

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

Case number: NCT/7939/2013/57(1)

In the matter between:

NATIONAL CREDIT REGULATOR

APPLICANT

and

VANESSA HEWITT

RESPONDENT

Coram:

Ms H Devraj	–	Presiding member
Prof T Woker	–	Member
Prof J Maseko	–	Member

Date of Hearing: 12 November 2015

JUDGMENT AND REASONS

APPLICANT

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, 2005 ("the Act").
2. At the hearing the Applicant was represented by Ms A Du Plooy.

RESPONDENT

3. The Respondent is Vanessa Hewitt, a registered Debt Counsellor (hereinafter referred to as "the Respondent").
4. The Respondent was registered with the Applicant as a Debt Counsellor with registration number NCRDC 268, with its registered place of business in Durban.
5. The Respondent was not present at the hearing and was not represented.

APPLICATION TYPE

6. This is an application in terms of Section 57(1)(a) of the Act for an order to cancel the Respondent's registration as a Debt Counsellor and for certain other ancillary relief as set out more fully in the Applicant's pleadings.

SUMMARY OF THE APPLICANT'S FOUNDING AFFIDAVIT

7. The Applicant's Founding Affidavit is deposed to by Mr. ZR Zakwe in his capacity as Manager: Investigations and Enforcement.
8. The Respondent was registered as a Debt counsellor on 07 February 2008, subject to General and Specific Conditions of Registration.
9. During the course of 2011, a written complaint was lodged by a consumer who had applied for debt review with the Respondent. The consumer alleged that the Respondent had acted improperly in discharging her duties. Subsequent to the complaint, the Applicant's Investigation and Enforcement Department was mandated to conduct an investigation into the business activities of the Respondent.

10. On or about August 2011, the Applicant conducted an inspection at the Respondent's registered business premises. The Applicant ascertained that the Respondent no longer practiced debt counselling at the premises and was directed to another address and again it was ascertained that the Respondent did not practice there either. The Respondent once contacted, agreed to meet the inspector at a hotel in Durban.
11. The Applicants' investigation revealed that the Respondent in conducting her business as a debt counsellor failed to act professionally and reasonably when providing debt counselling services. The Respondent also failed to provide debt counselling services in a manner that was timely, fair and which did not bring the Applicant into disrepute, as per her conditions of registration.
12. The Applicant submits that the conduct exhibited by the Respondent constitutes contraventions in terms of the Act and conditions of registration, which was repeatedly contravened. The specific contraventions as raised by the Applicant relate to the following:-
 - 12.1.1 The Respondent failed to comply with Section 86(4)(b) and Regulation 24(2) in that the Respondent failed to submit the Form 17.1 timeously to each credit provider.
 - 12.1.2 The Respondent failed to comply with Section 86(6)(a) read with Regulation 24(6) and 24(10) in that the Respondent failed to make a determination of over –indebtedness and in some instances the Form 16 and Form 17.2 were not present on the files.
 - 12.1.3 The Respondent failed to comply with Regulation 55(1)(a)(i), (ii), (iv) read with Part A, General Conditions of Registration, Clause 11, in that various documents that formed an integral part of the activities of a Debt Counsellor were not retained for record purposes as prescribed by the Act. In some instances the Form 16.2 was incomplete by the consumer.
 - 12.1.4 The Respondent failed to comply with Section 52(5)(c) read with Regulation 11, Part B, Specific Conditions of Registration Clause 1, in that the Respondent received funds directly from the complainant.

12.1.5 The Respondent failed to comply with the General Conditions of Registration Part A, Clauses 1,2,5,6, and 10. The Respondent failed to comply with the legislation applicable to the operations of a debt counsellor services were not provided in a timely manner to consumers; acted contrary to the best interest of consumers by receiving funds from consumers and failing to distribute the funds; abandoned her practice and did not inform consumers of her intention to cease practicing as a debt counsellor; failed to maintain adequate records of consumers' files and documents.

13. The Applicant therefore prays for an order:

13.1 Cancelling the Respondent's registration as a debt counsellor with the Applicant in terms of Section 150(g) read together with Section 57(1)(a) and (c) of the Act;

13.2 Declaring the Respondent to be in contravention of the following sections of the Act, Regulations and Conditions of Registration;

- Section 86(4)(b)(i) read with Regulation 24(2);
- Section 86(6)(a) read with Regulation 24(6) and 24(10);
- Section 52(5)(c) read with Regulation 11 and Specific Conditions of Registration, Part B, Clause 1;
- General Conditions of Registration, Part A, Clause 1,2,5,6 and 13.

13.3 Compelling the Respondent to refund the consumer Ms MA Osborn all outstanding amounts due and owing, insofar as it relates to the funds requested by the Respondent, which were to be distributed to the consumers' credit providers.

13.4 Granting the Applicant such further and/or alternative relief as the Tribunal may consider appropriate to give effect to the consumers' rights in terms of the Act.

THE HEARING

14. At the hearing the Applicant's representative addressed the Tribunal on the issues as raised in the founding affidavit. The Applicant handed in evidence of the proof of service of the main

application via registered mail as well as proof of service of the default application via registered mail on the Respondent. The Applicant further handed in evidence of the application being forwarded to the Respondent via e-mail and a response obtained from the Respondent to the application that was received.

15. The Applicant further addressed the Tribunal on the issue of the lapsing of the registration. The Applicant submitted that the Respondent has not submitted a Form 10.1 to be de-registered. The Applicant submitted that according to their system, the Respondent's registration has not yet lapsed.
16. The Tribunal directed the Applicant to file the following information on affidavit by close of business on Friday, 20 November 2015:-
 - Confirmation of when the last prescribed registration renewal fee was paid by the Respondent;
 - Confirmation of when the next registration renewal fee was due to be paid by the Respondent;
 - Evidence of the arrangement or the system used by the Applicant which indicates that the Respondent still has a further period of time before the registration lapses.
17. The Applicant confirmed at the hearing that the amount to be refunded to Ms MA Osborn was R8 000.00.
18. The matter was then adjourned for a written judgment to be issued by the Tribunal.

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

19. The Applicant filed the section 57(1) application with the Tribunal in March 2013. The Applicant attached a copy of a courier slip to show that the application was sent to the Respondent via courier. Subsequently a Notice of Complete Filing was issued by the Registrar to both the Applicant and the Respondent on 07 March 2013. The notice stated that the Respondent had to

file an answering affidavit within 15 business days. By the date of the hearing, the Respondent had not filed any answering affidavit or a response to the application.

20. The Applicant filed an application for a default order in terms of Rule 25(2) on 19 April 2013.

21. 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"

22. 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

23. The allegations made by the Applicant regarding the Respondent's conduct have not been disputed by the Respondent and therefore the Tribunal accepts the allegations made as proven on a balance of probabilities.

24. In response to the directive that was issued by the Tribunal, the Applicant submitted that the annual subscription fees were paid by the Respondent on 09 February 2009 and submitted the evidence thereof. The evidence placed before the Tribunal shows that the Respondent failed to pay the annual subscription fees from the 2010 financial year to date as required in terms of Section 52(5)(d) of the Act.

CONSIDERATION OF THE APPLICABLE LAW AND THE TRIBUNAL'S FINDINGS

Application for a default judgment

25. Rule 25(2) and (3) provides as follows:

"(2) An applicant may make application by way of form T.1 r25 (2) for purpose of obtaining a default order, if no response to the application was filed within the time stated in the application.

(3) *The Tribunal may make a default order-*

- (a) *After it has considered or heard any necessary evidence and*
- (b) *If it is satisfied that the application documents were adequately served. “*

26. The Tribunal noted however that the Respondent had not signed receipt of the application on the courier waybill. The Tribunal was satisfied with the additional evidence that was handed up at the hearing, whereby the Applicant had also e-mailed the application to the Respondent and the Respondent's reply to the e-mail.
27. The Tribunal is therefore satisfied that the requirements for a default judgment have been met as the Applicant served the papers at the last known address of the Respondent (even if there was no evidence that they were received) and further forwarded the application to the Respondent via e-mail.

Determination of application for de-registration

28. Section 57(1) states *“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 S48(1); or*
 - (c) contravenes this Act”*

In the matter of *NCR v Lightning Cash Loans cc*¹, the Tribunal discussed this point at length. The Tribunal found that *“Section 57(1) of the Act provides for the Tribunal to cancel the registration of a Registrant. This clearly and unequivocally requires a current registration of a registrant”*. The judgment further went on to cite Section 52(4) that states *“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 de-registered; or (ii) the registration is cancelled in terms of the Act”*. The finding of the Tribunal was that after the first anniversary date of its registration

¹ NCR v Lightning Cash Loans CC NCT/7281/2013/57(1)(P)NCA

and upon its failure to pay the annual registration renewal fee by the due date, the registration was no longer in effect. This effectively amounts to a cancellation of the registration by operation of law (*ex lege*).

29. The Tribunal in this matter, also concludes that the failure of the Respondent to pay the annual renewal fees in 2010 means that the registration is no longer in effect and the Tribunal cannot consider an application for the cancellation of its registration.
30. The Applicant in its response to the directive further stated that as per the Lightning Cash Loans judgment, the specific prayer relating to the cancellation of registration of the Respondent is abandoned.

Determination in respect of claims of prohibited conduct

31. The Applicant requested the Tribunal to declare the Respondent's conduct to be prohibited in relation to non-compliance of sections of the Act, Regulations and Conditions of Registration consisting of:
 - Section 86(4)(b)(i) read with Regulation 24(2);
 - Section 86(6)(a) read with Regulation 24(6) and 24(10);
 - Section 52(5)(c) read with Regulation 11 and Specific Conditions of Registration, Part B, Clause 1;
 - General Conditions of Registration, Part A, Clause 1,2,5,6 and 13.
32. The Tribunal found that while the Respondent's registration lapsed in 2010, the Respondent still continued to perform the functions of a debt counsellor.
33. The evidence before the Tribunal is that the Respondent failed to meet these requirements. Therefore, the Tribunal on a balance of probabilities concludes that the Respondent engaged in prohibited conduct.
34. In terms of the prayer by the Applicant for the Respondent to refund Ms MA Osborn the amount of R8 000.00, the Tribunal considered the decision taken in the matter *NCR v Adberof*². In the *NCR v Adberof* matter the Tribunal found that it was empowered in terms of

² NCT/17833/2014/140(1)

Section 150(i) to order a refund of amounts that were taken from consumers unlawfully. This decision was in the light of the Supreme Court of Appeal decision *Barko Financial Services Ltd v NCR*³ which was handed down on 18 September 2014.

35. The Tribunal in this particular matter has found that the Respondent engaged in prohibited conduct because she took payments directly from consumers. The evidence before the Tribunal clearly shows the amounts that were paid by Ms MA Osborn to the Respondent. She was not entitled to do this according to her specific conditions of registration.

ORDER

In the light of the above facts and legal provisions, governing the matter:

36. The application for de-registration is regarded as withdrawn since the Applicant effected this withdrawal on the record as already indicated in paragraph 30 above.
37. The Tribunal finds that the Respondent has contravened the Act and has therefore engaged in prohibited conduct in terms of Section 150(a) of the Act.
38. The Respondent is ordered to refund Ms Osborne the amount of R8000.00 within 30 days of the date of receiving this judgment.
39. There is no order as to costs.

DATED ON THIS 07th DAY OF JANUARY 2016

Authorised for issue by National Consumer Tribunal
Case Number: NCT/7939/2013/57(1)
Date: 2016 12 11
CCYY / MM / DD

[signed]
Ms H Devraj
Presiding Member

National Consumer Tribunal
Ground Floor, Building B
Lakefield Office Park
Centurion Avenue, Centurion, 0157



Prof T Woker (Member) and Prof J Maseko (Member) concurring

³ (415/13) [2014] ZASCA 114