IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION

Case Number: **NCT/417333/2025/73(2)(b)**

In the matter between:

NATIONAL CONSUMER COMMISSION **APPLICANT**

And

WINGFOOT TRAINING (PTY) LTD t/a AIMX **RESPONDENT**

Coram:

Prof K Moodaliyar - Presiding Tribunal Member
Ms Z Ntuli - Tribunal Member
Mr S Hockey - Tribunal Member

Date of Hearing - 4 May 2026
Date of Judgment - 19 October 2026

JUDGMENT AND REASONS

THE PARTIES

1. The applicant is the National Consumer Commission (the applicant), a statutory body established under section 85(1) of the Consumer Protection Act 68 of 2008 (the Act). At the hearing, the applicant was represented by Mr M Magagula (Mr Magagula), its legal advisor.

2. The respondent is Wingfoot Training (Pty) Ltd t/a AIMX (the respondent), a private company incorporated under South African law with registration number 2019/412616/07. The respondent is a supplier as defined in section 1 of the Act. At the hearing, the respondent was represented by Mr T Kapp of Kapp Attorneys Inc., based in Cape Town.

TERMINOLOGY

3. A reference to a section in this judgment refers to a section in the Act. A reference to a rule in this judgment refers to the Rules of the National Consumer Tribunal.[1]

JURISDICTION

4. Section 27(1)(a)(ii) of the National Credit Act 34 of 2015 (the NCA) empowers the National Consumer Tribunal (the Tribunal) or a Tribunal member acting alone to adjudicate claims of prohibited conduct by determining whether prohibited conduct has occurred and, if so, by imposing a remedy provided for in the NCA.

5. Section 150 of the NCA empowers the Tribunal to make an appropriate order concerning prohibited or required conduct under the NCA or the Act. The Tribunal, therefore, has jurisdiction to hear this application.

APPLICATION TYPE AND THE RELIEF SOUGHT

6. This is an application in terms of section 73(2)(b) in which the applicant alleges that the respondent has contravened certain provisions of the Act and, in doing so, has engaged in prohibited conduct.

BACKGROUND

7. The applicant received three complaints against the respondent. In these complaints, it is alleged that the three consumers concluded transactions arising from direct marketing to purchase the AIMX Simulation Software package, under which monies were deducted for the software and subscription. It is further alleged that when the consumers sought to cancel the transactions and obtain refunds, the respondent declined to do so and continued to enforce the agreements. The complaints are summarised as follows:

    7.1 **Norman Albert Gibbins (Mr Gibbins):** On 6 February 2023, the complainant, who was 74 years old at the time, entered into a transaction with the respondent for the

[1] GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007 (Government Gazette No. 30225).

AIMX Simulation Software package. He alleges that R35 000 was debited from his credit card account without his consent and that the deduction had not been agreed upon during discussions or when signing the agreement. On 14 February 2023, he raised his concerns with the respondent's technical trainer, who advised him to email the respondent. He did so that day, explaining that he had neither been aware of nor agreed to the deduction and expressing his intention to cancel. He seeks cancellation and a refund of R35 000. The respondent refused, asserting that he remained bound by the agreement.

7.2 **Francois Petrus Brand (Mr Brand):** On 4 October 2022, the complainant, who was 76 years old at the time, entered into a transaction with the respondent for the AIMX Simulation Software, with a monthly subscription fee of R440. Upon receiving a flash drive containing the software, he realised that the product was not what he had expected, as he is computer illiterate and does not own a computer. On 7 October 2022, he verbally cancelled the agreement, explaining that he could not submit written cancellation because he had no access to a computer. When the respondent failed to assist, he approached Guthrie & Theron Attorneys, who wrote to the respondent on 26 October 2022, requesting it to collect the flash drive or provide an address for its return. The respondent refused to cancel the agreement or refund R35 000, maintaining that cancellation was permitted only after the six-month simulation period.

7.3 **Guihermina Maria Lemos Ribeiro (Ms Ribeiro):** On 8 December 2023, the complainant, who was 64 years old at the time, purchased an analytical monitoring educational software package from the respondent for R39 000, with a subscription fee of R440. The transaction resulted from direct marketing by the respondent's agent at her residence. According to the complainant, the agent represented that the software would provide market signals offering an 89% guaranteed gain and that the respondent would provide R5 000 to start trading. On 8 January 2024, she emailed the respondent, expressing dissatisfaction that the product differed from the representations made by "Gerhard" at the time of sale. According to her, the respondent subsequently indicated that it no longer provided trading signals and that she had to study the signals and decide independently when to trade. It also indicated that the company had closed for the December break, that no one was available to assist with opening a live account, that

cancellation under the Act's cooling-off period was unavailable, and that trading with the bank would attract a fee of $47 per trade. She requested cancellation and a refund of the purchase price. The respondent refused, relying on its contractual cancellation clause.

8 Based on these complaints, the applicant formed a reasonable suspicion that the respondent had contravened the Act and directed an investigation. Upon investigation, the applicant concluded that the respondent had contravened sections 16(3)(a)-(b), 16(4), 14(2)(b)(i)(bb), 51(1)(a)-(b) and 40(1) and (2). The applicant referred the complaints for adjudication and seeks an order declaring these contraventions as prohibited conduct, interdicting the respondent from engaging in such conduct, directing the respondent to refund complainants a total of R109,000.00, broken down into R35 000 to Mr Gibbins, R35 000 to Mr Brand and R39 000 to Ms Ribeiro, imposing an administrative fine of R1 million or 10% of the annual turnover, whichever is greater, issuing a certificate in terms of section 115 to enable the complainants to pursue damages in the civil courts; and granting any other appropriate order contemplated in section 4(1)(b)(ii).

9. The respondent has acknowledged contravention of section 14(2)(b)(i)(bb) by not processing the cancellation and has tendered to refund the complainants following advice from its lawyers. The respondent, however, denies all other allegations, specifically highlighting that the cancellations were not done within the cooling-off period as alleged, that the six-month period before cancellation is not aimed at restricting the rights of consumers but to enhance the performance of the product, and that complainants have not been taken advantage of, as the issue regarding lack of a laptop, for instance, became apparent only after the fact. The respondent denies that the administrative penalty is warranted and asserts that it has a clean compliance record.

10. The matter was set down for a hearing on 4 May 2026, which occurred virtually via Microsoft Teams.

THE HEARING

THE TESTIMONY OF MR GIBBINS

11. During the hearing, the applicant requested permission to call one of the complainants, Mr Gibbins, as a witness to clarify some aspects of the complaint to the Tribunal. The first

respondent objected to the request, citing the applicant's failure to give prior notice and the possibility that the hearing may need to be postponed. The Tribunal conducts its hearings inquisitorially, with discretion in calling witnesses. The Tribunal permitted the applicant to call Mr Gibbins as a witness, noting that the respondent would not suffer any prejudice and that it would be afforded an opportunity to cross-examine the witness.

12. Mr Gibbins testified under oath that the respondent contacted him through direct marketing, stating that it worked with banks to improve clients' portfolios. He was offered a simulated online trading course at R440 per month for 12 months, payable by debit order from his cheque account. After Francois was unable to attend the meeting scheduled for 30 January 2023 due to an accident, Mr Gibbins met Calvin on 6 February 2023. Calvin explained the product, demonstrated its use and loaded information onto his laptop. Mr Gibbins signed an agreement and received a blue carbon copy.

13. Mr Gibbins subsequently discovered a deduction of R35 000 from his credit card account, which he denied discussing or authorising. Calvin had explained that the card was required in the same manner as car rental companies require security against vehicle damage. Mr Gibbins immediately queried the deduction but received no response. He attended a further meeting on 14 February 2023 to resolve it but was referred to another person. That day, he emailed his intention to cancel. Instead, the respondent organised training for 17 February 2023, which he attended together with his IT specialist daughter. No meaningful training occurred. The respondent refused his request to cancel, relying on the six-month limitation clause.

14. At Mr Gibbins' request, on 13 March 2023 the respondent later supplied what it described as the original agreement signed on 6 February 2023. It contained pages he had not previously seen, including a Subscription Form authorising the R35 000 deduction, on which he alleged his signature had been forged. He denied signing two originals, maintaining that he signed one agreement and received its carbon copy.

THE APPLICANT'S SUBMISSIONS

15. Mr Magagula submitted that the matter concerned whether a supplier could, through contractual terms and business practices, undermine statutory consumer rights and avoid the consequences. He identified the following issues for determination: whether the respondent's contractual framework unlawfully restricted consumers' cancellation rights

under section 14, whether clause 6.5 of the respondent's standard terms, which prevented cancellation for six months, was prohibited under section 51, whether the respondent contravened section 16(3) by imposing rigid cancellation requirements despite the Act permitting cancellation in any recorded form, whether the respondent's conduct, viewed as a whole and considering the consumers' vulnerability, constituted unconscionable conduct under section 40, and whether the established contraventions warranted an administrative penalty under section 112. According to Mr Magagula, each of these questions must be answered in the affirmative based on the following:

15.1 **The respondent's contractual framework restricted statutory rights**. Mr Magagula submitted that the respondent systematically restricted cancellation while retaining payments and collecting subscriptions. The three consumers, aged 74, 76 and 64, purchased a complex product through direct marketing without understanding its nature. Mr Brand expected the respondent to trade on his behalf. Ms Ribeiro was unaware of the six-month simulation requirement and questioned paying R39 000 for it. Mr Gibbons did not fully understand the presentation, the R35 000 credit card deduction, or the training arrangements. He lacked computer skills and could not afford the payments from his pension. These misunderstandings concerned the substance of the agreements and demonstrated an absence of a meeting of minds.

15.2 **Section 14(2) was contravened.** Consumers were entitled to cancel fixed-term agreements on 20 business days' notice. The respondent conceded that it had failed to give effect to this right. Its procedural barriers and contractual restrictions delayed cancellation and ensured continued payments.

15.3 **Section 16(3) was contravened**. The Act permitted cancellation in writing or another recorded manner. The respondent nevertheless insisted on written cancellation and rejected Mr Brand's telephonic cancellation within the cooling-off period. Mr Magagula argued that a recorded telephone cancellation could serve as proof and that requiring a writing imposed an additional restriction not found in the CPA.

15.4 Clause 6.5 contravened section 51(1)(b). The clause permitted cancellation or refunds only after completion of the six-month simulation period. It deprived

consumers of their statutory cancellation rights while enabling the respondent to retain the purchase price and continue collecting subscriptions. He submitted that binding consumers to products they could not use, refusing to allow cancellation, and continuing to charge them were unjust, unfair, unreasonable, and contrary to public policy. Mr Magagula accepted that the clause in question appears clearly in the standard terms on page 151, rather than on page 42 of the bundle.

15.5 **Unconscionable conduct**. The respondent contravened section 40(2) of the CPA by taking advantage of the consumers' lack of technical knowledge and inability to protect their interests. It marketed complex trading software to vulnerable consumers, resisted cancellation and retained their payments.

16. Mr Magagula concluded the applicant's submission with motivation for the Tribunal to impose an administrative fine in terms of section 112 read with section 151 of the NCA, considering the factors outlined in section 112(3) as follows:

16.1 **Nature and duration of the contraventions:** The conduct was serious, systematic and embedded in the respondent's contractual framework. It restricted the cancellation rights protected by sections 14 and 16 through terms prohibited by section 51. The respondent continued to defend its contractual model despite acknowledging that cancellations had been mishandled, demonstrating a risk of continued non-compliance.

16.2 **Consumer prejudice:** Consumers paid upfront fees of between R35 000 and R39 000, together with monthly subscriptions, for products they did not properly understand, or which did not meet their expectations. They were kept in agreements from which they derived little or no benefit and suffered financial loss, inconvenience and frustration in pursuing regulatory relief.

16.3 **Financial benefit:** The respondent benefited from upfront payments and continued subscription revenue secured through restrictions on cancellation. A penalty was necessary to remove the financial incentive to continue the conduct.

16.4 **Market circumstances:** The respondent operated through direct marketing, where persuasive sales techniques heightened consumer vulnerability. The software's

complexity and the targeting of consumers aged 64, 74, and 76 increased the imbalance between the parties and the need to comply with the CPA.

16.5 **The respondent's behaviour:** The respondent obstructed cancellation through rigid procedural requirements, including insisting on written cancellation and refusing other recorded forms of cancellation. It relied on clause 6.5 to retain consumers in agreements for six months as a standard practice.

16.6 **Refunds and cooperation:** The respondent's engagement and tender of refunds followed regulatory intervention and were late and reactive. They could mitigate the penalty but did not eliminate liability or remedy the underlying contraventions.

16.7 **Previous contraventions:** Although there might be no evidence of previous contraventions, this did not preclude a substantial penalty for serious, systematic and prejudicial conduct.

17. Mr Magagula argued that cooperation and remedial action did not justify dispensing with a penalty. A meaningful penalty was necessary to promote compliance, deter future contraventions and give effect to the CPA's regulatory purposes. The applicant requested a declaration of prohibited conduct, refunds to the affected consumers and an administrative fine of 10% of the respondent's annual turnover for 2025, alternatively an amount the Tribunal considered appropriate, noting that 10% of that turnover exceeded R1 million.

RESPONDENT'S SUBMISSIONS

18. Mr Kapp submitted that, contrary to the applicant's assertion, the respondent had engaged in good faith with the complainants and the applicant, and further attempted a settlement, but negotiations were unsuccessful. Mr Kapp submitted that the respondent conceded that it had incorrectly handled the three complainants' cancellation requests under section 14. Its unconditional refund tenders remained in place regardless of whether section 14 applied to the agreements. The remaining alleged contraventions were disputed.

19. Mr Kapp explained that as fully demonstrated in the answering affidavit, and contrary to the applicant's assertions, the respondent supplied a user-friendly educational tool designed to teach trading principles and portfolio management through simulated trading. It did not trade on clients' behalf, hold their funds or act as a financial services provider. The product's simulation nature was expressly disclosed in the contractual documents.

20. Mr Kapp submitted that the agreements between the respondents and the consumers were made clear during the engagements. He asserted that there were two separate agreements: a sale agreement for the software and a subscription agreement providing continuing services, including live market information. Although the services required the purchase of the software, the agreements were not one and the same.

21. Mr Kapp stated that the agreement had the consumer protection and benefit purpose for the which required the six-month simulation period to achieve the guarantee. Specifically, the product carried a guarantee of 40% simulated growth over six months, provided the consumer followed the simulation rules. Failure to achieve that growth entitled the consumer to a refund. Achieving it qualified the consumer for R5 000 to be deposited into a live trading account at a financial institution of their choice.

22. Mr Kapp disputed that clause 6.5 contravened section 51. Mr Kapp submitted that properly construed, the guarantee provided an additional contractual remedy alongside consumers' statutory rights. The reasoning behind the six-month limitation clause is that the product is subject to a simulation growth guarantee, which cannot be provided if the terms of the agreement and/or the simulation rules and conditions were breached.

23. The simulation period and rules regulated the parties' relationship and enabled performance to be measured. The complaints concerned operational implementation, which had been addressed, rather than substantive unlawfulness of the contractual terms. Mr Kapp emphasised that the Tribunal must consider the purpose of the six-month limitation in its determination.

24. Regarding section 16(3), Mr Kapp submitted that there was no proof that the verbal communications constituted cancellation notices in a recorded form. Mr Gibbins' written cancellation was received on 14 February 2023, six business days after contracting, while Ms Ribeiro cancelled on 8 January 2024, outside the cooling-off period. Mr Brand relied

on a verbal cancellation without proof that it had been recorded. The respondent does not dispute the telephone conversations but contends that the applicant failed to satisfy the jurisdictional prerequisite that cancellation must be in writing or another recorded form.

25. The respondent denied unconscionable conduct under section 40. Mr Kapp submitted that the respondent engaged with the complainants and offered training, including further training, to help them better understand the product. According to him, the product required no prior technical expertise, and the complainants' ages did not establish exploitation or deliberate targeting. The respondent became aware that Mr Brand did not own a computer only when cancellation was requested on his behalf and stated that it would have provided one had it known.

26. Mr Kapp stated that allegations of fraud and forgery were seriously disputed and insufficiently supported. He submitted that Mr Gibbins appeared to concede that the signature on the document relating to the R35 000 credit card deduction might be his. Although the applicant had been invited to appoint an expert to examine the original agreement, it had not done so or filed a replying affidavit.

27. Mr Kapp submitted that the respondent accepted that admitted contraventions could be declared prohibited conduct but opposed further interdictory relief. There was no evidence of continuing conduct or a likelihood of repetition, and the requirements for a final interdict had not been established. Disputing the legality of clause 6.5 did not, by itself, amount to continued prohibited conduct.

28. Mr Kapp opposed the maximum administrative penalty as disproportionate and unjustified. He submitted that the contraventions were limited and administrative in nature, had been acknowledged and addressed internally, and did not involve proven fraud, coercion, deception or exploitation. The unconditional refunds would remedy the complainants' losses, and no additional consequential loss had been established by the applicant.

29. Mr Kapp submitted that the respondent had communicated with the complainants and the applicant, supplied information during the investigation, sought legal advice, attempted mediation and implemented corrective measures. Its cooperation, unconditional tenders and absence of previous contraventions were significant mitigating factors. The market

circumstances did not aggravate the matter, and no adverse effect on the broader market had been shown.

30. Referring to previous Tribunal decisions, Mr Kapp submitted that penalties should remain proportionate to the misconduct proved. The dissenting judgment relied upon by the applicant did not require a penalty, still less the maximum penalty. He highlighted administrative fines ranging from R50 000 to R250 000 as a pattern and that the Tribunal retained its discretion under section 112.

31. Mr Kapp concluded by requesting that the Tribunal record the admitted contravention and unconditional refund tenders, dismiss the remaining allegations and interdictory relief, and impose no administrative penalty, alternatively only a nominal penalty.

APPLICABLE PROVISIONS OF THE ACT

32. Section 14(2)(b)(i)(bb) permits a consumer to cancel a fixed-term agreement at any other time, by giving the supplier 20 business days' notice in writing or other recorded manner and form, subject to subsection (3)(a) and (b).

33. Section 14(3)(a)-(b) provides that upon cancellation of a consumer agreement as contemplated above, the consumer remains liable to the supplier for any amounts owed to the supplier in terms of that agreement up to the date of cancellation. The supplier may impose a reasonable cancellation penalty with respect to any goods supplied, services provided, or discounts granted to the consumer in contemplation of the agreement enduring for its intended fixed term, if any, and must credit the consumer with any amount that remains the property of the consumer as of the date of cancellation.

34. Section 16(3)(b) provides that a consumer may rescind a transaction resulting from any direct marketing without reason or penalty, by notice to the supplier in writing, or another recorded manner and form, within five business days after the later of the date on which the transaction or agreement was concluded or the goods that were the subject of the transaction were delivered to the consumer.

35. Section 16(4) provides that a supplier must return any payment received from the consumer in terms of the transaction within 15 business days after receiving notice of the rescission, if no goods had been delivered to the consumer in terms of the transaction, or

receiving from the consumer any goods supplied in terms of the transaction. The supplier must not attempt to collect any payment in terms of a rescinded transaction, except as permitted under section 20(6).

36. Section 32(1) provides that a person who is directly marketing any goods or services, and who concludes a transaction or agreement with a consumer, must inform the consumer, in the prescribed manner and form, of the right to rescind that agreement, as set out in section 16.

37. Section 40(1) provides that a supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any marketing of any goods or services; supply of goods or services to a consumer; negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer; demand for, or collection of, payment for goods or services by a consumer; or recovery of goods from a consumer.

38. Section 40(2) provides that, in addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier to knowingly take advantage of the fact that a consumer was substantially unable to protect the consumer's own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.

39. Section 51(1)(a) provides that a supplier must not make a transaction or agreement subject to any term or condition if its general purpose or effect is to defeat the purposes and policy of this Act, mislead or deceive the consumer, or subject the consumer to fraudulent conduct.

40. Section 51(1)(b) provides that a supplier must not make a transaction or agreement subject to any term or condition if it directly or indirectly purports to waive or deprive a consumer of a right in terms of this Act, avoid a supplier's obligation or duty in terms of this Act, set aside or override the effect of any provision of this Act, or authorise the supplier to do anything unlawful in terms of this Act or fail to do anything that is required in terms of this Act.

CONSIDERATION OF CONTRAVENTIONS AND PROHIBITED CONDUCT

41. The Tribunal has considered the evidence placed before it and deemed it appropriate to characterise the agreement(s) that the respondent concluded with the complainants. The respondent asserted that there were two separate agreements: a sale agreement for the software and a subscription agreement providing continuing services, including live market information. Also, although the services required the purchase of the software, the agreements were not one and the same. These are the titles of the suite of documents that the respondent provided as part of the standard agreement[2] between the respondent and complainants:

    41.1 SIMULATION TRAINING RULES AND CONDITIONS;[3]
    41.2 SUBSCRIPTION FORM;[4]
    41.3 Standard Terms and Conditions of Sale;[5]
    41.4 Authority and Mandate – Payment Instruction;[6]
    41.5 WITHOUT PREJUDICE TO ANY RIGHTS;[7] and
    41.6 DELIVERY CONFIRMATION AND ACKNOWLEDGMENTS.[8]

42. According to the WITHOUT PREJUDICE TO ANY RIGHTS document, the respondent marketed an opportunity for a unique training tool and concept, a simulation product with its own software. The SUBSCRIPTION FORM includes authorisation to deduct the purchase price of the AIMX Software. The Authority and Mandate – Payment Instruction includes authorisation to pay the monthly subscription amount for a 12-month period for a service, with terms and conditions related thereto. The Standard Terms and Conditions of Sale set out the terms and conditions of the sale and provide direct links to the simulation and the service subscription terms. Detailed requirements for the simulation are covered in SIMULATION TRAINING RULES AND CONDITIONS.

43. Whereas executed as separate agreements in the commercial context, the suite of agreements, based on their nature, context and purpose, are interdependent and form components of a single indivisible agreement for the provision of goods and services.

[2] Pages 148-156 of the bundle.
[3] Pages 148-149 of the bundle.
[4] Page 150 of the bundle.
[5] Page 151 of the bundle.
[6] Pages 152-153 of the bundle.
[7] Pages 154-155 of the bundle.
[8] Page 156 of the bundle.

There is an inextricable link that renders the simulation product useless without purchasing the software and subscribing to the agreements, as they form the AIMX Simulation Software package. In determining the indivisibility of a two-phased transaction, the Competition Tribunal held that the first leg was merely to facilitate the possibility of the second leg occurring and that, legally and factually, the two legs constitute parts of a single transaction.[9] The Constitutional Court[10] in Clicks Retailers (Pty) Ltd v Commissioner for the South African Revenue Service[11] stated that our jurisprudence establishes that there is an "inextricable link" when an issue, claim, contract or conduct cannot be determined or assessed without another, or the legal consequence of the one cannot be understood or measured without reference to another.

44. In this matter, clauses 6 and 16 of the Standard Terms and Conditions of Sale directly and expressly link the terms and conditions of the AIMX Simulation Software purchase to the service subscription and simulation. The simulation cannot take place without acquiring the software. The provision of services under the subscription agreement is expressly dependent on the AIMX Simulation Software offered to consumers. Moreover, failure to pay the monthly subscription within the first six months may result in suspension of the service or termination of the AIMX Simulation Software agreement of sale. The Tribunal therefore accepts that, in this case, the multiple agreements signed between the respondent and each complainant constitute a single, indivisible agreement.

45. The respondent concluded agreements with Mr Gibbins on 6 February 2023, Mr Brand on 4 October 2022 and Ms Ribeiro on 8 December 2023. Although the applicant presented their complaints as similar, their basis for cancellation differed substantially. Mr Gibbins was unhappy about the deduction of R38 000 from his credit card, allegedly without his consent. Mr Brand understood that the respondent would trade on his behalf and could not use the software because he did not have a computer. Ms Ribeiro wanted direct trading rather than simulation, which the product seemingly did not offer. Despite the applicant's allegation that misrepresentations by agents of the respondent induced the complainants to enter into the agreements, no evidence of such misrepresentations was provided.

[9] Crown Gold Recoveries (Pty) Ltd and Industrial Development Corporation of South Africa Limited / Khumo Bathong Holdings (Pty) Ltd (31/LM/May 02) [2002] ZACT 38 (4 June 2002), page 3.
[10] New Nation Movement NPC v President of the Republic of South Africa [2020] ZACC 11; 2020 (6) SA 257 (CC).
[11] (CCT 07/20) [2021] ZACC 11; 2021 (4) SA 390 (CC); 2021 (10) BCLR 1102 (CC); 84 SATC 71; 2021 BIP 16 (CC) (21 May 2021) par.44 & 46.

46. Further, no expert evidence was led to support the applicant's claim that Mr Gibbins' signature and/or initials were forged or that the respondent's 10-page original agreement had pages that were completely new to Mr Gibbins. Mr Gibbins denied being aware of the Subscription Form and testified that he was misled into believing that his credit card was required for reasons other than purchasing the software. He confirmed that the signature on the Subscription Form appeared to be his but claimed that it might have been forged. The applicant failed to discharge its onus in this regard. Mr Magagula also accepted during the hearing that absent the expert evidence, this allegation will not be taken any further. The applicant's reliance on the absence of consensus is undermined by failure to prove the alleged misrepresentation.

47. Consequently, the Tribunal can reasonably conclude that there was an agreement between the respondent and each of these complainants. The Tribunal nevertheless accepts that each complainant had a different understanding of, and set of expectations regarding, the concluded agreement. As a result, they voiced their concerns and invoked their right to cancel, which led to this referral. We now turn to the alleged contraventions.

Alleged contravention of section 16(3)(b)

48. Section 16(3)(b) gives a consumer a right to cancel or rescind a transaction resulting from any direct marketing without reason or penalty, by notice to the supplier in writing or another recorded manner and form, within five business days after the later of the date on which the transaction or agreement was concluded or the goods that were the subject of the transaction were delivered to the consumer. Section 32(1) obliged the respondent to inform the consumer of the right to cancel contemplated in section 16. Clause 6 of the Standard Terms and Conditions of Sale states that the agreement is subject to a cooling-off period of five business days.

49. According to the applicant, the respondent refused to cancel the agreements despite the three complainants having given cancellation notices within the cooling-off period. The evidence before the Tribunal does not support this, as none of the complainants cancelled in writing or another recorded manner or form within the prescribed five business days. Mr Gibbins sent an email on 14 February 2023, six business days after the agreement was concluded. Mr Brand sent an email on 26 October 2022, well outside the prescribed period. Ms Ribeiro sent her cancellation notice on 8 January 2024, approximately a month after the agreement was signed.

50. The applicant relied on telephone cancellations but failed to produce the recording of the telephone calls. The respondent admitted to telephone conversations that occurred within the cooling-off period but denied that cancellation was done in the prescribed manner during that period. The applicant's reliance on telephone cancellation, without a recording thereof provided to the Tribunal, falls short of the jurisdictional requirement in section 16(3). The requirements of section 16(3)(b) are unequivocal and peremptory. The Tribunal finds no contravention of section 16(3)(b) read with section 16(4) against the respondent.

Alleged contravention of section 14(2)(b)(i)(bb)

51. Section 14(2)(b)(i)(bb) permits a consumer to cancel a fixed-term agreement at any other time, by giving the supplier 20 business days' notice in writing or other recorded manner and form, subject to subsection (3)(a) and (b). Section 14(3)(a)-(b) provides that upon cancellation of a consumer agreement as contemplated above, the consumer remains liable to the supplier for any amounts owed to the supplier in terms of that agreement up to the date of cancellation. The supplier may impose a reasonable cancellation penalty with respect to any goods supplied, services provided, or discounts granted to the consumer in contemplation of the agreement enduring for its intended fixed term, if any, and must credit the consumer with any amount that remains the property of the consumer as of the date of cancellation.

52. Clause 6 of the Terms and Conditions of Sale states that the agreement is subject to a cooling-off period, but on conditions outlined in sub-clauses 6.1 to 6.8. Relevant to the applicant's case before the Tribunal is sub-clause 6.5, which states that cancellation and/or refunds (terms and conditions apply) will be applicable only after completing the six-month simulation period. This refers to the right to cancel within the cooling-off period. The clause directly restricts and undermines section 16 by expressly excluding the right to cancel through the six-month condition. To the extent that sub-clause 6.5 applies to cancellation under section 14, as admitted by the respondent, it subjects cancellation of the agreement to six months, a condition not permitted under section 14(2)(b)(i)(bb). The permitted conditions are provided in section 14(3)(a)–(b).

53. Sub-clause 6.3 of the Standard Terms and Conditions of Sale permits the imposition of a cancellation fee of 10% of the purchase price for administration and handling fees, plus R2 000 as a merchant fee upon cancellation. Save to confirm that a reasonable penalty is

allowed under the Act, the Tribunal is not required to determine the reasonableness of the cancellation penalty. The Act allows a consumer to cancel at any time, and the respondent unlawfully tied cancellation to a six-month hurdle. Upon receipt of the cancellation notice, the respondent was legally obliged to act as directed by the Act and cancel but refused to do so. Sub-clause 6.5 suspends or excludes the application of section 14(2)(b)(i)(bb) for six months, contrary to the objectives of the Act. In National Consumer Commission v Vodacom (Pty) Ltd,[12] the Tribunal found the respondent to have contravened section 14(2)(b)(i)(bb) by not timeously cancelling consumers' agreements after having been duly notified to do so.

54. The Tribunal notes the respondent's admission that its handling of the three complainants' cancellation notices was incorrect and in contravention of the Act. It attributed this admission to subsequent legal advice and tendered unconditional refunds of the purchase price: R35 000 to Mr Gibbins, R35 000 to Mr Brand and R39 000 to Ms Ribeiro. The admission does not alter the fact that the respondent refused to cancel the agreements. As of the date of this referral, the agreements had not yet been cancelled. No refunds had been made. The Tribunal finds that the respondent contravened section 14(2)(b)(i)(bb) of the Act by failing to cancel the agreements it had with the complainants.

Alleged contravention of sections 51(1)(a) and (b)

55. Section 51(1)(a) provides that a supplier must not make a transaction or agreement subject to any term or condition if its general purpose or effect is to defeat the purposes and policy of this Act, mislead or deceive the consumer, or subject the consumer to fraudulent conduct. Section 51(1)(b) provides that a supplier must not make a transaction or agreement subject to any term or condition if it directly or indirectly purports to waive or deprive a consumer of a right in terms of this Act, avoid a supplier's obligation or duty in terms of this Act, set aside or override the effect of any provision of this Act; or authorise the supplier to do anything unlawful in terms of this Act or fail to do anything that is required in terms of this Act.

56. The Tribunal considered the respondent's assertion that sub-clause 6.5 of the Terms and Conditions of Sale was not intended to limit or waive consumers' statutory rights. Mr Kapp implored the Tribunal to seriously consider the nature of the agreements and the purpose

[12] (NCT/260497/2023/73(2)(b)) [2023] ZANCT 44 (13 October 2023).

for which the sub-clause was included, asserting that it aimed to provide the consumer with an additional contractual remedy and benefit through a guarantee. Even if the Tribunal were to accept that its purpose was noble, the guarantee did not operate alongside the right to cancel under section 14(2)(b)(i)(bb). In fact, it effectively suspended or excluded the right to cancel for the first six months of the 12-month agreement. The sub-clause restricted the complainants' ability to cancel and deprived them of their statutory rights. Its wording undoubtedly had the effect of overriding section 14(2)(b)(i)(bb) or other cancellation rights under the Act.

57. The respondent's agreements with the complainants were concluded between 2022 and 2023, yet they remain uncancelled owing to the sub-clause, defeating the purpose of the Act. The sub-clause could serve no legitimate functional purpose for a consumer who had clearly expressed an unwillingness to continue with the agreement. Its effect was to lock consumers into unwanted agreements for the respondent's benefit. The respondent avoided its statutory obligations under the Act and acted unlawfully as a result thereof. Justifiable conditions are those consistent with the Act, such as the imposition of a reasonable cancellation fee. The Act deliberately prohibits the condition in sub-clause 6.5. Consequently, the Tribunal agrees with the applicant that the respondent contravened section 51(1)(a) and (b).

Alleged contravention of section 40(1) and (2)

58. Section 40(1) provides that a supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any marketing of any goods or services; supply of goods or services to a consumer; negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer; demand for, or collection of, payment for goods or services by a consumer; or recovery of goods from a consumer. Section 40(2) provides that, in addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier to knowingly take advantage of the fact that a consumer was substantially unable to protect the consumer's own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.

59. The applicant submitted that the respondent applied unfair tactics and took advantage of

the complainants as older people. However, no evidence of unfair tactics or other conduct contemplated in section 40 was provided. The respondent denied misrepresenting itself or misleading the complainants before or after the agreements were concluded. It submitted that when the complainants expressed dissatisfaction, it attempted to persuade them to attend training sessions to understand the product better. Mr Gibbins attended the suggested training but insisted on cancellation of the agreement. Mr Brand refused to attend further training. The Tribunal found no evidence that the complainants were targeted or taken advantage of because of their age.

60. The complainants had differing levels of comprehension of the terms of the agreements they concluded. No specific unfair tactic or pattern of unfair tactics that the respondent or its agents applied could be established. During the hearing, Mr Magagula accepted that, other than the respondent's alleged insistence on locking the complainants into an unfair agreement, there is no act or conduct that the applicant can attribute to the respondent as a contravention under this section. Unconscionable conduct cannot be assumed purely because a supplier dealt with older people. The Tribunal, therefore, finds that the respondent did not contravene section 40.

CONCLUSION

61. The Tribunal concludes that the respondent contravened section 14(2)(b)(i)(bb) and section 51(1)(a) and (b) by failing to cancel the agreements of Mr Gibbins, Mr Brand and Ms Ribeiro after they transmitted written cancellation notices and by including a prohibited provision in the agreements concluded with the three complainants, restricting or waiving the statutory rights of the complainants as consumers, defeating the purpose of the Act, avoiding the supplier’s obligations under the Act, overriding the statutory provision under the Act, amongst other things. The respondent did not advance justifiable reasons to excuse the respondent’s conduct.

62. The Tribunal finds no basis for other alleged contravention of sections 16(3)(b), 16(4) and 40(1) and (2).

RELIEF SOUGHT

63. The Tribunal has concluded that the respondent contravened the Act and agrees with the applicant that the contraventions are serious and warrant being declared prohibited

conduct. The Tribunal has wide-ranging powers to make appropriate orders concerning prohibited conduct on the relief sought.[13] Section 150 of the NCA, read with section 4(2)(b), empowers the Tribunal to provide redress to give practical effect to the right violated.

64. Regarding the request for the Tribunal to grant an interdict against the respondent, it is trite that an interdict is directed at future conduct. If there is no risk of future conduct which may be interdicted, an interdict should not be granted.[14] The test for a final interdict is also well settled, with the requisites being a clear right, an injury actually committed or reasonably apprehended, and an absence of an alternative remedy.[15] The Tribunal agrees with the respondent that adequate basis has not been demonstrated for this relief to be granted.

65. Regarding the refund of the purchase price for the software, section 4(2)(b)(ii)(bb) appears to empower the Tribunal to grant an order that goes beyond the right (to the price paid for) already afforded to the consumer in terms of the Act. The Tribunal notes the respondent's unconditional tender to refund the complainants a total of R109,000.00, broken down as follows: R35 000 to Mr Gibbins, R35 000 to Mr Brand, and R39 000 to Ms Ribeiro. The Tribunal resolves to make the refund subject to a strict 15-day timeline, given the time elapsed.

66. Regarding the request for the Tribunal to issue a certificate in terms of section 115 to enable the complainants to pursue damages in the civil courts, the Tribunal is not competent to issue such a certificate. The complainants would be required to follow due process under the Act and apply for the Chairperson of the Tribunal to issue the certificate after a formal finding of prohibited conduct has been made against the respondent. Such certificate is conclusive proof that the respondent engaged in prohibited conduct under the Act. This relief can thus not be ordered or granted by this Tribunal.

67. Regarding the administrative penalty, section 112(1) empowers the Tribunal to impose an administrative fine regarding prohibited or required conduct. Such a fine may not exceed the greater of 10% of the respondent's annual turnover during the preceding financial year or R1 000 000.00. Mr Magagula stated that the respondent's annual turnover for the

[13] See National Credit Regulator v Dacqup Finances CC trading as ABC Financial Services – Pinetown and Another (382/2021) [2022] ZACSA 104 (24 June 2022).
[14] See Malema v Rawula (139/2020) [2021 ZACSA 88 (23 June 2021).
[15] See Setlego v Setlego 1914 AD 221 at 227.

preceding financial year, 2025, was R10 916 542, and requested the Tribunal to consider imposing the 10% thereof. Given the seriousness of the contraventions, the Tribunal agrees with the applicant that a fine is appropriate and justified.

68. Section 112(3) enjoins the Tribunal to consider the factors specified therein when determining an appropriate administrative fine. The Tribunal considers the factors below.

The nature, duration, gravity, and extent of the contravention

69. The applicant submitted that the respondent's conduct disregarded more than one provision of the Act, severely prejudiced the consumers in question and undermined the objectives of the Act. The contraventions are serious in nature. By unlawfully withholding the consumers' funds and denying them the statutory protections expressly provided in the Act, the respondent gained financially at the expense of elderly and vulnerable consumers. The respondent referred to its admission of a contravention of section 14(2)(b)(i)(bb) and the corrective measures it is implementing. It maintained that the contraventions were isolated and not serious. Moreover, the Tribunal has absolved the respondent of the other alleged contraventions for lack of evidence.

Any loss or damage suffered as a result of the contravention

70. The applicant stated that the complainants are entitled to the cancellation of the transaction and receipt of a full refund of the purchase price for the software. The respondent has made an unconditional tender to refund the complainants the full purchase price respectively.

The behaviour of the respondent

71. The applicant submitted that, throughout this matter, the respondent showed no regard for the complainants' rights as enshrined in the Act. Even after being notified of the issue and the complainants' right to cancel, the respondent refused to engage constructively, ignored valid cancellation notices and persisted in enforcing the agreements. The respondent submitted that, after receiving advice from its lawyers, it admitted to handling the cancellations incorrectly and implemented corrective measures, including tendering full refunds to the complainants. It also asserted that it engaged the complainants and the applicant in good faith and attempted to settle the matter.

The level of profit derived from the contravention

72. The applicant submitted that the complainants suffered significant and immediate financial loss without receiving a product that could be used for the purpose it was purchased. This caused not only economic harm but also continued financial strain for the complainants due to subscription obligations. The respondent submitted that no significant profit was derived. The respondent's financial statements do not reflect a significant profit that can be said to be derived from the contravention.

The degree to which the respondent cooperated with the applicant

73. The applicant submitted that the respondent demonstrated a measure of cooperation during the investigation, including the timely submission of requested information and engagement with the investigative process. Although a mitigating factor, this does not diminish the seriousness, duration or gravity of the contraventions. The respondent remains liable for the breaches of the Act and the prejudice caused to the complainants. The respondent requested that the Tribunal consider its full cooperation and good-faith engagement with the applicant and the Tribunal when determining appropriate remedial measures or administrative penalties.

Whether the respondent has previously been found in contravention of the Act

74. The applicant stated that there was no evidence that the respondent had committed previous contraventions of the Act or enforcement action against it. The respondent submitted that it has a clean compliance record and has committed to corrective measures.

75. Having considered the parties' submissions on these factors, the Tribunal exercises its discretion and finds a fine of R350 000 appropriate, payable within 60 business days from the date of issuance of the judgment.

ORDER

76. Accordingly, the Tribunal makes the following order:

    76.1 The respondent has contravened sections 14(2)(b)(i)(bb) and 51(1)(a) and (b) of the Act.

76.2 The contraventions are declared prohibited conduct.

76.3 The respondent must, within 15 business days of the issuance of this judgment, refund each complainant the amount the respondent debited the complainants' respective accounts, by paying the following amounts into their nominated accounts:

76.3.1 Mr Norman Gibbins: R35 000.00;
76.3.2 Mr Francois Brand: R35 000.00; and
76.3.3 Ms Guihermina Lemos Ribeiro: R39 000.00.

76.4 The applicant must ensure the execution of the refund order in paragraph 76.3.

76.5 The respondent must, within 60 business days of the date of issue of this judgment, pay an administrative fine of R350,000.00 into the National Revenue Fund's following bank account:

Bank:	Nedbank
Account Holder:	Department of Trade, Industry and Competition
Account type:	Current Account
Branch Name:	Telecoms and Fiscal
Branch code:	198765
Account number:	126 884 7941
Reference:	NCT-417333-2025-Section 73(2)(b) and the name of person or business making the payment; and

76.6 There is no order as to costs.

(Signed)

Ms Z Ntuli

Tribunal Member

Presiding Tribunal Member Prof K Moodaliyar and Tribunal Member S Hockey concur.

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

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national consumer tribunal