IN THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

CASE NO: NCT-112239-2018-141(1)(b)

In the matter between:

ANNET LUDICK APPLICANT

and

FIRST NATIONAL BANK
A DIVISION OF FIRSTRAND BANK LIMITED RESPONDENT

PANEL:

Ms D Terblanche - Presiding Tribunal Member
Adv J Simpson - Tribunal member
Mr A Potwana - Tribunal member

Date of Hearing - 6 June 2019
Date of Judgment - 20 August 2019

JUDGEMENT AND REASONS

THE PARTIES

1. The Applicant in this matter is Annet Ludick, a major female (hereinafter referred to as "the Applicant or "Ludick").

2. The Respondent is First National Bank, a division of FirstRand Bank Limited (hereinafter referred to as "the Respondent" or "FNB"), a company with limited liability, duly registered and incorporated in accordance with the company laws of South Africa; a bank as defined in the Banks Act, 94 of 1990 and duly registered as a credit provider in terms of the National Credit Act, Act 34 of 2005 (the NCA) with registration number NCRCP20.

APPLICATION TYPE

3. This is an application in terms of Section 141(1)(b) of the National Credit Act 34 of 2005 ("the NCA").

4. Section 141(1)(b) of the NCA provides as follows–

   "If the National Credit Regulator issues a notice of non-referral in response to a complaint other than a complaint concerning section 61 or an offence in terms of this Act, the complainant concerned may refer the matter directly to the Tribunal, with the leave of the Tribunal."

5. A member of the Tribunal granted the Applicant leave to refer the complaint in a written judgment dated 27 February 2019.

6. The Tribunal now considers the merits of the main application and whether the Applicant is entitled to the relief she seeks.

BACKGROUND

7. The complaints that form the basis of the application before the Tribunal has a long history, starting in March 2015.

8. During 2015 the Applicant received a substantial amount of credit from the Respondent on numerous accounts. She alleges that the Respondent did not assess her income and expenditure properly and should have realized that she

could not afford to repay the credit received. She wants the Tribunal to set aside all her obligations in terms of the credit granted.

9. The pleadings in the matter refer to numerous accounts and numerous loan applications. The Tribunal will only consider the accounts and applications that the Applicant is pursuing, based on her founding affidavit. In the affidavit she lodges the claim against the Respondent in respect of Overdraft (account number […]6), Revolving loan (account number […]1), FNB Credit card (account number […]3) and FNB Discovery card (account number […]4).

10. Based on the Applicant's founding affidavit, she received the following loans –

    10.1 On 30 March 2015 she applied for and received an increase in her credit card limit to R61 000.00 (Account number […]3);

    10.2 On 7 May 2015 she applied for and received a revolving loan of R10 000.00 (Account number […]1);

    10.3 On 6 October 2015 she applied for and received an increase in her overdraft account to R68 000.00 (Account number […]6); and

    10.4 On 7 December 2015 she again applied for and received an increase in her overdraft limit to R80 000.00 (Account number […]6).

11. During March 2016 she became unable to repay the debt. She approached a debt counselling firm called Zero Debt to assist her. Zero Debt started the debt review process on her behalf.

12. During September 2016 Zero Debt lodged reckless lending complaints on behalf of the Applicant with the National Credit Regulator (the "Regulator").

13. In December 2016 she lost her employment. She was only able to regain employment 6 months later but at a lower salary.

14. The Respondent denied that it recklessly granted credit to the Applicant. It sent a response to the Regulator setting out the income and expenses it calculated

when the credit was granted. Its calculations showed a surplus was available on each occasion.

15. The Regulator investigated the complaints and concluded that no reckless lending had taken place. It sent a letter dated 22 June 2017 to Zero Debt in this regard. The Applicant only received a copy of this letter in November 2017. The Applicant made numerous further submissions to the Regulator. The Regulator subsequently reopened the complaint. After further investigations it issued a Notice of non-referral dated 28 June 2018.

16. The Applicant launched the application with the Tribunal on 26 July 2018 for leave to refer her complaint directly to the Tribunal.

17. On 27 February 2019, the Tribunal granted the Applicant leave to refer her complaints.

THE HEARING

18. The Tribunal's Registrar set the hearing down for 6 June 2019 at the NCT's office in Centurion.

19. The Applicant appeared in person.

20. Adv. A Friedman, briefed by CF van Coller Incorporated, represented the Respondent.

21. The Respondent raised various points *in limine* at the hearing.

22. The Tribunal decided to hear the points *in limine* and proceed to the main matter on the day of the hearing.

POINTS *IN LIMINE*

POINT *IN LIMINE 1:* THE TRIBUNAL DOES NOT HAVE THE JURISDICTION TO ADJUDICATE THE MATTERS IN RESPECT OF WHICH THE NCR DID NOT ISSUE A NOTICE OF NON-REFERRAL.

23. The Respondent submitted that-

23.1. A Complainant may only apply for leave to refer a complaint directly to the Tribunal if the complaint had been non-referred by the Regulator;

23.2. The Regulator did not issue non-referral notices in respect of all the accounts the Applicant is complaining about to the Tribunal; and

23.3. The Respondent submitted that the NCR issued a Notice of non-referral only in respect of two credit agreements. Those are:

23.3.1. Credit Card account number […]3 in respect of which the Applicant applied for a credit limit increase to the amount of R77 000.00, on 14 September 2015; and

23.3.2. Overdraft account number […]6 in respect of which the Applicant applied for an overdraft facility increase to the amount of R80 000.00, on 7 December 2015.

24. The Respondent further submitted that –

24.1. The Tribunal is established in terms of section 26 of the NCA. As a creature of statute it must exercise its functions in accordance with the NCA, or other applicable legislation;

24.2. The Tribunal may only adjudicate on matters specifically provided for in its founding legislation - the NCA and the Consumer Protection Act 68 of 2008 (the CPA);

24.3. A Complainant may only refer a matter directly to the Tribunal, with leave of the Tribunal, *"(1) After …., the National Credit Regulator— (a) issue a notice of non-referral to the complainant in the prescribed form;…";* and

24.4. Where the Regulator has not issued a non-referral notice in respect of a complaint, the Tribunal does not have the jurisdiction to entertain such complaint or referral.

25. It is undisputed that in her original complaint to the Regulator, the Applicant complained about all the credit applications on all the accounts. The Regulator's

letter, dated 22 June 2017, stated that it sought responses from the Respondent regarding 5 credit applications that the Applicant complained about. The Respondent dealt with four of the five in its response. The Regulator, in its Notice of non-referral on 28 June 2018, referred to only two credit applications.

26. It is therefore clear that all the credit transactions in 2015 were disputed and responded to. The NCR made a finding on all the credit applications that there was no evidence of reckless lending. Although the NCR only referred to two of the applications in its formal Notice of non-referral there is no doubt that it investigated all the applications and had no intention of taking these complaints further.

27. Section 2(1) of the NCA requires of the Tribunal to interpret the NCA in a manner that gives effect to the purposes of the NCA set out in section 3. The relevant part of section 3, provides that the purpose of the NCA, amongst others, is -

"… *to protect consumers, by—… (c) promoting responsibility in the credit market by— …. (ii) discouraging reckless credit granting by credit providers and contractual default by consumers; and* …"

28. It would be fundamentally unreasonable and contrary to the spirit of the NCA to hold the Applicant responsible for the Regulator's failure to mention all the applications in its formal Notice of non-referral.

29. In the specific circumstances of this matter the Tribunal can accept that the Regulator non-referred all the credit applications.

30. The Tribunal therefore dismisses the Respondent's point *in limine* that the Tribunal only has the power to adjudicate the reckless lending allegations in respect of the two credit applications.

POINT *IN LIMINE 2:* TRIBUNAL DOES NOT HAVE JURISDICTION OR POWERS TO ADJUDICATE ALLEGATIONS OF RECKLESS CREDIT IN RESPECT OF THE CREDIT LIMIT INCREASE ON 14 SEPTEMBER 2015

31. In this respect the Respondent submitted that –

31.1. The Applicant elected not to include allegations of reckless credit in respect of the increase of the credit limit to the amount of R 77 000.00 on 14 September 2015 (Credit Card account number […]3), in her application for leave to refer her complaint directly to the Tribunal;

31.2. The Applicant made no reference to the 14 September 2015 agreement in her founding affidavit, in support of her application for leave to refer a matter directly to the Tribunal; and

31.3. The Tribunal could therefore not decide whether to refer the complaint or not, and cannot hold a hearing into the merits of the complaint since it has not granted leave to refer the complaint.

32. From the Tribunal's study of the Applicant's founding affidavit it appears the Respondent is correct that the Applicant has not included allegations of reckless credit in respect of the credit limit increase on 14 September 2015. This increase was on top of the increase for the same credit card account number 4-000-060-151-253 to R 61 000.00 on 30 March 2015.

33. The Applicant has not put material facts before the Tribunal to consider reckless lending in respect of the 14 September 2015 credit agreement for leave to refer. In the famous judgment by Grosskopf, JA in Trope v South African Reserve Bank and Another and Two Other Cases [1993] ZASCA 54; 1993 (3) SA 264 (A) at 273A-B, the appellate Judge articulated the requirement as follows:

"It is trite that a party has to plead – with sufficient clarity and particularity - the material facts upon which he relied for the conclusion of law he wishes the Court to draw from those facts (Mabaso v Felix ***1981 (3) SA 865*** *(A) at 875A-H; Rule 18(4)). It is not sufficient, therefore, to plead a conclusion of law without pleading the material facts giving rise to it. (Radebe and Others v Eastern Transvaal Development Board* ***1988 (2) SA 785*** *(A) at 792J-793G.)"*

34. As to the extent of the particularity and details of the pleadings, as explained in ***Jowell v Bramwell-Jones and Others*** ***1998 (1) SA 836*** *(W) at 913B-G:*

". . . (T)he plaintiff is required to furnish an outline of its case. This does not mean that the defendant is entitled to a framework like a crossword puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and possess rough edges not obvious until actually explored by evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible, the plaintiff will have satisfied the requirements."

35. The Tribunal, in its ruling of 27 February 2019, refers to the credit agreements held under account numbers – […]6 (overdraft account); […]1 (revolving loan account); […]3 (FNB credit card); and […]4 (Discovery credit card). The Member did not grant specific leave in respect of the 14 September 2015 credit application.

36. In earlier Tribunal judgments the Tribunal was clear that the Tribunal will not consider the merits of a complaint unless it has considered whether it would grant the Applicant leave to refer the matter to the Tribunal first. This has not happened in respect of the credit card limit increase of 14 September 2015.

37. Based on the above, the point *in limine* is upheld. The Tribunal cannot consider allegations of reckless credit extension in respect of the credit granted on 14 September 2015.

38. Only those credit applications that are set out in the Applicant's founding affidavit will be considered.

POINT *IN LIMINE 3:* THE APPLICANT IS, IN TERMS OF SECTION 166(1) OF THE NCA, PRECLUDED FROM REFERRING THE COMPLAINT OF RECKLESS LENDING IN RESPECT OF THE CREDIT CARD LIMIT INCREASE ON 30 MARCH 2015, (ACCOUNT […]4)[1] AND REVOLVING LOAN CREDIT AGREEMENT ENTERED INTO ON 7 MAY 2015, TO THE TRIBUNAL

[1] The account number appearing in the Respondent's Heads of Argument appears to be incorrect. The parties agree in their pleadings that the 30 March 2015 credit agreement account number is […]3, i.e. the FNB credit card not […]4 which is the Discovery Credit Card.

39. In this respect, the Respondent submitted that –

39.1 The Applicant's cause of action arose more than three years before she applied to the Tribunal for leave to refer her complaint against the Respondent directly to the Tribunal;

39.2 The cause of action that forms the basis of the Applicant's complaint is that the Respondent failed to conduct an affordability assessment; as required by section 81(2) of the NCA; and that the Respondent entered into the credit agreements with the Applicant recklessly; in contravention of the provisions of the NCA;

39.3 The Respondent and the Applicant entered into the agreements on 30 March 2015 (credit card increase) and 7 May 2015 (revolving credit loan) respectively;

39.4 The Applicant applied to the Tribunal to directly refer her complaint on 26 July 2018;

39.5 More than three years had elapsed before the Applicant applied to the Tribunal for leave to directly refer her complaint against the Respondent to the Tribunal on 26 July 2018; and

39.6 Section 166 precludes the Applicant from referring the complaint to the Tribunal in terms of section 166 of the NCA. Section 166(1) of NCA provides as follows:

"(1) A complaint in terms of this Act may not be referred or made to the Tribunal or a consumer court more than three years after the act or omission that is the cause of the complaint; or …"

40. The original act of granting the credit arose in March 2015. The Applicant lodged a complaint with the NCR regarding the credit in September 2016. The NCR issued a Notice on non-referral in June 2018. On a strict interpretation of section 166 of the NCA, the complaint would have prescribed in March 2018. This is before the Applicant lodged the application with the Tribunal in July 2018.

41. It is clear from the time line above that the Applicant's complaint prescribed while the issue was being investigated by the Regulator. It could never have been the intention of the legislature to require a consumer to lodge a complaint with the Regulator and then to prejudice the consumer if the matter prescribes in that time.

42. The Tribunal has issued a number of previous judgments finding that prescription is interrupted while the complaint is with the Regulator[2]. In this matter the same approach can be applied. The prescription of the Applicant's complaint was therefore interrupted from the time it was reported to the Regulator until the Notice of non-referral was issued. This is a period of 21 months. The applicant's complaint regarding the March 2015 credit application would therefore only prescribe in January 2020.

43. The Tribunal, therefore, finds that the Applicant's complaints had not prescribed by the time the Applicant referred her application to the Tribunal on 26 July 2018.

44. The Tribunal dismisses the Respondent's point *in limine.*

POINT *IN LIMINE 4:* NCR LETTER DATED 22 JUNE 2017 CAN BE REGARDED IN SUBSTANCE AS A NOTICE OF NON-REFERRAL WHICH COULD NOT BE REVIEWED BY THE NCR

45. The Respondent submitted that –

45.1. Although the letter dated 22 June 2017 does not seem to resemble the prescribed form as required in the NCA, it, in substance contains the same information required in a Notice of Non-Referral. It can therefore be regarded as a Notice of Non-Referral.

45.2. The Applicant had to bring her application for leave to refer the complaint directly to the Tribunal within the prescribed time, i.e. within 20 business days from 22 June 2017, which she failed to do.

[2] Lazarus and Another v RDB Project Management CC t/a Solid and Another (NCT/36112/2016/75(1)(b)) [2016] ZANCT 15 (9 June 2016)

45.3. The NCR could not re-open their file and review its own decision after it had already issued a Notice of Non-Referral on 22 June 2017.

46. The Respondent's view is that the Regulator exhausted its powers in respect of the complaints, in other words, that the Regulator became *functus officio* on 22 June 2017.

47. Although the Regulator dealt with many credit applications in its 22 June 2017 letter, it was not in the format of a Notice of non-referral. The Applicant would not have been able to lodge an application with the Tribunal on the basis of this letter.

48. The Applicant made further submissions and the Regulator then issued a proper Notice of non-referral in July 2018. Only then could the Applicant approach the Tribunal.

49. Whether or not the Regulator was *functus officio* is not relevant to the Applicant lodging the application with the Tribunal. The fact remains that the Applicant could only lodge an application with the Tribunal after July 2018.

50. The Tribunal therefore dismisses the point *in limine*.

51. Having dealt with the points in limine the Respondent raised, we now turn to consider the merits of the Applicant's complaints.

THE MAIN COMPLAINTS

52. The credit applications that will be considered are the following –

52.1 On 30 March 2015 - increase in credit card limit to R61 000.00 (Account number […]3);

52.2 On 7 May 2015 – granting of a revolving loan of R10 000.00 (Account number […]1);

52.3 On 6 October 2015 - increase in overdraft account to R68 000.00 (Account number […]6); and

52.4 On 7 December 2015 - increase in overdraft limit to R80 000.00 (Account number […]6).

THE APPLICANT'S SUBMISSIONS

53. The Applicant alleges that she made applications and the Respondent extended credit to her as follows:

53.1. On 30 March 2015, she applied telephonically for an increase of her FNB credit card limit. She did not provide any documentation or income and expenses information. The Respondent sent her a quote and contract to sign. It granted the application and increased her credit card limit to R 61 000,00;

53.2. On 7 May 2015, the Applicant applied at the Respondent's Lambton branch for a revolving credit loan of R10 000.00. The Respondent did not request any documentation or expenses and income information. It returned the quotation to her and approved the loan on the same day;

53.3. On 6 October 2015, she applied telephonically for an increase of her overdraft facility. The Respondent did not request any documentation or expenses and income information. It returned the quotation to her and approved the increase to R68 000.00 on the same day; and

53.4. On 7 December 2015, she applied telephonically for a further increase of her overdraft facility. She provided pay slips from September to November 2015. The Respondent made no further inquiries and increased her overdraft facility to R80 000.00 on the same day.

54. The Applicant alleges that the Respondent did not conduct affordability assessments or credit checks. The Respondent did not request information from her beyond her providing pay slips on one occasion.

55. The Applicant disputed the income amounts calculated and utilised by the Respondent. She further disputed the surpluses it alleged she had.

56. The Applicant claimed that –

56.1. She was moving money from one account to another. The income reflected by the Respondent is therefore artificially inflated. She only had one income from her single employer; and

56.2. She received deposits from Britain into her bank account on behalf of a neighbour to pay the neighbour's rental on the neighbour's behalf.

57. The Applicant claimed that her monthly expenses by far exceeded her monthly income as per annexure W to her founding affidavit. Annexure W shows a deficit for each and every month from March 2015 to October 2015. It consistently reflects an average income that is lower than what the Respondent utilized. Her expenses and obligations, under her then existing credit agreements, as per the credit bureau records; were higher than the expenses and obligations the Respondent took into account for its assessment.

58. The Applicant alleges that, in respect of the –

58.1. 30 March 2015 credit card limit increase, she signed the "*FNB credit card limit increase quotation, declaration and pre-agreement"*. The document does not reflect income and expenditure amounts;

58.2. 7 May 2015 revolving credit loan facility, the Applicant signed documents at the Respondent's Lambton branch. The Applicant cannot recall what documents she signed and the information the documents contained. The Applicant requested the documents she signed from the Respondent. The Respondent's officials said they do not have the documents and did not provide them to her. The Respondent provided an affidavit to the effect that they could not locate the documents and that the Respondent re-constructed the credit agreement;

58.3. 6 October 2015 overdraft facility increase, she signed the "*Overdraft pre-agreement statement and quotation / costs of credit*" agreement. The document does not reflect income and expenditure amounts; and

58.4. For the 7 December 2015 overdraft facility increase, she provided a few months' pay-slips to the Respondent. She did not read the "*Overdraft Pre-*

Agreement Statement and Quotation/Cost of Credit" agreement she signed. She insists that her income at the time was approximately R 20 000.00, not the approximate R28 000.00 per month as per the declaration.

59. The Applicant contends that, had the Respondent done a proper affordability assessment, the Respondent would not have granted any credit to her because she could not afford to repay the credit.

THE RESPONDENT'S SUBMISSIONS

60. The Respondent submitted in its answering affidavit that –

60.1. The Respondent denied that it entered into the credit agreements with the Applicant recklessly;

60.2. The Respondent explained its overarching evaluative mechanisms, models and procedures in terms of section 81 of the NCA to the Tribunal. The Respondent claims that its evaluative mechanisms, models and procedures result in an objective, assessment and is consistent with the affordability assessment of the regulations under the NCA;

60.3. The Respondent assessed the Applicant's affordability based on her average 'normalised' income calculated from her bank statements; the monthly living expenses it 'derived' for the Applicant from the Statistics SA's Household Income and Expenditure Survey ("IES"); and the Applicant's existing credit obligations from the Respondent's online feed from the credit bureau;

60.4. The Respondent calculated the Applicant's income based on the credits and deposits into her transactional account, excluding inter-account transfers;

60.5. The Respondent derived the Applicant's monthly expenses from the Statistics SA's Household Income and Expenditure Survey (IES). In the view of the Respondent, the expenses amounts it derives from the IES are more conservative (higher) than the minimum expenses norms prescribed

in Regulation 23A of the Regulations promulgated under the NCA. According to the Respondent, the Applicant confirmed the Respondent's estimation of her living expenses;

60.6. The Respondent extracted the Applicant's obligations under existing credit agreements and her debt repayment history via a link with TransUnion. The Respondent's information technology system automatically populates the Respondent's internal systems with the Applicant's information from TransUnion for assessment purposes. From the Respondent's assessment, the Applicant maintained and repaid existing debt obligations well. According to the Respondent the Applicant confirmed their records of her debt obligations as correct; and

60.7. The Respondent provides consumers with a pre-agreement statement to sign to confirm and verify the information the Respondent used in their affordability assessments. If the Applicant did not agree and signed the income and expenses figures the Respondent would not have entered the credit agreements with her.

61. Based on its records, and the above mentioned approach, the Respondent did the following affordability assessment for each loan –

61.1 Credit card limit increase to R61 000.00 on 30 March 2015

The Respondent did not submit any record of any assessment done on this application. It did not attach any documents or agreement relating to this application. As per paragraph 60 of its answering affidavit, it submitted that this application was novated by the application for an increase on 14 September 2015. The Respondent further submits that the Applicant is not requesting for the current agreement to be declared reckless, as there is submission regarding the 14 September 2015 application in her founding affidavit.

61.2 Revolving loan facility of R10 000.00 granted on 7 May 2015

Monthly average income	R21 154.00
Monthly average net income (credit bureax and internal records	R11260.00
Less monthly necessary living expenses	R6 648.00
Les proposed repayment amount for the credit facility	R290.00
Monthly surplus available	R2 956.00

61.3 Overdraft increase to R68 000.00 on 6 October 2015

The Respondent did not submit any record of any assessment done on this application. It did not attach any documents or agreement relating to this application. As per paragraph 62 of its answering affidavit, it submitted that this application was novated by the application for an increase on 7 December 2015.

61.4 Overdraft increase to R80 000.00 granted on 7 December 2015

Monthly average income	R28 875.00
Monthly average net income (credit bureaux and internal records	R14 075.00
Less monthly necessary living expenses	R9 083.00
Les proposed repayment amount for the credit facility	R1607.00
Monthly surplus available	R4 090.00

62. The Respondent further submitted that, if the Applicant is indeed over-indebted, the Respondent did not cause her to be overindebted. According to the Respondent, the Applicant would have been able to meet her financial obligations was it not for her excessive cell phone, food, Solidariteit and DSTV expenses.

63. At the hearing, the Respondent called Mr Gert van der Venter, employed by the Respondent as a credit manager, as a witness to give oral evidence. Mr van der Venter also deposed to the Respondent's answering affidavit. In brief, Mr van der Venter confirmed the statements he made in his answering affidavit. He further explained that -

63.1. When the Respondent calculates a consumer's income, the Respondent takes into account all electronic transfers, cash deposits, income into the

Consumer's account over six months. The Respondent 'normalises' the consumer's income by excluding the highest and lowest income amounts and averages the consumer's income over the remaining four months;

63.2. The Respondent could not trace the itemized expenses declared by the consumer on 7 May 2015. However, he maintained that the monthly expenses amount the Applicant declared is exactly the same amount the Respondent determined from the IES. The Respondent reconstructed the 7 May 2015 credit agreement;

63.3. The witness pointed the Tribunal to a statement on page 16 of the paginated bundle that the Applicant's annual income is R 288 00.00. The Applicant signed the document;

63.4. The witness further pointed the Tribunal to a declaration, signed by the Applicant, declaring monthly expenses of R 9 083,00; debt commitments of R 14 095,00; and financial means and prospects of R 28 875,00 in respect of the increase in the overdraft facility to R 80 000,00 on 7 December 2015. The Respondent pointed out that the Applicant's declaration above shows that the Applicant understood the risks, costs, rights and obligations and that the affordability assessment is authentic;

63.5. The Respondent conceded that, except for the 7 December 2015 credit agreement for the overdraft facility increase, the other documents before the Tribunal do not contain income, monthly expenses and credit obligation values the Applicant confirmed and signed;

63.6. The reason the December 2015 document contains the declaration is because the Respondent changed their forms to include the declaration after Regulation 23A came into operation on 13 September 2015. For credit agreements entered into before that date, the Respondent captured and kept that information and proof on its system. The evidence in support of the Respondent's witness' submissions is

captured on the Respondent's system and was not available at the hearing;

63.7. The Respondent provided the NCR with a letter from TransUnion dated 23 March 2018 that the Respondent conducted a credit bureau inquiry in respect of the Applicant on 7 December 2015. Regarding credit bureau checks, the witness gave evidence that the Respondent does not have credit bureau reports due to the process of consumers' information being ingested electronically into the Respondent's systems. The Respondent's witness did not have letters to confirm credit bureau inquires beyond the one for 7 December 2015; and

63.8. If a consumer applies for credit at the branch, the consultant at the branch captures whatever the consumer declares and requests the consumer to confirm it. This is the mandated process within the bank. The witness was not aware of the exact process that was followed when the Applicant applied for her loans. Call recordings were available if required.

ANALYSIS AND FINDINGS ON EVIDENCE

<u>The 30 March 2015 and 6 October 2015 credit applications</u>

64. The Respondent was unable to produce any evidence regarding any affordability assessment done on the 30 March 2015 (Credit card account – increase to R61 000.00) and 6 October 2015 (Overdraft account – increase to R68 000.00) loan applications. As an explanation, it submits that these agreements were novated by subsequent applications (on 14 September 2015 and 7 December 2015) on the same accounts.

65. The argument in this regard is not clearly explained by the Respondent. As far as the factual evidence is concerned, the Tribunal finds that there is no evidence of the Respondent having done an affordability assessment on the 30 March 2015 and 6 October 2015 credit applications.

<u>The 7 May 2015 revolving loan credit application</u>

66. The Respondent was unable to produce the original agreement and evidence regarding the assessment done on the 7 May 2015 revolving loan application. It reconstructed the credit agreement from information on its systems. This agreement however only reflects the basic information relating to the loan amount and interest. It does not contain any information relating to any affordability assessment.

67. The Respondent submitted that it did do an affordability assessment using its internal processes and information on its system. It further submitted that the Applicant would have been requested to confirm this information at the branch. It has however not provided any evidence of any document signed by the Applicant. It has not submitted any recordings of any conversations. It has not attached any actual raw evidence emanating from its systems. The witness for the Respondent was not present when the application was made at the branch. He only submitted what should have happened, not what actually happened. The Applicant states that she cannot recall what she was told at the branch. The Respondent is therefore essentially asking the Tribunal to merely accept its verbal testimony that it did do an assessment.

68. The NCA is peremptory in requiring a credit provider to conduct an affordability assessment. It therefore stands to reason that a credit provider must retain accurate and clear evidence regarding the assessment done. At the very least, one would expect an assessment document physically signed or confirmed by the Applicant in some way. A telephone recording might also assist. The evidence submitted by the Respondent in this regard falls woefully short. It does not satisfy the Tribunal whatsoever that an assessment was in fact done. The Tribunal therefore finds that the Respondent has been unable to prove that it did do an assessment as required by the NCA.

<u>The 7 December 2015 overdraft increase application</u>

69. For this application the Respondent was at least able to submit a signed agreement. The Respondent was further able to submit evidence that it did access the credit bureau information relating to the Applicant. The agreement contains a declaration regarding the Applicant's income and expenditure. On the

face of it, the Applicant confirmed the affordability assessment done by the Respondent. The values reflected in the agreement further confirm that the Applicant could afford the repayment on the loan.

70. The manner in which the values are reflected and where it is reflected on the agreement is however of concern. The information and values form part of the normal terms and conditions relating to the agreement. It is in bold type but does not stand out in any way. It is in the same font as the rest of the document. It is not reflected in any separate paragraph, it is not in a table format. A consumer would be hard pressed to see these few lines amongst numerous others on a densely typed document in very small font.

71. The Applicant stated that she did not read the document at the time and did not notice the information it contained. In the Tribunal's view, this is highly probable.

72. Be that as it may, the fact remains that the Respondent was at least able to show that an assessment was done in this application.

73. The Applicant submitted that her average monthly income was approximately R20 000.00 at the time this application was approved. She denies it was R28 875.00 as calculated by the Respondent. The Applicant did not submit any evidence to show that the Respondent's calculation was incorrect. While her income may have been R20 000.00, it would appear she received additional deposits into her account. This may have originated from the rental deposits she confirmed that she received on behalf of a friend.

74. The Tribunal accepts that the Respondent did conduct an assessment in this specific application and the assessment displayed an apparent ability to repay the loan.

CONSIDERATION OF THE APPLICABLE LAW

Novation of the The 30 March 2015 and 6 October 2015 credit applications

75. The Respondent submitted that the credit applications of 30 March 2015 and 6 October 2015 should not be considered by the Tribunal as they have been novated by the 14 September 2015 and 7 December 2015 credit applications.

76. In the view of the Tribunal the Respondent's reliance on novation is misplaced. The replacement of one contract by another cannot do away with illegality a party perpetrated when entering into any one of the contracts – be it the substituted or substitution contract. Section 80(2) of the NCA directs that the determination whether a credit agreement is reckless or not, is made at the time of application.

77. Even if the two later credit agreements novated the earlier agreements, the Tribunal must evaluate the Respondent's actions at the time the application for credit was considered. The Respondent is further obligated to show that it conducted the assessment as required by the NCA. It cannot escape this requirement by entering into a further agreement on the same account at a later stage.

RECKLESS CREDIT

78. The NCA headlines reckless credit in its preamble and sets the scene for the importance with which the lawmakers regard it. It provides in the preamble that the NCA had been promulgated, amongst others, *"...to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting;..."*

79. Under section 1 of the NCA, "*reckless credit*" means the "… *credit granted to a consumer under a credit agreement concluded in circumstances described in section 80."*

80. Section 80 states –

> ***80. Reckless credit.***—*(1) A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119 (4)—*
>
> > *(a) the credit provider failed to conduct an assessment as required by section 81 (2), irrespective of what the outcome of such an assessment might have concluded at the time; or*
> >
> > *(b) the credit provider, having conducted an assessment as required by*

section 81 (2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that—

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

(ii) entering into that credit agreement would make the consumer overindebted.

81. Section 80(2) directs the person making a determination whether a credit agreement is reckless or not, to apply the criteria set out in section 80(1) "*as they existed at the time the agreement was made"***,** and without regard for the current financial ability of the consumer at the time the determination is being made.

82. Section 81(2) provides that –

"A credit provider must not enter into a credit agreement without first taking reasonable steps to assess—

(a) the proposed consumer's—

(i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;

(ii) debt repayment history as a consumer under credit agreements;

(iii) existing financial means, prospects and obligations; and..,."

83. The Tribunal found that the Respondent did not conduct any assessment of the Applicant's financial means in three of the credit applications. It therefore finds that the Respondent contravened section 80(1)(a) of the NCA in the following three instances -

83.1. On 30 March 2015 - increase in credit card limit to R61 000.00 (Account number [...]3);

83.2. On 7 May 2015 – granting of a revolving loan of R10 000.00 (Account number […]1); and

83.3. On 6 October 2015 - increase in overdraft account to R68 000.00 (Account number […]6).

84. These three credit transactions are therefore found to have been recklessly granted.

RELIEF SOUGHT

85. The Applicant requested the Tribunal to order the following relief -

85.1. To write off the debt she has with the Respondent in terms of the credit agreements she entered into with the Respondent; and

85.2. That the Respondent reimburse her with the payments she made to the Respondent from 2016 in terms of the credit agreements.

86. The overall empowering provision for the imposition of orders by the Tribunal is set out in section 150 of the NCA. [3] S150(i) provides that "*… in addition to its other powers in terms of this Act, the Tribunal may make an appropriate order in relation to prohibited conduct or required conduct in terms of this Act, or the Consumer Protection Act, 2008.*"

87. Section 83 of the NCA was amended by the National Credit Amendment Act ("the NCAA), 19 of 2014. After the promulgation of the amendment the Tribunal may impose the relief the NCA provides for in section 83(2). The NCAA came

[3] Section 150 of the NCA provides for orders which the Tribunal can make and states that:

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

(a) declaring conduct to be prohibited in terms of this Act;
(b) interdicting any prohibited conduct;
(c) imposing an administrative fine in terms of section 151, with or without the addition of any other order in terms of this section;
(d) confirming a consent agreement in terms of this Act or the Consumer Protection Act, 2008 as an order of the Tribunal;

[Para. (d) amended by s. 121 (1) of Act 68 of 2008 (wef 31 March 2011).]

(e) condoning any non-compliance of its rules and procedures on good cause shown;
(f) confirming an order against an unregistered person to cease engaging in any activity that is required to be registered in terms of this Act;
(g) suspending or cancelling the registrant's registration, subject to section 57 (2) and (3);
(h) requiring repayment to the consumer of any excess amount charged, together with interest at the rate set out in the agreement; or
(i) any other appropriate order required to give effect to a right, as contemplated in this Act or the Consumer Protection Act, 2008."

into operation on 13 March 2015. All the credit agreements the Tribunal adjudicated on, are subject to the amended sections of the NCA. As set out below -

87.1. Section 83(1) empowers the Tribunal to declare that a credit agreement is reckless; and

87.2. Section 83(2) provides that if a court or Tribunal declares that a credit agreement is reckless in terms of section 80(1)(a) or 80(1) (b)(i), the Tribunal may make an order—

87.2.1. Setting aside all or part of the consumer's rights and obligations under that agreement, as the court determines just and reasonable in the circumstances; or

87.2.2. Suspending the force and effect of that credit agreement in accordance with subsection (3) (b) (i).

88. The Tribunal found that the Respondent entered into the impugned agreements with the Applicant recklessly and declared them reckless.

89. Once the Tribunal has declared a credit agreement reckless in terms of section 80(1)(a) or 80(1) (b)(i) it may "… *set aside all or part of the consumer's rights and obligations under that agreement, as the court determines just and reasonable…"*

90. The phrase '*just and reasonable'* is not defined in the NCA. It is for the Tribunal to give content and effect to this phrase within the context of this matter.

91. The Respondent is a major banking institution in South Africa. It can reasonably have been expected to have had good systems in place to ensure it can produce evidence of the assessment done. It may have conducted assessments but in the particular circumstances of this matter it was unable to provide adequate proof thereof. The Respondent should have settled the matter when the complaint was reported in September 2016. It however continued to dispute the allegations and forced the Applicant to report the matter to the Tribunal.

92. The pattern of credit applications by the Applicant in 2015 clearly indicates a trend of financial distress. A reasonable lender would have been wary of granting all the credit that it did without further inquiry. It however cannot be ignored that the Applicant contributed to her own financial distress by continuing to apply for credit and utilizing the funds.

93. In the light of the above the Tribunal finds that it is just and reasonable that it sets aside all of the Applicant's future rights and obligations under the credit agreements the Tribunal declared reckless. The Applicant is therefore not liable for any payments made on the three credit agreements as from 30 September 2016 (approximating the date when the complaint was reported to the Regulator).

ORDER

94. The Tribunal makes the following orders -

94.1. The following credit agreements are declared reckless and set aside -

94.1.1. The Increase of the Applicant's credit card limit granted on 30 March 2015 (account number […]3);

94.1.2. The granting of a revolving credit loan to the Applicant on 7 May 2015 (account number […]1); and

94.1.3. The increase of the Applicant's overdraft granted on 8 October 2015 (account number […]6).

94.2. All the Applicant's future rights and obligations in terms of the above credit agreements are set aside. The Applicant is therefore not liable for any payments, charges and fees levied on these specific credit amounts as from 30 September 2016;

94.3. The Respondent is to credit the Applicant's abovementioned accounts with all payments made on the three credit agreements as from 30 September 2016. The accounts must further be credited with all interest fees and charges charged on these accounts from 30 September 2016;

94.4. The revolving loan granted on 7 May 2015 must therefore be regarded as having been settled on 30 September 2016; The additional credit granted on 30 March 2015 and 8 October 2015 must therefore also be regarded as having been settled on 30 September 2016; and

94.5. No order is made as to costs.

Dated at Centurion on this 20th day of August 2019

Adv J Simpson
Tribunal Member

Ms D Terblanche (Presiding Tribunal member) and Mr A Potwana (Tribunal member) concurring.