

IN THE NATIONAL CONSUMER TRIBUNAL
HELD AT CENTURION

Case Number: NCT/41672/2016/140

In the matter between:

NATIONAL CREDIT REGULATOR

APPLICANT

And

ALLIED CAPITAL (PTY) LTD

RESPONDENT

Coram:

Adv. J. Simpson	-	Presiding member
Adv. FK Manamela	-	Member
Ms. P Beck-Paxton	-	Member

Date of Hearing	-	24 February 2017
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JUDGMENT AND REASONS

INTRODUCTION

1. The Tribunal is asked to determine whether or not the transactions concluded under the "*pawn your car and still drive it*" scheme, constitute secured loans which are subject to the provisions of the National Credit Act, 34 of 2005 (*"the Act"*). On the one hand, the Applicant avers that the series of transactions the Respondent concluded with the consumers are credit agreements in the form of secured loans, and such fall within the ambit of the provisions of the Act, while on the other, the Respondent argues that the transactions are in fact "*sale and lease back agreements*", and are as such, not subject to the Act. The Applicant regards these transactions prohibited, and has approached the Tribunal to declare that the Respondent has engaged in prohibited conduct. This application is presented to the Tribunal in terms of section 140 of the Act.

THE PARTIES

2. The Applicant is the National Credit Regulator (" the NCR"); an organ of state and a juristic person within the public administration established in terms of Section 12 of the National Credit Act 34 of 2005 ("the NCA"). The NCR has its address at 127 Fifteenth Road, Randjespark, Midrand, ("the Applicant").
3. The Founding Affidavit of the Applicant is deposed to by Ms Nthupang Magolego, the Manager for Investigation and Enforcement in the employ of the Applicant. At the hearing, the Applicant was represented by Counsel, Ms N. Mbelle, from the Johannesburg Bar, instructed by Hogan-Lovells Attorneys, Sandton, Johannesburg.
4. The Respondent is Allied Capital (Pty) Ltd, a company incorporated in South Africa under Registration number 2014/012802/07 and also a registered credit provider in terms of section 40 of the Act, under registration number NCRCP 6855. The Respondent has its physical address at Centurion Gate Centre, corner of John Vorster & Akkerboom streets, Centurion, Gauteng Province.

JURISDICTION

The National Consumer Tribunal ("Tribunal") has jurisdiction to hear this matter and has powers conferred upon it in terms of section 150 of the NCA to make orders in relation to the suspension of a registrant who contravenes this Act, or fails to comply with any condition of its registration.

ISSUES TO BE DECIDED

6. The issues to be decided in this matter included whether or not the Respondent *has engaged in prohibited conduct*; and in view of that, *its registration should be suspended* by this Tribunal in terms section 150(g) of the NCA, as prayed for by the Applicant.

Section 150 provides for *Orders of the Tribunal*, and reads thus:

"In addition to its other powers in terms of this Act, the Tribunal may make an appropriate in relation to prohibited or required conduct in terms of this Act, or the Consumer Protection Act, 2008, including-

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

7. And in deciding this question, this Tribunal had to first decide the individual underpinning claims by the Applicant on:
 - 7.1 whether the Respondent contravened section 76(4)(c)(ii) and (iii) read with Regulation 21(6)(a) and 21(7) regarding advertising practices;
 - 7.2 whether the Respondent contravened section 90(1) and 91(1) of the NCA by concluding supplementary agreements and requiring consumers to sign documents containing prohibited provisions;
 - 7.3 whether the Respondent contravened section 93(2) read with Regulation 30 of the NCA;
 - 7.4 whether the Respondent contravened section 100(1)(c) read with Regulation 42(1) of the Act; regarding the charging of excess fees on short-term credit agreements;
 - 7.5 whether the Respondent contravened section 101(1) (b) of the Act regarding the initiation fee;

- 7.6 whether the Respondent has contravened section 129 of the Act regarding the enforcement of credit agreements;
8. In the event that the Tribunal finds that the Respondent did indeed contravene the above sections of the Act, the Applicant further prayed that the Tribunal should thence:
- (a) declare that the *"pawn your car and still drive it"* scheme, under which the impugned credit agreements were concluded, as prohibited conduct;
 - (b) interdict the Respondent from engaging in the conduct declared prohibited;
 - (c) direct the Respondent to submit a report compiled by an independent auditor at the cost of the Respondent verifying and confirming the amounts owed to consumers as calculated by the Applicant;
 - (d) direct the Respondent to refund the consumers in the schedule marked Annexure A for over-charging of interest and initiation fee;
 - (e) direct the Respondent to submit a report containing the names of all consumers that have been refunded for over-charging of interest and initiation fee; and the amounts that have been refunded to all consumers;
 - (f) direct the Respondent to return the motor vehicles repossessed or where motor vehicle has been sold, to credit the consumer having considered lawful default charges and lawful settlement amounts;
 - (g) order the suspension of the registration of the Respondent for a period of 18 months from the date of the order of the Tribunal in terms of section 150(g) of the Act;

BACKGROUND FACTS

9. The Applicant's evidence on the founding affidavit, points to the investigation conducted on its behalf in July 2015, by Mr Whale, an inspector appointed by the Applicant to conduct an investigation into the activities of the Respondent in terms of section 139(1) (c) of the Act. The investigation was triggered by complaints received from consumers by the Applicant between May and July 2015¹;

¹ The complaints are: A Mahomed; I Mahomed; V Mhobo and Mthembu

- 9.1 During the investigation, random samples of ten agreements from each of the branches of the Respondent in Cape Town, Sandton and Centurion were taken and staff of the Respondent was interviewed between 29 July 2015 and 4 August 2015 respectively;
- 9.2 The Respondent's scheme: *"pawn your car and still drive it"*, is made up of a series of documents presented to the consumer *at the same time and signed on the same day*, and they are:
- 9.2.1 a customer information form;
 - 9.2.2 a declaration by the seller of a second hand vehicle in terms of the Value Added Tax Act 89 of 1991;
 - 9.2.3 offer to purchase;
 - 9.2.4 car rental agreement between the Respondent and the user (the consumer)
 - 9.2.5 written authority and mandate for debit order payment instructions;
 - 9.2.6 a consent to voluntary surrender.
10. The Respondent had advertisements on billboards, trailers and on the internet with the following words written on them:
- "Need cash now? Pawn your car and still drive it! We pawn, we buy, we sell, we hire...cars. No credit checks! Instant decisions! That's how...we do it"*
11. On 5 November 2014 the Applicant issued a Compliance Notice in terms of section 55(1) and 55(3) of the Act, alleging non-compliance with section 74(4)(c) (iii) of the Act;²
12. In the investigation process the Applicant identified two pawn transactions which were later confirmed by the Respondent to be such;
13. In its Registration application as a credit provider, the Respondent's activities and undertakings are recorded to be the following:
- 13.1 only one branch would be engaged in normal credit facilities;

² Annexure "NM46", page 1260 of the paginated bundle

- 13.2 the type of product offered would be that of “pawn broking”
- 13.3 a commitment to conduct affordability assessments when granting credit.

THE APPLICANT’S SUBMISSIONS

A. The Nature of the Respondent’s Business and the Agreements:

- 14. The Respondent started business in March 2014 at the Sandton branch followed by the Centurion branch in July of the same year.
- 15. During the investigation, the Applicant’s Investigators made the following findings:
 - 15.1 that the transactions were simulated transactions that were in fact *secured loans*
 - 15.2 that the conduct of the Respondent defeated the purpose of the Act, in particular, section 3 (e)(iii) of the said Act;
 - 15.3 that the advertisement of the scheme contravened section 76(4)(c)(iii) if the Act
- 16. The Applicant received further complaints from one Van der Bijl; Modupe and Momberg, concerning the scheme³. Further complaints regarding the scheme were received. In one other matter the complainant launched an application in the North Gauteng High Court, against the Respondent for unlawful repossession of a motor vehicle on the basis of a consent to voluntary surrender of a motor vehicle in the possession of the complainant, one Maake⁴. In that High court judgment of 5 February 2016, Allied Capital (Pty) Ltd, the Respondent in this current matter, was ordered to return the motor vehicle to the consumer.
- 17. In March 2016, the Applicant extended its investigation scope of the Respondent’s conduct to include debt enforcement procedures in terms of sections 127 and 129 of the NCA. In its findings, the Respondent was found to have contravened section 120 of the Act.

³ Pages 1135;1184 and 1261 of the paginated bundle

⁴ *Maake v Allied Capital (Pty) Ltd and the National Credit Regulator; case number 100540/2015*

18. The elements of the *“pawn your car and still drive it”* scheme are the following:
- 18.1 a consumer approaches the Respondent for a loan;
 - 18.2 ownership of a motor vehicle is a prerequisite for the Respondent to approve and grant the loan;
 - 18.3 a consumer signs a series of documents on the same day for the approval of the loan;
 - 18.4 a consumer pays a monthly rental fee which does not reduce the loan amount obtained;
 - 18.5 the consumer is required to settle the loan (the principal debt) over an agreed period of six months, the period for the payment of the monthly rental fee
 - 18.6 for the duration of the loan period, the consumer remains in possession of the motor vehicle
 - 18.7 the Respondent advances funds to a consumer against a fully-paid motor vehicle that is in the name of the consumer;
 - 18.8 the Respondent charges a once-off administration fee of R1000;
 - 18.9 consumers approaching the Respondent are generally in financial trouble;
 - 18.10 the Respondent approves the loan amount to the consumer that is for far less than the trade value of the motor vehicle, or does not in any way accord with the true trade value of the vehicle;⁵
 - 18.11 for the term of the loan agreement, the Respondent deducts from the consumer’s bank account via a debit order, the rental amounts for a period of six months. These amounts are paid into the Respondent’s account;
 - 18.12 once the principal debt is settled, the agreement terminates;
 - 18.13 the name of the title-holder is changed to that of the Respondent, but the consumer retains possession of the motor vehicle;
 - 18.14 the underlying purpose of the Respondent’s scheme is to provide loans to consumers, in that the motor vehicle serves as a collateral or security for the loan
 - 18.15 the Respondent then charges the consumer R1000, 00 as administration fees.
 - 18.16 it is the Applicant’s submission that the Respondent has contravened the following provisions of the NCA:

⁵ See page 173 of the paginated bundle. D Slinger applied for a loan of R15000, the trade value of the motor vehicle is R95 700 but the purported purchase price is R16000 plus an administration fee of R1000

- 16.16.1 section 50(2), read with section 52(5) – breach or non-compliance by the registrant of the provisions of this Act;
 - 16.16.2 section 3, regarding the purpose of the Act insofar as it relates to responsible, effective and accessible credit market and industry and providing consumers with adequate disclosures in order to make informed choice; to avert or prevent reckless lending, deception, fraud and unfair conduct by credit providers;
 - 16.16.3 section 8(3), regarding the type of credit agreement classified as a credit facility under certain conditions
 - 16.16.4 section 76(4), regarding advertisements that are unlawful, misleading, fraudulent, deceptive or prohibited by regulation
19. In summary, the Applicant argues that the purported rental agreement between the consumer and the Respondent states that the Respondent will conduct credit checks with credit bureaux, yet during the Applicants' investigation of the Respondent's business, the Respondent ran an advertisement which claimed the following: *"pawn it and still drive it...no credit checks"*. The Applicant contends, this conduct by the Respondent is misleading the consumers and is in direct contravention of the Act.

B. Unlawful Provisions and Supplementary Agreements

20. The Applicant raises breaches of certain provisions of the Act by the Respondent as follows:
Contravention of section 91 of the Act, which provides that:
- (1) A credit provider must not directly or indirectly, by false pretences or with the intent to defraud, offer, require or induce a consumer to enter into or sign a credit agreement that contains an unlawful provision as contemplated in section 90.
 - (2) A credit provider must not directly or indirectly require or induce a consumer to enter into a supplementary agreement or sign any document that contains a provision that would be unlawful if it were included in a credit agreement.
21. The Applicant's assertion is that the Respondent required or induced consumers to enter into supplementary agreements, namely the rental agreement and the voluntary surrender agreement, which form a part of the credit agreement.

22. Further that the inclusion of the "*Consent to Voluntary Surrender*" document, authorises the Respondent to take a motor vehicle in possession of a consumer without proper recourse to the courts, the courts have held that such a provision is void and unenforceable. Parties to an agreement cannot agree "to take the law into their own hands" where the one party defaults on the agreement. The unlawful dispossession of movable property can only be affected by a court.

C. Debt enforcement

23. According to the Applicant, subject to a debt-restructuring order and court order, a credit provider is required under section 129, to notify a consumer by written notice of the default before commencing debt enforcement procedures. The purpose of the written notice is to resolve the dispute and to settle the outstanding debt.

24. Under the "*Pawn it and still drive it*" scheme, the respondent requires the consumers to sign document entitled "*consent to voluntary surrender*" the terms of which are that the credit provider is authorised to take possession of the motor-vehicle should the consumer breach the agreement.

25. The Applicant submits that signing a document which gives the credit provider authority to take possession of the movable property that is the subject of the credit agreement is unlawful under the provision of the Act and common law.

D. Prescribed forms

26. The Applicant avers that section 92 of the Act requires a credit provider to use prescribed forms including pre-agreement statement and quotation. The investigation report shows the prescribed forms were not used when concluding the credit agreement with the consumers. There was no evidence of the prescribed forms in the consumer files sampled.

27. Further that, the Respondent is in contravention of section 93 read with regulation 30 and 31 in that the credit agreement is not in the prescribed form.

E. Cost of credit

28. The Applicant argues, in terms of section 101(1) (b) of the Act, a credit agreement must not require a payment of any money except an initiation fee which may not exceed the prescribed amount as provided for in the Regulations. Regulation 42 (2) places a maximum limit on the initiation fee that may be charged in respect of a short term credit agreement. The Applicant submits that in several instances where consumers obtained short term credit, the Respondent charged fees in excess of the prescribed amount.
29. Accordingly, the interest that can be charged under section 101(10(d) of the Act, cannot exceed the amount prescribed by the Regulations.
30. It is submitted by the Applicant that the purported rental which is deducted by debit order each month is in fact interest for the secured loan obtained. The interest rate the Respondent is charging for credit agreements is 30 per cent instead of 5 per cent per month for a short term credit agreement (*that is, an agreement for and amount not exceeding R8 000 and which is payable over a period of six months*). In the instances of other credit agreements, the maximum interest rate that can be charged is between 22.15 % and 23.3% per annum.
31. Further that, Regulation 42(1) imposes limits on the interest rate that can be charged in the instance of short term credit transactions.
32. The Act, according to the Applicant, is designed to ensure transparency and openness in the credit industry and to protect consumers. The cost of credit must be affordable to prevent reckless credit and over- indebtedness. It is contended that the manner in which the agreements were presented to the consumers were in contravention of the provisions of the Act in that consumers were not made aware of the true cost of credit and the Respondent over-charged on the cost of credit to the detriment of the consumers.

F. Prevention of Reckless Credit

33. The Applicant submits, from the credit agreements sampled during the investigation, there was no evidence of affordability assessment having been conducted by the Respondent at the time of approving the credit agreements. Section 81(2) of the Act places an obligation on a credit provider to prevent reckless credit and reads as follows:

- 2) A credit provider must not enter into a credit agreement without first taking reasonable steps to assess:
- (a) a 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 of 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.
34. A credit provider such as the Respondent is required to take reasonable steps in assessing financial means, obligations and prospects in terms of section 81(2) of the Act. The reasons for this requirement are to prevent reckless credit and over- indebtedness, to promote fair and responsible lending, and to prohibit reckless credit.
35. The Respondent, according to the Applicant, has contravened section 80 and 81 of the Act, by failing to: *conduct a proper affordability assessment in accordance with the Act; and prevent reckless credit.*

G. Sale and Lease-back Agreement

36. Further that, the Respondent contends that the transactions it entered into were in fact sale and lease-back agreements and as such are not credit agreements as defined in the Act. Respondent, the Applicant avers, relies on the existence of a purported sale, however, the Respondent has not demonstrated that the elements of sale have been satisfied.
37. A contract of sale, the Applicant avers, constitutes the following:
- 37.1 there must be a buyer and a seller capable of entering into an agreement;
 - 37.2 the *merx* – the thing which forms the subject matter of a sale;

- 37.3 the price of the *merx* must be readily accessible in terms of money;
- 37.4 there must be mutual consent of the contracting parties.
38. The intention to buy and sell, and the price of the *merx* must be genuine for the transaction to constitute a sale.
39. The Applicant asserts that the transactions entered into were in fact simulated transactions that were in essence credit agreements⁶ and that the cases cited on simulated transactions, below, show that the impugned transactions were not that of sale and purchase, but that of secured loans, for the reasons that follow:
- 39.1 there was no intention on the part of the consumers to sell their motor- vehicles. The customer information form completed by each and every consumer indicates the "*loan requested*" or "*amount requested*". These terms are used interchangeably with *capital amount*". There was no intention on the part of the Respondent to purchase the vehicle.
- 39.2 the purchase price of the motor vehicle was not the genuine price for the *merx*. The purported purchase price was far less than the value of the second hand motor vehicle. In fact, there is no relation between the purported purchase price and the value of the motor vehicle.

⁶ The court in *Maize Board v Jackson* 2005 (6) SA 592 (SCA) held that the enquiry in determining whether a contract is simulated is: "*to establish whether the real nature and the implementation of the particular contracts is consistent with the ostensible form. In pursuit of the inquiry, one must strive to ascertain from all the relevant circumstances, the actual meaning of the contracting parties*". In *Commissioner, South African Revenue Service v Bosch and Another* 2015 (2) SA 174 (SCA), the Supreme Court of Appeal at para [40] held that a court is required to "*examine the transaction as a whole, including all surrounding circumstances, any unusual features of the transaction and the manner in which the parties intend to implement it, before deciding if the transaction is simulated*". The Supreme court of Appeal in *Roshcon (Pty) Ltd v Auto Body Builders CC and Others* 2014 (4) SA 319 (SCA) at para [10] held that in ascertaining whether a contract is simulated, must look at the facts of each particular case. In *Michau v Board* 2003 (6) SA 459 (SCA), the Supreme Court of Appeal held that *where parties disguise or conceal the true nature of a transaction, court will discard the form and consider the real transaction*. Further, it was held that the court in seeking to ascertain the true, intention of the parties will also consider "*the matter in which the contract was implemented*".

- 39.3 at all relevant times, the consumer remains in possession of the motor vehicle, save in the two pawn agreements. Once the loan has been settled, the consumers do not "*purchase*" the motor vehicle.
40. Though the form may be that of a sale and purchase, the Applicant contends, the real nature of the transactions in this application is that of a secured loan – the motor vehicle serving as security.
41. Further that the Respondent alleges that payment of VAT is evidence that the transactions are indeed those of a sale and purchase and rental agreement and not a credit agreement. The Respondent contends that VAT is not payable in the case of a loan or a pawn transaction. The Applicant argues that in terms of section 7 of the Value Added Tax Act, 89 of 1991, value added tax is payable on the supply of goods or services supplied by the vendor.

RESPONDENT'S SUBMISSIONS

42. In its response to the allegations levelled against it, the Respondent submits the following argument:
- 42.1 that it denies the case the Applicant seeks to make out;
- 42.2 that its honest and reasonable view is that the suite of transactions in question fell beyond the purview of the National Credit Act;
- 42.3 that these transactions were not simulated or intended to deceive consumers; to avoid the Respondent's obligations under the NCA; or intended to override the provisions of the aforesaid Act;
- 42.4 that these transactions are of sale and purchase and/ or leaseback, and;
- 42.5 that it relies on, and bases its defence on the decision handed down by the Tribunal in the matter of *Sanza Kayola v Allied Capital (Pty) Ltd*⁷
43. The Respondent cites a list of authorities⁸ in support of its argument that the transactions are not simulated credit agreements, and that there is express intention of the parties to conclude sale agreements. Briefly, the totality of the Respondent's argument is that these transactions

⁷ NCT/34844/2015/149(1)- application for an interim relief heard on 18 December 2015

⁸ See page 29 of the Respondent's submission.

fall outside the ambit of the provisions of the NCA. The rest of the Respondent's argument is academic in form and I do not intend to go in detail to lay it out here.

CONSIDERATION OF APPLICABLE SECTIONS OF THE NCA TO THE FACTS AND TRIBUNAL'S FINDINGS

44. A close look at the transactions concluded between the Respondent and consumers has a "customer information form" completed by each and every consumer, containing terms such as: the "loan requested" or "amount requested". These terms are used interchangeably with "capital amount". The Applicant argues, these terms are related to (or are of a character of) a kind of an agreement where loans are offered. To this end, the argument continues, these transactions are effectively credit agreements in nature
45. but are disguised as sale or leaseback transactions. The Applicant's assertion is that the transactions entered into were in fact simulated transactions that were in essence credit agreements, and that the impugned transactions were not those of sale and purchase, but secured loans;
46. The intention of the Respondent was, according to the Applicant, *inter alia*, to avoid or frustrate the operations of the NCA over these agreements. In doing so, the Respondent contravened the provisions of the Act, the Regulations and the conditions of its registration.

The General Condition 1 of the Conditions of Registration provides that:

"The registrant must comply with all applicable legislation relating to the operation of the business of a credit provider, including but not limited to the Act, the regulations and any subsequent amendment or substitution of the applicable legislation and regulations."

47. At the centre of this application, are two key issues the Tribunal is asked to determine:(a) *whether or not the Respondent has engaged in prohibited conduct in contravention of the Act, (and its Regulations and the Conditions of Registration); and*
48. *(b) whether or not the Respondent's registration as a credit provider ("the Registrant") should be suspended on account of such contraventions;*

49. The analysis that will ensue in the discussion below, will demonstrate whether or not a logical conclusion points to a finding on the key issues above. The background facts of the matter are generally not in dispute, the application of the law to these facts, probably is;
50. The Respondent is a registered credit provider under registration number NCRCP6855⁹;
51. Section 50(2), read with section 52(5) of the NCA provides that *it is a condition of every registration issued in terms of this Act that the Registrant must comply with every applicable provision of this Act*;
52. In May and June/July 2015, the Applicant received complaints from consumers against the Respondent in terms of section 136(1) of the NCA. This then caused the Applicant to conduct an investigation into the operations of the Respondent;
53. On 5 November 2014, the Applicant issued a compliance notice to the Respondent, calling upon the Respondent to amend certain conduct that is the subject of this
54. hearing, and asking the Respondent to comply with the provisions of the National Credit Act;
55. In July 2015, the Applicant launched an investigation into the affairs of the Respondent and found conduct in contravention of the Act and its Regulations. These alleged contraventions are common cause¹⁰ and may not be repeated in this judgment;
56. Section 3 of the NCA provides for the purpose of the Act and how it seeks to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry and to protect consumers;
57. It is the responsibility of the credit provider, *inter alia* to provide consumers with *adequate disclosures of standardised information in order to make informed choices; providing them with protection from deception and unfair or fraudulent conduct by credit providers; discouraging reckless credit granting by credit providers and contractual default by consumers*;
58. Section 76(4) of the NCA provides that an advertisement of the availability of credit, or goods or services to be purchased on credit, must comply with this section; contain any statement required by Regulation; and must not advertise a form of credit that is unlawful; misleading;

⁹ dated 23 June 2014, Annexure "NM1", page 38 of the paginated bundle

¹⁰ See pages 3,4 and 5 supra

fraudulent or deceptive; or contain any statement prohibited by Regulation. The Respondent's advertisement in regard to the availability of credit states the following:

"Need cash now? Pawn your car and still drive it! We pawn, we buy, we sell, we hire...cars.

No credit checks! Instant decisions! That's how...we do it"

The Respondent's advertisement of the availability of credit contains statements prohibited by the Regulations to the NCA, and is therefore in contravention of the NCA.

59. Section 8(3) of the NCA states that an agreement is a credit agreement if it is a credit facility, and irrespective of its form, a credit provider undertakes to supply goods and services; or pay an amount or amounts on behalf of a consumer; and defer the consumer's obligation to pay any part of the cost of goods or services;
60. Evidence on papers before this Tribunal shows that the Respondent, in breach of section 91, has directly or indirectly, induced a consumer to enter into or sign a *credit agreement*; a *supplementary agreement*; or *sign any document* that contains a provision that would be unlawful if it were included in a credit agreement, as contemplated in section 90 of the NCA;
61. The Respondent, under its *"pawn it and still drive it"* scheme, required or induced consumers to conclude a *rental agreement* and the *voluntary surrender agreement ("Consent to Voluntary Surrender")*, which form part of the credit agreement. These are supplementary agreements prohibited by the NCA. In terms of section 129, *the credit provider is required to notify a consumer by written notice of the default before commencing debt enforcement procedures. The purpose of the written notice is to resolve the dispute and to settle the outstanding debt*;
62. Signing a document which gives the credit provider authority to take possession of the movable property that is the subject of the credit agreement is unlawful under the provisions of the Act;
63. Section 92 of the Act requires *a credit provider to use prescribed forms including pre-agreement statement and quotation*. The investigation report, in the consumer files sampled, shows no evidence of the prescribed forms. The Respondent is thus in contravention of this section and section 93 read with Regulations 30 and 31, in that the credit agreement is not in the prescribed form;

64. Section 101(1) (b) of the Act, *prescribes certain fees to be paid in a credit agreement which may not exceed the prescribed amount as provided for in the Regulations*. Regulation 42 (2) places *a maximum limit on the initiation fee* that may be charged in respect of a short-term credit agreement. The Respondent charged fees in excess of the prescribed amount.
65. The Respondent, in contravention of section 101(1) (d) of the Act, read with Regulation 42(1), charges interest in excess of the prescribed rate. The interest rate the Respondent is charging for credit agreements is 30% instead of 5% per month for a short term credit agreement (*that is, an agreement for and amount not exceeding R8 000 and which is payable over a period of six months*). The cost of credit must be affordable to prevent reckless credit and over-indebtedness. The manner in which the agreements were presented to the consumers were in contravention of the provisions of the Act in that consumers were not made aware of the true cost of credit and the Respondent over-charged on these fees, to the detriment of the consumers.
66. Section 81(2) of the Act places an obligation on a credit provider to prevent reckless credit and reads as follows:

"A credit provider must not enter into a credit agreement without first taking reasonable steps to assess a proposed consumer's 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; debt re-payment history of a consumer under credit agreements; existing financial means, prospects and obligations, and 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.

In the sampled files during the investigation, there was no evidence of affordability assessment having been conducted by the Respondent at the time of approving the credit agreements. The Respondent has thus contravened sections 80 and 81 of the Act, by failing to conduct a proper affordability assessment in accordance with the Act.

67. The Respondent contends that the transactions it entered into were in fact sale and lease-back agreements and as such are not credit agreements as defined in the Act. Respondent relies on the existence of a purported sale, however, the character of these transactions demonstrate the opposite of what an ordinary person may perceive as an agreement of sale, in that the

elements of a contract of sale have not been fully satisfied. In concluding a sale agreement, the genuine intention of the parties is key;

68. The intention of the parties has not been proven to be that of persons concluding a sale agreement;
69. Though the form of these transactions may look like those of a sale and purchase, (*simulated*) the real nature of the transactions in this application is that of a secured loan where the motor vehicle serves as a collateral to secure debt- *securitatem indebiti*;
70. The allegations made by the Applicant regarding the Respondent's conduct have not been disputed as fact by the Respondent, and are on a balance of probabilities, true;
71. The evidence placed before this Tribunal shows that the Applicant has made out a case that the Respondent is in contravention of the Act and consequently engaged in prohibited conduct as envisaged in section 1 of the NCA.

Prohibited conduct is defined as an "*act or omission in contravention of this Act*" ¹¹

72. Further, the Applicant has established the basis upon which a remedy is sought under the NCA, and the Tribunal is satisfied that the Respondent is in contravention of the following provisions of the National Credit Act:
 - 72.1 section 76(4)(c)(ii) and (iii) read with Regulation 21(6)(a) and 21(7) regarding advertising practices;
 - 72.2 sections 80 and 81 by failing to conduct affordability assessment when advancing credit to consumers
 - 72.3 section 90(1) and 91(1) of the NCA by concluding supplementary agreements and requiring consumers to sign documents containing prohibited provisions;
 - 72.4 section 93(2) read with Regulation 30 of the NCA by failing to use the prescribed form when concluding a credit agreement;
 - 72.5 section 100(1)(c) read with Regulation 42(1) of the Act; regarding the charging of excess fees on short-term credit agreements;
 - 72.6 section 101(1) (b) of the Act by over-charging of the initiation fee;
 - 72.7 section 129 of the Act regarding the enforcement of credit agreements;

¹¹ Definition of 'prohibited conduct' substituted by s.1(g) of Act 19 of 2014 (w.e.f 13 March 2015)

73. The Respondent's reliance on *Kayola*¹² in support of its argument is misplaced. The matter involved an application for interim relief (*interdict*, as the Tribunal later established) against Allied Capital for the repossession of Mr Kayola's vehicle. The issue here was whether the Tribunal could competently order such a relief under the circumstances of the case. It was an interlocutory application that had nothing to do with simulated transactions¹³. The merits are different. In the current matter, the issue concerns simulated transactions, prohibited conduct, and certain contraventions of the NCA by the Respondent.

CONCLUSION

74. In the sample of documents identified during the investigation, it was established that two of the agreements were pawn transactions, a fact the Respondent admitted. Pawn transactions are regulated by the NCA. The Respondent is thus bound to comply with the provisions of the NCA when granting credit to consumers. The Respondent's denial that its transaction fall outside of the provisions of the NCA cannot be sustained, and is accordingly dismissed. These credit transactions are simulated in order to look as if they are purchase and sale agreements. The adverts posted by the Respondent speak volumes of its intention to lure unsuspecting consumers to enter into agreements that would otherwise be prohibited by the NCA. These consumers are ones the Respondent describe as "*normally in financial trouble*", and who do not want "*credit checks*" done against their names in order to access credit;
75. the transactions concluded under the "*pawn your car and still drive it*" scheme, constitute secured loans which are subject to the provisions of the National Credit Act, 34 of 2005 ("*the Act*").
76. The intention of the NCA is very clear when it relates to credit agreements. It seeks to provide clarity to all the parties and specifically regulate credit agreements for what they are, and which form they must take. In essence, Section 3 of the NCA provides for the purpose of the Act and how it seeks to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry and to protect consumers;

¹² NCT/34844/2015/149(1)- application for an interim relief heard by the Tribunal on 18 December 2015

¹³ Interestingly though, the *customer information form* signed by Kayola in Annexure BGR6A bears the words: "loan requested and granted"

77. It puts the responsibility ["required conduct"], *inter alia* of providing consumers with adequate disclosures of standardised information; preventing deception and unfair or fraudulent conduct; preventing reckless credit granting by credit providers and contractual default by consumers, squarely on the shoulders of the credit provider. This, in order to allow consumers the opportunity to make informed choices
78. Section 76(4) of the NCA provides that an advertisement of the availability of credit, or goods or services to be purchased on credit, must comply with this section;
- 78.1 contain any statement required by Regulation; and
- 78.2 must not advertise a form of credit that is unlawful; misleading; fraudulent or deceptive; or ;
- 78.3 contain any statement prohibited by Regulation.
79. The NCA seeks to prevent the potential for customers to be misled if credit providers would have a choice of coming up with any form or kind of transaction purporting to be something, when actually it has elements of a credit agreement.
80. To finally conclude, in a nutshell, the transactions concluded by the Respondent with its customers carry every element of a credit transaction as defined in the NCA. They are clearly done with the intention of lending money to the consumers with interest payable and using the vehicle of the consumer as security for the loan. The phrasing and titling of the various loan documents as purchase and rental agreements does not change the nature of the transaction in any way. There is no evidence whatsoever that the consumers who entered into these contracts had any direct or true intention of selling their vehicles and renting them back from the Respondent. This is supported by the fact that the purported selling price of the vehicles did not in any way relate to any objective or reasonable market value. The conclusion is inescapable that the Respondent used this form of transaction to enable it to escape the provisions of the NCA and charge its customers more interest than it was entitled to in terms of the Act.

Order

81. The Tribunal, in consideration of the afore-going, makes the following ruling:

- 81.1 the Respondent is found to have contravened the provisions of the NCA as alleged by the Applicant;¹⁴
- 81.2 the *“pawn your car and still drive it”* scheme, under which the impugned credit agreements were concluded, is declared to be prohibited conduct;
- 81.3 the Respondent is hereby interdicted from engaging in the conduct declared prohibited;
- 81.4 the Respondent is directed to appoint an independent auditor at the cost of the Respondent, to compile a report on all the transactions concluded with its customers since inception of the business. The auditor must determine the amounts charged to consumers for interest and fees. Any excess fees charges or interest charged in contravention of the Act relating to unsecured loans must be identified and refunded to consumers. This report must be produced and submitted to the Applicant within a period of six months from the date of this judgment. ;
- 81.5 the Respondent is directed to return to the affected consumers, the motor vehicles repossessed - or where the motor vehicle has been sold, to credit the consumer having considered lawful default charges and lawful settlement amounts;
- 81.6 the registration of the Respondent with the NCR is hereby suspended for a period of 18 months from the date of the order of this Tribunal in terms of section 150(g) of the Act;
- 81.7 There is no order as to costs

Thus done and handed down on this 28th day of April, 2017.

¹⁴ see the Applicant's notice of motion

[signed]

Adv F Manamela

MEMBER

Adv J Simpson (Presiding Member) and Ms P Beck-Paxton (Member), concurring