

SOUTH AFRICA / JUDGMENT

Fulton v National Credit Regulator (NCT/130744/2019/Section56(1)) [2019] ZANCT 146 (10 September 2019) [2019] ZANCT 146

COURT

National Consumer Tribunal

BEFORE

Tanya Woker, H Devraj, M Peenze

CASE / FILE NUMBER

NCT/130744/2019/Section56(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT/130744/2019/Section 56 (1)

In the matter between

MARK JAMES FULTON APPLICANT

and

THE NATIONAL CREDIT REGULATOR RESPONDENT

Coram:

Prof Tanya Woker – Presiding member

Ms H Devraj – Tribunal member

Dr M Peenze – Tribunal member

Judgment

with reasons

INTRODUCTION

1. The Applicant is Mark James Fulton a debt counsellor registered with the National Credit Regulator (NCR) in terms of the National Credit Act, 2005 (“the Applicant”).

2. The Respondent is the NCR a juristic person established by section 12 of the National Credit Act, 2005 (NCA) tasked with the responsibility of inter alia monitoring registrants in the consumer credit market to ensure that prohibited conduct is prevented or detected and prosecuted^[1] (“the Respondent” or “the NCR”).

BACKGROUND

3. In June 2018 the NCR received certain complaints from consumers regarding the conduct of the Applicant. The NCR then proceeded to investigate the complaints and concluded that the Applicant was contravening the NCA and his Conditions of Registration in certain respects.^[2]
4. The Respondent issued a Notice of Compliance in terms of section 55 of the Act (“the notice”) to the Applicant. The notice stated that an investigation by the NCR revealed that the Applicant was contravening certain provisions of the Act as well as his conditions of registration and he was required to take certain steps in order to address the said areas of non-compliance.
5. The NCA provides that any person who is issued with such a notice may apply to the National Consumer Tribunal (“the Tribunal”) in the prescribed manner or form to review the notice within 15 days of having received that notice;^[3] or such longer period as may be allowed by the Tribunal on good cause shown.^[4]
6. The Applicant disputes the allegations contained in the notice and has submitted an objection to the notice to the Tribunal.^[5]

ISSUE TO BE DECIDED

7. Section 56 of the NCA provides that any person issued with a notice in terms of section 55 may apply to the Tribunal to review the notice. After considering any representations by the Applicant and any other relevant information, the Tribunal may confirm, modify or cancel all or part of the notice.
8. The issue we are required to decide is whether the notice which the Respondent has served on the Applicant should be confirmed, modified or cancelled.
9. If the Tribunal conforms or modifies all or part of a notice, the Applicant must comply with that notice as confirmed or modified within the time period specified in it.

THE NOTICE OF COMPLIANCE

10. The notice of compliance alleges that the Applicant has engaged in an activity that is inconsistent with the provisions of the NCA in that the Applicant has:

- a. Failed to comply with Regulation 11 of the Act read with the Applicant's general conditions of registration in that payments made by consumers in respect of debt counselling fees and aftercare fees were made directly to the Applicant without the Applicant making use of a payment distribution agency (PDA); and
- b. Failed to comply with Point 1.5 of the debt counselling fee guidelines in that the Applicant has charged aftercare fees in excess of prescribed rates stipulated in the said guidelines.
11. The compliance notice instructs the Applicant to take certain steps in order to address the said areas of non-compliance. These steps include inter alia:
 - a. Ceasing to collect fees from consumers without making use of a PDA;
 - b. Ceasing to charge aftercare fees in excess of the prescribed rates; and
 - c. Refunding all consumers the aftercare fees charged in contravention of the debt counselling guidelines.
12. The notice further requires the Applicant to furnish an external audit report to the Respondent within 20 business days. This external audit report must indicate the following:
 - a. The number of consumers registered under debt review with the Applicant who have opted to make direct payments to their credit providers without using a PDA, together with their names, contact details and identity numbers;
 - b. The total amount of restructuring fees and aftercare fees collected and/or received from each of the concerned consumers;
 - c. Verification that the fees charged to each concerned consumer for restructuring fees and aftercare fees, where a PDA was not used, were in line with the Debt Counselling Fee Guidelines;
 - d. The amount of restructuring fees charged in excess of the prescribed rates as stipulated in the Debt counselling Fee Guidelines;
 - e. The amount of aftercare fees charged in excess of the prescribed rates as stipulated in the Debt Counselling Fee Guidelines;
 - f. A list of consumers who have refunds due together with the amount due to each consumer, in respect of payments collected and/or received for restructuring fees and aftercare fees charged in excess of the prescribed rates; and
 - g. Confirmation accompanied by supporting documents that the refunds due to concerned consumer were paid to such consumers.

THE HEARING

13. The hearing into the Applicant's objections to the notice was held on 15 August

2019. This judgment is based on the papers filed before the Tribunal as well as the arguments of both the Applicant and the Respondent presented at the hearing.

14. At the hearing the Applicant was represented by Advocate Steward Hoar instructed by Hahes Attorneys and the Respondent was represented by Ms Petro Coetzee, an employee of the Respondent.

The Applicant's submissions

15. The Applicant's objection to the notice focuses on two aspects:

A denial that the Applicant contravened the Act or the Regulations; and

A denial that the Respondent was entitled to issue the compliance notice that it had issued.

Contraventions of the NCA

16. The Applicant submits that the compliance notice ought not to have been issued at all because only two complaints were received from consumers, one from a Ms Viljoen and another from a Ms van der Bank. The complaint from Ms Viljoen related to the charging of high debt counselling fees but the one from Ms van der Bank had nothing to do with fees and has been resolved. The only issue therefore was the complaint from Ms Viljoen.

17. Arising from Ms Viljoen's complaint; the Respondent alleges that the Applicant is doing two things wrong. First, it says that the Applicant has received payments directly from consumers which is a contravention of Regulation 11 of the NCA and his conditions of registration as a debt counsellor and secondly that the applicant has charged fees in excess of the NCR's guidelines.

18. As far as Regulation 11 is concerned it simply states as follows:

"A debt counsellor must not collect and distribute moneys on behalf of consumers".

19. There is no complaint against the Applicant that he collected and distributed funds; the complaint is that he has taken fees for the services that he provides.

20. Regulation 11 only prohibits debt counsellors from collecting and distributing money on behalf of consumers. The two words collect and distribute must be read together (i.e conjunctive rather than disjunctive) and therefore debt counsellors can only contravene the Act if they collect funds from consumers and then distribute those funds to credit providers.

21. Regulation 11 does not apply to payments by consumers of the debt counsellor's fee.

22. Further the Act does not require that consumers make use of a PDA, they can pay their creditors directly themselves. In circumstances where consumers have elected not to make use of a PDA, they have to pay their debt counsellors directly for the services that the debt counsellor provides otherwise the debt counsellor will be unable to collect his fees.

23. The NCR is requiring an absurd situation where it agrees that the debt counsellor is entitled to his fees but he cannot collect those fees because the consumer has not appointed a PDA.
24. The NCR's interpretation of Regulation 11 is therefore incorrect; it does not prohibit the Applicant from receiving payment of his fees; the payment of debt counsellor fees is a completely different issue to the collection and distribution of funds.
25. As far as the conditions of registration are concerned, the Applicant concedes that in terms of the NCA, it is a requirement for the Applicant to comply with his conditions of registration; that is a non-issue.
26. Special condition 1 of the Applicant's conditions of registration reads as follows:

"The debt counsellor may not receive payment from consumers in respect of debt obligations that were re-arranged in terms of the Act or distribute such payments to credit providers. All payments from consumers in respect of debt obligations and or debt counsellor fees must be received and distributed to respective parties by a PDA approved by the National Credit Regulator".
27. The question which then arises is this: how does the debt counsellor get paid? The debt counsellor does not have the power to insist that consumers appoint a PDA if they do not want to. So if the interpretation of the Regulator regarding this condition of registration is correct there is a stalemate. Special condition 1 must be read with the next paragraph which explains why the specific conditions were proposed. This paragraph reads:

"The specific conditions are proposed for the following reasons. To prevent a debt counsellor from being involved in payment distribution. If such debt counsellor does not have adequate staff, infrastructure systems or procedures in order to safeguard funds, efficiently distribute the fund or account for the funds".
28. It is clear from this explanation that the purpose of the specific condition is to prevent the Applicant from distributing funds. He is not doing that; he is only collecting his fees which nobody disputes he is entitled to. In the case of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 SCA the Supreme Court of Appeal points out that when interpreting a document, a sensible meaning is to be preferred to one that leads to insensible or un-business like results or which undermines the apparent purpose of the document. The NCR's interpretation of the specific condition means that the debt counsellor will not get paid which is not a sensible interpretation.
29. For the above reasons, the Applicant submits that the conditions of registration also do not prevent the Applicant from receiving payments directly from consumers.
30. As far as point 1.5 of the Debt Counsellors' Fee Guidelines are concerned, the Applicant denies that he has charged aftercare fees in excess of the prescribed rate as stipulated in the said guidelines.
31. In 2011 the fee guidelines provided that a debt counsellor could charge::

“A monthly aftercare fee of 5 percent (excluding vat) of the monthly instalment of the debt rearrangement plan, up to a maximum of R400 for a period of 24 months, thereafter reducing to 3 percent of the monthly instalment to a maximum of R400.”

32. The fee guidelines do not expressly state that he is only allowed to charge the lesser of those two amounts. Therefore if the consumer agrees to pay R400 which is the maximum, there is nothing in these guidelines which prevents the debt counsellor from charging R400. The fee guidelines were updated in 2018 to make it clear that the debt counsellor is only entitled to the lesser amount but the 2011 guidelines did not have this stipulation. So going forward debt counsellors may only charge the lesser amount but in the period 2014 to 2019 the Applicant cannot be faulted because after the fact and based on current guidelines the position is now made clear.
33. Based on these arguments the Applicant submits that the Tribunal should dismiss the notice of compliance in its entirety.

The compliance notice

34. Alternative to the above submissions, the Applicant argues that if the Tribunal finds that the Applicant did contravene the Act or his conditions of registration, then the notice stands to be modified because it is overbroad.
35. The NCR only received one complaint relating to the overcharging of fees and therefore any relief must relate to that complaint. The Respondent however is requiring the Applicant to go back and relook at every consumer that he has dealt with and refund them, if they have been overcharged. This the Applicant submits is stretching things too far.
36. In support of this contention, the Applicant refers to section 139 of the NCA which deals with the powers of an investigator when a complaint has been made. Subsection 4 provides that a person is not obliged to answer any question if that answer is self-incriminating. Therefore any person who is being questioned by an investigator is entitled to refuse to answer questions if those answers will incriminate him. In the notice however the Respondent is requiring the Applicant to submit a report detailing every consumer, whether they have been overcharged, etc and is thereby circumventing the functions of the investigator. The NCR is effectively telling the Applicant to give them all the information they need to prosecute him. If the NCR believes that there is a problem which extends beyond Ms Viljoen, it should have conducted an investigation and should put those facts before the Tribunal.
37. The notice puts the Applicant in an invidious position. If the Applicant is forced to comply with the notice as it stands this violates his clear right as set out in section 139(4) (a) .

38. The Respondent has the powers to conduct an investigation and in doing so the Applicant will be protected because he does not have to self-incriminate himself. The Respondent can complete its investigation and if at that stage it wants to proceed with further action against the Applicant, it is at liberty to do so but getting this relief at this stage is “a bridge too far”. The Applicant cannot be compelled to do the Respondent’s work for it which is what they are trying to do with paragraph C2 of the notice.
39. In summary therefore, if the Tribunal is of the view that the compliance notice should stand it must modify paragraph C of the notice. The Tribunal should delete paragraph C 1 (a) because the Applicant should be allowed to collect his fees from consumers in circumstances where the consumer has elected not to use a PDA. In addition paragraph C 1 (c) and paragraph C 2 must be deleted as these paragraphs relate to refunds owed to consumers in circumstances where the NCR has not investigated the matter beyond the complaint of Ms Viljoen.

THE RESPONDENT’S SUBMISSIONS

40. The Respondent submits that the NCR only needs to receive one complaint for a reasonable suspicion to arise. Once it receives a complaint it is entitled to issue a compliance notice which covers not only the complaint, but all the other consumers as well.
41. Regulation 11 must be read with the Applicant’s conditions of registration. The Applicant’s Conditions of Registration (Specific Condition in clause B1) stipulates that “all payments from consumers in respect of debt obligations and/or debt counsellor fees must be received and distributed to respective parties by a payment distribution agency approved by the National Credit Regulator”.
42. The Applicant’s conditions of registration make it clear that the Applicant may not collect fees directly from consumers. He must provide and use a PDA. The reason why the NCR requires the use of a PDA is so that it can regulate the fees which are being paid by consumers. This is for the protection of consumers.
43. Even though the Act has been amended to allow for consumers to decide for themselves whether they want to pay a monthly instalment to a PDA or distribute their funds themselves, the debt counsellor conditions of registration have not changed. The Applicant could have objected to these conditions at any time but he has never done so, therefore they still stand. The Applicant’s conditions of registration are very clear that the Applicant must use a PDA in respect of fees.
44. The Applicant is not entitled to charge higher fees than those set out in the fee guidelines even if consumers agree to this higher fee.

CONSIDERATION OF THE MERITS

45. The Tribunal is satisfied that even though the Respondent only received a single relevant complaint against the Applicant, it is entitled to investigate the complaint and if it has a reasonable suspicion that the Applicant is contravening the Act then it is entitled to issue a compliance notice in accordance with section 55.[6]
46. The Applicant concedes (quite correctly in our view) that he is obliged to comply with his conditions of registration. These conditions of registration provide that the debt counsellor must comply with fee guidelines which have been recognised by the NCR and that all payments received from consumers in respect of debt obligations and/or debt counselling fees must be received and distributed to respective parties by a PDA approved by the NCR.
47. Although the Applicant has argued that the fee guidelines of 2011 should be interpreted to allow the Applicant to charge the full R400, in our view, the guidelines clearly stipulate that a debt counsellor was entitled to 5% of the monthly instalment up to a maximum of R400. Therefore if 5% led to a fee of more than R400, then the debt counsellor was only entitled to R400 but if 5% led to a fee of less than 5% then he was entitled to the lesser amount. Although this has now been made clear in the 2018 fee guidelines this does not detract from a reasonable interpretation of the previous guidelines. To the extent that there was any ambiguity regarding the interpretation, a compliance notice was the correct route for the NCR to follow in order to ensure that the debt counsellor complied with the guidelines. The purpose of a compliance notice is in our view, the correct process to follow when the NCR intends to correct errant behaviour of a regulated entity and to make its position clear on the particular

interpretation of the Act, its regulations or conditions of registration. This issue is now moot because the fee guidelines have

been altered to make the position clear.

48. Regulation 11 of the Act, clearly relates to the collection and distribution of money which debt counsellors receive from consumers. In terms of this regulation debt counsellors are prohibited from collecting and distributing monthly payments from consumers to credit providers. We are satisfied that Regulation 11 does not relate to the payment of debt counsellor fees.
49. However that is not the end of the matter because special condition 1 of the Applicant's conditions of registration makes it clear that in addition to the prohibition on collecting and distributing monies on behalf of consumers, debt counsellors may not collect their own fees.
50. Initially all payments made by consumers (monthly distributable amounts and debt counsellor fees) had to be distributed through a PDA, however the Act has been amended to allow consumers the choice of paying their creditors themselves or making use of a PDA.

Nevertheless, debt counsellors may still not collect and distribute money on behalf of consumers. This special condition still stands and has not been altered by the NCR or challenged by the Applicant. Although the Applicant has argued that this must be interpreted in the light of the other conditions and explanations, we cannot get away from the clear wording of the special condition. The Applicant refers to the Supreme Court of Appeal decision in *Natal Joint Municipal Pension Fund v Endumeni* where the SCA held that where more than one meaning is possible each possibility must be weighed up in the light of certain factors.[7] The SCA was referring to a situation where there is ambiguity in the document and not to the situation where the wording is clear. The SCA also stated that the process of interpretation is objective and that judges must be alert to and guard against the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used.[8]

51. If the Applicant is of the view that it is impractical for consumers to pay his fees to a PDA when they have elected to pay their credit providers directly, then the Applicant must take this issue up with the NCR. He cannot simply choose to ignore his conditions of registration and decide for himself how he will be paid his fees. In the case of *NCR v Deborah Solomon* Case No 397/2017 of 18 October 2018 the Gauteng Division of the High Court stated that a debt counsellor voluntarily chooses her profession as a debt counsellor. If she experiences difficulties because PDAs are not working optimally she is not lawfully permitted to take the law into her own hands and override the statutory body's authority. That argument is wrong in law and falls to be rejected.[9]
52. In our view the same applies in this situation. Whilst the law has changed to permit consumers to pay their creditors directly without making use of a PDA, the stipulation that debt counsellors fees must be paid to a PDA remains. The NCR has explained that this has been retained in order that the NCR may continue to monitor the fees that debt counsellors charge. The Applicant cannot simply ignore this special condition and must approach the NCR to have his conditions of registration changed should he believe that it does not make sense for consumers to pay his fees to the PDA where they have not appointed a PDA for the purposes of distributing funds to credit providers.
53. In summary therefore we are satisfied that the NCR received two complaints from consumers and it investigated those complaints. It established that in its view the Applicant was contravening the Act, its regulations and his conditions of registration. There is a dispute between the parties regarding how the Act should be interpreted and the NCR issued a compliance notice to the Applicant in order to make its position clear. The Applicant has objected to this interpretation, as he is entitled to do. We are satisfied that the NCR's interpretation of the Act is the correct one and to that extent we uphold the compliance notice.

54. However there is still the issue of paragraphs C1 (c) and C2 of the notice. The Act requires that the compliance notice set out the details of the nature and extent of the non-compliance. This the compliance fails to do when it comes to all the consumers that the Applicant was dealing with. The NCR simply assumes that there has been non-compliance without providing any details regarding the nature and extent.

Without the details regarding who the consumers are and what amounts they have been charged the Applicant cannot be ordered to refund consumers.

55. This is a compliance notice, where the debt counsellor is being instructed by the Regulator to bring his conduct within the confines of the Act as interpreted by the Regulator. The matter can therefore be distinguished from those matters where after a full investigation and a hearing before the Tribunal an entity is found to have been engaged in prohibited conduct and an order as required by the NCR is then granted by the Tribunal.

ORDER

56. Accordingly, for the reasons set out above, we make the following order:-

- (1) The application to modify the notice is hereby granted;
- (2) The modified notice reads as follows:

A In terms of sections 55

- (1) and 55(3) of the National Credit Act of 2005 ("the Act") your attention is drawn to the fact that you have failed to comply with the provisions of the Act, in that:
 1. Section 52 (5) (c) of the Act provides that a registrant must comply with its conditions of registration and the provisions of the Act;
 2. General conditions of your registration provide amongst others that:
 - a) A debt counsellor must perform debt counselling in a manner that is consistent with the purpose of the Act;
 - b) A debt counsellor must safeguard the rights and interests of consumers;
 - c) Where the Act or the Regulations do not prescribe a limit to any fee, the debt counsellor must comply with such guidelines, which may have been issued by a debt counsellor representative body and recognised by the National Credit Regulator; and
 - d) All payments received from consumers in respect of debt obligations and/or debt counselling fees must be received and distributed to respective parties by a Payment Distribution Agent ("PDA") approved by the National Credit Regulator.
 3. The Debt Counselling Fee guidelines of 2001 provided as follows:

Point 1.5 “A monthly after-care fee of 5% (excluding VAT) of the monthly instalment of the debt re-arrangement plan up to a maximum of R400.00

(excluding VAT), for a period of 24 months, thereafter reducing to 3% (excluding VAT) of the monthly instalment, to a maximum of R400 (excluding VAT), for the remaining period of the debt re-arrangement plan.”

B You have engaged in an activity that is inconsistent with the provisions of the Act in that:

1. Payments made by consumers in respect of debt restructuring fees, legal fees and aftercare fees were made directly to you without making use of a PDA; and
2. You charged Ms Viljoen aftercare fees in excess of prescribed rates stipulated in the said guidelines.

C. In terms of section 55(3) of the Act, you are required to take the following steps to address the non-compliance with the Act:

1. Cease charging after care fees in excess of the prescribed rates;
 2. Refund Ms Viljoen the aftercare fees which she was charged in excess of the prescribed rates in 2011. These fees must be refunded to Ms Viljoen within 20 days of the date of the issuing of this order; and.
 3. Cease to collect fees from consumers without making use of a PDA; and
- (2) There is no order as to costs.

DATED ON THIS 29 day of August 2019

T Woker

56.

57.

Presiding Member

Ms H Devraj and Dr M Peenze concurring

- [1] See section 15 (d) of the NCA.
- [2] See the Applicants signed conditions of registration dated 2 February 2009 (pages 90-93 of the documents before the Tribunal)
- [3] See section 56 (1) (a).
- [4] See section 56 (1) (b).
- [5] Initially the Applicant's notice of objection did not comply with the Tribunal rules and he subsequently filed an application for condonation, which condonation was granted by the Tribunal on 21 May 2019.

[6] See *Woodlands Diary Ltd v Competition Commission* 2010 (6) SAA 108 (SCA) and *Competition Commission v Yara (South Africa) (Pty) Ltd* 2013 (6) SA 404 (SCA) where the Court dealt with the initiation of an investigation following a complaint in relation to the Competition Act, 1998. The procedures for investigations and referrals set out in the National Credit Act, 2005 are similar to those set out in the Competition and the Tribunal has frequently turned to cases relating to the Competition Act for guidance in order to interpreting the National Credit Act. See for example *National Credit Regulator v Capitec Bank* (NCT/9152/2013/140(1) [2014]. This decision of the Tribunal was upheld on appeal to the High Court. See *National Credit Regulator v Capitec Bank*

[2016] ZAGPPHC 125 (23 March 2016).

[7] See page 604 A of the judgment.

[8] See page 604 B of the judgment.

[9] See para 21 of the judgment.

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Prepared on 12 October 2026 · Esheria