



**IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA**

DELETE WHICH IS NOT APPLICABLE	
[1] REPORTABLE: YES / <del>NO</del>	
[2] OF INTEREST TO OTHER JUDGES:	
YES / NO	
[3] REVISED ✓	
DATE 23/5/18	SIGNATURE <i>[Signature]</i>

CASE NO: A237/2017

In the matter between:

**EDCON HOLDINGS LIMITED**

Appellant

and

**THE NATIONAL CONSUMER TRIBUNAL**

First Respondent

**THE NATIONAL CREDIT REGULATOR**

Second Respondent

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**JUDGMENT**

**LOUW, J (MDALANA AJ CONCURRING)**

[1] This is an appeal against a judgment of the National Consumer Tribunal (“the Tribunal”) in respect of a complaint initiated by the National Credit Regulator (“the Regulator”) against the appellant (“Edcon”)<sup>1</sup> in terms of s 136(2) of the National Credit Act 34 of 2005 (“the NCA”). The complaint was that Edcon was charging its customers a club fee on credit agreements, which fee was a cost of credit not permitted by s 101 of the NCA. The order sought by the Regulator from the Tribunal was, *inter alia*, a declarator that Edcon had repeatedly contravened sections 90, 100, 101(1)(a) and 102(1) of the NCA. Further orders sought by the Regulator were that Edcon be directed to refund all the consumers who were, from 2007 to date, charged club fees, an interdict restraining Edcon from charging consumers club fees in future and an administrative fine in the amount of 10% of Edcon’s annual turnover.

[2] The order granted by the Tribunal was that Edcon had engaged in repeated prohibited conduct. It directed that a hearing should proceed on the appropriate sanctions to be imposed. The appeal is brought in terms of s 59(3) read with s 148(2)(b) of the NCA against the whole of the decision handed down by the Tribunal.

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<sup>1</sup> Edcon states in its answering affidavit that it has been cited incorrectly as Edcon Ltd is the party that is the registered credit provider and the party that sells Club membership to its customers. No point was, however, made of this.

[3] It is clear from the Tribunal's judgment that its order that Edcon had engaged in repeated prohibited conduct, related to s 101 of the NCA. The relevant part of that section provides as follows:

**Cost of credit -**

- (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 ...*
  - (c) *a service fee ...*
  - (d) *interest ...*
  - (e) *cost of any credit insurance provided in accordance with section 106;*
  - (f) *default administration charges ...*
  - (g) *collection costs ...*

[4] The proceedings before the Tribunal were brought by way of affidavit. The Regulator could therefore only succeed if the facts averred in its founding affidavit which were admitted by Edcon together with the facts alleged by Edcon justified the order made.<sup>2</sup> Edcon provided extensive evidence of the nature of the "Club" membership which it sells to its customers and the manner in which it is paid for. This evidence, which was not disputed by the Regulator, can be summarised as follows:

- Edcon is a retailer that offers a revolving credit facility to its customers which customers access by using a "Private Label Store Card" to purchase products such as clothing and accessories, insurance, cellular airtime and other services. One of the products sold is known as Club.
- The Club product represents a basket of value-added services and benefits which a customer receives in return for payment of a consideration. This consideration is the Club fee. Edcon is able to make the benefits and services available to its customers as a result of separate agreements concluded between itself and various third party service providers.
- The amount of the Club fee as well as the benefits receivable depend on the category of Club membership. There are four different

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<sup>2</sup> *Plascon-Evand Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634-635



categories of Club membership that can be purchased, ranging from R30.90 to R60.00 per month. A customer who purchases the VIP Club membership for R60.00 per month is entitled to many more benefits than a customer who purchased the Jet Club membership for R30.90 per month. The benefits to which a customer who purchases the VIP membership is entitled *inter alia* include delivery of a free Edgars magazine, emergency road side assistance, savings on purchases of Ster Kinekor movie tickets, on consultations with certain doctors and optometrists, on Altech Netstar tracking contracts, on licensing of a new vehicle, on SAA Express flights, on Planet Fitness membership and on Tempest Car Hire. Also included is a R10 000.00 funeral benefit.

- Club membership is an optional item which a customer applies for, or declines, when he or she applies for a credit facility in-store by ticking the appropriate tick box on the pre-agreement statement. The same can be done when application for a credit facility is made online. Club membership can also be purchased subsequently by using the store card. Club membership may be cancelled by a customer at any time.
- The Club fee is due and payable in full monthly in arrears in respect of each month during which the customer remains a Club member. It is not amortised over any period. The primary reason for this is that Edcon has to pay various service providers for the benefits accruing to Club members monthly in full.

- If a customer's account goes into arrears of 90 days, the charging of Club fees is suspended and the customer's Club membership is suspended. Where the account has a zero balance in respect of the sale of merchandise and the outstanding amounts are only in respect of Club fees, such amounts are written off without interest. Where the account has an outstanding balance in respect of the sale of merchandise or other services, the arrears in respect of Club fees is not written off and the normal collection processes are initiated.
- As at December 2015, 1 491 412 of Edcon's accounts had the Club fee charged on them, which equates to 58,8% of its active client base.
- The Club membership has been offered since the 1980's. Historically, Club was offered in-store via blister packs to cash customers. Club fees could be paid in cash in-store on a monthly basis or by debit order. The customer take-up and success of this initiative was found to be mediocre and resulted in the cash option being removed in August 2013, whereafter Club fees were payable via the store card account.

[5] The Tribunal states in its judgment that the main argument by both parties was based on whether the Club fee constitutes a cost of credit as referred to in s 101 of the NCA. It is then stated that, in the Tribunal's

view, the debate is not whether the fee constitutes a cost of credit as defined in the NCA, but that the debate is much broader and that the question is rather whether the NCA allows a credit agreement to contain any fee or charge other than that permitted by the NCA. The following is then stated in the judgment:

*"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..." 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 any exceptions to the fees or charges which can be levied.*

....”

[6] The Tribunal concluded that, by adding the Club fee to the credit agreement, Edcon contravened s 101 of the NCA. It was submitted by Mr. Loxton on behalf of Edcon that this conclusion was erroneous and that it flowed from posing the wrong question, namely whether the NCA allows a credit agreement to “*contain*” any fee or charge other than that which is permitted by the NCA. Had it asked the right question, namely whether Edcon’s credit agreements require the payment of Club fees, which is the word used in s 101(1), it would have come to the right answer: Edcon’s credit agreements do not require the payment of Club fees.

[7] The submission is clearly correct. In the context of s 101, the word “require” can only be interpreted to mean to demand from a consumer who applies for credit, or to impose an obligation on such consumer, to pay for something which is not permitted in terms of the section. Edcon’s credit agreements do not place any obligation on a consumer to pay a Club fee. The consumer has a choice whether or not to apply for Club membership. The Club fee charged is clearly not a cost of the credit which is extended to the consumer in terms of the credit agreement. The notion of a cost of credit is the cost of lending money or extending a credit facility. The Tribunal correctly found that the fee is for a product that entitles the customer to various benefits. It can therefore not be a cost of credit or, as



was contended by the Regulator, in consequence of or pursuant to the conclusion of a credit agreement. The fact that membership of the Club can be cancelled by the customer at any time negates that contention.

[8] I conclude, therefore, that the Tribunal erred in finding that Edcon engaged in conduct which is prohibited by the NCA. I accordingly make the following order:

- (a) The appeal is upheld with costs, including the costs of two counsel.
- (b) The order made by The Consumer Tribunal is set aside and replaced with the following order:

“The complaint of the National Credit Regulator is dismissed.”



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J W LOUW

JUDGE OF THE HIGH COURT

Counsel for appellant: Adv. C D A Loxton SC; Adv. M A Chohan SC.

Instructed by: Edward Nathan Sonnenbergs, Sandton.

Counsel for Second Respondent: Adv. I V Maleka SC; Adv. T V Norman SC;

Adv. P Jara.

Instructed by: R & S Attorneys, Umhlanga.