

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Segelaar and Others (NCT/195105/2021/140(1)) [2021] ZANCT 47 (18 October 2021)

[2021] ZANCT 47

COURT

National Consumer Tribunal

BEFORE

A Potwana, M Peenze, D Terblanche

CASE / FILE NUMBER

NCT/195105/2021/140(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT/195105/2021/140(1)

In the matter between:

NATIONAL CREDIT REGULATOR

APPLICANT

and

GRUZELDA ROUXNELL SEGELAAR FIRST

RESPONDENT

EDDIE SAMPSON SECOND

RESPONDENT

TRANSUNION CREDIT BUREAU (PTY) LTD

THIRD RESPONDENT

Coram:

Mr A Potwana

- Presiding Tribunal member

Dr M Peenze

- Tribunal member

Ms D Terblanche - Tribunal member

Date of hearing: 13 October 2021

JUDGEMENT AND REASONS

THE APPLICANT

1. The Applicant is the National Credit Regulator (“NCR”), a juristic person established in terms of section 12 of the National Credit Act 34 of 2005 (“NCA”) with offices situated at 127, 15th Road, Randjespark, Midrand, Gauteng.
2. At the hearing, Ms Isabella Klynsmith (“Ms Klynsmith”), an employee of the Applicant, represented the Applicant.

THE RESPONDENTS

3. The First Respondent is Gruzelda Rouxnell Segelaar, an adult female who was previously registered as a debt counsellor with the Applicant and conducted business under the name and style of Pro Debt Review. The Respondent’s last known address is 972 Kensington Crescent, Lenasia, Johannesburg.
4. The Second Respondent is Eddie Sampson, a major male person.
5. The Third Respondent is Transunion Credit Bureau (Pty) Ltd, a private company that was duly incorporated and registered in terms of the company laws of the Republic of South Africa and a registered credit bureau with its principal place of business at Wanders Office Park, 52 Corlett Drive, Illovo, 2196.
6. There was no appearance by any of the respondents or any legal representatives on their behalf at the hearing.

TYPE OF APPLICATION AND JURISDICTION

7. The Applicant referred a complaint to the Tribunal in terms of section 140(1)(b) of the NCA.
8. In terms of Section 27(a)(i) of the National Credit Act 34 of 2005 (“NCA”), the Tribunal has jurisdiction.[1]
9. Due to the coronavirus pandemic and the resultant physical distancing protocols, all the parties appeared via the Microsoft Teams audio and video technology link.

INTRODUCTION

10. On 5 July 2021, the Applicant filed an application in terms of section 140(1) of the NCA with the Tribunal’s Registrar (Registrar). In “PART 2: THE COMPLAINT” of the prescribed form for referring matters to the Tribunal, Form NCR 32, the Applicant stated that on 2 February 2020, the Second Respondent initiated a complaint alleging that he was placed under debt

review without having applied for debt review at all. He only realised that he was placed under debt review when he received his credit report from the Third Respondent. He sought the removal of the debt review status as this negatively impacted his credit profile.

11. In “PART 3: REASONS, RELIEF AND LEAVE REQUIRED” of Form NCR 32, the Applicant stated that, on or about 6 July 2018, the First Respondent updated the Second Respondent’s records on the specified database for recording debt review applications, the Debt Help System (DHS) with a status of having applied for debt review. Information uploaded on the DHS is populated onto and reflected on the Second Respondent’s credit profile. Credit information about the Second Respondent’s debt review status has been reflected on the DHS since the First Respondent updated it.
12. The Applicant alleges that the First Respondent failed to perform debt counselling in a manner consistent with the purpose and requirements

of the NCA. She failed to act professionally and reasonably in providing debt counselling services in a manner that was timely,

fair, non-discriminatory, and that was consistent with her conditions of registration. Her actions were inconsistent with the provisions of section 52(5)(c) read with her conditions of registration. Despite having requested the First Respondent on numerous occasions to provide documentary evidence that the Second Respondent applied for debt review, the First Respondent has failed to provide the same. The listing of the Second Respondent with the Third Respondent reflects that he applied for debt review even though he never applied for debt review.

13. Based on the above allegations, the Applicant seeks an order in the following terms:

13.1. Declaring that the First Respondent contravened section 86(1) read with regulation 24 and/or section 52(5)(c) read with her conditions of registration;

13.2. Declaring that the First Respondent’s contravention of section 86(1) read with regulation 24 and/or section 52(5)(c) of the NCA read with her conditions of registration constitutes prohibited conduct as contemplated in the NCA;

13.3. Ordering the First Respondent to immediately take the necessary steps to remove the unlawful listing of the Second Respondent’s debt review application status from both the DHS and/or all records held by credit bureaus, including those held by the Third Respondent; and

13.4. Any other appropriate order required to give effect to a right as contemplated in the NCA and the Consumer Protection Act 68 of 2008.

FACTS

14. The Applicant’s case is stated in its founding affidavit. The deponent is Ms Takalani Mudau (“Ms Mudau”), a manageress

in the Applicant's Complaints Department. Ms Mudau averred that the First Respondent was previously registered as a debt counsellor with the Applicant since September 2009. Her registration lapsed after she failed to pay the prescribed renewal fees. The Applicant obtained her current address from an independent tracing agent. On or about 2 February 2020, the Applicant received a complaint from the Second Respondent. The Second Respondent alleged that he was placed under debt review without having applied for debt review at all. He only realised that he was placed under debt review when he received his credit record from the Third Respondent. He sought the removal of the debt review status as this negatively impacted his credit profile.

15. Subsequent to the Applicant's preliminary investigation into the complaint, the Applicant's Chief Executive Officer appointed Ms Klynsmith as an investigator. On 8 June 2021, issued a summons, calling the First Respondent to avail himself on 21 June 2021 at 09:00 to be questioned on a virtual platform and to produce documentation supporting the Second Respondent's debt review. The First Respondent neither attended nor provided the documentation requested in the summons. Subsequently, Ms Klynsmith obtained an affidavit from the Second Respondent wherein he stated, among other things, that:

15.1. He never requested to be placed under debt review by any debt counsellor;

15.2. He never applied for debt review, made any enquiries about debt review, signed any application forms for debt review or made any payments in respect of any debt review applications;

15.3. He did not know anything about debt review; and

15.4. He did not know and has never communicated with any person by the name of Gruzelda Segelaar.

16. Ms Klynsmith obtained information from the Third Respondent confirming that the First Respondent uploaded the Second Respondent's

status for debt review. The Third Respondent does not have supporting documentation that confirms that the Second Respondent applied for debt review.

17. Following the assessment of all documentation, Ms Klynsmith compiled an investigation report. A copy of the investigation report, marked "TM6", is attached to Ms Mudau's affidavit and is accompanied by Ms Klynsmith's confirmatory affidavit. The salient points of the investigation report are that:

17.1. On 6 July 2018, the First Respondent uploaded a notification on the DHS that reflected that the Second Respondent applied for debt review;

17.2. The information reflected on the DHS is communicated to registered credit bureaus resulting in such information being reflected on consumers' credit reports as was the case with the Second Respondent;

17.3. Despite being afforded numerous opportunities to provide substantiating documentation confirming that the Second Respondent applied for debt review, The First Respondent failed to produce the same;

17.4. It appears that the First Respondent updated the DHS with a status that the Second Respondent applied for debt review and caused the Second Respondent's consumer credit profile held by the Third Respondent to reflect such status in the absence of such a debt review application ever being made;

17.5. The effect of an application for debt review is that a consumer may not enter into further credit agreements;

17.6. In breach of his conditions of registration, the First Respondent failed to act professionally and reasonably in providing debt counselling services;

17.7. The First Respondent failed to comply with the requirements of the NCR in respect of registering consumers who applied for debt review on the specified database. He incorrectly and unlawfully registered the Second Respondent as having applied for debt review on the specified database and failed to correct the wrong status at all relevant times;

17.8. The First Respondent's conduct prejudiced the Second Respondent; and

17.9. The First Respondent has no intention of remedying her non-compliance in any way.

18. During the hearing, Ms Klynsmith submitted that the Applicant did not seek an order declaring that the First Respondent contravened section 86(1) read with regulation 24 but an order declaring that the First Respondent contravened section 52(5)(c) of the NCA read with general conditions 1,2 and 4 of her conditions of registration.

19. On 3 August 2021, the Registrar issued a notice of Set-Down for the application to be heard on 13 October 2021 and served it on all the parties by email and on the First Respondent by registered mail, as well.

THE LAW

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

21. Condition 1 of the First Respondent's General Conditions of registration states –

"The Debt Counsellor must comply with all legislation applicable to the operation of the business of a Debt Counsellor, including but not limited to the Act, the Regulations and any subsequent amendment or substitution of the applicable legislation and regulations."

22. Condition 2 of the First Respondent's General Conditions of registration states –

“The Debt Counsellor must perform debt counselling in a manner that is consistent with the purpose and requirements of the Act. The debt counsellor must, in all instances, act professionally and reasonably in providing debt counselling services to consumers and provide such services in a manner that is timely, fair, and non-discriminatory and does not bring the NCR or debt counselling into disrepute.”

23. Condition 4 of the First Respondent’s General Conditions of registration states –

“The Debt Counsellor must comply with the requirements specified by the NCR in respect of registering consumers who apply for debt review on the specified database. The Debt Counsellor must update such consumer records with the status of the review and post-review performance, from time to time.”

24. Rule 13(1) and (2) of the Tribunal Rules state –“

(1) Any person required by these Rules to be notified of an application or referral to the Tribunal may oppose the application or referral by serving an answering affidavit on:

(a) the Applicant; and

(b) every other person on whom the application was served.

(2) An answering affidavit to an application or referral other than an application for interim relief must be served on the parties and filed with the Registrar within 15 business days of the date of the application.”

25. Rule 13(5) of the Rules of the Tribunal states that “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.”

26. Rule 25(3) states-

“The Tribunal may make a default order –

(a) after it has considered or heard any necessary evidence; and

(b) if it is satisfied that the application documents were adequately served.”

27. Rule 30(1) states –

“A document may be served on a party by-

(a) delivering it to the party; or

(b) sending it by registered mail to the party’s last known address.”

HEARING OF THE MATTER ON A DEFAULT BASIS

28. Notwithstanding the service of the application documents on all the respondents, none of the respondents filed any answering affidavits as provided for under rule 13(1) and (2) of the Tribunal Rules. On the day of the hearing, the Tribunal panel was satisfied that the application documents and the Notice of Set Down were adequately served on all the respondents. The hearing of the application proceeded on a default basis.

ISSUES

TO BE DECIDED

29. The Tribunal is required to determine whether the First Respondent contravened the provisions of section 52(5)(c) of the NCA read with general conditions 1, 2 and 4 of her conditions of registration and whether the Applicant should be granted the relief it seeks.

ANALYSIS

OF THE EVIDENCE AND REASONS FOR JUDGEMENT

30. In terms of rule 13(5) of the Tribunal Rules, all the facts or allegations made by the Applicant are deemed to have been admitted. It is apparent from the submissions made by the Applicant that there is no evidence that the Second Respondent applied to the First

Respondent to be declared over-indebted. Thus, the Tribunal is satisfied that the Applicant has shown, on a balance of probabilities, that the First Respondent wrongly updated the Second Respondent's debt review status on the DHS. Subsequent to the wrongful uploading of the status that the Second Respondent's applied for debt review on the DHS, the Second Respondent's information was uploaded onto the records of credit bureaus, including the Third Respondent.

CONCLUSION

31. By uploading the DHS with information that the Second Respondent applied for debt review when the Second Respondent never applied for debt review, the First Respondent breached conditions 1, 2 and 4 of her conditions of registration and thereby contravened section 52(5)(c) of the NCA. Thus, we find that the First Respondent committed prohibited conduct. The incorrect listing of the Second Respondent as being under debt review by the Third Respondent and by all credit bureaus must be corrected.

32. The presiding Tribunal member asked Ms Klynsmith why the Applicant decided to bring a complaint to the Tribunal in terms of section

140(1) of the NCA instead of advising the Second Respondent to challenge the accuracy of the information held by the Third Respondent and other credit bureaus in terms of section 72 of the NCA. In response, she submitted that the Applicant needs the Tribunal's order to remove the incorrect listing on the DHS. The removal of the incorrect listing on the DHS would result in the removal of the incorrect listing by credit bureaus. Furthermore, a declaration of prohibited conduct would enable the Second Respondent to claim damages in a civil court. When asked

whether the Second Respondent had informed the Applicant that he wanted to claim damages if the Tribunal made a finding of prohibited conduct, Ms Klynhans responded negatively. The presiding Tribunal member then

pointed out to Ms Klynsmith that to resolve the Second Respondent's primary cause of complaint, namely, the removal of the incorrect adverse credit listing from the records of credit bureaus, expeditiously, the Applicant could have advised the Second Respondent to invoke the relevant provisions of section 72 of the NCA. Section 72(1)(c)(ii) states –

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

Section 72(3) 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).”

Section 72(5) states –

“A credit bureau or the National Credit Register may not report information that is challenged until the challenge has been resolved in terms of subsection (3)(a) or (b).”

33. In view of the various provisions of section 72 of the NCA, we are of the opinion that, unless a consumer informs the Applicant that it seeks a declaration of prohibited conduct and would be seeking a certificate envisaged in section 164 of the NCA for purposes of claiming damages in a civil court, the Applicant should advise complainants to consider invoking the provisions of section 72. These provisions can ensure the removal of incorrect credit information held by credit bureaus and the national register expeditiously whilst ensuring that the Applicant's and the Tribunal's human and financial resources are utilised efficiently, economically and effectively as envisaged under section 195(1)(b) of the Constitution. The scheme envisaged under section 72 of the NCA appears to be what the legislature envisaged should be followed by persons who want to challenge the correctness and accuracy of the information held by credit bureaus. It is quick and efficient.

34. Concerned that, since the First Respondent is no longer registered as a debt counsellor, it is unlikely that she would be able to remove the incorrect listing from the DHS, the panel asked Ms Klynhans if the Applicant was willing to remove the adverse listing on the DHS and advise credit bureaus to do so. She submitted that if the Tribunal made a finding that the Second Respondent wrongly uploaded the status of the First Respondent as being under debt review, the Applicant would willingly advise all credit bureaus to remove the adverse listing.

ORDER

35. The Tribunal makes the following order:

35.1. The First Respondent contravened section 52(5)(c) read with conditions 1,2 and 4 of her conditions of registration;

35.2. The First Respondent's contravention of section 52(5)(c) of the NCA read with conditions 1,2 and 4 of her conditions of registration

constitutes prohibited conduct as contemplated in the NCA;

35.3. The First Respondent must immediately take the necessary steps to ensure that the unlawful listing of the Second Respondent's debt review application status is removed from both the DHS and all records held by credit bureaus, including those held by the Third Respondent;

35.4. The Applicant must immediately take the necessary steps to ensure that the unlawful listing of the Second Respondent's debt review application status is removed from both the DHS and all records held by credit bureaus, including those held by the Third Respondent; and

35.5. There is no order made as to costs.

Thus, done and signed on this the 18th day of October 2021.

Mr Andisa Potwana

Presiding Tribunal Member

Dr M Peenze (Tribunal member) and Ms D Terblanche (Tribunal member) concur.

[1] Section 27(a)(i) of the NCA provides that "The Tribunal or a member of the Tribunal acting alone in accordance with this Act or the Consumer Protection Act, 2008 may adjudicate in relation to any application that may be made to it in terms of this Act in respect of such an application."

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