

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Grundling and Another (NCT/123277/2019/137(1)) [2019] ZANCT 154 (23 October 2019)

[2019] ZANCT 154

COURT

National Consumer Tribunal

BEFORE

T Bailey, H Devraj, P Beck

CASE / FILE NUMBER

NCT/123277/2019/137(1)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

number: NCT/123277/2019/137(1)

In

the matter between:

NATIONAL
CREDIT
REGULATOR APPLICANT
and
GERALDINE
GRUNDLING FIRST
RESPONDENT
NADEEM
WILLIAMS SECOND
RESPONDENT

Coram: Mr
T Bailey – Presiding member
Ms
H Devraj – Tribunal member
Ms
P Beck – Tribunal member
Date
of hearing – 8 October 2019
Date
of judgment – 23 October 2018

JUDGMENT

AND REASONS

APPLICANT

1. The Applicant is the National Credit Regulator (the applicant). It is a juristic person established in terms of section 12 of the National Credit Act, 2005 (the Act) to regulate the consumer credit market and ensure compliance with the Act. The applicant's physical address is at [...] Road, Randjespark, Johannesburg, Gauteng.
2. The applicant was represented in these proceedings by Roy Stocker, who is a legal adviser in the applicant's Investigations and Enforcement Department.

FIRST RESPONDENT

3. The First Respondent is Geraldine Grundling (the first respondent). The first respondent's registration as a debt counsellor was cancelled on 10 May 2017 because she failed to pay her renewal fees. The first respondent was registered as a debt counsellor under registration number NCRDC582 and conducted business as a debt counsellor at Credit Matters CC at 14th Floor, The Pinnacle, corner Strand and Burg Streets, Cape Town, Western Cape.
4. The first respondent did not oppose this application.

SECOND RESPONDENT

5. The Second Respondent is Nadeem Williams (the second respondent). The second respondent is a registered debt counsellor under registration number NCRDC19, and currently conducts business as a debt counsellor at Credit Matters (Pty) Ltd at 14th Floor, The Pinnacle, corner Strand and Burg Streets, Cape Town, Western Cape.
6. The second respondent has opposed this application and was represented in these proceedings by Kevin Munro, who is an attorney

at RM Brown Attorneys.

FIRST RESPONDENT'S FAILURE TO OPPOSE THIS APPLICATION

7. Mr Munro recorded that the second respondent would not pursue the submission in his opposing affidavit that the applicant had failed to notify the first respondent of this application. The Tribunal was satisfied that the applicant had served the application on the first respondent at her last known address in terms of rule 30 (1) (b) of the Tribunal rules.[1] Consequently, the Tribunal proceeded to hear the application by default in the first respondent's absence.

OTHER PRELIMINARY MATTERS

8. Mr Munro also recorded that the second respondent would not pursue the submission in his opposing affidavit that the applicant had failed to investigate the complaint in this matter. The details of the complaint will become apparent in the course of this

judgement.

9. A reference to a section in this judgement refers to a section in the Act.

APPLICATION TYPE AND RELIEF SOUGHT

10. The applicant applied in terms of section 137 (1) (d) for an order that:
 - 10.1. The applicant is granted leave to bring an application for prohibited conduct directly to the Tribunal;
 - 10.2. The respondents committed prohibited conduct because they contravened:
 - 10.2.1. section 86 (7) (c) read together with section 86 (10); and
 - 10.2.2. section 52 (5) (c) read together with general conditions A1 and A2 of their conditions of registration as debt counsellors;
 - 10.3. The chairperson of the Tribunal issue a certificate in terms of section 164 (3) (b) to consumers Nigel Anthony Redfearn (identity document number 610826 5017 08 2) and Elaine Ann Redfearn (identity document number 630405 0151 08 3); and
 - 10.4. Incorporates any other appropriate order in terms of section 150 (i) that gives effect to the consumers' rights in terms of the Act.
11. On 19 July 2019, the Tribunal granted the applicant leave to refer the complaint directly to the Tribunal in terms of section 137 (1) (d). The complaint is, therefore, a deemed application in terms of rule 9 of the Tribunal rules.
12. The merits of the complaint were heard in a separate hearing on 8 October 2019 and form the subject matter of this judgment.

JURISDICTION

13. In addition to its other powers in terms of the Act, section 150 gives the Tribunal the power to make an appropriate order concerning

prohibited or required conduct in terms of the Act or the Consumer Protection Act, 2008.

14. This power includes declaring conduct to be prohibited in terms of the Act; interdicting any prohibited conduct; confirming an order against an unregistered person to cease engaging in any activity that must be registered in terms of the Act; requiring payment to the consumer of an excess amount charged together with interest set out in an agreement; or as set out in subsection (i), any other appropriate order required to give effect to a right in the Act.

BACKGROUND

15. This matter has a long and contorted history. It is therefore convenient to set out the salient events that transpired in this

matter.

16. Credit Matters CC offered debt counselling services to consumers by employing registered debt counsellors, who assume responsibility for consumers that applied for debt review. The first and second respondents (the respondents) conducted business as debt counsellors

at Credit Matters CC, which converted to a private company on 6 July

2018. It currently trades under the name of Credit Matters (Pty) Ltd. The first respondent is a director of both Credit Matters CC and Credit Matters (Pty) Ltd. For convenience, both entities will be referred to interchangeably in this judgement as “Credit Matters”.

17. On 18 October 2010, Nigel and Elaine Redfearn (the consumers), who married in community of property, applied for debt review at Credit Matters and were placed under the first respondent’s profile.

18. The consumers’ total monthly contractual commitments to their credit providers amounted to R68 048.83. The first respondent

conducted an assessment and concluded that the consumers were over-indebted. The consumers proposed an amount of about R7 547.00

(the initial amount) towards liquidating their indebtedness while under debt review.

19. On or about 24 November 2010, the first respondent submitted a debt re-arrangement proposal (the proposal) to the credit providers.

20. Subsequently, the consumers proposed that they increase the initial amount to R11 870.00 and later increased their offer to R13 664.22. The consumers appear to have consistently paid the initial amount since they applied for debt review.

21. The credit providers included Absa Bank, Standard Bank, WesBank and Nedbank. During November 2010 and January 2011, those banks submitted counter-proposals to the debt re-arrangement proposal because the proposal would not solve the consumers' indebtedness with those banks within a reasonable period.
 22. On 26 January 2011, the Credit Matters' quality assurance manager, Sumaya Fredericks (Fredericks), sent an email to the first respondent and one Antoinette Louw. Fredericks copied the email to other Credit Matters employees. Fredericks requested a response by 28 January 2011 because the consumers stood a strong chance of losing their assets if the matter was not resolved immediately. Fredericks added that the offers made on the application were unacceptable; the consumers needed to adjust their lifestyle to save their assets, and Credit Matters was to prepare a new proposal.
 23. During the last week of January 2011, Credit Matters sent both Standard Bank and Absa Bank a revised proposal. Both banks responded
- with counter-proposals. The consumers also sent a revised budget to Credit Matters to enable Credit Matters to formulate a revised debt re-arrangement proposal.
24. As from the February 2011, Nedbank, Absa Bank, and Standard Bank terminated the consumers' accounts from debt review. On 29 June 2011, Nedbank issued two separate summonses against the consumers in the Johannesburg Magistrate's Court to enforce payment of the consumers' credit card accounts with Nedbank.
 25. On 11 February 2011, the first respondent instituted the debt review application out of the Pretoria Magistrate's Court (the application). The application was set down for hearing on 2 August 2011 but was, ultimately, postponed to 15 September 2011. On that day, the attorneys removed the application from the court roll because it appeared that the first respondent had not paid their fees. The first respondent took no further steps to reinstate the application for hearing.
 26. During October 2011, the consumers complained to the applicant that the first respondent had not obtained a debt re-arrangement order (the order). Credit providers had contacted the consumers for payment and subsequently terminated their credit agreements from the debt review process. Certain credit providers, such as Nedbank, instituted legal action against the consumers. Credit Matters conceded that the attorneys erroneously removed the application from the court roll and undertook to appoint new attorneys to obtain the order.
 27. The first respondent appears to have closed her debt counselling practice in late 2011, and the second respondent took over as the consumers' debt counsellor in early 2012.
 28. On 12 December 2011, Credit Matters sent the consumers an email that it had appointed new attorneys, RM Brown & Associates, to represent the consumers in the application. However, Credit Matters did not communicate with the consumers during 2012 and, the consumers assumed that Credit Matters was dealing with the application.

29. On 28 April 2013 Absa Bank terminated the consumers' home loan and credit card accounts from debt review. On 9 May 2013, the consumers sent an email to Credit Matters requesting a progress report. They also sought assistance concerning legal action that credit providers had instituted against them. The following day, Credit Matters informed the consumers that it was waiting for its legal department to advise it of the date of the application hearing.
30. The consumers also approached the National Debt Mediation Association, Credit Ombud, Debt Counselling Association of South Africa to assist them. Consequently, some of the credit providers agreed to reinstate their accounts under debt review.
31. On 6 December 2013, the consumers again complained to the applicant because Credit Matters had not complied with its 2011 undertaking to obtain the order.
32. On 5 June 2014, Credit Matters sent an email to the consumers advising that it was obtaining balances on all their credit agreements to prepare a new proposal for the court.
33. On 25 June 2015 Absa Bank sent the consumers a notice in terms of section 129 (1) demanding payment of the home loan account. On 6 June 2016, which was just under a year later, Absa Bank issued summons against the consumers to enforce payment of the balance of the home loan account and declaring the consumers' home executable.
34. On 14 June 2017, the consumers transferred to a different debt counsellor.

SUMMARY OF SUBMISSIONS

Applicant

35. Mr Stocker submitted that the respondents launched the application many weeks outside of the required 60 business days envisaged in sections 86 (7) (c) and (10). The respondents were tardy in eventually enrolling the application for hearing during August 2011.

They then removed the application from the court roll and never reinstated it for hearing. Consequently, the respondents failed to comply with their conditions of registration as debt counsellors (the conditions).

Respondent

36. Mr Brown submitted that the second respondent only took over the matter in early 2012. The consumers' initial proposal was too low, and Fredericks urged them to increase their payments to prevent credit providers withdrawing from the debt review process.
37. Subsequently, the second respondent sought to obtain updated certificates of balance to formulate a new proposal. The consumers

were unable to afford the increased instalments to reduce the capital balance, which ended the prospects of a successful application. It would, therefore, have been an "exercise in futility" to reinstate the application for hearing.

38. It could not have been the legislature's intention that the second respondent refer such an application to a court. Such

applications are likely to be opposed and result in a court backlog. It will mean that debt counsellors will be obliged to place fatally defective proposals before the court and result in punitive costs

orders.

39. Consequently, the respondent's failure to reinstate the application for hearing does not amount to a dereliction of duty.

ISSUES

TO BE DECIDED

40. The issues the Tribunal is required to decide are:

40.1. Whether the respondents committed prohibited conduct by failing to place the application down for hearing before a magistrate; and

40.2. Whether their failure to have done so contravenes the conditions.

PROHIBITED CONDUCT

The Act

41. The Act defines prohibited conduct to mean an act or omission that contravenes the Act.
42. Section 86 (6) (ii) requires a debt counsellor who has accepted an application for debt review, to determine within the prescribed time, whether the consumer is over-indebted.
43. Section 86 (7) (c) (ii) provides that if the debt counsellor conducts an assessment in terms of subsection (6) and reasonably concludes that the consumer is over-indebted, then the debt counsellor may issue a proposal recommending that the Magistrate's Court make certain orders. These orders include extending the period of the agreement and reducing the amount of each payment; postponing the dates on which payments are due; or recalculating the consumers' obligations.
44. Section 86 (10) (a) protects the consumer because it precludes credit providers from terminating a credit agreement under debt review before 60 business days from the date that the consumer applied for debt review. Section 86 (10) (b) also precludes a credit provider from terminating a credit agreement if the consumer has applied for a debt re-arrangement order.

Analysis

45. It was undisputed that the consumers applied for debt review on 18 October 2010. The first respondent conducted an assessment and reasonably concluded that the consumers were over-indebted. She then made the application on 11 February 2011. The attorneys set the application down for hearing on 2 August 2011. The application was postponed twice and eventually removed from the court roll on 15 September 2011. The respondents did not reinstate the application for a hearing and the consumers transferred to a new debt counsellor in June 2017.
46. Our courts have held that if the debt counsellor has found that the debtor is over-indebted, then the debt counsellor must issue a proposal that restructures the debt. The debt counsellor must also submit the proposal to the Magistrate's Court for a hearing for the court to grant the necessary order. If the debt counsellor has not done so, the debt counsellor has failed to comply with his duties and obligations in terms of the Act.[2]
47. The respondents were required to procure the relevant information, collate it, evaluate the situation and advise the court of the

appropriate rescheduling that best suited the consumers' needs.[3] The first respondent made the application well outside of the required 60 business days and then having done so, failed to have the application set down for hearing in 2011. The second respondent took the matter over at the beginning of 2012 and failed to set the application down for hearing for almost four and a half years.

48. In the Tribunal's view, the second respondent misconstrued his statutory obligation in his belief that it would have been futile to approach the court. Even if true, the doomsday scenario or absurdity about which the second respondent complains is not the consumers' fault. Nor is the consumers' inability to increase their instalments to an amount that would satisfy the first or second respondents. The converse is true. The respondents' combined failure to place the application before the court meant that the court could not exercise its powers in terms of section 87 (1) (a) to reject the application. Nor could the court issue an order re-arranging the consumers' obligations as contemplated in section 86 (7) (ii). The respondents' failure also precluded the court from exercising its powers under subsection 86 (11) that the debt review resume on any condition that the court considered just.
49. The events that unfolded over almost seven years could also not have come as a surprise to the respondents. As far back as January 2011, Fredericks warned the first respondent that the consumers could lose their assets; and called on the first respondent to prepare a new proposal.
50. Despite Fredericks clarion call to action, the respondents sat on their hands and failed to place the application before the court. Their combined dilatory behaviour resulted in the consumers' desperate approaches to numerous dispute resolution agencies and the applicant to assist them. It also resulted in credit providers contacting the consumers for

payment; terminating their credit agreements from the debt review process; and instituting legal action. The consumers also stood to lose their home when Absa Bank issued a summons against them to declare their home executable.

51. It is of little wonder that the consumers, who had for almost seven years continued to pay the initial amount, eventually transferred to another debt counsellor.

Conclusion

52. The Tribunal has found that the respondents were statutorily bound to place the application before the court. They did not do so and thereby committed prohibited conduct.

CONDITIONS OF REGISTRATION AS DEBT COUNSELLORS

53. Section 52 (5) (c) requires a debt counsellor to comply with the Act and the conditions.
54. General condition A1 of the conditions requires a debt counsellor to comply with all legislation that applies to the business of a debt counsellor. General condition A2 requires a debt counsellor to perform debt counselling that is consistent with the purpose and requirements of the Act. The debt counsellor is also required to act professionally, reasonably, timely and fairly; and must not bring the applicant or debt counselling into disrepute.
55. The Tribunal has found that the respondents failed to comply with the Act. This failure means that the respondents contravened general condition A1 of the conditions. The Tribunal is also satisfied, for the reasons set out in its earlier analysis in this judgement, that the respondents consistently failed to meet the professional standards expected of them. Moreover, the combined delays of almost seven years render their actions unreasonable and unfair to the consumers. The respondents have also brought the applicant and debt counselling into disrepute. The respondents, therefore, contravened general condition A2 of the conditions.
56. Consequently, the respondents have contravened section 52 (5) (c) and general conditions A1 and A2 of the conditions.

NOTICE IN TERMS OF SECTION 164 (3) (b)

57. Section 164 deals with civil actions. Section 164 (3) (b) requires a person, who has suffered a loss due to prohibited conduct and who wishes institute legal proceedings, to file a notice from the chairperson of the Tribunal with the registrar or clerk of the court.
58. The applicant requested the Tribunal to include in its order that the chairperson of the Tribunal issue the notice to the consumers.

Neither Mr Stocker nor Mr Brown addressed the Tribunal concerning this request at the hearing of this application. The Tribunal will, therefore, deal with this request in a cursory manner.

59. The Tribunal is a creature of statute. Earlier in this judgement, the Tribunal set out the powers the Act gives to it in section 150 to make appropriate orders concerning prohibited conduct. The power to order the chairperson to issue the notice is absent in section 150 and elsewhere in the Act. Although the Tribunal's powers in section 150 (i) are wide, the Tribunal must nevertheless interpret them restrictively. Moreover, section 164 (3) (b) is specifically addressed to the chairperson and not to the Tribunal.
60. Consequently, the Tribunal is satisfied that it lacks jurisdiction to order the chairperson to issue the notice to the consumers. However, the consumers are entitled to exercise their rights in terms of section 164 (3) (b) and request the chairperson to issue the notice.

ORDER

61. Accordingly, the Tribunal makes the following order:

61.1. The first and second respondents committed prohibited conduct because they contravened:

61.1.1. section 86 (7) (c) read together with section 86 (10) of the Act; and

61.1.2. section 52 (5) (c) read together with general conditions A1 and A2 of their conditions of registration as debt counsellors;

61.2. The Tribunal lacks jurisdiction to order the chairperson of the Tribunal to issue a notice in terms of section 164 (3) (b) of the Act to the consumers; and

61.3. There is no order as to costs.

TREVOR BAILEY

PRESIDING MEMBER

Tribunal members Ms P Beck and Ms H Devraj concur with this judgement.

- [1] 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 government notice 789 in government Gazette 30225 on 28 August 2007.

- [2] Nedbank v National Credit Regulator 2011

(3) SA 581 (SCA) at 598C. See also SA Taxi Securitisation (Pty) Ltd v Lennard 2012

(2) SA 456 (ECG) Paragraph 2.

- [3] Nedbank Ltd v Jones and others 2017

(2) (SA) 473 (WCC).

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