IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: **NCT/6977/2012/57(1)(P) NCA**

In the matter between:

THE NATIONAL CREDIT REGULATOR APPLICANT

and

SEASON STAR TRADING 333 CC T/A DE NOON'S CASH LOANS RESPONDENT

Coram:

Ms D Terblanche – Presiding Member

Adv. N Sephoti – Panel Member

Mr X May – Panel Member

Date of Adjudication – 29 May 2013

JUDGMENT AND REASONS

APPLICANT

1. The Applicant in this matter is the National Credit Regulator, a body established in terms of Section 12 of the National Credit Act (the "NCA" or the "Act") (hereinafter referred to as "the Applicant").

RESPONDENT

2. The Respondent is Seasons Star Trading 333 CC, a closed corporation registered in terms of the Closed Corporations Act 69 of 1984, with principal place of business in Orkney, Klerksdorp and trading as De Noons Cash Loans. The Respondent is a registered credit provider with the Applicant, under registration number NCRCP3841. (Hereinafter referred to as "the Respondent").

APPLICATION

3. This is an application in terms of section 57(1) of the National Credit Act, 34 of 2005 (hereinafter referred to as "the Act") for the cancellation of the Respondent's registration in terms of the Act resulting from the Respondent's alleged repeated contravention of the Act and its Regulations.

RELIEF SOUGHT

4. The Applicant seeks the following relief:
   4.1 Cancellation of Respondent's registration as a Credit Provider, in terms of section 57(1)(a) and (c) of the Act;
   4.2 Declaration that the Respondent's conduct is in contravention of the Act and the Respondent's conditions of registration, and in terms of section 150(a) of the Act, constitutes prohibited conduct;
   4.3 Imposition of an administrative fine in terms of section 151 of the Act, as a further penalty for the Respondent's contraventions of the Act, its regulations and the Respondent's conditions of registration.
   4.4 Any other appropriate order required to give effect to the consumers' rights in terms of section 150(i) of the Act.

BACKGROUND

5. Applicant registered Respondent as a Credit Provider with effect from 9 April 2008 subject to General and Specific Conditions of Registration.

6. Applicant alleged that Respondent, in the past and at present, repeatedly contravened the Act.

7. Respondent's past contraventions, relating mainly to prohibited collection methods, admitted to by the Respondent in reply, led to the Applicant issuing a compliance notice against the Respondent. Applicant and Respondent entered into a settlement agreement in terms of which the Respondent admitted to repeated contraventions of the Act and the Regulations and committed itself to comply with the Act. The settlement agreement was made an order of the Tribunal on 1 October 2009[1].

[1] Section 152(1) of the Act provides that *"... any decision, judgment or order of the Tribunal may be served, executed and enforced as if it were an order of the high court ..."*.

8. Applicant brought this current application to the Tribunal for the cancellation of Respondent's registration, alleging that Respondent engaged in repeated and further breaches of the Act, the Regulations, and the Respondent's conditions of registration.

PRELIMINARY ISSUES FOR DETERMINATION

Points *in limine*

9. Respondent raised two points *in limine* on its papers but abondoned it at the hearing. We will not delve into those matters for the purposes of coming to a decision in this matter.

What constitutes repeated contraventions in terms of section 57(1) of the Act?

10. Section 57(1) of the Act provides that a registrant's registration may be cancelled by the Tribunal upon application by the Regulator (Applicant in this matter) if the registrant (Respondent in this matter) repeatedly fails to comply with any condition of registration and contravenes the Act.

11. The meaning of repeated contraventions have been considered by the Tribunal on a number of occassions, most prominently in the cases of *NCR v Petrus Martinus Ferreira*[2] and *NCR vs JW Van Zyl*[3] wherein the Tribunal held that the registrant had repeatedly contravened the Act, Regulations and Conditions of Registration where it engaged in similar contraventions in respect of multiple consumers.

Whether non-compliance with a Tribunal order could be considered a previous contravention for the purpose of establishing repeated conduct

12. It is convenient to start with the question of whether non-compliance with a Tribunal order could be considered a previous contravention for the purpose of establishing repeated conduct.

13. The Act provides in section 160(1) that a *"person commits an offence who contravenes or fails to comply with an order of the Tribunal"*. Section 161(a) provides that any person who is convicted of an offence in terms of this Act, is liable in the event of a contravention of section 160(1), *"to a fine or imprisonment for a period not exceeding 10 years or to both a fine or imprisonment"*

[2] NCT/166/2008/57(1)(P).
[3] NCT/3868/2012/ 57(1).

14. This clearly indicates that the route open to the Applicant to deal with Respondent's non-compliance with the Tribunal order is to cause the non-compliance to be prosecuted through the criminal courts. It does not avail the Applicant to, by itself, prosecute such non-compliance via the Tribunal on the basis of alleged prohibited conduct in order to invoke the sanctions provided for in the Act, *in casu* cancellation of Respondent's registration in terms of section 57(1) and an administrative penalty.

The contraventions admitted by the Respondent under the existing order of the Tribunal and the weight thereof in respect of the current proceedings

15. The next question is then whether the contraventions admitted to by the Respondent during the settlement proceedings, leading up to the existing order of the Tribunal, can be taken into account by the Tribunal **as prior conduct** in the current application for cancellation of Respondent's registration. This has to be considered by the Tribunal bearing in mind–

    15.1 the nature of the alleged prior and current contraventions (and their similarity or not); and
    15.2 that the investigation reports and matters investigated date back to September 2008 and may not be capable of referral to the Tribunal by the Applicant in terms of section 166 of the Act[4].

16. Applicant contended that Respondent admitted to contravening the Act and the Regulations. From the record and the parties' submissions, it was evident that the contraventions admitted to by the Respondent, and the subsequent undertaking given, related specifically to prohibited collection methods and the retention of cards and pins. It appears that Applicant proposes a broader construction to this specific contravention, and canvases it as a contravention of the Act in its entirety.

17. On Applicant's submission, if we are persuaded to follow this approach, Respondent's previous contraventions with regard to prohibited collection methods and the retention of cards and pins may be considered in conjunction with the current allegations relating to *inter alia* non-disclosure and the overcharging of fees and charges, as repeated contraventions of the Act.

18. As appealing as this approach appears to the Applicant, we are not tempted to follow suit. The main reason being that registrants can never be held liable on the basis of a broad and vague allegation such as 'contraventions of the Act'. The Regulator will have to be much more specific to enable the

[4] Section 166 provides that "*A complaint in terms of this Act may not be referred or made to the Tribunal...more than three years after the act or omission or in the case of conduct or continuing practice the date that the conduct has ceased*"

registrant to answer to the allegation. Not doing so would render the Regulator vulnerable to a charge of infringing the right of the registrant to know and answer to the specific charge against him and the factual basis thereof. This is not possible in a broadly formulated charge that the registrant contravened the provisions of the Act, regulations and/or its conditions of registration. The principle is similar to what the Tribunal expressed in the matter of *Matjokana v National Credit Regulator*[5] where the Tribunal refused to confirm a compliance notice issued by the Regulator for lack of particularity in the steps prescribed by the Regulator.

19. In the view of the Tribunal the alleged current contraventions do not seem to relate to the prior contraventions pertaining to the use of prohibited collection methods and the retention of cards and pins. The investigator's report on page 2 par 2.5 (page 45 of the record) unequivocally states that no cards and pins were found in the possession of the Respondent at its Orkney branch. No mention was made of cards and pins kept by Respondent at any of their other branches. In the view of the Tribunal there was accordingly no evidence placed before the Tribunal that the current complaints relate to continuing (prior) conduct or practice/s.

20. The Tribunal, in the light of the above considerations, is of the view that it cannot consider the Respondent's previous contraventions of the Act, leading up to the existing order of the Tribunal, nor consider the Respondent's alleged failure to keep to its commitments, **as prior repeated conduct** in the current application. The Applicant's only available recourse to the Respondent's non-compliance with the Tribunal order is to cause the non-compliance to be prosecuted through the criminal courts.

21. In the view of the Tribunal, furthermore, the investigation reports and matters investigated date back to September 2008 and may very well not be capable of being referred to the Tribunal by the Applicant due to prescription, in terms of section 166 of the Act[6]. The Tribunal makes no finding on prescription in this judgment.

Onus and burden of proof

22. Accordingly, in considering whether the Respondent's registration should be cancelled, the Tribunal will consider the allegations of prohibited conduct, subsequent to the date of the existing order of the Tribunal i.e. after 1 October 2011.

[5] NCT/585/2010/56(1)(P).

[6] Section 166 provides that "*A complaint in terms of this Act may not be referred or made to the Tribunal...more than three years after the act or omission or in the case of conduct or continuing practice the date that the conduct has ceased*"

23. Applicant therefore has to acquit itself of the burden of proof set out in section 167 of the Act, namely to proof "*...on the balance of probabilities*" that Respondent repeatedly contravened the Act.

The documentary evidence

24. Respondent referred to a number of decided cases with regard to the documentary evidence. These cases did not find application in this matter as Respondent agreed that neither the contents nor the origination of the documents were in dispute. The issue for the Tribunal to decide is how the parties' interpretation of the contents of the documents, relates to the application of the Act to that interpretation.

The sufficiency of the evidence

25. Respondent put forward a view that Applicant relied too heaviliy on too little evidence. The Respondent submitted that Applicant had only investigated a sample of 11 of its alleged 1200[7] odd consumer files and that these 11 consumer files do not comprise sufficient evidence of Respondent repeatedly contravening the Act. According to the Respondent's representative, Applicant's reliance on the client files as a basis for applying for the cancellation of Respondent's registration, amounts to "*taking the whale out of the sea*".

26. This issue of the Regulator putting a case forward on the basis of sample files, is not a new issue before the Tribunal. It was raised and dealt with by the Tribunal in previous matters namely, amongst others, *NCR v Van Dyk*[8] and *Matjokana v National Credit Regulator*[9] where the Tribunal found that it cannot be expected of the Regulator to investigate each and every consumer file of a credit provider or debt counsellor and to show contraventions in respect of each and every one or even a majority of the files. It is sufficient for the Regulator to prove contravention of the NCA through putting forward evidence drawn from "sample" files. It was stated by the Tribunal in the *Matjokana* –matter that "*Applicant takes issue with the Respondent's references to 'sample' files to draw the Tribunal's attention to instances of non-compliance with the Act and the regulations. Applicant did not point out to the Tribunal where and if he was in fact compliant; contrary to the Respondent's assertions.*"

[7] Having said that, there is no proven evidence before the Tribunal about the number of the Respondent's client files.
[8] NCT/2017/2011/57(1).
[9] NCT/2636/2011/56(1).

27. There is no basis for differentiating this matter from the previous matter referred to *supra*. We will accordingly decide whether the Respondent's registration should be cancelled on the basis of the consumer files brought before the Tribunal by the Applicant and the parties' submissions and arguments in respect thereof.

Establishing the requirements of the contraventions in terms of the Act

28. Respondent submitted that it did not intend to contravene the Act and should therefore not be visited with the consequences of the alleged repeated contraventions. Respondent submitted that " ... *even when I could have disadvantaged people I did not, even if I was legally entitled to do things I did not."* Respondent appears to not argue against the nature and ramifications of a contravention in terms of the Act, but rather to the sanctions the Applicant requests the Tribunal to impose on it. Respondent goes on to propose what would constitute an approriate sanction in its view namely"... *We wish not away the statutory contraventions, we feel that the correct sanction should rather had been asked for in terms section 150(b) of the Act and without being—in front of you we feel that the correct sanction may enclose something and we tender we will refund or reimburse any damage incurred to clientele, (b) pay the costs of the Applicant and this day, the Tribunal, (c) tender cost of an audit at any specific stage deemed fit by the Tribunal at the cost of the Respondent.*"

29. Applicant submitted that it is not required to prove that the alleged repeated contraventions were done with intent or with knowledge thereof, it is only required to prove the conduct took place to establish prohibited conduct.

30. The question before the Tribunal is to determine whether the Applicant has to prove *mens rea* on the part of the Respondent to succeed in proving its case and not only the *actus reus*. It goes to the foundation of the regulatory structure for consumer protection in SA and whether, in that structure, prohibited conduct is by nature criminal, civil, a hybrid of civil and criminal and then whether it amounts to strict liability (not requiring any form of fault).

31. Firstly, it is quite clear from the Act that prohibited conduct is differentiated from offences. The Act prescribe prohibited conduct and offences. Prohibited conduct is defined "*as an act or omission in contravention of the Act, other than ... offences under the Act*". The Act allows for administrative fines in respect of prohibited or required conduct in terms of the NCA or the CPA. [10] Section 160 of

[10] Section 151 of the NCA

the Act contains provisions regarding offences against the Regulator and the Tribunal. Throughout the Act, references are made to specific conduct or omissions constituting offences. Section 161 sets out the sanctions for offences committed in respect of the Regulator, the Tribunal and in terms of the Act.

32. The Competition Tribunal in *The Competition Commission of South Africa and Federal Mogul Aftermarket Southern Africa (Pty) Ltd, Federal Mogul Friction Products (Pty) Ltd T & N Holdings Ltd T & N Friction products (Pty) Ltd*[11] states that "*We conclude that neither the nature of the prohibitions, their history, the legislative intent or policy informing their treatment, suggests that prohibited practices are, in substance, akin to crimes. We do not suggest that section 59 exhibits a 'pure' deterrent model devoid of any retributive element. We do however suggest that it is by far the dominant element, and that retribution is insufficiently a determinant in the final mix to alter the categorization of the penalty into a punitive one. For this reason the sanction imposed by section 59(3) is insufficiently retributive in character to render it punitive in nature in a manner that requires the heightened protections afforded by section 35(3).*"

33. The regime of sanctions, particularly the administrative (civil) penalties regime is key to the South African consumer protection regulatory system and is akin to the Australian regime. The system of civil penalties has been introduced in Australia in 1993.[12] This was aimed at reducing the role of criminal law...only to the most serious contraventions. The majority of cases attracted civil penalty sanctions.[13]" For example sections 113 to 156 of the Australian Corporations Act, 50 of 2001 as amended, continue to make it an offence to contravene certain provisions of the Act (except where the provisions contravened specify that the contravention is not an offence).[14] In South Africa the provisions of the National Credit Act mirror this structural set-up. See the definition of prohibited conduct above and the references to sections 160 and 161 of the Act.

34. The Rome statute[15] adopted an elements analysis approach. "Elements" in the context of the Rome statute are the basic building blocks of a crime. In the civil context they are the basic building blocks of the civil suit. The Rome statute recognizes two types of elements: material elements (*actus rea*)

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11 (08/CR/Mar01) [2003] ZACT 43 (21 August 2003).

12 Vicky Comino - Effective Regulation by the Australian Securities and investment Commission: The civil penalty problem - Melb. U. L. Rev. 802 (2009 at page 804 footnote 8 stating that "since it was amended in the Corporations laws most significant amendments were introduced in the 1998 law ...which increased both the number and provisions to which the civil penalty regime applies. These amendments demonstrate the preference for the use of civil and administrative penalties over criminal prosecutions in the enforcement of the Australian corporation's legislation.

13 Vicky Comino - Effective Regulation by the Australian Securities and investment Commission: The civil penalty problem - Melb. U. L. Rev. 802 (2009 at page 804

14 Australian Corporations Act, 50 of 2001

15 U.N. Doc. A/CONF.183/9 adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 12 July 1998.and it entered into force on 1 July 2002

and mental elements (*mens rea*). It conceives of three types of material elements: conduct, circumstance and consequence. Delictual claims and crimes have a common denominator namely that for both there has to be some level of fault whether it is in the form of intent or negligence. With prohibited conduct, the question is whether the mens rea element has to be present over and above the *actus reus*.

35. In *Amalgamated Beverage Industries Natal (Pty) Ltd v City Council of the City of Durban* [16], an appeal against a conviction of distributing "unclean" drink – bee in a bottle - the question the Appellate division had to determine was whether for this contravention to be established, strict liability or *mens rea is* required? The majority decision was that *"Arising from the nulla poena sine culpa principle of the common law there is, as JAMES JP indicated in Ismail and Another v Durban Corporation 1971(2) SA 606 (N) at 607 E, "a strong current of judicial opinion ... against finding anyone guilty of an unlawful act unless that act is accompanied by mens rea*. But it is generally accepted by the courts that the legislature may dispense with the requirement of *mens rea* and the only question in any given case is therefore whether it has in fact done so."

36. The answer is to be sought in the intention of the legislature. The learned judge continued to state *"Two features of the subject-matter of the by-law emerge as pointing strongly, in my view, to the intention of the lawmaker to impose strict liability. Firstly, contraventions of the prohibition endanger and may have disastrous effects on public health, which it is the concern of the lawmaker to protect. Secondly, the prohibition is directed only at that specific class of persons who are engaged in the business of dealing in food."* and *"My view is that strict liability should only be found in cases where there are compelling reasons to do so, but that the circumstances of this case proclaim the need to recognize that rare exceptions to the general rule of mens rea must be allowed, for the sake of the proper, practical administration of criminal justice."* The court held accordingly that *mens rea* is not an element of the contravention.

37. In the United States of America, in the *Williams* - case [17], the court found that the only question to be determined by the fact-finder (Tribunal in this instance) was whether an advertisement claiming that Geritol "*builds iron in your blood*" was within the class of representations forbidden by the FTC's prior cease and desist order which forbade any future Geritol advertisement "*which represents directly or by implication that the use of such preparation will be beneficial in the treatment or relief of tiredness, loss of strength, rundown feeling, nervousness or irritability...*". The fact-finder considers the "meaning" of the representation only for the purpose of determining whether it falls within the forbidden territory.

[16] (675/92) [1994[ZASCA 2; 1994 (3) SA 170 (AD); [1994] 2 All SA 222 (A) (22 February 1994).
[17] *United States v. J B Williams Company Inc* 498 F.2d 414

38. Middleton[18] suggests that because *"Parliament has given...regulators (like ASIC[19]) the power to commence civil penalty proceedings where there has been a contravention of the physical elements of the legislation, rather than the fault element of a criminal offence .. the courts should observe Parliament's mandate ... and treat such proceedings as civil"* though not denying the punitive nature of the civil penalties.

39. On the basis of the above discussion the Tribunal's view is that Applicant need only proof repeated conduct by Respondent that contravenes the Act on the balance of probabilities, to render Respondent vulnerable to the cancellation of its registration under the Act.

40. Intention("*mens rea*"), is not a requirement to establish a contravention of the NCA once the Regulator proved that the conduct took place, nor is the lack of intention or motive ("*mens rea*"), a defence. This could however be a factor to take into account when determining the appropriate sanction.

THE MAIN APPLICATION

41. The Tribunal now has to determine whether the Applicant has put forward proof on a balance of probabilities that the Respondent repeatedly contravened the Act, for the Tribunal to grant its application for the cancellation of Respondent's registration in terms of section 57 of the Act.

42. Applicant alleged various repeated contraventions of the Act, regulations and its general and special conditions of registration by the Respondent. These are set out and discusssed in the paragraphs following namely:

Failure to use prescribed form (Form 20(2)) for small credit agreements in terms of section 93(2) of the Act read with regulation 30, and form used does not meet the requirements for exemption from using the prescribed form as set out in Regulations 75.

43. The relevant provisions of the Act and the regulations are contained in

[18] Middleton, "The privilege against self-incrimination" above note 17 P812 Melb U. L. Rev 2009 at page 812
[19] Australian Securities and Investment Commission.

43.1 Section 93 (2) read with regulation 30 which presecribes that *"A document that records a small credit agreement must be in the prescribed form."* The prescribed form with information as required / reflected in Form 20.2.

44. The factual allegations Applicant put forward are that the Respondent, during the period from 9 April 2008 to date, failed to stipulate all the required necessary information in its agreements in respect of small credit agreements as set out in Form 20.2 of the Act in that, the default administration costs or penalty interest on arrear amounts were not stipulated and any deviations did not satisfy the requirements for deviations in terms of Regulation 75 in order to satisfy all substantive requirements with regards to the content and design of the prescribed form.

45. Respondent denies this contravention stating that they are utilising the prescribed form and complying with this specific requirement. With regard to the default administration costs regarding consumer Vuthusa, Respondent's representative pointed out that Respondent set out in the agreement a paragraph stating that "*payment of default administration charges to the amount allowed by the registered letter of demand in an undefended matter in terms of the Magistrate Court Act together with reasonable necessary expenses in delivering the letter of demand*" in the event of the consumer defaulting. Respondent conceded that the information provided is description of the costs and not the actual amounts that will become due.

46. The Tribunal after having considered the submissions of the parties formed the view that Respondent contravened section 93(2) of the Act read with regulation 30, and the form used does not meet the requirements for exemption from using the prescribed form as set out in Regulations 75 in that the descriptive disclosure of the costs as they appear in respect of consumers, whose files were inspected as per annexures 2 – 11 of the investigator's report, do not conform with the requirements of the Act and the Regulations.

Failure to fully disclose all the costs of credit in the pre-agreement in contravention of section 92(1) read with Regulation 28.2 of the Act

47. The relevant legal provisions provide in –

47.1 Section 92(1) that *"A credit provider must not enter into a small credit agreement unless the credit provider has given the consumer a pre-agreement statement and quotation in the prescribed form.* This pertains to the pre-agreement statement and quotation prescribed in

Regualtion 28(2) as follows *"If any section of the pre-agreement statement and quotation as prescribed in this section does not apply to the particular type of credit agreement, such section may be omitted from the statement.*

47.2 Section 92(3) that *"Subject only to subsection (4), sections 81 and 101(1)(d)(ii), for a period of five business days after the date on which a quotation is presented in terms of subsection 2(b) with respect to a small agreement, the credit provider must, at the request of the consumer, enter into the contemplated credit agreement at or below the interest rate or credit cost quoted, subject only to sections 81 and 101(1)(d)(ii);*

48. Applicant submitted that factually -

48.1 Respondent reflected the initiation fee and credit life insurance on the three pre-agreements statements and quotations as zero but in the relevant credit agreements and client statements of the particular consumers, Respondent indeed charged a fee in respect of consumers Mofokeng Esau(pages 263 – 277 of the record); Edmond Manyokolo(annexure 5) and Disebo Seiphetlho (annexure 8).

48.2 The pre-agreement statement and quotation does not disclose the cost of credit fully as the initiation fee and service fee are indicated as zero or none on the pre-agreement statement and quotation, yet in the actual credit agreement it is reflected as R50 or R150 as in the case of consumers Esther Ali ; Sara Baba and Edmond Manyokolo as set out in Annexure 3- 5 to the investigation report annexed as annexure C to the founding affidavit.

48.3 During the period from 9 April 2008 to date Respondent failed to state amounts in respect of initiation fees, interest and service fees in the pre-agreement statements and quotations yet those fees were included in the credit agreements concluded. The Applicant submitted that, these fees should be reflected as zero in the credit agreement but does not reflect as such, as indicated in annexures 7 to 10 of the investigation report.

48.4 The Applicant submits that, the client statements of consumers' as per annexure C of the record, loan accounts reflect an interest of 25% per month without the other charges like credit life insurance, initiation fees and Value Added Tax (VAT) being stipulated.

49. Respondent admitted during the hearing that he did not use a pre-agreement statement and quotation as required by the Act.

50. In the light of the evidence put forward by the Applicant and the concession by the Respondent the Tribunal finds that Respondent failed to fully disclose all the costs of credit in the pre-agreement statement and quotation in contravention of section 92(1) read with Regulation 28.2 of the Act.

Respondent has contravened section 92(3)(a) of the Act because it fails to enter into a credit agreement at or below the interest rate or credit cost quoted.

51. The applicable legal provisions are set out in section **92(3)(a) which provides that:**

"(3) Subject only to subsection (4), sections 81 and 101(1)(d)(ii) for a period of five business days after the date on which a quotation is presented in terms of subsection (2)(b) -

(a) with respect to a small agreement, the credit provider must, at the request of the consumer, enter into the contemplated credit agreement at or below the interest rate or credit cost quoted, subject only to sections 81 and 101(1)(d)(ii)"

52. Applicant's factual submissions are –

52.1 The clients' statements in respect of consumers' Lucky Vuthuza ; Sara Baba; Mamtolo Ali, Edmond Manyokolo and Daniel Mamatela (Annexures 3 to 6), which are attached to the investigation report, reveal that the interest rate is reflected at 60% per annum instead of 5% per month, in contravention of the Act; and

52.2 No cost of credit is stipulated such as credit life insurance, initiation fee, VAT, etc. Further evidenced in respect of, amongst others, Sipho Zweni in Annexure 7 of the investigation report (Annexure C of the founding affidavit) .

53. The Tribunal finds that Respondent has contravened section 92(3)(a) of the Act because it failed to enter into a credit agreement at or below the interest rate or credit cost quoted.

Respondent charges interest in excess of the prescribed maximum as set out in the Act in contravention of sections 100; 101; 102 and 105 read with regulation 42(1) and 44 of the Act.

54. Applicant submitted that –

54.1 In respect of agreements concluded on the same day, Respondent do not charge a service fee, but charges the initiation fee double in respect of those agreements concluded on the same day.

54.2 Annexure 7 to the investigation report contains contracts numbered 66817 and 66816 which clearly shows the initiation fees of R75 and R150 being charged on the same date being the 23rd of August 2010.

54.3 Interest is overcharged in respect of Annexures 2, 3, 4, 6, 7, 8, 9, 10 and 11.

54.4 In respect of Annexures 2 and 8 it was interest and the initiation fee that were overcharged.

54.5 From the table illustrated with regards to the rest of the annexures it is noted, upon perusal of the consumer client statements, that the interest was overcharged.

54.6 Annexures 7 and 10 reflect that there weres splitting of the loans.

54.7 Annexure 9 reflects that there was no contract in respect of the loan amount of R1000, but the client statement once again indicated that there was a loan granted.

54.8 And in respect of Annexure 10 it is very important to note that the consumer was unable to make the payments on the due dates in respect of this credit agreement, but instead of granting aan extension to the consumer, the Respondent issues new loans and recharges the consumer in respect of the cost of credit, the service fee, the initiation fee and interest. The consumer was granted 5 loans even though it was clear that he was unable to afford the repayment of these loans.

54.9 Annexure 7 and 10 to the investigation report, through a simple arrhythmic calculation, reveal that the amount reflected under the interest column on the consumer client statement, is not on the credit agreement itself. The credit agreement may state 60% per annum and which is calculated at 5% per month, but from the consumer client statement it appears that the consumer is actually being charged for 25% in one aspect and 30% in another of the principle debt. The cost of credit is further not disclosed in this consumer client statement.

55. Respondent admitted in paragraph 31 on page 13 of their answering affidavit that some consumers might have been overcharged with interest due to a human error.

56. The fact that the consumers were overcharged irrespective of the cause for the overcharge is sufficient to establish the contravention. The consideration of how it came about that consumers were overcharged might be relevant at the stage when and if the Tribunal considers the Applicant's prayer for an administrative penalty.

Contravention of section 101(2) of the Act

57. Applicable legal provisions -

> "(2) A credit provider who is a party to a credit agreement with a consumer and enters into a new credit agreement with the same consumer that replaces the earlier agreement in whole or in part may charge that consumer an initiation fee contemplated in subsection (1)(b) in respect of that second credit agreement, only to the extent permitted by regulation, having regard to the nature of the transaction and the character of the relationship between the credit provider and consumer."

58. Applicant submitted that –

58.1 Respondent granted two consecutive loans to a particular consumer on the same day inferring that the amount is split in order for the Respondent to charge double fees. Annexures 7 and 10 to the investigation report illustrates that: (a) during the period from 9 April 2008 to date splitting loans and charging fees were in excess of what is prescribed in terms of the Act; (b) two loans would be granted consecutively on the same day to a consumer and the loan would be split in order for the Respondent to charge double fees in contravention of section 101(2) of the Act[20]. This is contrary to the spirit and purport of the Act that seeks to promote a fair and accessible credit market.

58.2 The splitting of loans amounts to contravention of the Act, moreover as the Respondent charged the consumer double in respect of the initiation fees and did not conduct an affordability asessment in respect of the second loan as required in terms of the Act.

59. Respondent admitted to the fact that it issued two consecutive loans on the same day[21].

60. Respondent denied contravening the Act, but admitted in his papers and at the hearing of this matter to splitting of loans. Respondent explained this incongruity on the basis that these instances constituted an exception in special circumstances on request of the consumer. He further explained that he did not charge a service fee in the second loan albeit he levied an initiation fee. Respondent submitted that, on their interpretation of the Act they have complied with the Act.

[20] Annexure "C"
[21] Applicant's Founding Affidavit Para 20.1 Respondent's Answering Affidavit Para 20.1.

61. The Tribunal, after having considered the submissions of the parties and in the light of the discussion in paragraphs 59 to 61 above finds that Respondent contravened section 101(2) of the Act.

Respondent granted credit recklessly in contravention of section 80 (1) (b) and section 88(4) of the Act.

62. Applicant referred to the relevant sectiion, Section 88(4) of the Act, which specifically precludes a credit provider from entering into a credit agreement with a consumer when such a consumer is under debt review, except for consolidation loans.

63. Applicant submitted that factually –

63.1 Respondent granted credit to a consumer who was clearly under debt review. The founding affidavit on page 14 paragraph 21 refers to this and Annexure 2 in respect of Ntsikelelo Lucky Vuthuza to the investigation report specifically points to this.

63.2 That the loan granted was not a consolidation loan and therefore the credit agreement entered into by the Respondent with this particular consumer is an agreement which is granted recklessly in contravention of section 81(2) and (3) of the Act.

63.3 Respondent being a credit provider needed to take the necessary steps in terms of the provisions of the National Credit Act to ascertain the debt history of this particular consumer, to ascertain whether or not this particular consumer was in a financial position to be granted credit or not. Evidently, by being aware of the fact that this particular consumer is under debt review or debt restructuring it must be acceded that the granting of credit to such consumer had been done recklessly.

64. Respondent, in its answering affidavit and in evidence at the hearing, its representative in argument denied that a loan was recklessly granted to a person under debt review. He submitted that the Compuscan enquiry for Vuthusa was done on 23 December 2009, the loan was granted on 22 July 2010 and then there was a follow-up. This is reflected in Annexure 2(c) of Compuscan of 2 November 2010. It remains a fact that the consumer's credit profile indicated that the consumer was under debt review since April 2009.

65. The Tribunal found that Respondent failed to adequately satisfy himself that the consumer was indeed not under debt review, nor had he entered into a debt re-arrangement and instead Respondent opted to take the consumer's word for it that the consumer was not under debt review. The Act is clear that Respondent must have satisfied himself regarding the ability of the consumer to meet his obligations

or not, and not that he can enquire from the consumer and thereafter reach his conclusion on that basis.

Respondent charges Nupay fees in contravention of section 100(d) of the Act

66. The Respondent charges consumers "Nupay fees", which is in contravention of section 100(1)(d) of the Act.

67. Applicant referred the Tribunal to the matter of *Barko Financial Services (Pty) Ltd v The National Credit Regulator NCT/743/20/56(1)* where the Tribunal held that the charging of Nupay fees, in excess of the fees allowed by the Act, is in contravention of the Act. This decision was upheld by the North Gauteng High Court and therefore, the Respondent is clearly acting in contravention of the Act.

68. The Respondent admitted to charging the NuPay fees but justifies that by stating that it does not burden the consumer because the consumer does not have the inherent risk of carrying cash around , therefore, it is convenient for the consumer to make use of the NuPay system. .

69. The Tribunal finds that Respondent contravened the Act in charging consumers in excess of what is allowed in terms of the Act for transactions relating to this Act.

Respondent charges credit life insurance to consumers without the actual existence of an insurance policy and / or proper forms in contravention of section 106(2), (4) and (6) of the Act.

70. Section 106 relates to credit insurance and prescribes that a credit provider may not offer or demand unreasonable insurance or insurance at an unreasonable cost having regard to the actual risks and liabilities involved in the credit agreement; and the consumer be given a choice of insurer.

71. From the submissions made the Respondent admitted to collecting money from his consumers in respect of credit insurance without issuing an insurance policy. Respondent submitted that the costs were disclosed costs and that he gave the consumer an option in respect of the insurance. That the costs were disclosed is borne out by the papers before the Tribunal. What is not set out by the papers is whether the consumer had a choice about taking the credit life insurance. There appears to be a choice about further insurance. It appears in effect that the Respondent alluded to being a self-insured entity in respect of the credit risk on the strength, as was submitted, that in the event of the death of

the consumer it writes off the outstanding balance of the loan and that no collection attempts are made against the deceased's estate for the recovery thereof.

72. The Respondent includes a fee for credit life insurance in the credit agreements without such fees having been disclosed in the pre-agreement statement and quotation and no insurance policy is taken out or exists as none were found on the files by the inspector during the investigation. This in contravention of section 106(2), (4) and (6) of the Act.

73. In terms of section 106(6) the consumer has a right to be informed of the prescribed manner and form requiring and permitting the credit provider to deduct any premiums due to any policy in terms of credit life insurance during the term of the credit agreement.

74. Respondent admitted that it charged consumers credit life fees and confirmed that no contracts were found for the insurances by the inspector during the investigation. His representative put forward that the amounts charged for credit life insurance were internal fees pertaining to the administration of the loan. The Respondent submitted that this entails that when the consumer passes away, the Respondent will settle the outstanding balance due which alleviates the consumer's estate from having to pay the outstanding debt and with having no further obligation.

Imposition of an administrative fine as contemplated in section 151(3) of the Act

75. In *NCR v Werlan Cash Loans t/a Lebathu Finance* [22] the Tribunal stated the following in relation to the aspects to consider when considering the imposition of an administrative fine:

> *"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:*
>
> *a) The nature, duration, gravity and extent of the contravention;*
> *b) Any loss or damage suffered as a result of the contravention*
> *c) The behaviour of the respondent;*
> *d) The market circumstances in which the contravention took place;*
> *e) The level of profit derived from contravention;*

[22] NCT/3867/2012/57(1).

f) The degree to which the respondent has co-operated with the National Credit Regulator, or the National Consumer Commission, in the case of a matter arising in terms of the Consumer Protection Act, 2008 and the Tribunal; and

g) Whether the respondent has previously been found in contravention of the Act, or the Consumer Protection Act 2008, as the case may be.

76. In the *Werlan*-case above, the Tribunal further stated that the Tribunal must consider fairness towards both the Applicant and Respondent when considering what would be a just administrative fine in the relevant circumstances. A careful consideration of the factors listed in Section 151(3) will result in the achievement of this objective. In the current matter the Applicant has dealt with factors listed in Section 151(3) and though the annual turnover of the Respondent is not for the preceding financial year but for the 1 January 2010 to 31 December 2010 financial year. The Applicant has made the following submissions as per the requirements of the Act and jurisprudence set out in the case of *Werlan* concerning the following:

The nature, duration, gravity and extent of the contravention

76.1 The nature of the contraventions found in respect of a sample of eleven consumer files that were selected randomly from one of the eight branches is of a serious nature. This is even more so taking congnisance of the history between the Applicant and the Respondent dating back to an initail set of contraventions during 2007 and later a further set of contraventions resulting in the current application by Applicant for the cancellation of Respondent's registration. Of even more concern is the fact that Respondent previously admitted to breaches of the Act and in the current instance again does not deny the contraventions but attempts to raise justifications therefor. The contraventions amounting to overcharging of Respondent's consumers, have grave consequences for the consumers and something the Act specifically focuses on in prescribing interests rates and charges and fees that may be levied and when they may so be levied. The contraventions complained of are exploitative by nature and moreover deprived those consumers of their rights and protections enshrined in the Act. The lasting damage suffered affects all consumers which have entered into credit agreements with the Respondent and they are not informed of the cost of credit, they are exploited by the splitting of loans, they are charged interest in excess of the prescribed maximum and the behaviour of the Respondent is clearly with no regard for the law or the order imposed by the Tribunal or the compliance notice issued to them. Respondent makes the submission in their papers that when they were issued with the compliance notice they subsequently ceased the behaviour of cards and pins

but that is not true. 11 files were referred to but it appears that Respondent had many more clients.It is unknown to what extent the Respondent's other clients are subjected to the same conduct and contraventions and it is not the role of the Tribunbal to speculate in respect thereof.

Any loss or damage suffered as a result of the contravention

77.2 The prejudice on the consumers is grave in that consumers have suffered financial loss due to concealed costs or additional costs mounted on the credit agreements without having been disclosed in the quotes or not allowed in terms of law. Evidence has been placed before the Tribunal on loss or damages suffered as a result of the contraventions. These mainly relate to amounts overpaid by the consumers and amounts for which a value was not provided to consumers in the case of insurance premiums paid and no insurance contracts issued. The transgression that appear most apparent from the record pertain to losses suffered by consumers due to the overcharging of interest. Consumers had been grossly overcharged on their small loans.

The behaviour of the Respondent

77.3 The Tribunal considered that the Respondent has shown a total disregard for the processes by the Applicant, the various investigations conducted, the issuance of a compliance notice and an order of this Trbunal. These compliance and enforcement actions by the Regulator against the Respondent all constitute aggravating factors impacting the amount of the penalty to be imposed ultimately. Respondent further presents the argument and submits that even if it is found to be acting in contravention of the provisions of the National Credit Act, like for instance they indicated that the overcharging of the interest of consumers was a human error and they have now rectified it in respect of the identified consumers that the Applicant has pointed out, this was as a result of lack of knowledge and with no intent. The consent order clearly states that the Respondent admits that they were found in possession of cards and pins after the issuing of the compliance notice.

The market circumstances in which the contravention took place

77.4 The market circumstances under which the contravention took place was at a stage of implementation of the Act so as to promote a conducive environment for a fair and accessible credit market against the backdrop of exploitative lending practices. Notwithstanding the fact

that the Respondent was afforded opportunity to remedy the contraventions it has continued to violate the consumers' rights in a manner that does not promote a fair and accessible credit market. The loan amounts are very small, indicative of highly vulnerable consumers. From the files placed before the Tribunal most of its clients appears to be low income individuals and as such regarded as vulnerable. This is considered to be an aggravating factor.

The level of profit derived from contravention

77.5 The Applicant argues that the Respondent has derived maximum profit from its contraventions through strategies such as splitting of loans, charging fees which were not disclosed to the consumers in the pre-agreement statements and/or quotations and which is not lawful in terms of the Act. The Applicant submitted that Respondent derived a profit through prohibited practices in that, not all the costs were disclosed as per the requirements of section 106(2), (4) and (6) of the Act and therefore it was not entitled to charge such costs in the credit agreements to the prejudice of the consumers. The Respondent clearly derives major profits from these contraventions because the annual turnover for 2010 was an amount of R8.9 million. Applicant submitted that it views the overcharging of interest by the Respondent in respect of practically all its consumers as an aggravating factor. Respondent submitted in paragraph 28 on page 12 of their answering affidavit that 80% of short term loans granted were granted to consumers lower than the prescribed cost of credit as allowed in terms of the Act, but provided no proof. Further in paragraph 29 on page 12 of their answering affidavit Respondent alleges that amounts have been written off as well as the fact that no outstanding loans are collected on when the consumer has passed away, due to the credit life insurance which the Respondent collects. Again no proof was provided.

The degree to which the respondent has co-operated with the National Credit Regulator and the Tribunal.

77.6 The Applicant disputes the Respondent's claim that Respondent cooperated with Applicant during the investigation. It submits that, the Respondent continued to repeatedly contravene the Act on numerous occasions whilst claiming to be complying with the Act, together with the Regulations as per their undertaking in the settlement agreement that was made a Tribunal order in 2009. The behaviour of the Respondent aggravates the seriousness and degree of contravention as the contraventions occurred during a period when the Respondent was under

scrutiny, implying that there was deliberate disregard for the provisions of the Act, its Regulations and Respondent's conditions of registration.

Whether the respondent has previously been found in contravention of the Act

77.7 The Respondent had given undertakings to the Applicant after the compliance notice was issued and also in terms of the Tribunal order it is evident that the Respondent was in contravention of the Act previously. It stands to reason that in terms of Section 55(4) of the Act a compliance notice remains in force until it is set aside or the Respondent is issued with a compliance certificate. In the current application before the Tribunal the Applicant approached the Tribunal in terms of section 55(6)(b) with a settlement agreement which was made an order of the Tribunal. Thus, a breach of that order amounts to a breach of the Tribunal order. In terms of section 160(1) of the Act a person that contravenes or fails to comply with a Tribunal order commits an offence which is punishable by a fine in terms of section 161(a) of the Act. It appears from the investigations report and a follow-up report that the Respondent has failed to comply with the Tribunal order.

78. It would therefore be appropriate to consider imposing an administrative fine as provided for in Section 151(2)(b), which does not exceed R1,000,000 or 10% of the Respondent annual turnover. Respondent's turnover for the previous financial year based on the return for 1 Jan 2010 to 31 December 2012 (as submitted by the Applicant and not disputed by the Respondent) was R8 983 360.

79. In light of the fact that all, but one, of the considerations above the Tribunal has to take into account, they all operated in aggravation of Respondent's conduct.

80 The Tribunal is of the view that an administrative fine of R1,000,000[23], based on the greater of 10% of its annual turnover for the previous financial year or R1,000,000 whichever is the greatest, reflects the seriousness with which the Tribunal views this type of prohibited conduct and disregard of the Act by a market participant.

81 For the reasons set out above the Tribunal makes the following order:

[23] Section 151(2)(b) of the Act.

81.1 Cancelling the respondent's registration as a Credit Provider, in terms of section 57(1)(a) and (c) of the Act as of the date of this judgment;

81.2 Declaring the following conduct of the Respondent to be in contravention of its conditions of registration, in terms of section 150(a) of the Act, and declaring the conduct to be prohibited in terms of the Act:

81.2.1 The Respondent's failure to comply with General Condition A1 of its General Conditions of Registration; and

81.2.2 The Respondent's contravention of -

81.2.2.1 Section 93(2) read with Regulation 30 of the Act81.2.2.2 Section 92(1) of the Act;

81.2.2.3 Section 92(3)(a) of the Act;

81.2.2.4 Section 42(1)(b) of the Act;

81.2.2.5 Section 101(2) of the Act;

81.2.2.6 Section 100(1)(d) of the Act;

81.2.2.7 Section 106(2), (4) and (6) of the Act;

81.2.2.8 Section 80(1)(b) and Section 88(4) of the Act;

81.2.2.9 Section 81(2) & (3) of the Act.

81.3 The Respondent must surrender all client files to the Applicant and must furnish the Applicant and the Tribunal with a comprehensive list of all past and present clients within twenty (20) business days of the Tribunal's order. The prohibited conduct as declared in 81.2 is in relation to the list of consumers so provided.

81.4 Pursuant to the order in paragraph 81.3, the Respondent is ordered to submit an audit report to the Applicant, within 60 days from the date of the order, detailing the following:

81.4.1 all the short term credit agreements concluded by the Respondent;

81.4.2 the capital amounts advanced in terms of such agreements;

81.4.3 the interest charged thereon;

81.4.4 the amount of any interest charged in excess of the prescribed rate;

81.4.5 the date on which interest payments were collected by the Respondent where interest of more than the prescribed rate was charged;

81.4.6 the amount of all repayments made by the Respondent in terms of paragraph 5 and the steps taken by the Respondent to locate consumers whom it was not able to trace and names of the recipients of all such payments.

81.5 The Respondent is ordered to refund all of its past and current consumers within 90 days of the date of this order, the following:

81.5.1 All interest charged to consumers under short term credit agreements in excess of the 5% per month together with interest at a rate of 15,5 % per annum from the date on which such excess interest was charged to date of payment;

81.5.2 All amounts paid by consumers in respect of NuPay fees, as far as the total fee charged exceed the prescribed minimum in term of the Act; and

81.5.3 All amounts paid by consumers in respect of credit life.

81.6 Imposing an administrative fine in terms of section 151 of the Act in the amount of R1,000,000 (One Million Rand Only) payable by no later than 30 December 2013 as a further penalty for the Respondent's contraventions of the Act, its regulations and its conditions of registration.

This done and signed at Centurion this 21st day of November 2013.

signed

Diane Terblanche
Presiding member
Adv N Sephoti and Mr X May concurring

Authorised for issue by the National Consumer Tribunal
Case number
Date: 2013 / 11 / 22
ccyy / mm / dd

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