

IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION

Case number: NCT/35378/2015/140(1)

In the matter between:

NATIONAL CREDIT REGULATOR

APPLICANT

and

EDCON HOLDINGS LIMITED

RESPONDENT

Coram:

Adv J Simpson – Presiding Member

Adv FK Manamela – Member

Mrs H Devraj – Member

Date of Hearing - 15 February 2017

JUDGMENT AND REASONS

INTRODUCTION

The Pre-hearing

At the pre-hearing of this matter it was agreed that the matter would proceed on the merits of the referral and that heads of argument will be confined to the merits only. The arguments on sanction will follow later after the Tribunal had made a ruling on the merits. The parties agreed that the Applicant will provide a *list of documents indicating consumers who have purchased the club or membership for cash; a sample of separate club or membership sale agreements concluded with consumers; and the terms and conditions for club sale agreements* that they wish the Respondent to consider providing, and that the Respondent will respond accordingly to the request by the Applicant. In response, the Respondent furnished an Excel spreadsheet of customers containing customer raw data reflecting details of customers who purchased Club for cash. No separate Club sale agreement was concluded. The Respondent provided various

"blister packs" containing the terms and conditions of Club, which the customer received over the counter when purchasing various Club products. There are, according to the Respondent only Edgars Club and Jet Club, with different categories underneath them. This judgment will address the issues raised above. Where I have underlined texts, I do so for purposes of my emphasis only.

The Parties

APPLICANT

1. The Applicant is the **NATIONAL CREDIT REGULATOR** ("the NCR" or "the Applicant"), a juristic person established in terms of section 12 of the National Credit Act, 2005 ("the Act"), whose offices are situated at 127 Fifteenth Road, Midrand, Gauteng.
2. The Applicant was represented at the hearing by Ms N Magolego, Senior Legal Advisor employed by the Applicant.

RESPONDENT

3. The Respondent is **EDCON HOLDINGS LIMITED**, an entity registered as such in terms of the laws of the Republic of South Africa, and a registered credit provider with registration number NCRCP82, whose principal address is Edgardale, Crown Mines, *alternatively*, Edcon Place, Laub Street, New Centre, Johannesburg, ("hereinafter referred to as the Respondent"). The Respondent was represented by Advocate Chohan SC, instructed by Werksmans Attorneys.

THE APPLICATION TYPE AND RELIEF SOUGHT

4. This is an application in terms of Section 140(2) (b) of the Act for an order declaring that:
 - 4.1 the Respondent is in repeated contravention of specific sections of the Act, namely sections 90; 100; 101; and 102(1);
 - 4.2 engages in prohibited conduct by contravening the said sections;
 - 4.3 be directed to refund all the consumers *who were from 2007 to date*, charged club and membership fees;
 - 4.4 conducts, at its cost, an independent audit of all its consumers who were charged club and membership fees by the Respondent since 2007 to date, in order to identify those consumers who are entitled to refunds, which report must be submitted to the Applicant and Tribunal within 90 days of the order, containing the following

information- (i) full details of the consumers; (ii) club and membership fee and the amount thereof for each consumer; and (iii) the statement of account for each consumer to date;

Further that the Tribunal:

- 4.5 issues an order declaring all the clauses or provisions relating to the club and membership fees in the credit agreements of consumers with the Respondent referred to in the investigation report, unlawful;
 - 4.6 interdicts the Respondent, restraining it from, in future, charging consumers a club and membership fee;
 - 4.7 imposes an administrative fine on the Respondent in the amount equalling 10% of the Respondent's annual turnover;
 - 4.8 makes any other appropriate order required to give effect to the consumers' rights in terms of section 150(j) *[sic]*¹ of the Act.
5. The parties handed up heads of argument ("the Heads") in support of their submissions. I shall begin with the Applicant's Heads, as summarised herein below:

BACKGROUND

6. The Applicant conducted an investigation into the affairs of the Respondent and initiated a complaint on its own in terms of section 136(2) after reasonably believing that the Respondent may be flouting the provisions of the NCA, relating to the *cost of credit* and more particularly sections 100; 101; and 102 of the said Act. This investigation, the Applicant alleges, was also sparked by its investigation into the furniture retail business, where a reasonable suspicion was created that other retailers might be charging consumers club fees under the credit agreement, in contravention of the Act. The investigation was conducted by Messrs Mahobyne and Lekoko, both appointed in terms of section 25 of the Act.
7. The Applicant further alleges to have perused the Respondent's annual report for the Financial Year ending March 2015, and discovered that the Respondent has reported income generated from club fees.
8. According to the Applicant, various print media reported bad lending practices of retailers, including the charging of club fees on credit agreements.

¹ The correct citation of the provision is section 150 (i) and not (j)- National Credit Act 34 of 2005 & Regulations, reflecting the law as at 9 September 2016, Published by Juta Law.

9. The Respondent asserts that the Applicant's allegation that the club fee constitutes a cost of credit is incorrect. The Respondent submits that the club fee, is a purchase consideration for a product called "Club", which provides consumers with a basket of value added services and benefits.

SUMMARY OF THE APPLICANT'S SUBMISSION

10. At the outset, the Applicant asks the Tribunal to make the following determination: *whether or not the amount charged by the Respondent to consumers as a membership or club fee is in fact a cost of credit?*
11. The Applicant contends that the amount charged to consumers as membership or club fees, is charged as a cost of credit, and further that such a cost of credit is not one that is allowed under the Act.
12. The Applicant relies on the following provisions of the NCA to support its argument:
 - 12.1 section 100(1)(a) which provides that the credit provider must not charge an amount to or impose a monetary obligation on the consumer in respect of a credit fee or charge prohibited by the Act.
 - 12.2 section 101 (a)-(g) which provides that a credit agreement must not require payment by the consumer of any money or other consideration, except the principal debt; an initiation fee; a service fee; interest; cost of credit insurance; default administration charges and collection costs.
 - 12.3 Section 102(1) which provides that if a credit agreement is an instalment agreement, a mortgage agreement, a secured loan or 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;
 - (d) subject to section 106, the premiums of any credit insurance payable in respect of that credit agreement.
 - 12.4 section 90(1) which provides that a credit agreement must not contain an unlawful provision.
 - 12.5 section 90(2)(a)(i) which provides that a provision of a credit agreement is unlawful if its general purpose or effect is to defeat the purposes or policies of the Act.

12.6 section 90 (2)(b) that provides that a provision in a credit agreement is unlawful if it directly or indirectly purports to –

- (i) waive or deprive the consumer of a right set out in the Act;
- (ii) avoid a credit provider's obligation or duty in terms of the Act;
- (iii) set aside or override the effect of any provision of the Act;
- (iv) authorise a credit provider to- (aa) do anything that is unlawful in terms of the Act or
(bb) fail to do anything that is required in terms of the Act.

12.7 Under the heading "*the nature of a cost of credit*" the Applicant advances argument describing cost of credit under the NCA, in the following terms:

12.7.1 that the Act does not provide a direct description or definition of the words "the cost of credit". In terms of sections 101 and 102 the Act provides a closed list of cost of credit that can be levied to consumers. The Applicant attaches the contextual reading and interpretation of section 100(1) in order to determine whether or not the membership or club fee charged by the Respondent to consumers is a cost of credit. In its form, section 100 (1) provides that a credit provider must not charge an amount to or impose a monetary liability on the consumer.... Section 101(1) also deals with cost of credit, stating that: "a credit agreement must not require payment by the consumer of any money or other consideration....."

12.7.2 that section 8(3)(b) and 8(4) both describe the cost of credit as *any charge, fee or interest payable to the credit provider*. The Applicant gives the totality of all these sections it had referred to, as the best description attributed to the cost of credit, being: "*any consideration, monetary liability; amount of money levied either as a charge; fee; or interest and payable by a consumer to a credit provider under a credit agreement*". The Applicant argues that in order to determine whether or not the membership or club fee is a cost of credit, the aforementioned description must be applied to the membership or club fee charged by the Respondent to consumers. The argument goes further to say: when applying this description, the following becomes apparent-

12.7.2.1 Firstly, the membership or club fee is either a consideration, monetary liability, amount of money which is levied to consumers as a fee (membership or club fee);

12.7.2.2 Secondly, the membership or club fee is payable by consumers to the Respondent as credit provider; and

12.7.2.3 Lastly, the membership or club fee is also charged to consumers under a credit agreement.

12.7.3 The Applicant, on the basis of this argument concludes that the nature of the membership or club

fee levied by the Respondent to consumers, fits the description of a cost of credit. The issue, according to the Applicant, is that this kind of cost of credit is not a cost of credit permitted under the NCA. Credit providers can only charge consumers the cost of credit allowed under the Act. The Applicant has referred the Tribunal to authorities where such argument was upheld by this Tribunal and the Supreme Court of Appeal².

12.7.4 The Applicant makes further submissions in argument and refers to, "*Required disclosure under the credit agreement*" and states that the Act makes provision for several disclosures that must be made to consumers by credit providers, and in certain instances has prescribed the forms to be used by credit providers when making such disclosures. These are:

- pre-agreement disclosures, whose purpose is to disclose to consumers the principal debt; the rate of interest and other credit costs and the total cost of credit;³
- credit agreement disclosures where the credit agreement must disclose to consumers the cost of credit;⁴
- accounting disclosure where through a statement of account, the credit provider must disclose to a consumer, the opening and closing balance in respect of a credit agreement, the total amount debited and credited in respect of payments received, fees levied and interest accrued, *inter alia*.⁵

12.7.5 The Applicant asserts that in instances where a credit provider must use a prescribed form, Regulation 75 of the NCA, dealing with these forms, provides the following:

(1) If a prescribed form of words or expression is used in conjunction with other information in a document, the document must be designed in such a manner that the prescribed form of words or expression are:

(a) Clearly distinguishable from the other information in that document; and

² See NCR v Credit Care (Pty) Ltd NCT/7751/2013/57 (1) where the NCT ruled that section 100(1)(d) of the NCA prohibits a credit provider from charging an amount to or imposing a monetary liability on the consumer in respect of 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 the Act. In *Barko Financial Services (Pty) 415/13* the SCA upheld the Tribunal's decision of finding Barko Financial Services to have contravened the NCA by charging fees not permitted under the NCA. In both these matters the issue of charging of fees other than the fees permitted by the NCA was discussed in detail. These are clear-cut cases of prohibited conduct where fees were levied to the consumers in direct contravention of the NCA.

³ Section 92(2)(b)

⁴ Regulation 31(c), Form 20.2 of the NCA

⁵ Section 109(1)

- (b) At least as prominent, in respect of size and legibility, as the other information in that document.
- (2) If a prescribed form is used in conjunction with another prescribed form, each must clearly be distinguishable from the other;
- (3) A registrant may include its logo or letterhead on a prescribed Form, subject to sub-regulation (4);
- (4) If a form of document is prescribed by these regulations-
 - (a) It is sufficient if a person required to prepare such a document does so in a form that satisfies all the substantive requirement as to content and design of the prescribed form; and
 - (b) Any deviation from the prescribed form does not invalidate the document unless the deviation-
 - (i) fails to satisfy the requirements set out in paragraph (a);
 - (ii) negatively affects the substance of the document; or
 - (iii) is deceptive or misleading

12.7.6 Applicant submits that the fact that the Respondent disclosed the membership or club fee as cost of credit by including it both in the pre-agreement statement and quotations; the credit agreements concluded with consumers; as well as the statements of account to consumers; is conclusive proof that the membership or club fee is in fact part of the cost of credit. The Applicant argues further that one of the purposes of these disclosures is to inform consumers about the cost of credit. The Applicant asserts that the Respondent's conduct of including membership or club fees in the pre-agreement statement and quotation, affirms the fact that these fees are part of the cost of credit.

12.7.7 Further that the Respondent deviated from using the prescribed standard form for pre-agreement statement and quotation; the credit agreement and the statement of account as the Act substantively prescribed and required, but instead included information not prescribed by the Act into the prescribed forms. The inclusion of membership or club fee in the prescribed form itself, the Applicant contends, is deceptive or misleading and thus renders the Respondent's form, invalid, and constitutes prohibited conduct. The Applicant refers the Tribunal to a decision of the Supreme Court of Appeal, in the matter of *Senwes Ltd v Competition Commission of South Africa*. The Applicant

informs the Tribunal that this matter was initially not part of the referral, but claims the Tribunal is competent to make an order finding the Respondent to have engaged in prohibited conduct.

12.8 The Applicant submits that there is a rebuttable *presumption of fact* that the membership or club fee is part of the cost of credit and that the Respondent bears the onus of rebutting this presumption. And, the Applicant argues further, that if the Tribunal cannot uphold this view, then on a balance of probabilities, the Applicant claims, it has discharged this onus, that the membership or club fee is levied by the Respondent to consumers as part of the cost of credit.

12.9 The proof on a balance of probabilities, is the standard applicable in all proceedings before the Tribunal. This is in terms of section 167 of the Act.⁷ The Applicant concludes in its argument that the evidence before the Tribunal points to the conclusion that it is more than probable that the membership or club fees are levied as cost of credit, and such a fee is not one of the allowed fees to be levied to consumers.

THE RESPONDENT'S SUBMISSION

13. The Respondent raises sharply, eleven critical points in defence to the Applicant's assertion that the Respondent charges membership or club fees as cost of credit. According to the Respondent the primary enquiry relates to whether or not the club fee charged by Edcon represents the consideration payable for a product or whether it is, as the Regulator assumes, a cost of credit. These points are not the totality of the Respondent's argument, but are highlighted saliently in the body of this judgment in order to deal with them at the outset. These points are the following:

13.1 that the Club fees constitute a purchase consideration for a product called the *Club product* which provides consumers with a basket of value added services and benefits which a customer receives in return for the payment, known as Club fee;

13.2 that Edcon is able to make the benefits and services contemplated by the Club product available to its customers as a result of separate agreements concluded between Edcon and various third party service providers;

13.3 that the Regulator bears the onus of demonstrating on the balance of probabilities that the Club fee represents a cost of credit and is not in respect of any product that is being sold by Edcon to consumers;

13.4 that the Regulator has simply "noted" certain factual allegations made by Edcon in its answering

⁷ The requirement of the balance of probabilities is that the case must be such that, on preponderance, it is probable the particular state of affairs existed.

affidavit, meaning that the Regulator does not deny these allegations and whilst the Regulator has not admitted them, they are not contentious issues. In that regard, they may, according to the Respondent, be accepted as evidence before the Tribunal;

13.5 that Edcon offers various products for sale. These products include clothing and accessories; insurance; air time and other services. One of these products is, according to the Respondent, known as Club;

13.6 that the benefits to which a consumer is entitled on the purchasing of a Club membership such as an Edgars Club VIP, range from the delivery of a free Edgars magazine to emergency roadside assistance; savings of various percentages of third party service providers such as Ster Kinekor, SAA, Planet Fitness, Tempest Car Hire, Funeral benefits ranging from R5, 000.00 to R10, 000.00. The Club product, according to the Respondent, is sold through a store card;⁸

13.7 that the Club fee is due and payable in full every month, in respect of each month during which a customer remains a Club member, with the benefits accruing to members on a monthly basis, the Respondent cited the example of the funeral product;⁹

13.8 that the Club fee is not payable over a fixed period of 24 months nor any other fixed period;

13.9 that when a customer buys the Club membership product, a pre-agreement statement and quotation is produced in store at the point of sale. The pre-agreement statement and quotation contains a clause that reads:

"Club does not form part of the credit agreement";

13.10 that Edcon's Standard Terms and Conditions relating to its revolving credit facility do not contain specific clauses dealing with the Club fee. This, the Respondent argues, is due to the fact that the Club fee is not part of the credit agreement;

13.11 that the Club product has been on offer dating back many years, and that consumers have been billed club fees in instances where they have elected to purchase the Club product, and that Edcon had always drawn this distinction between customers who wanted it, and those who did not. Further that the club fee had not been charged across the board to customers who had accounts with Edcon.

14 As mentioned, these points form the crux of the Respondent's defence raised in argument. The Respondent avers in its lengthy argument that the onus now shifts to the Applicant, to show on a balance of probabilities that the club membership fee constitutes cost of credit, and that the club is not a product linked to a basket of products benefitting Edcon's customers. The Applicant must discharge this onus and demonstrate to the Tribunal that the

⁸ Pp 14-17 of Respondent's Answering Affidavit read with p 553 of Respondent's Affidavit

⁹ Para 26, p17 of Respondent's Answering Affidavit; p554; para 44 of Respondent's Replying Affidavit

Respondent has failed to prove that the club or membership fee is linked to a product offering a basket of benefits to consumers.¹⁰ The demonstrable assertion by the Respondent, of this fact, has not been adequately challenged.

THE "FACT IN ISSUE" TO BE DECIDED

15 The Tribunal is required to determine the following:

15.1.1 whether or not the Club or membership fee charged by Edcon represents the consideration payable for a product called Club, or whether such a fee charged by Edcon to consumers as club or membership fee is in fact a cost of credit or in any way prohibited by the NCA.

16 Section 100 of the Act generally prohibits the charging or imposing of amounts or 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, or commission, expense or other amount payable by the credit provider to a third party in respect of a credit agreement, except as contemplated in section 102 or elsewhere in the Act.

17 Section 101 - Cost of Credit, provides:

- (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)...
 - (ii)...
 - (c) A service fee, which-
 - (i)...
 - (ii)...
 - (iii)...
 - (d) Interest, which-
 - (i)...
 - (ii)...

¹⁰ See *Selamolele v Makhado* 1988(2)SA 372(V) at 374J-375B. The approach to the question whether the onus has been discharged was dealt with as follows: "Ultimately the question is whether the onus on the party who asserts a state of facts, has been discharged on a balance of probabilities and this depends not on a mechanical quantitative balancing of the pans of scale of probabilities but, first, on a qualitative assessment of the truth and/or inherent probabilities of the evidence of witnesses and secondly, an assessment of which of two versions is the more probable"

- (e) Cost of any credit insurance provided in accordance with section 106
- (f) Default administration charges, which-
 - (i)...
 - (ii)...
- (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

CONSIDERATION OF FACTS AND THE APPLICABLE LAW

18 The disputed issue in this matter is the Club or membership fees. Are these fees to be considered a cost of credit, or are they linked to a purchase consideration of a product with benefits to consumers? The Tribunal, in determining these factors will have to rely on evidence presented by the parties by way of affidavits. The problem arises when there is a dispute of fact which unfortunately cannot be dealt with by calling oral evidence. In this matter, the dispute arises in the application of the law to the facts. The facts are not in dispute. The matter has to be adjudicated on the strength of submissions presented in documents and the parties have both presented strong arguments in support of their submissions in their affidavits and heads of argument.

Consideration of the Respondent's submissions

19 I need to consider clinically the Respondent's answering affidavit and later turn to the Applicant's reply thereto.

20 These I summarize as follows:

20.1 A purchase consideration for a Club product is payable monthly in arrear, in full in respect of each month during which the customer remains a Club member. This Club charge or fee is not part of the cost of credit in respect of the purchase of items on credit, or in consequence of entering into a credit agreement, but the cost of the *merx* which the customer receives as a consequence of purchasing the Club product. These products are: **Edgars Club VIP; Edgars Club Life; Edgars Club Classic; and Jet Club.** The membership to these clubs can be cancelled by the customer at any time, or can be suspended if not paid for in full for 90 days, in which respect the customer would not be entitled to a product or benefit. For each category of Club membership, different charges are paid for benefits (products) flowing from these club memberships;

20.2 Club charges are debited to the customer's credit facility and in accordance with the provisions of Section 8 (3) of the NCA, as they constitute the purchase price for the purchase of an item called, Club membership. Section 8(3) states:

"an agreement, irrespective of its form but not including an agreement contemplated in subsection (2) or subsection 4(6)(b), constitutes a credit facility, if in terms of that agreement-

- (a) *a credit provider undertakes-*

 - (i) *to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer, or on behalf of, or at the direction of, the consumer, and*
 - (ii) *either to-*

 - (aa) *defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of the amount contemplated in sub paragraph (i); or*
 - (bb) *bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (i); and*
 - (b) *any charge, fee or interest is payable to the credit provider in respect of-*

 - (i) *any amount deferred as contemplated in paragraph (a) (ii) (aa)*
 - (ii) *any amount billed as contemplated in paragraph (a)(ii) (bb) and not paid within the time provided in the agreement.*
- 20.3 Club charges accrue to Edcon as the seller of the Club product and this is explicitly authorized by a statutory provision of the NCA, to charge customers for Club membership, as section 8(3) above provides;
- 20.4 The reason why the Respondent's customers chose to pay for Club, is because they have chosen to purchase that product and to receive the benefits of the services contemplated by the Club product which is not received by customers who do not purchase Club product;
- 20.5 Club charges, just like the purchase price for all of the Respondent's products, are charged to the relevant customers, via the revolving credit facilities with the Respondent, which facilities are accessed with Private Label Store Card, which is used to pay for purchases similar to a credit card issued by a bank. The customer applies for a credit facility either in store or online by providing application data. Once an application passes the credit scorecards and affordability test, a credit facility is approved and a credit limit determined by the Respondent and the Private Label Store Card (*which is an enabling, convenient mechanism used to pay for what you have purchased*) must then be issued and collected by the customer in-store;
- 20.6 Customers who choose not to purchase the Club product do not have the basket of benefits accruing to them;
- 20.7 The Club charge is due and payable in full every month, in respect of each month during which the customer remains a Club member (as it is added onto the account instalment) and is not amortised over a period. The primary reason for this is that the Respondent has to pay various service providers

for the benefits accruing to Club members in respect of which payment has to be made monthly in full, similar to an insurance product;

20.8 The customer's Club membership gets suspended if payments fall into arrears, and gets automatically reinstated with effect from the date when the account is made current again, confirming the fact that Club is distinct from other charges / costs or fees required to be paid as cost of credit. To this end, it is not uncommon for customers to have only Club charges due on their accounts, while having a nil balance in respect of goods purchased on credit;

20.9 Historically, Club was offered and merchandised in-store to cash customers in the form "Blister Packs" where Club charges could be paid in cash in-store on a monthly basis or via a debit order. However it was later discontinued as the cash option from stores in 2013, because it was mediocre. It has since then been paid for via the Private Label Store Card¹¹. The Respondent argues that for the Applicant to suggest that Club changed from being a separate and self-standing product to simply being a "cost of credit", merely by virtue of the payment mechanism for Club being changed from cash to card, is illogical and incorrect;

20.10 Club has always been popular with account-holders, as the single monthly charge is convenient and forms part of the customer's total interaction with the Respondent. The Edcon Account Billing Platform enables customers to receive one consolidated statement for all merchandise purchases like Club; financial services; and airtime products, with a single amount payable by the statement's due date;

20.11 The Respondent asserts that the fact that Club as a product, and other products like, airtime and insurance are purchased via a revolving credit facility, does not make the purchase price for these products part of cost of credit. The purchase of these products is debited to the customer in accordance with the provisions of section 8 (3) of the NCA;

¹¹ The Respondent handed up the Blister Packs during the hearing. Copies of these packs are also part of the bundle of documents. The Respondent also provided the spreadsheet as part of the documents used in the hearing, setting out the customers who had purchased the Club product in cash. The Applicant, notwithstanding such evidence, denied this assertion by the Respondent in its Replying affidavit, paragraphs 62 to 62.7. This is tantamount to a bare denial. Section 8(3) states:

"an agreement, irrespective of its form but not including an agreement contemplated in subsection (2) or subsection 4(6)(b), constitutes a credit facility, if in terms of that agreement-

(a) a credit provider undertakes-

(i) to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer, or on behalf of, or at the direction of, the consumer, and

(ii) either to-

(aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of the amount contemplated in sub paragraph (i); or

(bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (i); and

(b) any charge, fee or interest is payable to the credit provider in respect of-

(i) any amount deferred as contemplated in paragraph (a) (ii) (aa)

(ii) any amount billed as contemplated in paragraph (a)(ii) (bb) and not paid within the time provided in the agreement.

- 20.12 Club charges form part of the principal debt owing in terms of the revolving credit facility, and these charges are paid to the Respondent who provides the product to its customers. This, the Respondent argues, is proof enough that Club is not *inextricably* linked to the credit agreements, but a stand-alone credit facility.

Consideration of the Applicant's submissions

- 21 I now turn to the Applicant's Replying affidavit, one after another, in a serial response to the Respondent's Answering Affidavit. The Applicant avers the following:

21.1 That it generally persists in its assertion that the Act prohibits the Respondent from charging consumers a club fee on a credit agreement, irrespective of whether or not the Respondent is a credit provider under that credit agreement. The Respondent's characterization of club fee as a "consideration" or "purchase price" is opportunistic and thus runs contrary to the express wording of the credit agreements. The credit agreements annexed to the referral, explicitly state that the fee is a club fee, and this fee is not described in the credit agreements as a "consideration" or the "purchase price" for the club membership.

21.2 The Applicant denies the Respondent's assertion [*that the Club charges are debited to the customer's credit facility and in accordance with the provisions of Section 8 (3) of the NCA, as they constitute the purchase price for the purchase of an item called, Club membership*]
The Applicant then states that the club fee is part of the cost of credit which consumers are paying under credit agreements to the Respondent. The Applicant repeats the same assertion as above that: "The Respondent's characterization of club fee as a "consideration" or "purchase price" is opportunistic and runs contrary to the express wording of the credit agreements. The credit agreements clearly describe the club fee as a fee and nothing else. The Respondent cannot import words or descriptions into the credit agreements which are not there"

21.3 The Respondent's customers purchase items from the Respondent on cash and credit basis. If indeed the Club is a product available for purchase by the Respondent's customers, the Respondent should have produced evidence indicating that customers have purchased this Club for cash. Surely such crucial evidence should have been brought forward by the Respondent in order to its allegation that the Club is indeed a product available for purchase by the Respondent's customers. ¹² The evidence the Applicant is referring to was adduced at the hearing. The Applicant did not attempt to contradict

¹² It is noted that the replying affidavit was deposed to in June 2006, before the parties attended the pre-trial hearing. The parties had agreed at the pre-hearing, that the Applicant will provide a list of documents indicating consumers who have purchased the club or membership for cash; a sample of separate club or membership sale agreements concluded with consumers; and the terms and conditions for club sale agreements that they wish the Respondent to consider providing, and that the Respondent will respond accordingly to the request by the Applicant. In response, the Respondent furnished an Excel spreadsheet of customers containing customer raw data reflecting details of customers who purchased Club for cash. This evidence was accepted into the record of the hearing of this matter.

this piece of evidence orally at the hearing or in its heads of argument. The evidence, to date remains uncontroverted.

- 21.4 The Applicant notes the contents of the Respondent's paragraphs 13 to 19 of its Answering Affidavit. The contents of these paragraphs are the gist of what the Club and its benefits entail. These paragraphs are the very reasons why the matter is before the Tribunal. The Applicant does not deny or admit these assertions by the Respondent, but merely notes them. What this means is that these submissions are not in dispute and if they are not expressly denied, according to the Tribunal Rules, they are admitted.
- 21.5 The club fees are cost of credit whether or not the Respondent's customers exercised an option to purchase the club. They remain prohibited by the Act. The Respondent is not entitled to debit the consumers' credit facilities with the amount of the club fee.
- 21.6 The Applicant denies the fact that customers who did not choose the Club option do not enjoy benefits associated with the Club product¹³. Instead, the Applicant persists in its assertion that the Club fees have caused consumers huge financial loss and over-indebtedness. There is no evidence to support this presumption.
- 21.7 The Applicant denies the Respondent's assertion that the Club charges are not amortised to the extent that they are not cost of credit, and argues that the Club charges are inextricably linked to the Revolving Credit Facility, and are incorporated into the pre-agreement statement and quotation. Once this charge/ fee appears in that space, and forms part of the monthly statement of account sent to consumers by the Respondent, that, according to the Applicant, is classified as cost of credit
- 21.8 The Applicant denies the Respondent's averments that the Club membership gets suspended if in arrears for over a period of ninety days, at which point the Respondent stops charging the customer and the latter stops receiving the Club product. The Applicant persists in its stance that Club fee is a cost of credit and it denies the accuracy of the Respondent's statement, as unsubstantiated and lacking evidence.¹⁴
- 21.9 The Applicant simply denies the contents of the Respondent's submission at paragraph 62 in entirety (subparagraphs 62.1 to 62.7 thereof) by merely stating that " the Club fees are part of the cost of credit and the credit agreement; and are charged to consumers as a consequence of them entering into credit agreements and are inextricably linked to credit agreements"¹⁵

¹³ The Applicant is put to the proof of this. This is an obvious fact. If the customer does not choose Club, then there is no way in which they can enjoy the benefits. The Applicant's reply is a bare, unsubstantiated denial. See paragraph 15 of the Respondent's Answering affidavit. The Respondent gives full detail of packages that customers who have taken up the Club, enjoy at different levels of club categories.

¹⁴ The evidence this Tribunal has, is on affidavit. If the Applicant denies the Respondent's claims, then it is put to the proof thereof. The accuracy of the Respondent's evidence could have been tested and/ or contradicted by the Applicant's investigation report. There is no evidence in the report to challenge the Respondent's assertion.

- 21.10 The Applicant denies that Club has been popular with account holders.¹⁶
- 21.11 The Applicant denies the applicability of section 8 (3) in agreements constituting a credit facility.¹⁷
- 21.12 The Applicant further denies that Club is a stand-alone product, delinked from the credit agreement.

EVALUATION OF EVIDENCE PRESENTED

- 22 I have deliberately sketched out the two competing sets of evidence presented on the answering and replying affidavits of both parties in order to assist the Tribunal to arrive at a balanced decision.
- 23 The Applicant is of the view that Club is a fee constituting part of, or associated with the cost of credit. Cost of credit is not defined in the Act, (a recipe for many interpretations) but expressly provided for in section 101 of the NCA. We have quoted this section in paragraph 19 of this judgment, and it mentions eight types of costs that the credit provider may charge the consumer when entering into a credit agreement. Categorically, the section prohibits any other fees or charges that the credit provider must not charge the consumer (*perhaps this is the right approach to the legal issue*). These provisions are peremptory and give no room to manoeuvre. The Applicant in its heads of argument formulated its own description of cost of credit as follows:

"any consideration, monetary liability, amount of money, levied (18) either as a charge, fee, or interest, and payable by a consumer to a credit provider under a credit agreement"

- 24 The Applicant professes, this description fits the conduct of the Respondent in respect of the allegations levelled against it. It follows therefore that (if we follow this argument) a consideration, monetary liability and amount of money is levied either as a charge, fee or interest, and such charge/fee/interest is imposed or collected by

¹⁵ At para 62.3 of the Respondent's Answering Affidavit, the Respondent agrees with the Applicant that the amount payable at the end of each month will increase due to add-ons, of optional products, yet the Applicant still denies this factual statement in para 62.

¹⁶ Para 75;76 and 77 of the Applicant's Replying affidavit

¹⁷ Para 75-77 supra- this is a bare denial by the Applicant: Section 8(3) states:

"an agreement, irrespective of its form but not including an agreement contemplated in subsection (2) or subsection 4(6)(b), constitutes a credit facility, if in terms of that agreement-

- (a) a credit provider undertakes-
- (i) to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer, or on behalf of, or at the direction of, the consumer, and
 - (ii) either to-
 - (aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of the amount contemplated in sub paragraph (i), or
 - (bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (i); and
- (b) any charge, fee or interest is payable to the credit provider in respect of-
- (i) any amount deferred as contemplated in paragraph (a) (ii) (aa)
 - (ii) any amount billed as contemplated in paragraph (a)(ii) (bb) and not paid within the time provided in the agreement.

¹⁸ BusinessDictionary.com describes levy as: 'impose or collect and amount(such as tax) by compulsion or legal authority'

compulsion or legal authority, like tax. As such, nothing tangible (*merx*) should necessarily be attached to the imposition of such charges or fees as a benefit: The law says these fees are payable, period. The charge or fee forms part of, or is associated with the cost of credit- it is inextricably linked.

- 25 The Respondent in contrast, argues that it provides credit to its customers for the purchase of services and products like insurance; Club membership; airtime; clothing, perfume, etc by means of a credit facility called Private Label Store Card. This card is issued by the Respondent and used by customers to access the credit facility and to pay for their purchases. The Respondent argues that this scenario is similar to a bank providing credit to its customers for the purchase of services and products like groceries; clothing; car-parts; plumbing services, etc by means of a credit facility called Visa Platinum Master Card. This card is issued by the bank and used by customers to access the credit facility and to pay for their purchases.
- 26 The Respondent argues further that the Club product or membership can be purchased on cash basis or through a credit facility (Store Card), billed on a monthly basis. The reason why it is mostly billed on a monthly basis via a credit facility is for convenience purposes, and is not linked or associated with the cost of credit.
- 27 If we follow the description of the Applicant of what cost of credit is, then it means that for the mere reason that cost of credit is charged across the board without an option, makes it compulsory to do so, because the Act has sanctioned it. According to the Respondent's submission, once there is room for the customer to exercise the option of whether or not to acquire the Club product or membership, then the conduct of the Respondent falls short of the description of the Applicant, of what actually Club fees are. The Respondent has provided figures of Edcon's clients who took out the Club product, totalling more than half of its clientele base.
- 28 The Respondent paints the following picture: (i) *attention is brought to the customers that a product is sold-this product is called Club / membership* (ii) *this product is sold at different prices, according to the extent of the benefits and the choice you make of these benefits;* (iii) *the benefits contemplated by the club membership are being paid for on a monthly basis because they are available every month for as long as the customer remains a member;* (iv) *the customers are asked to exercise the option to buy this Club product if they so wish, if they do not want to buy it, they will not be charged a fee;* (v) *Edcon the provider of the Club product and not ABSA the credit facility provider, earns the revenue it collects for the product sold.*
- 29 The assumption by the Applicant that the fee is charged on a twelve month credit facility is incorrect. The Club operates via a revolving credit facility with no fixed term. It subsists for as long as the membership is paid for fully every month for the period which the customer remains a member.
- 30 The Applicant persists that the Act prohibits the Respondent from charging consumers a club fee on a credit agreement irrespective of whether or not the Respondent is a credit provider under that credit agreement¹⁹. The

¹⁹ Page 577, para 9 of Applicant's Replying Affidavit

Applicant goes further to say that the Respondent's characterization of the club fee as a "consideration" or "purchase" price is opportunistic and runs contrary to the express wording of the credit agreements. The credit agreements annexed to the referral explicitly state that the fee is a club fee. The club fee is not "purchase price for the club membership", according to the Applicant. This begs the question: "If the Respondent were to describe this fee as a 'consideration' or 'purchase price', would such a description escape the Applicant's criticism of the Respondent's charging of this consideration or purchase price?"

- 31 The Applicant's view is that, for whatever reason the fee may be charged, whether as a consideration or purchase price, or for a *merx*, it should not be on the document purporting to be a credit agreement because the NCA does not allow it. Once the fee appears on the said document, it is part of cost of credit.

THE TRIBUNAL'S FINDINGS

- 32 For the purpose of reflection and clarity, perhaps it is necessary to briefly summarise the facts of this case, once again. These facts are not in dispute. It is more the law applicable to the facts which is disputed. It is important to mention that the Tribunal, in adjudicating matters, will confine itself strictly to the law that creates it.
- 33 The Respondent is a retailer that offers a credit facility to its customers in the form of, what can be described as, a "Store card". This store card can be used to purchase various items on credit from its stores as well as other products such as cell phone airtime. The credit facility that the Respondent offers falls under the NCA. For the purposes of this matter the NCR has not taken issue with any aspect of the credit agreement except for a certain fee which the Respondent includes in its credit agreement.
- 34 This fee is for a product which entitles the customer to various benefits, such as the delivery of a free Edgars magazine, emergency roadside assistance; savings of various percentages of third party service providers such as Ster Kinekor, SAA, Planet Fitness, Tempest Car Hire, Funeral benefits ranging from R5, 000.00 to R10, 000.00 etc.
- 35 The monthly fee for this product ranges from R30.90 per month for the "Jet Club" option to R60 per month for the "Edgars Club VIP" option. The customer can elect to purchase this product or refuse it. This is provided for in the credit agreement which allows for a tick box option. The credit agreement further contains a clause stating that "*Club does not form part of the credit agreement*". The club membership can be cancelled by the customer at any time. The monthly fee is not amortised as part of the deferred credit amount on the credit agreement. It is a stand-alone fee which is simply added to the monthly instalment. The fee is charged indefinitely until cancelled by the customer.
- 36 Other than the clause referred to above, there are no other clauses in the credit agreement which refer to the Club membership or any terms and conditions relating to it. There is no separate document provided to the consumer which sets out the terms and conditions applicable to the product. The fee is charged on a monthly basis for a period of three months if an account is in arrears. After the 90 day period the fee is terminated.

- 37 As at December 2015, 1 491 412 of the Respondent's accounts had the Club fee charged on them, which equates to 56.8% of their active client base.
- 38 The Store card is used as a payment method for the Club fee. The Club membership has been offered since the 1980's. The Club membership was offered as a stand-alone product to be paid for in cash or by separate debit order, however this was not successful and the option was removed in August 2013. The product was then offered via the Store card.
- 39 The main argument submitted by both parties is based on whether the Club fee constitutes a cost of credit as referred to in section 101 of the NCA. Both parties made numerous submissions in this regard and this judgment has reflected these arguments in detail. The NCR essentially argues that the fee constitutes a cost of credit which is not permitted by the NCA. The Respondent argues that the Club fee does not constitute a cost of credit and is a monthly payment for goods or services which has nothing to do with the credit agreement.
- 40 In the Tribunal's view, the debate is not whether the fee constitutes a cost of credit as defined in the NCA. This approach is narrow and too confined. The debate is much broader: the question is rather: whether the NCA allows a credit agreement to contain any fee or charge other than that permitted by the NCA. One therefore does not need to specifically classify a fee or charge so as to identify whether it is permitted or not. The Respondent has constantly submitted that the Club fee does not constitute a cost of credit and has nothing to do with the credit agreement. The Tribunal can therefore safely accept that the Respondent concedes that the Club fee does not fall under any fee specified in the NCA as validly forming part of a credit agreement. The Respondent has also confirmed that the consumer is not provided with any separate document or contract relating to the Club membership. The only reference to the Club membership appears on the application for the credit as a *tick box* option. The Club membership is therefore not purchased separately or as a separate transaction, it is an integral part of the credit agreement application process.
- 41 In this regard the NCA is very clear. The NCA goes to great lengths to describe the fees and charges which are permitted to form part of a credit agreement. The intention of the legislature is clearly to ensure that consumers are not misled in any way and know exactly the fees, charges and costs associated with the credit agreement. These specific costs, fees and charges are described in section 101 of the NCA. There is no section of the NCA which provides for a Club fee or anything similar. Any fee appearing on the credit agreement which is not a fee or charge as described in the NCA would therefore not be permitted.
- 42 Although section 101 of the NCA contains the word "...require..."²⁰ this does not necessarily allow a credit provider to add a charge or fee as long as the consumer is provided with an option to refuse the fee or payment. It is irrelevant whether or not the fee is presented as a tick box option, can be cancelled, is optional, is not amortized, or whether there is a clause specifically excluding the fee from the credit agreement. Section 101 seeks to prescribe the fees and charges that may appear in the credit agreement. The NCA does not allow for or provide for

²⁰ 101. Cost of credit.—(1) A credit agreement must not require payment by the consumer of any money or other consideration, except —“My underlining

any exceptions to the fees or charges which can be levied. It does not provide for any manner in which a credit provider can add additional fees or charges to the agreement as long as it takes precautions to ensure the consumer is not misled or is given an option to refuse the fee. Had the legislature intended such an exception it would have clearly provided for it. The reason for the lack of such an exception is however clear – it would essentially be impossible to control the manner in which optional fees and charges are explained or sold to consumers, the potential for consumers to be misled would therefore be significant.

- 43 The Respondent also cannot argue that the Club fee does not fall under the credit agreement as it is treated entirely separately and is for the purchase of goods or services. The normal manner in which purchases are made on the Store card is an entirely separate transaction. The credit facility account is opened by the Respondent in the same manner as any other similar credit provider. A consumer will then purchase goods or services using the credit facility. These purchases are entirely separate transactions and will be debited to the account as a purchase of a product or service.
- 44 The Club fee in this case is not treated in the same manner. It is reflected as an option in the credit agreement application process. It is therefore not an entirely separate purchase transaction. This merging of the purchase of the product and the credit agreement is further evidenced by the need for the Respondent to insert a clause in the credit agreement stating that the Club fee does not form part of the agreement. This clause would not be required in any normal case where a product is purchased as an entirely separate transaction. The fee is further treated in a very different manner to the normal purchase of goods on credit. The fee is not amortized and does not attract interest. It can be cancelled at any time. The Respondent therefore appears to be trying to argue both sides at the same time. It is arguing that the fee is for the purchase of goods or services but it is not treated in the same way on the account as the normal purchase of goods from the store on credit. On the other hand it is arguing that the fee does not form part of the credit agreement, yet it is an integral part of the credit agreement and credit application process with no separate terms and conditions. It is in fact so integral to the credit agreement that a disclaimer is necessary.
- 45 The intention of the NCA is very clear when it relates to credit agreements. It seeks to provide clarity to all the parties and specifically regulate what may be contained in credit agreements. The NCA does not allow for any other fees, charges or costs to be reflected in the credit agreement or credit agreement documents, irrespective of the nature of the charge, fee or cost. There is further no basis for arguing that fees for products or services can be integrated with the credit agreement process as long as the fees or costs are clearly separated from the credit agreement by a clause stating this fact. The potential for customers to be misled would be too great. Any purchase of any product must be an entirely separate transaction which does not in any way form part of the credit agreement or credit facility application process.
- 46 Therefore the Tribunal finds that, by adding the Club fee to the credit agreement or credit facility process, the Respondent has contravened section 101 of the NCA, in that it added a fee to the credit agreement that is not permitted.

47 The Tribunal makes the following order –

47.1 The Respondent is found to have engaged in repeated prohibited conduct.

47.2 There is no order as to costs

48 As an order in respect of the merits has been made, the matter shall then proceed for a hearing on the appropriate sanctions to be imposed.

49 Thus done and handed down on 24 April 2017

[signed]

FK MANAMELA (Member)

Authorised for issue by National Consumer Tribunal
Case Number: NCT-35378-2015-140(1)
Date: 2017-05-02

National Consumer Tribunal
Ground Floor, Building B
Lakefield Office Park
272 West Avenue, Centurion, 0157
www.thenct.co.za



Adv J Simpson (Presiding Member) and Ms H Devraj (Member), concurring