

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Hirst (NCT/22133/2015/57(1)) [2015] ZANCT 21 (31 August 2015) [2015] ZANCT 21

COURT

National Consumer Tribunal

BEFORE

L Best, T Woker, F Sibanda

CASE / FILE NUMBER

NCT/22133/2015/57(1)

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IN THE NATIONAL CONSUMER
TRIBUNAL
HELD IN
CENTURION

Case number: NCT/22133/2015/57(1)
In
the matter between: THE
NATIONAL CREDIT
REGULATOR
APPLICANT
and
LUKE
HIRST
RESPONDENT
Presiding
member – Ms L Best
Member
– Prof. T Woker
Member
– Mr F Sibanda
Date
of hearing – 6 August 2015

JUDGMENT**AND REASONS**

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”). The Applicant was represented by Mr Joseph Selolo and Ms Anne Carien Du Plooy.
2. The Respondent (and Registrant) is Luke Hirst, a male debt counsellor, who practiced as such under registration number NCRDC 195, and under the name Debt Busters, with offices situated at Suite 2, IDM House, 144 Buitengracht Street, CapeTown (“the Respondent”). At the hearing the Respondent was represented by counsel, Mr Joseph Richard Whitaker.
3. The Applicant avers that the Respondent contravened the Act in that the Respondent
 - 3.1 Contravened Section 86(7)(c) of the Act: Failure to refer matters to court;
 - 3.2 Failed to comply with Condition 2 of his General Conditions of Registration: Charging legal fees where no legal service is rendered; and
 - 3.3 Contravened Regulation 55 (1) of the Act, read with conditions 4 and 11 of his General Conditions of Registration: Failure to maintain records.
4. This is an application in terms of Section 57 (1) (a), (b) and (c) of the National Credit Act wherein the Applicant seeks the following order:
 - 4.1 that the registration of the Respondent as a debt counsellor be cancelled;
 - 4.2 that the Respondent be declared to be in repeated contravention of his conditions of registration;
 - 4.3 that the Respondent be declared to be in repeated contravention of the Act;
 - 4.4 that the repeated contravention of the Act by the Respondent be declared prohibited conduct;
 - 4.5 that the Respondent refund to consumers the amounts that were not utilised to pay legal costs in order to obtain a debt rearrangement order at the appropriate forum;
 - 4.6 that the Respondent surrender all his client files and furnish to the Applicant a list of all past and present clients within 10 (ten) days of the order;
 - 4.7 that an administrative fine be imposed against the Respondent; and
 - 4.8 any further and/or alternative relief as the Tribunal may consider appropriate to give effect to consumer rights in terms of the Act.

5. The brief background as alleged by the Applicant is as follows:

5.1 The Respondent practised as a debt counsellor under the name Debt Busters (Pty) Ltd from offices situated in Cape Town.

5.2 On 18 September 2012, Mr Mark Whale was appointed by the Applicant in terms of Section 25 of the Act to conduct an investigation of the Respondent's business.

5.3 The investigation was conducted on 25 and 28 September 2012, and 16 October 2012 respectively by Mr. Mark Whale.

5.4 During the course of the investigation, the investigator randomly selected 15 consumer files which were assessed, and met with the Respondent and Mr Ian Wason, the directors of Debt Busters (Pty) Ltd, a company that offers and is engaged in debt counselling.

6. The allegations contained in the investigation report submitted by the Applicant relate to debt review applications dealt with by the Respondent in ways which the investigator was of the view were contrary to the requirements of the Act. The report also contains

allegations concerning the legal fees the Respondent charged consumers who applied for debt review.

APPLICANT'S

SUBMISSIONS

6. The Applicant alleges that –

6.1 In the sample of consumer files examined during the course of the investigation, no debt restructuring orders or consent orders were found and neither was any application to court or to the National Consumer Tribunal ("the NCT"). The Respondent failed to refer any of the matters to a court or the NCT for debt re-structuring or a consent order, in contravention of s86(7) of the Act.

6.2 As a direct result of this conduct by the Respondent, credit providers terminated the debt review proceedings in 4293 instances, in terms of s86(10), as reported at the offices of the Applicant.

6.3 Alternatively, the Respondent failed to retain records of matters referred to the courts and/or the NCT to obtain the required order/s, in contravention of Regulation 55 of the Act and general conditions 4 and 11 of the Respondent's conditions of registration.

6.4 In all 15 case files examined by the investigator, the Respondent charged legal fees of R3 500.00 while no legal service was

rendered. This conduct contravenes general condition 2 of the Respondent's conditions of registration, which prohibits the

Respondent from performing debt counselling in a manner that is inconsistent with the purpose and requirements of the Act.

6.5 Examination of the 15 files demonstrates repeated contraventions and failures to comply with the Act and the Respondent's conditions of registration.

RESPONDENT'S

SUBMISSIONS

7. On the Respondent's version, the application is opposed as follows:

7.1 The Applicant's complaints against the Respondent are based, by and large, on two main issues, the first being that in the sample of 15 files investigated by Mr Whale he found no debt restructuring orders or consent orders nor any applications to court or to the NCT, and the second being concerns regarding payment of legal fees of R 3,500.00 plus VAT to the company.

7.2 In respect of the first issue, the Respondent, in his Answering Affidavit provided detail and supporting documentation of what became

of the various consumers in each of the 15 matters referred to in Mr Whale's report, namely that: 4 consumers have court orders, copies of which have been provided to the NCT as annexures LAH 3.1 – LAH 3.4 to the Respondent's Answering Affidavit; six consumers either did not pay the restructuring fees and/or legal fees and the debt review process was therefore cancelled, 4 consumers exited the debt review process, and one consumer is still under debt review, and repeated attempts have been made to obtain the supporting affidavit of the consumer needed to proceed with the formal legal process.

7.3 This evidence demonstrates that the Respondent is not in contravention of s86(7) of the Act,

7.4 Further, that availing said documentation demonstrates that proper records were kept as the Respondent is obliged to do in terms of the abovementioned Regulation 55, and conditions 4 and 11 of his General Conditions of registration.

8. In regard to the second issue, the payment of legal fees, the Respondent submits as follows:

8.1 In the case of six of the 15 consumer files investigated, no legal fees were paid

8.2 It is also not correct, as alleged by Whale, that only R1 000,00 of the legal fee was ever refunded to consumers, since if the debt review was terminated at an early stage then the entire legal fee would be refunded.

8.3 Among the remaining 9 consumers, four obtained debt restructuring orders, a further four exited the debt review process, and one is currently still under debt review.

8.4 In 14 of the 15 cases a complete application for debt review was prepared, despite the fact that in many instances no legal fees were paid by the consumers. It is therefore incorrect that Whale states that no legal work was done. Whale was provided with this information but has not included it in his report.

8.5 The system employed by the company (Debt Matters (Pty) Ltd) t/a “Debt Busters”, pertaining to the payment of legal fees was implemented in order to speed up the processing of debt review applications by centralising control of the process with the company, as opposed to individual attorneys, and by fixing the fee which a consumer would pay for legal work to obtain a debt restructuring

order.

8.6 In many instances the company incurred extra expense which it paid itself, and which it did not pass on to the consumer involved.

8.7 The very purpose of the system was to provide a better quality of service to the consumers, and to protect them from the vagaries of the legal fees which were charged by different attorneys.

8.8 The Respondent was employed by the company, and was a director and shareholder at the time of Whale’s investigation, but ceased to work as a debt counsellor as of the end of July 2013, and at the same time ceased to be a director and shareholder of the company. Although the Respondent maintained his registration as a debt counsellor, all of his files were transferred to his colleague Ian Eugene Romer Wason (Registration No. NCRDC1817)

CONSIDERATION OF THE FACTS

9. The Applicant’s main ground for the relief sought is that the Respondent has contravened section 86(7)(c) of the Act which provides that –

“If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that –

(a)....

(b)

(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, it the debt counsellor has concluded

that those credit 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."

10. It is also the Applicant's contention that the Respondent failed to comply with the conditions of registration, specifically Condition No 2 of the General Conditions of Registration which states as follows:

"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."

11. The Applicant did not file a Replying Affidavit to the Respondent's Answering Affidavit.

12. The rules applicable to proceedings before the NCT, specifically Rule 14(4), provide that if the Applicant does not file a replying

affidavit the Applicant will be deemed to have denied each new issue raised in the answering affidavit and each allegation of fact

relevant to each of these issues.

13. The adjudicating panel is faced with a dispute of facts, in that the Respondent in his Answering Affidavit and supporting documentation

provided evidence of court orders that had been obtained for consumers who had approached the Respondent for debt counselling, or that the debt review process had ceased in other instances.

14. Further, the Respondent's Answering Affidavit provided detail regarding the payment of legal fees pertaining to the particular circumstance of the 15 consumer files that formed part of the investigation.

15. The Tribunal notes its observation that of the four investigated files in which court orders were granted, three were obtained on dates after which the Respondent had ceased to practice as a debt counsellor. This of course leaves the panel to but wonder and ponder about the rigour of the debt counselling regimen practiced by the Respondent. Similarly the charging of legal fees must be left as an indeterminate vagary.

16. The Applicant did not file a Replying affidavit and did not present any further evidence at the hearing. The panel is therefore faced with a situation where the Respondent has provided direct and material evidence which contradicts the assertions made by the Applicant. In accordance with Section 167 of the Act, the standard of proof applied by the Tribunal is on a balance of probabilities.
17. When applying this standard to the evidence before it, the Tribunal finds that the Applicant has been unable to prove that the Respondent in fact contravened the Act as alleged.

ORDER

18. In the result the Tribunal makes the following order:
 - a. On the basis of the evidence before it, the Tribunal does not find the Respondent to be in contravention of section 86(7)(c) of the Act or having failed to comply with General Conditions of Registration 2, 4, and 11.
 - b. No order is made as to costs.

DATED THIS 31st DAY OF AUGUST 2015.

____(Signed)_____

L. Best, Presiding Member

Mr F. Sibanda (Member) and Prof T. Woker (Member) concurring.

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