

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Wilbers (NCT/9596/2013/57(1)) [2014] ZANCT 11 (7 April 2014) [2014] ZANCT 11

COURT

National Consumer Tribunal

BEFORE

F Manamela, B Dumisa, J Simpson

CASE / FILE NUMBER

NCT/9596/2013/57(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT/9596/2013/57(1)

In the matter between:

THE NATIONAL CREDIT REGULATOR..... APPLICANT

and

WERNER WILBERS.....RESPONDENT

Coram:

Adv F Manamela – Presiding member

Prof B Dumisa – Member

Adv J Simpson – Member

Date of Hearing – 24 January 2014

JUDGMENT AND

REASONS

- [1] Application for cancellation of Respondent's registration as a Debt Counsellor in terms of Section 57(1) of the National Credit Act, Act 34 of 2005 ("the Act") – Cancellation sought on the basis of repeated failure to comply with conditions of registration and repeated contraventions of the Act.
- [2] Where several sections contravened – Where Respondent failed to pay registration fees for 2011 and 2012 – Tribunal considered provisions of Section 54(2)(b) and whether non-payment of registration fees will result in automatic cancellation or lapsing of registration – Tribunal referred to Lightning Cash Loans-matter and held that Section 54(2)(b) applies to all registrants in terms of the Act – Where no basis for a finding that Tribunal should depart from previous judgment in Lightning Cash Loans-matter – Respondents registration as Debt Counsellor therefore regarded as having automatically lapsed in 2011 when registration fees were due and payable – Tribunal unable to grant application for cancellation of registration which have lapsed.
- [3] Tribunal not empowered to order refund of amount paid to Debt Counsellor and intended for distribution to Credit Provider but not paid over to Credit Provider – Where consumer should use Section 164 of the Act to claim compensation for damages suffered in such event – Tribunal is however empowered to order refund of any excess fees charged.
- [4] Where administrative penalty sought but no submissions were made regarding fine to be imposed, no evidence placed before Tribunal

which could be used to consider factors prescribed by Section 151(3) – Tribunal unable to impose administrative penalty.

- [5] Request by Tribunal to parties to provide documents must be strictly adhered to.
- [6] Application for deregistration refused as registration lapsed in 2011. Respondent to surrender all client files to Applicant and provide contact list of all clients. No order as to costs.

APPLICANT

- 1. The Applicant in this matter is the National Credit Regulator, a body established in terms of Section 12 of the National Credit Act 34 of 2005 (the "NCA" or the "Act") (hereinafter referred to as "the Applicant").
- 2. At the hearing the Applicant was represented by Mr Joseph Selolo, an employee of the Applicant.
- 3. The Applicant's Founding Affidavit is deposed to by Mr Lesiba Jacob Mashapa, Company Secretary of the Applicant.

RESPONDENT

4. The Respondent is Werner Wilbers, a major male conducting business in Rayton as a debt counsellor (hereinafter referred to as “the Respondent”).
5. At the hearing the Respondent did not appear in person and was not represented.

APPLICATION TYPE

6. This is an application in terms of Section 57(1) of the NCA for the cancellation of the Respondent’s registration as a debt counsellor due to the Respondent’s repeated failure to comply with its conditions of registration and/or repeated contraventions of the Act.

BACKGROUND

7. The Respondent was registered by the Applicant as a debt counsellor with registration number NCRDC 685, with effect from 22 July 2008, subject to General and Specific Conditions.
8. At some stage unknown to the Tribunal, the NCR received complaints from consumers who had applied for debt review with the Respondent. It was alleged that the Respondent had received funds from the consumers for distribution to their credit providers, but the funds were never transferred to the credit providers. Specific complaints were lodged by David Nnete Phakisi and Marie Janse van Rensburg.
9. On 01 November 2012, Claire Mordaunt (“the Inspector”) was appointed by the Chief Executive Officer of the Applicant in terms of Section 25 of the Act to conduct an investigation into the Respondent’s business. The investigation was duly conducted by the Inspector on 29 January 2013. This resulted in an investigation report (“the investigation report”)

being submitted to the Applicant.

10. The investigation report revealed that the Respondent started working as a debt counsellor with registered debt counsellors Barry Kotze and thereafter Lourens Jacobs. The Respondent thereafter started his own debt counselling service called Werner Wilbers Debt Counselling Services.
11. In summary the Investigation report states further that the Respondent appeared to only have 7 active debt review files with him, this included the two files for the consumers who had lodged complaints against him. The report describes numerous instances where there were no records of the Form 16 or the debt restructuring proposal as required by Regulation 55. There were instances where legal fees were charged to the consumers but there was no record of legal services being rendered. In one instance the Respondent had charged a fee of R350 which exceeded the limit of R50 as set down by the Act. The Respondent had further failed to pay his registration renewal fees to the Applicant for 2011 and 2012.
12. The Respondent is alleged to have contravened the following sections of the Act:

12.1 Contravention of Regulation 55(1)(a)(i): Failure to keep record of any Form 16;

12.2 Contravention of Regulation 55(1)(a)(iv): Failure to retain proposals;

12.3 Contravention of Section 86(7)(c): Failure to refer matters to court;

12.4 Failure to comply with General Condition 9.2 of General Conditions of Registration:
Charging legal fees where no legal services were rendered;

12.5 Failure to comply with Schedule 2 of the Regulations: Charging application fees that exceed the prescribed fee;

12.6 Failure to comply with Condition B1 of Specific Conditions of Registration: Receipt and distribution of payments from consumers in respect of debt obligations that were restructured;

12.7 Contravention of Section 52(4)(b) read with Section 44(2): Acting as a debt counsellor whilst registration has lapsed due to failure to pay registration fees for 2011 and 2012.

13. In light of these repeated contraventions of the Act, the Regulations and the Respondent's Conditions of Registration, the Applicant applied for the following from the Tribunal:

13.1 In terms of Section 150(a) of the Act, declaring the conduct of the Respondent a contravention of the following sections of the Act, Regulations and Conditions of Registration:

(i) Contravention of Regulation 55(1)(a)(i) of the Act;

(ii) Contravention of Regulation 55(1)(a)(iv) of the Act;

(iii) Contravention of Section 86(7)(c) of the Act;

(iv) Contravention of Section 52(4)(b) read with Section 44(2) of the Act;

(v) Failure to comply with General Condition No. 2 of the Respondent's Conditions of Registration;

(vi) Failure to comply with General Condition No. 9.2 of the Respondent's Conditions of Registration;

(vii) Failure to comply with Specific Condition B(1) of the Respondent's Conditions of Registration;

(viii) Contravention of Schedule 2 to the Regulations to the Act.

13.2 Cancellation of the Respondent's registration as a debt counsellor in terms of Section 57(1)(a) of the Act;

13.3 Requiring the Respondent to refund to the consumers the amounts that were not paid to credit providers;

13.4 Ordering the Respondent to surrender all of his client files to the Applicant and furnish the Applicant with a list of all past and present clients. This order must be complied with, within 10 (ten) days of the granting of the order;

13.5 Imposing an administrative penalty;

13.6 In terms of Section 150(i), make any other appropriate order required to give effect to the consumers' rights in terms of the Act.

APPLICABLE SECTIONS OF THE NCA

14. Section 57

Cancellation of registration

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

Regulator, if the registrant repeatedly –

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

(2) ...”

15. Section 86(7)(c)

Application for debt review

“(7) If, as a result of an assessment conducted in terms of sub-section (6), a debt counsellor reasonably concludes that-

(a)..

(b)...

- (c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders:
 - (i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and
 - (ii) that one or more of the consumer's obligations be re-arranged by-
 - (aa) extending the period of the agreement and reducing the amount of each payment due accordingly ;
 - (bb) postponing during a specified period the dates on which payments are due under the agreement ;

(cc) extending the period of the agreement and postponing during a specified period the date on which payments are due under the agreement, or;

(dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6.”

16. Section 52(4)(b)

Certificate, validity and public notice of registration

“(4) A registration -

- (a) Takes effect on the date on which the certificate or duplicate certificate of registration is issued; and
- (b) Subject to timely payment of the prescribed registration renewal fees, remains in effect until-
 - (i) The registrant is deregistered; or
 - (ii) The registration is cancelled in terms of this Act”

17. Section 44(2)

Registration of debt counsellors

“(2) A person must not offer or engage in the services of a debt counsellor in terms of this Act, or hold themselves out to the public

as being authorised to offer any such service, unless that person is registered as such in terms of this Chapter”

18. Regulation 55(1)(a)

Records of registered activities to be retained by registrants

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

- (a) Debt Counsellors, in respect of each consumer:
 - (i) Application for debt review ;
 - (ii) Copy of all documents submitted by the consumer ;
 - (iii) Copy of rejection letter (if applicable) ;
 - (iv) Debt restructuring proposal ;
 - (v) Copy of any order made by the tribunal and/or the court ;
 - (vi) Copy of the clearance certificate”

19. Schedule 2 of the Regulations

Prescribed Fees

“(2) An application fee charged by a debt counsellor to a consumer when applying for debt restructuring may not exceed R 50.00”

APPLICABLE CLAUSES OF THE RESPONDENT’S CONDITIONS OF REGISTRATION

20. General Condition 2

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

21. General Condition 9.2

“All fees which are payable by the consumer or by any other party in relation to debt counselling performed in terms of the Act, must be disclosed to or agreed by the consumer in writing prior to the debt counsellor accepting application for debt review in terms of Section 86 of the Act. No fee may be recovered from a consumer prior to the delivery of the service in respect of which such a fee is charged.”

22. Specific Condition 1

“The Debt Counsellor may not receive payments from consumers in respect of debt obligations that were re-arranged in terms of the Act or distribute such payments to credit providers. All payments from consumers in respect of debt obligations and/or debt counsellors fees must be received and distributed to the respective parties by a Payment Distribution Agency approved by the National Credit

Regulator.

The specific conditions are proposed for the following reasons:

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

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

THE HEARING

23. At the hearing the Applicant’s representative was requested to firstly address the Tribunal on the applicability of the judgement by the Tribunal in the matter of NCR v Lightning Cash Loans CC[1] to the present matter. After an adjournment to allow Mr Selolo to read the judgment, he made various submissions to the Tribunal.

24. In summary, Mr Selolo submitted that the decision made in the Lightning Cash Loans-matter was incorrect. He submitted that the Act did not provide for an automatic lapsing of a registration. Amongst various other submissions he submitted that the Applicant was only permitted to make changes to a registration in limited circumstances. One of these was where the Tribunal had ordered a cancellation of a registration. There was no provision in the Act, according to Mr Selolo, allowing the Applicant to change a registration by automatic lapsing due to late or non-payment of registration fees. He further submitted that this Tribunal was not bound by the previous judgment and could depart from it.
25. Due to the potential impact of departing from a previous judgment made by the Tribunal Mr Selolo was requested to obtain further instructions from the Applicant to confirm his submissions before proceeding. After a short adjournment Mr Selolo advised the Tribunal that he was unable to contact a senior person at the Applicant. The Tribunal then requested Mr Selolo to provide Heads of Argument to the Tribunal by 7 February 2014. Mr Selolo proceeded to address the Tribunal on the main aspects relating to the application as set out in the founding affidavit.
26. By 7 February 2014 the Tribunal had not received the Heads of Argument as requested. Instead the Registrar received a letter dated 7 February 2014 from Ms Nthupang Magolego, the Manager of the Investigations and Enforcement Department of the Applicant. The letter essentially stated that the Applicant did not agree with the submissions made by Mr Selolo to the Tribunal and therefore regards the Lightning Cash Loans matter as having been correctly decided.

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

27. The Applicant filed the section 57(1) application with the Tribunal on 1 July 2013. Subsequently a Notice of Complete Filing was issued by the Registrar to both the Applicant and the Respondent on 10 July
2013. The notice stated that the Respondent had to file an answering affidavit within 15 business days. To date the Respondent has not filed any answering affidavit or a response to the application.
28. The Applicant did not file an application for a default order in terms of Rule 25(2).
29. Rule 13(5) provides as follows:

“Any fact or allegation in the application or referral not specifically denied or admitted in the answering affidavit, will be deemed to have been admitted”
30. Therefore, in the absence of any answering affidavit filed by the Respondent, the Applicant’s application and all of the allegations contained therein are deemed to be admitted.

CONSIDERATION OF THE EVIDENCE BEFORE THE TRIBUNAL

31. In the absence of any contrary evidence placed before the Tribunal it is accepted that the Respondent repeatedly contravened the Act, Regulations and the conditions of his registration as alleged.

CONSIDERATION OF THE ORDERS APPLIED FOR

Cancellation of the Respondent's registration as a debt counsellor in terms of Section 57(1)(a) of the Act

32. Section 57(1) empowers the Tribunal to cancel the registration of a debt counsellor where he/she repeatedly fails to comply with the conditions of registration or contravenes the Act.
33. In the matter before the Tribunal the Respondent did not pay his registration fees for 2011 and 2012.
34. Section 52(4)(b) states that "A registration – (a) takes effect on the date on which the certificate or duplicate certificate of registration is issued; and
(b) subject to timely payment of the prescribed registration renewal fee , remains in effect until – (i) the registrant is de-registered or (ii) the registration is cancelled in terms of the Act".
35. In the matter of NCR v Lightning Cash Loans[2] the Tribunal considered the effect of section 54(2)(b) and whether the non-payment of registration fees results in an automatic cancellation or lapsing of the registrant's registration. In that matter the Tribunal held that the non-payment of fees resulted in the lapsing of the credit provider's registration and it could therefore not be cancelled subsequent to the lapsing thereof.
36. The Tribunal must consider whether the Lightning Cash Loans decision is applicable to this matter, which would result in the Respondent's registration having lapsed automatically. In the event that the Tribunal is of the view that this decision is applicable to the matter, the application for cancellation would have to be denied.
37. The Applicant's representative argued in the hearing that the Lightning Cash Loans-matter was incorrectly decided and that non-payment of registration fees does not result in an automatic lapsing of the registration. However it must be noted that he did not submit his heads of argument as requested by the Tribunal and the Applicant in fact submitted a letter to the Registrar stating that it agreed with the Lightning Cash Loans-decision.
38. Although the Lightning Cash loans-matter dealt with the de-registration of a credit provider, section 54(2)(b) applies to all registrants in terms of the Act. It therefore applies whether or not the Registrant is a debt counsellor or a credit provider. The Lightning Cash Loans-decision is therefore applicable to this matter.
39. With the greatest of respect to my learned colleagues, the decision made in the Lightning Cash Loans-matter can be subjected to considerable debate. However the Tribunal will only depart from a previous decision made where there are very clear reasons to do so. The Applicant made various oral submissions in this regard but failed to support the

submissions by providing Heads of Argument as requested by the Tribunal. While the Tribunal takes note of the oral submissions, they do not provide a clear basis for a finding that it should depart from the decision made in the Lightning Cash Loans-matter.

40. The Respondent's registration as a debt counsellor is therefore regarded as having automatically lapsed in 2011 when his registration fees were due and were not paid.
41. The Tribunal is therefore unable to grant the application for de-registration.

Requiring the Respondent to refund to the consumers the amounts that were not paid to credit providers

42. In the matter of NCR v Bonney Tebogo Dioka[3] the Tribunal carefully considered whether the Tribunal was empowered to order a refund of amounts not paid over to credit providers. After considering relevant case law and the relevant sections of the Act the Tribunal came to the following conclusion:

"Accordingly, the Tribunal finds that the Tribunal is empowered to order a refund of any excess amount charged. This excess amount could include legal fees, debt counselling fees, administrative fees, amongst others. The Tribunal finds however that it is not empowered to order refunds of amounts paid to a debt counsellor intended for payment to a credit provider in circumstances where the debt counsellor failed to effect the payment to the credit provider. In the instance where a consumer has paid amounts to a debt counsellor for payment to a credit provider a consumer must utilize the process set out in section 164 of the Act to claim compensation for damages suffered."

43. This Tribunal confirms the finding in the Dioka matter and therefore finds that it is not empowered to make an order refunding the consumers for the funds that were not paid over to the credit providers.

Imposing an administrative penalty

44. Section 151(1) of the Act empowers the Tribunal to impose an administrative fine in respect of prohibited or required conduct in terms of the Act. Section 151 (3) lists the 7 factors that must be taken into account when determining the appropriate amount.
45. The Applicant did not make any submissions regarding the amount of the fine to be imposed and did not place any evidence before the Tribunal which could be used in considering the factors prescribed in section 151(3). In the absence of any evidence in this regard the Tribunal is unable to consider the factors listed and is therefore unable to impose any administrative penalty.

CONSIDERATION OF THE APPLICANT'S ACTIONS

46. The Tribunal requested the Applicant's representative, Mr Selolo, to provide Heads of Argument to support the oral submissions he made at the hearing. Mr Selolo failed to provide the Heads of Argument by the due date of 7 February 2014 or indeed at any point thereafter.

47. The Applicant further submitted a letter to the Registrar in which it stated that it disagreed with the submissions made by its own representative.
48. The Tribunal wishes to express its extreme displeasure at the Applicant's failure to provide the Heads of Argument as requested. Mr Selolo could have requested a postponement of the matter if further guidance was required from the Applicant. If Mr Selolo was unable to provide Heads of Argument for whatever reason, then he could have informed the Registrar of the Tribunal of the difficulty and provided an explanation for his failure to provide them.
49. The Applicant is admonished to ensure that the Tribunal's requests, such as providing Heads of Argument, are strictly adhered to.

ORDER

50. Accordingly, the Tribunal makes the following order:

50.1 The application for cancellation of the Respondent's registration as a debt counsellor is refused as the registration is deemed to have lapsed in 2011 already; and

50.2 The Respondent is ordered to surrender all of his client files to the Applicant and to furnish the Applicant with a detailed contact list of all past and present clients of Werner Wilbers Debt Counselling Services. This order must be complied with within 10 (ten) days of receipt of this judgment; and

50.3 No order as to costs.

DATED ON THIS 7th DAY OF APRIL 2014

[signed]

Adv J Simpson

Member

Mr F Manamela (Presiding member) and Prof B Dumisa concurring.

[1] NCT/7281/2013/57(1)(P).

[2] NCT/7281/2013/57(1)(P).

[3] NCT/7750/2012/57(1)(P).

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