

SOUTH AFRICA / JUDGMENT

Botha v Koekemoer t/a The Debt Expert 2 and Others; Mafakane v MSA Consultants t/a Consumer Financial Services and Others (7723/2017; 750/2018) [2018] ZALMPPHC 20 (11 May 2018)

[2018] ZALMPPHC 20

COURT

Limpopo High Court, Polokwane

BEFORE

G.C Muller

CASE / FILE NUMBER

7723/2017; 750/2018

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

Case no:7723/2017

:750/2018

ADRI BOTHA APPLICANT

AND

BERNIICE KOEKMOER (NCRDC760) T/A THE DEBT EXPERT 2 FIRST RESPONDENT

DIRECT AXIS (PTY)LTD SECOND

RESPONDENT

FINCHOICE (PTY)LTD THIRD

RESPONDENT

NEDBANK LTD FOURTH

RESPONDENT

RAINBOW FINANCE C/O OF FURNITURE FIFTH

RESPONDENT

WESBANK – VEHICLE FINANCE SIXTH

RESPONDENT

RICHARD MAFAKANE APPLICANT

MSA CONSULTANTS TA CONSUMER FINACIAL SERVICES FIRST RESPONDENT

CAPITEC BANK LTD SECOND

RESPONDENT

CONSUMER FRIEND THIRD

RESPONDENT

JUDGMENT

MULLER J:

[1] Two applications were placed before me in the unopposed motion court. The relief claimed is identical and is formulated as follows:

“(1) That the applicant be declared no longer to be in debt review;

(2) That the credit bureau remove the debtor review status from the Applicant’s credit reports;

(3) That the Debt Counsellor provide Form 17.W confirming that the Applicant have been declared no longer over-indebted.”

[2] The salient facts relevant to the issues are that the applicants applied for debt review in terms of section 86 of the National Credit Act 34 of 2005 (hereinafter the NCA). Their respective debt counsellors issued Form 17.2 to their creditors confirming that the debt review applications had indeed been successful. None of the applications had been rejected or had been submitted by the respective debt counsellors to a magistrates’ court with jurisdiction to make an appropriate order when the creditors were provided with form 17.2. The notifications were misleading in the absence of an explanation by the relevant debt counsellors why they have done so.[1] The applicants nevertheless continued to pay their indebtedness towards their creditors, without any objection.

[3] It is averred by the applicants that their respective financial circumstances have improved since the applications were made to their respective debt counsellors to such an extent that they are presently in the position to pay their debts. The applicants, therefore, wish to terminate the debt review process instituted by them.

[4] Acting on advice that debt counsellors do not possess the power in terms of the NCA to terminate the debt review proceedings instituted by the applicants, they seek relief from this court.

- [5] To determine whether the applicants are entitled to the relief they seek, an analysis of the debt review process must be undertaken to determine whether debt review process initiated by the applicants may be terminated at any time before the application is placed before a magistrate, and, if not, whether a magistrate has the authority to terminate debt review in the exercise the court's discretion.
- [6] Debt review is a novelty. It was introduced in South African law for the first time, by the NCA. The debt review process is therefore regulated by statute. The aim of debt review proceedings is to avoid litigation for the enforcement of credit agreements by providing consumers an opportunity to settle their credit related debts.
- [7] The procedure commences with a consumer making an application to a debt counsellor[2] in a prescribed manner and form to have the consumer declared over-indebted.[3] On the receipt of prescribed application the debt counsellor notifies the applicant as well as all the credit providers listed in the application as proof of receipt of the application and the debt counsellor also notifies every registered credit bureau as proof of receipt of the application.[4]
- [8] A debt counsellor who has accepted the application for debt review must determine in the prescribed manner and time whether the consumer appears to be over-indebted.[5] If he debt counsellor, after assessment of the application, reasonably concludes that the applicant is not over-indebted, the said debt counsellor rejects the application.[6] In such an event the debt counsellor is obliged to provide the consumer with the letter of rejection setting out the basis for finding that the consumer is not over indebted.[7]
- [9] Section 86(7)(b) provides that if a debt counsellor concludes that a consumer is not over-indebted, but is of the opinion that the consumer is nevertheless experiencing, or is likely to experience difficulty in satisfying all the consumers obligations in a timely manner, the debt counsellor may recommend that the consumer and the credit providers voluntarily consider and agree on a plan of debt re-arrangement. If the parties, as a result, agree and accept the proposal, the debt counsellor must record the proposal in the form of an order. The debt counsellor is obliged to file[8] the agreement as a consent order in terms of section 138, if the parties involved are amenable to have their agreement be made an order of court.[9]
- [10] Section 86(8)(a) and
- (b) states:
- "If a debt makes a recommendation in terms of subsection (7)(b) and-*
- (a) the consumer and each creditor provider concerned accept that proposal, the debt counsellor must record the proposal in the form of an order, and if it is consented to by the consumer and each credit provider concerned, file it as a consent order in terms of section 138; or

(b) if paragraph (a) does not apply, the debt collector must refer the matter to the Magistrate's Court with the recommendation."

[11] It is necessary, before moving on to section 86(7)(c), to make reference to the purpose of section 86(7)(b) and the relationship

between this section and section 86(8). When a debt counsellor concludes that an applicant is not over-indebted but in the opinion

of the debt counsellor is experiencing difficulty or is likely to experience difficulties with its obligations, the debt counsellor

does not reject the application as required by section 86(7)(a), but recommends to the credit providers and the applicant to voluntarily

agree to a plan of debt arrangement[10]. The debt counsellor, in such a case, assumes the role of a mediator by making proposals to the parties. If a proposal is accepted by all the parties an agreement is concluded, which agreement must be recorded in the form of an order and filed as a consent order.[11] Section 138(1) explains that if a dispute is resolved by an ombudsman consumer court, alternative dispute resolution agent, or the National Credit Regulator and the debtor agrees to the proposed terms of an appropriate order, the National Consumer Tribunal[12] or court or may confirm the agreement as an order by consent.[13] Debt review proceedings are instituted by debtors, who are over-indebted but have not defaulted yet in respect of credit agreements entered into, and also by those who have defaulted to prevent credit providers enforcing credit agreements by the institution of legal proceedings against a debtor. When the former application is made no dispute has arisen between the debtor and creditor. Usually two basic requirements must be met before a court makes an agreement an order of court. One, the court must be satisfied that the parties freely and voluntarily entered into the agreement that they wish to make a consent order. And two, a court must be satisfied that the agreement relates to pending litigation.[14] There cannot be any doubt that section 86(8) has in mind that voluntary agreements reached between a debtor and credit providers after a recommendation have been made by the debt counsellor shall be made an order of court.[15]

[12] Section 86(7)(c) provides that if a debt counsellor reasonably concludes that a consumer is over-indebted, the debt counsellor makes a proposal in which the debt counsellor recommends that a magistrate's court having jurisdiction may make either or both of the following orders:

"(i) that one or more of the consumers credit agreements declared to be reckless credit if the debt counsellor has concluded that those agreements appear to be reckless; and

(ii) that one or more of the consumers obligations be rearranged by-

(aa) extending the period of the agreement and reducing the amount of each payment due accordingly;

(bb) postponing during specified period the dates on which payment are due under the agreement;

(cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or

(dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5 or Part A of Chapter 6.”[16]

[13] It is clear from the scheme of the NCA dealing with debt review that consumers are over-indebted when a court makes an order in terms of section 86(7)(c). Until such an order is made, a proposal made by a debt counsellor has no legal effect. The recommendation simply sets in motion a chain of prescribed events which, ultimately may lead to a court determining that an applicant to be over-indebted.[17]

[14] The NCA makes no provision for an applicant to terminate the debt review process once an application containing the required information is submitted to a debt counsellor.

[15] Section 86(7)(c) must be read with 88(1) which provides that a consumer who has filed an application for debt review in terms of section 86(1) may not incur any further charges under the credit facility or enter into any further credit agreement other than the consolidation agreement with any credit provider until one of the following events has occurred:

“(a) The debt counsellor rejects the application and the prescribed time period for direct filing in terms of section 86(9) has expired

without the consumer having so applied;

(b) the court has determined that the consumer is not over-indebted, or has rejected a debt counsellor's proposal or the consumer's application; or

(c) a court having made an order or the consumer and credit providers having made an agreement re-arranging the consumer's obligations, all the consumer's obligations under the credit agreements as re-arranged are fulfilled, unless the consumer fulfilled the obligations by way of a consolidation agreement.”

[16] Section 88(1)(b) authorizes a court to:

(i) hold that a consumer is not over-indebted;

(ii) reject a proposal of a debt counsellor; or

(iii) reject an application by a consumer.[18]

[17] The court has a discretion in terms of the provisions of section 88(1)(b) to determine whether an applicant for debt review is not over-indebted and also to reject a recommendation of a debt counsellor. Section 88(1)(b) read with section 87(1)) obliges a court to conduct a hearing when it considers an application for debt review. The

Constitution guarantees a fair hearing before a court.[19] A court cannot act as a rubber stamp of the debt counsellor (and to a lesser extent the parties) simply to confirm the status of a debtor at the request of a debt counsellor or to confirm an agreement entered into between the debtor and credit providers. It is a restriction upon the independence of the courts and offends the doctrine of separation of powers. When making a consent order, a court exercises an independent discretion. A court, for the same reason, exercises a judicial discretion, when acting in terms of section 86(7)(c)(ii).

[18] The NCA neither expressly allows nor prohibits the withdrawal an application for debt review by the applicant. The fact that no mention is specifically made with regard to withdrawal of an application does not mean that an applicant is unable to withdraw an application by means of the debt counsellor. A debt counsellor plays a pivotal role in the process once an application is submitted to him/her. The contents of the application needs to be scrutinized to determine whether it contains the prescribed information and it then has to be appraised to make an informed decision. If a debt counsellor has made a recommendation such debt counsellor is obliged to refer the application within a reasonable time to a court for an order.[20]

[19] In *Rougler v Nedbank Ltd*[21] it was held that a debt counsellor acts ultra vires the NCA if the debt counsellor wishes to terminate debt review proceedings which has commenced. I agree, the application is after

all not his application, but that of the applicant. I am in agreement that a debt counsellor may not terminate debt review proceedings

subsequent to him having made a proposal in terms of section 86(7)(c). The debt counsellor is obliged to make a determination within thirty days from receipt of the application.[22] However, it cannot seriously be contended that a court may not take into account that an applicant wishes to withdraw the application or that the applicant has entered into further credit agreements subsequent to the commencement of the debt review proceedings in contravention of section 88(1). A hearing is central to debt review proceedings. I cannot think of any reason why a debt counsellor

cannot place the subsequent wishes of the applicant to withdraw an application before the court. A court after considering the

reasons

for the withdrawal of the application by the applicant may reject[23] the application in terms of section 88(1)(b)[24] for that very reason.[25] The express wording of section 88(1)(b) is wide enough.[26]

[20] Attention was drawn to the judgment in *Manamela v Hein Du Plessis trading as Debt Safe and Others*.[27]The court stated that:

“Where a consumer is found to be over indebted, section 86(7) of the Act requires that such status be confirmed by order of the magistrate

court. Upon the debt counsellor finding that a consumer is over-indebted and prior to the magistrate’s order confirming the status being obtained, the consumer’s status gets registered thus obviously adversely affecting his credit worthiness

or ability to obtain credit.”

[21]The court referred to the following:

“The predicament that arises, as in the present case, is a situation where the consumer, having been found to be over-indebted and that fact registered against his name, but prior to a magistrate order being obtained, finds a second wind and becomes financially able to honour his repayment terms and, therefore desires to have his registered financial status reversed. It is apparent that the Act did not envision this and, therefore, makes no provision for the withdrawal of the debt review process and the reversal of the adverse effects thereof on a consumer in the situation of the applicant.”

[22] Until such time that an application for debt review is heard by a magistrate and an order in terms of section 86(7)(c)(ii) is made that an applicant’s obligations are rearranged, such an applicant is not over indebted for purposes of the NCA. I disagree with the reasoning that that a court is merely required to confirm the status of a consumer who applied for debt review. A consumer may be factually over-indebted when an application is submitted to a debt counsellor, but the law takes no cognizance of that fact until the consumer is declared over-indebted by a court of law.[28] A debt counsellor has no power to declare a debtor to be over-indebted. As stated previously, courts do not act as a rubber stamp for a debt counsellors to give judicial recognition to, or approval of, a conclusion reached by the debt counsellor. The NCA does not deprive magistrates of their judicial independence.[29] The final arbiter to pronounce on the over-indebtedness of a debtor is the court.

[23] In *Magadze and Another v ADCAP (Debtsafe) and Others*[30] Neukircher AJ held that section 71 does not confer new powers on a debt counsellor to release a consumer from debt review but that the purpose of the section is to inform creditors that the consumer is now able to meet his/her obligations. It does not expunge from the record that the consumer successfully applied for debt review in terms of section 86(1). Section 71 becomes relevant only after a debt review application has been successful either in terms of an order in terms of section 87(1)(b) or by agreement in terms of section 86(8)(a) after the debtor has satisfied all the obligations under the credit agreements which were subject to re-arrangement. It will be recalled that section 86(4) only requires a debt counsellor to notify credit providers and every credit bureau that a debt review application has been received. The credit history of the applicant remains unaffected. It is in the interest of credit providers to be made aware that a consumer has applied for debt review. If an application is rejected by the debt counsellor a notice must be issued to notify the applicant credit providers and credit bureau’s of the outcome. Credit providers generally, are entitled to be informed and to be aware if an application was rejected by the court or that the debts have been re-arranged by the court.

Every creditor and every credit bureau should be notified of the outcome of a matter, even if no provision is made for notification.

- [24] The provisions of section 87(1) are informative with reference to the right to a fair trial. The section should also be read with section 86(7) and 88(1)(b). It applies in instances where a debt counsellor has made a recommendation and has referred the application to court in terms of section 86(8)(b) or where the consumer applied to court in terms of section 86(9) for an order after the application was rejected by a debt counsellor. A magistrate is obliged to conduct a hearing and have regard to the proposal of the debt counsellor and other information before making an order in terms of section 87(1)(a) or (b). A magistrate conducting a hearing, is obliged to have regard to all evidence properly placed before him/her. A debt counsellor is obliged to place information before the court when the applicant has subsequently indicated that he/she no longer wishes to continue with the debt review application, notwithstanding a positive recommendation by the debt counsellor.[31] A court, in such an event, when considering the application, may reject the application on the basis that the applicant no longer

persists with the debt review application.

- [25] The purpose of the NCA is to promote and advance the social and economic welfare of all and addressing and preventing over-indebtedness and to provide mechanisms for resolving over-indebtedness by providing for a consistent and accessible system of debt restructuring, enforcement and judgment which places priority on satisfaction of consumer obligations. [32] A court cannot be hamstrung in the exercise of its discretion simply because Form 17.W is insufficiently worded.

- [26] Courts do not have the inherent jurisdiction to disregard statutory provisions but is under a duty to interpret and apply legislation in a manner that promotes the spirit purport and objects of the Bill of Rights.[33] Legislation must be interpreted purposively. The judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[34] sets out the approach to be adopted when interpreting legislation:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable

point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

[27] In both the applications before me, the applications for debt review never reached a court due to the failure of the debt counsellors to refer the applications with their recommendations to court. In *Collett v FirstRand Bank Ltd*[35] the court stated the following in the course of the judgment:

I do not think that s 86 requires the consumer or his debt counsellor to “approach the court” within a period of 60 days. Indeed no time period is specified within which the debt counsellor must make application to the magistrates’ court. Nor does the NCA require the process of debt-restructuring to be complete within the period of 60 days after the application is made. To do so would obviously be unrealistic..”

The debt counsellors should have made recommendations to a court for an order. It is quite unacceptable that debt counsellors who have the responsibility to administer the Act callously flout their responsibilities towards the applicants and creditors alike without any consequences.

[28] I am not prepared to issue declaratory orders as prayed. The applicants were at no time declared to be over-indebted by a competent court. In my view the applications must be referred to the respective magistrates’ court with jurisdiction for hearing. All the evidence inclusive of the subsequent events must be placed before the court by the debt counsellors with notice to all the parties and every credit bureau.

In the result, I make the following order.

ORDER

The application under case no 7723/2017 is dismissed.

The application under case no 750/2018 is dismissed.

A copy of this judgment must be made available to the National Credit Regulator and the debt counsellors concerned.

G.C MULLER

JUDGE OF THE HIGH COURT LIMPOPO DIVISION:POLOKWANE

APPEARNCES

ATTORNEYS FOR APPLICANT : H MASINDI ATTORNEYS POLOKWANE

: ADV L NEMUKULA

DATE HEARD :20 MARCH 2018

DATE DELIVERED :11 MAY 2018

- [1] Both the applications were served upon the debt counsellors. They did not oppose the applications and consequently no explanation why the notifications had been issued to creditors without complying with their obligations in terms of s 86 was offered.
- [2] s 44. The NCA contains no definition of debt counsellor.
- [3] s 86(1) read with s 79 which contains the criteria to be met to be over-indebted.
- [4] s 86(4).
- [5] s 86(6).
- [6] s 86(7)(a).
- [7] Regulation 25 prescribes that the letter must contain certain information which includes information that the application will be removed from all registered credit bureaux within 5 business days with the result that credit providers will be entitled to take legal steps against the consumer. In addition it must also advise the applicant that he/she has the right to approach the magistrates' court within 20 business days for an order to be declared over-indebted and have agreements declared reckless and/or restructuring of his/her debt obligations.

Regulation 26 requires that the application must be submitted to court within 20 days after receipt of the letter of rejection. The time period of 20 business days may be extended by the court with a further 20 days on application and good cause shown.

- [8] The use of the word "file" is unfortunate. In *Hodd v Hodd* 1942 NPD 198, 204 it was held that a court is not a mere registry of documents or agreements. Court orders are obtained by instituting an

appropriate process in a court.

- [9] s 87(8) read with s 138.
- [10] The application falls to be rejected if the mediation is unsuccessful.
- [11] Procedure in magistrates' courts is governed entirely by statute and the rules of the magistrates' court.
- [12] The tribunal.
- [13] s 138(1).
- [14] *Schierhout v Minister of Justice* 1925 AD 417 at 423. Courts determine disputes between parties. A dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties. It falls to the court determine whether the claim of one party is positively opposed by the other. *Case Concerning Certain Property (Liechtenstein v Germany (Preliminary Objections))* (10 February 2005) ICJ Reports (2005) para 24. www.icj-cii.org. This definition of a dispute is equally appropriate in our domestic law.

- [15] s 138(1) is not only applicable to disputes being settled but is also applicable to agreements concluded in terms of section 86(8).The rule that court decides disputes is therefore not applicable.
- [16] S 86(7)(c).
- [17] The application and the subsequent issuing of notices in terms of section 86(4)(b)(i) have legal consequences for the debtor and credit providers until the debtor is in default under a credit agreement.
- [18] The wording of the printed document (Form 17.2) is inadequate and makes no provision for such an eventuality.
- [19] s 34 of the Constitution.
- [20] A debt counsellor has no discretion to withhold an application from court after he has made his recommendation. A court however may consider the withdrawal at the hearing.
- [21] 2013 JDR 1167 para 12. Case no 27333/2010. South Gauteng High Court.
- [22] Regulation 24(7).
- [23] Dismiss the application.
- [24] Also s 87(1)(a) which is similarly worded.
- [25] A court will hardly proceed to re-arrange the debts of a debtor if the debtor wishes to withdraw from a voluntary process to the benefit of the debtor.
- [26] By rejecting the recommendation or by rejecting the application by the court the applicant is not over-indebted.
- [27] Case no 78244/2016. Gauteng Division Pretoria (14 June 2017).
- [28] Also by consent order.
- [29] Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC) para 19. NSPCA v Minister of Agriculture Forestry and Fisheries and Others 2013 (5) SA 571 CC para 14-17.
- [29] Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC) para 19. NSPCA v Minister of Agriculture Forestry and Fisheries and Others 2013
- (5) SA 571 CC para 14-17.
- [30] Case 57186/2016 (25 October 2016) Gauteng Division Pretoria.
- [31] It is highly unlikely that a court will insist to rearrange the debts of an applicant if the applicant wishes to withdraw the

application for debt review.

[32] s 3(g)-(i).

[33] s 39(2) of the Constitution.

[34] 2012

(4) SA 593 (SCA) 13 para 18.

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(4) SA 508 (SCA) para 9.

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