

IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION

Case number: NCT/223348/2022/140(1)

In the matter between:

NATIONAL CREDIT REGULATOR

APPLICANT

AND

LOANS AT SMART CASH BIZANA (PTY)LTD

RESPONDENT

Coram:

Adv N Sephoti Presiding Member

Dr L Best Tribunal Member

Mr F Sibanda Tribunal Member

Date of hearing 07 June 2022

Date of judgement 13 June 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"), ("the Applicant" or "the NCR"), with its address at 127 Fifteenth Road, Midrand, Gauteng.

2. At the hearing, the NCR was represented by Mr Stocker, its Principal Legal Advisor.

RESPONDENT

3. The Respondent is Loans at Smart Cash Bizana (Pty) Ltd, who was a registered credit provider with registration number 2016/010301/07 and National Credit Regulator registration number NCRCP 8724 (Smart Cash-Bizana” or “the Respondent”), with their address at Shop 4 Clairwood Shopping Centre, 622 South Coast Road, Durban in the province of Kwazulu Natal. Respondent’s registration lapsed on 31 July 2021.
4. The Respondent did not file an answering affidavit opposing the application and was not represented at the hearing.

APPLICATION TYPE

5. This is an application for a finding of prohibited conduct against Smart Cash-Bizana, in terms of section 140 f the NCA.

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

6. On the 30th March 2022, the Applicant filed the application with the Tribunal. The application was served on the Respondent by registered post on the same day, 30th March 2022. The Registrar issued a notice of complete filing to the parties on the 01st of April 2022. A notice of set down was issued to the parties on the 09th May 2022. The address used for service on the Respondent is the same address of registration of the business used by the Respondent with the Companies and Intellectual Property Commission.
7. In terms of Rule 12 of the Tribunal Rules, the Respondent had to respond within 15 business days by serving an answering affidavit on the Applicant. However, the Respondent failed to do so.
8. The Applicant did not file an application for a default order in terms of Rule 25(2).
9. The Registrar proceeded to set the matter down for a hearing on a default basis due to the pleadings being closed.
10. Rule 13(5) states:

“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”.

11. In the absence of an answering affidavit filed by the Respondent, the Applicant's application, and allegations contained therein, are deemed to be admitted.
12. The Tribunal was satisfied that the application was adequately served on the Respondent, therefore, the matter proceeded on a default basis.

BACKGROUND

13. Smart Cash-Bizana registered as a credit provider with the NCR on 12 January 2017. This matter has its origins in a complaint initiated by the Applicant in terms of section 136(2) of the NCA. The Applicant's Compliance Department referred a memorandum to the Applicant's investigations and Enforcement Department recommending that the latter take appropriate steps, based on the findings of the Desktop Monitoring exercise undertaken within the NCR.
14. The Applicant's Compliance Department conducted a Desktop monitoring exercise on the Respondent in accordance with its functions as provided for in terms of section 15(c) of the Act. During the said exercise, a few credit agreements as provided by the Respondent were assessed. The assessment conducted resulted in the following alleged contraventions being identified, inter alia:
 - a. Charging service fees in excess of the prescribed amount;
 - b. Failure to conduct proper affordability assessments and extending reckless credit;
 - c. Charging consumers credit life insurance exceeding the maximum allowable limits; and
 - d. Failure to submit statistical, financial annual and operational returns.
15. The aforesaid identified contraventions raised serious concerns regarding the business practices of the Respondent. The contraventions so identified raised reasonable suspicion that the Respondent was not conducting its business in compliance with the provisions of the Act and its Regulations.
16. In light of the above findings, the Applicant on or about the 26th May 2021, initiated a complaint against the Respondent in terms of section 136(2) of the Act and authorized an investigation into the business practices of the Respondent in terms of section 139(1(c) of the Act.
17. On the 01st June 2021, Applicant's Chief Executive Officer appointed Muhanganei Mbedzi in terms of section 25 of the Act as an inspector for the purposes of carrying out an investigation into the business practices of the Respondent.
18. On the 01st June 2021, Mbedzi submitted a formal letter to the Respondent informing them of the Applicant's investigation into its business activities and requested an interview to be held

between the parties to enable the Applicant to obtain the necessary information for assessment purposes.

19. In compliance with COVID19 Regulations, the Applicant conducted the investigation remotely as agreed with the Respondent. On 21 June 2021, Mbedzi held a virtual meeting via Teams with Mr Hugh Tower, Director of the Respondent and Mr Arno Bosch, Legal representative of the Respondent. Mr Hugh provided Mbedzi with a summary of the Respondent's business model. The Respondent operates only one branch and the business offers loans of up to R8 000.00. The Respondent elected to respond to Applicant's enquiries and questions through written submissions which they provided.
20. Respondent indicated that:
 - a. Prospective consumers who are under administration, debt review, employed on a contract basis and those earning commission like insurance brokers do not qualify for Respondent's services;
 - b. Respondent requires documents from consumers prior to entering into agreements;
 - c. Respondent verifies the information provided by consumers and name and surnames must correspond with the name on the ID;
 - d. Respondent conducts affordability assessments; and
 - e. Credit checks are done every time when consumers apply for new credit.
21. The Respondent, upon request by Applicant, provided ten (10) randomly selected consumer files for assessment purposes. An investigation report was compiled with findings following assessment of the provided samples of files.

Credit extension whilst registration has lapsed

- 21.1 The registration of the Respondent lapsed on the 31st July 2021 yet the Respondent continued to grant credit to consumers. Section 54(4)(b)(iii) stipulates that registration remains in effect until it has lapsed on the last day upon which the prescribed renewal fee should have been paid in terms of section 51(1)(c) of the Act. Upon lapsing of a registration, a credit provider is deemed unregistered and as such precluded in terms of section 40(3) of the Act to offer, make available or extend credit, enter into a credit agreement or agree to do any of those things.
- 21.2 The Respondent provided samples in which they extended credit to several consumers, namely on 17 August 2021 and on 14 August 2021 when their registration had lapsed thereby contravening the Act. In terms of section 40(4) of the Act, a credit agreement entered into by a credit provider who is required to be registered in terms of subsection

(1) but who is not registered is an unlawful agreement and void to the extent provided for in terms of section 89 of the Act. In the absence of any proof to the contrary that the registration of the Respondent had not lapsed, the Respondent has contravened section 40(3). The Respondent's conduct is therefore unlawful and renders all agreements entered into whilst being unregistered null and void to the extent provided for in section 89.

Charging credit life insurance premiums exceeding the allowed maximum amount relative to the deferred amount.

- 21.3 The Respondent charged consumers credit life insurance premiums in excess of the prescribed maximum amount. The credit life insurance in terms of section 101 (1)(e) read with Regulation 3 of the Final Credit Life Insurance Regulations provides that credit life insurance charged in respect of a short-term credit transaction may not exceed R4.50 per R1000 of the deferred amount. From the sample of files submitted Consumer Sihlahla was overcharged by R6,04; Consumer Nyawose by R0.56 and Consumer Nquphaza by R0.89.

Subjecting the credit agreement to a supplementary agreement and agreement that contains unlawful provisions

- 21.4 Section 91(2) stipulates that a credit provider must not directly or indirectly require or induce a consumer to enter into a supplementary agreement or sign any document, that contains a provision that would be unlawful if included in a credit agreement.
- 21.5 The Respondent required consumers to enter into supplementary agreements or sign a document titled "PROMISSORY NOTE, ACKNOWLEDGEMENT OF DEBT AND AUTHORITY TO PROCESS PAYMENT INSTRUCTIONS AGAINST MY ACCOUNT.
- a. Consumer Isihlahla Jeniffer Nowakhe signed a supplementary agreement for R181.72 raising credit advanced from R 7 470.73 to R 7 652.46;
 - b. Consumer Gusha Winile signed a supplementary agreement for R87.03 raising credit advanced from R 2 440.69 to R 842.58;
 - c. Consumer Nokuthula Theodora Ndlanya signed a supplementary agreement for R 123 .94 raising credit advanced from R 3 950.01 to R4 073,96
- 21.6 These transgressions are evident in all the provided samples advanced by the Respondent to the Applicant. It is therefore evident from the samples that Respondent induced consumers to issue promissory notes in favour of the Respondent and the supplementary agreement, promissory note and acknowledgement of debt, is unlawful as it levies fees

or charges that are prohibited in terms of section 100 of the Act. It is the Applicant's submission therefore that the Respondent is in contravention of section 91(2) read with section 90(2) (e) & (f) and section 101(1)(a) of the Act.

Unlawful provisions in respect of enforcement undertaking and for charging consumers Intecon fee, which fee is actually a service fee and which results in excessive services being charged

- 21.7 Although Applicant maintains that the Intecon fee and or any other supplementary agreement fee charged should have fallen into the limit of the service fee charged by the Respondent, Applicant was willing to abandon prayers contained in paragraphs 9 & 10 in its founding affidavit.

Respondent's failure to conduct proper affordability assessments

- 21.8 The Respondent in the main seems to ignore consumers' ongoing debt repayment obligations. In some instances, there are no consumer reports or alternatively, the Respondent relies on outdated credit reports and uses them when consumers enter into agreements. There are also no documents relating to consumers' income e.g. there are no pay slips attached to the documents. The Tribunal was directed to Annexures E1, E2, E4, E5, E7 and E10 annexed to the investigation report.
- 21.9 Further, the Respondent failed to take reasonable steps to assess the consumer's financial means, prospects and obligations prior to extending credit and in failing to do so, Respondent contravened section 81(2) (1) (iii) read with Regulation 23A (3), 23 (A)(8) and 23A (12)(c) of the Act. In the documents provided by the Respondent, Respondent did an assessment and concluded that consumer Noma Afrika Veronica Mbooi had disposable income of R 2 569.93 whereas the credit report indicated that consumer Mbooi had balance exposure of R 10 555 and was over indebted at the time of the agreement. Annexures E1, E2, E4, E5, E7 and E10 show that the Respondent failed to ascertain and calculate the consumers' discretionary income as envisaged by section 78(3) of the Act.

Extending reckless credit

- 21.10 The Applicant alleges that Respondent contravened section 81 (3) read together with section 80(1) in that the Respondent extended credit recklessly to consumers. In particular, the Respondent failed to assess consumers' living expenses, debt repayment history, financial means, prospects and obligations. Further that Respondent contravened section 81(3) read with section 80 (1)(b) (ii) in that the credit agreements are perceived reckless due to the preponderance of

information available to the Respondent at the time the credit agreements were entered into, indicating that entering into those credit agreements would make the consumes over-indebted.

Failure to submit statistical, financial annual and operational returns

21.11 Applicant alleges that the Respondent contravened section 52(5)(c), (d) and (f) read with Regulation 62(1)(b) and (c) and further with Regulation 64(2) and 66 of the Act in that Respondent had failed to submit Annual Financial Statements and Operational, Form 40 for the year 2021. Respondent's last submitted returns were for the financial year 2018.

CONSIDERATION OF THE EVIDENCE

22. The evidence before the Tribunal as set out in the Applicant's founding affidavit, investigation report and annexures and expanded upon by the Applicant's submissions during the hearing, has satisfied the Tribunal that the Respondent engaged in prohibited conduct by repeatedly contravening the sections of the NCA and the provisions of the Regulations promulgated under the NCA as set out above.
23. The evidence of the conduct of the Respondent in contravening the NCA and the Regulations, showed a pattern of prohibited conduct in the consumer files provided by the Respondent and examined during the investigation.

CONSIDERATION OF AN APPROPRIATE ORDER

24. APPLICANT'S PRAYERS

24.1 Declaration that the Respondent has repeatedly contravened the following sections:

- i. Section 52(4)(b)(iii) and section 51 (1)(c) read with section 40(3) & (4);
- ii. Section 100(1)(b) and section 106 (8) read with Regulation 3 of the Credit Life Assurance Regulations of the Act;
- iii. Section 91 (2) read with Section 90(2) (e) & (f) of the Act;
- iv. Section 90(1) read with Section 90(2)(k)(iii) of the Act;
- v. Section 91(2) read together with section 101 (1) (c)(iii) and 105 (1)(b) and Regulation 44 of the Act;

- vi. Section 81(2)(a)(ii) and (ii) read with Regulation 23A (3), 23 (A)(8), 23A(12)(b), 23A (12)(c), 23A (13), of the Act;
 - vii. Section 81 (3) read with Section 80(1)(a) of the Act; and
 - viii. Contravention of section 52(5)(c), (d) and (f), read with General Condition 3 and Regulation 62 (1)(b) and (c) and further with Regulations 64(2) and 66 of the Act.
- 24.2 Declaring the conduct of the Respondent in contravention of the relevant Sections of the Act outlined above, as prohibited conduct in terms of Section 150 (a) of the Act;
- 24.3 The imposition of an administrative fine on the Respondent in the amount of 10% of the Respondent's annual turnover or R 1 000 000.00 whichever is the greater;
- 24.5 Order the Respondent to within 30 days appoint an independent auditor, at its own costs to identify all open loans, to identify where loans were extended without proper affordability assessments having been done. All such identified loans are to be referred to the Applicant, whereupon the Applicant will conduct its own assessment and referral to the Honourable Tribunal to have said agreements declared reckless and for specified relief set forth in Section 83(2);
- 24.6 Any other appropriate order required to give effect to the consumers' rights in terms of section 150(j) of the Act; and
- 24.7 Further and/or alternative relief.
23. The Applicant requested the Tribunal to impose an administrative fine on the Respondent. 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 contraventions that the Tribunal has found the Respondent to have perpetrated. The Tribunal would therefore be failing in its duty if it fails to apply the law to send the correct message to the Respondent and all those who seek to abuse the system and consumers that the Tribunal will not tolerate credit providers contravening the Act.
24. Section 151 (3) of the Act sets out the factors that the Tribunal must consider when determining an appropriate fine. The Tribunal proceeds to consider each in turn.

The nature, duration, gravity and extent of the contraventions

25. The investigation report reveals that the Respondent's approach when granting credit appears to be an ongoing and common practice. The Respondents' contraventions are serious and appear

to go to the heart of the Respondent's business practices and indicate a disregard for the rights of the consumers.

Loss or damage as a result of the contraventions

26. The Respondent's failure to conduct affordability assessments means that consumers obtained loans that they were in all likelihood unable to afford. This resulted in consumers being over indebted as appears in the case of some of the consumers who took loans from the Respondent. Consumers were also charged excess fees that were not in line with the Act and which they should not have paid. Consumers have clearly suffered financial losses.

The level of profit derived from the contraventions

27. The Applicant did not place specific evidence before the Tribunal concerning the level of profit the Respondent has derived from the contraventions. There is no doubt however, that the Respondent derived profit from the amounts the Respondent overcharged consumers in interest and extra charges.

The Respondent's behaviour

27. The Applicant submitted that there is no plausible reason for the Respondent not to be aware of its statutory obligations to adhere to the provisions of the Act. The Respondent's behaviour amounts to a reckless disregard of the law, ultimately prejudicing consumers. Respondent tried to mislead the Regulator regarding the amounts, namely that the amount advanced and repaid are in line with the prescripts of the law; that affordability tests and credit checks were conducted yet the paperwork provided indicated the contrary and instead consumers who were over indebted were advanced credit making their situation worse off.

Market circumstances under which the contraventions occurred

28. The market circumstances in which the contraventions occurred are such that consumers are in a cycle of ongoing credit and repayment. The Tribunal can also note that the consumers are uneducated, unsophisticated and desperate and would have signed anything that the Respondent placed in front of them as Respondent purported to be doing business legally. In these instances, the consumers are vulnerable to exploitation. It therefore appears that the Respondent has simply ignored its obligations in terms of the Act. Furthermore, the contraventions occurred in a vulnerable market segment.

The degree to which the Respondent co-operated with the Applicant

29. The Tribunal has noted that the Respondent had responded when the investigation was initiated and even cooperated by submitting the samples of files as requested by the Applicant. This however, does not excuse the fact that the Respondent had failed in many respects to adhere to the law – the documentation that the Respondent put before consumers; the amounts he charged and the characteristics of its borrowers, all sought to mislead the Applicant into believing that Respondent was compliant with the NCA, its Regulations and Conditions of its Registration.

The Respondent's prior contraventions

30. The Applicant has not provided the Tribunal with any previous contraventions or convictions for the Respondent contravening the NCA and its Regulations.

ADMINISTRATIVE FINE

31. The Tribunal is persuaded that a strong message must be sent to all credit providers, including smaller credit providers that they cannot escape complying with the Act. The Tribunal therefore deems that it is appropriate to impose an administrative fine of R 200 000.00 (two hundred thousand rand)
32. In *The Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd & Others (Federal Mogul case)*, [2003] ZACT 43(08/CR/Mar01, the Competition Tribunal held that “*deterrence is the primary purpose of imposing administrative penalties*”. The Competition Tribunal further held that “*the deterrence must have some relationship to the harm inflicted by the prohibited practice*”.

ORDER

33. Accordingly, the Tribunal makes the following order:

33.1 The Respondent has repeatedly contravened the following provisions-

33.1.1. Section 52(4)(b)(iii) and section 51 (1)(c) read with section 40(3) & (4);

33.1.2 Section 100(1)(b) and section 106 (8) read with Regulation 3 of the Credit Life Assurance Regulations of the Act;

33.1.3 Section 91 (2) read with Section 90(2) (e) & (f) of the Act;

33.1.4 Section 90(1) read with Section 90(2)(k)(iii) of the Act;

33.1.5 Section 91(2) read together with section 101 (1) (c)(iii) and 105 (1)(b) and Regulation 44 of the Act;

33.1.6 Section 81(2)(a)(ii) and (ii) read with Regulation 23A (3), 23 (A)(8), 23A(12)(b), 23A (12)(c), 23A (13), of the Act;

33.1.7 Section 81 (3) read with Section 80(1)(a) of the Act; and

33.1.8 Section 52(5)(c), (d) and (f), read with General

Condition 3 and Regulation 62 (1)(b) and (c) and further with

Regulations 64(2) and 66 of the Act.

33.2 The Respondent's repeated contraventions in paragraph 33.1 above are prohibited conduct in terms of section 150 (a) of the NCA;

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

33.4 Interdicting the Respondent from future breaches of the NCA;

33.5 Declaring the Respondent's credit agreements with consumers contained in Annexures E1 to E10 of the investigation report as reckless in terms of section 80(1)(a) and-

33.5.1 Setting aside all consumers obligations under these agreements alternatively and should the amounts have been paid -

33.5.1.1 Ordering the Respondent to, at its costs-

33.5.1.1.1 refund all the cost of credit charged and recovered from consumers under all such agreements;

33.5.1.1.2 take all such steps as may be reasonably necessary to rescind all civil judgements it obtained against consumers if any of the consumers defaulted and any such collection attempts were done by the Respondent;
and

33.5.2 Interdicting the Respondent from proceeding with enforcement collections on any of its extended credit agreements, specifically is said agreements were found to be extended recklessly.

33.5.3 The imposition of an administrative fine on the Respondent in the amount of R200 000.00 (two hundred thousand rand). The Respondent must pay the administration fine into the National Revenue Fund referred to in section 213 of the Constitution of the

Republic of South Africa, 1996 within a period of 60 days of the date of this judgement.

The National Revenue Fund account details are as follows:

Bank	:	Standard Bank of South Africa
Account name	:	Department of Trade and Industry
Account number	:	370650026
Account Type	:	Business current account
Branch code	:	010645 (Sunnyside)
Branch code- electronic payments:		051001
Reference	:	NCT/223348/2022/140(1) (Name of the depositor)

33.6 Order the Respondent to -

33.6.1 within 30 days appoint an independent auditor at its own cost to determine and identify all open loans, to identify where loans were extended without proper affordability assessments having been done. All such identified loans are to be referred to the Applicant, whereupon the Applicant will conduct its own assessment and referral to the Honourable Tribunal to have said agreements declared reckless and for specified relief set forth in Section 83(2);

33.6.2 The audit to also include an identification of all consumers, since the inception of Respondent's business who have been charged fees in excess of the maximum, prescribed rate more specifically interest as well as Intendo fees and compile a list of the affected consumers;

33.6.3 Once the aforesaid auditor has compiled the list, the Respondent must refund the amounts received over and above their prescribed minimum amounts allowed by the NCA to each consumer within 60 days of the auditor's report; and

33.6.4 Once the refunds have been made as stated above, the Respondent is to provide a written to the Applicant detailing the identity of the consumers and the refunds made. This report is to be provided to the Applicant within 120 days after the order has been obtained.

33.7 The Respondent is interdicted from engaging in any further activities as a credit provider.

33.8 There is no order as to costs.

Dated this 13th day of June 2022

Adv N Sephoti
Presiding Tribunal Member

Dr L Best (Tribunal Member) and Mr F Sibanda (Tribunal Member) concurring.

Authorised for issue by The National Consumer Tribunal

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