

SOUTH AFRICA / JUDGMENT

Govender v Alexanderson (NCT/193156/2021/141(1)(b)) [2022] ZANCT 60 (4 November 2022) [2022] ZANCT 60

COURT

National Consumer Tribunal

BEFORE

A Potwana, M Peenze, C Sassman

CASE / FILE NUMBER

NCT/193156/2021/141(1)(b)

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IN

THE NATIONAL CONSUMER TRIBUNAL HELD IN CENTURION

Case

number: NCT/193156/2021/141(1)(b)

In

the matter between:

ANDREW
LLOYD GOVENDER APPLICANT
And
SEBASTIEN
ALARIK ALEXANDERSON RESPONDENT

Coram:

Mr
A Potwana: -
Presiding Tribunal Member
Dr
M Peenze: -
Tribunal Member
Adv
C Sassman: - Tribunal Member
Date
of Hearing: - 1 November 2022,
conducted via Microsoft Teams
Date
of Judgment: - 4 November 2022

JUDGMENT**AND REASONS****THE PARTIES**

1. The Applicant is Mr Andrew Lloyd Govender, (“Mr Govender” or “the Applicant”), a consumer in terms of section 1 of the National Credit Act 34 of 2005 (“the NCA”). At the hearing, the Applicant represented himself.
2. The Respondent is Sebastien Alarik Alexanderson (“the Respondent”). The Respondent is a registered debt counsellor. At the hearing, the Respondent was represented by Mr Rynhardt De Lange, an attorney from De Lange Attorneys.

APPLICATION TYPE

3. This is an application made in terms of section 141(1)(b) of the NCA.
4. Section 141(1)(b) of the NCA states:

If the National Credit Regulator issues a notice of non-referral in response to a complaint, other than a complaint concerning section 61 or an offence in terms of this Act, the complainant concerned may refer the matter directly to the Tribunal, with the leave of the Tribunal.

JURISDICTION

5. Section 27(a)(i) of the NCA states:

The Tribunal or a member of the Tribunal acting alone in accordance with this Act or the Consumer Protection Act, 2008 may adjudicate in relation to any application that may be made to it in terms of this Act, and make any order provided for in the Act in respect of such an application.

6. Accordingly, the Tribunal has jurisdiction to hear this application.

BACKGROUND**AND FACTS**

7. On 6 September 2017, the Applicant applied for debt review with the Respondent. At that stage, he was indebted to four different creditors with nine credit accounts. On 10 October 2017, the Respondent prepared a debt restructuring proposal which was sent to the creditors of the Applicant. The proposal indicated a total outstanding debt amount of R256 498, 86 and proposed a reduced monthly instalment of R7 000,00. R5 585,69 would be allocated towards the outstanding debt each month and the remainder allocated towards insurance and fees.
8. Between 6 and 9 October 2017, the Respondent received acceptance letters from each of the Applicant’s creditors indicating that they had accepted the restructuring proposal.

Each acceptance letter included a reduced annual interest rate on the outstanding debt.

9. On 6 November 2017, the Applicant notified the Respondent by email that he had experienced a change in circumstance and could no longer afford the restructured instalment of R7 000,00 per month. On the same day, the Respondent replied and indicated that the account and proposal would be reassessed.
10. On 14 November 2017, the Respondent sent an email to the Applicant and indicated that it was possible to reduce his monthly instalment by an amount of R1 500,00 per month and advised the Applicant that there was no guarantee that his creditors would accept the reduced amount. The Applicant gave written instructions to the Respondent to proceed with a revised proposal. The Applicant's monthly instalment was reduced to R5 500,00 per month of which R4 227,42 would be allocated towards the outstanding debt and the remainder allocated towards insurance and fees. The revised proposal was sent to the Applicant's creditors.
11. Between 16 and 23 November 2017, the Respondent received acceptance letters for six of the Applicant's credit agreements. Creditors for the remaining 3 credit agreements did not accept the proposal.

11.1 The following credit providers accepted the revised proposal:

- 11.1.1 FNB – Account ending in 852
- 11.1.2 FNB – Account ending in 003
- 11.1.3 FNB – Account ending in 595
- 11.1.4 FNB – Account ending in 641
- 11.1.5 TFG – Account ending in 444
- 11.1.6 Woolworths – Account ending in 652.

11.2 The following credit providers rejected the revised proposal:

- 11.2.1 RCS – Account ending in 019
- 11.2.2 Woolworths – Account ending in 010
- 11.2.3 Woolworths – Account ending in 307.

12. It must be noted that when FNB accepted the revised proposal, the bank increased its interest rate offer from 3.36% per annum on the first proposal to 10.50% on the revised proposal for all four of its credit agreements. In contrast, TFG and Woolworths reduced their interest rate offer even further from 3.29% per annum to 2.50% per annum respectively. Interest rates for the two Woolworths credit agreements and the RCS credit agreement, with no acceptance letters, continued to accrue interest at what appears to be the contractual interest rates of 24.85%, 22.90%, and 21% per annum respectively.

13. During January 2020 the Applicant requested settlement figures from the Respondent and noticed that his balances had increased instead of decreased as expected. On 18 June 2020, he sent an email to the Respondent questioning this. On 24 and 28 July 2020, an employee of the Respondent replied and explained several contributing factors which had occurred. This included his monthly instalment being low and a portion of it was allocated to paying insurance and fees.
14. On 25 August 2020, the Applicant proceeded to lodge a formal complaint with the National Credit Regulator (“the NCR”) alleging misconduct on the part of the debt counsellor which resulted in his overall outstanding balance increasing since he applied for debt review. The NCR considered the facts of the matter and attempted to settle in terms of section 15(g) of the NCA but according to the documents before the Tribunal, the Respondent did not agree to this. The NCR then found that the facts, if true did not warrant further investigation. Accordingly, the NCR issued a Notice of Non-Referral on 11 May 2021.
15. The Applicant applied to the National Consumer Tribunal (“the Tribunal”) for leave to refer the matter. The Applicant was granted leave to refer the matter directly to the Tribunal on 16 March 2022.

THE APPLICANT’S SUBMISSIONS

16. The Applicant made the following submissions during the hearing and in his papers:
 - 16.1 he has suffered damages and has been financially prejudiced due to the Respondent not fulfilling his statutory and mandatory obligations in terms of the NCA and its Regulations;
 - 16.2 he entered debt review with a total debt amount of R243 141,00 and has made payments to the Respondent of more than R250 000,00 (the exact amount differs in different documents) but at the time of deposing his replying affidavit on 8 October 2021 he was still left with a total debt amount of R218 609,58;
 - 16.3 the Respondent distributed amounts ultra vires the NCA in that the amounts paid in respect of the two Woolworths accounts ending in 307 and 010 respectively were less than the amount of interest added to the accounts monthly. As a result, his total outstanding debt increased instead of decreasing between September 2017 and November 2021;
 - 16.4 he decided to start paying his creditors directly from November 2021 and has since settled six of his nine accounts on his own without the assistance of the Respondent;
 - 16.5 when the restructuring proposal was revised on 14 November 2017, he was not informed that some of his creditors did not accept the revised instalments;
 - 16.6 the Respondent did not advise him of the implications of a reduced instalment, and he was therefore not allowed to make an informed decision on whether to proceed with the debt restructuring process;

16.7 he was not informed that the interest rates had reverted to the contractual interest rate for the rejected accounts and that FNB had increased their interest rate offer from 3.36% p/a to 10.50% p/a on all four of their accounts;

16.8 the Respondent's delay in filing a court application on his behalf has prejudiced him;

16.9 at the time of deposing his replying affidavit the Respondent had received fees of approximately R74 442,00; and

16.10 because of the above he has not received any debt relief.

THE RESPONDENT'S SUBMISSIONS

17. The Respondent made the following submissions during the hearing and in his papers:

17.1 the Respondent fulfilled all of his statutory obligations in terms of section 86 and Regulation 24 of the NCA and its guidelines;

17.2 the Applicant did not participate in the debt counselling process in good faith as required in terms of section 85(a) and (b) of the NCA by failing to make all payments due and failing to provide bank statements on request from the Respondent. Furthermore, the Applicant's income has likely increased since applying for debt review, but he has failed to disclose this to the Respondent;

17.3 the Applicant was properly informed and advised of the consequences of submitting a revised debt restructuring proposal to his creditors;

17.4 debt counsellors cannot compel creditors to accept debt restructuring proposals or reduce their interest rates;

17.5 the Applicant had access to his accounts at all times and could obtain updated balances to keep a record of his payments;

17.6 the Respondent was unable to make an application to the Magistrates' Court for a debt restructuring order soon after the Applicant applied for debt review. This was due to the Applicant's instalment being paid towards the two Woolworths accounts ending in 307 and 010 being less than the interest which was added monthly. Such an application would likely be opposed by creditors and dismissed with costs;

17.7 an application was eventually made to the court for a debt restructuring order when funds became available to make a more promising offer to the creditors who had rejected the proposal. The matter was referred to the court in November 2019 and set down for 20 January 2020. The Applicant was contacted on numerous occasions to provide certain documents but failed to co-operate and the matter was postponed to 02 March 2020;

17.8 on 20 February 2020, the Applicant contacted the Respondent and indicated that he no longer wanted to proceed with a court application as he had approached the NCR for assistance;

17.9 the Applicant entered into credit agreements with his creditors, and it cannot be expected of the Respondent to settle his outstanding debt;

17.10 all fees paid by the Applicant were in line with the NCA and its Regulations;

17.11 the Applicant's claims for a refund of fees and settlement of his debts cannot be justified and is mathematically incorrect;

17.12 neither the NCA nor its Regulations compel a debt counsellor to inform a consumer, should a credit provider not accept a debt restructuring proposal;

17.13 the Applicant has received debt relief by way of a reduction in interest rates on most of his accounts which was negotiated by the Respondent;

17.14 the Applicant's prayers are unsound in law, and he has failed to provide the Tribunal with any concrete evidence to show any negligence on the Respondent's part or prejudice suffered and wishes to shift his responsibility to repay his debt to the debt counsellor;

RELIEF SOUGHT

18. The Applicant seeks the following orders:

18.1 instructing the Respondent to settle the balances on his remaining credit accounts as reflected at the time of the judgment;

18.2 instructing the Respondent to refund all the fees which he paid to date; and

18.3 issuance of a clearance certificate.

19. The Respondent seeks an order dismissing the Applicant's application with costs.

THE LAW

20. Section 44(3)(b) of the NCA states:

In addition to the requirements of section 46, an applicant for registration as a debt counsellor must be in a position to satisfy

within a reasonable time such requirements as the National Credit Regulator may determine as a condition of the applicant's

registration.

21. Section 48(3) of the NCA states:

The National Credit Regulator, having regard to the objects and purposes of this Act, the circumstances of the application and the applicable criteria set out in subsections (1) and (2), may propose any conditions on the registration of an applicant by delivering a written notice in the prescribed manner and form setting out the proposed conditions, and the reasons for them.

22. Section 52(5)(c) of the NCA states:

A registrant must comply with its conditions of registration and the provisions of this Act.

23. Condition A2 of the debt counsellors' Conditions of Registration ("the CoR")[1] states:

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 nondiscriminatory and does not bring the NCR or debt counselling into disrepute.

24. Condition A3 of the CoR states:

Upon application for debt review and throughout the different stages of the process of application for debt review, the debt counsellor must fully inform the consumer of the consequences for the consumer of applying for debt review and of the consequences of an order for debt re-arrangement being made.

25. Condition A9.2 of the CoR states:

All fees which are payable by the consumer or by any other party in relation to debt counselling performed in terms of the Act, must be disclosed to and agreed by the consumer in writing, prior to the debt counsellor accepting an application for debt review in terms of section 86 of the Act. No fee may be recovered from the consumer prior to delivery of the service in respect of which such a fee is chargeable.

26. Section 86(7)(c)(ii) (aa) – (cc) of the NCA states:

If a debt counsellor conducts an assessment and concludes that the consumer is over-indebted, the debt counsellor may issue a proposal

recommending that the Magistrates' Court may order that the consumer's obligations be rearranged by extending the agreement

and reducing the payment amounts, postponing the dates on which payments are due, and extending the agreement periods and postponing

the dates on which payments are due.

CONSIDERATION

27. The Applicant makes no reference to specific areas of the legislation which he alleges the Respondent has contravened. However, when one considers his allegations, if correct, would amount to a contravention of conditions A2, A3 and A9.2 of the Respondent's conditions of registration as shown above. Sections 44(3)(b), 48(3) and 52(5)(c) of the NCA require a debt counsellor to comply with his or her conditions of registration.

28. The Applicant avers that the Respondent did not inform him that three of his creditors did not accept the revised restructuring proposal and that their respective interest rates would revert to the contractual rate. He further avers that the Respondent did not inform him that

the initially reduced interest rate offers for his four FNB credit agreements were increased from 3.36% per annum to 10.50% per annum on each account due to the debt restructuring proposal being revised. He considers this to be material information that should have been shared with him at the time. The Applicant contends that the failure on the part of the Respondent to inform him of the above has prejudiced him financially.

29. Clearly, the Applicant himself requested and consented to a revised proposal being sent to creditors but maintains that the outcome of the proposal was never communicated to him and therefore prevented him from making an informed decision. When the Applicant queried the increase in his total outstanding balance on 18 June 2020, an employee of the Respondent named Ashlene Gilbert replied to his email on 24 and 28 July 2020.[2] The emails mention several contributing factors which may be the cause, but still omits the most crucial fact which is that the

Applicant had been paying instalments on two Woolworths accounts which were less than the monthly interest amount added to those

accounts.[3] During the hearing, a question was raised as to whether the Respondent informed the Applicant at any time that his two instalments were less than the interest being accrued. The representative for the Respondent was not able to confirm nor deny whether there was indeed correspondence sent to the Applicant regarding the acceptance or rejection of the revised proposal. The Respondent states in his papers that neither the NCA nor its Regulations compel a debt counsellor to inform a consumer, should a credit provider not accept a debt restructuring proposal.

30. The Respondent relies on the *Nedbank v Norris*[4] judgment to prove that making an application to the Magistrates' Court to restructure all the Applicant's accounts would have been futile. The reason is that the monthly distributable amount which the Applicant could afford would mean that his instalment would have been less than the monthly interest amount added to his two Woolworths accounts. The Respondent also states that the Magistrate would not have had the authority to unilaterally reduce the interest rates of those accounts. In *Nedbank v Norris* the court held in paragraph 51 (3.1 – 3.2)

3.1 A Magistrate's Court hearing a matter in terms of s 87

- (1) of the National Credit Act, 34 of 2005 does not enjoy jurisdiction to vary (by reduction or otherwise) a contractually agreed interest rate determined by a credit agreement.

3.2 A re-arrangement proposal in terms of s 86 (7) (c) of the National Credit Act that contemplates a monthly instalment which is less than the monthly interest which accrues to the outstanding balance does not meet the purposes of the Act and a re-arrangement order incorporating such proposal is ultra vires the National Credit Act and a Magistrate's Court has no jurisdiction to grant such an order.

31. In *Nedbank v National Credit Regulator*[5] it was held that a debt counsellor as a statutory functionary is obliged, consequent to reviewing a consumer's debt in terms of section 86, to refer a proposal to the Magistrates' Court to make certain orders. Failing to do so would amount to him not complying with his duty as a debt counsellor.
32. It is apparent that the way the service was offered by the Respondent has negatively impacted the financial position of the Applicant. However, the Applicant has not properly computed the amount of all fees he paid to the Respondent and has not presented a clear basis upon which this Tribunal should order the Respondent to settle the remainder of his debt. These appear to be contractual and delictual damages which can be properly assessed by a civil court. As a creature of statute, the Tribunal is not empowered to award damages.
33. The Applicant paid an aftercare fee to the Respondent monthly to monitor the progress of his debt restructuring. He also paid legal fees to the Respondent in the amount of R6 000, 00 between 28 October and 30 December 2017. While the amount of the legal fees is not in dispute, the fact that the fees were charged upfront, and the matter was only referred to court some two years later is of concern. It must be noted that the Applicant confirms that he instructed the Respondent to not proceed with the court application once he referred the matter to the NCR. Therefore, there is still no court order in place.
34. Although it is apparent from the papers that the Applicant defaulted on his restructured payments a few times, it appears that he did participate in the process in good faith. The Applicant's decision to pay his creditors directly is a right afforded to him in terms of section 44A(2)(b) of the NCA and does not amount to a contravention of section 86(5)(a)(b) of the NCA.
35. The Respondent avers that the Applicant benefited through the Respondent's negotiation with his creditors and enjoyed a reduction in interest rates on six of his credit accounts and, therefore, the Applicant indeed received debt relief. While the benefit of the reduction in interest rates cannot be disputed, the Applicant did not receive all the debt relief one would associate with applying for debt review. The Applicant was left vulnerable to legal action from his creditors as no court order was sought for nearly two years. Furthermore, the Applicant did not receive peace of mind by not having to deal with his creditors and debt collectors on his own. He took matters into his own hands and dealt with his creditors directly to close six of his accounts. Had he been satisfied with the service of the Respondent he would likely not have resorted to this.
36. The Applicant's request for a clearance certificate to be issued is unwarranted since section 71(3) of the NCA only allows the Tribunal to order the debt counsellor to issue a clearance certificate if the Tribunal is satisfied that the consumer is entitled to the certificate in terms of section (2)(b)(i). In terms of this section, the requirement would be that the consumer has satisfied all the obligations under all the credit agreements that were subject to the debt re-arrangement. In this case, the Applicant still has three accounts which need to be settled.

CONCLUSION

37. In not keeping the Applicant informed during the different stages of the process and not informing the Applicant of the outcome of the revised debt restructuring proposal the Respondent did not act professionally, reasonably and fairly. Such conduct contravened conditions A2 and A3 of the CoR.
38. In not making an application to the Magistrates' Court for a restructuring order within a reasonable time, the Respondent did not provide a service in a manner which is timely and contravened condition A2 of the CoR.
39. In charging the Applicant legal fees some two years before the matter was referred to court, the Respondent has contravened condition A9.2 of the CoR.
40. Having regard to the submissions made by the Applicant and Respondent in this matter, the Tribunal finds, on a balance of probabilities, that the Respondent has contravened conditions A2, A3 and A9.2 of the CoR read together with section 44(3)(b) and section 52(5)(c) of the NCA. These contraventions constitute prohibited conduct in terms of the NCA and have prejudiced the Applicant financially.
41. On this basis, the Respondent is found to have engaged in prohibited conduct. A finding of prohibited conduct by the Tribunal entitles the Applicant to a certificate from the Chairperson of the Tribunal, which he can submit to a civil court to claim damages.

ORDER

42. Accordingly, the Tribunal makes the following order:
- 42.1 The Respondent is found guilty of contravening conditions A2, A3 and A9.2 of his conditions of registration read together with section 44(3)(b) and section 52(5)(c) of the NCA;
- 42.2 The Respondent's contravention of conditions A2, A3 and A9.2 of his conditions of registration is hereby declared prohibited conduct;
- 42.3 The Applicant may approach the Chairperson of the Tribunal for a certificate in terms of section 164 (3) (b) of the NCA to claim damages in a civil court; and
- 42.3 There is no order as to costs.

DATED AT CENTURION ON THIS 4th DAY OF NOVEMBER 2022.

[signed]

Adv C Sassman

Tribunal Member

Mr A Potwana (Presiding Tribunal Member) and Dr M Peenze (Tribunal Member) concur.

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- [1] Conditions of Registration as a debt counsellor in terms of section 44 of the National Credit Act 34 of 2005.
- [2] See pages 264; 301 and 302 of the bundle.
- [3] See pages 186 – 191 of the bundle.
- [4] Nedbank Limited v Norris and Others (2978/2015) [2016] ZAECPEHC 5; 2016 (3) SA 568 (ECP) (1 March 2016).
- [5] Nedbank Ltd and Others v The National Credit Regulator and Another (662/2009, 500/2010) [2011] ZASCA 35; 2011 (3) SA 581 (SCA); [2011] 4 All SA 131 (SCA) (28 March 2011).
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