

SOUTH AFRICA / JUDGMENT

Magadze v ADCAP, Ndlovu v Koekemoer (57186/2016) [2016] ZAGPPHC 1115 (2 November 2016) [2016] ZAGPPHC 1115

COURT

North Gauteng High Court, Pretoria

BEFORE

Neukircher AJ

CASE / FILE NUMBER

57186/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Date:

2/11/16

Case

no: 57186/2016

In

the matter between:

THIZWILONDI

ANANIAS MAGADZE (ID no: [7....]) Applicant
and
ADCAP
(DEBTSAFE)
1st Respondent and 5
others
Case
no:59419/2016
SOYAPHI
GREEN
NDLOVU
Applicant
BERNICE
KOEKEMOER (THE DEBT EXPERTS 2)
1st Respondent and 8 others

JUDGMENT

NEUKIRCHER AJ:

1] These two applications came before me in the unopposed motion court in which the respective applicants seek the following relief:

1. That the they be declared to be no longer over-indebted and no longer in debt review;
2. the credit bureau removes the debt review status from the applicants credit reports;
3. the respective debt counsellors provide the Form 17.W confirming that the respective applicants have been declared no longer over-indebted.

2] The applications are virtually mirror images of each other, other than the specifics pertaining to each debtor and thus this judgment will deal with the principles of section 71 and section 88(1)(b) of the National Credit Act no 34 of 2005 ("the Act").

3] The ultimate question is: given the amendment to section 71 on 13 March 2015 will this have the same effect as the court granting an order that:

- 1) the applicant is no longer over-indebted and no longer in debt review; and
- 2) that the credit bureau removes the debt review status from the applicant's credit reports.

4] The facts in both matters are as follows:

4.1. the applicants applied to have themselves declared over- indebted in terms of section 86(1) of the NCA 34 of 2005;

4.2 the applications were never confirmed in terms of section 87(1) i.e in terms of a court order of the Magistrate's Court;

4.3 the first Respondent (the debt counsellors in each case) issued a Form 17.2 to all applicants' creditors that the applicants' debt review applications were successful and their debt obligations were in the process of being restructured;

4.4 as a result of the successful debt review applications the applicants began to make the necessary payments to their creditors;

4.5 as a result of the debt review process the applicants have now paid off two of their creditors and they state that their financial circumstances have significantly improved

subsequent to their application to be declared over-indebted and that they are now able to afford the increase the total monthly amount that their respective debt counsellors (the first Respondents in each application) directed that they must pay to their creditors.

4.6 their present remaining creditors have all received notice of this application and none have objected.

5] It is directly as a result of this set of circumstances that the applicants wish to terminate the debt review process and pay their creditors directly and the first Respondent advised that, as per the National Credit Regulator's Guidelines, a debt counsellor does not have the statutory powers to terminate or withdraw the debt review process. Thus, so applicants were informed, they had only the following options available to them:

5.1. they would have had to withdraw from the debt review process prior to the issuance of Form 17.2;

5.2. the first Respondent had suspended provision of service due to non-cooperation by the applicants but the first Respondent would remain the debt counsellor on record;

5.3. the applicants obtain a court order to rescind the debt review order; and

5.4. the applicants obtain a court order declaring that they are no longer over-indebted.

6] In the present two cases the only applicable scenario would be that set out in 5.3 and 5.4 as:

6.1. a Form 17.2 was already issued and

thus it is too late for applicants to withdraw from the debt review process;

6.2. the applicants have co-operated with the respective first Respondents since being placed under debt review and thus 5.2 supra is not applicable.

7] During argument I enquired from counsel what the effect of section 71 was with regard to the relief sought by applicants and whether it would not have the same effect as a court order declaring the applicants to be no longer over-indebted and no longer in debt review.

8] To place this in context one must have regard to the decision of *Rougier v Nedbank Limited* 2013 JOR 1167 (GSJ) where Nobanda AJ stated the following:

"[12] In the circumstances, the debt counsellor fulfils a statutory function. As such, the debt counsellor is enjoined to act within the parameters of the empowering provision. Accordingly, the debt counsellor's powers in dealing with a s 86(1) application are limited as set out above. I could not find any provision in the Act that empowers the debt counsellor to "withdraw" the debt review instituted in terms of s 86(1). Neither was I referred to any authority by the Respondent to this effect.

[13] In the premises I find that in purporting to withdraw the debt review instituted by the applicant in terms of the provisions of s 86(1), the debt counsellor acted ultra vires. "

[9] When reviewing this judgment however, one must bear in mind that it was handed down in May 2013. At that stage section 71 was extremely limited in scope. Section 71(1) and 71(2) read as follows:

"(1) A consumer whose debts have been re-arranged in terms of Part 0 of this Chapter, may apply to a debt counsellor at any time for a clearance certificate relating to that debt re-arrangement.

(2) A debt counsellor who receives an application in terms of subsection (1), must -

(a) investigate the circumstances of the debt re-arrangement; and

(b) either -

(i) issue a clearance certificate in the prescribed form if the consumer has fully satisfied all the obligations under every credit agreement that was subject to the debt re- arrangement order or agreement, in accordance with that order or agreement; or

(ii) refuse to issue a clearance certificate, in any other case."

10] Thus it appears that in order to qualify for the issuing of a clearance certificate, a consumer under debt review had to fully

satisfy "all the obligations under every credit arrangement" that was subject to the debt re-arrangement order or agreement in accordance with that order or agreement. Once the consumer had done that:

10.1 he was entitled to receive the clearance certificate from the debt counsellor;

10.2 he could file a copy of that certificate with the national register or any credit bureau (s 71(4)) and

10.3 upon receipt of the clearance certificate

a credit bureau, or national credit register must expunge from its records:

(a) the fact that the consumer was subject to the debt re- arrangement order or agreement;

(b) any info regarding to any default by the consumer that may have

(i) precipitated the debt re-arrangement; or

(ii) been considered in making the

debt re- arrangement order or agreement; and

(c) any record that a particular credit agreement was subject to the relevant debt re- arrangement order or agreement.

11] On 13 March 2015 the provisions of section 71 were substantially amended with the exception of subsections (5), (6) and (7). The provisions of sections 71(1) - (4) now read as follows:

"71. Removal of record of debt adjustment or

judgment

(1) A consumer whose debts have been re-arranged in terms of Part 0 of this Chapter, must be issued with a clearance certificate by a debt counsellor within seven days after the consumer has-

(a) satisfied all the obligations under every credit agreement that was subject to that debt re- arrangement order or agreement, in accordance with that order or agreement; or

(b) demonstrated-

(i) financial ability to satisfy the future obligations in terms of the re-arrangement order or agreement under-

(aa) a mortgage agreement which secures a credit agreement for the purchase or improvement of immovable property; or

(bb) any other long term agreement as may be prescribed;

(ii) that there are no arrears on the re-arranged agreements contemplated in subparagraph (i); and

(iii) that all obligations under every credit agreement included in the re-arrangement order or agreement, other than those contemplated in subparagraph (i), have been settled in full.

(Section 71(1) substituted by section 21 of Act 19 of 2014)

(2) A debt counsellor must for the purposes of the demonstration envisaged in subsection (1) (b), apply such measures as may be prescribed.

(Section 71(2) substituted by section 21 of Act 19 of 2014)

(3) If a debt counsellor decides not to issue or fails to issue a clearance certificate as contemplated in subsection (1), the consumer may apply to the Tribunal to review that decision, and if the Tribunal is satisfied that the consumer is entitled to the certificate in terms of subsection (1), the Tribunal may order the debt counsellor to issue a clearance certificate to the consumer.

(Section 71(3) substituted by section 21 of Act 19 of 2014)

(4)

- (a) A debt counsellor must within seven days after the issuance of the clearance certificate, file a certified copy of that certificate,

with the national register established in terms of section 69 of this Act and all registered credit bureaux.

- (b) If the debt counsellor fails to file a certified copy of a

clearance certificate as contemplated in subsection (1), a consumer may file a certified copy of such certificate with the National Credit Regulator and lodge a complaint against such debt counsellor with the National Credit Regulator.

(Section 71(4) substituted by section 21 of Act 19 of 2014)

12] It is thus clear that whereas prior to 13 March 2015, in order to qualify to receive a clearance certificate a consumer had to have "fully satisfied all the obligations under every credit agreement" subject to the debt-rearrangement or order, this was no longer the case. Whilst this still remained one of the alternatives, once a consumer has demonstrated

'71(1)(b)

- (i) financial ability to satisfy the future obligations in terms of the re-arrangement order or agreement under-

(aa) a mortgage agreement which secures a credit agreement for the purchase or improvement of immovable property; or

(ii) that there are no arrears on the re-arranged agreements contemplated in subparagraph (i); and

(iii) that all obligations under every credit agreement included in the re-arrangement order or agreement, other than those contemplated in subparagraph (i), have been settled in full."

he then qualified for a clearance certificate which would then, when presented to the credit bureau, cause the following:

'71(5) Upon receiving a copy of a clearance certificate, a credit bureau, or the national credit register, must expunge from its records-

- (a) the fact that the consumer was subject to the relevant debt re- arrangement order or agreement;

(b) any information relating to any default by the consumer that may have-

(i) precipitated the debt re-arrangement; or

(ii) been considered in making the debt re-arrangement order or agreement; and

- (c) any record that a particular credit agreement was subject to the relevant debt re-arrangement order or agreement."

13] So the question is: does this clearance certificate have the same effect as the court order envisaged in s 88(1) ?

14] S 88(1) reads as follows:

"(1) A consumer who has filed an application in terms of section 86(1), or who has alleged in court that the consumer is over-indebted, must not incur any further charges under a credit facility or enter into any further credit agreement, other than a 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."

(my emphasis)

15] In my view section 71 does not confer any new powers on the debt counsellor to release the consumer from debt review. All that the new provisions of section 71 do, is to inform the creditors that the consumer is now able to meet his/her monthly obligations whilst the clearance certificate may expunge from the consumer's record any default in respect of a particular credit agreement. It does not appear to expunge from the consumer's record the fact that the consumer successfully applied under section 86(1) to be placed under debt review.

16] This, of course has implications for all future credit transactions the applicant seeks to enter into:

16.1. in case no 57186/2016 the applicant requires a loan to further his tertiary studies. He specifically states that being under debt review also cost him a promotion;

16.2 in case 59419/2016 the applicant wishes to purchase a motor vehicle and "enrol [his] children in a good school."

17] The purpose of the NCA 34/2005 ("the Act") is:

"The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by-

- (a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;
- (b) ensuring consistent treatment of different credit products and different credit providers;
- (c) promoting responsibility in the credit market by-
 - (i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and
 - (ii) discouraging reckless credit granting by credit providers and contractual default by consumers .. .
- (d) .. .
- (e) .. .
- (f) .. .
- (g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;
- (h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and
- (i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements."

18] It is clear that the Act is geared towards the protection of the consumer and where relevant, the fiscal rehabilitation of the

consumer. It can only be with this in mind that the records of a credit bureau must be expunged upon issuing of a clearance certificate under section 71 but this section of the Act does not go so far as to remove from the credit bureau records the fact that the consumer had, at some stage, been placed under debt review. All that section 71 does is remove from the credit bureau records the specific

details of the debt re-arrangement as well as details of the credit agreement that was subject to this re- arrangement. This

naturally means that each time that the consumer applies for credit (eg the purchase of a house or motor vehicle or even apply for a credit card or cellular telephone account) the fact that the debtor was, at some stage, under debt review will come up and may adversely affect his application.

19] The situation would be the same if one has regard to the provisions of section 88(1)(b) as that section simply provides that a court can declare a consumer to be no longer over-indebted but that does not take away the obvious inference that at some stage the consumer was over indebted. (my emphasis)

20] Interestingly enough, section 88(1) does not have a similar proviso to section 71(5) which is the expunging of the credit bureau records.

21] In my view it would create an anomalous position where a Form 17.W (which is a form issued by the National Credit Regulator and is termed

"Withdrawal from Debt Review") is issued pursuant to a court order and the credit bureau did not expunge the consumer's records in toto. To grant an order that falls short of failing to expunge the consumer's credit record in toto would effectively mean that section 71 would carry more weight than an order issued out by the High Court and that situation would be untenable. In any event, it is my view that a court has wide powers to grant the order sought to expunge the records of the consumer given the specific facts set out in the applications that these consumers are no longer over-indebted and are financially in a position to pay their creditors.

22] I therefore find that the amended provisions of section 71 have not conferred any additional powers on a debt counsellor to release a consumer from debt review proceedings instituted in terms of section 88(1).

23] I was satisfied in both matters that a case was made out for the relief sought. Accordingly, the following orders are granted:

23.1. In case no 57186/2016:

- (a) the applicant is declared to be no longer over-indebted and no longer under debt review;
- (b) the credit bureau is ordered to remove the applicant's debt review status from applicant's credit records;
- (c) the debt counsellor is to provide the Form 17.W to all the applicant's creditors to confirm that the applicant has been declared to be no longer over-indebted.

23.2 In case no 59419/2016:

- (b) the credit bureau is ordered to remove the applicant's debt review status from applicant's credit records;

NEUKIRCHER AJ

18 OCTOBER 2016

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