

IN THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

Case number: NCT/183485/2021/140(1)

In the matter between:

NATIONAL CREDIT REGULATOR

APPLICANT

and

DUBE CASH LOANS CC (in liquidation)

RESPONDENT

Coram:

Prof T Woker – Presiding Tribunal member

Ms Maseti – Tribunal member

Mr T Bailey – Tribunal member

Date of hearing – 21 June 2022 via the Teams digital platform

Date final documents for adjudication received by Tribunal - 5 July 2022

Date of judgment – 6 July 2022

JUDGMENT

INTRODUCTION

1. This is an application in terms of section 141 (1) of the National Credit Act, 34 of 2005 ("NCA" or "the Act"). The Applicant seeks an order in terms of which the Respondent is to be found to be in repeated contravention of the NCA, its Regulations and the conditions of its registration, and such contraventions to be declared prohibited conduct.

2. The National Consumer Tribunal ("the Tribunal") is further asked to make a finding of reckless lending because of other transgressions allegedly perpetrated by the Respondent. Based on these and other grounds, the Applicant also seeks an order imposing an administrative fine on the Respondent.

THE APPLICANT

3. The Applicant is the National Credit Regulator ("Applicant"), a juristic person established in terms of section 12 of the NCA to regulate the consumer credit market and ensure compliance with the Act. The Applicant's principal business address is 127 - 15th Road, Randjespark, Johannesburg, Gauteng.
4. Mr M Mathivha, a legal adviser in the Applicant's Investigations and Enforcement Department, represented the Applicant at the hearing of this application, assisted by Ms L Schwartz.

RESPONDENT

5. The Respondent is Dube Cash Loans CC ("Respondent"), a close corporation registered in terms of the Companies Act of the Republic of South Africa, 2008 with CIPC registration number 2011/057456/23. The Respondent was also a registered credit provider in terms of section 40 of the Act, with registration number NCRCP 5722, operating at its registered physical addresses situated at 30 Main Road, Joubertina Eastern Cape, 6430 and Janoni Centre, Van Riebeeck Street, Kareedouw, 6400 and its postal address as P.O Box 88, Kareedouw, 6400.
6. The Respondent was registered as a credit provider with the Applicant on 15 June 2012. The Respondent failed to pay its full registration fees within the prescribed periods in 2020; therefore, the Respondent's registration lapsed by operation of law in terms of section 52(4)(b)(iii).
7. This matter was previously set down for a hearing on 15 September 2021. However, on the morning of the hearing, the Respondent informed the Applicant that it had commenced liquidation proceedings and that Liqui Solutions legal consultants had been appointed to attend to the liquidation. The matter was, therefore, postponed so that the Applicant could engage with Liqui Solutions.

8. On 23 September 2021, the Respondent passed a special resolution to voluntarily wind up the close corporation in sections 349 and 351 of the Companies Act 61 of 1973. On 24 September 2021, the Applicant was advised that Kaap-Vaal Trust would be appointed as a liquidator. The appointment certificate of two co-liquidators is dated 4 April 2022.¹
9. On 19 April 2022, the Applicant received consent to serve the application on the liquidators per email and the application was then served on 20 April 2022.
10. On 22 April 2022, the liquidators sent an email to the Registrar of the Tribunal ("Registrar") requesting reasons why the matter was proceeding whilst the Respondent was under liquidation.
11. On 29 April 2022, the Registrar advised the liquidators that should they wish to, they could oppose the matter and file an answering affidavit.² The liquidators have failed to do so.
12. The Respondent, the liquidators or their legal representative did not oppose the matter or attend the hearing. Due to their non-appearance, the Tribunal proceeded to hear the matter in their absence in terms of Rule 24(1) (c) of the NCA.³

TERMINOLOGY

13. A reference to a section in this judgment refers to a section in the Act. A reference to a Regulation refers to the National Credit Regulations, 2006 ("Regulations").⁴ A reference to a condition or general

¹ See Certificate of Appointment of Liquidators confirming the appointment of Olga Kotze (Kaal Vaal Trust) and Elizabeth Margaret Van Rooyen (Merris Xirimele Trust) as co-liquidators of the estate dated 4 April 2022.

² In *Moto Health Care Medical Scheme v HMI Healthcare Corporation (Pty) Ltd & others* (341/2018) [2019] ZASCA 87 the court held that if the liquidator has knowledge of an action that has been instituted and does not oppose that action, the liquidator has waived her right to object.

³ See GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007 (Government Gazette No. 30225), as amended.

Rule 24 (1) provides:

If a party to a matter fails to attend or be represented at any hearing or any proceedings, and that party-

(a)...

(b) is not the Applicant, the presiding member may-

(i) continue with the proceedings in the absence of that party.

⁴ Published under Government Notice R489 in Government Gazette 28864 of 31 May 2006.

condition refers to the Respondent's registration conditions as a credit provider in terms of section 40 ("conditions").⁵ Moreover, a reference to a form refers to a form as prescribed in schedule 1 of the Regulations.

JURISDICTION

13. The Tribunal has jurisdiction to hear this matter in terms of section 27 of the NCA. It has powers conferred upon it in terms of section 150 of the said Act to make orders concerning a credit provider who allegedly contravenes this Act or fails to comply with any condition of its registration. Even though the Respondent is in liquidation, it remains a juristic entity⁶ and a credit provider in terms of the NCA. In terms of section 359 of the Companies Act, 1973 (which applies in these circumstances despite the promulgation of the Companies Act, 2008), any person who has instituted legal proceedings against a company, which was suspended by winding up, intends to continue with those proceedings must give notice to the liquidator before continuing with those proceedings. The Tribunal is satisfied that such notice has been provided to the liquidators and that it is therefore empowered to adjudicate on this matter.⁷

ISSUES TO BE DECIDED

14. This judgment is based on the documents before the Tribunal and arguments by the Applicant at the hearing held on 21 June 2022 and in the Applicant's heads of argument submitted after the hearing. Due to the Covid19 pandemic, the hearing took place *via* a Microsoft Teams video and audio link.
15. The issues to be decided are:

⁵ Section 40 empowers the National Credit Regulator to impose conditions on an Applicant's registration as a credit provider.

⁶ In *Richter v Absa Bank Limited* (20181/2014 [2015] SCA), the SCA concluded that a company retains its juristic status and identity despite a final order of liquidation being granted. The court held that "the correct position is that upon a final order of liquidation being granted the company continues to exist, but control of its affairs is transferred from the directors to the liquidator who exercises his or her authority on behalf of the company. See also *De Villiers & Other NNO v Electronic Media Network 1991 (2) SA 180 (W)*).

⁷ See *National Credit Regulator v CMR Group (Pty) Ltd* Case No NCT/119696/2018/57. The appointed liquidators of a company are empowered to take or defend any action against or in favour of a juristic entity, and such action will be done in the name of the juristic entity. The liquidator is accorded the power to bring or defend any action or other legal proceedings in the name and on behalf of the juristic entity 9Henochoberg on the Companies Act 61 of 1973, 801: Commentary on section 376.).

- (1) whether or not the Respondent has engaged in prohibited conduct by repeatedly contravening the provisions of the Act, the Regulations and the conditions of its registration, and because of that;
 - (2) whether or not an administrative fine is a competent sanction to be imposed by the Tribunal in the circumstances.
16. Section 150 provides for Orders of the Tribunal, thus:
- "In addition to its other powers in terms of this Act, the Tribunal may make an appropriate order concerning prohibited or required conduct in terms of this Act, or the Consumer Protection Act, 2008, including-*
- (a) declaring conduct to be prohibited in terms of this Act;*
 - (b) ...;*
 - (c) imposing an administrative fine in terms of section 151, with or without the addition of any other order in terms of this section, or*
 - (g) suspending or cancelling the registrant's registration, subject to sections 57(2) and (3)."*
17. In deciding these issues, the Tribunal must first consider the individual foundational claims by the Applicant set out in its notice of motion, relating to the alleged contraventions of the NCA.
18. The Applicant alleges that the Respondent contravened the following sections of the Act.
- Sections 76(4) and (5) read with Regulation 21 (6);
 - Sections 81(2)(a)(ii) and (iii) read with Regulation 23A (3); (8) and 23A (12);
 - Section 81(3) read with s80(1)(a);
 - Section 81(3) read with s80(1)(b)(ii);
 - Section 170 read with Regulation 55 (1) (b) (vi)
 - Section 100(1)(b) read with section 101(1)(b) and (c) read with Regulation 42 and 44);
 - Section 3(e)(i) and s3(g)
 - Section 90(2)(b)(iii) read with section 101 (1) (c), (f) and (g);
 - Section 52(5)(c) read with General Condition 2;
 - Section 52(5)(c) and (f) read with Regulations 62,64 and 66 read further with General Condition 3 of its Conditions of Registration.

BACKGROUND

19. The Applicant initiated a complaint in terms of section 136 (2) of the Act in response to advertising material displayed on the Respondent's website. These advertisements contained statements such as "blacklisted individuals can be assisted" and "Does not matter if you are blacklisted". Such statements are prohibited in terms of section 74(4) (c) read with Regulation 21 (6) of the Act. Having perused these advertisements, the Applicant suspected that the Respondent might be extending credit without conducting proper affordability assessments. The Applicant alleges that such suspicion was reasonable in the circumstances.
20. On 24 October 2020, Thinandavha Phalanndwa, an employee of the NCR, was appointed, in terms of section 25, to investigate the Respondent's business practices.
21. Due to the advent of the Covid-19 pandemic, the Applicant has been conducting its investigations remotely, using video link applications or telephonic engagements. On 8 December 2020, Phalanndwa conducted a virtual investigation and held an interview with Lesley Bester, who identified himself as the branch manager of the Respondent's business.
22. Phalanndwa requested a list of credit agreements approved by the Respondent, from which she randomly selected ten agreements. After assessing those credit agreements, Phalanndwa compiled an Investigation Report ("Investigation Report") dated 12 January 2021.⁸
23. The Investigation Report details the alleged contraventions. The ten (10) sampled consumer files are annexed to the Investigation Report to support its conclusions.⁹

CONTRAVENTIONS OF THE ACT

Unlawful advertising practices

24. In its advertisements, the Respondent uses phrases and/or statements such as "Blacklisted individuals can be assisted" and "does not matter if you are blacklisted". These phrases have

⁸ Annexure FA4 of the founding affidavit. See page 47 of the documents before the Tribunal.

⁹ Annexures E1 to E10 of the Investigation Report.

substantially the same meaning as "No credit checks required" and "blacklisted consumers welcome" which statements and/or phrases are prohibited in terms of section 76(4) read with Regulation 21(6).

25. The Respondent's advertisements accordingly contain prohibited statements and/or phrases in contravention of the Act and its Regulations.

Failure to conduct proper affordability assessments

26. In terms of section 81(3) of the Act, a credit provider must not enter into a reckless credit agreement with consumers. In terms of section 80(1)(a), a credit agreement is reckless if at the time that the agreement is made, the credit provider failed to conduct an assessment as required by section 81
(2) irrespective of what the outcome of such assessment might have concluded at the time.
27. As appears from the Respondent's files sampled in the Investigation Report, the Respondent failed to conduct proper affordability assessments in that it failed to take steps to assess consumers' debt repayment histories and failed to evaluate consumers' existing financial means prospects and obligations.¹⁰
28. This conduct of the Respondent is evident in all the sampled approved credit agreements marked annexures E1 to E10 of the Investigation Report.
29. Based on the above, the Tribunal is satisfied that the Respondent repeatedly contravened sections 81(2)(a)(ii) and (iii) read with Regulation 23A (3), 23A(8) and 23A (12) of the Act.

RECKLESS CREDIT GRANTING

30. As a result of the Respondent not conducting proper affordability assessments as set out above, the Respondent has extended credit recklessly to consumers and has consequently repeatedly contravened Section 81(3) read together with Section 80(1)(a) of the Act.

¹⁰ For example: E1 to the Investigation Report. Here the consumer had 4 open accounts on his credit record but these were not taken into consideration before the Respondent granted an additional loan. See also E2 where the consumer had an

adverse listing with Lewis stores. The Respondent also failed to consider information on the consumer's bank statements. It seems that the bank statements were only obtained as a 'tick box' exercise.

31. In terms of section 83(2)(a), the Applicant seeks an order declaring the credit agreements reckless in terms of section 80(1)(a). The Applicant further seeks an order setting aside all of the consumers' obligations under those agreements.

Loan Splitting and the overcharging of interest and initiation fees

32. In some instances, the evidence established that the Respondent signed more than one credit agreement with the same consumer on the same day. This practice is commonly referred to as the "splitting of loans". This allows the Respondent to charge more initiation and service fees than is legally permitted.

33. The evidence gathered from the small sample reveals four instances of splitting of loans, as follows:

- (1) Annexure E2¹¹ - loan no 40116 and loan no 40117 were concluded on 7 January 2020.
- (2) Annexure E5¹² - loan no 40189 and loan no 40190 were concluded on 17 January 2020.
- (3) Annexure E6¹³ - loan no 40036 and loan no 40039 were concluded on 2 January 2020.
- (4) Annexure E8¹⁴ - the consumer's credit bureau report¹⁵ shows that the consumer had two loans with the Respondent that were closed on 30 August 2019.

34. In the above examples, consumers have, effectively, concluded only one credit agreement with the Respondent, with the consumers having borrowed the total capital amount advanced under both agreements entered on the same day.

35. The Respondent has no reasonable or lawful rationale for splitting the loans. The loan splitting was done purely to circumvent the Act and impose excessive and unlawful charges. This is in contravention of sections 100 (1) (b) and 101 (1) (b) and (c) read with Regulation 42 (2) and 44 of the Act.

¹¹ See pages 103-128 of the documents before the Tribunal.

¹² See pages 190-207 of the documents before the Tribunal.

¹³ See pages 208-224 of the documents before the Tribunal.

¹⁴ See pages 248-261 of the documents before the Tribunal.

¹⁵ See page 255 of the documents before the Tribunal.

36. The Tribunal, therefore, finds and is satisfied with the evidence before the Tribunal that the Respondent contravened the abovementioned sections of the Act.

Including an unlawful provision in a credit agreement

37. An assessment of the credit agreements before the Tribunal revealed that the Respondent's credit agreements contain an unlawful provision, which essentially allows the Respondent to charge consumers penalty service fees in the event of default.
38. A penalty service fee is not allowed in terms of the Act, nor does it fall within the definition of penalty interest, default administration charges or collection costs.
39. The Respondent has accordingly contravened section 90 (2) (b) (iii) of the Act read with sections 101 (1) (c), (f) and (g) of the Act.

Failure to submit annual statistical returns (Form 39) and Financial Statements (Form 40)

40. The Respondent failed to submit its latest annual statistical returns (Form 39) and Financial Statements (Form 40) for 2020/21.
41. This is a contravention of its General Conditions 3 of its Conditions of Registration read with section 52(5) (c) of the Act read further together with Regulations 64 and 66 of the Act.¹⁶

CONSIDERATION AND ANALYSIS OF THE APPLICANT'S EVIDENCE

42. The Tribunal considered the Applicant's submissions regarding the basis upon which it formulated a reasonable suspicion that the Respondent engaged in prohibited conduct.
43. There is no opposing view from the Respondent. Accordingly, the Tribunal is satisfied that the Applicant has provided sufficient argument and basis for establishing that the Applicant formulated a reasonable

¹⁶ See correspondence from the Applicant's compliance department on page 299 of the documents before the Tribunal.

suspicion that the Respondent contravened the Act.¹⁷ The Tribunal is seized only with the Applicant's uncontroverted documentary evidence and oral submissions. The Tribunal deems the facts alleged by the Applicant as admitted because the Respondent elected not to attend the proceedings to defend itself by filing an answering affidavit.

44. After considering the evidence, the Tribunal finds that the Respondent has repeatedly contravened the NCA, its Regulations, and the conditions of its registration as a credit provider. These contraventions amount to prohibited conduct and are serious. The Respondent failed, without reason, to file its answering affidavit and failed to appear at the hearing. Accordingly, it has forfeited the opportunity to put a proper defence against the allegations levelled against it; and has left the matter in the hands of the Tribunal.
45. The Tribunal views the transgressions by the Respondent in a severe light. Such unlawful conduct undermines the purpose of the NCA and the NCR and causes immeasurable harm to consumers. The Tribunal is satisfied that the Applicant has proven on a balance of probabilities that the Respondent has repeatedly contravened the sections, Regulations, and conditions of registration as set out in the preceding paragraphs.
46. The Tribunal proceeds to consider an appropriate order.

CONSIDERATION OF AN APPROPRIATE ORDER

Declaring the Respondent to have repeatedly contravened the Act and committed prohibited conduct

47. Following the Applicant's request, the Tribunal deems it appropriate to order that the Respondent's repeated contraventions amount to prohibited conduct. The Tribunal proceeds to consider the Applicant's other wide-ranging requested relief.

¹⁷ For a discussion of what constitutes a reasonable suspicion see *National Credit Regulator v Dacqup Finances CC trading as ABC Financial Services – Pinetown and Another* (382/21) [2022] ZASCA 104 (24 June 2022)

Administrative Penalty

48. The Applicant has requested that the Tribunal impose an administrative fine on the Respondent of R1 000 000 (One Million Rand). This issue is complicated by the fact that the Respondent has elected to go into voluntary liquidation. At the close of the hearing, the Tribunal requested the Applicant to provide further arguments on how liquidation impacted the Respondent's position.¹⁸
49. The imposition of an administrative fine is both a punitive and preventative measure and necessary to prevent repetitive and similar conduct in the marketplace and credit market. The importance of the administrative fine was highlighted by the Competition Tribunal in *Competition Commission v Federal Mogul Aftermarket Southern Africa (Pty) Ltd.*¹⁹ The Competition Tribunal held that the theoretical justification for the punishment of those who violate regulatory law appears to rest firmly on the deterrence theory of punishment. Although fines have a retributive purpose by punishing the transgressing responsible party for illegal conduct, the main purpose of an administrative fine in terms of this theory is to act as a deterrent, both to the offending responsible party and to other responsible parties that may consider engaging in the same type of behaviour in the future.
50. The Applicant submitted that, in this case, there is a need for deterrence and example setting. The Applicant argued that by imposing an administrative fine despite the change in the Respondent's operations, the Tribunal would send a strong warning to "would be" or other offenders of the Act that liquidation does not provide for an escape nor would it protect them from the consequences of their contraventions.
51. A similar situation arose in *National Credit Regulator v Circle Way Trading 10 (Pty) Ltd*,²⁰ where the respondent applied for voluntary liquidation three months after the NCR served the application for deregistration. The Tribunal stated:²¹

¹⁸ The Applicant's submissions were received by the Tribunal on 5 July 2022.

¹⁹ Case number 08/CR/Mar01.

²⁰ NCT/158491/2020/57(1) [2021] ZANCT 7 (16 April 2021).

²¹ At para 129.

"The Tribunal is satisfied that the nature of the Respondent's contraventions and the consequent financial implications for consumers justify the Tribunal imposing an administrative fine on the Respondent. Parliament introduced the Act into the South African legislative landscape to curb precisely the types of excesses that the Tribunal has found the Respondent to have perpetrated. The Tribunal would, therefore, be failing in its duty were it not to send a clear message to the Respondent and other credit providers that the Tribunal will not tolerate credit providers contravening the Act".

52 Consequently, even though under voluntary liquidation, the Respondent was ordered to pay an administrative fine of R1 000 000.00 (One Million Rand).

53 *NCR v Golden Mile Loans CC t/a Cash 4 U*²² also involved prohibited conduct on the part of a credit provider. This case was initially postponed for settlement negotiations. However, on the return date, the respondent's attorneys advised the Tribunal that the respondent was in voluntary liquidation. The liquidation proceedings did not bar the Tribunal from imposing an administrative fine on the respondent for its conduct. In agreeing with the NCR's request to impose an administrative fine on the respondent, and in detailing the importance of granting the penalty, the Tribunal held:²³

"The applicant has requested the Tribunal to impose an administrative fine. The Tribunal is satisfied that the nature of the respondent's contraventions and the consequent financial implications for consumers justify the Tribunal imposing an administrative fine on the respondent. The Act was introduced into the South African legislative landscape to curb precisely the types of excesses that the Tribunal has found the respondent to have perpetrated. Therefore, the Tribunal would fail in its duty to not send a clear message to the respondent and other credit providers that the Tribunal will not tolerate credit providers contravening the Act. Although the respondent appears to have been a relatively small credit provider, it is crucial to send a strong message to all credit providers, including their employees, that they cannot escape complying with the Act."

²² NCT/158460/2020/57(1).

²³ At para 68.

54. Similarly, in this case, the Applicant submits that voluntary liquidation of the Respondent should not be a barrier to imposing an administrative penalty; but should be taken as an aggravating factor. The Applicant submits that the Respondent deliberately sought voluntary liquidation to avoid the possible payment of an administrative penalty for prohibited conduct. Further, the Applicant submits, that it is reasonable to infer that this process was undertaken to avoid conducting an audit. The process of liquidation should not be used as an exit strategy. In all likelihood, should the Tribunal fail to send a clear message, credit providers will use voluntary liquidation to avoid the consequences of their unlawful conduct. and may even proceed to trade under a different name.
55. The Competition Tribunal, in the case of *Competition Commission of South Africa v Afrion Property Services CC and Others*²⁴ accepted the Commission's submissions that the respondent went into liquidation as part of its strategy to avoid paying the penalty for its cartel conduct and that this should be viewed as an aggravating factor when the penalty was calculated. The Tribunal further, because of the seriousness of the contraventions and the aggravating factors, disregarded the 30% discount requested by the Commission and ordered that the respondent pay the full fine.
56. Further, in submitting that the liquidation status of the company should not affect the Tribunal's powers to impose an administrative fine, the Competition Tribunal in *Competition Commission v Tosaco Commercial Services (PTY) Ltd (In liquidation)*²⁵, accepted a settlement agreement between the parties to be made an order in terms of section 58 of the Competition Act where the Commission had initiated an application in the Competition Tribunal against the respondent for contraventions of the Competition Act. The material terms of the settlement were that:
- (i) The respondent had contravened the Competition Act and had engaged in prohibited conduct;
 - (ii) The respondent agreed to pay an administrative penalty of R3 000 000 (three million rand) within 30 days from the date of confirmation of the settlement agreement by the Tribunal;
 - (iii) It was recorded that the respondent was in voluntary liquidation but that its liquidators would procure the payment of the administrative penalty.

²⁴ (CR245Mar17) [2021] ZACT 79 (15 January 2021).

²⁵ Case no 2012 Aug 0480.

57. The Applicant pointed out that the liquidation status in the *Tosaco Commercial Services* matter did not prevent the respondent from being liable for a fine for their contraventions and argued that the same should apply in this matter.
58. The Tribunal is satisfied that the nature of the Respondent's contraventions and the consequent financial implications for consumers justify the Tribunal imposing an administrative fine on the Respondent.
59. The Act was introduced into the South African legislative landscape to curb precisely the type of conduct the Tribunal has found the Respondent to have perpetrated. Therefore, the Tribunal would be failing in its duty to not send a clear message to the Respondent and other credit providers that the Tribunal will not tolerate credit providers contravening the Act.
60. Section 151 (3) sets out the factors the Tribunal must consider when determining an appropriate fine. The Tribunal proceeds to consider each in turn.

Nature, duration, gravity, and extent of the contraventions

61. The contraventions show that the Respondent failed to conduct proper affordability assessments and extended credit recklessly. It also gouged consumers with excessive costs of credit by splitting a single loan into two credit agreements. In each credit agreement examined by the inspector the Respondent breached its obligations in terms of the Act in a severe manner.

Loss or damage suffered because of the contraventions

62. The Applicant did not place specific evidence before the Tribunal concerning the actual loss or damage suffered by consumers. Since the Tribunal has found that the Respondent exploited consumers by entering into loan agreements without first taking reasonable steps to ensure that the loans are affordable, the Tribunal is satisfied that consumers have suffered prejudice and financial loss because of the Respondent's conduct. The damage to a consumer's economic status is far-reaching if they apply for and are placed under debt review because of over-indebtedness. The Tribunal is satisfied that it may reasonably conclude that consumers also suffered loss through the Respondent's overcharging of costs of credit.

Respondent's behaviour

63. There is no plausible reason why the Respondent should not have complied with its obligations as a credit provider under the Act. The Respondent has brought the consumer credit industry into disrepute and disregarded consumers' rights.

Market circumstances under which the contraventions occurred

64. It appears that the Respondent simply ignored its obligations in terms of the Act. It could do so because it operates in an environment where consumers are ill-educated about their rights concerning access to and the cost of credit. The Respondent's prohibited conduct caused ill-informed consumers to be exploited.

Level of profit derived from the contraventions

65. The Applicant has been unable to place evidence before the Tribunal regarding the Respondent's annual turnover because the Respondent has not submitted its latest annual form 39 Statistical Return nor the Form 40 Annual Financial Statement for the 2020/21 financial year. However, the Respondent must have been making a profit from its activities in contravention of the Act and Regulations. Each loan was extended unlawfully, and the prohibited charges, constitute a profit gained by the Respondent.

The degree to which the Respondent cooperated with the Applicant

66. The Tribunal considered that the Respondent provided the inspectors with the required information and cooperated with them during the investigation.

Respondent's prior contraventions

67. The Respondent has not been the subject of prior investigations or enforcement measures.

Amount of the fine

68. The imposition of an administrative penalty is an important decision not taken lightly by the Tribunal. It has severe consequences for the Respondent. In this matter, the Tribunal did not have the benefit of hearing the Respondent's side in mitigation of the allegations raised by the Applicant at the hearing. The Tribunal, based on the evidence before it as well as the Applicant's further submissions on an appropriate penalty, finds the Applicant's submissions compelling on the contraventions of the Act by the Respondent and accepts the Applicant's submissions in support of the imposition of an administrative penalty.
69. The Tribunal considered that the Applicant did not produce evidence concerning the Respondent's financial turnover during the previous financial year. Consequently, the Tribunal may impose a fine limited to a maximum of R1 000 000.00 (One Million Rand).
70. In *NCR v Werlan Cash Loans t/a Lebathu Finance*²⁶ the Tribunal, regarding the imposition of an administrative fine, stated the following:

""When determining an amount, the Tribunal must consider the legislation from which its own mandate derives and when determining an appropriate fine the Tribunal must consider the following factors: the nature, duration, gravity, and extent of the contravention; any loss or damage suffered as a result of the contravention; the behaviour of the Respondent; the market circumstances in which the contravention took place; the level of profit derived from the contravention; the degree to which the Respondent has cooperated with the National Credit Regulator, or the National Consumer Commission, in the case of a matter arising in terms of the Consumer Protection Act, 2008, and the Tribunal; and whether the Respondent has previously been found in contravention of this Act, or the Consumer Protection Act, 2008, as the case may be.""

71. In *NCR v Midwicket*²⁷ the Tribunal found the following:

""One of the main purposes of an administrative fine is to serve as a means of deterring an offender from engaging in the prohibited conduct again. Where the offender's

²⁶ NCT/3867/2012/57(1).

²⁷ NCR v Midwicket Trading 525 CC t/a Butterfly Cash Loans NCT/7962/2013/57(1).

registration is cancelled and is thus no longer permitted to conduct business as a credit provider, one of the main reasons for the imposition of a fine falls away. The imposition of the fine then becomes purely punitive, which would generally only be warranted in the most extreme of circumstances. ""

72. The Respondent transgressed the law in every instance sampled, which indicates that the Respondent has little if any, regard for the law and regulatory bodies. Further, the Tribunal accepts the Applicant's argument that the Respondent's decision to liquidate to avoid a possible penalty for their actions should be regarded as an aggravating factor when a penalty is calculated.²⁸ In *Competition Commission of South Africa v Afrion Property Services CC and Others*²⁹ the Competition Tribunal held that in the absence of any mitigating factors put up from the respondent its conduct was found to be an aggravating factor and therefore disregarded the 30% discount proposed by the Commission.
73. Similarly, in this matter, the Respondent has not bothered to take the Tribunal into its confidence and has not put up any mitigating circumstances.
74. However, the Respondent did cooperate with the Applicant during its investigation, it has no prior contraventions and the level of profit generated from the prohibited conduct has not been quantified.
75. Taking all these factors into consideration the Tribunal finds that it is appropriate to impose an administrative fine of R500 000.00 (Five Hundred Thousand rand) on the Respondent.

Appointment of an auditor

76. The Applicant also requested the Tribunal to appoint an auditor to audit the Respondent's practices as a credit provider. The Tribunal is aware that the investigation that led to this application comprised a small sample of the Respondent's consumer files. The Tribunal has found, amongst other things, that

²⁸ See *Competition Commission of South Africa v Afrion Property Services CC and Others* (CR245Mar17) [2021] ZACT 79 (15 January 2021)- para 170 where the Tribunal held that "In the absence of any mitigating factors put up from Belfa (The Respondent), we further found its conduct to be an aggravating factor and we therefore disregard the 30% discount (mitigation) proposed by the Commission."

²⁹ (CR245Mar17) [2021] ZACT 79 (15 January 2021) para 170.

the Respondent has extended reckless credit and charged unlawful fees. The evidence placed before the Tribunal means that it is not possible for the Tribunal to establish the extent of this practice and whether the Respondent only provides short-term credit agreements. It is, therefore, appropriate to appoint an independent auditor to assess the situation and establish the facts.³⁰

Request for interdict

77. The Applicant requested that the Tribunal make an order interdicting the Respondent from engaging in prohibited conduct in the future. The interdict will serve no purpose because the Respondent may not engage in prohibited conduct given the Act's provisions.³¹

ORDER

78. Accordingly, the Tribunal makes the following order:

78.1. The Respondent has repeatedly contravened the following sections of the Act, the Regulations and its conditions of registration:

- Sections 76(4) and (5) read with Regulation 21 (6);
- Section 81(2)(a)(ii) and (iii) read with Regulation 23A (3); (8) and 23A (12);
- Section 81(3) read with s80(1)(a);
- Section 100(1)(b) read with section 101(1)(b) and (c) read with Regulation 42 and 44;
- Section 90(2)(b)(iii) read with section 101 (1) (c), (f) and (g);
- Section 52(5)(c) read with General Condition 2; and
- Section 52(5)(c) and (f) read with Regulations 62,64, and 66 read further with General Condition 3 of its Conditions of Registration.

78.2 The repeated contraventions are prohibited conduct in terms of section 150 (a) of the Act.

³⁰ In *National Credit Regulator v Dacqup Finances CC trading as ABC Financial Services – Pinetown and Another* (382/21) [2022] ZASCA 104 (24 June 2022) the SCA confirmed that the appointment of an auditor in such circumstances is warranted.

³¹ *Shoprite Investments Ltd v The National Credit Regulator* (509/2017 dated 18 December 2019).

- 78.3 The Respondent's credit agreements with consumers contained in annexures E1 to E10 of the Investigation Report are reckless in terms of section 80 (1) (a) and are set aside.
- 78.4 The Respondent is ordered to:
- 78.4.1 Within 30 days of the date of issue of this judgment to appoint an independent auditor, who is registered as a Chartered Accountant, at its own cost to determine and compile a list of all the consumers across all the Respondent's branches and the amounts by which the Respondent has within the last three years of the date of issue of this judgment overcharged consumers service fees, interest or charges;
 - 78.4.2 Within 30 days of the date of the independent auditor's report, to refund each consumer appearing on the list the amounts the Respondent has overcharged each consumer;
 - 78.4.3 Within 150 days of the date of issue of this judgment, the Respondent is to furnish the independent auditor's report and the Respondent's written report to the Applicant that details the consumers' identities and the refunds made to the consumers; and
 - 78.4.4 The independent auditor is to identify and include in the independent auditor's report all the Respondent's credit agreements still in force (which have amounts due to the Respondent) and concluded without the Respondent having conducted assessments in terms of section 81 (2) (a) (ii) and (iii) of the Act.
- 78.5 The Applicant may, upon receipt of the independent auditor's report, apply to the Tribunal for an order declaring the agreements as reckless in terms of section 80 (1) (a) and setting aside the consumers' obligations under those agreements.
- 78.6 The Respondent is within 90 business days of the date of issue of this judgment to pay an administrative fine of R500 000.00 (Five Hundred Thousand rand) into the National Revenue Fund's following bank account:

Bank: The Standard Bank of South Africa

Account holder: Department of Trade and Industry

Branch name: Sunnyside

Branch code: 05100

Account number: 317 650 026

Reference: NCT/223376/2022/57(1) and name of person or business making the payment.

78.7 There is no order as to costs.

Prof T Woker

Presiding Tribunal member

Tribunal members Mr T Bailey and Ms N Maseti concur with this judgment.

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

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