

IN THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

Case number: NCT/212864/2021/57(1)

In the matter between:

NATIONAL CREDIT REGULATOR

APPLICANT

and

MATHUSA BATHO FINANCIAL SERVICES CC

RESPONDENT

Coram:

Dr MC Peenze – Presiding Tribunal member

Ms H Alwar – Tribunal member

Adv C Sassman – Tribunal member

Date of hearing – 01 September 2022 via the Teams digital platform

Date of judgment – 07 September 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. Mr Roy Stocker, a senior legal adviser in the Applicant's Investigations and Enforcement Department, represented the Applicant at the hearing of this application.

RESPONDENT

3. The Respondent is Mathusa Batho Financial Services CC, trading as Bashasha Financial Services (the Respondent or Bashasha), a closed corporation registered as such in terms of the Companies Act of the Republic of South Africa, with CIPC registration number 2005/046111/23. The Respondent is also a registered credit provider with registration number NCRCP7912, with its registered business address situated at Plaas Lawton 7, Kroonstad, Free State Province.
4. The Respondent has been registered as a credit provider with the Applicant since April 2016, and it remains so registered to date, with annual registration renewal fees fully paid up, up to and including for the period 1 August 2020 to 31 July 2021.
5. The Respondent has one branch registered with the Applicant from which it conducts business, which is situated at 17 Van der Walt Street, Marquad, Free State Province. The Respondent was under voluntary liquidation at the time of the hearing and the Tribunal confirmed proper service to the appointed liquidator.
6. The Respondent or its liquidator did not oppose the matter or 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

7. A reference to a section in this judgment refers to a section in the National Credit Act² (the NCA or the Act). A reference to a Regulation refers to the National Credit Regulations, 2006 (the

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 Act no 34 of 2005.

Regulations).³ 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).⁴

TYPE OF APPLICATION AND THE RELIEF SOUGHT

8. This application is in terms of section 57 (1) of the NCA⁵. The Applicant approached the Tribunal to cancel the Respondent's registration as a credit provider.
9. The Applicant also seeks an order in terms of which the Respondent is to be found to be in repeated contravention of the NCA and its Regulations, and such contraventions to be declared prohibited conduct.
10. The Tribunal is further asked to make a finding of *reckless lending* because of other transgressions allegedly perpetrated by the Respondent. Based on these and other grounds, the Applicant also seeks an order for the imposition of an administrative fine on the Respondent.

JURISDICTION

12. The National Consumer Tribunal (the Tribunal) has jurisdiction to hear this matter in terms of section 27 of the NCA. It has powers conferred upon it in terms of section 150 of the said Act to make orders concerning a registrant who allegedly contravenes this Act or fails to comply with any condition of its registration.

ISSUES TO BE DECIDED

13. The issues to be decided are:
 - 13.1 whether or not the Respondent *has engaged in prohibited conduct by repeatedly contravening the provisions of the Act, the Regulations and the conditions of its registration, and because of that;*

³ Published under Government Notice R489 in Government Gazette 28864 of 31 May 2006.

⁴ Section 40 empowers the National Credit Regulator to impose conditions on an Applicant's registration as a credit provider.

⁵ In terms of Section 57(1) of the Act, 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) Failed to comply with any condition of its registration; and
- (b) Contravenes this Act.

- 13.2 whether or not its *registration must be cancelled*, and;
- 13.3 whether or not an *administrative fine* is a competent sanction to be imposed by the Tribunal in the circumstances.
14. Section 150 provides for *Orders of the Tribunal*, thus:
- "In addition to its other powers in terms of this Act, the Tribunal may make an appropriate order concerning prohibited or required conduct in terms of this Act, or the Consumer Protection Act, 2008, including-*
- (a) declaring conduct to be prohibited in terms of this Act;*
 - (b) ...;*
 - (c) imposing an administrative fine in terms of section 151, with or without the addition of any other order in terms of this section, or*
 - (g) suspending or cancelling the registrant's registration, subject to sections 57(2) and (3)."*
15. In deciding these issues, the Tribunal would first have to determine the individual foundational claims by the Applicant as canvassed in the notice of motion, relating to the alleged contraventions of the provisions of the NCA - that is:
- *s81(2)(a)(ii) and s81(2)(a)(iii), read with Regulation 23A;*
 - *s81(3) read with s80(1)(a);*
 - *s81(3) read with s80(1)(b)(ii);*
 - *s100(1)(b) read with Regulation 42(2); and*
 - *s100(1)(b), s101(1)(b)(i) and s101(1)(c)(iii), read with Regulations 42(2) and 44.*

FACTUAL BACKGROUND

16. This referral has its origins in a complaint initiated by the Applicant in its own name in terms of section 136(2) of the Act.
17. Section 15 of the Act requires from the Applicant to monitor the consumer credit market and industry to ensure that prohibited conduct is detected and prosecuted. In particular, the Applicant is mandated to investigate registrants and ensure they comply with the Act and their respective registrations.

18. The Applicant conducted a compliance monitoring exercise pursuant to its mandate during October and November 2020. The desktop compliance monitoring report, dated 9 November 2020, details the way the monitoring exercise was carried out and the subsequent findings made. It further created a reasonable suspicion that the Respondent was acting in contravention of the Act.
19. Subsequently, in February 2021, the Applicant initiated a complaint in terms of Section 136(2) of the Act and authorised an investigation into the activities of the Respondent.
20. On 2 February 2021, Douglas Musandiwa (Musandiwa), an employee of the Applicant, was appointed in terms of Section 25 of the Act as Inspector for purposes of investigating the conduct of the Respondent.
21. Due to the increased health and safety concerns brought about by the advent of the Covid-19 pandemic, the Applicant adapted its investigation process. Investigations were primarily conducted remotely, using video link applications or telephonic engagements.
22. On the 10th of February 2021, Musandiwa addressed an engagement letter to the Respondent informing it of the Applicants intention to investigate its credit business activities.
23. On the 18th of February 2021, Musandiwa conducted a virtual investigation via Microsoft Teams with the Respondent's representatives.
24. The Respondent's representatives provided an overview of their credit granting policy. After the interview, Musandiwa requested the file contents relating to ten randomly selected credit agreements. The Respondent subsequently provided these documents via email to the Applicant.
25. After completion of the investigation, Musandiwa submitted an Investigation Report (the Investigation Report) dated 20 April 2021.⁶
26. The Investigation Report details the alleged contraventions. The ten (10) sampled consumer files are annexed to the Investigation Report to support its conclusions.⁷

⁶ Annexure FA6 and FA7 of the founding affidavit.

⁷ Annexures D1 to D10 of the Investigation Report.

CONTRAVENTIONS OF THE ACT

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

27. In terms of sections 81(2)(a)(ii) and (iii) of the Act, a credit provider must not enter into a credit agreement without first taking reasonable steps to assess the debt repayment history of the consumer under credit agreements as well as the consumer's existing financial means, prospects and obligations.
28. Regulation 23A prescribes the procedure to be followed for purposes of conducting an affordability assessment prior to granting credit. It requires credit providers to do the following: -
 - 28.1. Sub-Regulation 3 requires that a credit provider must determine a consumer's discretionary income to determine whether the consumer has the financial means and prospects to pay the proposed credit instruments;
 - 28.2. Sub-Regulations 8 to 12 require that credit providers determine consumers' gross income, statutory deductions therefrom, living expenses, other existing debt obligations and maintenance obligations and any other necessary expenses for the credit provider to calculate the discretionary income available to the consumer. A minimum expense amount to be considered is imposed under Table 1, under sub-Regulation 10;
 - 28.3. Sub-Regulation 12(b) requires that a credit provider ascertain, by way of a report from a registered credit bureau, a consumer's existing debt obligations;
 - 28.4. Regulation 23A (13) deals explicitly with debt repayment history. It provides that, when conducting the affordability assessment, a credit provider must consider the consumer's debt repayment history as a consumer under credit agreements as envisaged in section 81(2)(a) and must ensure that this requirement is performed within seven business days immediately prior to the approval of credit; and
 - 28.5. In terms of Regulation 23A (8), a credit provider must make a calculation of the consumer's existing financial means, prospects and obligations as envisaged in sections 78(3) and 81(2)(a)(iii).
29. The purpose of obtaining a consumer's credit bureau report is to, amongst others, ascertain a consumer's current debt repayment obligations so that the consumer's discretionary income can be

calculated with a reasonable degree of accuracy to be satisfied that the consumer has enough funds available to satisfy new the debt repayment occasioned by the proposed loan.

30. As apparent from the Respondent's files sampled in the Investigation Report, it is evident that the Respondent failed to conduct proper affordability assessments, in that it failed to take steps to assess consumers' debt repayment histories and failed to assess consumers' existing financial means prospects and obligations. Specifically, the Respondent failed to fulfil the following requirements:
 - 30.1. The credit provider must properly assess consumers' income. From the files sampled, the Applicant demonstrated how the Respondent failed to properly assess the consumers' income and failed to properly calculate the consumers' discretionary income. Income documentation on record was either outdated, incomplete or unsatisfactory evidence of the consumers' income;
 - 30.2. The credit provider must take any reasonable steps to ascertain and assess consumers' monthly living expenses. Living expenses are generally ascertained from two sources. Firstly, from the consumers themselves, generally by way of a detailed income and expenditure declaration form the consumer must fill in and sign. Secondly, from consumers' bank statements. In this matter, the files sampled lacked evidence indicating an attempt to verify the consumers' income. Most files did not contain banks statements, payslips or proof of receiving any pension or grant, to prove the income of the consumer. Where the Respondent obtained income information, it was superficial and inadequate. Regarding bank statements, it is clear that the Respondent did not consider or utilize (as part of its assessments) the contents of consumers' bank statements;
 - 30.3. The credit provider cannot *only* apply the minimum expense norms in its affordability assessments. The Respondent must take steps to ascertain consumers' actual living expenses. According to the evidence before the Tribunal, the Respondent effectively did not consider living expenses a part of its affordability assessments. Therefore, the Respondent could not hope to make a reasonably accurate calculation of consumers' discretionary income. Thus, the Respondent could not reasonably assess whether the consumers had the financial means to satisfy the loan repayment under the credit agreements in question. By leaving living expenses out of the equation, as it were, the Respondent invariably overestimated consumers' discretionary income available. Accordingly, the likelihood of granting credit to consumers who could not afford the repayments increased; and

- 30.4. The credit provider must obtain credit bureau reports before entering credit agreements. A credit bureau report is an essential document for carrying out a proper affordability assessment. Firstly, it is the only objective, reasonably accurate, and complete source from which a credit provider can obtain information about a consumer's debt repayment history. Suppose a credit provider fails to obtain and assess the information in a bureau report before entering a credit agreement with a consumer. In that case, it has, on that basis alone, breached its obligations as set out in section 81(2)(a)(ii). Secondly, it is the only reasonably accurate and complete source from which a credit provider can ascertain and calculate a consumer's current debt repayment obligations. By not obtaining a bureau report, or obtaining a bureau report after extending credit, the Respondent ultimately failed to assess consumers' debt repayment history as a consumer under credit agreements, in contravention of Section 81(2)(a)(ii) read with Regulation 23A(13). Another fundamental reason the credit provider must obtain a report at the time of the consumer applying for credit is to avoid the situation where consumers obtain loans simultaneously from multiple credit providers.
31. By systematically approving credit applications without considering the consumers' existing debt repayment obligations, the Respondent perpetually overstated the consumers' disposable income by entirely ignoring or understating current debt obligations of the consumer at the time they were approved for credit. The Respondent failed to carry out proper affordability assessments and thus failed to take reasonable steps to assess consumers' existing financial means, prospects and obligations.
32. This conduct of the Respondent is evident in all the sampled approved credit agreements marked annexures D1 to D10 of the investigation Report.
33. Based on the above, the Applicant seeks an order declaring the Respondent in repeated contravention of sections 81(2)(a)(ii) and (iii) read with Regulation 23A.

Concluding reckless credit agreements with consumers

34. 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.

35. As a result of the Respondent not conducting proper affordability assessments as set out above, the Respondent has extended credit recklessly to consumers and has consequently repeatedly contravened Section 81(3) read together with Section 80(1)(a) of the Act.
36. 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.
37. Regarding the examples of consumers Rathaba and Morobe,⁸ based on the information at the Respondent's disposal at the time of concluding the credit agreements, the consumers were already over-indebted at the time of applying for credit with the Respondent or, at the very least, could not afford the instalments under the proposed new credit agreements.
38. Furthermore, several of the consumers sampled were repeat customers of the Respondent and other credit providers. They were stuck in a debt trap and a further loan should have been refused. However, the Respondent continued to extend more credit to these consumers.
39. In terms of section 83(2)(a), the Applicant seeks an order declaring the credit agreements reckless in terms of section 80(1)(a). The Applicant further seeks an order setting aside all the consumers' obligations under those agreements.

Overcharging of initiation and service fees

40. The Applicant argued that the Respondent has overcharged all the sampled consumers on costs of credit by splitting the credit agreement into various loans, attempting to disguise the actual amount being borrowed by the consumer. The Respondent signs more than one credit agreement with the same consumer on the same day and subsequently charges initiation and service fees on all such credit agreements. The Applicant submitted that the splitting of loans in this fashion is prohibited by the Act and amounts to excessive and unlawful charges.

⁸ Annexures D2 and D7 to the Investigation Report

41. During the hearing, the Applicant conceded that apart from the argument pertaining to the “splitting of fees”, the fees charged were not excessive.

CONSIDERATION AND ANALYSIS OF THE APPLICANT’S EVIDENCE

42. The Tribunal considered the Applicant's written and oral submissions regarding the Respondent's prohibited conduct.
43. 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 the Applicant formulated reasonable suspicion that the Respondent contravened the Act, and that the investigation was conducted lawfully. Further, 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 did not attend the proceedings or defended itself by filing an answering affidavit.
44. After considering the evidence, the Tribunal finds that the Respondent has repeatedly contravened the NCA and its Regulations by not conducting proper affordability assessments prior to extending credit to consumers. The Respondent is found to have engaged in reckless credit activities. These contraventions amount to prohibited conduct and are serious. The Tribunal therefore finds and is satisfied with the evidence before the Tribunal that the Respondent contravened sections 81(2)(a)(ii) and 81(2)(a)(iii), read with Regulation 23A, as well as section 81(3) read with section 80(1)(b)(ii).
45. The Tribunal also considered the Applicant's submissions relating to the “splitting of loans”. However, the Tribunal is not convinced that the practice of entering into separate loan agreements on the same day automatically constitutes prohibited conduct in terms of the Act. Although the impact of charging fees for every loan agreement would impact on the consumer, the Applicant could not provide evidence that the practice of entering into various lawful loan agreements at the same time, or within a short period of time, automatically constitutes prohibited conduct.
46. The Tribunal is of the view that the circumstances of each loan agreement need to be considered. Before any loan agreement is entered into, the necessary assessments need to be done. If the required criteria would have been met, the entering into any number of credit agreements will be lawful. In this matter, the Applicant did not prove that the multiple credit agreements constituted one

credit agreement. According to the evidence before the Tribunal, each separate credit agreement adhered to the criteria of a credit agreement as defined in section 8 of the Act. Accordingly, the Tribunal dismissed the allegation of unlawful splitting of loans.

47. The Tribunal therefore finds and is satisfied with the evidence before the Tribunal that the Respondent did not contravene sections 100(1)(b), 101(1)(b)(i), or 101(1)(c)(ii), as read together with Regulations 42(2) and 44.

CONSIDERATION OF AN APPROPRIATE ORDER

48. The Tribunal views the transgressions by the Respondent in a harsh 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 sections of the Act and its Regulations as outlined in the preceding paragraphs.

49. The Tribunal proceeds to consider an appropriate order.

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

50. Following consideration of the Applicant's request, the Tribunal deems it appropriate to order that the Respondent's repeated contraventions amount to prohibited conduct.

Administrative fine

51. The Applicant requested that the Tribunal impose an administrative fine on the Respondent. The Tribunal considered the nature, impact and seriousness of the Respondent's contraventions and the consequent financial implications for consumers. However, the Tribunal also took into account the present liquidity position of the Respondent, being that of voluntary liquidation.
52. In the circumstances of this matter, the Tribunal is not convinced that an administrative fine is justified.

Appointment of an auditor

53. The Applicant also requested the Tribunal to appoint an auditor to audit the Respondent's practices as a credit provider. The Tribunal is aware that the investigation that led to this application comprised a small sample of the Respondent's consumer files. The Tribunal has found that the Respondent has extended reckless credit. The evidence placed before the Tribunal means that it is not possible for the Tribunal to establish the extent of this practice and whether the Respondent only provides short- term credit agreements. It is, therefore, appropriate to appoint an independent auditor to assess the situation and establish the facts.

Request for interdict

54. The Applicant requested that the Tribunal make an order interdicting the Respondent from engaging in prohibited conduct in the future. The interdict will serve no purpose because the Respondent may not engage in prohibited conduct given the Act's provisions.⁹

ORDER

55. Accordingly, the Tribunal makes the following order:

55.1. The Respondent has repeatedly contravened the following sections of the Act and Regulations:

55.1.1. Section 81(2)(a)(ii) and (iii) read with Regulation 23A; and

55.1.2. Section 81(3) read with section 80(1)(a) and 80(1)(b)(ii);

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

55.3 The registration of the Respondent as a credit provider is cancelled with immediate effect in terms of section 57 of the NCA;

⁹ Shoprite Investments Ltd v The National Credit Regulator (509/2017 dated 18 December 2019)

55.4 The Respondent's credit agreements with consumers contained in annexures D1 to D10 of the Investigation Report are reckless in terms of section 80 (1) (a) and set aside;

55.5 The Respondent is ordered to, at its own costs:

55.5.1 Refrain from taking any enforcement action against the consumers under the credit agreements contained in annexures D1 to D10 of the Investigation Report. 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;

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

(i) Any adverse credit bureau reports which may have arisen as a result of the consumer having concluded such credit agreement with the Respondent, are removed; and

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

55.6 The Respondent is ordered to, at its own costs:

55.6.1 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 identify and include in the independent auditor's report all the Respondent's credit agreements still in force (which have amounts due to the Respondent) and concluded without the Respondent having conducted assessments in terms of section 81 (2) (a) (ii) and (iii) of the Act;

55.6.2 Within 150 business days of the date of issue of this judgment, the Respondent is to furnish the independent auditor's report to the Applicant;

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

55.7 There is no order as to costs.

DR MC PEENZE

Presiding Tribunal member

Tribunal members Ms H Alwar and Adv C Sassman concur with this judgment.

Authorised for issue by The National Consumer Tribunal

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