

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Van Dyk (NCT/2017/2011/57(1)(P))

[2012] ZANCT 1 (18 January 2012)

[2012] ZANCT 1

COURT

National Consumer Tribunal

BEFORE

T Woker, D Terblanche, X May

CASE / FILE NUMBER

NCT/2017/2011/57(1)(P)

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1IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN PRETORIA

CASE No: NCT/2017/2011/57(1)(P)

DATE:18/01/2012

In the matter between

National Credit Regulator.....Applicant

and

Susan Catherina Van Dyk.....Respondent

JUDGMENT

INTRODUCTION

The Applicant is the National Credit Regulator (NCR) and the Respondent is Susan Catherina Van Dyk, a registered debt counsellor with registration number NCRDC179 registered with the NCR in terms of section 44 of the National Credit Act 34 of 2005 (the Act).

On 6 September 2011 the Applicant commenced proceedings before the National Consumer Tribunal (NCT) for an order in the following terms:

The Respondent should be declared to be in repeated contravention of the provisions of her conditions of registration and section 86 of the Act read with regulation 24. The abovementioned contraventions must be declared prohibited conduct in accordance with section 150(a) of the Act;

the Respondent's registration with the Applicant as a debt counsellor must be cancelled in accordance with section 150(g) of the Act; The Respondent must be ordered to surrender all her client files to the Applicant and to furnish the Applicant with a list of all past and present clients. The order must be complied with within 10 (ten) days of the order The Respondent must be ordered to refund all her existing clients and or consumers who were under debt review with the Respondent, the ten percent (10%) paid by such consumers to the Respondent and to furnish the Respondent with proof of such payment within 10 (ten) days from the date of the order;

The Respondent must be ordered to pay an administrative fine in terms of section 151 of the Act; and or The Tribunal must make any other appropriate order, in terms of section 150(i) required to give effect to the consumers' rights in terms of the Act

BACKGROUND

The Respondent set out that the application was as a result of an investigation into the activities of the Respondent conducted on 19 November 2009 by Koketso Tlou, an inspector employed by the Applicant. This investigation was conducted because of three complaints which the Applicant had received from consumers regarding the Respondent.

During his investigation, Mr Tlou perused 15 files. He perused the files of the three complainants as well as 12 files which were chosen at random. He established that the Respondent was not adhering to the procedures as set out in the Act. (The procedures relating to an application for debt review are set out in s86 of the Act. This section must be read with regulation 24 which prescribes the times within which certain conduct must be done). He also established that the Respondent accepts and distributes funds from consumers and charges consumers a 10% monthly administration fee.

Following the submission of a report by the inspector, the Applicant brought the application for deregistration of the Respondent on the basis that the Respondent has repeatedly failed to comply with the conditions of her registration as a debt counsellor and she repeatedly contravened the Act.

These contraventions were amplified as follows in the application:

During the period 1/2/2008 and 21/10/2009 the Respondent contravened section 86 (4) (b) (i) read with regulation 24 (2) of the Act in that she failed to notify credit providers within 5 business days of receiving an application for debt review, alternatively she contravened her General Conditions of Registration (No11) in that she had failed to maintain adequate records.

During the period 1/2/2008 and 31/10/2009 the Respondent contravened regulation 24 (1) read with regulation 24 (6) and section 86 (6) of the Act in that she had failed to submit the form 17.2 to credit providers within 5 business days of making a determination regarding the consumer's indebtedness or within 35 business days of receiving an application for debt review. In addition the Respondent failed to use the correct form 17.2 as prescribed in terms of the Act. Alternatively, the Respondent contravened her General Conditions of Registration No 11 in that she failed to

maintain adequate records.

During the period 1/2/2008-31/10/2009 the Respondent failed to comply with Condition 2 of her General Conditions of Registration in that she failed to comply with the obligation to perform debt counselling in a manner consistent with the purpose and requirements

of the Act and to in all instances Act professionally and reasonably in providing debt counselling services to consumers to provide such services in a manner that is timely, fair and non-discriminatory and does not bring the NCR or debt counselling into disrepute.

During the period 1/2/2008 and 31/10/2009 the Respondent failed to comply with her Specific Condition of Registration which contains a prohibition on receiving and distributing consumer payments.

THE HEARING

The hearing commenced on 6 September 2011. On that date the Respondent elected to represent herself. The Applicant was represented by Ms N Soobrayan. Although much of the information presented in the Applicant's founding affidavit appeared to be common cause, the Respondent disputed the investigator's findings regarding the various documents which should have been in the files on the date of the inspection. However, the Respondent was unable to present any evidence regarding this because, as she informed the Tribunal, the documents were with her attorney and she needed to get this information in order to contradict the evidence provided by the Applicant (see page 100 - 106 of the record of proceedings on 6 September 2011). The Respondent requested an adjournment to obtain the relevant documents. However, during the proceedings it was established that the Respondent was still collecting funds from consumers and distributing them to creditors which was in contravention of her conditions of registration. The Applicant therefore opposed the application for an adjournment. In order to settle the matter the parties reached an agreement which was then made an order of the Tribunal. This order read as follows:

The matter is postponed until 27 September 2011. The Respondent is warned that no further postponements will be granted and she must be ready to proceed in this matter on 27 September

2011. The Respondent is prohibited from accepting any new applications for debt review from the date of this order (which is today) until the matter has been finalised. The Respondent is directed to cease contravening her conditions of registration by receiving and distributing consumer funds and thereby acting as a payment distribution agency. The Respondent is directed to return all consumers all funds paid to the respondent for distribution to their credit providers. The Respondent is directed with immediate effect to enter into a service level agreement with an NCR approved

PDA and to direct all consumers under debt review with the Respondent to pay all funds intended for distribution to credit providers to the PDA. The Respondent is directed to supply the PDA with all necessary documentations required by them in order to assist them in effectively making payments on behalf of various consumers to credit providers. The Respondent is directed to

furnish a list of all consumers under debt review with the Respondent and all monies received and distributed in respect of those consumers to both the Applicant and the Tribunal within a week from the date hereof. The Applicant is directed to compile a list of the contraventions of the Respondent in a schedule and to present the schedule at the date of the next hearing.

The matter resumed on 27 September 2011. The Respondent was now represented by Mr Grove. The Applicant had drafted the required schedule and the Respondent had submitted numerous documents to the Tribunal regarding her clients. These documents appeared to be computer print outs regarding clients statements of accounts but provided very little guidance for the Applicant or the Tribunal regarding the meaning of various entries. It was difficult for the Applicant and the Tribunal to establish which monies had in fact been received by the Respondent and which monies had been distributed. The hearing did however continue with the evidence presented by the inspector. The Respondent disputed the evidence of the inspector who was alleging that documents which should have been in the files were not there when he conducted his investigation. It became difficult to continue with the hearing because of problems with the various bundles of documents which each party, including the Tribunal, had in its possession. The proceedings were adjourned in order for the Applicant and Respondent to try to find a common way forward.

Despite several attempts to proceed, the matter was ultimately adjourned and the Tribunal requested that the Respondent do the following:

Compile a schedule similar to the one compiled by the Regulator in which it was clearly indicated which documents were present in the file, which documents were not in the file and which were not part of the replying affidavit but which had now been discovered so that the Tribunal could establish which documents were in dispute and which documents were not. (see page 118 of the proceedings on 27 September 2011)

Compile a schedule as was requested in the order issued on 6 September (and which the Tribunal was of the view had not been complied with) indicating which amounts the Respondent had received from consumers and how these had been distributed.

The Respondent was specifically informed that the schedule which she had drafted was basically of “no use to the Tribunal”

(see page 118 of proceedings on 27 September 2011).

In addition the presiding member informed the Respondent as follows:

I must say that I have to agree with the Regulator in that regard, that sitting here trying to work out what money is coming in and how it is being distributed is extremely confusing. (page 123 of proceeding on 27 September 2011).

The Respondent undertook to “sort that out” (page 123). The Respondent was requested to ensure that the two schedules were filed with the Applicant and the Tribunal by 1 November 2011 to enable the Applicant and Tribunal to consider these documents before the continuation of the hearing. The matter was adjourned to 15 November 2011.

On 1 November the Respondent forwarded 4 boxes of documents to the Tribunal which the Tribunal staff put into 18 lever arch files. Despite valiant efforts by the Tribunal staff and members of the Tribunal, the Tribunal members were unable to establish the relevance of these documents other than that they were print outs of financial statements relating to the Respondent’s clients. Neither of the schedules as requested by the Tribunal on 27 September was forthcoming although the Respondent did provide the first schedule at the hearing on 15 November 2011. When it was put to the Respondent that she had failed to comply with the Tribunal’s request relating to the schedules the Respondent maintained that she had complied with the request by sending the boxes of documents which comprised some 6000 pages.

The matter proceeded on 15 November. The cross examination of the inspector by the Respondent which had commenced on 27 September was completed. The Respondent elected not to give evidence, relying instead on all the information which had already been presented to the Tribunal in the various affidavits and documents handed in to the Tribunal and the evidence of the inspector.

SUMMARY OF THE EVIDENCE

From all the evidence, it can be established that the Applicant is concerned about the following conduct and this is the conduct on which the various allegations of contravening the Act and the conditions of registration are based:

The Respondent does not follow the procedures set out in the National Credit Act.

The Respondent receives and distributes funds from consumers.

The Respondent charges consumers a 10% monthly administration fee

The Respondent does not follow the procedures set out in the National Credit Act.

Under this heading there are a number of issues:

The Respondent does not send forms 17.1 to credit providers and credit bureaux within the required time limits.

Regulation 24 (2) states that within 5 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. The Respondent confirmed that there were times when this was not done within the required time. (Initially the complaint contained the allegation that the Respondent did not send the form 17.1 to all credit bureaux. However the Applicant did not pursue this aspect of the complaint because the Respondent put the information onto the Applicant’s debt help line which meant that credit

bureaux would receive the information. Placing the information on the debt help line was in line with a directive sent by the Applicant to all debt counsellors. However, the Applicant continued to pursue the complaint that this was often not done within the required 5 day time period). In some instances, it seems that these forms may have been re-sent and the inspector had sight of the second sending and not the first one. It was not possible for the Tribunal to establish exactly why this was the case. The Respondent

suggested that in some instances the inspector simply did not make copies of all the forms. The inspector informed the Tribunal that he requested the Respondent's own staff to make copies of the files. The Respondent also argued that in some cases consumers may have told her about their other creditors at a later stage, hence the later date for informing those creditors. The inspector accepted that this may have been a possibility. Nevertheless the Respondent admitted that there were times when she did not send the forms within the correct time period.

The Respondent does not sent form 17.2 to credit bureaux

The Respondent confirms that she does not sent form 17.2 to credit bureaux (see opposing affidavit 18.2.) The Respondent denies that she had to send the Form 17.2 to the Credit Bureaux in terms of the Regulations, or the Act or order of court. In terms of Regulation 24

(10) the debt counsellor must submit form 17.2 to all affected credit providers and all registered credit bureaux within five days of completing the consumer's assessment in terms of section 86

(6) of the Act. It appears that the Respondent is unaware of Regulation 24 (10).

The Respondent fails in some instances to send form 17.2 to credit providers.

The Respondent confirms that she does not sent forms 17.2 to credit providers if the "consumer is not paying" (see 18.5 of the opposing affidavit). In addition the Respondent did not use the form which is prescribed in the Act but used her own form obtained from another debt counsellor. The Respondent was unaware of the prescribed form and some of the prescribed information was missing from her form.

The Respondent has difficulty complying with the procedures set out in the Act.

The Applicant is of the view that the Respondent does not perform her debt counselling duties in a manner which is consistent with the purpose and requirements of the Act and to in all instances act professionally and reasonably in a manner that was timely, fair and non-discriminatory and hence has brought debt counselling into disrepute (see 15.6 of the founding affidavit). It appears from the Applicant's founding affidavit that it is of this view particularly because the Respondent frequently does not conclude the debt review process within 60 (sixty) days and so creditors can terminate the debt counselling process (see 15.6.2 of the founding affidavit). The Respondent confirms that she was often unable to conclude the debt review process within the time limits set out in the Act but explains that she was unable to secure the services of an attorney to assist her with making applications for debt review (see 21 – 23 of the

opposing affidavit). She also argues that credit providers were not acting in good faith when they terminated the debt review process.

The Respondent receives and distributes funds from consumers.

The Respondent confirmed that she receives and distributes funds from consumers. This is in contravention of her specific conditions of registration. The specific conditions read as follows:

The Debt Counsellor may not receive payments from consumers who have applied for debt review or receive payments in respect of their debt obligations that were re-arranged in terms of the Act or distribute such payments to credit providers.

The Respondent explained that she is of the view that she is entitled to do this because her conditions of registration set out a reason why the specific conditions are imposed. The reason is “to prevent a debt counsellor from being involved in payment distribution if such a Debt counsellor does not have adequate staff, infrastructure, systems or procedures in order to safeguard the funds, efficiently distribute funds or account for such funds (see clause B1 of the conditions of registration marked Annexure A1 of the founding affidavit).

The Respondent is of the view that she complies with this requirement and therefore she is capable of distributing funds for consumers (see 25.5 of the opposing affidavit). She is also of the view that there is nothing in the Act or Regulations which prevent her from administering funds.

She also argued that the Vanderbijlpark Magistrate’s Court does not allow for a court order to distribute funds via a Payment Distribution Agent (PDA) (see 25.6 of the opposing affidavit).

The Respondent explained that she uses two bank accounts (see 10.2 of the opposing affidavit). She uses one account to receive money from consumers and the other account to distribute funds in terms of her proposal when necessary.

She is however of the opinion that she only has to distribute funds once a court order is made or a credit provider accepts her proposal (see 10.3 of the opposing affidavit. See also 24.2.1.1 of the opposing affidavit where the Respondent states that she does not pay credit providers when they have indicated that they rejected the proposals and that payments towards said credit providers will only start once a court order is obtained). It seems from a study of the documents submitted by the Respondent that consumers may continue to make payments to the Respondent but if credit providers have not agreed to accept a reduced payment, the funds remain in the Respondent’s account undistributed (see for example the account of Mrs Eddie, one of the complainants in this matter – discussed below).

The Respondent also acknowledged that she selectively distributed amounts to credit providers. She explained that she elected in some instances to pay the credit providers for houses and cars to ensure that credit providers did not unnecessarily terminate the debt review process (see 24.2 of the opposing affidavit).

In some instances she was unable to pay credit providers because consumers did not make payments in terms of their agreements (see for example 24.2.1.2; 24.2.9 and 24.2.10 of the opposing affidavit). She is of the view that she cannot be held responsible when a consumer does not make regular payments (see for example 24.2.1.2 of the opposing affidavit).

She has also used the funds in some instances to pay legal fees (see 25.7 of the opposing affidavit).

The Respondent charges consumers a 10% monthly administration fee.

The Respondent confirms that she charges a 10% debt counselling fee. This fee is made up as follows: 5% PDA fee and 5% debt counselling fee.

The Respondent's conditions of registration state as follows (clause 9):

The Debt counsellor may only charge fees or recover fees from consumers as provided for in the Act and Regulations. The Debt Counsellor may not receive fees, commission or any other remuneration where such income may compromise the independence of the Debt Counsellor in respect of debt counselling services provided to consumers.

At the time when the Respondent was registered as a debt counsellor the only fee which was provided for under the Act was the R50 registration fee. However the Regulator permitted debt counsellors to charge a R3000 fee for single consumers or R4000 fee for married consumers. It seems therefore that the charging of such a fee, although not provided for in the Act, was condoned by the Regulator. In addition debt counsellors are entitled to a 5% fee on the monthly payment as an "after care fee". This fee is paid to debt counsellors by the PDA. The Respondent however deducted the 5% after care fee from the amount paid by the consumer as part of the administration fee. The Respondent also deducted a 5% PDA fee despite the fact that she was not a registered PDA.

EVALUATION

From the above it can be established that there are two separate issues for the Tribunal to consider:

The procedural irregularities in the debt review process as conducted by the Respondent; and

The financial irregularities in the manner in which the business of the Respondent was conducted

The procedural irregularities

Although there was some dispute regarding the documents which the inspector found in the files which he investigated, the Respondent herself admitted that there were times when she did not comply with the time frames specified in the Act. In addition, the Respondent seemed to be unaware of certain requirements in terms of the Act, such as the required form 17.2 and whether or not this form had to be served on the relevant credit bureaux. Based on the Respondent's own version, it is clear that the Respondent at times contravened the Act.

The financial irregularities

The Respondent's conditions of registration clearly state that she is not entitled to take funds from consumers. In addition to her conditions of registration, Regulation 11 of the Act states that a debt counsellor who receives or intends to receive monies on behalf of a consumer and/or distributes such funds to credit providers in terms of debt restructuring must comply with the required legislation and must advise the National Credit Regulator of its receiving or intention to receive and/ or distributing or intention to distribute such funds. Although the Respondent stated that she had informed some of the Applicant's employees that she was receiving funds the Tribunal is of the view that to merely mention this to certain employees of Respondent is insufficient to ensure that the Applicant is properly informed of the Respondent's conduct in order that it may take steps to ensure that the Respondent is in a proper position to receive and distribute funds.

The Respondent paid herself fees which she was not legally entitled to take. She was not a registered payment distribution agent and yet she charged consumers a monthly fee for distributing their funds. The after care fee which she also paid herself is a fee which is paid to a debt counsellor by the PDA for services which are rendered by the debt counsellor. The Respondent took this fee even in circumstances where the consumer has not made a payment for distribution. This practice was admitted by the Respondent.

In addition there appear to be numerous discrepancies in the documents which the Applicant provided. During the hearing the Tribunal raised one issue which it had identified in the account of Mr Joseph and Mrs Martha Barnard (account 662) made a payment of R2000 on 11/12/2009 and yet R900 was deducted as the 10% debt counselling fee. When this was initially pointed out to the Respondent she stated that this was a mistake and she undertook to clarify the issue (27 September 2011). At the hearing on 15 November the Respondent stated that the consumer was supposed to pay R9 000 which was the reason why she had taken R900 as her fee. The account indicates that even where the consumer made no payment at all or paid a minimal amount of R1000, she still deducted her fee of R900. The fee was increased to R923 on 11/12/2010.

The account of Mr Brian Fouche (account no 597) indicates the Respondent also deducted payment distribution fees notwithstanding the fact that the consumer had failed to make any payments for November 2009, December 2009, January 2010, and March 2010.

A perusal of the files indicates that it is a practice of the Respondent to deduct fees for distribution of funds notwithstanding the fact that the consumer fails to make a payment. The Respondent is therefore paying herself a fee despite the fact that no services are provided to consumers.

The account of CE Strydom (as detailed on statement A40) indicates that the consumer applied for debt review during February 2008 and the Respondent charged a debt counselling fee on 9 February 2008. The consumer then made a series of monthly payments in the amount of R1,896.00 per month from 29 February 2008 to 4 September 2008, totalling R13,272.00. On 23 September 2008 the Respondent made a payment to Stadler Attorneys in the amount of R850. The

account is confusing as immediately after the entry on 23 September 2008, there is an entry dated 9 February 2008 in the amount of R6,593.80, which purports to be a refund to the client, followed by a cancellation fee in the amount of R2,250.00 and a sundries fee of R568.20 on 10 February 2008. There is no provision in the Act for a sundries fee as charged by the debt counsellor in this matter. It is also noteworthy from the statement that the Respondent deducted a total of R5,828.20 from the consumer's account despite the fact that the Respondent did not effect payment to a single credit provider on behalf of the consumer, despite having ample funds and opportunity to do so.

A further egregious example examined by the Tribunal is that of Mrs Eddie another complainant in this matter. Mrs Eddie's account indicates that she registered for debt counselling on 14 May 2008. The account reveals that she made a series of payments to the Respondent from 3 June 2008 to 3 September

2009. At one stage the account reflected that the Respondent had R46,587.28 in the account on behalf of the consumer. There is no evidence that any payments were made on behalf of the consumer to any credit providers other than SARS but during this period 6 payments, totalling R42,504.81 were made to attorneys. On 27 August 2009 the account reflects a cancellation fee of R2,250.00.

In her opposing affidavit the Respondent provides the following explanation regarding Mrs Eddie (see page 4 of the opposing affidavit):

I confirm the following action was taken on Mrs Eddie's file where summonses were received. Mrs Eddie applied for debt review of the 14th of May 2008. As stated further in this affidavit, none of the attorneys assisted me in issuing debt review application to Court before Smit & Grove Attorneys, and therefore the application for debt review was only issued on 19th June 2009 under case number 6483/2009. Summons was issued on 31 March 2009 by Changing Tides 17 Pty Ltd (the Plaintiff) under case number 18974/3009 against Mrs Eddie, and my attorney at that stage, CMM Inc Attorneys entered appearance to defend, which was filed on 16th April 2009. The plaintiff thereafter applied for summary judgment which was filed on the 7th of May 2009. CMM Attorneys withdrew as attorneys of record on or about 12th of June 2009 as result of their non-cooperation with the debt review applications. Smit & Grove Attorneys became the attorneys of record in this matter during May 2009, where after they served and filed notice of intention to oppose on the 28th May 2009 on the application for summary judgment. The opposing affidavit was served and filed on 12th June

2009. As stated in paragraph 26.5 below, CMM Attorneys did not refer the debt review applications to court and as stated in the same paragraph, I had much difficulty in finding an attorney who was willing to bring these applications, until Smit & Grove Attorneys crossed my path. Smit & Grove withdrew as attorneys of record on the 27th August 2009 as a result of Mrs Eddie's non-payment of my attorneys account as agreed, to oppose the application for summary

judgment.

It seems clear from both the statement of account and the Respondent's explanation in the Eddie matter that the only people who were paid out of the payments made by the consumer were the Respondent and the attorneys. Despite the fact that the consumer was making regular payments to the Respondent, this money was not paid to the bond holder and so the bond holder took judgment against the consumer and the consumer ultimately lost her home.

What happened in the Eddie case is a clear indication of the prejudice which consumers can face when debt counsellors fail to follow the steps prescribed in the Act relating to the re-arrangement of debts. In particular debt counsellors are obliged to follow the procedures which are clearly set out in section 86 read with regulation 24. The Regulations also provide steps which the debt counsellor can take when there is no co-operation from the credit provider. Regulation 24 (4) provides that when a credit provider fails to provide a debt counsellor with corrected information within five business days of such verification being requested, the debt counsellor may accept the information provided by the consumer as being correct.

During the proceedings it became obvious that the Respondent was unaware of many of the procedures which were being followed in her office and she had to rely on staff for information. She also seemed to be unaware of the specific requirements of the Act and admitted that she had never read the Act itself but relied on the one week's training which she had received before applying to become a debt counsellor.

Taking all the above into account the Tribunal is satisfied that the Respondent repeatedly contravened her conditions of registration as a debt counsellor and the Act. Such contraventions of the Act constitute prohibited conduct and therefore the Tribunal concludes that the Respondent was engaged in prohibited conduct.

In particular the Respondent contravened conditions 2, 9 and 11 of her general conditions of registration and condition 1 of her specific conditions of registration. She also contravened section 86 (4) (b)

- (i) read with Regulation 24 (2) of the Act as well as Section 86 (6) of the Act read with Regulation 24 (6) and Regulation 24 (10) of the Act.

CONSIDERATION OF AN ORDER

In arriving at an appropriate order in this matter the Tribunal takes a number of factors into consideration:

The seriousness of the contraventions;

The position of the Respondent; and

- (3) The rights of the Respondent's existing consumers.

The Tribunal considers the contraventions by the Respondent to be extremely serious. The Respondent's failure to comply with the procedures set out in the Act places consumers at serious risk. This was particularly evident in the Eddie matter when the creditor took action against the consumer at a time when the Respondent appeared to have a significant sum of the consumer's money in her account.

In addition, it appears that the main recipients of the fees paid by consumers were attorneys and the Respondent herself. The Respondent paid herself monthly fees even in circumstances where consumers paid very little or no money at all. This is seriously prejudicial to consumers who, instead of solving their debt problems, would have found themselves further indebted. The Respondent's lack of understanding regarding the Act, as well as the processes in her own office, is of grave concern to the Tribunal.

The Tribunal is well aware that cancelling a registrant's registration has very serious consequences. For a debt counsellor, this means that she must cease acting as a debt counsellor. In the case of the Respondent, her business will be at an end, she will have to dispose of the infrastructure of her business, she will have to retrench her staff and any investment made to set up the business will be lost. However, the Tribunal regards the financial irregularities in this matter to be so serious that deregistration of the Respondent in this matter is an appropriate order.

The Applicant has also asked that the Respondent be ordered to pay an administrative penalty. However the Applicant has not put forward any of the factors set out in section 151 which the Tribunal must consider before an administrative penalty may be imposed. The Tribunal declines therefore to consider an administrative penalty.

The Respondent argued that her existing consumers will be extremely prejudiced if they have to start their debt counselling procedures over again when transferred to another debt counsellor. However, the Applicant informed the Tribunal that it will facilitate the transfer and has done this on a number of occasions (once involving up to 5000 consumers). The Tribunal is satisfied therefore that there will be no prejudice to consumers when they are transferred to another debt counsellor.

The Applicant has also requested that the Respondent be ordered to repay moneys received from consumers which the Respondent was not entitled to. The refunds relate specifically to the 10% administrative fees which the Respondent should not have charged any of her clients, not just those clients who have submitted complaints to the applicant. Here the Applicant acts in the public interest and does not have to wait to receive a complaint before it takes action against a registered entity. In these circumstances, the Applicant is requesting that the Respondent be ordered to repay money to consumers to which she was not entitled. The Respondent was only entitled to a 5% after care fee in circumstances where the Respondent performed certain functions for consumers and this fee would have been paid to the Respondent by the PDA, once those functions had been performed. The Respondent herself was not entitled to decide for herself when she had earned those fees and to deduct the fees from funds which she had taken

from consumers. In addition, the Respondent was not entitled to take a PDA fee. This applies not only to those consumers who have complained to the Applicant, but also to all those consumers who have had this deducted from the funds they paid over to the Respondent, funds which should have been used to pay the consumers' debts.

ORDER OF THE TRIBUNAL

The Tribunal issues the following order:

The Respondent is declared to be in repeated contravention of the general conditions No 2, 9 and 11 and the specific condition of her registration.

(2) The Respondent is declared to be in repeated contravention of the following sections and regulations of the National Credit Act, 2005 :-

- (i) section 86 (4) (b) (i)) read with regulation 24(2);
- (ii) section 86 (6) read with regulation 24 (6) and regulation 24(10).

(3) The Respondent's conduct in repeatedly contravening the general conditions and the specific condition of her registration,

and also her conduct in repeatedly contravening the Act, is declared to be conduct prohibited in terms of section 150(a) of the Act;

(4) In terms of section 150(g) of the Act, the Respondent's registration with the Applicant as a debt counsellor is cancelled,

with immediate effect,;

(5) In terms of section 150 (i) of the Act, the Respondent is ordered to refund all past and current consumers all amounts taken from consumers as administrative fees. The refund shall be paid to each consumer within thirty (30) days of the date of this order. The Respondent is ordered to use her best efforts, in good faith, to locate every consumer for the purpose of affecting the refund.

(6) Pursuant to the order in paragraph 5, the Respondent is ordered to submit a report to the Applicant within 60 days of the date of this order. The report shall detail:-

- (i) the amount of all repayments made by the Respondent;
- (ii) the recipients of all repayments; and
- (iii) the steps taken by the Respondent to locate consumers that she

was unable to trace.

(7) The Respondent is ordered to surrender all of her client files to the Applicant within ten (10) days of the date of this order. She is furthermore ordered to furnish the applicant with a list of all past and present clients within ten (10) days of the date of this order;

- (8) The Applicant shall take reasonable steps to furnish each of the Respondent's consumers who were under debt review with contact details of registered debt counsellors who are willing to continue each consumer's respective debt review; and

Dated this 18th day of January 2012

[signed]

T Woker

Presiding Member

Ms D Terblanche and Mr X May concurring.

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