

IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT/146839/2019/140(1)

In the matter between:

NATIONAL CREDIT REGULATOR

APPLICANT

AND

IHAWU TEBE FUNERAL SERVICES (PTY) LTD T/A

IHAWU LOANS

RESPONDENT

Coram:

Prof. K Moodaliyar - Presiding member

Mr T Bailey - Tribunal Member

Ms D Terblanche - Tribunal Member

Date of hearing: 25 February 2022

JUDGMENT AND ORDER

APPLICANT

1. The Applicant in this matter is the National Credit Regulator ("the NCR"), a juristic person established in terms of Section 12 of the National Credit Act ("the NCA" or "the Act")¹, with its offices situated at 127 Fifteenth Road, Randjiespark, Midrand, in the Gauteng Province.

¹ Act 34 of 2005 as amended.

2. At the hearing, Mr Linda Mhlongo, the Applicant's Junior Legal Advisor: Investigations and Enforcement, represented the Applicant.
3. The hearing was held via Teams audio and video transmission.

RESPONDENT

4. The Respondent is Ihawu Tebe Funeral Services (Pty) Ltd Trading as Ihawu Loans ("Ihawu" or "Respondent") with Registration number: 2013/047980/07, a private company duly registered as such in terms of the Company Laws of the Republic of South Africa and a registered credit provider under registration number NCRCP7154 with its registered address situated at 30 Timber Street, Suite 11, Allied Building, Pietermaritzburg, KwaZulu-Natal, 3201.
5. At the hearing, the Respondent was represented by Mr Jodwana from NJ Attorneys.

APPLICATION TYPE AND JURISDICTION

6. The Applicant brought an application in terms of Section 140 (1) of the National Credit Act 34 of 2005 ("the Act" or "NCA"). The NCR wants a finding of prohibited conduct to be made against the Respondent and appropriate sanctions to be imposed.
7. In terms of Section 27 of the Act National Consumer Tribunal ("the Tribunal") has jurisdiction.²

BACKGROUND

STATUS OF RESPONDENT'S REGISTRATION

8. The Respondent was registered as a credit provider on or about 16 February 2015³. The Respondent has, however, failed to pay its annual renewal fees due at the end of July 2018. In terms of Section 52(4)(b) of the Act, a registration remains in effect until it has lapsed on the last day upon which the prescribed renewal fee

² Section 27(a)(i) provides that: "*The Tribunal or a member of the Tribunal acting alone in accordance with this Act or the Consumer Protection Act, 2008 may adjudicate in relation to any application that may be made to it in terms of this Act in respect of such an application.*"

³ See Annexure "FA2.1"³ and "FA2.2".

should have been paid in terms of section 51(1)(c) of the Act. The Respondent's registration as a credit provider has subsequently lapsed.

9. Section 40 (3) provides that a person who is required in terms of section 40 (1) to be registered as a credit provider but who is not so registered must not offer, make available or extend credit, enter into a credit agreement or agree to do any of those things.
10. Section 40 (4) deals with the fate of those credit agreements entered into by a credit provider who is required to be registered in terms of section 40 (1) but who is not so registered; the credit agreement is an unlawful agreement and void to the extent provided for in section 89 (2) (d), namely, that *"...a credit agreement is unlawful if— at the time the agreement was made, the credit provider was unregistered and this Act requires that credit provider to be registered."*

APPLICANT'S SUBMISSIONS

11. The Applicant's case is stated in its founding affidavit. The deponent is Anne-Carien du Plooy (Ms Du Plooy). Ms Du Plooy is an acting manageress in the Applicant's Investigations and Enforcement Department.
12. On 17 October 2018, the Applicant embarked on a scouting exercise in Pietermaritzburg, KwaZulu-Natal⁴. During the scouting exercise, the Applicant's inspector visited the trading premises of the Respondent. The inspector noticed what appeared to be prohibited instruments retained in transparent containers on the Respondent's premises. The inspector further observed that the window decal displayed at the premises of the Respondent had expired and that the advertisement material of the Respondent on the premises contained phrases such as "quick smart loans" as well as "fast approval" which raised concerns as to the affordability assessment mechanisms employed by the Respondent if any. These observations all created a reasonable suspicion that the Respondent may be contravening the Act.⁵

⁴ This is endorsed by the Act in terms of section 15 (c) which provides that the National Credit Regulator must enforce the monitoring the consumer credit market and industry to ensure that prohibited conduct is prevented or detected and prosecuted.

⁵ See Inspector's memorandum "FA3" in the Tribunal bundle.

13. On the strength of this information, the Applicant initiated a complaint against the Respondent in terms of section 136(2) of the Act. Mr Douglas Musandiwa (Mr Musandiwa) was duly appointed by the Chief Executive Officer of the Applicant as an inspector in terms of section 25(1)(a) of the Act for the purpose of carrying out the investigation into the Respondent.⁶ The Applicant also obtained a Search Warrant in terms of sections 153 and 154 of the Act.
14. On 29 November 2018, an onsite investigation was conducted at the business premises of the Respondent. Mr Musandiwa was accompanied by Members of the South African Police Service (SAPS), who assisted with conducting the search for prohibited instruments at the Respondent's premises. Despite the Respondent's initial denial of retention, several prohibited instruments were found in the Respondent's possession, and a criminal case was subsequently opened.
15. Mr Musandiwa requested and obtained 8 (eight) credit agreements linked to the prohibited instruments found. Mr Musandiwa requested an additional 2 credit agreements, which the Respondent undertook to submit electronically, but has to date not been adhered to. During the investigation, Mr Musandiwa uncovered a number of transgressions of the Act by the Respondent, which will be dealt with below.

FAILURE TO CONDUCT AFFORDABILITY ASSESSMENTS

16. In terms of section 81(2)(a) a credit provider must not enter into a credit agreement without first taking reasonable steps to assess•
 - The proposed consumer's-
 - (i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;
 - (ii) debt repayment history as a consumer under credit agreements; and
 - (iii) existing financial means, prospects and obligations.
17. Regulation 23A(3), (8),(10) and (12) further provides that a credit provider must take practical steps to assess the consumer's discretionary income to determine

⁶ See the Investigators Report market "Annexure A" in the Tribunal bundle.

whether the consumer has the financial means and prospects to pay the proposed credit instalment and must make a calculation of consumer's existing financial means, prospect and obligations as envisaged in section 78(3) and section 81(2)(iii) of the Act.

18. Annexures "D1" to "D4" and "D6" to "D8", respectively, show that the Respondent failed to conduct any affordability assessments in accordance with Section 81(2)(a) read with Regulation 23A prior to extending credit to consumers, in that it failed to obtain credit bureau statements of consumers to ascertain consumers' existing monthly debt repayment obligations.
19. Further, the Respondent failed to obtain bank statements or proof of income in the form of a payslip of consumers at the time the credit was extended; and it failed to calculate consumers' discretionary income, nor did it calculate the consumer's monthly living expenses.
20. The Respondent has accordingly failed to take reasonable steps to assess consumers' affordability and its conduct herein constitutes a repeated contravention of Section 81 (2)(a)(ii) and (iii) read with Regulation 23A(3), (8), (10) and (12) of the Act.

RECKLESS CREDIT AGREEMENTS

21. In terms of section 80(1) 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.
22. The Applicant asserts that the Respondent failed to take reasonable steps to assess the consumers' affordability in accordance with the Act and the Regulations. The Respondent thus entered into reckless credit agreements in contravention of section 80(1)(a) read with section 81(3) of the Act.
23. Alternatively, the Applicant submits that the Respondent failed to retain the proof of the steps taken to conduct the assessments. In this instance, the Respondent thus repeatedly contravened Section 170, read together with Regulation 55(1)(b) (vi) of the Act.

COSTS OF CREDIT - LEVYING EXCESSIVE CHARGES ON CONSUMER CREDIT AGREEMENTS

24. In terms of section 101(1) of the Act, a credit agreement must not require payment by the consumer of any money or other consideration, except-
- a. The **principal debt** is the amount deferred in terms of the agreement, plus the value of any item contemplated in section 102;
 - b. An **initiation fee**, which- (i) may not exceed the prescribed amount relative to the principal debt; and (ii) must not be applied unless the application results in the establishment of a credit agreement with that consumer;
 - c. A **service fee**, which- (i) in the case of a credit facility, may be payable monthly, annually, on a per transaction basis or on a combination of periodic and transaction basis; or (ii) in any other case, may be payable monthly or annually; and (iii) must not exceed the prescribed amount relative to the principal debt;
 - d. **Interest**, which- (i) must be expressed in a percentage manner; and (ii) must not exceed the applicable maximum prescribed rate determined in terms of section 105.
25. Section 100(1)(b) of the Act provides that a credit provider must not charge an amount to or impose a monetary liability on the consumer in respect of an amount of a fee or charge exceeding the amount that may be charged consistent with the Act.
26. Regulation 44 of the Act stipulates the maximum monthly service fee that may be charged as R60.00 and Regulation 44(4) further provides that the service fee must be pro-rated if the credit agreement does not endure for an entire calendar month. The Respondent charged excessive monthly service fees, as is evident from the following examples:
- a. Annexure D3 - consumer Ngubane - the Respondent charged a total service fee of R50.00. The loan was extended over 24 days (inclusive of the first and last day). The Respondent was therefore only allowed to charge a total monthly service fee of R48.00.
 - b. Annexure D4 - consumer Ndlovu- the Respondent charged a total service fee of R50.00. The loan was extended over two days (including the first

and last days). The Respondent was only allowed to charge a total monthly service fee of R4.00.

27. The Respondent has accordingly repeatedly contravened section 100(1)(b), and Section 101(1)(c)(iii), read together with Regulation 44 and 44(4) of the Act.

SUPPLEMENTARY AGREEMENT/ DOCUMENT THAT CONTAINS A PROVISION OR FEE THAT WILL BE UNLAWFUL IF IT WERE INCLUDED IN A CREDIT AGREEMENT

28. The Applicant alleges that the Respondent directly or indirectly requires and/or induces consumers to enter into a supplementary agreement when concluding the credit agreements with consumers, which agreement is entitled "*Application for Services: ALLPS Promissory Note Facility System for Issue Clearing and Settlement of Promissory Notes including the authority to debit*" (the "ALLPS agreements").
29. The abovementioned agreement contains a provision for the payment by the consumers of fees to an entity named Information Technology Consultants (Pty) Ltd.
30. This can be evidenced in Annexure **D5** to the Investigation Report, where the ALLPS forms part of the credit agreement which the consumer concluded with the Respondent. Here, the credit agreements sampled wherein the service fee charged by the Respondent – R50.00 – did not (in and of itself) exceed the maximum amount allowed as prescribed by Regulation 44. However, the ALLPS Promissory Note agreement required the consumer also to pay an amount of R54.95 to Intecon. This additional charge effectively required the consumer to pay a monthly service fee of R104.95 for the duration of the agreement.
31. The ALLPS agreement requires the consumer to pay a fee which: -
- a. Is prohibited by the Act, and thus the Respondent has Act contravened section 100(1)(a) read with Section 101(1) of the Act; and
 - b. It is not a permissible fee amount as contemplated in section 100, and thus the Respondent has contravened section 100(1)(d) of the Act; and
 - c. Exceeds the maximum service fee that may be charged in terms of the Act, and thus the Respondent has contravened sections 101 (1)(c) and 105(1)(b) read with Regulation 44 of the Act.

32. The Respondent has accordingly contravened section 91(2) read together with the sections quoted above.

EMPLOYING PROHIBITED COLLECTION AND ENFORCEMENT PROCEDURES

33. Section 133 of the Act deals with prohibited collection and enforcement practices. It stipulates that a credit provider must not- *(1) make use of any document, number or instrument referred to in section 90(2)(l)(i) and (ii) when collecting on or enforcing a credit agreement; or direct or permit any other person to do anything contemplated in this subsection on behalf, or as an agent, of the credit provider.*
- (2) When collecting money owed by a consumer under a credit agreement or when seeking to enforce a credit agreement, a credit provider must not use or rely on or permit any person to use or rely on, any document, instrument or contract provision referred to in section 90(2)(l).*
34. The Applicant found that the Respondent retained prohibited instruments on its premises and submitted that such retention was done to collect on and/or enforce the credit agreements it had concluded.
35. The credit agreements marked annexures "D1" to "D8" were successfully linked to certain prohibited instruments found on the Respondent's premises. The Applicant's conclusion that these instruments were retained for illegal purposes is supported by the fact that Personal Identification Numbers (PIN) were identified on at least three (3) of the prohibited instruments annexed to the investigation report marked as Annexures "D2", "D6" and "D8". The Applicant's conclusion is further supported with reference to the document annexed to the investigation report marked as Annexure "C3". The Respondent employed this prohibited enforcement practice despite such conduct being a criminal offence in terms of section 133(3) of the Act. As previously mentioned, a criminal case has been opened against the Respondent.
36. The Respondent has repeatedly contravened the provisions of Section 133 read with Section 90(2)(1) of the Act by retaining and utilising consumers and instruments when collecting on or enforcing credit agreements.

The Applicant's prayers

37. The Applicant prays for an order against the Respondent in the following terms:

37.1 Declaring the Respondent to have repeatedly contravened:

- (a) Section 81 (2)(a)(ii) and (iii) read with Regulation 23A(3), (8),(10) and (12) of the Act;
- (b) Section 81 (3) read section 80(1)(a) of the Act;
- (c) Alternatively, section 170 read together with Regulation 55(1)(b)(vi);
- (d) Section 100(1) and section 101 (1)(c)(iii) read together with Regulation 44 and 44(4) of the Act;
- (e) Section 91 (2) read with section 100(1)(a) and section 101(1), read with section 100(1)(d) and section 101(1)(c)(iii) read with 105(1)(b) and regulation 44 of the Act; and
- (f) Section 133 read with Section 90(2)(1).

37.2 Declaring the Respondent's conduct in contravention of the relevant Sections of the Act outlined above as prohibited conduct in terms of Section 150 (a) of the Act;

37.3 Declaring the Respondent to have brought the consumer credit industry into disrepute further and/or alternatively, declaring the Respondent to have acted with disregard for consumer rights generally;

37.4 Interdicting the Respondent from offering, making available or extending credit and restraining the Respondent from further engaging in similar prohibited conduct;

37.5 Declaring the Respondent's credit agreements with consumers, contained in Annexures D1 to D4 and D6 to D8 of the Investigation Report as reckless in terms of Section 80(1)(a) and setting aside all of the consumers' rights and obligations under those agreements; and

37.6 The imposition of an administrative fine on the Respondent in the amount of 10% of the Respondent's annual turnover or R1 000 000.00 whichever is the greater;

37.7 Ordering the Respondent to:

- (a) Within 30 days appoint an independent auditor at its own costs. whose appointment shall be subject to the prior written approval of the Applicant, to

determine if any consumers in the past 3 (three) years were overcharged on monthly service fees and/or any fees under the ALLPS agreements, and provide

a list of such consumers as well as the amount by which each consumer was overcharged;

(b) Once the aforesaid auditor compiled the abovementioned list, the Respondent will refund the amounts in the form of fees or charges, which it was not entitled to receive or which exceeded the prescribed maximum amounts allowed by the Act, to each consumer within 30 days from the date of the auditor's report;

(c) Once the refunds have been made, as stated above, the Respondent is to provide the auditor's report and a written report to the Applicant detailing the consumers' identity and the refunds made. These reports are to be provided to the Applicant within 120 days after the Tribunal order has been obtained;

(d) The appointed auditor must also, as part of the report referred to above, identify all credit agreements which are still in force, i.e. where all amounts owing thereunder have not been paid, and of those agreements, the appointed auditor must identify which of such agreements the Respondent entered into without properly conducting assessments in terms of section 81(2)(a)(ii) and/or (iii) of the Act. Once the auditor has identified those agreements and the Applicant has received the auditor's report in this regard, the Applicant may apply to the Tribunal for an order declaring such agreements as reckless in terms of Section 80(1)(a) and setting aside all the consumers' rights and obligations under those agreements; and

37.8 Further or alternative relief as the Tribunal may consider appropriate to affect the consumers' rights under the NCA as per Section 150 (i) thereof.

The Applicant's submission on Penalty

38. As motivation for the appropriate penalty, the Applicant submits as follows:

Nature, duration, gravity, and extent of the contraventions

39. The Applicant extracted a sample of ten credit agreements concluded by the Respondent and found that every one of those agreements had been concluded recklessly by the Respondent.

40. Reckless credit granting and failing to conduct proper affordability assessments are serious contraventions of the Act. Consumers risk becoming over-indebted

by the Respondent granting credit without taking reasonable steps to determine
the

consumer's ability to afford the credit repayments. The conduct of the Respondent cannot be benevolently considered because the gravity and regularity of the offences committed by the Respondent have the potential to cause consumers extreme prejudice.

41. In every approved sampled agreement obtained during the investigation, the Respondent breached its obligations in terms of the Act. This illustrates a total disregard for the rules and norms of the regulated activity which the Respondent undertakes.
42. The gravity of the offences depicts the Respondent's callous disregard of the legislation for the regulated activity which it undertakes.

Loss or damage suffered as a result of the contraventions

43. Consumers have suffered loss and damage as a result of the Respondent's conduct. The Respondent exploited consumers by entering into loan agreements with the Respondent without the Respondent first taking reasonable steps to ensure that the loans are affordable. The damage to consumers' economic status is far-reaching if they, due to over-indebtedness, apply for and are placed under debt review.

The behaviour of the Respondent

44. There is no plausible reason for the Respondent to be unaware of the Act's provisions and its statutory obligation to adhere to all of the Act's provisions. 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. The Respondent's behaviour is concerning as it pays lip service to its duty to grant credit responsibly. An example is a pretence to follow the prescribed procedure for conducting affordability assessments without really conducting proper affordability assessments.
45. The Respondent's conduct regarding the retention and use of identity documents, banks and/or SASSA cards and pin numbers is particularly alarming behaviour. By undertaking this practice, the Respondent wields enormous power over consumers – it takes full control over consumers' only source of income and

thereby denies consumers of their rights in terms of a credit agreement. For example, suppose a consumer wished to exercise his/her right to dispute a charge levied by the Respondent. In that case, he/she could not do so because, practically speaking, the Respondent could simply take what money it believes is owing to it, without any recourse to law.

Market circumstances under which the contraventions occurred

46. It is submitted that the Respondent's conduct illustrates that the market circumstances within which the contraventions occurred are such that consumers are not educated about their credit access rights. Many of the consumers are exploited to the unjust benefit of the Respondent.

Level of profit derived from contraventions

47. A substantial profit was likely derived from the unlawful activities undertaken by the Respondent. However, the Applicant cannot provide detailed information on the level of profit derived by the Respondent due to the Respondent's failure to submit prescribed financial and statistical reports to the Applicant.

Degree of co-operation between the Respondent and Applicant

48. The Respondent co-operated with the Applicant during the investigation to an extent. However, the degree of the said co-operation is questionable in that:
- a. The Respondent failed to provide two further approved credit agreements requested by the inspector despite undertaking to provide the same; and
 - b. The Respondent attempted to mislead the Applicant during the investigation. The inspector found the Respondent in possession of prohibited consumer instruments despite the Respondent's initial denial of retaining such documents. Once found, the Respondent tried to explain this by stating that the instruments belonged to consumers queuing outside at the time. The inspector quickly established that this was also not true - the identity documents did not belong to consumers who were queuing outside at the time. It was established that said instruments belonged to consumers who had existing credit agreements with the

Respondent.

Prior contraventions committed by the Respondent

49. There are no prior investigations or enforcement actions instituted by the Applicant against the Respondent. However, the contraventions' nature and duration indicate that the Respondent's conduct has been ongoing before the investigation.

RESPONDENT'S SUBMISSIONS

50. The Respondent's case is contained in their Answering Affidavit, as deposed to by Mr Alex Nandile Vato, the owner of Ihawu Tebe Funeral Services.
51. Based on the Answering Affidavit filed, Mr Vato indicated that the Respondent is in the business of granting loans to consumers and that all consumer loan applications must be accompanied by three (3) months' bank statements, their latest pay slip and a copy of the consumer's identity document.
52. The branch of the Respondent only did preliminary checks, whereafter all application documents were forwarded to the Respondent's Durban branch for final checks and approval.
53. The Respondent charged interest and service fees on all amounts advanced to the consumers.
54. The Respondent utilised the ALLPS agreement to verify consumer details and do credit bureau checks.
55. In his affidavit, Mr Vato admitted that the Respondent had contravened the Act as alleged, save for employing prohibited collection and enforcement procedures.
56. The Respondent admitted to being in possession of consumers' SASSA cards, I.D books, and bank pins. The Respondent's response to this is that the Identity Books were kept at the Respondent's premises because clients kept forgetting to take them or mistakenly leaving these instruments behind. The Respondent stated that they are safeguarding these instruments until the rightful owner comes to collect it.
57. With respect to the Bank Pins, the Respondent indicates that they have written these bank pins because a large number of their elderly clients forget their bank pins, and this serves as a reminder to them. The Respondent denies that these instruments have been kept to enforce any agreements, and they only have them for safekeeping.

58. The Respondent requests that the Tribunal should not suspend the Respondent's registration since it is the only source of income, and the Respondent is a breadwinner also taking care of the siblings in the family.
59. The Respondent is willing to appoint auditors to assist all consumers that have been overcharged and to refund all of the affected consumers and compile a list to provide it to the Applicant.
60. The Respondent is willing to seek training and to rectify all errors and contraventions.

THE HEARING

61. At the hearing, we were informed that the deponent and owner of the Respondent, Mr Vata, had passed away. The business was transferred to his wife.
62. It was reiterated during the hearing that the Respondent had admitted to all the contraventions, save for the retention of the instruments which could be used to enforce the contracts.
63. The focus was on the prohibited instruments retained by the Respondent.
64. The Applicant submitted that their investigation revealed that where there was a promissory note in the consumer's file but no prohibited instruments were found in the file, for example, Annexure "D5". On the contrary, these prohibited instruments were found in files where there were no promissory notes. This could be found in 8 credit agreements sampled. The Applicant alleged that the Respondent retained the IDs of clients so that they could not cancel the cards in the Respondent's possession and apply for new instruments.⁷
65. The Respondent maintained that these consumers merely forgot their cards and that the Applicant did not question these consumers directly.
66. In response to the Respondent's submission that some of these clients were elderly and could not remember their pin numbers and hence the Respondent wrote it down on the file, the Applicant argued that some files where pins were retained belonged to younger consumers, for example, Annexure D2, who was born in 1993. The oldest person in the sampled files was born in 1952.

⁷ See consumer files Annexures "D1" to "D8".

ANALYSIS OF EVIDENCE

67. Considering that the Respondent has admitted to most of the contraventions, the Tribunal will not analyse the contraventions of the Respondent failing to conduct an affordability assessment; approving applications for credit recklessly, and supplementary agreement/document that contains a provision or fee that will be unlawful if it were included in a credit agreement (the ALLPS).
68. The Tribunal will focus its analysis on whether the Respondent had employed collection and enforcement procedures by retaining the consumer's instruments.
69. There is no dispute that the Respondent retained these instruments (SASSA cards, Bank Cards, Identity Documents). There is no tangible evidence to suggest that the Respondent merely retained these instruments for safekeeping.
70. The evidence revealed that the Respondent had retained the SASSA card and identity document of consumer "D2", who was born in 1993 and was 27 years old at the time. Consumer information in Annexure "D6" revealed that a promissory note, acknowledgement of debt and identity document was retained. The Consumer was 36 years old at the time. In Annexure "D8", it revealed that the SASSA card and identity document of a consumer aged 69, was retained.
71. Considering the age of the consumers in these sampled files, there is no reasonable explanation as to why their instruments were retained. In addition, the Respondent would have been prohibited from retaining these instruments even if their clients were "elderly".

CONCLUSION

72. The Tribunal considered the cumulative provisions of Sections 80, 81 and 82 of the Act and found that, as admitted, reckless lending occurred due to the Respondent's failure to properly conduct the affordability assessments as required by the Act.
73. 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.
74. 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,

to

examine bank statements properly, to 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.

75. The Tribunal finds that, as admitted, the ALLPS agreement and fee is unlawful as it was included in a credit agreement which was not a permissible fee amount as contemplated in section 100, and thus the Respondent has contravened section 100(1)(d) of the Act.
76. The Tribunal finds that the Respondent employed prohibited collection and enforcement proceedings against consumers. The Respondent has repeatedly contravened the provisions of Section 133 read with Section 90(2)(1) of the Act by retaining and utilising consumers, and instruments when collecting on or enforcing credit agreements.
77. The Applicant has presented sufficient evidence for the Tribunal to declare that the Respondent repeatedly contravened various provisions of the NCA. As envisaged 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."
78. 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.
79. The Respondent has been a registered credit provider since 2015 and failed to pay its annual renewal fees for 2018. By the operation of law, more specifically Section 52(4)(b) of the Act, the Respondent's registration as a credit provider has subsequently lapsed. The last annual return was dated 2019.
80. Given the averments that Ms Du Plooy made in her affidavit, the documentary

evidence annexed to the Applicant's founding affidavit, the admitted

contraventions of the Respondent as well as the Respondent's failure to adduce and produce sufficient evidence refuting the Applicant's allegations regarding the prohibited instruments, the Tribunal is satisfied that the Applicant has shown, on a balance of probabilities, that the Respondent breached its conditions of registration and repeatedly contravened the above-cited provisions of the NCA.

ADMINISTRATIVE FINE

81. We now turn to the administrative fine the Applicant wants to impose on the Respondent. In its application documents, the Applicant stated that it wants an administrative fine in the amount of R1 000 000.00 or 10% of the Respondent's annual turnover, whichever is greater.

82. The imposition of administrative fines as provided for in Section 150(c) read with Section 151 is as follows -

"151. Administrative fines.—

(1) The Tribunal may impose an administrative fine in respect of prohibited or required conduct in terms of this Act, or the Consumer Protection Act, 2008.

(2) An administrative fine imposed in terms of this Act, or the Consumer Protection Act, 2008, may not exceed the greater of—

(a) 10 per cent of the Respondent's annual turnover during the preceding financial year; or

(b) R1 000 000.

(3) When determining an appropriate fine, the Tribunal must (emphasis added) consider the following factors:

(a) The nature, duration, gravity and extent of the contravention;

(b) any loss or damage suffered as a result of the contravention;

(c) the behaviour of the respondent;

(d) the market circumstances in which the contravention took place;

(e) the level of profit derived from the contravention;

(f) 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

Tribunal; and

(g) whether the Respondent has previously been found in contravention of this Act, or the Consumer Protection Act, 2008, as the case may be."

83. Section 151(4) deals with what is meant by "turnover" -

"(4) For the purpose of this Section, the annual turnover of—

(a) a credit provider at the time an administrative fine is assessed, is the total income of that credit during the immediately preceding year under all credit agreements to which this Act applies, less the amount of that income that represents the repayment of principal debt under those credit agreements; or

(b) any other person, is the amount determined in the prescribed manner."

84. Per the provisions of Section 151 (3) of the NCA, in determining the appropriate administrative fine, we will consider the following:

Nature, duration, gravity, and extent of the contraventions

85. Nature: Reckless credit granting is one of the most egregious forms of prohibited conduct under the NCA. The Respondent exploited consumers. By extending credit without conducting proper affordability assessments, the Respondent acted in a manner that undermined the NCA's purpose and showed a callous disregard for consumers.

86. Duration: The evidence presented to the Tribunal shows that contraventions took place over an extended period.

87. Gravity: The Respondent's conduct totally disregards the consumer protection measures provided for in the NCA and the regulated credit industry.

88. Extent: The fact that the Applicant found contraventions of the NCA in all the files its inspectors extracted from Respondent shows that the Respondent generally conducted its business illegally.

Loss or damage suffered as a result of the contraventions

89. Although the actual loss by consumers has not been computed, consumers have suffered loss and damage due to the Respondent's conduct. The Respondent exploited consumers by entering into loan agreements with the Respondent

without the Respondent first taking reasonable steps to ensure that the loans are affordable.

90. The damage to consumers' economic status is far-reaching if they, due to over-indebtedness, apply for and are placed under debt review.

The behaviour of the Respondent

91. As a registered credit provider, the Respondent knew it had to comply with the NCA's prescripts but chose to exploit consumers, nonetheless.
92. The owner of the Respondent, Mr Vata is now deceased. His wife has taken over the business and has requested training assistance.

Market circumstances under which the contraventions occurred

93. The Tribunal accepts the Applicant's submission that the Respondent's conduct illustrates that the market circumstances within which the contraventions occurred are those in which consumers are not educated on their rights relating to credit access.
94. The Tribunal views the exploitation of vulnerable consumers with contempt.

Level of profit derived from contraventions

95. The Applicant was unable to state what the total amount of profit was.

Degree of co-operation between the Respondent and Applicant

96. The Respondent co-operated with the Applicant's inspectors to an extent.

Prior contraventions committed by the Respondent

97. There are no prior investigations or enforcement actions instituted by the Applicant.
98. However, the Tribunal takes a very dim view that the Respondent has been found guilty of contravening numerous provisions of NCA.
99. The Tribunal turns to consider the question of deterrence when imposing an administrative penalty.

Deterrence

100. In *The Competition Commission of South Africa v Federal-Mogul Aftermarket Southern Africa (Pty) Ltd & Others*⁸, the Competition Tribunal held that deterrence is the primary purpose of imposing administrative penalties.⁹
101. The above approach is aligned to 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, 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."
102. 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.
103. On a conspectus of the evidence tendered by the Applicant, the Tribunal is of the view that the Respondent's disdain for the law that is meant to protect consumers and its callous treatment of consumers warrant the imposition of an administrative fine.

ORDER

104. The Tribunal makes the following order: -
- a. The Respondent is found guilty of repeatedly contravening the following provisions of the NCA:
 - i. Section 81 (2)(a)(ii) and (iii) read with Regulation 23A(3), (8),(10) and (12) of the Act;
 - ii. Section 81 (3) read section 80(1)(a) of the Act;

⁸ Competition Tribunal Case number: Case Number: 08/CR/Mar01.

⁹ At para 166.

- iii. Section 100(1) and section 101 (1)(c)(iii) read together with Regulation 44 and 44(4) of the Act;
 - iv. Section 91 (2) read with section 100(1)(a) and section 101(1), read with section 100(10(d) and section 101(1)(c)(iii) read with 105(1)(b) and regulation 44 of the Act;
 - v. Section 133 read with Section 90(2)(1);
- b. The Respondent's conduct stated in sub-paragraphs (a) above is hereby declared prohibited conduct in terms of Section 150 (a);
 - c. The Respondent is interdicted from any further breaches of the NCA; in the manners as listed in sub-paragraph (a) above;
 - d. The Respondent is interdicted from conducting business activities as a credit provider whilst it remains unregistered as a credit provider;
 - e. The Respondent's credit agreements with consumers, contained in Annexures D1 to D8 of the Investigation Report, are declared reckless in terms of Section 80 (1) (a) read with Section 81 (3);
 - f. The Respondent must appoint an independent auditor at its own costs within thirty (30) days of issuing this order who must identify all open credit agreements concluded by the Respondent and determine which of such agreements the Respondent entered into without obtaining a credit bureau report in terms of Section 81 (2) (a) (ii) and (iii) read with Regulation 23 A. The auditor must report his findings within ninety (90) days after his appointment to the Applicant. After the Applicant has received the auditor's report in this regard, the Applicant may apply to the Tribunal for an order declaring such agreements as reckless in terms of Section 80 (1) (a) read with Section 81 (3);
 - g. The Respondent must pay an administrative fine in the amount of R30 000.00 (Thirty Thousand Rand) into the following bank account;

Bank Name: Standard Bank

Account Holder: The Department of Trade and Industry and Competition

Account Number: 370650026

Account Type: Business Current Account

Branch: Sunnyside

Branch code: 010645

Branch Code (electronic payments): 051001

SWIFT Address: SBZA JJ

Reference: NCT-146839-2019-140(1) (Name of depositor.)

in terms of Section 151 (5) of NCA within 60 (sixty) ordinary days of issuing this order; and

h. There is no order made as to costs.

Thus, done and signed at Centurion on the 28 May 2022.

{signed}

Prof. K Moodaliyar

Presiding Tribunal Member

Mr T Bailey (Tribunal Member) and Ms D Terblanche (Tribunal Member) concurring.

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

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national consumer tribunal