

SOUTH AFRICA / JUDGMENT

Less v Vosloo and Others (7520/17P) [2017] ZAKZPHC 58 (22 September 2017) [2017] ZAKZPHC 58

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Bezuidenhout

CASE / FILE NUMBER

7520/17P

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IN HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Reportable

CASE NO: 7520/17P

In the matter between

TRACEY-ANN LESS Applicant

(ID No.: [...])

and

JOHANNA WILHELMINA VOSLOO First Respondent

ABSA BANK LIMITED Second Respondent

FNB, A DIVISION OF FIRSTRAND LIMITED Third Respondent

CONSUMER FRIEND Fourth Respondent

MFC, A DIVISION OF NEDBANK LIMITED Fifth Respondent

NEDBANK LIMITED Sixth Respondent

STANDARD BANK OF SA LIMITED Seventh Respondent

JUDGMENT

Delivered on: 22 September 2017

BEZUIDENHOUT, J

[1] Applicant, during March 2013, made application in terms of section 86(1) of the National Credit Act 34 of 2005 to first respondent, a debt counsellor, to have herself declared over indebted. A copy of such application is not attached to these papers, nor are Forms 17.1 and 17.2.

1.1 It is accordingly not possible to determine when the said forms were sent to the credit providers and credit bureaus and if in fact it was indeed done as applicant only states in paragraph 11 of her founding affidavit that “First respondent advised me that the Form 17.2 has been issued as per paragraph 2 and that there is no court order in respect of my debt review.”

1.2 There is no court order declaring applicant over indebted, and also no such attachment to the papers.

[2] Applicant now seeks the following relief:

1. That she be declared no longer over indebted and under debt review.
2. That the Credit Bureau remove the debt review status from applicant’s credit reports.
3. That the debt counsellor provides Form 17.W confirming that applicant is being declared to be no longer over indebted.

[3] Applicant avers she has paid off certain of the credit providers listed in paragraph 7 of her affidavit and is making direct payments to the outside credit providers in the amounts set out in paragraph 11 of her affidavit.

3.1 Annexure “A”, a consumer statement, to her affidavit sets out certain payments made to credit providers as at 9 June 2016.

[4] She avers that she is being prejudiced, as she cannot apply for a rental agreement, etc.

[5] It is not possible to determine whether the direct payments made are what the payments should be, if not how much less and whether the credit providers have accepted it.

5.1 It cannot be determined whether she is still over indebted or not.

5.2 However, due to the conclusion I have reached it is not necessary to decide this issue.

[6] It has been submitted that Annexure “C” to the founding affidavit, is a copy of the guidelines for the withdrawal from debt review, and it is apparent therefrom that a debt counsellor does not have the statutory powers to terminate or withdraw the debt review process. Applicant therefore has no other option but to approach the High Court because of its inherent jurisdiction as it cannot be done in the magistrate’s court which is a creature of statute. There is nothing in the Act and regulations which set out what must be done in such

a case.

- [7] The question that arises is, if she is no longer over indebted and the application to declare her over indebted was never issued and filed at the magistrate's court nor was an order to that effect granted by the magistrate's court, must this court then grant an order that she is no longer over indebted if there is no specific provision in the Act to do so, and there is no court order.
- [8] The restructuring was never confirmed by any court in terms of section 87(1) of the National Credit Act 34 of 2005, nor is any restructuring agreement agreed to between all the parties attached to the papers.

8.1 In Nedbank v National Credit Regulator 2011

- (3) SA 581 (SCA) it was held at 598c:

"In terms of s86(7)(c) the debt counsellor may "issue a proposal" that the magistrate's court make certain orders. It is not said

that he 'must' do so but, given his duty in terms of ss(6) and his position as statutory functionary, he must issue the proposal."

8.1.1 The debt counsellor having found that the debtor is over indebted, must issue a proposal restructuring the debt, and submit this to the magistrate's court for a hearing and the granting of the necessary order. If this is not done the debt counsellor has failed to comply with his duties and obligations in terms of the Act.

8.1.2 It is clear from Nedbank v National Credit Regulator that there must be judicial oversight to declaring a person over indebted and the restructuring of his/her debt.

8.1.3 Until the magistrate's court has thus made an order approving the over indebtedness and restructuring no declaration of over indebtedness has occurred.

8.1.4 Form 17.2 used by the debt counsellor does not reflect the correct position as it fails to incorporate the judicial oversight required and that any application for a declaration of over indebtedness and restructuring must be approved by the magistrate's court. Form 17.2 is also incorrect in stating that the application for debt review was successful.

- [9] In terms of section 86(1) of the National Credit Act a consumer can apply to a debt counsellor to be declared over indebted. Section 86(4) stipulates that on receipt of such an application the debt counsellor must provide proof of receipt of the application and notify in the prescribed manner and form all credit providers listed and every registered credit bureau. Section 86(6) stipulates a debt counsellor who has accepted an application in terms of the section must determine within the prescribed time whether the consumer is over indebted and if it is concluded that he is over indebted then in terms of section 86(7)(1)(c) the debt counsellor may issue a proposal recommending that the magistrate's court make either or both of the certain orders as provided for in the said section.

9.1 Section 24(9) of the Act further provides that any arrangements by a debt counsellor with a credit provider must be reduced to writing and signed by all the credit providers, the debt counsellor and the consumer.

9.2 No such document is attached and it does not appear from the papers that any arrangement had indeed been made by the debt counsellor which was accepted by all the parties.

9.3 From the above it would appear that the requirements of the National Credit Act have not been complied with. No restructuring could have occurred until an application was brought to the magistrate's court and the court confirmed the over indebtedness and debt restructuring.

[10] In terms of section 86(1) of the National Credit Act a consumer can apply to a debt counsellor to be declared over indebted. Section 86(4) stipulates that on receipt of such an application the debt counsellor must provide proof of receipt of the application and notify in the prescribed manner and form all credit providers listed and every registered credit bureau. Section 86(6) requires a debt counsellor who has accepted an application in terms of the section to determine within the prescribed time whether the consumer is over indebted and if it is concluded that he is over indebted then in terms of section 86(7)(1)(c) the debt counsellor may issue a proposal recommending that the magistrate's court make either or both of the certain orders as provided for in the said section. The word "may" suggests that it is discretionary to issue and file the application at the magistrate's court. As set out in paragraph 2 above it is not discretionary and the word "may" must be read as "must".

[11] I have been referred to the unreported judgment of Malesela David Manamela v Hein Du Plessis t/a Debt Safe and 6 Others in the Gauteng Division, Pretoria where an order was granted that the applicant was no longer over indebted. No details of the case is provided and in my view is distinguishable as will appear from this judgment.

11.1 I was also referred to Rougier v Nedbank Ltd Case No 27333/2010 South Gauteng, where it was held that it was ultra vires for a debt counsellor to withdraw a debt review instituted in terms of section 86(1) of the Act. It is only instituted when the application is filed and issued at court. That is the position in the case of business rescue applications as held in Blue Star Holdings v West Coast Oyster Growers 2013 (6) SA 540 (WCC). In my view the same principles apply.

[12] What is the position in the present case? There is nothing in the Act or its Regulations which sets out how, once an application for a declaration of over indebtedness has been submitted to a debt counsellor who had not yet issued and served such application at the magistrate's court to be made an order of court, can be stopped, or cancelled.

12.1 It has been submitted that the guidelines of the withdrawal from debt review provides certain options how such an application can be withdrawn but does not cater for this situation, and that only a High court due to its inherent jurisdiction has the power to declare a consumer no longer over indebted. These are clearly guidelines and not specific procedures.

12.2 It is further submitted that it would be ultra vires for the debt counsellor to withdraw the application. The application is only instituted once it is issued and filed at court. Prior to that the debt counsellor only reaches a conclusion as to over indebtedness and prepares a restructuring of the debt. Debt review has not yet been instituted. Once the application is issued and filed the debt review is instituted.

12.3 Until a magistrate has ruled thereon there is only an application pending, and no declaration of over indebtedness and restructuring.

[13] What happens as in the present case when the debt counsellor sends out notices 17.1 and 17.2 but fails in his/her duty to issue and serve the application at the relevant magistrate's court.

13.1 The issuing of the application at the magistrate's court is the date the application is instituted as thereafter various factors may cause the application to be adjourned.

13.2 The debt counsellor must ensure that the over indebted consumer receives the necessary assistance within a reasonable time of receiving the application for a declaration of over indebtedness and ensure that the application is issued and filed at the magistrate's court for its judicial oversight and approval and only when approved will such an order ensue.

13.3 What is a reasonable time? In the present case the application to the debt counsellor was made during April 2016 and by August 2017 no such application had been issued and filed at the magistrate's court. Nearly four (4) years later cannot be a reasonable time nor in the interest of the consumer or credit providers. Section 86(10) of the Act allows for a period of 60 days after which a credit provider may apply to have the debt review terminated if there was no cooperation.

13.3.1 The debt counsellor must obtain information from the consumer, assess the application and prepare a restructuring of the debt and draft the necessary application to the magistrate's court. In my view a period of 90 days from the date of the application for a declaration of over indebtedness by the consumer to the debt counsellor should be sufficient to do so and to issue and serve the application at the relevant magistrate's court for its decision.

13.3.2 If this is not done, the consumer cannot be prejudiced and wait indefinitely for the debt counsellor to comply. The consumer and credit providers are being prejudiced, as there is no valid debt rescheduling because the magistrate's court has not approved such and made no order.

13.4 The intention of the Act is to ensure that consumers who are over indebted receive the necessary assistance within a reasonable time. They are in the majority of cases already in a vulnerable position.

13.5 If the debt counsellor fails to issue and serve the application at the magistrate's court within 90 days after receiving the application, the consumer if he/she so wishes must after the expiry of the 90 days be able to stop the whole process. The consumer can in such a situation at any time before the application is issued and filed at the magistrate's court inform the debt counsellor that he/she must not proceed with the application. The debt counsellor must then inform the credit bureau to remove the name of the said consumer from all its records.

[15] The position therefore appears to me to be follows:

15.1 A debt counsellor after receiving an application from a consumer to be declared over indebted must follow the process as set out in the Act.

15.2 A debt counsellor must within 90 days of receiving an application for a declaration of indebtedness and restructuring from a consumer issue and file such application at the relevant magistrate's court for approval.

15.3 The application for a declaration of over indebtedness and restructuring is only instituted once it is issued and filed at the magistrate's court. Until then it is merely a pending application.

15.4 If this is not done by the debt counsellor, the consumer can after the expiry of a period of 90 days and before the application is issued and filed notify the debt counsellor in writing not to proceed with the application.

15.5 The debt counsellor must notify the credit bureaus accordingly.

15.6 The relevant credit bureaus must then remove such consumer's name from the relevant records.

[16] As no application for a declaration of over indebtedness and restructuring had been instituted there has not been any valid

declaration of over indebtedness. The relief as sought in the notice of motion can therefore for the reasons set out above not be granted.

[17] The application is dismissed.

Date of hearing

: 17 August 2017

Date delivered

: 22 September 2017

Appearances:

For the Applicant

: Ms Dhoda

Instructed by

: Campbell Attorneys

011 616 2665

Ref:NC/alm/N1603

c/o Stowell & Co Attorneys

033 845 0500

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