

**IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION**

Case number: NCT/4723/2012/57(1)

In the matter between:

THE NATIONAL CREDIT REGULATOR

APPLICANT

and

MADELEINE HEFFERMAN

RESPONDENT

Coram:

Ms Y Carrim – Presiding member

Prof T Woker – Member

Ms P Beck – Member

JUDGMENT

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 (and Registrant) is Madeleine Hefferman ("the Respondent") an adult female debt counsellor, with registration number NCRDC 54. The Respondent is currently working as

the National Marketing Manager of Messrs Inclusive Debt Counselling Services (Pty) Ltd but previously practiced under the name of Messrs Debtcon CC until 2 March 2010.

- 1.3 The Applicant brought an application before the National Consumer Tribunal ("the Tribunal") for an order to have the Respondent's 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 her Conditions of Registration as a debt counsellor.
- 1.4 The application was lodged against the Respondent as a result of 3 complaints lodged with the Applicant by consumers who had applied to the Respondent for debt review. This led to an investigation into the activities of the Respondent conducted by Mr Tlou ("Tlou") an inspector employed by the Applicant. Shortly after this investigation (on 2 March 2010) the Respondent sold her business to another debt counsellor Mr Andre Snyman ("Snyman"). Snyman made a report to the Applicant which then resulted in a follow up investigation conducted by Mr Whale ("Whale"), also an inspector employed by the Applicant. This investigation was conducted on 2 December 2010. The Applicant's founding affidavit was deposed to by Mr Zwelithini Ronald Zakwe, Manager of the Applicant's Investigations and Enforcement Department. The Applicant made an application to the Tribunal for the de-registration of the Respondent on 5 July 2012.
- 1.5 At the hearings into this matter, the Applicant was represented first by Ms Soobrayan (20 March 2013) and then by Mr Selolo (30 January 2014) and the Respondent was represented by her husband, Mr Hefferman, a practicing attorney.
- 1.6 The 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 The matter was first dealt with by the Tribunal on 20 March 2013. Following an agreement reached between the parties, which was made an order of the Tribunal, the matter was adjourned *sine die*. The Registrar of the Tribunal again placed the matter on the Tribunal's roll and the hearing re-convened on 30 January 2014. This judgment follows those hearings and is based on the written submissions and oral arguments of the parties.

2. BACKGROUND

- 2.1 The Respondent was registered by the Applicant as a debt counsellor with registration number NCRDC 54, subject to certain General and Specific Conditions. A copy of the Respondent's NCR Certificate of Registration and the relevant General and Specific Conditions of Registration are annexed to the founding affidavit and marked **Annexure "A1"** and **"A2"** respectively.
- 2.2 The Respondent practised as a debt counsellor under the name of Messrs Debtcon CC situated in Centurion until 2 March 2010 when the business was sold to Snyman and the CC was de-registered. The Respondent stopped practicing as a debt counsellor at that time as she was subjected to a restraint of trade. The Respondent did however intend to practice as a debt counsellor when her restraint came to an end and hence she did not apply to be de-registered as a debt counsellor.
- 2.3 During the course of 2009, the Applicant conducted an investigation into the activities of the Respondent. The Respondent was informed of this investigation and co-operated with the Applicant during the investigation. This investigation was conducted by Tlou and revealed a number of issues related to the timeframes which the Act imposed on debt counsellors as well as concerns regarding the charging of fees. Tlou's report dated 19 March 2010, while noting a number of contraventions in relation to these issues, nevertheless recommended that, instead of a cancellation of her registration, a compliance notice in terms of Section 55 of the Act be issued to the Respondent. The reason given for this recommendation was the fact that the Respondent had approximately 3000 clients under debt review and Tlou was of the view that it would be too disruptive to these consumers for the Respondent's registration to be cancelled.
- 2.4 Subsequent to the investigation, on 2 March 2010, the Respondent sold her business to another debt counsellor, Snyman, who conducted his business under the name of Consumer Assist. As stated above the Respondent was subjected to a restraint of trade and could not practice as a debt counsellor for a period of time.
- 2.5 During 2010 Snyman contacted the Applicant and reported that, in conducting her business, the Respondent had contravened the Act. As a result of this report another investigator, Whale, was appointed to conduct a further investigation. He first visited the offices of Snyman on 30 November 2010 in order to ascertain whether there was merit in the complaint and on 2

December 2010 an appointment certificate to conduct an investigation was issued. The certificate related to the Respondent.

- 2.6 Snyman informed Whale that most of the debt review applications which he had received from the Respondent had been re-done but he provided Whale with 5 client files which he alleged had not been redone. In these files, Whale found evidence that the times lines set out in the Act for the debt counselling process had not been complied with. For example, Form 17.1 forms were not sent out within the 5 day period specified in the Act and the Respondent had failed to make applications to court within the 60 day period. Whale pointed out that the delay in referring the matter to court could result in prejudice to the consumers as credit providers would be entitled to terminate the debt review process in terms of section 86 (10).
- 2.7 Following the investigation Whale concluded that the Respondent had contravened a number of sections of the Act as she had failed to follow the procedures for debt review set out in the Act and she had also contravened her conditions of registration. However Whale also reported that, following the Tlou investigation, the Applicant's monitoring officers conducted an investigation into the Respondent and her fees and had found no irregularities (Whale's investigation report, para 2.5.2).
- 2.8 The Respondent was not informed of this second investigation conducted by Whale, and only became aware of it when the Applicant applied to the Tribunal for cancellation of her registration. At that time the Respondent attempted to access the files which she had handed over to Snyman but had difficulty doing so because of the time lapse, many of her files were no longer available. This meant that the Respondent was hampered in answering many of the allegations made against her. The Respondent's answering affidavit is dated 19 December 2012. She states that the files would have contained notes which would have refreshed her memory regarding the steps which she took relating to each client. She does however acknowledge that during the early days of debt counselling there were many uncertainties regarding the process and that debt counsellors generally experienced many difficulties. These difficulties included the fact that many creditors were hostile to debt counselling, did not co-operate with debt review processes and frequently terminated the process.

3. THE HEARINGS

- 3.1 The first hearing into the matter was held on 20 March 2013. At that hearing the Tribunal members raised a number of concerns specifically related to whether or not any consumers had suffered prejudice because while the Applicant had made general allegations that consumers could have suffered prejudice, no specifics were provided in the documents put up in the application. The Respondent stated that she was willing to compensate any consumers who might have been prejudiced. As a result the parties then reached an agreement which agreement was made an order of the Tribunal. In terms of the agreement, the Applicant was required to provide the details of the consumers who might have been prejudiced and the Respondent was to file a report with the Tribunal (and provide a copy thereof to the Applicant) setting out the details or the steps taken pursuant to her undertaking to compensate consumers and any agreement in respect thereof reached with the Applicant, by no later than 19 June 2013. The matter was then to be enrolled on the Tribunal's roll as soon as possible thereafter. The agreement reached between the parties was made an order of the Tribunal. Despite the fact that the Respondent's restraint of trade had come to an end, the Respondent also undertook at that hearing not to act as a debt counsellor until the matter had been finalised which at the time was anticipated as being shortly after 19 June 2013.
- 3.2 The Respondent contacted the Tribunal on a number of occasions requesting information regarding the order. There appears to have been some confusion between the parties regarding what happened to their respective hard copies of the order. It is however common cause that the Tribunal's order was not complied with.
- 3.3 The Registrar of the Tribunal then set the matter down so that it could be dealt with. The matter was set down for 30 January 2014. At that hearing Mr Selolo on behalf of the Applicant explained that the person who had represented the Applicant at the first hearing, Ms Soobrayan, had left the employ of the Applicant at the end of June 2013 and that she had not informed anyone of this matter. He only became aware of the matter on 17 December 2013 when it was again set down for hearing. Mr Selolo confirmed that, although Ms Soobrayan had left at the end of June 2013, there was no indication in the file that any steps to draft the required report had been taken by the Applicant. This despite the fact that the date for finalisation of the steps set out in the agreement was 19 June 2013, some two weeks before Ms Soobrayan left the employ of the Applicant.

3.4 Although the order of the Tribunal had not been complied with, the parties indicated that they were ready to proceed with the matter. Non-compliance with an order of the Tribunal is an offence and the Tribunal does not have the required jurisdiction to adjudicate on such non-compliance. The Applicant's failure to file a report setting out possible prejudice or loss to consumers per the Tribunal order of 20 March 2013 will therefore not be regarded in the deciding of this matter. From the background facts summarised above it can be seen that this matter had been dragging on for a long period of time and so, in the interests of the justice, the Tribunal decided to proceed with the hearing.

4. ISSUES TO BE DECIDED

Preliminary matters

4.1 As a preliminary matter, the Respondent raised the issue that Whale's report should not be taken into consideration because the certificate of appointment was only issued after he had conducted his inspection and because the Respondent had not been informed of the investigation and so had not had a proper opportunity to prepare a response to the allegations which had been made against her. In this regard the Respondent referred to section 25 (2) of the Act which reads as follows:

When an inspector performs any function in terms of section 139 or Chapter 8, the inspector must –

(a) Be in possession of a certificate of appointment issued to that inspector in terms of subsection (1); and

(b) Show that certificate to any person who-

(i) Is affected by the inspector's actions in terms of this Act; and

(ii) Requests to see the certificate.

4.2 The Respondent argued that when Whale attended Snyman's premises on 30 November 2010, he did not have a certificate because this was only issued on 1 December 2010 and that this certificate was never shown to the Respondent as is required by section 25 (2).

- 4.3 Whale gave evidence under oath in this regard and explained that he went to Snyman's premises on 30 November 2010 in order to ascertain whether there was any merit in Snyman's allegations. It was only after he had established that there was merit, that he proceeded to obtain the required certificate and to conduct the investigation.
- 4.4 The Applicant argued that the section should be interpreted to mean that the inspector was only required to show the certificate to any person at the premises being inspected and who could be inconvenienced by that inspection and that the section should not be interpreted to mean that the Respondent who was under investigation should be shown the certificate.
- 4.5 At that stage the Tribunal did not make a decision on the point *in limine* but elected instead to proceed with the merits of the matter in the interests of finalising the matter. It informed the parties that its arguments on this aspect was placed on record and will be duly considered whereafter the judgment and reasons pertaining to the point *in limine* would be included in this judgment.

Main Issue

- 4.6 The Tribunal must determine whether the Applicant has made out a case for cancellation of the registration of the Respondent.

5. APPLICABLE SECTIONS OF THE NCA

a. 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) ...”

b. Section 86(1)

Application for debt review

"(1) A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted."

c. Section 86(4)(b)(i) and (ii)

Application for debt review

"(4) On receipt of an application in terms of subsection (1), a debt counsellor must-

(a) Provide the consumer with proof of receipt of the application ;

(b) Notify, in the prescribed manner and form-

(i) All credit providers that are listed in the application; and

(ii) Every registered credit bureau

(c) ..."

d. Regulation 24(1)(a)

Application for debt review

"(1) A consumer who wishes to apply to a debt counsellor to be declared over-indebted must:

(a) Submit to the debt counsellor a completed Form 16; and

(b) ..."

e. Regulation 24(2)

Application for debt review

"(2) Within five 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."

6. APPLICABLE CLAUSES OF THE RESPONDENTS CONDITIONS OF REGISTRATION

a. General Condition 11

"The Debt Counsellor must maintain adequate records and keep relevant copies of documentation in order to demonstrate compliance with the Act and conditions and to provide a full record of all communication with a consumer to whom debt counselling services are provided. Such documentation should be retained for a period of 5 years. The Debt Counsellor must provide copies of documentation to the consumer, a credit provider, the NCR or court, upon reasonable request"

b. Specific Condition 1

"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 APPLICANT'S SUBMISSIONS

7.1 The Applicant submitted that its investigations revealed that the Respondent's conduct contravened the Act in that there were instances when she failed to comply with the prescribed timeframes in respect of the issuing of Form 17.1 and 17.2 to credit providers and credit bureaus. She also failed to make application to the courts within the 60 day period and she was taking funds directly from consumers.

8. RESPONDENT'S SUBMISSIONS

8.1 The Respondent denied that she wilfully failed to follow the procedures set out in the Act, but explained that there were times when she faced difficulties either because consumers were not honest with her about their debts or because creditors did not co-operate, or because matters were complicated and required substantial research on her part.

8.2 She explained further that these problems arose in the very early days of debt counselling when many creditors were averse to the debt counselling procedure.

8.3 She also stated that she had co-operated with the Applicant during the first investigation and that as far as she was concerned the matter had been satisfactorily resolved. When she became aware of the second investigation (more than two years after the first investigation and after she had sold her business to Snyman) she had difficulty accessing her files and finding documents which would have shown that she had complied with the Act or which would have given reasons why she had experienced these difficulties.

8.4 As far as the complaint regarding the referral of matters to the Magistrate's Court is concerned, the Respondent argued that debt counsellors faced many difficulties in this regard, particularly when it came to jurisdictional issues and obtaining a court date. The Respondent pointed out

that these issues were the subject of a number of High Court decisions and it was only after these decisions that debt counsellors had more clarity regarding the procedures to be followed.

- 8.5 With regard to the issue of taking funds from consumers, the Respondent explained (which was supported by documentary evidence) that consumers were informed to pay their debt counselling fees into her business account and then to pay their monthly instalments into the account of a payment distribution agent. There were instances where consumers had not followed instructions and had continued to pay their instalments into her account. When this had occurred she had paid the money over to creditors to avoid consumers having their debt counselling process cancelled. In other instances, consumers paid their creditors directly but some consumers failed to keep up with their payments which resulted in creditors terminating the debt counselling process.

CONSIDERATION BY THE TRIBUNAL

9. The history of this matter is complicated. First there was an investigation by Tlou who recommended that the Applicant's registration should not be cancelled. Then the Applicant transferred her files to another debt counsellor. There was ongoing monitoring of the Respondent's and Whale's reports in which the inspectors found no irregularities pertaining to her financial arrangements. (see the Whale investigation report para 2.5.2). Whale then conducted a further inspection after the files had changed ownership. This investigation was limited to only 5 files because, as Snyman informed Whale, these were the only files which were still in their original state as received from the Respondent.
10. Even though the Applicant at the hearing argued that the fees charged by the Respondent were in contravention of the Act, this is not supported out by the Applicant's own investigator's report. In fact Whale's own report, sets out at para 2.5.2 that following the Tlou investigation, the Applicant's monitoring officers conducted an investigation into the Respondent and into her fees and had found no irregularities (Whale's investigation report, para 2.5.2). Hence, the Applicant's recent argument that the Respondent's fees were in contravention of the Act was not supported by its own investigations. In fact, the only contraventions that appeared to be of concern to the Respondent at the time the section 57(1) application was launched were time based concerns

which related to the issue of sending out the required forms within the required time periods and with ensuring that court applications were made within the required time periods.

11. The matter at the Tribunal also took a number of turns. There was an attempt to settle the matter at the previous hearing. At that hearing an agreement (which was made an order of the Tribunal) was struck between the parties. The effect of this was that the Tribunal had to ascertain whether any consumers actually suffered any prejudice. Then Ms Soobrayan left the employ of the Applicant and that agreement/order was never complied with.
12. The matter was enrolled and a point *in limine* raised. The Tribunal decided to hear the matter on the merits so as to avoid any further delays given that the matter was already pending since 2010 and the conduct that was the subject matter of the application related to a period very early in the days of the Act.

Point in limine

13. The Tribunal does not find it necessary to make a definitive finding on how section 25 (2) should be interpreted. This is because regardless of the interpretation which can be placed on section 25 (2) the Tribunal is of the view that in the circumstances of this case, the Respondent should have been informed of the fact that there was a second investigation into her affairs and she should have been afforded a proper opportunity to deal with the allegations which were being made against her both by Snyman and by Whale. The Respondent only became aware of the second (Whale) investigation and allegations some two years after she had transferred her files to Snyman and at that stage it was not possible to access any of her previous files, hence she was denied an opportunity to on the one hand answer to the conclusions reached by Whale at that time and to prepare a proper defence at the time when this Application was launched..
14. Given the fact that the Applicant had already investigated the Respondent once before (Tlou) and seemingly had some kind of ongoing monitoring (according to Whale's investigation report, para 2.5.2) fairness required of the Respondent to notify her of a subsequent investigation for two main reasons: (1) the NCR did not proceed with a section 57(1) application pursuant to the first investigation (this may have given her comfort that further steps were not going to be taken against her) and then (2) when further steps were taken against her she was not given timeous notice so as to enable an opportunity to meaningfully respond thereto.

Merits of the matter

15. Although the Tribunal is of the view that this matter could be dispensed on the basis of this procedural irregularity alone, and that the application must fail on this ground alone, the Tribunal has decided to deal with the merits of the matter because the interests of justice require that this matter be finalised without any further delay.
16. We are of the view that the application for cancellation of registration must also fail on the merits of the matter.
17. This view is based on the fact that before the Tribunal can order the cancellation of the registration of a debt counsellor the Tribunal must be satisfied that the debt counsellor is in repeated contravention of the Act and of her conditions of registration.
18. As we have discussed above, the only contraventions that were of concern to the Applicant and which were supported by its own investigation were the time based concerns and not the payment of fees to the Respondent. Hence it is only the latter which were to be considered by this Tribunal.
19. In order to show that the Respondent is in contravention the Act and her conditions of registration, the Applicant has argued that its investigations show that
 - (1) The Respondent failed to follow the time lines in the Act particularly when it came to forms 17.1 and 17.2; and
 - (2) The Respondent failed to submit matters to the Magistrate's courts within the required 60 day period.
20. As far as the first issue is concerned, the Respondent argued that she was unable to respond effectively to this allegation because she was unable to access her files and only became aware of the second investigation some two years after it took place. The Tribunal accepts that the Respondent was unable to respond fully to these allegations due to the fact that the relevant files had already been transferred to Snyman and she experienced difficulty in accessing same. As a

result thereof there is insufficient evidence before the Tribunal to decide conclusively that the Respondent failed repeatedly to comply with the Act.

21. As far as the second issue is concerned, the Respondent explained the difficulties which debt counsellors were experiencing at the time when it came to referring matters to court. Many of these difficulties were outside her control. The Respondent also submitted that despite her difficulties in this regard, no consumers had been prejudiced by her failure to refer matters to the Magistrates Courts within the required dates.
22. The Tribunal was particularly concerned about the issue of prejudice to consumers and whether or not consumers had suffered loss. The Respondent denied that there had been any such loss which was occasioned by her conduct although she did state that in some instances the process was cancelled by creditors or that consumers themselves withdrew from the process. This she explained was experienced by all debt counsellors and was part of the whole process, especially in the early days of debt counselling when the initial investigation was carried out.
23. The purpose of the agreement, issued as an order on 20 March 2013 was for the Applicant to establish whether or not there had been any prejudice or loss to consumers and for the Respondent to re-imburse or compensate such consumers and then for the parties to come to an appropriate agreement for a way forward. The Applicant was given an opportunity to compile a further report in this regard. This the Applicant had failed to do.
24. There are allegations that the Respondent failed to comply with the Act and with her conditions of registration, but the Tribunal is of the view that there is insufficient evidence to support that this occurred on a scale which justifies cancellation of registration. The contraventions such as they were took place the early days of debt counselling when all parties involved were still finding their feet (some 5-7 years ago). This certainly does not justify cancelling the Applicant's registration in 2014.
25. The application to cancel the registration of the Applicant is therefore dismissed.

DATED AT JOHANNESBURG ON THIS 24th DAY OF FEBRUARY 2014

Prof TA Woker

Member

Ms Y Carrim (Presiding Member) and Ms P Beck (Member) concurring.

Authorised for issue by the National Consumer Tribunal
Case number _____
Date 2014 / 02 / 11
Cc/y / mm / dd
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