IN THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

CASE NO: NCT/6210/2012/57(1) (P)

In the matter between:

THE NATIONAL CREDIT REGULATOR APPLICANT

And

LIEZL DE KLERK RESPONDENT

Coram:

MS Y Carrim	-	Presiding Member
Ms P Beck-Paxton	-	Member
Adv FK Manamela	-	Member

Date of hearing	-	5 December 2013

JUDGMENT

INTRODUCTION

1. The Applicant is the National Credit Regulator ("the NCR"), a juristic person established in terms of section 12 of the National Credit Act, 2005("the Act").

2. The Respondent is Liezl de Klerk an adult female registered debt counsellor with registration number NCRDC757, who does business ostensibly under the name and style of Get-Debt- Free and whose business address is in Pretoria.

BACKGROUND

3. On 2 October 2012, the Applicant filed an application with the National Consumer Tribunal in terms of section 57 (1) (a) and (c) of the Act for the de-registration of the Respondent as a registered Debt Counsellor.

4. The application was brought as a result of the finding made by the Applicant of various contraventions. Details of such contraventions are contained in the inspector's reports compiled by Mr Gwacela following an inspection which took place on the 20th of April 2011 at the Respondent's premises.

5. On 5 February 2013 the Applicant entered into a settlement agreement with the Respondent which culminated into a consent order for consideration by the Tribunal. The said settlement was entered into in terms of Section 138(1) of the Act. The section provides that if a matter has been–

   (a) ...

   (b) Investigated by the National Credit Regulator, and the National Credit Regulator and the respondent agree to the proposed terms of an appropriate order, the Tribunal or a court, without hearing any evidence, may confirm that resolution or agreement as a consent order

6. The Applicant filed an application for default judgment with the National Consumer Tribunal on 6 February 2013. This was accompanied by a consent order or settlement for consideration by the Tribunal.

7. The consent order or settlement agreement was served before the Tribunal on 9 May 2013 in the absence of the Respondent. It appears in the extract of the record of the proceedings that the Tribunal had concerns regarding some of the aspects of the consent order/settlement agreement, more specifically the handing over of files to one Ferdinand de Klerk, the Respondent's husband, who was implicated in the investigation carried out by the Applicant.

8. In light of the concerns raised by the Tribunal, the consent order was set aside. The Tribunal directed that the registration of the Respondent be cancelled and the conduct of the Respondent was found to constitute prohibited conduct. It was ordered that a list of the affected consumers be filed with the Tribunal by 31 May 2013 and that all the consumer files under the Respondent be transferred to another registered Debt Counsellor.

9. The Tribunal's decision of 9 May 2013 was set aside by the North Gauteng High Court for want of compliance with Rule 20(3), following an urgent application brought by the Respondent on 11 June 2013. The High Court remitted the matter back for reconsideration by a different panel of the Tribunal.

CONDONATION APPLICATION

10. In August 2013, the parties lodged applications to the Tribunal to condone non-compliance with a rule or procedure. The submissions made in support of the application persuaded the Tribunal to condone the late filing of the papers as both parties had engaged in interlocutory processes of attempting to further settle the matter before the current hearing. The papers show that the parties have been in settlement discussions up to as recent as August 2013. 30. Neither of the parties would suffer any prejudice if condonation is granted, by reason of the fact that the parties' request for condonation was mutually agreeable and beneficial to both of them.

THE CURRENT PROCEEDINGS

11. The matter was first heard on 19 July 2013. At that hearing the Applicant's legal representative advised the Tribunal of the Applicant's intention to resile from clause 4 of the settlement agreement it had concluded with the Respondent. Clause 4 provided that the consumer files in the Respondent's possession would be transferred to her business partner and husband, Mr Ferdinand de Klerk. The Respondent objected to this stance on the basis that the Applicant had not indicated its change of stance prior to the hearing and that it was prejudicial to the Respondent.

12. Upon closer questioning by the panel it became apparent that the Applicant's legal representative had limited instructions on the reasons why the Applicant had now changed its stance. The Tribunal then adjourned the hearing to a future date in order to provide the parties with a proper opportunity to consider the recent developments and to arrive at some settlement, failing which the Applicant was to file, on affidavit, a proper explanation for its new stance and to provide the Respondent an opportunity to answer both the recent position of the Applicant and the substantive application. The Respondent had to date not filed an answer to the original main application because the parties had concluded a settlement agreement which became the subject matter of this application.

13. At the close of the proceedings of 19 July 2013, the Tribunal issued the following ruling:

    13.1 The parties have agreed that the only outstanding issue relating to the settlement agreement is whether or not the files registered with the Respondent should be transferred to another registered debt counsellor in the employ of Debt-Get-Free or any other associate of the Respondent

13.2 The applicant must file an affidavit within 10 days from the date of the ruling:

13.2.1 in support of its position set out in paragraph 1 hereof;

13.2.2 providing an explanation for its decision to resile from clause 4 of the settlement agreement dated 5 January 2013

13.3 The Respondent must file its answering affidavit within 10 days from receipt of the Applicant's aforesaid affidavit;

13.4 The Applicant must file its replying affidavit, if any within 3 days from receipt of the Respondent's answering affidavit;

13.5 The costs relating to the postponement will be argued when the main application is heard.

14. The parties failed to reach a settlement and filed papers in accordance with the Tribunal's order, save for a delay on the part of the Applicant which had been agreed to by the Respondent and in respect of which both parties sought condonation. The matter was set down for hearing on 5 December 2013.

15. Because of what transpired at the hearing of 5 December 2013 we do not find it necessary to traverse all the submissions made by the parties. Indeed at the hearing of 5 December 2013 the Applicant had changed its stance once again.

16. In its opening statement, the Applicant indicated to the Tribunal that it would not proceed to further persist with the repudiation (or striking out of clause 4) of the settlement agreement as to where the consumer files should be transferred to. While the Applicant had put up its reasons for the earlier refusal to agree that the files be transferred to Mr de Klerk, the Applicant would now abide the decision of the Tribunal.

17. The Respondent in response asked the Tribunal to grant the settlement agreement in its original form as the *onus* rested on the Applicant to state reasons why the original settlement agreement should not be granted and that the Applicant had failed to meet this burden. Moreover the Applicant had not shown why the consumer files ought not to be transferred to Mr de Klerk when the Applicant itself had registered Mr de Klerk as a debt counsellor after the investigation had Get-Debt-Free had taken place and had not alleged any contraventions of his registration by Mr de Klerk .

18. Given the most recent stance of the Applicant, namely that it no longer persists in its repudiation of the settlement agreement, we are of the view that we do not need to evaluate the reasons put up by the Applicant in support of its repudiation and only need to consider the proposed settlement as it was agreed to by the parties initially on 05 February 2013. However in the event that we are found to be wrong on this, we provide brief reasons why we do not find the explanation put up by the Applicant satisfactory. In any event some of the reasoning supports our conclusion that the settlement agreement must be confirmed as an order of this Tribunal.

19. The deponent for the Applicant, Mr Mashamaite, avers that he cannot provide us with the reasons why the Applicant's officials at that time concluded the agreement on those terms simply because such officials are no longer in the employ of the Applicant. Despite this he then engages in, what we consider to be inappropriate speculation as to how the settlement might have come about. None of these averments were persuasive, not only because these were speculative but also because they raised no recognisable legal basis to support a repudiation of the agreement. There was no allegation of absence of or vitiated consent, the lack of authority or fraud on the part of the Applicant's officials. In essence the Applicant's central contention seemingly was that the files ought not to be transferred to Mr de Klerk because he had once before, in the past, contravened the Act because he had practised as a debt counsellor without being registered as such. However, notwithstanding this concern, expressed by the Applicant's in its papers, its own conduct, as pointed out by the Respondent, in the past and at present, contradicted it. The Applicant had registered Mr de Klerk as a debt counsellor notwithstanding the fact of the investigation into Get-Debt-Free. Hence we are not persuaded that the Applicant has any substantial grounds for its repudiation, *qua party*, from the agreement.

20. The only issue that we are left to consider is whether or not we should grant the settlement agreement as a consent order in terms of section 138(1).

APPLICATION OF THE LAW TO THE FACTS

21. In Section 150 of the Act, the orders which may be made by the Tribunal are set out clearly as follows:

"In addition to its other powers in terms of this Act, the Tribunal may make an appropriate order in relation to prohibited conduct or required conduct in terms of this Act, or the Consumer Protection Act 2008, including:
(a) ...;
(b) ...;
(c) ...:
(d) Confirming a consent agreement in terms of this Act or the Consumer Protection Act, 2008 as an order of the Tribunal;
(e) ...;
(f) ...;
(g) ...;
(h) ...;
(i) any other appropriate order required to give effect to a right, as contemplated in this Act or the Consumer Protection Act, 2008".

22. In terms of section 138 (1) of Act 34 of 2005:
If a matter has been-
(a) ...

(b) Investigated by the National credit Regulator and the respondent agree to the proposed terms of an appropriate order, The Tribunal or a court, without hearing any evidence, may confirm that order as consent order.

23. Regulation 20 of the regulations for matters relating to the function of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2008 provides as follows:

"(1) The Tribunal may confirm a resolution or agreement as a consent order-
(a) on application by the facilitator of that resolution or agreement; and
(b) without hearing any evidence.

(2) ...;

(3) If the Tribunal refuses to make the consent order applied for, or requires any changes that a party is unwilling to accept, the Registrar must serve on each party to the agreement or resolution-

(a) a notice that the application has been refused; and

(b) a copy of the agreement or resolution in its original form in respect of which the application was refused".

24. As we have discussed above the only contentious issue in this settlement agreement was whether or not the consumer files ought to be transferred to Mr de Klerk. We are satisfied that the remaining clauses do not give rise to any concern on our part.

25. The requirement in terms of section 150 is that we may grant an appropriate order. In other words the order granted by the Tribunal must be appropriate to the contravention under consideration. However section138 (1)(b) read with regulation 20, suggests that the Tribunal's powers when considering settlement agreements[1] placed before it, are limited or different to those it would otherwise enjoy in a matter that is fully litigated before it.

26. Reading the provisions together we see that the Tribunal may grant the order without hearing any evidence. (138(1)(b)) In the event that it is of the view that it is not appropriate for it to confirm the settlement agreement. In other words, if the Tribunal disagrees with a particular provision of a settlement agreement it must refuse the application and return the agreement to the parties. The Tribunal cannot *mero motu* amend the agreement[2].

27. The underlying policy and reasons for the limitation of the Tribunal's powers in these circumstances are clear. In the first instance if the Tribunal is minded to amend a settlement

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[1] The wording in the statute is not consistent but we have understood section 138(1) to apply in this situation where the parties have arrived at a settlement and seek an order from the Tribunal to confirm this. In substance a settlement of such a nature could arise prior to the commencement of litigation (in which it would be in analogous to a 'plea bargain' of some sort, or during the course of proceedings. This instance of a settlement agreement or consent order is distinguished from debt rearrangement agreements (also called consent orders) arrived at between a debtor and credit providers.

[2] Rule 20 of the Rules for the Conduct of Matters before the Tribunal

agreement which is nothing more than a draft order seeking to settle the dispute between the parties, it cannot do so without granting a hearing to the parties. And where it concerns a matter of substance, the Tribunal is likely to require the placing of relevant evidence before it which might require granting parties an opportunity to examine and cross-examine witnesses. In such a case the proceedings would be converted into contested proceedings even if limited to the issue in dispute. Because a settlement agreement is precisely that – a settlement between the parties without the leading of evidence at all or further evidence depending at what stage of the proceedings such agreement is struck – the standard of review to be applied by the Tribunal can only be one of appropriateness.

28. In the context of the language of section 138 read with section 150 all that we need to consider is whether the agreement between the parties that the files be transferred to Mr de Klerk is an appropriate agreement in the light of the facts placed before us.

29. No evidence has been placed before us that Mr de Klerk is currently in contravention of the provisions of the Act. The only allegation that has been made by the Applicant in this matter is that Mr de Klerk "knew that he could not practice as a debt counsellor without registration". Yet it was the Applicant itself who subsequently registered Mr de Klerk as a debt counsellor. Moreover the consumer files have now been left under the supervision of Mr de Klerk by the Applicant for at least two years, from which the only inference to be drawn is that the Applicant is not unduly alarmed at the existing arrangement. To date no investigation into the practices of Mr de Klerk has been initiated although the Applicant hinted that this might occur at some future date. Hence there is no evidence before us that consumers are being prejudiced in any way or that they will be prejudiced if the files were to remain in Mr de Klerk's possession for now. Finally we also have regard to the fact that the public interest requires us to provide certainty for all parties involved, including the consumers involved in this case that this matter reaches finality.

30. Hence we conclude that the settlement agreement concluded between the parties is an appropriate agreement in the circumstances and grant the application to confirm it as an order of the Tribunal.

31. Our conclusion does not order that Mr de Klerk is a suitable person, that he is complying with all aspects of the Act or that consumers are not being prejudiced by his administration. These are issues for the Applicant to take up and investigate should it wish to do so in future. Our decision is simply limited to whether or not the Tribunal's decision was an appropriate one in the context of the facts placed before us at the time. We have held it is so but wish to make clear that it does no inure Mr de Klerk from further investigation by the regulator.

CONCLUSION

32. The Tribunal is mindful of the fact that this matter has been pending for a considerably long time and wishes to have it concluded. The Tribunal has also considered the fact that the consumers' files have been with the Respondent for a period of two years. To the extent that the Tribunal

should arrive at a decision that would be fair and equitable, the interests of the consumers under debt review should be a deciding factor.

33. On the issue of costs, Section 147(1) provides that each party participating in a hearing must bear its own costs. This section must be read in conjunction with section 141(1) of this Act and /or section 75 (1)(b)of the Consumer Protection Act 2008.

34. The Tribunal makes the following ruling:

34.1 The consent order dated 5 February 2013 is hereby confirmed.
34.2 There is no order as to costs.

DATED AND SIGNED ON THIS 5th DAY OF DECEMBER 2013

Adv FK Manamela
Member

Ms Y Carrim (Presiding Member) And Ms P Beck-Paxton (Member) concurring

Authorised for issue by the National Consumer Tribunal
Case number ______
Date 2014 / 01 / 30
Ccyy / mm / dd

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