THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1104/2023

In the matter between:

THE LOAN COMPANY (PTY) LTD **APPELLANT**

and

THE NATIONAL CREDIT REGULATOR **FIRST RESPONDENT**

THE NATIONAL CONSUMER TRIBUNAL **SECOND RESPONDENT**

Neutral citation: *The Loan Company (Pty) Ltd v The National Credit Regulator and Another* (1104/2023) [2025] ZASCA 40 (8 April 2025)

Coram: MOKGOHLOA ADP and KEIGHTLEY and COPPIN JJA and PHATSHOANE and VALLY AJJA

Heard: 26 February 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date for hand down is deemed to be 8 April 2024 at 11h00

Summary: National Credit Act, 34 of 2005 – interpretation – sections 40(1), 40(3), 76(3), 100(1)*(c)*,100(1)*(d)*(ii) and 151 – obligation to register as credit provider – permissibility of advertising the availability of credit and concluding credit agreements prior to registration – permissible interest charges – power of National Credit Tribunal in terms of the Act – to declare non-compliant credit agreements unlawful and void –

to order refunds to consumers – to determine and impose administrative fines – nature of appeal from the tribunal to the high court in terms of s 148(2)*(b)* of the Act.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Nyathi J and Molopa-Sethosa J concurring, sitting on appeal from the National Consumer Tribunal):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Coppin JA (Mokgohloa ADP, Keightley JA and Phatshoane and Vally AJJA concurring):

[1] Following an investigation by the first respondent, the National Credit Regulator (NCR), into the business activities of the appellant, the Loan Company (Pty) Ltd (the Loan Company), and in proceedings initiated by the NCR, the National Consumer Tribunal (the tribunal) made various orders against the Loan Company. They included a declaration that it had contravened several sections of the National Credit Act 34 of 2005 (the Act) and the imposition of an administrative penalty.

[2] An appeal against those orders by the Loan Company to the Gauteng Division of the High Court, Pretoria (the high court), in terms of s 148(2)*(b)* of the Act, was unsuccessful. The appeal before this Court is with the leave of the high court. The tribunal did not participate in the proceedings and has given notice to abide by the decision of this Court.

[3] The following will be dealt with sequentially: the background facts, the orders of the tribunal appealed against and in respect of which leave to appeal was granted by the high court, a discussion, which includes a brief overview of the high court's

findings, the arguments of the parties, the nature of the appeal before the high court, and lastly the conclusion and order.

Background facts

[4] The Loan Company is a typical 'pawn' broking business. It gives small short-term loans to consumers and in return retains possession of their movable property as security. If the loan or credit is not repaid on time it sells the 'pawned' movable and retains all the proceeds of the sale.

[5] Following complaints, the NCR investigated the business activities of the Loan Company. It then brought an application in the tribunal against the Loan Company in terms of s 140(1)*(b)* (read with s 140(2)*(b)*) of the Act (the application). The sections, in essence, provide that after completing an investigation, the NCR may refer the matter to the tribunal if it believes that the person investigated has engaged in 'prohibited conduct'. Section 1 of the Act defines 'prohibited conduct' as an act or omission that is in contravention of the Act.

[6] The NCR alleged in its affidavits that the Loan Company had engaged in multiple acts (or omissions) that were in contravention of the Act. These included: (a) concluding credit agreements and extending credit to consumers without being registered in terms of the Act and in contravention of sections 40(1) and 40(3) of the Act; (b) advertising the availability of credit while not registered as a credit provider in terms of the Act and in contravention of sections 76(3) and 76(4)*(c)*(iii) of the Act (read with regulation 21(6)*(b)*) of the National Credit Regulations (regulations)[1]; and (c) over charging interest and levying other fees and charges in contravention of sections 100(1)*(c)* and 100(1)*(d)* (read with s 101(1)) of the Act.

[7] The NCR also averred that the contraventions by the Loan Company were repeated contraventions of the Act and regulations and consequently sought the imposition of an administrative penalty on the Loan Company, as well as other interdictory and further relief against it. In substantiation of its case against the Loan Company, the NCR relied on an investigation report, which is attached to the founding

[1] National Credit Regulations in GN R489 GG 28864 of 31 May 2006

papers in the application. It also relied on about fifteen other attachments to that report, which essentially document fifteen instances where the Loan Company either entered into credit agreements (according to the NCR) before being registered as a credit provider in terms of the Act, or contravened the Act (the sample transactions).

[8] The NCR sought an order in respect of the sample transactions that all amounts charged by the Loan Company over and above the capital amount it loaned in those matters be refunded to the affected consumers. It also sought orders that the Loan Company return all vehicles it held as security to the consumers. Alternatively, in instances where that was impossible because the vehicle had already been sold, that the Loan Company be directed to pay the affected consumer the difference between the gross proceeds from the sale of the vehicle and the loan amount advanced (less any amount the consumer had paid toward the loan). The NCR also sought other relief which will be dealt with below at the appropriate juncture.

[9] The Loan Company opposed the application and delivered an answering affidavit deposed to by its sole director, Jacques Guillaume Fromet De Rosnay (Mr De Rosnay). It essentially denied the NCR's allegations of impropriety and illegality. It averred, inter alia, that all the credit transactions it concluded (including the sample transactions) were concluded after it had applied for registration as a credit provider in terms of the Act. And it contended that it had advertised the availability of credit only after its registration certificate as a credit provider had been issued. Ultimately, the Loan Company denied contravening the Act. The NCR filed a replying affidavit in which it basically joined issue with the Loan Company.

[10] After hearing the parties, the tribunal found in favour of the NCR, and against the Loan Company. It made several orders, not all of which are relevant for purposes of this appeal. Of those that are relevant, some dealt with contraventions of the Act by the Loan Company (contravention orders). Others were remedial in nature (remedial orders).

[11] The relevant orders included the following. First, the tribunal declared that the Loan Company had repeatedly contravened several sections of the Act including s 40(1) (read with s 40(3)), s 76(3), s 92(1) (read with regulation 28 and form 20.2),

ss 100(1)*(c)* and 101(1)*(d)*(ii) (read with regulation 40) and ss 100(1)*(a)* and 101(1). Second, it declared that those repeated contraventions were 'prohibited conduct' in terms of the Act. Third, it declared that the sample transactions were all unlawful and void. In respect of the contravention orders, the tribunal made the following (relevant) remedial orders. It ordered the Loan Company to refund each of those customers all amounts that they were charged in excess of the amount the Loan Company advanced to them as a loan. It also ordered the Loan Company to return to the customers the goods pawned as security for their loans, alternatively, to pay them the gross proceeds of the sale of the goods, less the balance outstanding on the amount loaned. Finally, the tribunal levied an administrative fine on the Loan Company of R250 000.00, which had to be paid within 30 days of its order into the account of the National Revenue Fund. The tribunal made no order as to the costs.

[12] The Loan Company appealed to the high court in terms of s 148(2) of the Act in respect of all the orders of the tribunal. Even though the Act and Regulations do not make any specific provision in that regard, the procedure the Loan Company adopted and followed was essentially the same procedure employed when a civil matter is appealed from the magistrate's court to the high court. The matter was argued before two judges of the high court, as would be the case generally in civil appeals from the magistrate's court. The record of the proceedings in the tribunal was the record in the appeal. In addition, heads of arguments were filed by the parties.

[13] The high court dismissed the Loan Company's appeal with costs. It found that the 'findings and orders' of the tribunal 'cannot be faulted' and it confirmed them. The high court then granted the Loan Company leave to appeal to this Court on a limited basis. The extent of that grant is detailed in the high court's order of 5 October 2023, read with the Loan Company's notice of appeal dated 31 October 2023, which is in accordance with that order. It is limited to three of the 'contravention' orders and three of the 'remedial' orders made by the tribunal and confirmed by the high court.

[14] The contravention orders appealed against are those relating to: the conclusion of credit agreements before the Loan Company was registered in terms of the Act; advertising the availability of credit before being registered in terms of the Act; and repeatedly charging interest rates in excess of the prescribed rate in terms of the Act.

The remedial orders appealed against are the following: the tribunal's declaration that the credit agreements concluded in contravention of the Act are unlawful and void; the tribunal's order that the Loan Company refund consumers; and, the tribunal's imposition of the administrative fine.

[15] Each of these orders raise diverse issues and they will be dealt with in turn. The determination of those issues involves the interpretation of the relevant sections of the Act. The principles of interpretation, which are now trite, were recently summarised by the Constitutional Court in *AmaBhungane Centre for Investigative Journalism NPC v President of South Africa*[2] as follows:

'As always, in interpreting any statutory provision, one must start with the words, affording them their ordinary meaning, bearing in mind that statutory provisions should always be interpreted purposively, be properly contextualised and must be construed consistently with the Constitution. This is a unitary exercise. The context may be determined by considering other subsections, sections or the chapter in which the keyword, provision or expression to be interpreted is located. Context may also be determined from the statutory instrument as a whole. A sensible interpretation should be preferred to one that is absurd or leads to an unbusinesslike outcome.'[3] (Footnotes omitted).

[16] Section 2 of the Act contains general principles for its interpretation. In terms of section 2(1) the Act must be interpreted in a manner that gives effect to the purposes set out in s 3 of the Act. In terms of that section the purpose of the Act is to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect customers by specific means identified in that section. The Act represents 'a clean break from the past' and one of its main aims is the protection of consumers, while securing a sustainable credit market by 'balancing the respective rights and responsibilities of credit providers and consumers'.[4]

---

[2] *AmaBhungane Centre for Investigative Journalism NPC v President of South Africa* [2022] ZACC 31; 2023 (2) SA 1; 2023 (5) BCLR 499 (CC) para 36.
[3] Ibid para 36.
[4] *Sebola and Another v Standard Bank of South Africa Ltd* [2012] ZACC 11; 2012 (5) SA 142; 2012 (8) BCLR 785 (CC) paras 39-40.

Orders appealed against

Entering into credit agreements before registration

[17] The NCR alleged, the tribunal found and declared, and the high court confirmed that the Loan Company had entered into credit agreements before it was registered on 31 March 2017 as a credit provider, and that it did so in contravention of s 40(1) read with s 40(3) of the Act. Section 40 of the Act, insofar as is relevant to this matter, reads as follows:

'Registration of credit providers

(1) A person must apply to be registered as a credit provider if the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1);

(2) In determining whether a person is required to register as a credit provider –

(a) the provisions of subsection (1) apply to the total number and aggregate principal debt of credit agreements in respect of which that person, or any associated person, is the credit provider . . .

(b) . . .

(c) . . .

(d). . .

(3) A person who is required in terms of subsection (1) to be registered as a credit provider, but who is not so registered, must not offer, make available or extend credit, enter into a credit agreement or agree to do any of those things.

(4) A credit agreement entered into by a credit provider who is required to be registered in terms of subsection (1) but who is not so registered is an unlawful agreement and void to the extent provided for in section 89.

(5) . . .

(6) . . .'

[18] In this Court the Loan Company's argument in respect of this ground of appeal was the following. The finding that it had contravened s 40(1) read with s 40(3) of the Act is incorrect. At the time of entering into credit agreements it had already applied for registration. In terms of s 42(3)*(a)* of the Act a credit provider which is obliged to register for the first time because of a new threshold determination made by the Minister, may, after it has applied for registration, continue to provide credit until the NCR has decided on its application. The Loan Company, in essence, argued that it registered for the first time on 9 June 2016. It denied that it was obliged to register

before the threshold was changed from R500 000.00 to nil by the Minister on 11 November 2016. (It is common cause that until 11 November 2016 the threshold for registration was R 500 000 and thereafter it was nil).[5] The Loan Company further argued that there is no evidence that it had concluded credit agreements before 9 June 2016. These arguments were also advanced in the high court and were rejected. The high court found, essentially, that the Loan Company's registration did not fall within the provisions of s 42 and it could therefore not rely on s 42(3)*(a)* of the Act.

[19] However, in its answering affidavit the Loan Company placed no reliance on s 42(3)(a) in its defence. Its version in the affidavit, confirmed under oath by Mr De Rosnay, is the following. It was only registered as company in October 2015. It applied for registration as a credit provider to the NCR on 9 June 2016 and thereafter commenced 'trading' by concluding credit agreements with consumers. According to Mr De Rosnay, it was permissible for the Loan Company to do so because of the provisions of s 89(2)*(d)* of the Act. According to Mr De Rosnay, the business the Loan Company conducted until it decided to register as a credit provider on 9 June 2016, 'did not involve any credit agreements as regulated by legislation'.

[20] In its founding papers the NCR alleges that during February 2017 it became aware of advertisements put up by the Loan Company on its website, advertising the availability of credit and claiming that it was a registered credit provider, whereas it was not registered. On 16 February 2017 the NCR appointed an inspector to investigate the Loan Company's business. As part of the investigation, it obtained copies of the sample transactions, which were eventually attached to the investigation report. An analysis of those transactions lead to the formulation of the greater part of the NCR's case against the Loan Company in the tribunal.

[21] The NCR deals specifically, inter alia, with the Loan Company's registration status. It alleges the following: The first time the Loan Company was registered as a credit provider with the NCR was on 31 March 2017. At the time of the investigation (1 March 2017) the Loan Company was not registered. It had previously applied for

[5] *De Bruyn NO and Others v Karsten* [2018] ZASCA 143; 2019 (1) SA 403 (SCA) (*De* Bruyn) para 26; National Credit Act Regulations in GN 713 GG. 28893 of 1 June 2006 Item 5; National Credit Act Regulations in GN 513 GG 39981 of 11 May 2016 item 2.

registration, but that application lapsed after it failed to provide the NCR with certain requested information within the stipulated time. The Loan Company re-applied for registration after its initial application had lapsed, and it is only then that it was registered on 31 March 2017. All the sample transactions were entered into prior to that date, most having been concluded in 2016.

[22] In the Loan Company's answering affidavit Mr De Rosnay does not engage directly with each averment made by the NCR in its founding affidavit, but gives a uniform, vague response to all those averments in a few paragraphs under the heading 'Registration status of the respondent'. He does not expressly admit or deny that the Loan Company's first application lapsed and that it reapplied resulting in its registration on 31 March 2017. Instead, he avers the following:

'10.1 The Respondent's application for registration with the Applicant was submitted on the 9th of June 2016. The Respondent started trading, after it was surmised that the registration of the Respondent would be successful and given the provisions of section 89(2)(d) and as I was advised at the time.

10.2 I employed the services of an attorney one Richard Nortje at the time to assist me with the registration. He handled all the paperwork including the drafting of the loan agreements and preparing the documents for Respondent's registration with the Applicant. He has since emigrated, and I do not have a copy of what was submitted when. What I can say is that Annexure C to the Applicants papers surmises that the Respondent started trading in 2015. This is not correct as the Respondent was only registered as a company in October 2015. The business that the Respondent conducted until it decided to register as a credit provider did not involve any credit agreements as regulated by legislation.

10.3 All of the information required by the Applicant, to be submitted to the Applicant to finalise the registration of the Respondent was provided to the Applicant. Respondent's application was never refused and since the Applicant's letter of 13 June 2016 and having provided the relevant information to Applicant without delay, nothing was heard from the Applicant until they issued the registration certificate on 31 March 2017.

10.4 The Applicant, as a result, only issued the Respondent's certificate on the 31st of March 2017.

10.5 In looking at section 89 of the Act, it states in (1) that this Section does not apply to a pawn transaction. It does not deserve any debate that the Act has been formulated in a clumsy matter and accordingly all of the Court cases over many years, as I am advised.

10.6 Nevertheless, Section 89(2)(d) states that subject to (3) and (4) a credit agreement is unlawful if – (d) at the time the agreement was made, the Credit Provider was unregistered

and this Act requires the Credit Provider to be registered. So it follows that if Respondent concluded pawn transactions he would be exempted from having conducted an unlawful activity and would rather be subject to a compliance notice a contemplated in the Act.

10.7 Irrespective of the fact that section 89 does not apply to a pawn transaction, Section 89(4) states that: (2)(d) does not apply to a Credit Provider if – (a) at the time the credit agreement was made, or within 30 (thirty) days after that time, the Credit Provider had applied for registration in terms of Section 40, and was awaiting a determination of that application. I am advised that legal argument will be presented if required regarding the interpretation of legislation and its application to the Act.

10.8 The Applicant states that: Respondent has accordingly repeatedly contravened Section 40(1), Section 40(3) and Section 89(2)(d) of the Act. This is denied as the agreements concluded constitutes pawn transactions.

10.9 This submission by the Applicant is premised on the basis that the Respondent's agreements are not defined as pawn transactions.

10.10 I submit that all of the transactions drawn as a sample concluded by the Respondent took place subsequent to the Respondents application for registration, and the sample agreements were concluded before the certificate of registration was issued. When the Applicant conducted its investigation it was inclined to issue a compliance notice in terms of section 55 of the Act read together with section 54 and regulation 13.'

[23] No confirmatory affidavit by Mr Richard Nortje (Mr Nortje) is attached to the answering papers. Accordingly, what Mr De Rosnay states in the paragraphs quoted and what was in the personal, first-hand knowledge of Mr Nortje, is inadmissible hearsay evidence, in the absence of confirmation by Mr Nortje. Mr De Rosnay could not have known what was submitted, or when, and he could not seriously contend that all the information requested by the NCR was given to it. Only Mr Nortje and the NCR could testify to that. In its replying affidavit the NCR provides proof of the request that it had sent to the Loan Company, its notification to the Loan Company that the application would be refused if it failed to submit the information within a stipulated period, and Loan Company's failure to comply with that request.

[24] At the time the Loan Company applied for the first time on 9 June 2016, the threshold was R500 000 but, on its version, it was not then obliged to register. However, the fact that it had to re-register indicates that something compelled it to do so. In its answering affidavit it found support in s 89(4) of the Act and in particular s

89(2)*(d).* That section provides that the provision, that a credit agreement entered into by an unregistered credit provider who is required to be registered, is unlawful, does not apply if the agreement was concluded after an application for registration was made, and the credit provider was awaiting the outcome of that application. But that support was misplaced, because s 89(1) explicitly provides that the section does not apply to a pawn transaction. The Loan Company's transactions, on its own admission, are pawn transactions.

[25] This explains the Loan Company's change in approach by the time the matter went on appeal to the high court. Even though no mention at all was made of s 42(3)*(a)* in the proceedings before the tribunal, reliance on that section became the Loan Company's main defence (in argument) in the high court. In this Court it places no reliance at all on s 89 and bases its defence on s 42(3)*(a).* Unfortunately, this once again proves to be 'a building of straw' because that section applies to specific instances, namely, where a credit provider who was never registered or previously required to be registered, is required to register, because the threshold determined by the Minister now obliges it to register. On the facts before the tribunal and the high court, this was not the position of the Loan Company.

[26] On the Loan Company's own version it applied for registration on 9 June 2016, when it was not obliged to register. It could only have done so voluntarily (assuming in its favour that it was not required to register under the R 500 000 threshold). In which event, it was very easy for it to say so and to have relied on s 40(5) of the Act, which provides that the person to whom s 40 of the Act does not apply may nevertheless 'voluntarily apply to the [NCR] at any time to be registered as a credit provider'. In that event, it would not have been necessary for it to rely on s 89 or even on s 42 of the Act, which are not applicable in that instance. And in the alternative, it should not have applied to be registered, if it was not obliged to do so. But its persistence to register and its reliance on those sections belies its denial that it was obliged to register as a credit provider at the time when it applied to be registered. The Loan Company even found it necessary to employ an attorney to attend to that process. All of that implies something other than voluntariness on its part. The evidence of the attorney, who would have first-hand knowledge of those facts, is conspicuously lacking.

[27] In the circumstances there is no basis for accepting Mr De Rosnay's inadmissible hearsay version and rejecting that of the NCR, which is supported with documentation. Section 42 does not apply to the Loan Company and its reliance on s 42(3)*(a)* is misplaced. The high court did not err in finding that the tribunal correctly declared that the Loan Company contravened s 40(1) read with s 40(3) of the Act.

Advertising the availability of credit

[28] Section 76(3) is clear and unambiguous; it reads as follows:

'A person who is required to be registered as a credit provider, but who is not so registered, must not advertise the availability of credit, or of goods or services to be purchased on credit.'

[29] The Loan Company does not deny advertising on its website, but it once again, belatedly seeks support in s 42(3)*(a),* which, as found above, does not apply to it. The Loan Company argues that s 76(3) must be purposefully interpreted in the context of the Act 'in its totality, including section 42(3)*(a)'*. The argument then proceeds as follows: Because s 42(3)*(a)* allows a credit provider to conclude credit agreements after it has submitted its application for registration – '[a] business-like interpretation of s 76(3) requires that advertising is allowed to credit providers who are entitled to enter into credit agreements'. The Loan Company contends that on such an interpretation its advertisements were lawful.

[30] This is a far-fetched and untenable argument. Firstly, the Loan Company's reliance on s42(3)*(a)* is misplaced, because on its own version it did not apply for registration as envisaged in s 42 of the Act. Secondly, the interpretation contended for would require more than a mere 'reading-in' to s 76(3) of what is permitted in terms of s 42(3)*(a).* This would be more like legislating, which is not within the sphere of competence of the courts, let alone the tribunal. The high court did not err in its conclusion regarding the tribunal's order on advertising.

Charging interest in excess of the prescribed rates

[31] The tribunal found that the Loan Company permissibly charged the rate applicable to short-term agreements as allowed for in terms of item 5 of regulation 4.2. However, it found that in calculating the interest the Loan Company impermissibly charged the same rate of interest, irrespective of the duration of the agreement. For

example, it would charge 5 percent of the loan amount as interest in an agreement of 29-days duration and charge that same rate in respect of an agreement with a duration of 30-days or more. The tribunal held that since the sample transactions had a specified date range the Loan Company was obliged to take into account the actual number of days in the range of each agreement and to calculate the interest incurred for the specified number of days.

[32] Section 100(1)*(c)* of the Act provides:

'A credit provider must not charge an amount to, or impose a monetary liability on, the consumer in respect of –

(a) . . .

(b) . . .

(c) an interest charge under a credit agreement exceeding the amount that may be charged consistent with this Act; or

(d) . . . '

[33] Section 101 of the Act deals with the cost of credit. Section 101(1)*(d),* which deals with interest, provides:

'a credit agreement must not require payment by the consumer of any money or other consideration, except – . . . 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.'

[34] In terms of s 105 the Minister, after consulting the NCR, may prescribe a method for calculating the maximum rate applicable to each subsector of the consumer credit market. Regulation 40 provides the method. Even though regulation 40(2)*(c)(iv*) [6] provides, in respect of short-term loans, that 'the number of days in the month may be interpreted either as 30, or as the actual number of days in the particular month', that does not mean that in months consisting of 28 days, it is permissible to charge a consumer interest for 30 days, and vice versa. Permitting that would be unreasonable as it would increase the already high cost of credit. As an example, in the case of one of the Loan Company's debtors, Ms Katsande, she was charged

[6] National Credit Regulations in GN R489 GG 28864 of 31 May 2006.

interest for 30 days, whereas the agreement only had a 29-day duration. This resulted in her paying an extra R20 in interest.

[35] Properly construed, regulation 40(2)*(c)(iv)* means no more than that credit providers have an election whether to charge interest for the actual number of days of the month or for 30 days. But they may only charge interest for 30 days if the agreement's duration is for 30 days or more. In other words, the period charged for must not be for more than the duration of the credit agreement. The Loan Company's interpretation that the regulation permitted it to do so, was therefore rightfully found by the tribunal to have been incorrect and unreasonable, and in contravention of the Act.

[36] In terms of the regulations, the daily value of the amount outstanding (the deferred amount) is of crucial importance in the calculation of the interest. On any particular day, several entries may be made in respect of an account. The regulations are therefore very specific about the dates on which fees and charges are to be debited to an account. The deferred amount for the day must be calculated as the average deferred amount for the day, or if the credit agreement provides otherwise, as the deferred amount at the particular time of the day. Interest may be added to the deferred amount only once, at the end of the month. A credit provider may thus not require payment of, or debit, an interest charge before the end of the day to which the interest charge applies. This also means that a consumer cannot be charged interest for a period beyond the actual duration of the credit agreement.

[37] In this Court the Loan Company also argued that there was no evidence that it did not calculate interest as contemplated in regulation 40(1), or that it added and compounded interest daily as the tribunal found. The main complaint in the tribunal was not in that regard, but because the Loan Company charged consumers an interest rate of 5% irrespective of whether the agreement endured for a period of an entire month. The NCR gave examples from the sample transactions, such as that between the Loan Company and Ms Falatsi, the loan agreement with Mr Tselapedi and the agreement with Ms Katsande. Those loans were all payable in 29 and not 30 or more days. The Loan Company charged 5 percent as interest in those agreements as well as 5 percent in the other agreements that endured for more than 30 days. As pointed

out above, that is not permissible. For all of the above reasons, the tribunal's finding was correct. There is no merit in this ground of appeal.

First remedial order - declaring credit agreements null and void

[38] The Loan Company argues that the tribunal did not have the power to declare the sample credit agreements unlawful and void, and that only a court of law may do so. In support of its argument, it relies on s 164(1) of the Act which provides:

'Nothing in this Act renders void a credit agreement or a provision of a credit agreement that, in terms of this Act is prohibited or may be declared unlawful unless a court declares that agreement or provision to be unlawful.'

[39] The Loan Company also relies on a dictum of this Court in *Vesagie NO and Others v Erwee NO and Another (Vesagie)*[7] where it was stated: '*. . . unless the party extending the credit is registered as a credit provider in terms of s 40 of the Act, the agreement is unlawful. The consequence of such a finding is that a court is required to declare the agreement null and void ab initio'*. It further argues that the stipulation in s 164(1) of the Act that only a court, and not the tribunal, may declare an agreement unlawful or void, is also borne out by s 89(5)*(a)* of the Act.

[40] The Loan Company then argues that s 40(4) of the Act, which is quoted earlier in this judgment, does not empower the tribunal to declare credit agreements unlawful and void. The section provides, in essence, that a credit agreement concluded by a credit provider, who is required to be registered, and is not registered 'is an unlawful agreement and void to the extent provided for in section 89'. According to the Loan Company, the section does not empower the tribunal to declare agreements unlawful and void because: (a) section 89 of the Act does not apply to pawn transactions; (b) section 40(4) is subject to the stipulation in section 164(1); (c) sections 27 and 17 of the National Credit Amendment Act 7 of 2019, which have not commenced yet, respectively, insert the words 'or the Tribunal' after the words 'a court' in s 164(1) of the Act, so that the section should read '. . . unless a court or the Tribunal declares the agreement or provision to be unlawful. . .'. The effect of the amendment is that the tribunal will also be empowered to declare a prohibited agreement, or an agreement

[7] *Vesagie NO and Others v Erwee NO and Another* [2014] ZASCA 121 para 1.

that may be declared unlawful, to be unlawful. According to the Loan Company, this is an indication that the legislature recognised that the tribunal did not have the necessary power to do so, hence the amendment; and (d) section 90(4)*(b)* of the Act also allows for a court and not the tribunal to declare an entire agreement unlawful.

[41] In *Vesagie* this Court accepted that an agreement of purchase and sale that provided that interest was payable on deferred payments, was a credit transaction under section 8(4)*(f)* of the Act and unless the party extending the credit was registered as a credit provider in terms of section 40 of the Act, the agreement was unlawful. More relevant for present purposes, it found that '[t]he consequence of such a finding is that a court is required to declare the agreement null and void *ab initio*'. But in reaching that conclusion it did not refer to either s 40(4) or to s 164(1) of the Act.

[42] In *Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport and Others* [8] the Constitutional Court dealt with the constitutionality of section 89(2)(*c*). It confirmed that, in terms of s 89, if it was applicable, the credit agreement concluded by an unregistered credit provider who was supposed to be registered, would be unlawful in terms of the Act itself.[9] In other words, the illegality follows *ex lege*, and it is not established by any order of court or the tribunal. If this is so, then the appeal on this ground must fail. However, the difficulty in this matter is that it involves pawn transactions, in respect of which s 89 is not applicable. The question is whether this means that as far as pawn transactions are concerned, illegality does not arise ex lege?

[43] In *De Bruyn*[10]*,* where this Court confirmed what had been held in *Vesagie*, but accepted that the mere fact that the credit provider was not registered at the time of concluding the agreement would render such agreement null and void. None of those decisions dealt with pawn transactions, or with the powers of the tribunal.

---

[8] *Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport and Others* [2015] ZACC 15; 2015 (10) BCLR 1158 (CC) para 7.
[9] See also *National Credit Regulator v Opperman and Others* [2012] ZACC 29; 2013 (2) BCLR 170; 2013 (2) SA 1 (CC) (*Opperman*) where the Constitutional Court dealt with s 89(5)(*c*).
[10] Op Cit fn 5 para 13.

[44] That the Act is not a model of clarity is an accepted fact, as has been pointed out by other courts,[11] including this Court.[12] It is an understatement to say that its interpretation is a daunting exercise. Section 40(4) of the Act, which applies to all credit agreements, including pawn transactions, does not refer at all to s 164 of the Act, but it refers to s 89. However, section 89(1) stipulates that section 89 it is not applicable to pawn agreements. On the other hand, Section 164 deals with 'Civil actions and Jurisdiction'. It is directed at court proceedings and is not directed at proceedings in the tribunal. The fact that the new Amendment Act intends to add 'tribunal' to 'court' in s 164(1) is hardly consoling. If the aim was to provide clarity, this could easily have been achieved by an amendment to the powers of the tribunal as provided in s 150 of the Act.

[45] Section 164 correctly does not require an agreement that is unlawful in terms of the Act to be declared unlawful by a court. And it confirms that an unlawful agreement does not require a declaration by a court that it is null and void. The section is therefore not applicable, because s 40(4) provides that the agreements envisaged there are unlawful.[13] If s 164(1) was to be applied, as contended for by the Loan Company, the clear wording of both, s 164(1) and s 40(4) would have to be ignored. And the clear stipulation of unlawfulness in s 40 (4) would be rendered nugatory. This is because, having obtained an order in the tribunal, the NCR would still be obliged to approach a court for an order declaring the prohibited, unlawful agreement to be unlawful.

[46] In terms of s 40 (3) of the Act in general, the conclusion of a credit agreement by an unregistered credit provider who is supposed to be registered, is prohibited. This is of course subject to the exceptional circumstances contemplated in s 42(3) and 89(4) of the Act. In terms of s 40(4) an agreement contemplated in s 40(3) is an unlawful agreement and void to the extent provided for in s 89. At common law an

---

[11] *Micro Finance South Africa and Another v National Credit Regulator and Others* [2020] ZAGPPHC 463; 2021 (1) SA 487 (GP) para 3.12.
[12] *Nedbank Ltd and Others v The National Credit Regulator and Another [2011] ZASCA 35; 2011 (3) SA 581 (SCA); [2011] 4 All SA 131* (SCA) (*Nedbank*) para 2; *National Credit Regulator v Lewis Stores (Pty) Ltd and Another* [2019] ZASCA 190; 2020 (2) SA 390 (SCA); [2020] 2 All SA 31 (SCA) para 9.
[13] Op cit fn 10 para 8.

unlawful contract is generally considered as *void ab initio* and to be of no effect, since it is a nullity, and it cannot be enforced.[14]

[47] A sensible interpretation of s 40(4) is called for in this instance. The general principle is that agreements in contravention of the Act are unlawful and have no effect. There is no rationale for distinguishing between pawn transactions and other credit agreements in this respect. The cross-reference to s 89 in s 40(4) is not intended to draw that distinction. It merely states the position insofar as it applies to that section. What is clear is that the intended default position is that credit agreements entered into by unregistered credit providers who are required to be registered will be null and void. That consequence is justified in that such agreements breach one of the most fundamental protections provided to consumers under the Act.[15] They are all unlawful in terms of the Act by operation of law.

[48] Even though s 89(5)*(a)* requires that unlawful agreements in terms of that section must be declared *void ab initio*, that follows as a matter of law because these agreements did not start off as lawful and then become unlawful, but were unlawful from the outset. This is borne out by the wording of ss 164(1) and 90(3) of the Act. Section 90 deals with unlawful provisions in a credit agreement. Section 90(3) provides: 'In any credit agreement, a provision that is unlawful in terms of this section is void from the date that the provision purported to take effect.'

[49] In conclusion on this point, the tribunal did not act outside the scope of its powers when it declared that the sample agreements were unlawful and null and void. One of the functions of the tribunal in terms of s 27*(a)* of the Act is to adjudicate in relation to any application made to it in terms of the Act and to make any order provided for in terms of the Act in respect of such an application. It may also determine whether prohibited conduct has occurred and if so, impose a remedy provided in the Act.[16]In this instance the tribunal merely stated what the legal position in terms of the Act

[14] *Blacher v Josephson* [2023] ZAWCHC 27; 2023 (3) SA 555 (WCC) para 23.
[15] Compare *Mayo NO v De Montlehu* [2015] ZASCA 127; 2016 (1) SA 36 (SCA) paras 14-18.
[16] Compare *Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit* [2023] ZACC 8; 2023 (6) BCLR 709; 2023 (2) SACR 1 (CC) paras 65-66.

was,[17] namely, that the impugned agreements of the Loan Company were unlawful and null and void. Section 150 of the Act is not exhaustive of the tribunal's powers and the high court did not err in finding that the tribunal acted within its powers.

Second remedial order- that consumers be refunded

[50] The order that the Loan Company refund consumers was the consequence of the finding and confirmation that the sample agreements which the Loan Company concluded before it was registered as a credit provider, were prohibited and were unlawful and void. This is apparent from paragraph 164.3 of the tribunal's order. The issue of the entitlement to the excess after the sale of the asset retained as security, is dealt with later under that rubric. As for the power of the tribunal to order refunds, the exercise of that power is entirely appropriate and falls within the parameters of s 150 of the Act.[18] The section empowers the tribunal to make orders requiring repayment to the consumer of any excess amount charged, together with interest, at the rate set out in the agreement, or any other appropriate order required to give effect to a right as contemplated in the Act.

[51] The order was to the effect that the Loan Company repay the consumers in the sample agreements all amounts, over and above the amount the Loan Company loaned to those consumers, and to return to them the assets that they had pawned, or the proceeds of the sale of the assets less the amount loaned to them (after deducting the amount the consumer repaid in that respect). That order was not only appropriate but was the only order that was justifiable in respect of those instances.[19]

Pawn brokers' entitlement to proceeds of sale of asset

[52] The Loan Company interprets the definition of 'pawn transaction' as one entitling it to retain all the proceeds of the sale of the pawned asset, irrespective of whether it is more than what the consumer was liable to repay in terms of the credit agreement. The phrase 'pawn transaction' is defined in s 1 of the Act as:

'… an agreement, irrespective of its form, in terms of which –

---

[17] Golela O 'The Constitutionalisation of the Text for Statutory Illegality in South African Contract Law: Cool Ideas v Hubbard 2014 (4) SA 474 (CC)' (2018) 21 *Potchefstroom Electronic Law Journal* para 3.
[18] *Bornman v National Credit Regulator* 2013 ZASCA 130; 2014 (3) SA 384 (SCA) (*Bornman*) para 27.
[19] Compare *Bornman* para 27.

(*a*) one party advances money or grants credit to another, and at the time of doing so, takes possession of goods as security for the money advanced or credit granted; and
(*b*) either –
(i) the estimated resale value of the goods exceeds the value of the money provided or the credit granted;
(ii) a charge, fee or interest is imposed in respect of the agreement, or in respect of the amount loaned or the credit granted; and
(*c*) the party that advanced the money or granted the credit is entitled on expiry of a defined period to sell the goods and retain all the proceeds of the sale *in settlement of the consumers' obligations under the agreement*.' (Emphasis added.)

[53] The Loan Company's interpretation of the definition fails to consider the emphasised portion of ss (*c*). In a pawn transaction the credit provider is only allowed 'to retain all the proceeds of the sale in settlement of the consumer's obligations under the credit agreement'. This does not mean that the credit provider is entitled to retain any more than what the consumer was obliged to pay the credit provider in terms of the credit agreement. In the definition, the words 'all proceeds of the sale' are qualified by the words 'in settlement of a consumers' obligations under the agreement'. A consumers' obligations 'under the agreement' consists only of repaying the amount of the loan advanced to him or her and the lawful charges, including interest, that had been added in terms of the agreement.

[54] One must assume, in the absence of any indication to the contrary, that in enacting the Act and defining 'pawn transaction', the legislature did not intend to alter the common law. Under the common law the pawn broker is not entitled to retain the excess, but must account to the consumer concerning any surplus after settling the debt.[20] After all, one of the aims or purposes of the Act is to ensure consistency and to promote and advance the social and economic welfare of South Africans, and advance all the other laudable objectives referred to in s 3 of the Act.[21] In terms of s 2(1) the Act must be interpreted in a manner that gives effect to those objectives.

---

[20] See for example the position in Botswana which would be the same as in South Africa: *Quick Cash (Pty) Ltd v Molome* 2003 All Bots 20 (CA) pages 4-5; see also *Grobler v Oosthuisen* [2009] ZASCA 51; 2009 (5) SA 500 (SCA) ; [2009] 3 All SA 508 (SCA)
[21] Op cit fn 13 (*Nedbank)* para 2; *National Credit Regulator v Standard Bank of South Africa, Limited* [2019] 3 All SA 846; 2019 (5) SA 512 (GJ).

[55] On the Loan Company's interpretation of the definition it is really contending for something like the prohibited *pactum commissorium* in the context of pledges. That is an agreement where, if the pledgor defaults, the pledgee may keep the security as his or her own property, irrespective of its value and the paucity of the debt.[22] The only difference in this instance, is that the Loan Company argues that it is entitled to sell the goods given as security, and to retain all of the proceeds of the sale irrespective of the paucity of the outstanding debt and the value of the pawned asset.

[56] Commissary agreements were prohibited in Roman times because they were harsh, unjust and unfair. That prohibition has endured for centuries and still applies in South African law.[23] The same considerations which motivated the prohibition of the commissary agreements are also present in this instance. This may be illustrated with reference to the facts of the sample cases. In one instance, the Loan Company advanced Mr Tselapedi a loan of R35 000.00. He was to pay back R42 000.00 by 3 August 2016. He gave his motor vehicle, a 2002 BMW X5 3 litre with an estimated value of R100 000.00 (which he had bought for R 70 000.00), as security. When he defaulted, the Loan Company sold his vehicle for R 65 000.00, which was almost double the amount it had loaned him initially and retained all the proceeds of the sale.

[57] The language of s 1(*c*) accords with the common law position. To interpret it any other way would be to promote harshness and unfairness, and to undermine all the laudable objectives that the Act seeks to promote. If the interpretation of the Loan Company is to prevail it will not only defeat those objects, but undermine and render meaningless the Act's regulation of, for example, the charges that may or may not be levied by a credit provider. Even though it is quintessential to a pawn transaction for goods to be given as security for the loan the pawn broker advances to the consumer and for the pawn broker to sell the goods upon the consumer's default, it would be harsh and unfair for the pawn broker to retain any amount from the sale in excess of what the consumer was owing to it. And therefore, it should not be permissible.[24]

---

[22] *Hesseling v Meyer* 1991 (1) SA 276 (SWA) at 280F-281F.
[23] *Graf v Buechel* [2023] 2 All SA 123; 2003 (4) SA 378 (SCA) (*Graf*) paras 9-12.
[24] Compare *Graf* para 29.

Third remedial order- the power to impose an administrative fine

[58] This power is explicitly given to the tribunal in terms of s 151(1) of the Act. The section provides: 'The Tribunal may impose an administrative fine in respect of prohibited or required conduct in terms of this Act or the Consumer Protection Act, 2008'. In terms of s 151(5) of the Act the fine must be paid into the National Revenue Fund. Section 151(2) stipulates the limits of the fine. It may not exceed the greater of 10 percent of the transgressor's annual turnover during the preceding financial year, or R1 million.

[59] The Loan Company's argument in respect of the fine imposed on it is the following. Section 151(2) implies that the financial position of the credit provider must be considered when the tribunal considers imposing a fine. In this instance the tribunal erred in imposing a fine because it did not consider the Loan Company's financial position since no such evidence was put before it. Secondly, because the findings of the tribunal on the merits were wrong, the imposition of the penalty was not proper. Thirdly, the penalty was imposed purely to punish the Loan Company and not to encourage it 'to refrain from future contravention'. Fourthly, the tribunal made the Loan Company a scapegoat when imposing the fine.

[60] Section 151 gives the tribunal a discretion. Unless it is shown that the tribunal erred in the exercise of that discretion, the interference with its imposition of the penalty would not be justified.[25] Section 151(3) insofar as is relevant to this matter, provides the following. When determining an appropriate fine the tribunal must consider the following factors: (a) the nature, duration, gravity and the extent of the contravention; (b) any loss or damage suffered as a result of the contravention; (c) the behaviour of the transgressor; (d) the market circumstances in which the contravention took place; (e) the level of profit derived from the contravention; (f) the degree to which the transgressor cooperated with the NCR; and (g) whether the transgressor had previously been found to have been in contravention of the Act or the Consumer Protection Act, as the case might be.

---

[25] See inter alia *Molteno Brothers and Others v South African Railways and Others* 1936 AD 321 at 326-327; *City of Cape Town v South African National Roads Agency Ltd and Others* [2013] ZAWCHC 74 para 72.

[61] The Loan Company has not shown that the tribunal did not consider the factors that it was obliged to take into account in terms of s 151(3) when it imposed the fine, or that it took into account factors that it was not supposed to have taken into account. The Loan Company's financial position is a matter that is peculiarly and exclusively within its knowledge. It cannot seek to benefit from deliberately withholding that information to make the task of the tribunal difficult or even impossible. The Loan Company was acutely aware that the NCR wanted (as part of its relief) the tribunal to impose an administrative penalty. It had ample opportunity to disclose its financial position in its own interest. The lack of candour on the part of the Loan Company in that regard persisted in the high court and in this Court. Despite its arguments, it still did not provide any insight into its financial position. And more significantly, it has not shown that the penalty imposed on it exceeded the limits prescribed in s 151(1). The high court correctly dismissed its appeal in respect of the administrative penalty.

Conclusion

[62] For all the above reasons the entire appeal of the Loan Company must fail. The tribunal's orders stand. Because of the passage of time, the time limit stipulated in the tribunal's order, in particular in paragraphs 164.4 and 164.6, are to be adjusted. The 30 days referred to in paragraph 164.4, and the 120 days referred to in paragraph 164.6 of the tribunal's order are to commence from the date of this Court's order. Unless the Loan Company has already paid the administrative fine, the 30 days referred to in paragraph 164.7 are to commence from the date of this Court's order.

[63] In the result:

The appeal is dismissed with costs, including the costs of two counsel.

_____

P COPPIN

JUDGE OF APPEAL

Appearances

For the appellant:	J G Bergenthuin SC
Instructed by:	Cilliers and Reynders Attorneys, Pretoria c/o Honey and Partners Inc., Bloemfontein
For the first respondent:	L Kutumela SC with N A Moyo
Instructed by:	VDT Attorneys, Pretoria c/o Phatshoane Henny Attorneys, Bloemfontein.