

**IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION**

Case number: **NCT/8273/2013/57(1)**

In the matter between:

THE NATIONAL CREDIT REGULATOR

APPLICANT

and

SINAKO KONTANT LENINGS CC

RESPONDENT

Coram:

Adv F Manamela – Presiding member

Ms L Best – Member

Prof J Maseko – Member

Date of Hearing – 11 September 2013

JUDGMENT

APPLICANT

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

2. The Applicant's Founding Affidavit is deposed to by Lesiba Jacob Mashapa, Company Secretary of the Applicant.

RESPONDENT

3. The Respondent is Sinako Kontant Lenings CC, a close corporation duly incorporated in terms of the Close Corporations Act and conducting business in Ceres, Western Cape (hereinafter referred to as "the Respondent").
4. The Respondent filed an opposing affidavit deposed to by Ismaiel Johannes Philander, a member of the Respondent, who is duly authorised to depose to such affidavit. The opposing affidavit was filed outside of the timeframe allowed for such service in terms of Rule 13¹ and this aspect will be dealt with in full later on in this judgment.

APPLICATION TYPE

5. This is an application in terms of section 57(1) of the National Credit Act, 34 of 2005 (hereinafter referred to as "the Act") for the cancellation of the Respondent's registration in terms of the Act, due to the Respondent's repeated failure to comply with its conditions of registration or repeated contraventions of the Act.

BACKGROUND

6. The Respondent was registered with the Applicant as a credit provider under registration number NCRCP538 on 01 August 2007. The aforesaid registration of the Respondent was done subject to certain General and Specific Conditions. Two different branches of the Respondent were registered, both located in Ceres, Western Cape.
7. On or about 3 December 2012 an investigation was conducted by the Applicant into the business practices of the Respondent. The investigation was conducted by Inspector Gwacela ("the Inspector") who was appointed in terms of section 25 of the Act. At the end of the investigation the Inspector compiled a report of his findings
8. The report sets out the procedure adopted by the Inspector in conducting the investigation.

¹ Rules for the Conduct of Matters before the Tribunal published under GN 789 in GG 30225 of 28 August 2007 as amended by GenN 428 in GG 34405 of 29 June 2011.

9. The Inspector requested the owner of the Respondent, Mr. Johannes Philander ("Philander") to explain the procedure followed by the Respondent when a consumer applies for a loan. The process was explained to the Inspector and is set out in the investigation report².
10. Mr. Philander informed the Inspector that the Respondent issues only short term credit transactions and that interest is charged at a rate of 5%. He also advised the Inspector that the Respondent is a VAT vendor and therefore also charges VAT at a rate of 14%.
11. The Inspector selected 15 of the Respondent's consumer files for assessment purposes. All of the files that were selected were short term credit transactions and according to regulation 42(1)³ of the Act interest can be charged at a rate of 5%.
12. The Applicant alleges that the investigation revealed that the Respondent was acting in contravention of the Act, its Regulations and the Respondent's Conditions of Registration.
13. It is submitted in the application that the Respondent contravened the following sections of the Act, its Regulations and Conditions of Registration:
 - 13.1 Contravention of section 91(a) read with section 90(2)(f) of the Act;
 - 13.2 Contravention of section 90(2)(b)(i) and (iii) of the Act;
 - 13.3 Contravention of section 100(1)(a) and/or (b) and/or (c) read with section 101(1) and regulation 42, 43 and 44 of the Act;
 - 13.4 Contravention of section 100(1)(d) read with section 91(a) of the Act;
 - 13.5 Failure to comply with General Condition A1 of its conditions of registration.
14. The Applicant submits that the Respondent is guilty of repeated contraventions of the Act, its Regulations and its Conditions of Registration and prays that the Tribunal make an order in the following terms:
 - 14.1 Cancellation of the Respondent's registration as a Credit Provider, in terms of section 57(1)(a) and (c) of the Act;

² Paragraph 2.6 of the founding affidavit

³ Of the regulations published in GNR 489 of 31 May 2006 ("the Regulations").

- 14.2** Declaring the following conduct of the Respondent to be in contravention of its conditions of registration, in terms of section 150(a) of the Act, and declaring the conduct to be prohibited in terms of the Act:
- 14.2.1 the Respondent's failure to comply with General Condition A1 of its General Conditions of Registration;
 - 14.2.2 the Respondent's contravention of section 91(a) of the Act;
 - 14.2.3 the Respondent's contravention of section 100(1)(a) and/or (b) and/or (c) and/or (d) read with Regulations 42(1), 43 and 44 of the Act;
 - 14.2.4 the Respondent's contravention of section 90(2)(b)(i) and section 90(2)(b)(ii) of the Act;
- 14.3** Imposing an administrative fine in terms of section 51 of the Act as a further penalty for the Respondent's contraventions of the Act, its regulations and its conditions of registration and/or
- 14.4** Making any other appropriate order required to give effect to the consumer's rights in terms of the Act, in terms of section 150(i).

APPLICABLE SECTIONS OF THE NCA

15. Section 57

Cancellation of 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) Fails to meet a commitment contemplated in section 48(1); or

(c) Contravenes the Act.

(2) ..."

16. Section 90(1) and (2)

Unlawful provisions of a credit agreement

"(1) A credit agreement must not contain an unlawful provision.

- (2) *A provision of a credit agreement is unlawful if-*
- (a) *Its general purpose or effect is to-*
 - (i) *Defeat the purposes or policies of this Act ;*
 - (ii) *Deceive the consumer; or*
 - (iii) *Subject the consumer to fraudulent conduct;*
 - (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 this Act;*
 - (iv) *Authorise the credit provider to-*
 - (aa) *do anything that is unlawful in terms of this Act or;*
 - (bb) *fail to do anything that is required in terms of this Act;*
 - (c) *It purports to waive any common law rights that-*
 - (i) *May be applicable to the credit agreement; and*
 - (ii) *Have been prescribed in terms of subsection (5);*
 - (d) *The provision results from an offer prohibited in terms of section 74(2) and (3);*
 - (e) *It purports to make the agreement subject to a supplementary agreement prohibited by section 91(a) ;*
 - (f) *It requires the consumer to enter into a supplementary agreement, or sign a document, prohibited by section 91(a); or*
 - (g) *...*
- (3) *..."*

17. Section 91 (a)

Supplementary requirements and documents

"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;*
- (b) *..."*

18. Section 100(1)

Prohibited charges

"(1) A credit provider must not charge an amount to, or impose a monetary liability on, the consumer in respect of-

- (a) A credit fee or charge prohibited by this Act ;*
- (b) An amount of a fee or charge exceeding the amount that may be charged consistent with this Act ;*
- (c) An interest charge under a credit agreement exceeding the amount that may be charged consistent with this Act; or*
- (d) Any fee, charge, commission, expense or other amount payable by the credit provider to any third party in respect of a credit agreement except as contemplated in section 102 or elsewhere in this Act.*

(2) ..."

19. Section 101(1)

Cost of credit

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

- (a) The principal debt, being the amount deferred in terms of the agreement, plus the value of any item contemplated in section 102;*
- (b) An initiation fee, which-*
 - (i) May not exceed the prescribed amount relative to the principal debt; and*
 - (ii) Must not be applied unless the application results in the establishment of a credit agreement with that consumer;*
- (c) A service fee, which-*
 - (i) in the case of a credit facility, may be payable monthly, annually, on a per transaction basis or on a combination of periodic and transaction basis; or*
 - (ii) in any other case, may be payable monthly or annually; and*
 - (iii) Must be not exceed the prescribed amount relative to the principal debt*
- (d) Interest, which-*
 - (i) must be expressed in percentage terms as an annual rate calculated in the prescribed manner; and*

- (ii) must not exceed the applicable maximum prescribed rate determined in terms of section 105;*
 - (e) cost of any credit insurance provided in accordance with section 106;*
 - (f) default administration charges, which-*
 - (i) may not exceed the prescribed maximum for the category of credit agreement concerned; and*
 - (ii) may be imposed only if the consumer has defaulted on a payment obligation under the credit agreement, and only to the extent permitted by Part C of Chapter 6; and*
 - (g) collection costs, which may not exceed the prescribed maximum for the category of credit agreement concerned and may be imposed only to the extent permitted by Part C of Chapter 6*
- (2) ...”*

APPLICABLE REGULATIONS OF THE NCA

20. Regulation 39 (2)

Short term credit transaction

- (a) means a credit transaction-**
 - (i) in respect of a deferred amount at inception of the agreement not exceeding R8000; and**
 - (ii) in terms of which the whole amount is repayable within a period not exceeding 6 months; and**
- (b) in terms of which an amount of money was disbursed to the consumer, to be utilised at the sole discretion of the consumer, and**
- (c) includes pawn transactions**
- (d) but does not include credit transactions in respect of which the agreement is conditional upon-**
 - (i) the amount deferred being paid by the credit provider directly or indirectly to a person or juristic person that is related to the credit provider; or**
 - (ii) the amount deferred being paid by the credit provider to a person or juristic person other than the consumer, except where such condition is introduced by the consumer**

20. Regulation 42

Maximum prescribed interest and initiation fees

Sub-sector	Maximum Prescribed Interest Rate
<i>Mortgage Agreements</i>	$[(RR \times 2.2) + 5\%]$ per year
<i>Credit facilities</i>	$[(RR \times 2.2) + 10\%]$ per year
<i>Unsecured credit transaction</i>	$[(RR \times 2.2) + 20\%]$ per year
<i>Developmental credit agreements</i>	
<i>For the development of a small business</i>	$[(RR \times 2.2) + 20\%]$ per year
<i>For low income housing (unsecured)</i>	$[(RR \times 2.2) + 20\%]$ per year
<i>Short terms credit transactions</i>	5% per month
<i>Other credit agreements</i>	$[(RR \times 2.2) + 10\%]$ per year
<i>Incidental credit agreements</i>	2% per month

Where,

- (a) RR indicates the reference rate, being the ruling SA Reserve Bank Repurchase Rate;
- (b) The interest rate on short term credit transactions and incidental credit agreements must be disclosed as a monthly interest rate, in such disclosure as is required by the Act and these Regulations.

(2) The following maximum limits will apply to initiation fees:

Table B: Maximum Initiation Fee

Sub-sector	Maximum Initiation Fee
<i>Mortgage agreements</i>	(a) R 1000 per credit agreement, plus, 10% of the amount of the agreement in excess of R 10 000 (b) But never to exceed R 5000
<i>Credit facilities</i>	(a) R 150 per credit agreement, plus,

	<p>10% of the amount of the agreement in excess of R 1000</p> <p>(b) But never to exceed R 1000</p>
Unsecured credit transaction	<p>(a) R 150 per credit agreement, plus, 10% of the amount in excess of R 1000</p> <p>(b) But never to exceed R 1000</p>
Developmental credit agreements	
For the development of a small business	<p>(a) R 250 per credit agreement, plus 10% of the amount in excess of R 1000</p> <p>(b) But never to exceed R 2 500</p>
For low income housing (unsecured)	<p>(a) R 500 per credit agreement, plus, 10% of the amount of the agreement in excess of R 1000</p> <p>(b) But never to exceed R 2500</p>
Short term credit transactions	<p>(a) R 150 per credit agreement, plus 10% of the amount of the agreement in excess of R 1000</p> <p>(b) But never to exceed R 1000</p>
Other credit agreements	<p>(a) R 150 per credit agreement, plus, 10% of the amount of the agreement in excess of R 1 000</p> <p>(b) But never to exceed R 1000</p>
Incidental credit agreements	Nil

Where,

(a) The amount of the agreement is the amount deferred in terms of the agreement.

21. Regulation 43

Supplementary conditions on the application of the maximum initiation fee

The following supplementary conditions shall apply on the application of the maximum initiation fee:

- (1) *An initiation fee may be charged at the registration of a replacement mortgage in respect of a transfer from one credit provider to another, without there being a transfer of ownership of the mortgaged property, only if-*
 - (a) *The transfer is done at the request of the consumer; and*
 - (b) *The levying of the fee and the amount of the fee has been disclosed to the consumer by the acquiring credit provider before the consumer has agreed to the transfer.*
- (2) *No initiation fee may be charged on credit agreements as envisaged in section 101(2).*
- (3) *Initiation fee may never exceed 15% of the principal debt.*

22. Regulation 44

Maximum service fee

The maximum monthly service fee, prescribed in terms of section 105(1) of the Act, is R 50.

- (1) *Where an annual service fee is levied, the applicable limit is*
 - (a) *The monthly limit on the service fee, multiplied by 12, and*
 - (b) *Where the period for which the fee is levied is less than 12 months, the monthly service fee multiplied by the number of months in such a period.*
- (2) *If a service fee is payable on a transaction basis, or on a combination of periodic and transaction basis, the total of such fees may not exceed the monthly or annual limit.*

APPLICABLE CONDITIONS OF REGISTRATION

23. General Condition A1

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

THE HEARING

24. The matter was set down for hearing at the offices of the Tribunal at 10h00 on 11 September 2013. At the outset, the Applicant presented to the Tribunal a draft deed of settlement,

purporting to be the outcome of its settlement negotiations with the Respondent. The Respondent did not appear at the hearing and no reason for its absence was communicated to the Tribunal. The Tribunal had established that the Respondent did receive proper notification of the date, time and venue of the hearing

25. When the Tribunal asked about the Respondent's non appearance, the Applicant indicated that he had no clue why the Respondent did not appear.
26. The Applicant then presented to the Tribunal a deed of settlement crafted in the following terms:

"WHEREAS the Applicant has made application on the 20th of March 2013 to the National Consumer Tribunal in terms of Section 57(1) of the National Credit Act 34 of 2005 ("the Act") for the de-registration of the Respondent as a registered Credit Provider; and

And WHEREAS the Applicant and the Respondent have voluntary (sic) and freely reached an agreement to settle all issues between them;

NOW THEREFORE the parties record the terms of the settlement as follows:

1.

The Respondent admits that it committed the following contraventions of the Act, Regulation and its condition of registration:

- 1.1 *Contravention of section 90 (2) (f) read with Section 91(a) in that the Respondent directly or indirectly required or induced Consumers to sign supplementary agreements that contain a provision that is unlawful;*
- 1.2 *Contravention of section 101 (1) (c) (iii) read with Regulation 44 in that the Respondent charged service fees that exceed the prescribed limit.*
- 1.3 *Contravention of section 101 (1) (d) (ii) read with Regulation 42 in that the Respondent charged a rate of interest that exceeds the prescribed rate.*

2.

The Respondent and Applicant agree that the National Consumer Tribunal make the following order:

- 1.1 *The Respondent's conduct referred to in 1.1 to 1.3, above, is declared prohibited conduct.*
- 1.2 *The Respondent's registration as a credit provider is cancelled with immediate effect.*

3.

Each party to bear its own legal costs pertaining to the matter

THEREFORE the parties hereby apply to the Tribunal to confirm and record the terms of settlement as a consent order in terms of Section 138(1) of the Act and Rule 20 of the Tribunal Rules."

27. The Tribunal considered the application of the relevant sections and Rules as follows:

27.1 The application of Rule 20 and Section 138 of the Act⁴ on a settlement agreement

The applicable Rules⁵ and Section read as follows:

"Rule 20

20 Consent Orders

- (1) *The Tribunal may confirm a resolution or agreement as a consent order-*
 - (a) *on application by the facilitator of that resolution or agreement; and*
 - (b) *without hearing any evidence.*
- (2) *Upon receipt of an application for a consent order, the Chairperson must allocate the matter for adjudication.*
- (3) *If the Tribunal refuses to make the consent order applied for, or requires any changes that a party is willing to accept, the Registrar must serve on each party to the agreement or resolution-*
 - (a) *a notice that the application has been refused; and*

⁴ National Credit Act, Act 34 of 2005

⁵ Rules for the conduct of matters before the National Consumer Tribunal published under GN 789 in GN 30225 of 28 August 2007 as amended by GenN 428 in GG 34405 of 29 June 2011

(b) a copy of the agreement or resolution in its original form, in respect of which the application was refused.”

27.2 Section 138

138 Consent orders

(1) If a matter has been-

(a) resolved through an ombud with jurisdiction, consumer court or alternative dispute resolution agent; or

(b) investigated by the National Credit Regulator, and the National Credit Regulator and the respondent agree to the proposed terms of an appropriate order, the Tribunal or a court, without hearing any evidence, may confirm that resolution or agreement as a consent order.

(2) With the consent of a complainant, a consent order confirmed in terms of subsection (1)(b) may include an award of damages to the complainant.

The abovementioned section and Rules relate to two possible situations: the first is an application made to the Tribunal to confirm a consent order in terms of section 138. The second is where a matter pending before the Tribunal (in the form of any possible application that can be brought before the Tribunal) is settled between the parties at any time before a final order is made in relation to such a matter.

In the present matter an application was brought before the Tribunal in terms of Section 57 of the Act. Prior to the making of a final order, and at the outset of the hearing of the Section 57-application, the Applicant provided the Tribunal with a copy of a Deed of Settlement. The Deed of Settlement specifically stated that *“The parties hereby apply to the Tribunal to confirm and record the terms of settlement as a consent order in terms of Section 138(1) of the Act and Rule 20 of the Tribunal Rules.*

At the hearing, the Applicant was requested to address the Tribunal on the applicability of Rule 20 and Rule 22 to the present matter and whether the settlement can be made an order of the Tribunal in terms of Section 138. The Applicant submitted in oral argument that Rule 22 relates to the process of reaching a settlement and Rule 20 in turn relates to the granting/confirmation of such a settlement as an order of the Tribunal.

In the matter of *Cloete Murray and Others v The National Consumer Commission and Others*⁶ and *Auction Alliance v The National Consumer Commission*⁷ the Tribunal was faced with a similar issue and had to consider whether the settlement agreement that was entered into between the Liquidators and the Commission was a consent order or a settlement of the application for a modification of a consent order which served before the Tribunal at that stage. The Tribunal held as follows:

“substantively the application before the tribunal was not an application for a consent order but rather an application for the modification of the compliance notice as part of a settlement agreement between the Commission and the set of parties to a single compliance notice...”

The Tribunal went on to explain as follows:

“Rule 20 would be applicable to settlements reached prior to a matter being referred to the Tribunal for adjudication as Rule 20(2) indicates that upon receipt of an application for a consent order, the Chairperson must allocate the matter for adjudication. Rule 22 would be applicable to settlements which parties may wish to reach during a hearing, prior to the Tribunal making a final order. Rule 22 states as follows:

“At any time prior to making a final order in relation to a matter, the member or panel, as the case may be, may order an adjournment of the proceedings to allow an opportunity for the parties to reach agreement on an issue.”

In this specific matter however, Rule 22 was also not applicable as not all parties to the issue reached agreement on the issue. In this specific instance the issue was whether the compliance notice should be modified and to what extent. One of the parties to this issue, Auction Alliance, was not a party to the settlement agreement reached between the Commission and the Liquidators and accordingly there was no agreement reached for purposes of Rule 22.”

It is submitted that, when the above is considered, it is evident that the settlement agreement brought before the Tribunal in the present matter is in terms of section 138 and rule 20. In this matter an application for confirmation of a consent order is brought where a matter has been resolved after it has been investigated by the Regulator and the Regulator and the respondent agree to the proposed terms of an order.

⁶ NCT/4454/2012/101(1)(P)CPA

⁷ NCT/4570/2012/101(1)(P)CPA

May the Tribunal proceed to hear the matter in the absence of the Respondent

27.3 Rule 24 provides as follows:

"24 Non-appearance

- (1) If a party to a matter fails to attend or be represented at any hearing or any proceedings, and that party-*
 - (a) is the applicant, the presiding member may dismiss the matter by issuing a written ruling;*
 - (b) is not the applicant, the presiding member may-*
 - (i) continue with the proceedings in the absence of that party; or*
 - (ii) adjourn the hearing to a later date.*
- (2) The Presiding member must be satisfied that the party had been properly notified of the date, time and venue of the proceedings, before making a decision in terms of subrule (1).*
- (3) If the matter is dismissed, the Registrar must send a copy of the ruling to the parties".*

It is apparent that the aforesaid rule 24(1)(b) grants the Tribunal discretion to either continue with the proceedings in the absence of a respondent or to adjourn the matter to a later date. The Tribunal must however be satisfied that the party had been properly notified of the date, time and venue of the proceedings.

In the present matter, the Notice of Set Down was issued to the Respondent on 19 August 2013. The Notice of Set Down, appearing on page 8 of Part B of the Case File, notified the Respondent of the date, time and venue of the hearing. The issuance of such a notice took place in accordance with the provisions of rule 31 pertaining to the delivery of documents and the Tribunal has therefore satisfied itself that the Respondent was properly notified of the date, time and venue of the proceedings.

The Tribunal therefore has the discretion to either proceed to hear the matter in the absence of the Respondent or to adjourn the matter to a later date.

In the matter of *Goldschagg v Minister of Police*⁸ the appeal court reversed the decision of the Transvaal Provincial Division⁹ and considered specifically the provisions of Section 309(2) of the Criminal Procedure Act.

The appeal court considered Section 309(2) of the Criminal Procedure Act, 56 of 1955, and held that:

"It is not in law required of an officer serving a summons under section 309(2) to specify the facts why an accused cannot conveniently be found by him where he serves the summons by leaving a copy thereof with an inmate at the accused's place of business or usual or last known abode. Likewise he does not have to specify facts why it is the accused's place of business or last known abode.

Section 309(3) of Act 56 of 1955 (by the use of the words "fails to appear") deals with the mere non-appearance of the accused as a fact without the cause of his non-appearance of blameworthiness of his non-appearance being relevant at this stage in considering whether a warrant for his arrest should be issued or not. The question as to whether the non-appearance of an accused is excusable or blameworthy is only relevant at a later stage when he is brought before the magistrate's court by means of his arrest in terms of a warrant in order that an enquiry into his non-appearance can then be instituted in terms of section 309(5).

The provisions of Rule 24, and specifically the words "fails to attend" should be interpreted in the same manner, and that the Tribunal may deal with the fact of the mere non-appearance of the Respondent without the cause of such non-appearance and the blameworthiness of its non-appearance. The Tribunal has rightfully exercised its discretion to proceed to hear the matter in the absence of the Respondent where the Tribunal has established that the Respondent did receive proper notification of the date, time and venue of the hearing.

The Tribunal can therefore, hear the matter and make any decision that it is entitled to make in terms of Section 150 of the Act and Rule 22 as the matter is brought before it in terms of Section 57 and not Section 138 of the Act and Rule 20.

⁸ 1981 (1) SA 37 (A)

⁹ 1979 (3) SA 1284 (T)

What is the effect of de-registration of a credit provider on existing agreements with consumers and the rights and obligations under such agreements?

27.4 Section 57(9) of the Act provides a very clear answer to this question:

Section 57 Cancellation of registration

(1)...

(5) If the Tribunal has cancelled a registration, the National Credit Regulator must notify the registrant in writing of-

- (a) the cancellation ;*
- (b) the reasons for the cancellation; and*
- (c) the date of cancellation ;*

(6) If a registration is cancelled in terms of this section or section 58, the National Credit Regulator must-

- (a) cancel the registration certificate; and*
- (b) amend the register accordingly.*

(7) A registration is cancelled as of-

- (a) the date on which the Tribunal issues an order; or*
- (b) in the case of a cancellation in terms of section 58, the date specified by the registrant in the notice of voluntary cancellation.*

(8) A registrant whose registration has been cancelled must not engage in any formerly registered activities after the date on which the cancellation takes effect.

(9) The obligations of-

- (a) a registrant under this Act, or under any credit agreement in respect of which it is the credit provider, survive any suspension or cancellation of its registration ; and*
- (b) a consumer under a credit agreement survives the cancellation of the credit provider's registration.*

It is evident that the obligations of the Respondent and consumers under credit agreements entered into by it will survive the cancellation of the Respondent's registration in the event that such cancellation is granted. However, in terms of section 57(7) the cancellation of the Respondent will be cancelled as of the date on which the Tribunal issues such an order and the Respondent may not, in terms of section 57(8), engage in any formerly registered activities after the date of such cancellation.

In as far as the effect of a cancellation on agreements entered into after the date of cancellation of registration is concerned, the Tribunal ruled as follows in the matter of NCR v *Lightning Cash Loans*¹⁰:

- “39. Section 54 provides that activities, which require registration, by unregistered entities constitute offences due to non-compliance.*
- 40. The National Credit Regulator, in terms of section 54, may issue a notice in the prescribed form to such unregistered entity regarding the non-compliance, informing the entity that it constitutes an offence under the Act and that it is punishable in terms of section 161 with a fine or imprisonment.*
- 41. Section 89(2)(d) provides that a credit agreement is unlawful if entered into with an unregistered credit provider (resulting from the lapse of registration) required to be registered and section 89(5) provides that a court can make an appropriate order and declare the agreement void from the date it was entered into and to return money received from and prohibits the recovery of monies from the consumer.*
- 42. The Tribunal carefully considered this and the status and treatment or action to be taken in respect of the credit agreements and the restricted activities of the unregistered entity after the latter’s registration has lapsed.*
- 43. In the matter of National Credit Regulator v Opperman and Others the Constitutional Court inter alia confirmed the order of the High Court in as far as it relates to the provisions of Section 40 and 42(1) of the NCA. In this regard it held as follows:*
- “Section 40 of the NCA requires certain credit providers to register with the NCR. Because Mr Boonzaaier’s total principal debt exceeded the R500 000 threshold, prescribed in terms of section 42(1) of the NCA, the High Court held that Mr Opperman was required to register. Since he was not registered, the credit agreement was unlawful. Section 89(5) stipulates how unlawful credit agreements must be dealt with by courts.”*
- 44. In terms of Section 89(5) of the NCA a court must order that the unlawful credit agreement is void from the date it was entered into, the credit provider must refund to the consumer any money paid by the consumer under the agreement to the credit provider and all the purported rights of the credit provider under the credit agreement to recover any money paid or goods delivered to the consumer in terms of the agreement are cancelled.”*

¹⁰ NCT/7281/2013/57(1)(P)NCA

It is evident from the above that any agreements entered into by the Respondent after the date of deregistration would be void, that consumers will be entitled to a refund of any money paid in terms of such agreements and that the credit provider would have no right to recover any money paid or goods delivered in terms of such agreements.

Who are the consumers affected by the conduct of the Respondent?

The investigation conducted by the Applicant did not include a list of affected consumers, but from the papers filed with the Tribunal, the following consumers have been identified:

1. Selvin Nico September (Annexure B1.3)
2. Peter Ndabeni (Annexure B1.4)
3. Makhosazana Princess Mrwetyana (Annexure B1.5)
4. Quintan Oranje (Annexure B1.6)
5. Othniel Gordon (Annexure B1.7)
6. Martin Lukas (Annexure B1.8)
7. Thembeke Jenet Mdingi (Annexure B1.9)
8. Deon Franklin Davids (Annexure B1.10)
9. Maans Titus (Annexure B1.11)
10. Francois Louw (Annexure B1.12)
11. Gerrit Erasmus Meissenhemimer (Annexure B1.13)
12. Bianca Koopstad (Annexure B1.14)
13. Anesley Fredwin Windvogel (Annexure B1.15)
14. Ivan Augus (Annexure B1.16)
15. Florence Mvunyiswa (Annexure B1.17)

The above list may not be exhaustive. These are the only consumers mentioned in the application before the Tribunal.

28. ORDER

The Tribunal makes the following order:

- 28.1 The Deed of Settlement is hereby confirmed as a consent order in terms Section 138 of the National Credit Act and Rule 20 of the Tribunal Rules

- 28.2 The conduct of the Respondent is declared prohibited.
- 28.3 The registration of the Respondent is forthwith cancelled.
- 28.4 The consumers who have been affected by Respondent's conduct and the resultant cancellation of the Respondent's registration are to apply for the issuance of a certificate in terms of Section 164(3)(b) of the Act.
- 28.5 There is no order as to costs.

DATED AT CENTURION ON THIS 30TH OCTOBER 2013

[SIGNED]

Adv FK Manamela

Presiding Member

Professor J Maseko (Member) and Ms L Best (Member) concurring

Authorised for Issue by the National Consumer Tribunal

Case number _____

Date: 20/11/2013
ccy mm dd

National Consumer Tribunal
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