THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 667/2023

In the matter between:

THE NATIONAL CREDIT REGULATOR **APPELLANT**

and

THE NATIONAL CONSUMER TRIBUNAL **FIRST RESPONDENT**

VOLKSWAGEN FINANCIAL SERVICES (SA) (PTY) LTD **SECOND RESPONDENT**

and

In the matter between:

THE NATIONAL CREDIT REGULATOR **APPELLANT**

and

THE NATIONAL CONSUMER TRIBUNAL **FIRST RESPONDENT**

BMW FINANCIAL SERVICES (SA) (PTY) LTD **SECOND RESPONDENT**

and

In the matter between:

THE NATIONAL CREDIT REGULATOR **APPELLANT**

and

THE NATIONAL CONSUMER TRIBUNAL **FIRST RESPONDENT**

MERCEDES BENZ FINANCIAL SERVICES (SA) (PTY) LTD **SECOND RESPONDENT**

Neutral citation: *National Credit Regulator v National Consumer Tribunal and Others and Similar Matters* (667/2023) [2025] ZASCA 132 (12 September 2025).

Coram: MAKGOKA, SCHIPPERS, MOLEFE and UNTERHALTER JJA and MASIPA AJA

Heard: 22 August 2024

Delivered: 12 September 2025

Summary: National Credit Act 34 of 2005 – ss 100, 101 and 102 – whether 'on the road fees' are permissible fees or charges which credit providers may levy on consumers when financing purchase of motor vehicles on credit – whether the charging of 'on the road fees' contravenes s 102.

ORDERS

On appeal from: Gauteng Division of the High Court, Pretoria (Millar and Moshoana JJ and Malungana AJ, sitting as court of appeal in terms of s 148(2)(*b*) of the National Credit Act):

A. In *National Credit Regulator and Another v Volkswagen Financial Services (SA) (Pty) Ltd*:

1. The appeal is dismissed with no order as to costs.
2. The cross-appeal is dismissed with no order as to costs.
3. The order of the majority of the Full Court is set aside and replaced with the following:

   '1 The appeal is upheld;

   2 The compliance notice issued by the National Credit Regulator is set aside;

   3 Each party is to pay its own costs.'

B. In *National Credit Regulator and Another v BMW Financial Services (SA) (Pty) Ltd*:

1. The appeal is dismissed.
2. Each party is to pay its own costs.
3. The costs order of the majority of the Full Court is set aside and replaced with the following:

   'Each party is to pay its own costs.'

C. In *National Credit Regulator and Another v Mercedes-Benz Financial Services (SA) (Pty) Ltd*:

1. The appeal is dismissed.
2. Each party is to pay its own costs.

3. The costs order of the majority of the Full Court is set aside and replaced with the following:
   'Each party is to pay its own costs.'

JUDGMENT

Makgoka JA (Schippers, Molefe, Unterhalter JJA and Masipa AJA concurring):

[1] This judgment consolidates three interrelated appeals, which were heard together in this Court. The issue in the appeals is whether the so-called 'on the road fees' (the OTR fees) are permissible fees or charges which may be levied on consumers when the respondent credit providers grant finance for the purchase of motor vehicles on credit. If not, then the credit providers have contravened s 102 of the National Credit Act 34 of 2005 (the Act).

[2] The appellant in all three appeals is the National Credit Regulator (the Regulator). The Regulator appeals against the orders of the majority of the Full Court of the Gauteng Division of the High Court, Pretoria (the Full Court). The majority found that the credit providers did not charge consumers the OTR fees. They merely financed the purchase of motor vehicles on credit, the purchase price of which included the OTR fees agreed upon between the consumer and motor vehicle dealers (the dealers). Consequently, the majority made certain orders against the Regulator in favour of the credit providers, about which I will say more later.

[3] With the leave of the Full Court, the Regulator appeals against all the orders mentioned above. In the appeal against Volkswagen Financial Services

South Africa (Pty) Ltd (Volkswagen), the Regulator cross-appeals against the order of the Full Court dismissing its counter-application.

[4] The National Consumer Tribunal (the Tribunal) is the first respondent in each of the appeals. Volkswagen, BMW Financial Services South Africa (Pty) Ltd (BMW), and Mercedes-Benz Financial Services South Africa (Pty) Ltd (Mercedes-Benz) are, respectively, the second respondents in their respective appeals.

[5] The Regulator is a statutory juristic body established under s 12 of the Act. Its enforcement functions are outlined in s 15 of the Act. It must, among other duties: (a) promote informal resolution of disputes arising under the Act between consumers, on the one hand, and credit providers or credit bureaus, on the other; (b) receive complaints concerning alleged contraventions of the Act; and (c) investigate alleged contraventions of the Act. In terms of s 15(*i*), the Regulator may refer matters to the Tribunal and appear before it pursuant to s 15(*j*).

[6] The Tribunal is a statutory adjudicatory body established under s 26 of the Act. In terms of s 27 of the Act, the Tribunal is empowered to: (a) adjudicate applications referred to it regarding allegations of 'prohibited conduct' by determining whether such conduct has occurred.[1] Upon considering such applications, the Tribunal may make any orders provided for in the Act.

[7] Volkswagen, BMW and Mercedes-Benz are all credit providers as defined in the Act. They offer finance for purchasing motor vehicles on credit.

[1] 'Prohibited conduct' is defined in s 1 of the Act as 'an act or omission in contravention of this Act, other than an act or omission that constitutes an offence under this Act, by –
(*a*) an unregistered person who is required to be registered to engage in such an act; or
(b) a credit provider, credit bureau or debt counsellor . . .'

The relevant provisions of the Act

[8] The provisions of the Act which are the subject of the appeal are ss 100, 101, and 102. The provisions appear in Part 'C' of the Act under the heading '*Consumer's Liability, interest, charges and fees*'. Section 100 prohibits certain charges from being levied against a consumer. Section 102(1) lists 'fees or charges' that may be included 'in the principal debt deferred under the agreement'.

[9] The relevant provisions read:

'**Prohibited charges**

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

(a) a credit fee or charge prohibited by this Act;

(b) an amount of a fee or charge exceeding the amount that may be charged consistent with this Act;

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

(d) any fee, charge, commission, expense or other amount payable by the credit provider to any third party in respect of a credit agreement, except as contemplated in section 102 or elsewhere in this Act.

(2) A credit provider must not charge a consumer a higher price for any goods or services than the price charged by that credit provider for the same or substantially similar goods or services in the ordinary course of business on the basis of a cash transaction.

Cost of credit

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

(*a*) the principal debt, being the amount deferred in terms of the agreement, plus the value of any item contemplated in section 102;

(*b*) an initiation fee, which –

(i) may not exceed the prescribed amount relative to the principal debt; and

(ii) must not be applied unless the application results in the establishment of a credit agreement with that consumer;

(*c*) a service fee, which –

(i) in the case of a credit facility, may be payable monthly, annually, on a per transaction basis or on a combination of periodic and transaction basis; or

(ii) in any other case, may be payable monthly or annually; and

(iii) must not exceed the prescribed amount relative to the principal debt;

(*d*) interest, which –

(i) must be expressed in percentage terms as an annual rate calculated in the prescribed manner; and

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

(*e*) cost of any credit insurance provided in accordance with section 106;

(*f*) default administration charges, which –

(i) may not exceed the prescribed maximum for the category of credit agreement concerned; and

(ii) may be imposed only if the consumer has defaulted on a payment obligation under the credit agreement, and only to the extent permitted by Part C of Chapter 6; and

(*g*) collection costs, which may not exceed the prescribed maximum for the category of credit agreement concerned and may be imposed only to the extent permitted by Part C of Chapter 6.

(2) A credit provider who is a party to a credit agreement with a consumer and enters into a new credit agreement with the same consumer that replaces the earlier agreement in whole or in part may charge that consumer an initiation fee contemplated in subsection (1)(*b*) in respect of that second credit agreement, only to the extent permitted by regulation, having regard to the nature of the transaction and the character of the relationship between the credit provider and consumer.

(3) If a credit facility is attached to a financial services account, or is maintained in association with such an account, any service charge in terms of that account –

(a) if that charge would not have been levied if there were no credit facility attached to the account, is subject to the prescribed maximum contemplated in subsection (1)(*c*); and

(b) otherwise, is exempt from the prescribed maximum contemplated in subsection (1)(*c*).

Fees or charges.

102. (1) If a credit agreement is an instalment agreement, a mortgage agreement, a secured loan or a lease, the credit provider may include in the principal debt deferred under the agreement

any of the following items to the extent that they are applicable in respect of any goods that are the subject of the agreement –

(a) an initiation fee as contemplated in section 101(1)(*b*), if the consumer has been offered and declined the option of paying that fee separately;

(b) the cost of an extended warranty agreement;

(c) delivery, installation and initial fuelling charges;

(e) taxes, licence or registration fees; or

(f) subject to section 106, the premiums of any credit insurance payable in respect of that credit agreement.

(2) A credit provider must not –

(a) charge an amount in terms of subsection (1) unless the consumer chooses to have the credit provider act as the consumer's agent in arranging for the service concerned;

(b) require the consumer to appoint the credit provider as the consumer's agent for the purpose of arranging any service mentioned in subsection (1); or

(c) charge the consumer an amount under subsection (1) in excess of –

(i) the actual amount payable by the credit provider for the service, as determined after taking into account any discount or other rebate or other applicable allowance received or receivable by the credit provider; or

(ii) the fair market value of a service contemplated in subsection (l), if the credit provider delivers that service directly without paying a charge to a third party.

(3) If the actual amount paid by a credit provider to another person is not ascertainable when the consumer pays an amount to the credit provider for a fee or charge contemplated in subsection (1) and if, when it is ascertained, it is less than the amount paid by the consumer, the credit provider must refund or credit the difference to the consumer.'

Factual background

[10] The OTR fees in these appeals are charged when a consumer purchases a motor vehicle on credit. The process for buying a motor vehicle is generally as follows. The consumer selects a motor vehicle of their choice from a dealer. The consumer signs and submits an 'offer to purchase'. In the offer to purchase, the dealer states the costs agreed upon by the consumer, including the selling price of the vehicle, delivery charges, any additional features requested by the

consumer, and the OTR fees. Any deposit or trade-in value is deducted from the vehicle's final cost.

[11] In the transactions in question, the credit provider gives the consumer a quotation and a pre-agreement. The pre-agreement outlines the proposed terms and conditions under which the credit provider will sell the motor vehicle to the consumer.

[12] The quotation lists the cash price of the motor vehicle, the costs of any extras or additions to the motor vehicle, including the OTR fees, less the deposit or the value of a trade-in. This is the total principal debt, to which the total finance charges are added, resulting in the total balance payable by the consumer to the credit provider. If the consumer's application for credit is approved, the credit provider purchases the motor vehicle from the dealer. It then sells it to the consumer under a credit agreement, which stipulates that the total balance is payable in monthly instalments over an agreed term. This agreement is regulated by the Act, and the dealer is not a party to it.

[13] From this overview, three agreements are salient: (a) the sale agreement between the dealer and the consumer; (b) the sale agreement between the dealer and the credit provider; and (c) the instalment agreement between the credit provider and the consumer.

[14] The Regulator determined that the credit providers had contravened certain provisions of the Act, particularly ss 100, 101 and 102, by charging the OTR fees. These are composite fees for various services provided by motor vehicle dealers. They include, among other things, costs for services such as conducting a pre-delivery inspection, obtaining roadworthy certificates, licensing the vehicle,

acquiring license plates, delivery, fuel, and fees charged by the Financial Sector Conduct Authority. This list is by no means exhaustive.

[15] During various periods in 2017, the Regulator conducted investigations into the practice of charging the OTR fees in the motor retail industry. After communicating with the credit providers and being dissatisfied with their explanations about the OTR fees, the Regulator invoked its powers under s 55 of the Act, which authorises it to issue a 'compliance notice' to 'a person or association of persons' it reasonably believes has failed to comply with a provision of the Act or is engaged in activity contrary to the Act.[2]

[16] The Regulator's compliance notices to the credit providers stated that its investigation had revealed that, in contravention of ss 100(1)(*a*), 101(1), 102(1) and (2) of the Act, the credit providers charged consumers OTR fees on instalment agreements with consumers. The Regulator contended that the OTR fees are: (a) credit fees or charges prohibited by s 100(1)(*a*) of the Act; (b) not credit fees or charges permitted in a credit agreement in terms of s 101(1); and (c) not credit fees or charges that can be included in the principal debt deferred of an instalment agreement or a lease agreement in terms of s 102(1).

[17] The Regulator further asserted that the credit providers charged consumers the OTR fees despite not being chosen by the consumers to act as their agents in arranging the service for which the fees were charged. The compliance notice against Volkswagen included an additional allegation that it had 'disguised and/or

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[2] Section 55(1) reads:
'**Compliance notices**
55. (1) Subject to subsection (2), the National Credit Regulator may issue a compliance notice in the prescribed form to –
(a) a person or association of persons whom the National Credit Regulator on reasonable grounds believes –
(i) has failed to comply with a provision of this Act; or
(ii) is engaging in an activity in a manner that is inconsistent with this Act; or
(b) a registrant whom the National Credit Regulator believes has failed to comply with a condition of its registration . . .'.

inaccurately disclosed as service and delivery' the OTR fees in its credit agreements. The Regulator stated that this was a violation of s 89(2)*(c)* of the Act, which stipulates that, subject to subsections (3) and (4), a credit agreement is unlawful if it is a supplementary agreement or document prohibited by s 91*(a)* of the Act. As a result, the Regulator ordered the credit providers to undertake specific corrective actions. These included ceasing to charge consumers OTR fees and refunding all consumers who had been charged such fees.

Litigation history

In the Tribunal

[18] The Regulator's compliance notices prompted the credit providers' applications to the Tribunal for orders to review and set them aside. Their applications were submitted separately on different dates to the Tribunal and were thus considered by different panels of the Tribunal.[3]

[19] Volkswagen's application was the first to serve before the Tribunal.[4] The Tribunal reached a different conclusion from that in the BMW application. It held, among other things, that the OTR fees are credit fees or charges prohibited by s 100(1)(*a*) of the Act and that those fees are not credit fees that can be included in the principal debt deferred in terms of an instalment agreement according to s 102(1) of the Act. It concluded that Volkswagen charged the OTR fees in contravention of the Act. The Tribunal thus dismissed Volkswagen's application but amended the terms of the Regulator's compliance notice in certain respects.

[20] Next was BMW's application. BMW brought an interlocutory application for the consolidation of its application with that of Volkswagen, with the intention

[3] BMW brought its application to review and set aside the compliance notice on 25 October 2017. Volkswagen brought a similar application on 16 November 2017. Mercedes-Benz brought its application on 15 May 2018, which was heard on 25 and 26 May 2021, and judgment delivered on 31 May 2021.
[4] Volkswagen's application was heard on 19 and 20 February 2019, and judgment delivered on 4 April 2019.

of hearing these applications together.[5] Volkswagen joined that application as a second respondent but did not submit any arguments. Instead, it instructed counsel to observe the proceedings.[6] The Regulator opposed that application, which the Tribunal dismissed, and ordered that the two applications be heard separately.

[21] The Tribunal subsequently heard BMW's application on the merits.[7] In its judgment, the Tribunal disagreed with the reasoning and the conclusions reached by the panel in Volkswagen. It held that the credit providers did not charge OTR fees. Such fees, it stated, were charged by the vehicle dealers. In any case, it concluded that vehicle dealers are not prohibited from charging OTR fees, nor is charging them unlawful in any way. The Tribunal noted that the transaction may be subject to the provisions of the Consumer Protection Act 68 of 2008 (the Consumer Protection Act), but found nothing inherently unlawful about an agreed cost or fee. The Tribunal accordingly reviewed and set aside the Regulator's compliance notice against BMW.

[22] In Mercedes-Benz's application,[8] the Tribunal adopted the same reasoning as in the BMW application. It concluded that the OTR fees are not charges imposed by the credit providers, but by the vehicle dealers. The Tribunal accordingly reviewed and set aside the Regulator's compliance notice.

In the Full Court

[23] Aggrieved by the Tribunal's order against it, Volkswagen appealed to the Full Court against the dismissal of its application to review and set aside the

[5] BMW's Consolidation Application was argued on 15 May 2018, and judgment was delivered on 2 June 2018.
[6] The Tribunal's judgment in BMW's Consolidation, para 6.
[7] The Tribunal heard BMW's application on 4 and 5 May 2021 and delivered its judgment on 10 May 2021.
[8] The Tribunal heard Mercedes-Benz's application on 25 and 26 May 2021 and delivered its judgment on 31 May 2021.

Regulator's compliance notice. For its part, the Regulator: (a) cross-appealed against the Tribunal's modification of its compliance notice concerning Volkswagen; and (b) appealed against the Tribunal's orders setting aside its compliance notices relating to BMW and Mercedes-Benz. The Full Court heard the four appeals together. As mentioned, the court was not unanimous.[9]

The judgment of the majority

[24] The majority found that the credit providers did not charge consumers the OTR fees separately when these fees and services were included in the credit agreements. These fees, according to the majority, are negotiated between the dealers and consumers. Credit providers only financed the principal debt, which, according to the majority, included the purchase price and other extras, such as OTR fees and additional services.

[25] As regards the relevant provisions of the Act alleged to be contravened by the credit providers, the majority reasoned as follows. Section 100 prohibits a credit provider from charging or imposing monetary liability upon a consumer. When financing the purchase of a vehicle on credit, the majority said, the credit providers imposed no obligation or financial liability on the consumer. They merely provided finance for the principal debt, which had been pre-determined by the dealers.

[26] On these grounds, the majority: (a) upheld Volkswagen's appeal against the decision of the Tribunal dismissing its application to review and set aside the Regulator's compliance notice; (b) dismissed the Regulator's cross-appeal regarding the modification of its compliance notice against Volkswagen; and (c) dismissed the Regulator's appeal against the orders of the Tribunal reviewing and

[9] The majority judgment was written by Malungana AJ, in which Millar J concurred. Moshoana J wrote the minority judgment.

setting aside the Regulator's compliance notices against BMW and Mercedes-Benz, respectively. In each of the above orders, the Regulator was ordered to pay costs, including those of two counsel.

[27] The minority agreed with the majority to dismiss the Regulator's cross-appeal against Volkswagen. However, it disagreed with the majority's conclusion to uphold BMW and Mercedes-Benz applications to review and set aside the Regulator's compliance notices against them. The minority reasoned that the cost of credit includes, among other things, the price and value of items contemplated in s 102. This constitutes the 'principal debt'. Once the dealer charges the consumer the OTR fees, they should not be imposed on the consumer, as this is prohibited by s 100. For these reasons, the minority would have dismissed Volkswagen's appeal against the Regulator and upheld its appeals against BMW and Mercedes-Benz.

[28] Subsequently, the Full Court unanimously granted the Regulator leave to appeal to this Court against the orders of the majority, and to cross-appeal against the decision of the court to dismiss the Regulator's counter-application against Volkswagen.

In this Court

The Regulator's submissions

[29] Section 100, couched in 'peremptory terms', prohibits credit providers from charging an amount or imposing a monetary liability on consumers in respect of a fee or charge prohibited by the Act. Thus, charges not set out in the Act are not permitted to be charged to consumers.

[30] Section 101(1), read with s 102(1), contains a closed list of the permissible charges that a credit provider may require consumers to pay under an instalment

agreement. Accordingly, the consumer cannot be charged the OTR fees not mentioned in the list. And for those which are listed in s 102, a credit provider may only include them as part of the credit agreement if the credit provider has been authorised to provide the services. But if the services are not listed in s 102, the credit provider may not charge for them at all.

[31] Furthermore, what the Act permits the consumer to be charged is the principal debt, which is the amount deferred in terms of the credit instalment agreement. Since that agreement does not include the principal debt items making up the OTR fees not listed in s 102, these items cannot be of value and reflected in the purchase price under the definition of a credit instalment agreement. Thus, they cannot be charged as part of the credit instalment agreement.

The credit providers' submissions

[32] The credit providers did not set the OTR fees, which are determined by the dealers in agreement with the consumer based on freedom of contract between them, before being asked to finance the vehicle. Like all other extras, the consumer may request the dealer to include the OTR fees as part of the principal debt. These all contribute to the total amount which the consumer requests them to finance. The agreement between the dealer and the consumer is then 'carried over' to determine the amount (the principal debt) which the consumer seeks to have the credit provider finance.

[33] Section 102 has limited relevance in this context. It permits the credit providers, if they choose to offer any services listed in s 102, to include these in the principal debt, provided they comply with s 102(2). Therefore, the Act only protects the consumer when credit providers attempt to use their position to supply services to the consumer. However, the credit providers argued that the Act does not regulate the consumer's freedom to agree with the dealer the

accessories or extras which the consumer selects as part of the vehicle, or which connected services the consumer wishes to obtain. These services may incur OTR fees. According to the credit providers, the Act does not govern the relationship between dealers and consumers, which may be covered by other legislation, such as the Consumer Protection Act.

[34] In addition to the submissions above, BMW argued that if this Court upholds the appeals and finds that it charged fees contrary to the Act, we should nonetheless set aside the Regulator's compliance notice against it on the grounds of alleged selective enforcement. It stated that although most credit providers financed the OTR fees charged by dealers, the Regulator decided to target only Volkswagen, BMW and Mercedes-Benz. For its part, Volkswagen argued for the dismissal of the Regulator's cross-appeal.

Analysis

[35] The differing interpretations of the relevant provisions stem from the Act's drafting flaws, which this Court and the Constitutional Court have previously pointed out.[10] In relation to ss 101 and 102, the issue arises from the definition of 'principal debt' and its components. The definition merely refers to the amount determined under s 101(1)*(a)*. That provision, in turn, states that the principal debt is the deferred amount 'in terms of the agreement' plus the value of any item covered by s 102. The deferred amount is based on the definition of an instalment agreement, which relates to the price of the sale of movable property.[11] What

[10] In *Sebola and Another v Standard Bank of South Africa Ltd and Another* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) para 66 the Constitutional Court pointed to the fact that '[t]he lack of clarity in the drafting of the Act has justly been bemoaned'. In *Nedbank Ltd and Others v National Credit Regulator and Another* [2011] ZASCA 35; 2011 (3) SA 581 (SCA); [2011] 4 All SA 131 (SCA) para 2, this Court alluded to '[n]umerous drafting errors, untidy expressions and inconsistencies" make interpreting the NCA "a particularly trying exercise'.

[11] In terms of s 1 of the Act, 'an instalment agreement means a sale of movable property in terms of which –
(a) all or part of the price is deferred and is to be paid by periodic payments;
(b) possession and use of the property is transferred to the consumer;

remains unclear from these definitions is what the principal debt comprises when agreements involve the consumer, the dealer, and the credit provider.

[36] I first consider the credit providers' construction. On their construction, a consumer is afforded no protection in their agreement with the dealer when arriving at a price that constitutes the principal debt. The protection of the consumer only arises if the credit provider seeks to procure any of the items listed under s 102 for the consumer, in addition to what the consumer would have already agreed with the dealer.

[37] The credit providers sought to justify their position on the basis that the Act only seeks to protect the consumer when the latter is vulnerable to the exercise of power by the credit provider over them. According to them, that would only arise where the credit provider seeks to provide any of the items listed in s 102.

[38] The difficulty with this contention is that the consumer would enjoy the protection provided in s 102 only after the dealer and the consumer had agreed on what is likely to constitute the major portion of the principal debt, which the credit providers would later finance. By the time the agreement is presented to a credit provider for finance, the risk of harm to the consumer might already have occurred. But, on the credit providers' argument, the Act would have no role to play in this. The credit providers assert this even though they would significantly benefit from the agreement between the dealer and the consumer. This is because the larger the principal debt, the greater the opportunity for them to profit from

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(c) ownership of the property either-
(i) passes to the consumer only when the agreement is fully complied with; or
(ii) passes to the consumer immediately subject to a right of the credit provider to re-possess the property if the consumer fails to satisfy all of the consumer's financial obligations under the agreement; and
(d) interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred.'

the transaction, which they would finance. This would circumvent the Act and its protections for consumers.

[39] The credit providers' contention that they only finance the credit agreement and have no responsibility to scrutinise the agreement between the dealer and the consumer is unsustainable. Unlike dealers, who are not bound by the Act, credit providers are subject to it. They are therefore required to ensure that the amount they finance as part of the deferred amount in the credit agreement complies with the provisions of the Act.

[40] Section 102(1) lists the fees and charges that 'the credit provider may include in the principal debt deferred'. Section 101(1)(*a*) stipulates the component parts of the principal debt for which the credit agreement may require payment. If the credit provider wishes to include any of the items listed in s 102(1) as part of the principal debt, this can only be done by the credit provider complying with the requirements of s 102. The fact that a consumer may have already agreed with the dealer to provide for these items does not mean that the credit provider can include these items in the principal debt without complying with s 102.

[41] Thus, a credit provider cannot close its eyes to the contents of the agreement it is requested to finance. Section 90(1) of the Act provides that a credit agreement must not contain an unlawful provision. Among others, a provision of a credit agreement is unlawful if its general purpose or effect is to defeat the purposes of the Act or to deceive the consumer. Therefore, where it is requested to finance the purchase of goods based on an agreement between the dealer and the consumer, it has a responsibility to ensure that its credit agreement with the consumer complies with the Act. In other words, it cannot import any unlawful provisions into the credit agreement.

[42] To demonstrate the difficulty with the credit providers' argument, in the present appeals, the credit providers separately identified the OTR fees in their credit agreements. They stated that they were charged in accordance with s 102. This was neither a coincidence nor a mistake, as the credit providers sought to explain themselves in this appeal, but a recognition on their part that they had the responsibility to comply with the Act.

[43] On the construction preferred by the credit providers, s 102 would only apply where the dealer is also the credit provider. Where, as in the present case, the dealer and the credit provider are different entities, the provision does not apply. The effect of this construction is that the enjoyment of the protection afforded to the consumer in s 102 depends on whether the dealer is also the credit provider. If it is, then s 102 applies, and the consumer is protected. If the dealer and the credit provider are separate entities, the consumer has no protection under the Act.

[44] This is so, unless, even on the credit providers' argument, the s 102 items were not included in the agreement between the consumer and the dealer, and the consumer then sought to include a s 102 item in the principal debt. There is a glaring anomaly with this construction, which has the effect of circumventing s 102. What is more, there is no juridical basis to interpret the Act's provisions differently depending on the relationships between the dealer and the credit provider.

[45] I turn now to the Regulator's contention that s 102 contains a closed list. I make four observations about s 102(1). The first is that, unlike ss 100 and 101, which list what the credit provider may not charge a consumer, this provision is permissive. It sets out fees or charges that may be included in the principal debt deferred under a credit agreement, namely: (a) an initiation fee; (b) the cost of an

extended warranty agreement; (c) delivery, installation and initial fuelling charges; (d) connection fees, levies or charges; (e) taxes, licence or registration fees; or (f) credit insurance premiums.

[46] The second is that, except for an initiation fee, the charges listed in (*a*)-(*f*) are typically not charged by the credit providers because, in the normal course of their business, credit providers do not provide the services mentioned in (*b*)-(*f*). In the context of purchasing a motor vehicle, these services would be provided by the dealers and subsequently included in the credit agreement, which a credit provider finances. This explains the requirement in s 102(2)(*a*)-(*c*) for the credit provider to be appointed as the consumer's agent for the provision of the services envisaged in s 102(1)(*b)*-(*f*).

[47] This is in direct contrast to the charges listed in s 101(1)(*b*)-(*g*), namely: initiation fee, service fee, interest, cost of credit insurance, administration charge, and collection costs. These are typically charged by credit providers when they extend credit to consumers. As Heerden and Renke put it, 'they are costs that are directly related to the granting of credit and are charged in exchange for deferring payment of the principal debt that is financed in terms of the credit agreement'.[12]

[48] Third, like its related provisions ss 100 and 101, the purpose of s 102(1) is to protect the consumer. The provision: (a) limits the types of charges a credit provider may charge a consumer; (b) ensures transparency around the charges a consumer may incur when concluding credit agreements; and (c) ensures that credit providers do not impose arbitrary or hidden charges on consumers.

[12] C Van Heerden and S Renke: *Cost of credit in terms of the National Credit Act: "On the road fees", administrative fees and/or handling fees* Annual Banking Law Update 2019.

[49] Fourth, the charges listed in the provision are typically associated with the cost of credit, for the benefit of the dealer (and by extension, the credit providers in the credit agreement). The consumer has no say in these, and he or she would be in a 'take it or leave it' position as regards these charges. The purpose here is to limit the credit providers' power to add similar items to the principal debt deferred under a credit agreement.

[50] The Regulator's contention that the list in s 102(1)(*a*)-(*f*) constitutes a closed list has the support of Van Heerden and Renke.[13] The learned authors posit that '[g]iven the manner in which s 102(1) is phrased, it appears that the items mentioned therein . . . constitute a closed list'. There seems to be force in that contention. The provision is clearly meant to protect the consumer. The use of the phrase 'any of the following' in the provision, followed by a numbered list, suggests that the Legislature intended to limit the items that a credit provider can charge to the consumer, to those mentioned.

[51] This construction is further supported by the absence of a catch-all phrase like 'any other similar charges'. Typically, when such a phrase follows a list, it allows for additional items to be added to the list. Furthermore, the requirement in s 102(2) that the credit provider be appointed as the consumer's agent in arranging for the service concerned serves as an additional layer of protection for the consumer.

[52] I therefore conclude that s 102(1)(*a*)-(*f*) contains a closed list of charges that a credit provider may impose on a consumer in a credit agreement. As mentioned, these are typical charges associated with the cost of credit that a dealer would impose on a consumer. What s 102(1) prohibits is the addition of *similar*

[13] Ibid.

charges to the amount deferred in the credit agreement. The provision does not purport to regulate any other costs that the consumer and the credit provider may agree upon in a credit agreement. It is noteworthy that the section is headed 'Fees or charges' and not 'Costs', thereby signalling the Legislature's intent to limit the list to the genus of fees and charges. (Emphasis added.)

[53] This brings me to the question of whether consumers may agree with dealers to include the OTR fees in these cases as part of the principal debt. 'Principal debt' is defined in the Act as 'the amount calculated in accordance with section 101(1)(a).' The latter provision, in turn, describes the principal debt as 'the amount deferred in terms of the agreement, plus the value of any item contemplated in section 102'. As mentioned, the 'amount deferred' is not defined in the Act, but obviously, it includes the purchase price. This is underscored by the definition of 'instalment agreement', which means a sale of movable property in terms of which, among other things, all or part of the price is deferred and is to be paid by periodic payments, and 'interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred'.

[54] Having regard to this definition in the context of purchasing a motor vehicle, 'the amount deferred' includes the price of the vehicle and any other charges that could reasonably be regarded as part of the price. These would include items such as optional accessories and services, such as a sunroof, alloy wheels, smash-and-grab window film, navigation systems, maintenance plans, tyre warranties and roadside assistance. The cost of these accessories or services is added to the vehicle's purchase price. In other words, the principal debt comprises everything that is reasonably related to the *merx*, which the consumer wishes to finance. It is the amount deferred and consequently, the principal debt, in a case where the consumer is unable to pay for the accessories and services in

cash and requests that these costs be included in the periodic payments under the instalment agreement.

[55] However, the Act is not clear on what the concept 'principal debt' means. In s 101(1)*(a)*, it comprises the amount deferred '*plus the value of any item contemplated in s 102*'. On the other hand, s 102 states that the credit provider '*may include in the principal debt deferred*' the fees stipulated in that provision, thereby suggesting that the s 102 fees form part of the principal debt. These two provisions are inconsistent. What these definitions do not make clear, is how the Act seeks to regulate what can comprise the principal debt in the matrix of agreements between the consumer, dealer and credit provider, the result of which is to bring about the composition of the principal debt. Hence, the scope for the differences in the arguments presented to us.

[56] The term 'principal debt' must be given a broad definition, as there are other items not listed in s 102 that may constitute the principal debt under s 101, hence these items are not subject to the protections of items that fall within s 102. The accessories and services – reasonably related to the purchase price – are part of the principal debt to which the value of any item contemplated in s 102, is added. It follows that the accessories and services are not 'charges or fees' envisaged in s 102(1), and the nature of s 102(1) as a closed list, is preserved. Contrary to the Regulator's contention, the addition of accessories and services to the purchase price does not breach s 102(1) of the Act.

[57] This construction accords with the text, context and purpose of ss 100(1), 101(1) and 102(1) of the Act.[14] It gives effect to the Legislature's intention to proscribe certain charges in s 100(1); is consistent with what the principal debt

[14] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*) para 18.

comprises in s 101(1)*(a)*; and preserves the protection granted to consumers in s 102(1) against arbitrary and hidden costs.

[58] This interpretation is also sensible, business-like and practical.[15] First, it enables the dealer and the consumer to agree on accessories and services which customarily form part of the purchase price and are included in the principal debt. Second, it prevents the exclusion of items that are now standard features of vehicle purchases, and does not restrict the provision of credit to consumers for these items, which is commonplace in the motor industry. And third, this interpretation is consistent with the purposes of the Act, namely '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, industry, and to protect consumers.'

[59] As emphasised by the Constitutional Court in *Sebola v Standard Bank*,[16] the Act must be interpreted to give effect to these purposes. The Court also pointed out that although the primary aim of the Act is to protect consumers, the interests of creditors should also be safeguarded, and a balance must be maintained between the interests of consumers and those of credit providers.

[60] Section 102 is designed to protect consumers against arbitrary and hidden charges. The need for such protection is lessened where it is the consumer herself who requests the accessories or service, and agrees to pay the cost thereof. Thus, to insist in such a situation that the credit provider breaches s 102 is unrealistic, unbusinesslike, and would 'stultify the broader operation of the legislation,' an outcome *Endumeni* cautions against.[17]

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[15] Ibid.
[16] *Sebola v Standard Bank of South Africa & Another Ltd and Another* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) para 40.
[17] *Endumeni* para 26.

[61] The fact is that the cost of the accessories and services supplied by the dealer to the consumer at the latter's request is not a fee or charge prohibited by the Act. This means that in each case, any extra charge should be examined to determine whether it can be regarded as forming part of the purchase price, regardless of the name given to it in the credit agreement. In other words, it is the nature of the charge that is essential, not how it is named in a credit agreement. If it falls within the category of items listed in s 102(1), it is prohibited. That would be the case if, for example, a credit provider imposes a related charge on a consumer under a general line item such as 'Service Charge', 'On the Road fee' or Administration fee'.

[62] I therefore conclude that to the extent the credit providers have not imposed additional charges and fees on consumers similar to those mentioned in s 102(1), they have not breached s 102. The corollary is true. It is neither necessary nor desirable, for present purposes, to scrutinise each credit agreement concluded by the credit providers with consumers to determine whether there has been a breach of s 102. The fees and charges related to these appeals occurred during a period of uncertainty in the motor finance industry, and it must be stressed that what is stated in this judgment concerning the proper construction of ss 100(1), 101(1) and 102(1) of the Act, affects only future cases.

[63] This brings me to the Regulator's concern that OTR fees are calculated arbitrarily by dealers, as is apparent from selected instalment agreements concluded between the respective credit providers and consumers. For example, Volkswagen classifies the item as 'Service and Delivery'. Furthermore, the fees listed on the dealer's invoice differ from those in the credit agreement. The Regulator argued that this misled consumers, in violation of s 90(2)(*a*)(ii) of the Act. Additionally, by including the 'service and delivery charges' in Part E of the

credit agreement, the Regulator claimed, Volkswagen misled consumers into believing these charges were imposed under s 102 of the Act.

[64] BMW's agreement shows an item 'On Road cost – dealer' in Part E of the pre-agreement statement. It appears that the OTR fees were initially set arbitrarily by the dealer, ranging from R2 900 to R4 950. BMW monitored the OTR fees charged by dealers to ensure they did not exceed R6 000.

[65] Mercedes-Benz listed the OTR fees in the quotation, the pre-agreement, and the credit agreement under the heading 'Extras/Additions (in terms of section 102 of the National Credit Act)'. It stated that before 4 December 2017, it was unable to describe or itemise the costs comprising the OTR fees. Despite enquiries to the dealers, Mercedes-Benz was 'unable to determine precisely what elements were included in the 'on the road' fees by dealers and retailers'. As of 4 December 2017, Mercedes-Benz adopted a new business model and accompanying sales policy, resulting in a fixed amount being charged for OTR fees. It stated that the fees included pre-delivery inspections, registration fees, licence fees, and fuel.

[66] It is clear from the above examples that there was a lack of clarity regarding these fees, which, in turn, led to a lack of transparency. Credit providers should not ignore the Act's objectives, particularly transparency. They earn interest income from financing deferred amounts for the duration of credit agreements, which usually range from 60 to 72 months. A seemingly small amount of OTR fees deferred with interest over this period could generate substantial profits for a credit provider.

[67] As correctly observed by the Tribunal in the Volkswagen matter, although these sums may appear relatively minor within the overall framework of the credit

agreement, they can become significant over time due to charges, fees, or interest accrued during the term of the agreement. The high court minority judgment illustrates this with an example involving a car valet, which would typically cost R100. Financed as part of the deferred amount at 8% over 72 months, the consumer would have paid R676 over the course of the credit agreement. This amount would be higher at the current interest rate of 10.50%, making the debt R703.60 over 72 months. There is no indication in the papers before us that the consumers' attention is drawn to this fact.

[68] The purposes of the Act include ensuring a fair and transparent credit market, and to protect consumers by encouraging responsible borrowing, avoiding over-indebtedness, fulfilling their financial obligations and promoting equity in the credit market by balancing the rights and responsibilities of credit providers and consumers. Credit providers are enjoined to give effect to these purposes. To that end, this judgment has the following consequences:

(a) OTR fees to be added to the purchase price must be specified, and the credit provider must clearly state the nature and cost of each item.

(b) Consumers must be asked whether they prefer to pay cash for OTR fees or to have them financed as part of the amount deferred.

(c) To ensure an informed choice in this regard, consumers must be told of the difference between: (i) the cash price of the OTR fees; and (ii) the total cost of the fees, including interest and all other charges, if they are to form part of the principal debt to be financed in terms of the instalment agreement.

[69] To sum up, s 102(1) does not prohibit a credit provider from financing an agreement between a consumer and a dealer that contains items not listed in the provision. However, when requested to do so, it bears the responsibility to ensure that the provisions of such an agreement comply with the Act.

[70] In all the circumstances, the appeals must fail. This conclusion means that: (a) consequently, the Regulator's cross-appeal against Volkswagen for the repayment of the OTR fees must fail; (b) it is unnecessary to consider BMW's selective enforcement argument, as it was predicated on the Regulator's appeal succeeding.

Costs

[71] In matters of this nature, the salutary approach is that organs of State pursuing legitimate public interest litigation should not be mulcted in costs. This was recently restated by this Court in *National Credit Regulator v Southern African Fraud Prevention Services NPC* (*Fraud Prevention Services*):[18]

'The principle that a statutory body should not be ordered to pay costs in a case where it has acted impartially and reasonably in exercising its statutory duties, even if it has been shown to have acted incorrectly though bona fide, is well-established. More than a century ago in *Coetzeestroom*, affirmed by the Constitutional Court in *Pioneer Hi-Bred*, Innes CJ said that it was inequitable to mulct an official (the Registrar of Deeds in that case) with costs where his 5actions, though mistaken, were bona fide, as that was detrimental to the vigilance required of that office in the public interest.

In *Pioneer Hi-bred*, Skweyiya ADCJ stated the principle thus:

"The principle that should inform the CAC's exercise of discretion is that, when the Commission is litigating in the course of fulfilling its statutory duties, it is undesirable for it to be inhibited in the *bona fide* fulfilment of its mandate by the threat of an adverse costs award. This flows from the need to encourage organs of state to make and to stand by honest and reasonable decisions, made in the public interest, without the threat of undue financial prejudice if the decision is challenged successfully." (Footnotes omitted.)[19]

[72] Despite this principle, the credit providers all sought a costs order against the Regulator. Counsel for BMW argued that the Regulator acted irrationally and

[18] *National Credit Regulator v Southern African Fraud Prevention Services NPC* [2019] ZASCA 92; [2019] 3 All SA 378 (SCA); 2019 (5) SA 103 (SCA).
[19] Ibid paras 42 and 43.

irresponsibly in pursuing its case against BMW without first investigating the OTR fees. It was further argued that the Regulator had adopted an obstructive stance before the Tribunal by objecting to hearing the three applications together, opposing Volkswagen's intervention application in the high court, and resisting Mercedes-Benz's application to consolidate the three appeals for a combined hearing. These actions unnecessarily increased costs.

[73] Volkswagen and Mercedes-Benz argued that, before deciding to appeal to this Court, the Regulator should have considered the reasons and judgments of the specialist Tribunals in the BMW and Mercedes-Benz applications, as well as the majority of the Full Court. These, they argued, indicated there was no merit in a further appeal. The Regulator, as an organ of State, caused them unnecessary costs in the high court and this Court.

[74] For these reasons, counsel for the credit providers pressed us to make a costs order against the Regulator. None of the submissions justify deviating from the sound principle of not imposing costs on organs of State when they pursue public interest litigation. BMW's complaints concern the conduct of the Regulator in the Tribunal, which decided not to award costs. Volkswagen's and Mercedes-Benz's submissions similarly do not justify departing from the established principle. The fact that there were differences of opinion in the judgments in both the Tribunal and the high court indicated ongoing uncertainty, which warranted this Court's attention. The Regulator was therefore justified in appealing to this Court. For these reasons, there will be no costs order in this Court.

[75] It remains to consider the costs orders made by the majority of the Full Court that the Regulator should pay costs in each of the appeals. The majority observed that the matter: (a) involved legitimate issues of compliance; (b)

concerned public interest litigation; and (c) called for judicial resolution and clarity from the court. Having made these undoubtedly correct observations, the majority concluded that costs should follow the result. It is difficult to follow the majority's order. There is no suggestion that the Regulator was not bona fide in pursuing its case against the credit providers, or that its conduct in pursuing the appeal was motivated by malice.

[76] It is settled that a court of appeal has a limited scope for interfering with the exercise of discretion by a lower court. Interference is warranted only in circumscribed circumstances, such as where the discretion was not exercised judicially; or where the decision: (a) was influenced by wrong principles; (b) was affected by a misdirection on the facts; or (c) could not reasonably have been reached by a court properly directing itself to the relevant facts and principles.[20]

[77] This is a case justifying interference. First, there is no indication that the majority considered the fact that it was not dealing with an ordinary litigant, but rather an organ of State acting in the public interest. Second, the majority paid no regard to the authority of the Constitutional Court and of this Court, as restated in *Fraud Prevention Services* above. Its order amounted to a misdirection. We are therefore at large to interfere with the costs orders of the majority and replace them with those it ought to have made, which is that each party should pay its own costs.

[20] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) para 88; *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (9) BCLR 1113 (CC) para 144.

Orders

[78] The following orders are made:

A. In *National Credit Regulator and Another v Volkswagen Financial Services (SA) (Pty) Ltd*:

1. The appeal is dismissed with no order as to costs.
2. The cross-appeal is dismissed with no order as to costs.
3. The order of the majority of the Full Court is set aside and replaced with the following:

‘1 The appeal is upheld;

2 The compliance notice issued by the National Credit Regulator is set aside;

3 Each party is to pay its own costs.’

B. In *National Credit Regulator and Another v BMW Financial Services (SA) (Pty) Ltd*:

1. The appeal is dismissed.
2. Each party is to pay its own costs.
3. The costs order of the majority of the Full Court is set aside and replaced with the following:

‘Each party is to pay its own costs.’

C. In *National Credit Regulator and Another v Mercedes-Benz Financial Services (SA) (Pty) Ltd*:

1. The appeal is dismissed.
2. Each party is to pay its own costs.
3. The costs order of the majority of the Full Court is set aside and replaced with the following:

‘Each party is to pay its own costs.’

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JUDGE OF APPEAL

Appearances:

For appellant	PL Carstensen SC (with him AJ Lapan)
Instructed by:	Malatji & Co Inc., Johannesburg
	Honey & Partners Inc., Bloemfontein
For second respondent in first appeal (BMW):	M Chaskalson SC (with him WHJ van Reenen)
Instructed by:	Smit Jones & Pratt Attorneys, Johannesburg
	Symington De Kok Attorneys, Bloemfontein
For second respondent in second appeal (Volkswagen):	A Gautschi SC (with him M Sawyer)
Instructed by:	Smit Jones & Pratt Attorneys, Johannesburg
	Symington De Kok Attorneys, Bloemfontein
For second respondent in third appeal (Mercedes-Benz):	JPV McNally SC (with him DA Smith)
Instructed by:	Webber Wentzel, Johannesburg
	McIntyre Van der Post Inc., Bloemfontein.