

**IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION**

Case Number: **NCT/182923/2021/57(1)**

In the matter between:

THE NATIONAL CREDIT REGULATOR

APPLICANT

and

TITUSG TRADERS (Pty) LTD

RESPONDENT

(Registration Number: 2017/085647/07)

(NCR Registration Number: NCRCP9727)

Coram:

Dr M. Peenze	–	Presiding member
Dr. L. Best	–	Member
Prof B. Dumisa	–	Member

Date of Hearing	–	17 March 2022
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Date of Judgment	–	27 March 2022
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JUDGEMENT AND REASONS

APPLICANT

1. The Applicant in this matter is the **NATIONAL CREDIT REGULATOR**, a juristic person established in terms of Section 12 of the National Credit Act 34 of 2005 (the “NCA” or the “Act”) (hereinafter referred to as “the Applicant”), with offices at 127 Fifteenth Road, Randjiespark, Midrand, in the Gauteng Province.
2. At the hearing, the Applicant was represented by Adv. Moosa Vardalia, a legal advisor in the employ of the Applicant.

3. The Applicant's Founding Affidavit is deposed to by Ms. AnneCarien Du Plooy, Acting Manageress for Investigations and Enforcement in the employ of the Applicant.

RESPONDENT

4. The Respondent (and the Registrant) is **TITUSG TRADERS (Pty) LTD**, a company duly registered as such with Company Registration Number 2017/085647/07, and also registered with the Applicant as a credit Provider under registration number NCRCP9727, with registered offices at 2 Coleskop Street, Rosedale, Upington, in the Northern Cape Province (hereinafter referred to as "the Respondent").
5. There was an Answering Affidavit from the Respondent, deposed by Mr. Gerhard Deon Titus, the Director of the respondent company (hereinafter referred to as "Mr. Titus").
6. At the hearing, the Respondent was represented by Mr. Quintin Zimmerman an attorney practicing under the name and style of Liddle and Associates Incorporated.

APPLICATION TYPE AND ORDER SOUGHT

7. This Tribunal derives the jurisdiction from hearing this matter under Section 57(1) of the National Credit Act, 34 of 2005 (the NCA). This is an application in terms of Section 57(1) of the NCA for the cancellation of the Respondent's registration as a credit provider allegedly due to the Respondent's repeated failure to comply with its conditions of registration and/or repeated contraventions of the Act.
8. The Applicant sought an order for the Respondent to refund the affected consumers.
9. The Applicant also sought imposition of an administrative fine on the Respondent.

MATTERS TO BE DECIDED

10. The Tribunal has to decide whether:
 - 10.1 The Respondent breached the provisions of the Act as alleged; and
 - 10.2 The appropriate sanction.

BACKGROUND

11. The Respondent was registered by the Applicant as a credit provider with registration number NCRCP 9727, with effect from the 7th September 2017, subject to General and Specific Conditions of Registration. The Respondent remains a registered credit provider.
 - 11.1 Sometime around October 2020, the Applicant received a tip-off from the South African Police Services, SAPS, Upington, in the Northern Cape Province, concerning the business practices of credit providers in the Upington area, who were suspected of contravening the National Credit Act.
 - 11.2 The Respondent was identified as one of the entities who was engaging in business practices that may be in contravention of the Act, that is, by charging costs of credit that are not in line with the Act and/or failure to conduct proper affordability assessments before the granting of credit agreements.
 - 11.3 On the 27th of October 2020, the Applicant initiated a complaint in terms of Section 136(2) of the Act and authorized an investigation into the activities of the Respondent in terms of Section 139(1)(c) of the Act. The scope of the required the appointed inspector to request 10 samples of the Respondent's credit agreements to determine the following:
 - 11.3.1 To establish whether the Respondent granted credit recklessly in terms of the Act; and
 - 11.3.2 Whether the Respondent is conducting proper affordability assessments as required by the Act before the approvals of credit agreements.
 - 11.4 On the 12th of November 2020 Ms. Dipuo Mokobane "Mokobane", an employee of the Applicant, was appointed in terms of Section 25 of the Act as an inspector for purposes of carrying out an investigation into the conduct of the Respondent.
 - 11.5 After that November 2020 appointment as an inspector, Mokabane established telephonic contact with Mr. Titus to inform him of the intention of the Applicant to inspect the business activities of the Respondent. On the 13th of November 2020, by email, she also forwarded him a Certificate of Mandate, an engagement letter, and an acknowledgment of rights in terms of

Section 139(4) form. On the 16th of November 2020, she received by way of email from Mr. Titus, a signed Acknowledgement of Rights form duly signed by Mr. Titus.

11.6 Once all the preliminary investigations protocols had been attended to, Mokobane informed Mr. Titus about the tip-off from the SAPS, concerning overcharging of interest and failure to conduct proper affordability assessments before the granting of credit agreements which resulted in consumers not being able to make payments thereof.

11.7 Mokobane requested Mr. Titus to provide an overview of the business practices and he explained as follows:

11.7.1 Respondent granted short-term loans between R500 to R8000 to consumers;

11.7.2 Respondent required a consumer to provide three months' bank statements, a copy of his / her identity document, proof of residence, and their most recent payslip;

11.7.3 The consumers were required to bring their bank cards and identity documents for activation of the debit cheque transaction which they activate from their mobile phones;

11.7.4 Respondent uses the Delphin program to conduct affordability assessments and to obtain credit bureau reports before granting credit;

11.7.5 The system calculates interest at 5 percent per month on the first loan and 3 percent on subsequent loans. They further charged service fees, initiation fees, and credit life insurance levy;

11.7.6 The consumers are not provided with Pre-Agreement Statements and quotations;

11.7.7 Respondent extends credit to the working class, SASSA beneficiaries (that is, Old Age grants and Disability grants), and Government Employees Pension Fund recipients;

11.7.8 Respondent does not grant loans to consumers who are under debt review and/or blacklisted;

11.7.9 Respondent does not retain prohibited instruments to enforce credit agreements;

11.7.10 They do not make arrangements with consumers who are in default on their credit agreements; and

11.7.11 Mr. Titus furthermore explained that all credit agreements concluded during Lockdown did not contain consumers' signatures for safety reasons. They were in the process of securing an electronic signature pad to facilitate the signature process.

11.8 Mokobane informed Mr. Titus she was under instructions, as part of her investigations, to request a list of approved credit agreements to select ten random samples of consumers' files. She emphasized that the files must be accompanied by specific supporting documents, such as the Pre-Agreement Statements and Quotations, Credit Agreements, Mechanisms used to conduct affordability assessments, and consumers' credit records. It was from these files provided by Mr. Titus that Makobane randomly selected ten credit agreements; and

11.9 It was from these ten randomly selected files that Mokobane's investigation was based.

SUBMISSIONS BY THE APPLICANT

12. During the investigation, the Respondent is alleged to have repeatedly breached various provisions of the Act, especially with regards to conducting appropriate affordability assessments:

12.1 The Respondent entered into credit agreements with consumers without first taking reasonable steps to properly and accurately assess consumers' debt repayment history, existing financial means, prospects and obligations;

12.2 The Respondent failed to obtain any credit bureau reports to assess consumers' debt repayment history before entering into credit agreements with the consumers. The Applicant argued that most of the files sampled showed that most of the Respondent's consumers were not credit-worthy;

- 12.3 They did not properly use the bank statements, obtained from the consumers, in conducting affordability assessments, and/or inaccurately assessed the consumers' financial position and/or their disposable incomes;
 - 12.4 They were not utilizing minimum expense norms in conducting affordability assessments – hence in breach of Reckless Credit Lending, as per Section 81;
 - 12.5 Their service fees charged exceeded the allowed fees levels;
 - 12.6 They used splitting of loans to maximize fees, hence increasing initiation fees; and
 - 12.7 Based on the above, the Applicant concluded that the Respondent had repeatedly contravened Section 81(2)(a)(ii) and (iii) read with Regulation 23A by failing to take reasonable steps to conduct an affordability assessment before approving a credit application.
13. The Applicant alleged that the Respondent disregarded the provisions of Regulation 23 of the Act, in that their business conduct amounted to reckless lending.
 14. In light of these repeated contraventions of the Act, the Regulations, and the Respondent's Conditions of Registration, the Applicant applied for the following orders from the Tribunal:
 - 14.1 In terms of Section 150(a) of the Act, declaring the conduct of the Respondent a contravention of the following sections of the Act, Regulations and Conditions of Registration:
 - (i) Section 81(2)(a)(ii) and (iii) read together with Regulation 23A, in that the Respondent failed to take proper steps in conducting affordability assessments and/or in the prevention of extension of reckless credit;
 - (ii) In terms of Section 83(2)(a) the Applicant seeks an order declaring the credit agreements entered into between the Respondent and the consumers to have been reckless lending in terms of Section 80(1)(a);

- (iii) Section 81(3) read together with Section 80(1)(b)(ii);
 - (iv) The Respondent generally failed to retain prescribed records in terms of Section 170 read with Regulations 55 and 56 of the Act;
 - (v) Section 100(1)(b) and Section 101(1)(c)(iii) of the Act read together with Regulation 44;
 - (vi) Section 100(1)(c) and Section 101(1)(d)(ii) of the Act read together with Regulation 42(1); and
 - (vii) Section 52(5)(c) of the Act read with general condition 6 of its conditions of registration as a credit provider.
- 14.2 Declaring the above-repeated contraventions to be prohibited conduct in terms of Section 150(a) of the Act;
- 14.3 Cancellation of the Respondent's registration as a credit provider in terms of Section 57(1)(a) of the Act;
- 14.4 Declaring that the Respondent has brought the consumer credit industry into disrepute further and/or declaring that the Respondent has acted with disregard for consumer rights generally;
- 14.5 Interdicting and restraining the Respondent from in future engaging in prohibited conduct;
- 14.6 Imposing an administrative fine upon the Respondent, in the amount of R1 million or 10 percent of the Respondent's turnover, whichever is the greater;
- 14.7 Declaring the Respondent's credit agreements with consumers, contained in the investigation report plus those others so audited and found to be reckless, to be declared as reckless in terms of Section 80(1)(a) of the Act and:
- 14.7.1 setting aside all of the consumers' obligations under those agreements; and

14.7.2 ordering the Respondent to, at its own costs:

14.7.2.1 refund all the costs of credit charged and recovered from consumers under all such agreements;

14.7.2.2 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;

14.7.3 Take all such steps as may be reasonably necessary to ensure that:

14.7.3.1 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;

14.7.3.2 Any civil judgments taken by the Respondent against such consumers in respect of such agreements, are rescinded or, if rescission is not possible, abandoned;

15. The Applicant also requested the Tribunal to order the Respondent to:

15.1 Within 30 days of the date of this judgment, appoint an independent auditor at its own cost, though subject to prior approval of the Applicant;

15.2 This Auditor must identify all credit agreements concluded by the Respondent in the past 3 (three) years, and identify all the agreements where the Respondent failed to take the steps required in terms of Section 81(2) of the Act; and

15.3 The Applicant will, at the conclusion of this independent auditor's exercise, bring an application to the Tribunal for those agreements declared reckless to be set aside, and all the consumers' obligations under those agreements to be set aside.

16. In terms of Section 150(i), the Tribunal may grant any other appropriate order required to give effect to consumers' rights in terms of the Act; and
17. Granting further and /or alternative relief.

SUBMISSIONS BY THE RESPONDENT

18. The Respondent did not necessarily raise many issues that challenged the submissions by the Applicant, other than raising a legal point that since the Applicant had not filed the Replying Affidavit the Respondent's submissions should be regarded as uncontested by the Tribunal:
 - 18.1 The Respondent accused the Applicant of just making bold allegations, in their founding affidavit, without any particularity;
 - 18.2 They said they did not engage in any loan splitting, arguing that the cases of loan splitting cited by the Applicant were simply cases where consumers simply chose to make different applications on the same day; and
 - 18.3 They argued they were no merits in the claims of reckless lending made by the Applicant, arguing that the mere act of granting two loans or more to a consumer in a very short space of time is not tantamount to reckless lending.
19. They spent more time and effort on justifying their use of the Delphen system, which they emphasized as incorporating credit bureau information.
20. They emphasized that an adverse credit bureau report does not necessarily automatically exclude one from getting credit if other factors favour the granting of such

APPLICABLE SECTIONS OF THE NCA

21. Section 57

Cancellation of registration

"(1) Subject to subsection (2), a registration in terms of this Act may be cancelled by the Tribunal on request by the National Credit Regulator, if the registrant repeatedly –

- (a) *Fails to comply with any condition of its registration ;*
 - (b) *Fails to meet a commitment contemplated in section 48(1); or*
 - (c) *Contravenes the Act.*
- (2) ...”

CONSIDERATION OF THE EVIDENCE BEFORE THE TRIBUNAL

22. At the hearing, the Applicant’s representative highlighted some of the transgressions by the Respondent, as fully detailed in their written submissions.
23. The Applicant’s representative spent more time highlighting that the Respondent had mainly totally disregarded all or most of the provisions of the Act. They gave detailed examples of many cases where the Respondent contravened the provisions of the Act, as detailed under their submissions.
24. On the other hand, the Respondent focused mostly on trying to justify their reliance on the Delphen program as their tool for affordability assessments.
25. On the issue of the Delphen system, the Applicant’s representative emphasized that the NCR has not endorsed any automated system as an appropriate tool for affordability assessments, adding that it is up to the Respondent to prove that they did comply with the Act.
26. The Applicant’s representative emphasized that credit providers must establish the consumer’s ability to meet their financial obligations before they are granted the loans; not thereafter by saying they were able to pay.

CONSIDERATION OF THE ORDERS APPLIED FOR

Cancellation of the Respondent’s registration as a credit provider in terms of Section 57(1)(a) of the Act

27. Section 57(1) empowers the Tribunal to cancel the registration of a credit provider where they repeatedly fail to comply with the conditions of registration or contravene the Act.

28. In the matter before the Tribunal, the Respondent has, by their conduct, contravened their conditions of registration.
29. The facts placed before the Tribunal clearly show that the Respondent repeatedly failed to comply with the Act, and this had a serious impact on the consumers they dealt with. In the circumstances, cancellation of their registration is justified.

Appointment of the Auditor to identify and Assist those consumers negatively affected by the Respondent's breaches of the Act

30. The Applicant requested the Tribunal to order the Respondent to:
 - 30.1 Within 30 days appoint an independent auditor, at its own cost, whose appointment shall be subject to the prior written approval of the Applicant;
 - 30.2 The independent auditor must identify all credit agreements concluded by the Respondent in the past 3 (three) years;
 - 30.3 The independent auditor must identify all the agreements that the Respondent entered into without properly conducting assessments in terms of Section 81(2)(a)(ii) of the Act;
 - 30.4 The independent auditor must compile a report, listing all the Respondent's breaches of the Act and the financial implications thereof, especially those agreements which qualify to be declared reckless agreements in terms of Section 80(1)(a); and
 - 30.5 It is based on this independent auditor's report that the Applicant can approach the Tribunal for the appropriate relief for the consumers who were affected by the reckless lending practices of the Respondent.

IMPOSITION OF AN ADMINISTRATIVE FINE

31. The Applicant requested the Tribunal to impose an administrative fine on the Respondent. We thus need to consider all the factors set out under Section 151(3) in determining an appropriate fine. The Tribunal will consider each of the following factors:
- 31.1 The nature, duration, gravity, and extent of the contravention;
 - 31.2 Any loss or damage suffered as a result of the contravention;
 - 31.3 The behaviour of the Respondent;
 - 31.4 The market circumstances in which the contravention took place;
 - 31.5 The level of profit derived from the contravention;
 - 31.6 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, Act 68 of 2008; and
 - 31.7 Whether the Respondent has previously been found in contravention of this Act, or the Consumer Protection Act, Act 68 of 2008, as this case may be.
32. The Tribunal, having considered all the factors listed above, is of the opinion that the imposition of an administrative fine on the Respondent is justified, given that the Respondent has been alleged to have repeatedly contravened provisions of the Act, over a longer period.

ORDER

Accordingly, the Tribunal makes the following order:

33. The Respondent's registration as a credit provider is cancelled with immediate effect.

34. The Respondent is ordered to appoint an order, at its own cost, in line with Paragraph 30 of this judgment, to identify all the consumers who were negatively affected by the Respondent's reckless lending practices.
35. The Respondent must, within Ninety days (90) days after the Tribunal order has been obtained, pay an administrative fine of R50 000 (Fifty Thousand Rand) to the bank account of the National Revenue Fund: Banking Details are as follows:

Bank Name	: The Standard Bank of South Africa
Account Holder	: <i>Department of Trade and Industry</i>
Branch Name	: Sunnyside
Branch Code	: 05100
Account Number	: 370 650 026
Reference	: NCT/182923/2021/57(1) and Name of Person or Business making payment

36. There is no order as to costs.

DATED ON THIS 27th DAY OF March 2022

Prof B. Dumisa
Member

Dr. M. Peenze (Presiding Member) and Dr. L. Best (Member) concurred

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

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