

**IN THE NATIONAL CONSUMER TRIBUNAL**  
**Held at Centurion**

Case No: NCT/7963/2012/57(1) (NCA)

In the matter between:

**NATIONAL CREDIT REGULATOR**

Applicant

And

**RUFUS ALFONSO FINANCIAL CONSULTANTS CC**

Respondent

Coram:

Ms P A Beck	-	Presiding member
Adv F Manamela	-	Member
Ms L Best	-	Member

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**JUDGMENT AND REASONS**

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**INTRODUCTION**

1. The Applicant in this matter is the National Credit Regulator, ("the NCR" or the Applicant") a juristic person established in terms of section 12 of the National Credit act, No 34 of 2005 ("the Act").
2. The Respondent is Rufus Alfonso Financial Consultants CC, trading as RA Financial Consultants, a close corporation incorporated in accordance with the applicable laws of the Republic of South Africa with registration number 2002/100568/23 and with its principal place of business at Mogwase, hereinafter referred to as "the Respondent".

3. The Applicant brought an application before the National Consumer Tribunal ("the Tribunal") for the cancellation of the Respondent's registration in terms of section 57(1)(a) and (c) of the Act due to the Respondent's repeated failure to comply with its conditions of registration and repeated contraventions of the Act.
4. The application was as a result of an investigation into the activities of the respondent conducted by Mr Lesley Odendaal ("Odendaal") and Mlungiso Gwela ("Gwela") inspectors employed by the Applicant. The Applicant's founding affidavit is deposed to by Adv Zwelithini Ronald Zakwe ("Zakwe"), Manager in the Applicant's Investigations and Enforcement Department.
5. At the hearing of this matter, the Applicant was represented by Adv KD Iles. The Respondent was absent from the hearing despite having received proper notice of the set down of the matter. Accordingly the matter proceeded in the Respondent's absence<sup>1</sup>.
6. The Tribunal has jurisdiction to hear this matter in terms of section 27(a)(i) of the NCA. This section provides that the Tribunal may adjudicate in relation to any application made to it in terms of the Act, and make any order provided for in this Act in respect of such application.
7. This judgment follows the hearing of this matter on 20 September 2013 and is based largely on written submissions of the parties as well as on oral argument of the Applicant.

## **BACKGROUND**

8. The Respondent was registered with the Applicant as a credit provider on 18 January 2008 (the date appearing on the credit provider certificate) with three branches at Mogwase, Marikana and Rustenburg under registration number NCRCP2122.
9. The Respondent's registration was effected by the Applicant subject to certain General and Specific Conditions.

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<sup>1</sup> In terms of Rule 24(1)(b), read with Rule 24(2) of the Regulations for matters relating to the functions of the Tribunal and Rules for the Conduct of Matters before the National Consumer Tribunal, 2007 as amended ("the Rules"), a presiding member may continue with the proceedings in the absence of a respondent, if the presiding member is satisfied that the absent respondent received proper notice of the date, time and venue of the proceedings.

10. On 18 September 2012, the Applicant appointed Lesley Odendaal and Mlungisi Gwacela in terms of Section 25 of the Act as inspectors, to investigate the activities of the Respondent. The confirmatory affidavit of the inspectors together with the inspection report and findings shows that the requirements of Section 139(4) were complied with in that the inspectors introduced themselves to an official of the Respondent and handed over a copy of their appointment certificates.
11. The inspection report reveals that the Respondent was contravening the Act repeatedly whilst conducting its business as credit provider, by *inter alia* employing unlawful collection methods in enforcing credit agreements.
12. The following 20 case files were randomly selected for purposes of the investigation and details of the content of the files reveal contraventions of the Act, Regulations and the Respondent's conditions of Registration:
  - 12.1 P Chauke
  - 12.2 PP Paseka
  - 12.3 L Masana
  - 12.4 A S Zange
  - 12.5 B Nyirenda
  - 12.6 T Nyopa
  - 12.7 K P Phumo
  - 12.8 M Gxolkogxokwana
  - 12.9 M Sikeyi
  - 12.10 T A Mkhizwana
  - 12.11 S Malima
  - 12.12 M Sigigaba
  - 12.13 M Mqoboka
  - 12.14 T L Sechanke
  - 12.15 J P Mothobi
  - 12.16 M Teni
  - 12.17 T Ndlandla
  - 12.18 D J Morapedi

12.19 J P Malamule

12.20 N Manhice

13. The Respondent is alleged to have conducted itself in a manner that contravenes the Act, the Regulations and the Respondent's conditions of registration with specific reference to:

13.1 Conduct in contravention of Section 81(2)(a)(i) and (iii) of the Act, by failing to take reasonable steps to assess the consumer's general understanding and appreciation of the risks and costs of the proposed credit agreements.

13.2 Conduct in contravention of Section 81(2)(a)(i) and (iii) of the Act, by failing to perform affordability assessments on consumers.

13.3 Conduct in contravention of Section 91(a) of the Act, by inducing consumers to sign section 129 notices, letters of demand and consent to judgements in terms of section 58 and 65J of the Magistrates' Court Act prior to the loan amounts becoming due and payable and prior to the enforcement proceedings.

13.4 Conduct in contravention of the general condition A1 of its registration read together with Regulation 55(i)(b)(iv) by failing to keep records on consumer affordability assessments.

13.5 Conduct in contravention of Section 91(b) read together with sections 90(2)(b)(iii) and 90(2)(i) of the Act by requiring consumers to submit their identity document, bank account cards, Ubank books and Personal Identification Numbers (PIN).

13.6 Conduct in contravention of Section 92(1) of the Act by failing to provide consumers with pre-agreement statements and quotations prior to concluding small credit agreements, alternatively failing to retain such documents in the consumer files.

13.7 Conduct in contravention of Section 133(1) of the Act by using consumer's identity documents, bank cards and PINs to collect on and enforce credit agreements.

13.8 Conduct in contravention of Section 101(1)(d)(ii) of the Act, read with Regulation 42 as the Respondent charged consumers interest in excess of the maximum prescribed rate.

13.9 Conduct in contravention of the Respondent's general conditions of registration A1 by failing to comply with all the applicable legislation relating to the operation of the business of a credit provider.

#### **ISSUES TO BE DECIDED**

14. The issue which the Tribunal must first decide is whether Respondent has contravened its Conditions of Registration and the Act.

15. Once this decision is made, the Tribunal must determine:

15.1 Whether the contraventions are of such a nature to warrant deregistration of the Respondent as requested by the Applicant and

15.2 Whether sufficient evidence is placed before the Tribunal to impose an administrative fine, as requested, by the Applicant.

#### **APPLICABLE SECTIONS OF THE NCA**

##### **16. Section 57 in respect of cancellation of a registration**

*"(1) Subject to subsection (2), a registration in terms of this Act may be cancelled by the Tribunal on request by the National Credit Regulator, if the registrant repeatedly –*

*(a) Fails to comply with any condition of its registration ;*

*(b) ..... or*

*(c) Contravenes the Act."*

##### **17. Section 81 in respect of prevention of reckless credit**

*"81(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) *.....;*
- (iii) *Existing financial means, prospects and obligations;”*

**18. Section 90(2)(b)(i), (ii) and (iii) in respect of unlawful provisions of a credit agreement;**

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

*(a)...*

*(b) it directly or indirectly purports to –*

- (i) waive or deprive a consumer of a right set out in this Act;*
- (ii) avoid a credit provider's obligation or duty in terms of this Act;*
- (iii) set aside or override the effect of any provision of the Act”*

**19. Section 91 in respect of supplementary requirements and documents;**

*“91 A credit provider must not-*

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

**20. Section 92 in respect of pre-agreement disclosure;**

*“(1) A credit provider must not enter into a small credit agreement unless the credit provider has given the consumer a pre-agreement statement and quotation in the prescribed form.”*

**21. Section 101(1)(b) in respect of the cost of credit**

*“(1) A credit agreement must not require payment by the consumer of any money or other consideration, except-*

*(a)...*

*(b) .....*

*(c) .....*

(d) interest, which—

(ii) must not exceed the applicable maximum prescribed rate determined in terms of section 105;”

**22. Section 133(1) and (2) in respect of the prohibited collection and enforcement practices**

“(1) A credit provider must not-

- (a) Make use of any document, number or instrument referred to in section 90(2)(l) when collecting on or enforcing a credit agreement; or;
  - (b) Direct or permit any other person to do anything contemplated in this subsection on behalf, or as an agent, of the credit provider.
- (2) When collecting money owed by a consumer under a credit agreement or when seeking to enforce a credit agreement, a credit provider must not use, or rely on, or permit any person to use or rely on, any document, instrument or contract provision referred to in section 90(2)(l).
- (3) A person who contravenes this section is guilty of an offence.”

**APPLICABLE REGULATIONS OF THE NCA**

**23. Regulation 42(1) in respect of the maximum prescribed interest and initiation fees**

**Table A: Maximum Initiation Fee**

The following maximum limits will apply to initiation fees:

<b>Sub Sector</b>	<b>Maximum Initiation Fee</b>
<b>Mortgage Agreements</b>	(a) R 1 000 per credit agreement, plus, 10% of the amount of the agreement in excess of R 10 000 (b) But never to exceed R 5 000
<b>Credit Facilities</b>	(a) R 150 per credit agreement, plus 10% of the amount of the agreement in excess of R 1 000 (b) But never to exceed R 1 000
<b>Unsecured</b>	(a) R 150 per credit agreement, plus, 10% of the amount of the

<b>credit transaction</b>	agreement in excess of R 1000 (b) But never to exceed R 1000
<b>Developmental credit agreements</b>	
<b>For the development of a small business</b>	(a) R 250 per credit agreement, plus 10% of the amount of the agreement in excess of R 1000 (b) But never to exceed R 2 500
<b>For low income housing (unsecured)</b>	(a) R 500 per credit agreement plus 10% of the amount of the agreement in excess of R 1000 (b) But never to exceed R 2 500
<b>Short terms credit transactions</b>	(a) R 150 per credit agreement plus 10% of the amount of the agreement in excess of R 1000 (b) But never to exceed R 1000
<b>Other credit agreements</b>	(a) R 150 per credit agreement plus 10% of the amount in excess of R 1000 (b) But never to exceed R 1000
<b>Incidental credit agreements</b>	Nil

**24. Regulation 55(1) in respect of the records of registered activities to be retained by registrants**

(1) In addition to any records that must be kept in terms of the Act, a registrant must maintain the following records relating to its registered activities, which records may be kept in electronic format:

(a)...

(b) Credit providers, in respect of each consumer:

(i) .....

(ii) .....



- (iii) .....
- (ii) .....
- (iii) .....
- (iv) *Documentation in support of steps taken in terms of section 81(2) of the Act;*

## APPLICABLE GENERAL CONDITION OF REGISTRATION

### 25. General Condition Part A Clause 1

*"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"*

## APPLICANT'S SUBMISSIONS

The Applicant alleges that the Respondent conducted itself in a manner that contravenes the Act, the Regulations and the Respondent's conditions of registration with specific reference to -

### 26. Contravention of Section 81(2)(a)(i) and (ii) of the Act.

The Respondent failed to take reasonable steps to assess the consumer's understanding and appreciation of the risks and costs of credit. This omission is unlawful in that, conducting an assessment prior to entering into credit agreements with a consumer, is a mandatory requirement as stipulated in the Act. In the alternative, the Respondent contravened Regulation 55(1)(b)(vi) which requires a credit provider to maintain documentation in support of the steps it took in terms of Section 81(2) in respect of each consumer. The Respondent failed to produce such documents or to explain to the investigators what steps or procedures were followed to comply with this requirement. From the Applicant's submission it appears that the only steps taken by the Respondent was obtaining proof of the consumer's income for the preceding 3 months, the consumer's credit history and any existing credit obligations listed with the credit bureaus. No enquiry was made into the consumer's expenses or other financial means. The sampled files

attached to the founding affidavit<sup>2</sup>, in support of the application reveal that, the Respondent only obtained and captured necessary details i.e. the employment status and income, in respect of 5<sup>3</sup> consumers, after the credit agreements were concluded. It is therefore highly improbable that the Respondent conducted assessments prior to the conclusion of these credit agreements.

27. Contravention of Sections 91(a); 90(2)(b)(i), (ii) and 90(2)(k)(iii) of the Act.

The Respondent directly or indirectly induced consumers to enter into supplementary agreements or required consumers to sign documents that contained unlawful provisions<sup>4</sup>. At least 15 consumers from the selected 20 sampled files were required to sign section 129 notices. These section 129 notices inform consumers that enforcement steps will be taken by the credit provider in case the consumers default. Furthermore, the Respondent required of consumers to sign blank letters of demand and consent to judgments in terms of section 58 and 65J of the Magistrates' Court Act, prior to any enforcement steps having commenced.

The requiring of consumers to sign such default notices deprives the consumers of their guaranteed right or opportunity to pursue the debt review option, via a debt counsellor in the event where consumers are unable to service the repayments. This is tantamount to the proverbial putting the cart before the horse. The Respondent's conduct has the effect of diminishing or reducing consumers' rights enshrined in the Act and the consumers Constitutional rights.

28. Contravention of Sections 90(2)(b)(iii); 90(2)(l) and 91(b) of the Act.

The credit agreements that the Respondent entered into with the consumers contained unlawful provisions in that it sought to set aside or override certain provisions of the Act, whilst authorizing the Respondent to do what is unlawful in terms of the Act. The investigation report reveals that the Respondent made consumers hand over credit -, debit -, bank account - or automated teller machine cards and kept them at its premises. The Respondent would then make withdrawals from the relevant accounts, in the event of non-payment by the consumers.

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<sup>2</sup> Annexure "ZR4".

<sup>3</sup> Paragraph 13 of the Applicant's Replying affidavit.

<sup>4</sup> Paragraph 32-36 of the Applicant's founding affidavit.

29. Clause 10 and 12 of these credit agreements are unlawful in that they override sections 90(2)(l) and 91(b) of the Act, whilst employing unlawful payment collection methods.

30. Contravention of Section 92(1) of the Act.

The Respondent failed to furnish consumers with pre-agreement statements and quotations. The investigation report reveals that the Respondent omitted to furnish these quotations and pre-agreements statements to all the consumers relating to the 20 sampled files.

The omission of the Respondent is unlawful in that all loans defined as small credit agreements in terms of section 9(2) of the Act, require that such quotations and pre-agreements statements be furnished to the consumers prior to entering into credit agreements.

31. Contravention of Section 100(1)(d)(ii) read with Regulation 42(1) of the Act.

The Applicant submits that the Respondent charged interest in excess of the prescribed rate. The investigation report indicates that the Respondent charged interest at a rate of 30% per month in respect of short term credit agreements.

The Respondent contravened the provisions of the Act and Regulations in that the interest rate applicable to short term credit transactions in terms of Regulation 42(1) is 5% per month. This rate, compared to the 30% per month that was charged by the Respondent, would appear to be exorbitant. The Respondent was charging consumers 25% more than it was entitled to.

32. Contravention of Section 133 of the Act

The Respondent is alleged to have used identity documents, personal identification numbers and bank cards when collecting or enforcing a credit agreement. Clause 10 and 12 of the Respondent's credit agreements purport to confer authority on the Respondent to withdraw money from the consumer's banking accounts using a withdrawal slip or the consumer's bank card and personal identification number, in the event of non-payment by the consumer. The investigation

report indicates that the Respondent retained bank cards, Ubank books and identity documents<sup>5</sup> at their premises with records of the consumer's details for purposes of withdrawing money owed to it. In respect of the 20 sampled files investigated, 20 corresponding bank cards were found at the Respondent's premises. The Respondent stated that the reason for retaining the consumers' bank cards, Ubank books and identity documents was for purposes of security for the loans advanced. This conduct of the Respondent contravenes section 133 of the Act.

### 33. Contravention of General Conditions of Registration

The Respondent has failed to comply with its condition of registration A1 by failing to comply with the Act and its Regulations.

### 34. Grounds for an administrative fine

The Applicant submits that the Respondent has severely contravened various provisions of the Act, as highlighted above, the Regulations and the Respondents conditions of registration and as such it is appropriate that an administrative fine be imposed on it.

## RESPONDENT'S SUBMISSIONS

35. The Respondent opposed the application by filing its answering affidavit within the timeframe set out in Rule 13 of the Rules of the Tribunal<sup>6</sup>. The Respondent however made bare denials in its response to most of the allegations made against it.

36. The Respondent's answering affidavit was deposed to by Mutola Alfonso Alfredo, duly authorised to do so in his capacity as a Manager of the Respondent, who has at all material times acted as the Manager of the Respondent.

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<sup>5</sup> Investigatory report Annexure "ZRZ4" paragraphs 3,8 -9 and 3.11.6 and Table B.

<sup>6</sup> For the Conduct of Matters before the National Consumer Tribunal published under GN789 in GG30225 of 28 August 2007 as amended by GenN428 in GG34405 OF 29 June 2011 (hereinafter "Rules of the Tribunal").

37. The Respondent denies that it contravened sections 81, 90, 91, 92, 101 and 133 of the Act.
38. The Respondent submits that there is no legal basis to justify the application for the cancellation of its registration and as such, the application ought to be dismissed.

#### **APPLICANT'S SUBMISSIONS IN REPLY**

39. The Applicant raises a point *in limine* in terms of Rule 13(5) of the Rules of the Tribunal, which provides that any fact or allegation not specifically denied will be deemed to have been admitted in the answering affidavit. The Respondent denies most of the Applicant's allegations without providing a basis for the denial or stating the basis upon which it relies on, and therefore the Applicant is of the view that its allegations would be deemed to have been admitted.

#### **AFFIDAVIT OF SYLVIA ABENG MABEPA ("MABEPA")**

40. Mabepe is an employee of the Respondent who has been employed by the Respondent, at its Marikana offices, for three years.
41. Mabepe was present at the Respondent's Marikana offices when the offices were searched by the Applicant. Mabepe was interviewed by the Applicant's investigators subsequent to which Mabepe deposed to an affidavit setting out the process followed by the Respondent when granting or denying consumers personal loans.
42. The Respondent contends that Mabepe's affidavit should not be accepted because:
  - 42.1 She did not know that she was signing an affidavit;
  - 42.2 She was threatened with arrest if she failed to sign the affidavit and
  - 42.3 Had the affidavit been read back to Mabepe, she would not have confirmed it as a true reflection of what she does when dealing with consumers.
43. The Applicant rejects the contentions in paragraph 42 above as being "uncreditworthy, palpably implausible, far-fetched or clearly untenable" for a number of reasons, amongst others, because :
  - 43.1 Mabepe admits signing the affidavit and confirming the content as correct;

43.2 Mabepa's argument that she signed the affidavit because she was afraid of arrest is inconsistent with her statement that "had the document [been] read back to me I would not have confirm[ed] same to be a true reflection of what I do when dealing with consumers."

43.3 The Respondent's statement in paragraph 43.2 above does not explain the initialled changes to the affidavit "which changes would not have been necessary if the affidavit was not intended to be correct."

The Tribunal will now deal with the issues in agreement, the issues in dispute, considers the law and the facts.

### **ISSUES IN AGREEMENT**

The following issues are common cause:

44. The parties are in agreement with regards to the parties, the identity of the consumers, the credit agreements and the facts.

### **ISSUES IN DISPUTE**

45. The Respondent denies that it contravened sections 81, 90, 91, 92, 101 and 133 of the Act, read with its Regulations and Condition A1 of the General Conditions of Registration.

### **ANALYSIS LAW & FACTS**

**Did the Respondent contravene the provisions of the Act and/or its Conditions of Registration?**

46. The Applicant has made averments in its founding affidavit which are supported by annexures, such as the investigation report and source documents used to compile the investigation report. This evidence suffices in respect of proving the numerous ways in which the Respondent contravened the Act, the Regulations and its Conditions of its Registration. The Respondent, in reply thereto, despite compelling evidence submitted by the Applicant against it, merely makes a bare denial without substantiating its arguments with evidence to the contrary. In the absence of

any evidence to the contrary, it is submitted that the Applicant has succeeded, in proving on a balance of probabilities, that the Respondent contravened the provisions of the Act, the Regulations and its Conditions of registration, as set out below. The Tribunal will address the issue of a bare denial and its impact on the case of the Respondent more fully in paragraphs 47 – 49 below.

**Is there sufficient proof of contraventions of the Act before the Tribunal?**

47. The Respondent either failed to address the allegations made by the Applicant, alternatively answered with a bare denial. The allegations made by the Applicant are supported by compelling evidence. It is trite law in the principles of pleading that a bare denial does not constitute a defence. A mere general denial will not be sufficient to destroy or refute particular allegations in the declaration which could be specifically denied. Judge Landman in the North West High Court matter between *Dorcas Modipane v M M Dada BK h/a Dada Motors Lichtenburg*<sup>7</sup> highlighted the role of pleadings in the following manner:

*"[12] Pleadings define the ambit of the dispute. They indicate what the nature of the dispute is and what facts must be proven by the plaintiff to sustain the claim. And conversely the facts which must be resisted and facts which must be proven to sustain the defence. The pleaded facts also indicate the legal principles applicable to the claim and defence even though it is not customary to label the nature of the claim or defence.*

*[13]The facts alleged in the pleadings dictate what evidence is required and assist a party in determining how that evidence is to be placed before court. Pleadings enable the parties to establish the strength of their case and possibly the weakness in the other side's case.*

*[14]Pleadings indicate, roughly, the time that a trial may require. Pleadings indicate to the judge assigned to hear the matter the limits of the ring in which the contest is to take place. Pleadings permit the issues to be narrowed or clearly defined. This promotes*

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<sup>7</sup> (1559/2010) [2011] ZANWHC 43 (30 June 2011)

*expeditious litigation. Expeditious litigation is in the interest of the parties or a party and and in the deployment of the state's economic resources. It assists in eliminating the wastage of court days. A court day wasted is completely lost and absolutely irretrievable. The loss of a court day disadvantages litigants waiting in the lists.*

### **The rules of pleading**

*[15] It is convenient, at this stage, to highlight some basic rules relating to pleas. Allegations in a pleading must be true, correct and honest as must be all dealings with a court. So-called tactical denials or tactical pleading, if dishonest, receive severe censure. This is because lies, fraud and dishonesty divert the court from deciding the true issues between the parties.*

*[16] Pleadings must take into account developments as regards acceptable pleading. The move away from the need to precisely and accurately cite a party, when the true identification of a party is not in issue, is an example of such developments.*

*[17] The substantive rule of pleading is set out in Rule 22(2) which reads:*

*"The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies."*

*[18] The rules of pleading, particularly as regards a plea, as set out in the Uniform Rules of Court, consist of formal rules and substantive rules. C G Marnewick **Litigation Skills for South African lawyers**, 2<sup>nd</sup> edition at 124 – 125 puts it this way:*

#### **"7.3 Form and content of the plea**



*The plea has to comply with the provisions of Rule 18 relating to pleadings generally and Rule 22 relating to the plea specifically. According to Rule 8, the plea should:*

- *be divided into consequently numbered paragraphs, each containing a distinct averment;*
- *contain a clear and concise statement of the material facts relied upon with sufficient particularity to enable the opposite party to reply thereto:*
- *not contain evasive denials but should deal with the points of substance clearly; and*
- *state whether, if a contract is relied upon in the plea, the contract was written or oral, and when, where and by whom it was concluded, and if it was written, attach a copy.*

*Rule 22(2) gives the complete range of answers that may be given in the plea. The defendant is not obliged to admit or deny a complete paragraph, but is required to deal with each factual allegation within a paragraph separately. The Rule provides for four options and two obligations. The defendant may:*

- *admit an allegation;*
- *deny an allegation;*
- *lead a confession and avoidance, meaning to admit an allegation (confess that it is true) but adding an answer which amounts to a justification or excuse (avoid liability); and*
- *elect not to admit a material fact, in which event it should be stated to what extent it is not admitted.*

*In addition to one of the four options listed, the defendant is obliged to:*

- *plead the material facts upon which the defendant relies; and*
- *state any explanation or qualification of any denial which may be necessary.”*

[19] See also *Mullins and Da Silva Morris Technique in Litigation* 6<sup>th</sup> edition 90 - 100, H J Erasmus, *Superior Court Practice* B1–141 to B1 – 150 who say:

[20] *Daniel Beck's Theory and Principles of Pleading in Civil Actions* at 80-81 says the following about Rule 22(2):

**"5.1.3.2        The importance of rule 22(2)**

*A defendant must deal specifically with every allegation of fact which he or she intends to put in issue.*

*The allegations in the plea must be of sufficient precision to enable the plaintiff to know what is the case he has to meet. The difficulty of course arises in particular cases whether that precision is present, and the general rule to be deduced from the cases is that the denial of any particular paragraph in the declaration must not involve any ambiguity.*

*The above statement referred to the object of the then rule 29 of the Transvaal but is equally applicable to explain the object of rule 22(2) of the present consolidated rules.*

*A mere general denial will not be sufficient to destroy or refute particular allegations in the declaration which could be specifically denied. Thus a general denial does not operate to deny a plaintiff's capacity to sue and such capacity will be taken to be admitted if it has not been specifically challenged.*

*The golden rule of pleading is that the opposite party must be fairly apprised of the case which is to be raised against him, and denials must accordingly be pleaded with such certainty that he may be able definitely to know what fact or facts the pleader means to put in issue. Thus the bare denial that a fire spread into and upon the plaintiff's lands does not permit the defendant to call upon the plaintiff to prove his title to those lands, and proof of possession and occupation will be sufficient. It might be fairly said that a plain denial of that sort put the question of the fire alone in issue and could not operate*

*to deny the plaintiff's title and that therefore the title was admitted. A denial of each and every allegation of a paragraph in a declaration is permissible provided that there is no ambiguity in such denial. Where there is an ambiguity in such denial, pleading in this manner is embarrassing.*

*The rule is that everything not specifically denied is taken to be admitted and a general denial cannot be allowed and is liable to be struck out.*

*If a defendant in his or her plea makes admissions which in effect fall within the definition of a certain type of contract from which flow certain legal rights and obligations he or she cannot deny that the contract is of that type unless he or she at the same time pleads further facts which will take the contract out of the category to which it prima facie belongs.”*

48. The above quote can also be applied in the current matter, in that Rules 13(4) and 13(5) of the Rules of the Tribunal contain similar requirements for an answering affidavit. The relevant Rule reads as follows:

***“13 Opposing an application or referral***

- (1) ...
- (2) ...
- (3) ...
- (4) *The answering affidavit must set out in numbered paragraphs –
  - a. a concise statement of the grounds on which the matter is opposed;
  - b. facts or allegations contained in the application or referral that the Respondent admits;
  - c. facts or allegations contained in the application or referral that the Respondent denies and the grounds for such denial; and
  - d. the material facts or points of law on which the Respondent relies.*
- (5) *Any fact or allegation in the application or referral not specifically denied or admitted in an answering affidavit, will be deemed to have been admitted.”*

49. It is evident from the above that the Respondent's bare denials regarding the substantiated allegations of the Applicant do not constitute a valid defence to such allegations. As the Respondent did not specifically deny the allegations made by the Applicant, in terms of Rule 13(5), such allegations are deemed to be admitted. The Tribunal views the bare denial or the challenge to "put the Applicant to the proof" as one which does not raise a factual dispute in a case such as this where the facts denied fall within the personal knowledge of the Respondent. Accordingly, the Respondent is the author of its own demise.

**If so, were such contraventions made repeatedly as required by Section 57(1) of the Act?**

50. In the case of *NCR v J.W van Zyl*<sup>8</sup> it was explained that a "repeated contravention" in the context of Section 57(1) of the Act would mean a contravention that appeared at least twice, or more than that. More than a single contravention of different sections of the Act and conditions of registration also constitute repeated contraventions.

51. It is not only the evidence that is placed before the Tribunal by the Applicant that shows repeated contraventions of the Act, but also the failure by the Respondent to submit any evidence rebutting the allegations made against it in its answering affidavit. It can be said that the Respondent, on the evidence before the Tribunal, contravened the following sections of the Act repeatedly in that:

51.1 Its conduct was in contravention of Section 81(2)(a)(i) and (ii) of the Act by failing to conduct affordability assessments;

51.2 Its conduct was in contravention of Section 91(a) of the Act, by inducing consumers to sign supplementary documents, i.e a section 129 notice, that would be unlawful if included in the credit agreements.

51.3 Its conduct was in contravention of Section 90(2)(b)(i),(ii) and (iii) of the Act by requiring consumers to sign credit agreements with unlawful provisions depriving the consumers of certain rights enshrined in Act.

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<sup>8</sup> (NCT/3868/2012/57(1)(P)) [2013] ZANCT 14 (14 June 2013).

- 51.4 Its conduct was in contravention of Sections 101(1)(d)(ii) read with Regulation 42(1) of the Act by charging interest in excess of the prescribed rates.
- 51.5 It's conduct was in contravention of Sections 92(1) of the Act and alternatively Regulation 55(1)(b)(iv) read with the Respondent's conditions of registration, by failing to furnish the consumers with pre-agreement statements and quotations, alternatively failing to retain such documents in the consumer files.
- 51.6 Its conduct was in contravention of Section 133 of the Act by using consumer's identity documents, bank cards and PINs to collect on and enforce credit agreements.
- 51.7 Its conduct was in contravention of the Respondent's general conditions of registration A1 by failing to comply with all the applicable legislation relating to the operation of the business of a credit provider.

52. The Tribunal therefore finds that the contraventions of the Respondent constitute repeated contraventions of the Act.

**Do the above contraventions of the Act constitute prohibited conduct?**

53. In accordance with Section 27 of the Act:

*"The Tribunal or a member of the Tribunal acting alone in accordance with this Act may-*

*(a) adjudicate in relation to any-*

*(i) .....*

*(ii) allegations of prohibited conduct by determining whether prohibited conduct has occurred and, if so, by imposing a remedy provided for in this Act;*

*(b) grant an order of costs in terms of section 147; and*

*(c) exercise any other power conferred on it by law."*

54. Prohibited conduct is defined in the Act, as an act or omission in contravention of the Act, by *inter alia* a credit provider, which does not constitute an offence. Therefore, whenever a credit provider is required to do something or to refrain from doing something, this conduct may fall within the ambit of the definition of 'prohibited conduct'.

55. The Tribunal finds that the abovementioned contraventions constitute prohibited conduct, the actual acts of prohibited conduct being those referred to in paragraphs 51.1 to 51.7 above.

**What are the aspects that the Tribunal would have to consider when deciding on the cancellation of the Respondent's registration?**

56. The requirements for the cancellation of the registration of a registrant are set out in Section 57 (1) of the Act which provides as follows:

- “(1) Subject to subsection (2), a registration in terms of this Act may be cancelled by the Tribunal on request by the National Credit Regulator, if the registrant repeatedly-*
- (a) fails to comply with any conditions of its registration ;*
  - (b) fails to meet a commitment contemplated in section 48(1); or*
  - (c) contravenes the Act.*

57. It is submitted that the evidence before the Tribunal indicates that the requirements of Section 57(1) of the Act were met and in deciding on an appropriate order, the Tribunal must take the following factors in consideration:<sup>9</sup>

1. The seriousness of the contraventions;
2. The position of the Respondent;
3. The rights of the consumers.

These factors are discussed separately hereunder:

#### Seriousness of the contraventions

58. The contraventions by the Respondent are serious.

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<sup>9</sup> These factors were identified by the Tribunal in the matter of *NCR v Van Dyk* NCT/2017/2011/57(1). The same factors were considered in other matters such as *NCR v Kibogo* NCT/2881/2011/57(1) and *NCR v Njokweni* NCT/70/2009/57(1)

59. In the matter of the *National Credit Regulator v Piet Cash Loans*<sup>10</sup> the Tribunal held that the contraventions by the Respondent, which were similar to the contraventions in this matter, extremely serious.
60. The Tribunal found that the Respondent in that matter repeatedly contravened the Act and cancelled the Respondent's registration as a credit provider. As for the remaining contraventions of the Act as alleged and proven by the Applicant, each of the contraventions set out above is in fact a contravention of the Act and each of these contraventions did occur on more than one occasion.
61. Each of the alleged contraventions is also serious in nature. The Tribunal also considered the issue of retention of bank cards in one of its very early judgments, *National Credit Regulator v HD Finance Group*<sup>11</sup>. In that matter the Tribunal held as follows:
- "A prohibition against the taking of bank cards and PIN codes from borrowers has been in existence since 1999. Although the enactment containing the prohibition may have changed over the years, the message has remained the same"*
62. The Tribunal found that the Respondent in that matter repeatedly contravened the Act and cancelled the Respondent's registration as a credit provider.
63. In the matter before the Tribunal not only does the Respondent charge interest in excess of that permitted by the Act, the Respondent, prior to the loan being granted to consumers induces consumers to sign unlawful documents prior to consumers being in default of their respective credit agreements. This is a premeditated, unconscionable act which holds no benefits for consumers and does nothing other than swing the pendulum unlawfully in favour of the Respondent to the acute prejudice of consumers.

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<sup>10</sup> NCT/654/2010/57.

<sup>11</sup> NCT/23/2008/57(1.)

### The position of the Respondent

64. Cancelling the registration of a registrant may have serious consequences for such a person. This is however not the only factor to consider and when the seriousness of the contraventions and the prejudice suffered by the consumers are weighed up against the effect of the cancellation of the Respondent's registration, it is submitted that the Respondent's position cannot in any way justify the severity of its contraventions and the prejudice that consumers suffer and will continue to suffer as a result thereof. In the matter of *NCR v Van Dyk*<sup>12</sup> which was an application for cancellation of the registration of a debt counsellor, the Tribunal held as follows:

*"38. The Tribunal is well aware that cancelling a registrant's registration has very serious consequences. For a debt counsellor, this means that she must cease acting as a debt counsellor. In the case of the Respondent, her business will be at an end, she will have to dispose of the infrastructure of her business, she will have to retrench her staff and any investment made to set up the business will be lost. However, the Tribunal regards the financial irregularities in this matter to be so serious that deregistration of the Respondent in this matter is the appropriate order"*

65. It is submitted that the same applies in this matter. Even though the cancellation of the Respondent's registration may have very serious consequences for itself, its employees and the consumers making use of its services (despite the prejudice suffered by these consumers as a result of the Respondent's practices), the contraventions of the Act in this matter are so serious that cancellation of the Respondent's registration is the only appropriate order.

### The rights of the consumers

66. The rights of the consumers are severely prejudiced by the Respondent's practices and its continued contraventions of the Act. The Respondent *inter alia* enters into unlawful credit agreements with consumers and charges interest in excess of the prescribed rates. This is severely prejudicial to consumers and is also in direct contrast with the purpose of the Act.

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<sup>12</sup> NCT/2017/2011/57(1)(P) at par 38.



**Did the Applicant make out a case for an administrative penalty to be imposed on the Respondent?**

67. The Applicant requested for an administrative penalty to be imposed on the Respondent but submitted at the hearing of the matter that it was not in a position to place evidence before the Tribunal of those factors listed in section 151 of the Act. The Applicant submitted that it is not in a position to address the Tribunal on the administrative penalty because it required the files of the Respondent to be surrendered to the Applicant. Further the Applicant requires an order from the Tribunal that the Respondent submits a report detailing all short term credit agreements, the interest charged thereon, the amount of interest charged in excess of the rate prescribed in the Act, amongst others. The Applicant would then like an opportunity to return to the Tribunal to address the Tribunal more fully on the issue of the administrative fine.

68. Section 151 of the Act provides as follows:

*“The Tribunal may impose an administrative penalty in respect of prohibited or required conduct in terms of this Act...”*

69. In *NCR v Werlan Cash Loans t/a Lebathu Finance*<sup>13</sup> the Tribunal stated the following in relation to the aspects to consider when considering to impose an administrative penalty:

*“When determining an amount, the Tribunal must consider the legislation from which its own mandate derives and consider the factors listed in Section 151(3) which provides as follows:*

*When determining an appropriate penalty the Tribunal must consider the following factors:*

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

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<sup>13</sup> NCT/3867/2012/57(1)

- e) *The degree to which the respondent has co-operated with the National Credit Regulator, or the National Consumer Commission, in the case of a matter arising in terms of the Consumer Protection Act, 2008 and the Tribunal ; and*
- f) *Whether the respondent has previously been found in contravention of the Act, or the Consumer Protection Act 2008, as the case may be.*

*Section 151 of the NCA does not provide guidance about where the Tribunal should start in making a determination of the amount and what weight to ascribe to each of the factors listed. It does however clearly mandate the Tribunal to consider the factors laid down and set an upper cap on the administrative penalty that may not be exceeded."*

70. In the *Werlan*-case above, the Tribunal further stated that it must consider fairness towards both the Applicant and Respondent when considering what would be a just administrative penalty in the relevant circumstances.

71. A careful consideration of the factors listed in Section 151(3) will result in the achievement of this objective.

72. The Tribunal agrees with the Applicant that the Tribunal will only be in a position to consider the imposing of an administrative penalty on receipt of further submissions by the Applicant. As indicated by the Applicant, the Applicant requires the files in the possession of the Respondent as well as a report as detailed in paragraph 67 above, in order to make the necessary submissions.

73. The Tribunal will accordingly reserve its finding at this stage on whether or not to impose an administrative penalty.

## **ORDER**

In the result the Tribunal makes the following order:

1. The Respondent is declared to be in repeated contravention of sections 81(2)(a)(i), 81(2)(a)(iii), 90(2)(b)(i), 90(2)(iii), 90(2)(k)(iii), 90(2)(l), 91(a) and (b), 101(1)(d)(ii) and 133(1) of the Act;
2. The Respondent is declared to be in repeated contravention of its General Conditions of Registration A1;
3. The Respondent's conduct is declared as prohibited conduct in terms of the Act;
4. The Respondent's registration with the Applicant, as a credit provider is cancelled, with immediate effect, in terms of section 150(g) of the Act;
5. The Respondent is ordered to refund all of its past and current consumers within 30 days, of the date of this order, all interest charged to consumers under short term credit agreements in excess of the 5% per month together with interest at a rate of 15,5 % per annum from the date on which such excess interest was charged to date of payment.
6. Pursuant to the order in paragraph 5, the Respondent is ordered to submit a report to the Applicant, within 60 days from the date of the order, detailing the following:
  - 6.1 all the short term credit agreements concluded by the Respondent;
  - 6.2 the capital amounts advanced in terms of such agreements;
  - 6.3 the interest charged thereon;
  - 6.4 the amount of any interest charged in excess of the prescribed rate;
  - 6.5 the date on which interest payments were collected by the Respondent where interest of more than the prescribed rate was charged;
  - 6.6 the amount of all repayments made by the Respondent in terms of paragraph 5 and the steps taken by the Respondent to locate consumers whom it was not able to trace and
  - 6.7 the names of the recipients of all such payments.
7. The Tribunal decision with reference to the prayer of the Applicant for an administrative fine is held over. The Applicant is ordered to return to the Tribunal to make oral submissions alternatively written submissions once the Applicant is in receipt of the report referred to in 6

above, alternatively, by no later than 15 January 2014 on the issue of the administrative penalty, whereafter the Tribunal will make an appropriate order, after considering the Applicant's further submissions.

8. No order as to costs.

DATED THIS 23TH DAY OF OCTOBER 2013

{signed}

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**P A BECK**  
**PRESIDING MEMBER**

ADV F MANAMELA (MEMBER) AND MS L BEST (MEMBER) CONCURRING

**Authorised for issue by the National Consumer Tribunal**

Case number \_\_\_\_\_

Date: 2013 / 10 / 30  
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