

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Tryco Debt Management (Pty) Ltd (NCT/314933/2024/140(1)) [2024] ZANCT 17 (25 July 2024) [2024] ZANCT 17

COURT

National Consumer Tribunal

BEFORE

N Maseti, S Hockey, C Sassman

CASE / FILE NUMBER

NCT/314933/2024/140(1)

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IN THE NATIONAL CONSUMER
TRIBUNAL
HELD IN CENTURION

Case

number: NCT/314933/2024/140(1)

In

the matter between:

NATIONAL
CREDIT REGULATOR
APPLICANT
and
TRYCO
DEBT MANAGEMENT (PTY) LTD
RESPONDENT

Coram: Ms
N Maseti
- Presiding Tribunal
Member
Mr
S Hockey
- Tribunal member
Adv
C Sassman
- Tribunal Member
Date
of Hearing
- 23 May 2024
Date
of Judgment
-
25 July 2024

JUDGMENT

AND REASONS

INTRODUCTION

1. The applicant in this matter is the National Credit Regulator (the applicant or the NCR), a juristic person established by section 12 of the National Credit Act, 34 of 2005 (the NCA). At the hearing, the applicant was represented by Mr Mboniseni Mathivha, a legal advisor employed by the applicant.
2. The respondent is Tryco Debt Management (Pty) Ltd (the respondent), duly incorporated under the company laws of South Africa. The respondent is not a registrant in any capacity with the applicant in terms of the NCA. The respondent did not appear and was not represented at the hearing of this matter.
3. This is an application made in terms of section 140(1) of the NCA, whereby the NCR seeks an order declaring that the respondent repeatedly contravened various sections of the NCA and its regulations and that such contraventions be declared prohibited conduct in terms of section 150(a). The NCR further seeks additional orders relating to the alleged contraventions, which will be discussed below.

TERMINOLOGY

4. A reference to a section in this judgment refers to a section of the NCA.
5. A reference to a regulation refers to the National Credit Act Regulations, 2006[1] (the regulations).

6. A reference to a rule refers to the Rules of the National Consumer Tribunal[2] (the Tribunal).

CONSIDERATION OF THIS MATTER ON AN UNOPPOSED BASIS

7. The applicant served this application on the respondent by registered post on 15 February 2024 to both the latter's registered and business addresses. The track-and-trace reports from the South

African Post Office show that the registered post reached the correct post offices for the areas where the respondent's registered

and business addresses are situated. These reports further show that notifications were sent to the respondent advising that the posts were ready for collection. In terms of rule 30(3)(b) read with rule 30(1)(b), therefore, the NCR has shown that the application was served on the respondent.

8. In terms of rules 13(1) and (2), a respondent to an application or referral to the Tribunal may oppose the matter by filing an answering affidavit within 15 business days of receipt of the application or referral.
9. The respondent failed to file an answering affidavit within the prescribed period or at all, and the matter was accordingly set down for hearing on an unopposed basis.
10. In terms of rule 13(5), any fact or allegation in an application or referral not specifically denied or admitted in an answering affidavit will be deemed to have been admitted. Since no answering affidavit has been filed, the allegations by the applicant must be deemed to have been admitted by the respondent.

BACKGROUND

11. During 2019 and 2020, the applicant received various complaints from consumers regarding the respondent's business activities. These included that the respondent was conducting business as an Alternative Dispute Resolution Agent (ADR) and a Payment Distribution Agent (PDA) while it was not registered or accredited as such by the applicant. In some of these complaints, it was alleged that the respondent accepted funds from consumers but did not distribute these funds to credit providers, thereby not acting in the best interest of the consumers concerned.
12. The above raised serious concerns that the services rendered by the respondent resembled those of a debt counsellor, whereas the respondent was not registered as a debt counsellor. This invoked a reasonable suspicion with the applicant that the respondent was providing services contrary to the provisions of the NCA, which, if true, constituted prohibited conduct.

13. As a result of the above, on 21 October 2021, the applicant initiated a complaint in terms of sections 136(1)[3], authorising an investigation into the activities of the respondent in terms of sections 139(1)(c)[4].
14. Before the investigation commenced, the applicant's complaints department notified the inspectors authorised to conduct the investigation that they were in possession of further complaints against the respondent. Complaints were filed with the respondent from December 2020 to May 2022. These complaints contained allegations that the respondent was practising as an ADR, PDA, and debt counsellor whilst it was not registered with the applicant in any of these capacities.
15. Consequently, the applicant initiated a further complaint in terms of section 136(2)[5] and authorised an investigation into the respondent's activities in sections 139(1)(c). A copy of the memorandum initiating the complaint and authorising the investigation, together with the additional consumer complaints, is annexed to the papers. An inspector, Tshilidzi Mugwagwa (the investigator), was authorised to conduct the investigation.
16. On 26 August 2022, the inspector conducted an on-site investigation at the respondent's business premises, where he interviewed the respondent's director, Nkele Matsena (Matsena).
17. Before the interview with Matsena, the investigator explained the respondent's rights in terms of section 139(4)[6]. Matsena signed an acknowledgement that she understood her rights.
18. During the interview, Matsena confirmed she was the respondent's director. She further advised that they assisted over-indebted consumers by negotiating with creditors for reduced instalments, did not offer debt counselling services, and that no registered debt counsellors were operating under the business.
19. The investigator randomly selected ten consumer files but was told that some could not be located because of a burglary or were stored at a storage facility. The investigator received files marked D1 to D11 (the sampled files) annexed to the investigation report referred to below.
20. After the on-site investigation, the investigator assessed the consumer files obtained together with the other information received and compiled an investigation report.
21. In its founding affidavit, the applicant describes the modus operandi of the respondent's business after the sampled files have been assessed, as follows:
 - 21.1. The respondent offers debt mediation, conciliation, ADR, PDA, and debt management information services.
 - 21.2. Consumers sign documents giving the respondent authority to act as an intermediary between them and their creditors.

21.3. The respondent is given authority to defer funds directly from the consumers' bank accounts.

21.4. The respondent informs consumers that the services to be rendered are in accordance with section 129.

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21.5. The respondent is given the power of assumption and substitution to be the consumers' lawful representative, agent, and/or broker, purportedly to improve the consumers' financial position.

21.6. The respondent is provided with the authority to finalise a rescheduling, consolidation, moratorium, reduction, or rebate of the outstanding amounts of the consumers' debt with their creditors.

21.7. The respondent is given the authority to renegotiate the terms, conditions, and interest rates of their outstanding debts on the consumer's behalf to arrive at a more affordable, less burdening repayment total. In the alternative, the respondent is provided with the authority to dispute, defend, and oppose any of the consumer's liability and the creditors' alleged illegal or unethical conduct.

21.8. Consumers' debit orders are cancelled, and a new order authorisation is made, allowing the respondent to debit the consumers' accounts directly.

21.9. The consumers signed contracts and special powers of attorneys authorising the respondent to act as discussed above.

21.10. Consumers are required or induced to open new banking accounts and to arrange for their salaries to be paid into these new accounts.

21.11. The respondent communicates with credit providers, advising them that the consumers are over-indebted and/or unable to meet their monthly obligations and that they have been advised to offer re-arranged debt instalments.

21.12. The respondent reduces the monthly instalments as per the advisers to the consumers before any negotiations or arrangements are made with credit providers.

21.13. The respondent pays the creditors' credit providers from the second payment to the bank account from the proceeds of the consumers' available funds.

21.14. The respondent pays itself a fee equal to 100% of the consumers' instalments to a maximum of R3 000, an "aftercare" amount of 15% of amounts deferred, and a management fee of R68 per month.

22. The above facts relating to the modus operandi of the respondent stand uncontested and must, therefore, be accepted in terms of rule 13(5). The facts are also supported by the documents in the sampled files, especially those that consumers had to sign.

23. The way that the respondent conducted its business as described above, together with the fact that it is not registered with the applicant, indicates that it contravened several provisions of the NCA. The contraventions, as alleged by the applicant, will be discussed below.

THE PASSING OFF AS AN ALTERNATIVE DISPUTE RESOLUTION AGENT.

24. The applicant points out that section 1 defines an ADR as “a person providing services to assist in the resolution of consumer credit disputes through conciliation, mediation or arbitration.”
25. Section 134A obliges the applicant to register and accredit ADRs. However, an application for registration as an ADR must follow the procedure set out in regulation 10B and meet the criteria set out in that regulation.
26. The applicant alleges that the respondent misled consumers into believing that it is an ADR and that the services it offers are, therefore, in contravention of section 134A, read with section 1 and regulation 10B.

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27. Unlike the prohibitions in sections 44(2) and 44A(2) against providing the services of a debt counsellor and an ADR whilst being unregistered, the NCA does not prohibit an unregistered person from acting as a creditor's representative in negotiating with credit providers. In terms of section 126A(3), a person who offers to supply, or supplies, any service for the express or implied purpose of improving a consumer's credit

record, credit history, or credit rating or causing a credit bureau to remove credit information from its records concerning the

consumer, may not charge the consumer or receive payment from the consumer until that service has been fully performed. The implication is that a person need not be registered as an ADR to perform these services.

28. During the hearing of the matter, Mr Mathivha conceded that the facts may not appear to indicate a contravention of section 134A, read with section 1 and regulation 10B. He requested time to consider the issue and to prepare a further note thereon. A few days after the hearing, Mr Mathivha confirmed in a note that the applicant abandoned its submissions relating to a contravention of section 134A. The Tribunal will, therefore, pay no further attention to these aspects.

THE RENDERING OF SERVICES RESERVED FOR REGISTERED DEBT COUNSELLORS

29. Section 44(1) stipulates that only a natural person may apply to be a debt counsellor, and subsection (2) prohibits a person from offering or engaging in the services of a debt counsellor in terms of the NCA or holding themselves out to the public as being authorised to offer any such service unless that person is registered as such in terms of the NCA.

30. Regulation 1 defines a debt counsellor as a natural person who is registered under section 44 and offers a debt counselling service. Debt counselling is defined as performing the functions contemplated in section 86. Section 86 deals with the application process for debt review and sets out the functions of a debt counsellor in the process.
31. Documentation in the sampled files shows that the respondent's business activities resemble those of debt counsellors. These activities of the respondent are summed up in paragraph 10.5 of the founding affidavit. They include:
- 31.1. The respondent requests more or less the same information a debt counsellor would from a consumer in an application for debt review in terms of regulation 24(1) and for the completion of Form 16 attached to the regulations.
- 31.2. The respondent makes a determination whether the consumer is over-indebted or unable to satisfy their monthly repayment obligations. This is similar to what a debt counsellor would do in terms of sections 86(6) and (7).
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- 31.3. The respondent draws up a repayment plan and advises consumers of the reduced instalments they must pay to credit providers before negotiating with them.
- 31.4. The consumers pay one instalment into the respondent's account. This payment is intended to cover all payments to credit providers as per the rearrangement plan drawn up by the respondent or the advice to the consumer concerned.
- 31.5. The first instalment paid into the respondent's account is utilised towards the respondent's fee and distributions are made to credit providers only from the second instalment.
- 31.6. The respondent provides a service that includes monitoring the payments made by the consumers to the credit providers.
32. From the above, it is evident that the respondent provides a service reserved for debt counsellors registered with the applicant. Since the respondent is not so registered and has no registered credit providers within its ranks, it has continuously contravened section 44(2).

ENGAGING IN ACTIVITIES OF A PAYMENT DISTRIBUTION AGENT

33. A PDA is defined in section one as "a person who on behalf of a consumer, that has applied for debt review in terms of [the NCA], distributes payments to credit providers in terms of a debt re-arrangement, court order, order of the Tribunal or an agreement".
34. Section 44A(2)(a) prohibits a person from offering or engaging in the services of a PDA or holding themselves out to the public as being authorised to offer such service unless that person is registered as a PDA in terms of the NCA.

35. Regulation 10A sets out the criteria for registration of PDAs. The respondent is not so registered.
36. The sampled files show that the respondent engaged in a service similar to a PDA. The respondent received a monthly payment from the consumers' bank accounts, which was deposited into its account, from which account distributions were made to the relevant consumers' credit providers.

ADMINISTRATIVE FINE

37. The Tribunal has found that the respondent contravened sections 44(2) and 44A(2)(a) by engaging in activities that are preserved for registered debt counsellors and PDAs, respectively. These are serious contraventions in that they defeat the purpose of the NCA, namely to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective, and accessible credit market and industry and to protect consumers by, amongst others, providing for a consistent and harmonised system of debt restructuring, enforcement, and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.[7]
38. To meet the purpose of the NCA, the legislature has put in place various provisions in the NCA and its regulations, including those relating to the registration and regulation of debt counsellors and PDAs. These registrants must meet certain criteria before being registered and allowed to perform the duties prescribed in the NCA. By its actions, the respondent evaded these provisions and acted as debt a counsellor and PDA with impunity. This cannot be allowed. In these circumstances, the Tribunal is of the view that an administrative

fine to be imposed on the respondent is appropriate.

39. In terms of section 151(1), the Tribunal may impose an administrative fine in respect of prohibited or required conduct. Such a fine may not exceed the greater of 10% of the respondent's annual turnover during the preceding financial year or R1 000 000.00.
40. Section 151(3) outlines the factors the Tribunal must consider when determining an appropriate fine. The Tribunal will briefly deal with these factors under their headings below:

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

The respondent engaged in activities that require registration with and accreditation from the applicant under the NCA. The legislature required this for regulatory purposes to protect consumers in general and vulnerable sectors of our society.

As for the duration of these contraventions, it is clear that they have been ongoing for many years. The first complaints from consumers to the applicant were made in 2019.

40.2. The loss or damages suffered as a result of the contraventions.

Consumers have suffered losses because of the respondent's unlawful activities. Many of the consumers used the applicant's service as an ADR but only found out later that the respondent had not been making payments to creditors despite taking deposits from the consumers' accounts every month.

40.3. The behaviour of the respondent.

The respondent was aware of the NCA's provisions in that it followed certain provisions of the NCA, which created the impression that it was acting as debt counsellors and ADRs. By not being registered for these business activities with the applicant, it acted with impunity in circumventing the provisions of the NCA.

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

The respondent operated in a market where consumers were vulnerable and unaware of their rights under the NCA.

40.5. The level of profit derived from the contraventions

Because of the unlawfulness of the respondent's business activities, every payment received from consumers for the services as a debt counsellor and ADR is unlawful. It is not clear what the level of profit that the respondent derived from these activities is.

40.6. The degree to which the respondent co-operated with the NCR

The applicant conceded that the respondent co-operated during the investigation.

40.7. The respondent has previously been found in contravention of the NCA.

The respondent has not previously been found in contravention of the NCA.

41. Having considered the above factors, the Tribunal is of the view that an administrative fine of R200 000.00 is appropriate.

SANCTIONS

42. The Tribunal already found that the respondent contravened sections 44(2) and 44A(2)(a). These contraventions have been continuous and should be declared prohibited conduct.
43. The Tribunal is further of the view that it would be appropriate to interdict the respondent from acting in contravention of the provisions of the aforesaid sections. In this regard, the Tribunal is empowered under section 150(f) to confirm an order against an unregistered person to cease engaging in any activity required to be registered in terms of the NCA.
44. Since the services rendered to the consumers in annexures D1 to D11 are unlawful, it goes without saying that the fees charged for these services are unlawful, and the consumers concerned are entitled to refunds. The Tribunal is of the view that an order to this effect is appropriate and in accordance with section 150(i).

45. The NCR asked for an order that an auditor be appointed by the respondent at its cost to determine and compile a list of all the consumers who utilised the respondent's service and the fees charged to those consumers, as well as a list of consumers who make payments towards the settlement of the credit providers, but which payments were not affected by the respondent. The Tribunal agrees that such an order should be made.

THE ORDER

46. In the result of the above, the following order is made:

46.1. It is declared that the respondent contravened sections 44(2) and 44A(2)(a) of the NCA.

46.2. The aforesaid contraventions are declared prohibited conduct.

46.3. The respondent is interdicted from engaging in any activity that requires registration under the NCA while it is not registered for such activities.

46.4. The agreements between the respondent and the consumers, as contained in annexes D1 to D11, are declared unlawful and void. The respondent is ordered to refund these consumers the fees charged for the unlawful services rendered by the respondent.

46.5. Within 30 business days of the issuing of this order, the respondent shall appoint an auditor, who is a chartered accountant, at its costs to compile a list of consumers who utilised its services, the cost charged to each consumer, and a list of consumers who make payments to the respondent for purposes of paying over instalments to the consumers' credit providers, but which payments, and the amounts, were not affected by the respondent.

46.6. The auditor appointed in terms of paragraph 46.5 shall prepare and submit its report within three months from its appointment to the respondent.

46.7. There is no order as to costs.

S Hockey (Tribunal member)

Tribunal members Ms N Maseti (presiding) and Adv C Sassman concur.

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

[2] GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007 (Government Gazette No. 30225).

[3] This section provides that any person may submit a complaint concerning an alleged contravention of the NCA.

[4] This section provides that upon initiating or accepting a complaint in terms of sections 136, the NCR may direct an inspector investigate the complaint as quickly as practicable.

[5] This section allows for the initiation of a complaint by the NCR in its own name.

[6] This section requires a person being interviewed by an inspector to answer each question truthfully and to the best of his ability, but the person is not obliged to answer any questions if the answer is self-incriminatory.

[7] Section 3(i).

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