

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

Case Number: **NCT/177859/2021/141(1)(b)**

In the matter between:

**SUMMIT FINANCIAL PARTNERS (PTY) LTD**

APPLICANT

and

**DIRECT AXIS SA (PTY) LTD**

FIRST RESPONDENT

**CALLDIRECT**

SECOND RESPONDENT

**FIRSTRAND BANK LIMITED**

THIRD RESPONDENT

**NATIONAL CREDIT REGULATOR**

FOURTH RESPONDENT

Coram:

Dr MC Peenze        -        Presiding Tribunal member

Prof K Moodaliyar -        Tribunal member

Adv C Sassman        -        Tribunal member

Date of hearing:    11 November 2022

<b>JUDGMENT</b>
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**APPLICANT**

1. The Applicant in this matter is Summit Financial Partners (Pty) Ltd, located in Johannesburg ("the Applicant"). The Applicant ("Summit") assists over-indebted consumers by, among other things, investigating and challenging reckless credit agreements.

2. At the hearing, the Applicant was represented by Adv Dale Lubbe.

## **RESPONDENTS**

3. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents are credit providers. The 1<sup>st</sup> Respondent acts as an agent for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in the credit granting process. The 4<sup>th</sup> Respondent is the National Credit Regulator (“the NCR”), a juristic person established in terms of section 12 of the National Credit Act, No. 34 of 2005 (“the Act” or “the NCA”). The Respondents are collectively referred to as “the Respondents.”

4. At the hearing, the Respondents were represented by Adv Alasdair Sholto-Douglas.

## **APPLICATION TYPE**

5. This is an application made in terms of section 141(1)(b) of the NCA.

6. Section 141(1)(b) of the NCA states the following –

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

*(a) ...*

*(b) the Tribunal, with the leave of the Tribunal.”*

## **JURISDICTION**

7. Section 27(a)(i) of the NCA states that:

*“The Tribunal or a member of the Tribunal acting alone in accordance with this Act or the Consumer Protection Act, 2008 may -*

*(a) adjudicate in relation to any -*

*(i) application that may be made to it in terms of this Act, and make any order provided for in the Act in respect of such an application;”*

8. Accordingly, the Tribunal has jurisdiction to hear this application.

### **THE ALLEGED CONTRAVENTIONS**

9. The Applicant alleges that the Respondents contravened the NCA by extending credit recklessly to consumers by not conducting proper affordability assessments.

### **RELIEF SOUGHT**

10. The Applicant prays for an order from the Tribunal -

- 10.1. declaring that Direct Axis, alternatively FRB (FirstRand Bank Limited) duly represented by Direct Axis, repeatedly contravened section 81(3) of the NCA, read with sections 80(1)(b) and 81(2)(a);
- 10.2. declaring that the repeated contravention by Direct Axis, alternatively FRB duly represented by Direct Axis, of section 81(3) of the NCA, read with sections 80(1)(b) and 81(2)(a), constitutes conduct prohibited under the NCA;
- 10.3. declaring the standardised application of Regulation 23A(11) as conduct prohibited under the NCA;
- 10.4. interdicting and restraining FRB from granting credit recklessly;
- 10.5. declaring FRB's credit agreements concluded with the consumers referred to in the complaint ("the consumers") reckless in terms of section 83(1) of the NCA;
- 10.6. ordering FRB to write off all amounts still outstanding under the credit agreements concluded with the "*consumers contained in the complaint*";

10.7. imposing an administrative penalty in terms of section 151(2)(a) of the NCA, being 10% of Direct Axis', alternatively FRB duly represented by Direct Axis', respective annual turnover during the year immediately preceding the date that such an administrative fine is imposed; and

10.8. costs of suit.

## **BACKGROUND**

11. The matter has been brought before the Tribunal after the complaint submitted by the Applicant to the NCR for consideration and investigation was not referred. According to the NCR, the complaint does not include an allegation of acts which, if true, would constitute a remedy under the NCA. The non-referral received from the NCR was considered by the Applicant, who elected to refer the matter to the Tribunal to obtain clarity on the correct interpretation and application of Regulation 23A(10) and 23A(11) of the Act. These Regulations set out the prescribed minimum requirement that needs to be adhered to by a credit provider when developing their affordability assessment mechanism as required by Section 82 of the Act.
12. The Applicant alleges that the Respondents' affordability assessment mechanism does not comply with the Act and Regulations. The Respondents submit that their assessment mechanism is not deficient and that no reckless lending occurred.

## **POINT *IN LIMINE*: PENDING MATTER BEFORE THE TRIBUNAL**

13. The Respondents raised a point *in limine* at the hearing, namely -

That another case between the same parties, Case No NCT/145402/2019/141, about the same alleged prohibited conduct, albeit relating to different consumers, was heard two days before the date of this hearing. According to the Respondents, the ruling of this matter may impact the decisions of the Tribunal in the case presently before the Tribunal. In this regard, the Respondents submitted

that it would be in the interests of justice to stay the proceedings until judgment is issued in the prior matter.

14. The Respondents further acknowledged the Section 16A ruling by the Tribunal, whereby the application for consolidation of the two cases was refused. In this ruling, the Tribunal confirmed that each consumer's credit application would need to be dealt with on its own merits to establish whether any of the Respondents engaged in reckless lending. The Applicant opposed the request for a stay of the proceedings, as it wishes the Tribunal to rule on the circumstances in the matter at hand.
15. The Tribunal considered the parties' arguments above and discusses its views and findings below.
16. It is apparent from the prayers that the relief sought relates to the alleged failure of Direct Axis to conduct proper affordability assessments and the consequential reckless agreements that were entered into due to such failure.
17. The Respondents, in effect, raised the defence of *lis alibi pendens*, as they contend that the outcome of the other matter will impact the decision of the Tribunal.
18. It is trite law<sup>1</sup> that to be successful in a plea of *lis alibi pendens*, four requirements have to be complied with, namely:
  - (a) Pending litigation;
  - (b) Between the same parties or their privies;
  - (c) Based on the same cause of action; and
  - (d) In respect of the same subject matter.
19. This principle is succinctly dealt with in *Nestlé (South Africa) Pty Ltd v Mars Inc.*<sup>9</sup>, where Nugent AJA said:

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<sup>1</sup> *Eravin Construction CC v Twin Oaks Estate Development (Pty) Ltd* (1573/10) [2012]; ZANWHC 27 (29 June 2012) 9 2001(4) SA 542 (SCA), RA 7.

*“There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential for a duplication of actions.”*

20. The Tribunal agrees with the Applicant’s argument that the other matter between the parties is not a bar to the Tribunal proceeding with this matter, as there is no potential for duplication of actions.
21. Furthermore, the Tribunal is required, in terms of Section 142 (1)(b) of the Act, to conduct its hearings as expeditiously as possible.
22. The Tribunal confirms that the legal principles in the two applications before the Tribunal are necessarily the same. However, the Tribunal is required to determine  

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whether reckless lending occurred *in the circumstances of the particular consumers*. In deciding whether reckless credit occurred, the Tribunal will consider all the processes and practices used, as well as the circumstances of each consumer.
23. Accordingly, the ruling in any other matter relating to the same practice by the Respondents may be different. Therefore, it will not be a case of the Tribunal reaching conflicting judgments. It will be a case of reaching different conclusions based on other facts.
24. The Tribunal dismisses the *in-limine* matter.

## LOCUS STANDI

25. In this matter, the Applicant formulates a general complaint, namely that Direct Axis (acting as the agent of FirstRand Bank Ltd) conducts its affordability assessment unlawfully in that it deviates from the peremptory minimum expense

norms table in Regulation 23A(10). This general complaint is evidenced by examples where particular consumers allegedly fell victim to the unlawful practice.

26. The Tribunal considered the Applicant's *locus standi* to bring a complaint regarding an alleged prohibited practice in terms of the NCA, particularly regarding a transgression of Regulation 23A(10).

27. The *National Credit Regulations, Including Affordability Assessment*,<sup>2</sup> outlines the procedure to approach the Tribunal. Regulation 23A(2) prescribes that:

*"If the National Credit Regulator issues a notice of non-referral in response to a complaint, the consumer may refer the matter directly to the National Consumer Tribunal, subject to its rules of procedure."*

28. In *Lewis Stores (Pty) Ltd v Summit Financial Partners (Pty) Ltd and Others*<sup>3</sup>, the Court outlined that where the NCR issues a notice of non-referral, the particular complainant (such as Summit) may apply for the matter to be heard by the Tribunal.

The presumption that legislation does not alter common law more than necessary

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does not arise. Sections 136 and 141 (1) of the NCA, read in their statutory context, clarify the legal position on the Applicant's *locus standi*.

29. Accordingly, the Applicant's *locus standi* to bring this application is confirmed.

## THE MERITS

30. The parties presented arguments on the NCR's report. The NCR perused and investigated credit agreements entered between consumers and Direct Axis (as a subsidiary of FirstRand Bank Limited). It concluded that credit agreements were not reckless and that affordability assessments occurred lawfully.

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<sup>2</sup> Staatskoerant, 13 Maart 2015 No. 38557.

<sup>3</sup> A355/18 [2019] ZAGPPHC 476, par 13 – 20.

## THE APPLICANT'S ARGUMENT

31. According to the Applicant, as a direct result of the loans administered by Direct Axis, the consumers in question became over-indebted in terms of section 79 of the Act.
32. The Applicant conceded that three of the eight consumers' complaints had lapsed. Because of section 166(1) of the NCA, Summit abandoned seeking reckless credit relief in respect of three of the credit agreements (i.e., those concluded between FRB and Thembeke Duma-Mtolo ("Duma-Mtolo"), Modisa Shepard Molokwane ("Molokwane") and Shantell Sharin Fortuin ("Fortuin").
33. Summit only persisted with reckless credit relief in respect of five of the credit agreements referred to in the complaint, namely those concluded with Werner Paul Smith ("Smith"), Mosidi Ellen Modipa ("Modipa"), Galaletsang Gloria Mmatli ("Mmatli"), Raisile Joyce Moeketsi ("Moeketsi") and Kreson Pillay ("Pillay").
34. The Applicant argued that Direct Axis when conducting its affordability assessment, deviated from the peremptory minimum expense norms table in Regulation 23A(10). The Applicant argued that the circumstances of the particular consumers were neither exceptional nor justified by any evidence contrary to section 23A(11).
35. The Applicant argued that Direct Axis poorly assessed affordability and explained their reasons by referring to the consumers in question.

### **The use of a debtor's credit card to pay living expenses**

36. Mr. Werner Paul Smith:
- i. Living expenses elicited by Direct Axis - R6 250.00;
  - ii. Peremptory Minimum Expense Norms Table ("MENT") R3 972.38;
  - iii. Accepted living expenses by Direct Axis of R2 250.00 (deviation of R1



722.38 from MENT); and

- iv. Exceptional circumstance identified for deviation from MENT – payment of living expenses by credit card.

37. Ms Galaletsang Mmatli:

- i. Living expenses elicited by Direct Axis R1 000.00;
- ii. Peremptory MENT R4 972.88;
- iii. Accepted living expenses by Direct Axis of R 1 000.00 (deviation of R3 972.88 from MENT (R2 000.00 disregarded because it was paid by credit card); and
- iv. Exceptional circumstance identified for deviation from MENT – payment of living expenses by credit card.

38. The Applicant argues that excluding living expenses paid by credit cards falls to be declared prohibited conduct, and the Tribunal must order appropriate consequential relief.

**Acceptance, without verification, of expenses being paid by the third party**

39. Mr. Werner Paul Smith:

- i. Living expenses elicited by Direct Axis - R6 250.00;
- ii. Peremptory MENT R3 972.38;
- iii. Accepted living expenses by Direct Axis of R2 250.00 (deviation of R1 722.3 from MENT); and
- iv. Exceptional circumstance identified for deviation from MENT – payment of food expenses by “*spouse*”.

40. According to the Applicant, the credit provider must verify the spouse’s ability to cover the expenses alleged by the consumer.

41. Further, the Applicant alludes to the practice by call centre agents to obtain information to be listed in the 23A(11) questionnaire without first establishing whether exceptional circumstances exist.
42. Ms Mosidi Ellen Modipa:
- i. Living expenses elicited by Direct Axis - R0;
  - ii. Peremptory MENT R3 675.00;
  - iii. Accepted living expenses by Direct Axis of R500.00 (deviation of R3 175.00 from MENT); and
  - iv. Exceptional circumstance identified for deviation from MENT – payment of all expenses by “*family members*”.
43. Ms Galaletsang Mmatli:
- i. Living expenses elicited by Direct Axis - R1 000.00; ii. Peremptory MENT R4 972.88; iii. Accepted living expenses by Direct Axis of R1 000.00 (deviation of R3 972.88 from MENT (Unknown amounts for travel and education disregarded because her “husband” paid these amounts; and iv. Exceptional circumstance identified for deviation from MENT was the payment of travel and education expenses by “*husband*”.
44. Mr. Kreson Pillay:
- i. Living expenses elicited by Direct Axis - R800.00; ii. Peremptory MENT R2 398.00;
  - iii. Accepted living expenses by Direct Axis of R600.00 (deviation of R2 893.01 from MENT); and

iv. Exceptional circumstances identified for deviation from MENT payment of all other expenses by parents.

45. The Applicant argues that failing to verify expenditure paid by third parties falls to be declared prohibited conduct, and the Tribunal must order appropriate consequential relief.

### **Standardised use of Regulation 23A(11) questionnaire**

46. According to the Applicant, Direct Axis fails to ask pertinent questions at the “credit vetting stage,” Subsequently, such information is absent from the Respondents’ DA Table. Questions that the Applicant insists are necessary, include “*Sir/Madam, what are your actual living expenses?*” or “*Are there any other living expenses that you pay each month?*”, “*Do you foresee any further living expenses arising next month that we have not asked you about?*”.

47. The Applicant argues that using the completed Regulation 23A(11) questionnaire to motivate a departure from MENT is unlawful and amounts to prohibited conduct.

### **THE RESPONDENT’S ARGUMENT**

48. The primary matter in dispute concerns how Direct Axis dealt with the consumers’ living expenses, particularly the application of Regulation 23A(11) when assessing prospective consumers’ financial means and obligations.

49. Concerning Pillay, the Respondents argue that his credit agreement was the subject of an application to the Tribunal for a debt re-arrangement order by consent, which was granted on 7 May 2020. The issue regarding the alleged recklessness of Pillay’s credit agreement is, therefore, *res judicata*.

50. About the other four credit agreements, the Respondents motivated their practice of determining expenses as follows.

### **The alleged “standardized” application of Regulation 23A(11)**

51. The Respondents argue that the Applicant did not provide any evidence to support its allegation that Direct Axis failed to ensure that the consumers understood and appreciated the credit agreements’ risks, costs, and obligations before concluding. To this extent, the Applicant’s submission is limited to its opinion and constitutes inadmissible hearsay.
52. The Respondents dispute the allegation that Direct Axis, in violation of Regulation 23A(10) read with Regulation 23A(11), “*routinely accepts living expenses lower than the minimum set by the minimum expense norms table.*” It further disputes the allegation that Direct Axis is guilty of “*a continued, systemic abuse of the Regulation 23A(11) questionnaire...*” or that Direct Axis uses the Regulation 23A(11) “*questionnaire as the default assessment tool.*”

### **The merits of the complaint**

53. The Respondents argue that Direct Axis’ application of Regulation 23A, particularly insofar as it concerns the determination of the consumer’s monthly living expenses, complies with the NCA and the rules; and that Direct Axis does not use the exception in Regulation 23A(11) *by default* or *as a standardized process* as Summit alleges.

### ***Direct Axis’ application of Regulation 23A(11)***

54. According to the Respondents, regarding Smith, Modipa, Mmatli, Duma-Mtolo, and Moeketsi, living expenses below the prescribed minimum were not considered

when affordability was determined. The Respondents used the prescribed Form 48 to document the living expenses as provided by the consumers. They utilized the Regulation 23A(11) questionnaire where living expenses provided by the consumers were lower than the minimum expense norm table.

55. The Respondents argued that, in terms of Form 48 of the Regulations, living expenses are made up of accommodation, transport, food, education, medical, water and electricity, and maintenance expenses.
56. The Applicant does not dispute the completion of Form 48 but differs in how Direct Axis interprets the information provided by the consumers. According to the Respondents, the interpretation of the information supplied by consumers is lawful and reasonable. The Respondents motivated their approach by indicating that deductions may be accounted for in another line item when the consumer's ability to afford the loan applied for is assessed. The Respondents explained this by referring to expenses such as accommodation (e.g., a bond repayment), medical expenses, or travel. These expenses are frequently (i) deducted directly from a consumer's gross income by their employer or (ii) accounted for under credit bureau repayments. Accordingly, to avoid double counting, those living expenses already deducted from a consumer's gross income or taken into consideration as part of bureau expenses are not, and should not, be deducted again under the living expense line item.
57. In the case of Smith, Modipa, Mmatli, Duma-Mtolo, and Moeketsi, the *de facto* living expenses over the prescribed minimum were accordingly considered when their respective ability to afford the loan each applied for was assessed.

58. In respect of Smith:

Declared living expenses taken into	R2,250.00
Accommodation costs deducted under	R8,417.00
debt repayment obligations	
Total living expenses taken into account.	<b>R10,667.00</b>

Which is more than MENT R3,972.38.

59. In respect of Modipa:

Declared living expenses taken into	R500.00 account.
Accommodation costs deducted under	R8,617.00
debt repayment obligations	_____

Total living expenses taken into account.	<b>R9,117.00</b>
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60. Which is more than MENT R3,353.78.  
In respect of Mmatli:

Declared living expenses taken into	R1,000.00 account.
Accommodation costs deducted under	R5,866.00
debt repayment obligations	_____

Total living expenses taken into account.	<b>R6,866.00</b>
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Which is more than MENT R4,972.88.

61. In respect of Duma-Mtolo:

Declared living expenses taken into	R2,250.00 account.
Accommodation costs deducted under	R5,000.00
debt repayment obligations	_____

Total living expenses taken into account.	<b>R7,250.00</b>
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Which is more than MENT R3,696.21.

62. In respect of Moeketsi:

Declared living expenses taken into	R500.00 account.
Accommodation costs deducted under	R2,465.00

debt repayment obligations

Total living expenses taken into account. **R2,965.00**

Which is more than MENT R1,878.88.

63. The Respondents argue that the above examples outline that expenses were in all instances above the MENT. Accordingly, the examples do not support any argument relating to the exception to be applied in terms of Regulation 23A(11). Regulation 23A(11) was not used and the Respondents, therefore, argue that these cases are not “*examples*” of how Regulation 23A(11) is applied by Direct Axis.
64. Regarding those instances where living expenses paid for using a credit card were excluded from the living expense deduction, the Respondents argue that these were excluded insofar as credit card debt repayment was already deducted under debt repayment obligations in the circumstances of the particular consumers. Removing the same debt again under living expenses would amount to double counting.
65. According to the Respondents, it is only in respect of Molokwane, Pillay, and Fortuin that living expenses lower than the prescribed minimum were used. These are the matters before the Tribunal where Regulation 23A(11) was used.
66. More particularly, during the credit vetting phase, Molokwane, Pillay, and Fortuin represented to Direct Axis that their living expenses were *lower* than the prescribed minimum due to these being paid for in whole or in part by a spouse, parent, or employer. Based on their submissions, Regulation 23A(11) was used.
67. The Respondents argued that neither the NCA nor its Regulations require credit providers to verify or obtain any documentary proof concerning a prospective consumer’s living expenses. According to the Respondent, Regulation 23A(11) allows a credit provider, on an exceptional basis, where justified, to “*accept the*

*consumer's declared minimum expenses which are lower than those set out in table 1", provided only that the consumer completes the questionnaire. The Respondents submitted that a reasonable or practicable assessment procedure does not require a credit provider to verify a prospective consumer's living expenses independently.*

## ANALYSIS

68. The determination of whether any of the credit agreements before the Tribunal are reckless is inextricably tied up with the decision by Direct Axis' assessment of the selected consumers' monthly living expenses. Save in respect of Pillay, who had been placed under debt review, a finding of reckless lending about Smith, Modipa, Mmatli, and Moeketsi will follow if the Tribunal finds the affordability assessment has not been properly conducted.

### The proper interpretation of Regulation 23A(11)

69. Regulation 23A(8) – (12), which is headed "*Criteria to conduct an affordability assessment*," stipulates:

#### ***'Existing financial obligations***

(8) *A credit provider must calculate the consumer's existing financial means, prospects, and obligations as envisaged in sections 78 (3) and 81(2)(a)(iii) of the Act.*

(9) *The credit provider must utilize the minimum expense norms table below, broken down by monthly gross income when calculating the existing financial obligations of consumers.*

(10) *The methodology in the table requires for—*

*(a) credit providers to ascertain gross income;*



- (b) *statutory deductions and minimum living expenses to be deducted to arrive at a net income, which must be allocated for payment of debt installments; and*
- (c) *when existing debt obligations are considered, the credit provider must calculate discretionary income to enable the consumer to satisfy any new debt.*

**Table 1: Minimum Expense Norms**

<b>Minimum</b>	<b>Maximum</b>	<b>Minimum monthly Fixed Factor</b>	<b>Monthly Fixed Factor = % of Income Above Band minimum</b>
R0.00	R800.00	R0.00	100%
R800.01	R6 250.00	R800.00	6.75%
R6 250.01	R25 000.00	R1 167.88	9.00%
R25 000.01	R50 000.00	R2 855.38	8.20%
R50 000.01	Unlimited	R4 905.38	6.75%

(11) *The credit provider may, however, on an exceptional basis, where justified, accept the consumer's declared minimum expenses which are lower than those set out in table 1 provided the questionnaire set out in the Schedule, as issued from time to time, is completed by the consumer or joint consumers.*

(12) *When conducting the affordability assessment, the credit provider must—*

- (a) calculate the consumer's discretionary income;*
- (b) take into account all monthly debt repayment obligations in terms of credit agreements as reflected on the consumer's credit profile held by a registered credit bureau; and*
- (c) take into account maintenance obligations and other necessary expenses.'*

70. It is trite that the NCA does not prescribe the circumstances that will amount to “exceptional circumstances”, as referred to in Regulation 23A(11). Therefore, the credit provider can determine which circumstances necessitate the application of Regulation 23A(11). Further, obtaining actual minimum expenses from the consumer does not necessarily equate to the automatic and exclusive use of such information.
71. The courts have recognized that it is impossible to lay down precise rules as to what circumstances are to be regarded as exceptional or what constitutes “*an exceptional basis, where justified*.” Each case must be decided on its own facts. It has been said that an exceptional basis would be something out of the ordinary and unusual in nature. It must arise out of or be incidental to the particular circumstances of the specific consumer concerned.<sup>4</sup>
72. In the credit agreements at hand, Direct Axis convinced the Tribunal that it tried to determine whether exceptional circumstances existed, and it only utilized declared minimum expenses to the extent that an exceptional basis was determined. On the evidence presented regarding the consumers in question, the Tribunal finds that Direct Axis only used minimum expenses declared where the consumers were assisted by regular payments by third parties. The Applicant acknowledged that third-party payments would constitute exceptional circumstances but insisted that

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<sup>4</sup> *Ntlemenza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) para [37].

such third-party payments must be verified. According to the Applicant, failure to verify such would constitute prohibited conduct.

73. The Applicant did not convince the Tribunal that there is a legal obligation to verify thirdparty payments. The form referred to in Regulation 23A(11) requires a consumer to detail how expenses are paid. To insist on applying the minimum expense norm table in these circumstances (i.e., to insist on applying a fictional living expense amount that is higher than what, in truth, are the consumer's living expenses) may result in depriving such a consumer unfairly of credit, where they can afford the credit applied for.
74. However, if consumers are selective with the truth regarding actual expenses, and the granting of credit is subsequently resulting in over-indebtedness, the consumer is responsible for such over-indebtedness. The legislation does not protect the consumer when the latter provides false information to the credit provider, nor does the legislation expect the credit provider to verify whether a consumer is telling the truth. By consequence, the credit provider is not liable for credit extended based on false information provided by consumers, nor is there a legislative requirement that compels the credit provider to check the correctness of information provided by consumers. The NCA does not require it, and it is not reasonable or practical to expect credit providers to verify consumers' living expense representations. Credit providers can rely on consumers' terms concerning their living expenses.
75. In the circumstances of this particular complaint, no evidence was put before the

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Tribunal that the consumers sampled provided false information to the Respondents. The Applicant's submission of affordability is made on the assumption that the consumers' declarations of actual expenses must have been false or at the very least unreliable unless the credit provider can provide proof that it verified the reliability of the consumers' declared expenses. The Tribunal does not find any basis in law for such an argument.

76. The NCA and its Regulations envisage an appropriate balance between credit providers' and consumers' obligations to maintain a competitive and sustainable credit market and industry.

77. In *Sebola and Another v Standard Bank of South Africa Ltd*<sup>5</sup>, the Constitutional Court, considering the correct approach to the interpretation of the NCA, held:

*"The main objective is to protect consumers. But in doing so, the Act aims to secure a credit market that is 'competitive, sustainable, responsible [and] efficient'. And the means by which it seeks to do this embrace 'balancing the respective rights and responsibilities of credit providers and consumers'. These provisions signal strongly that the legislation must be interpreted without disregarding or minimising the interests of credit providers. So I agree with the Supreme Court of Appeal that —*

*'(t)he interpretation of the NCA calls for a careful balancing of the competing interests sought to be protected, and not for a consideration of only the interests of either the consumer or the credit provider'. [Footnote omitted.]*

*I also agree that 'whilst the main object of the Act is to protect consumers, the interests of creditors must also be safeguarded and should not be overlooked'."*

78. So too in *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others*,<sup>6</sup> the Constitutional Court held:

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<sup>5</sup> 2012 (5) SA 142 (CC) at para 40. <sup>66</sup>  
2016 (6) SA 596 (CC).

*“[17] The National Credit Act seeks to protect consumers by a number of means including the promotion of responsible borrowing that avoids overindebtedness, prevention of reckless credit-granting by credit providers, encouragement of consumers to fulfil their financial obligations and provision of a consistent and accessible system of consensual resolution of disputes arising from credit agreements.*

*[18] But the National Credit Act does not only protect and advance the interests of debtors. It also promotes the interests of credit providers.*

*For it may only achieve the goal of a 'fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market', if the Act strikes the right balance in advancing the rights of consumers on the one hand and credit providers' interests, on the other.”*

79. Amongst others, credit providers' obligations are balanced by the responsibility of prospective consumers to be honest with credit providers. In section 81(1) of the NCA, a prospective consumer applying for credit is under a positive obligation to *“fully and truthfully answer any requests for information made by the credit provider as part of the assessment”* required by the section.
80. Similarly, Regulation 23A(6) stipulates that a *“consumer must accurately disclose to the credit provider all financial obligations to enable the credit provider to conduct the affordability assessment.”* Suppose a consumer fails to do so, which materially affects the credit provider's ability to make a proper assessment. In that case, such failure constitutes a complete defence to an allegation that a credit agreement is reckless (section 81(4) of the NCA).
81. Section 82 of the NCA stipulates that a credit provider may determine for itself the evaluative mechanisms or models and procedures to be used in meeting its assessment obligations under section 81 of the NCA, provided that any such tool,

model or process results in a fair and objective assessment and must not be inconsistent with the affordability assessment Regulations made by the Minister.

82. The Tribunal, therefore, finds that, save where the Regulations expressly require a credit provider to verify and absent indications that would reasonably alert a credit provider to the contrary, a credit provider is entitled to accept the veracity of the information provided to it by or on behalf of a prospective consumer.<sup>6</sup>
83. Section 81(2) of the NCA places the burden on credit providers no higher than “*taking reasonable steps to assess*” the proposed consumer’s debt repayment history and existing financial means, prospects, and obligations. Regulation 23A(3) similarly stipulates that a credit provider “*must take practical steps*” to assess the consumer’s discretionary income.
84. The “*reasonable*” and “*practical steps*” required of a credit provider have been set out expressly by the legislature in Regulation s 23A, referred to as the “*affordability assessment Regulations*.” In respect of existing debt repayment obligations, a credit provider is required to verify those obligations against the consumer’s credit profile held by a registered credit bureau (Regulation 23A(12(b))).
85. In the circumstances of the credit agreements granted to the consumers in this application, the Tribunal finds that Direct Axis was entitled to rely on the information the consumers provided regarding their living expenses and was not obliged to verify the same.
86. Finally, there is no evidence that Summit or any of the consumers referred to in the complaint dispute the accuracy of the consumers’ representations regarding their living expenses when they applied for the loan agreements. In the circumstances, there is no justification for a conclusion that any of the credit agreements concluded with Smith, Modipa, Mmatli, Moeketsi, and Pillay were reckless.

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<sup>6</sup> *Horwood v FirstRand Bank Ltd* 2011 JDR 1151 (GSJ) at [14].

87. The Applicant did not convince the Tribunal that Direct Axis applies the exception provided in Regulation 23A(11) generally, i.e., *by default*, in every credit application it receives and not on an exception basis. The proprietary algorithm used by Direct Axis (the DA Table) to calculate a default living expense amount is found to be lawful in terms of section 82(1) of the NCA. Further, based on only three cases where Direct Axis was required to comply with Regulation 23A(11), the attack on the

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Respondents is found unwarranted.

88. The Tribunal finds that questions relating to a consumer's living expenses are relevant to any proper affordability assessment, and asking such questions does not equate to applying the exception in Regulation 23A(11) as a default. The Applicant could not provide evidence of such a "default practice" to the Tribunal.

## FINDING

89. The Tribunal finds that the Respondents took steps to determine the consumers existing financial means by using information supplied by the consumers personally.
90. The Tribunal finds that Direct Axis calculated the *financial means, prospects, and obligations* of consumers in compliance with the NCA and its Regulations. Further, based on the evidence before the Tribunal, there is no supporting evidence that Direct Axis solely relied on detailed information to the exclusion of others. The evidence before the Tribunal is that Direct Axis obtained comprehensive information and considered everything the consumers provided. The statutory obligation is that where the consumer's declared expenses are lower than the MENT, such costs can be considered if the questionnaire set out in the Schedule, as issued from time to time, is completed by the consumer. The

questionnaire was completed in all the examples before the Tribunal and, therefore, complied with the statutory prescript.

91. In the Tribunal's view, the Applicant failed to provide a basis in law that requires the credit provider to independently verify the information a consumer provides regarding their living expenses under Regulation 23A(11).
92. Direct Axis used its standard credit application system and undertook an assessment of the Applicant's financial circumstances as required by section 81(2).
93. Based on the information provided by the consumers and supplemented by the Respondents from its credit bureau records, the outcome of the assessments demonstrated that the consumers had sufficient financial means to be granted a loan. The figures used in the evaluation were as they existed when the credit agreements were concluded.
94. Section 81(4) provides that it is a complete defence to an allegation that a credit agreement is reckless where there has not been a complete and truthful provision of information by a consumer as part of the required affordability assessment process.
95. The Applicant was of the opinion that the consumers did not consistently or constantly disclose all expenses, but this opinion was not substantiated by documentary proof or any other evidence. Also, the Applicant argued that a zeroexpense response necessitates additional effort by the credit provider to obtain actual costs and verify such. The Tribunal finds that the Act does not place such an additional burden of verification on the credit provider. On the contrary, Section 81(1) the Act establishes a special obligation on the consumer to act truthfully, which is compulsory.
96. The Act allows a credit provider to rely entirely on the disclosures made by the consumer. Suppose an untruthful or wrong exposition is made regarding the



consumer's expenses, and the consumer becomes over-indebted. In that case, the credit provider is not automatically seen to have contravened section 81 or Regulation 23(A)(10).

97. Further, in the circumstances of the consumers in this matter, the Applicant did not convince the Tribunal that the credit providers failed to take steps to determine the consumer's debt repayment history as a consumer under credit agreements and as contemplated in section 81(2)(a)(ii) of the NCA. On the evidence before the Tribunal, the credit providers considered the consumers' credit obligations in line with Regulation 23A(13)(a) of the NCA.
98. There is no evidence to suggest that the consumers did not understand and appreciate the risks and costs of the proposed credit and their rights and obligations under the credit agreements.

## **CONCLUSION**

99. Having considered the party's submissions and the evidence before the Tribunal, the Tribunal finds that the Direct Axis complied with the NCA requirements of a credit provider when deciding to grant credit to the consumers.

Accordingly, the credit agreements entered between the Direct Axis and the consumers were not reckless.

## **ORDER**

100. Accordingly, the Tribunal makes the following order –
- 100.1. The Applicant's application is dismissed, and
- 100.2. There is no order as to costs.

THUS DONE IN CENTURION ON THIS 17<sup>th</sup> DAY OF NOVEMBER 2022.

[signed]

**Dr. MC Peenze**

Presiding Tribunal Member

Adv C Sassman (Tribunal Member) and Prof K Moodaliyar (Tribunal Member) concur.

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

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