

SOUTH AFRICA / JUDGMENT

Morewane v Credit Matters and Another (NCT/8292/2013/141(1) NCA) [2013] ZANCT 52 (8 November 2013) [2013] ZANCT 52

COURT

National Consumer Tribunal

BEFORE

L Best, H Devraj, T Woker

CASE / FILE NUMBER

NCT/8292/2013/141(1) NCA

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IN THE NATIONAL
CONSUMER TRIBUNAL
HELD IN
CENTURION

Case

number: NCT/8292/2013/141(1)

NCA

In

the matter between:

BRIAN
MPHO MOREWANE
APPLICANT
and
CREDIT
MATTERS
FIRST
RESPONDENT
NATIONAL
CREDIT REGULATOR
SECOND
RESPONDENT

Coram: Ms
L Best
–
Presiding
member
Ms
H. Devraj
–
Member
Prof
T Woker
–
Member
Date
of Hearing
–
8 November
2013

JUDGMENT

APPLICANT

1. The Applicant in this matter is Brian Mpho Morewane, a major male person, residing in Mbonambi, Soweto.
2. The NCR Form 32 was completed by the Applicant.

RESPONDENTS

3. The First Respondent is Credit Matters, a registered debt counsellor practising as such in Orkney (hereinafter referred to as “the

First Respondent”).

4. The First Respondent did not oppose the application, although the Tribunal is satisfied that the application was duly served on the First Respondent via registered mail on 15 April 2013.
5. The Second Respondent is the National Credit Regulator, a body established in terms of Section 12 of the National Credit Act, 34 of 2005 (“the Act”) (hereinafter referred to as “the Second Respondent”).
6. The Second Respondent’s Answering Affidavit was deposed to by Zolile Mngundaniso, Manager in the Complaints Department of the Second Respondent.

APPLICATION TYPE

7. This is an application in terms of Section 141(1) of the Act following the issuance of a notice of non-referral by the Second Respondent, in respect of a complaint that was lodged by the Applicant against the First Respondent, a registered debt counsellor who had provided services to the Applicant.

BACKGROUND

8. The Applicant applied for debt review with the First Respondent during the course of October 2009[1] in respect of a vehicle finance agreement entered into with Nedbank. It is submitted[2] that the initial instalment due by the Applicant to Nedbank was R5 458.71 per month and in terms of the debt review proposal[3] the Applicant offered to pay R1248.85 for a period of 239 months. The credit provider rejected the proposal and made a counter proposal of R6 820.36, however there was no response to the counter proposal resulting in the credit provider issuing a notice of termination on 28 September 2010. Another notice of termination was sent on the 18th of October 2010 as the Applicant was in arrears and not employed at the time. The Applicant's vehicle was subsequently repossessed.

APPLICABLE SECTIONS OF THE NCA

The following are applicable sections of the Act and Regulations:

9. "Section 136 Initiating a complaint to National Credit Regulator
- (1) Any person may submit a complaint concerning an alleged contravention of this Act to the National Credit Regulator in the prescribed manner and form.
- (2) The National Credit Regulator may initiate a complaint in its own name."
10. "Section 139 Investigation by the National Credit Regulator
- (1) Upon initiating or accepting a complaint in terms of section 136, the National Credit Regulator may –
- a. Issue a notice of non-referral to the complainant in the prescribed forms, if the complainant appears to be frivolous or vexatious, or does not allege any fact which, if true, would constitute grounds for a remedy under the Act:"
9. "Section 140 Outcome of complaint
- (1) After completing an investigation into a complaint, the National Credit Regulator may-
- (a) issue a notice of non-referral to the complainant in the prescribed form;
- (b) make a referral in accordance with subsection (2), if the National Credit Regulator believes that a person has engaged in prohibited conduct..."
10. "Section 141 Referral to Tribunal

- (1) If the National Credit Regulator issues a notice of non-referral in response to a complaint other than a complaint concerning section 61 or offence in terms of this Act, the complainant concerned may refer the matter directly to-
- (a) the consumer court of the province within which the complainant resides, or in which the respondent has its principal place of business in the Republic, subject to the provincial legislation governing the operation of that consumer court; or
- (b)
- the Tribunal, with the leave of the Tribunal.”

THE HEARING

11. The hearing was held on 8 November 2013.
12. The Applicant represented himself, and the Second Respondent was represented by Mr Selolo.
13. There was no appearance by the First Respondent, nor was the First Respondent represented.
14. At the hearing, the Applicant re-stated his reasons, as set out in his submissions, for registering a complaint with the Second Respondent regarding the conduct of the First Respondent, Credit Matters. These reasons relate to the alleged contraventions of the Act, as supported by documentary evidence, namely that:
- 14.1 The First Respondent failed to adequately carry out its function as a debt counsellor in the debt review process, and did not follow proper legal procedures to the prejudice of the Applicant in that:
- 14.1.1 It did not advise the Applicant regarding the rejection of the proposed offer in order to enable the Applicant to consider increased monthly instalments to the credit provider. The Applicant continued to pay the suggested payment for almost 2 years;
- 14.1.2 The First Respondent was negligent in that:
- 14.1.2.1 It failed to refer the matter to the court within the prescribed timeframe, resulting in the issuance of the termination letters and ultimately the repossession of the vehicle.
- 14.1.2.2 It was at all times aware of the termination notices;
- 14.1.2.3 It promised to take action when summons were issued but failed to do so;
- 14.1.2.4 It continued, for the entire period of two years, to deduct monies for services that were not rendered, a conduct constituting gross misconduct.
- 14.1.3 Further that the First Respondent misled and failed to properly advise the Applicant regarding the debt review process in that:

14.1.3.1 Upon receipt of the termination letters the First Respondent never bothered to inform the Applicant for a duration of 2 years until there was a predicament;

14.1.3.2 It failed to advise the Applicant regarding the option of surrendering the vehicle in terms of section 127 of the Act.

14.2 The Applicant views this conduct as constituting a blatant misleading and failure to properly advise, or a dereliction of the duties of a debt counsellor, and that this negligence by the First Respondent resulted in the subsequent repossession and sale of the Applicant's vehicle.

15. The Applicant re-iterated his submission that the Second Respondent failed to take the actual facts into consideration and that his submissions have not been properly considered as his rights have been grossly desecrated by the First Respondent who was:

- Negligent;
- Not transparent; and
- Unethical, resulting in the repossession of the Applicant's vehicle.

16. The Applicant confirmed that he was refunded the legal fees he paid to the First Respondent, upon the direction of the Second Respondent.

The Applicant views this refund as a confirmation of fault on the part of the First Respondent. However, the Applicant further wishes the opportunity to pursue compensation for the loss suffered as a result of the conduct of the First Respondent.

16. In reply, the Second Respondent indicated that upon receipt of the complaint from the Applicant, it assessed the possibility of success of the Applicant's pursuing a claim for damages and not regarding this as having a strong prospect, engaged in negotiations

with the Debt Counsellor, the First Respondent, which resulted in the payment of the refund of the legal fees paid by the Applicant. The motivation for entering into the negotiations was based on the Second Respondent's view that there was prima facie prohibited conduct on the part of the First Respondent.

17. The Respondent concluded its submission stating that it had issued a Notice of Non-Referral in terms of Section 139, as the Applicant had insisted that he wished to take his matter directly to the Tribunal.

ISSUES

TO BE DECIDED

18. From the grounds set out during the hearing, the Tribunal considered the following issues for decision:

1. Consideration of the Applicant's application for condonation for the late filling of the Application.

2. Whether the Tribunal may grant the Applicant leave to refer the matter directly to the Tribunal.
3. Whether the Respondent correctly issued the Applicant with a notice of non-referral (specifically whether the Respondent faulted by issuing this notice in terms of s139 (1) rather than in terms of s140 (1) of the Act).

ANALYSIS

OF THE LAW & FACTS

Condonation

19. Part 2A of the Rules of the Tribunal[4], stipulates that a matter brought in terms of section 141(1) must be lodged within 20 business days after receipt of the notice of non-referral, or within a longer time permitted by the Tribunal. As it was not apparent from the record exactly when the Applicant

received the notice of non-referral, the Tribunal sought to establish whether such an application is, in fact, necessary. From the papers the notice of non-referral is dated 6 February 2013 and was sent under cover of a letter dated 11 February 2013. The Applicant lodged the application with the Tribunal on the 14th of March

2013. The Applicant lodged its application on the 23rd day, if calculated from the date stated on the cover letter, which would be 3 days out of time.
20. The Applicant indicated that he had lodged his application as soon as was practically possible for him, after receiving the notice of non-referral.
21. The Second Respondent indicated that it had no objection to the time-frame within which the Applicant filed his application, be it 3 days out of time or not.
22. The Tribunal considered the Applicant's application for condonation and the Second Respondent's view on the late filing of the application and in the interests of justice grants condonation to the Applicant.

Leave to lodge an application with the Tribunal

23. The Tribunal, in determining the aspect of the granting of leave to refer a matter to the Tribunal, has established jurisprudence in the matters of *MV Chauke v Standard Bank et al*[5] and *Gerhard Roelof Coertze and Madelein Burger v Rocelia Young*[6] in which the panel quoted from the High Court decision of *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*[7], and applied the rationale underpinning the approach taken in that matter by holding that:

“When determining whether the Applicant should be granted leave to refer the matter to the Tribunal, the Tribunal must consider requirements for the granting of “leave”. A similar application can be found in the High Court practice, where an applicant applies for leave to appeal a judgment where it was held

in Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd that, “in applications for leave to appeal properly brought before the appropriate court in terms of the old sec 20, read with sec 21 as it then was, the only relevant criteria were whether the applicant had reasonable prospects of success on appeal and whether or not the case was of substantial importance to the applicant or to both him and the respondent”[8] This was so irrespective of whether the appeal lay to the full court or to the Appellate Division.

The Tribunal will therefore, when considering whether to grant the Applicant leave to refer or not, is use the same test as applied in the High Court for applications for “leave” and will therefore consider:

11.5.1 The Applicant’s reasonable prospects of success with the referral;

11.5.2 Whether the matter is of substantial importance to the Applicant or Respondents.”

24. The basis upon which leave should be granted has to be measured against the reasonable prospects of success and substantial importance of the matter.

The Applicant submits as part of his application that:

“For the record I’m not asking as I have not asked before for the NCR to over-turn the order of the Court which is due to the

negligence of the debt councillor just as much as I did not in any correspondence sent to the NCR ask them to order the debt

councillor to financially reimburse me, what I have been asking all along is to have the debt councillor take full responsibility for their negligence, non-transparency and unethical manner they’ve handled my case which resulted in the repossession of my car and the fabricated claims that they did not inform me of unsatisfactory instalments, section 127 and that I elected to continue with the debt review despite the 127 surrender act”.

25. It is evident from this paragraph that the Applicant submits that the Second Respondent did not investigate the conduct of the First

Respondent and that the relief he sought was not to be awarded damages, but to have the conduct of the First Respondent investigated.

26. The Second Respondent sets out in its notice of non-referral the following reasons for non-referral:

“The judgment granted remains an order of a competent court. The repossession of the consumer’s vehicle was done on the basis of such an order. The National Credit Regulator could not ascertain any irregularities in the process followed by the credit provider in this regard.

The consumer maintains that the Debt Counsellor did not make full disclosure to him and this resulted in the repossession of his vehicle. The Consumer requires the Debt Counsellor to compensate him for the loss suffered. The NCR does not have a mandate to instruct the Debt Counsellor to refund monies that were distributed to the consumers' respective creditors as his accounts were not settled at the time the funds were distributed. The monies distributed were due and payable to the creditors at that time.

Furthermore the NCR does not have a mandate to over-turn an order of a competent court. We further do not have the mandate to order a Debt Counsellor to pay damages to a consumer for the financial loss suffered due to irregular conduct during the debt review process. We are of the opinion that the Tribunal would not be in a position to make such an order and we once again reiterate our initial opinion that should the consumer wish to take action against the Debt Counsellor he should institute a civil claim for damages in an ordinary court of law.

We concluded that the consumer does not allege any facts which, if true, would constitute grounds for remedy under the National Credit Act. Since the consumer insists on taking the matter to the National Consumer Tribunal, we issue the notice of non-referral in terms of section 139(1)(a) of the Act."

The Second Respondent's submission that the First Respondent failed to submit proof advising the Applicant that his debt rearrangement

proposal had been rejected or a higher amount had been proposed and further failed to apply to court for a debt rearrangement order,

points to the conclusion that the finding of the Second Respondent was incorrect[9].

27. The Second Respondent stated in the notice of non-referral that the Applicant did not allege any facts which, if true, would constitute

grounds for a remedy in terms of the Act. This submission by the Second Respondent however makes it clear that possible prohibited

conduct might have taken place and that the First Respondent, instead of issuing the notice before finalising the investigation, should have finalised their investigation and either issued a notice of non-referral in terms of section 140(1)(a) or referred the matter to the Tribunal in terms of section 140(1)(b) if it formed the believe that First Respondent engaged in prohibited conduct.

28. At the hearing, the Second Respondent confirmed and admitted that in their view there was prima facie prohibited conduct on the part of the First Respondent. However, in the view of the Second Respondent, given the limited, if any possibility, of success should the Applicant pursue a claim for damages, the Second Respondent did not complete an investigation into the Applicant's complaint about the First Respondent, as required in terms of s140

(1) of the Act. Rather, the Second Respondent decided to issue a notice of non-referral in terms of s139 (1), as the Applicant "insisted he wanted to take his matter to the Tribunal".

29. The matter, however, has substantial importance to the Applicant, as confirmed during the hearing, as the conduct of the First Respondent

caused the Applicant to suffer severe prejudice. The Applicant further incurred legal costs and substantial losses due to the First

Respondent's conduct, which the Applicant will be able to pursue in a civil court, in the event of a declaration of prohibited

conduct.

Can the Tribunal proceed to adjudicate on the matter in its present form?

30. The Second Respondent states in the notice of non-referral that the notice was issued in terms of section 139(1)(a) of the Act and

further states in the notice that the complaint does not contain any facts which, if true, would constitute grounds for a remedy under the Act.

31. If the aspect of prohibited conduct was investigated by the Second Respondent, it should have followed the route provided for in section 140(1)(b) of the Act. By not doing so, this effectively precludes the Tribunal adjudicating on the aspect of prohibited conduct in this matter.

32. Prohibited conduct is defined in the Act, as an act or omission in contravention of the Act, by inter alia a credit provider, which does not constitute an offence. Therefore, whenever a registrant is required to do something or to refrain from doing something, this conduct may fall within the ambit of the definition of 'prohibited conduct'.

33. The difficulty in this matter is that the Second Respondent did not investigate prohibited conduct on the part of the Debt Counsellor

(First Respondent) and did not make a referral, or issued a notice of non-referral, in terms of section 140(1)(b). The Act makes specific provision for recourse in the event of prohibited conduct, which is a different route than the one taken by the Second Respondent in the present matter. The Tribunal does not have all of the evidence that it would have had (relating to the conduct of the First Respondent) if a proper investigation into prohibited conduct was conducted by the Second Respondent.

34. The Tribunal dealt with a similar issue in *Paulse vs Debt Quest and the NCR* (NCT/6550/2012/141). Although this matter concerned whether or not the application to the Tribunal was premature because the NCR had not yet issued a certificate of non-referral, in order to resolve this problem, the Tribunal had to consider the process which must be followed when a complaint is laid with the Second Respondent. In this case the Tribunal held that

“Debt counsellors are regulated by the Second Respondent (the NCR) and therefore their conduct stands to be judged by the requirements of the Act. Before a consumer can claim damages as a result of this conduct, it must be shown that this conduct constituted prohibited conduct as defined in the Act.”

Further that:

“To issue a notice of prohibited conduct without a proper investigation by the Second Respondent and without the Tribunal conducting a hearing would be unlawful as the procedure followed would not comply with the requirements of the Act and would also be contrary to all basic principles of administrative justice.”

ORDER OF THE TRIBUNAL

35. The Tribunal accordingly makes the following order -

35.1 This matter is referred back to the Second Respondent to conduct a proper investigation. In terms of the powers of the National Consumer Tribunal in sections 150(i) and 15(j), the Second Respondent is ordered to investigate this matter in accordance with the procedures set out in the Act and to decide whether to refer the matter to the Tribunal for a hearing into possible prohibited conduct or to issue a notice of non-referral to the Applicant in terms of s140 (1).

35.2 The Second Respondent is further ordered to notify the Applicant of the outcome of the investigation, upon the finalization thereof. Should the Second Respondent decide to issue a notice of non-referral, it will be the Applicant's prerogative to decide whether he wishes to pursue the matter any further.

Thus done and signed at Centurion this 30th day of November 2013.

Ms L. Best (Presiding Member)

Ms H. Devraj (Member) and Prof T. Woker (Member) concurring

[1] NCR Form 32.

[2] Notice of Non-referral issued by the Respondent.

[3] Form 17.2

[4] Regulations for Matters Relating to the Functions of the Tribunal and Rules for the Conduct of Matters before the National Consumer Tribunal, 2007 – Published under GN789 in GG30225 of 28 August 2007 as amended by GenN428 IN gg34405 OF 29 June 2011.

[5] NCT/4658/2012/141(1)(P).

[6] NCT/7142/2012/73(3)&75(1)(b)&(2) CPA

[7] 1986

(2) SA 555 (A) at par 15.

[8] Odendaal v Loggerenberg en Andere NNO (2) 1961

(1) SA 724 (0) at p 727 C; Attorney-General, Transvaal v Nokwe and Others 1962

(3) SA 803 (T), at p 807 A

[9] Paragraph 11 of the Second Respondent's answering affidavit.

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