

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Munsamy (NCT/140432/2019/57(1)) [2023] ZANCT 13 (13 February 2023) [2023] ZANCT 13

COURT

National Consumer Tribunal

BEFORE

MC Peenze, A Potwana, P Manzi-Ntshingila

CASE / FILE NUMBER

NCT/140432/2019/57(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

Case number: NCT/140432/2019/57(1)

In the matter between:

NATIONAL CREDIT REGULATOR

APPLICANT

and

ALFREDA MUNSAMY

RESPONDENT

Coram:

Dr MC Peenze: Presiding

Tribunal member

Dr A Potwana: Tribunal

member

Ms P Manzi-Ntshingila: Tribunal member

Date of hearing – 20 to 22 September 2022; 29 to 30 November 2022 & 27 January 2023

Date of judgment – 06 February 2023

JUDGMENT AND REASONS

APPLICANT

1. The Applicant is the National Credit Regulator (the Applicant), a juristic person established in terms of section 12 of the National Credit Act, 2005 (the Act) to regulate the consumer credit market and

ensure compliance with the Act. The Applicant's principal business address is 127 - 15th Road, Randjespark, Johannesburg, Gauteng.

2. Adv. Anita Lapan, instructed by VZDLR Attorneys, represented the Applicant at the hearing of this application.

RESPONDENT

3. The Respondent is Alfreda Munsamy. Her registered business address is 1 Old Main Road, Umhlali, Kwa-Zulu Natal. The Respondent is a registered debt counsellor with registration number [...]. The Respondent became registered as a debt counsellor on 12 August 2015, and she remains so registered.
4. Adv. Ana Milovanovic Better, instructed by CJ Cogan Attorneys, represented the Respondent at the hearing of this application.

JURISDICTION

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, 68 of 2008. This power includes declaring conduct to be prohibited in terms of the Act; de-registration of a registrant; and imposing an administrative fine in terms of section 151.
6. A section in this judgment refers to a section in the Act. A reference to a Regulation refers to the National Credit Regulations, 2006 (the Regulations).[1]

ISSUES TO BE DECIDED

7. This is an application in terms of section 57(1) to cancel the Respondent's registration as a credit provider.

BACKGROUND

8. On or about October 2017, the Applicant initiated a complaint in terms of section 136 (2) of the Act after receiving and reviewing a complaint from Hendrik Johannes de Beer on behalf of Susan Elsabe van Vuuren. The complaint related to the Respondent failing to distribute payments to credit providers and not obtaining court orders. As a result, the complainant's credit provider terminated the debt review process.
9. On or about 20 September 2018, the Applicant appointed R.W. Attorneys to investigate the debt counselling practices of the Respondent. The inspectors were appointed in terms of section 25(4) of the Act to investigate the Respondent's activities.
10. The investigation commenced on or about 17 October 2018 with a meeting between the Applicant's investigators and the Respondent. The Respondent was present in her own capacity. Renei Moonsamy, as Director and debt counsellor at National Debt Counsellors (NDC), also attended the meeting, accompanied by Ms. Joanne Cogan in her capacity as the attorney of record of the Respondent and NDC. The inspectors obtained 10 (ten) consumer files.
11. The files provided to the Applicant were incomplete, and further information was requested. Additional information was subsequently provided to the Applicant on 02 November 2018.
12. The inspectors assessed the 10 (ten) consumer files and concluded that the Respondent had repeatedly contravened provisions of the Act and the Regulations. The inspectors compiled an investigation report (the investigation report), which is dated 31 January 2019.[2] The investigation report details the alleged contraventions. The 10 (ten) sampled files are annexed to the investigation report to support the conclusions in the report.

THE HEARING

13. This matter is opposed. It has a long record of interlocutory applications.
14. The hearing took place over five days. The hearing commenced on 20 September 2022 at the Tribunal in Centurion before the Presiding Tribunal and two Tribunal members present via the digital platform. The hearing was postponed on 22 September 2022 and resumed on 29 November 2022. On 30 November 2022, the hearing was postponed sine die, and the Registrar subsequently set the matter down for the conclusion of arguments on 27 January 2023 via the digital platform.

MATTERS IN LIMINE

15. The Respondent raised the following matters in limine.

Bulk Transfer of Consumers

16. The Respondent submitted that the period of occurrence of the alleged contraventions is incorrectly reflected on Form T.157 as being 2015-2018.

17. The Respondent explained that she requested the Applicant to transfer active consumers to another debt counsellor, Renei Moonsamy of NDC, on 24 August 2017. As the Applicant failed to provide the approval through written response, the Respondent continued to transfer all her consumer files mero motu to Renei Moonsamy. Therefore, on 18 October 2018, when the investigation commenced, the consumers identified in the sampled files had already been transferred to Renei Moonsamy for more than a year. At the time of the hearing, the Respondent confirmed that she had no active consumers registered on her “Debt Help System” profile.[3]
18. The Applicant acknowledged that the Respondent requested a transfer of consumer files to another debt counsellor in August 2017. The Applicant could not provide the exact date on which the NCR approved the transfer but confirmed that the alleged contraventions occurred prior to the transfer request. The Applicant submitted further that “the relevant period is actually February 2016 to April 2017 to be exact”. [4]
19. According to the Applicant, the impact of the Respondent’s conduct during the relevant period would impact on consumers after the transfer of their files to Renei Moonsamy. Accordingly, the resulting bad credit record of consumers should be attributed to the Respondent’s conduct during the relevant period.

Finding

20. The Tribunal finds that the transfer process is irrelevant to this application. It is common cause that the Respondent transferred all active and inactive consumer files to Renei Moonsamy at the latest, in August 2017.[5] Further, the alleged prohibited conduct occurred during the period that the consumers were officially registered under the Respondent’s name.
21. As confirmed by the Applicant, the Tribunal will consider the alleged contraventions during the period February 2016 to April 2017.

Defective commissioning of Applicant's papers

22. The Respondent submitted that the Applicant's founding affidavit had yet to be initialled by the deponent or the commissioner of oaths. Forthwith, she submitted that the confirmatory affidavits of Johannes Ludewicus Barnard, Kgadi Sepuru, and Mmadika Phosoko were commissioned at different places and some three weeks after the commissioning of the founding affidavit. Accordingly, the Respondent submitted the deficiencies warrant the exclusion of the affidavits from the proceedings.
23. The Applicant submitted that the initialling of each annexure is not a requirement for the validity of the affidavit. Each annexure had been addressed in the founding affidavit or investigation report. The Applicant further submitted that confirmatory affidavits are deposed to after the founding affidavit has been deposed to and that the practice is known.

24. The Tribunal finds that the commissioning of the founding affidavit is lawful and in line with the Regulations promulgated under section 10 of the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963. It is not required to initial every page of the annexures. Further, the Tribunal confirms that the founding affidavit had to be attested to under oath prior to the confirmatory affidavits being deposed, ensuring that no alterations are made to the founding affidavit after the fact.
25. This point in limine is dismissed.

THE MERITS

26. The Applicant requests the Tribunal to cancel the registration of the Respondent based on her repeated failure to conduct debt counselling activities in a manner consistent with the purpose and requirements of the Act, Regulations, and Conditions of Registration. It asserts that the Respondent has repeatedly contravened the provisions of the Act as is fully set out in the investigation report.
27. In its founding affidavit, the Applicant also requested specific relief for the complainant, Ms. Van Vuuren. However, the Applicant withdrew this request during the hearing.
28. This ruling is based on the documents before the Tribunal, oral arguments, and testimony from several witnesses.

CONTRAVENTIONS OF THE ACT

Failure to update and inform the Applicant

29. The Applicant alleges that the Respondent repeatedly displayed prohibited conduct by contravening General Conditions 4 and 6 of her General Conditions of registration, read with Section 52(5).

The Act

30. Section 52 (5) (c) provides that debt counsellors must comply with their Conditions of Registration and the provisions of the Act.

The General Conditions of Registration

31. General Condition 5 provides that the debt counsellor must not engage in any activity that could conflict with the interests of the consumers to whom debt counselling services are provided or could lead to such conflict. The debt counsellor should refrain from entering into any agreement or engaging in any activity which may prevent him or her from acting in the best interest of the consumers to whom debt counselling services are provided.
32. General Condition 6 provides that the Respondent must notify the Applicant immediately of any change in contact details or upon the occurrence of any change in the information provided at the time of registration or any other circumstance where such change is

significant to the registrant's ability or eligibility to conduct the business of a debt counsellor or ability to comply with the Act or Regulations or the Conditions of Registration. The debt counsellor may not perform the duties or functions of a debt counsellor if such change in circumstances constitutes a disqualification as per the Act.

Submissions and evidence

33. The Applicant alleges that the Respondent failed to comply with General Condition 5 in that she: 33.1 Resigned from her employ and then failed to submit a request to transfer the consumer files in accordance with the procedures stipulated by the Applicant; and 33.2 Did not act in the best interest of consumers by failing to provide information as to the exact dates of her departure from the NDC.

34. The Applicant alleges that the Respondent failed to comply with General Condition 6 in that she:

34.1 Failed to notify the Applicant immediately upon the occurrence of any change in her employment, financial position, personal status, or any other matter whatsoever which may have affected her eligibility to provide debt counselling services as envisaged by the Act;

34.2 Failed to notify the Applicant of the fact that she did not retain her consumer files when she left the employment of NDC; and

34.3 Failed to inform the Applicant that she intended to transfer consumers to another debt counsellor.

35. The Respondent argued that she had never left the employ of NDC and never changed her address. Accordingly, the allegation that she failed to inform the Applicant of such alleged change, is misplaced. The Respondent provided a list of consumers to be transferred to another debt counsellor and submitted that she followed the e-mailed instructions from the Applicant. The Respondent was under the assumption that the consumers were properly transferred. She argued that the delay by the Applicant to confirm the transfer was unacceptable.

36. The Applicant, in reply, conceded that the Respondent did not leave the employ of NDC as alleged and acknowledged the present status of the Respondent as a supervisor at NDC. The Applicant further conceded that the Respondent provided the Applicant with a list of consumers to be transferred to another debt counsellor in 2017. However, the Applicant could not explain why it delayed close to a year to assist the Respondent with the formalisation of the transfer.

Analysis and Finding

37. The Tribunal is not convinced of the Respondent's transgression of General Conditions 5 or 6 of the Conditions of Registration. The Respondent is still an employee of NDC, which activity is not in conflict with the interests of the consumers to whom debt counselling services are provided, nor could it lead to such conflict. The Applicant failed to provide evidence of an agreement or activity which may prevent the Applicant from acting in the best interest of the consumers to whom debt counselling services are provided.
38. The Tribunal finds it in the interest of the consumers that the Respondent transferred the consumer files to another debt counsellor after she was appointed a supervisor within NDC and takes a dim view of the Applicant's delay in assisting in the formalisation of the transfer process. The Applicant failed to provide evidence to convince the Tribunal that the Respondent abandoned the consumer files under her supervision after she was appointed a supervisor at NDC.
39. The Tribunal, therefore, finds that the Applicant failed to provide evidence that the Respondent engaged in any activity during the relevant period that could conflict with the interests of the consumers to whom debt counselling services are provided or could lead to such conflict.
40. The Applicant could not substantiate the allegation that the Respondent failed to advise the NCR of a significant change to her ability or eligibility to conduct the business of a debt counsellor. No change occurred in the circumstances of the Respondent that would constitute a disqualification as per the Act.
41. The Tribunal finds that the Respondent did not contravene General Conditions 5 or 6 of her Conditions of Registration.

Unregistered persons providing debt counselling services

42. The Applicant alleges that the Respondent repeatedly displayed prohibited conduct by contravening condition 2 of her General

Conditions of Registration, read with Sections 44(2) and 52(5). By allegedly failing to consult consumers personally to determine

over-indebtedness, the Applicant further contends that the Respondent contravened Sections 86(6) and (7), read with Regulations 24(6), 24(7) and 24(8).

43. Section 44(2) prohibits a person from offering or engaging in a debt counsellor's services or holding themselves out to the public as being authorised to offer any such service unless that person is registered as a debt counsellor.
44. Section 86(6) compels a debt counsellor who has accepted a debt review application to:
 - 44.1 determine whether the consumer appears to be over-indebted; and

44.2 determine, if the consumer seeks a declaration of reckless credit, whether any of the consumer's credit agreements appear to be reckless.

45. Section 86(7) describes the responsibilities of a debt counsellor after conducting an assessment of over-indebtedness in terms of section 86(6):

45.1 If the debt counsellor finds the consumer not over-indebted, the debt counsellor must reject the application;

45.2 If the debt counsellor finds the consumer not over-indebted but experiencing difficulty satisfying all the consumer's obligations under credit agreements, the debt counsellor may [own emphasis] make a recommendation in terms of subsection 7(b) that the consumer and respective credit providers voluntarily consider and agree on a plan of debt re-arrangement; or

45.3 Suppose the debt counsellor finds the consumer over-indebted. In that case, the debt counsellor may [own emphasis] issue a proposal recommending that the Magistrate's Court make an order in terms of subsection 7(c).

46. Section 86(8) determines the process if a debt counsellor makes a recommendation in terms of subsection 7(b):

46.1 If the consumer and each credit provider [own emphasis] concerned accept the proposal, the debt counsellor must record the proposal in the form of an order, and if it is consented to by the consumer and each credit provider concerned, file it as a consent order in terms of section 138; or

46.2 If the consumer and each credit provider concerned do not accept the proposal, the debt counsellor must [own emphasis] refer the matter to the Magistrate's Court with the recommendation.

47. General Condition 2 requires the debt counsellor to provide debt counselling services in a manner that is consistent with the purpose and requirements of the Act. The debt counsellor must act professionally and reasonably in providing debt counselling services and ensure that services are provided in a timely, fair, and non-discriminatory manner; and must not bring the Applicant or debt counselling into disrepute.

48. General condition 3 provides that upon application for debt review and throughout the different stages of the debt review process, the debt counsellor must fully inform the consumers of the consequences of applying for debt review and of an order being made.

49. The Applicant alleges that the Respondent did not personally conduct debt counselling services. The Respondent allegedly allowed unregistered persons or consultants to determine that consumers are over-indebted and to determine the reduced amount which would be distributed to credit providers pursuant to a debt restructuring proposal. Accordingly, the Applicant alleges that the Respondent did not review the assessments or communicate the results to the consumers. Therefore, the

Respondent assumedly delegated her primary duties to unregistered persons. During the hearing, the Applicant submitted that in the Bornman[6] matter, the court held that the debt counsellor makes the crucial determination of over-indebtedness.

50. The Applicant argued that the Form 16s include the reduced amounts payable by consumers and that these Form 16s are completed before any involvement by a registered debt counsellor. Regarding the completion of Form 17s, the Applicant conceded that the Respondent's signature was affixed in all instances but argued that such signature does not prove the Respondent conducted the assessment of over-indebtedness herself.
51. The Applicant referred to the consumer files attached as appendix IR1.1 to IR1.10 and argued that agents of NDC made the notes found on these files while no notes by the Respondent could be found. According to the Applicant, the absence of notes by the Respondent signifies the Respondent's failure to personally conduct the assessment of over-indebtedness. The Applicant also argued that the absence of notes by the Respondent on the consumer files constitutes evidence that the Respondent failed to fully inform consumers of the consequence of applying for debt review.
52. The Applicant's case is that the Respondent's failure to personally consult or interview consumers to determine whether consumers are over-indebted is in contravention of Section 86(6) and
- (7) and Regulations 24(6), 24(7), and 24(8). By allowing agents to engage in the services of a debt counsellor, the Respondent contravened sections 44(2) and 52(5)(c), read with General Conditions 2 and 3.
53. The Respondent submitted that the use of administrative staff is allowed and necessary. The Respondent did not deny using agents or other administrative staff for duties unrelated to debt counselling. However, the Respondent denied the use of agents for debt counselling activities. The Respondent testified before the Tribunal and provided oral evidence that she personally considered the applications for debt review and personally made the determination of over-indebtedness in each application.
54. In her oral evidence before the Tribunal, the Respondent explained in detail all the factors she had considered in the over-indebtedness assessment process. She confirmed telephonically or through SMSs having advised consumers continuously about the progress in the debt review process, including the implications to the consumers if payments were not made promptly.
55. The Respondent conceded that she did not make any notes herself on the consumer files but argued that the absence thereof does not equate to evidence that she did not engage personally with the consumers. The Respondent further argued that none of the Act, Regulations nor the Conditions of Registration prescribes that debt counsellors must document conversations or text messages on the consumer file. According to the Respondent, the prescribed Forms 16 and 17, as co-signed by herself as debt counsellor,

contain and confirm all the required statutory information as communicated by herself to the consumers. As such, the Respondent complied with the legislative requirement of advising consumers about the implications of debt review.

Analysis and finding

56. The Tribunal is not convinced that the Respondent contravened section 44(2). This section applies to persons not registered as debt counsellors. As it is common cause that the Respondent was and still is a registered debt counsellor, the section is not applicable.
57. The Tribunal considered the evidence relating to the contravention of sections 86(6) and 86(7), read with Regulations 24(6), 24(7), and 24(8). This charge pertains to the alleged unlawful delegation of duties by the Respondent. The Respondent's oral evidence confirmed her personal involvement in the assessment of over-indebtedness and the making of proposals to the consumer and credit providers. The Respondent was a reliable witness, and the Tribunal accepted her testimony as truthful. The Respondent's testimony was not discredited during cross-examination by the Applicant. As such, the evidence before the Tribunal is that the Respondent personally assessed overindebtedness as required in terms of section 86.
58. The Tribunal further confirms that the Act does not compel a debt counsellor to document the discussions or text messages with consumers. In addition to the verbal testimony of the Respondent, the Tribunal accepts the signed Forms 16 and 17, as contained in the Respondent's consumer files, as sufficient compliance to the legislative requirement of advising consumers of the implications of debt review. Form 16 is itself evidence of the fact that the debt counsellor conducted the initial consultation and indebtedness assessment. It is also evidence of the fact that each of the applicants was made aware of the conditions of debt review and undertook to bona fide participate in debt review.[7]
59. Suppose the Applicant wants to expect debt counsellors to document all telephonic discussions in writing on the consumer file. In that case, the Applicant should pursue a revision of the founding legislation. Presently, the guidelines issued by the Applicant confirm that only Forms 16 and 17 are required to be kept on file as confirmation that consumers were adequately informed of the implications of debt review. More particularly, Regulation 55(1)(a) lists the documents that are required to be maintained by debt counsellors. This list does not include voice recordings of consultations with consumers or text messages. Documents required to be recorded and kept per Regulation 55(1)(a) include:

59.1 Applications for debt review;

59.2 Copies of documents submitted by consumers;

59.3 Copies of rejection letters (if applicable);

59.4 Debt restructuring proposals;

59.5 Copies of any order made by the Tribunal or the Court; and

59.6 Copies of clearance certificates.

60. Regarding section 86(7), the Tribunal wishes to confirm that there is no statutory obligation on a credit provider to accept a recommendation by the debt counsellor. The process is voluntary, whereby credit providers may consider and agree on a revised settlement. Only when all credit providers have agreed on a revised settlement can a consent order be obtained. By implication, where a credit provider disagrees, the debt counsellor needs the consumer's cooperation to consider an alternative settlement offer from a particular credit provider. This cooperation of the consumer is a statutory requirement.

61. Section 86(5) determines as follows:

“(5) A consumer who applies to a debt counsellor..., must – (a) comply with any reasonable requests by the debt counsellor to facilitate the evaluation of the consumer’s state of indebtedness and the prospect for responsible debt rearrangement; and (b) participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement.”

62. The responsibility of consumers is particularly important when a credit provider does not accept a proposal from the debt counsellor following consultations with the consumer. In such an instance, the consumer must participate in good faith in further negotiations with the credit provider and comply with any reasonable request by the debt counsellor to facilitate a responsible debt re-arrangement plan with a credit provider. The Tribunal finds that a request to contact the debt counsellor to discuss alternative settlement proposals is reasonable. According to the evidence before the Tribunal, the Respondent made numerous attempts to contact the consumers as sampled, to further engage in alternative settlement proposals where credit providers did not accept the initial proposal. By failing to respond and accordingly participate in good faith in further settlement negotiations, consumers contravene the Act.

63. The consumer's responsibility to act in good faith during the debt review process is similarly essential in the proper execution of sections 86(7)(b) and 86(8)(b). The Tribunal reiterates that these sections apply to an assessment outcome that the consumer is not over-indebted but nevertheless experiencing difficulty satisfying all his or her obligations under credit agreements in a timely manner. Where a debt counsellor makes a recommendation in such an instance, and this recommendation is not accepted by all the credit providers, the debt counsellor must [Emphasis added] refer the recommendation to the Magistrate's Court.

64. However, to give proper execution to section 86(8)(b), the debt counsellor should first engage the consumer and explain to him or her the credit provider's negation and possible counter-offer. To this extent, the consumer must cooperate in good faith. Secondly, the debt counsellor must bring the recommendation to the Magistrate's

Court per the Rules of the Magistrate's Court. The Magistrate's Court Rules required (and still require) a signed affidavit by the consumer. Suppose the consumer fails to participate in good faith and is not contactable or otherwise responsive. In that case, the debt counsellor cannot lodge an application before the Magistrate's Court. The Act is silent on a specific timeframe within which the debt counsellor must bring the application before the Magistrate's Court.

Accordingly, the debt counsellor cannot be blamed if he or she fails to bring the application before the Magistrate's Court due to the consumer's non-responsiveness or lack of cooperation. If the consumer fails to sign the required affidavit to lodge an application before the Magistrate's Court, the consumer is acting to his or her own detriment. More specifically, there is no statutory obligation to bring the application before the Magistrate's Court within 60 days, as alleged by the Applicant.[8]

65. On the evidence before the Tribunal, the sampled files contain an assessment of not being overindebted but experiencing difficulty satisfying the consumer's obligations under credit agreements. Accordingly, the Tribunal does not consider compliance with section 86(7), apart from confirming that the consumer's expectation of good cooperation would also apply in instances where the debt counsellor had assessed a consumer as over-indebted. In such an instance, the debt counsellor may issue a proposal recommending that the Magistrate's Court make an order that one or more of the consumer's credit agreements be declared to be reckless credit and order the re-arrangement of the consumer's obligations. An affidavit by the consumer will similarly be required in such instances.
66. The Tribunal wishes to confirm that, according to the testimony of Ms. van Vuuren, she was not in a proper emotional state to respond to calls or texts from the Respondent. She expected the Respondent to deliver a registered letter to her home address instead. No such agreement was entered into between the Respondent and Ms. van Vuuren, nor does the Act require delivery of communication by registered mail. Ms van Vuuren confirmed that she received various calls and text messages advising her of her credit provider's rejection of the proposed settlement. She also acknowledged that the Respondent requested her to return calls and to contact the Respondent to discuss the debt review process. She further confirmed in her testimony that she received numerous texts from the Respondent that she had defaulted on her payments. Accordingly, on her own testimony, Ms van Vuuren did not participate in good faith during the debt review process. Similarly, she did not deny that the Respondent called her personally and explained the debt review process.
67. The Tribunal finds that the Respondent's conduct in assessing debt review applications and providing debt counselling services was consistent with the purpose and requirements of the Act. On the evidence before the Tribunal, the Respondent acted professionally and reasonably to ensure that she provided services in a timely, fair, and non-discriminatory manner. There is no evidence before the Tribunal that the Respondent brought the Applicant or debt counselling in disrepute.

68. The Tribunal further finds no evidence that the Respondent did not fully inform consumers of the consequences of applying for debt review and of an order to be made by the Tribunal or Magistrate's Court. As confirmed by the completed and signed Forms 16 and 17, the various calls and text messages, and the oral evidence of the Respondent, the Tribunal finds that the Respondent complied with her debt counsellor responsibilities upon the applications for debt review and throughout the different stages of the debt review process.
69. Consequently, the Tribunal is satisfied that the Respondent did not contravene either General Condition 2 or 3 of the General Conditions of Registration, read with sections 44(2) and 52(5)(c). Further, the Tribunal finds no contravention of sections 86(6) and (7), read with Regulations 24(6), 24(7), and 24(8).

Failure to submit the Forms within the prescribed time period

70. The Applicant alleges that the Respondent repeatedly contravened Section 86(4)(b), read with Regulation 24(2) and 24(10).
71. Section 86(4)(b) provides that, on receipt of an application to be declared over-indebted, a debt counsellor must provide the consumer with proof of receipt of the application and notify all credit providers listed in the application and every registered credit bureau.

The Regulations

72. Regulation 24(2) requires a debt counsellor, within five business days of receiving an application for debt review, to deliver a completed Form 17.1 to all credit providers listed in the application and every registered credit bureau.
73. Regulation 24(10) requires the debt counsellor to submit Form 17.2 to the affected credit providers and all registered credit bureaux within five business days after completing the assessment in section 86 (6) (a).
74. The Applicant alleges that the Respondent should have ensured that a completed Form 17.1 was delivered to all the credit providers and credit bureaux within 5 (five) business days after receipt of an application for debt review. Furthermore, the Respondent needed to make a determination of over-indebtedness in the prescribed manner and within the prescribed time. The Applicant submitted that the Respondent had to be in possession of the documents in Form 16. The Respondent would need to use these documents to conduct an assessment and make a determination of overindebtedness. The information contained in the documents would also need to be verified.
75. According to the Applicant, the Respondent's failure to submit the completed Form 17.1 to every credit bureau is evident from the files of X Gcaba and E van Lingen.[9] In the case of Van Lingen, Form 17.1 was submitted several days after Form 17.2 was submitted, and due process was accordingly not followed.

76. The Applicant further submitted that the Respondent failed to submit Form 17.2 to all the registered credit bureaux within the prescribed timeframe, and this conduct was evidenced in all the sampled files. According to the Applicant, the consequences of the Respondent's failure constituted a risk that the consumers could obtain further credit from credit providers, notwithstanding the application for debt review. If further credit were obtained, it would be prejudicial

to the interests of existing credit providers. The Applicant submitted that the Respondent's failure to timely submit the

forms as mentioned above to the affected credit providers and every registered credit bureau is not professional and reasonable, as she did not provide services timely, fairly, and in a nondiscriminatory manner.

77. The Respondent assented to this prohibited conduct but outlined that she is not required to serve Form 17.1 to any credit bureaux, as this is done by virtue of the update of the debt help system and that such action is sufficient for compliance to section 86(4)(b)(ii) and Regulation 24(2) of the Act.
78. Similarly, the Respondent acknowledged that mistakes occurred but submitted that she subsequently served a corrected Form 17.1 on the applicable credit providers. Also, the Respondent submitted that she could only serve Form 17.1 on credit providers after receipt of the signed Form 16 from the consumer. In instances where the signed Form 16 was obtained only later, Form 17.1 was also submitted to the credit provider late. Other instances were attributed to administrative errors.
79. A perusal of the evidence reveals that the Respondent distributed Forms 17.2 to only some of the registered credit bureaux within 5 (five) days after completion of the assessment. On two occasions, there was also an error with the dispatch of Forms 17.1.[10] The Respondent confirmed this evidence during oral testimony.
80. The Tribunal is therefore satisfied that the Respondent contravened section 86(4)(b) read with Regulations 24(2) and 24(10).

Matters not referred to the Court or Tribunal at all or within a reasonable time.

81. The Applicant alleges that the Respondent contravened Section 86(7)(c) read with Section 86(8)(b) and thereby exposed consumers to the termination of their debt review services in terms of Section 86(10)(a).

The Act

82. Section 86(10)(a) determines as follows:

“10 (a) If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may, at any time, at least 60 business days after the date on which the consumer applied for the debt review, give notice to terminate the review in the prescribed manner to –

(i) The consumer;

(ii) The debt counsellor; and

(iii) The National Credit Regulator; and (b) No credit provider may terminate an application for debt review lodged in terms of this Act if such application for review has already been filed in a court or the Tribunal."

83. The Applicant submitted that the Respondent failed to refer matters to the Tribunal or to a Court within a reasonable period or, in some instances, not at all. According to the Applicant, credit providers terminated credit agreements with consumers because the Respondent did not lodge applications with the courts or the Tribunal within 60 business days after the date consumers applied for debt review.
84. The Respondent's responses to the allegations include references to failures by consumers to provide the necessary documents, failure to make an upfront payment of legal fees, defaults in payments, failure to make monthly payments duly, and failure to provide proof of residence as required in the Magistrate's Court.
85. In terms of section 86(10), credit providers are entitled to terminate the debt review process if applications for debt review are not lodged with or referred to the courts or the Tribunal within 60 business days after the date on which consumers applied for debt review. Thereafter, credit providers may institute an action to recover the outstanding indebtedness from the consumers.
86. It is clear from the evidence before the Tribunal; that in all 10 consumer files, there is no evidence of matters referred to a court or the Tribunal within 60 business days after the date on which the consumers applied for debt review. Irrespective, such failure does not constitute a contravention of section 86(10), nor does it constitute prohibited conduct in terms of section 86(7) or 86(8).
87. Section 86(10)(a) outlines unequivocally that, while a credit agreement is reviewed as part of a debt review process, the consumer is expected to honour the credit agreement in place at the time. If the consumer defaults, such failure may expose the consumer to the possible termination of his or her debt review application by the credit provider. The debt counsellor cannot be held responsible for the failure of the consumer to make prompt payments in accordance with the credit agreement in place at the time. Therefore, the consumer must participate in good faith during the debt review process and ensure that the credit provider has accepted any recommended change in the monthly premium. To the extent that a change has not been accepted, the debt counsellor must inform the consumer. On the evidence before the Tribunal, the Respondent advised all consumers promptly when a credit

provider did not accept a reduced monthly premium. The failure by the consumer to then adhere to the credit agreement premium that is in place cannot be attributed to the debt counsellor.

88. Therefore, the Tribunal finds that the Respondent did not contravene Section 86(7)(c) read with Section 86(8)(b) and did not expose consumers to the termination of their debt review services in terms of Section 86(10)(a).
89. The Tribunal further wishes to comment on the Applicant's argument that the Payment Distribution Agent (PDA) acts as an agent of the debt counsellor. The Applicant went to great lengths to illustrate the Respondent's failure to correctly inform the PDA of the particular payments and date of payments of debit orders. Firstly, no specific contravention of the Act was levelled against the Respondent regarding this alleged form of misconduct in the Applicant's founding affidavit. During the hearing, the Applicant raised this matter as an additional allegation in an attempt to justify a general contravention of the debt counsellor's responsibility to act professionally. In particular, the Applicant alleged that the failure by the PDA to debit consumers' accounts with the correct amount or at the correct time constitutes unprofessional conduct by the Respondent. The Applicant did not alter its pleadings during the hearing and the Tribunal cannot, therefore, consider this additional allegation. The allegation should have been pleaded in the founding affidavit and cannot be placed before the Tribunal through legal argument.
90. Secondly, a PDA enters into a parallel agreement with the consumer, and the debt counsellor is not a party to the agreement between the consumer and the PDA. As confirmed by Gautshi AJ in *Nedbank Limited v Thompson and Another*,^[11] a PDA does not stand in an agency relationship with the consumer. This judgment confirms that debt counsellors may not receive payments from consumers or distribute payments to respective parties. The Respondent approves payment PDAs), and all payments must be received

and distributed by a PDA. The relationship between a PDA and the consumer is, therefore, not an agency relationship but regulated in terms of the agreement signed between the consumer and the PDA. Irrespective, *Nedbank Limited v Thompson and Another* is not the authority for the Applicant's proposition that the PDA is the agent of the debt counsellor. According to the evidence before the Tribunal, the collection of funds was an arrangement between the PDA (Hyphen) and the consumers, while the Respondent acted as a conduit to such a relationship. She received instructions and uploaded the relevant payment dates to the system as and if requested by the consumer.

91. As prescribed in Condition 13 of the Respondent's Conditions of Registration, the debt counsellor must protect the confidentiality of all information about consumers and credit providers. Accordingly, the debt counsellor may only disclose information about the consumer to a third party, such as a PDA, with the consumer's written consent. Although the debt counsellor may facilitate the interaction between the consumer and the PDA, it remains the consumer's responsibility to advise the PDA and ensure that the PDA deducts

the correct amount for purposes of monthly payments to creditors. According to the evidence before the Tribunal, the consumers in the sampled files received regular communication from both the PDA and the Respondent relating to their default in making adequate payments in terms of their credit agreements. The Tribunal perceives the consumers' failure to act on such communication as aggravating.

ADMINISTRATIVE FINE

92. Section 151(3) provides that, in considering the imposition of an administrative fine, certain factors must be considered. The Tribunal considers those factors consequentially:

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

The Tribunal found that the Respondent contravened section 86(4)(b) read with Regulations 24(2) and 24(10). The Respondent made attempts to file Form 17 after she corrected an error, although evidently late in some instances. Any transgression of the Act constitutes prohibited conduct and is, therefore, serious. If a debt counsellor fails to submit Form 17 within the statutory timeframes, the consumer may obtain further credit from credit providers, notwithstanding that he or she has applied for debt review in terms of Section 86(1). If the consumer obtains further credit, existing credit providers would be prejudiced.

b) Loss or damage suffered as a result of the contravention

The Applicant did not determine the amount of loss or damage suffered because of the Respondent's contravention as outlined above.

c) The behaviour of the Respondent

The Respondent had full knowledge of the requirements she had to fulfil in terms of Section 86(4)(b) read with Regulations 24(2) and (10). Such failure cannot be countenanced. However, the Tribunal considered the Respondent's honesty when making admissions during her testimony and her attempts to rectify mistakes when identified.

d) Market circumstances under which the contraventions occurred

The Applicant did not quantify the market circumstances. The Applicant submitted that the Respondent's conduct illustrates that the market circumstances are those in which consumers are in a cycle of ongoing debt and are in a desperate financial situation. These consumers are often unaware of their rights and are vulnerable to exploitation.

e) Level of profit derived from the contraventions

The Applicant did not quantify the level of profit derived by the Respondent's conduct.

f) Degree of cooperation and prior contraventions

The Tribunal finds that the Respondent co-operated during the investigation. Save for the compliance notice issued against the Respondent,[12] the Applicant instituted no prior enforcement procedures against the Respondent.

93. Considering all these factors and the evidence before us, it is in the interests of justice to impose an administrative fine on the Respondent. We accept that the purpose of an administrative fine is punitive.[13] However, we believe that a penalty is warranted in the circumstances of this application.
94. Regarding the amount of the administrative fine, Section 151(2) provides that an administrative fine imposed may not exceed the greater of 10% of the Respondent's annual turnover during the preceding financial year; or R1 000 000.00.[14]
95. The imposition of an administrative penalty is an important decision that cannot be taken lightly. The Tribunal benefitted from hearing the Respondent's side in mitigating the transgression in this matter.

The Tribunal took that into account.

96. The Tribunal finds an administrative fine of R10 000.00 is reasonable in the circumstances.

COST ORDER

97. The Respondent alleged the application was vexatious and requested a punitive cost order against the Applicant.
98. The awarding of costs by the Tribunal is regulated by section 147. In terms of section 147(1), each party participating in a hearing must bear its own costs. Section 147(2)(a) makes provision for an exception, where the Tribunal can award costs against the complainant who referred the complaint to the Tribunal in terms of section 141(1). In the matter before the Tribunal, the NCR referred the complaint, not the complainant. Section 147(2) limits the Tribunal's jurisdiction to award cost orders to those instances where a complainant continues with his complaint to the Tribunal despite the complaint having been non-referred by the National Credit Regulator or the National Consumer Commission, as the case may be. Accordingly, section 147(2) does not apply to the matter at hand.
99. Further, the Tribunal has found prohibited conduct against the Respondent relating to one particular contravention of the Act. Subsection 2(a) would only apply if the Tribunal did not make a finding of prohibited conduct.
100. The Tribunal, as a creature of statute, has jurisdiction to act within the parameters of its founding legislation. In relying on the interpretative maxim "inclusio unius, exclusio alterius," the presumption of interpretation of statutes is that, if one thing is specified, other things which may be thought to be similar are impliedly excluded.[15] The Tribunal accepts that this maxim is not a rigid rule of statutory construction.[16]

101. Accordingly, the Tribunal considered whether the Applicant exerted any malice in bringing the application. It is a long-established principle in our law that where a statutory body fulfils its statutory duties, costs should not be awarded against it, even if it acted incorrectly, as long as its conduct was not mala fide.[17] The Respondent made mention of a vexatious pursuit against the debt counsellor and argued that the debt counsellor suffered from high legal costs as a result of the matter before the Tribunal. However, the Respondent did not provide evidence to persuade the Tribunal of any mala fide in the Applicant's application. As a regulatory body, the Applicant received a complaint, investigated the reasonable suspicion of misconduct, and brought the application based on the conclusions reached in the investigation report. The Tribunal, therefore, is not persuaded that the NCR's conduct had been actuated by malice. A punitive cost order in this matter will therefore not be in the interest of justice.[18]
102. Irrespective, the Tribunal will fail in its responsibility if it does not allude to the leading of irrelevant evidence by the Applicant and the unnecessary delays in the finalisation of this matter. It was conceded by the Applicant that it did not make out a successful case on affidavits.¹⁹ The Applicant subsequently filed a further supplementary affidavit and decided to call two witnesses, Ms van Vuuren and Mr de Beer. These witnesses had nothing of relevance to add to the evidence relating to the charges put to the Respondent, apart from Ms. Van Vuuren confirming her own failure to act in good faith during the debt review process. The testimony of Mr de Beer was irrelevant to the charges against the Respondent.
103. The Tribunal wishes to emphasize that it perceives the supplementary affidavit, as filed by the Applicant, as of a general nature and not sufficiently specific to the relief claimed. By elevating the generality of a charge of "unprofessional conduct" to a new substantial charge, the Applicant unsuccessfully attempted to amend and supplement the investigating report and, thus, the charges contained in the founding affidavit. The Tribunal takes a dim view of this attempt. Further affidavits can clarify factual matters in dispute, supplement a matter where a new matter was raised or provide information where it was not available at the time the founding affidavit was filed. The material to be raised in the supplementary affidavit must be relevant to the issues for determination of the main claim or application.[19]
104. In *Bafokeng Rasimone Platinum Mine (Pty) Ltd v CCMA & others*,^[20] Lagrange J held that:
- "Pleadings are intended, amongst other things, to identify the nature and parameters of a dispute. Care must be taken at the time of drafting to ensure that the full ambit of a party's case is canvassed... It should not regard the supplementary affidavit as merely a preliminary exploration of issues to be more fully developed when heads of argument are prepared."*
105. The Applicant went to great lengths to prove the detrimental effect on consumers when they defaulted on their payments to credit

providers via a PDA. The Applicant was also successful in outlining the serious impact on consumers when they act non-responsive towards the debt counsellor. However, the Applicant failed to prove that the default in payments and the prompt referral to the Magistrate's Court can be attributed to any prohibited conduct by the Respondent. If the Applicant, as the Regulator, expects debt counsellors to perform actions more specific than presently expected per the Act, then it should pursue legislative changes.

CONCLUSION

106. The Tribunal finds that the Applicant has provided sufficient argument and basis for establishing that the Applicant formulated reasonable suspicion that the Respondent contravened the Act and conducted the investigation lawfully.
107. The Tribunal is satisfied that the Respondent engaged in prohibited conduct by contravening section 86(4) read with Regulations 24(2) and (1). In the circumstances of this matter, the Tribunal does not find this contravention to constitute a breach of General Condition 2 of the Respondent's Conditions of Registration. The Tribunal further finds this contravention not to be a repeated contravention in terms of section 57(1).
108. The transgression most certainly does not warrant the severe penalty of deregistration of the Respondent. However, the Tribunal finds the transgression serious and deserving of an administrative fine.
109. The Tribunal does not find compelling evidence to warrant a punitive cost order on the evidence before the Tribunal.

ORDER

110. Accordingly, the Tribunal makes the following order:

110.1 The Respondent has engaged in prohibited conduct by contravening section 86(4) read with Regulations 24(2) and (1);

110.2 The Respondent must pay an administrative fine of ten thousand rands (R10 000.00) into the National Revenue Fund referred to in section 213 of the Constitution of the Republic of South Africa, 1996 within 30 days of the date of this judgment. The National Revenue Fund account details are as follows:

Bank:

Standard Bank of South Africa

Account name: Department of Trade, Industry and Competition

Account number: [...]

Account type: Business current account

Branch code: 010645 (Sunnyside)

Branch code: 051001

Reference:

NCT-140432/2019/57(1) (Name of depositor)

110.3 The application for deregistration of the Respondent is dismissed; and 110.4 There is no cost order.

DATED AT CENTURION ON THE 3RD OF FEBRUARY 2023.

[signed]

DR MC PEENZE Presiding Tribunal member

Tribunal members Dr A Potwana and Ms. P Manzi-Ntshingila

concur with this judgment.

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

[2] See Annexure AC19 of the Founding Affidavit.

[3] Annexure M3 to the Answering Affidavit.

[4] Transcript, 20 September, p. 5 lines 19-20.

[5] This was also the finding made by the Applicant's investigators: See Tribunal Bundle, p. 202, par. 4.14,

[6] Bornman v National Credit Regulator [2014] 2 All S.A. 14 (SCA).

[7] See an example of Form 16 on page 65 of the Tribunal bundle.

[8] See Collet v FNB 2011 (4) SA 508 (SCA), par. 12-14, and Hardenberg and Another v Nedbank Limited 2015 (3) SA, 470 (WCC) at par. 11.

[9] Appendix IR1.5 and IR1.6 to the investigation report.

[10] See Tribunal bundle p. 1838, par. 26.4.

[11] 2014 (5) SA 392.

[12] See p. 30 of the Tribunal bundle.

[13] NCR v Midwicket Trading 525 CC t/a Butterfly Cash Loans NCT/7962/2013/57(1).

- [14] See *Shoprite Investment Limited v NCR Gauteng Division of the High Court* Case Number: A509/2107, where the court held that if 10% of the annual income of a respondent exceeds R1 000 000.00, the Tribunal may impose such amount. But if the 10% annual income is less than R 1 000 000, 00, the Tribunal may impose a fine of R 1 000 000, 00. Also, see *NCR v Orel Enterprises (Pty) Ltd*. NCT/183368/2021/57(1) and *NCR v Akudle Kutishiyele* NCT/19294/2014/140(1).
- [15] See *Maxwell on The Interpretation of Statutes* 11 ed (Sweet & Maxwell, 1962) by Roy Wilson and Brian Calpin. Also, see the translation by Hiemstra and Gonin *Trilingual Legal Dictionary* (Juta, 1981) on p. 208.
- [16] See *Administrator, Transvaal and Others v Zenzile and Others* 1991 (1) SA 21 (A) at 37G.
- [17] *National Credit Regulator v Southern African Fraud Prevention Services NPC* [2019] ZASCA 92.
- [18] Also see *National Credit Regulator v Dacqup Finances CC trading as ABC Financial Services – Pinetown and Another* (382/21) [2022] ZASCA 104 (24 June 2022) at par. 31. 19 See Tribunal bundle, p. 2376, par. 11.
- [19] See also *Karpakis v Mutual & Federal Insurance Co Ltd* 1991 (3) SA 489 at 503F-504E; *Cohen, N. O v Nel and Another* 1975 (3) SA 963 at 966B; *Transvaal Racing Club v Jockey Club of South Africa* 1958 (3) SA 599 at 604A-E; *Long Beach Home Owners Association v Great Kei Municipality, Amathole District, Eastern Cape and Others* (28064/14) [2015] ZAGPPHC 642 (11 September 2015) at par. 29.
- [20] Case No: JR 2296/12 at par. 5.

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