

SOUTH AFRICA / JUDGMENT

Malesa v DMC Debt Management, A Division of OPCO 365 (Pty) Ltd (NCT/226906/2022/141(1) (b)) [2023] ZANCT 9 (12 January 2023) [2023] ZANCT 9

COURT

National Consumer Tribunal

BEFORE

P Manzi-Ntshingila, A Potwana, S Mbhele

CASE / FILE NUMBER

NCT/226906/2022/141(1)(b)

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IN

THE NATIONAL CONSUMER TRIBUNAL

SITUATED

AT CENTURION

Case

number: NCT/226906/2022/141(1)(b)

In

the matter between:

MATOME PIET MALESA

APPLICANT

and

DMC DEBT MANAGEMENT,

A DIVISION OF OPCO 365

(PTY) LTD RESPONDENT

Coram:

Ms
P Manzi-Ntshingila -
Presiding Tribunal Member
Dr
A Potwana
-
Tribunal Member
Mr
S Mbhele
-
Tribunal Member
Date
of Hearing -
17 November 2022
The
last documents were received on 12 January 2023

JUDGMENT

AND REASONS

PARTIES

1. The Applicant is Matome Piet Malesa (“the Applicant”), an adult male who lodged a complaint with the National Credit Regulator (“the NCR”) against the Respondent, in terms of the National Credit Act 34 of 2005 (“the NCA”). During the hearing, the Applicant represented himself and was aided by an

interpreter, Mr BG Sekete.

2. The Respondent is DMC Debt Management, a division of OPCO 365 (Pty) Ltd, a private company duly registered and incorporated in accordance with the company laws of the Republic of South Africa (“the

Respondent”). The Respondent’s principal place of business is at 12 Esplanade Road, Quigney, East London, Eastern Cape.

There was no appearance by the Respondent or its legal representatives on the day of the hearing.

TYPE OF APPLICATION AND JURISDICTION

3. This application is brought in terms of section 141 of the NCA after the NCR issued a notice of nonreferral in response to the Applicant’s complaint. Leave to refer a complaint directly to the National

Consumer Tribunal (“the Tribunal”) was granted in the Tribunal’s ruling issued on 14 September 2022.

4. The Tribunal has jurisdiction to hear this matter in terms of section 27

(a) of the NCA.

ISSUE TO BE DECIDED

5. The Tribunal is required to determine whether the orders sought by the Applicant should be granted.

CONSIDERATION OF EVIDENCE ON A DEFAULT BASIS

6. The Applicant served its application on the Respondent through registered mail, using the Respondent's principal place of business address, which also appears on the Respondent's letterhead.

7. In terms of Rule 13 of the Rules of the Tribunal[1], the Respondent was entitled to oppose the application by serving an answering affidavit on the Applicant and any other person on whom the application was served within fifteen (15) business days of receiving the application. However, the Respondent failed to do so.

8. Notwithstanding the Respondent's failure to file an answering affidavit, the Applicant did not file an application for a default order in terms of Rule 25(2).

9. On 6 May 2022, the Tribunal's Registrar ("the Registrar")

issued a Notice of Complete Filing on all the parties. On 13 October 2022, the Registrar set down the matter for hearing on a default

basis by issuing a notice of set down for the application to be heard via Microsoft Teams video and audio technology link on 17 November 2022 and serving the same on all the parties.

10. The Tribunal's panel was satisfied that all the parties were properly notified of the date, time and venue for the proceedings.

11. Rule 24 of the Rules of the Tribunal states that:

"(1) If a party to a matter fails to attend or be represented at any hearing or any proceedings, and that party –

(a) Is the Applicant, the presiding member may dismiss the matter by issuing a written ruling; or

(b) Is not the Applicant, the presiding member may –

(i) Continue with the proceedings in the absence of that party; or

(ii) Adjourn the hearing to a later date;

(2) The Presiding member must be satisfied that the party had been properly notified of the date, time and venue of the proceedings,

before making any decision in terms of subrule (1);

- (3) If a matter is dismissed, the Registrar must send a copy of the ruling to the parties.”
- 12. As the Tribunal did not receive any notification of intention to oppose the matter from the Respondent, the hearing continued on a default basis.
- 13. Rule 13(5) of the Tribunal Rules stipulates that any fact or allegation not specifically admitted or denied within an answering affidavit is deemed admitted. Therefore, in the absence of an answering affidavit, the Respondent is deemed to have admitted the allegations made by the Applicant.

BACKGROUND

The Applicant's case

- 14. The Applicant was a party to a credit agreement with Woolworths Holdings Limited (“Woolworths”) under account number: 9483363. The Applicant's last payment on the account was made on 4 July 2018. On 6 July 2021, the Applicant received a call from the Respondent demanding payment for the account. The Applicant informed the Respondent that the outstanding debt had prescribed. On 8 July 2021, the Applicant noticed from a credit report that he had been blacklisted by the Respondent without notice. According to the Applicant, the Respondent claimed that the Applicant had last made a payment on the account on 31 July 2018. The Respondent further claimed that on 20 July 2021, the Applicant had a telephone conversation with a call centre agent, thus interrupting the running of prescription, as a result of an express or tacit acknowledgement of liability. Despite these claims, the Applicant alleges that the Respondent failed to provide a recording of the alleged conversation between himself and the call centre agent. Furthermore, the Respondent could not provide the Applicant with a statement of account showing a payment made on 20 July 2021.
- 15. The Applicant alleges that the Respondent blacklisted him without notification, thus contravening section 72 (1)(a) of the NCA.
- 16. On 25 August 2021, the Applicant lodged a complaint with the Credit Ombuds, who advised him to refer the matter to the NCR and the Council for Debt Collectors. On 1 November 2021, the Applicant lodged a complaint with the Council for Debt Collectors. Following the complaint, the Respondent agreed to remove the Applicant's negative listing by 23 December 2021.
- 17. On 7 March 2022, the Applicant received a letter from the NCR advising him that it was closing his file since his complaint had been resolved. On 30 March 2022, the NCR issued the Applicant with a notice of non-referral stating that the Respondent accepted the Applicant's defence of prescription and confirmed that the outstanding balance of R3 146.29 had been written off. The NCR concluded that there was no longer a dispute because the Respondent had issued further instructions to the relevant credit bureaus to remove the negative listing

from the Applicant's credit profile. It concluded that the Applicant's complaint did not include an allegation of facts, which, if true, would constitute grounds for a remedy under the NCA

18. Notwithstanding the above, the Applicant alleges that the Respondent reloaded the Applicant's adverse listing with credit bureaus despite having removed such adverse listing in December 2021. As a result, the Applicant alleges the following against the Respondent:

18.1. The Respondent tried to collect a prescribed debt in contravention of section 126B(i) and (ii) of the NCA;

18.2. The Respondent did not notify the Applicant prior to the adverse listing, in contravention of section 72(i)(g) of the NCA;

18.3. Wrongful blacklisting in contravention of section 72(1)(c) of the NCA;

18.4. Failure to provide requested documents in contravention of section 64(a) and (b) of the NCA;

18.5. Reloading the negative listing, in contravention of Regulation 19(6) of the NCA Regulations; [2] and

18.6. The Respondent caused him considerable loss and damage.

19. Consequently, the Applicant seeks the following orders:

19.1. Declaring the Respondent's conduct to be prohibited conduct; and

19.2. Declaring that the Respondent contravened the following sections of the NCA and its Regulations:

19.2.1. Section 50(2)(b);

19.2.2. Section 52(5)(c) read with General Condition A1, 2 and 4 of its conditions of registration;

19.2.3. Section 65(4)(a) and (b);

19.2.4. Section 72(1)(a) read with Regulation 19(8) or 19(4);

19.2.5. Section 72(1)(c);

19.2.6. Section 72(3);

19.2.7. Section 126B(1)(b);

19.2.8. Regulation 19(3);

19.2.9. Regulation 19(4);

19.2.10. Regulation 19(5);

19.2.11. Regulation 19(6);

19.2.12. Regulation 19(7); and

19.2.13. Regulation 19(13).

THE APPLICABLE LAW

20. Section 50(2)(b) of the NCA states:

“It is a condition of every registration issued in terms of this Act that the registrant must comply with every applicable provision of-

(i) this Act;

(ii) the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001); and

(iii) applicable provincial legislation within any province in which the registrant conducts, engages in, or makes available the registered activities.”

21. Section 52(5)(c) of the NCA states that “A registrant must comply with its conditions of registration and the provisions of this Act.”

22. Section 65(4)(a) and (b) of the NCA states:

“On written request from the consumer the credit provider must provide the consumer with-

(a) a single replacement copy of a document required in terms of this Act, without charge

to the consumer, at any time within a year after the date for original delivery of that document; and

(b) any other replacement copy, subject to any search and production fees permitted by regulation.”

23. Section 72(1)(a) of the NCA states:

“Every person has a right to be advised by a credit provider within the prescribed time before any prescribed adverse information concerning the person is reported by it to a credit bureau, and to receive a copy of that information upon request.”

24. Section 72(1)(c) of the NCA states:

“Every person has a right to challenge the accuracy of any information concerning that person-

(i) that is the subject of a proposed report contemplated in paragraph (a); or

(ii) that is held by the credit bureau or national credit register, as the case may be, and require the credit bureau or National Credit Regulator, as the case may be, to investigate the accuracy of any challenged information, without charge to the consumer.”

25. Section 72(3) of the NCA states:

“If a person has challenged the accuracy of information proposed to be reported to a credit bureau or to the national credit register, or held by a credit bureau or the national credit register, the credit provider, credit bureau or national credit register, as the case may be, must take reasonable steps to seek evidence in support of the challenged information, and within the prescribed time after the filing of the challenge must-

- (a) provide a copy of any such credible evidence to the person who filed the challenge; or
- (b) remove the information, and all record of it, from its files, if it is unable to find credible evidence in support of the information, subject to subsection (6).”

26. Section 126B(1)(b) of the NCA states:

“No person may continue the collection of, or re-activate a debt under a credit agreement to which this Act applies –

- (i) which debt has been extinguished by prescription under the Prescription Act, 1969 (Act 68 of 1969); and
- (ii) where the consumer raises the defence of prescription, or would reasonably have raised the defence of prescription had the consumer been aware of such a defence, in response to a demand, whether as part of legal proceedings or otherwise.”

27. Regulation 19(3) of the NCA Regulations states:

“All sources of information as set out in section 70(2) of the Act and Regulation 18(7) must take reasonable steps to ensure that the information reported to the credit bureau is accurate, up-to-date, relevant, complete, valid and not duplicated.”

28. Regulation 19(4) of the NCA Regulations states:

“All sources of information as set out in section 70(2) of the Act and Regulation 18(7) must give the consumer at least 20 business days notice of its intention to submit the following adverse information concerning that person to a credit bureau:

- (a) classification of consumer behaviour, including classifications such as ‘delinquent’, ‘default’, ‘slow paying’, ‘absconded’ or ‘not contactable’;
- (b) classifications related to enforcement action taken by the credit provider, including classifications such as handed over for collection or recovery, legal action, or write-off.”

29. Regulation 19(5) of the NCA Regulations states:

“No source of information as set out in section 70(2) of the Act and Regulation 18(7) may submit information to a credit bureau that has prescribed in terms of the Prescription Act 68 of 1969.”

30. Regulation 19(6) of the NCA Regulations states:

“No source of information as set out in section 70(2) of the Act and Regulation 18(7) may submit adverse or other information to a credit bureau that has prescribed in terms of the Prescription Act 68 of 1969.”

31. Regulation 19(7) of the NCA Regulations states:

“No source of information shall submit consumer credit information comprising adverse information to a credit bureau, unless the required minimum monthly or such other instalment payments have not been paid for a minimum period of at least three (3) consecutive billing cycles.”

32. Regulation 19(13) of the NCA Regulations states:

“A credit provider must submit credit information to the credit bureaus in the manner and form prescribed by the National Credit Regulator through conditions of registration and any guidelines that may be used by the National Credit Regulator from time to time.”

33. General Condition A1 of the Respondent's General Conditions of Registration states:

“The registrant must comply with all applicable legislation relating to the operation of the business of a credit provider, including but not limited to the Act, the regulations and any subsequent amendment or substitution of the applicable legislation and regulations.”

34. General Condition 2 of the Respondent's General Conditions of Registration states:

“The registrant shall operate its business in a manner consistent with the purpose and requirements of the Act.”

35. General Condition 4 of the Respondent's General Conditions of Registration states:

“The registrant shall operate its business in a manner that ensures the fair, equitable and transparent treatment of all consumers in the credit market.”

ANALYSIS OF THE EVIDENCE

36. The application is not defended. In terms of Rule 13(5) of the Tribunal Rules, “Any fact or allegation in the application or referral not specifically denied or admitted in an answering affidavit, will be deemed to have been admitted.” In the circumstances, all the facts or allegations stated by the Applicant in its application or referral documents are deemed to be admitted.

37. We now turn to assess whether the orders sought by the Applicant are supported by the facts and are competent in law. We find that:

37.1. As will be apparent hereinbelow, the Respondent failed to comply with various applicable provisions of the NCA and thereby contravened section 50(2)(b) of the NCA;

37.2. As will be apparent hereinbelow, the Respondent failed to comply with its conditions of registration and the provisions of the NCA and thereby contravened section 52(5)(c) of the

NCA;

37.3. There is no evidence that the Applicant requested any document required in terms of the NCA within one year of the delivery of that document to him in contravention of section 65(4)(a) and (b) of the NCA;

37.4. The Applicant has established that the Respondent did not advise him within the prescribed time before any prescribed adverse information concerning him was reported by it to a credit bureau as required under section 72(1)(a) of the NCA;

37.5. The Respondent did not contravene section 72(1)(c) of the NCA, as the provisions of this section do not impose an obligation on the Respondent but serve to confer a right on consumers to challenge the accuracy of the information that has been reported to credit bureaus;

37.6. By failing to provide a copy of the challenged information within the prescribed time after the filing of the challenge by the Applicant, the Respondent contravened section 72(3) of the NCA;

37.7. By calling the Applicant demanding payment of a prescribed debt, the Respondent contravened section 126B(1)(b) of the NCA;

37.8. The Respondent's failure to take reasonable steps to ensure that the information reported to the credit bureaus is accurate, up-to-date, relevant, complete, valid, and not duplicated constitutes a contravention of Regulation 19(3) of the NCA Regulations;

37.9. The Respondent's failure to give the Applicant at least 20 business days' notice of its intention to submit the following adverse information concerning him to credit bureaus constitutes a contravention of Regulation 19(4) of the NCA Regulations;

37.10. By submitting information to a credit bureau that has prescribed in terms of the Prescription Act 68 of 1969, the Respondent contravened Regulation 19(5) of the NCA Regulations;

37.11. By reloading the negative listing, the Respondent contravened Regulation 19(6) of the NCA Regulations;

37.12. There is no evidence that the Respondent contravened Regulation 19(7) of the NCA Regulations;

37.13. There is no evidence that the Respondent contravened Regulation 19(13) of the NCA Regulations;

37.14. By failing to comply with several provisions of the NCA and its regulations, as discussed above, the Respondent contravened General Condition A1 of its General Conditions of Registration;

37.15. By failing to operate its business in a manner consistent with the purpose and requirements of the NCA, as evidenced by its failure to comply with several provisions of the NCA and its regulations, as discussed above, the Respondent contravened General Condition 2 of its General Conditions of Registration; and

37.16. By failing to treat the Applicant in a fair, equitable, and transparent manner, the Respondent contravened General Condition 4 of the Respondent's General Conditions of Registration.

38. In a letter dated 23 December 2021[3], the Respondent accepted the Applicant's defence of prescription and further indicated that the account would be written off. It is not clear why and under what circumstances the Respondent deemed it necessary to reload the adverse information against the Applicant.

CONCLUSION

39. Save for the allegations that the Respondent contravened section 72(1)(c) of the NCA and Regulations 19(7) and 13 of the NCA Regulations, we find that the Applicant has proved that the Respondent contravened the following provisions of the NCA, the NCA Regulations, and its General Conditions of Registration:

39.1. section 50(2)(b) of the NCA;

39.2. section 52(5)(c) of the NCA;

39.3. section 65(4)(a) and (b) of the NCA;

39.4. section 72(1)(a) of the NCA;

39.5. section 72(3) of the NCA;

39.6. section 126B(1)(b) of the NCA;

39.7. Regulation 19(3) of the NCA Regulations;

39.8. Regulation 19(4) of the NCA Regulations;

39.9. Regulation 19(5) of the NCA Regulations;

39.10. Regulation 19(6) of the NCA Regulations;

39.11. Regulation 19(8) of the NCA Regulations;

39.12. General Condition A1 of its General Conditions of Registration;

39.13. General Condition 2 of its General Conditions of Registration; and

39.14. General Condition 4 of its General Conditions of Registration.

40. In his application papers, the Applicant submitted that he seeks an order declaring the Respondent's conduct to be prohibited conduct but did not specify any relief for himself. During the hearing, however, he stated that he wants the Respondent to remove the adverse listing and a certificate that can enable him to sue for damages. In terms of section 150(i) of the NCA, the Tribunal may make any appropriate order, in relation to prohibited conduct, required to

give effect to a right contemplated in the NCA or the Consumer Protection Act 68 of 2008. We do not doubt that the Applicant has a right to have the adverse listing by the Respondent removed from all credit bureaus. Concerning the requested certificate, the Applicant is at liberty to approach the Chairperson of the Tribunal for such in terms of section 164(3)(b) of the NCA.

ORDER

41. The Tribunal makes the following order:

41.1. The Respondent contravened the following provisions of the NCA, the NCA Regulations, and its General Conditions of Registration:

41.1.1. Section 50(2)(b) of the NCA;

41.1.2. Section 52(5)(c) of the NCA read with General Conditions A1, 2, 4 of its General Conditions of Registration;

41.1.3. Section 65(4)(a) and (b) of the NCA;

41.1.4. Section 72(1)(a) of the NCA;

41.1.5. Section 72(3) of the NCA;

41.1.6. Section 126B(1)(b) of the NCA;

41.1.7. Regulation 19(3) of the NCA Regulations;

41.1.8. Regulation 19(4) of the NCA Regulations;

41.1.9. Regulation 19(5) of the NCA Regulations;

41.1.10. Regulation 19(6) of the NCA Regulations; and

41.1.11. Regulation 19(8) of the NCA Regulations;

41.2. The Respondent's contravention of the above-mentioned provisions of the NCA and its regulations is hereby declared to be prohibited conduct;

41.3. The Respondent must immediately take the necessary steps to ensure that its adverse listing of the Applicant, as a result of the Woolworths Holdings Limited ("Woolworths") Account Number: [...], is removed by all credit bureaus; and

41.4. No order is made as to costs.

Thus done and dated 25 January 2023.

Dr A Potwana Tribunal Member

With Ms P Manzi-Ntshingila (Presiding Tribunal Member)

and Mr S Mbhele (Tribunal Member) concurring.

- [1] Published under GN 789 in Government Gazette No. 30225 of August 2007 as amended by GN 428 in Government Gazette 34405 of 29 June 2011 (published in terms of the Consumer Protection Act, 68 of 2008), GN R203 in Government Gazette 38577 of 13 March 2005 and GN 39663 of 4 February 2016.
- [2] Published under Government Notice R489 in Government Gazette 28864 of 31 May 2006.
- [3] Annexure A to the Applicant's founding affidavit, page 17 of the bundle

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