

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Chetty (NCT/264621/2023/137(1)(d)) [2024] ZANCT 5 (8 March 2024) [2024] ZANCT 5

COURT

National Consumer Tribunal

BEFORE

N Maseti, S Hockey, Z Ntuli

CASE / FILE NUMBER

NCT/264621/2023/137(1)(d)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: NCT/264621/2023/137(1)(d)

In the matter between: NATIONAL CREDIT REGULATOR APPLICANT and PRESLEY CHETTY
(NCRDC1974) RESPONDENT

Coram:

Ms N Maseti - Presiding Member

Mr S Hockey - Tribunal Member

Ms Z Ntuli - Tribunal Member

Date of Hearing - 17 January 2024

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, 34 of 2005 (the NCA) to regulate the consumer credit market.
2. Mr Anda Makrwede, one of the applicant's supervisors, represented the applicant at the hearing of this application.

RESPONDENT

3. The respondent is Presley Chetty, an adult male, previously registered with the applicant as a debt counsellor under registration number NCRDC1974.
4. The respondent did not oppose this application and did not appear at the hearing.

TERMINOLOGY

5. A reference to a section in this judgment refers to a section of the NCA, a rule to the Rules of the Tribunal^[1], a regulation to the National Credit Regulations, 2006, and a condition to the respondent's Conditions of Registration.

APPLICATION TYPE AND JURISDICTION

6. The applicant instituted this application in terms of section 137(1)((1)(d) seeking leave of the National Consumer Tribunal (the Tribunal) to refer the complaint directly to the Tribunal for adjudication.
7. On 23 June 2023, the Tribunal granted the applicant leave to refer its complaint directly to the Tribunal. The Tribunal has jurisdiction to adjudicate this application in terms of section 27(a)(i).

HEARING ON A DEFAULT BASIS

8. On 22 March 2023, the applicant filed this application with the Tribunal and served it on the respondent and the complainant, Kipra Sheal Budree, by registered mail and email, respectively.^[2] The Tribunal's Registrar issued a notice of complete filing to the parties on 27 March 2023.
9. In terms of rule 13, the respondent had fifteen business days to oppose this application by serving an answering affidavit on the applicant and filing it with the Registrar by 19 April 2023. The respondent failed to file an answering affidavit within the prescribed period.
10. The applicant did not file an application for a default order in terms of rule 25(2). On 22 November 2023, the Registrar issued a notice of set down for hearing on a default basis due to the pleadings being closed.
11. Rule 13(5) provides that "any fact or allegation in the application or referral not specifically denied or admitted in the answering affidavit, will be deemed to have been admitted."
12. Therefore, in the absence of the respondent's answering affidavit, the applicant's application and all the allegations contained therein are deemed to be admitted.
13. The Tribunal was also satisfied that this application was properly served on the respondent. Accordingly, the hearing of this application proceeded on a default basis.

BACKGROUND

14. The complainant initially complained to the applicant that he had paid the respondent R208,000.00 on 25 March 2020 to settle nine out of the original 16 credit agreements. The respondent allegedly failed to settle all nine credit agreements as the Absa credit card account ending 1017 (the Absa account) was unpaid and accumulated arrears of R6 999.01 as of 8 March 2022.
15. The respondent rendered debt counselling services to the complainant in March 2016. He assisted the complainant with the debt review process that led to the magistrate court's order (the court order) declaring the complainant as being over-indebted.[3] The court order included 16 credit agreements.
16. The complainant acquired a substantial amount of money in March 2020 and approached the respondent to reduce his debts. On 24 March 2020, the respondent sent an email containing a list of nine credit obligations with specific amounts, proposing that the complainant use the R208,000.00 to settle them. The Absa account was included in the nine credit obligations.
17. On 25 March 2020, the complainant made a payment of R208,000.00 by electronic funds transfer to the respondent's bank account per their understanding. At the time, the respondent operated his debt counselling services under the name of CAA Debt Discovery. [4] Following the magistrate's court order, the complainant had made monthly payments directly to the Payment Distribution Agent (the PDA) until he received the respondent's advice to use the R208,000.00 to settle the nine credit obligations.
18. The applicant asserts that two statements obtained from the PDA, dated 15 March 2020 and 16 April 2020 showed fourteen and five credit obligations respectively. According to the applicant, the payment of R208,000.00 was illegally received and distributed by the respondent in violation of section 52(5)(c), read with regulation 11 and his conditions. Moreover, the respondent allegedly failed to settle the Absa account with a balance of R30,905.95 and did not refund the money to the complainant.

RELIEF SOUGHT

19. The applicant seeks an order declaring the conduct of the respondent to be prohibited in terms of the NCA as the respondent contravened:
 - 19.1 Section 52(5)(c) read with regulation 11 and condition B1 of the conditions in that he received payment from the complainant whose credit obligations were re-arranged by the magistrate's court in terms of sections 86 and 87.
 - 19.2 Section 52(5)(c) read with conditions 1 and 2 as a debt counsellor as he failed to comply with the provisions of the NCA and the conditions; and failed to conduct his debt counselling business professionally and reasonably consistent with the requirements of the NCA.

19.3 Any other appropriate order to give effect to a right as contemplated in the NCA.

APPLICABLE LAW

20. Section 52(5)(c) dictates that “a registrant must comply with its conditions of registration and the provisions of this Act”.
21. Regulation 11 concerns the receipt of funds by a debt counsellor. This regulation provides that “a debt counsellor must not collect and distribute monies on behalf of consumers”.
22. The conditions have two parts. Part A concerns general conditions. Condition A1 provides that: “The Debt Counsellor must comply with all legislation applicable to the operation of the business of a Debt Counsellor, including but not limited to the Act, the Regulations and any subsequent amendment or substitution of the applicable legislation and regulations”.
23. Condition A2 provides that:

“The Debt Counsellor must perform debt counselling in a manner that is consistent with the purpose and requirements of the Act. The Debt Counsellor must in all instances act professionally and reasonably in providing debt counselling services to consumers and provide such services in a manner that is timely, fair, and non-discriminatory and does not bring the NCR or debt counselling into disrepute”.

24. Part B concerns specific conditions. Condition B1 states that:

“A debt counsellor may not receive payments 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 terms of debt obligations or debt counsellor fees must be received and distributed to the respective parties by a Payment Distribution Agency approved by the National Credit Regulator”.

CONSIDERATION OF THE EVIDENCE

Contravention of section 52 (5) (c) read with regulation 11 and condition B1

25. Paragraphs 5 and 6 of the applicant’s founding affidavit set out the facts and evidence of the R208,000.00 payment to settle nine credit obligations, including the Absa account. The respondent’s email dated 24 March 2020 details crucial information about the nine credit agreements and specific amounts

associated with each credit obligation. The email dated 25 March 2020 from the complainant confirms the credit agreements (or obligations) that the respondent proposed to the applicant to settle with the R208,000.00. It was apparent in the two emails that this money was going to be deposited into the respondent’s CAA Debt Recovery Standard Bank account.[5]

26. It is, therefore, undisputed that the respondent received R208,000.00 on 25 March 2020 to settle the complainant's debt obligations that were re-arranged under the magistrate's court order.^[6] This money ought to have been paid to the relevant PDA as the only person legally authorised to receive and distribute payments to credit providers on behalf of consumers under debt review in terms of the court order or debt re-arrangement in terms of sections 86 or 87.
27. Consequently, the Tribunal is satisfied that the respondent violated section 52 (5) (c) read with regulation 11 and condition B1.

Contravention of section 52 (5) (c) read with conditions A1 and A2

28. The respondent also failed to settle the Absa account following the agreement of 25 March 2020. Consequently, the complainant incurred arrears of R6 999.01 as of 8 March 2022. When the complainant enquired with the respondent about the non-payment of the Absa account, the respondent stated that he had settled the debt and had difficulties obtaining a final settlement from Absa due to its staff working remotely. The complainant's further attempts to get the respondent to account for the failure to settle the Absa account proved futile because the respondent did not reply to calls and emails.
29. In addition, the respondent's conduct harmed the complainant because the respondent appears to have deliberately overstated the outstanding balances of the 16 credit obligations. This is apparent in the statements obtained from the PDA showing payment transactions and outstanding balances from 2 February 2020 to 16 April 2020. The Absa account did not escape the respondent's deliberate act of overstating the outstanding balances. In the email dated 24 March 2020, the respondent informed the complainant that the outstanding balance was R30,905.95 when the PDA's statement showed an outstanding balance of R17,089.88 as of 16 April 2020. The original outstanding balance reflected in the court order was R23,167.84. The R30,905.95 was inaccurate because the complainant paid R168.68 monthly from June 2016 to March 2020. These payments were made directly to the PDA until the respondent advised the complainant to pay the R208,000.00 into his bank account. The amount of R17,089.88 reflected in the PDA's statement should be the correct amount. Due to the non-payment, the account was in arrears of R6 999.91.
30. In paragraphs 6.2.10 to 6.2.12 of its founding affidavit, the applicant contends that the evidence of deliberately overstating the amounts owed by the complainant shows that the respondent misappropriated the complainant's monies. The total outstanding balance for the nine credit agreements was R182,159.33 according to the PDA records, yet the respondent stated in an email that it was R230,323.32 without substantiating it. Based on this, it is evident that the R208,000.00 could have settled more than the nine credit agreements, particularly the Absa account that was part of the agreement between the respondent and the complainant.

31. This conduct is unprofessional and exploits the complainant. The respondent failed to execute his debt counselling responsibilities in a manner that relieved the complainant from over- indebtedness. Instead, the complainant's debt increased as evidenced by the arrears reflected on the Absa account and the inflated outstanding balances for the nine credit agreements. The respondent has not accounted for this conduct and the extra amounts appropriated from the complainant. It follows that the respondent failed to comply with the NCA and the conditions by failing to conduct his debt counselling business professionally and reasonably consistent with the requirements of the NCA.
32. Consequently, the Tribunal is satisfied that the respondent contravened section 52 (5) (c) read with conditions A1 and A2.

EFFECT OF LAPSED REGISTRATION

33. The applicant presented evidence showing that the respondent was registered as a debt counsellor from 2011 until 31 July 2022. He failed to renew his registration. Despite the respondent's current registration status, the respondent engaged in unlawful conduct during March 2020 whilst his registration was still valid.

THE RELIEF

34. The Tribunal has already concluded that the respondent contravened section 52 (5) (c) read with regulation 11 and condition B1 of the conditions, and section 52 (5) (c) read with conditions A1 and A2. Section 150 (a) empowers the Tribunal to declare the above conduct of the respondent as prohibited conduct as defined in section 1.[7] The Tribunal concludes that it is appropriate to declare the respondent's contraventions as prohibited conduct.
35. The applicant also sought any other appropriate order required to give effect to a right as contemplated in the NCA. The Tribunal is of the view that the complainant's interest would be best served if the complainant's damages were dealt with separately. The Tribunal draws attention to section 164
- (3) (b), which entitles a person who is entitled to commence an action in a civil court for the assessment of damages suffered due to prohibited conduct, to approach the chairperson of the Tribunal for a notice certifying whether the conduct constituting the basis for the action is prohibited or required conduct in terms of the NCA. Such certificate must be filed with the registrar or clerk of the court where the action is instituted and, in terms of section 164 (4), the certificate is sufficient proof of its contents.

ORDER

36. Accordingly, the Tribunal makes the following order:

36.1 The respondent contravened section 52(5)(c) read with regulation 11 and condition B1 of the respondent's conditions of registration.

36.2 The respondent contravened section 52

(5) (c) read with conditions A1 and A2 of the respondent's conditions of registration.

36.3 These contraventions are declared as prohibited conduct.

36.4 There is no cost order.

DATED AT CENTURION ON 8 MARCH 2024

[signed]

Ms N Maseti

Presiding Member

With Ms Z Ntuli (Tribunal Member) and Mr S Hockey (Tribunal Member) concurring.

[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).

[2] Track and trace slips appear on pages 50, 55, and 60 of the record for all the notices served on the respondent.

[3] Court order dated 9 June 2016 by the Magistrate Court for the District of Durban – appears in paragraph 5 of the founding affidavit.

[4] Proof of payment of R208,000.00 made to the respondent appears on the record including an affidavit from the complainant.

[5] Evidence of emails referring to communication between the complainant and the respondent appears from pages 30 to 48 of the record. This includes proof of payment and bank statements reflecting the payments, accounts, and balances.

[6] Refer to the complainant's confirmatory affidavit, paragraph 2.4 on page 47 of the record.

[7] Section 1 defines 'prohibited conduct' as an act or omission in contravention of the NCA.

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