

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Adberof and Another (NCT/17833/2014/140(1)) [2015] ZANCT 37 (14 August 2015)

[2015] ZANCT 37

COURT

National Consumer Tribunal

BEFORE

Tanya Woker, Joe Maseko, John Simpson

CASE / FILE NUMBER

NCT/17833/2014/140(1)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

CASE

NUMBER: NCT/17833/2014/140(1)

In

the matter between:

THE

NATIONAL CREDIT

REGULATOR.....APPLICANT

And

YASMINA

ADBEROF.....FIRST

RESPONDENT

SIERAJ

ADBEROF.....SECOND

RESPONDENT

JUDGMENT**APPLICANT**

1. The Applicant in this matter is the National Credit Regulator, a juristic person established in terms of section 12 of the National Credit Act (the Act) and situated at 127 Fifteenth Road, Randjespark, Midrand (the Applicant).
2. At the hearing the Applicant was represented by Mr Joseph Selolo, an employee of the Applicant.
3. The Applicant's founding affidavit was deposed to by Ms Nthupang Magolego, the Applicant's manageress in the Investigations and Enforcement Department

RESPONDENT

4. The First Respondent (and Registrant) is Yasmina Adberof, an adult female debt counsellor practicing under registration number NCRCP 176, under the name of Debt Out with offices situated in Lotus River, Cape Town (First Respondent).
5. The Second Respondent is Sieraj Adberof, a natural person residing at 10 Roan Avenue, Lotus, Cape Town (Second Respondent). The Second Respondent was employed by Debt Out and is the husband of the First Respondent.
6. The First Respondent filed an answering affidavit in this matter but did not appear in the hearing and was also not represented.
7. The Second Respondent did not file an answering affidavit, did not appear at the hearing and was also not represented.

APPLICATION

8. This is an application in terms of Section 140 (1) (b) and Section 140 (2) (b) of the National Credit Act, 2005 (the Act) in which the Applicant, after completing an investigation into the Respondents' conduct has referred the matter to the National Consumer Tribunal (Tribunal), seeking the following order:
 - (1) Declaring the conduct of the Respondents as prohibited conduct in terms of section 150 of the Act;
 - (2) The imposition of an administrative fine; and
 - (3) Any appropriate order required to give effect to the consumer's rights in terms of the Act.
9. The Applicant served the Application on the First and Second Respondents on 29 September 2014.

10. The First Respondent opposed the application and filed an answering affidavit on 10 February 2015 although the First Respondent did not file proof that the answering affidavit was served on the Applicant and the Second Respondent as required by the Tribunal Rules.
11. The Second Respondent did not oppose the application.
12. The Applicant did not apply for condonation for the late filing of the application as is required by the Tribunal Rules and at the hearing the Applicant confirmed that it has not received the answering affidavit. However the Applicant did not oppose the filing of the answering affidavit and it confirmed much of what was contained in the Investigator's Report.
13. The matter was set down for hearing on 31 July 2015.

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

14. A notice of complete filing was issued by the Registrar to both the Applicant and the First Respondent on 24 February 2015. The notice of set down was served on the Applicant and the First Respondent by email on 9 July 2015 and was delivered to the First and Second Respondent's home address by courier (Globeflight) on 10 July 2015. The delivery note is signed by the Second Respondent.
15. In terms of Rule 25 (3) of the Tribunal Rules, the Tribunal may make a default order after it has considered the necessary evidence and if it is satisfied that the application for documents was adequately served.
16. The Tribunal was satisfied that the documents were adequately served and decide that the matter should continue because there was no basis for adjourning the hearing.

APPLICANT'S VERSION

17. The First Respondent was registered by the Applicant as a debt counsellor with registration number NCRDC 1976 with effect from 31 January 2011. The First Respondent did not pay Registration Renewal fees from February 2012 to date and as such her registration as a debt counsellor has lapsed.
18. The Second Respondent was employed by the First Respondent and is her husband.
19. A number of consumers who had applied for debt review under the First Respondent lodged complaints against the First Respondent with the Applicant.
20. Consumers complained in particular about the fact that the First Respondent had received funds from them for distribution to their credit providers but the money never reached the credit providers. Specific complaints were laid by Charlene Everst, Francois Herselman and Lyle Arendse who all indicated that they had paid money to the First Respondent for distribution to their credit providers but that the First Respondent had failed to hand the money over. In the case of Herselman, he paid R95 109.

21. On 16 March 2012 Lesley Odendaal (Investigator) was appointed by the Chief Executive Officer of the Applicant in terms of section 25 of the Act to conduct an investigation into the First Respondent's business. The investigation was conducted on 23 April 2012 and an investigation report was submitted to the Applicant. The report is dated 20 February 2014. No explanation is provided as to why it took so long to compile the report or to launch this application.
22. In summary the investigation report states that at the time of the investigation the First Respondent was still acting as a debt

counsellor and that according to her she had about 30 plus clients. The report describes the general administration of the files investigated, including that of Herselman, as being very poor. The First Respondent maintained inadequate records and failed to adhere to the time frames prescribed by the Act when it came to submitting the Forms 17.1. In the sample files extracted by the Investigator no debt restructuring orders or consent orders were found and neither was any application made to the court or the Tribunal for debt restructuring or for the confirmation of consent orders. The First Respondent allowed the Second Respondent to act as a debt counsellor despite the fact that the Second Respondent was not a registered debt counsellor and the First Respondent had failed to pay her registration renewal fees. Although the First Respondent denied to the Investigator that she took funds from consumers, she supplied a bank account record for the business which indicated that a total of R149 029.63 had been deposited into the account of Debt Out from 4 July 2011 to 10 February 2012. This did not include the payment made by Herselman. The statements were sent to the Investigator by email and the Investigator did not investigate the source of the funds. However according to an affidavit by Herselman he paid the money into the Debt Out Settlement account following an email from the First Respondent's employee Tamzin Passqualie (Tamzin).[1] This payment was made on 13 June 2011[2] (prior to the starting date of the records supplied) and the account into which the money was paid was Nedbank Current Account 1006907734 which is the same account as the documents supplied by the First Respondent to the Investigator.[3] On 21 November 2011 the Second Respondent gave Herselman a written undertaking that he (the Second Respondent) would refund the amount of R95 109 to Herselman by 1 December 2011.[4] To date this money has not been refunded. During the investigation the First Respondent informed the Investigator that an employee of the business, Tamzin had been collecting money from consumers and that this money had not been paid over to the business. She estimated that Tamzin had stolen in the region of R270 000 from clients up until October 2011 and that two criminal cases had been opened against her and were in the process of being investigated.

23. The Respondents are alleged to have contravened the following sections of the Act:
 - (1) Section 44 (2): the First Respondent permitted the Second Respondent to offer and engage in the services of a debt counsellor while the Second Respondent was never registered as a debt counsellor.

- (2) Section 44 (2) read with Sections 52 (4) (b): The First Respondent did not pay her registration renewal fees and so engaged in debt counselling services whilst her registration had lapsed
 - (3) Sections 86 (6) read with Regulation 24 (6): The Respondent did not submit forms 17.1 and where they did submit the forms, the Respondents did so outside of the prescribed five day period.
 - (4) Section 86 (6) read with Regulation 24 (6): The Respondents did not conduct determinations as to whether the consumers were over-indebted.
 - (5) Section 86 (7) (c) and 86 (8): the Respondents did not refer any matters to court or the Tribunal for debt restructuring or consent order.
 - (6) Specific condition B (1) of the First Respondent's conditions of Registration: receipt of payments from consumers in respect of debt obligations.
24. In the lights of these repeated failure to comply and contraventions, the Applicant applied for the following from the Tribunal
- (1) In terms of section 150 (a) of the Act, declaring the following conduct of the Respondent in contravention of her conditions of registration and the Act to be prohibited in terms of the Act:[5]
 - (i) Contravention of section 86 (4) read with Regulation 24 (2) of the Act.
 - (ii) Contravention of section 86 (6) (b) read with Regulation 24 (6) of the Act.
 - (iii) Contravention of section 86 (7) (c) and 86
 - (8) of the Act.
 - (iv) Failure to comply with Specific Condition B
 - (1) of the Conditions of Registration.
 - (2) Imposing an administrative penalty.
 - (3) In terms of section 150 (i) making any other appropriate order required to give effect to consumer rights in terms of the Act.

FIRST RESPONDENT'S VERSION

25. In her answering affidavit, the First Respondent stated that
- She had not operated as a debt counsellor for three years and that her business had failed because of the fraudulent activity of the employee, Tamzin.
 - She was not disputing the complaint but that the Tribunal should be aware of all the facts.

- She had allowed her registration to lapse because the business had failed and it was essentially a failed business at the time that the Regulator conducted the investigation and that is why the records were in different places, not ready or immediately available.
- She was attempting to assist consumers even though she was not earning an income from her activities.[6]
- She was trying to refund consumers the money which Tamzin had stolen.
- Tamzin had deliberately destroyed or misfiled documents to disguise her activities.
- Her husband worked in the business but she denied that he had ever held himself out to be a registered debt counsellor.
- Herselman had paid the amount into their account but this was not the correct procedure to follow and Tamzin must have done this to discredit the business.[7]
- Lyle Arendse was the boyfriend of Tamzin and he had acted together with her to discredit the business.

CONSIDERATION OF THE EVIDENCE

26. To a large extent the evidence presented in the affidavits is common cause although in her answering affidavit the First Respondent provides an explanation for her poor administration of the files. The extent that the First Respondent has denied certain allegations this is not borne out by the evidence presented to the Tribunal

27 The evidence can be summarised as follows:

- The consumer files were in disarray and documents were missing. The general administration appears to have been very poor. The First Respondent explains this by stating that Tamzin was responsible for the administration and had removed documents to hide her fraud.
- The employee Tamzin had been responsible for handling many of these files and appears to have stolen a substantial amount of money from consumers. Criminal charges have been laid against her.
- Consumers were paying money into the account of Debt Out. Although the First Respondent denied to the Investigator that this was happening, she accepted that in the case of Herselman this did in fact occur although she states that this was not the correct procedure. This is also confirmed by the fact that the Second Respondent undertook to repay the money. In the Investigation Report at para 2.16 attached to the founding affidavit, the Investigator explains that the business account was credited with certain amounts and provides the business bank statements as an annexure but no explanation is provided regarding where these amounts came from. In fact the First Respondent's answering affidavit only deals with issues from paragraph 2.22 of the Investigation Report. Mr Selolo at the hearing argued that the inference must be drawn that these amounts were deposited by consumers for distribution to credit providers. There is no indication in these bank statements that any distribution to credit providers was in

fact made.

- The Second Respondent was working in the business with the First Respondent and the evidence presented to the Tribunal strongly

suggests that the Second Respondent was in fact operating as a debt counsellor. In the case of JJ Plaatjies the Second Respondent

is identified as the consumer's advisor.[8] He is also the person who agreed to repay Mr Herselman. It seems therefore that the Second Respondent played a much bigger role in the business than the First Respondent would have the Tribunal believe.

- The First Respondent continued to operate as a debt counsellor after her registration had lapsed and even appointed a new administrator who operated on a part time basis.

28 The First Respondent seeks to blame other parties for her misfortune. However the First Respondent was the registered debt counsellor and therefore it was her responsibility to ensure that matters were handled properly and that consumers were not prejudiced. Although many of the emails appear to be coming from Tazmin they were operating off her personal email account and so she must have known what was happening, alternatively she was not conducting her practice in an appropriate manner and leaving it up to others to handle the business. This certainly seemed to be the case when the Investigator arrived to carry out the inspection as the Investigator states in the report that it took time for the First Respondent to see what was going on and had to rely on the new administrator for information.

29 The First Respondent must have been aware of the amounts of money which were being deposited into the business bank account and provides no explanation for these deposits. The First Respondent does however make mention of these bank statements in para 25 of her answering affidavit when she states:

"Client AF Omar requested that the Debt Review in her name be cancelled/terminated after a few payments, and no money was collected

from the client, which is clear from the bank statements in the possession of the Applicant."

30. This bank account was clearly being used to fund the business and there are no disbursements to pay credit providers of consumers.

CONSIDERATION OF THE ORDERS APPLIED FOR

Prohibited conduct

31 It is noted that only orders against the First Respondent have been sought and so even though it is possible that the Second Respondent was acting as a debt counsellor without being registered, the Tribunal is unwilling to consider making any finding on this specific aspect unless it was requested by the Applicant and evidence was submitted in this regard.

32. As far as contraventions of section 86 (4) (b) read with Regulation 24 (2) and contravention of section 86 (6) (b) read with Regulation 24 (6) and contravention of section 86 (7) (c) and 86 (8) are concerned, the First Respondent has provided a number of explanations – consumers withdrew from the debt counselling process, consumers do not pay the amounts they are supposed to, records went missing because of Tamzin’s conduct. The Tribunal is of the view that these explanations are not convincing. The Tribunal is satisfied that on the balance of probabilities and given the chaotic state of the Respondent’s general administration the Respondent, on more than one occasion (hence repeatedly) failed to meet the deadlines and/or carry out the processes required of her in terms of the Act and so has engaged in prohibited conduct.
33. The First Respondent failed to comply with Specific Condition B (1) of her conditions of her registration in that she received payments from consumers in respect of debt re-arrangements. The payments from consumers should have been received and distributed to the respective parties by a Payment Distribution Agency approved by the National Credit Regulator. The First Respondent clearly did not operate through an approved PDA because according to her own version her correct procedure was to assist clients to obtain settlement figures from credit providers and to arrange for direct payments to

be made. She alleges however that Tamzin did not follow the correct procedure and took cash deposits herself. The First

Respondent does not however explain the fact that clients were making deposits into the business bank account which she must have been aware of. In respect of Herselman she simply states that she does not know why Tamzin followed this procedure. However the deposit was made on 13 June 2011 and so the First Respondent must have been aware of the deposit. In this regard the First Respondent has also engaged in prohibited conduct.

34. The Tribunal has not been requested to make an order regarding the fact that the First and Second Respondents were acting as debt counsellors in circumstances where the First Respondents registration had lapsed and the Second Respondent had not registered as a debt counsellor and therefore it cannot make any orders in regard to this prohibited conduct.

Administrative fine

35. The Applicant has requested that an administrative fine be imposed on the First Respondent. In terms of section 151 the Tribunal may impose an administrative penalty which does not exceed the greater of 10 per cent of the Respondent’s annual turnover during the preceding financial year or R1 000 000.
36. When determining an appropriate fine, the Tribunal must consider the following factors:
- (a) The nature, duration, gravity and extent of the contravention;
 - (b) any loss or damage suffered as a result of the contraventions;

- (c) the behaviour of the Respondent;
- (d) the market circumstances in which the contravention took place;
- (e) the level of profit derived from the contravention;
- (f) the degree to which the Respondent has co-operated with the National Credit Regulator and the Tribunal; and
- g) whether the Respondent has previously been found in contravention of this Act.

37 The Applicant did not address these factors in its founding affidavit however Mr Selolo addressed the Tribunal at the hearing.[9] Mr Selolo argued that the nature and extent and duration of the contraventions were extremely serious as the Respondent appeared to be funding her business with consumer money and there is no evidence that any money was actually distributed to credit providers

Consumer suffered severe losses as a result of the Respondent's conduct as is evidenced by the loss suffered by the three consumers who laid complaints. Just from the bank statement submitted to the Tribunal it can be seen that R149 029.63 was deposited into the Respondent's bank account. In addition the Respondent herself estimated that Tamzin has stolen in the region of R200 000 from consumers.

The Tribunal concurs with the Applicant that the conduct of the Respondents was of an extremely serious nature and should be condemned in the strongest terms. However, the Respondent's business appears to be in disarray and no longer operating. There is no evidence of any profit having been made by the Respondent in recent times. In the circumstances it seems that it would be a futile exercise to impose an administrative penalty on the Respondent.

Any other appropriate order required to give effect to the consumers' rights in terms of the Act

38 In terms of section 150 (i) the Tribunal is empowered to make any other appropriate order required to give effect to the consumers' rights in terms of the Act. Taking into consideration the loss suffered by the consumers, an appropriate order may be to order the Respondents to refund any monies which they took from consumers unlawfully.

39 This then leads to the question whether the Tribunal is empowered to make such an order. This issue has been considered by the Tribunal in previous judgments. In the matter of NCR v Bonney Tebogo Dioka[10] the Tribunal considered whether the Tribunal was empowered to order a refund of amounts not paid over to credit providers. After

considering relevant case law and the relevant sections of the Act the Tribunal came to the following conclusion:

"Accordingly, the Tribunal finds that the Tribunal is empowered to order a refund of any excess amount charge. This excess amount could include legal fees, debt counselling fees, administrative fees, amongst others. The Tribunal finds however that it is not empowered to order refunds of amounts paid to a debt counsellor intended for payment to a credit provider in circumstances where the debt counsellor failed

to effect the payment to the credit provider. In the instance whether a consumers has paid amounts to a debt counsellor for payment to a credit provider a consumer must utilise the process set out in section 164 of the Act to claim compensation for damages suffered.”

This approach was confirmed by the Tribunal in the decision of NCR v Werner Wilbers.[11]

40 However the approach of the Tribunal must be re-considered in the light of the Supreme Court of Appeal decision Barko Financial Services Ltd v NCR[12] which was handed down on 18 September 2014. In this particular matter the court dealt with the power of the Tribunal to order repayment of a fee which Barko charged for successfully processing consumer repayments. The charging of this fee was found to be unlawful and the question was whether the Tribunal had the power to order that the fee be repaid. The court had this to say:[13]

“If one assumes, as one must for the purposes of this inquiry, that the Tribunal was correct in its finding that the recovery of the NuPay fee from the consumer is unlawful because it constitutes a contravention of the NCA, then it ought to follow logically that it is for Barko to set matters right by repaying the relevant amount. It would be astonishing (our emphasis) if, having correctly found that the NuPay service fee is not payable by the consumer and that its repayment by the consumer was unlawful, for the Tribunal to have simply shrugged its shoulders in circumstances where it is empowered by the NCA to make an appropriate order.”

41 The Tribunal in this particular matter has found that the Respondent engaged in prohibited conduct because she took payments directly from consumers. She was not entitled to do this according to her

specific conditions of registration. Therefore, as stated by the court in Barko it would be astonishing for the Tribunal to simply ignore the plight of these consumers and it is accepted that previous decisions by the Tribunal on this point should not be followed.

Order

The Tribunal finds that the First Respondent is in repeated contravention of the following sections of the Act:

- (1) Section 86 (4) read with Regulation 24 (2) of the Act in that she repeatedly failed to submit forms 17.1 to credit providers
- (2) Section 86 (6) (b) read with Regulation 24
- (6) of the Act in that she repeatedly failed to conduct determinations as to whether consumers were over- indebted.
- (3) Section 86 (7) (c) and 86 (8) of the Act in that she repeatedly failed to refer matters to court or to the Tribunal for a debt restructuring or consent order.
- (4) Specific Condition B (1) of the Conditions of Registration in that she took payments from consumers for distribution to credit providers.

This is prohibited conduct in terms of section 150 (a) of the Act.

The First Respondent is ordered to do the following

- compile a list of all clients who paid money to her business Debt Out or to Tamzin and to supply such list to the Applicant within 30 days of this order.
- to refund all her clients all amounts paid by them in order to pay credit providers. The refund shall be paid to each client within 90 days of this order.
- to use her best efforts, in good faith, to locate every client for the purpose of effecting a refund.
- to report to the Regulator within 120 days of this order providing details of the amount of repayments, the recipients thereof and the steps taken to locate clients that she cannot trace.
- To surrender all her client files to the Regulator and to supply full details regarding what has happened with each client regarding the debt counselling process.

14 August 2015

Prof Tanya Woker

Presiding Member

Prof Joe Maseko (Member) and Mr John Simpson (Member) concurring

[1] See page 113 of the record.

[2] See page 114 of the record.

[3] See page 75 of the record for the statement supplied by the First Respondent. It is noted that the First Respondent did not supply bank statements from the time of her registration. No explanation is given for this and the Investigator did not investigate further.

[4] See page 116 of the record

[5] It is noted that the Applicant's founding affidavit only refers to the Respondent when requesting that the Tribunal make an order against the parties. This is in respect of the First Respondent. No order is requested from the Tribunal in relation to the Second Respondent.

[6] See page 354 of the record.

[7] See page 352 of the record.

[8] See page 175 of the documents.

[9] In its founding affidavit, the Applicant stated that further argument on this aspect would be presented at the hearing. See page 11 of the record.

[10] NCT/7750/2012/57(1).

[11] NCT/9596/2013/57 (1).

[12] (415/13)

[2014] ZASCA 114

[13] At para 20.

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