

SOUTH AFRICA / JUDGMENT

Janse van Vuuren v Roets and Others, Nel v Roets and Others (37407/2018) [2019] ZAGPPHC 428 (3 September 2019) [2019] ZAGPPHC 428

COURT

North Gauteng High Court, Pretoria

BEFORE

Sutherland, Carelse, Maier-Frawley

CASE / FILE NUMBER

37407/2018

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

(1)

REPORTABLE:

yes

(2)

OF

INTEREST TO OTHER JUDGES: yes

CASE

NO: 37407/2018

In

the matter

between

HERMANUS

ADRIAAN JANSE VAN VUUREN

APPLICANT

AND

NEIL

FRANS ROETS

1ST

RESPONDENT

RCS

CARDS (PTY) LTD (GAME)

2ND

RESPONDENT

EDCON
(PTY) LTD
3RD
RESPONDENT
THE
STANDARD BANK OF SOUTH AFRICA
4TH
RESPONDENT
TENACITY
FINANCIAL SERVICES (PTY) LTD
5TH
RESPONDENT
and
THE
BANKING ASSOCIATION OF SOUTH AFRICA
1ST AMICUS CURIAE
THE
NATIONAL CREDIT REGULATOR
2ND AMICUS CURIAE
THE
LAW SOCIETY OF SOUTH AFRICA
3RD AMICUS CURIAE
MICHELL
BARNARD (NCR DC 94)
4TH AMICUS CURIAE
FABRIAN
MATTHIAS NEL
APPLICANT
NEIL
FRANS ROETS (NCR DC 474)
1ST
RESPONDENT
AFRICAN
BANK LTD
2ND RESPONDENT
FNB
A DIVISION OF FIRST RAND BANK LIMITED
3RD
RESPONDENT
GET
BUCKS (PTY) LTD
4TH
RESPONDENT
NEDBANK
LIMITED
5TH
RESPONDENT
THE
BANKING ASSOCIATION OF SOUTH AFRICA
1ST AMICUS CURIAE
THE

NATIONAL CREDIT REGULATOR
2ND AMICUS CURIAE
THE
LAW SOCIETY OF SOUTH AFRICA
3RD AMICUS CURIAE
MICHELL
BARNARD (NCR DC 94)
4TH AMICUS CURIAE

JUDGMENT

Headnote

Referral by JP of questions to full court – conflicts between judgments in Gauteng Division and other Divisions about whether the High Court has the power, as a court of first instance, to order the termination of debt review into the National Credit Act when it appears that a consumer is able to meet the terms of the initial credit agreements

Held: no such power exists and decision in Gauteng division holding that such power exists overruled

The dictum by the WCC in *Phaladi v Lamara* 2018 (3) SA 264 (WCC) at [17] – [21] unequivocally endorsed – the remedy for a consumer aggrieved at being subjected to debt review is to seek a clearance certificate from a debt counsellor and if one is refused, to apply to the tribunal for relief.

The scheme of the debt review model in the NCA explained, certain lacuna and anomalies identified

The questions posed in the referral are answered as follows: -

- (1) Is a High Court able to make an order confirming that an applicant is no longer over-indebted, where no valid declaration of over-indebtedness is before Court?

No. No textual or purposive interpretation exists that can cogently substantiate the idea that the High Court has jurisdiction as a court of first instance.

- (2) Where fresh facts arise since a debt counsellor's notification to all credit providers and every registered credit bureau of the consumer's application for debt review, or after the assessment and conclusion that a consumer appears to be over-indebted, and new facts demonstrate material change in the circumstances of a consumer causing such consumer to no longer be over-indebted, is the High Court the forum of first instance that the consumer should approach to provide an order to rectify his credit status with credit providers and credit bureaus?

No. A consumer who is not yet the subject of a Magistrate's order in terms of section 87, may together with the proposal of the debt counsellor present the additional facts to bring about a rejection of the proposal. If a Magistrate has already made a rearrangement order, section 71 regulates the only route to termination of debt review, and its terms must be met.

- (3) Is the relief sought [by the applicants; ie an application to high court to terminate debt review] consistent with the scheme of the National Credit Act?

No. No interpretation of the statute can support the relief sought; i.e. the High court may not order a release of the consumers from debt review.

- (4) The concepts of 'over-indebtedness' (including that of financial difficulty falling short of 'over-indebtedness'

contemplated by s 86(7)(b)) and the attendant remedy of 'debt review' within the meaning of the National Credit Act are statutory creations. How they work is governed entirely by the National Credit Act. In the absence of a challenge to their constitutionality, are the Courts' powers delineated by these provisions?

Yes. As a wholly statutory conception, debt review does not trespass into the realm of the common law.

- (5) Does section 71 of the National Credit Act afford an adequate remedy in the circumstances to expunge the record that the applicants were in debt review?

The question posed is about legislative policy and deliberately chosen objectives. If the remedies provided for do not cater for certain eventualities, it is the province of the legislature to contemplate amendments based on its preferred policy choices. The anomaly concerning section 71 and 88 must however be eliminated.

- (6) Is the only remedy at the disposal of the applicants the limited relief provided for in terms of section 71 of the National Credit Act and is it further limited to be sought in the manner set out therein?

The applicants per se have different remedies, (i) where no rearrangement order is made the applicant can place further information before a magistrate to section 87 to procure a rejection by the magistrate of a proposal put up by the debt counsellor for a rearrangement order; (ii) section 71 offers a remedy where a rearrangement order has been made, complicated by the effect of section 88(1) if the applicant can satisfy the prescriptions of that those sections

- (7) Would the Court in exercising its powers in terms of section 21 of the Superior Courts Act to grant such relief, be inappropriate considering the environment regulated by the National Credit Act?"

Yes, it would be inappropriate.

SUTHERLAND J:

INTRODUCTION:

- [1] This matter is about the interpretation of certain provisions of the National Credit Act 34 of 2005. (NCA) A controversy exists about whether the High Court has jurisdiction, as a court of first instance, to address the alleged plight of the two applicants. Both sought relief from the High Court to release them from debt review, essentially, on the premise that since their initial applications in terms of section 86(1) of the NCA, their financial positions had so improved that they could pay their way again, albeit that they had not discharged all of their indebtedness.
- [2] Several decisions in different Divisions of the High Court had taken a different approach to the question of such jurisdiction. In the Western Cape, Kwazulu-Natal and Limpopo, there are decisions that no such jurisdiction can exist. In Gauteng, there are decisions that the High Court has such jurisdiction. As a result, the Judge President of the Gauteng Division, acting in terms of section 14(1)(a) of the Superior Courts Act referred certain questions to a Full Court of the Division to resolve the conflicts in the case law.
- [3] The Judge President's referral reads thus:
- "6. The following issues have been raised and are to be determined by the Full Court:*
- a. Is a High Court able to make an order confirming that an applicant is no longer over-indebted, where no valid declaration of over-indebtedness is before Court?
 - b. Where fresh facts arise since a debt counsellor's notification to all credit providers and every registered credit bureau of the consumer's application for debt review, or after the assessment and conclusion that a consumer appears to be over-indebted, and new facts demonstrate material change in the circumstances of a consumer causing such consumer to no longer be over-indebted, is the High Court the forum of first instance that the consumer should approach to provide an order to rectify his credit status with credit providers and credit bureaus?
 - c. Is the relief sought consistent with the scheme of the National Credit Act?
 - e. Does section 71 of the National Credit Act afford an adequate remedy in the circumstances to expunge the record that the applicants were in debt review?
 - f. Is the only remedy at disposal of the applicants the limited relief provided for in terms of s 71 of the National Credit Act and is it further limited to be sought in the manner set out therein?
 - g. Would the Court in exercising its powers in terms of section 21 of the Superior Courts Act to grant such relief, be inappropriate considering the environment regulated by the National Credit Act?"

55.2 No interpretation of the statute can support the relief sought; i.e. the High court may not order a release of the consumers from debt review.

[56] The concepts of ‘over-indebtedness’ (including that of financial difficulty falling short of ‘over-indebtedness’ contemplated by s 86(7)(b)) and the attendant remedy of ‘debt review’ within the meaning of the National Credit Act are statutory creations. How they work is governed entirely by the National Credit Act. In the absence of a challenge to their constitutionality, are the Courts’ powers delineated by these provisions?

56.1 Yes.

56.2 As a wholly statutory conception, debt review does not trespass into the realm of the common law.

[57] Does section 71 of the National Credit Act afford an adequate remedy in the circumstances to expunge the record that the applicants were in debt review?

57.1 The question posed is about legislative policy and deliberately chosen objectives.

57.2 If the remedies provided for do not cater for certain eventualities, it is the province of the legislature to contemplate amendments based on its preferred policy choices.

57.3 The anomaly concerning section 71 and 88 must however be eliminated.

[58] Is the only remedy at the disposal of the applicants the limited relief provided for in terms of section 71 of the National Credit Act and is it further limited to be sought in the manner set out therein?

The applicants per se have different remedies as addressed earlier; section 71 offers a remedy where a rearrangement order has been made, complicated by the effect of section 88(1).

[59] Would the Court in exercising its powers in terms of section 21 of the Superior Courts Act to grant such relief, be inappropriate considering the environment regulated by the National Credit Act?”

The Costs

[60] In our view, because the character of this application is to test purely legal aspects in order to clarify conflicts in the case law there should be no costs order made.

The order

[61] The court is required to answer the questions posed. The order is that:

- (1) Question 6(a): No
- (2) Question 6(b): No
- (3) Question 6(c): No
- (4) Question 6(d): Yes.
- (5) Question 6(e): An answer is declined.

(6) Question 6(f): Yes, Section 71 is one remedy.

(7) Question 6(g): Yes.

Sutherland J (with whom Carelse J and Maier-Frawley AJ agree.)

Date of hearing: 29 July 2019

Date of judgment: 3 September 2019

For the Applicants: S v W van der Hoven

of Van der Hoven Attorneys

For the 1st Amicus Curiae: Adv CDA Loxton SC,

with him, Adv P Daniell

Instructed by: ENS Attorneys

For the 2nd Amicus Curiae: Adv LM Maite

Instructed by: VZLR Attorneys

For the 3rd Amicus Curiae: Adv D Whittington

Instructed by: Bhayat Attorneys

For the 4th Amicus Curiae: Adv JJN Swart

Instructed by: Cornè Myles Attorney

[1] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at [18]

[2] 86(1) A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted. (2) (3) A debt counsellor-

(a)

(b) (4) On receipt of an application in terms of subsection (1), a debt counsellor must-

(a) provide the consumer with proof of receipt of the application;

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

[2] 86(1) A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted.

(2)

(3) A debt counsellor-

(a)

(b)

(4) On receipt of an application in terms of subsection (1), a debt counsellor must-

(a) provide the consumer with proof of receipt of the application;

(b) notify, in the prescribed manner and form-

(i) all credit providers that are listed in the application; and

(ii) every registered credit bureau.

[3] See: Seyffert v FNB [2012] ZASCA 81 (30/05/12) at [15] on the exercise of this discretion.

[5] A corresponding freeze on action by creditors co-exists: Section 88(3)

[6] See: Botha v Bernice Koekemoer & Others Unreported, (2017/7723 , 11/05/19), Limpopo Division, per Muller J where this view is shared.

[7] See: Phaladi v Lamara 2018

(3) SA 264 (WCC) at [21] & [26] where Binns- Ward J concluded likewise.

[8] See: Mayana v Body Corporate of Cottonwood, Case No 2016/3068 (GJ) at [19] – [20] per A Gautschi AJ on the power of magistrates court in relation to declarations proper and orders of court.

[9] The identical remarks were uttered in Mokubung at [9].

[10] See: Botha v Koekemoer (Supra) at [19] – [26].

[11] In Less v Vosloo it was also held that an application for a release from debt review could be made to a Magistrate. With this finding, we disagree for the reason already traversed.

[12] In the context of this issue, several obvious errors in the Regulations were also pointed out. We need make no specific

comments other than now that they have been drawn to the attention of the National Credit Regulator, swift remedial action is

appropriate.

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