

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

Case No: NCT/7750/2012/57(1)(P)NCA

In the matter between:

NATIONAL CREDIT REGULATOR

APPLICANT

and

BONNEY TEBOGO DIOKA

RESPONDENT

Coram:

Prof T Woker - Presiding Member

P A Beck - Member

H Devraj - Member

Date of Hearing: 29 August 2013

JUDGMENT AND REASONS

INTRODUCTION

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").
2. The Respondent (and Registrant) is Bonney Tebogo Dioka, ("Dioka or "the Respondent") an adult male debt counsellor, practising as such under registration number NCRDC180 under the name and style of 'Consumer Justice (SA)' from offices situated in Pretoria, Gauteng.

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.
4. The application was as a result of an investigation into the activities of the Respondent conducted by Lesley Odendaal ("Odendaal"), an inspector employed by the Applicant. The Applicant's founding affidavit is deposed to by Adv Zwelithini Ronald Zakwe ("Zakwe"), Manager of the Applicant's Investigations and Enforcement Department.
5. At the hearing of this matter, the Applicant was represented by Ms Deshni Govender ("Govender") and the Respondent was absent from the hearing despite having received proper service of the notice of set down of the matter.
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.
7. This judgement follows the hearing of this matter on 29 August 2013 and following consideration of the Applicant's supplementary heads of argument received by the Tribunal on 18 September 2013, in accordance with the Tribunal ruling on 29 August 2013. This judgment is based largely on written submissions of the parties as well as oral argument of the Applicant.

BACKGROUND

8. 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.
9. On 31 January 2012 inspector Lesley Odendaal ("Odendaal") was appointed to conduct an investigation in respect of the conduct of Mr Bonney Tebogo Dioka as a Debt Counsellor. The

investigation was initiated flowing out of a complaint received from two consumers being Jacqueline Sebigi ("Sebigi") and Mazome David Selopyane ("Selopyane") who alleged that the Respondent was not complying with his conditions of registration when collecting and / or receiving and distributing funds received from consumers who have applied for debt review.

10. On the 16th of February 2012, Odendaal visited the business premises of Dioka. Upon arrival at the business premises of Dioka, Odendaal found a person by the name of Betty at the office, who is an employee of Dioka. Dioka was not present at the office on the aforementioned date. Betty provided Odendaal with the cell phone number of a certain Tabang, who arrived at the office some thirty minutes after Odendaal's arrival. Tabang explained to Odendaal that he is a paralegal, employed by Dioka, to deal with civil matters. Tabang also informed Odendaal that Dioka is currently employed in Nelspruit (Mbobela) Mpumalanga.
11. Odendaal requested Tabang to assist him with the investigation, which Tabang agreed to do. Odendaal enquired from Tabang when Dioka was last at the office. Tabang indicated that Dioka was last in the office during September or November 2011. Tabang explained that Dioka is involved with other business and not with the debt counselling business. Odendaal telephoned Dioka during which telephone conversation Dioka explained that he is employed in Nelspruit and only returns to Pretoria on Fridays. Dioka further expressed his dissatisfaction with debt counselling as there is no financial gain in it for him and as such he is not accepting new clients as per his instructions to Tabang.
12. Odendaal enquired from Dioka whether Dioka received funds from consumers (other than for his own fees) to pay creditors on behalf of the consumers, as the National Credit Regulator received such complaints, to which Dioka responded that he has not received such funds. Odendaal enquired as to when Dioka attended to his client files to which Dioka indicated that a paralegal by the name of Sammy, who is not registered as a debt counsellor, is attending to client files.
13. Odendaal noticed that files were stacked on various desks and on window sills. Odendaal enquired whether there is any system for record keeping purposes of these client files. Tabang indicated that there is a laptop in use at the office, however he had left it at home on this

particular day. Odendaal enquired whether there is a fax machine and telephone in use in the office to telephone and or fax creditors. Tabang's response was that the telephone in the office has been out of service for a year and that there is no functional fax machine. In the event that there are e-mails to be sent to creditors, employees are requested to phone Sammy or Tabang who are in possession of the office laptop.

14. On Monday 20 February 2012 Odendaal indicated to Sammy that it was clear from his initial visit on Friday 17 February 2012, that Dioka had abandoned his clients as he had not attended to these client files for approximately 4 to 5 months. Sammy agreed with Odendaal and indicated that he had to assist clients as Dioka was not available. Sammy handed over a total of 164 files to Odendaal.
15. Odendaal found that:
 - 15.1 The files were in a terrible condition with torn file covers;
 - 15.2 Some files' covers are held together with adhesive tape and the general administration of the files was poor;
 - 15.4 No file for complainant Selopyane was found.
 - 15.5 In the case of Segibi an amount of R29 307,50 (twenty nine thousand three hundred and seven rand, fifty cents) intended for distribution to credit providers was not distributed to credit providers.
16. Dioka however swore on affidavit, that the Selopyane file was one of the files, on the list of files that Odendaal took with him from Dioka's offices.
17. Odendaal then carried out a more comprehensive inspection of 11 specific files. In these files he found that Form16, related to the application for debt review, was incomplete in that the applicant's income, debt repayments and monthly commitments were not completed and the forms were not signed by consumers. It further appeared that there were no form 17.1 and 17.2 issued in respect of the applications and this placed consumer at risk to termination of the debt review process by the creditors.

18. Odendaal concluded that the Respondent had contravened the provisions of the NCA, its Regulations and/or his specific and general conditions of his registration. Specifically the Respondent's conduct: -
- 18.1 Contravenes section 86(4) (b) read with Regulation 24(2);
 - 18.2 Contravenes section 86(6)(a) read with Regulation 24(6) and 24(10)
 - 18.3 Amounts to non-compliance with Section 55(1)(a)(i),(ii) and (iv) read with Part A, General condition of registration , Clause 11;
 - 18.4 Amounts to non-compliance with Section 52(5)(c) read with Part B, Specific Condition of Registration Clause 1; and
 - 18.5 Amounts to non-compliance with General Condition of Registration Part A, Clauses 1,2,5,6,10 and 13.

ISSUE TO BE DECIDED

Preliminary matters

19. The Tribunal must first determine whether the requirements for default judgment have been met.

The main application

20. The Tribunal must determine whether the Applicant has made out a case for cancellation of the registration of the Respondent and further ancillary relief as requested and in particular whether the Tribunal may make an order for restitutionary damages.

APPLICABLE SECTIONS OF THE NCA

21. Section 57 (1)

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.*

22. Section 86(4) (b) read with Regulation 24(2)¹

Section 86(4)(b)

“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 prescribe manner and form*
 - (i) *all credit providers that are listed in the application and*
 - (ii) *every registered credit bureau.”*

Regulation 24(2)

“Application for debt review

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.”

23. Section 86(6)(a) read with regulation 24(6) and 24(10)

Section 86(6)(a)

“Application for debt review

- (6) *A debt counsellor who has accepted an application in terms of this section must determine, in the prescribe manner within the prescribe time-*
- (a) *Whether the consumer appears to be over-indebted.”*

¹ The Regulations published under Section 120(1) of the Act, on 1 April 2011 in GN R293 GG34180.

Regulation 24(6)

“Application for debt review

Within 30 business days after receiving an application in terms of section 86(1) of the Act, a debt counsellor must make a determination in terms of section 86(6)”

Regulation 24(10)

“Application for debt review

After completion of the assessment, the debt counsellor must submit Form 17.2 to all the affected credit providers and all registered credit bureaus within 5 business days.”

24. Section 55(1)(a)(i)(ii) and (iv)

“Records of registry 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;*

(iii)....

(iv) *Debt restructuring proposal.”*

25. Section 52(5)(c)

“Certificate, validity and public notice of registration

(5) *A registrant must-*

(a) ...

(b)...

(c) *comply with its condition of registration and provisions of the Act;”*

APPLICABLE CLAUSES OF THE SPECIFIC AND GENERAL CONDITIONS OF REGISTRATION OF THE RESPONDENT

26. **Contravention of Specific Condition of Registration Clause 1, which provides 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 rearranged in terms of the Act or distribution such payments to credit providers.

27. **Contravention of General Condition of Registration 1, which provides as follows:**

The Debt Counsellor must comply with all legislation applicable to the operation of the business of a Debt Counsellor, including but not limited to the Act, the Regulations and any subsequent amendment or substitution of the applicable legislation and regulations.

28. **Contravention of General Condition of Registration Clause 2, which provides as follows:**

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

29. **Contravention of General Condition of Registration Clause 5, which provides as follows:**

The Debt Counsellor must not engage in any way activity which could be in conflict with the interest of the consumer to whom debt counselling services are provided or which may lead to such a conflict. The Debt Counsellor should not enter any agreement or engage in any activity

which may prevent him or her from acting in the best interest of the consumer to whom debt counselling service are provided.

30. Contravention of General Condition of Registration Clause 6, which provides as follows:

The Debt Counsellor must notify the National Credit Regulator immediately upon any change in contact details or upon the occurrence of any change in the information provided at the time of registration or any other circumstances where such change is significant to the registrant ability or eligibility to conduct the business of a debt counsellor or ability to comply with the Act or regulation and/or these Conditions of Registration. The Debt Counsellor may not perform the duties or functions of a debt counsellor as per the Act, if such change in circumstances constitutes a disqualification as per the Act.

31. Contravention of General Condition of Registration Clause 10, which provides as follows:

The Debt Counsellor must have access to adequate infrastructure with which to provide debt counseling services professionally including telephone, fax, electronic mail facilities and computer system to the extent that it is reasonable having regard to practicality and local circumstances.

32. Contravention of General Condition of Registration Clause 13, which provides as follows:

The Debt Counsellor must protect confidentiality of all information pertaining to consumers, credit providers, credit bureaus and the NCR. The Debt Counsellor may not disclose any information pertaining to the consumer to a third party without the written consent of the consumer to whom such information relates, unless required by the law, in terms of a court order or required by the NCR as part of its monitoring or research functions.

33. Contravention of General Condition of Registration Clause 11, which provides as follows:

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 service are provided. Such documentation should be retained for a period of 5 years. The debt counselor must provide copies of documentation to the consumer, a credit provider, the NCR upon reasonable request.

PARTIES' SUBMISSIONS

34. APPLICANT'S SUBMISSIONS

- 34.1 The Applicant submits that its investigation revealed that the Respondent's conduct contravened the above cited provisions of the NCA.
- 34.2 The Applicant further submits that the Respondent evidently abandoned his clients, *inter alia* complainants Sebigi and Selopyane.
- 34.3 It is further submitted that the Respondent failed to comply with the obligation to perform debt counseling in a manner consistent with the purpose and requirements of the Act.
- 34.4 It was required of the Respondent to act professionally and reasonably when providing debt counseling services to consumers and to provide such service in a manner that is timely, fair and non-discriminatory and does not bring the Applicant or debt counseling into disrepute.
- 34.5 The Applicant submits that the Respondent therefore contravened clause A (1), (2), (3) (4) (5)(6) and (10) of his general conditions of registration imposed in terms of Section 48 of the Act and as cited *supra*. Alternatively the Respondent contravened

his general conditions of registration (clause 11) in that he failed to maintain adequate records.

- 34.6 It is further submitted by the Applicant that the Respondent is in contravention of Section 86(4) (i) and Section 52(5)(c) of the Act read with Regulation 24(2) of the Act, in that he failed to notify credit providers within 5 business days of receiving an application for debt review.
- 34.7 The Applicant submits that the Respondent contravened Section 86 (6) (a) and Section 52(5)(c) of the Act, read with regulation 24(6) and Regulation 24(10), in that he had failed to submit the form 17.2 to credit providers within 5 business days after making a determination regarding the consumer's indebtedness or within 35 business days of receiving an application for debt review.
- 34.8 The Respondent further failed to conclude the debt review process within 60 days of receipt of an application for debt review and credit providers therefore terminated the debt review process of consumers.
- 34.9 The Applicant further submits that, with reference to its Specific Conditions of Registration, clause 1, imposed in terms of Section 48 of the Act, the Respondent failed to comply with the prohibition on receiving and distributing consumer payments. The Respondent failed to distribute funds that were paid over to him by consumers, to pay the consumers' respective credit providers

RESPONDENT'S SUBMISSIONS

35. The Respondent failed to file his answering affidavit to indicate that he is opposing the application. The Applicant subsequently applied for a default order in terms of Rule 25(3).

ISSUES IN AGREEMENT

36. Due to the fact that the matter was not opposed there is no explicit agreement on the issues between the parties. The application of Rule 13(5) of the Rules of the Tribunal² however renders the entire application to have been admitted.

ISSUES IN DISPUTE

37. Due to the fact that the matter was not opposed there are no issue in dispute.

ANALYSIS OF THE LAW AND THE FACTS

38. This section of the judgment will deal with each of the legal questions separately as they relate to the facts:

The default application

39. The Tribunal must first determine whether the requirements for default order application has been met.
40. On the 8th of February 2013 the Applicant served the Respondent with the application, which was deemed complete by the Tribunal on the 14th February 2013. Notice of complete filing was issued by the Tribunal on the 14th February 2013 to both the Applicant and the Respondent.
41. In terms of Rule 13 of the Rules of the Tribunal the Respondent was due to respond by serving an answering affidavit on the Applicant and on every other person on whom the application was served on or before 7 March 2013.

² For the Conduct of Matters before the National Consumer Tribunal published under GN789 in GG30225 of 28 August 2007 as amended by GenN428 in GG34405 OF 29 June 2011.

42. The Respondent failed to serve its answering affidavit within the 15 business days of the date of notice as provided for in the Rule and the Applicant subsequently filed an application in terms of Rule 25(3) for default judgment. The Registrar has set the matter down for hearing
43. Rule 25(2)(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. “*
44. This Rule forms the basis of the test for applications for default judgment before the Tribunal.
45. It is submitted that the Applicant has placed sufficient evidence before the Tribunal to make a determination on the matter.
46. As far as the second requirement is concerned, the amendment of the Rules by Government Notice 428 of 29 June 2011 clearly provides that the Tribunal need only be satisfied that the application documents were adequately served on the Respondent. This requirement relates to the main application and it is submitted that there is a waybill in the case file, which serves as a proof that the main application was adequately served on the Respondent. Accordingly, the Tribunal is satisfied that the requirements for a default application have been met.

What are the requirements are for deregistration of a debt counsellor?

47. In terms of section 57(1) of NCA states that registration can be cancelled by the Tribunal on the request by the National Credit Regulator, if the registrant repeatedly:

- (a) Fails to comply with the condition of registration
- (b) Contravenes certain provisions of the Act

48. In the case of *NCR v JW van Zyl*³ it was held that a "repeated contravention" in the context of section 57(1) of the Act is a contravention that appeared at least twice, or more than that. Further that a single contravention of different sections of the Act and conditions of registration also constitute repeated contraventions.
49. The allegations made and evidence submitted by the Applicant, which are uncontested at this stage, clearly indicates that the requirements of Section 57 of the Act have been met in that the Respondent contravened his conditions of registration and the provisions of the Act repeatedly as is evidenced by the investigation report and the file content annexed thereto. The list of consumers submitted by the Applicant also clearly indicates which consumers were affected by the Respondent's specific contraventions.
50. Secondly, from a procedural point of view, the Applicant complied with the provisions of Section 140(1)(c) of the Act and the requirement of an investigation as prescribed by Section 139(1)(c) of the Act has also been satisfied.
51. The conduct of the Respondent shows that the Respondent failed to follow the process set out in the Act when debtors approach debt counsellors for debt review. This is supported by the admission of the Respondent that the Respondent was not making any money out of debt counselling, that he was in full-time employment in Nelspruit whilst his debt counselling business was based in Pretoria, that he had last been physically present at his business some four or five months prior to Odendaal's inspection and that he left a paralegal, who is not a registered debt counsellor in charge of his debt counselling business.
52. The Tribunal is of the view that the Respondent relied on the services of other persons who are not debt counsellors to perform the services of a debt counsellor. Such conduct is in direct contravention of the Act which clearly states that only registered persons may perform the

³ NCT/2017/2011/57(1).

services of a debt counsellor. Furthermore consumers may have been misled into believing that the persons they were dealing with were registered debt counsellors whilst the respondent held down a fulltime position of employment in Nelspruit.

53. Accordingly, the Tribunal is satisfied that the requirements for deregistration of the Respondent as a debt counsellor have been met.
54. When deciding on an appropriate order in an application for deregistration of a debt counsellor the Tribunal must take the following factors into consideration:⁴-
1. The seriousness of the contraventions ;
 2. The position of the Respondent ;
 3. The rights of the consumers.

The contraventions by the Respondent are serious.

55. The Respondent contravened the conditions of his registration as a Debt Counsellor; Furthermore the Respondent failed to comply with the regulations as cited above. The Respondent further did not conduct debt counselling timely and fair, and consequently brought the Applicant and Debt Counselling into disrepute. On the facts before the Tribunal the Respondent clearly abandoned consumers under debt counselling and left his business, on his own admission in the hands of a paralegal in an office that did not have the necessary infrastructure to conduct debt counselling in a professional manner. This much is evidenced in the condition of the files, the non-existent filing system where files were left on the office window sill in disarray and the noteworthy absence of Dioka who last "visited" the office approximately four or five months ago at the time of the inspection. The conduct of Dioka could not be said to favour debt stressed consumers who place their trust and funds in the hands of individuals who hold themselves out as registered debt counsellors and who clearly are not. This type of conduct is seriously prejudicial to consumers and viewed as an aggravating factor by the Tribunal.

⁴ These factors were identified by the Tribunal in the matter of NCR v Van Dyk NCT/2017/2011/57(1). The same factors were considered in other matters such as NCR v Kibogo NCT/2881/2011/57(1) and NCR v Njokweni NCT/70/2009/57(1).

The position of the Respondent

56. The Respondent is in a position of trust, in that consumers trusted the Respondent to assist them with debt rearrangement. The Respondent abused this position of trust by not conducting the debt review process properly, or at all. The conduct of the Respondent certainly is to the detriment of the consumers, as they are already debt-stressed, and then further risk losing *inter alia* their property and/or being handed over to Attorneys for recovery, as a result of the Respondent's negligence. The fact that the respondent is "not making any money" out of debt counselling is no excuse for abandoning his debt counselling business and leaving the business in the hands of paralegals. Remote management of a debt counselling business by Dioka who is employed in another province is frowned upon by the Tribunal and is viewed by the Tribunal as an aggravating factor.

Will the consumers be prejudiced by an order cancelling the registration of the Respondent?

57. Consumers were indeed in any event prejudiced by the Respondent's conduct. It is on record that 161 files were handed over to Odendaal to be redistributed to other registered debt counsellors in order for those consumers to continue with the debt review process and be professionally assisted.

CONSIDERATION OF THE RELIEF SOUGHT BY THE APPLICANT

58. The relief sought by the Applicant, against the Respondent, is as follows:
- 58.1 Cancelling the Respondent's registration as a debt counsellor.
 - 58.2 That the Respondent surrender, within 10 business days of this order, all its clients' files to the Applicant, together with a comprehensive list of all past and present clients.
 - 58.3 That the Respondent refunds consumer J.S Sebigi, insofar as the refund relates to the funds requested by the Respondent, which were to be distributed to the consumer's credit providers and

58.4 Such further and alternative relief as the Tribunal may consider appropriate to give effect to the consumers' rights in terms of the Act.

59. At the hearing of the matter the Presiding member asked the Applicant to address the Tribunal on whether the Tribunal has the powers to grant the relief sought in 58.3 above. The Applicant was given an opportunity to supplement its heads of argument by addressing the Tribunal on the papers as to how and whether the Tribunal has the powers to make an order referred to in 58.3 above. The Tribunal has considered the Applicants further submissions, which are in brief:-

Applicant's submissions

60. The Applicant seeks a restitutionary order against the Respondent. The Applicant submits that the granting of a restitutionary order falls within the ambit of the remedies provided for in the Act and within the powers of the Tribunal, in particular, the ambit of the orders provided for in section 150(h) of the Act.
61. Such an order, if granted by the Tribunal would ensure that the consumer is not "impoverished by the Respondents prohibited conduct" or said in reverse would ensure that the Respondent is "not unjustly enriched by the Respondents prohibited conduct at the expense of the consumer."
62. The Applicant refers the Tribunal to the doctrine of *stare decisis* by stating that the main purpose of the Act is to protect consumers, as provided for in section 3 of the Act. Section 27 goes further by allowing the Tribunal to "make any order provided for in the Act" as well as "exercise any power conferred on it by law." The Applicant drew the Tribunal's attention to the Tribunal's past decisions in *NCR v Kibigo* NCT/2881/2011/57(1)(P) *NCR v van Dyk* NCT/2017/2011/57(1), *NCR v Sahibdeen* NCT/666/2010/57(1)(a)(c)(P) and *NCR v Borman* NCT/656/2010/57(1) where the Tribunal ruled in favour of consumers where debt counsellors charged consumers amounts in excess of that permitted by the Act.

63. The Tribunal has already found the Respondent to be in repeated contravention of the Act. In addition to repeatedly contravening the Act, the Respondent:-
- abandoned consumers who were under debt review and solicited alternate employment;
 - received funds from consumers which he was not entitled to received and failed to distribute same, retaining those funds for himself;
 - made an undertaking to Segibi to repay the misappropriated funds, yet failed to do so;
 - was untraceable when consumers attempted to reach / contact the Respondent in order to give effect to an undertaking.
64. In the present case the Applicant submitted that Segibi was “grossly abused” by the Respondent’s prohibited conduct. Accordingly, the Applicant prays that the Tribunal grants a restitutionary order that the Respondent refunds the consumer, Segibi, an amount of R29 307,50 (twenty nine thousand, three hundred and seventy rand, fifty cents.), with interest at a rate to be determined by the Tribunal.

Consideration by the Tribunal of the argument for a restitutionary order

65. Section 150 (h) provides that :

“In addition to its other powers in terms of the 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).....

(h) requiring repayment to the consumer of any excess amount charged, together with interest at the rate set out in the agreement.

66. In considering the order sought by the Applicant the approach of the Tribunal is to firstly look at the meaning of the word "restitution" and the meaning of the word "compensation". The Oxford English Dictionary gives the meaning of *compensation* as: "1. *something given to compensate for loss, suffering, or injury.* 2. *something that makes up for an undesirable situation.*"

67. The meaning of restitution is provided as:

"1. *The restoration of something lost or stolen to its proper owner...*"

In Section 150(h) the use of the words 'excess amount charged' provides for an order to be made for a refund in order to compensate a consumer for an amount charged in excess. Upon consideration of the definition of *compensation* namely *something given to compensate for loss, suffering, or injury* it becomes apparent that subsection 150(i) does not make provision for an order compensatory in nature but rather as stated above, restitutory in nature.

When the above definitions are considered it is clear that in the instance of restoration it is a case of property or a belonging being given back to the owner thereof as opposed to compensation where something is provided in the place of that which has been totally lost. The two definitions are accordingly not synonymous but rather two different concepts all together.

68. Having said that the Tribunal secondly, turns to the meaning of "*repayment...of any excess amount charged*" in section 150(h). Section 150(h) requires repayment of any excess amount charged. What is the precise meaning of the wording of subsection 150(h)? Unpacking of the wording of subsection 150(h) and a definition of the wording is as follows:

Repayment is an adjective of payment; The Collins English Dictionary ³ giving the meaning of repay as:

"...1. *Pay back, refund...*"

The Oxford English Dictionary gives the meaning of excess and charge as:

"excess... 1. *an amount that is more than necessary, allowed, or desirable...*"

"charge...1. ask an amount as a price..."

Upon a consideration of these definitions subsection 150(h) can be re-phrased in terms of these definitions as follows:

"pay back an amount that is more than necessary, allowed, or desirable."

Thus "repayment...of any excess amount charged" broken down into its plain ordinary meaning can be interpreted as paying back an amount that was more than you are entitled to, or lawfully allowed to retain. Accordingly, this would mean that where a consumer has paid more for something, i.e. a service than he should have paid for the service, the additional amount would be classified as an excess amount charged which should be refunded to the consumer.

69. An Applicant would therefore have to prove, in the present case, that a consumer paid over an amount to the Respondent that was in excess of that which the Respondent was entitled to lawfully to retain and that it follows that the consumer would therefore be entitled to a refund of such an amount. If consideration is had to the difference between the term "restoration" as opposed to "compensation", this specific section would relate to restoration of funds to a consumer where fees for example were charged over and above lawful charges. It is submitted that only the overcharges would be recoverable in terms of this section, as can be intimated from the words "excess amount".. An example of such a charge can be seen in the *Bornman*-matter where the Respondent was ordered, by the Tribunal, to repay excess collection fees etc charged to consumers.

70. Accordingly, for an Applicant to be entitled to an order in terms of section 150(i), such an Applicant would have to establish that the Applicant has a right, in terms of the Act (which it has done) and that the Tribunal may make an order to give effect to such a right.

The Tribunal would like to emphasize that the Act does not specifically provide for a right to a refund in instances where debt counselors have allegedly misappropriated funds. Thus if this was the case, in the matter before the Tribunal, the Applicant would not be entitled to an order for a refund in terms of section 150(i) of the Act.

71. Having considered the Section 150 and the definition of the words compensation and restitution, the Tribunal turns to Section 164 of the Act which provides As follows:

164 Civil actions and jurisdiction

(3) A person who has suffered loss or damage as a result of prohibited conduct or dereliction of required conduct –

(a) may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has consented to an award of damages in a consent order; or

(b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the registrar or the clerk of the court a notice from the Chairperson of the Tribunal in the prescribed form-

(i) certifying that the conduct constituting the basis for the action has been found to be a prohibited or required conduct in terms of this Act;

(ii) . . .”

72. Further case law has relevance here. In the ex parte *Otto* matter the Applicant made an ex parte application for the issuance of a certificate by the Chairperson in terms of section 164 of the Act. The Tribunal held that there are two main considerations found in section 164–

“(i) “(3)(b)(i) ... conduct constituting the basis for the action has been found to be a prohibited or required conduct in terms of this Act and “...

(ii) (6) A person’s right to damages arising out of any prohibited or required conduct comes into existence –

(a) on the date that the Tribunal makes a determination in respect of a matter that affects that person.” (emphasis added)”

The Tribunal held that there should be a link between the matter that the Tribunal is making a determination on and the person requesting a certificate. It is of crucial importance that the Tribunal ensures that its judgments meet the requirements of *Otto* in order that a consumer who suffered damages as a result of prohibited conduct and wishes to claim such damages in a Civil Court, is able to do so.

It is evident that the Act in terms of section 150(h) provides for the award of restitution in the form of a repayment of a charge in excess. Section 164 of the Act empowers the civil courts to award compensatory damages. It can be assumed that the intention of the legislature was to reserve the power to award compensatory damages with the civil courts in these instances.

73. The approach followed by the Tribunal in past decisions has relevance in arriving at a complete determination of this matter.

In the *Bornman* matter the Respondent received amounts from consumers for distribution to credit providers and charged a collection fee and an after care fee. The charging of a collection fee and an after care fee was prohibited in terms of the Respondents conditions of registration. The Tribunal found that the Respondent had to refund all amounts taken as collection commission or retainer, or legal fees not provided for in terms of the fee guidelines. The order for refund did not include all amounts paid to the Respondent but just the amounts that the Respondent was not entitled to, namely a commission fee and an after care fee.

In the *Van Dyk* matter the Respondent was ordered to refund all past and current consumers all amounts taken from consumers as administrative fees. The approach followed in the *Bornman* and *Van Dyk* judgments is that of the Tribunal not ordering refunds in terms of section 150(h) but an order limited to repayment, in terms of section 150(h), of any excess amount charged in the form of an administrative fee etc. This has been the consistent approach of the Tribunal.

The Applicant in its heads of argument mistakenly refers to the *Kibigo* judgment as authority for the granting of an order for a refund of monies paid to a debt counselor and not paid over to a credit provider. If the facts of the *Kibogo*-matter are considered, where a debt counselor abandoned her clients, it is clear that the order was not to refund amounts that was not paid over to credit providers, but a similar order as the order in the *Bornman-matter* and *Van Dyk-matter* as detailed above.

74. 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.

75. In as much as section 164 grants civil courts the jurisdiction to assess and award damage the Tribunal finds that the order prayed for by the Applicant as one that does amount to compensatory damages and not to an award for restitutionary damages. In the circumstances the Tribunal finds that the Tribunal does not have jurisdiction to award compensatory damages based on past Tribunal decisions and upon the Tribunal's interpretation of the relevant sections of the Act.

76. **ORDER**

76.1 The Respondents registration with the Applicant as a debt counsellor is hereby cancelled, with immediate effect.

76.2 The Respondent's repeated contravention of the National Credit Act 34 of 2005 ("the Act") in particular section 48(3) of the Act , read with General and Specific Conditions of Registration are declared as prohibited conduct in terms of the Act. Such prohibited conduct is in relation to the list of consumers as set out in Annexure "B", pages 67-71 of the paginated bundle and is attached to this order. The Respondent is directed to furnish the Tribunal with the identity number of these listed consumers.

76.3 The Respondent must surrender, all client files to the Applicant, and must furnish the Applicant with a comprehensive list of all past and present clients within ten business days of the Tribunal's order;

76.4 The Tribunal has no jurisdiction to order a refund to consumer Segibi of the amount of R29 307,50 (twenty nine thousand, three three hundred and seventy rand, fifty cents) together with interest.

76.5 No order as to costs is made.

DATED AT JOHANNESBURG ON THIS 23RD DAY OF OCTOBER 2013

P A BECK
MEMBER

CONCURRING : PROF T WOKER (PRESIDING MEMBER) AND MS H DEVRAJ (MEMBER)

Authorised for issue by the National Consumer Tribunal

Case number _____

Date: 2014 / 01 / 14
Ccy/y mm dd

National Consumer Tribunal
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