IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: **NCT/71764/2016/140(1)**

In the matter between:

THE NATIONAL CREDIT REGULATOR **APPLICANT**

And

QUICK STEP FINANCE (PTY) LTD **RESPONDENT**

Coram:

Ms D Terblanche		Presiding member
Mr X May	-	Tribunal Member
Ms H Devraj	-	Tribunal Member

Date of hearing – 20 February 2018

JUDGMENT AND REASONS

THE APPLICANT

1. The Applicant in this matter is the National Credit Regulator, a juristic person established in terms of section 12 of the National Credit Act 34 of 2005 ("the NCA" or "the Act"), hereinafter referred to as ("the Applicant").

2. The Applicant was represented at the hearing on 20 February 2018 by Ms Du Plooy and assisted by Ms. Germishuys.

THE RESPONDENT

3. The Respondent is Quick Step Finance (Pty) Ltd, a registered Credit Provider with registration number NCRCP6676, hereinafter referred to as ("the Respondent"). Its

registered business address is 16 Village Square Shopping Centre, 46 Voortrekker Road, Alberton.

4. The Respondent was represented by Adv. J Augustyn, instructed by Cilliers and Reynders Attorneys.

TYPE OF APPLICATION

5. This is an application in terms of section 140(1) of the NCA. Section 140(1) provides that -

> *"(1) After completing an investigation into a complaint, the National Credit Regulator may—*
> *(a) ... ;*
> *(b) make a referral in accordance with subsection (2), if the National Credit Regulator believes that a person has engaged in prohibited conduct;"*

THE ALLEGED CONTRAVENTIONS

6. The Applicant alleges that the Respondent contravened the NCA by -

6.1. Extending credit recklessly to consumers by not conducting proper affordability assessments; and

6.2. Failing to keep proper records.

RELIEF SOUGHT

7. The Applicant prays for an order from the Tribunal -

7.1. Declaring the Respondent to be in repeated contravention of the NCA and the Regulations promulgated thereunder;

7.2. Declaring the (alleged) Respondent's repeated contraventions of the NCA and Regulations promulgated thereunder, to be prohibited conduct in terms of Section 150 (a) of the NCA;

7.3. Imposing an administrative fine against the Respondent in the sum of one million rand (R 1 000 000,00) or ten percent (10%) of the Respondent's annual turnover, whichever is the greater; and

7.4. Making any other appropriate order required to give effect to the consumers' rights in terms of Section 150(i) of the Act.

BACKGROUND

8. This matter has a lengthy procedural history, commencing with the filing of the application in terms of Section 140 (1) of the NCA in December 2016, condonation applications for the late filing of both the answering and replying affidavits and various set-downs for hearing; until it was finally set down and heard on 20 February 2018.

9. The background to the referral before the Tribunal is common cause between the parties, and is set out immediately below -

9.1. On or about 14 September 2015 the Applicant conducted an on-site compliance visit at the Respondent's premises;

9.2. During the compliance visit, five (5) consumer files were randomly selected, copied and assessed. Further to this an interview was conducted with a representative of the Respondent, a certain Mr. Kelvin Jiang;

9.3. The compliance officer, Siziwe Ribe, compiled an on-site visit report dated 19 October 2015 of the visit conducted on 14 September 2015, recommending that the activities of the Respondent be formally investigated. He stated in the report that -

9.3.1. From the files it appears that the Respondent did not conduct proper affordability assessments as they found only bank statements on the file which showed, for the majority of the consumer files, a surplus after the monthly deductions, but with no other indication of the consumers' income, expenses and debt obligations;

9.3.2. From the files it appears that the Respondent overcharged in respect of initiation fees and interests charges; and.

9.3.3. From the interview with Mr. Kelvin Jiang he stated that certain documents are requested before loans can be granted namely an identity document, recent payslip and 3 months' bank statement;

9.4. Subsequently, a complaint was initiated and investigation mandated by the Applicant in terms of Section 136(2) of the Act into the Respondent's credit providing practices, against the Respondent, to ascertain if credit was being granted in a manner that was compliant with the NCA and its Regulations;

9.5. T Mahobye and M Lekoko were appointed as investigators for the purposes of carrying out the investigation into the Respondent;

9.6. The investigation was conducted by way of a visit to the Respondent's premises on 20 May 2016. On that occasion the investigators randomly selected and assessed ten (10) of the Respondent's consumer files. They also conducted an interview with a representative of the Respondent, a certain Mr. K Jiang;

9.7. From this investigation Tshepo Mahobye prepared the report of the investigation (visit) conducted on 20 May 2016. The report is dated 14 June 2016;

9.8. The report reflects the following findings -

9.8.1. That the Respondent failed to take reasonable steps to assess the repayment history of the Consumer, thus failing to conduct proper affordability assessments and therefore granting credit recklessly in contravention of section 81(2)(a)(ii) of the NCA;

9.8.2. That the Respondent has contravened regulation 23A (3) in that it did not assess whether the consumer has the financial means and prospects to pay the proposed credit instalments;

9.8.3. That the Respondent has contravened regulation 23A (8) in that the consumers existing financial means had not been taken into account; and

9.8.4. The Applicant further alleges, should the Respondent contend that it did conduct the necessary affordability assessments, but does not have or retain copies of the affordability assessments, that the Respondent is in contravention of Section 170 read with Regulation 55(2)(vi) of the NCA .

10. In terms of the report the investigators recommended that the Respondent be prosecuted in terms of Section 81(2)(a)(ii), Regulation 23A(3) and Regulation 23A(8).

11. The Respondent raised various defenses to the referral made by the Regulator.

12. Some of these defenses translated into points *in limine*, which the Respondent raised both in its answering affidavit and at the hearing of the matter.

13. For the sake of brevity; these will be dealt with to the extent necessary in the discussions below. Suffices to state; at this stage; that in the main; the Respondent submitted that Regulator acted *ultra vires* its mandate and that the referral to the Tribunal is premature and invalid.

14. We will first deal with the matters raised *in limine* and then if necessary, with the substantive defenses on the prohibited conduct the Regulator alleged the Respondent committed should that be necessary.

POINTS *IN LIMINE*

15. The Respondent raised the certain points *in* limine in its answering affidavit and at the hearing. And these were -

15.1. That there are pending high court cases of which the outcome impacts the decisions of the Tribunal in its cases and in its decisions. In this regard in its answering affidavit the Respondent submitted that it will be in the interests of justice to postpone the hearing of the application until the finalisation of the matters in the high court;

15.2. That the Applicant did not have a reasonable suspicion to initiate the complaint and launching the investigation into it. The Respondent challenged the Regulator's use of the information obtained during the on-site visit against it to initiate a complaint in terms of section 136(2) of the NCA, as the lead-up, execution and outcome, were flawed and -

15.2.1. Challenges the Applicant's legal authority to conduct an on-site visit;

15.2.2. The Applicant should have had a search warrant, which it did not have, to conduct an investigation; and.

15.2.3. The Respondent did not provide it with an opportunity to be heard; and

15.2.4. The Respondent should have been issued with a compliance notice, to which it could have objected had it so wished; in terms of section 56, as in its view; it is trite law that the word *"may"* in section 55 of the NCA; has the meaning of *"must*".

15.3. That the investigation was poor and the Respondent as a result did not know what the case is it needed to meet; and

15.4. That the Respondent also was raising what it termed the *"defensive" or "collateral"* challenge to the validity of the Applicant's administrative action.

POINT *IN LIMINE* 1: PENDING HIGH COURT CASES

16. The Respondent referred the Tribunal to four (4) cases pending in the high courts, which, according to the Respondent, would render it premature for the Tribunal to hear this matter and make a decision. They are -

16.1. The *Truworths* case [1] - the *Truworths* matter relates to the validity of the 'Affordability Assessment Guidelines' prescribed by the Minister in Regulation 23A. This Regulation was initially published under General Notice No. R202 in Government Gazette No. 38557 of 13 March 2015 with the date of publication i.e.

[1] Truworths Ltd, The Foschini Group and Mr Price Group Ltd against the Minister of Trade and Industry and the NCR: Case 4375/2016 Western Cape Division.

13 March 2015 as the effective date. The effective date was suspended for a period of 6 months to commence on 13 September on 2015 as per General Notice No. 756 in Government Gazette No. 39127 on 21 August 2015;

16.2. The *Micro Finance SA* case [2]- in this case, Micro Finance SA challenged the validity of the 'Review of Limitations on Fees and Interest Rates Regulations', published in Government Gazette 39379, volume 605 on 6 November 2015 as it relates to short-term credit. These Regulations came into effect on 6 May 2016. Louw J of the North Gauteng High Court heard the challenge to the validity of the Regulations in case 16746 on 21 November 2016 and set the Regulations aside as invalid. The Minister appealed the decision. The judgment on the appeal was pending at the date of the hearing. The Respondent conceded that it has not been charged of any contraventions pertaining to the charging of fees and charges in excess of the prescribed amounts as per the NCA;

16.3. The *Micro Finance South Africa* case[3] - in this regard the Respondent argues that the matter pertains to the definition of the "deferred amount" in the NCA and could impact the matter before the Tribunal. This matter is still to be heard; and

16.4. The *Getbucks* case[4] - in which *Getbucks* attacks the validity of the entirety of the Regulations to the National Credit Act, 2005 as issued by the Minister on 13 March 2015 as set out in paragraph 16.1 above. The Respondent contends that the outcome of *Getbucks* is of great importance as the Respondent is charged with contravening the record keeping regulations in terms of Regulation 55(2)(vi) of the National Credit Act.

17. The Applicant counters this point *in limine,* contending that there is no legal basis upon which this matter cannot proceed, as there is no litigation in another court over the same cause of action and between the same parties.

17.1. For support of this position, the Applicant referred to the condonation judgment of *Gnome Finance t/a Wise Money vs National Credit Regulator*[5] where the Tribunal ordered that "*The matter before the Tribunal is stayed until the ruling by the North*

[2] Micro Finance SA case vs the NCR: Case No. 16746/2016,Gauteng Division: Pretoria
[3] Micro Finance South Africa vs the NCR : Case 64646 Gauteng Division, Pretoria.
[4] Getbucks vs the NCR Case 65977 of 2016 / North Gauteng High Court
[5] NCT/78961/2017/140 (1)

Gauteng High Court on the matter before it which are the same subject matters of the case before the Tribunal and between these same parties;..."

17.2. The Applicant further argues that the High Court cases the Respondent referred to, have no bearing on the current matter as the substantive issues before the High Courts and the Tribunal is not the same.

17.2.1. The case before the Tribunal does not relate to short-term credit, which is the subject matter of the *Micro Finance SA* x 2 cases before the high court;

17.2.2. The Regulations forming the basis for the contraventions alleged against the Respondent, have not been overturned, and are applicable and valid;

17.2.3. That it is apparent from the prayers that the relief sought relates to the failure of the Respondent to conduct proper affordability assessments and the consequential reckless agreements that were entered into as a result of the Respondent's failure to conduct them; and

17.2.4. The reference to *Getbucks*, which relates to Regulation 44, is without a legal basis or authority and is therefore void.

18. The Applicant further argued that it will not be in a position to regulate certain sections of the NCA and / or Regulations merely as a result of same being challenged in the courts.

19. The Applicant lastly contended that the Respondent will not be prejudiced should the hearing proceed.

20. The Tribunal has considered the parties' arguments above and discusses its views and findings below.

21. The Tribunal's assessment of the relevance of the matters before the High Courts, raised by the parties, is that -

21.1. With regard to the *Truworths* case -

- It is common cause between the parties that the on-site visit was conducted a day after Regulation 23A came into operation and that the credit agreements considered related to credit extended before the effective date of Regulation 23A; and that the investigation date was after Regulation 23A came into operation and that the sample files related to credit extended after the effective date of regulation 23A;

- The Applicant's case is that the Respondent grants credit without any affordability assessments as required by the Act in contravention of sections 81(2)(a), 81(3) and section 80(1)(a) of the Act; and

- The Applicant mentions Regulation 23A in paragraph 21.1 of its founding affidavit but seemingly places no reliance on it. It does not, as in the founding affidavit in respect of the alleged contraventions of the stated sections of the NCA, set out in any detail any requirements of Regulation 23A the Respondent allegedly breached.

21.2. With regard to the *Micro Finance of South Africa* Cases - there are no allegations or contraventions alleged by the Applicant in regard to the issues that form the subject matters of those cases in the High Court matters, before the Tribunal. The Respondent's concern about averments the Applicant may make in that regard during the hearing is wholly without substance and merit. The Tribunal process does not allow for parties to simply introduce new causes of action at the hearing of a matter through averments from the bar; and

21.3. With regard to the *Getbucks* matter where the Regulations have been challenged in their entirety, the same situation pertains where the Regulator relies on contraventions of the substantive statutory provisions.

22. To the extent that any of the matters before the High Courts relate to challenges of subsidiary provisions, an argument that therefore allegations of contraventions of primary provisions cannot be entertained, cannot be correct and sustained.

23. Albeit the view of the Tribunal is that the Applicant seemingly does not rely on Regulation 23A in its case against the Respondent, by the time the investigation was conducted in May 2016, regulation 23A, that came into effect on 13 September 2015,

was applicable to the credit agreements the Respondent entered into with consumers between January 2016 to May 2016, that were assessed and reviewed by the Applicant. Regulation 23A, although challenged, was at that date still applicable and valid. In *Nourse V Van Heerden*[6] the honourable judge stated that[7] - *"Existing legislation remained in force until repealed or declared unconstitutional. The trial started before the repeal of the Abortion Act and in terms of Section 12(2) of the Interpretation Act, the trial had to be completed as if the Abortion Act had not been repealed"*. The Tribunal therefore has jurisdiction to hear this matter and there is nothing in law that prevents it from proceeding to hear it.

24. The Tribunal agrees with the Applicant that it would result in an untenable situation, in a regulated environment, if the Applicant could not enforce regulations merely because of challenges to the laws and regulations in the courts. That could, in the view of the Tribunal, result in a situation where parties wishing to escape regulation, can simply either launch challenges in the High Court against the regulation or align them to challenges others have launched in the high courts.

25. The Applicant should be able to continue with enforcing legislation until it is set aside or declared unconstitutional by a court.

26. The Respondent has in effect raised the defence of *lis alibi pendens* as it contends that the outcome of those matters will impact the decision of the Tribunal in this matter.

27. It is trite law that[8] in order to be successful in a plea of *lis alibi pendens,* four requirements have to be complied with, namely:
    (a) Pending litigation;
    (b) Between the same parties or their privies;
    (c) Based on the same cause of action; and
    (d) In respect of the same subject matter.

28. This principle is succinctly dealt with in *Nestlė (South Africa) Pty Ltd v Mars Inc.*[9], where Nugent AJA said:

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6 1999 (2) SACR 198 (W)

7 Botha C, "Statutory Interpretation an introduction for Students", Fifth Edition, 2012, Juta

8 Eravin Construction CC v Twin Oaks Estate Development (Pty) Ltd (1573/10) [2012] ZANWHC 27 (29 June 2012)

9 2001(4) SA 542 (SCA) PARA 17.

> *"There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential for a duplication of actions."*

29. The Tribunal therefore agrees with the argument of the Applicant that the pending High Court matters are not a bar to the Tribunal proceeding with this matter.

30. Furthermore, the Tribunal is required in terms of Section 142 (1)(b) of the Act, to conduct its hearings as expeditiously as possible.

31. In *Shosholoza Finance CC v National Credit Regulator;*[10] ,Counsel for Shosholoza argued that the main application ought to be postponed as requested in the Notice of Motion; because the proceedings in the TPD would have a material bearing on the outcome of the main application. He had argued that the outcome of the proceedings in the High Court could possibly dispense with the need for the matter proceeding in the Tribunal. In deciding that application for postponement the; Tribunal said in paragraph 12 thereof "*… our courts have held that a court or a Tribunal should not easily divest itself of jurisdiction. Courts do not act on abstract ideas of justice and equity but must act on principle.*[8]*"*

32. It is worth noting here that these cases in the high courts are at different stages in the litigation process and it is uncertain when or if they will run their course; to a final determination. It is also uncretain whether or not they will run their full gambit of appeals up to the constitutional court of South Africa. These uncertainties obviously impact how quickly the Tribunal can adjudicate on the issues between the parties.

POINT *IN LIMINE* 2: REASONABLE SUSPICION

33. The Respondent raises this point *in limine* on the basis that the Applicant cannot rely on the information it obtained during the on-site visit to initiate a complaint in terms of section 136(2) against it, due to alleged irregularities in the lead-up, execution and outcomes of the on-site visit.

34. The Tribunal will deal with these alleged irregularities as separate and distinct discussions after dealing with the primary aspects relating to reasonable suspicion.

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10 (NCT/09/2008/57(1)(P)) [2008] ZANCT 4 (6 October 2008)

35. The Respondent relied on the *Woodlands* judgment and the *NCR v Capitec* judgment in arguing that the routine visit was merely a fishing expedition, which was a disguised inspection in order for the Applicant to initiate a complaint in terms of Section 136(2), and that there was no reasonable suspicion. Therefore the investigation was not justified and the complaint initiated in terms of Section 136(2) is unlawful and invalid.

36. The Applicant argues that it did have a reasonable suspicion to initiate a complaint in its own name and relies on the *Woodlands Dairy (Pty) Ltd and Another v Competition Commission*[11] judgment in order to support its argument.

> *"A complaint has to be 'initiated'. The commissioner has exclusive jurisdiction to initiate a complaint under s 49B(1). The question then arises whether there are any jurisdictional requirements for the initiation of a complaint by the commissioner. I would have thought, as a matter of principle, that the commissioner must at the very least have been in possession of information 'concerning an alleged practice' which, objectively speaking, could give rise to a reasonable suspicion of the existence of a prohibited practice. Without such information there could not be a rational exercise of the power. This is consonant with the provisions of s 49B(2)(a) which permit anyone to provide the commission with information concerning a prohibited practice without submitting a formal complaint".*
>
> *"The CAC did not take into account that the initiation must at least have a jurisdictional ground by being based on a reasonable suspicion. The initiation and subsequent investigation must relate to the information available or the complaint filed by a complainant."*

37. The Applicant therefore submits that it had sufficient grounds to believe that prohibited conduct had taken place. Following the compliance visit and the information that was obtained, the Applicant is expected to take further steps against the Respondent.

38. The Applicant initiated a complaint by way of a memorandum wherein it identified that the Respondent, during the compliance visit was conducting business in non-compliance with the Act which; was severe in nature; and warranted a formal investigation; which if found to be true; would refer same to the Tribunal.

39. The Applicant argues that it cannot be the contention that the Applicant embarked on a fishing expedition. The Applicant referred to the *NCR v Capitec*[12] matter; and argued that; the facts in this matter are different; in that the investigation initiated; was not a wide reaching investigation into the affairs of the Respondent. The Applicant based this

[11] (2010 (6) SA 108 (SCA); [2011] 3 All SA 192 (SCA)) [2010] ZASCA 104; 105/2010 (13 September 2010)
[12] NCT/9152/2013/140(1)

argument on the assertion that the memorandum clearly sets out the contraventions that were identified.

40. The Applicant submitted that its process was in line with the *Competition Commission v Yara*[13] judgment regarding the process of initiating a complaint. The court held:

> *"Taken literally 'initiating a complaint' appears to be an awkward concept. The Commission does not really 'initiate' or start a complaint. What it does is to start a process by directing an investigation, which process may lead to the referral of that complaint to the Tribunal. And it can clearly do so on the basis of information submitted by an informant, like Mrs Malherbe in the Glaxo case; or because of what it gathers from media reports; or because of what it discovers during the course of an investigation into a different complaint and/or against a different respondent. Since no formalities are required, s 49B(1) seems to demand no more than a decision by the Commission to open a case. That decision can be informal. It can also be tacit. In argument, counsel for Omnia informed us that, in practice, the initiation usually takes the form of a memorandum. I have no doubt that for the sake of good order and certainty, that would be so. But it is not a requirement of the Act."*

41. In conclusion the Applicant submits that it initiated a valid investigation, in the light of Section 136(2), Section 50(2) and Section 15(c) of the Act and that the information obtained during the compliance visit led to a reasonable suspicion being formed.

42. It is apparent to the Tribunal, from the submissions made by the parties and with reference to paragraphs 9.1, 9.2 and 9.3 above, that an on-site visit was conducted where certain contraventions of the NCA were identified.

43. The Regulator, based on a memorandum, which in turn is based on the on-site monitoring report, initiated a complaint. That on-site monitoring report set out objective information of the findings of the Regulator's compliance officers.

44. On 20 May 2016 an investigation was conducted. During the investigation the investigators identified contraventions of the NCA. These are detailed in paragraphs 9.8 above.

45. From the dicta in the *Woodlands* judgment and the *Capitec* matter, it is very clear that objectively speaking there needs to be a reasonable suspicion before the Applicant can initiate a complaint.

[13] Competition Commission v Yara (South Africa) (Pty) Ltd and Others (784/12) [2013] ZASCA 107; [2013] 4 All SA 302 (SCA); 2013 (6) SA 404 (SCA) (13 September 2013) Par 21

46. According to the *Woodlands* [14] judgment the Competition Commission must have been in possession of some information (own emphasis) concerning an alleged practice and this information could give rise to a reasonable suspicion.

47. In *Yara*[15] it was held that -

> *"A vital consideration in evaluating the cogency of the CAC's equation of the two complaint forms, is that with regard to formalities, the legislature draws a clear distinction between a complaint initiated by the Commission (in terms of s 49B(1)) and a complaint submitted by a private person (in terms of s 49B(2)(b)). While the latter has to be in the 'prescribed form', no formalities are prescribed for the former. Taken literally 'initiating a complaint' appears to be an awkward concept.* ***The Commission does not really 'initiate' or start a complaint. What it does is to start a process by directing an investigation, which process may lead to the referral of that complaint to the Tribunal. And it can clearly do so on the basis of information submitted by an informant, like Mrs Malherbe in the Glaxo case; or because of what it gathers from media reports; or because of what it discovers during the course of an investigation into a different complaint and/or against a different respondent.(Emphasis added).*** **"**

48. We will now discuss the bases upon which the Respondent challenges the Applicant's use of the information obtained during the on-site visit.

A: LEGAL BASIS FOR CONDUCTING AN ON-SITE VISIT

49. The Respondent submits that the Applicant has not established the legal authority under which it conducted the on-site visit.

50. The Applicant submits that it is specifically mandated in terms of Section 15(c) to monitor the consumer credit market and industry to ensure that prohibited conduct is prevented or detected and prosecuted; and that it is further mandated to investigate and ensure that national and provincial registrants comply with the Act and their respective registrations.

51. The Applicant also referred the Tribunal to the *Xanadu*[16] matter where a similar procedure was followed and where the Tribunal held that:

[14] Par 13
[15] Par 21
[16] NCR v Xanadu Properties 117 cc t/a Cash in a Flash – NCT/21924/2015/57(1)

" the Applicant monitored the business of the Respondent and observed that the Respondent was engaging in credit granting practices that were suspected to be in contravention of the Act….

…..the Applicant then conducted an investigation into the Respondent's business. The Applicant uncovered practices that were in contravention of the Act.."

52. Having regard to Section 15 (c) and the *Xanadu* judgment, the Applicant submits that a valid investigation was conducted.

53. The Applicant further submitted that -

53.1. The Respondent's conditions of registration, empowers the Applicant to assess and monitor Respondent's compliance with the Act, relevant Regulations and conditions of registration;

53.2. Section 50(2) places an obligation on a Registrant to permit the National Credit Regulator or any person authorized by the National Credit Regulator to enter any premises, during normal business hours, at or from which the Registrant conducts the registered activities and to conduct reasonable inquiries for compliance purposes, including any act contemplated in Section 154(1) (d) to (h); and

53.3. The Applicant therefore, rightfully conducted an on-site compliance visit of the business practices of the Respondent on 14 September 2015. It is the submission of the Applicant that the on-site visit was not an investigation and was purely to establish the compliance status of the Respondent.

54. The Tribunal noted the submissions of the parties in this regard specifically with regard to the provisions of the NCA and registrants' conditions of registration.

55. The Applicant rightfully contends, in the view of the Tribunal, that in terms of Section 15 of the Act, it "must" monitor the credit industry. It is a peremptory requirement in terms of the Act and one of the enforcement functions conferred on the Applicant by the Act.

56. The legislature did not end with simply mandating the Applicant. It went further and prescribed the means by which the Regulator executes the mandate. These are the provisions that are contained, amongst others, in section 50(2) and section 154(1)(d) to (h).

57. Section 50(2)(a) falls under the heading of *"Authority and standard conditions of registration"* and permits the -

> *"... National Credit Regulator or any person authorised by the National Credit Regulator to enter any premises at or from which the registrant conducts the registered activities during normal business hours, and to conduct reasonable inquiries for compliance purposes, including any act contemplated in section 154 (1) (d) to (h);"*

58. The provisions under Section 154 (1)(d) to (h) are under the heading "Powers to enter and search". It appears to the Tribunal that this provision appears specifically under the "conditions of registration" of a registrant to make it easier for the Regulator to perform its enforcement functions, without requiring a search warrant.

59. The Tribunal finds that Section 15(c) of the NCA empowers the Applicant to conduct a monitoring exercise. Section 50(2)(a) embeds that obligation in a pragmatic way and then also links in the tools at the Regulator's disposal to exercise its mandate.

B: SEARCH WARRANT

60. The Respondent submitted that the investigation is invalid due to the Applicant conducting the investigation without a search warrant.

61. The Applicant argued that a search warrant was not required at the time of the compliance visit or the investigation.

62. The Applicant referred to the Tribunal to the *Eminem Cash Loans Upington*[17] matter where the Tribunal found that when the Applicant uses the provisions of Section 50(2)(b), it has most of the powers normally reserved for a person who has a search warrant. The main difference was that the Applicant may not search the premises or any person on the premises without a search warrant.

63. The Applicant submits that neither the premises nor any persons were searched. Neither were articles seized, and nor was the Respondent deprived of lawful possession of articles.

[17] NCT/23179/2015/57(1)

64. The Applicant argued that on the Respondent's own version in paragraph 33 of the Applicant's Answering Affidavit, copies of the selected files were provided to the inspectors. The investigation therefore did not constitute a search and seizure and therefore a search warrant was not required.

65. In considering the parties' submissions the Tribunal noted that -

65.1. It is common cause that the Respondent co-operated with the investigators during the investigation conducted in May 2016;

65.2. The Respondent has not made any assertions that the premises were searched or that persons were searched or provided any evidence in that regard;

65.3. The main contention of the Respondent is that the Applicant should have had a search warrant to conduct the investigation;

65.4. The plain reading of Section 50(2)(a) as well as Section 154 (d) to (h) is that the Applicant has wide powers to during its enforcement of the legislation. These powers allow the Applicant to make copies of documents, request information, use the computer equipment on the premises and these functions can be performed without a search warrant. This is exactly what happened in this matter;

65.5. The Applicant requested consumer files and received copies of the information; and.

65.6. The Applicant did not search the premises, or any person, nor did it seize any information.

66. The Tribunal therefore finds that there was no requirement for the Applicant to obtain a search warrant in this particular matter. The Applicant performed its functions as empowered to under the provisions of Section 50(2) (b) and Sections 154 (d) to (h). The investigation was therefore not unlawful.

C: RIGHT TO BE HEARD

67. The Respondent submits that the Applicant have not adhered to the *audi alteram partem* principles up to the point where the unresolved issues have been referred to the Tribunal.

68. The Respondent faults the Applicant for not interacting with the Respondent after the compliance visit and for not addressing the Respondent's explanations for its non-compliance and testing then against the reasonable explanations provided by the Respondent, that could have averted the referral to the Tribunal.

69. The Respondent argued that the Applicant should have adhered to the *audi alteram partem* up to the point where the unresolved issues have been referred to the Tribunal.

70. The Respondents version is that the Applicant was more interested in referring the matter to the Tribunal, than ensuring the proper regulation of the industry, fairness and objectives and adhering to the principles of administrative justice. The Respondent substantiated this point by referring the Tribunal to the decision in the *NCR v Capitec* case where the judge stated -

> *"[the] NCR exercises a discretion requiring the balancing of rights and responsibilities of credit providers as all as consumers. Within this framework the NCR is required, as far as possible to achieve the correction of non-compliance with the provisions of the NCA by credit providers, impartially, while at the same time observing audi alterum partem up to the stage that the unresolved issues inevitably are to be referred to the tribunal. A unilateral fault finding mission with the sole purpose of securing a hearing by the tribunal, as has happened in this case, is at odds with Constitutional values and principles and is therefore to be deprecated. I have no doubt that had the perceived transgressions by Capitec, that were discovered in Gobodo's investigation, been addressed by mutual co-operation and in the spirit of bettering the interest of the credit consumer industry as a whole, ... a hearing before the tribunal could have been averted."*

71. The Respondent also referred the Tribunal to Paragraph 20 of the *Woodlands Dairy (Pty) Ltd and Another v Competition Commission* judgment[18] where the Court held -

> *"[For] purposes of a fishing expedition without having initiated a valid complaint based on a reasonable suspicion. It would otherwise mean that the exercise of power would be unrestricted because there is no prior judicial scrutiny as in the case with a search warrant."*

72. From the above authority the Respondent's argument was that the Applicant's far-reaching powers may not be abused.

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[18] (2010 (6) SA 108 (SCA); [2011] 3 All SA 192 (SCA)) [2010] ZASCA 104; 105/2010 (13 September 2010)

73. The argument put forward by the Applicant is that the Tribunal will adjudicate on the facts before it and the Respondent will be afforded the opportunity to have its side of the case heard. The Applicant further avers that it has brought the contraventions to the notice of the Respondent and the Respondent has had ample opportunity to respond to the allegations.

74. The Tribunal considered the submissions of the parties in the above regard and discusses its views and the bases therefore below.

75. In *Yara*[19] the Court held that -

> *"The Commission is not even required to give notice of the complaint and of its investigation to the suspect. Least of all is the Commission required to engage with the suspect on the question whether its suspicions are justified. The principles of administrative justice are observed in the referral and the hearing before the Tribunal. That is when the suspect firm becomes entitled to put its side of the case."*

76. The principle in *Yara* is that the Applicant is not required to engage with the Respondent and allow the Respondent to make representations.

77. The Tribunal therefore agrees with the Applicant that the Respondent is provided with the opportunity to be heard at the Tribunal hearing and to put its case to the Tribunal.

D: COMPLIANCE NOTICE

78. Section 55(1) of the NCA deals with the issuing of compliance notices. It provides that -

> *"Subject to subsection (2), the National Credit Regulator **may** issue a compliance notice in the prescribed form to—*
>
> *(a) a person or association of persons whom the National Credit Regulator on reasonable grounds believes—*
>
> *(i) has failed to comply with a provision of this Act; or*
>
> *(ii) is engaging in an activity in a manner that is inconsistent with this Act; or*
>
> *(b) a registrant whom the National Credit Regulator believes has failed to comply with a condition of its registration."* (Emphasis added)

79. The Respondent initially submitted in its answering affidavit that the word 'may' in section 55(2) of the NCA means 'must'.

[19] Par 24

80. At the hearing the Respondent argued that while Section 55 states that the Applicant 'may' issue a compliance notice to a person believed to be engaging in activities inconsistent with the Act, the Respondent had a reasonable expectation to expect some communication, a report or a compliance notice.

81. The Respondent argued that the Applicant cannot have an unfettered discretion to issue a compliance notice and that it must issue a compliance notice within a legal framework and that administrative action.

82. The Applicant submits that the nature of the contraventions that were identified during the on-site compliance visit, were of such a serious nature that it initiated a complaint in its own name to formally investigate the contraventions.

83. The Applicant argued that there is no provision in the Act that obliges the Applicant to issue a compliance notice upon becoming aware of any breaches of the Act.

84. The Applicant referred the Tribunal to the *SA Taxi Securitisation (Pty) Ltd vs. The National Credit Regulator*[20] matter where it held that a compliance notice is intended for situations where the alleged non-compliance is of a less serious and less complex nature.

85. The Applicant further referred the Tribunal to the *NCR vs. A-Z Microloans*[21] matter where the Tribunal held that the issuing of a compliance notice is discretionary. The judgment went on to state that even if a compliance notice was issued, a hearing into the compliance notice, where the party it was issued against objects to it, allows for the *audi alterum partem* rule to be applied. Therefore the Respondent's interpretation of the word "may" in section 55(1) of the Act to mean "must" is erroneous.

86. The Tribunal considered the parties' submission and the text of the provisions referred to.

87. It is very clear to the Tribunal applying the ordinary meaning of the word 'that section 55(1) provides the Applicant with the discretion to decide whether to issue a compliance notices or not.

[20] NCT/31877/2015/56(1)

[21] National Credit Regulator v A-Z Micro Loans CC (NCT/78949/2017/57(1)) [2017] ZANCT 113 (29 September 2017)

88. The word "may" is defined as a choice to act or not, or a promise of a possibility, as distinguished from "shall" which makes it imperative.[22]

89. The golden rule of interpretation is that wherever possible, the words should be given the meaning that they have in ordinary usage. It follows that the use to which a word is put derives from the context in which it is used.

90. In *Manyasha v Minister of Law and Order 1999 (2) SA 179 (SCA) the SCA reiterated the so-called 'golden rule' of statutory interpretation in the following terms -*

> *"It is trite that the primary rule in the construction of statutory provisions is to ascertain the intention of the Legislature. . . . One seeks to achieve this, in the first instance, by giving the words of the provision under consideration the ordinary grammatical meaning which their context dictates, unless to do so would lead to an absurdity so glaring that the Legislature could not have contemplated it.*
>
> *It is however also a well-established rule of construction that words used in a statute must be interpreted in the light of their context, and that, in this regard; the 'context' is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background.*
>
> . . .
>
> *(T)he legitimate field of interpretation should not be restricted as a result of an excessive peering at the language to be interpreted without sufficient attention to the contextual scene. (Jaga v Dönges NO and Another; Bhana v Dönges NO and Another 1950 (4) SA 653 (A))"*

91. The word "may" in section 55(1) is only limited by the provisions of section 55(2). It provides that -

> *"(2) Before issuing a notice in terms of subsection (1) (a) to a regulated financial institution, the National Credit Regulator must consult with the regulatory authority that issued a licence to that regulated financial institution."*

[22] https://legal-dictionary.thefreedictionary.com/may accessed on 18 May 2018

92. The only strictures, the Tribunal could discern on the Regulator's power to initiate a complaint in terms of section 136(2), have developed through case law relating to the requirement of a reasonable suspicion based on objective information.

93. Similarly the Tribunal could not locate any additional requirements, pertaining to certain entities and types of prohibited conduct, on the Regulator to; for example; issue a compliance notice before prosecuting prohibited conduct.

94. The legislation clearly provides the Applicant with the discretion to issue or not to issue a compliance notice.

95. The Tribunal finds that the Applicant has acted within the confines of the Act, when it decided to initiate an investigation rather than issue a compliance notice against the Respondent.

FINDING ON REASONABLE SUSPICION

96. The Tribunal finds that the information that was obtained during the on-site visit, constituted objective information that the Respondent might be in contravention of certain provisions of the NCA; and that this information caused a reasonable suspicion to initiate the complaint and the investigation.

POINT *IN LIMINE* 3: POOR INVESTIGATION & RESPONDENT NOT KNOWING WHAT CASE TO MEET

97. The Respondent submits that -

    97.1. The investigation was poorly conducted, since in its view the Applicant should have done a quick follow-up with the clients to determine whether affordability assessments were conducted; and

    97.2. The Respondent does not know what the case is it needs to meet.

98. The Respondent referred the Tribunal to the case of *Portland Cement Company Limited*[23] where the court reiterated that there was little point in charging a person if they did not know what case they had to meet.

[23] Case 64/2001 page 33

99. The Applicant argued that the charges against the Respondent only relate to the Respondent not conducting affordability assessments. The lack of proper record keeping was added as an alternative charge. The Applicant submits that during the compliance visit as well as during the investigation, the Applicant tried to determine how the Respondent conducts an affordability assessment; and; the issue of records arose out of the lack of records to indicate that affordability assessments had indeed been conducted.

100. The Applicant submitted that the Respondent was not in a position to prove that it conducted an affordability assessment and therefore raised the defense that it did not keep records of the assessments.

101. The Tribunal considered the brief argument raised by the Respondent regarding the Plascon-Evans Rule[24]. The courts use the Plascon-Evans rule to determine whether there was a true dispute of fact between the parties that required them to lead oral evidence.

102. In *Wightman v Headfour (Pty) Ltd* (66/2007) [2008] ZASCA 6 (10/3/2008) (para [12]) the court discussed the rule further as follows:-

> *"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he*

[24] *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd. (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (21 May 1984.*

> *commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.*

103. The Applicant in its founding affidavit clearly set out the contraventions that were found during the on-site visit and then the contraventions that were found during the investigation. The prayers of the Applicant also clearly set out the alleged contraventions by the Respondent which are stated as follows-

> *"Declaring the Respondent to be in repeated contravention of the following Sections of the Act:*
>
> - *Section 81(2);*
> - *Section 82(2) read with Regulation 23A;*
> - *Section 81(2)(a) read with Section 81(3) and Section (80) (1)(a);*
> - *Section 81(3) read with Section 80(1);*
> - *Section 170 read with Regulation 55(1)(b)(vi)"*

104. The Respondent in its answering affidavit answered to the alleged contraventions stating that it conducts affordability assessments but it does not keep copies thereof. This indicates to the Tribunal that the Respondent knew what the case is it had to answer to and indeed to do so.

105. The Tribunal therefore does not accept that Respondent's argument that it did not know what case it needed to meet.

106. The Tribunal chooses not to express a view on the submissions by the Respondent regarding the quality of the investigation. Doing so will not assist the Tribunal in coming to a final determination on the issues in dispute between the parties.

COLLATERAL CHALLENGE / DEFENSE

107. The Respondent's also raised the so-called *"defensive" or "collateral"* challenge to the validity of the Applicant's administrative actions on the authority of the Supreme Court of Appeal in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others.*[25]

[25] 2004 (6) SA 222(SCA)

108. The Respondent submitted that the Courts have accepted collateral challenges as a defense to unlawful administrative action where the issue is not being taken on review. [26]

109. The *Oudekraal* judgment explains the basis for the collateral challenge / defense as follows:

> *"When construed against the background of principles underlying the rule of law a statute will generally not be interpreted to mean that a subject is compelled to perform or refrain from performing an act in the absence of a lawful basis for that compulsion. It is in those cases - where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act - that the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising what has become known as a "defensive" or a "collateral" challenge to the validity of an administrative act".*

110. The Respondent premises its collateral defense on its submissions that the administrative actions taken by the Applicant in respect of the initiation, investigation and referral of the complaints, is unlawful and that it therefore should not be coerced into compliance with it.

FINDINGS IN RESPECT OF THE POINTS *IN LIMINE*

111. The Tribunal dismisses the various points *in limine* raised by the Respondent.

112. The Respondent's collateral defense is accordingly also not upheld.

We will now turn to and deal with the merits of the application placed before the Tribunal.

THE ALLEGED PROHIBITED CONDUCT

113. The Applicant alleges that the Respondent granted credit to all the consumers investigated during the course of the investigation without conducting any affordability assessment as required by the Act.

114. The Applicant argues that the Respondent therefore granted credit recklessly to the consumers and is in contravention of Section 81(2), Section 81(3) and Section 80(1)(a) of the Act.

[26] *National Industrial Council for the Iron, Steel Engineering and Metallurgical Industry v Photocircuit SA (Pty) and other* 1993(2) SA 245(C)

115. The Applicant referred the Tribunal to the investigation report where reference is made to copies of the consumers' identity documents and credit agreements were kept. The Applicant raised a rhetorical question as to why the Respondent would keep copies of consumers' identity documents but not keep documentation relating to the affordability assessments they allegedly conducted.

116. The Applicant also submitted that even if the Tribunal accepts that Regulation 23A is not applicable; there are still no proper affordability assessments that were conducted, nor a structure on how the affordability assessments were conducted.

117. The Applicant argued that the Respondent had credit agreements in place. However, the Respondent failed to attach proof of the affordability assessments in the answering affidavit. The Applicant also argued that the Respondent could have done a credit bureau report search and attached this as proof that a credit bureau search was conducted at the time that the credit was granted. These reports would have shown the timeline as to when the reports were actually considered. However, the Respondent failed to do so. Therefore the Applicant submits that the only conclusion one can draw from the evidence is that the Respondent never conducted any affordability assessments.

118. The Applicant cited the case of *R v Blom*[27] in support of its inference that the Respondent never conducted any affordability assessments. The Applicant argued that its inference sought is consistent with all the proved facts when looked at as a whole.

119. With regard to the Regulator's allegations that the respondent failed to conduct proper affordability assessments the Respondent -

    119.1. Submits that all the consumers whose files have been taken as samples have repaid their loans fully;

    119.2. Denies that consumers were prejudiced by its actions;

    119.3. Submits that it may determine its own evaluative mechanisms or and procedures to be used in meeting its assessment obligations under section 81;

[27] R v Blom 1939 AD 188

119.4. Submits that during the on-site visit it explained fully how the affordability assessments were conducted and that it therefore complies with Section 81(2) and Section 81(1)) (a) of the Act. The Respondent submits that it explained to the Applicant that he makes copies of the consumers' identity documents, obtains a copy of the recent pay slips, obtains a copy of the bank statements for the past 3 months and then checks the income and deductions on the bank statements. The Respondent submits that it then physically demonstrated how the credit checks are done on Compuscan and demonstrated this to the Applicant; and

119.5. Submits that the Regulator does not make a case for how the affordability assessment used by the Respondent does not meet the legislative requirements.

FAILURE TO KEEP PROPER RECORDS

120. With regard to the allegation of its alleged failure to keep proper records, the Respondent concedes that it did not keep proper records.

DISCUSSION: APPLICABLE LEGAL PROVISIONS

121. Section 80(1)(a) provides that-

" A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119(4)-

(a) the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time; or

(b) the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that-

(i) the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or

(ii) entering into that credit agreement would make the consumer over-indebted."

122. Section 81(2) and 81(3) provides that –

"(2) 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.

(3) A credit provider must not enter into a reckless credit agreement with a prospective consumer."

123. Section 170 provides that –

"Credit provider to keep records.—A credit provider must maintain records of all applications for credit, credit agreements and credit accounts in the prescribed manner and form and for the prescribed time."

APPLYING THE LEGAL PROVISIONS TO THE FACTS

124. The evidence before the Tribunal is that when the Applicant conducted an investigation, it requested certain consumer files from the Respondent. As stated on the investigation report, the Applicant had requested a list of all loans entered into for the period January 2016 to May 2016 in order to select a sample of 10 credit agreements from the list. The Respondent explained that the documents requested were not present at the premises, but the Applicant could fetch the documents at a later stage. On 27th May 2016 the documents were fetched from the business premises and 10 credit agreements were received. These are marked as annexure B1-B10 of the case record.

125. The evidence before the Tribunal (Annexures B1 and B10) clearly show that each consumer file contained consistent information - i.e. a copy of the consumers' identity document; a copy of a merchant slip reflecting the payment that was made to the Respondent; a pre-agreement statement and quotation; and a small credit agreement.

126. All these credit agreements also relate to the year 2016, which means that the Applicant did not charge or put forward evidence relating to information that was obtained during the on-site compliance visit in 2015, as was the version of the Respondent.

127. While the Respondent in its answering affidavit goes to great lengths to explain the manner in which it conducts an affordability assessment, it would appear very unlikely, that the Respondent would obtain copies of recent pay slips and 3 months bank statements; use this information to conduct an affordability assessment, and then not keep any such records save for the documents set out above.

128. The Respondent was unable to put forward any evidence to support its argument that it conducted affordability assessments.

129. During the on-site visit in September 2015 the Applicant had requested the affordability documents. And 8 months later; in May 2016; when the investigation was conducted, the Respondent still did not have records of the affordability assessments it claimed it conducted other proof thereof.

130. On the Respondent's own admission, the Respondent states that subsequent (own emphasis) to the investigation; it had installed a system styled as "compuloans." The compuloans supposedly aides the Respondent in conducting the affordability assessments.

131. The Respondent submitted evidence marked Annexure D2 to D5 of affordability assessments in response to a compliance report that was issued by the Regulator on 13 December 2016. However, all this reflects is a copy of a Compuscan print out dated 15 December 2016. The document is marked "affordability calculation" and only has 2 sets of figures captured on the report that refer to "debt obligations". This evidence is merely an indication to the Tribunal that the Respondent is utilizing the Compuscan system, after the investigation was conducted (*ex post facto).*

132. On a balance of probabilities, the Tribunal finds that the Respondent failed to conduct affordability assessments and is therefore in contravention of Section 81(2); Section 81(2) read with Regulation 23A; Section 81(2)(a) read with Section 81(3); Section 80(1)(a); Section 81(3) read with Section 80(1) and Section 170 read with Regulation 55(1)(b)(vi).

CONSIDERATION OF THE APPROPRIATE PENALTY

133. The Applicant has requested that an administrative fine be imposed on the Respondent.

134. Section 151(3) of the NCA sets out the factors the Tribunal must consider when imposing an administrative fine.

135. Section 151 of the NCA allows the Tribunal to impose an administrative fine that does not exceed the greater of 10 per cent of the respondent's annual turnover during the preceding financial year; or R 1 000 000,00. The Applicant did not provide any evidence of the Respondent's annual turnover for the previous financial year as required. The Annual Financial statements provided by the Respondent were for the period ending 2016 and did not provide an analysis of the information. The Applicant put forward information of the Respondent's loan book, but yet again without any submission to the Tribunal on the inferences it drew.

136. The Tribunal has fully considered the Applicant's prayer in respect of the imposition of the administrative fine and the arguments raised by both the Applicant and the Respondent in this regard. The Tribunal does not intend regurgitating the extensive submissions made by the parties during the hearing relevant to the consideration of the administrative penalty, but will briefly deal with the most pertinent aspects immediately below.

137. Regarding the duration of the prohibited conduct, the only evidence placed before the Tribunal is the period of approximately eight (8) months from the date of the on-site visit to the date of the investigation visit.

138. Speaking to the nature of the prohibited conduct, the Applicant submitted that the extension of reckless credit to consumers should be viewed in a very serious light. Respondent disagrees and maintains that it did not extend credit recklessly to consumers, but at most failed to keep records. This disagreement between the parties have now become moot as the Tribunal has made a determination that the Respondent has indeed committed the prohibited conduct of extending credit recklessly to consumers and failed to keep records.

139. The key factor for the Tribunal is that the Respondent did not conduct affordability assessments, which means that credit was granted recklessly to vulnerable consumers. The amounts that were borrowed by the consumers reflect amounts ranging from three hundred rand (R 300,00) to one thousand, two hundred and ten rand (R 1 210,00) which

are indicative of consumers who are amongst the more vulnerable consumers within the consumer market. This prohibited conduct is very serious as the preamble, purpose and objectives of the NCA features the eradication of the extension of reckless credit prominently.

140. The Applicant alleged that the Respondent have charged excessive interests and initiation fees *vis-a-vis* three (3) of the eight (8) factors the Tribunal has to take into account when assessing the amount of the administrative penalty it may impose. The view of the Tribunal is that as the Applicant has not put those matters forward as contraventions and they are untested and unproven, the Applicant cannot rely on them to weigh in in the Tribunal's determination of the amount of the administrative penalty.

141. The Applicant submits that the Respondent's conduct displayed no or little regard for the spirit and purpose of the Act; and that the Respondent's continued participation in the credit market places consumers at substantial risk of further financial harm. This is a peculiar submission on the part of the Applicant taking into account that they have not taken any steps to ensure that the Respondent no longer participates in the credit market. This leaves the Tribunal with the view that this submission cannot be afforded any weight in its consideration.

142. No evidence has been placed before the Tribunal regarding the market circumstances within which the prohibited conduct was committed. The Applicant seems to expect of the Tribunal to infer that the market circumstances within which the contraventions occurred are those in which consumers are not educated about their rights relating to access to credit.

143. The Applicant submitted that the Respondent has derived a substantial level of profit from the activities undertaken by it, but the Applicant has not placed any evidence to that effect before the Tribunal. The Respondent submits that there is no basis for the statement that the Respondent had made a substantial profit and has submitted the financial statements of the Respondent ending 2016. From the sample of credit agreements that were assessed by the Applicant the amounts loaned to consumers ranged between three hundred rand (R300.00) and one thousand, two hundred and ten rands (R1 210.00).

144. The Applicant submits that at the time of the investigation; there was an alleged attempt to bribe the inspectors. The Respondent argued that there has been no criminal case opened as yet by the Applicant in this regard. Therefore this is not a matter the Tribunal can take into account as; for whatever reason; the Applicant did not deem it fit to press charges against the Respondent on the bribery allegations.

145. However the Tribunal noted that the Respondent did co-operate with the Applicant. This is in respect of providing the consumer files that were initially not available but provided to the Regulator at a later agreed upon date.

146. It is common cause between the parties that there has not been any prior investigations or enforcement action instituted or taken by the Applicant against the Respondent.

147. While the Tribunal can impose a fine of R1 000 000.00 on the Respondent under these circumstances, it can impose a lesser fine if warranted by the circumstances of each case.

FINDINGS

148. Tribunal finds that -

148.1. The evidence submitted by the Applicant, which is uncontested, clearly indicates that the Respondent has repeatedly contravened the provisions of the Act, thus contravening section 140(1);

148.2. The Respondent is in repeated contravention of and have committed prohibited conduct in respect of -

148.2.1. Section 81(2);
148.2.2. Section 81(2) read with Regulation 23A;
148.2.3. Section 81(2)(a) read with Section 81(3) and Section (80)(1)(a)
148.2.4. Section 81(3) read with Section 80(1);
148.2.5. Section 170 read with Regulation 55(1)(b)(vi).

148.3. An administrative fine of R 50 000.00 (fifty thousand rand) would be appropriate considering that:-

148.3.1. The fine must deter others from committing the same prohibited conduct and further punishes the offender;

148.3.2. The Respondent has conducted its business as a credit provider, in a manner that is contrary to the Act and its Regulations;

148.3.3. The Respondent did not conduct affordability assessments, which means that credit was granted recklessly to vulnerable consumers; and

148.3.4. The extent, nature and duration- even after the initial on-site visit, the Respondent continued with the same behavior; and

148.4. The Tribunal therefore finds an administrative fine of fifty thousand rands (R50 000.00) appropriate in the circumstances.

ORDER

149. The Tribunal makes the following order-

149.1. All the Respondent's *points in limine* are dismissed;

149.2. The Respondent's repeated contravention of the provisions of the Act and Regulations is hereby declared prohibited conduct;

149.3. With immediate effect, the Respondent is interdicted from future breaches of the Act;

149.4. The Respondent is ordered to pay an administration fine in the amount of fifty thousand rand (R 50 000.00) by no later than 31 August 2018; and.

149.5. There is no order as to costs.

Thus done and handed down in Centurion this 28th day of May 2018

[signed].

Ms H Devraj
Tribunal member

Ms D Terblanche (Presiding Member) and Mr X May (Tribunal Member) concurring