

IN THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

Case number: NCT/223376/2022/57(1)

In the matter between:

NATIONAL CREDIT REGULATOR

APPLICANT

and

VAVIKA FINANCE (PTY) LTD T/A VAVIKA FINANCIAL SERVICES

RESPONDENT

Coram:

Dr MC Peenze – Presiding Tribunal member

Prof T Woker – Tribunal member

Ms P Beck – Tribunal member

Date of hearing – 08 June 2022 via the Teams digital platform

Date of judgment – 10 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 Respondent's Investigations and Enforcement Department, represented the Applicant at the hearing of this application.

RESPONDENT

3. The Respondent is Vavika Finance (Pty) Ltd t/a Vavika Financial Services (the Respondent or Vavika), a private company registered as such in terms of the Companies Act of the Republic of South Africa, with CIPC registration number 2017/498496/07. The Respondent is also a registered credit provider with registration number NCRCP10805, with its registered business address situated at 38-40 Caxton Street, East London, Eastern Cape.
4. The Respondent has recently changed its registered name. From its incorporation as a company up until 9 July 2020, the Respondent's registered name was Vavika Training Academy (Pty) Ltd, whereafter it changed its name to its current registered name (Vavika Finance (Pty) Ltd).
5. The Respondent has been registered as a credit provider with the Applicant since June 2018, and it remains so registered to date, with annual registration renewal fees fully paid up, up to and including for the period 1 August 2020 to 31 July 2021.
6. The Respondent has two branches registered with the Applicant from which it conducts business, one in East London, the registered address, and one in King Williams Town.
7. The Respondent or its 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 NCA¹.

¹GN 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) 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.

TERMINOLOGY

8. 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 (the Regulations).² A reference to 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 reference to a form refers to a Form as prescribed in schedule 1 of the Regulations.

TYPE OF APPLICATION AND THE RELIEF SOUGHT

9. This application is in terms of section 57 (1) of the NCA⁴. The Applicant approached the Tribunal to cancel the Respondent's registration as a credit provider.
10. The Applicant also seeks an order in terms of which the Respondent is to be found to be in repeated contravention of the National Credit Act.⁵, its Regulations and the conditions of registration, and such contraventions to be declared prohibited conduct.
11. 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 for the imposition of an administrative fine on the Respondent.

JURISDICTION

12. The National Consumer Tribunal (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 registrant who allegedly contravenes this Act or fails to comply with any condition of its registration.

²Published under Government Notice R489 in Government Gazette 28864 of 31 May 2006.

³Section 40 empowers the National Credit Regulator to impose conditions on an Applicant's registration as a credit provider.

⁴In terms of Section 57(1) of the Act, a registration in terms of this Act may be cancelled by the Tribunal on request by the National Credit Regulator, if the registrant repeatedly:

(a) Failed to comply with any condition of its registration; and

(b) Contravenes this Act.

⁵Act no 34 of 2005.

ISSUES TO BE DECIDED

13. The issues to be decided are:

- 13.1 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;
- 13.2 whether or not its *registration must be cancelled*, and;
- 13.3 whether or not *an administrative fine* is a competent sanction to be imposed by the Tribunal in the circumstances.

14. 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)."*

15. In deciding these issues, the Tribunal would first have to determine the individual foundational claims by the Applicant as canvassed in the notice of motion, relating to the alleged contraventions of the provisions of the NCA - that is:

- *s81(2)(a)(ii) read with Regulation 23A;*
- *s81(3) read with s80(1)(a);*
- *s100(1)(c) and s101(1)(d)(ii) read with s105 and Regulation 42(1)*
- *s100(1)(b) read with Regulation 42(2);*
- *s100(1)(b) and s101(1)(c)(iii) read with Regulation 44;*
- *s124(1) read with s 90(2)(b); and*
- *Condition 3, read with Regulation 52(5)(c); Regulation 62(1)(b), and Regulations 64 and 66 of the NCA.*

FACTUAL BACKGROUND

16. On 19 November 2020, the NCR conducted an investigation into the business activities of TTR Consulting (Pty) Ltd t/a TTR Cash Loans, a private entity which is unrelated to the Respondent. During the investigation of TTR Cash Loans, the Applicant's inspectors noticed a trend wherein loan repayments of consumers were deducted directly from the payroll of the consumers' employers. These credit repayments appeared on particular consumers' payslips and were made to various credit providers, including the Respondent.
17. This information raised a reasonable suspicion that the Respondent may be conducting its credit granting activities in contravention of the Act. On the 11th of February 2021, the Applicant initiated a complaint against the Respondent in terms of Section 136 (2) of the Act.
18. On 11 February 2021, Muhanganei Mbedzi (Mbedzi), an employee of the Applicant at the time, was appointed in terms of Section 25 of the Act as Inspector for purposes of investigating the conduct of the Respondent.
19. Due to the increased health and safety concerns brought about by the advent of the Covid-19 pandemic, the Applicant adapted its investigation process to the current times. Investigations are now primarily conducted remotely, using video link applications or telephonic engagements. On the 12th of February 2021, Mbedzi addressed an engagement letter to the Respondent informing it of the Applicants intention to conduct an investigation into its credit business activities.
20. On the 22nd of November, 2021, Mbedzi conducted a virtual investigation via Microsoft Teams. The Respondent was represented by Malivin Musvupo, Kalinda Miyoba and Phillip Kakura. All three persons completed and signed acknowledgement of rights forms.
21. Mbedzi then proceeded to interview the representatives of the Respondent. After the interview, Mbedzi requested a list of credit agreements approved by the Respondent, from which she randomly selected ten agreements. In respect of those ten selected credit agreements, the Inspector requested copies of the Respondent's entire file contents pertaining to those credit agreements. The Respondent provided these documents via email on the 2nd of March 2021.

22. After completion of the investigation, Mbedzi submitted an Investigation Report (the Investigation Report) dated 5 March 2021.⁶
23. The Investigation Report details the alleged contraventions. The ten (10) sampled consumer files are annexed to the Investigation Report to support its conclusions.⁷

CONTRAVENTIONS OF THE ACT

Approving applications for credit without first taking reasonable steps to assess affordability

24. In terms of sections 81(2)(a)(ii) and (iii) of the Act, a credit provider must not enter into a credit agreement without first taking reasonable steps to assess the debt repayment history of the consumer under credit agreements as well as the consumer's existing financial means, prospects and obligations.
25. Regulation 23A prescribes the procedure to be followed for purposes of conducting an affordability assessment prior to granting credit. It requires credit providers to do the following: -
 - 25.1. Sub-Regulation 3 requires that a credit provider must determine a consumer's discretionary income to determine whether the consumer has the financial means and prospects to pay the proposed credit instruments;
 - 25.2. Sub-Regulations 8 to 12 require that credit providers determine consumers' gross income, statutory deductions therefrom, living expenses, other existing debt obligations and maintenance obligations and any other necessary expenses for the credit provider to calculate the discretionary income available to the consumer. A minimum expense amount to be considered is imposed under Table 1, under sub-Regulation 10;
 - 25.3. Sub-Regulation 12(b) requires that a credit provider ascertain, by way of a report from a registered credit bureau, a consumer's existing debt obligations;
 - 25.4. Regulation 23A (13) deals explicitly with debt repayment history. It provides that, when conducting the affordability assessment, a credit provider must consider the consumer's debt repayment history as a consumer under credit agreements as envisaged in section 81(2)(a)

⁶ Annexure FA5 of the founding affidavit Pg 55-75 of the bundle.

⁷ Annexures E1 to E10 of the Investigation Report.

and must ensure that this requirement is performed within seven business days immediately prior to the approval of credit; and

- 25.5. In terms of Regulation 23A (8), a credit provider must make a calculation of the consumer's existing financial means, prospects and obligations as envisaged in sections 78(3) and 81(2) (a)(iii).

26. The purpose of obtaining a consumer's credit bureau report is to, amongst others, ascertain a consumer's current debt repayment obligations so that the consumer's discretionary income can be calculated with a reasonable degree of accuracy to be satisfied that the consumer has enough funds available to satisfy new the debt repayment occasioned by the proposed loan.

27. As appears from the Respondent's files sampled on the Investigation Report, it is evident that the Respondent failed to conduct proper affordability assessments in that it failed to take steps to assess consumers' debt repayment histories and failed to assess consumers' existing financial means prospects and obligations. Specifically, the Respondent failed to fulfil the following requirements:
 - 27.1. The credit provider must properly assess consumers' income. In some of the files sampled, the Respondent overstated consumers' income as part of its affordability assessments despite having clear evidence of those consumer's actual monthly income;
 - 27.2. The credit provider must take any reasonable steps to ascertain and assess consumers' monthly living expenses. Living expenses are generally ascertained from two sources. Firstly, from the consumers themselves, generally by way of a detailed income and expenditure declaration form the consumer must fill in and sign. Secondly, from consumers' bank statements. In all the instances sampled, the Respondent did not question consumers or obtain any information regarding their living expenses; if they did, it was superficial and inadequate. Regarding bank statements, it is clear that the Respondent did not consider or utilize (as part of its assessments) the contents of consumers' bank statements;
 - 27.3. The credit provider cannot *only* apply the minimum expense norms in its affordability assessments. The Respondent must take steps to ascertain consumers' actual living expenses. According to the evidence before the Tribunal, the Respondent effectively did not consider living expenses a part of its affordability assessments. Therefore, the Respondent could not hope to make a reasonably accurate calculation of consumers' discretionary income. Thus, the Respondent could not reasonably assess whether the consumers had the

financial

means to satisfy the loan repayment under the credit agreements in question. By leaving living expenses out of the equation, as it were, the Respondent invariably overestimated consumers' discretionary income available. Accordingly, the likelihood of granting credit to consumers who could not afford the repayments increased; and

- 27.4. The credit provider must obtain credit bureau reports before entering credit agreements. A credit bureau report is an essential document for carrying out a proper affordability assessment. Firstly, it is the only objective, reasonably accurate, and complete source from which a credit provider can obtain information about a consumer's debt repayment history. Suppose a credit provider fails to obtain and assess the information in a bureau report before entering a credit agreement with a consumer. In that case, it has, on that basis alone, breached its obligations as set out in section 81(2)(a)(ii). Secondly, it is the only reasonably accurate and complete source from which a credit provider can ascertain and calculate a consumer's current debt repayment obligations. By not obtaining a bureau report, the Respondent ultimately failed to assess consumers' debt repayment history as a consumer under credit agreements, in contravention of Section 81(2)(a)(ii) read with Regulation 23A(13). Another fundamental reason the credit provider must obtain a report at the time of the consumer applying for credit is to avoid the situation where consumers obtain loans simultaneously from multiple credit providers.
28. By systematically approving credit applications without considering the consumers' existing debt repayment obligations, the Respondent perpetually overstated the consumers' disposable income by entirely ignoring or understating current debt obligations of the consumer at the time they were approved for credit. The Respondent failed to carry out proper affordability assessments and thus failed to take reasonable steps to assess consumers' existing financial means, prospects and obligations.
29. This conduct of the Respondent is evident in all the sampled approved credit agreements marked annexures E1 to E10 of the investigation Report.
30. Based on the above, the Tribunal is convinced that the Respondent repeatedly contravened sections 81(2)(a)(ii) and (iii) read with Regulation 23A.

Concluding reckless credit agreements with consumers

31. A credit agreement is reckless if, at the time that the agreement was made, the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time.
32. 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.
33. 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

34. The Respondent also "splits" loans to disguise the actual amount being borrowed by the consumer. The Respondent signs more than one credit agreement with the same consumer on the same day to:
 - 34.1. Reduce the apparent capital advanced to create the appearance that each credit agreement is a "short term credit transaction" and thereby levy the maximum allowable interest; and
 - 34.2. Charge more initiation and service fees than is legally permitted.
35. The evidence gathered from the small sample reveals three instances of splitting of loans, as follows:
 - - 35.1. Annexure "E1" to the Investigation Report, specifically the two credit agreements signed by consumer Nomaputukezi Malgas, both on 27 January 2021: The loan amount under one agreement was R8000.00 (loan number 2286), and the loan amount under the other agreement was R2000.00 (loan number 2287). Both contracts provide for repayment by way of three instalments, the last being payable by 23 April 2021. Under loan number 2286, the Respondent charged initiation fees of R865.00, service fees of R176.00 and interest at a rate of 5% per month, amounting to R766.87. Under loan number 2287, the Respondent charged

initiation fees of R265.00, service fees of R176.00 and interest at a 3% per month, amounting to R114.37;

352. Annexure "E5" to the Investigation Report, the two credit agreements signed by consumer Xhashimbe, both on 27 January 2021: The loan amount under one agreement was R8000.00 (loan number 2270), and the loan amount under the other agreement was R2000.00 (loan number 2271). Both contracts provide for repayment by way of three instalments, the last being payable by 23 April 2021. Under loan number 2270, the Respondent charged initiation fees of R865.00, service fees of R176.00 and interest at a rate of 5% per month, amounting to R766.87. Under loan number 2271, the Respondent charged initiation fees of R265.00, service fees of R176.00 and interest at a 3% per month, amounting to R114.37; and
353. Annexure "E10" to the investigation Report, the two credit agreements signed by consumer Ondala, both on 23 September 2020: the loan amount under one agreement was R2000.00 (loan number 1841), and the loan amount under the other agreement was R8000.00 (loan number 1840). Both contracts provide for repayment by way of 3 instalments, the last instalments being payable by 24 December 2020. Under loan number 1840, the Respondent charged initiation fees of R865.00, service fees of R180.00 and interest at a 3% per month, amounting to R495.54. Under loan number 1841, the Respondent charged initiation fees of R265.00, service fees of R180.00 and interest at a rate of 3% per month, amounting to R123.90.
36. 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, i.e., R10,000.00. The creation of two written agreements in each case was merely done to circumvent the prescripts of the Act.
37. By splitting the loans, the Respondent:
- 37.1. Was able to levy the maximum prescribed interest rate of 5% per month, equating to 60% per annum, or 3% per month, equating to 36% per annum, which is the highest rate allowed for any type of credit agreement as per Table A of Regulation 42. The separate agreements, if considered separately, could be classified as short-term transactions given that the capital advanced under each was not more than R8 000.00. By treating both agreements as a single transaction as lawfully required, the Respondent would only be allowed to levy interest

on an annual maximum rate of the Repo Rate plus twenty-one percent on the "combined" loan

amounts, in terms of item 3 of Table A of Regulation 42. Accordingly, the Respondent has, in effect, levied interest at a rate substantially higher than the rate which it is allowed to charge. The Respondent has accordingly repeatedly contravened section 100(1)(c) and section 101(1)(d)(ii), read together with section 105 and Regulation 42(1);

- 37.2. Has levied R80.00 more for initiation fees than what it is entitled to (a loan of R10 000.00 carries a maximum initiation fee of R1 050.00, but the Respondent levied initiation fees of R1 130.00. The Respondent has accordingly repeatedly contravened section 100(1)(b), and section 101(1)(b)(i) read together with section 105 and Regulation 42(2); and
- 37.3. Has, in effect, charged double the service fees that he is entitled to charge and has accordingly repeatedly contravened section 100(1)(b) and section 101(1)(c)(iii) read together with Regulation 44.
38. The Respondent has no other reasonable or lawful rationale for splitting the loans. The loan splitting was done purely to circumvent the Act and impose excessive and unlawful charges, as mentioned above.
39. The Tribunal therefore finds and is satisfied with the evidence before the Tribunal that the Respondent contravened section 93(2) read with Regulation 30(1) and form 20.2 by failing to provide consumers in the ten (10) sampled files with credit agreements in the prescribed form.

Including an unlawful provision in a credit agreement

40. An assessment of the credit agreements before the Tribunal revealed that the Respondent employs an unlawful credit collection or enforcement method to the detriment of consumers. This practice encompasses an agreement with specific consumers' employers in terms of which the consumers' employers permit the Respondent to deduct the loan instalments directly from the consumers' salary held by the employer. A perusal of the documents submitted by the Respondent, particularly the pay slips issued by their employers, revealed that the Respondent collects loan repayments from a consumer's monthly salary before it is transferred to the consumer by the employers.
41. For instance, consumer Thozamile Bukani (Annexure E3) was approved for a loan of R4000.00 on the 24th of November 2020 with one repayment. The consumer's pay slip shows that the Respondent was paid R020.00 directly from this consumer's salary before being approved for the

abovementioned loan.

42. A perusal of the file contents pertaining to the sampled credit agreements reveals that the Respondent did not procure any written authorization from the consumers in question for the Respondent to make such deductions directly from the consumers' salary on their employer's payroll, as is required in terms of Section 124 (read with Section 90(2)(n)). The salary or wage amount held by a consumer's employer is an "asset, account or amount deposited by or for the benefit of the consumer and held by...a third party", as contemplated in Section 90(2)(n).
43. Since the Respondent did not have any authorization from consumers, it goes without saying that the Respondent did not have any authorization, which is required in terms of Section 124(1)(a) to (d).
44. The Respondent has repeatedly contravened by deducting loan instalments directly from consumers' salaries via their employer's payroll whilst not having any authorization from consumers. Section 124(1) read with Section 90(2)(n).

Failure to submit prescribed statutory returns in the prescribed form 39 and form 40

45. The Applicant obtained information from its Compliance Department that the Respondent has repeatedly violated Regulation 64 and 66 of the National Credit Regulations in that it has failed to submit to the Applicant the prescribed form 39 statistical return and the form 40 annual financial and operational return.
46. The credit provider must submit form 40 annually within six months of the Respondent's financial year-end, and form 39 must be submitted by the 15th of February each year.
47. The Respondent failed to submit its statistical return and annual financial and operational returns to the Applicant for 2019 and 2020. Thus, the Respondent has repeatedly contravened section 52(5) (c) of the Act read with General Condition 3 of its conditions of registration as a credit provider, as well as Regulation 64 and 66 of the National Credit Regulations.

CONSIDERATION AND ANALYSIS OF THE APPLICANT'S EVIDENCE

48. The Tribunal considered the Applicant's written submissions regarding the basis upon which it formulated a reasonable suspicion that the Respondent engaged in prohibited conduct.
49. 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 reasonable suspicion that the Respondent contravened the Act. 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.
50. 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.
51. The Tribunal views the transgressions by the Respondent in a harsh light because it undermines the Tribunal, the purpose of the NCA, the consumers, and the NCR. Consequently, 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 in the preceding paragraphs. It is an aggravating factor that the Respondent infringed on the labour processes in workplaces to unlawfully obtain the deduction of payments through debit order from the salaries of employees, which amounts are now found to sprung from unlawful credit agreements.
52. 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

53. 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.

Administrative fine

54. The Applicant requested that the Tribunal 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.
55. 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.
56. 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

57. 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 multiple credit agreements. These contraventions of the Act are severe. Further, the Respondent's repayment collection methods are particularly troubling, as they require consumers' employers to collaborate in an unlawful practice in terms of the Act. Payments are collected as if a consumer has defaulted on its debt repayment obligation where there was no default. Consumers were found to be victims of the Respondent's unlawful conduct.

Loss or damage suffered because of the contraventions

58. 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 convinced 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

59. 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

60. 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

61. The Applicant placed no evidence before the Tribunal of the precise profit derived from the contraventions of the Respondent. The Tribunal accepts the argument that a substantial profit has been derived from the Respondent's activities in contravention of the Act and Regulations. Each loan extended unlawfully, and the prohibited charges, constitute a profit gained by the Respondent.

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

62. The Tribunal considered that the Respondent provided the inspectors with the required information and co-operated with them during the investigation.

Respondent's prior contraventions

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

Amount of the fine

64. 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 led at the hearing, 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.

65. 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.

66. In *NCR v Werlan Cash Loans t/a Lebathu Finance*⁸ 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 co-operated 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

⁸ NCT/3867/2012/57(1)

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.”

67. In NCR v Midwicket⁹ 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 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. “Although the Respondent appears to have been a relatively small credit provider, it is crucial to send a strong message to all credit providers that they cannot escape complying with the Act.
68. 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. The Respondent's continued participation in the credit market places consumers at substantial risk of further financial harm.
69. The Tribunal takes it in an incredibly dim light that consumers in the workplace are abused through the enforcement of a practice where a debit order against the consumer's salary is implemented without following due and lawful processes. The Applicant is expected to bring the unlawful nature of such practice under the attention of all credit providers, outlining that the Tribunal is taking a strong stance against the calculated abuse of labour processes that exploit consumers.
70. These considerations persuade the Tribunal that it is appropriate to impose an administrative fine of R1 000 000.00 (one million rand) on the Respondent.

Appointment of an auditor

71. 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 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

⁹ NCR v Midwicket Trading 525 CC t/a Butterfly Cash Loans NCT/7962/2013/57(1)

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.

Request for interdict

72. 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.¹⁰

ORDER

73. Accordingly, the Tribunal makes the following order:

73.1. The Respondent has repeatedly contravened the following sections of the Act and Regulations:

- 73.1.1. Section 81(2)(a)(ii) and (iii) read with Regulation 23A;
- 73.1.2. Section 81(3) read with section 80(1)(a);
- 73.1.3. Section 100(1)(c) and Section 101(1)(d)(ii) read with Section 105 and Regulation 2(1);
- 73.1.4. Section 100(1)(b) and Section 101(1)(b)(i) read together with Regulation 42(2);
- 73.1.5. Section 100(1)(b) and Section 101(1)(c)(iii) read together with Regulation 44;
- 73.1.6. Section 124(1) read with Section 90(2)(b) of the Act; and
- 73.1.7. Regulation 64 and 66 of the Act, as well as Section 52(5)(c), read with condition A3 of its conditions of registration as a credit provider;

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

73.3 The registration of the Respondent as a credit provider is cancelled with immediate effect in terms of section 57 of the NCA;

73.4 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 set aside;

¹⁰ Shoprite Investments Ltd v The National Credit Regulator (509/2017 dated 18 December 2019)

73.5 The Respondent is ordered to:

7351 Within 30 business 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 judgement overcharged consumers service fees, interest or charges;

7352 Within 30 business 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;

7353 Within 150 business 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

7354 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;

73.6 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;

73.7 The Respondent is within 90 business days of the date of issue of this judgment to pay an administrative fine of R1 000 000.00 (one million 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;
and

73.8 There is no order as to costs.

(signed)

DR MC PEENZE

Presiding Tribunal member

Tribunal members Ms P Beck and Prof T Woker concur with this judgment.

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

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