

IN THE NATIONAL CONSUMER TRIBUNAL

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Case Number NCT-223372-2022-140(1)

In the matter between:

NATIONAL CREDIT REGULATOR

APPLICANT

AND

BERRY HILL TRADING 32 CC

RESPONDENT

(Registration Number 2006/202591/23)

(NCRCP Registration number 8734)

Coram:

Presiding Tribunal Member: Dr MC Peenze

Tribunal Member: Mr T Bailey

Tribunal Member: Mr A Potwana

Date of Hearing: 3 June 2022

Judgment date: 6 June 2022

JUDGMENT AND REASONS

THE PARTIES

1. The Applicant is the National Credit Regulator (the Applicant or NCR), a juristic person established in terms of section 12 of the National Credit Act, 34 of 2005 (the NCA or the Act) to regulate the
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consumer credit market and ensure compliance with the Act, with its principal business address at 127 - 15th Road, Randjespark, Johannesburg, Gauteng.

2. The Applicant was represented at the hearing by Mr Roy Stocker, a senior legal advisor of the Applicant, and Mr Senku Mosaemedi, a junior legal advisor of the Applicant.
3. The Respondent is Berry Hill Trading 32 CC (the Respondent or Berry Hill), a close corporation registered in terms of the Company Laws of South Africa with registration number 2006/202591/23. The Respondent is a registered credit provider in terms of section 40 of the NCA under registration number NCRCP 8734. The Respondent's principal place of business is located at 5 Houtema Building, 36 Main Road, Grabouw, Western Cape.
4. The Respondent did not file an answering affidavit, nor was it represented at the hearing.

JURISDICTION

5. This application is brought in terms of section 140(1) of the Act, which provides for the referral of a matter to the National Consumer Tribunal (the Tribunal) if the National Credit Regulator believes that a person has engaged in prohibited conduct.
6. The National Consumer Tribunal (the Tribunal) is required to determine whether the Respondent engaged in prohibited and, if so, to grant the orders sought by the Applicant.
7. Section 150 of the Act gives the Tribunal the power to make an appropriate order concerning prohibited or required conduct in terms of the Act or the Consumer Protection Act, No. 68 of 2008. This power includes –
 - 7.1. Declaring conduct to be prohibited in terms of the Act;
 - 7.2. Interdicting prohibited conduct;
 - 7.3. Confirming an order against an unregistered person to cease engaging in an activity that must be registered in terms of the Act; and
 - 7.4. Imposing an administrative fine in terms of section 151 of the Act.

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8. Therefore, in terms of section 27 (a)(i) of the Act, the Tribunal has jurisdiction to hear this matter.

THE HEARING

9. The Applicant served on the Respondent the application documents as contemplated under rule 30 of the Tribunal Rules¹.
10. Rule 13(1) and (2) of the Tribunal Rules states that –
- (1) Any person required by these Rules to be notified of an application or referral to the Tribunal may oppose the application or referral by serving an answering affidavit on:
a) the Applicant; and
b) every other person on whom the application was served.*
 - (2) An answering affidavit to an application or referral other than an application for interim relief must be served on the parties and filed with the Registrar within 15 business days of the date of the application."*
11. On the day of the hearing, the Applicant submitted that on or about 31 March 2022, the Applicant filed this application on the Tribunal. On 30 March 2022, the Applicant sent the application by registered post to the Respondent's registered address at 16 Voortrekker Road, Bellville, Western Cape and 5 Houtema Building, 36 Main Road, Grabouw, Western Cape, 7530. The application was also sent to the Respondent's postal address at PO Box 160, Century City, 7446, being the address that appears on the Respondent's registration certificate with the Companies and Intellectual Property Commission² and is also the address used by the Respondent when it tried to register with the Applicant in 2017³.
12. The Applicant submitted track and trace reports showing that the first notification went out to the Respondent's physical address on 9 May 2022 and its postal address on 6 May 2022. The Respondent failed to collect the documents.

¹ GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007 (*Government Gazette* No. 30225), as amended.

² See page 36 of the tribunal bundle – CIPC registration certificate

³ Page 41 of the bundle

13. On 9 May 2022, the Tribunal sent a notice of set down by registered post to the Respondent's physical address and its registered postal address.⁴
14. The Applicant submitted that the Respondent would have known about the hearing.
15. The Respondent did not file an answering affidavit as provided for under rules 13(1) and (2) of the Tribunal Rules. The Tribunal panel was satisfied that the application documents and the Notice of Set Down were adequately served on the Respondent. On that basis, the hearing of the application proceeded on a default basis in accordance with rule 24 of the Tribunal Rules.
16. According to rule 13(5) of the Tribunal Rules –
"Any fact or allegation in the application or referral not specifically denied or admitted in an answering affidavit will be deemed to have been admitted."
17. As such, all the allegations levelled against the Respondent are deemed to have been admitted.

BACKGROUND

18. The Applicant submits that it conducted a compliance monitoring exercise on the Respondent during September 2020 per its functions as provided in Section 15(c) of the Act. During the said exercise, a few credit agreements were assessed as requested by the Applicant and provided by the Respondent. The assessment conducted revealed the following:
 - 18.1. The Respondent had failed to comply with the reckless lending provisions of the Act;
 - 18.2. The Respondent levied costs of credit which exceeded the maximum prescribed cost of credit that a credit provider may levy in terms of the Act; and
 - 18.3. The Respondent failed to comply with its obligations to submit annual returns.
19. The aforesaid identified contraventions raised serious concerns regarding the business practices of the Respondent. The contraventions so identified gave rise to a reasonable suspicion that the

⁴ See page 438 of the tribunal bundle

Respondent is conducting its business and extending credit in a manner that is not in accordance with the provisions of the Act and its Regulations.

20. On or about 31 March 2021, the Applicant initiated a complaint in terms of section 136 (2) of the Act and authorised an investigation to be conducted by Muhanganeni Mbedzi (Mbedzi) into the activities of the Respondent in terms of section 139 (1)(c) of the Act.
21. In compliance with COVID 19 Regulations, the investigation was conducted remotely as agreed with the Respondent. On 19 April 2021, a virtual interview was held between Mbedzi, Chen Fungui (Chen), and Michael Owen (Owen). They identified themselves as the owner and area manager of the Respondent, respectively.
22. During the interview, Chen advised that –
 - 22.1. The Respondent offers short term loans to employed consumers, government and the private sector pension recipients to a maximum amount of R5 500 for a repayment period of one month at an interest rate of 5% on all initial loans and an interest rate of 3% on subsequent loans;
 - 22.2. When extending credit to consumers, the Respondent provides consumers with a pre-agreement statement and quotation;
 - 22.3. The Respondent conducts affordability assessments by using the *Delfin System*, which obtains a consumer's credit history from the Experian credit bureau;
 - 22.4. The Respondent charges an initiation and service fee; and
 - 22.5. The Respondent does not offer credit life insurance.
23. Upon request, on 20 April 2021, Chen provided Mbedzi with a sample of ten (10) randomly selected consumer files for assessment purposes.
24. Following the investigation and subsequent assessment of the submitted documents, Mbedzi compiled an investigation report on 30 April 2021⁵ that led the Applicant to believe that the Respondent had engaged in prohibited conduct. As Mbedzi is no longer in the employ of the Applicant, Mbedzi's direct senior, senior inspector Douglas Musandiwa, has attested to a

⁵ Annexure FA7, page 143 of the tribunal bundle

confirmatory affidavit, confirming the findings made against the Respondent as set out within the investigation report⁶ and in support of the founding affidavit deposed to by Ms Leanne Schwartz, the Applicant's Acting Manageress: Investigations and Enforcement.

25. On 31 March 2022, the Applicant filed a referral against the Respondent with the Tribunal in terms of section 140(1) of the Act.
26. The Tribunal proceeded to consider the contraventions alleged in the founding affidavit and the investigation report.

CONTRAVENTIONS OF THE ACT

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

27. As a credit provider, the Respondent is compelled in Section 81(2) of the Act to take reasonable steps to assess consumers' debt repayment history, existing financial means, prospects, and obligations before entering into credit agreements with consumers.
28. Section 80 of the Act stipulates that a credit agreement is deemed reckless if the credit provider failed to conduct an assessment, as required by Section 81(2) of the Act, irrespective of the outcome of such assessment, before entering into a credit agreement with a consumer.
29. The Applicant submits that the Respondent has failed to conduct affordability assessments in accordance with the requirements of Section 81(2) and Regulation 23A of the Act. In this regard, the Applicant submits that, despite providing evidence that consumers' credit reports were obtained, the Respondent failed to assess consumers' debt repayment histories before or when entering into the credit agreements. The aforesaid is evident on all the assessed consumer files marked annexures "D1" to "D10". Therefore, the Applicant submits that the Respondent could not have conducted credit checks before extending credit to each sampled consumer.
30. Particular examples of the aforesaid are as follows:

⁶ Annexure FA8

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- 30.1. With reference to annexure "D1", the credit agreement was entered into on 5 February 2021. The credit bureau report was obtained on 19 April 2021, which is more than two months after the credit agreement was confirmed;
- 30.2. With reference to annexure "D3", the credit agreement was entered into on 9 April 2021. The credit bureau report was obtained on 19 April 2021, ten days after the credit agreement in question was confirmed; and
- 30.3. With reference to annexure "D6", the credit agreement was entered into on 30 November 2020. The credit bureau report was obtained on 19 April 2021, which is more than four months after the credit agreement was confirmed.
31. The Applicant submits that the Respondent's failure to obtain credit reports before entering into credit agreements rendered it unable to regard the consumers' open loans, adverse credit reports or arrear statuses of accounts. As such, the Applicant submits that the Respondent was not in the position to properly assess the consumers' debt repayment histories or the consumers' credit worthiness before entering into the credit agreements, as required by the Act.
32. Further, the Applicant submits that despite obtaining credit bureau reports *ex post facto*; the Respondent failed to have regard to the open or outstanding debt obligations listed on the credit bureau reports. Accordingly, the Applicant submits contravention of Section 81(2)(a)(ii) read with Regulation 23A(12)(b) and (13) of the Act.
33. With reference to the assessed consumer files, the Applicant subsequently indicates that the Respondent failed to take reasonable steps to ascertain and assess consumers' actual monthly living expenses, which expenses are generally ascertained either directly from the consumers by way of a detailed income and expenditure declaration form or from the consumers' credit bureau reports. Examples of this contravention are as follows:
- 33.1. With reference to annexure "D1", the consumer was approved for a loan of R1 500 on 5 February 2021. The Respondent recorded that the consumer has an average income of R6 679.18 and monthly living expenses of just R1 395.44, which is above a prescribed monthly minimum expense norm for a person in that income band. However, the credit bureau report shows that this consumer had combined monthly debt repayments of R11 669 and had R5 903 in cumulative arrears. Regarding the Respondent's affordability
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assessment document, these debt repayments were not taken into account, although the document appears to make provision for existing debt obligations. The Respondent took no tangible steps to assess the consumer's financial position.

33.2. With reference to annexure "D3", the consumer was approved for a loan of R850 on 9 April 2021. The Respondent recorded that this consumer had an average monthly income of R3

041.42 and monthly living expenses of just R1 163.33. Yet, the consumer's credit report shows that this consumer had monthly credit repayments of at least R3 867. With regard to the Respondent's affordability assessment document, these debt repayments were not taken into account, although the document appears to make provision for existing debt obligations.

33.3. With reference to annexure "D6", the consumer was approved for a loan of R750 on 30 November 2020. The Respondent recorded that this consumer had a monthly income of R7

068.77. Yet, the consumer's credit report obtained by the Respondent on 19 April 2021 shows that the consumer had monthly debt repayments of R8 009 and cumulative arrears of R8 815 when the loan was confirmed. Regarding the Respondent's affordability assessment document, these debt repayments were not considered, even though the document appears to make provision for existing debt obligations.

34. The Applicant forthwith submits that the Respondent has failed to take reasonable steps to assess the consumers' existing financial means properly, prospects and obligations in repeated contravention of Section 81(2)(a)(iii) read with Regulation 23A(3) and 23A(12)(b) and (c) of the Act.

35. Further, the Applicant argues that the Respondent's failure to include all of the debt obligations listed on the consumers' credit bureau reports provides an inaccurate calculation of the consumers' available discretionary income and results in an improper affordability assessment. The Applicant, therefore, argues that the Respondent's conduct also constitutes a repeated contravention of Section 81(2)(a)(iii) read with Regulation 23A(8) and 23A(12)(a) of the Act.

Concluding reckless credit agreements with consumers

36. The Applicant submits that the Respondent's failure to take reasonable steps to conduct a proper

affordability assessment resulted in the extension of credit recklessly to consumers. As required

by section 81(2) of the Act, a credit agreement is reckless if, at the time that the agreement was made, the credit provider failed to take reasonable steps to conduct an assessment in terms of the Act.

37. With reference to annexures "D1" to "D10", the Applicant argues that the Respondent has entered into credit agreements with consumers. However, the preponderance of the information available to the Respondent before entering into the credit agreements indicated that entering into such credit agreements would render the consumers over-indebted. The Applicant accordingly submits a contravention of Section 81(3), read with Section 80(1)(b)(ii) of the Act.

Failure to keep records of documentation

38. The Applicant argues in the alternative that the Respondent has contravened Section 170, read with Regulation 55(1)(b)(vi) of the Act, by failing to retain proof of the steps taken to conduct proper affordability assessments as required in terms of Section 81(2) of the Act.
39. In particular, the Applicant submits that no records are evident showing how the consumers' expenses were derived, considering that the debt obligations listed on the consumers' credit bureau profiles far exceeded the expenses that the Respondent captured on its affordability assessments.

Annual financial and operational returns

40. According to the Applicant, the NCR records demonstrate that the Respondent failed to submit its annual statistical returns (Form 39). The NCR does not have any record of any Form 39 submitted by the Respondent.⁷
41. The Respondent failed to submit its latest and due annual financial and operational report (Form 40). The last submitted Form 40 was for the financial year, February 2017.⁸

⁷ Annexure FA9 (Communication from the NCR Compliance Department)

⁸ Annexure FA10

42. Section 52(5)(c) of the Act provides that a registrant must comply with its conditions of registration and with the provisions of the Act.
43. Regulation 62 of the Act obliges each consumer to submit to the NCR, amongst others, reports and returns, statistical returns and annual financial and operational returns.
44. Regulation 64(2) of the Act informs all credit providers to complete and submit the statistical return in Form 39 to the NCR by 15 February each year from 1 January to 31 December.
45. Regulation 66 of the Act provides that a credit provider must submit its annual financial and operational return in Form 40 to the NCR within six months after the registered credit provider's financial year-end.
46. In terms of general condition 3 of the Respondent's conditions of registration, the Respondent is required to submit reports and returns within the specified periods.
47. Consequently, the Applicant submits that the Respondent has contravened Section 52(5)(c) and (f) of the Act read with general conditions of registration and Regulation 62(1)(b) and (c), read further with Regulation 64(2) and Regulation 66 of the Act.

RELIEF SOUGHT

48. As a result, the Applicant seeks an order:
 - 48.1. Declaring the Respondent to be in contravention of the following sections of the Act and Regulations:
 - (a) Section 81(2)(a)(ii) read with Regulations 23A(12)(b) and (13) of the Act;
 - (b) Section 81(2)(a)(iii) read with Regulations 23A(3), 23A(12)(b) and (c) of the Act;
 - (c) Section 81(2)(a)(iii) read with Regulations 23A(8) and 23A(12)(a) of the Act;
 - (d) Section 81(3) read with Section 80(1)(a) of the Act;
 - (e) Section 81(3) read with Section 80(1)(b)(ii) of the Act; and
 - (f) Section 170 read with Regulation 55(1)(b)(vi) of the Act.

- 48.2. Declaring the conduct of the Respondent to be prohibited conduct;
- 48.3. Declaring that the Respondent by its conduct has brought the consumer credit industry into disrepute further or alternatively, declaring that the Respondent has acted with disregard for consumer rights generally;
- 48.4. Interdicting and restraining the Respondent from in future engaging in prohibited conduct;
- 48.5. Imposing an administrative fine on the Respondent in the amount of R1 000 000 (one million Rand) or 10% of the annual turnover of the Respondent;
- 48.6. Declaring the credit agreements annexed to the investigation report, marked annexures "D1" to "D10" to have been recklessly granted and setting aside all of the consumers' obligations under those agreements;
- 48.7. Ordering the Respondent to, at its own cost, to:
- (a) Refund all the costs of credit charged and recovered from consumers under all such agreements;
 - (b) Refrain from taking any enforcement action against such consumers and, to the extent that the Respondent may already have taken enforcement action which is pending against any such consumers, the Respondent shall formally withdraw such action, and tender payment of the consumer's legal costs where the action is defended or opposed; and
 - (c) Take all such steps as may be necessary to ensure that any adverse credit bureau listings which may have arisen as a result of the consumer having concluded such credit agreements with the Respondent are removed and any civil judgments taken by the Respondent against such consumers in respect of such agreements, are rescinded or, if rescission is not possible, such judgments to be abandoned;
- 48.8. Ordering the Respondent to appoint an independent auditor at its own cost within 30 days of the date of this judgment, to –
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- (a) Identify and compile a list of names and contact details of all consumers with whom the Respondent entered into a credit agreement without properly conducting affordability assessments as required by the Act; and
 - (b) Compile the list mentioned above of consumers, compile a report and submit the same to the Respondent;
- 48.9. Ordering the Respondent to, within thirty (30) days of receipt of the Auditor's report, submit all credit agreements identified as having been entered into without the Respondent having conducted a proper affordability assessment to the Applicant, after which the Applicant is authorised to approach the Tribunal for an order declaring those credit agreements as reckless in terms of Section 80(1)(a) of the Act;
- 48.10. Ordering the Respondent to take all reasonable steps to rescind all and any judgments possibly obtained against consumers where the credit agreements were entered into without conducting proper affordability assessments as outlined in the Auditor's report;
- 48.11. Ordering the Respondent to take all necessary steps to clear any adverse listings with all credit bureaus should it have obtained judgments against the consumers mentioned above; and
- 48.12. Making any other appropriate order contemplated under section 150 of the Act to give effect to consumer rights under the Act.

CONCLUSION

49. The Tribunal considered the cumulative provisions of Sections 80, 81 and 82 of the Act and found that reckless lending occurred due to the Respondent's failure to conduct the affordability assessments as required by the Act.
50. Reckless lending, which is prohibited conduct, was committed by the Respondent in that it failed to follow the affordability assessment principles prescribed under Section 81. Despite thereof, it continued to conclude the proposed credit agreements with consumers.

51. In contravention of Section 80 (1) and 81 (2) of the NCA, the Respondent failed to take reasonable steps to assess the debt repayment histories of consumers, examine bank statements properly, read and apply credit bureau reports available, or obtain the most recent credit bureau reports for purposes of assessing prospective consumers' debt repayment histories before entering into credit agreements with consumers.
 52. In contravention of Regulation 55 (1) (b) (vi) of the NCA, the Respondent failed to retain copies of the credit bureau reports utilised to assess prospective consumers' debt repayment histories before entering into credit agreements with the consumers.
 53. Section 83 of the NCA allows the Tribunal to impose specific relief where it found that the Respondent engaged in prohibited conduct and engaged in reckless credit.
 54. The Applicant has presented sufficient evidence for the Tribunal to declare that the Respondent repeatedly contravened various provisions of the NCA. Under Section 150 (a) of the NCA, the Respondent's contravention of various NCA provisions constitutes prohibited conduct. Prohibited conduct is defined under Section 1 of the NCA as "*an act or omission in contravention of this Act other than an act or omission that constitutes an offence under this Act, by-*
 - (a) an unregistered person who is required to be registered to engage in such an act; or
 - (b) a credit provider, credit bureau or debt counsellor."
 55. Having found that the Respondent repeatedly contravened various provisions of the NCA, it follows that the Applicant has established a clear basis for imposing a penalty on the Respondent and for the Tribunal to make an order interdicting the Respondent from any further breaches of the NCA.
 56. In contravention with Regulation 64 (2) of the NCA, the Respondent failed to complete and submit a statistical return (Form 39) by 15 February each year.
 57. In contravention with Regulation 66, the Respondent failed to complete and submit an annual financial and operational return (Form 40) to the Applicant within six months after the Respondent's financial year.
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The Tribunal is satisfied that the Applicant has shown that the Respondent breached its conditions of registration and repeatedly contravened the above-cited provisions of the NCA on a balance of probabilities.

58. The Tribunal proceeds to consider an appropriate order.

Consideration of the administrative penalty

59. 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. Section 151 (3) of the Act sets out the factors 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

60. The Respondent's contraventions are extremely serious and appear to go to the heart of the Respondent's business practices. The investigation report reveals that the Respondent has repeatedly contravened the Act by failing to conduct proper affordability assessments and extending credit recklessly. Such a contravention is probably the most blatant contravention under the Act because it leads to over-indebtedness, which in turn can damage the entire consumer credit industry. It, therefore, undermines the express purposes of the Act to avoid over-indebtedness and create a sustainable credit market.

Loss or damage suffered as a result of the contraventions

61. The severe nature of the contraventions is evident in the financial losses suffered by consumers by entering into loan agreements with the Respondent without the Respondent first taking reasonable steps to ensure that the loans are affordable to the consumers. The damage to a consumer's economic status is far-reaching if a consumer, due to over-indebtedness, applies for and is placed under debt review.

62. The sampled files and the complaint received by the Applicant indicated that the Respondent removed the protection that consumers would have enjoyed had they undergone the required affordability assessment as required by law. Therefore, the Tribunal is satisfied that it may reasonably conclude that consumers have suffered a loss due to the Respondent's conduct.

The Respondent's behaviour

63. There exists no plausible reason for the Respondent to be unaware of its statutory obligation to adhere to the provisions of the Act. The very fact that the Respondent elected to become a registered credit provider is indicative that the Respondent is aware of the prescripts of the Act.

Market circumstances under which the contraventions occurred

64. The Respondent appears to operate in a market where consumers are vulnerable and uninformed of the rights and measures afforded them under the Act. In these instances, consumers are susceptible to exploitation if the Applicant and the Tribunal fail to take appropriate action against offending credit providers.

The level of profit derived from the contraventions

65. The Applicant did not place specific evidence before the Tribunal concerning the Respondent's level of profit derived from the contraventions. Nevertheless, it is reasonable for the Tribunal to conclude that the Respondent derives profit from its business practices that contravene the Act.

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

66. The Tribunal has considered that the Respondent provided the inspector with the required information and co-operated with the inspector during the investigation.

The Respondent's prior contraventions

67. There is no evidence that the Respondent was ever the subject of prior investigations or enforcement action. However, the Respondent's business activities have been ongoing since the Respondent commenced business.

Deterrence

68. In *The Competition Commission of South Africa v Federal-Mogul Aftermarket Southern Africa (Pty) Ltd & Others*⁹ (Federal-Mogul case), the Competition Tribunal held that deterrence is the primary purpose of imposing administrative penalties.¹⁰

69. The above approach is aligned with the purpose of the NCA and is set out in Section 3 of the NCA. In summary, the purposes of the Act are to promote and advance the social and economic welfare of South Africans, to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry and to protect consumers "... by ... (c)...(ii) discouraging reckless credit granting by credit providers and contractual default by consumers."

70. The Tribunal believes that the nature of the offence, namely entering into reckless credit agreements, justifies the imposition of an administrative fine. For this reason, we are of the view that the Tribunal may impose an administrative penalty without reference to annual turnover. Accordingly, where no evidence regarding annual turnover is available, the Tribunal still has the option to award a penalty not exceeding R 1 000 000.00.

71. On a conspectus of the evidence tendered by the Applicant, the Tribunal believes that the Respondent's disdain for the law that is meant to protect consumers and its callous treatment of consumers warrant the imposition of a substantial administrative fine.

⁹ Competition Tribunal Case number: Case Number: 08/CR/Mar01.

¹⁰ At para 166.

The amount of the fine

72. The Applicant did not submit information regarding the Respondent's annual financial statements. Notwithstanding, the Tribunal considered that the preamble to the Act states that the Act was introduced explicitly to, amongst other things, protect vulnerable consumers from unlawful and prohibited practices.
73. Taking the above into account, the Tribunal is persuaded that it is appropriate to impose an administrative fine of R150 000.00 (one hundred and fifty thousand Rand) on the Respondent.

Appointment of an auditor

74. 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 failed to conduct proper affordability assessments. The evidence placed before the Tribunal means that the Tribunal can't establish the extent of this practice and whether the Respondent only provides short-term credit agreements. It is, therefore, appropriate to appoint an independent auditor to assess the situation and establish the facts.

Other requested orders

75. 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
76. Mr Stocker did not pursue that part of the requested order that the Respondent had brought the consumer credit industry into disrepute and disregarded consumers' rights. It, too, serves no purpose and will not form part of the order.

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

ORDER

77. The Tribunal makes the following order: -

77.1. The Respondent is found guilty of repeatedly contravening the following provisions of the NCA:

- (a) Section 81(2)(a)(ii) read with Regulations 23A(12)(b) and (13) of the Act;
- (b) Section 81(2)(a)(iii) read with Regulations 23A(3), 23A(12)(b) and (c) of the Act;
- (c) Section 81(2)(a)(iii) read with Regulations 23A(8) and 23A(12)(a) of the Act;
- (d) Section 81(3) read with Section 80(1)(a) of the Act;
- (e) Section 81(3) read with Section 80(1)(b)(ii) of the Act; and
- (f) Section 170 read with Regulation 55(1)(b)(vi) of the Act;

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

77.3. The Respondent's credit agreements with consumers, contained in annexures D1 to D10 of the investigation report, are declared reckless in terms of section 80 (1) (a) and set aside.

77.4. The Respondent is:

- (a) Within 30 days of the date of issue of this judgment to appoint an independent auditor, who is registered as a Chartered Accountant, at its own cost to determine and compile a list of all the consumers across all the Respondent's branches and the amounts by which the Respondent has within the last three years of the date of issue of this judgement overcharged consumers service fees, interest or charges;
 - (b) Within 30 days of the date of the independent Auditor's report, to refund each consumer appearing on the list the amounts the Respondent has overcharged each consumer;
 - (c) Within 150 days of the date of issue of this judgment, the Respondent is to furnish the independent Auditor's report and the Respondent's written report to the Applicant that details the consumers' identities and the refunds made to the
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consumers; and

(d) 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;

77.5. The Applicant may, upon receipt of the Independent Auditor's report, apply to the Tribunal for an order declaring those agreements as reckless in terms of section 80 (1) (a) and setting aside the consumers' obligations under those agreements;

77.6. The Respondent is within 90 business days of the date of issue of this judgment to pay an administrative fine of R150 000.00 (one hundred and fifty thousand rands) 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/223372/2022/140(1) and name of person or business making the payment; and

77.7. There is no order as to costs.

(signed)

Dr MC Peenze

Presiding Member

Mr T Bailey (Tribunal Member) and Mr A Potwana (Tribunal Member) concurred.

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

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national consumer tribunal
