



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

CASE NO: A3086//2019

**NCT Case No:
NCT/29052/2015/140(1)(P)**

7 May 2025

Date

S. Mahomed

In the matter between:

THE NATIONAL CREDIT REGULATOR

Appellant

and

JDG TRADING (PTY) LTD

1st Respondent

THE NATIONAL CONSUMER TRIBUNAL

2nd Respondent

THE BLACK SASH TRUST

Amicus Curiae

DATE OF JUDGMENT: This judgment is issued by the Judges whose names are reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge's secretary. The date of the judgment is deemed to be 7 May 2025.

JUDGMENT

CORAM: MAHOMED J et MANAMELA AJ

1. The appellant, the National Credit Regulator, (“the Regulator”) appeals the whole of the judgment and the order of the second respondent, the National Consumer Tribunal, (“the Tribunal”), which was handed down on 8 July 2019. The appeal is brought in terms of section 148 of the National Credit Act 34 of 2005 (“the Act”). The Tribunal has elected not to participate in this appeal. No leave is required for this appeal as section 148 (1) (c) of the Act provides for an automatic right of appeal in respect of a decision of the Tribunal.
2. The first respondent, JDG Trading (Pty) Ltd (“JDG”), a credit lender, offers credit inter alia, for household goods and furniture, which consumers purchase at retail stores. Upon an application for credit the consumer is required to purchase credit insurance for the loans advanced. A consumer has a choice to either purchase the insurance that JDG Trading offers, or he/she may obtain and provide his/her own insurance. JDG offers credit life insurance which includes cover for disability and retrenchment in a bundled form. It is not disputed that it sold this form of cover to pensioners, disabled persons and consumers receiving social grants, who were already disabled or unemployed when they signed up for the credit. Advocate PL Carstensen SC on behalf of the Regulator submitted that JDG offered and sold credit insurance as a bundle to people who will never benefit from the cover, as they will never claim for disability being already disabled or for retrenchment cover since they are no longer employed. Therefore, it was contended that albeit allegedly cheap, the selling of such an insurance cover contravenes the provisions of s 106(2) (a) and (b) of the Act, in that it is unreasonable, or its cost is unreasonable having regard to the “actual risk and liabilities involved in the credit agreement”. Counsel proffered that JDG is in terms of section 106(1) of the Act is permitted to offer cover, however the cover does not comply with section 106(2) of the Act.

3. The Issue

The issue before this court is whether JDG Trading has contravened sections 106(2), 90(1) and (2), 91(1) and (2) of the Act. It was submitted that if this court agrees with the Regulator on a contravention of section 106 (2) (a) or (b), it follows then that the remainder of the sections have been contravened.

4. The Relief Sought

The appellant seeks that:

“2.1 *the appeal be upheld;*

2.2 *the appellant be granted relief sought in prayer 2(a) and 2(b) of the NCR Form 32, dated 6 August 2015 as follows:*

2.2.1 *it is declared that the first respondent has repeatedly contravened sections 90(1), 90(2)(a)(ii), 91(1), 101 (1)(A) 106(2)(a) and (b) of the Act;*

2.2.2 *it is declared that the first respondent’s repeated contravention of the aforesaid sections constitutes conduct prohibited by the Act; and*

2.2.3 *that the determination of the appropriate administrative penalty and the relief sought in terms of prayers 2 (c) and (e) of the NCR form 32, dated 6 August 2015, be referred to the Tribunal for hearing and adjudication.”*

5. The Black Sash Trust (“BST”) has been permitted to join the appeal hearing, as amicus, in terms of a judgment by Mia J, dated 20 April 2021. The BST contended that the matter raises important constitutional issues concerning the right of access to social security and social assistance as guaranteed by section 27 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”). Advocate J Bhima appeared for the BST and contended

that there is a positive obligation on the state to protect social grant beneficiaries from exploitation, and a negative obligation on corporate entities to refrain from interfering with the realisation of rights to social assistance, of the most vulnerable members of society. He proffered that his client is before this court to demonstrate JDG's insurance cover is meaningless for consumers reliant on state pensions and disability grants. JDG strongly objected to the BST's adducing of evidence, at an appeal stage and argued that it has never had an opportunity to challenge the contents of a report by an actuary, Professor R Harris, relied upon by the BST. Advocate C Loxton SC, on behalf of JDG argued very strongly, questioning both the qualifications of the expert and the content of the report. It was submitted that the BST had gone beyond the duties of an amicus. He argued that the BST's appears to be biased and its evidence, must be disregarded. I shall return to this point later in the judgment.

6. The Tribunal's Judgment

On 8 July 2019 the Tribunal delivered its judgment, when it dismissed the Regulator's application to declare JDG's credit insurance policy as prohibited conduct. In paragraph 32 of the judgment¹, it stated:

“[t]he Tribunal however wishes to make it clear that it cannot and will not make a finding that bundled or group insurance is inherently suitable or appropriate. The Tribunal can only find that the Applicant [the Regulator] was unable to prove that the credit insurance provided was unreasonable or provided at an unreasonable cost.”

7. The Law

Section 106 (1) of the Act provides:

¹ CaseLines (“CL”) 009-2215

(1) A credit provider may require a consumer to maintain during the term of their agreement :

(a) credit life insurance not exceeding, at any time during the life of the credit agreement, the total of the consumers outstanding obligations of the credit provider in terms of the agreement; and

(b) either ...

i. ...

ii. in any other case, insurance cover against damage or loss of any property other than property referred to in sub paragraph (i) not exceeding, at any time during the life of the credit agreement, the total of the consumer outstanding obligations to the credit provider in terms of the agreement,”

Section 106 (2) of the Act provides:

“Despite subsection (1) a credit provider must not offer or demand that the consumer purchase or maintain insurance that is:

(a) unreasonable; or

(b) at an unreasonable cost to the consumer, having regard to the actual risk and liabilities involved in the credit agreement.”

8. The facts are mostly common cause between the parties. JDG did not deny that it required credit insurance for loans advanced; it did not deny that the cover it sold included cover for permanent and temporary disability, retrenchment and loss of employment, and that it sold this cover to consumers receiving social security grants and unemployed consumers. Mr Carstensen SC referred the court to the profiles of the various consumers which the

Regulator referred to as examples and submitted that the cover was meaningless to those consumers. The consumers who were in the main pensioners, were never going to benefit from the cover for retrenchment and loss of employment, and the consumer who is disabled, is never going to claim in terms of the disability cover he/she paid for in the bundle. It was contended that the cover was unreasonable, inter alia, for this very anomaly. JDG is at no risk of ever having to pay for a claim in this category and, therefore, JDG's "low cost and limited options for consumers for cover" argument, cannot be sustainable. Counsel argued that one must have regard for the "effect or result" of the insurance cover offered in the bundle. The pensioner and the young consumer purchase the same insurance, at the same price, however the young consumer can claim the full benefits of the cover as opposed to the pensioner or disabled person, for whom the retrenchment or disability cover is meaningless. Counsel contended that the court must not lose sight of the fact that JDG is never at risk to pay out benefits to the pensioner for retrenchment or to the disabled for disability cover, as included in the bundle.

9. Mr Carstensen SC, further, submitted that the provisions of the Act focus on an individual consumer, not a group. The bundling does not provide the consumer with an option as contended by JDG, the consumer is obliged to take the full package, including cover for retrenchment and disability. Counsel reminded the court that when one has regard for the definition of e.g. retrenchment and how one may qualify for the benefit in the agreement, it must be unreasonable. In order for a claim to be considered, JDG requires the pensioner who claims retrenchment benefits to provide a "*contract of employment, a letter from an employer in regard to his retrenchment*". The consumer will never be in a position to meet the requirements, as he/she no longer works. A disabled consumer who has a claim must "*produce a medical report from a doctor on the disability and a letter from an employer*

that she/he is disabled.” The consumer is already disabled, is not employed and will never be able to produce such a letter. The consumers were pensioners or/ and disabled at the date of the purchase of the insurance, their claims will never manifest. In my view it is farcical to refer to a claim for such consumers.

10. Furthermore, it was contended that the Tribunal ought not to have distinguished the matter of *National Credit Regulator v Lewis Stores (Pty) and Another*² (“Lewis Stores”) from the current dispute, the same reasoning applies to this dispute. The only difference between the cases is that in Lewis Stores the agreements concluded were for separate cover at specified costs, whereas in this matter the cover is in a bundle form and for an all-inclusive premium. Mr Carstensen SC proffered that if the JDG cover were in terms of the Act, it would have been unlawful, it attempts to pass muster in this case as part of an insurance cover. It was argued for JDG, that the applicant did not raise the Lewis Stores’ case before the Tribunal and must be restricted to the record before the appeal court.

11. Mr Carstensen SC proffered that the agreements set out that all benefits paid will firstly, settle the amount outstanding as per the instalment agreement. JDG protects its interests and justifies relaxation of the interests of a pensioner or disabled persons on the basis that the cover supports access to credit and is at a low cost. It was submitted that although life cover may be cheap, the pensioner or disabled consumers do not fully benefit from the cover he/she pays for, as other members of the group and the agreement is unreasonable. The bundle insurance offered, to the group results in cross subsidisation, where the older members subsidise younger members of the group, who benefit more, in that the younger members will likely require retrenchment and disability cover in their lifetime or work life.

² *National Credit Regulator v Lewis Stores (Pty) and Another* NCT/27651/2015/140(1) [2016] ZANCT 33 (9 September 2026)

12. Mr Bhima for the Black Sash contended that a claim will never manifest. Counsel submitted that the state has a positive duty to protect grant recipients to realise their rights in terms of section 27 of the Constitution and private or corporate entities are to refrain from interfering with the realisation of those rights afforded in the Constitution. The BST has been involved in matters of social grants for decades and based on its experience, his client can with confidence argue that JDG is involved in predatory practice in this matter. He rejected submissions of bias by Mr Loxton SC and stated that his client stands by the content of the report by Professor Harris, and her qualifications to provide her opinion. However he left it to the court to determine the degree of weight to be attached to the report.

13. Mr Loxton SC on behalf of JDG, contended that the cover was sold in the form of a bundle, there was only one premium which included cover for various risks and it was sold as group cover. This form of cover is the only way to ensure that the price is kept to a minimum. Counsel argued that the consumer is given a choice to obtain his/her own cover but will not find cover any cheaper elsewhere. The price promotes access to credit and can only be in the interest of the consumer. There is no specified price for the cover for disability, or retrenchment, it is a comprehensive cover at a single cost. Carstensen SC referred the court to the record where JDG did not deny that there was a cross subsidisation, where some in the group may derive the full benefit whilst others in the group may not. However, Mr Loxton SC argued that it is the intrinsic feature of group cover, not unusual in the insurance industry and reiterated that the consumer gets life cover, which would not ordinarily be offered to pensioners and disabled persons, and at a low cost. He reminded the court that the insurance is convenient as JDG's qualification requirements, dispenses with the delays in waiting periods and costs for medical examinations, no medical

examination is required, which must be seen to be in the interest of the consumer. It was further argued that the Regulator failed before the Tribunal because it did not provide any comparative evidence on cheaper products and therefor failed to demonstrate that the bundled insurance was unreasonable, or sold at an unreasonable cost. In its heads of argument JDG at paragraph 2.9 refers to paragraph 23.10 of the findings where the Tribunal struggled to understand why the Regulator would complain if the bundled insurance was cheaper for the consumer than if the consumer had to take out separate insurance for each benefit.

14. Furthermore, it was contended that the Regulator, only at this appeal stage, relies on section 90(2)(ii) (a) which provides that provision in the credit agreement is “*unlawful if its general purpose or effect is to deceive the consumer*”, however, it has failed to present any evidence of deception or even that the agreement has the potential to deceive consumers. It was contended that there is no evidence of a consumer who was confused or deceived by the bundled insurance, and therefor its argument must fail, counsel therefor denied that there was any basis for a finding of a violation of section 90(2) (a)(ii). It was submitted that the contracts were clear, the price was known, and consumers knew they had an option to purchase their own cover. It was common cause that the agreements were clear in the language used and the cost was clearly set out. The Regulator’s argument of an unlawful provision, is without merit.

15. Mr Loxton SC further proffered that the Regulator’s argument is speculative and unfounded. It was argued that both the Regulator and the BST are paternalistic in their approach and they presented no evidence that credit consumers misunderstood the scope of bundled insurance, no evidence of confusion or deception is before the court. He denied any violation of section 90(2)(a)(ii), and proffered that there was no evidence of any

inducement; the insurance cover was offered but never required to be taken up; the consumer had a choice, and a violation of the provisions of section 91 was also denied. The contention was that the Regulator again failed to provide evidence of the mischief and the appeal stands to be dismissed.

16. Mr Loxton SC submitted that his client seeks costs against the BST, because in its view, the BST had gone beyond the bounds and purpose of an amicus, it demonstrated a bias and cannot be seen to have assisted the court. Mr Bhima argued that the BST's submissions were relevant and necessary, the court has a discretion on the weight it would attach to the report by Professor Harris and the court must be guided by the decision in *Biowatch Trust v Registrar Genetic Resources and Others*³ on costs. It was accepted that the Regulator acted in good faith and no costs would be appropriate in that instance.

Judgment

17. The parties presented comprehensive arguments, before both the Tribunal and this court. The focus must be on whether the instruments offered deliver on the desired outcomes for both the credit lender and the credit consumer as contemplated by the Act. The Act's purpose inter alia was to help draw into the economy most consumers who for decades were excluded from full and fair participation in the economy of our country. An economy which outpaced both the majority of the people of our country as well as the majority of our neighbours in our continent. That said, the state within the ethos of our constitutional democracy, identified a need to "upgrade and align" our laws to the needs and demands on the ground in particular, on the socio economic challenges on the ground. In my view the BST has been very much a part of that exercise of "bridging the gaps" for the very

³ *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) (3 June 2009)

marginalised people of our society. We noted that there was no objection to its participation in these proceedings only to its adducing of evidence.

18. It is common cause that the central point in the arguments is the provisions of section 106(2) of the Act and the practical effect of the application of the section to the facts.

19. The section is couched in two separate and distinct parts and I am of the view that the dispute can be resolved by analysis of facts to each of the parts. The consumer group comprised a marginalised community of consumers, they relied on state grants for their existence and must be understood within their context and position in our economy. JDG offered the access to credit, obviously it must look for its sustainability and adopted an accepted model of group cover. The cover was available at the point of sale, the consumer had already identified his or her need, identified where and how to purchase their goods and concluded the agreements to take home their purchases, to my mind, it is unlikely that he/she would have had the time to even consider the details of the contract in regard to a “limited right to claim.”

20. It is noteworthy that JDG conceded before the Tribunal that the cover offered was designed to meet the needs of the group, and that some in the group would likely not benefit to the same extent as others. The question is whether at the point of sale, does the pensioner/disabled person know this and regardless, agree to such an imbalance? It is an unfairness, no matter that the price is at its lowest. I agree with Advocate Bhima, a claim will never manifest, the consumer is already at the point of purchase disabled, what in the future would lead him to believe that he may have a claim for disability cover and that he should lodge a claim. Besides, to qualify, he will have to produce a letter from his employer about his disability, he is disabled, unemployed, which employer does he look to? The provision is unreasonable on the logic of the claims process in the agreement. The claimant in this

instance is entitled to hold a reasonable expectation that he has cover and can claim in the event of any loss. A disabled person who signs up for such cover, cannot hold such expectation, and logically would not agree to pay for such cover.

21. Likewise, a pensioner who is now no longer employed, cannot hold an expectation, to claim retrenchment cover, when he/she is in fact unemployed. The pensioner is in terms of the claims process expected to produce a contract of employment and a letter from his/her employer on the circumstances of his unemployment. This surely is unreasonable, as he no longer works. If, as Mr Bhima for the BST contends, the claims will never manifest, the Regulator will not be in a position to present evidence of a claimant who was misled, confused, or misguided, to meet its evidentiary burden. It is noteworthy that the Tribunal correctly identified that the credit grantor bears the burden to prove that the credit insurance agreement is not unreasonable. The terms of the agreement highlight the unreasonableness of the agreement and therefor a violation of section 106(2)(a). On the objective facts, the agreement violates the provisions of the Act.

22. When one has regard to the effect of the group cover which results in a cross subsidisation, it is difficult to accept that a pensioner on a very small grant would knowingly agree to pay for a service, that has no meaning to him, but a great deal of meaning to a younger consumer, whom he does not even know. I am cognisant of the accepted practice of a wide cover, and usual in certain insurance products, however, in casu we are concerned with a particular kind of consumer, and understanding this individual consumer becomes critical.

23. The Tribunal in its judgment appeared to have been satisfied that the agreement promotes access to credit and is cheap, there being no comparative costs before it, it was unable to compare “apples with apples”, but overlooks the net effect of such insurance on the rights

and benefits to the unemployed and disabled compared to other members of the group for the same price. See paragraphs, 23.16, 28 line 22, 29 lines 7-10 and 30 of the Tribunal's judgment.

24. In my view, having regard to a pensioner's claim, JDG will never bear a risk, that has no potential to get off the ground in the first instance, the pensioner he would have no proof of employment and logically no reasons for unemployment. In my view, JDG has a secured source of revenue, in pensioners and disabled consumers, but carries no risk. The revenue generated from this group simply pays out a claim which can comply with all its requirements, that from the younger consumer. There can be no fairness and ultimately reasonableness in this instance. There may be some truth in Mr Bhima's submissions of predatory practices, the cross subsidisation may assist in liquidating claims lodged by the young consumer.

25. In reply Carstensen SC referred the court to the submission by JDG that the price is "generally cheap", some may not benefit, which must then support the Regulator's case for the order sought for a declaration and a referral to the Tribunal to determine an appropriate penalty.

26. In my view there is no need for this court to even consider the price argument in terms of section 106(2) (b), save to state that the risks to the disabled and unemployed consumer exist, and there is no risk to JDG. The fact that no cheaper options are available should not be seen as an "invitation" to relax on the pensioner's and disabled person's rights to dignity and fair economic activity, the premiums are the same as all others in the group they are entitled to the same benefits as all others in the group, the agreement to be seen as fair and within the ethos of the Act.

27. The Tribunal stated , “*on the face of it selling disability and retrenchment insurance to consumers who are unemployed certainly appears to be unreasonable.*” The Tribunal accepted the credit provider’s case JDG, when, it did not deny that the credit insurance was required; it did not deny that is sold insurance to the consumers; at the cost set out in the agreement; it did not deny that the insurance had no meaning for those consumers, and that they were unable to claim for benefits. The consumer had no choice to exclude the retrenchment and disability covers, the fact they would not have sourced such cover elsewhere for less makes it reasonable, surely this cannot be the intention of the lawmaker.

28. To find differently, would mean that the court expects that a pensioner, must do the impossible, find a contract of employment and an employer who provides a reason for his unemployment, he/she must accept less for his/her money, and his/he consumer rights carry less weight than those young consumers in the groups. I find that JDG has contravened section 106(2)(a) of the Act, the agreement is unreasonable, it treats pensioners, and disabled persons, unfairly and disproportionately, it’s an insurance cover that goes beyond common sense, in the circumstances of the pensioner and the disabled consumer. Although no comparative price or other option was before the Tribunal and this court, I am of the view it is not fatal to the Regulator’s case, objectively viewed, the risks to each of the parties is sufficient to demonstrate the unfairness and discriminatory practises that the Act seeks to eradicate. The relief sought is therefor granted.

Costs

29. The parties agreed that based on the nature of the dispute and the duty of the Regulator and the amicus, each party is to pay its own costs, which is appropriate in the circumstances.

30. Accordingly I make the following order:

1. The appeal is upheld;
2. The appellant is granted the relief sought in prayer 2(a) and 2(b) of NCR form 32, 6 dated August 2015, as follows:
 - 2.1 it is declared that the first respondent has repeatedly contravened sections 90(1), 90(2) (a) (ii), 92(1), 101 (1) (a) 106(2)(a) of the Act;
 - 2.2 it is declared that the first respondent's contravention of the aforesaid sections constitute conduct prohibited by the Act, and
 - 2.3 the determination of the appropriate administrative penalty and the relief sought in terms of prayers 2 (c) and (e) of the NCR form 32, dated 6 August 2015, is referred to the Tribunal for hearing and adjudication.
3. Each party is to pay its own costs.



S Mahomed
Judge of the High Court

I concur



Khashane La M. Manamela
Acting Judge of the High Court

Date of hearing : 6 February 2025

Date of Judgment : 7 May 2025

Appearances:

For appellant: Adv PL Carstensen SC
Instructed by: Ramushu Mashile Twala, Johannesburg

For Respondent: Adv C Loxton SC, with him
Adv A Milovanovic-Bitter and
Adv. M Zikalala
Instructed by: Werksmans, Johannesburg

On behalf of amicus: Advocate J Bhima
Instructed by: Centre for Applied Legal Studies, Wits