NATIONAL CONSUMER TRIBUNAL

Physical
Ground Floor
East Wing, Building B
Lakefield Office Park
272 West Avenue
(cnr West Ave &
Lenchen Ave North)
Centurion

Postal
Private Bag X110
Centurion 0046

Tel 012 663 5615
Fax 012 663 5693
Website www.thenct.org.za

CASE No: NCT/53/2009/57(1)(P)

In the matter between

NATIONAL CREDIT REGULATOR **Applicant**

and

KWAZIKWENKOSI RALPH ZULU **Respondent**

JUDGMENT

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1. INTRODUCTION

1.1 The Applicant is the National Credit Regulator (NCR) and the Respondent is Mr Kwazikwenkosi Ralph Zulu a debt counsellor with registration number NCRDC 39 registered with the NCR in terms of section 44 of the National Credit Act 34 of 2005 (the Act).

1.2 On 21 May 2009 the Applicant commenced proceedings before the National Consumer Tribunal (NCT) for an order to cancel the registration of the Respondent in terms of section 57 (1) (a) and (c) of the Act on the grounds that the Respondent had repeatedly contravened the Act. The Applicant also applied to the Chairperson of the Tribunal to exercise her powers in terms of Rule 37 (1) (b) to direct that the time permitted in rule 13(2) for lodging an answering affidavit be shortened from 15 business days to five days. The Chairperson delegated her powers to the Presiding member of the Tribunal appointed to hear the matter in terms of Rule 37(2). For the reasons set out below the Presiding member refused to grant the order (see 2 below).

1.3 The Respondent was due to file his answering affidavit on 30 June 2009. On that date the Respondent filed an incomplete application to condone non compliance with the rules and requested that the matter be postponed for a period of two weeks to enable him to "file proper papers". On 1 July 2009 the Acting Registrar for the Tribunal informed the Respondent via email of the correct procedures to follow in order to file an application for condonation. The Acting Registrar informed the Respondent that he should file the application on or before 7 July 2009. The Respondent did not file a completed application for condonation.

1.3 The Applicant applied to the Tribunal for a default order in terms of rule 25 (2) of the Tribunal Rules.

2. APPLICATION IN TERMS OF RULE 34

2.1 The Applicant lodged the application to shorten the time period for filing an answering affidavit on the basis of urgency. The Applicant argued that consumers who have applied for debt counselling or who were about to apply to the Respondent to act as a debt counsellor may be prejudiced.

2.2 The Applicant's application for deregistration of the Respondent as a debt counsellor was lodged on 21 May 2009 and was served on the Respondent on 28 May 2009. The Respondent had until 30 June to lodge an answering affidavit unless this period was shortened by the Tribunal.

2.3 The Presiding member of the Tribunal accepts that in cases of urgency the Tribunal may dispense with forms and service provided for in the Rules and may hear a matter at such time and place and in such a manner and procedure as the circumstances may require.

2.5 The application for cancellation in terms of Section 57 was for a final order of cancellation and was not for some form of interim relief such as suspension of the Respondent's registration. This would have severe consequences for the Respondent.

2.6 In terms of Section 142 (1) (d) of the National Credit Act, this Tribunal must conduct its hearings in public and in accordance with the principles of natural justice. The *audi alteram patem* rule, as a principle of natural justice, entails that the Respondent must have sufficient time to be heard from an informed position. The Presiding Member was of the view that shortening the days from 15 days to 5 days would not make such a difference to the interests of consumers, given the fact that the Applicant has been aware of the contraventions since 17 April 2009 (the date on which the Applicant's investigator signed his report). However, shortening the time period would place a major constraint on the Respondent's rights.

2.7 In addition, an application to shorten the time periods has certain practical implications. The Tribunal would have had to conduct a hearing into the matter and the Respondent would, in all probability, have opposed the application. This means that a hearing into the matter would have been held at about the same time as the Respondent's answering affidavit was due. In all probability the application for urgency would have delayed the hearing into the merits rather than having the desired effect of bringing the matter forward. The Presiding Member was therefore of the view that it would not serve the interests of justice to shorten the days in which the Respondent had to lodge his answering affidavit. The order was refused.

3 APPLICATION FOR POSTPONEMENT OF THE MATTER BY THE RESPONDENT

The Applicant lodged an application for default judgment on 10 July 2009. The application was served on the Respondent. The Respondent appeared at the hearing and requested that the matter be postponed. The Respondent also opposed the application for default judgment.

3.1 The Respondent elected to give evidence in order to explain why he was requesting a postponement of the matter. The Respondent informed the Tribunal that he had become aware of the Applicant's application for his deregistration on 21 May 2009. He confirmed that he received the application on 28 May 2009 and had then consulted his attorney. The Respondent explained that he would have expected the Applicant to have served him first with a compliance notice. He also stated that the attorney that he was consulting had a conflict of interest and so he had had to find another attorney. The Respondent was questioned by the Tribunal regarding his request for a two week postponement which he filed on 30 June 2009. This would have meant that the Respondent could have filed an answering affidavit by 14 July 2009. The Respondent confirmed that on the date of the hearing (20 July 2009) an answering affidavit had still not been prepared. The Respondent stated that during the time period between 28 May and 20 July 2009 he had been "doing a clean-up operation ... for almost 250 files". He stated further that "it is a major cleanup project from a backlog of work I have had for almost a year".[1] The Respondent stated that he was unable to comply with the time period because he had to withdraw "some of this information from my Yahoo email address".[2] He also stated that the amount of work required to deal with nine files was considerable because if "a person has ten credit providers. I have got to now withdraw from the ten of the different

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1 Page 23 of the transcript (20 July 2009).

2 Page 27 of the transcript (20 July 2009).

email addresses from the credit providers".[3] In response to a question from the Tribunal the Respondent confirmed that some of the information relating to the debtors was stored on Yahoo and some of the information was stored on hard drives which were stolen in 2008. Some of the information was on a backup system and some of the information was not. The Tribunal put it to the Respondent that if the information was stored on Yahoo it would have been a simple exercise to download the information. The Respondent confirmed that this was correct and he also confirmed that he had failed to download the information. In response to a question from the Applicant the Respondent stated that he did not prepare an affidavit because he felt that it was his right to receive a compliance notice in terms of section 55 of the Act[4] and further stated that he did not act on the affidavit because of his "specific travel commitments".[5]

3.2 The Applicant addressed the Tribunal on the issue of a postponement and argued that the matter should not be postponed where "the delay was caused by the party himself and where the other party will suffer prejudice". The Applicant referred to the case of ***Greyvenstein v Neethling* 1952 (1) SA 463**. The Tribunal requested that the Applicant address the matter of the failure to issue the Respondent with a compliance notice as the Respondent was very aggrieved that the Applicant had chosen to go straight to the Tribunal for an order of deregistration rather than to first issue a compliance notice in terms of section 55. The Applicant explained that the Applicant had chosen not to exercise its discretion to issue a compliance notice because it was quite clear that the Respondent had repeatedly contravened the Act and that consumers were suffering as a result of the Respondent's conduct. If the Respondent was to be given further time to comply with the Act, consumers would suffer even more damage. The Applicant decided to pursue the matter before the Tribunal

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3 Page 28 of the transcript (20 July 2009).

4 Page 38 of the transcript (20 July 2009).

5 Page 40 of the transcript (20 July 2009).

because it felt that the damage and the severity of the matter justified that the matter to be brought to the Tribunal rather than that a compliance notice be issued.[6]

3.3 The Respondent responded to the Applicant's address by arguing that he was not being treated fairly in this matter[7] and that he should have been given a compliance notice. He further stated that he has instructed his employees to engage in a cleanup operation and that "everybody (was) working tooth and nail".[8]

3.4 In order to decide whether or not to postpone the matter the Tribunal considered

(1) whether the Respondent had a good reason for being unable to file his answering affidavit within the prescribed time period, and

(2) whether any purpose would be served by postponing the matter given the fact that the Respondent had appeared at the hearing and could present his version of the facts.

3.5 The Tribunal found:

(1) the documents had been correctly served on the Respondent and he had been aware of the application from 21 May 2009;
(2) there had been correspondence between the office of the Tribunal and the Respondent advising him of the steps he should take;
(3) the Respondent had requested further time to lodge his affidavit and

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6 Page 50 of the transcript (20 July 2009).

7 Page 55 of the transcript (20 July 2009).

8 Page 58 of the transcript (20 July 2009).

although the time had not been formally granted that period of time had "unofficially" been given to the Respondent simply because of the time it took to set up the hearing;

(4) the Respondent had made no real effort to draft his answering affidavit;

(5) the Respondent had used the time period between the lodging of the Applicant's affidavit and the hearing to attempt to get his files in order;

(6) on the Respondent's own version it was clear that the Respondent had not complied with the Act.

3.6 Taking all the above factors into consideration the Tribunal concluded that the Applicant had not provided a satisfactory reason as to why he had failed to comply with the rules and that his own evidence suggested that he was not in compliance with the Act. The Tribunal was also of the view that it would serve no purpose to adjourn the matter as both the Applicant and the Respondent were attending the proceedings. In terms of Rule 25 (2) the Applicant may apply for a default order against a party and the Tribunal may make an order in terms of sub-rule (2) after it has considered or heard any necessary evidence. The Tribunal was of the view that as the Respondent was present at the hearing, he should be allowed to present his version of the facts and could challenge the evidence presented by the Applicant. Further the Applicant would have an opportunity to question the Respondent and the Tribunal would then be in a position to make an informed decision regarding the initial order sought by the Applicant. The Tribunal held that the fact that the Respondent had failed to file an answering affidavit did not bar the Respondent from giving oral evidence. Rule 25 (2) clearly states that the Tribunal may make an order after it has considered or heard any necessary evidence. Such evidence will also include any evidence which the Respondent can give. The Tribunal therefore decided that the hearing should proceed and that the Respondent should be allowed to participate in the hearing.

4 SUMMARY OF THE COMPLAINT

The complaint is set out in the Applicant's founding documents and Mr Mark Whale, an inspector employed by the Applicant in terms of section 25 of the Act gave evidence on behalf of the Applicant. Mr Whale stated that he had conducted an investigation into the business practices of the Respondent and found that the Respondent was not following the procedures regarding debt counselling as set out in the Act and in the Regulations. Before the evidence given by Mr Whale is discussed it is necessary to set out the applicable sections in the Act and in the Regulations.

5. THE RELEVANT SECTIONS OF THE ACT AND THE REGULATIONS

Section 86 of the Act deals with an application for debt review. For the purposes of this judgement the relevant sub-sections read as follows:

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

(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; and
(b) notify, in the prescribed manner and form -
(i) all credit providers that are listed in the application;
(ii) every registered credit bureau.

(6) A debt counsellor who has accepted an application in terms of this section must determine, in the prescribed manner and within the prescribed time -

(a) whether the consumer appears to be over-indebted;

(7) If, as a result of an assessment conducted in terms of subsection (6) a debt counsellor reasonably concludes that-
(a) the consumer is not over indebted, the debt counsellor must reject the application, even if the debt counsellor has concluded that a particular credit agreement was reckless at the time it was entered into;

(b) the consumer is not over-indebted; but is nevertheless experiencing, or is likely to experience, difficulty satisfying all the consumer's obligations under credit agreements in a timely manner, the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement; or

(c) *the consumer is over-indebted, the debt counsellor may issue a proposal …*

(10) *If a consumer in a default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review … at any time at least 60 days after the date on which the consumer applied for the debt review."*

Further details regarding how a debt counsellor is obliged to perform his functions are found in Regulation 24 (Application for debt review). The relevant subregulations of this Regulation read as follows:

(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*

(b) *Provide the debt counsellor with the following information:*[9]

(c) *Submit to the debt counsellor the documents specified in Form 16.*

(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.*

(3) *The debt counsellor must verify the information provided in terms of subsection (1) above by requesting documentary proof from the consumer, contacting the relevant credit provider or employer or any other method of verification.*

(4) *In the event that a credit provider fails to provide a debt counsellor with corrected information within five business days of such verification being requested, the debt counsellor may accept the information provided by the consumer as being correct.*

(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 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).*

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9 This subregulation of Regulation 24 (b) contains a long list of information which the consumer is obliged to provide the debt counsellor

(9) Any arrangement made by the debt counsellor with credit providers must be reduced to writing and signed by all the credit providers mentioned, the debt counsellor and the consumer.

(10) After completion of the assessment, the debt counsellor must submit form 17.2 to all the affected credit providers and all registered credit bureaux within 5 business days.

Chapter 7 of the Regulations deals with record keeping. In addition to any record that must be kept in terms of the Act, debt counsellors are required to keep the following records 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 clearance certificate.

Records that are required to be maintained in terms of the Act can be maintained in paper form or in electronic form. However if they are kept in electronic format they must be reproduced in paper form within a period of five business days after a request by the National Credit Regulator.[10] If a debt counsellor has appointed a third party to maintain a person's records, as required by the Act, that appointment does not absolve the debt counsellor of any responsibility to maintain the records in accordance with the Act and the debt counsellor must ensure that any records maintained by the third party will be available without any undue delay.[11] All records must be kept for a period of three years from the

10 Regulation 55 (2) and (3).

11 Regulation 55 (4).

earlier of the date on which the debt counsellor created, signed or received the document.[12]

6. THE EVIDENCE GIVEN BY MR WHALE

Mr Whale's evidence is summarised as follows:

6.1 On 8 March 2009 SA Home Loans (SAHL) lodged a complaint with the NCR that the Respondent was not co-operating with them in respect of the debt review application of Mr and Mrs Moyo. On 6 April 2009 Mr Whale was appointed to conduct an investigation into the activities of the Respondent and on 7 April Mr Whale visited the business premises of the Respondent.

6.2 Mr Whale selected 9 consumer files for consideration. These files were selected randomly.[13] He found these files to contain very little information. In particular the files did not contain copies of Forms 17.1 and 17.2. Mr Whale questioned the Respondent in this regard and the Respondent informed Mr Whale that the documents were kept on his laptop. Mr Whale requested the Respondent to make copies of the documents available to him and the Respondent undertook to provide the copies the following morning.[14] (8 April 2009).

6.3 On 8 April 2009 Mr Whale returned to the Respondent's business premises. Copies were made of the documents which were contained in these files and these documents were handed to the Tribunal.[15] The Respondent confirmed that

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12 Regulation 55 (5).

13 See page 66 of the transcript (20 July 2009).

14 See page 66 of the transcript (20 July 2009).

15 Mshibe - Annexure C
Mhlongo - Annexure D
Mthembu - Annexure E
Ramlucken - Annexure F

these were the documents which Mr Whale found in the files on 8 April 2009.[16] Some of these documents had been added to the files by the Respondent after Mr Whale had requested him to print out all relevant documents.[17] The contents of each file (as they were when Mr Whale conducted his investigation) are outlined as follows:

6.3.1 Mshibe (annexure C)

This file contains a Form 16 which is not dated so it was unclear when the consumer applied for debt review. In addition, the names of creditors do not appear and the form is for the most part blank. Annexure C2 is a Form 17.1 which is dated 30 August 2007, however there was no record of how this form was sent to the various creditors or when it was sent as is required by Regulation 24(5). There are no further documents relating to this consumer in the file.[18]

6.3.2 Mhlongo (annexure D)

This file contains a Form 16 which is dated 21 April 2008. The Form 16 is incomplete as the number and names of the creditors do not appear on the form. There were no further documents relating to this consumer in the file.

Msani - Annexure G
Shabir Hoosen - Annexure H
Mohamed Hoosen - Annexure J
Mtshali - Annexure K
Moyo - Annexure L

16 Page 67 - 69 of the transcript (20 July 2009).

17 Page 70 of the transcript (20 July 2009).

18 At the hearing the Respondent supplied certain other documents - an email which indicated that a proposal had been sent to creditors on 20 May 2008 and he also submitted a document which was headed "proposed payment structure."

6.3.3 Mthembu (annexure E)

Annexure E1 is a Form 16 which indicates that the consumer applied for debt review on 5 of February 2008. The Form 17.1 appears to have been sent to two of the creditors on 5 February 2009 (annexure E2 and E3). The rest of the Forms 17.1 appear to have been sent to the remaining creditors on 12 February 2009 (annexure E3 to E8). However, the Respondent has not kept a record indicating that these documents were actually sent to the various consumers as required by Regulation 24(5). Although a proposed payment structure is contained in the file (annexure E9) it is not dated, it has not been signed and there is no record that it has been sent to any of the creditors.

6.3.4 Ramlacken (annexure F)

Annexure F1 is a Form 16 which indicates that the consumer applied for debt review on the 17 October 2008. The Form 17.1 appears to have been sent to the creditors on 20 October 2008 (annexure F2) but there is no record that these forms were actually sent as required by Regulation 24(5). The Form 17.1 was again sent to two of the creditors on the 12 January 2009 (annexure F3 and F4). This Form 17.1 indicates that this consumer applied for debt review on 12 December 2009 (this is obviously a mistake and should have been 2008). There is no record in the file that these documents were actually sent to creditors. On 13 January 2009 a Form 17.1 was again sent to creditors indicating that the consumer applied on 13 January 2009 (see annexure F5 and F6). There is a copy of a proposal in the file (see annexure F7) but it is not dated, it is not signed, and there is no record that has been sent to any of the creditors.

6.3.5 Msani (annexure G)

G1 is a Form 16 but it is unclear when this consumer applied for debt review as the Form 16 is not dated. The details regarding the creditors do not appear on the Form 16. Annexure G2 is a Form 17.1 which is dated 12

October 2007 but there is no record that the Form 17.1 was actually sent to the creditors. Annexure G3 is a certificate of balance (dated 5 November 2007) sent by Edgars (one of the creditors) which indicates that the Form 17.1 must have been sent to some of the creditors (see annexures G3 to G6). On 23 May the Respondent signed an application to claim from the NCR fund (annexure G7)[19] and there is a copy of a proposed payment structure (annexure G8). But this proposal is not dated, it is not signed and there is no record that it has been sent to the creditors. In addition, it has not been completed properly because the information supplied by Edgars (annexures G3 to G6) does not appear on this proposal.

6.3.6 Shabir Hoosen (annexure H)

Annexure H1 is a Form 16 which indicates that this consumer applied for debt review on the 25 March 2008. The Form 17.1 was sent to the creditors on 3 April 2008 (annexure H2 and H3). However, there is no record that these documents were sent to the creditors as required by Regulation 24(5). There is a copy of two proposals in the file (annexure H4 and H5) but neither of these documents are dated, they are not signed and there is no record that they were sent to creditors. Nevertheless, there is an indication that the Forms 17.1 must have been sent because the attorneys representing Nedbank sent a certificate of balance on the 28 May 2008 (annexure H6). Standard Bank must also have received some sort of documentation because an email was sent to the Respondent on 16 October 2008 (annexure H7) and again on 6 February 2009 (annexure H8). The credit providers appear to have been making a proposal to the Respondent regarding this matter but nothing further appears in the file regarding this matter.

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19 In circumstances where the consumer is earning below a certain threshold the NCR has a fund from which debt counsellors may claim to cover their costs involved in the debt review process.

6.3.7 Mohamed Hoosen (annexure J).

This consumer applied for debt review on the 5 February 2008 as indicated on the Form 16. The Form 16 has not been completed properly and no form 17.1 appears to have been submitted to any of the creditors. No form 17.2 has been submitted. There is a copy of a proposal in the consumer's file but it is not dated, it is not signed and there is no proof that this proposal was sent to creditors.

6.4.8 Mtshali (annexure K),

The Form 16 indicates that this consumer applied for debt review on the 31 October 2008 (annexure K1). A Form 17.1 was sent to Nedbank on the 26 November 2008 (annexure K2) which was 17 business days after the application. A From 17.1 was sent to Standard Bank on 15 January 2009 (annexure K3) which was 46 business days after the application. Nedbank submitted an undated certificate of balance to the Respondent and on 19 January 2009 Standard Bank also submitted a certificate of balance. The Respondent has still not made a determination as required in terms of section 86(6). There is a copy of a proposal in the file but it has not been signed and it is not dated (annexure K6). Further there is no proof that it has been sent to any of the creditors.

6.3.9 Moyo (annexure L)

The Form 16 indicates that Mr Moyo applied for debt review on the 18 January 2008 (annexure L1). There is no evidence in the file that a Form 17.1 was submitted to any of the creditors by the Respondent.[20] No Form

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20 But SA Home Loans must have received something because they acknowledge that they received one in an email sent to the NCR. The email states that the "the consumer applied for debt review on the 26th of May 2008", attached hereto a copy of the form 17.1, a copy of which was forwarded to your offices via email on the 6th of June, we responded thereto on the 16th of June 2008". Mr Whale reported that he obtained annexure L2 from SAHL and not from the Respondent.

17.2 has been submitted to any of the creditors. There is a copy of a proposal in the consumer's file (annexure L3) but this proposal has not been dated, it is not signed and there is no record that it was ever sent to any of the creditors.[21]

6.4 Because of the complaint levelled against the Respondent by SAHL Mr Whale pursued the matter with SAHL and the Respondent in order to establish how far the debt review process had proceeded. The Respondent informed SAHL and Mr Whale that the matter had been handed over to an attorney so that the matter could proceed to court. Mr Whale requested the Respondent on a number of occasions (as did SAHL) to provide details regarding the court matter. The Respondent referred SAHL and Mr Whale to his attorney. The attorney responded by stating that the matter was proceeding to court. On 9 March 2009 the attorney sent an email to Ms Khan from SAHL informing her that SAHL would "have proof of the application by the end of today, latest tomorrow morning".[22] An email from Mr Whale to the Respondent dated 8 April 2009 confirms that the parties had agreed that the Respondent would supply Mr Whale with "copies of the documents filed in the court application". Mr Whale also confirmed that these documents would be supplied by close of business the following day (ie 9 April 2009). To the date of the hearing no details regarding a court application have been provided by the Respondent or his attorney.[23] In view of the fact that SAHL issued a notice in terms of section 86(10) of the Act that SAHL was terminating

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21 A proposal must have been sent to SAHL because they acknowledge that they received one in an email. The email reads:
"we have received a proposal on the 17th October 2008. We do not agree with the income provided for and query same on the 30th October 2008. Mr Moyo failed to respond to a follow up mail which was forwarded to this office on 12th January 2009. Mr Moyo responded by saying that the matter has been referred to court and will be obtaining the court order on the 26th of this month February 2009." Mr Whale stated that when the creditor made reference to Mr Moyo it should have stated Mr Zulu.

22 Annexure L5.

23 Annexure L6.

the debt review process, the NCR removed the file from the Respondent and handed it over to another debt counsellor. SAHL agreed to work with this debt counsellor. The notice terminating the debt review process was sent by registered mail to the Respondent on 14 April 2009.[24] The Respondent was given 10 days to respond to this notice but he failed to respond.

5. THE RESPONDENT'S ANSWER TO THE COMPLAINT

The Respondent confirmed that the documents which Mr Whale had handed to the Tribunal were the only documents which were present in the consumer files on the date on which the investigation was conducted.[25] The Respondent was able to provide some of the documents which should have been given to Mr Whale when he was requested to hand over any further documents. These documents were down loaded from the Respondent's computer during the time the hearing was taking place.[26] Most of these documents related to the Form 17.1 or a proposal and it was argued by the Respondent that these documents indicated that the Form 17.1 or a proposal was sent to creditors. In some instances the Respondent was able to provide the Form 17.1 or the proposal and in others he provided a document which consisted of an email addressed to a particular creditor which indicated that there was an attachment. For example in the Mshibe matter he handed in a document which was sent to
lee@rebinc.co.za;
debtcounselling@standardbank.co.za;
thehub@nedbank.co.z;
debtreview@edcon.co.za.

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24 Annexure L8

25 See page 133 of the transcript (20 July 2009).

26 These documents were downloaded by the Respondent after the hearing was adjourned on 20 July 2009 and were handed to the Tribunal on 3 August 2009.

The subject line said Mshibe NB.xls and the attachment said Mshibe Nbxls.[27] He also provided the Tribunal with a proposed payment structure but the document was not completed.[28]

The Respondent explained that he had had a number of difficulties:

(1) originally he was working with another debt counsellor, Goodman Makhanya. The two debt counsellors operated as Goodman Ningi, Ralph and Associates (GNR and Associates). This business experienced difficulties because they were not properly set up to deal with debt counselling.[29] The business relationship broke up and the Respondent took over many of the files which Goodman Mahanya had been dealing with. He experienced difficulties with these files. The Moyo file was one such file.

(2) he experienced difficulties with the credit bureaux in that he "didn't know exactly where to start" therefore he failed to inform them of the debt counselling applications which he had received.[30]

(3) he experienced difficulties with creditors in that they did not respond timeously to his requests for information and often he did not have the correct addresses for

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27 According to the Respondent this was an excel spreadsheet which contained the proposed payment structure for the consumer which was sent to creditors. See page 95 of the transcript (3 August 2009).

28 The documents were marked A2 and A4 by the Respondent. See also page 12 of the transcript (3 August 2009) where the Respondent explained that he could only answer the question relating to the time when Mshibe applied for debt counselling if he referred to annexure A2 on Yahoo mail.

29 See page 139 of the transcript (20 July 2009).

30 See pages 142 and 144 of the transcript (20 July 2009).

credit providers. He also explained that in many instances creditors themselves appeared to be unaware of the process.[31]

(4) he experienced difficulties with a particular employee whom he trusted and who turned out to be dishonest.[32]

(5) his offices were broken into in 2008 and his hard drives were stolen. Many of his records were on these hard drives and he is now in the process of reconstructing his records. However he did state that he had backup copies which he then managed to retrieve when the hearing reconvened on 28 July 2009.[33] In response to a question from the Tribunal regarding why he had failed to file his answering affidavit the Respondent stated that he had had difficulty locating the documents on his computer.

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31 See page 143 of the transcript (20 July 2009) and page 33-34 of the transcript (28 July 2009). It must be noted the Respondent's concerns in this regard do not appear to be unfounded. The issue was raised in certain memoranda which were handed to the Tribunal by the Respondent. In addition in *The National Credit Regulator v Nedbank Limited and others* Case No 19638/2008 (a judgment by du Plessis J in the North Gauteng High Court on 21 August 2009) the court stated that "I have been informed that credit providers delay the negotiation process with a view to exercising their rights under section 86 (10)" (see page 40 of the judgment). The court pointed out that if a debt counsellor concluded that a credit provider is not negotiating in good faith, he or she will on that basis also conclude that negotiations are leading nowhere and may proceed to take the matter to court. However the court also cautioned that debt counsellors should be careful before reaching such a conclusion and should warn the relevant credit provider that the matter is to be referred to court because "hasty and unreasonable conclusions on the part of the debt counsellor might result in adverse costs order (page 41 of the judgment).

32 See page 145 of the transcript (20 July 2009).

33 See page 9 of the transcript (28 July 2009). See also page 65 of the transcript (28 July 2009) where the Respondent stated that he "printed all this out when I was in Durban last week. I wanted to show that if they say I have not done no determination I have done a determination, it has already been done, but it is sitting in my consumer's data as we speak".

(6) he experienced difficulty following through with the debt review process because often consumers did not have money for the legal fees that were required before a matter could proceed to court.[35] In other instances consumers did not have money and so the process simply fell away.[36]

In his evidence and during cross-examination, the Respondent admitted the following:

(1) He did not always complete the Form 16. He stated:

> "So sometimes it (the documents which the debtor provides) is right in front of me, if I am going to take all of this and rewrite it again under form 16 it can be somewhat composite to be honest with you. However, if you have got the document from the consumer at the time then it becomes even easier because you retrieve it from the latest statement of that consumer".[37]

(2) In many instances he did the assessment to establish whether the consumer was over indebted based only on the Form 16 and sometimes the determination was done on the same day that the debtor applied for debt counselling.[38] In many instances he simply relied on the what the consumer told him and did not request further information to confirm the correctness of the information.[39]

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35 See pages 26 and 29-30 of the transcript (3 August 2009).

36 See pages 30, 96, 118 and 139-143 of the transcript (3 August 2009).

37 See page 18 of the transcript (28 July 2009). See also page 32 of the transcript (28 July 2009) where the Respondent says "it is incomplete fair enough"

38 See page 129 of the transcript (20 July 2009) 19-20 of the transcript (28 July 2009) and page 47 of the transcript (28 July 2009) where the Respondent states that "this document (form 16) can serve three specific purposes". See also page 55 of the transcript (28 July 2009) and pages 42 ,115 -117 and 146 of the transcript (3 August 2009)

39 See page 127 of the transcript (3 August 2009).

(3) In many instances he did not send a Form 17.2 to creditors. [40]

(4) He did not keep a specific record of the manner and date on which forms (in particular Form 17.1 as required by Regulation 24 (5)) were sent to the various creditors and he relied merely on the email which was stored on computer.[41] In order to obtain documents for this Tribunal hearing he resorted to calling creditors in order to find out from them as to when they had received the documents.[42] He also admitted that he did not print out the documents (which he produced at the hearing) when requested by Mr Whale to supply them.[43]

(5) His administration and attention to detail is, to use the Respondent's own words, "rather tardy".[44] He has always relied on his staff to attend to most of the administrative matters and does not check that they that they have actually

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40 See for example pages 23 and 30 of the transcript (28 July 2009) and pages 43 and 74 of the transcript (3 August 2009). See page 111-112 of the transcript (3 August 2009) where the Respondent admitted that it had not been his practice to send out Form 17.2 but that now he had done a "clean-up operation".

41 For example on page 25 of the transcript (28 July 2009) the Respondent was specifically asked to produce a form 17.1. He explained that he could not do that but "it was definitely sent because I have got proof of that". By proof of that the Respondent is referring to the fact that he has an email which indicates that an attachment was sent. See also pages 47, 50, 52, 56, 61, 67, 7, 89-91 of the transcript (28 July 2009) and pages 7, 35-36, 90, 95 and 98 of the transcript (3 August 2009).

42 See page 10 of the transcript (3 August 2009). In one particular instance it was clear that incorrect information was received from the creditor as the information provided to the Tribunal indicated that the Form 16 had been sent 5 days before the debtor even applied for debt counselling. (See pages 14-20 of the transcript (3 August 2009). This could also have been an administrative error on the part of the Respondent's staff.

43 See page 75 of the transcript (28 July 2009).

44 See page 98 of the transcript (28 July 2009) and page 164 of the transcript (3 August 2009).

carried out his instructions.[45] Further, when he took over Mr Makhanya's files he did not go through them to check the state of the debt counselling process.[46]

(6) He did not follow through with the court application in the Moyo matter once he had handed the matter over to the attorney.[47] He simply relied on the attorney to finalise the matter.

6. EVALUATION

The debt counselling process is set out in detail in the Act (read with the regulations). The debt counsellor is obliged to follow certain strict deadlines and he is obliged to keep a record of certain documents. Even on the Respondent's own version he has failed to comply with the Act:

(1) The Form 16 must be completed properly or alternatively the consumer must supply the debt counsellor with a comprehensive set of documents. In most of the files under scrutiny the Form 16 was not completed properly and there was no record in the files of any documents which consumer may have submitted to substantiate the facts provided to the debt counsellor. In terms of Regulation 55 (a) a debt counsellor is obliged to keep a copy of all documents submitted by the consumer

(2) The debt counsellor must inform all creditors and the credit bureaux that the debtor has applied for debt counselling by sending a Form 17.1 within 5 days of

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45 See page 77 of the transcript (28 July 2009) and pages 38,108 and 120 of the transcript (3 August 2009) where he admitted that he relied on his staff to send out Forms 17.1 . See also pages 105 and 121 of the transcript (3 August 2009) where the Respondent said he did not know why his staff had not sent out the form 17.1.

46 See page 55 of the transcript (3 August 2009).

47 See page 78-81 and 191-197 of the transcript (3 August 2009).

the consumer's application for debt counselling. The debt counsellor must keep a record of the date, time and manner of delivery of the notice. There are no records in the files that the Forms 17.1 have been sent, when they were sent and how they were sent. Although the Respondent produced emails at the Tribunal hearing which he stated indicated that creditors were informed of the applications for debt counselling, these emails do not constitute proof of what exactly had been sent to creditors as they do not comply with Regulation 24(5). The Respondent admitted that he did not send the Form 17.1 to all the registered credit bureaux.

(3) The debt counsellor must verify the information which the debtor has supplied to him by obtaining documentary proof and by contacting the various creditors. Then within 30 days the debt counsellor must do an assessment of the debtor's financial position and must make a determination. In some instances the Respondent relied merely upon what the consumer had told him and he used the Form 16 (application for debt counselling) as the determination. The fact that the date of application is also used as the date of the determination is problematic as this suggests that no real action was taken by the debt counsellor to do a proper assessment as required by the Act into the debtor's financial position. Such a practice suggests that no proper determination was made. The Respondent explained that in many instances he did not receive the information from the creditors which is also why the process was delayed. However the Act does make provision for such a situation (Regulation 24(5)) and in order to ensure that he is complying with the Act, the Respondent should have kept a record of the attempts made and what procedure was followed if these attempts were unsuccessful.

(4) The debt counsellor is permitted in terms of the Act to keep records in electronic form. However the debt counsellor must be able to reproduce those records in paper form within five business days after a request by the NCR. The Respondent was requested to produce these documents by Mr Whale when the

investigation took place in April 2009. The Respondent undertook to produce the relevant documents but failed to do so. At the hearing the Respondent explained that his computer hard drive had been stolen and that was why he was unable to provide these documents. However, the Respondent was able to produce certain documents at the hearing. Therefore there is no reason why the Respondent could not have produced at least these documents when requested to do so by Mr Whale. In addition, in the case of Ramlucken, the consumer applied for debt counselling after the date of the break-in. Therefore there is no reason why he should not have a complete record for Ramlucken. The Respondent admitted that he was having difficulty tracking the electronic records for each consumer under scrutiny which indicates that he does not have a separate file on the computer for each consumer. In view of the difficulty which the Respondent has had in tracing the relevant documents it can be assumed that each document is saved in an indiscriminate fashion as and when the document is sent or received.

Mr Whale in his affidavit and the Applicant during his cross-examination of the Respondent questioned the fact that the Respondent did not explain his fee structure to debtors because there was no record in the files that this had been done. The allegation was also made that where there were proposal forms, these were not dated and signed. It must be noted that although Regulation 24(5) requires that a debt counsellor keep a record of the date, time and manner of delivery of a 17.1 notice, there is no similar provision which relates specifically to the explanation of fees, nor to the proposal form. Regulation 25(9) states that any arrangement made by the debt counsellor with credit providers must be reduced to writing and signed by all credit providers mentioned, the debt counsellor and the consumer, but there is no similar provision which applies just to a proposal. It seems that in the case of the files under consideration, none of the cases had reached the point where there was an agreed arrangement. In answer to a question from the Tribunal relating specifically to the Applicant's requirement that there be a written record of the fees which were to be charged, the Applicant acknowledged that there was no requirement in terms of the Act

or the Regulations. The Applicant argued that nevertheless, a professional and responsible debt counsellor would keep such records. It is clear however that the Respondent did not prepare a determination for each consumer within the 30 day period as required by Regulation 24 (6) and that in most instances he simply allowed the process to fall away without taking any further action such as notifying creditors.

Taking all the above into account the Tribunal is satisfied that the allegation that the Respondent has repeatedly contravened the Act is correct.

7 Conclusion

In arriving at an appropriate order in this matter the Tribunal takes a number of factors into consideration:

(1) The seriousness of the contraventions;
(2) The position of the Respondent; and
(3) The rights of the Respondent's existing consumers.

The Tribunal considers the contraventions by the Respondent to be extremely serious. The Respondent's failure to keep proper records and his failure to comply with the procedures set out in the Act place his consumers at serious risk. This was particularly evident in the Moyo matter when the creditor exercised its right to terminate the debt review in terms of section 86(10).

In its application the Applicant requested that the Tribunal cancel the Respondents registration in terms of section 150 (g) of the Act or grant the Applicant such further or alternative relief as the Tribunal may consider appropriate to give effect to a right as contemplated in the Act (in terms of section 150 (i)). But at the conclusion of the hearing the Applicant requested that the Respondent's registration be cancelled and that all the consumers which the Respondent was dealing with be handed over to other

debt counsellors. The Applicant also requested that all the fees which consumers had paid to the Respondent be handed back to consumers so that these fees could be used to compensate the new debt counsellors. This is certainly an appropriate order as set out in section 57 (1) (c) (Cancellation of Registration) and it is one which the Tribunal considered seriously. However, as pointed out, the Tribunal is not limited to cancelling the registration of a registrant as it may also consider the various orders as set out in section 150 (Orders of the Tribunal).

Cancelling a registrant's registration is the ultimate penalty. For a debt counsellor, this means that he must cease acting as a debt counsellor. In the case of the Respondent, his business will be at an end, he will have to dispose of the infrastructure of his business, he will have to retrench his staff and any investment made to set up the business will be lost.

In this particular matter, the Tribunal considers whether, in its opinion, the Respondent is beyond rehabilitation and so cancellation of registration is the only suitable penalty. The Respondent had failed to take appropriate action when initially investigated by the Applicant, he had failed to take the proceedings of the Tribunal seriously when the Applicant instituted these proceedings and he failed to file an answering affidavit. The Respondent admitted that he had not applied his mind properly to these proceedings. However, the Respondent appeared at the Tribunal hearing. At this hearing he admitted that his administrative procedures were sadly lacking and that he had relied too much on his staff. He pleaded for a second chance to prove that he was capable of meeting the requirements of the Act and of providing debtors with a professional service.

The Tribunal takes into consideration that the Respondent is an intelligent person who is well qualified. He obviously understands the Act (although he has adopted a cavalier attitude toward meeting its prescribed requirements) and has an established an office with a number of staff members, some of whom are in the process of becoming debt counsellors. The Respondent's business is not a fly-by-night operation. The Tribunal takes into consideration the submission by the Applicant that the Respondent can again

apply for registration at a later date but this would mean that his existing operation would have to close down and his existing infrastructure would be lost.

The issue of consumer prejudice is an extremely important consideration. In order to protect existing consumers the Applicant has argued that the Respondents existing clients must be removed from under the Respondent's control and must be handed over to another debt counsellor. However, this would not necessarily solve the problem as the new debt counsellor would have to start the procedure again and many creditors may object to this. If the Respondent is already out of time there is no guarantee that creditors will allow the process to start again. Although the Respondent has not necessarily followed the correct procedures as set out in the Act, some of his matters may have been resolved to the satisfaction of debtor and creditor and so to begin the process again may have a negative impact on the rights of debtors

With due consideration to the above, the Tribunal issues the following order:

(1) The decision of the Tribunal regarding the Respondent's registration as a debt counsellor is postponed until 26 February 2010.

(2) From Monday 24 August 2009 until 26 February 2010 the Respondent may not take on any new consumers subject to the following proviso:

> If the NCR submits a report to the Tribunal before 20 November 2009 that it is satisfied that the Respondent is conducting his affairs in a professional and satisfactory manner and that it is withdrawing its application for the Respondent's deregistration as a debt counsellor, the Tribunal will reconsider the matter on 20 November 2009 and will finalise the matter on that date.

(3) The Respondent must ensure that the NCR conducts a visit to his offices on a monthly basis from 24 August 2009 until 26 February 2010 to ensure that the

Respondent is making a concerted effort to comply with the Act. Investigations must be conducted in September 2009, October 2009, November 2009, December 2009, January 2010 and February 2010.

(4) The onus is on the Respondent to facilitate these investigations and to pay all reasonable travelling and accommodation costs of the NCR to conduct such investigations.

(5) If the NCR does not submit a positive report on or before 20 November 2010, the final decision of the Tribunal will be held over until 26 February 2010.

(6) If the matter is not finalised on 20 November 2009, a hearing of the Tribunal will be convened on 26 February 2010, the purpose of which will be to consider a report by the NCR regarding the Respondent's continued registration as a debt counsellor.

(7) As far as the Respondent's existing clients are concerned, the Respondent must hand over any files to the NCR where the NCR has received complaints and where clients are dissatisfied with the service provided by the Respondent. These consumers must be handed over to another debt counsellor to be identified by the NCR. The Respondent must refund any fees which he has received from these consumers to the NCR and such fees are to be used to pay the fees of the new debt counsellor. In the event of a surplus between the fees paid to the Respondent and the fees paid to the new debt counsellor, the NCR must return this surplus to the consumer.

T Woker
Presiding Member

F Manamela
Member

W Haslam
Member

Date