

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Van Zyl (NCT/3868/2012/57(1)(P))

[2013] ZANCT 14 (14 June 2013)

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COURT

National Consumer Tribunal

BEFORE

P A Beck, F Manamela, FK Sibanda

CASE / FILE NUMBER

NCT/3868/2012/57(1)(P)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN DURBAN

Case

No: NCT/3868/2012/57(1)(P)

DATE: 14/06/2013

In

the matter between:

NATIONAL
CREDIT
REGULATOR.....Applicant
and
JOHAN
WALTER VAN
ZYL.....Respondent

CORAM:

Ms.
P A Beck - Presiding Member
Adv
F Manamela - Member
Mr
FK Sibanda - Member
Date
of Hearing: 2 April 2013

JUDGMENT**AND REASONS**

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 is Johan Walter van Zyl, (“Respondent”) an adult debt counsellor registered with the NCR in terms of section 44 of the Act on 8 June 2007 under registration No NCRD36 (“the Respondent) conducting business under the name and style of J Walter Legal Forum & Associates.

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 his Conditions of registration as a debt counsellor.

1.4 The application was as a result of an investigation into the activities of the respondent conducted by Mr Mark Whale (“Whale”), an inspector employed by the Applicant. The Applicant’s founding affidavit is deposed to by Adv Zwelithini Ronald Zakwe (“Zakwe”), Acting Manager of the Applicant’s Investigations and Enforcement Department.

1.5 At the hearing of this matter, the Applicant was represented by Adv T Prinsloo and the Respondent by Adv B Jorgenson.

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 judgement follows the hearing of this matter on 2 April 2012 at the offices of the Law Society, Kwazulu Natal. This judgment is based largely on written submissions of the parties as well as oral argument of the Applicant and the Respondent.

2.

BACKGROUND

2.1 The Respondent was registered by the Applicant as a debt counsellor, with registration number NCRD36 with effect from 8 June 2007, in terms of section 44 of the Act, subject to certain Specific and General conditions.

2.2 In response to complainants received from consumers, numerous investigations were conducted by the Applicant into the activities of the Respondent between 2007 and March 2010.

2.3 The Applicant is of the view that the investigations revealed consistently that the Respondent had repeatedly contravened and continues to breach the Act and its Regulations, as well as Specific Condition B1 of the Respondents Specific Conditions of Registration.

2.4 Subsequent to the initial investigation, a letter was sent by the Applicant to the Respondent on 17 September 2007, highlighting the following alleged contraventions of the Respondent's Conditions of Registration, the Act and the Regulations:

He collected payments from consumers who applied for debt review and distributed such payments to creditors in contravention of Specific Condition B1;

He failed to use the prescribed form 16 for consumers who applied for debt review as required by Regulation 24(1)(a) of the Regulations;

He failed to register consumers who applied for debt review with the credit bureaus as prescribed in form 17.1 as required by regulation 24(2) and section 86(4)(b)(ii).

2.5 On 25 September 2007, the Respondent's attorney wrote to the Regulator Applicant advising the Regulator Applicant that all of the alleged contraventions have been remedied. In this letter the Respondent indicated that he is of the view that he could receive and distribute funds and that he was of the opinion that he had the necessary infrastructure for this task.

2.6 A follow up inspection of the Respondent was conducted by the Applicant and the outcome thereof revealed that the Respondent did not remedy all contraventions complained of in the letter of 25 September of 2007 addressed to the Applicant by the Respondent. A compliance notice, dated 17 March 2008 was accordingly issued by the Applicant to the Respondent on 10 April 2008. This compliance notice was issued in accordance with sections 48(3) and 55(1) of the Act.

2.7 The Compliance notice dated 17 March 2008 detailed the contraventions of the Respondent and steps to be taken by the Respondent as follows:

Contraventions

Received payment from consumers who applied for debt review and distributed such payments to credit providers (Special Condition B1);

Failed to pay over funds received from consumers who applied for debt review to a PDA approved by the NCR for distribution to respective parties (Special Condition B1);

Charged fees and or recovered fees from consumers who applied for debt review in excess of the limits prescribed by the guidelines and

Charged and / or recovered fees from consumers who have applied for debt review where fees or charges have not been fully disclosed in writing, prior to the debt counsellor accepting an application for debt review (General Condition B9).

Steps to be taken by the Respondent

Refrain from accepting or receiving payment from consumers who applied for debt review;

Refrain from distributing any payments to credit providers on behalf of consumers who applied for debt review;

Within ten days of the compliance notice, submit to the NCR a detailed list of all monies received or collected from consumers indicating any payments made to credit providers in respect of each consumer, indicating any monies received for fees and costs incurred in respect of each payment received from consumers and attaching a copy of the agreement with each consumer in terms of which he acted and which specified the amount of any fee or charge;

Transfer all monies received and collected from consumers and not paid over to a registered credit provider to a registered chartered accountant or admitted attorney nominated by the NCR and

Only charge fees that have been fully disclosed and within the limits prescribed.

2.8 Review proceedings were then instituted by the Respondent requesting the Tribunal to review the compliance notice issued by the Applicant. The parties however came to an agreement on the day that the review was set down for hearing, and the agreement reached between the parties made a consent order of the Tribunal.

2.9 In terms of the consent order, the Respondent was to formally apply to the Applicant for authorisation to receive and distribute monies to credit providers on behalf of consumers and to remove condition B1 of his conditions of his registration. The Respondent was also to pay an administrative penalty in the amount of R30 000,00 on specific conditions. Lastly, the Applicant was permitted in terms of the order to conduct inspections on the Respondent's premises on 48 hours' notice to the Respondent.

2.10 On 10 April 2008, the Respondent made the relevant application to the Applicant as envisaged in para 2.9 above.

2.11 The Applicant appointed Gobodo Forensic and Investigative Accounting (Pty) Ltd ("Gobodo") to conduct an inspection on the Respondents premises to ascertain whether the Respondent had adequate resources, internal controls and capacity to receive funds from consumers and to distribute those funds to credit providers. Gobodo conducted an inspection and produced a report dated 26 November 2008. In terms of the Gobodo-report the Respondent did not at that particular time have adequate resources, internal controls or capacity to receive funds from

consumers and to distribute those funds to credit providers. The Gobodo-report also highlighted that the Respondent levied a 12,5% fee in respect of each amount distributed.

2.12 The Applicant forwarded the Gobodo-report to the Respondent and in its covering letter sought written undertakings and assurances from the Respondent that the inadequacies highlighted in the report would be sufficiently addressed.

2.13 On 17 September 2009 the Respondent agreed to address all of the shortcomings highlighted in the Gobodo-report and undertook to comply within a period of 3 months.

2.14 A follow up investigation by the Applicant revealed that the Respondent had failed to comply with the undertakings and assurances as agreed to on 17 September 2008 and instructed him to cease with payment distributions. In a subsequent affidavit the Respondent advised the Applicant that he had instructed an attorney to register a private company, but that the attorney had failed to carry out his instructions. The Respondent did not deal with the rest of his undertakings in this affidavit.

2.15 On 28 June 2011, the Respondent's attorney wrote to the Applicant denying that the Applicant failed to comply with his undertakings and assurances, but nevertheless sought an extension of time within which to ensure compliance with the undertakings.

2.16 The Applicant refused the extension sought in the letter dated 5 August 2010 to which letter the Applicant received no response. The Applicant then addressed a further letter to the Respondent dated 15 January 2011 advising the Respondent that his application for registration as a PDA was unsuccessful.

2.16.1 Accordingly, in terms of the consent order, the Respondent became liable to pay the final R15 000,00 of the R30 000,000 administrative fine to the Applicant within 10 days of receipt of the notification that his application was unsuccessful.

2.17 The Respondent has failed to pay this amount.

2.18 On 19 January 2011 the Respondent's attorney advised that the Respondent intended to appeal the Applicant's decisions to decline the application for the Respondent to register as a PDA. To date no such application was made.

2.19 The Applicant submits that the Respondent has repeatedly contravened his Specific Conditions of registration as well as the Act and its Regulations and accordingly on 14 January 2012 the Applicant made application to the Tribunal for the cancellation of the Respondent's registration as a debt counsellor and for ancillary relief.

3. ISSUE TO BE DECIDED

3.1 The issue which the Tribunal must first decide is whether Respondent has contravened his Conditions of Registration and the Act.

3.2 Once this decision is made The Tribunal would have to determine:

Whether the contraventions are of such a nature to warrant deregistration of the Respondent as requested by the Applicant and Whether sufficient evidence is placed before the Tribunal to impose a further administrative fine, as requested, by the Applicant.

3.3 In as much as these are key considerations in an application for deregistration, this particular application is very different in that the parties have entered into a consent order which order was made an order of the Tribunal. The Respondent is presently in contempt of an order of the Tribunal. Accordingly, the Tribunal must also consider the effect of non compliance with an order of the Tribunal and its impact on the application before the Tribunal.

4. APPLICANTS SUBMISSIONS

The Applicant alleges that-

4.1 The Respondent has repeatedly contravened Specific Conditions of Registration B1, in that the Respondent has for a period of several years, conducted the business of a Payment Distribution Agency ("PDA") without the approval of the Applicant. Stated differently the Applicant has for a number of years received and distributed funds on behalf of consumers in contravention of Specific Condition B1 of his registration.

4.2 The Respondent continues to contravene section 52(5)(c) of the Act in that he has for a number of years failed to comply with Specific Condition B1.

4.3 The Applicant submits that the Respondent's misconduct is more significant than mere non compliance with provisions of the Act and Regulations and that the conduct of the Applicant Respondent has dire consequences and high costs for consumers who are in financial distress.

4.4 The Applicant submits that the reason for the prohibition to distribute funds if a debt counsellor does not have adequate resources and infrastructure is to safeguard consumer's funds and to ensure that the funds are in fact distributed to credit providers and to discharge consumers' ultimate responsibility in this regard.

4.5 The Applicant submits that if a debt counsellor, who does not have adequate resources and infrastructure is allowed to distribute funds, it will expose consumers to real risk of the possibility that funds may be unaccounted for or not adequately tracked.

4.6 The Applicant submits that the above real risk is realised in relation to the Respondent's previous conduct set out in case NCT/13/2008/56(1) & 59(P). In the current matter monies are unaccounted for in respect of the following consumers:

4.6.1 Imtiaz Shaik

4.6.2 Armstrong

4.6.3 Nel

4.6.4 Shaik

4.6.5 Scheepers

4.6.6 Pienaar

4.6.7 Botha

4.6.8 Laubscher

4.6.9 Shozi and

4.6.10 Ntuli

4.7 The Applicant submits that the Respondent is guilty of repeated contraventions of the Act, its regulations and his conditions of registration (sections 52(5)(c) and 160(1) of the Act and Conditions B1 and the Specific Conditions of Registration).

4.8 The Applicant lastly submits that the Respondent indicated his unwillingness to comply with the Act as a result of his continuous

misrepresentations to the Applicant that he has remedied breaches complained of, when in fact he did not, his refusal to comply with the compliance notice issued, his disregard of the consent order issued by the Tribunal, his failure to comply with the undertakings

and assurances requested and lastly his conduct of continuing to carry on the business of a PDA in breach of his conditions of

registration.

4.9 Accordingly, the Applicant seeks and an order from the Tribunal in the following terms:

4.9.1 cancelling the registration of the Respondent as a debt counsellor;

4.9.2 declaring that the following conduct of the Respondent is in contravention of the Respondent's registration as a debt counsellor and prohibited by the Act:

4.9.2.1 the Respondent's failure to comply with Specific Condition B1;

4.9.2.2 the Respondent's failure to comply with the consent order;

4.9.5.3 directing the Respondent to surrender all client files to the NCR and to furnish the NCR with a list of all past and present clients within ten days of the Tribunal's order;

4.9.2.4 directing the Respondent to pay the outstanding administrative fine of R15 000,00 imposed in terms of the consent order plus interest *a tempore morae*;

4.9.2.5 imposing an administrative fine, in terms of section 151 of the Act, as a further penalty for the Respondent's continued

contravention of the Act, the conditions of his registration as a debt counsellor and the failure to pay the penalty imposed in terms of the consent order.

5. RESPONDENTS

SUBMISSIONS

The Respondent alleges that-

5.1 Central to the application for his deregistration is the allegation that J Walter Legal Forum & Associates CC conducted business as a PDA without first having obtained approval from the NCR.

5.2 The Respondent raised the following main defences to the application for his deregistration:

5.2.1 The application is premature because the Applicant is obliged to first issue a compliance notice after the dismissal of the

Respondents PDA application and before proceeding with the deregistration application. The Respondent submits that in terms of

section 55(6)(b) of the Act, the NCR is obliged to issue a compliance notice after having dismissed the Respondents application for a declaration as a PDA, and may only approach the Tribunal for an order cancelling the registration of the Respondent as a debt counsellor if he failed to comply with a compliance notice or failed to raise an objection in terms of section 56.

5.2.2 The NCR was not empowered to impose Specific Condition B1 as there is no provision in the Act that prohibits the respondent to conduct the business of a PDA. The Respondent is of the view that he is entitled to engage in the activities of a PDA by virtue of Regulation 11 of the regulations published in GNR 489 of 31 May 2006 ("the Regulations").

5.2.3 The Respondent disputes that he did not have the necessary expertise, experience and infrastructure to conduct the business of a PDA.

5.3 The Respondent submits that the application should be dismissed as a result of these procedural irregularities and the failure of the Applicant to first issue a compliance notice.

5.4 The Respondent submits that the application is brought in reaction to a defamation claim which the Respondent launched against the Regulator Applicant and Adv Jan Augustyn.

5.5 The Respondent denied that his actions prejudiced consumers and submits that the investigation done by Whale was shoddy and

superficial and that he did not have an opportunity to engage with Whale iro Whale's report.

5.6 During the course of the hearing Adv Manamela asked the Respondent the following question1:

Adv Manamela: "But what would your response be if one were to argue that the consent order is the result of what was initially in breach. Are you actually saying the Applicant should proceed in terms of all the breaches that actually emanate out of the consent order?"

To which the Respondent replied2:

“That is my argument Sir. ...Yes we did consent to all these things. We consented because, to put it plainly, we did not want to make waves, we did our best to comply, we did our best to appease the Regulator, without success.”

6. COMMON CAUSE

The following is common cause between the parties and therefore not in dispute:

6.1 That the Respondent applied to be a PDA and that this application was declined by the Applicant.

6.2 It is also common cause that the Respondent acts as a PDA, receives payments from consumers iro debt re-arrangements, distributes such payments and charges a fee of 12,5 percent in respect of such amounts distributed.

6.3 That a consent order was entered into between the parties, which order was made an order of the Tribunal and the Respondent has complied in part with the order of the Tribunal by paying over to the Applicant the amount of R15 000,00 of the administrative penalty of R30 000,00 levied by the Regulator Applicant against the Respondent.

7. ANALYSIS OF THE LAW AND THE FACTS

Registration as a debt counsellor

7.1 The first question the Tribunal must consider is the requirements of the Act in regard to the registration of a debt counsellor

7.2 The Act provides the framework for the registration of debt counsellors and the NCR is charged with the registration of debt counsellors. Section 48(2) of the Act if the Act states as follows:

“If the NCR has determined that an applicant qualifies for registration as a debt counsellor the NCR must further consider the application

relating to the Applicant’s education, experience and competence relative to any prescribed standards.”

7.3 Section 48(3) and (4) of the Act provides that:

“(3) The National Credit Regulator, having regard to the objects and purposes of this Act, the circumstances of the application and the applicable criteria set out in the subsections (1) and may propose any conditions on the registration of an applicant by delivering a written notice in the prescribed manner and form setting out the proposed conditions, and the reason for them.”

(4) Conditions contemplated in subsection 3 must be reasonable and justifiable in the circumstances.”

7.4 The Act further provides that where an applicant applies to the NCR to be registered as a debt counsellor and who receives a proposal of conditions from the NCR, may either consent to the agreed conditions (Section 48(6)(a) of the Act) or may reject the proposed conditions. Should the Applicant not consent to the conditions proposed by the NCR such applicant may apply in terms of section 59 of the Act, to the Tribunal for the review of such proposed conditions.

7.5 In the matter before the Tribunal and in response to the Respondent's application to be registered as a debt counsellor, on 8 June 2007 the NCR proposed certain conditions to be attached to the Respondent's application to be registered as a debt counsellor.

7.6 The Respondent did not object to the conditions imposed by the Applicant and in the Respondent's communication with the Applicant on 12 June 2007, the Respondent signified his unqualified written acceptance of the proposed conditions.

7.7. Specific Condition B1 reads as follows:

"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."

7.8 Specific Condition B1 was proposed by the Respondent / Applicant for the following reason:

"To prevent a Debt Counsellor from being involved in payment distribution if such 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."

7.9 In the absence of an objection from the Respondent to Specific Condition B1 in terms of Section 48(5) and (6) of the Act, Specific

Condition B1 became binding on the Respondent and remains binding on the Respondent. Further the Respondent could have applied in terms of Section 49(1)(a) of the Act to the Tribunal for a variation or deletion of Specific Condition B1. No such application was made by the Respondent.

7.10 The Applicants submits that the Respondent contravened Condition B1 of the Respondents Specific Conditions of Registration together with Section 52(5)(c):

"52 Certificate, validity and public notice of registration

(1)...

(2)...

(3)...

(4)...

(5) A registrant must –

(a)...

(b)...

(c) comply with its conditions of registration and the provisions of this Act;

(d)..."

Section 160 (1)

“(1) A person commits an offence who contravenes or fails to comply with an Order of the Tribunal.”

7.11 It is common cause that the Respondent is receiving payment from consumers in respect of debt re-arrangements and that the Respondent is charging a fee of 12,5 percent for amounts distributed. Accordingly, on the Respondents own admission the Respondent is clearly in contravention of Specific Conditions B1 of his registration and the Act.

Requirements for deregistration of a debt counsellor

7.12 The Tribunal must now consider the requirements for deregistration of a debt counsellor.

Section 57(1) of the Act states that :

“... registration in terms of the Act may be cancelled by the Tribunal on request by the National Credit regulator, if the registrant

repeatedly

a)Fails to comply with the conditions of registration;

b) Fails to meet a commitment in section 48(1); or

c) Contravenes the Act”.

Section 140(1)(c) of the Act stipulates that:

“After completing an investigation into a complaint, the NCR may make an application to the Tribunal if the complaint concerns a matter that the Tribunal may consider an application in terms of any provision of this Act;”

7.13 In the context of Section 57(1) “repeated contraventions” would mean a contravention that appeared at least twice, or more than that. The allegations made and the evidence submitted by the Applicant, shows that the Respondent repeatedly received funds from consumers and distributed these funds to credit providers. The Respondent furthermore repeatedly levied a fee of 12,5 percent for distribution of monies in contravention of his specific conditions of registration.

7.14 Repeated contraventions, in the context of Section 57(1), do not mean that the exact same contravention has to appear more than once. More than a single contravention of different sections of the Act and Conditions of Registration also constitutes repeated contraventions.

7.15 On the Respondent's own admission the Respondent received and distributed funds on numerous occasions. This act is in contravention of the Respondent's Specific Conditions of Registration B1, constitutes repeated contraventions of the Act, its Regulations and the Respondents conditions of registration.

7.16 These acts of the Respondent are aggravated by the fact that the Respondent acknowledges that he is in breach of his Specific

Conditions of Registration B1 and the Act, yet persists in his conduct in wilful disregard of the Act and an Order of the Tribunal.

Application for the Cancellation of the Respondent's Registration is premature

7.17 The Respondent argues that the application for the cancellation of the Respondent's registration is premature.

7.18 Section 55(1) of the Act states that :

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

regulator, if the registrant repeatedly

Fails to comply with the conditions of registration; Fails to meet a commitment in section 48(1); or Contravenes the Act.

7.19 Accordingly, if the NCR has reason to believe that a registrant has failed to comply with a condition of his registration the NCR may, in terms of section 55 of the Act issue a compliance notice to a registrant in accordance with the requirements listed in section 55(3) of the Act. If the registrant complies with the compliance notice, the NCR will issue a compliance certificate.

7.20 Subsection (2) relates to regulated financial institutions and is accordingly not applicable in this matter. If the registrant wishes to have a compliance notice reviewed, the registrant may apply to the Tribunal to review the notice under section 56 of the Act. If an objection is raised to the notice the Tribunal has the power, under section 55(2) of the Act, to "confirm, modify or cancel" all or part of the notice.

7.21 On the other hand section 55(6) deals with the instance where a registrant fails to comply with the compliance notice without raising an objection. The NCR may in these circumstances apply to the Tribunal for an "appropriate order" or refer the matter to the National Prosecuting Authority.

7.22 The issuance of a compliance notice is not a prerequisite for the bringing of an application to cancel the registration of a registrant. The only prerequisite is that the conduct complained of must be a contravention of either the Act, its regulations or conditions of registration and that these contraventions must occur repeatedly.

7.23 Thus the application for cancellation of registration cannot be said to be premature because the Act does not provide for the issuance of a compliance notice prior to the cancellation of a registrants registration.

7.24 In this matter the Applicant issued a compliance notice. A consent order was entered into affording the Respondent to remedy the complaints raised in the compliance notice. Issuing of a further compliance notice would serve no purpose because the Respondent

admitted (in the consent order) that his business of conducting himself as a PDA contravenes Specific Condition B1 and notwithstanding this admission continues unabated with a contravention of Specific Condition B1.

7.25 Section 57 was drafted to address non compliance of this nature which the issuing of a second compliance notice cannot remedy in the face of repeated contraventions of Conditions of Registration and the Act.

7.26 The Respondent's remedy is to appeal the decision of the Applicant not to register him as a PDA but he has elected not to avail himself of this right of appeal.

Consent Order varied the Respondents conditions of registration

7.27 The Respondent argues that the consent order varied the Respondent's conditions of registration. In terms of the consent order entered into by the parties, the Respondent had to apply to the Regulator Applicant for formal authorisation to act as a PDA. It is common cause that this application was refused by the Regulator Applicant.

7.28 There is accordingly no authorisation in place in terms of which the Respondent may act in contravention of Condition B1 of his Conditions of Registration.

7.29 Section 49 of the Act deals with variation of conditions of registration. The relevant section states that the Regulator may

review and propose new conditions upon request of the registrant in the prescribed manner and form. Accordingly, until such time as the Conditions of Registration were formally amended, either by the Regulator Applicant ito Section 49 or the Tribunal, reviewing a decision of the Regulator Applicant ito Section 59(1) of the NCA the Tribunal is of the view that there is in law no basis upon which to suggest that the consent order varied the conditions of registration.

7.30 Section 59(1) is clear and states as follows:

"59 Review or appeal of decisions

A person affected by a decision of the National Credit Regulator under this Chapter may apply to the Tribunal to review that decision, and the Tribunal may make an order confirming or setting aside the decision in whole or in part.”

7.31 The Respondent did not bring an application in terms of Section 59(1) after the Regulator Applicant refused the Respondent’s

application to distribute funds and accordingly the Specific Condition of Registration B1 remains. In any event the above refusal

and subsequent actions occurred after the consent order was entered into and it follows that it would not have been possible for the consent order to amend the conditions of registration. The Tribunal finds that the wording of the consent order is furthermore of such a nature that it is not possible to infer that the intention thereof was to amend conditions of registration.

Respondent is entitled to collect and distribute monies on behalf of consumers in terms of Regulation 11.

7.32 Regulation 11 states as follows:

“A debt counsellor who received or intends to receive monies on behalf of the 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 intention to receive and / or its distributing or intention to distribute funds.”

7.33 The question before the Tribunal is not whether a debt counsellor can conduct the business of a PDA. The question is whether or not this particular debt counsellor is duly authorised to conduct the business of a PDA. In this particular instance the Respondent is prohibited by his conditions of registration from conducting the business of a PDA. This means regardless of whether in law the Respondent is entitled to conduct the business of a PDA, the Respondent’s conditions of registration prohibit him from conducting the business of a PDA (which it does under Specific Condition B1) and he is bound by those conditions, until such time as these conditions are varied or deleted as the case may be.

7.34 It is clear from the papers that the Respondent was granted every opportunity to regularise his position and has failed to do so or to appeal the decision of the Regulator. On the Respondent’s own admission he continues unabated to carry on the business of a PDA in defiance of the Order of the Tribunal.

7.35 Whether or not the Respondent has the necessary infrastructure and expertise to conduct the business of a PDA is not a question this Tribunal has to decide.

8. IMPOSITION OF AN ADMINISTRATIVE PENALTY

8.1 The Applicant argued for the imposition of an administrative penalty on the Respondent. The Tribunal’s power to impose an administrative

penalty is derived from section 151(1) of the NCA.

Section 151 of the Act reads 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 NCA provides as follows –

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

10 percent of the Respondent’s annual turnover during the preceding financial year; or

R1 000 000”.

8.2 In *NCR v Werlan Cash Loans t/a Lebathu Finance*³ the Tribunal stated the following in relation to the aspects to consider when deciding on whether to impose an administrative fine:

When determining an appropriate fine the Tribunal must consider the following factors:

The nature, duration, gravity and extent of the contravention; Any loss or damage suffered as a result of the contravention; The behaviour of the respondent; The market circumstances in which the contravention took place; The level of profit derived from a contravention; 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 Whether the respondent has previously been found in contravention of the Act, or the Consumer Protection Act 2008, as the case may be.

8.3 Section 151 of the NCA does not provide guidance on where the Tribunal should start in making a determination of the amount and what weight to ascribe to each of the factors listed. It does however clearly mandate the Tribunal to consider the factors laid down and set an upper cap on the administrative fine that may not be exceeded.

8.4 In the *Werlan*-case above, the Tribunal further stated that the Tribunal must consider fairness towards both the Applicant and the Respondent when considering what would be a just administrative fine to impose.

8.5 In the current matter the Applicant did not deal with each of the factors listed in the Section 151(3) and furthermore did not put any evidence before the Tribunal on the Respondent’s annual turnover. The *Werlan*-case dealt with this aspect and found that even in the absence of evidence related to annual turnover the Tribunal still has the option to award a penalty not exceeding R1,000,000 in order to give effect to the intention of the legislature.

8.6 The purpose of the NCA is set out in section 3 of the Act and can be summarised as 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.

Any loss or damage suffered as a result of the contraventions

8.7 No evidence is 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 of the manual system of the Respondent in that it is not clear how consumers' funds were distributed and whether reconciliations were effective.

The behaviour of the Respondent

8.8 The Tribunal considered that the Respondent has shown a total disregard for the requests and warnings of the Applicant, the various investigations conducted, the issuance of a compliance notice, the consent order of the Tribunal and the lodging of these proceedings before the Tribunal. These compliance and enforcement actions by the Regulator Applicant against the Respondent all constitute aggravating factors impacting the amount and penalty to be imposed. It is clear to the Tribunal that the Respondent's conduct towards the Regulator Applicant is nothing other than a blatant disregard of the Act and his Specific Conditions of Registration and contempt of the Order of the Tribunal since 2009.

The market circumstances in which the contravention took place

8.9 No submissions were made by the Applicant.

Level of Profit derived from the contraventions

8.10 No submissions were made by the Applicant in this respect save for the Applicant to state that the Respondent has "profited

handsomely from his activities." The Applicant submitted that the levying of a 12.5 percent fee on consumers by the Respondent is far in excess of what the Respondent "ought to have charged" and what the Respondent "agreed to charge." The Applicant submitted that a proper audit would reveal the level of profiting by the Respondent. The Tribunal views this aspect which is in contravention of Specific Condition B1 as an aggravating factor. The Tribunal finds that on a balance of probability the Respondent has derived a profit from his activities even if one confines the level of profiting only to the charge of the 12,5 percent fee charged to consumers.

The degree to which the respondent has co-operated with the National Credit Regulator and the Tribunal

8.1 It was submitted by the Applicant that the Respondent ultimately did not co-operate with the Regulator Applicant and made undertakings and assurances which he failed to honour. In the Respondent's submission he stated that "Yes we did consent to all these things. We consented because, to put it plainly, we did not want to make waves we did our best to comply, we did our best to appease the Regulator, without success."

The Tribunal finds that the Respondent has shown contempt for the steps taken by the Regulator Applicant and for the Order issued by the Tribunal, which conduct the Tribunal views as an aggravating factor.

Whether the respondent has previously been found in contravention of the Act.

8.2 The Respondent has been found to be in contravention of the Act and the Respondent's Specific Conditions of Registration dating back as far as 2008 resulting in the Applicant issuing a compliance notice to the Respondent. The Tribunal has further made an Order against the Respondent in respect of which the Respondent is in contempt.

9. ORDER

The Tribunal has considered the matter as a whole and has found the Respondent's conduct towards the Act, more particularly his conditions of Registration and towards the Regulator to be an aggravating factor. The Tribunal further finds that the conduct of the Respondent and his blatant contempt of an Order of the Tribunal as a further serious aggravating factor which factor weighs heavily, together with the factors referred to above, in ultimately deciding whether or not to impose an administrative fine upon the Respondent.

In the result the Tribunal makes the following Order:

9.1 Declaring the repeated contravention of the General Conditions and Specific Condition B1 of the Respondent's Conditions of Registration as prohibited conduct;

9.2 Declaring the Respondent to be in contempt of the Order of the Tribunal;

9.5 The Respondent's registration as a debt counsellor is cancelled;

9.4 The Respondent must surrender all client files to the Applicant and must furnish the Applicant with a list of all past and present

clients within ten days of the Tribunal's order;

9.5 The Respondent must pay the outstanding administrative fine of R15 000,00 to the Applicant, imposed in terms of the consent order plus interest a tempore morae;

9.6 Ordering that the Respondent must pay an administrative fine of R100 000,00 by no later than 31 July 2013.

9.7 No order as to costs is made.

DATED THIS 14TH DAY OF JUNE 2013

[signed]

P A BECK

PRESIDING MEMBER

ADV F MANAMELA (MEMBER) AND MR FK SIBANDA (MEMBER) CONCURRING

1 Transcript pg 46 line 6-8

2 Transcript pg 46 line 9-16

3 NCT/3867/2012/57(1)

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