

IN THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

Case number: NCT/223369/2022/57(1)

In the matter between:

NATIONAL CREDIT REGULATOR

APPLICANT

and

MOSADI 19 TRADING ENTERPRISE (PTY) LTD

RESPONDENT

Coram:

Mr T Bailey – Presiding Tribunal member

Adv J Simpson – Tribunal member

Adv N Sephoti – Tribunal member

Date of hearing – 1 June 2022 via the Teams digital platform

Date of judgment – 17 June 2022

JUDGMENT AND REASONS

APPLICANT

- 1 The Applicant is the National Credit Regulator (the applicant), a juristic person established in terms of section 12 of the National Credit Act, 2005 (the Act) 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.
- 2 Mr Roy Stocker, a senior legal adviser in the applicant's investigations and enforcement department, represented the applicant at the hearing of this matter.

RESPONDENT

3. The Respondent is Mosadi 19 Trading Enterprise (Pty) Ltd (the respondent). It is a company duly registered in terms of the company laws of the Republic of South Africa under registration number 2019/203268/07. The respondent's registered address is Stand 1445, Siyabuswa D, Siyabuswa, Mpumalanga.
4. The respondent is a registered credit provider in terms of section 40 of the Act with registration number NCRCP12164.
5. The respondent did not file an answering affidavit opposing the application and did not attend the hearing of this matter.

TERMINOLOGY

6. A reference to a section in this judgment refers to a section in the Act. A regulation refers to the National Credit Regulations, 2006 (the regulations)¹, and a rule to the Tribunal rules.² A condition or general condition refers to the respondent's registration conditions as a credit provider in terms of section 40 (the conditions).³ Moreover, a form refers to a form prescribed in schedule 1 of the regulations.

JURISDICTION

7. In addition to its other powers in terms of the Act, section 150 gives the National Consumer Tribunal (the Tribunal) the power to make appropriate orders concerning prohibited or required conduct in terms of the Act or the Consumer Protection Act, 2008. This power includes declaring conduct to be prohibited in terms of the Act; interdicting prohibited conduct; confirming an order against an unregistered person to cease engaging in an activity requiring registration in terms of the Act;

¹ Published under Government Notice R489 in Government Gazette 28864 of 31 May 2006.

² Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007.

³ Section 40 empowers the National Credit Regulator to impose conditions on the registration of an applicant as a credit provider.

requiring payment to the consumer of an excess amount charged together with interest set out in an agreement, or any appropriate order required to give effect to the Act.

APPLICATION TYPE AND THE RELIEF SOUGHT

8. This application is in terms of section 57 (1), which empowers the Tribunal to cancel a registrant's registration if the registrant, among other things, contravenes the Act or a condition of its registration.,
9. The applicant sought orders declaring the respondent's conduct as prohibited conduct⁴ in terms of section 150 (a) because it contravened the Act and the regulations. It also sought orders interdicting the respondent from breaching the Act in the future, imposing an administrative fine on the respondent and granting remedial measures to affected consumers.
10. The allegations of prohibited conduct and the detailed order the applicant requests in this matter will become apparent in this judgment.

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

11. On 31 March 2022, the applicant filed this application with the Tribunal Registrar (the registrar). The applicant served this application on the respondent by registered post on 25 March 2022. The registrar issued a notice of filing to the parties on 1 April 2022 and sent it by registered post to the respondent on 13 April 2022. Subsequently, the registrar issued a notice of set down to the parties on 10 May 2022.
12. Rule 13 (2) requires the respondent to respond within 15 business days of receiving the application by serving an answering affidavit on the applicant. The respondent did not do so.
13. The applicant did not apply for a default order under rule 25 (2). Consequently, the registrar correctly set the matter down for hearing on a default basis because the pleadings had closed.
14. Rule 13 (5) provides that a factual allegation in the application or referral not specifically denied or

⁴ The Act defines prohibited conduct as an act or omission in contravention of the Act.

admitted in the answering affidavit is deemed to have been admitted. Since the respondent did not file an answering affidavit, the respondent is deemed to have admitted the allegations in the applicant's application.

FACTUAL BACKGROUND

Compliance monitoring exercise

15. The respondent registered as a credit provider on 4 June 2019. The applicant received information from its compliance department that the respondent had likely engaged in prohibited conduct. The compliance department acquired the information after conducting a routine compliance monitoring exercise on the respondent's credit granting business activities under section 15 (c).⁵
16. The compliance monitoring report established that the respondent had likely contravened the Act and regulations. It failed to conduct proper affordability assessments, did not supply consumers with credit agreements in the prescribed form, and included unlawful provisions in its credit agreements. In addition, the costs of credit exceeded the prescribed maximum amounts.

Investigation

17. Consequently, the respondent formed a reasonable suspicion of prohibited conduct, initiated a complaint against the respondent and appointed an inspector, Muhanganei Mbedzi (the inspector), to investigate the respondent. The inspector conducted the investigation virtually following the applicant's Covid 19 protocols.
18. On 10 May 2021, the inspector spoke to the respondent's Nomsa Nkosi (Nkosi). He questioned her about the respondent's credit granting business conduct. He also requested a list of credit agreements the respondent had approved. Nkosi randomly selected 10 agreements from the list and, following the inspector's request, on 14 May 2021, provided the entire file contents of those agreements (the sample files) to the inspector.

⁵ Section 15 (c) requires the applicant to monitor the consumer credit market and industry to, amongst other things, detect and prosecute prohibited conduct.

19. Subsequently, the inspector compiled an investigation report (the investigation report)⁶ based on Nkosi's answers during the interview and the information he gleaned from the sample files. The investigation report detailed the alleged contraventions. The 10 sample files are annexed to the investigation report to support the conclusions in the investigation report.⁷
20. The Tribunal considers the alleged contraventions appearing in the investigation report.

CONTRAVENTIONS OF THE ACT

Affordability assessments

Contravention 1: Failing to conduct proper affordability assessments in contravention of section 81 (2) (a) (ii) and (iii) read with regulation 23A

The Act

21. Section 80 deals with reckless credit. An agreement is reckless under section 80 (1) (a) if the credit provider failed to conduct an agreement as required by section 81 (2), irrespective of what the outcome of such an assessment might have concluded at the time.
22. Section 81 deals with the prevention of reckless credit. Section 81 (2) (a) (ii) precludes a credit provider from concluding a credit agreement without taking reasonable steps to assess the proposed consumer's debt repayment history.
23. Section 81 (2) (a) (iii) also requires the credit provider to take reasonable steps to assess the proposed consumer's existing financial means, prospects, and obligations.
24. Regulation 23A sets out the criteria for assessing affordability before granting credit. Regulation 23A (3) requires a credit provider to take practical steps to assess the consumer's discretionary

⁶ Annexure FA7 of the founding affidavit.

⁷ Annexures D1 to D10 of the investigation report.

income to determine whether the consumer has the financial means and prospects to pay the proposed credit instalments.

25. Regulation 23A (12) (b) requires the credit provider to consider all monthly debt repayment obligations in terms of credit agreements, as reflected on the consumer's credit profile held by a registered credit bureau.
26. Regulation 23A (13) (a) also requires the credit provider to consider the consumer's debt repayment history as a consumer under credit agreements, as envisaged in section 81 (2) (a), within seven business days before initially approving the credit.

Alleged contraventions and analysis

27. The applicant submitted that there was no evidence in all the sample files that the respondent considered the consumer's debt repayment history under credit agreements when conducting the affordability assessments. It failed to obtain the consumers' credit profiles held by a registered credit bureau.⁸ The respondent admitted that they did not do so.
28. In all the sample files, the respondent also failed to produce records that it took practical steps to assess the consumer's discretionary income. It did not obtain salary slips and bank statements to determine whether the consumer had the financial means and prospects to pay the proposed new credit instalments.
29. The Tribunal is satisfied that without the credit bureau reports and proof of income, the respondent could not accurately determine a consumer's discretionary income and debt repayment history under a credit agreement.
30. Consequently, the respondent did not take the required practical steps when conducting all the affordability assessments and contravened sections 81 (2) (a) (ii) and (iii) read with regulations 23A (12) (b) and 23A(13).

⁸ Annexures D1 to D10 of the investigation report.

Reckless credit

Contravention 2: Granting reckless credit in contravention of Section 81 (3) read with Section 80 (1) (a)

The Act

31. Section 80 deals with reckless credit. Section 80 (1) (a) provides that a credit agreement is reckless if, when concluding the agreement, the credit provider failed to conduct an assessment as required by section 81 (2), irrespective of what the outcome of the assessment might have concluded.
32. Section 81 (3) specifically prohibits a credit provider from entering into a reckless credit agreement with a prospective consumer.
33. Section 83 (2) (a) empowers the Tribunal upon declaring a credit agreement as reckless to set aside all or part of the consumer's rights and obligations under that credit agreement that is just and reasonable in the circumstances.

Alleged contravention and analysis

34. The applicant alleged that the respondent's failure to conduct proper affordability assessments meant the respondent entered into reckless credit agreements with consumers. The respondent had, therefore, contravened section 81 (3) read with section 80 (1) (a).
35. The Tribunal is satisfied that the respondent contravened section 81 (3) read with section 80 (1) (a) by entering into reckless credit agreements with consumers because the respondent failed in all the sample files to conduct proper affordability assessments.

Excessive costs of credit

Contravention 3: Levying interest of 30% in contravention of sections 100 (1) (c) and 101 (1) (d) (ii) read with regulation 42 (1)

Contravention 4: Charging excessive total costs of credit in contravention of sections 100 (1) (b) and (c) and 101 (1) (b) (i), (c) (iii) read with regulation 42 (1) and (2), 43 and 44

The Act

36. Sections 100 and 101 deal with prohibited charges and the cost of credit. Sections 100 (1) (b) and (c) respectively preclude a credit provider from requiring the consumer to pay a fee, charge or interest exceeding the amount consistent with the Act.
37. Sections 101 (1) (b) (i) and (c) (iii) respectively preclude a credit provider from charging an initiation fee and service fee exceeding the prescribed amount relative to the principal debt. So too, section 101 (1) (d) (ii) precludes a credit provider from requiring the consumer to pay interest exceeding the maximum prescribed interest rate.
38. Regulation 42 (1) deals with the maximum prescribed interest rates. It stipulates that the maximum monthly short-term agreement interest rate is 5%. Subregulation (2) stipulates that the maximum initiation fee for short-term agreements may not exceed R165.00 per credit agreement plus 10% of the amount exceeding R1 000.00. In addition, regulations 43 and 44 respectively concern supplementary initiation and maximum service fee conditions.

Alleged contraventions and analysis

39. The applicant alleged that all the agreements were short-term agreements. However, in all the sample files, the respondent had charged a monthly interest rate of 30%.
40. The Tribunal is satisfied that the respondent contravened sections 100 (1) (c) and 101 (1) (d) (ii) read with regulation 42 (1) in all the agreements. They record the interest of 30% and the repayment period as a calendar month. For example, consumer Lindiwe Ndala loaned R800.00 and had to repay R1 040.00, equating to the interest of 30%.⁹
41. In addition, the applicant alleged that the total costs of credit the respondent had charged in all the

⁹ Annexure D2 of the investigation report.

sample files exceeded the prescribed maximum total costs of credit. The Tribunal agrees with the applicant. If one assumes that the total amount all the consumers had to repay, as quoted in all the sample files, included the total costs of credit, being the initiation and service fees plus interest, the respondent charged all the consumers amounts that exceeded the total costs of credit.

42. The respondent's contravention is no more apparent than in consumer Nomsa Sibanyoni's case.¹⁰ She signed her credit agreement on 2 October 2019. The respondent was entitled to charge her the prescribed maximum total cost of credit of R263.67. However, the respondent charged her a total cost of credit of R300.00.
43. Consequently, the Tribunal is satisfied that the respondent contravened sections 100 (1) (b) and (c) and 101 (1) (b) (i), (c) (iii) and (d) (ii) read with regulations 42 (1) and (2) 43 and 44.

Unlawful provisions in credit agreements

Contravention 5: Supplying consumers with credit agreements containing unlawful provisions in contravention of section 90 (1) read with 90 (2) (a) and (b)

The Act

44. Section 90 concerns unlawful provisions in credit agreements. Section 90 (1) precludes a credit agreement from containing an unlawful provision. Subsection (2) (a) and (b) provides that a credit agreement is unlawful if, among other things, its general purpose or effect defeats the purposes or policies of the Act.

Alleged contraventions and analysis

45. The applicant alleged that the respondent unlawfully provided in clause 4 of all the agreements that the consumer was liable to pay commission and administrative charges according to a formula of 30% should the consumer default on their obligations under the agreement.

10 Annexure D2 of the investigation

46. Section 101 (1) (f) precludes a credit provider from charging default administrative charges exceeding the prescribed maximum for the category of credit agreement concerned. Regulation 46 concerns default administration charges. It provides only for the costs of each letter necessarily written for debt enforcement. Therefore, clause 4 amounts to an unlawful provision rendering the credit agreements void from the date that the provision purported to take effect as envisaged in section 90 (3).
47. Consequently, the respondent has contravened sections 90 (1) read with 90 (2) (a) and (b).

Pre-agreement disclosure

Contravention 6: Failing to provide consumers with pre-agreement statements and quotations in the prescribed form and containing the prescribed content in contravention of section 92 (1) read with regulation 28 (1)

The Act

48. Section 92 concerns pre-agreement disclosure. Section 92 (1) provides that a credit provider must not enter into a small credit agreement unless the credit provider has given the consumer a pre-agreement statement and quotation in the prescribed form.
49. Regulation 28 concerns pre-agreement statements and quotations for small agreements. Regulation 28 (1) provides that the pre-agreement statement and quotation given to a consumer under section 92 (1) must comply with the form and content provided in form 20.

Alleged contraventions and analysis

50. The applicant alleged that the respondent acted unlawfully because the only document in all the sample files was the credit agreement the respondent concluded with the consumer. In the Tribunal's view, the respondent's failure to furnish consumers with pre-agreement statements and quotations before granting credit or entering into the credit agreements meant the respondent contravened section 92 (1) read with regulation 28 (1).

Credit agreements

Contravention 7: Failing to provide credit agreements in the prescribed form in contravention of section 93 (1) and (2) read with regulation 30 (1)

The Act

51. Section 93 concerns the form of credit agreements. Section 93 (1) requires the credit provider to deliver a copy of a document that records their credit agreement to the consumer.
52. Section 93 (2) provides that a document that records a small credit agreement must be in the prescribed form.
53. Regulation 30 (1) provides that the document recording a small credit agreement must contain all the information reflected in form 20.2.

Alleged contraventions and analysis

54. The applicant alleged that the respondent's small credit agreements failed to meet the standards in form 20.2. The Tribunal agrees with the applicant. The respondent's small credit agreements are inadequate. They do not provide essential information concerning the credit provider's identity, physical address and the applicant's credit provider registration number. The consumer's right to elect an early settlement is also glaringly omitted.
55. These omissions meant that the respondent contravened section 93 (1) and (2) read with regulation 30 (1).

Contravention 8: Failing to submit financial and operational returns in contravention of section 52 (5) (c) read with general condition 3 and regulation 66

The Act, regulations and conditions

56. Section 52 (5) (c) requires a registrant to comply with its registration conditions and the Act.

57. Regulation 66 concerns annual financial and operational returns. It requires a credit provider to submit an annual financial and operational return in form 40 to the respondent within six months after the registered credit provider's financial year-end.
58. General condition 3 requires the respondent to submit the reports and returns required in the regulations within the specified period.

Alleged contraventions and analysis

59. The applicant alleged that the respondent had failed to submit the prescribed annual financial and operational returns to the applicant returns for 2020 as required by section 52 (5) (c) read with condition 3 and regulation 66.
60. The respondent's failure to oppose this application and show that it submitted the returns means it did not do so. Consequently, it contravened section 52 (5) (c) read with general condition 3 and regulations 66.

CONCLUSION

61. Consequently, the Tribunal is satisfied that the respondent repeatedly contravened the sections, regulations, and conditions in the preceding paragraphs. Therefore, it committed prohibited conduct, which justifies declaring the respondent's credit agreements with the consumers in the sample files reckless.
62. The Tribunal proceeds to consider an appropriate order.

CONSIDERATION OF AN APPROPRIATE ORDER

Declaring the respondent to have repeatedly contravened the Act, committed prohibited conduct and declaring the respondent's credit agreements as reckless

63. The Tribunal deems it appropriate to order that the respondent's repeated contraventions amount to prohibited conduct and justifies declaring the respondent's credit agreements with consumers in

the

sample files reckless. The Tribunal proceeds to consider the applicant's other wide-ranging requested relief.

Cancelling the respondent's registration as a credit provider

64. The applicant did not formally request the Tribunal to make an order cancelling the respondent's registration as a credit provider. However, Mr Stocker requested the Tribunal to make such an order at the hearing. He submitted that the applicant's omission to request it specifically in its prayer did not mean that the applicant did not seek such an order.
65. In the Tribunal's view, the omission is not fatal to the applicant's cause. The applicant launched this application under section 57 (1), which empowers the Tribunal to cancel the respondent's registration as a credit provider after considering the respondent's request. Part C of the applicant's application details the grounds for cancellation in response to the respondent's repeated contraventions of the Act and regulations. Moreover, under Part D, the applicant records that it seeks further orders against the respondent in addition to the respondent's cancellation as a credit provider. Consequently, Mr Stocker's request for the cancellation order would not have surprised the respondent, and the Tribunal is empowered to make the order
66. In the Tribunal's view, the respondent's contraventions appearing in this judgment are egregious. The respondent danced to its own tune. It wholly disregarded consumers' interests and the Act justifying its deregistration as a credit provider.

Administrative fine

67. 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.
68. 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.

69. Section 151 (3) provides 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

70. The contraventions show the respondent failed to provide consumers with pre-agreement statements and quotations in the prescribed form and containing the prescribed contents. It failed to conduct proper affordability assessments. It also granted credit recklessly and contravened its conditions as a credit provider. These contraventions of the Act are severe. In particular, the respondent's failure to conduct proper affordability assessments placed consumers at severe risk of over-indebtedness.

Loss or damage suffered as a result of the contraventions

71. The applicant did not place specific evidence before the Tribunal concerning the actual loss or damage consumers suffered. Since the Tribunal has found reckless lending, it is satisfied that it may reasonably conclude that consumers suffered loss through their exorbitant interest rate payments.

Respondent's behaviour

72. 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

73. The respondent 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 cost of credit. It appears that the respondent's prohibited conduct mainly impacted vulnerable consumers.

Level of profit derived from the contraventions

74. The respondent charged consumers with excessive interest rates. The Tribunal can safely assume that it derived a significant profit from its unlawful activities.

The degree to which the respondent co-operated with the applicant

75. The Tribunal has considered that the respondent provided the inspectors with the required information and co-operated with them during the investigation.

Respondent's prior contraventions

76. The respondent has not been the subject of prior investigations or enforcement measures.

Amount of the fine

77. 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.

78. 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.

79. These considerations persuade the Tribunal that it is appropriate to impose an administrative fine of R100 000.00.

Appointment of an auditor

80. 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 the respondent has extended reckless credit. The evidence placed before the Tribunal means that the Tribunal cannot establish the extent of this practice. Therefore, it is appropriate to appoint an independent auditor registered as a chartered accountant to assess the situation and establish the facts.

Other requested orders

81. 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 provisions of the Act.¹¹

ORDER

82. Accordingly, the Tribunal makes the following order:

Contraventions

82.1. The respondent has repeatedly contravened the following sections of the Act, regulations and conditions:

- 82.1.1. section 81 (2) (a) (ii) and (iii) read with regulation 23A;
- 82.1.2. section 81 (3) read together with section 80 (1) (a);
- 82.1.3. sections 100 (1) (c) and 101 (1) (d) (ii) read with regulation 42 (1);
- 82.1.4. sections 100 (1) (b) and (c) and 101 (1) (b) (i), (c) (iii) and (d) (ii) read with regulation 42 (1) and (2), 43 and 44;
- 82.1.5. section 90 (1) read with 90 (2) (a) and (b);
- 82.1.6. section 92 (1) read with regulation 28 (1);
- 82.1.7. section 93 (1) and (2) read with regulation 30 (1); and
- 82.1.8. section 52 (5) (c) read with general condition 3 and regulation 66.

Prohibited conduct

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

Cancellation of registration

82.3. The respondent's registration as a credit provider is cancelled immediately.

¹¹ *Shoprte Investments Ltd v The National Credit Regulator* (509/2017 dated 18 December 2019).

Reckless credit agreements

- 82.4. The respondent's credit agreements with consumers in annexures D1 to D10 of the investigation report are reckless in terms of section 80 (1) (a) and set aside.
- 82.5. The respondent must refund all the credit costs charged and recovered from those consumers within 30 days of the audit report referred to in the following paragraph.

Appointment of an auditor

- 82.6. The respondent is, at its own cost, within 30 business days of the date of issue of this judgment to appoint an independent auditor registered as a Chartered Accountant to conduct an audit and submit a report to the respondent (the audit report).
- 82.7. The auditor must determine and compile a list of all the consumers with whom the respondent concluded credit agreements within three years of the date of issue of this judgment without properly conducting affordability assessments in terms of section 81 (2) (a) (ii) and/or (iii) of the Act read with regulation 23A (the credit agreements).
- 82.8. The auditor must assess whether the respondent correctly calculated the interest under the Act on the credit agreements.
- 82.9. The respondent must reimburse the excess interest the respondent charged to the relevant consumers under the credit agreements.
- 82.10. The auditor must identify those credit agreements not containing an affordability assessment and include those credit agreements' details in the audit report.
- 82.11. The auditor must complete the audit within 90 business days of the auditor's appointment.
- 82.12. The auditor must submit the audit report to the respondent within 120 business days of the auditor's appointment.

Administrative fine

82.13. The respondent is within 60 business days of the date of issue of this judgment to pay an administrative fine of R100 000.00 (one 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/223369/57(1) and name of person or business making the payment.

82.14. There is no cost order.



Mr T Bailey - Presiding Tribunal member

Tribunal members Adv J Simpson and Adv N Sephoti concur with this judgment.

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

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