

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

Case Number: NCT/13393/2014/57(1)

In the matter between:

**THE NATIONAL CREDIT REGULATOR**

**APPLICANT**

and

**HYAN ABRAHAMS**

**RESPONDENT**

**Coram:**

|               |   |                  |
|---------------|---|------------------|
| Prof B Dumisa | – | Presiding member |
| Mrs H Devraj  | – | Member           |
| Adv N Sephoti | – | Member           |

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|-----------------|---|-------------|
| Date of Hearing | – | 8 July 2014 |
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**JUDGMENT AND REASONS**

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**APPLICANT**

1. The Applicant in this matter is the National Credit Regulator, a body established in terms of Section 12 of the National Credit Act 34 of 2005 (the “NCA” or the “Act”) (hereinafter referred to as “the Applicant”).
2. At the hearing the Applicant was represented by Mr Joseph Selolo, the legal representative and employee of the Applicant.
3. The Applicant's Founding Affidavit is deposed to by Nthupang Magalego, Manager of the Investigations and Enforcement Department of the Applicant.

## RESPONDENT

4. The Respondent (and the Registrant) is Hyan Glynne Abrahams, a major male, registered as a Debt Counsellor and trading as Lex-Care Debt Counselling Services in Florida, in the Province of Gauteng (hereinafter referred to as "the Respondent").
5. The Respondent did not file an Answering Affidavit.
6. At the hearing of the matter, the Respondent did not appear in person and was not represented. Proof was provided to show that the Respondent had been properly served with all the necessary documents pertaining to the set-down of the matter for hearing on 08 July 2014.

## APPLICATION TYPE

7. This Tribunal derives the jurisdiction to hear this matter, under Section 57(1) of the Act. This is an application in terms of Section 57(1) of the NCA for the cancellation of the Respondent's registration as a debt counsellor allegedly due to the Respondent's repeated failure to comply with its conditions of registration and/or repeated contraventions of the Act.

## BACKGROUND

8. The Respondent was registered by the Applicant, on 01 November 2007, as a debt counsellor with registration number NCRDC 142, subject to General and Specific Conditions.
9. During the period leading up to February 2010, numerous complaints were lodged with the Applicant by consumers ("the complainants") against the Respondent. The complainants had applied to the Respondent for debt review. The complainants paid the proposed amounts into the allocated account, yet they were inundated with phone calls from their credit providers who demanded payment for their outstanding debts; and / or when creditors instituted legal action against such consumers.
10. On 24 February 2010, Mr Russel Willoughby ("the Inspector") was appointed by the Chief Executive Officer of the Applicant in terms of Section 25(1)(a) of the Act to conduct an investigation into the Respondent's business. The investigation was duly conducted by the Inspector, who encountered

numerous problems in trying to access the Respondent's premises in order to interview the Respondent and to solicit his response to the allegations made by the consumers.

11. Attempts of the Inspector to contact the Respondent by phone proved fruitless.
12. On more than one occasion the Inspector found the Respondent's business premises locked.
13. Even after the Inspector had been able to meet the Respondent at the Respondent's place of business, no consumer files were found on the premises; and the Respondent continuously failed to co-operate with the Inspector who had been mandated by the Applicant to investigate the business activities of the Respondent and to establish whether he had been conducting his business in compliance with the Act.
14. Due to all these problems, the Respondent was, on the 12<sup>th</sup> of May 2011, summoned by the Applicant, in terms of Section 139(3) of the Act, to appear at the Applicant's offices and present the outstanding information. The Respondent only responded two weeks later, on the 25<sup>th</sup> May 2011, when he visited the Applicant's offices without the required documentation.
15. The investigation was eventually concluded in June 2011, and the investigation report submitted to the Applicant.

#### **MAJOR FINDINGS OF THE INVESTIGATION ON THE BUSINESS PRACTICES OF THE RESPONDENT**

16. The Respondent did not keep to the 60 days' timeframe within which to finalise the debt review process; resulting in credit providers terminating the debt review process.
17. The Respondent instructed consumers to make direct deposits with regard to debt counselling fees into his bank account; while at the same time receiving fees for a Payment Distribution Agent (PDA).
18. The Respondent further instructed consumers to pay legal fees of R3000.00 upfront into his bank account without referring the matters to court; and also refused to refund these fees when the consumers requested such refunds.

19. The Respondent gave undertakings to consumers, promising to force credit providers to include matters under debt review in cases where there was already legal action pending.
20. The Respondent did not make full disclosures with regard to the debt review process to consumers.
21. The Respondent failed to act on letters of demand and termination letters which were brought to him by consumers already under debt review with him.
22. The Respondent failed to deliver on promises he made to consumers.
23. The Respondent charged a cancellation fee of 75% to dissatisfied consumers who attempted to transfer their debt review processes to other debt counsellors, presumably because of the failure of the Respondent to fulfil his obligations under the Act.
24. In summary, the Investigation Report states that the Respondent conducted his business in a manner which contravened the General and Specific Conditions of Registration in addition to certain Sections and Regulations of the Act.

#### **PROCEDURAL IRREGULARITIES**

25. The Respondent is alleged to have contravened the following sections of the Act, during the period November 2007 to at least the point of the investigation by the Applicant in February 2010:
  - 25.1 Contravention of Section 86(4) of the Act read with Regulation 24(2): Failure to submit Forms 17.1 within 5 days from date of receipt of an Application for Debt Review;
  - 25.2 Contravention of Regulation 24(10) alternatively Regulation 55(1)(a) read with General Condition 11: Failure to submit completed Forms 17.2, within 5 business days, to all affected credit providers that are listed in the application forms received, and to every registered credit bureau;
  - 25.3 Contravention of Section 86(7)(c) of the Act: Failure to refer debt-rearrangement applications of over-indebted consumers or those consumers in financial difficulties to a court or the Tribunal, respectively, in the prescribed manner and form;

- 25.4 Contravention of Condition 2 of his registration: Failure to perform debt counselling services in a manner that is consistent with the purpose and requirements of the Act; and also failure to act professionally and failure to ensure that he did not bring the Regulator or debt counselling into disrepute.

## CONSIDERATION OF THE PRAYERS BY THE APPLICANT

26. In light of these repeated contraventions of the Act, the Regulations and the Respondent's Conditions of Registration, the Applicant applied for the following from the Tribunal, in the initial application:
- 26.1 In terms of Section 150(a) of the Act, declaring the conduct of the Respondent a repeated contravention of the following sections of the Act, Regulations and Conditions of Registration:
- (i) Contravention of Section 86(4)(b) read with Regulation 24(2) of the Act;
  - (ii) Contravention of Regulations 24(5) and 24(10) of the Act;
  - (iii) Contravention of Regulation 55 the Act;
  - (iv) Failure to comply with General Condition 2 of the Respondent's Conditions of Registration;
  - (v) Failure to comply with Specific Condition B(1) of the Respondent's Conditions of Registration.
- 26.2 Cancellation of the Respondent's registration as a debt counsellor in terms of Section 57(1)(a) of the Act;
- 26.3 Imposing an Administrative penalty.
- 26.4 In terms of Section 150(i), make any other appropriate order required to give effect to the consumers' rights in terms of the Act.
27. During the hearing the Applicant amended the prayers and this is further discussed in the judgment.

## APPLICABLE SECTIONS OF THE NCA

### 28. 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) ...”*

### 29. Section 86

#### **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; or*

*(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.*
  - (iii)*

### 30. Section 151

#### **“Administrative fines**

*(1) The Tribunal may impose an administrative fine in respect of prohibited or required conduct in terms of this Act or the Consumer Protection Act, 2008.*

*(2) An administrative fine imposed in terms of this Act, or the Consumer Protection Act, 2008, may not exceed the greater of –*

- (a) 10 per cent of the respondent's annual turnover during the preceding financial year;*  
*or*
- (b) R1 000 000.*

*(3) When determining an appropriate fine, the Tribunal must consider the following factors:*

- (a) The nature, duration, gravity and extent of the contravention;*
- (b) Any loss or damage suffered as a result of the contravention;*

- (c) *The behaviour of the respondent;*
- (d) *The market circumstances in which the contravention took place;*
- (e) *The level of profit derived from the contravention;*
- (f) *The degree to which the respondent has co-operated with the National Credit Regulator, or the National Consumer Commission, in the case of a matter arising in terms of the Consumer Protection Act, 2008, and the Tribunal; and*
- (g) *Whether the respondent has previously been found in contravention of this Act, or the Consumer Protection Act, 2008, as the case may be."*

**31. Regulation 24**

**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.*
- (5) A notice contemplated in subregulation (2) must be sent by fax, registered mail or email provided that the debt counsellor keeps a record of the date, time and manner of the delivery of the notice.*
- (6) 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).*
- (10) After completion of the assessment, the debt counsellor must submit Form 17.2 to all affected credit providers and all registered credit bureaux within 5 business days."*

**32. Regulation 55(1)(a)**

**Records of registered activities to be retained by registrants**

- "(1) In addition to any records that must be kept in terms of the Act, a registrant must maintain the following records relating to its registered activities, which records may be kept in electronic format:*
- (a) Debt Counsellors, in respect of each consumer:*
    - (i) Application for debt review ;*
    - (ii) Copy of all documents submitted by the consumer ;*
    - (iii) Copy of rejection letter (if applicable) ;*
    - (iv) Debt restructuring proposal ;*
    - (v) Copy of any order made by the tribunal and/or the court ;*
    - (vi) Copy of the clearance certificate"*

## APPLICABLE CLAUSES OF THE RESPONDENT'S CONDITIONS OF REGISTRATION

### 33. General Condition 2

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

### 34. Specific Condition 1

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

***The specific conditions are proposed for the following reasons:***

*To prevent a Debt Counsellor from being involved in payment distribution if such a Debt Counsellor does not have the adequate staff, infrastructure, systems or procedures in order to safeguard the funds, efficiently distribute funds or account for such funds."*

## THE HEARING

35. At the hearing the Applicant was represented by Mr Joseph Selolo.

36. The Respondent was neither present nor represented at the hearing.

37. The matter proceeded on a default basis.

38. The Tribunal raised the issue of the inspector's certificate which lapsed before the investigation was concluded. The Applicant's representative explained that the investigator had finalised the inspection before the certificate lapsed and awaited the outstanding information from the Respondent and since this took some time, he could only finalise writing his report once all the



information had been collated. The Applicant further stated that the evidence which was put forward was obtained before the inspector's certificate had lapsed.

## CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

39. A Notice of Complete Filing was issued by the Registrar to both the Applicant and the Respondent on 12 March 2014.
40. To-date the Respondent has not filed any answering affidavit or response to the application.
41. The Tribunal is satisfied that the Respondent was given sufficient opportunity to respond to and / or challenge any of the Applicant's allegations after being officially notified of the Applicant's Application to the Tribunal for the Cancellation of his (Hyan Abrahams') registration as Debt Counsellor.
42. Rule 13(5) of the Rules of the Tribunal<sup>1</sup> 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"*
43. Therefore, in the absence of any answering affidavit filed by the Respondent, the Applicant's application and all of the allegations contained therein are deemed to be admitted.

## CONSIDERATION OF THE EVIDENCE BEFORE THE TRIBUNAL

44. The Applicant's representative spent time presenting their case on their conclusion that the Respondent had absconded from and /or abandoned his debt counselling practice.
45. The Applicant, however, abandoned some of the allegations they had made against the Respondent, on grounds that they had been wrong in their initial submissions:  
  
45.1 The Applicant had alleged, in their earlier submissions, that the Respondent did not do a determination on whether the consumers were over-indebted or not, as required by Section 86(6) of the Act. The Applicant later abandoned this allegation as they later established that the Respondent did these determinations.

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<sup>1</sup> 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 (hereinafter "the Rules of the Tribunal").

- 45.2 The Applicant had alleged that the Respondent received funds directly from the consumers for distribution to the credit providers, which would have been in breach of his Specific Condition 1 of his registration. The Applicant later abandoned this allegation because they later established that the funds were paid to the Payment Distribution Agency (PDA) and not to the Respondent.
- 45.3 The Applicant, however, reiterated that the Respondent received other PDA related funds that the Respondent was not entitled to receive directly. These were the Debt Counsellor aftercare fees, debt restructuring fees, and legal fees. These amounts were supposed to be paid to the PDA who would then distribute it to him if he had done the work.
- 45.4 The Applicant alleged that the Respondent took restructuring fees from the consumers despite the fact that he did not do the actual restructuring on behalf of the consumers. This means he remunerated himself for work not done.

## FINANCIAL IRREGULARITIES

46. The Respondent was specifically prohibited by Specific Condition B1, of his conditions of registration, from receiving payments from consumers who have applied for debt review. This prohibition excludes the application for debt review fee of R50. The investigation report, however, revealed that the debt counselling activities of the Respondent benefitted only himself, in that he received a total of R506 415.80 which comprised the following:
- Unidentified deposits: R 97 122.34
  - Legal fees: R 75 900.00
  - From PDA: R 294 843.46
  - Application Fees: R 2 100.00
  - Restructuring Fees R 36 450.00
47. In the absence of any contrary evidence placed before the Tribunal it is accepted that the Respondent repeatedly contravened the Act, Regulations and the conditions of his registration as alleged.
48. The evidence before the Tribunal clearly outlines:

- 48.1 Repeated contravention of section 86(4)(b), read with Regulation 24(2), in that the Respondent repeatedly failed to submit Forms 17.1 within the prescribed timeframes;
- 48.2 Repeated contraventions of Regulation 24(10) or alternatively Regulation 55(1)(a), read with General Condition 11, in that no evidence was found in the Respondent's files that Forms 17.2 were sent to all affected credit providers and all registered credit bureaux within the prescribed timeframes;
- 48.3 Repeated contraventions of Section 86(7), in that no evidence was found in the Respondent's files that the Respondent referred any debt-restructuring orders or applications to court or the NCT;
- 48.4 Repeated contraventions of General Condition 2, in that from the contraventions above, the Respondent did not perform the debt counselling services in a manner that is consistent with the purpose and requirements of the Act; and in that the Respondent did not act professionally in a manner that ensures that he does not bring the Regulator or debt counselling into disrepute.

#### **CONSIDERATION OF OTHER ORDERS APPLIED FOR**

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

- 49. Section 57(1) empowers the Tribunal to cancel the registration of a debt counsellor where he/she repeatedly fails to comply with the conditions of registration and/or contravenes the Act.
- 50. The facts placed before the Tribunal clearly show that the Respondent repeatedly failed to comply with the Act and this had a serious impact on the consumers who were his clients. In the circumstances cancellation of his registration is justified.
- 51. The Applicant made out a case for the imposition of an administrative fine on the Respondent in terms of Section 151 of the Act. The Applicant has not provided the Tribunal with the necessary full annual financial data that is necessary for the determination of an appropriate administrative fine; though the Applicant was able to show that the Respondent did receive a total of R506 415, 80 from consumers, which, according to the Applicant, benefited only one person, namely the Respondent. Submissions by the Applicant show that the Respondent was not co-operative with the investigators; and that the

Respondent did try to hide some information from the investigators; and that it is not certain if the Applicant was able to access all the necessary files and / or information related to the Respondent's debt counselling activities. In considering whether it may be possible to impose an administrative fine under such circumstances, where the Respondent's annual turn-over information is unknown to the Applicant, the Tribunal referred to a previous Tribunal decision. The Tribunal was previously faced with such a challenge in *NCR v Werlan Cash Loans t/a Lebathu Finance* (NCT/3887/2012/57(1)(P)) where the Applicant did not put any evidence before the Tribunal on the Respondent's annual turn-over, because the Applicant did not have such accurate financial information. In that case, the Tribunal made an assertion that where there is no basis for calculating the "10 per cent of the respondent's annual turnover during the preceding financial year" in line with Section 151(2)(a), the Tribunal has the option to simply follow Section 151(2)(b) by imposing an administrative fine not greater than or equal to R1 000 000 (one million Rand). Section 151(3) will thus be important when determining an appropriate fine, if any, in this case:

- (a) The nature, duration, gravity, and extent of the contravention: According to the Applicant's calculations, the Respondent's undesirable debt counselling activities lasted for at least two years, between February 2008 and November 2009. During that period, he did contravene many provisions of the Act, as indicated elsewhere above.
- (b) Any loss or damage suffered as a result of the contravention: On this the Applicant's submissions are telling: *"Consumers jointly lost an estimated R506 415.80 in fees paid to the Respondent. These losses exclude the possible loss of house, cars, new debt counsellor fees, and legal costs occasioned by the legal actions instituted by credit providers."* The hardships placed upon the consumers (whom were already debt stressed) as a result of the Respondent's contraventions are unimaginable.
- (c) The behaviour of the Respondent: The Respondent was not co-operative with the Applicant's investigators in various ways, to the extent of not even responding in a compliant manner when served a summons by the Applicant's inspector.
- (d) The market circumstances in which the contraventions took place: The period 2008 – 2009 was internationally regarded as an era of global financial hardship and economic recession. The Applicant submits that the Respondent's conduct made even dire the circumstances of vulnerable consumers who had applied to him because they were already facing financial hardship, during these very difficult times.
- (e) The level of profit derived from the contravention: The Applicant submits that *"The only person to benefit from the debt counselling activities of the Respondent is the Respondent. He received*

*a total of R506 415.80.*" It is clear from the submissions of the Applicant that the amount mentioned here cannot be regarded as conclusive on its own; which means it is possible the Respondent made more money from his debt counselling activities than what the investigators could uncover.

- (f) The degree to which the respondent has co-operated with the National Credit Regulator, or the National Consumer Commission, in the case of a matter arising in terms of the Consumer Protection Act, and the Tribunal: As already indicated elsewhere above, the Respondent did not co-operate with the Applicant; and also did not co-operate with the Tribunal in that he did not even bother to defend the case.
- (g) Whether the Respondent has previously been found in contravention of the Act, or the CPA, as the case may be: This was the first investigation of the Respondent under the Act.

52. Section 2 of the Act requires of the Tribunal to interpret the NCA in a manner that "*gives effect to the purposes of the Act.*" Section 150(i) becomes relevant here as well, in that it gives the Tribunal powers to make "*any other appropriate order required to give effect to a right, as contemplated in this Act or the Consumer Protection Act, 2008.*" The blatant disregard for the provisions of the Act by the Respondent show that he was just in it for his own personal enrichment, and nothing else; and that he benefited from a lot of money that he was not entitled to, and that he did not work for.

## **ORDER**

53. Accordingly, the Tribunal makes the following order:

- 53.1 The Respondent is declared to have engaged in prohibited conduct in terms of Section 150(a) of the Act.
- 53.2 An administrative fine of R506 415.80 is imposed on the Respondent in terms of Section 151 of the Act, in respect of prohibited conduct
- 53.3 The Respondent's registration as a debt counsellor is cancelled with immediate effect.
- 53.4 No order as to costs.

DATED ON THIS 14<sup>th</sup> DAY OF AUGUST 2014

[signed]

Prof B. Dumisa

Presiding Member

Mrs H Devraj (Member) and Adv N Sephoti (Member) concurring.

Authorised for issue by the National Consumer Tribunal  
Case number NCT/13393/2014/57(1)  
Date 2014/10/06  
Copy / item / dtd

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NATIONAL CONSUMER TRIBUNAL