

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Ndlela (NCT/7644/2013/57(1)) [2013] ZANCT 48 (25 November 2013) [2013] ZANCT 48

COURT

National Consumer Tribunal

BEFORE

T Woker, X May, P Beck

CASE / FILE NUMBER

NCT/7644/2013/57(1)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

number: NCT/7644/2013/57(1)

DATE: 25 NOVEMBER 2013

In

the matter between:

THE

NATIONAL CREDIT REGULATOR

.....APPLICANT

And

LINDIWE

NDLELA.....RESPONDENT

Coram:

Prof

T Woker – Presiding member

Mr

X May – Member

Ms

P Beck – Member

Date

of hearing - 11 October 2013

JUDGMENT

1.

INTRODUCTION

1.1 The Applicant in this matter is the National Credit Regulator, (“the NCR” or “the Applicant”) a juristic person established in terms of section 12 of the National Credit act, No 34 of 2005. (“the Act”).

1.2 The Respondent (and Registrant) is Lindiwe Ndelela (“the Respondent”) an adult female debt counsellor, practising as such under registration number NCRDC 249 under the name SLK Beyond Solutions from offices situated in Midrand, Gauteng.

1.3 The Applicant brought an application before the National Consumer Tribunal (“the Tribunal”) for an order to have the Respondents registration as a debt counsellor cancelled and additional relief, in accordance with section 57(1)(a) and (c) of the Act on the grounds that the respondent had repeatedly contravened the Act and her Conditions of registration as a debt counsellor.

1.4 The application was as a result of 35 complaints lodged against the Respondent with the Applicant by consumers who had applied to the Respondent for debt review. This led to an investigation into the activities of the Respondent conducted by Mr Mlungisi Gwacela an inspector employed by the Applicant. The Applicant’s founding affidavit was deposed to by Adv Zwelithini Ronald Zakwe (“Zakwe”), Manager of the Applicant’s Investigations and Enforcement Department.

1.5 At the hearing into this matter, the Applicant was represented by Mr Selolo. The Respondent was absent despite having received proper service of the notice of set down of the matter.

1.6 The National Consumer Tribunal (Tribunal) has jurisdiction to hear this matter in terms of section 27(a)(i) of the NCA. This section provides the Tribunal may adjudicate in relation to any application made to it in terms of the Act, and make any order provided for in this Act in respect of such application.

1.7 This judgment follows the hearing into this matter on 11 October

2013. Following certain submissions regarding the powers of the Tribunal to order that the Respondent repay money which she had received from consumers the Applicant was given until 11 November to provide further information to the Tribunal. The Applicant has not provided that information, however following the decision of the Tribunal in NCR v Dioka NCT/7750/2013/57(1) that information is no longer relevant. This judgment is based largely on written

submissions and oral argument of the Applicant.

2.

BACKGROUND

2.1 The Respondent was registered by the Applicant as a debt counsellor with registration number NCRDC 249, with effect from 31 January 2008, subject to General and Specific Conditions. A copy of the Respondent's NCR Certificate of Registration and General and Specific Conditions of Registration are annexed to the founding affidavit and marked Annexure "A1" and "A2" respectively.

2.2 The Respondent practised as a debt counsellor under the name of SLK Beyond Solutions from offices situated in Midrand.

2.3 During the course of July 2011, 35 complaints against the Respondent were lodged with the Applicant by consumers who had applied to the Respondent for debt review. Much of the discontent of the consumers arose from the fact that the Respondent had received funds from them for distribution to their credit providers, but that the money had not reached the credit providers. Consequently these consumers were still being inundated with calls from credit providers regarding their outstanding debts.

2.4 In response to these complaints, on 27 January 2012, the Applicant's Investigations and Enforcement Department was mandated to conduct an investigation into the debt counselling practices of the Respondent.

2.5 Mr. Mlungisi Gwacela ("the Inspector") was duly appointed in terms of section 25(1)(a) of the Act as the Inspector to the investigation and his certificate of appointment was issued. The Inspector's report dated 30 October 2012 detailing the findings of his investigation is annexed to the founding affidavit marked Annexure "B" with annexures thereto marked "A1 to A16" and "BB1 to BB35" and a confirmatory affidavit by the Inspector marked "C".

2.6 During the inspection, the Respondent informed the Applicant that she had handed over all her consumer files to another debt counsellor, Mr. Jason Makwala NCRDC 1497 based in Johannesburg. When the Applicant visited the premises of Mr. Makwala, he indicated that he was the junior debt counsellor at Jumo Debt Counsellors, that he received files from the Respondent, that these files were in disarray and that he had to start from the beginning in order to assist these consumers. Makwala's affidavit dealing with the status of the files when he received them is annexed to the investigation report and marked Annexure "A14".

2.7 The Applicant alleges that the investigation revealed that the Respondent had repeatedly failed to comply with her conditions of registration and she had repeatedly contravened the Act.

2.8 According to the investigation report the Respondent specifically provided services to employees of Nola Food Corp (Pty) Ltd ("Nola"). An affidavit from the HR Manager of Nola is annexed to the report and marked Annexure "A2".

2.9 Nola regularly deposited funds into a Consumer Protection Excellence ("CPE") Trust Account. The monies were however

distributed late and credit providers continued to phone consumers. A table setting out the dates and amounts of payments made from Nola to CPE is annexed to the investigation report marked Annexure “A3”.

2.10 Due to the problems experienced with CPE the Respondent then requested Nola to transfer the consumer funds directly into her

business account so that she could, in turn, transfer the money to CPE. Nola was reluctant to do this but did comply with her request. A table setting out the amounts and dates of payments from Nola to the Respondent is annexed to the investigation report and marked Annexure “A3”.

2.11 Despite this new arrangement, the distribution problem continued. Consumers then found it difficult to contact the Respondent and eventually they stopped making payments. Certain payments were refunded to employees. This is set out in the investigation report. Nola’s shop steward eventually proceeded to report the matter to the Applicant.

2.12 Following the investigation the inspector concluded that the Respondent has contravened a number of sections of the Act as she failed to follow the procedures set out in the Act for debt review and her conditions of registration specifically because she had taken money from consumers. Hence this application.

3 ISSUES TO BE DECIDED

3.1 Preliminary matters

The Tribunal must determine whether the requirements for default judgment have been met.

3.2 Main Issue

3.2.1 The Tribunal must determine whether the Applicant has made out a case for deregistration of the Respondent.

3.2.2. The Tribunal must also determine whether it has the power to order that the Respondent refund the money which consumers had handed over to the Respondent.

4. APPLICABLE SECTIONS OF THE NCA

4.1 Section 57

Cancellation of registration

“(1) Subject to subsection (2), a registration in terms of this Act may be cancelled by the Tribunal on request by the National Credit

Regulator, if the registrant repeatedly –

- (a) Fails to comply with any condition of its registration ;
- (b) Fails to meet a commitment contemplated in section 48(1); or

(c) Contravenes the Act.

(2) ...”

4.2 Section 86(1)

Application for debt review

“(1) A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted.”

4.3 Section 86(4)(b)(i) and (ii)

“(4) On receipt of an application in terms of subsection (1), a debt counsellor must-

(a) Provide the consumer with proof of receipt of the application ;

(b) Notify, in the prescribed manner and form-

(i) All credit providers that are listed in the application; and

(ii) Every registered credit bureau

(c) ...”

4.4 Regulation 24(1)(a)

“(1) A consumer who wishes to apply to a debt counsellor to be declared over-indebted must:

(a) Submit to the debt counsellor a completed Form 16; and

(b) ...”

4.5 Regulation 24(2)

“(2) Within five business days after receiving an application for debt review in terms of section 86(1) of the Act, a debt counsellor must deliver a completed Form 17.1 to all credit providers that are listed in the application and every registered credit bureau.”

4.6 Regulation 24(5)

“(5) A notice contemplated in subregulation (2) must be sent by fax, registered mail or e-mail provided that the debt counsellor keeps record of the date, time and manner of delivery of the notice.”

4.7 Regulation 55(1)(a)

Records of registered activities to be retained by registrants

“(1) In addition to any records that must be kept in terms of the Act, a registrant must maintain the following records relating to its registered activities, which records may be kept in electronic format:

(a) Debt Counsellors, in respect of each consumer:

- (i) Application for debt review;
- (ii) Copy of all documents submitted by the consumer ;
- (iii) Copy of the rejection letter (if applicable) ;
- (iv) Debt restructuring proposal ;
- (v) Copy of an order made by the tribunal and/or the court ;
- (vi) Copy of the clearance certificate;

5. APPLICABLE CLAUSES OF THE RESPONDENTS CONDITIONS OF REGISTRATION

5.1 General Condition 2

“The Debt Counsellor must perform debt counselling in a manner that is consistent with the purpose and requirements of the Act. The Debt Counsellor must in all instances act professionally and reasonably in providing debt counselling services to consumers and provide such services in a manner that is timely, fair and non-discriminatory and does not bring the NCR or debt counselling into disrepute.”

5.2 General Condition 4

“The Debt Counsellor must comply with the requirements specified by the NCR in respect of registering consumers who apply for debt review, on the specified database. The Debt Counsellor must update such consumer records with the status of the review and post-review performance, from time to time”

5.3 General Condition 11

“The Debt Counsellor must maintain adequate records and keep relevant copies of documentation in order to demonstrate compliance with the Act and conditions and to provide a full record of all communication with a consumer to whom debt counselling services are provided. Such documentation should be retained for a period of 5 years. The Debt Counsellor must provide copies of documentation to the consumer, a credit provider, the NCR or court, upon reasonable request”

5.4 Specific Condition 1

“The Debt Counsellor may not receive payments from consumers who have applied for debt review or receive payments in respect of debt

obligations that were re-arranged in terms of the Act or distribute such payments to credit providers.”

5.5 The specific conditions are proposed for the following reasons:

“To prevent a Debt Counsellor from being involved in payment distribution if such a Debt Counsellor does not have the adequate staff,

infrastructure, systems or procedures in order to safeguard the funds, efficiently distribute funds or account for such funds.”

6 APPLICANT’S SUBMISSIONS

“The Applicant submits that its investigation revealed that the Respondent’s conduct contravened the Act in the following manner:

6.1 Contravention of Section 86(1) read with Regulation 24(1)(a) of the Act alternatively contravention of General Condition of Registration 11

6.1.1 A consumer may, in terms of Section 86(1) of the Act, apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted. In terms of Regulation 24(1)(a) of the Act, a consumer who wishes to lodge such application must submit to the debt counsellor a Form 16.

6.1.2 The Applicant submits that the Respondent repeatedly contravened this section in that the Respondent as a manner of practice did not maintain records of any Form 16s in respect of all 35 consumers mentioned in the investigation report.

6.1.3 The Applicant furthermore submits that, as a result of the Form 16’s not having been filed, it was impossible for the Applicant to establish whether the Respondent complied with the prescribed timeframes in respect of the issuing of Form 17.1 and 17.2 to credit providers and credit bureaus.

6.1.4 The Applicant submits that this contravention occurred on all of the files examined and includes a list of such consumers as well as copies of the file content in respect of each such consumer 1.

6.2 Contravention of section 86(4)(b)(i) and (ii) read with regulation 42(2) of the Act alternatively contravention of General Condition of Registration 11

6.2.1 In terms of section 86(4)(b)(i) and (ii) of the Act a debt counsellor should, on receipt of an application for debt review, notify (in the prescribed manner and form) all credit providers that are listed in the application and every registered credit bureau.

6.2.2 The Applicant submits that the Respondent repeatedly contravened this section in that she failed, upon receipt of an application for debt review, to notify the credit providers listed in the application and every registered credit bureau. The Applicant furthermore submits that, in some instances, there were no Form 17.1 notifications on file.

6.2.3 The Applicant provided the Tribunal with a list of consumers on whose files this contravention occurred as well as copies of the file content in respect of each such consumer 2.

6.3 Conduct in contravention of regulation 24(5) of the Act

6.3.1 In terms of regulation 24(5) of the Act, a debt counsellor should send a Form 17.1 notification as anticipated by regulation 24(2) of the Act by fax, registered mail or email and the debt counsellor should further keep a record of the date, time and manner of delivery of such notice.

6.3.2 The Applicant submits that the Respondent repeatedly contravened this regulation of the Act in that she either filed no Form 17.1 notifications on the consumer files or in some instances no proof of service of the Form 17.1 notification was found on file.

6.3.3 The Applicant provided the Tribunal with a list of consumers on whose files this contravention occurred as well as copies of the relevant file content in respect of each consumer³.

6.4 Contravention of regulation 55(1)(a) of the Act

6.4.1 In terms of regulation 55(1)(a) the Respondent must maintain records in respect of each consumer relating to its registered activities. These include applications for debt review, copies of all documents submitted by the consumer, copies of rejection letters (if applicable), debt restructuring proposals, court orders or orders from the Tribunal and copies of clearance certificates.

6.4.2 The Applicant submits that the Respondent failed to comply with this provision.

6.4.3 The Applicant submits that, even if the Respondent had complied with the Act, her consumer files did not reflect this. In terms of General Condition 11 the Respondent was required to maintain adequate records and keep relevant copies of documentation in order to demonstrate compliance with the Act and her conditions of registration. The Applicant submits that her failure to do so would constitute a contravention of that condition.

6.4.5 The Applicant provided the Tribunal with a list of consumers on whose files this contravention occurred as well as copies of the relevant file content in respect of each consumer⁴.

6.5 Failure to comply with general condition 2 of Conditions of Registration

6.5.1 In terms of general condition 2 of the Respondent's Conditions of Registration, the Respondent had to perform debt counselling in a manner consistent with the purpose and requirements of the Act and to, in all instances, act professionally and reasonable in a manner that was timely, fair and non-discriminatory and did not bring debt counselling into disrepute.

6.5.2 The Applicant submits that it is clear from the consumer files examined and copied by the inspector that the Respondent acted in contravention of this condition as her services were provided in a manner which brought debt counselling and the Applicant into disrepute.

6.6 Failure to comply with general condition 4 of Conditions of Registration

6.6.1 In terms of general condition 4 of the Respondent's Conditions of Registration the Respondent had to comply with the requirements specified by the Applicant in respect of registering consumers who applied for debt review on the specified database. The Respondent must update such consumer records with the status of the review and post review performance, from time to time.

6.6.2 The Respondent informed the Applicant that she had handed over her consumer files to a new debt counsellor. However, they are still registered in her name on the ncrdebthelp system. The Applicant submits that the only reasonable inference that can be drawn from this is that she failed to update the ncrdebthelp system in contravention of general condition 4 of her Conditions of Registration.

6.6.3 The Applicant submits that the Respondent failed to refer matters to the Magistrate's Court within 60 business days from the date of application for debt review thereby exposing consumers to the risk of receiving termination notices from their credit providers in terms of section 86(10) of the Act.

6.7 Failure to comply with the Specific Condition of Registration

6.7.1 In terms of her specific condition of registration the Respondent was prohibited from receiving payments from consumers or distributing such payments.

6.7.2 The Applicant submits that, in contravention of this prohibition, she nevertheless instructed consumers to pay her directly and then failed to distribute these payments to credit providers. The affidavits obtained from the complainants annexed to the Inspector's investigation report indicate that they dealt directly with the Respondent at all times regarding payments made directly to the Respondent.

6.7.3 The Applicant submits that the table on page 6 of the investigation report, read with the annexures attached thereto, clearly indicates that an amount of R 581 951.24 was paid directly to the Respondent by the employer of the consumers who were under debt review with the Respondent. The Applicant furthermore submits that the Respondent failed to distribute this amount to the credit providers of the affected consumers and also failed to refund the consumers the said amount.

6.7.4 The Applicant provided the Tribunal with a list of consumers on whose files this contravention occurred as well as copies of the relevant file content in respect of each consumer⁵.

7. RESPONDENT'S SUBMISSIONS

7.1 The Respondent failed to oppose the application and the application was therefore dealt with on the basis of an application for default judgment as provided for in Rule 25(3) of the Rules.

7.2 The investigation report however contains certain submissions made by the Respondent. She explained that she handed the funds received from consumers over to SDK Attorneys, Klerksdorp in order for them to attend to the court applications, but that the attorney disappeared with the funds. Furthermore, that she has lodged a complaint with the Law Society annexed to the founding affidavit marked Annexure “A11”.

7.3 The Respondent failed to provide the Applicant with copies of her bank statements, stating that she did not keep record of these

statements and that the account is now closed. The Respondent did however allege that she would contact her bookkeeper and obtain

statements from them, but never did. The bookkeeper eventually furnished the Applicant with copies of such statements, annexed to the investigation report and marked Annexure “A12 – A13”.

8. ISSUES IN AGREEMENT

8.1 Due to the fact that the matter was not opposed there is no explicit agreement between the parties. The application of Rule 13(5) of the Rules of the Tribunal⁶ however renders the entire application to have been admitted.

9. ISSUES IN DISPUTE

9.1 Due to the fact that the matter was not opposed there are no issues in dispute.

10. DEFAULT JUDGMENT

10.1 The Applicant attached to the application proof of service via courier dated 29 January 2013. The application appears to have been served on the Respondent at her address in Midrand. The Tribunal issued a Notice of Complete Filing in respect of the application on 01 February 2013.

10.2 In terms of the provisions of Rule 13 of the Tribunal Rules, the Respondent was supposed to file her response by 22 February 2013, however she failed to do so. The Applicant filed an application in terms of Rule 25(3) for default judgment and the matter was set down for a hearing.

10.3 Rule 3(2)(v)(vi) of the Tribunal Rules provides that the Tribunal may consider applications for default judgment in terms of Rule 25. The said Rule 25(3) provides as follows:

“(3) The Tribunal may make a default order –

- (a) After it has considered or heard any necessary evidence; and
- (b) If it is satisfied that the application documents were adequately served.

This forms the test for application for default judgment before the Tribunal.

10.4 The Tribunal finds that the Applicant has placed sufficient evidence before the Tribunal to make a determination on the matter.

10.5 As far as the second requirement is concerned, the amendment of the Rules by Government Notice 428 of 29 June 2011 clearly provides that the Tribunal need only be satisfied that the application documents were adequately served on the Respondent. This requirement relates to the main application. In this matter the Tribunal was provided with proper proof of service of the main application on the Respondent (page 486 of the paginated pages) and it is therefore submitted that this requirement has also been met.

11. DEREGISTRATION

11.1 In the case of *NCR v JW van Zyl*¹⁷ it was held that a “repeated contravention” in the context of section 57(1) of the Act is a contravention that appeared at least twice, or more than that. Further that a single contravention of different sections of the Act and conditions of registration also constitute repeated contraventions.

11.2 The allegations made and evidence submitted by the Applicant, which was uncontested, clearly indicates that the requirements of Section 57 of the Act have been met in that the Respondent contravened her conditions of registration and the provisions of the Act repeatedly. The lists submitted by the Applicant also clearly indicate which consumers were affected by the Respondent’s conduct.

11.3 Secondly, from a procedural point of view, the investigations conducted by the Applicant complied with the provisions of Section

140(1)(c) of the Act and the requirement of an investigation as prescribed by Section 139(1)(c) of the Act has also been satisfied.

12. FACTORS TO BE TAKEN INTO CONSIDERATION

12.1 When deciding on an appropriate order, the Tribunal must take the following factors into consideration⁸:

1. The seriousness of the contraventions ;
2. The position of the Respondent ;
3. The rights of the consumers.

12.2 The contraventions by the Respondent are serious. Nola Food Corp appointed the Respondent to see to the debt review applications of 35 of its employees. The Respondent failed to follow the correct procedure as stipulated by the Act and also requested, at a stage, that the monies be transferred to her directly instead of making use of CPE’s services.

12.3 Cancelling the registration of a registrant may have serious consequences for such a person. The Respondent however confirmed she has already handed her consumer files to Mr. Makawala who is currently seeing to the applications. The effect of a possible

deregistration of the Respondent is therefore not as severe as in previous matters heard by the Tribunal.

12.4 The consumers will also not be prejudiced by an order deregistering the Respondent.

13 RELIEF SOUGHT BY THE APPLICANT

13.1 The relief sought by the Applicant, against the Respondent, Is as follows:

- (i) The Respondent's registration as a debt counsellor be cancelled.
- (ii) The conduct of the Respondent be declared in contravention of the Act and the Respondent's conditions of registration. The specific sections are sections 86(1), 86(4)(b)(i) and (ii), regulation 24(1)(a), 24(5) and 55(1) of the Act and Condition 2,4,11 of the General Conditions of Registration and the Specific Condition of Registration.
- (iii) The Respondent be ordered to refund consumers the amount of R 581 951.24
- (iv) All consumer files be surrendered to the Applicant and the Applicant must be furnished with a list of past and present clients.
- (v) Any further order that the Tribunal deems necessary.

13.2 As far as (iii) above is concerned, the Tribunal asked the Applicant to file further information regarding this request by 11 November

2013. However, since that date, the Tribunal has dealt with a similar request by the Applicant in another matter dealing with the deregistration of a debt counselor namely NCR v Dioka NCT 7750/2013/57 (1). In its judgment regarding this matter, the Tribunal dealt extensively with the powers of the Tribunal as set out in the Act as well as previous decisions by the Tribunal. The Tribunal concluded that it is not empowered to order refunds of amounts paid to a debt counsellor intended for payment to a credit provider in circumstances where the debt counsellor failed to effect the payment to the credit provider. Where a consumer has paid amounts to a debt counsellor for payment to a credit provider a consumer must utilize the process set out in section 164 of the Act to claim compensation for any loss or damages suffered.

14. ORDER

(I) The Respondents registration with the Applicant as a debt counsellor is hereby cancelled, with immediate effect.

(ii) The Respondent's repeated contraventions of the National Credit Act 34 of 2005 ("the Act") in particular section 86(1), 86(4)(b)(i) and (ii), regulation 24(1)(a), 24(5) and 55(1) of the Act and section 48(3) of the Act, read with Condition 2,4,11 of the General Conditions of Registration and the Specific Condition of Registration is declared to be prohibited conduct in terms of the Act. Such prohibited conduct is in relation to the list of consumers as set out in Paragraph 11.7.4 of the founding affidavit. and is attached to this order. The Respondent is directed to furnish the Tribunal with the identity number of these listed consumers.

(iii) The Respondent must surrender, all client files to the Applicant, and must furnish the Applicant with a comprehensive list of all past and present clients within ten business days of the Tribunal's order.

(iv) No order as to costs is made.

DATED AT JOHANNESBURG ON THIS 25 DAY OF November 2013

T A Woker

PRESIDING MEMBER

CONCURRING : Ms P Beck (MEMBER) AND Mr X May (MEMBER)

1Paragraph 11.1.2 of the Founding Affidavit.

2Paragraph 11.2.2 of the Founding Affidavit.

3Paragraph 11.3.2 of the Founding Affidavit.

4Paragraph 11.4 of the Founding Affidavit.

5Paragraph 11.7.4 of the founding affidavit.

6For the Conduct of Matters before the National Consumer Tribunal published under GN789 in GG30225 of 28 August 2007 as amended by GenN428 in GG34405 OF 29 June 2011

7NCT/2017/2011/57(1).

8These factors were identified by the Tribunal in the matter of NCR v Van Dyk NCT/2017/2011/57(1). The same factors were considered in other matters such as NCR v Kibogo NCT/2881/2011/57(1) and NCR v Njokweni NCT/70/2009/57(1).

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