IN THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

Case No: NCT/78954/2017/140(1)

In the matter between:

NATIONAL CREDIT REGULATOR **APPLICANT**

AND

GAUTENG MOTORS CC **RESPONDENT**

Coram:

Adv. F Manamela	-	Presiding Tribunal Member
Adv. J Simpson	-	Tribunal Member
Ms. M Nkomo	-	Tribunal Member

Date of Hearing: 1 February 2018

JUDGMENT AND REASONS

INTRODUCTION

1. The Applicant is seeking an order declaring that the Respondent engaged in prohibited conduct, and for that reason, the National Consumer Tribunal (the Tribunal) is asked to impose an administrative fine against the Respondent. This application is before the Tribunal in terms of section 140 of the National Credit Act, 2005[1] (the Act).

2. The Applicant is empowered by section 15 of the Act to monitor the consumer credit market and industry in order to "*ensure that prohibited conduct is prevented or detected, and prosecuted*".

[1] National Credit Act, No. 34 of 2005, as amended.

The Applicant discovered certain contraventions by the Respondent which involve, *inter alia*, extending credit whilst not registered as a credit provider, and entering into reckless credit agreements.

THE PARTIES

3. The Applicant in this matter is the National Credit Regulator (the NCR), a juristic person established in terms of Section 12 of the Act, having its principal address at 127 Fifteenth Road, Randjespark, Midrand, Gauteng (hereinafter referred to as the Applicant).

4. The Founding Affidavit of the Applicant is deposed to by Ms. Jacqueline Peters, the Manager responsible for Investigation and Enforcement in the employ of the Applicant. At the hearing the Applicant was represented by Ms. L. Schwartz, an employee of the Applicant.

5. The Respondent is Gauteng Motors CC, whose principal place of business is at 489 WF Nkomo Street, Pretoria. The Respondent was not a registered credit provider at the time of the investigation into its activities by the applicant. The Respondent subsequently applied to the Applicant and was registered as a credit provider under Registration Number NCRCP9258 on 15 April 2017[2]. Mr. S. Kelly attended the hearing on behalf of the Respondent.

JURISDICTION

6. The National Consumer Tribunal (the Tribunal) has jurisdiction to hear this matter and has powers conferred upon it in terms of section 150 of the Act to make orders in line with prayers canvassed in the notice of motion.

[2] Page 9 of the hearing transcript

BACKGROUND FACTS

7. The Applicant's evidence on the founding affidavit points to the investigation conducted on its behalf by Ms. Kgadi Sepuru assisted by Mr. Godfrey Tladi, inspectors appointed by the Applicant to conduct an investigation into the activities of the Respondent in terms of section 25 of the Act. The investigation was prompted by a complaint received on 18 October 2014 from a certain consumer Mr. Elias Elvin Sera Manche. The complaint related to the repossession of the consumer's vehicle by the Respondent; allegedly without following the required enforcement procedures.

8. The Respondent is a second hand car dealer, with a business model which entails selling second hand cars and providing finance to purchasers to purchase the vehicles it sells. The Respondent has multiple branches which fall under the same registration certificate. Consumers who purchase vehicles from the Respondent are expected to pay a deposit. The balance of the purchase price, referred to by the Respondent as the 'deferred amount;' is then paid off in instalments ranging from 18 to 36 months. Before taking possession of the vehicle, the consumer enters into an instalment credit agreement with the Respondent. Attached to the agreement is a 'Hire Purchase Agreement", which includes clauses the Applicant found to be in contravention to the Act.

9. On 1 December 2015, the Applicant conducted an investigation into the alleged contraventions of the Act by the Respondent. The investigation was initiated in terms of section 136(1) of the Act.

10. During the investigation, a random sample of 10 credit agreements was selected at the Respondent's head office. The Respondent's Manager, Yusuf Suliman, was interviewed by the

Applicant's inspectors. The investigation revealed that the Respondent was involved in various breaches of the Act including the following–

10.1. Extending credit whilst not being registered as a credit provider;

10.2. Failure to conduct affordability assessments;

10.3. Charging consumers costs of credit in excess of the maximum allowed by the Act;

10.4. Charging fees and costs not permitted by the Act;

10.5. Unlawful provision contained in Respondent's credit agreements, and

10.6. Failure to adhere to debt enforcement procedures.

11. Based on the outcome of the investigation, the Applicant decided to refer these instances of prohibited conduct against the Respondent to the Tribunal.

CONSIDERATION OF THE APPLICABLE LAW TO EVIDENCE ON A DEFAULT BASIS

12. At the hearing, a legal representative, Mr S Kelly, appeared on behalf of the Respondent and applied for a postponement of the matter. The application was opposed by the Applicant. The application for the postponement was refused by the Tribunal and the matter proceeded on a default basis. The reasons for the refusal of the application for postponement now follow.

13. The Applicant filed the Section 140(1) application with the Tribunal, and the Tribunal Registrar signed a Notice of Complete Filing on 7 April 2017. The notice of Complete Filing was issued to the parties on 10 April 2017. A summary of how the Respondent responded to the proceedings before the Tribunal is provided below:

13.1. Instead of serving the answering affidavit by not later than 4 May 2017, the Respondent filed on 28 July 2017 an application to condone non-compliance with the Tribunal Rules[3]. The Respondent stated under oath that it became aware of the proceedings before the Tribunal

[3] Published under GN 789 in GG 30225 of 28 August 2007 as amended by GenN 428 in GG 34405 of June 2011 (published in terms of the Consumer Protection Act 88 of 2008). GN R203 in GG 38557 of 13 March 2015 and GN 157 in GN 39663 of February 2016.

on 15 May 2017 when it received by email the notice of set down of the matter. The Applicant did not oppose the condonation application.

13.2. On 14 September 2017, the Tribunal granted condonation for the late filing of the answering affidavit, and directed that it be filed within 15 business days of the issuing thereof. Therefore, the answering affidavit should have been served on the Applicant by no later than 6 October 2017, as the condonation ruling was issued on 14 September 2017.

13.3. The Respondent did not file its answering affidavit as directed by the Tribunal. The matter was then set down for hearing on 3 November 2017.

13.4. On 2 November 2018, the Registrar of the Tribunal removed the matter from the roll as it appeared the Respondent did not receive the notice of set-down. Notwithstanding the removal of the matter from the roll, the Respondent still did not file an answering affidavit nor a condonation application.

13.5. On 16 January 2018, the Tribunal Registrar issued a notice of set down for the matter to be heard on 1 February 2018.

14. Despite the Tribunal having previously granted condonation for the late filing of the answering affidavit by the Respondent, and directing the Respondent to file its answering affidavit, the Respondent failed to comply.

15. The Respondent's legal representative submitted that he received instructions late in the afternoon of the day before the hearing to seek a postponement as the Respondent had appointed a forensic auditor or accountant. In addition, it has been brought to his attention that the Applicant would be abandoning the irregularity of the charges of the interest rate, an aspect the Respondent was focusing on. If the Applicant abandons the claim for the interest, the Respondent's legal representative requested that the Tribunal grants a final postponement, puts

the Respondent on strict stringent terms to file their answering affidavit within a week, and enable compliance with the *audi alteram partem* rule.

16. The Applicant opposed the request for a postponement, mainly because the Respondent had sufficient time to respond. The Applicant submitted that the Respondent does not have proper reasons for the late filing, and only delays this matter. The Applicant submitted that the Respondent had received the application, and should have applied for condonation timeously. The Applicant was further of the view that the Respondent does not have prospects of success, and that it will not be in the interests of the broader public that the matter be postponed again.

17. Having heard the parties, and having taken into account the history of this matter, the Tribunal's findings are as follows-

17.1. The Tribunal is satisfied that the Applicant served the application on the Respondent, and the Respondent failed to file any answering affidavit.

17.2. The Respondent failed to comply with the terms and requirements of the condonation order granted by the Tribunal. The matter has been repeatedly postponed, giving the Respondent many opportunities to file its answering affidavit. The Respondent's failure to respond is inexcusable.

17.3. The application for postponement of the matter was therefore refused.

17.4. Rule 13 states that:

"Any Respondent to an application or referral to the Tribunal may oppose the application or referral by serving an answering affidavit on:-

i. the Applicant; and

ii. every other person on whom the application was served".

(2) An answering affidavit to an application or referral other than an application for interim relief must be served on the parties and filed with the Registrar within 15 business days of receipt of such party to the application"

17.5. Rule 13(5) provides as follows:

"Any fact or allegation in the application or referral not specifically denied or admitted in the answering affidavit will be deemed to have been admitted"

17.6. Therefore, in the absence of any answering affidavit by the Respondent, the Applicant's application and the allegations contained therein are deemed to be admitted.

17.7. Although the Applicant did not file a formal application for a default order in terms of Rule 25(2), the Registrar set the matter down for hearing on a default basis due to the pleadings being closed. Rules 25(2) and (3) of the Tribunal Rules, empower the Tribunal to hear this matter on a default basis. Rule 25(3) states that:

"The Tribunal may make a default order:

i. (2)….

ii. (3) The Tribunal may make a default order-

a. after it has considered or heard any necessary evidence, and

b. if it is satisfied that the application documents were adequately served"

17.8. The Tribunal is satisfied that the requirements for a default hearing have been met, and the hearing therefore proceeded on a default basis.

APPLICANT'S SUBMISSIONS

18. The Applicant's submissions are evidenced from the investigation report it compiled after conducting an investigation into the activities of the Respondent. According to the Applicant, the

investigation uncovered various contraventions of the Act, which are outlined in more detail hereunder:

Failure to register as a Credit Provider

18.1. According to the Applicant, the Respondent offered and extended credit and entered into credit agreements whilst not being registered as a credit provider as required in terms of section (40)1 of the Act. The Respondent exceeded the thresholds prescribed in terms of section 42 (1) of the Act[4]. The Respondent engaged in offering, making available credit and entering into credit agreements with consumers without being registered to so. Therefore the Respondent contravened section 40 (3) of the Act. The total amount of credit extended to consumers, based on the 10 sample agreements, was R580 164.04 (five hundred and eighty thousand one hundred and sixty rand and four cents).

Reckless Credit

18.2. According to the Applicant, the Respondent entered into credit agreements with consumers without taking reasonable steps to assess consumers' financial means, prospects and obligations accurately. The Respondent extended credit based on trust[5] without requiring proof of income in the form of payslips and/or bank statements. In all the files inspected by the Applicant, there was no evidence that the Respondent had verified the consumers' financial obligations. The Respondent failed to conduct credit checks on consumers to determine their debt repayment history.

18.3. The Applicant presented details and information about a number of consumers it alleges the Respondent entered into reckless credit agreements with. Eight files (Annexures B1, B3, B4,

[4] Hearing transcript page 14 and pages 126 to 199 attached to the Investigation report compiled by Kgadi Sepuru, an inspector appointed by the Applicant in terms of section 25 of the Act
[5] See Annexures attached to Annexure JP5 being the Investigation Report compiled by Kgadi Sepuru, an Inspector appointed by the Applicant in terms of section 25 of the Act.

B5, B6, B8, B9 and B10)[6] out of the 10 sample files selected, as well as the complainant's file (Annexure F) had no indication in relation to the criteria used in conducting affordability assessment on the consumer.

18.4. The failure of the Respondent to establish the existing financial means, prospects and obligations of consumers when extending credit is a contravention of section 81(2)(a)(iii) of the Act.

18.5. The Respondent entered into Reckless Credit agreements with consumers and therefore contravened section 81(3) read with section 80 (1) of the Act.

Charging Consumers Interest in Excess of the Maximum Rate Allowed by the Act

18.6. At the hearing, the Applicant decided to abandon this charge.[7]

Contraventions relating to the Cost of Credit

18.7. According to the Hire Purchase contract which is attached to the Instalment Credit Agreements the Respondent enters into with consumers, the Respondent charges consumers extra charges. The exact nature of these extra charges is not disclosed. At the hearing[8], the Applicant identified two consumers out of the 10 sample files selected, which were charged the extra charge of R1 749.16 (one thousand seven hundred and forty nine rand and sixteen cents) and R6 291.20 (six thousand two hundred and ninety one rand and twenty cents). The exact nature of such charges was not disclosed to the consumers at the time the Respondent extended credit, as evident from Annexures B3 and B5 to the investigation report[9].

[6] Annexures attached to the Investigation report compiled by Kgadi Sepuru, an inspector appointed by the Applicant in terms of section 25 of the Act.
[7] Hearing transcript 01 February 2018 page 19
[8] Hearing transcript 01 February 2018 page 20
[9] See Annexures attached to Annexure JP5 being the Investigation Report compiled by Kgadi Sepuru, an Inspector appointed by the Applicant in terms of section 25 of the Act.

18.8. The conduct of the Respondent amounts to a contravention of section 101 (b) read with section 102 and Regulation 31 (2) (c) of the Act.

Unlawful Provision

18.9. The Applicant contends that paragraph 4.11 of the Respondent's credit agreements contains the following clause[10]:

> "*The Consumer expressly renounces the benefit of the exceptions, revision of accounts, no value received, and de duobus vel pluribus rei denbendi (the right of a co-debtor to claim that all the other co-debtors be joined in any action, each for his proportionate share of the debt), ordinis sue exceussionis (that the debt first be realised from the co-principal debtors), beneticium divisionis (the right to claim a division of the debt between the co-principal debtors). The Consumer acknowledges to be fully acquainted with the contents of these exceptions and the effects of the renunciation thereof".*

18.10. Certain common law rights applicable to credit agreements and prescribed by the Act may not be waived in a credit agreement and this includes the exception and revision of accounts, that is, *errori calculi.*

18.11. The clause has the effect of waiving all exceptions and constitutes a contravention of section 91 read with section 90(2)(c) and Regulation 32 of the Act.

Prohibited Debt Enforcement Practices

18.12. The Applicant submits that according to clause 4.11 of the Instalment Credit Agreement the Respondent enters into with consumers, "the consumer expressly renounces the benefit of the exceptions, revision of accounts, no value received and *de duobus vel pluribus reis debendi….."*

18.13. The clause does not apply the required procedures before debt enforcement. In particular, the terms and conditions attached to the clause 12.7.2 provides for the Respondent to take possession of the goods in the event the consumer default in punctual payment of the instalment. With respect to the Complainant, whose car was repossessed by the

[10] Paragraph 4.11 of the Respondent's credit agreement (Annexure B2 of the Investigation Report)

Respondent, the Respondent failed to submit a section 129 letter to the Consumer, but relies on a letter[11] submitted in terms of section 11 of the Credit Agreements Act No 75 of 1980, which was repealed by the National Credit Act in terms of section 172 (4) of the Act. The letter sent to the consumer does not inform the consumer of any rights that he had to go see a debt counsellor, nor is the consumer referred to relevant entities that could assist the consumer.

18.14. Failure to apply the required procedures before debt enforcement is a contravention of section 129 read with section 130 of the Act.

RESPONDENT'S SUBMISSIONS

19. There are no submissions of the Respondent to consider.

CONSIDERATION OF THE APPLICABLE LAW AND TRIBUNAL'S FINDINGS

Failure to Register as a Credit Provider

20. Section 40(3) of the Act states that –

> *"A person who is required in terms of subsection (1) to be registered as a credit provider, but who is not so registered, must not offer, make available or extend credit, enter into a credit agreement or agree to do any of those things."*

21. At the time of the investigation by the Applicant, section 40(1) required a person to register as a credit provider if that person, alone or in conjunction with any associated person, is the credit provider with under at least 100 credit agreements, other than incidental credit agreements[12].

22. From the year 2012 to 2014, the Respondent entered into credit agreements which were in excess of the threshold as prescribed in section 42(1) of the Act, and therefore the Respondent should have been registered as a credit provider in terms of the Act.

[11] Page 49 of the bundle

[12] This section has been amended by section 10 of the National Credit Amendment Act No 19 of 2014

23. However, section 89 of the Act provides that –

> *(2) Subject to subsections (3) and (4), a credit agreement is unlawful if –*
>
> *(a)…*
>
> *(b)…*
>
> *(c)…*
>
> *(d) at the time the agreement was made, the credit provider was unregistered and this Act requires that credit provider to be registered; or*
>
> *(e)…*
>
> *(3)…*
>
> *(4) Subsection (2)(d) does not apply to a credit provider if –*
>
> *(a) at the time the credit agreement was made, or within 30 days after that time, the credit provider had applied for registration in terms of section 40, and was awaiting a determination of that application.*

24. During the hearing, the Applicant submitted that the Respondent applied for registration and was registered as a credit provider under registration number NCRCP9258 on 17 April 2017[13]. However, during the investigation by the Applicant, the Respondent had not applied for registration but had extended credit in excess of the prescribed threshold. The amount of credit granted by the Respondent exceeded the prescribed threshold of R500 000.00 (five hundred thousand rand), based on a sample of ten credit agreements which were investigated by the Applicant. Accordingly, the protection granted by section 89 of the Act was no longer applicable.
25. Therefore, the Tribunal finds a contravention of section 40(1)(a) of the Act by the Respondent.

Reckless Credit

26. Section 81 of the Act states that –

[13] Hearing transcript page 9

i. When applying for a credit agreement and while that application is being considered by the credit provider, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section.

ii. A credit provider must not enter into a credit agreement without first taking reasonable steps to assess –

(a) the proposed consumer's –

(i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;

(ii) debt re-payment history as a consumer under credit agreements;

(iii) existing financial means, prospects and obligations; and

(b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement.

iii. A credit provider must not enter into a reckless credit agreement with a consumer.

27. An affordability assessment is a crucial step in the process of granting credit. Hence, section 81(2) of the Act places an obligation on a credit provider to take reasonable steps to assess, among others, the consumer's debt repayment history under credit agreements and the existing financial means, prospects and obligations. Section 81(2) of the Act is written in peremptory language to indicate the weight placed on the process of determining whether a consumer is in a position to service the debt should credit be granted.

28. The evidence gathered during the investigation by the Applicant reveals that in all 10 sample files[14] that were selected, there is no indication of affordability assessments being conducted on the consumers who were granted credit by the Respondent. Proof of employment, bank statements and salary advices were not attached to the files. The report states that, when interviewed by the Applicant's inspectors, the Respondent's manager Yusuf Suliman, informed them that the Respondent does not use any kind of mechanism, and qualification to credit is solely based on trust.

[14] Annexures B1 to B10 attached to the investigation report compiled by Kgadi Sepuru, an Inspector appointed by the Applicant in terms of section 25 of the Act.

29. Whilst section 82(1) of the Act allows a credit provider to determine for itself any evaluative mechanism to be used for conducting affordability assessments, any such mechanism or procedure should result in a fair and objective assessment. For a mechanism or procedure to result in a fair and objective assessment in accordance with section 81 of the Act, it should evaluate, among others, the following:
    (a) the consumer's debt repayment history;
    (b) existing financial means and prospects; and
    (c) the consumer's financial obligations.

30. There is no indication that the Respondent enquired into the consumers' debt repayment history. Insofar as existing financial means and prospects are concerned, the Respondent relies on the trust it has with the consumer regarding the consumer's income and expenditure. This approach contravenes the provisions of the Act.

31. The NCA requires the Respondent to ensure that it uses reasonable and objective measures to assess the consumer's credit worthiness. It is clear that in order to ascertain whether reckless lending occurred, a fair and objective measure must be used. A salary advice and bank statement show the consumer's existing financial means, prospects and obligations, whilst credit bureau records show a consumer's debt repayment history. This is the same information required in terms of section 81(2) of the Act, although there is no provision prescribing how to assess same.

32. The enquiry on affordability should consider the factors in section 81 (2) of the Act as a conspectus and in a fair and objective manner before coming to a determination as to whether a particular consumer will afford the loan being applied for. Against this background, the

Tribunal finds the Respondent did not conduct affordability assessments before entering into credit agreements.

33. Should a credit provider fail to conduct an assessment as contemplated in section 81(2) of the Act the resultant credit agreement entered into with a consumer is regarded as reckless in terms of section 80 of the Act.

Charging Consumers Interest in Excess of the Maximum Rate Allowed by the Act

34. At the hearing, the Applicant decided to abandon this charge. The Tribunal will therefore not rule on this charge.

Contraventions Relating to the Cost of Credit

35. The Respondent charges consumers extra charges in respect of the Hire Purchase contract attached to the credit agreements, without disclosing the exact nature of said charges. The extra charges in the amount of R1 747.16 and R6 291.20 are evident from Annexures B1 and B5 to the investigation report[15]. The complainant, whose complaint triggered the investigation conducted by the Applicant, was charged extra charges in the amount of R8 070.28, as apparent from page 56 of the bundle submitted to the Tribunal.
36. Sections 101 and 102 of the Act read with Regulation 31 (2)(c) describe the fees and charges that may appear in credit agreements. The Act does not provide for any exceptions to the fees and/or charges which can be levied, and there is no provision for 'extra charges' in the Act. Any fee on a credit agreement which is not in accordance with what is described in the Act would be deemed unlawful.

[15] See Annexures attached to Annexure JP5 being the Investigation Report compiled by Kgadi Sepuru, an Inspector appointed by the Applicant in terms of section 25 of the Act.

37. The Tribunal therefore finds that by levying the extra charges in respect of the Hire Purchase contract attached to the Respondent's credit agreements, the Respondent has contravened section 101 of the Act, read with section 102 and Regulation 31(2) (c) of the Act.

Unlawful Provision

38. Section 90 (2) (b) (i), (ii) and (iii) of the Act states as follows:

(2) A provision of a credit agreement is unlawful if-

(a) …

(b) it directly or indirectly purports to-

(i) waive or deprive a consumer of a right set out in this Act;

(ii) avoid a credit provider's obligation or duty in terms of this Act;

(iii) set aside or override the effect of any provision of the Act.

39. Section 90 (2) (k) (iii) of the Act states as follows:

A provision of a credit agreement is unlawful if it expresses, on behalf of a consumer an undertaking to sign in advance any documentation relating to enforce of the agreement, irrespective of whether such documentation is complete or incomplete at the time it is signed.

40. Section 91 of the Act states:

A credit provider must not-

(a) Directly or indirectly require or induce a consumer to enter into a supplementary agreement, or sign any document, that contains a provision that would be unlawful if it were included in a credit agreement.

41. Paragraph 4.11 of the Respondent's credit agreement makes provision to waive all exceptions which may not be waived in terms of the Act.

42. The Tribunal therefore finds that that the credit agreements which the Respondent enters into with consumers contain an unlawful provision, which has the effect of waiving all exceptions and accordingly constitutes a contravention of section 91 read with section 90(2)(c) and Regulation 32 of the Act.

Prohibited Debt Enforcement Practices

43. Section 133 (1) and (2) of the Act states that

(1) A credit provider must not –

(a) Make use of any document, number or instrument referred to in section 90(2)(i) 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 no 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) (i).

44. The evidence[16] before the Tribunal reveals that the Complainant entered into a credit agreement with the Respondent for the purchase of a vehicle with a purchase price of R142 450.00 (one hundred and forty two thousand and four hundred fifty rand). The complainant paid a deposit of R96 200.00 (ninety six thousand two hundred rand), and elected to pay off the balance of R42 441.80 (forty two thousand four hundred and forty four rand and eighty cents), which was inclusive of extra charges and the cost of the vehicle tracking system, by way of 36 monthly instalments of R1 713.20 (one thousand seven hundred and thirteen rand and twenty cents). According to paragraph 9 of the investigation report compiled by the

[16] Page 56 of the bundle of documents submitted to the Tribunal.

Applicant, the Respondent confirmed that when the complainant defaulted on payments, the Respondent issued a notice in terms of section 11 of the Credit Agreements Act, No 75 of 1980, which was repealed in terms of section 172(4) of the Act.

45. Although the Respondent informed the Applicant that the complainant voluntarily surrendered his vehicle, it can be deduced from the correspondences the complainant sent to the respondent that the Respondent arranged a recovery company to repossess the vehicle without the complainant's consent. There is no evidence of the Complainant having voluntarily surrendered his vehicle in accordance with section 127 of the NCA or that the Respondent followed any of the required procedures set out in the section.
46. The Tribunal finds that the Respondent's debt enforcement procedures failed to apply the required procedures before debt enforcement. This failure to apply the required procedures before debt enforcement is a contravention of section 129 read with section 130 of the Act.

Prescription

47. Although it is trite in law that prescription can only be raised by the parties in a matter[17], the Tribunal has inquisitorial powers, and can take steps to ensure that all relevant facts are place before it. The Tribunal therefore requested the Applicant to address it regarding the application of prescription to the charges against the Respondent.
48. Since the prescription applicable to this matter is provided for in section 166 of the Act, it is not necessary to invoke the provisions of the Prescription Act, No 68 of 1969.
49. It is common cause that the complaint before the Applicant was initiated during 2014. The Applicant's investigation focussed on agreements which were entered into from 2011 to 2014.
50. Section 166 of the Act provides for prescription as follows:

166 Limitation of bringing action

[17] Section 17(1) of the Prescription Act No. 68 of 1969 provides that: "A court shall not of its own motion take notice of prescription". However, in terms of section 17(2) a court may allow a litigant to raise the defense of prescription at any stage of the proceedings.

(1) A complainant in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after-

(a) the act or omission that is the cause of the complaint; or

(b) in the case of a course or conduct or continuing practice, the date that the conduct or practice ceased.

51. *Prima facie*, it would appear that the Applicant's investigation relied on credit agreements which have prescribed. However, when an analysis is done on the credit agreements, it is clear that not all those investigated by the Applicant had prescribed. Three credit agreements (Annexures B3, B7 and B10) out of the ten sample files selected by the Applicant during its investigation were still active at the time of the investigation. The instalments of these three agreements were ending in June 2016, February 2016 and May 2015 respectively. The credit agreements were therefore still active within three years before the matter was referred to the Tribunal. The conduct by the Respondent is therefore still continuing.
52. The Tribunal therefore finds that the prohibited conduct is still continuing and has not prescribed.

CONCLUSION

53. The Tribunal accordingly finds that the Respondent's contravention of section 81(2) and (3), section 101 (1) and section 91(a) read with section 90(2) (c) and Regulation 32, and section 129 read with section 130 of the Act and the National Credit Regulations is declared to be prohibited conduct.

CONSIDERATION OF ORDERS PRAYED FOR

54. Once prohibited conduct has been established, it is incumbent upon the Tribunal to make an appropriate order as empowered by section 150 of the Act which states as follows:

"***(150) Orders of the Tribunal***

In addition to its other powers in terms of this Act, the Tribunal may make an appropriate order in relation to prohibited conduct or required conduct in terms of this Act, including –

(a) declaring conduct to be prohibited in terms of this Act;

(b) interdicting any prohibited conduct;

(c) imposing an administrative fine in terms of section 151, with or without the addition of any other order in terms of this section;

(d) confirming a consent agreement in terms of this Act as an order of the Tribunal;

(e) condoning any non-compliance of its rules and procedures on good cause shown;

(f) confirming an order against an unregistered person to cease engaging in any activity that is required to be registered in terms of this Act;

(g) suspending or cancelling the registrant's registration, subject to section 57(2) and (3);

(h) requiring repayment to the consumer of any excess amount charged, together with interest at the rate set out in the agreement; or

(i) any other appropriate order required to give effect to a right, as contemplated in this Act."

Administrative penalty

55. Section 151 (3) of the Act provides that in considering the imposition of an administrative fine, certain factors must be considered by the Tribunal.

56. Discussed below is an analysis of whether the Tribunal may impose an administrative fine in this matter. This requires the Tribunal to interpret the Act in a manner that "*gives effect to the purpose set out in section 3*". In summary, Section 3 of the Act aims to promote and advance the social and economic welfare of South Africans, to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market.

The nature, duration, gravity and extent of the contravention

56.1. The Applicant argues that based on a sample of files extracted from the records of the Respondent, and the nature and extent of the contraventions from the batch, warrant action against the Respondent. The granting reckless credit by the Respondent goes against the stated purpose of the Act, namely, to combat reckless credit granting and to prevent over indebtedness. When looked at from the degree of culpability of the Respondent and the harmfulness of the conduct, the Applicant makes out a case that the gravity and extent of the contravention warrants a high administrative fine.

56.2. The investigation by the Applicant revealed that the Respondent has been engaged in this conduct since 2012 at least and continued for many years thereafter.

56.3. The Respondent's conduct displays a callous and total disregard for the provision of the Act.

Loss or damage suffered as a result of the contravention

56.4. With respect to the loss and damage suffered, the Respondent charges 'extra charges' which are not disclosed to consumers, thereby denying consumers the information necessary for them to make informed choices. In the circumstances, consumers get charged fees that are impermissible. Consumers are further exposed to enforcement practices that are not in line with the provisions set out in section 129 of the Act.

The level of profit derived from the contravention

56.5. The level of profit derived from the contravention positively correlates with the extra charges charged and the loss suffered by consumers.

56.6. As profit implies that costs can be deducted from income, there is no additional information before the Tribunal to enable a calculation of the level of profit derived.

The behaviour of the respondent and degree of cooperation

56.7. The Applicant submitted that the Respondent is a first time offender and cooperated with the investigation. The Respondent has also since registered as a credit provider. This should count in the Respondent's favour.

Prior contraventions committed by the Respondent

56.8. Other than the Respondent being found by this Tribunal to be in contravention of the Act, there is no further evidence of any additional contraventions having been placed before the Tribunal. However, the duration of the contraventions show that the conduct of the Respondent has been going on for a substantial period prior to the investigation.

57. According to the Applicant, the gravity of the contraventions committed by the Respondent justifies the Applicant's prayer to have an administrative fine imposed by the Tribunal.

58. The Tribunal has a responsibility to ensure that it levies an administrative fine that acts as a deterrent not only to the Respondent but other credit providers as well.

59. In *NCR v Werlan Cash Loans t/a Lebathu Finance*[18] the Tribunal held that where the Applicant did not put any evidence before the Tribunal on the Respondent's annual turnover because it did not have such accurate information, the Tribunal can impose an administrative fine not greater than or equal to R1 000 000 (one million rand), in accordance with section 151 (2) (b) of the Act. The Tribunal found the Respondent to have engaged in prohibited conduct in the *Werlan* matter, and imposed an administrative penalty.

60. In the light of the above factors, The Tribunal is of the view that the factors operated in aggravation of the Respondent's conduct. The imposition of an administrative fine is appropriate in the circumstances having regard to the submissions made by the Applicant. It

[18] NCT/3887/2012/57(1)(P)

is however, also appropriate that the Tribunal also takes into account any evidence in mitigation. This relates to the conduct of the Respondent, and the fact that the Respondent has subsequently applied for and is registered as a credit provider.

61. On the conspectus of the above, the Tribunal views the imposition of an administrative fine of R800 000 (eight hundred thousand rand) appropriate. This reflects the seriousness with which the Tribunal views this type of prohibited conduct and the disregard for the Act and for consumers' rights by the Respondent.

62. The Applicant has not requested an order that an audit be done on the Respondent's credit agreements. The Tribunal will therefore not make any order in this regard.

CONCLUSION

63. The Tribunal has considered all the relevant submissions substantiating the Applicant's prayers in terms of section 140 of the Act. The Applicant's version of the alleged contraventions by the Respondent remains unopposed.

64. The Tribunal finds the Respondent to have engaged in prohibited conduct when it contravened relevant provisions of the Act, by engaging in reckless credit, charging extra charges without disclosing the nature thereof, and failing to adhere to lawful debt enforcement procedures.

65. The Applicant has made out a case for the Tribunal to consider the imposition of an administrative penalty due to the contraventions committed by the Respondent. The Tribunal is competent to decide on whether or not to impose a penalty in these circumstances,

ORDER

66. Accordingly, the Tribunal makes the following order:

66.1. In terms of section 150(a) of the Act, the Respondent's conduct in breaching section 81(2) and (3), section 101 (1) and section 91(a) read with section 90(2) (c) and Regulation 32, and section 129 read with section 130 of the Act and the National Credit Regulations is declared to be prohibited conduct;

66.2. The Respondent is ordered to pay an administration fine in the amount of R800 000.00 (eight hundred thousand rand) within 30 days of the handing down of this order.

Thus done and handed down in **Centurion** on this **25th day** of **March 2018**

[duly signed]

_____

Ms M. Nkomo
(Tribunal Member)

Adv. F Manamela (Presiding Member) and Adv. J Simpson (Tribunal Member) concurring.