3 They say the LMS ensures compliance with the issuing of pre-agreement statements and quotations and credit agreements in the prescribed format, charging the cost of credit in line with the Act and Regulations, and conducting proper affordability assessments;

21.4 They say the Delfin LMS prompts their consultants to request the credit bureau report, which is displayed on the screen and can either be printed or stored electronically. In the event that

the consumer has applied for or is under debt review, the consultant does not proceed with the processing of the loan;

- 21.5 The Respondent's consultant will further be prompted to insert the monthly existing debt obligations as per the credit report and all current loans (if any) with the Respondent will automatically be inserted by the LMS for that specific consumer. The discretionary income (credit limit amount) is calculated based on the entries made and if the consumer can afford the loan, the loan will be granted; and
- 21.6 Once the prospective consumer has confirmed the deduction date and banking details for the deduction of the instalment, the consultant only orally confirms the contents of the pre-agreement statement and quotation, which is signed by the consumer if in agreement with the amounts and dates.

APPLICABLE SECTIONS OF THE NCA

22. Section 57

Cancellation of registration

- “(1) Subject to subsection (2), a registration in terms of this Act may be cancelled by the Tribunal on request by the National Credit Regulator, if the registrant repeatedly –*
- (a) Fails to comply with any condition of its registration ;*
 - (b) Fails to meet a commitment contemplated in section 48(1); or*
 - (c) Contravenes the Act.*
- (2) ...”*

THE PROCEEDINGS AT THE HEARING

23. At the hearing, the Applicant was represented by Mr. Roy Stocker.
24. The Respondent was neither present nor represented at the hearing.
25. A day before the Tribunal hearing, the Respondent's Liquidator formally informed the Tribunal that they would not be attending the hearing. The Tribunal panel was satisfied that the Respondent had been properly served, as evidenced by their formal notification that they would

not be attending. Further noting that the Respondent had filed their answering affidavit, the Tribunal was satisfied that it was in the interests of justice that the Tribunal hearing would proceed in the absence of the Respondent.

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

26. The Respondent filed an answering affidavit, in response to the Applicant's founding papers.

27. The Respondent was later placed under liquidation.

28. The matter was thus be heard on a default basis, in terms of Rule 25(3) which entitles the Tribunal to hear the matter and make a default order:

28.1 After it has considered or heard any necessary evidence; and

28.2 If it is satisfied that the application documents were adequately served.

29. Rule 13(5) which provides as follows, will not apply here because the Respondent filed an answering affidavit:

“Any fact or allegation in the application or referral not specifically denied or admitted in the answering affidavit, will be deemed to have been admitted.”

30. Therefore, the Tribunal will only rely on the Respondent's answering affidavit when considering the evidence before the Tribunal. However, all other allegations made at the hearing that the Respondent chose not to attend, will be deemed to be admitted.

CONSIDERATION OF THE EVIDENCE BEFORE THE TRIBUNAL

31. At the hearing, the Applicant's representative highlighted some of the transgressions by the Respondent, as fully detailed in their written submissions.

32. The Applicant's representative spent more time highlighting that the Respondent had mainly totally disregarded all or most of the provisions of the Act.

33. After careful consideration of the submissions made by the Respondent in their answering affidavit, the Tribunal has not found any of their submissions convincing in rebutting the allegations by the Applicant in its Founding Affidavit:
- 33.1 Though claiming that their Delfin LMS does all the things required by the Act and Regulations, the Respondent conceded they do not provide the consumers with any hardcopy or electronic copy of any pre-contract agreement documents and quotations as stipulated by the Act and Regulations;
- 33.2 The Respondent did not have any credit agreements as required by the Act;
- 33.3 The Respondent did not provide evidence to prove they did affordability tests for each consumer. Saying they do it electronically, without providing evidence to that effect does not comply with the Act;
- 33.4 The Respondent did not rebut the allegations that they charged the excessive cost of credit; and
- 33.5 The Respondent failed to rebut the Applicant's allegations that they never submitted any Forms 39 and/or 40 as required by the Act.
34. In the absence of any contrary evidence placed before the Tribunal, it is accepted that the Respondent repeatedly contravened the Act, Regulations and the conditions of his registration as alleged.

CONSIDERATION OF THE ORDERS APPLIED FOR

Cancellation of the Respondent's registration as a credit provider in terms of Section 57(1)(a) of the Act

35. Section 57(1) empowers the Tribunal to cancel the registration of a credit provider where they repeatedly fail to comply with the conditions of registration or contravene the Act.
36. The Applicant has adequately proved that the Respondent has contravened their conditions of registration.

37. The facts placed before the Tribunal clearly show that the Respondent repeatedly failed to comply with the Act, which had a serious impact on the consumers they dealt with. In the circumstances, cancellation of their registration is justified.
38. It is unnecessary for the Tribunal to order the Respondent's deregistration because it has voluntarily deregistered as a credit provider. The Applicant also no longer pursues this particular prayer.

Appointment of the Auditor to identify and assist those consumers negatively affected by the Respondent's breaches of the Act

39. The Applicant has prayed that the Respondent be ordered to appoint an auditor, at its own cost, in line with the details listed under Paragraph 20 of this Judgment. It is vital that this be done in order to ensure that many victims of the Respondent's reckless lending be protected from the negative consequences thereof.

Imposition of an Administrative fine

40. The Respondent benefitted significantly from breaching the provisions of the Act, in that they overcharged consumers. The imposition of an administrative fine is, therefore, in order, for the following reasons:
- 40.1 The Respondent repeatedly approved applications recklessly. This had the potential of allowing the Respondent to significantly profit from granting such reckless loans;
- 40.2 The unlawful excessive charges levied by the Respondent resulted in financial losses for consumers who had to pay credit fees that worsened their financial situation and pushed them into a debt trap;
- 40.3 The Respondent did not adhere to the prescripts of the Act and Regulations, by not submitting the relevant forms and information in the prescribed manner;
- 40.4 The Respondent capitalized on the vulnerability and gullibility of the lower income groups, who comprise almost 79% of their client base;

40.5 The Respondent initially resisted the Applicant's inspectors' attempts to gain access to its premises and only agreed to open in the presence of uniformed policemen armed with a warrant of search and seizure;

40.6 There were no prior investigations or enforcement actions instituted by the Applicant against the Respondent. The Applicant submitted that the nature of the contraventions and the various dates on which the credit agreements were entered into, however, indicate that the conduct of the Respondent has been ongoing for a substantial period prior to the investigation; and

40.7 Under normal circumstances, the Tribunal would have seriously considered imposing a heavier administrative penalty against the Respondent. The Tribunal will however need to consider a lesser administrative fine given that the Respondent is currently under liquidation.

ORDER

Accordingly, the Tribunal makes the following order:

41. The Respondent is declared to have been in repeated contravention of the following Sections of the Act and Regulations:
 - (a) Section 92(1) of the Act read with Regulation 28;
 - (b) Section 93(1) and (2) of the Act read with Regulation 30;
 - (c) Section 81(2)(a)(ii) and (iii) of the Act read with regulation 23A;
 - (d) Section 81(3) read together with Section 80(1)(a);
 - (e) Section 81(3) read together with Section 80(1)(b)(ii);
 - (f) Section 101(1)(b)(i) read with Regulation 42(2), Section 101(1)(c)(iii) read with Regulation 44 and Section 101(1)(d)(ii) read with Regulation 42(1);
 - (g) Section 91(2) read together with Section 101(1)(c)(iii) and 105(1)(b) and regulation 44 of the Act;

(h) Section 170 of the Act with Regulation 55(1)(b)(i) to (vii) and Regulation 55(2)(b); and

(i) Section 55(2)(c) of the Act read with General Condition 3 of its conditions of registration as a credit provider, as well as Regulations 64 and 66 of the National Credit Regulations.

42. The Respondent's repeated contraventions of the Act and Regulations are declared to be prohibited conduct in terms of Section 150(a) of the Act.

43. The Respondent is ordered to appoint an Auditor, who is a chartered accountant, at its own cost, in line with paragraph 20 of this judgment, to identify all the consumers who were negatively affected by the Respondent's reckless lending practices.

44. The Respondent must, within Ninety days (90) days after the Tribunal order has been obtained, pay an administrative fine of R20 000 (Twenty Thousand Rand) to the bank account of the National Revenue Fund: Banking Details are as follows:

Bank Name	: The Standard Bank of South Africa
Account Holder	: Department of Trade and Industry
Branch Name	: Sunnyside
Branch Code	: 05100
Account Number	: 370 650 026
Reference	: NCT/158481/2020/57(1) and Name of Person or Business making payment

45. There is no order as to costs.

DATED ON THIS 12th DAY OF JULY 2022

(signed)

Prof B. Dumisa
Presiding Member

Authorised for issue by The National Consumer Tribunal

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Ms D Terblanche (Member) and Mr A Potwana concurring