

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Nkuta (NCT/78403/2017/57(1)(NCA)) [2018] ZANCT 27 (4 January 2018) [2018] ZANCT 27

COURT

National Consumer Tribunal

BEFORE

K Moodaliyar, N Maseti, PA Beck

CASE / FILE NUMBER

NCT/78403/2017/57(1)(NCA)

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IN

THE NATIONAL CONSUMER TRIBUNAL

Case

No: NCT/78403/2017/57(1)(NCA)

In

the matter between:

NATIONAL

CREDIT

REGULATOR APPLICANT

and

JABULANIRAPHAELNKUTA RESPONDENT

Coram:

Prof

K Moodaliyar

- Presiding member

N

Maseti - Member

PA

Beck - Member

Date

of hearing - 5 December 2017

JUDGMENT**AND REASONS****ADMINISTRATIVE FINE****INTRODUCTION****THE PARTIES**

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").
2. The Respondent is Jabulani Raphael Nkuta, a debt counsellor duly registered as such with the Applicant with registration number NCROC 40 with its principal place of business at Mondeor, South Gate ("the Respondent").

BACKGROUND

3. The Applicant brought an application before the National Consumer Tribunal ("the Tribunal") for the cancellation of the Respondent's registration in terms of section 57(1)(a) and (c) of the Act due to the Respondent's repeated failure to comply with its conditions of registration and repeated contraventions of the Act.
4. The Application followed a complaint received from a Mr Tshabalala that the Respondent was not referring matters to court timeously. The Applicant initiated an investigation into the business practices of the Respondent. In the sample files extracted by the Applicant, no debt restructuring agreements or consent orders were found on the Respondents files nor were any applications for debt restructuring or consent orders to court or to the Tribunal found. It was alleged that as a result of the conduct outlined above, credit providers terminated the debt review process in 459 instances and these terminations were reported at the offices of the Applicant. Alternatively to the latter, it was alleged that the Respondent failed to retain records of matters referred to courts and or the Tribunal.

THE HEARING

5. This matter was set down for hearing on 5 December 2017 and a settlement agreement was subsequently signed with regard to all the alleged contraventions with the exception of the prayer for an administrative fine. In summary, in terms of the settlement agreement the Respondent admitted to be in contravention of the following sections of the Act and the Respondent's Conditions of Registration:

5.1 Section 52(5)(c) read with General Condition 4 of the conditions of registration;

5.2 Section 86(4) read with Regulation 24(2), Regulation 24(6) and Regulation 24(10)7c7c7c">;

5.3 Section 86(4) read with Regulation 24(5);

1.25cm; margin-bottom: 0cm; line-height: 150%"> 5.4 Section 86(6) read with Regulation 24(6) and Regulation 24(10);

1.25cm; margin-bottom: 0cm; line-height: 150%"> 5.5 Section 86(7)(c) read with Section 86(10);

1.25cm; margin-bottom: 0cm; line-height: 150%"> 5.6 Regulation 55 read with General Condition with General Condition 4 and 11;

5.7 General Condition 2 of the conditions of registration;

5.8 General condition 12 of the conditions of registration.

5.9 The Respondent admitted and was found by the Tribunal to be in repeated contravention of the sections of the Act referred to in 5.1 to 5.8 above. The Respondent agreed to refund all consumers within 6 months of the date of the order all amounts obtained as after-care fees over the past three years in instances where no court orders were obtained by the Respondent. The Respondent agreed to submit an audit report to the Applicant within 7 months of the date of the order detailing the amounts of repayments, the recipients of the payments and the steps taken to locate the consumers the Respondent was unable to trace. All client files were agreed to be surrendered to the Applicant by the Respondent within 20 days of the agreement being made an order of the Tribunal.

6. The parties then proceeded at the hearing to make oral submissions with regard to the prayer for an administrative fine.
7. This is the judgment in respect of the prayer for an administrative fine, sought by the Applicant against the Respondent, in the amount of R1 000 000.00 (One Million Rand) alternatively 10% of the Respondents turnover.

CONSIDERATION OF THE ADMINISTRATIVE FINE APPLICANT'S SUBMISSIONS

8. The Applicant made oral and written submissions to the Tribunal arguing for the imposition of an administrative fine of R1 000 000.00 (One Million Rand) or 10% of the Respondents annual turnover, against the Respondent in terms of sections 150(c) and 151 of the Act.
9. It is the submission of the Applicant that the nature and extent of the Respondent's conduct led to an unavoidable conclusion that the Respondent conducts debt counselling in a manner that is contrary to the Act, the Regulations and the Respondent's Conditions of Registration. Thus the Respondent brings the Applicant and debt counselling into disrepute and in so doing the Respondent has contravened the various conditions of the Respondents registration.
10. The Applicants mandate is to protect consumers and to prevent exploitation and for this reason an administrative fine of one million Rand or 10% of the annual turnover of the Respondent would be appropriate in the circumstances.

RESPONDENTS

SUBMISSIONS

11. The Respondent made submissions as follows-

11.1 The main submission of the Respondent was that an administrative fine of R1 000 000.00 (One Million Rand) or 10% of the Respondent's annual turnover is not justifiable in these circumstances.

11.2 The Respondent submits that he has admitted to the contraventions of the Act together with his conditions of Registration and signed a settlement agreement; has co-operated with the Applicant; was not hostile to the Tribunal processes; shown remorse by agreeing to refund consumers; and thereby has not wasted the time of the Applicant and that of the Tribunal.

11.3 In mitigation the Respondent stated that he had no "bad intentions" when conducting the business of debt counselling. By way of explanation the Respondent made submissions that, when the debt counselling business began, business was "brisk" in that the Applicant would refer clients to the Respondent. Once the Applicant ceased to refer clients to the Respondent, the Respondent's

business "died" leading to the Respondent only servicing his existing clients.

11.4 He has co-operated with the NCR by agreeing as part of the settlement agreement to hand over all client files and has agreed as part of the settlement agreement to refund consumers all after cares fees received where he failed to obtain court orders as instructed by the consumer.

11.5 On a personal level he submitted that he is a 63 year old pensioner, sickly, has not conducted the debt counselling business for the past 3 years and is supporting a daughter at university.

11.6 Accordingly, it is the submission of the Respondent that an administrative fine of R1 000 000,00 (one million Rand) alternatively 10% of the Respondent's turnover would not be appropriate and beyond the means of the Respondent.

ANALYSIS

OF THE LAW AND THE EVIDENCE

12. The Tribunal's power to impose an administrative fine is derived from section 151 of the Act. Section 151(1) of the Act provides as follows -

"The Tribunal may impose an administrative fine in respect of prohibited or required conduct in terms of this Act or the Consumer Protection Act, 2008."

Section 151(2) of the Act provides as follows -

"An administrative fine imposed in terms of the Act may not exceed the greater of-

(a) 10 per cent of the respondent's annual turnover during the preceding financial year; or

(b) R1 000 000".

13. Section 151 of the Act does not provide guidance on where the Tribunal should start in making a determination of the amount nor what weight to ascribe to each of the factors listed. It does however clearly mandate the Tribunal to consider the factors as laid down in the Act and to set an upper cap on the administrative fine that may not be exceeded.
14. When determining an amount, the Tribunal must consider the legislation from which it derives its own mandate and consider the factors in Section 151(3) of the Act which provides as follows:

"(a) The nature, duration, gravity and extent of the contravention;

(b) Any loss or damage suffered as a result of the contravention

(c) The behaviour of the respondent;

(d) The market circumstances in which the contravention took place;

(e) The level of profit derived from a contravention

(f) The degree to which the respondent has co-operated with the National Credit Regulator, or the National Consumer Commission, in the case of a matter arising in terms of the Consumer Protection Act, 2008 and the Tribunal; and

(g) Whether the respondent has previously been found in contravention of the Act, or the Consumer Protection Act 2008, as the case may be.

15. We now turn to whether the Tribunal may impose an administrative fine in this particular matter and in so doing also to section 2 of the Act which requires the Tribunal to interpret the Act in a manner that "gives effect to the purposes set out in section 3." Section 3 of the Act, is in summary, to promote and advance the social and economic welfare of South Africans, to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry to protect consumers.

16. The starting point in determining the administrative fine is the annual turnover of the Respondent as defined. It follows that it is incumbent upon the Applicant to place such information before the Tribunal. No annual financial statements were submitted by the Respondent to the Applicant and therefore the Applicant as part of their submissions to the Tribunal stated that the Applicant could not determine the annual turnover of the Respondent. Upon being questioned by the Tribunal as to the means made to determine the annual turnover of the Respondent such as documents submitted to the CIPC, the response of the Applicant was that it was the duty of the Respondent to provide this information to the Applicant. Surely it is the responsibility of the party seeking an administrative fine to take all the necessary steps to place all relevant information such as evidence of the Respondents annual turnover before the Tribunal to assist the Tribunal in arriving at a decision? Does this lack of information however preclude the Tribunal from imposing an administrative fine?

17. In *National Credit Regulator v Werlan Cash Loans* at paragraph 32 The Tribunal stated that: "Section 151(2)(b), establishes an alternative to an administrative penalty of 10% of annual turnover namely R1 000 000,00. Accordingly, where no evidence regarding annual turnover is available, the Tribunal still has the option to award a penalty not exceeding R 1 000 000,00. The Tribunal stated further in the *Werlan* matter that the Tribunal must consider fairness towards both the Applicant and the Respondent, any mitigating factors that can be taken into account in arriving at the final amount of the penalty as well as the evidence before the Tribunal of the Respondent's annual turnover. For this reason we are of the view that the Tribunal may impose an administrative penalty without reference to annual turnover.
18. The application of the factors in section 151(3) of the Act is now appropriate. These factors have been dealt with in a number of Tribunal judgments where without the necessary evidence the Tribunal may not be placed in a position to consider the factors and to apply the aggravating and mitigating considerations.

18.1 From the evidence placed before the Tribunal it is clear that the contraventions of the Act are of a serious nature, namely amongst others the failure to submit form 17.1 timeously, failure to make a determination of affordability of a consumer and the failure to refer matters to court at all thereby seriously prejudicing over indebted consumers. The nature of these contraventions led to consumers being vulnerable and unprotected from credit providers who would exert Section 86(10) termination processes against such consumers. This behaviour showed the Respondents callous disregard for consumers. The Respondent admitted to engaging in such prohibited conduct in the settlement agreement and was accordingly found guilty of prohibited conduct by the Tribunal.

18.2 No evidence has been placed before the Tribunal on quantifiable loss or damage suffered as a result of the contraventions of the Respondent save for the Applicant to say that consumers are prejudiced because the Respondent accepted the after-care fees for a service he had not delivered. The Respondent has admitted to the latter and has agreed to refund consumers the aftercare fees as part of the settlement agreement.

18.3 The Tribunal noted that the Respondent attended the hearing and co-operated with both the Tribunal and the Respondent. However, it did not escape the Tribunal that the Respondent had clarity of mind when it came to his personal circumstances but was less than forthcoming when it came to the details of his transgressions, citing his recent hospitalisation and being medicated as the reasons for not being in a position to provide the Tribunal with accurate details. The Respondent however admitted that he engaged in prohibited conduct as declared and found by the Tribunal. The behaviour of the Respondent was clearly not consistent with the purposes and the requirements of the Act. Said behaviour is in conflict with the best interests of consumers.

18.4 The Applicant was not able to quantify the market circumstances in which the transgressions were committed, save to submit that it was clear that consumers were prejudiced at a time when they were in financial distress and vulnerable. Consumers at the time of entering

in to the debt review process require expert assistance of a debt counsellor on an urgent basis to be protected from credit providers. The Applicant correctly made submissions of the vulnerability of consumers and the exploitation of consumers but was not able to substantiate these allegations nor to place evidence on the market circumstances thereof before the Tribunal.

18.5 Save to submit that a substantial profit was derived from the activities undertaken by the Respondent the Applicant was not able to determine the level of profit derived by the Respondent. It was submitted by the Respondent in mitigation that the Respondent ceased operating his business directly after the investigation by the Applicant.

18.6 Other than the Respondent being found by this Tribunal to be in contravention of the Act and the Respondent's Specific Conditions of Registration by this Tribunal and the Respondent admitting to having engaged in prohibited conduct as found by the Tribunal, no further evidence of any additional contraventions are before the Tribunal.

CONCLUSION

19. In the light of the factors to be taken into account by the Tribunal in Section 151(3) it is the considered view of the Tribunal that all of the factors may have operated in aggravation had evidence been led by the Applicant. There is no doubt that the imposition of an administrative fine is appropriate in the circumstances having regard to the nature of the contraventions and the impact of the Respondents conduct on over-indebted consumers. However, it is also appropriate that the Tribunal applies a rational approach to the prayer for an administrative fine, linking such thinking to the evidence led by the Applicant, evidence led in mitigation by the Respondent, to evidence of the impact on consumers, the annual turnover of the Respondent and balance of the factors cited in Section 151(3) of the Act.
20. Accordingly, it is the considered view of the Tribunal that the imposition of an administrative fine is not appropriate in this particular matter because sufficient evidence was not led to support such a finding.

ORDER

21. In the result the Tribunal makes the following order:

21.1 No order is made to pay an administrative fine.

21.2 No order as to costs is made.

DATED THIS 4TH DAY OF JANUARY 2017

[SIGNED]

PA BECK

PRESIDING MEMBER

Prof. K Moodaliyar (Presiding Member) and N Maseti (Member) concurring.

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