

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Maoto (NCT/277089/2023/57(1)) [2024] ZANCT 16 (10 July 2024) [2024] ZANCT 16

COURT

National Consumer Tribunal

BEFORE

S Hockey, MC Peenze, P Manzi-Ntshingila

CASE / FILE NUMBER

NCT/277089/2023/57(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT/277089/2023/57(1)

In the matter between: NATIONAL CREDIT REGULATOR APPLICANT And MATEA GLADNESS
MAOTO (NCRD3301) RESPONDENT

Coram:

Mr S Hockey

- Presiding Tribunal member

Dr MC Peenze - Tribunal member

Ms P Manzi-Ntshingila - Tribunal member

Date of the hearing: - 22 February 2024

Date of judgment:

- 10 July 2024

JUDGMENT AND REASONS

THE PARTIES

1. The applicant is the National Credit Regulator (the NCR or the applicant), an organ of the state and a juristic person established in terms of section 12 of the National Credit Act 34 of 2005 (the NCA) with the purpose of regulating the consumer credit market and ensure compliance with the NCA.
2. At the hearing, the applicant was represented by Ms Louis Page, a legal advisor employed by the applicant.
3. The respondent is Ms Matea Gladness Maoto (the respondent), a debt counsellor duly registered as such since 18 February 2019 under the provisions of Chapter 3 of the NCA. The respondent conducts her debt counselling business under the business name M Credit Solutions.
4. At the hearing, the respondent was represented by Mr Henk Cilliers, an attorney from Cilliers and Reynders Attorneys.

TERMINOLOGY

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

APPLICATION TYPE

7. This is an opposed application in terms of section 57(1) whereby the applicant seeks an order in terms of which the respondent's registration as a debt counsellor be cancelled on the grounds of her alleged repeated contraventions of provisions of the NCA and failure to comply with her conditions of registration

as a debt counsellor. The applicant further seeks orders, amongst others, that the alleged transgressions by the respondent be declared prohibited conduct and that an administrative fine be imposed on her.

BACKGROUND

8. During the period April 2020 to July 2020, the applicant noticed that the respondent updated a large number of consumers' statuses on the Debt Help System (DHS)[3]. These status updates indicated that the consumers concerned obtained court orders declaring them no longer over-indebted, with clearance certificates.
9. The above-mentioned gave rise to a reasonable suspicion that the respondent was contravening provisions of the NCA and its regulations, as well as its conditions of registration.

10. Based on the aforesaid, the applicant initiated an investigation in terms of section 136(2) and duly appointed two of its inspectors to investigate the respondent's debt counselling practices.
11. On 7 December 2021, an on-site investigation was initiated at the premises where the respondent was registered to conduct her business. Upon arrival, the investigating team was informed that the respondent no longer operated from that address and had moved back to her home in Mpumalanga.
12. A desktop investigation then proceeded, during which the respondent was requested to deliver documents relating to twenty consumers identified under her profile. The investigators also requested the respondent to provide proof of invoices and receipt of funds relating to the consumers selected for investigation by no later than 27 September 2021 to verify the amounts paid by those consumers for the respondent's services.
13. The respondent failed to deliver all documentation as requested by 27 September 2021 but did deliver some documentation listed in annexure "MM5" attached to the applicant's founding affidavit.
14. As a result of the above, the applicant issued a summons against the respondent in terms of section 139(3)(a) and (b), requiring the respondent to appear in person at the offices of the applicant on 19 November 2021. The respondent duly appeared without legal representation on the required date, and an interview was held with her.
15. During the interview, the respondent provided the applicant with further requested documents. However, the majority of documents remained outstanding and were never received by the applicant. The respondent informed the applicant that she never had sight of the outstanding documents and doubted that such documents existed.
16. According to the applicant, when the respondent was asked to explain the modus operandi in obtaining consumer files and the activities that led to the updating of the consumer statuses on the DHS, the respondent was extremely evasive, and answers could not be elicited with regards to the process leading to the DHS updates.
17. During her interview, the respondent denied allegations that she forced two debt counsellors who were in her employ to conduct DHS updates without supporting documentation. Instead, she blamed a certain Mr Tshiamo Mavimbela, who had absconded at the time of the interview and was un-contactable.
18. With the above information at hand, the investigators compiled a report (the investigation report). The findings, as reflected in the investigation report, will be discussed below.

19. The respondent filed an answering affidavit wherein she conceded that she could not deny the factual allegations of the findings but denied that she ever instructed anybody to act in contravention of the NCA or knowingly acted to the prejudice of anybody. The respondent also stated that to the extent that it is found that she violated the NCA, she did not do so intentionally and that it was her lack of experience and exposure to the disciplines of debt counselling that caused her inabilities.
20. The respondent alleges that when she started out in 2019, she had the best intentions, as helping financially destitute people is her passion. She further alleges that she misjudged her colleagues and her previous “purported” mentors and accepted what they had done as incorrect.
21. The respondent further alleges that when she first started the business, she charged consumers fees in accordance with the 2018 guidelines published by the applicant. To her own detriment, however, she did not charge many consumers for her services, which embroiled her in financial constraints. This, coupled with the consequences of the COVID-19 pandemic since March 2020, left her destitute, which resulted in her abandoning her offices. Her employees had to work from home and elsewhere where they could.
22. The respondent states that her current position is that she uses DC Partners, a registered Payment Distribution Agency (PDA), to distribute consumers’ money, including her fees, in accordance with the prescribed guidelines. Since November 2021, when she learned and realised the issues raised against her, she has employed every effort to operate within the boundaries of the relevant legislation. She currently has 18 people working for her. All of them are currently undergoing training; one is a registered debt counsellor.

THE ALLEGED CONTRAVENTIONS OF THE NCA, ITS REGULATIONS, AND CONDITIONS OF REGISTRATION

23. The applicant alleges that the respondent contravened various provisions of the NCA, its regulations, and the applicant’s conditions of registration.
24. It is apt to mention at this stage that in terms of section 52(5)(c), a registrant such as the respondent is obliged to comply with its conditions of registration and the provisions of the NCA. A transgression of a registrant’s conditions of registration, therefore, is also a breach of section 52(5)(c).

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25. The Tribunal shall now deal with the various transgressions by the respondent as alleged by the applicant.

Status updates made without proper documentation

26. In terms of section 71, a debt counsellor must issue a consumer whose debts have been rearranged in terms of provisions of the NCA with a clearance certificate if the consumer has satisfied all the obligations under every credit agreement that was subject to the debt

rearrangement order or restructure agreement. Once such a clearance certificate has been issued, a credit bureau or national credit register, on receipt of a copy thereof, must expunge from its records, amongst others, that the consumer was subject to a debt re-arrangement order or agreement.

27. Upon the respondent's registration, the applicant imposed certain conditions of registration on the respondent, as it is entitled to do in terms of section 48. These conditions of registration require the respondent to perform her debt counselling services in a manner that is consistent with the purposes and requirements of the NCA, in a professional and reasonable manner, and in a manner that does not bring debt counselling into disrepute.
28. From a report extracted from the DHS system, marked as annexure "MM8" to the founding papers, the respondent made various status updates to the twenty consumer files in question indicating that the consumers were found to be either not over-indebted or that a court order finding that they were over-indebted, was rescinded, or that all the debts were paid up, resulting that the consumers were no longer indicated as being under debt review. No supporting documents for the status updates were found to be existing. The various consumers concerned are listed in paragraph 27 of the founding affidavit with their respective statuses before and after the updates.
29. The respondent could not provide any paid-up letters indicating that the relevant consumers paid up their debts. No court applications or court orders declaring the consumers to be no longer over-indebted could be provided that supported their status updates to this effect.
30. As a result of the above, the applicant submits that the respondent failed to conduct her debt counselling services in a professional and reasonable manner, and she engaged in her debt counselling practices in a manner that conflicts with her registration conditions. The applicant further submits that these actions by the respondent are not in the best interests of the consumers.
31. In the light of any supporting documentation for the actions of the respondent as outlined above, the Tribunal agrees with the submissions made by the applicant that the respondent contravened her conditions of registration, in particular conditions 2, 4, 5, and 11. These conditions of registration require the respondent to:

31.1.

Perform debt counselling in a manner that is consistent with the purpose and requirements of the NCA and act, in all instances, professionally and reasonably in providing debt counselling services to consumers in a manner, amongst others, that does not bring the NCR or debt counselling into disrepute (i.e. condition of registration 2).

31.2. Comply with requirements specified by the NCR in respect of registering consumers who apply for debt review on the specific database. The debt counsellor must update the consumer's records with the status of the review and post-review performance from time to time (i.e., condition of registration 4).

31.3. Not engaging in any activity that could conflict with the interests of the consumers to whom debt counselling services are provided or do anything that may lead to such conflict. The debt counsellor should also not enter into any agreements or engage in any activity that may prevent her from acting in the best interests of the consumers to whom debt counselling services are provided (i.e., condition of registration 5).

31.4. Must maintain adequate records and keep relevant copies of documentation to demonstrate compliance with the NCA and the conditions of registration and to provide a full record of all communication with a consumer to whom debt counselling services are provided. Such documentation must be retained for five years, and the debt counsellor must provide copies of the documentation to the consumer, a credit provider, the NCR or a court upon reasonable request (i.e. condition of registration 11).

32. The respondent does not dispute the findings of the NCR in relation to the transgressions of her conditions of registration outlined above, and the Tribunal finds that the respondent indeed transgressed these conditions of registration.

Unlawful charges

33. The applicant submits that in terms of her conditions of registration, the debt counsellor is obliged to adhere to the Debt Counselling Fee Guidelines issued by the applicant with respect to the fees and charges the respondent levelled against the consumers for debt counselling services.

34. The applicant alleges that since the respondent did not divulge whether any fees were charged for the services rendered to the various consumers, it stands to reason that the respondent would have charged fees for her services relating to the status updates. There is, however, no evidence of the alleged fees charged by the respondent in this regard.

35. The applicant fails to point out which parts of the Debt Counselling Fee Guidelines were not adhered to by the respondent, and neither does the applicant state what condition of registration the respondent breached.

36. In the result, the Tribunal is in no position to find that the respondent charged unlawful fees as alleged.

Payments made directly to the respondent by consumers

37. The applicant points out that only PDAs are entitled to receive and distribute payments from consumers under debt review. In terms of her specific conditions of registration as a credit provider, namely condition B1, the respondent may not receive payments from consumers in respect of debt obligations that were re-arranged. All payments from consumers in respect of debt obligations or debt counsellor's fees must be received and distributed to the various parties by a PDA approved by the applicant.
38. The respondent did not utilise the services of a registered PDA. She admitted this and stated that she currently uses PDAs and has tried to comply with the obligations since November 2021.
39. The Tribunal agrees that the respondent previously repeatedly contravened her conditions of registration by not making use of PDAs as required.

Alleged breach of the provisions of section 86 and regulation 24

40. In the conclusion of its founding affidavit, the applicant submits that the respondent failed to attend to any debt review processes as set out in section 86 of the NCA and regulation 24. From the failure of the respondent to provide any documentation to support the notion that the debt review process was followed as set out, among other things, in section 86 and regulation 24, the applicant states that it believes that the respondent had failed to provide any debt review services in terms of the NCA, the

regulations and its conditions of registration.

41. Section 86 and regulation 24 deal with applications for debt review and the processes that should be followed in respect thereof. The applicant does not allege in its affidavit what part of section 86 or regulation 24 the respondent can be said to have contravened. The paucity of information in this regard leads the Tribunal to no option but to refuse an order confirming that the respondent has transgressed section 86 and regulation 24.

IS AN ORDER IN TERMS OF SECTION 57 APPROPRIATE?

42. The Tribunal will now consider whether an order cancelling the respondent's registration is appropriate in the circumstances.
43. The modus operandi, as can be gleaned from the evidence on record, particularly annexure "MM8", which is an extract from the DHS, indicates that the applicant transferred consumers under debt review onto her profile and changed their statuses shortly thereafter, often on the same day or the following day. By way of example, the first consumer on MM8, Joel Kenneth Zitha, was transferred to the applicant on 30 March 2020, and his status was changed later that same day, indicating that he was not over-indebted and that a Magistrate rejected his application. The previous status descriptions of this consumer indicate that he was assessed as being over-indebted on 21 August 2019, that his formal debt restructuring through the courts commenced on 9 June 2020, and that on 15 March 2020, his formal debt restructuring was completed when a court order was granted. The status indication that the

consumer's application was rejected by a Magistrate's Court is clearly false.

44. The second consumer, Refiloe Francina Miza, was transferred to the applicant's profile on 28 February 2020. Her status was changed on the DHS the following day with a description that she voluntarily withdrew from debt review before being declared over-indebted. Her previous status descriptions on the DHS indicate that she was assessed as being over-indebted on 28 August 2029, that her formal debt restructuring through the courts commenced on 23 November 2019, and that on 29 February 2020, the same day that she was transferred to the applicant's profile, a Magistrate rescinded her debt review court order and that she was declared not to be over-indebted. The entries on 29 February 2020 are clearly fraudulent.
45. Similar patterns are prevalent among other consumers listed in MM8. The patterns are not repeated to avoid prolixity.
46. It goes without saying that a debt counsellor is expected to be a person of high moral and ethical standards. It is for this very reason that the NCR requires debt counsellors to comply with all legislation applicable to the operation of the business of a debt counsellor, including but not limited to the NCA, and that debt counsellors must perform their business in a manner that is consistent with the purpose of the NCA, by imposing conditions of registration to these effects. It stands to reason that a person who has been removed from the office of trust on account of misconduct relating to fraud or the misappropriation of money or a person who has been convicted of a crime of this dishonesty, violence, or an offence in terms of the NCA, in terms of section 46(f), is disqualified from applying to be a debt counsellor.
47. In the Tribunal's view, the respondent has clearly not met the standards required of a debt counsellor. By changing the statuses of various consumers on the DHS as she did and without any documents or justifications for the changed statuses, the respondent undermined the debt review system and brought the debt counselling business into disrepute.
48. The respondent's explanation that she wanted to assist consumers cannot be accepted. Instead of helping consumers, she removed the protection the debt review system affords them. It is not known how many of such consumers were, because of the actions of the respondent, subjected to legal action against them by credit providers
49. Since the respondent has repeatedly contravened provisions of the CPA as discussed, the Tribunal is of the view that it is appropriate that the respondent's registration as a debt counsellor be cancelled.

ADMINISTRATIVE FINE

50. Section 151 empowers the Tribunal to impose an administrative fine in respect of prohibited or required conduct. Such fine may not exceed the greater of 10% of the respondent's annual turnover during the preceding financial year, or R1 000 000,00.
51. The Tribunal has the discretion to impose a penalty or not. It has already concluded that the respondent contravened the provisions of the NCA. These contraventions are considered serious and constitute disregard for the provisions of the NCA. It follows that the transgression should be declared prohibited conduct, and the Tribunal is of the view that an administrative fine would be appropriate.
52. Section 151(3) outlines seven factors the Tribunal must consider when determining an appropriate administrative fine. These factors will be considered below:

52.1. The nature, duration, gravity, and extent of the contraventions.

As already alluded to, the transgressions of provisions of the NCA, which the respondent committed, are serious. From the evidence of record, the duration spans from 2019 until 2020. These transgressions can potentially cause serious harm to consumers by taking away the protection afforded to them under the NCA. Potentially, the actions of the respondent are seriously prejudicial to consumers as well as to credit providers.

52.2. Any loss or damage suffered as a result of the contraventions.

It is impossible to determine the extent of loss or damage suffered by consumers or credit providers, but without doubt, such losses could be substantial.

52.3. The behaviour of the respondent.

The respondent did not operate her debt counselling services in a manner consistent with the purpose and requirements of the NCA. The Tribunal is of the view that she knowingly transgressed various provisions of the NCA and its regulations. Instead of taking ownership of her behaviour, she blamed others, in some cases, employees who worked for her.

52.4. The market circumstances in which the contraventions took place.

The market in which the respondent operates invariably involves consumers who experience financial difficulties and hardships. These are the same consumers who require the protection of the NCA and the assistance of debt counselling. The respondent acted contrary to the interests of such consumers.

52.5. The level of profit derived from the contraventions.

It is unknown to what extent the respondent profited from her unlawful actions.

52.6. The degree to which the respondent has co-operated with the NCR and the Tribunal.

The respondent co-operated with the NCR's investigation to a limited extent. She, for example, honoured the summons issued against her, but she was evasive during the interview with the NCR officials and failed to supply them with certain documentation.

52.7. Whether the respondent has previously been found in contravention of the NCA.

There is no indication that the respondent was previously found to have contravened provisions of the NCA.

53. After carefully considering the above factors, the Tribunal finds that an administrative fine of R100 000.00 would be appropriate.

CONCLUSION

54. The Tribunal has already dealt with certain requests by the applicant for orders against the respondent. In addition, the applicant also asks that the Tribunal interdicts the respondent from contravening the NCA in the future. Furthermore, the applicant asks that an order be granted whereby the respondent must hand over all her consumer files to the respondent for purposes of an audit and for the appointment of an auditor to, amongst others, identify consumers who may be entitled to refunds in respect of certain fees charged by the respondent. However, the request to hand over consumer files for a new debt counsellor to take them over should be granted.
55. The Tribunal is of the view that an interdict against future transgressions of the NCA is appropriate. As for the appointment of an auditor, however, the only evidence on record relates to the unlawful status changes of consumers on the DHS. The Tribunal is mindful that the consumers whose statuses have been unlawfully changed by the respondent may have knowingly engaged the respondent's services for this purpose. It would not be appropriate for an auditor to investigate whether each and every consumer knew that his or her change of status on the DHS was unlawful. The appointment of an auditor in the circumstances is not appropriate.

THE ORDER

56. In the result, the following order is made:
- 56.1. It is declared that the respondent repeatedly contravened sections 52(5)(c) read with her general conditions of registration 2, 4, 5, 11, and B1.
- 56.2. The aforesaid contraventions are declared to be prohibited conduct.
- 56.3. The respondent is interdicted from similar prohibited conduct in the future.
- 56.4. The respondent's registration as a debt counsellor is hereby cancelled with immediate effect.

56.5. The respondent is ordered to provide the NCR with all assistance reasonably required for the NCR to allocate the respondent's erstwhile consumers to another registered debt counsellor, including providing the NCR with all necessary information and copies of documentation.

56.6. The respondent shall pay an administrative fine of R100 000.00 within one month of the issuing of this order into the bank account of the National Revenue Fund, the details of which are as follows:

Bank:

The Standard Bank of South Africa

Account holder: Department of Trade and Industry

Branch name: Sunnyside

Branch code: 010645

Account number: 3[...]

Reference:

NCT/277098/2023/57(1) and name of the person or business making the payment.

56.7. There is no order as to costs.

S Hockey (Tribunal member)

Tribunal members Dr M Peenze and Ms P Manzi-Ntshingila concur.

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

[2] Published under GN 789 in GG 30225 on 28 August 2007 as amended by GN 428 in GG 34405 on 29 June 2011, GN R203 in GG 38557 on 13 March 2015 and GN 157 in GG 39663 on 4 February 2016.

[3] The DHS is an online system of the NCR. Debt counsellors are required to capture and update information about clients on the system. The DHS is also linked to various credit bureaus and communicates debt counselling applications to them.

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