

IN THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

Case number: NCT/213023/2021/140(1)

In the matter between:

NATIONAL CREDIT REGULATOR

APPLICANT

and

DEVCO AUTO CC

RESPONDENT

Coram:

Ms. P A Beck – Presiding Tribunal member

Adv. J Simpson – Tribunal member

Dr. M Peenze – Tribunal member

Date of hearing – 19 May 2022 via the Teams digital platform

Date of judgment – 27 May 2022

JUDGMENT AND REASONS

APPLICANT

- 1 The Applicant is the National Credit Regulator (“the applicant,”) a juristic person established in terms of section 12 of the National Credit Act, 2005 (“the Act”) to regulate the consumer credit market and ensure compliance with the Act. The applicant’s principal business address is 127 - 15th Road, Randjespark, Johannesburg, Gauteng.

- 2 Ms Lee-Anne Schwartz, a senior legal adviser in the applicant's Investigations and Enforcement Department, represented the applicant at the hearing of this matter.

RESPONDENT

- 3 The respondent is Devco Auto CC ("the respondent"), a close corporation registered in terms of the close corporation laws of the Republic of South Africa under registration number 1998/003030/23. The respondent's registered address is 80 Brighton Road, Kraaifontein, Western Cape.
- 4 The respondent was a registered credit provider in terms of section 40 of the Act with registration number NCRCP11607.
- 5 The respondent or its legal representative did not attend the hearing. Due to their non-appearance, the Tribunal proceeded to hear the matter in their absence, in terms of Rule 24(1)(c) of the NCA¹.

TERMINOLOGY

- 6 A reference to a section in this judgment refers to a section in the Act. A reference to a regulation refers to the National Credit Regulations, 2006 ("the regulations.")² A reference to a condition or general condition refers to the respondent's registration conditions as a credit provider in terms of section 40 ("the conditions.")³ Moreover, a reference to a form refers to a Form as prescribed in schedule 1 the regulations.

JURISDICTION

- 7 In addition to its other powers in terms of the Act, section 150 gives the National Consumer Tribunal ("the Tribunal") the power to make appropriate orders concerning prohibited or required conduct in terms of the Act or the Consumer Protection Act, 2008. This power includes declaring conduct to be prohibited in terms of the Act; interdicting prohibited conduct; confirming an order

¹ 1GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007 (Government Gazette No. 30225), as amended. Rule 24 (1) If a party to a matter fails to attend or be represented at any hearing or any proceedings, and that party-(a)...(b) is not the applicant, the presiding member may-(i) continue with the proceedings in the absence of that party.

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

³ Section 40 empowers the National Credit Regulator to impose conditions on the registration of an applicant as a credit provider.

against an unregistered person to cease engaging in an activity requiring registration in terms of the Act; requiring payment to the consumer of an excess amount charged together with interest set out in an agreement, or any appropriate order required to give effect to the Act.

APPLICATION TYPE AND THE RELIEF SOUGHT

8. This application is in terms of section 140(1) which empowers the applicant after completing an investigation into a complaint to, amongst other things; make a referral to the Tribunal if it believes a person engaged in prohibited conduct.⁴
9. The applicant sought orders declaring the respondent's conduct as prohibited conduct in terms of section 150(a) because it repeatedly contravened the Act and the regulations. It also sought orders interdicting the respondent from breaching the Act in the future, imposing an administrative fine on the respondent and granting remedial measures to affected consumers.
10. The allegations of prohibited conduct and the detailed order the applicant requests in this matter will become apparent in this judgment.

PROCEDURAL BACKGROUND

11. On 10 December 2021, the applicant filed this application with the Tribunal Registrar ("the registrar.")
12. On 13 December 2021, the registrar issued a notice of filing.
13. On 12 January 2021, the respondent filed a notice of appointment of Cilliers and Reynders as the respondent's attorneys of record. On 12 January 2021, the respondent filed an application for condonation for the late filing of the respondent's answering affidavit. On 16 March 2022, the Tribunal handed down a judgment granting the respondent condonation for the late filing of the respondent's answering affidavit.

⁴ The Act defines prohibited conduct as an act or omission in contravention of the Act.

14. Subsequent to the handing down of the aforementioned judgment, the respondent failed to file its answering affidavit.
15. Consequently, on 19 April 2022, the registrar issued a notice setting this matter down for hearing on 19 May 2022.
16. The applicant informed the Tribunal on the day of the hearing that the respondent's attorneys had withdrawn as the respondent's attorneys of record. The withdrawal notice was also filed with the registrar.
17. The Tribunal considered the procedural aspects in so far as it relates to service of the notice of set down of the matter. The Tribunal was satisfied that the notice of set down was properly served on the respondent in terms of rule 24(2) of the rules for the conduct of matters before the Tribunal detailing the date, time and venue of the hearing; and proceeded with the hearing in the absence of the respondent.

FACTUAL BACKGROUND

18. It is convenient to set out the parties material submissions that form the background to this matter.

Applicant's submissions

19. In October 2020, as part of its mandate to monitor the consumer credit market and industry, the applicant conducted a desktop compliance monitoring exercise on the respondent's business activities. The monitoring exercise report, dated 24 March 2021, revealed that the respondent was likely committing prohibited conduct. Consequently, on 26 May 2021, the applicant initiated a complaint in terms of section 136(2)⁵ of the Act and authorised an investigation into the respondent's business activities.
20. On or about 1 June 2021, the applicant appointed Dipuo Mokobane ("Mokobane") in terms of section 25 of the NCA to investigate the respondent's business activities.

⁵ Section 136(2) empowers the respondent to initiate a complaint in its own name.

21. On or about 4 June 2021, Mokobane held a virtual meeting with the respondent's representative, Devan du Plessis ("du Plessis,") the manager, owner and sole member of the respondent. At this meeting du Plessis provided Mokobane with an overview of its credit-granting policy and costs charged to consumers. Du Plessis provided Mokobane with ten (10) randomly selected consumer sample files ("the sample files") concerning ten (10) credit agreements that the respondent concluded with consumers.
22. Mokobane compiled an investigation report ("the investigation report") dated 9 September 2021.⁶
23. The investigation report details the alleged contraventions. The ten (10) sample consumer files are annexed to the investigation report to support the conclusions in the investigation report.⁷

Respondent's submissions

24. The respondent, at the interview with Mokobane, highlighted that –
 - 24.1 it charges 5% interest on all loans;
 - 24.2 initiation fees are charged at R100.00 per R1000.00 borrowed;
 - 24.3 it charges monthly service fees of R60.00;
 - 24.4 it charges 7% storage fees of the loan amount;
 - 24.5 it extends secured loans as "pawn transactions" using the consumers' fully paid up vehicles as security;
 - 24.6 the loan amount is determined by the value of the vehicle and is repayable within one month;
 - 24.7 consumers are required to sign vehicle ownership transfer forms prior to the approval of the loan, but ownership remains in the consumer's name until the loan is settled in full; and
 - 24.8 ownership of the vehicle is changed to the name of the respondent on default.

CONTRAVENTIONS OF THE ACT

⁶ Annexure FA6 of the founding affidavit Pg 73-88 of the bundle.

⁷ Annexures F1 to F10 of the investigation report Pg. 102-153 of the bundle.

Contravention 1: Failure to provide consumers with a credit agreement in the prescribed form

The Act

25. Section 93 concerns the form of credit agreements. Section 93(1) requires the credit provider to deliver to the consumer a copy of a document that records their credit agreement. Section 93(2) provides that a document that records a small credit agreement must be in the prescribed form.
26. Regulation 30(1) provides that the document must contain all the information reflected in form 20.2.

Alleged contravention

27. The applicant submitted that the respondent entered into pawn transactions with consumers; that these transactions fall within the definition of a small agreement; and must comply with section 93(2) read with form 20.2 of the Act.
28. The applicant alleged that the respondent provided all the consumers in the ten (10) sample files with a document entitled "*Pre-agreement statement and quotation and credit agreement*" that did not meet the requirements of a credit agreement as provided in Form 20.2 in Schedule 1 of the regulations. The respondent failed to comply with form 20.2 in that the document entitled "*Pre-agreement statement and quotation*" did not set out the value of the security; the frequency of payments; the consumer's rights and obligations when the consumer elects to settle the loan early in terms of section 125 of the Act; makes no mention of the consumer or the respondent's rights and obligations pertaining to early settlement of the loan as referred to in section 122 and 123 of the Act; and does not permit the consumer to elect marketing options. The respondent therefore contravened the Act in that it failed to disclose critical information in the credit agreements to all the consumers in the ten (10) sample files as required by the Act.

Analysis

29. The Tribunal considered the differences between pawn and secured loan transactions. In the matter *NCR v The Loan Company*⁸ the Tribunal considered the definition of a pawn transaction and a secured loan. The Tribunal found that the major difference between pawn and secured loan transactions is that in a pawn transaction the credit provider takes possession, of the pawned asset, whereas in a secured loan transaction, the credit provider “*retains, or receives a pledge to any movable property or other thing of value as security for all amounts due under that agreement*” not the immovable asset itself. In this matter, there is no evidence before the Tribunal that the consumers in the ten (10) sample files were driving their vehicles after the respondent extended credit to these consumers. Based on the evidence, the respondent took possession of the vehicles as a condition for granting the loan. Therefore, the vehicles were pawned by the consumers.
30. On the conspectus of evidence before the Tribunal, the Tribunal concludes that the respondent entered into pawn transactions that are small agreements with consumers as detailed in the ten (10) sample files, F1-F10, attached to the investigation report. The evidence is not disputed as no answering affidavit was filed by the respondent.
31. The Tribunal therefore finds and is satisfied on the evidence before the Tribunal, that the respondent contravened section 93(2) read with regulation 30(1) and form 20.2 by failing to provide consumers in the ten (10) sampled files, F1-F10, with credit agreements in the prescribed form.

Contravention 2: Overcharging of interest

The Act

32. Section 100 deals with prohibited charges. Section 100(1) stipulates that a credit provider must not charge an amount to, or impose a monetary liability on the consumer in respect of 100(1)(b) an amount of a fee or charge exceeding the amount that may be charged consistent with the Act.
33. Section 101(1) prescribes the cost of credit which a credit provider may charge in respect of a credit agreement. Section 100(1)(c) prohibits a credit provider from charging a consumer an amount or imposing a monetary liability that exceeds the amount consistent with the Act. In

⁸ NCT/140518/2019/140(1).

addition, section 101(1)(d)(ii) prohibits a credit provider from requiring the consumer to pay any money or other consideration, except interest, which must not exceed the applicable maximum prescribed rate determined in terms of section 105.

34. Regulation 42(1) table A of the Act stipulates that the maximum prescribed interest rate for short-term credit agreements is 5% interest per month; and 3% interest per month for subsequent loans extended in the same calendar year. Regulation 40(2)(b) of the Act determines that interest for a short term transaction must be calculated by multiplying the deferred amount for the month with the interest rate and then be divided by the number of days in the month.

Alleged contravention

35. The applicant alleges that the respondent charged consumers interest that exceeded the prescribed maximum limit in the Act.

36. The applicant submitted that in certain of the sampled files, it was found that the respondent charged an amount of interest in its credit agreements which exceeded the maximum prescribed amount permitted in terms of the Act. The evidence of the overcharge can be found in Annexures "F1," and "F5" annexed to the investigation report as follows:

- 36.1 In annexure F1, the consumer was granted credit of R11 000.00 (R10 000.00 loan plus R1000.00 initiation fee) at an interest rate of 5% re-payable, within 30 days. The respondent charged the consumer interest of R880.00 whereas the maximum amount of interest that could be charged is R550.00. This equates to an overcharge of R330.00. In so doing, the applicant alleges that the respondent contravened section 100(1)(c) read with section 101(1) (d) read further with Regulation 40(2)(b) and Regulation 42(1) of the Act; and

- 36.2 In annexure F5, the respondent concluded two separate short term credit agreements with the same consumer within the same calendar month and year. The first credit agreement was concluded on 15 March 2021; and the second credit agreement was concluded on 30 March 2021. The respondent charged interest of 5% per month in respect of both credit agreements instead of 3% per month in respect of the second credit agreement. In the case of the second credit agreement, the respondent charged interest of R2050.00 instead of

R1230.00 which amounts to an overcharge of R820.00. The applicant submits that the respondent therefore contravened section 100(1)(c) read with section 101(1)(d)(ii) read further with regulation 42(1) of the Act.

Analysis

37. The Tribunal is satisfied on the evidence before the Tribunal that the respondent contravened the Act and finds that the respondent contravened section 100(1)(c) read with section 101(1)(d)(ii) read further with regulation 40(2)(b) and regulation 42(1) of the Act.

Contravention 3 – Prohibited Charges

The Act

38. Sections 100 and 101 of the Act, respectively, deals with prohibited charges and the cost of credit.
39. Section 100(1)(a) precludes a credit provider from charging an amount to or imposing 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.
40. Section 101(1) prescribes the cost of credit which a credit provider may charge in respect of a credit agreement.
41. In terms of section 102(1) of the Act, if a credit agreement is an instalment agreement, a mortgage agreement, a secured loan or a lease, the credit provider may include in the principal debt deferred under the agreement any of the following items to the extent that they are applicable in respect of any goods that are the subject of the agreement-
- 41.1 an initiation fee as contemplated in section 101(1)(b), if the consumer has been offered and declined the option of paying that fee separately;
 - 41.2 the cost of an extended warranty agreement;
 - 41.3 delivery, installation, and initial fuelling charges;
 - 41.4 connection fees, levies or charges;
 - 41.5 taxes, licence or registration fees; or

41.6 subject to section 106 of the Act, the premiums of any credit insurance payable in respect of that agreement.

Alleged contravention

42. The applicant submitted that the respondent entered into pawn transactions with the consumers in files F1-F10. Furthermore, that it is clear from the respondent's pre-agreement statements and quotations that the respondent charges consumer's storage fees which charges are provided for under the heading "agreement summary." These fees or charges are not listed under sections 101(1)(a) to 101(1)(g) of the Act; nor are they fees or charges listed under section 102(1)(a) to (f) of the Act. In all of the ten (10) sample files attached to the investigation report, the respondent charged storage fees, which fees are not provided for in the Act, and in so doing, the respondent contravened the provisions of sections 100(1)(a) and 101(1) of the Act.

Analysis

43. The Tribunal is satisfied on the evidence before the Tribunal that the respondent contravened the Act and finds that the respondent contravened section 100(1)(a) read with section 101(1) read of the Act.

Contravention 4: Unlawful provisions in the pre-agreement statements and quotations

The Act

44. Section 3(e)(iii) of the Act states as follows:

"The purpose of this Act is 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 protect consumers by providing consumers with protection from deception and from unfair or fraudulent conduct by credit providers and credit bureaux."

45. Section 99(1)(b) of the Act provides that a credit provider who enters into a pawn transaction with a consumer must retain until the end of the credit agreement, and at the risk of risk of the credit

provider, any property of the consumer that is delivered to the credit provider as security under the credit agreement.

Alleged contravention

46. The applicant alleges that the respondent has within its pre-agreement statements and quotations annexed to each of the ten (10) sample consumer files (“F1-F10”) annexed to the investigation report, incorporated an unlawful clause at clause 3 that causes the respondent not to keep the consumers assets at the total risk of the respondent. The clause provides for risk mitigation and as such purports to avoid the respondent’s obligations or duty as stipulated in the Act; and further purport to set aside or override the provisions of section 99(1)(b) of the Act. The clause is accordingly unlawful.

Analysis

47. In considering the submissions of the respondent the Tribunal had regard to the matter of NCT v HJM Fick NO & JHF Fick NO.⁹ In this matter it was specifically raised that the Act expressly lists the fees a credit provider can charge. Anything else is expressly prohibited. It was further held in this matter, that just because a consumer voluntarily signed documents does not mean consumers’ were not required or induced to sign said documents.
48. On the evidence led by the applicant and the requirements of section 99(1)(b) of the NCA, the Tribunal is satisfied that the respondent has to bear the costs of storage to keep the consumer’s property safe. Accordingly, the Tribunal finds that the respondent has contravened section 90(1) read with section 90(2)(b)(ii) and (iii) read further with section 99(1)(b) of the Act.

Contravention 5: Failure to provide consumers with a credit agreement in the prescribed form

The Act

⁹ NCT/99222/2018/140(1.)

49. Section 93(2) of the Act stipulates that a document that records a small credit agreement must be in the prescribed form. Regulation 30(1) of the Act stipulates that a document that records a small credit agreement must contain all the information as reflected in Form 20.2.

Alleged contravention

50. The applicant submitted that in respect of all of the agreements sampled and that form part of the investigation report, the respondent's pre-agreement statements and quotations do not contain all of the required, prescribed content in that it does not include the following information:

- 50.1 it does not set out the value of the security;
- 50.2 the frequency of payments;
- 50.3 the consumer's rights and obligations when electing early settlement of the agreement in terms of section 125 of the Act;
- 50.4 the consumer's rights and obligations to terminate the agreement in terms of section 122 of the Act;
- 50.5 the credit provider's rights and obligations regarding termination in terms of section 123 of the Act; and
- 50.6 does not allow consumers to elect or make a decision on any marketing options in terms of section 74(6) of the Act.

;

Analysis

51. Accordingly, based on the aforementioned the Tribunal is satisfied and finds that the respondent contravened section 93(2) of the Act read with regulation 30(1) and form 20.2 of the Act in that the respondent failed to provide consumers with credit agreements in the prescribed form.

Contravention 6: Annual renewal fees

The Act

52. Section 52(5)(d) states that a registrant must pay the prescribed annual renewal fees within the prescribed time.

Alleged contravention

53. The applicant submitted that the respondent did not pay the respondent's 2020 annual renewal fees.
54. On 4 March 2021, the applicant sent the respondent an e-mail requesting payment of the respondent's 2020 annual renewal fees. Proof of payment of the respondent's 2020 annual renewal fees has not been provided to the applicant.

Analysis

55. Based on the submissions of the applicant and in the absence of any evidence to the contrary from the respondent who did not attend the hearing, the Tribunal finds that the respondent contravened section 52(5)(d) of the Act.

Contravention 7: Entering into credit agreements whilst not being registered as a credit provider

The Act

56. Section 40(1) of the Act provides that a person must apply to be registered as a credit provider if the total principal debt owed to the credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1.)
57. Section 40(3) of the Act stipulates that a person who is required in terms of subsection (1) to be a registered 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.
58. In terms of section 52(4)(b)(iii) of the Act a credit providers registration remains in effect until it has lapsed on the last day upon which the prescribed renewal fee should have been paid.

Alleged contravention

59. The applicant submitted that the respondent's registration as a credit provider lapsed when the respondent failed to make payment of the respondent's annual renewal fees and penalty fees for the year 2020. Payment of the 2021 annual renewal fees does not resuscitate the lapsed certificate; and as such the respondent should not have concluded any credit agreements with consumers after the lapsing of the respondent's registration certificate. As such the respondent should have re-registered should the respondent have wished to conduct the business of a credit provider

Analysis

60. The NCA clearly requires that a credit provider be registered prior to entering into credit agreements with consumers, except if those agreements are incidental credit agreements; or if section 89(4) of the NCA applies. It is undisputed that the respondent's agreements are not incidental credit agreements and that the agreements are pawn transactions. Section 89(1) of the NCA explicitly provides that "*This section does not apply to pawn transactions.*"

61. The Tribunal is thus empowered in terms of section 40(4) of the NCA to declare the credit agreements the respondent entered into with consumers (annexures F1-F10 to the Applicant's founding affidavit), in contravention with section 40(1) unlawful and void.

62. The Tribunal is therefore satisfied that the respondent by entering into the credit agreements annexed to the investigation report (marked as annexures F1-F10) whilst not being registered as a credit provider; and or whilst registration by operation of law has lapsed, the respondent was in direct violation of section 40(1) read with section 40(3) read further with section 52(4)(b)(ii) of the Act. Accordingly, the Tribunal finds that all such credit agreements are unlawful and void to the extent provided for in section 89 of the Act.

Contravention 8: Failure to submit Annual Financial Reports and Returns

The Act

63. Section 52(5)(c) of the Act states that a registrant must comply with the Act and its conditions of registration; and section 52(5)(f) of the Act stipulates that a registrant must file any prescribed reports with the applicant in the prescribed manner and form.
64. Regulation 62 of the Act obliges each credit provider to submit to the National Credit Regulator its Statistical Returns and Annual Financial and Operational Returns. Regulation 66 of the Act further provides that the Annual Financial and Operational Return in Form 40 must be submitted to the National Credit Regulator within 6 months after the registered credit provider's financial year end. In terms of General Condition 3 of the respondent's Conditions of Registration, the respondent is required to submit prescribed reports and returns within the prescribed period.

Alleged contravention

65. The applicant submitted that it received the respondent's Form 39 annual statistical return for the year 2020, however at the time of deposing to the founding affidavit on 9 December 2021, the respondent had not filed its annual financial operational returns.

Analysis

66. The Tribunal is satisfied and finds based on the submissions of the applicant, in the absence of any evidence to the contrary from the respondent who did not attend the hearing, that the respondent contravened section 52(5)(c) and (f) read with General Condition 3 of the conditions of registration as a credit provider, as well as regulations 62(1)(c) of the Act.

CONSIDERATION AND ANALYSIS OF THE APPLICANT'S EVIDENCE

67. The Tribunal considered the applicant's written submissions regarding the basis upon which it formulated a reasonable suspicion that the Respondent engaged in prohibited conduct. The applicant filed detailed submissions in its founding affidavit, as read with the investigation report.
68. There is no opposing view from the respondent. Accordingly, the Tribunal is satisfied that the applicant has provided sufficient argument and basis for establishing that there was reasonable suspicion formulated by the applicant that the respondent contravened the Act. The Tribunal is

seized only with the applicant's uncontroverted documentary evidence and oral submissions. The Tribunal deems the facts alleged by the applicant as admitted because the respondent elected not to attend the proceedings to defend itself by filing an answering affidavit.

69. After considering the evidence, the Tribunal finds that the respondent has repeatedly contravened the NCA, its regulations, and the conditions of its registration as a credit provider. These contraventions amount to prohibited conduct and are serious. The respondent, by failing without reason to file its answering affidavit after being granted condonation by the Tribunal to do so, and by failing to appear at the hearing, has forfeited the opportunity to put up a proper defence against the allegations levelled against it; and has left the matter in the hands of the Tribunal.
70. The Tribunal views this type of conduct in a serious light because it undermines the Tribunal, the purpose of the NCA, the consumers, and the NCR. Consequently, the Tribunal is satisfied that the applicant has proven on a balance of probabilities that the respondent has repeatedly contravened the relevant sections of the Act, regulations, and its conditions of registration in the preceding paragraphs. It an aggravating factor that the respondent entered into credit agreements with consumers whilst being unregistered.
71. The Tribunal proceeds to consider an appropriate order.

CONSIDERATION OF AN APPROPRIATE ORDER

Declaring the respondent to have repeatedly contravened the Act and committed prohibited conduct

72. Following the applicant's request, the Tribunal deems it appropriate to order that the respondent's repeated contraventions amount to prohibited conduct. The Tribunal proceeds to consider the applicant's other wide-ranging requested relief.

Administrative fine

73. The applicant requested that the Tribunal to impose an administrative fine on the respondent. The Tribunal is satisfied that the nature of the respondent's contraventions and the consequent financial implications for consumers justify the Tribunal imposing an administrative fine on the respondent.
74. The Act was introduced into the South African legislative landscape to curb precisely the type of conduct that the Tribunal has found the respondent to have perpetrated. Therefore, the Tribunal would be failing in its duty to not send a clear message to the respondent and other credit providers that the Tribunal will not tolerate credit providers contravening the Act.
75. Section 151 (3) sets out the factors the Tribunal must consider when determining an appropriate fine. The Tribunal proceeds to consider each in turn.

Nature, duration, gravity, and extent of the contraventions

76. The contraventions show that the respondent failed to provide consumers with pre-agreement statements and quotations in the prescribed form and containing the prescribed contents. It also granted credit at a time when it was not registered as a credit provider. These contraventions of the Act are severe. In particular, the respondent's overcharging on interest and charging consumers fees that are prohibited by the NCA, such as storage fees. Consumers were found to be victims of the respondent's unlawful conduct.

Loss or damage suffered as a result of the contraventions

77. The applicant did not place specific evidence before the Tribunal concerning the actual loss or damage suffered by consumers. Since the Tribunal has found that the respondent overcharged on interest and charged consumers fees prohibited by the NCA, it is satisfied that it may reasonably conclude that consumers suffered loss through the excessive interest charged and the unlawful vehicle storage charges. The Tribunal is satisfied that the respondent, through its conduct, caused consumers to suffer prejudice and financial loss.

Respondent's behaviour

78. There is no plausible reason why the respondent should not have complied with its obligations as a credit provider under the Act. The respondent has brought the consumer credit industry into disrepute and disregarded consumers' rights.

Market circumstances under which the contraventions occurred

79. It appears that the respondent simply ignored its obligations in terms of the Act. It could do so because it operates in an environment where consumers are ill-educated about their rights concerning access to and the cost of credit. It appears that the respondent's prohibited conduct caused ill-informed consumers to be exploited.

Level of profit derived from the contraventions

80. The applicant placed no evidence before the Tribunal of the precise profit derived from the contraventions of the respondent. It can be fairly assumed that a substantial profit has been derived from the activities of the respondent in contravention of the Act and regulations. Each loan extended unlawfully, the prohibited charges and excessive interest levied, constitute a profit gained by the respondent.

The degree to which the respondent co-operated with the applicant

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

Respondent's prior contraventions

82. The respondent has not been the subject of prior investigations or enforcement measures.

Amount of the fine

83. The imposition of an administrative penalty is an important decision that is not taken lightly by the Tribunal. It has serious consequences for the respondent. In this matter the Tribunal, did not have the benefit of hearing the respondent's side in mitigation of the allegations raised by the applicant

at the hearing. The Tribunal, based on the evidence led at the hearing, finds the applicant's submissions compelling on the contraventions of the Act by the respondent; and accepts the applicant's submissions in support of the imposition of an administrative penalty.

84. The Tribunal considered that the applicant did not produce evidence concerning the respondent's financial turnover during the previous financial year. Consequently, the Tribunal may impose a fine limited to a maximum of R1 000 000.00. I point out however, that in the matter NCR/EZ Trade 490 CC18, the Tribunal imposed a fine of R1 000 000.00. In this matter the applicant was not able to present any financial statements; however, taking all listed factors into account the Tribunal found it an appropriate sanction.

85. In NCR v Werlan Cash Loans t/a Lebathu Finance¹⁰ the Tribunal, regarding the imposition of an administrative fine, stated the following:

"When determining an amount, the Tribunal must consider the legislation from which its own mandate derives and when determining an appropriate fine the Tribunal must consider the following factors: the nature, duration, gravity, and extent of the contravention; any loss or damage suffered as a result of the contravention; the behaviour of the respondent; the market circumstances in which the contravention took place; the level of profit derived from the contravention; the degree to which the respondent has co-operated with the National Credit Regulator, or the National Consumer Commission, in the case of a matter arising in terms of the Consumer Protection Act, 2008, and the Tribunal; and whether the respondent has previously been found in contravention of this Act, or the Consumer Protection Act, 2008, as the case may be."

86. In NCR v Midwicket¹¹ the Tribunal found the following:

"One of the main purposes of an administrative fine is to serve as a means of deterring an offender from engaging in the prohibited conduct again. Where the offender's registration is cancelled and is thus no longer permitted to conduct business as a credit provider, one of the main reasons for the imposition of a fine falls away. The imposition of the fine then becomes purely punitive which would generally only be warranted in the most extreme of circumstances." Although the respondent appears to have been a relatively small credit provider, it is crucial to send a strong message to all credit providers that they cannot escape complying with the Act.

¹⁰NCT/3867/2012/57(1).

¹¹NCR v Midwicket Trading 525 CC t/a Butterfly Cash Loans NCT/7962/2013/57(1).

87. These considerations persuade the Tribunal that it is appropriate to impose an administrative fine of R250 000.00 on the respondent.

Appointment of an auditor

88. The Tribunal is aware that the investigation that led to this application comprised of a small sample of the respondent's consumer files. The Tribunal has found, amongst other things, that the respondent has extended credit unlawfully after the lapse of its registration. The evidence placed before the Tribunal means that the Tribunal cannot establish the extent of this practice. Therefore, it is appropriate to appoint an independent auditor to assess the situation and establish the facts.

Other requested orders

89. The applicant requested that the Tribunal make an order interdicting the respondent from engaging in prohibited conduct in the future. An interdict of this nature will serve no purpose because the respondent may not engage in prohibited conduct given the provisions of the Act.¹²

ORDER

90. Accordingly, the Tribunal makes the following order:

90.1 The respondent has repeatedly contravened the following sections of the Act, regulations and conditions of registration:

90.1.1 section 40(1) and section 40(3) read with section 52(4)(b)(ii) of the Act;

90.1.2 section 52(5)(c) read with general condition 2 of the respondent's conditions of registration;

90.1.3 section 52(5)(c) and (f) read with general condition 3 of the respondent's conditions of registration; read further with regulation 62(1)(c) and regulation 66;

90.1.4 section 90(1) and section 90(2)(b)(ii) and (ii) read with section 99(i)(b);

¹² *Shoprte Investments Ltd v The National Credit Regulator* (509/2017 dated 18 December 2019).

- 90.1.5 section 93 (2) read with regulation 30 (1) and form 20.2 in schedule 1 of the Act;
- 90.1.6 section 100(1)(a) and section 101(1); and
- 90.1.7 section 100(1)(c) read with section 101(1)(d)(ii) read further with regulation 42(1);

- 90.2 The repeated contraventions are prohibited conduct in terms of section 150 (a) of the Act;
- 90.3 The respondent has by its actions brought the consumer credit industry into disrepute and acted with disregard for consumer rights generally;
- 90.4 The respondent's credit agreements with consumers referred to in annexures F1 to F10 of the investigation report are unlawful in terms of section 40(4) of the Act and set aside;
- 90.5 Should the respondent have proceeded to repossess and/or sell any of the vehicles or pawned assets referred to in annexures F1-F10 of the investigation report, the respondent is ordered to immediately deliver the property back to the consumers, alternatively where sold, the respondent is ordered to pay the consumers the fair market value of the property, less the settlement value of the vehicle;
- 90.6 The respondent is further ordered to:
 - 90.6.1 within 30 business days of the date of issue of this judgment to appoint an independent auditor (who is registered as a chartered accountant,) at its own cost to determine and identify those consumers who have since the inception of the respondent's business charged fees in excess of the prescribed rates, more specifically interest, and compile a list of the mentioned affected consumers;
 - 90.6.2 Once the aforesaid auditor compiled the above-mentioned list, the respondent must refund the amounts received over and above the maximum prescribed amounts permitted by the Act, to each consumer within 30 business days of the auditor's report;
 - 90.6.3 Identify all the loans entered into whilst the respondent's registration lapsed and where the credit agreements are still in force and where all amounts owing thereunder have not been paid;
 - 90.6.4 The respondent is within 120 business days of the date of issue of this judgment, to furnish the independent auditor's report and the respondent's written report to the applicant detailing the consumers' identities, where refunds and write-offs were made;

90.7 The applicant may, upon receipt of the information in 90.6 on these papers, duly supplemented, apply to the Tribunal for an order setting aside the consumers obligations under those agreements;

90.8 The respondent is within 90 business days of the date of issue of this judgment to pay an administrative fine of R250 000.00 (two hundred and fifty thousand rand) into the National Revenue Fund's following bank account:

Bank: The Standard Bank of South Africa

Account holder: Department of Trade and Industry

Branch name: Sunnyside

Branch code: 05100

Account number: 317 650 026

Reference: NCT/213023/2021/140(1) and name of person or business making the payment.

90.9 There is no order as to costs.

DATED AT CENTURION ON THIS 27TH DAY OF MAY 2022

[Signed]

P A BECK

Presiding Tribunal member

Tribunal members Dr. M Peenze and Adv. J Simpson concur with this judgment.

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

Ground Floor, Building B

Lakefield Office Park

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