

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Collectnet PDA (Pty) Ltd (NCT/267892/2023/55(6)) [2024] ZANCT 64 (17 October 2024) [2024] ZANCT 64

COURT

National Consumer Tribunal

BEFORE

S Hockey, A Potwana, CJ Ntsoane

CASE / FILE NUMBER

NCT/267892/2023/55(6)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: NCT/267892/2023/55(6)

In the matter between:

NATIONAL CREDIT REGULATOR

APPLICANT

and

COLLECTNET PDA (PTY) LTD

RESPONDENT

Coram:

Mr S Hockey Presiding Tribunal Member

Dr A Potwana Tribunal member

Mr CJ Ntsoane Tribunal Member

Date of Hearing 3 September 2024

Date of Judgment 17 October 2024

JUDGMENT AND REASONS

INTRODUCTION

1. The applicant in this matter is the National Credit Regulator (the applicant or the NCR), a juristic person established by section 12 of the National Credit Act, 34 of 2005 (the NCA). Part of the applicant's mandate, as prescribed in the NCA, is to receive complaints of alleged contraventions of the NCA, monitor the consumer credit market and industry to ensure that prohibited conduct is detected, prevented, and prosecuted, and investigate and evaluate alleged contraventions of the NCA. The NCR is also responsible for registering various registrants in the consumer credit industry and ensuring that the registrants comply with the provisions of the NCA and their respective registrations.
2. At the hearing, the applicant was represented by Ms Louise Page, a legal advisor employed by the applicant.
3. The respondent is CollectNet PDA (Pty) Ltd (the respondent), duly incorporated under the company laws of South Africa. The respondent is a registered payment distribution agent (PDA) with the applicant with registration number NCRPDA04.
4. The respondent was represented at the hearing by its chief executive officer, Ms Christel de Bruin.
5. This is an application made in terms of section 55(6) of the NCA, which entitles the NCR to refer a matter to the National Consumer Tribunal (the Tribunal) for an appropriate order if a person fails to comply with a compliance notice which had been issued in terms of section 55(1) without the person having raised any objection to the said notice in terms of section 56.
6. The NCR alleges that the respondent failed to comply with a compliance notice issued by it and applies for an appropriate order, including a declaration that the respondent repeatedly contravened section 52(2) read with regulation 20A(9)(a)–(g) and its conditions of registration, that such contraventions be declared prohibited conduct and that the registration of the respondent as a PDA be immediately cancelled. In addition, the NCR asks that an administrative fine be imposed on the respondent.

TERMINOLOGY

7. A reference to a section in this judgment refers to a section of the NCA.
8. A reference to a regulation refers to the National Credit Act Regulations,
9. 2006[1] (the regulations).
9. A reference to a rule refers to the Rules of the Tribunal[2].

WHAT IS A PAYMENT DISTRIBUTION AGENT?

10. Due to the respondent's alleged failure to comply with the compliance notice issued by the NCR, the latter asks for an order, among other things, to cancel the respondent's registration as a PDA. First, it is important to consider what a PDA is and its role and functions in debt counselling and re-arrangement under the provisions of the NCA.
11. A PDA is defined in section 1 as a person who, on behalf of a consumer that has applied for debt review in terms of the NCA, distributes payments to credit providers in terms of a debt re-arrangement, court order, order of the Tribunal or an agreement.
12. In terms of section 44A(1), it is unlawful to engage in the services of a PDA unless the person is registered as such under the provisions of the NCA.
13. The duties and obligations of the PDA are set out in regulation 10A(9)(a)–(h) as follows:

“(9) Payment distribution agent must:

 - (a) implement, maintain and utilise an electronic payment distribution system that offers the functionality determined by the National Credit Regulator in its conditions of registration and any guidelines that may be issued by the National Credit Regulator from time to time;
 - (b) comply with the reporting requirements to consumers, credit providers, debt counsellors and the National Credit Regulator in the manner and form determined by the National Credit Regulator in its conditions of registration and any guidelines that may be issued by the National Credit Regulator from time to time;
 - (c) on a monthly basis provide a statement to the consumer reflecting the following information:
 - (i) date of receipt of payment;
 - (ii) amount of payment received;
 - (iii) names of the consumer's credit providers who received payments during the relevant month and the actual amounts paid;
 - (v) undistributed funds;
 - (vi) outstanding balances under the debt re-arrangement plan, court, or tribunal order, as the case may be, reflecting a disclaimer to the effect that the outstanding balances may be adjusted from time to time after the debt counsellor has provided the payment distribution agent with updated transactions from credit providers including, interests;
 - (vii) fees of the payment distribution agent;
 - (viii) payments made to the debt counsellor; and
 - (ix) payments made to the credit providers.

- (d) provide a monthly statement referred to in sub-regulation 8(c) [sic], in a manner chosen by the consumer which may be in the form of an e-mail, short message service (sms), multi-media messaging service (mms), fax or written statement;
- (e) comply with any other requirements that may be imposed by the National Credit Regulator in its conditions of registration and any guidelines that may be issued by the National Credit Regulator from time to time;
- (f) deposit monies collected from consumers into a trust account opened at a registered bank and distribute the monies to the credit providers and debt counsellors;
- (g) distribute monies received within five (5) days of receipt, failure which reasons must be submitted to the National Credit Regulator.
- (h) open a separate trust account with a registered bank into which interest earned on monies collected from consumers is deposited. The National Credit Regulator must:
- (i) open a trust account into which all interest earned on monies held by the payment distribution agent is deposited;
- (ii) transfer interest accrued from these monies to the trust account stipulated in subregulation 10A(9)(h)(i); and
- (iii) develop a policy on the usage of trust account funds for approval by the Minister of Trade and Industry.”

BACKGROUND

14. During the course of their duties, the NCR initiated an investigation into the respondent's possible non-compliance with its legal obligations in 2022. The findings of the investigation revealed that the respondent was non-compliant in various aspects, and the NCR accordingly issued a compliance notice in terms of section 55(1)[3]and (3) on 12 July 2022.
15. The respondent did not object to the compliance notice by applying for it to be reviewed in terms of section 56(1). Therefore, the validity of the compliance notice is not at issue.
16. The compliance notice is fairly detailed and is aptly summarised in the respondent's written submissions. Part A, comprising paragraphs 1–17, records what is expected of the respondent in terms of the NCA, the regulations, and its conditions of registration. Part A, under paragraph 18, further sets out the respondent's contraventions which were identified. In part B of the compliance notice, the remedial measures were set out to correct the identified contraventions and the timelines within which compliance was required. In part C, the respondent's attention was drawn to the possible sanctions that could be imposed if the required steps were not taken to rectify the identified areas of non-compliance. Lastly, part D informed the respondent that it could object to the compliance notice in terms of section 56 and could request the Tribunal to review the notice within fifteen business days after its receipt.

17. What follows are the contraventions identified by the NCR, which were brought to the attention of the respondent in paragraph A18 of the compliance notice:

Re paragraph A18.1 of the compliance notice

16.1. In terms of regulation 10A(9)(a), a PDA must implement, maintain and utilise an electronic payment distribution system that offers the functionality determined by the NCR in its conditions of registration and any guidelines that may be issued by the NCR from time to time.

16.2. In November 2021, the NCR issued a Reporting Template User Guideline setting out the requirements of PDAs. Amongst others, PDAs were required as follows:

“The User is expected to adhere fully to the format and template of this report. There should not be any manual manipulation of figures for the report as all totals must pull automatically from the respective or corresponding tabs.”

16.3. The respondent’s conditions of registration 2, 6 and 7 required it to (a) implement, maintain and utilise an electronic payment distribution system that offers the functionality determined by the NCR; (b) comply with requirements concerning the NCR specified systems, and (c) comply with the standard operational processes and procedures prescribed by the NCR.

16.4. The NCR found that the respondent’s monthly NCR reports were manually generated and prepared. The functionality to process consumer funds was inadequate, as not all payment records were evident in the past years of operation. It was recorded that this was a repeated finding which constituted a contravention of section 52(5)(c) read with regulation 10(9)A(a) and the respondent’s conditions of registration 2, 6 and 7.

Re paragraph A18.2 of the compliance notice

16.5. Under section 10A(9)(f), a PDA must deposit monies collected from consumers into a trust account opened at a registered bank and distribute the funds to credit providers and debt counsellors. The respondent's conditions of registration 4 require it to reconcile and distribute monies received from consumers in terms of the debt re-arrangement plan in a manner that is accurate, timely, efficient, and consistent

with the purpose and requirements of the NCA.

16.6. The respondent was found to have made use of an unlawful bank account from ABSA Bank Limited (ABSA), with account number ending in 303 (the ABSA account), which was held in the name of Capital Computer Bureau (Pty) Ltd[4] for payment distribution-related activities.

16.7. The above is recorded in the compliance notice as a contravention. In addition, the respondent’s conditions of registration 17 and 28, in terms of which the respondent is prohibited from engaging in any activities which could conflict with the interest of the consumers to whom the payment distribution services are provided or which may lead to such conflict and not to engage in conduct that brings the NCR and industry into disrepute, are also mentioned as having been contravened under this paragraph.

Ad paragraph A18.3 of the compliance notice

16.8. Regulation 10A(9)(g) requires a PDA to distribute monies received within five days of receipt. If it fails to do so, reasons must be provided to the NCR. This requirement is repeated in the respondent's conditions of registration 4 and 9. The compliance notice recorded that the respondent repeatedly failed to distribute consumer funds to creditors within five days of receipt.

Ad paragraph A18.4 of the compliance notice

16.9. In terms of its conditions of registration 4 and 8.2, the respondent must reconcile and distribute monies received from consumers in terms of the debt re-arrangement plan in a manner that is accurate, timely, efficient and consistent with the purpose and requirements of the NCA, and distribute the funds on behalf of consumers to credit providers, debt counsellors and attorney's firms in accordance with a debt re-arrangement plan or the interim payment arrangement proposed by the debt counsellor whilst negotiations are still taking place.

16.10. The NCR found and recorded in the compliance notice that the respondent failed to distribute consumer funds to credit providers as required by its registration conditions 4 and 8.2.

Ad paragraph A18.5 of the compliance notice

16.11. In addition to section 10A(9)(f), which requires a PDA to deposit monies collected from consumers into a trust account opened at a registered bank, the respondent's condition of registration 9 requires it to open such a trust account and to distribute monies within five days of receipt.

16.12. Because the respondent used the ABSA account that did not depict its name, it could not be used to reconcile and monitor the respondent's reports. This resulted in the applicant's inability to trace some transactions noted on remittance advices and debt re-arrangement plans to the bank statements.

16.13. The compliance notice recorded that this was a contravention of the respondent's conditions of registration 1, 17 and 28.

Ad paragraph 18.6 of the compliance notice

16.14. Section 10A(9)(b) requires a PDA to comply with reporting requirements to consumers, credit providers, debt counsellors and the NCR in the manner and form determined by the NCR in its conditions of registration and any guidance that may be issued by the NCR from time to time. The wording of the respondent's condition of registration 13 effectively requires it to comply with section 10A(9)(b).

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16.15. The NCR found and recorded in the compliance notice that the respondent incorrectly and inaccurately reported various categories of related funds by not implementing automated functionalities in the system. It was stated that this resulted in misrepresenting reports that the NCR could rely on for reporting purposes in the PDA landscape. The respondent, therefore, contravened the above sector regulation and condition of its registration.

Ad paragraph 18.7 of the compliance notice

16.16 In terms of section 10A(9)(e), a PDA must comply with any other requirements that may be imposed by the NCR in its conditions of registration and any guidelines that the NCR may issue from time to time. In 2018, the NCR issued Debt Counselling Fee Guidelines, which set limits on debt counselling fees. The respondent's condition of registration 7 required it to comply with the standard operational processes and procedures prescribed by the NCR.

16.17. The respondent was found to have distributed debt counselling fees over the limits set in the Debt Counselling Fee Guidelines. It was recorded in the compliance notice that this contravened regulation 10A(9)(e) read with the respondent's condition of registration 7.

Ad paragraph 18.8 of the compliance notice

16.18. The compliance notice noted that the respondent acted in contravention of regulation 10A(9)(e) read with its condition of registration 1, 7, 17, 21 and 28 by having collected PDA fees in excess of the PDA fees regulations during the period 01 to 31 July 2021. The respondent charged consumers R8.40 per distribution to credit providers, which is in excess of the fee guidelines and Schedule 2 of the regulations.

Ad paragraph 18.9 of the compliance notice

16.19. Similarly to the collection of fees in paragraph 18.8 of the compliance notice, in paragraph 18.9, it was recorded that the respondent also collected PDA fees in excess of the limits set in the PDA fees regulations during a different period, namely from 01 January 2021 to 31 December 2021.

Ad paragraph 18.10 of the compliance notice

16.20. It was recorded that the respondent failed to follow due process to resolve identified and undistributed funds for all the periods under review and failed to keep all relevant documents. This, it was stated, contravened the respondent's conditions of registration 7 and 22.

18. It must be noted that section 52(5)(c) requires all registrants to comply with the conditions of registration and provisions of the NCA. Therefore, where the respondent is alleged to have contravened its conditions of registration, this extends to a contravention of section 52(5)(c). This was noted in the compliance notice wherever there was a reference to a contravention of any of the respondent's registration conditions.

19. In terms of section 55(3)(d), a compliance notice must set out any required steps and the period within which those steps must be taken. The steps required to be taken by the respondent were set out in part B of the compliance notice. It is convenient to borrow from the NCR's written submissions, where the required steps to be taken by the respondent were summarised as follows:

"13.1 System Review: Letter of undertaking to confirm a review of the payment distribution system to ensure compliance and for same to be completed it (sic) within 6 months.

13.2 Account Use: Stop using the ABSA account for distribution, notify consumers, and transfer all funds to the proper PDA trust account, and to provide proof of same within 15 business days.

13.3 Late Fund Distribution: Provide reasons for delayed distributions within 30 days and proposed measures to ensure future timely payments.

13.4 System Development: Ensure system developments to ensure consumer funds are distributed as per the debt re-arrangement plan and notify affected stakeholders to prevent terminations, within 15 days.

13.5 Payment Schedules: Employ system functionality to ensure alignment of payment schedules and remittances with distributed amounts within 90 days.

13.6 Inaccurate Reporting: Explain inconsistent reporting and provide evidence that no misappropriation occurred within 30 days.

13.7 Overpaid Fees: Submit a list of consumers overcharged for debt counselling within 15 business days.

13.8 Fee Recovery: Recover overpaid fees from debt counsellors or PDA's business account and distribute in line with consumer's debt re- arrangement plans loaded, and submit a report within 30 days confirming the aforementioned.

13.9 Unlawful Bank Fees: Provide a list of consumers charged unlawful fees in terms of the R8.40 charged.

13.10 Unlawful Bank Fees: Provide a report on the refunding of the identified list of consumers, within 30 days.

13.11 Excess PDA Fees: Submit a list of consumers affected by the overcharged PDA fees within 15 days.

13.12 Excess PDA Fees: Submit a report of the refunds disbursed to the consumers affected within 30 days.

13.13 Unidentified Funds: Resolve undistributed funds and provide relevant documentation.

13.14 Independent Auditor: Appoint a service provider to assist the PDA with its management processes, alignment to the Act, its regulations and conditions of registration, related procedures and guidelines, and implementation of all corrective measures in terms of identified contraventions within 20 days.

13.15 List of possible service providers: Provide a list of possible service providers, and provide bi-weekly progress reports once appointed.

13.16 Stop Onboarding: Cease onboarding new debt counsellors until corrective measures show progress (reviewed after 3 months).

13.17 Audit Report: Perform an independent audit of the system within 6 months and provide a report assuring compliance.”

20. The general tenor of the respondent’s answering affidavit is that it was not in contravention of any of the provisions of the NCA or its conditions of registration and that it complied with the requirements of the compliance order. On the other hand, the applicant persists that the respondent has not complied with most of the requirements of the compliance order. What follows below are the parties' versions regarding some of the requirements of the compliance order.
21. The compliance notice was issued on 12 July 2022. On 3 August 2022, the respondent sent a letter to the NCR confirming that it would comply and undertook a review of its current electronic payment distribution system to ensure compliance with PDA-related functionalities required by the NCR.
22. In the abovementioned letter, the respondent advised that they ceased to use the ABSA account and that all eight consumers who utilised that account were advised to use the respondent’s registered trust account. They stated further that measures had been put in place to ensure that monies deposited in the ABSA account would immediately be transferred to the trust account.
23. In the 3 August 2022 letter, the respondent disputed that they overpaid debt counselling fees. They stated that they have the regulated fees built into their system. They also denied that the amount of R8.40 was unlawful as the consumers concerned signed up with Capital Software before the respondent was registered as a PDA. They submitted that the R8.40 was applicable before the new fees were introduced. The respondent also denied that they overcharged PDA fees.
24. The NCR submitted that the respondent, as confirmed in their letter of 3 August 2022, complied with some of the compliance notice requirements, but most were not complied with. The requirements not complied with were set out in paragraph 4 of the NCR’s founding affidavit, which will not be repeated here to avoid prolixity. It bears to be mentioned that according to the NCR, most of the requirements were not met. In particular, when the founding affidavit was deposed, the respondent had not engaged a service provider to undertake an independent audit of the payment distribution system. No report had been

provided to the NCR, assuring that the respondent complied with all the payment distribution provisions and that all areas of non-compliance listed in the compliance notice had been remedied.

25. In its answering affidavit, the respondent alleges that an independent audit of the payment distribution system and processes was conducted within six months of the compliance notice. It is further alleged that the NCR was provided with a report that assured the respondent complied with all the payment distribution provisions listed in part A of the compliance notice and that all shortcomings had been remedied.
26. In its replying affidavit, the NCR denied that the respondent complied with the requirement for a system review and confirmed that it met all the required PDA- related functionalities. The compliance notice required the respondent to deliver by way of the auditor's report within six months, i.e. by 11 January 2023, that the systems review had been attended to along with any amendments for the system to operate as stipulated in paragraphs A18.1 and B17 of the notice.

The letter from the auditor the respondent referred to was dated 5 May 2023, exceeding the deadline by almost four months. The NCR also notes that the said letter from the respondent's auditors was received 13 days after the respondent was served with the present application.

27. In its answering affidavit, the respondent averred that the eight debt counsellors who used the ABSA account were notified that they should no longer use it. In response to the notification, five affected debt counsellors terminated their services with the respondent. The remaining three were informed of the changes to the bank details on 26 November
2018. However, the three debt counsellors were of the view that it would not be in the best interests of the consumers if the payments made into this account were rejected, as it would cause non-payment of the debt review distributions, which could result in the termination by credit providers and cause prejudice to the consumers concerned. The respondent further stated that they implemented a "sweeping" programme whereby any deposits made into the ABSA account were automatically transferred to the correct account.
28. In its replying affidavit, the NCR refers to the letters attached to the answering affidavit as evidence that the relevant debt counsellors were informed that they were to refrain from utilising the ABSA account. The NCR points out that the letters were not addressed to all eight relevant parties, and there is no proof that such letters were dispatched. There is no written proof that all consumers using this account were notified not to use the account as required in paragraph B2 of the compliance notice.

29. The NCR further stated in its replying affidavit that the respondent failed to provide written proof or evidence that all debt review funds paid into the ABSA account had been transferred to the required trust account intended to distribute debt review consumer funds. The NCR reiterated that the letter from an order to claim compliance is not proof of such compliance and that the respondent had failed to deliver any evidence of compliance.
30. The NCR further pointed out that the respondent's answering affidavit confirmed that the respondent remained in contravention of the compliance notice by allowing three debt counsellors to continue using the ABSA account. The continued use of a bank account not registered in the name of the PDA and false declarations of such account contravenes section 52(5)(c) read with regulation 10A(9)(f) and the respondent's conditions of registration 9, 17 and 28 according to the NCR.
31. Regarding the requirement in paragraph B3 of the compliance notice, the respondent denied that it was in continued non-compliance with the requirement to distribute funds within five days of receipt. It averred that the historical failure in this regard was related to the migration of two previous debt counselling accounts that had since been resolved. Since then, all consumer distributions have been made within five days, barring patent errors made by debt counsellors when submitting account information on the payment plans. In light of this, according to the respondent, all measures have been put in place to ensure the timeous distribution of consumer funds. The respondent referred to a letter from its auditors, who confirmed that funds were distributed within five days.
32. In its replying affidavit, the NCR submitted that the respondent did not deliver reasons within 30 days why funds were not timeously distributed as required in paragraph B3 of the compliance notice, nor did it show that measures were put in place to ensure timeous distribution of consumer funds. The NCR referred to the report from its auditors of the bi-annual review report for the period 1 July 2022 to 31 December 2022, wherein a finding was made that the auditors could not confirm whether distributions were made to credit providers within five days as the supporting documents that were provided were not sufficient.
33. The NCR argues that paragraphs 19 and 22 of the respondent's conditions of registration require it to permit the NCR or any person authorised by the NCR (such as its auditor) to enter the premises of the PDA and the PDA must satisfy all requests and requirements relating monitoring compliance with its conditions of registration and the provisions of the NCA and the relevant guidelines. Furthermore, the PDA must maintain adequate records and keep copies of documentation to demonstrate compliance with the NCA and the conditions of registration. It must also provide records of all communications with the consumers, debt counsellors, or credit providers to whom payment distribution services are provided. Such documents must be provided to the consumers, credit providers or the NCR upon reasonable request.

34. Regarding the requirement in paragraph B4 of the compliance notice, namely for the respondent to make system developments to ensure consumer funds are distributed as per the debt re-arrangement plans loaded and to inform all credit providers and debt counsellors whose consumers were affected within 15 business days from the date of the compliance notice, the respondent submits that it developed several automation and system developments to ensure compliance. The respondent refers to the letter it sent to the NCR dated 3 August 2022 wherein it advised that the system enhancements included an hourly drop distribution plan as opposed to the previous daily drop of distribution plans.
35. The NCR stated that in their bi-annual review report for the period 1 January 2021 to 30 June 2021, its auditors found that the respondent's operational system did distribute monies from consumers in line with their debt re- arrangement plans in 16 out of 30 sampled transactions and eight transactions could not be traced back to their debt re-arrangement plans. For these reasons, the respondent was required to make system developments to ensure consumer funds were distributed per the debt re-arrangement plans as loaded by the debt counsellors. The review report from the applicant's auditors for 1 July 2022 to 31 December 2022 reported that the respondent was unavailable for a scheduled online system walkthrough. The auditor stated that they could not confirm that the respondent complied with paragraph 2 of the respondent's condition of registration, which states that the respondent must implement, maintain and utilise an electronic payment distribution system that offers the functionality determined by the NCR. The auditors concluded that the respondent did not comply with paragraph 2 of its conditions of registration and noted this as a high-risk item.
36. The NCR drew attention to the second part of paragraph B4 of the compliance notice, which required the respondent to inform all credit providers and debt counsellors whose customers were affected to avoid termination within 15 business days from the date of receipt of the compliance notice, and noted that notification of compliance by way of written notice was not compliant as required. Compliance was to be proven to have taken place considering the complexities, functionalities and operations of a PDA. This was why the auditors were employed to review the operational systems, documents, transactions and the like to verify by way of independent source documentation and a physical walkthrough of the actual operation system that compliance had been adhered to.
37. The NCR also submits that the respondent failed to comply with the time limits in the compliance notice and the remedial measures, which included reviewing the respondent's current PDA system functionality.
38. In terms of the requirement in paragraph B7 of the compliance notice, the respondent had to provide the NCR with a list of consumers whose debt counselling fees were overpaid from January 2020 to the date of the notice. In response, the respondent denied any overpayment of the debt counselling fees. The respondent submitted that the confusion around the collection and distribution of VAT may apply to certain distributions, and the amounts seemingly distributed outside the maximum amounts in the fee guidelines were merely the

VAT component applicable to certain debt counsellors who were entitled to VAT in the distributions. The respondent also avers that the NCR's overpayment findings did not consider double collections due to defaults in the preceding months.

39. The NCR denies the allegations of overcharged fees by the respondent were due to VAT charges or double collections. It states that during the monitoring period, its auditors found that none of the overcharges were attributed to VAT charges or double collections. It noted that the respondent did not deliver any documentation to substantiate these allegations. The NCR further pointed out that its auditors found in the biannual review report for January 2021 to 30 June 2021 that the respondent overcharged consumers for debt counselling fees to be paid to the debt counsellors. In terms of the Debt Counselling Fee Guidelines of 2018, the care fees were to be charged at 5% of the distributed amount or a maximum of R450, whichever amount is the lesser. It was found that the respondent did not comply with the said guidelines as it overpaid debt counsellors R84 399.45 for the period.
40. Paragraph B8 of the compliance notice required the respondent to recover all overpaid debt counselling fees from debt counsellors, failing which the overpaid fees must be recovered from the respondent's business account and distributed accordingly as per the consumer debt rearrangement plans. The respondent was required to complete this task within 30 business days of receipt of the compliance notice and submit a report to the NCR detailing how overpaid fees were corrected and distributed.
41. In its answering affidavit, the respondent submitted that in every instance where it collected an overpayment of the debt counselling fees, the same had been recovered and distributed according to the consumer's debt re-arrangement plan as loaded on the system. The respondent attached a schedule, which allegedly reflects the reimbursements of R326 949.46, as annexure "CN10" to its answering affidavit.
42. In its replying affidavit, the NCR states that its auditors could not find evidence during their monitoring duties that the overcharged amounts had been repaid as alleged by the respondent. It further states that the respondent's annexures do not provide any substantive or probative value as they are editable spreadsheets that do not indicate that any amounts had been repaid to consumers. Therefore, there is no indication of compliance with paragraph B8, nor is there an indication that future compliance would occur.
43. Paragraph B14 of the compliance notice required the respondent to, within 20 business days from receipt of the compliance notice, appoint an independent qualified service provider over a period of six months to support it with the management of its operations, alignment of all PDA processes in terms of the NCA and regulations, the related procedures and guidelines and to implement corrective methods to remedy the contraventions indicated in part A (from paragraph 18.1 to 18.10) of the compliance notice.
44. In terms of paragraph B15 of the compliance notice, the respondent was to provide the NCR within 15 business days from the date of receipt of the compliance notice, with a list of service providers identified for the provision of the services mentioned in paragraph B14.

Upon receipt of the NCR's response to the list, appoint the service provider and submit proof of appointment with a commencement date. From the date of its commencement, the appointed service provider had to provide bi-weekly reports to the NCR on the progress made.

45. In its founding affidavit, the applicant stated that the respondent did not comply with paragraph B14 of the compliance notice. Regarding paragraph B15 of the compliance notice, the NCR acknowledged that the respondent addressed a letter to it dated 14 September 2022 regarding the appointment of auditors and agreed to a meeting on 22 September 2022 to discuss the required services. However, it was stated that the respondent failed to deliver proof of compliance and did not receive any biweekly reports on the progress made.
46. In its answering affidavit, the respondent acknowledged that an independent audit of its payment distribution system was to be performed and that the NCR was to be provided with a report giving assurance that it complied with all the payment distribution provisions. The respondent alleged that such an audit was duly completed, and the necessary system enhancements were done. Regarding paragraph B15 of the compliance notice, the respondent denied the allegations in the NCR's founding affidavit.
47. In its replying affidavit, the NCR countered that the respondent clearly confused the appointment of an independent qualified service provider's appointment with an auditor's appointment. The former is to support the management of its operations, align all its processes with the NCA, regulations, related procedures, and guidelines, and implement all corrective measures identified in the compliance notice. An auditor is to be appointed for auditing purposes. It stated that the appointment of auditors was not the remedial action required from the applicant to comply with the compliance notice. Instead, an independent service provider was to be appointed to assist the respondent in the daily operations and to deliver biweekly progress reports made regarding the required remedial action. According to the NCR, the respondent failed to comply with these requirements (in paragraphs B14 and B15 of the compliance notice).
48. Paragraph B17 of the compliance notice required the respondent to perform an independent audit of the payment distribution system and processes within six months from the date of receipt of the notice and provide the NCR with a report that assured that the respondent complied with all the payment distribution provisions and that the areas of non-compliance listed in part A of the compliance notice have been remedied.
49. The respondent avers that it did comply with paragraph B17 of the compliance notice and referred to its letter dated 3 August 2022, which was discussed above. The respondent also states that the system enhancements that were found to be necessary were duly completed.
50. The NCR drew attention to the fact that the compliance notice required the respondent to deliver a letter of undertaking within 15 days of receipt of the compliance notice indicating their intention to comply with the remedial action stipulated in the notice (this is what the letter of 3 August 2022 did). The respondent was further requested, by way of their auditors,

to submit a report within six months wherein it was confirmed that a system review had been attended to along with any amendments for the system to operate as stipulated in paragraphs A18 and B17 of the compliance notice. Such a

review had to take place by 11 January 2023, but the NCR received no report indicating that the review had been done.

51. The NCR noted that it received a letter from the respondent's auditors dated 5 May 2023, almost four months after the required deadline. As stated above, the NCR received this letter after the current application had been served on the respondent. The NCR further noted that the letter from the auditors states that the review had been completed. Yet, the result of such review in the form of a report or in the form of allowing the NCR's auditors access to the system was not received. The NCR alleges, therefore, that the respondent failed to audit the payment distribution operations within six months, as required by the compliance notice.
52. It must be noted that after the hearing of the matter and before this judgement had been completed, the Tribunal received a document from the respondent's auditors. The respondent merely submitted this document by way of correspondence to the Tribunal registry without any application in terms of rule 15 or any other provision of the NCA

or the rules to have the document admitted as part of the record of the proceedings. The Tribunal, therefore, had no regard for the document received for the above reason and because the NCR did not have an opportunity to respond to it.

DISCUSSION AND SANCTIONS

53. As noted above, the respondent's response to the allegations of non-compliance with the compliance notice against it consists, regarding some of the allegations, of denials of any contraventions of the NCA, the regulations or its conditions of registration. On other allegations, it submits that it complied with the compliance notice. However, the respondent's versions concerning the non-compliance allegations are, in many instances, bare denials or, like in the case of the requirement to appoint a service provider to assist it with its operations, misconstrued or non-existent.
54. The Tribunal agrees with the NCR that the respondent did not show compliance with most of the compliance notice's requirements. As discussed above, the NCR detailed these in its founding and replying affidavits. To the extent that the respondent did reply concerning some of the required compliances, these were woefully out of time and inadequate, as pointed out by the NCR. The Tribunal agrees with the NCR that, in many instances, the respondent did not show any evidence of compliance as alleged by them.
55. On a balance of probabilities, the Tribunal finds that the respondent did not comply with the compliance notice. Therefore, the NCR is entitled to the relief in paragraph 6 of its notice of motion.

56. Cancelling the respondent's registration as a PDA entails that its operations must cease and that the debt counsellors and consumers who use the respondent's services must be allowed opportune time to transfer to another PDAs. The Tribunal considered the draft winding up agreement attached to the founding affidavit as annexure "E"

and considered it an appropriate arrangement in the circumstances.

57. The NCR's request to impose an administrative fine on the respondent is unfortunate because it did not provide a detailed motivation or assist the Tribunal regarding the factors that must be considered to determine an appropriate fine.
58. From the circumstances of this matter and the level of the respondent's dereliction of its duties and obligation under the provisions of the NCA and its conditions of registration, the Tribunal is of the view that the imposition of an administrative fine is appropriate.
59. Section 151(1) empowers the Tribunal to impose an administrative fine regarding conduct prohibited by the NCA. Such fine may not exceed the greater of 10% of the respondent's annual turnover during the preceding financial year of R1 000 000.00. Section 151(3) outlines the factors the Tribunal must consider when determining an appropriate fine. These are listed and discussed under separate sub-headings below.

a) The nature, duration, gravity and extent of the contraventions

It is apparent that the contraventions, which the Tribunal considered serious, had been ongoing for a considerable time. The NCR's auditors found various contraventions relating to overpayments to debt collectors as far back as January 2020.

The gravity of the contraventions cannot be overstated. PDAs are entrusted with millions of rand, which consumers under financial stress entrust them to transfer to various credit providers and debt re-arrangements plans. The PDAs are, therefore, obliged to have proper electronic payment distribution systems in place that comply with the requirements of the NCR. The evidence shows that the respondent did not have this in place, resulting in its inability to properly report to all stakeholders involved regarding collecting and distributing consumer funds.

b) The loss or damages suffered as a result of the contraventions

Because the respondent overpaid debt collector fees, the financially stressed consumers who used the respondent's services suffered due to the contraventions. It is difficult to estimate the extent of the damages suffered by the consumer.

c) The behaviour of the respondent

It seems the respondent co-operated to an extent with the NCR, but its behaviour was one of denial. One would expect parties to negotiate and reach a settlement in these matters, but it is clear, as can be ascertained from the tone of the respondent's answering affidavit, that the respondent was not prepared to compromise and do what was necessary to comply with the compliance notice.

d) The market circumstances in which the contraventions took place

The circumstances in which the contraventions occurred are where the consumers cannot meet their financial obligations. Accordingly, they applied for debt review in terms of the provisions of the NCA and entered into debt re-arrangements with their credit providers. These consumers are the most financially vulnerable in our society and have been prejudiced by the respondent's behaviour.

e) The level of profit derived from the contraventions

It is uncertain what profit level the respondent may have derived from the contraventions.

f) The degree to which the respondent co-operated with the NCR

The extent to which the respondent co-operated with the NCR was discussed above.

g) Whether the respondent has previously been found in contravention of the NCA

There is no indication that the respondent had previously been found in contravention of provisions of the NCA.

60. In light of the above, the Tribunal is of the view that an administrative fine of R100 000.00 is appropriate.

THE ORDER

61. In the result of the above, the following order is made:

61.1. The respondent repeatedly contravened section 52(5)(c) read with regulation 10A(9)(a) and the conditions of its registration numbers 1, 2, 4, 6, 7, 8.2, 9, 13, 17, 21, 22, and 28.

61.2. The contraventions listed above are hereby declared to be prohibited conduct.

61.3. The respondent's registration with the NCR as a payment distribution agent is cancelled with immediate effect.

61.4. The respondent is ordered to cease its operations as a payment distribution agent immediately and, within ten business days from the date of this order, to enter into and comply with the draft winding-up agreement with the NCR, which is attached to the NCR's founding affidavit marked as annexure "E."

61.5. The respondent is ordered to pay an administrative fine of R100 000.00 (one hundred thousand rand) into the bank account of the National Revenue Fund, the details of which are as follows:

Bank:

Nedbank

Account holder: Department of Trade, Industry and Competition

Branch name: Telecoms and Fiscal

Branch code: 198765

Account number: 1[...]

Reference: NCT/314933/2024/140(1) and name of the person or business making the payment.

61.6. There is no order as to costs.

[signed]

S Hockey (Presiding Tribunal member)

Tribunal members Dr A Potwana and Mr CJ Ntsoane concur.

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

[2] 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).

[3] In terms of this subsection, the NCR may issue a compliance notice in the prescribed form to a person or association that it believes has failed to comply with the provisions of the NCA or to a registrant that it believes has failed to comply with its conditions of registration. Subsection (3) sets out the details that the compliance notice must contain.

[4] This company is not a registered PDA.

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