

SOUTH AFRICA / JUDGMENT

National Credit Regulator v MSR Financial Solutions (Pty) Ltd (NCT/214111/2022/140(1)) [2022] ZANCT 15 (24 March 2022)

[2022] ZANCT 15

COURT

National Consumer Tribunal

BEFORE

F Sibanda, P Beck, M Peenze

CASE / FILE NUMBER

NCT/214111/2022/140(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT/214111/2022/140(1)

In the matter between:

NATIONAL CREDIT REGULATOR

APPLICANT

and

MSR FINANCIAL SOLUTIONS (PTY) LTD

RESPONDENT

Previously known as Major Authorised Debt Mediation (Pty)

Ltd (Registration number: 2016/215666/07)

Coram:

Mr F Sibanda - Presiding Member

Ms P Beck

- Tribunal Member

Dr M Peenze - Tribunal Member

Date of hearing - 8 March 2022

Date of judgment - 24 March 2022

JUDGMENT AND REASONS

THE PARTIES

1. The Applicant is the National Credit Regulator (the Applicant or the NCR), a juristic person established in terms of section 12 of the National Credit Act, No. 34 of 2005 (the Act) to regulate the consumer credit market and ensure compliance with the Act. The Applicant's principal business address is at 127 - 15th Road, Randjespark, Johannesburg, Gauteng. The Applicant was represented at the hearing by Ms Leanne Schwartz, a senior legal advisor in the employ of the Applicant.
2. The Respondent is MSR Financial Solutions (Pty) Ltd, formerly known as Major Authorised Debt Mediation (Pty) Ltd (the Respondent), a private company duly registered as such in terms of the company laws of the Republic of South Africa, with registration number 2016/215666/07. The Respondent's physical address is at Office 402, Stabilitas Building, 4th Floor, Charlotte Maxeke Street, Bloemfontein,
9300. The Respondent did not file an answering affidavit, nor was it represented at the hearing.

JURISDICTION

3. This application is brought in terms of section 140(1) of the Act, which provides for the referral of a matter to the Tribunal if the National Credit Regulator believes that a person has engaged in prohibited conduct.
4. The National Consumer Tribunal (the Tribunal) is required to determine whether the Respondent engaged in prohibited practice and if so, to grant the orders sought by the Applicant.
5. Section 150 of the Act gives the Tribunal the power to make an appropriate order concerning prohibited or required conduct in terms of the Act or the Consumer Protection Act, No. 68 of 2008. This power includes –
 - 5.1. Declaring conduct to be prohibited in terms of the Act;
 - 5.2. Interdicting prohibited conduct;
 - 5.3. Confirming an order against an unregistered person to cease engaging in an activity that must be registered in terms of the Act; and
 - 5.4. Imposing an administrative fine in terms of section 151 of the Act.

6. Therefore, the Tribunal has jurisdiction to hear this matter, in terms of section 27 (a)(i) of the Act.

THE HEARING

7. The Applicant served on the Respondent the application documents as contemplated under rule 30 of the Tribunal Rules[1].
8. Rule 13(1) and (2) of the Tribunal Rules states that –
 - (1) Any person required by these Rules to be notified of an application or referral to the Tribunal may oppose the application or referral by serving an answering affidavit on:
 - a) the Applicant; and
 - b) every other person on whom the application was served.
 - (2) An answering affidavit to an application or referral other than an application for interim relief must be served on the parties and filed with the Registrar within 15 business days of the date of the application.”
9. On the day of the hearing the Applicant submitted that on or about 14 December 2021, the Applicant filed this application on the Tribunal. On 13 December 2021 the Applicant sent the application by registered post to the Respondent’s address at Office 402, Stabilitas Building, 4th Floor, Charlotte Maxeke Street, Bloemfontein, 9300, being the address at which the inspection was conducted[2]. This address also appears on the Respondent’s marketing material[3]. The application was also sent to the Respondent’s postal address at 20532 Extension 10, Soshanguve, Gauteng, 0152, being the address that appears on the Respondent’s registration certificate with the Companies and Intellectual Property Commission[4] and is also the address used by the Respondent when it tried to register with the Applicant in 2017[5].
10. The Applicant submitted track and trace reports showing that the first notification went out to the Respondent on 21 December 2021. The Respondent failed to collect the documents.
11. The Applicant sent emails to the Respondent’s three known email addresses –
 - (a) compliance@majormediation.co.za;
 - (b) enquires@major.co.za; and
 - (c) majorauthorisedmediation@outlook.com.
12. On 28 January 2022, the Tribunal sent a notice of set down by registered post to the Respondent’s physical address and to all three known email addresses.
13. The Applicant submitted that the Respondent would have known about the hearing.

14. The Respondent did not file an answering affidavit as provided for under rule 13(1) and (2) of the Tribunal Rules. The Tribunal panel was satisfied that the application documents and the Notice of Set Down were adequately served on the Respondent. On that basis, the hearing of the application proceeded on a default basis in accordance with rule 24 of the Tribunal Rules.
15. According to rule 13(5) of the Tribunal Rules –
“Any fact or allegation in the application or referral not specifically denied or admitted in an answering affidavit will be deemed to have been admitted.”
16. As such, all the allegations levelled against the Respondent are deemed to have been admitted.

BACKGROUND

17. The Applicant submits that it received information from the Consumer Protector’s Offices in the Free State province, indicating that the Respondent could be practicing as an alternative dispute resolution agent without registration or accreditation by the Applicant. The information submitted further raised concerns that the Respondent could be practising as a debt counsellor without registering as such with the Applicant.
18. On or about 19 July 2019, the Applicant initiated a complaint in terms of section 136 of the Act and authorised an investigation, to be conducted by Muhangane Mbedzi (Mbedzi), into the activities of the Respondent in terms of section 139 (1)(c) of the Act.
19. On or about 5 August 2019, Mbedzi conducted an on-site investigation at the Respondent’s business premises at Office 402, Stabilitas Building, 4th Floor, Charlotte Maxeke Street, Bloemfontein, 9300. An interview was conducted with Kevin Chabalala (Chabalala), who identified himself as the Assistant Manager of the Respondent.
20. During the interview, Chabalala advised that –
 - 20.1. The business is owned by Lebo Mashigo;
 - 20.2. The business assists over-indebted consumers by negotiating with their creditors or reduced instalments;
 - 20.3. They do not offer debt counselling services and they are no debt counsellors operating under the entity; and
 - 20.4. They used to provide loans to consumers under the name and style of MAM Cash, a registered credit provider. MAM Cash stopped the cash loan business due to the failure by consumers to re-pay their loans.
21. As per the Applicant’s records, MAM’s registration as a credit provider lapsed effective from 16 March 2021.

22. On or about 7 August 2019, Mbedzi had a telephone conversation with the owner of the Respondent, Ms Lebo Mashego, who confirmed the information provided by Chabalala and further undertook to submit the requested documents by 8 August 2019, which she did.
23. Following the investigation and subsequent assessment of the submitted documents, Mbedzi compiled an investigation report[6] that led the Applicant to believe that the Respondent had engaged in prohibited conduct. Mbedzi also deposed to a confirmatory affidavit insofar as it relates to the investigation undertaken[7], and in support of the founding affidavit deposed to by Ms Anne-Carien Du Plooy, the Applicant's Acting Manageress: Investigations and Enforcement.
24. Subsequent to the investigation, the Applicant received a complaint from a consumer, Mthandeki Francis Mahlamba (Mahlamba)[8]. Mahlamba complained that the Respondent charged for services not rendered. Moreover, the Respondent advised Mahlamba to change bank accounts, resulting in returned debit orders and the non-payment of creditors. This had adverse financial effects on Mahlamba. Mahlamba's complaint aligns with the Applicant's investigation and findings and is thus considered within the broader ambit of this case.
25. The Tribunal proceeded to consider the contraventions that are alleged in the founding affidavit and the investigation report.

CONTRAVENTIONS OF THE ACT

Passing off as an alternative Dispute Resolution Agent

The Act

26. Section 1 of the Act defines an alternative dispute resolution agent as –
“...a person providing services to assist in the resolution of consumer credit disputes through conciliation, mediation or arbitration.”
27. Section 134A of the Act requires a person practising as a dispute resolution agent to be registered with and accredited by the Applicant. In order to be registered and accredited as an alternative dispute resolution agent, a person must meet the criteria set out in Regulation 10B of the National Credit Regulations[9] (the Regulations).
28. In terms of section 134 (1)(b)(ii) of the Act, a person may, as an alternative to filing a complaint with the NCR in terms of section 136, refer a matter that could be the subject of such a complaint to an alternative dispute resolution agent, for resolution by conciliation, mediation or arbitration.

Alleged contravention

29. The Respondent markets itself as an alternative dispute resolution agent[10]. The Respondent's advertising material contains the NCR logo despite the Respondent not being registered with the Applicant. The sampled files annexed as D1 to D10 to the investigation report contain agreements signed by consumers with the Respondent, where the Respondent describes itself as an alternative dispute resolution agent.
30. However, the Respondent is not an alternative dispute resolution agent nor does it offer alternative dispute resolution services as envisaged in the Act, in that –
- 30.1. The Respondent is not registered and/or accredited by the Applicant;
- 30.2. The sampled files do not contain proof of disputes between consumers and credit providers;
- 30.3. The sampled files do not contain notices in terms of section 129 (1)(a) of the Act, served by credit providers on consumers nor is there any alleged reckless lending complaint against the credit providers;
- 30.4. The services rendered by the Respondent do not amount to conciliation, mediation and/or arbitration;
- 30.5. The Respondent does not maintain the neutral position of an adjudicator; and
- 30.6. There is no negotiation process with credit providers prior to reducing the instalments as indicated in Annexures D1 to D10.

Analysis

31. The evidence presented shows that the Respondent markets itself as an alternative dispute resolution agent. However, the functions and services rendered by the Respondent do not resemble or amount to alternative dispute resolution as envisaged in section 134 read with section 1 of the Act. Consequently the Respondent is in contravention of section 134A, read with section 1 of the Act and Regulation 10B of the Regulations.

Offering services and/or rendering of functions reserved for debt counsellors The Act and Regulations

32. Regulation 1 of the National Credit Regulations defines –

- 32.1. A debt counsellor as –

“a natural person who is registered in terms of section 44 of the Act offering services of debt counselling.”; and

- 32.2. Debt counselling as –

“performing the functions contemplated in section 86 of the Act”

33. In terms of section 44(2) of the Act, a person must not offer or engage in the services of a debt counsellor in terms of the Act, or hold themselves out to the public as being authorised to offer any such service, unless that person is registered as such.
34. Regulation 10 sets out the criteria for registering as a debt counsellor. Section 86 of the Act provides for the process of debt review and the functions of a debt counsellor.
35. The Respondent's business activities resemble and/or simulate the activities and/or services of a debt counsellor, in that –
- 35.1. The Respondent acts on behalf of the consumer, is not impartial or neutral;
- 35.2. The Respondent or its representative requests more or less the same information a debt counsellor would request from the consumer in terms of Regulation 24(1) and Form 16 of the Act;
- 35.3. The Respondent's representative makes a determination that the consumer is over-indebted or is unable to satisfy his or her monthly debt obligations;
- 35.4. The Respondent seemingly draws up a repayment plan or advises the consumer of the reduced instalments, prior to engaging or in the alternative, negotiating with the creditors;
- 35.5. The Respondent's representative engages with all of the consumer's creditors and informs or in the alternative, negotiates for restructured and reduced monthly instalments;
- 35.6. The consumer pays one instalment into the Respondent's bank account, which instalment is intended to cover all the payments to the creditors as per the re-arrangement plan;
- 35.7. The Respondent appoints attorneys to pursue actions on behalf of the consumer; and
- 35.8. The Respondent's service includes monitoring consumers' repayments to creditors.
- 35.9. Based on the above the Respondent's activities resemble and amount to functions and services reserved for a debt counsellor as envisaged in section 86 of the Act and Regulation 24 of the Regulations. The Respondent is not registered or duly qualified to provide such services. Therefore the Tribunal is satisfied that the Respondent is in contravention of section 44(2) of the Act, read with Regulation 1 and 10 of the Regulations.

Engaging in activities reserved for payment distribution agents The Act

36. Section 1 of the Act defines a payment distribution agent as –
- “a person who on behalf of a consumer, that has applied for debt review in terms of this Act, distributes payments to credit providers in terms of a debt re-arrangement, court order, order of the Tribunal or an agreement;”*
37. Section 44(A) prohibits a person from offering or engaging in the services of a payment distribution agent, or hold themselves out to the public as being authorised to offer any such service, unless that person is registered as such in terms of the Act.

38. From annexures D1 to D10 to the investigation report, it is evident that the Respondent, in its business activities, engages in the services reserved only for payment distribution agents, in that the Respondent–

38.1. Receives funds from consumers into its business bank account; and

38.2. Engages in the distribution of funds to and/or payment of consumers' creditors in terms of a debt re-arrangement or restructuring plan, which is an action solely restricted for payment distribution agents.

38.3. The Respondent's activities resemble and/or amount to the functions of a payment distribution agent as envisaged in terms of Regulation 10A. The Respondent is not registered to provide such services and therefore is in contravention of section 44A (2)(a) of the Act read with Regulation 10A.

RELIEF SOUGHT

39. As a result, the Applicant seeks an order:

39.1. Declaring the Respondent to be in contravention of the following sections of the Act and Regulations:

- (a) Section 134A read with section 1 and Regulation 10B;
- (b) Section 44(2) read with Regulation 1 and 10;
- (c) Section 44 (2)(a) read with section 1 and Regulation 10A;
- (d) Section 3(g) and (h);
- (e) Section 126A; and
- (f) Section 126(3);

39.2. Declaring the conduct of the Respondent to be prohibited conduct;

39.3. Declaring the contracts entered into with consumers void;

39.4. Ordering the Respondent to cease and desist from offering and rendering its services;

39.5. Interdicting the Respondent from:

- (a) Any further breaches of the Act;
- (b) Providing any service that requires registration in terms of the Act; and
- (c) Collecting its fees on any of the agreements already entered into with consumers;

39.6. Directing the Respondent to refund all past and present consumers any amounts which it received in the form of fees and/or costs for its service;

39.7. Ordering the Respondent to remove its advertisement, more specifically to remove the NCR logo from its marketing material;

39.8. Ordering the Respondent to appoint an independent auditor at its own cost within 30 days of the date of this judgment, to –

- (a) Determine the Respondent's annual turnover for the year 2019;
- (b) Determine and compile a list of all the consumers who utilised the Respondent's services and the cost charged to each consumer; and
- (c) Determine and compile a list of all the consumers who made payment and whose credit providers did not receive payments.

39.9. Once the aforesaid auditor compiled the abovementioned list, the Respondent will refund the amount of fees and/or costs charged to each consumer within 30 days from the date of the auditor's report;

39.10. Once the refunds have been made as stated above, the Respondent is to provide a written report to the Applicant detailing the identity of the consumers and the refunds made. This report is to be provided to the Applicant within 120 days after the order has been obtained;

39.11. Imposing an administrative penalty on the Respondent in the amount of R1 000 000 (one million Rand) or 10% of the annual turnover of the Respondent; and

39.12. Making any other appropriate order contemplated under section 150 of the Act to give effect to consumer rights under the Act.

CONCLUSION

- 40. Consequently, the Tribunal is satisfied that the respondent engaged in prohibited conduct by contravening the sections referred to in the preceding paragraphs and has repeatedly contravened the Act and Regulations.
- 41. The Tribunal proceeds to consider an appropriate order.

CONSIDERATION OF THE ADMINISTRATIVE PENALTY

- 42. The Applicant submits that the Respondent's business activities and conduct amount to repeated contraventions of the Act that undermine the purposes of the Act. The serious nature of the contraventions is evident in the financial losses suffered by consumers through costs charged for unlawful services, some of which were not rendered to consumers. As a result, the Applicant argues that an administrative penalty would be appropriate under the circumstances. We discuss the appropriate fine next.

Administrative fine

43. The Tribunal is satisfied that the nature of the Respondent's contraventions and the consequent financial implications for consumers justify the Tribunal imposing an administrative fine on the Respondent. Section 151(3) of the Act sets out the factors the Tribunal must consider when determining an appropriate fine. The Tribunal proceeds to consider each in turn.

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

44. The Respondent's contraventions are extremely serious and appear to go to the heart of the Respondent's business practices. The investigation report reveals that the Respondent has repeatedly contravened the Act by engaging in activities reserved for alternative dispute resolution agents, debt counsellors and payment distribution agents registered in terms of the Act. These activities have been going on since the Respondent commenced its business.

Loss or damage suffered as a result of the contraventions

45. Consumers appear to have suffered financial loss by paying fees for unlawful services and/or not receiving services paid for. The Respondent's business practice resulted in consumers defaulting on their payments for two months after signing up with the Respondent. The sampled files and the complaint received by the Applicant indicate that the Respondent removed the protection that consumers would have enjoyed had they received services from a registered entity[11]. Therefore, the Tribunal is satisfied that it may reasonably conclude that consumers have suffered loss due to the Respondent's

conduct.

The respondent's behaviour

46. The Respondent has previously attempted to register with the Applicant, as an alternative dispute resolution agent. However, the application was unsuccessful because the Respondent failed to provide further information requested by the Applicant. The fact that the Respondent attempted to register with the Applicant is indicative that the Respondent is and was aware of the prescripts of the Act. Despite being informed by the Applicant that it was prohibited from providing such services without registration, the Respondent nevertheless continued to do so.

Market circumstances under which the contraventions occurred

47. The Respondent appears to operate in a market in which consumers are vulnerable and unaware of the rights and measures afforded them under the Act. Consumers are led to believe that the services offered by the Respondent are permitted in terms of the Act. The Applicant's logo displayed by the Respondent in its marketing material further leads consumers to believe that the Respondent's business practices are sanctioned by the Applicant.

The level of profit derived from the contraventions

48. The Applicant did not place specific evidence before the Tribunal concerning the level of profit the Respondent derived from the contraventions. Nevertheless, it is reasonable for the Tribunal to conclude that the Respondent derives profit from its business practices that contravene the Act.

The degree to which the respondent co-operated with the applicant

49. The Tribunal has considered that the Respondent provided the inspectors with the information they required and co-operated with the inspectors during the investigation.

The Respondent's prior contraventions

50. There is no evidence that the Respondent was the ever the subject of prior investigations or enforcement action. However, indications are that the Respondent's business activities have been on-going since the Respondent commenced business.

The amount of the fine

51. The Applicant did not submit information regarding the Respondent's annual financial statements. This notwithstanding, the Tribunal considered that the preamble to the Act states that the Act was specifically introduced to, amongst other things, protect vulnerable consumers from unlawful and prohibited practices.
52. Taking the above into account, the Tribunal is persuaded that it is appropriate to impose an administrative fine of R50 000.00 (fifty thousand Rand) on the Respondent.

ORDER

53. Accordingly, the Tribunal makes the following order:

53.1. In terms of section 150(a) of the Act, the Respondent is declared to have engaged in prohibited conduct by repeatedly contravening the following provisions of the Act and the Regulations:

- (f) Section 126(3).

53.2. The Respondent's conduct outlined above is declared to be prohibited conduct in terms of section 150(a) of the Act.

53.3. The contracts entered into between the Respondent and consumers listed in the investigation report are declared void and all the consumers' obligations under those agreements are set aside;

53.4. The Respondent is ordered to cease and desist from offering and rendering its services as outlined above;

53.5. The Respondent is interdicted from –

- (b) Providing any service that require registration in terms of the Act; and

(c) Collecting fees on any of the agreements already entered with consumers;

53.6. The Respondent must refund all past and present consumers any amounts which it received in the form of fees and/or costs for its services;

53.7. The Respondent must remove its advertisements and the NCR logo from all its advertisements;

53.8. The Respondent is to pay an administrative fine of R50 000.00 (fifty thousand Rand) into the National Revenue Fund account as follows:

Bank: Standard Bank of South Africa

Account name: Department of Trade and Industry

Account number: [...]

Account type: Business current account

Branch code: 010645 (Sunnyside) Branch code for electronic payments: 051001

Reference: NCT/214111/2022/140(1) (Name of depositor);

53.9. The Respondent must, within thirty (30) days of the date of this order, appoint an independent auditor at its own cost to:

53.9.1. Determine the Respondent's annual turnover for the year 2019;

53.9.2. Determine and compile a list of all the consumers who utilised the Respondent's services and the amount charged to each consumer;

53.9.3. Determine and compile a list of all consumers who made payment and whose credit providers did not receive payment;

53.9.4. Once the afore-said auditor has compiled the abovementioned list, the Respondent must refund the amount of fees and/or costs charged to each consumer within 30 days from the date of the auditor's report; and

53.9.5. Once the refunds have been made, as stated above, the Respondent must provide a written report to the Applicant detailing the identity of the consumers and the refunds made. This report must be provided to the Applicant within 120 days after the order has been obtained; and

53.10. There is no order as to costs.

DATED at CENTURION on the 24th day of March 2022.

(signed)

Mr F Sibanda

Presiding Member

Ms P Beck (Tribunal Member) and Dr M Peenze (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), as amended.

[2] Page 81 of the bundle contains a signed acknowledgement by representative of the Respondent, showing the physical address

[3] Page 83 of the bundle

[4] Page 40-41 of the bundle - CIPC registration certificate

[5] Page 58 of the bundle

[6] Annexure FA3

[7] Annexure FA4

[8] Annexure FA5

[9] National Credit Regulations, published in GN R489, GG 28864, on 31 May 2006, as amended

[10] Annexure C1, page 83 of the bundle

[11] See for example Annexure D9 and FA5

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