

IN THE NATIONAL CREDIT TRIBUNAL

HELD AT CENTURION

Tribunal Case No: **NCT/214099/2021/57(1)**

In the matter between:

NATIONAL CREDIT REGULATOR

APPLICANT

and

**WQ PRIME CASH LOANS &
TRADING (PTY) LTD**

RESPONDENT

(NCR Registration Number: NCRCP10374)

Coram

Prof K Moodaliyar - Presiding Tribunal Member

Prof T Woker - Tribunal Member

Mr T Bailey - Tribunal Member

Date of hearing - 9 March 2022

JUDGMENT AND REASONS

INTRODUCTION

1. The National Consumer Tribunal ("Tribunal") is requested to cancel a registrant's registration, WQ Prime Cash Loans and Trading (Pty) Ltd, the Respondent in this matter. The National Credit Regulator ("NCR") is the Applicant in this matter. The Applicant seeks an order in terms of which the Respondent is found to have engaged in prohibited conduct by repeatedly contravening the National Credit Act¹ ("NCA" or the "Act") the Regulations

¹Act no 34 of 2005.

promulgated in terms of the Act and its Conditions of Registration. The Applicant alleges that the Respondent has contravened the NCA by failing to conduct affordability assessments; granting credit recklessly to consumers; overcharging consumers' interest; failing to provide consumers with pre-agreement statements and credit agreements in a prescribed form; having an unlawful provision in its credit agreements, failing to update its records with the Applicant and failing to submit its current statistical returns to the Applicant.

2. The Tribunal is further asked to make a finding of reckless lending in view of certain transgressions allegedly perpetrated by the Respondent. For this and other grounds, the Applicant asks that the Respondent's registration be cancelled; and the maximum administrative penalty imposed.

THE PARTIES

3. The Applicant is the NCR, a juristic person established by Section 12 of the National Credit Act 34 of 2005. The Applicant is an independent, juristic person and is responsible for *inter alia* monitoring the consumer credit market to ensure that prohibited conduct is prevented or detected and prosecuted, with physical address at 127 15th Road, Randjespark, Midrand and postal address at PO box 209, Halfway House, 1685.
4. At the hearing, the Applicant was represented by its employer, Mrs L Swartz.
5. The Respondent is WQ Prime Cash Loans and Trading (Pty) Ltd, (Registration number: 2017/079138/07), a private company with limited liability duly registered as such in terms of the Company laws of South Africa and a credit provider registered with the NCR with registration number NCRCP 10374. Its last known registered and physical address is at Shop 6, Super Dragon Finance, Mdantsane City Mall, Eastern Cape.

6. The Respondent did not oppose the application and was not represented at the hearing.

REGISTRATION STATUS OF THE RESPONDENT

7. The Respondent has been registered as a credit provider with the Applicant since 15 March 2018 under the registration number NCRCP10374. The Respondent's annual registration renewal fees are up to date.

RESPONDENT'S FAILURE TO OPPOSE THIS APPLICATION

8. On 14 December 2021, the Applicant served this application on the Tribunal and sent it by registered post to the Respondent's registered physical address in the Eastern Cape. At the hearing, the Applicant handed in track and trace reports indicating that the first notification of the application parcel was sent out to the Respondent on 31 December 2021.
9. There was no indication that the Respondent did not intend to collect the parcel and the NCR stated that they did their utmost to deliver the parcel to the Respondent.
10. On 4 January 2022, the office of the Registrar of the Tribunal (the Registrar) issued a notice of filing. This notice was sent by email to the Respondent's email address and via registered post to the Respondent's registered business and physical addresses.² That notice records that the Respondent may oppose the application by serving an answer within 15 business days of receipt of the application.
11. On 28 January 2022, the Registrar issued a notice setting this application down for hearing on 9 March 2022. The Registrar sent the notice by email to the

² See track and trace report at page 258-259 of the documents before the Tribunal.

Applicant at *litigation@ncr.org.za* and the Respondent by email and by registered post to its last known address.

12. The Applicant cited several cases, including *Sebola v Standard Bank of South Africa* 2012 (5) SA 142 (CC) and *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC), to show that the application was properly served on the Respondent. The Applicant argued that the steps it took were sufficient to meet the requirements for proper service as set out in both *Sebola* and *Kubyana* (and other cases cited). Further, the Applicant acted in accordance with Rule 30(1)(b) of the Tribunal Rules.³ This Rule stipulates that a document may be served on a party by delivering it to the party or by sending it by registered mail to the party's last known address.
13. We are satisfied that the sequence of events shows that the Applicant served the application papers in this application on the Respondent at the Respondent's chosen postal and physical address as per its Conditions of Registration. The Registrar notified the Respondent that it had 15 days from receiving the application papers to file an answering affidavit, and it did not do so; and furthermore, the Respondent was notified that the matter had been set down for hearing by the Tribunal.
14. Despite these attempts to allow the Respondent to answer the serious allegations the Applicant makes against the Respondent, the Respondent elected to remain silent, not oppose the application, and not attend the hearing of this application. Consequently, we proceeded to hear this application by default in the Respondent's absence.⁴

BACKGROUND AND BASIS FOR THE APPLICATION

³ Regulations for Matters Relating to the Functions of the Tribunal and Rules for the Conduct of Matters before the National Consumer Tribunal, 2007 (as amended).

⁴ See Rule 25 of the Tribunal rules which provides for a hearing on a default basis.

15. The Applicant received a complaint from the Consumer Protection Offices of the Eastern Cape Provincial Government's Department of Economic Development, Environmental Affairs and Tourism. The information so received alleged the Respondent, amongst other credit providers in the East London region, to be overcharging consumers on interest; failing to conduct proper affordability assessments; failing to provide consumers with copies of their agreements; and failing further to display an NCR window decal at its business premises.
16. Therefore, on 5 March 2020, the Applicant initiated a complaint against the Respondent in terms of Section 136(2) of the Act and authorised an investigation in terms of Section 139(1)(c) into the business practices of the Respondent.
17. Muhanganei Mbedzi ("Mbedzi") and Douglas Musandiwa ("Musandiwa") (collectively "the Inspectors"), both employees of the Applicant, were appointed as inspectors in terms of Section 25(1)(a) of the Act to investigate the Respondent.⁵
18. On or about the 11 March 2020, an onsite investigation was conducted at the Respondent's registered physical address. The Inspectors were accompanied by the Manager of the Consumer Protection Offices situated in the Eastern Cape, Mr Bongani Ndyoko, who observed the investigation.
19. During the investigation, an interview was conducted with a Guo Hang Hai, commonly referred to as Handsome ("Mr Handsome"), who identified himself as the Respondent's Manager. The interview was conducted with the aid of the Respondent's shop assistants as Mr Handsome was found not to be proficient in English.
20. Mr Handsome gave an overview of the Respondent's credit-granting policy.

⁵ The Certificate of Appointment authorising the Inspectors to conduct the investigation is annexed to the Investigation Report as Annexures A and B.

21. In summary, during the interview:

- a. Mr Handsome provided the inspectors with an outdated registration certificate for Super Dragon (Pty) Ltd, a now previous registered entity under NCRCP7676. At the time of the investigation, Super Dragon (Pty) Ltd was, in fact, still registered; however, Mr Handsome informed operation under said entity to have ceased in late 2019;
- b. Mr Handsome provided the Inspectors with an outdated emailed copy of the NCR registration certificate for the Respondent;
- c. Mr Mbedzi (the Inspector) noticed a stack of consumer instruments (identity documents and bank cards) on the consultants' cabinet, which he raised with the Respondent. Respondent's consultants addressed the inspectors and alleged said instruments to have been mistakenly left behind by consumers. The inspectors proceeded to register a case against the Respondent at the Vulindlela Police Station under case number 89/03/2020, and the prohibited instruments found were entered into the SAP13 logbook;
- d. No window decal was noted at the premises, nor was any valid and/or current NCR certificate displayed at the Respondent's premises.

22. A sample of ten (10) consumer files was provided to the inspectors upon request. Seven (7) of the consumer files so provided were files linked to the consumer instruments found at the business premises, and three (3) consumer files were randomly selected by the inspectors.

23. The Inspectors assessed these credit agreements and drafted a report.⁶

APPLICANT'S SUBMISSIONS

⁶ See Annexure WQ 5 before the Tribunal.

24. The Applicant's founding affidavit is attested to by Mrs Anne-Carien Du Plooy, the Acting Manageress within the Applicant's Investigations and Enforcement Department. This founding affidavit provides details of the Respondent's repeated contraventions of the Act and Regulations.
25. According to the Applicant, the Respondent has failed to operate its business in a manner that is consistent with the purpose and requirements of the Act.
26. The Applicant alleges that the conduct exhibited by the Respondent constitutes critical contraventions of the Act, which repeatedly occurred, as appears from the Investigation Report.
27. The Applicant states that a comprehensive assessment of the documents obtained from the Respondent shows that it committed the following contraventions:-

a) Failure to conduct affordability assessments

The Act dictates that a credit provider must not enter into a credit agreement without first taking reasonable steps to assess the proposed consumer's general understanding and appreciation of the risk and costs of the proposed credit agreement, the debt repayment history of the consumer under credit agreements and the proposed consumer's existing financial means, prospects and obligations, as stipulated in Section 81(2) of the Act.

Section 80 of the Act stipulates that credit is reckless if at the time the agreement was made, the credit provider failed to conduct an assessment in terms of Section 81(2) of the Act, irrespective of the outcome of such as assessment, before entering into a credit agreement with a consumer.

Section 81 (3) of the Act stipulates that a credit provider must not enter into a reckless agreement with a prospective consumer.

Regulation 23A of the National Credit Regulations prescribes the standards to be applied and the procedure to be followed when conducting affordability assessments, which standards and procedures be met and adhered to before extending credit to consumers.

In the sampled agreements, Annexures "G2" to "G4", "G6", "G9" and "G10" of the Investigation Report, the Respondent failed to obtain credit bureau reports of consumers and, as such, was not in a position to ascertain the consumers' existing monthly debt repayment history prior to extending the credit to consumers. A credit bureau report is the only reliable and objective source for a credit provider to obtain information relating to a consumer's debt repayment history. A credit bureau report is another reliable and objective source from which a credit provider can ascertain and calculate a consumer's current debt repayment obligations. In this regard, it is alleged that the Respondent accordingly contravened Section 81(2)(a)(ii) read with Regulation 23A(12)(b) and 23A(13) of the Act.

There were instances where the Respondent failed to obtain any and/or current salary advice of consumers and/or any bank statements of consumers to ascertain the consumers' income (see Annexures "G2", "G4" and "G6" of the investigation report).

In respect of Annexure "G6", the record reflects a salary advice dated the 15 April 2019, and the loans were extended monthly up to the 18 February 2020. The Respondent was not in any position to ascertain the consumers' current financial means, prospects and obligations at the time of extending such credit to the consumers.

Although a bank statement and salary advice is noted on record for the consumer in Annexure "G4", it is noted that the incomplete bank statement was obtained for a loan extended by the entity Super Dragon and not for purposes of a loan extended by the Respondent. Further to this, even if it is argued that the bank statement in question was on

record and was somehow used for purposes of an assessment in respect of the Respondent, which is denied, it should be noted that the consumer entered into more than one loan within the year 2019 and the next. Loans were extended to the consumer on 4 October 2019, 18 November 2019, and 17 February 2020. The evidence suggests that the Respondent received and accepted an outdated and incomplete bank statement. The salary advice on record reflects a date of 31 December 2016; as such, it is evident that current salary advice was not obtained from the consumer by the Respondent prior to extending the loans.

This is a contravention of Section 81(2)(a)(iii) read with Regulation 23A(3) and 23(A)(12) (c) of the Act.

Further, the Respondent failed to obtain any information pertaining to consumers' monthly living expenses, nor did it obtain completed income and expenditure declarations from said consumers, which is standard practice throughout the industry and is considered the bare minimum starting point of conducting a proper affordability assessment (see Annexures "G2", "G3", "G4", "G6", "G9", and "G10"). A very concerning point to have regard to is the fact that the Respondent obtained incomplete and/or blank declarations that consumers signed.

b) Minimum Expense Norms

On all the assessed files ("G1" to "G10"), the Respondent failed to apply the minimum expense norms table or was unable to provide evidence that this table had been taken into consideration. This is a contravention of Regulation 23A (9) of the Act.

c) Reckless credit

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.

As a result of the Respondent not conducting any/proper affordability assessments, as set out above, the Respondent extended credit recklessly to consumers and has therefore repeatedly contravened Section 81(3) read together with Section 80(1)(a) of the Act.

The Respondent, as evidenced in Annexures "G3", "G9", and J'G10", extended credit to consumers who received child support grants, income which has to be used to the benefit of third parties (the child and/or children) and not the consumers and therefore cannot be deemed to be the income of the consumers. The aforesaid loans were accordingly extended recklessly to the aforementioned identified consumers. The Applicant viewed the use of child support grants in this matter as one of the most egregious offences.

During its investigation, the Applicant viewed the files of Annexure "G3" and "G9" and found that these consumers had insufficient discretionary income to afford the instalments of the credit agreements entered into.⁷

In addition, Section 80(1)(b)(ii) stipulates that a credit agreement is reckless if, at the time the agreement was entered into, the preponderance of information available to the credit provider indicated that entering into that credit agreement would make the consumer over- indebted.

⁷ See pg 24 of the Tribunal record illustrating these examples.

The Respondent accordingly repeatedly contravened Section 81(3) read together with Section 80(1)(b)(ii) of the Act.

d) Alternative contravention: Failure to keep records

Section 170 of the Act stipulates that a credit provider must maintain records of all applications for credit, credit agreements and credit accounts in the prescribed manner and form and for the prescribed time period.

Regulation 55(1)(b)(vi) and (vi) stipulate that a credit provider must maintain pre-agreement statements and quotations and all documentation in support of any steps taken in terms of section 81 (2) of the Act.

Alternatively, suppose the Applicant is not successful in proving reckless credit by the Respondent. In that case, the Applicant submits that the Respondent failed to keep and maintain records of the documentation in support of the steps taken in terms of Section 81(2) of the Act. Thus the Respondent repeatedly contravened of Section 170 of the Act read with Regulation 55(1)(b)(vi).

e) Pre-Agreements not in the prescribed form

An examination of all the consumer files ("**G1**" to "**G10**") shows that the Respondent's pre-agreement statements and quotations are not in the prescribed form, which is Form 20.1. For example, certain critical information is lacking from client files in Annexures "G2", "G3", "G4", "G6", "G9" and "G10" in that the pre-agreement statements and quotations provided to and signed by customers were:

- Blank;
- failed to reflect the Respondent's name, address, contact details and NCR registration number;

- failed to reflect the consumer's name, address and contact details;
- failed to disclose the proposed cost of credit and amounts;
- failed to set out the exact rand value of the cost of credit payable in terms of the agreement.

Therefore, the Respondent has contravened Section 92(1) read with Regulation 28(1) and Form 20 of the Act.

f) Credit agreements not in the prescribed form

Section 93(1) and 93(2) of the Act, read with Regulation 30(1) of the Act, provides that the Respondent must provide a consumer with a document that records his/her credit agreement with the Respondent and that such credit agreement must be in the prescribed form and must contain the prescribed content, as prescribed in Form 20.2 in Schedule 1 of the Regulations

An examination of all the consumer files (Annexures "G211", "G3", "G4", "G6", "G9" and "G10") demonstrates that the Respondent failed to provide consumers with credit agreements in the prescribed form in that critical information has been omitted from the agreements. The information lacking is as follows: Respondent's full name; Respondent's NCR registration number; Respondent's contact number; Respondent's physical address; Consumer's name, address and contact details; A completed payment schedule and a full disclosure of the cost of credit; Information pertaining to payments, the frequency thereof; the number of payment and the first and last repayment date; The consumer's rights to terminate the agreement in terms of Section 122 of the Act; the Respondent's rights to terminate the agreement in terms of section 123 of the Act; Penalty interest on the amount in arrears; and the marketing option as set in Section 74(6) of the Act.

In this regard, the Respondent has contravened Section 93(2) read with Regulation 30(1) and Form 20.2 of the Act.

g) Possession and retention of prohibited instruments

Section 133 of the Act deals with prohibited collection and enforcement practices and stipulates that-

- (1) *A credit provider must not-*
 - (a) *make use of any document, number or instrument referred to in section 90(2)(1) when collecting on or enforcing a credit agreement; or*
 - (b) *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)(1).*

The investigators found that the Respondent had retained prohibited instruments on its premises and the Applicant concluded that such retention was done for the purpose of ensuring repayment in respect of the credit agreements entered into. The Applicant accordingly submits that the mentioned instruments were used for collection and enforcement purposes in contravention of Section 133(1) and (2) read with Section 90(2)(1) of the Act.⁸

⁸ See Annexure "F" of the Investigation report for an inventory list.

In terms of Section 133(3) of the Act, a person who contravenes this section is guilty of an offence. A case docket was opened against the Respondent and the matter is currently under investigation.

h) Overcharging of interest

Section 100 (1) (c) of the Act prohibits a credit provider from charging an amount or imposing a monetary liability on the consumer in respect of an interest charge under a credit agreement exceeding the amount that may be charged consistent with the Act.

Section 101(1)(d)(ii) of the Act stipulates that interest charged must not exceed the maximum prescribed rate determined in terms of Section 105 of the Act. Regulation 42(1) table A of the Act stipulates the maximum prescribed interest per month on short-term loans as 5% interest per month and 3% interest for loans subsequently granted to the same consumer.

It is evident from the credit bureau reports that the Respondent entered into subsequent loans with consumers within the same calendar year. See "G2", "G4" and "G6". These subsequent loan agreements indicate that the Respondent charges 5% interest regardless of whether this is a repeat loan.

During the interview, the Respondent admitted to charging 28% interest on its agreements. This was also evidenced in Annexures "G2", "G3", "G4" and "G6", which show that the Respondent charges exactly 28% interest on its credit agreements, which equates to a staggering **23%** overcharge on interest per month. Furthermore, Annexures "G2", "G4" and "G6" show that subsequent loans were extended to consumers within the same calendar year and were charged 28% interest for these loans.

Other examples can be found in Annexures "G9" and "G10" where the calculation of the difference between the deferred amount and actual repayment amount (R290.00) equates to 58% ($R500.00 \times 58\% = R790.00$).

In the absence of any evidence that other fees were charged in accordance with Section 101 of the Act and more so, with specific reference to the admissions made during the investigation, the Applicant submits that the Respondent charged a rate of 29% interest per month in respect of the two aforesaid loans which equates to an overcharge of 24% interest per month.

The Respondent has overcharged interest in contravention of Section 100(1)(c) and Section 101(1)(d)(ii) read with Regulation 42(1) of the Act. By overcharging consumers in this manner, the Respondent has further committed an offence in terms of Section 100(3) of the Act.

i) Annual financial statements and annual financial operational returns

Section 52 (5) (c) of the Act provides that a registrant must comply with its registration conditions and the NCA provisions.

Regulation 62 of the Act obliges each registrant to submit to the NCR amongst other reports and returns, Statistical Returns and Annual Financial and Operational Returns. Regulation 68 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.

In terms of General Condition 3 of the Respondent's Condition of Registration, the Respondent is required to submit reports and returns within the specified periods.

The Applicant's records demonstrate that the Respondent has, in recent years, failed to submit its annual financial statements and operational return, Form 40. The latest reports were submitted in February 2019.⁹

⁹ See Annexures "WQ7" and "WQ8".

The Respondent, therefore, contravened Section 52 (5) (c) and (f) of the Act read with General Conditions of the Respondent's Conditions of Registration read further with Regulation 62 (1) (c) and read further with Regulation 66 of the Act.

THE TRIBUNAL'S FINDINGS

28. The Respondent did not file an answering affidavit. Neither the Respondent nor its legal representative was present at the hearing. Due to their non-appearance, the Tribunal heard the matter in their absence in terms of Rule 24(1) (b)(i) of the NCA.

29. Only the Applicant's uncontroverted documentary and oral version of the evidence is before us. Rule 13(5) of the Tribunal Rules states –

"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."

30. After considering the evidence before us, we find 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. By failing without reason to appear at the hearing, the Respondent has lost the opportunity to put up a defence and has placed itself in the hands of the Tribunal. We view all these factors seriously, as they undermine the NCA and its purpose.

31. The Applicant has made out a case against the Respondent and has proven on a balance of probabilities that the Respondent has repeatedly contravened the provisions of the NCA, the Regulations and the conditions of its registration. The Respondent has contravened the following provisions:

- Section 52(5)(c) read with General Condition 2 of its General Conditions of Registration;
- Sections 81(2)(a)(ii) and (iii) of the Act read with Regulation 23A(3), 23A(8), 23A(9), 23A(12)(a), 23A(12)(b) and 23A(12)(c) of the Act;
- Section 81(3) read together with Section 80(1)(a) of the Act;
- Section 81(3) read together with Section 80(1)(b)(ii) of the Act;
- Alternatively Section 170 of the Act read with Regulation 55(1)(b)(vi);
- Section 92(1) of the Act read with Regulation 28(1) and Form 20 in Schedule 1 of the Regulations;
- Section 93(2) of the Act read with Regulation 30(1) and Form 20.2 in Schedule 1 of the Regulations;
- Regulation 23A(15) of the Act;
- Section 3(e)(ii) of the Act;
- Section 100(1)(c) and 101(1)(d)(ii) of the Act read with and Regulation 42(1);
- Section 133(1) and (2) read with Section 90(2)(1) of the Act;
- 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 62(1)(c) and Regulation 66.

CONSIDERATION OF AN APPROPRIATE ORDER

32. The Applicant persisted with its request for the orders set out in the application.

Administrative fine

33. The Applicant requested the Tribunal to impose an administrative fine on the Respondent. We are 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. As pointed out in previous Tribunal decisions, one of the central tenets of the NCA is to promote responsible credit granting and to prohibit reckless credit granting. The Respondent's contraventions fall squarely within the ambit of the operations that the NCA seeks to prohibit. The Tribunal must send a strong message to the credit industry that such conduct will not be countenanced.

34. Section 151 (3) of the Act sets out the factors we must consider when determining an appropriate fine. These are:

- “(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.”

35. The Applicant addressed all the aspects mentioned above in its founding affidavit, and Mrs Swartz amplified them when she addressed us at the hearing:

- a) The nature, duration, gravity and extent of the contraventions** Although only 10 sample files were extracted, the Applicant argued that the Respondent had entered into about 3800 credit agreements. The Applicant argued that having regard to the sample of files and the number of contraventions identified from that batch, the nature and extent of the contraventions warrants serious action against the Respondent. Over an extended period, the Respondent has continuously committed serious

contraventions, which has a huge economic impact on consumers who are placed in a dire situation.

b) Loss or damage suffered as a result of the contraventions

The Applicant argued that consumers have suffered loss and/or damage due to the Respondent's conduct. The Respondent exploited consumers by entering into loan agreements without taking reasonable steps to ensure that the loans were affordable. The lack of proper affordability assessments results in reckless credit being granted. The damage to consumers' economic status is far-reaching if they, as a result of over-indebtedness, apply for and are placed under debt review. Consumers have further suffered direct financial losses due to the Respondent's overcharging interest.

c) Behaviour of the Respondent

As a registered credit provider since 2018, the Respondent has no excuse to claim that it is unaware of the provisions of the Act. The Respondent has a statutory obligation to adhere to the provisions of the NCA, the regulations and its conditions of registration. The Respondent also contravened the Act by retaining instruments for enforcement purposes. Criminal proceedings will ensue.

d) Market circumstances under which the contraventions occurred

The Applicant submitted that the Respondent's conduct illustrates that the market circumstances are those in which consumers are in a cycle of ongoing debt and are in a desperate financial situation. These consumers are often unaware of their rights and are vulnerable to exploitation, and, indeed, the Respondent has

exploited them. A quarter of some consumer's child support grant was going towards their loan repayments. The Applicant stated that this was one of the worse contraventions they had investigated.

e) Level of profit derived from contraventions

It was impossible to establish the level of profit because the Respondent has filed its statutory returns since 2019, which indicated a revenue of R900 000 (nine hundred thousand Rand) per annum, and it has not filed an answering affidavit to explain whether it is making a profit from its activities subsequent to that. However, it may be assumed that a substantial profit has been derived from its actions because it charges excessive interest. It grants credit to consumers who should not have received it because they were already overindebted.

f) Degree of co-operation between the Respondent and Applicant

The Applicant has not investigated the Respondent before this matter. However, the Applicant argued that the systematic nature of the contraventions indicates that the Respondent's conduct has been ongoing for a substantial period before the investigation.

36. The Applicant submitted that in repeatedly contravening the Act, the Respondent displayed little or no regard for the spirit and purposes of the Act. The Respondent's continued participation in the credit market and more egregiously taking support grants places consumers at substantial risk of further financial harm.

37. Considering all these factors, the evidence before us, and the conduct displayed, we believe that it is in the interests of justice for an administrative fine

to be imposed on the Respondent. We accept that in the circumstances of this application, the purpose of an administrative fine is a punitive measure.¹⁰ However, we believe that a fine is warranted in this instance.

38. Regarding the amount of the administrative fine, Section 151(2) of the NCA provides that an administrative fine imposed may not exceed **the greater** (our emphasis) of 10% of the Respondent's annual turnover during the preceding financial year; or one million Rand (R1 000 000.00).¹¹ In this regard, it is useful to consider other Tribunal decisions where similar matters have been dealt with.

39. In *NCR v Akudle Kutishiyele*¹² the Tribunal imposed an administrative fine of one million Rand (R1 000 000.00) to reflect the seriousness with which the Tribunal viewed this type of prohibited conduct.

40. In *NCR V EZ Trade 490 CC*¹³ the Tribunal also imposed a fine of one million Rand (R1 000 000.00). In this matter, the Applicant could not present any financial statements; however, taking all the listed factors into account, the Tribunal found it an appropriate sanction.

41. In *NCR v Orel Enterprises Pty Ltd*¹⁴, the Tribunal found that the Respondent's conduct had displayed little or no regard for the spirit and purpose of the Act. The Respondent had repeatedly contravened the Act, which was deemed an aggravating factor. The Tribunal also imposed a fine of one million Rand (R1 000 000).

42. The imposition of an administrative penalty is an important decision that cannot be taken lightly as it has severe consequences for the Respondent. However,

¹⁰ *NCR v Midwicket Trading 525 CC t/a Butterfly Cash Loans* NCT/7962/2013/57(1).

¹¹ See *Shoprite Investment Limited v NCR Gauteng* Division of the High Court Case Number: A509/2107 where the court held that if 10% of the annual income of a respondent exceeds R 1 000 000, 00, the Tribunal may impose such amount. But if the 10% annual income is less than R 1 000 000, 00, the Tribunal may impose a fine of R 1 000 000, 00.

¹² NCT/19294/2014/140(1).

¹³ NCT/38719/2016/57).

¹⁴ NCT/183368/2021/57 (1)

the Respondent has not appeared at this hearing. Therefore, we did not benefit from hearing the Respondent's side in mitigation of the allegations raised by the Applicant. It has not put forward any reasons why we should not accept the Applicant's submissions in its pursuit to impose an administrative fine of one million Rand (R1 000 000.00).

Appointment of an auditor

43. Although the Inspector only examined ten (10) files, the Applicant has shown serious contraventions in each of the files examined. This raises serious concerns about the nature of the Respondent's business practices and what has occurred with all the other consumers. Therefore, in our view, an auditor's appointment is justified to establish all the consumers who the Respondent has exploited. Once the Applicant receives a report from the auditor, it can seek redress from the Tribunal on behalf of those consumers.

ORDER¹⁵

44. Accordingly, we make the following order:

- (1) The Respondent has engaged in prohibited conduct by repeatedly contravening the following sections of the Act:
 - Section 52(5)(c) read with General Condition 2 of its General Conditions of Registration;
 - Sections 81(2)(a)(ii) and (iii) of the Act read with Regulation 23A(3), 23A(8), 23A(9), 23A(12)(a), 23A(12)(b) and 23A(12)(c) of the Act;
 - Section 81(3) read together with Section 80(1)(a) of the Act;

¹⁵ In respect of the interdict contained in the Applicant's prayer, which restrains the Respondent from engaging in reckless credit in future we believe that the interdict will serve no purpose as the Respondent may in any event in view of the provisions of the Act, not engage in reckless credit. See also *Shoprite Investment Limited v NCR* where the High Court held likewise that an interdict would serve no purpose.

- Section 81(3) read together with Section 80(1)(b)(ii) of the Act;
 - Section 92(1) of the Act read with Regulation 28(1) and Form 20 in Schedule 1 of the Regulations;
 - Section 93(2) of the Act read with Regulation 30(1) and Form 20.2 in Schedule 1 of the Regulations;
 - Regulation 23A(15) of the Act;
 - Section 3(e)(ii) of the Act;
 - Section 100(1)(c) and 101(1)(d)(ii) of the Act read with and Regulation 42(1);
 - Section 133(1) and (2) read with Section 90(2)(1) of the Act;
 - 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 62(1)(c) and Regulation 66.
- (2) The Respondent's registration as a credit provider is now cancelled with immediate effect.
- (3) The Respondent must pay an administrative fine of one million rand (R1 000 000.00) into the National Revenue Fund referred to in section 213 of the Constitution of the Republic of South Africa, 1996 within 30 days of the date of this judgment.

The National Revenue fund account details are as follows:

Bank: Standard Bank of South Africa

Account name: Department of Trade, Industry and Competition

Account number: 370650026

Account type: Business current account

Branch code: 010645 (Sunnyside)

Branch code: electronic payments:051001

Reference: NCT-214099-2021-57(1) (Name of
depositor.)

- (4) The Respondent's credit agreements with consumers, contained in Annexures **G1** to **G10** of the Investigation Report (which is attached to the Applicant's founding affidavit), are declared reckless in terms of Section 80(1)(a) of the Act and:-
- (a) all of the consumers' obligations under those agreements are set aside; and
 - (b) the Respondent shall, at its own cost:-
 - (i) refund all the costs of credit charged and recovered from consumers under all such agreements;
 - (ii) 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;
 - (iii) take all steps as may be reasonably necessary to ensure that: any adverse credit bureau records which may have arisen as a result of the consumer having concluded such credit agreements with the Respondent are removed; and
 - (iii) any civil judgments taken by the Respondent against such consumers regarding such agreements are rescinded or, if rescission is not possible, abandoned.
- (5) The Respondent is further ordered to:
- (a) within 30 days, appoint an independent auditor, at its cost, to identify all credit agreements concluded by the

Respondent in the past three years to determine if any consumers were overcharged on interest and provide a list of such consumers as well as the amount by which each such consumer was overcharged.

- (b) Once the auditor has compiled its report, the Respondent must:
- (i) within 30 days from the date of the auditor's report, refund the consumers all amounts which exceeded the prescribed maximum amounts allowed by the NCA.
 - (ii) take the same steps as are set out in 41(4)(b) above, in respect of all such consumers who were overcharged.
- (6) Once the refunds, the Respondent must provide the auditor's report, together with a written report to the Applicant, detailing the identity of the consumers, the refunds made, and further steps as contemplated in 41(4) and (5). These reports must be provided to the Applicant within 120 days after the Respondent has received the Tribunal's order.
- (7) Further, the Respondent must ensure that the appointed auditor, identifies all the credit agreements which the Respondent entered into without properly conducting assessments in terms of section 81(2)(a) (iii) of the NCA. Once these consumers have been identified the Applicant is authorized to approach the Tribunal for an order declaring those agreements as reckless in terms of section 80(1)(a) of the NCA and for appropriate relief for those consumers.
- (8) There is no order as to costs

DATED THIS 27th DAY OF MAY 2022

(signed)

Prof K Moodaliyar

Presiding Member

Tribunal Members Mr T Bailey and Prof T Woker concur with this judgement.

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

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national consumer tribunal