
SOUTH AFRICA / JUDGMENT

National Credit Regulator v Abrahams (NCT/132322/2019/57(1)) [2020] ZANCT 5 (26 February 2020) [2020] ZANCT 5

COURT

National Consumer Tribunal

BEFORE

H Alwar, A Potwana, J Simpson

CASE / FILE NUMBER

NCT/132322/2019/57(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

Case number: NCT/132322/2019/57(1)

In the matter between:

NATIONAL CREDIT REGULATOR APPLICANT

and

RUDOWYN ROBERTO ABRAHAMS RESPONDENT

Coram:

Ms H Alwar – Presiding member

Mr A Potwana – Tribunal member

Adv J Simpson –Tribunal member

Date of hearing – 13 February 2020

Date of judgment – 26 February 2020

JUDGMENT AND

REASONS

APPLICANT

1. The Applicant is the National Credit Regulator (the Applicant), a juristic person established in terms of section 12 of the National Credit Act, 2005 (the Act) to regulate the consumer credit market and ensure compliance with the Act, with its principal business address at 127 - 15th Road, Randjespark, Johannesburg, Gauteng.
2. Ms Leanne Schwartz, who is an employee of the Applicant, represented the Applicant at the hearing.

RESPONDENT

3. The Respondent is Rudowyn Roberto Abrahams (the Respondent), a registered Debt Counsellor with registration number NCRDC1873, whose registered physical address is 58 Bath Street, Montagu.
4. The Respondent did not oppose this application. He also failed to attend the hearing of this application.

JURISDICTION

5. Section 150 of the Act gives the Tribunal the power to make an appropriate order concerning prohibited or required conduct in terms of the Act or the Consumer Protection Act, 68 of 2008. This power includes declaring conduct to be prohibited in terms of the Act; de-registration of a registrant; and imposing an administrative fine in terms of section 151.
6. A section in this judgment refers to a section in the Act. A reference to a regulation refers to the National Credit Regulations, 2006 (the regulations).[1]

ISSUES

TO BE DECIDED

7. The Tribunal is required to determine whether the Respondent has engaged in prohibited conduct by having repeatedly contravened the provisions of the Act and Regulations; should be de-registered; and whether to impose an administrative penalty on the Respondent.
8. The allegations of prohibited conduct will become apparent in the course of this

judgment.

RESPONDENT'S FAILURE TO OPPOSE THIS APPLICATION

9. On 10 May 2019, the Applicant filed this application with the Tribunal and sent it by registered post to the Respondent at P.O. Box 636, Sanlam Hof, in terms of rule 30 (1)(b) of the rules.[2] The Applicant also attempted to serve the application via courier, but it was returned undelivered. The Applicant then sent the

application via e-mail on 6 May 2019, although the Respondent failed to provide consent to service via e-mail.

10. On 13 May 2019, the office of the registrar of the Tribunal (the registrar) issued a notice of filing. That notice records that the Respondent may oppose the application by serving an answer within 15 business days of receipt of the application.
11. The matter was set down for hearing on 9 July 2019. On the same day, the Respondent's attorney on record formally withdrew as the Respondent's attorney of record. The Tribunal postponed the matter sine die and ordered that the Respondent file a condonation application as well as an Answering Affidavit within 15 (fifteen) business days of receiving the order. The Respondent failed to adhere to this order. The matter was set down for hearing on 19 September 2019 and subsequently removed from the roll. The matter was again set down to be heard on 13 February 2020.
12. On 19 November 2019, the registrar issued a notice setting this application down for hearing on 13 February 2020. The registrar sent the notice by e-mail to the Applicant at litigation@ncr.org.za, the Respondent's e-mail addresses at info@abrahamsassociates.co.za; and abrahamsrudowyn@gmail.com.
13. The Tribunal was satisfied that the sequence of events shows that:
 - 13.1 The Applicant served the application papers via registered mail and e-mail. The Respondent's Attorney confirmed that the Respondent received the application.
 - 13.2 The registrar notified the Respondent that it had 15 (fifteen) business days from the date of receiving the application papers to file an answering affidavit and did not do so;
 - 13.3 On 9 July 2019, the Tribunal granted the Respondent an opportunity to file and serve a condonation application with his Answering Affidavit, but he failed to do so; and
 - 13.4 The Tribunal was satisfied that the service requirements as set out in Rule 30(1)(b) were met.
14. Despite these attempts to afford the Respondent an opportunity to answer the serious allegations the Applicant makes against him, the Respondent elected to remain silent, not oppose the application; and not attend the hearing of this application. Consequently, the Tribunal proceeded to hear this application in the Respondent's absence.

BACKGROUND

15. On or about 13 September 2018, the Applicant initiated a complaint in terms of section 136 (2) of the Act after having received numerous complaints. The complaints related to the Respondent failing to distribute payments to credit providers and not obtaining court orders. As a result, some of the credit providers terminated the debt review process.
16. On or about 20 September 2018, the Applicant appointed R.W. Attorneys to investigate the debt counselling practices of the Respondent. The inspectors were appointed in terms of section 25 of the Act to investigate the Respondent's activities.

17. The investigation commenced on or about 31 October 2018. During the investigation, the Applicant found it difficult to locate the Respondent. The Applicant eventually made contact with the Respondent's attorney. The Respondent's attorney arranged for the inspectors to meet the Respondent at the premises situated at 58 Bath Street, Montagu. The inspectors obtained 20 (twenty) consumer files. The inspectors selected a random sample from the Debt Help System data.
18. A significant portion of the consumer files was with The Debt Management Group (the Respondent's previous employer). The inspector received the sample of consumer files on 7 and 15 November 2018. The Respondent failed to provide all the information as requested by the inspectors during the investigation.
19. The inspectors assessed the 20 (twenty) consumer files and concluded that the Respondent had repeatedly contravened provisions of the Act and the Regulations. The inspectors compiled an investigation report (the investigation report), which is dated 31 January 2019. [3] The investigation report details the alleged contraventions. The 20 (twenty) sample files are annexed to the investigation report to support the conclusions in the report.

APPLICANT'S FOUNDING AFFIDAVIT

20. The Applicant's Nthupang Magolego, who is employed as the Senior Executive Legal Advisor, submitted that the Respondent has repeatedly failed to conduct its business in a manner that is consistent with the purpose and requirements of the Act, Regulations and Conditions of Registration. She asserts that the Respondent has repeatedly contravened the provisions of the Act as is fully set out in the investigation report.
21. The Tribunal proceeded to consider the contraventions that are alleged in the investigation report.

CONTRAVENTIONS OF THE ACT

Failure to update and inform the Applicant

The General Conditions of Registration

22. General Condition 2 requires the debt counsellor to provide debt counselling services in a manner that is consistent with the purpose and requirements of the Act. The debt counsellor is required to act professionally and reasonably in providing debt counselling services and to ensure that services are provided in a timely, fair and non-discriminatory manner; and must not bring the Applicant or debt counselling in disrepute. General Condition 6 provides that the Respondent must notify the Applicant immediately of any change in employment, financial position, personal status or any other matter that may affect his eligibility to provide debt counselling services.

Alleged contraventions

23. The Applicant alleges that the Respondent failed to inform it of his change of business address and employment status with the Debt Management Group. The Respondent failed to retain consumer files when he left the employment of the Debt Management Group; he allowed the Debt Management Group and its employees to use his debt counsellor registration number in exchange for an amount of R6000.00 (six thousand) rand per month; he did not provide personal services to the consumers and did not intend continuing serving the consumers registered under his name or transfer the consumers to another debt counsellor.

Analysis

24. The Tribunal is satisfied that the Respondent has contravened General Condition 2 and 6 of the Conditions of Registration. According to the Registrant Information Update Form, dated 31 March 2010, the Respondent provided an address of 74 Short Street, Cape Town.

During the investigation, the inspectors located the Respondent and met him at his premises at 58 Bath Street, Montagu. Furthermore,

the evidence before the Tribunal is e-mail correspondence dated 7 April 2017,[4] from the Respondent to a representative of the Debt Management Group stating that he is resigning with immediate effect. The Respondent confirms, that as per the contract, the Debt Management Group will utilise his licence for a period of 3 to 6 months for an amount of R6000 (six thousand) rand. His consumer files must be transferred to the new debt counsellor, once that person is appointed.

Failure to provide information and documentation

The Act

25. Section 52 (5) (c) provides that a debt counsellor must comply with its conditions of Registration and the provisions of the Act. General Condition 8 relates to a Debt counsellor satisfying all requests and enquiries during compliance monitoring by the Applicant.

Alleged contravention

26. The Applicant alleges that during the investigation, the Respondent failed to provide the inspectors with documents such as court applications; consumer proposals and acceptance letters.
27. The Tribunal is satisfied that the Respondent has contravened General Condition 8 read with section 52 (5). The evidence before the Tribunal is a table setting out a list of documents that were not provided to the inspectors.[5]

Allowing unregistered persons to conduct and provide debt counselling services

28. Section 44(2) prohibits a person from offering or engaging in the services of a debt counsellor, or to hold themselves out to the public as being authorised to offer any such service unless that person is registered as a debt counsellor. General condition 3 provides that upon application for debt review and throughout the different stages of the debt review process, the debt counsellor must fully inform the consumers of the consequences of applying for debt review and of an order being made. General condition 5 provides that a debt counsellor should not enter into any agreements or engage in any activity which may prevent him from acting in the best interest of the consumer.
29. The Applicant alleges that the Respondent did not personally conduct debt counselling services. The Respondent allowed unregistered persons or consultants to use a "Sales Calculator" in the form of an Excel spreadsheet to calculate consumer's over-indebtedness. The Respondent did not review the assessments or communicate the results to the consumers. Therefore, the Respondent delegated his primary duties to unregistered persons. During the hearing, the Applicant submitted that in the Bornman[6] matter, the court held that the debt counsellor makes the crucial determination of over-indebtedness.
30. The investigation report sets out the consultation held with the Respondent whereby he admits to consultants conducting the over-indebtedness assessments with the consumers. It is clear that when the Respondent resigned with immediate effect, he allowed unregistered persons to perform debt counselling services in his absence. A debt counsellor must be actively involved in the debt review process and to provide consumers with the necessary advice and professional service. The Respondent is not entitled to circumvent the statutory requirements by appointing unregistered persons to provide debt counselling services. Nor is the Respondent entitled to rely on the mechanical processes of a computer system to render debt counselling services, including making the crucial determination that a consumer is over-indebted. Consequently, the Tribunal is satisfied that the Respondent has contravened section 44 (2) and General Condition 3 and 5.

Failure to determine the over-indebtedness of consumers

31. Section 86 (6) requires a debt counsellor who has accepted an application for debt review to determine whether the consumer appears to be over-indebted. Section 86 (7) provides that if, as a result of an assessment conducted in terms of subsection 86 (6), a debt counsellor reasonably concludes that; (a) the consumer is not over-indebted, the debt counsellor must reject the application, even if the debt counsellor has concluded that a particular credit agreement was reckless at the time it was entered into; (b) the consumer is not over-indebted, but is nevertheless experiencing, or likely to experience, difficulty satisfying all the consumer's obligations under credit agreements in a timely manner, the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement; or (c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders- (i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those

agreements appear to be reckless and; (ii) that one or more of the consumer's obligations be re-arranged by- (aa) extending the period of the agreement and reducing the amount of each payment due accordingly; (bb) postponing during a specified period the dates on which payments are due under the agreement; (cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or (dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6.

32. Regulation 24 (6) requires a debt counsellor to make a determination, within 30 business days after receiving an application for debt review, whether the consumer is over-indebted and if the consumer seeks a declaration of reckless credit, whether any of the consumer's credit agreements appear to be reckless in terms of section 86 (6). Regulation 24(7) requires a debt counsellor to consider section 79 when assessing a consumer's debt review application and to consider further whether a consumer is over-indebted if his/her monthly debt payments exceed the balance derived by deducting his/her minimal living expenses from his/her net income; calculate the net income and the minimum living expenses. Regulation 24 (8) requires a debt counsellor to consider various criteria in determining whether a particular debt was granted recklessly.
33. The Applicant alleges that the Respondent did not make a determination of over-indebtedness, but instead relied on consultants and an Excel spreadsheet to make the determination.
34. The evidence before the Tribunal is the admission of the Respondent during the consultation with the inspectors, that he did not conduct assessments with the consumers, but that it was done by consultants. Consequently, the Tribunal is satisfied that the Respondent has contravened sections 86
(6) and 86(7) and Regulations 24(6), 24(7).

Failure to adhere to the prescribed timelines set out in the Act

35. Section 86(4)(b) provides that, on receipt of an application to be declared over-indebted, a debt counsellor must provide the consumer with proof of receipt of the application and notify all credit providers listed in the application and every registered credit bureau.
36. Regulation 24(2) requires a debt counsellor, within five business days of receiving an application for debt review, to deliver a completed Form 17.1 to all credit providers listed in the application and every registered credit bureau. Regulation 24(3) requires a debt counsellor to verify the information in regulation 24 (1) by requesting documentary proof from the consumer, contacting the credit provider or employer, or any other method of verification. Regulation 24(5) requires a debt counsellor to send the completed form 17.1 by fax, registered mail or e-mail to all credit providers listed in the application and every registered credit bureau. Regulation 24

- (6) requires a debt counsellor to determine whether the consumer is over-indebted in terms of section 86 (6) within 30 business days after receiving an application for debt review. Regulation 24 (10) requires the debt counsellor to submit Form 17.2 to the affected credit providers and all registered credit bureaux within five business days after completing the assessment in section 86 (6) (a).
37. The Applicant alleges that the Respondent did not ensure that a completed Form 17.1 was delivered to all the credit providers and credit bureaux within 5 (five) business days after receipt of an application for debt review. Furthermore, the Respondent failed to make a determination of over-indebtedness in the prescribed manner and within the prescribed time. The Applicant submitted that the Respondent had to be in possession of the documents in Form 16. The Respondent would need to use these document to conduct an assessment and make a determination of over-indebtedness. The information contained in the documents would also need to be verified.
38. A perusal of the evidence reveals that in all 20 (twenty) consumer files; there is no proof of delivery of Form 17.1 to the credit providers or every registered credit bureau. In the case of consumer Mr Mabogoane, he applied for debt review on 31 October 2016, and Form 17.1 is dated 15 November 2016, which is over the 5(five) business day period. Concerning the over-indebted assessment, the Tribunal already found that the function was performed by consultants and not the Respondent. The evidence with regard to the timeframes show that in the case of consumer K. Makaloni, Form 17.1 is dated 12 January 2016; and Form 17.2 that was sent to the credit providers is dated 13 January 2016. It is highly improbable that the information of the consumer could have been verified and that credit providers could have provided the certificate of balances within a day. The Tribunal is therefore satisfied that the Respondent contravened section 86(4)(b) read with Regulations 24(2), 24(3),24(5),24(6); and 24(10).

Matters not referred to the Court or Tribunal at all or within a reasonable time

39. Section 86(7)(c) provides that if a consumer is over-indebted, the Debt Counsellor may issue a proposal recommending that the Magistrate's Court make an order that one or more of the consumer's credit agreements is reckless and that one or more of the consumer's obligations be re-arranged. In terms of section 86(b), if the debt counsellor finds that the consumer is not over-indebted but is nevertheless

experiencing, or likely to experience, difficulty satisfying all the consumer's obligations under credit agreements in a timely manner, the debt counsellor can make a recommendation that the consumer and the respective credit providers agree on a plan of debt re-arrangement.

40. The Applicant submitted that the Respondent failed to refer matters to the Tribunal, within a reasonable period, or in some instances not at all. According to the Applicant, credit providers terminated credit agreements with consumers, as a result of the Respondent not lodging applications with the courts or the Tribunal within 60 (sixty) business days after the date on which consumers applied for debt review. The Applicant submitted that in the

Nedbank matter,[7] the court found that upon making a finding of over-indebtedness a debt counsellor must (own emphasis) refer the matter to a Magistrate's Court or the Tribunal; and that this is not discretionary.[8]

41. It is clear from the evidence before the Tribunal; that in all 20 (twenty) consumer files, there is no evidence of matters referred to a court or the Tribunal. In the case of consumers HC Van Wky and PJ Ngubeni, there were draft notices of court applications, but no evidence of the applications referred to the court. In the case of consumer K Hermanus, the consumer applied for debt review on 16 February 2016; and a notice of withdrawal was filed on 20 November 2017. In the case of consumer PA Khoza, the consumer applied for debt review on 18 April 2016; and a notice of withdrawal was issued on 11 January 2018. In the absence of any court applications, it would appear that the credit providers issued notices of withdrawals, as the 60 day period had lapsed. The Tribunal is therefore satisfied that the Respondent has contravened section 86(7) (c) read with section 86 (8)(b).

Fees not charged in accordance with the Act or fee guidelines

The Act and Fee Guidelines

42. Schedule 2(2) of the Act provides that the application fee charged by a debt counsellor to a consumer when applying for debt restructuring may not exceed R50.00 (fifty) rand. The Debt Counselling Fee Guidelines (Guidelines) state that a legal fee for a consent order is limited to R750.00 (seven hundred and fifty) rand. The said fee may only be deducted in the second month after the restructuring fee has been paid. Furthermore, according to Paragraph 1.4 of the Guidelines, should the Respondent fail to submit proposals to credit providers or refer matters to a Magistrate's Court within 60 days from the date of the debt review application, the Respondent must refund 100% of the fee paid by the consumer. General Condition 9.2 of the Respondent's conditions of Registration prohibits the charging of fees prior to the service being delivered.
43. The Applicant submitted that the Respondent failed to provide it with Payment Distribution Agent (PDA) statements of the 20 sampled consumer files. According to the Applicant, the PDA statements attached to the complaints received show that legal fees were charged to consumers.
44. As the Respondent did not provide any PDA statements for the consumer files that were sampled, the Tribunal considered the evidence from the complaints received. In the case of consumer S Hamman, the PDA statement for 25 November 2015, reflects a restructuring fee of R2897.40; the statement dated 28 December 2015 reflects legal fees of R2794.80. There is no evidence of the Respondent obtaining a court order. The Respondent was not entitled to the fees. Concerning the debt review application fee, there is no evidence that the Respondent overcharged the consumers. The Tribunal is therefore satisfied that the Respondent has contravened Paragraph 1.4 and 1.7 of the Debt Counselling Fee Guidelines read with General Condition 9.2 of his conditions of Registration.

CONCLUSION

45. Consequently, the Tribunal is satisfied that the Respondent engaged in prohibited conduct by contravening the sections referred to in the preceding paragraphs and has repeatedly contravened the Act and Regulations.

46. The Tribunal proceeds to consider an appropriate order.

CONSIDERATION OF AN APPROPRIATE ORDER

The Applicant's requested orders

47. In addition to finding that the Respondent has repeatedly contravened the Act, Regulations, General Conditions of Registration; and the Debt Counselling Fee Guidelines, the Applicant requests the Tribunal to make the following order:

47.1 Interdicting any person from using the credentials of the Respondent in order to provide debt counselling services and to prohibit the Respondent from allowing such conduct;

47.2 Cancelling the Respondent's Registration as a debt counsellor in terms of section 150(g) of the Act;

47.3 Ordering the Respondent to appoint an auditor, at his costs and within 30 business days from the date of the order, to audit all consumer files of the Respondent;

47.4 Ordering the Respondent, following the outcome of the audit, to refund all past and present affected consumers any amounts which the Respondent received in fees which did not accord with the fee guidelines and/or which he was not entitled to receive. If no proof of debt restructuring orders can be provided, ordering the Respondent to refund 100% (hundred) percent of the fees paid by the consumer, with the exclusion of the application fee of R50,00 (fifty) rand;

47.5 Ordering the Respondent, in respect of all complaints received, reimburse the complainants in full for all fees charged to; and paid by these consumers;

47.6 Ordering the Respondent to surrender all of his consumer files to the Applicant, and to furnish the Applicant with a list of all past and present consumers, with 10 (ten) days from the date of this order;

47.7 Ordering the Respondent to pay an administrative fine, in accordance with section 151 of the Act; and

47.8 Granting the Applicant such further and/or alternative relief as the Tribunal may consider appropriate to give effect to the consumers' rights in terms of Section 150(i) of the Act.

48. The Tribunal proceeds to consider each request in turn.

Administrative fine

49. The Applicant has requested the Tribunal to impose an administrative fine. The Tribunal is satisfied that the nature of the Respondent's contraventions and the consequent financial implications for consumers justify the Tribunal imposing an administrative fine on the Respondent. The Act was introduced into the South African legislative landscape to curb precisely the types of excesses that the Tribunal has found the Respondent to have perpetrated. The Tribunal would be failing in its duty were it not to send a clear message to the Respondent that the Tribunal will not tolerate such conduct.
50. Section 151 (3) sets out the factors the Tribunal must consider when determining an appropriate fine. The Tribunal proceeds to consider each in turn.

Nature, duration, gravity and extent of the contraventions

51. The inspection report reveals that the nature of the Respondent's contraventions has adversely affected many consumers. The Respondent allowed unregistered persons to make a finding of over-indebtedness; the Respondent fails to refer applications to the courts or Tribunal within a reasonable time or not at all. Credit providers have terminated agreements with consumers and consumers have been unable to receive the protection afforded by debt review. The Respondent abandoned his consumers at the time he resigned from the Debt Management Group. The Respondent's contraventions are extremely serious.

Loss or damage suffered as a result of the contraventions

52. The Applicant did not place specific evidence before the Tribunal concerning the actual loss or damage consumers suffered. However, the Tribunal is satisfied that it may reasonably conclude that consumers have suffered a loss due to consumers' being charged restructuring fees and legal fees without any court applications being referred to the Magistrate's Court. In the case of the complainant F.C. Burger, the Respondent failed to ensure that all payments were made in accordance with the court order. This resulted in some of the credit providers terminating the debt review process.

The Respondent's behaviour

53. The Applicant submitted that there is no plausible reason for the Respondent not to be aware of its statutory obligations. The Respondent's behaviour is made worse by him abandoning his consumers and; failing to oppose this application and ignoring the notice setting this application down for hearing.

Market circumstances under which the contraventions occurred

54. The Applicant submitted that the market circumstances in which the contraventions occurred are in one in which consumers are debt-stressed and in need of debt counselling services and expert advice and guidance; which the Respondent failed to provide to the consumers. The Tribunal concludes that the consumers were not protected during the debt review process and were adversely affected by the Respondent's actions.

The level of profit derived from the contraventions

55. The Applicant did not place specific evidence before the Tribunal concerning the level of profit the Respondent has derived from the contraventions. Nevertheless, it is reasonable for the Tribunal to conclude that the Respondent derived a significant profit from his business practices that contravene the Act.

The degree to which the Respondent co-operated with the Applicant

56. The Tribunal has considered that the Respondent co-operated with the Applicant to a limited degree. The Respondent provided the investigators with the 20 (twenty) consumer files. As the investigation progressed, the Respondent failed to provide all the requested information, which delayed the finalisation of the investigation and negatively impacted the investigation.

The Respondent's prior contraventions

57. The Tribunal has considered that the Respondent has not previously been the subject of an investigation. No previous findings have been made against the Respondent.

The amount of the fine

58. The Applicant did not produce evidence concerning the Respondent's financial turnover during the previous financial year. This means that the Tribunal may impose a fine that is limited to a maximum fine of R1 000 000.00.
59. The preamble to the Act states that the Act was specifically introduced to, amongst other things, promote a fair and non-discriminatory marketplace for access to consumer credit; prohibit certain unfair credit and credit marketing practices; promote responsible credit granting and use, and prohibit reckless credit granting. Debt counselling was introduced to ensure that vulnerable, debt stressed consumers can be provided with professional advice and guidance and offered protection through the debt review process. Consequently, protecting vulnerable consumers and ensuring that debt counsellors act fairly and comply with the provisions of the Act is imperative.
60. The Tribunal is satisfied that it must send a strong message to all debt counsellors, whether large or small, that they cannot escape

complying with the Act. Debt counsellors are required to personally provide service to the consumers and must comply strictly with the Act.[9] Unregistered persons cannot be allowed to perform these functions on behalf of the debt counsellor.

61. These considerations persuade the Tribunal that it is appropriate to impose an administrative fine of R250 000.00 (two hundred and fifty thousand) rand.
62. The Applicant requested the Tribunal to make an order to interdict any person from using the credentials of the Respondent in order to provide debt counselling services and to prohibit the Respondent from allowing such conduct. The Tribunal finds that it cannot make

an order against a party that is not before it. Furthermore, section 44 (2) expressly prohibits a person from offering or engaging in the services of a debt counsellor, or to hold themselves out to the public as being authorised to offer any such service, unless that person is registered as a debt counsellor.

ORDER

63. Accordingly, the Tribunal makes the following order:

63.1 The Respondent has contravened the following sections of the Act:

63.1.1 General condition 2, 3, 5 and 6 of the General Conditions of Registration read with section 52(5) (c) of the Act;

63.1.2 General condition 8 and 9.2 read with Section 52(5)(c) of the Act;

63.1.3 Section 44(2) of the Act;

63.1.4 Section 86(4)(b) read with Regulation 24(2) of the Act;

63.1.5 Section 86(4)(b) read with Regulation 24(5) of the Act;

63.1.6 Section 86(6)(b) read with Regulation 24(6) of the Act;

63.1.7 Regulation 24(10) of the Act;

63.1.8 Section 86(6) and 86(7) of the Act read with Regulations 24(6), 24(7);

63.1.9 Section 86(7)(c) read with section 86(8)(b) of the Act; and

63.1.10 Paragraph 1.4 and 1.7 of the Debt Counselling Fee Guidelines read with general condition 9.2 of the conditions of Registration.

63.2 The Respondents registration as a debt counsellor is cancelled with immediate effect in terms of section 150(g);

63.3 The Respondent must appoint an independent auditor within 30 (thirty) business days of the date of this judgment at his own cost to audit all the Respondent's consumer files to:

63.3.1 Identify all files wherein the Respondent failed to adhere to the timeframes set out in Regulation 24(2);

63.3.2 Identify all consumers who were not competently dealt with in accordance with the Act;

63.3.3 Identify all matters which were not referred to a court or a Tribunal within 60(sixty) business days and specifically the matters which to date have still not been referred to a Court or the Tribunal; and

63.3.4 Identify all consumers who have been overcharged in respect of fees including, legal fees or charged fees without receiving any such service.

63.4 Following the outcome of the audit, the Respondent must refund all past and present affected consumers any amounts which the Respondent received in fees which did not accord with the fee guidelines and/or which he was not entitled to receive. If no proof of debt restructuring orders can be provided, the Respondent must refund 100 (hundred) percent of the fees paid by consumers, with the exclusion of the application fee of R50.00 (fifty) rand.

63.5 The Respondent, must reimburse the complainants in full for all fees charged to, and paid by these consumers;

63.6 The Respondent must surrender all of his consumer files to the Applicant, and furnish the Applicant with a list of all past and present consumers, within 10 (ten) days from the date of this order; and

63.7 The Respondent must pay an administrative fine of R250 000.00 (two hundred and fifty thousand)rand into the National Revenue Fund referred to in section 213 of the Constitution of the Republic of South Africa, 1996 within 90(ninety) days of the date of this judgment. The Banking Details of the National Revenue Fund are as follows:

Bank Name

: The Standard Bank of South Africa

Account Holder : Department of Trade and Industry

Branch Name : Sunnyside

Branch Code : 05100

Account Number : 370 650 026

Reference

: NCT/132322/2019/57(1) and Name of Person or Business making payment; and

63.8 There is no order as to costs.

DATED AT CENTURION ON THIS 26th DAY OF FEBRUARY 2020

Ms H Alwar

Presiding member

With members Mr A Potwana and Adv J Simpson concurring.

[1] Published under Government Notice R489 in Government Gazette 28864 of 31 May 2006, as amended.

[2] Regulations for Matters Relating to the Functions of the Tribunal and Rules for the Conduct of Matters before the National Consumer Tribunal, 2007, as amended

[3] See Annexure NM9 of the Founding Affidavit.

- [4] E-mail correspondence dated 7 April 2-17; page 587 of case file
 - [5] Table setting out list of documents requested and documents received and not received. Page 562 of the case file.
 - [6] Bornman v National Credit Regulator [2014] 2 All SA 14 (SCA)
 - [7] Nedbank v National Credit Regulator 2011 (3) SA 581 (SCA) at 598C.
 - [8] Nedbank v National Credit Regulator 2011 (3) SA 581 (SCA) at 598C.
 - [9] Section 163 (1C) provides a debt counsellor may only use agents for administrative tasks relating to debt review.
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