

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Strydom and Another (NCT-274566-2023-137) [2023] ZANCT 31 (5 September 2023) [2023] ZANCT 31

COURT

National Consumer Tribunal

BEFORE

MC Peenze, C Sassman, P Manzi-Ntshingila

CASE / FILE NUMBER

NCT-274566-2023-137

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THE NATIONAL CONSUMER

TRIBUNAL HELD AT CENTURION

Case Number: NCT-274566-2023-137

In the matter between: NATIONAL
CREDIT REGULATOR
APPLICANT
and
CORNEL
STRYDOM
1ST RESPONDENT
SUSAN
STRYDOM
2ND RESPONDENT

Coram: Dr MC Peenze
– Presiding Tribunal member
Adv C Sassman –
Tribunal member
Ms P Manzi-Ntshingila –
Tribunal member
Date of consideration (in
chambers) - 4 September 2023
Date of judgement - 5
September 2023

RULING

AND REASONS

(LEAVE TO REFER)

THE PARTIES

1. The applicant is the National Credit Regulator (NCR), a juristic person established in terms of section 12 of the National Credit Act (the NCA) and with offices situated at 1[...] 1[...] Road, Randjespark, Midrand, Gauteng.
2. The first respondent is Cornel Strydom, an adult male, registered as a debt counsellor, with registration number NCRDC1437, conducting business as such under the name of "Debt Review Centre", with a registered address situated at 2[...] B[...] Drive, Newton Park, Port Elizabeth, 6025.
3. The second respondent is Susan Strydom, an adult female, registered as a debt counsellor, with registration number NCRDC1355, conducting business as such under the name of "Debt Review Centre", with a registered address situated at 2[...] B[...] Drive, Newton Park, Port Elizabeth, 6025.
4. The first and second respondents are collectively referred to as "the respondents".
5. The complainant is Shaun Harvey, an adult male.

TERMINOLOGY

6. A reference to a section in this ruling refers to a section of the NCA unless indicated otherwise.

APPLICATION TYPE AND JURISDICTION

7. The applicant seeks leave to bring a complaint directly to the National Consumer Tribunal (the Tribunal). The application is made in terms of section 137(1)(d).
8. In terms of Section 27(a)(i), the Tribunal has jurisdiction to consider this application.[1]

INTRODUCTION

9. On 3 October 2022, Mr Harvey lodged a complaint with the applicant by submitting a completed Form 29. Mr Harvey detailed his complaint in which he made allegations to the effect that the respondents levied unlawful legal fees and other service fees.
10. The complainant and his wife were placed under court-ordered debt review on 16 September 2015. As they experienced problems with their former debt counsellor, they subsequently approached the respondents, whereafter they transferred to Debt Counseling CC t/a Debt Review Centre (registration No. 2010 038 504 23). As the complainant had already been declared over-indebted when they were transferred to Debt Review Centre, their transfer did not constitute an application to be declared over-indebted as contemplated in section 86(1). Irrespective, the respondents required the complainant to complete Form 16. The respondents also required payment of restructuring fees, legal fees, and additional fees. According to the complainant, these fees should not have been charged, as the complainant and his wife were already under court debt review at the stage the transfer occurred. The complainant wants the fees charged to be refunded.
8. In support of his complaint, Mr Harvey provided the applicant with copies of Forms 16 and 17.2, as signed in September 2020 and October 2020, respectively. The complainant also provided a copy of the complainant's PDA statement, issued by DC Partner (Pty) Ltd, showing the fees deducted by the respondents. He further provided a copy of an email from Debt Review Centre, advising him that it would cost R2,200.00 extra to have his interest rates reduced.
9. On receipt of the complaint, the applicant proceeded to conduct a preliminary investigation into the matter.

THE PRELIMINARY INVESTIGATION

10. Given that the complainant submitted a complaint against Debt Review Centre and that the second respondent was the person representing Debt Review Centre, the applicant only sent the complaint for a response from the second respondent.
11. According to the second respondent, Debt Review Centre was allowed to charge restructuring fees because the complainant's application had to be re-done due to accounts being paid up and an account being omitted from the initial court order. The second respondent confirmed that the complainant had been charged an amount of R9,200.00 in respect of restructuring fees.
12. The second respondent also indicated that Debt Review Centre's attorneys had drafted documents for a variation application, which included a Notice of Motion, a Founding Affidavit and Confirmatory Affidavits, and that they were therefore entitled to the legal fees.

13. The second respondent did not respond to the complainant's allegation that he had been charged an additional fee of R2,200.00 to have his interest rates reduced. However, she confirmed that the complainant was transferred to the Debt Review Centre with an existing court order and that he had been charged the following fees:

13.1. Restructuring fees in the amount of R9,200.00;

13.2. An application fee of R57.00;

13.3. An admin fee of R345.00; and

13.4. Legal fees of of R5,104.48.

14. Based on the information provided by the second respondent, the applicant concluded the preliminary investigation and found sufficient grounds to bring the matter for adjudication by the Tribunal:

14.1. The applicant outlined that the charging of an application fee is regulated by section 86(3) (a), which specifically provides that such a fee may be charged when a consumer applies to a debt counsellor to be declared over-indebted. According to the applicant, the complainant and his spouse had already been declared over-indebted when they were transferred to the Debt Review Centre. Therefore, their transfer did not constitute an application to be declared over-indebted as contemplated in section 86(1), and the respondents were not entitled to charge an application fee.

14.2. The applicant referred to the applicant's "Debt Counselling Fee Guidelines", which came into effect on 01 April 2018, and specifically provides that an administration fee of R300.00 may be charged per debt counselling application. Because the Complainant's transfer to the Debt Review Centre did not constitute a debt counselling application, the applicant concluded that the Debt Review Centre was not entitled to charge an administration fee.

14.3. Regarding the restructuring fees, the applicant concluded that the Debt Review Centre was not entitled to charge the complainant an amount of R9,200 in respect of restructuring fees because the complainant's debt had already been restructured in terms of a valid court order.

14.4. Regarding the legal fees, the applicant found that the founding affidavit prepared by Debt Review Centre's attorneys in respect of the intended variation application was incomplete. Therefore, the variation application had not been filed with the court, and the attorneys had not attended the hearing of the application. According to the applicant, the complainant was charged an amount of R5,000.00 for legal services that had not been delivered, which charge is contrary to condition 9.2 of the conditions of registration of both the first and second respondent.

14.5. As the applicant's "Debt Counselling Fee Guidelines" do not make provision for the charging of additional fees, the applicant concluded that Debt Review Centre was not entitled to charge additional fees.

15. The applicant submits that a formal investigation, as contemplated in section 139(1)(c), would be unnecessary as it is already in possession of documentation indicating non-compliance on the part of the respondents. According to the applicant, the second respondent is the representative of the Debt Review Centre. In that capacity, the second respondent indicated that the Debt Review Centre is not willing to refund any of the fees charged to the complainant. The applicant therefore submits that a resolution as contemplated in section 15(g) is not possible. The applicant further submits that the respondents' commissions and omissions failed the consumer as they acted with disregard to their statutory obligations and brought the debt counselling process into disrepute.
16. Notwithstanding service of the application documents on the respondents as contemplated under rule 30 of the Tribunal Rules, the respondents did not file any answering affidavits as provided for under rule 13(1) and (2).

RELIEF SOUGHT

17. The applicant seeks leave to bring a complaint against the respondents directly before the Tribunal and, in the event of such leave being granted, for an order on the same papers, in the following terms:
 - 17.1. Declaring the conduct of the first respondent and/or the second respondent to be prohibited in terms of the NCA in that they acted inconsistent with the following sections thereof:
 - 17.1.1. Section 52(5)(c) read with general conditions 9.1 and 9.2 of his/her/their general conditions of registration in that he/she/they charged the Complainant an application fee, an administration fee, a restructuring fee, legal fees and additional fees contrary to the provisions of the above conditions of registration, and/or;
 - 17.1.2. Section 52(5)(c) read with general conditions 1 and 2 of his/her/their conditions of registration in that he/she/they failed to comply with legislation and regulations applicable to the operation of the business of a debt counsellor and failed to perform debt counselling in a manner that is consistent with the purpose and requirements of the NCA to act professionally and reasonably in providing debt counselling services to consumers and failed to provide such services in a manner that was fair and does not bring the NCR or debt counselling into disrepute.
 - 17.2. Ordering repayment to the Complainant of any excess fees charged as contemplated in section 150(h); and
 - 17.3. Any other appropriate order required to give effect to a right, as contemplated in the NCA.

THE LAW

18. Section 137(1)(d) states:

"The National Credit Regulator may apply in the prescribed manner and form for leave to bring a complaint directly before the Tribunal."

19. Rule 13(1) and (2) of the Rules of the Tribunal[2] states –

"(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."

20. Rule 13(5) of the Rules of the Tribunal states –

"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."

21. Rule 25(3) of the Rules of the Tribunal 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."

22. Rule 30(1)(b) of the Rules of the Tribunal states-

"A document may be served on a party by sending it by registered mail to the party's last known address."

LEAVE TO REFER HEARINGS

23. The NCA does not specify the factors that the Tribunal must consider when determining applications for leave to bring a complaint directly to the Tribunal. In *Lewis Stores (Pty) Ltd v Summit Financial Partners (Pty) Ltd and Others*[3], the court provided helpful guidance to the Tribunal in decisions regarding leave to refer applications. It held that a formal hearing for leave to refer applications was unnecessary and that there was no test to be applied. The court held that:

"If a cognisable claim has been presented, then leave to refer should be granted ... The term 'cognisable claim' is defined as 'one that meets the basic criteria of viability for being tried or adjudicated before a particular tribunal. The test of a cognisable claim has been applied by implication by the Tribunal in numerous decisions under the guise of 'prospects of success.' The Tribunal's past enquiries into the prospect of success (or cognisable claim) were, in fact, evaluation of complaints on the basis of their viability."[4]

24. As there is no test to be applied, the Tribunal will consider the matter in the general context of the circumstances as submitted by the applicant.

CONSIDERATION

25. The applicant is applying for leave to refer this complaint to the Tribunal without having to investigate the matter as outlined in section 139.
26. In terms of section 139, the NCR may take various actions after receipt of a complaint. One such action is to investigate the complaint in accordance with section 139 (2) – (5). If the NCR decides not to investigate the complaint, it may issue a notice of non-referral in terms of section 139(1)(a) or refer the complaint for alternative dispute resolution in terms of section 139(1)(b).
27. Although the NCA does not limit the decision of the NCR to the investigation of a complaint, it does limit the jurisdiction of the Tribunal in considering a complaint referred to in terms of section 140(2)(b). In terms of sections 140 (1)(b) and 140(2)(b), the applicant may refer a complaint to the Tribunal “if, ...after completing an investigation into a complaint...the NCR believes that a person has engaged in prohibited conduct” [sic].
28. By requesting leave to refer a complaint directly to the Tribunal without following the investigation process outlined in section 139, the applicant, in essence, requests a ruling on the jurisdiction of the Tribunal to consider a complaint irrespective of no statutory investigation conducted. Whilst it is apparent from the submissions made by the applicant that the complaint meets the basic criteria of a matter that the Tribunal may consider, namely clear allegations of prohibited conduct through the unlawful charging of fees, a leave to refer application process cannot be utilised to condone non-compliance to a statutory process.
29. The substantial importance of the matter to the complainant is evident. However, the preliminary investigation appears limited:
 - 29.1 The applicant only conducted a preliminary investigation against the second respondent. Although the first respondent did not dispute the information provided by the second respondent, there is no evidence before the tribunal that the first respondent had been given an opportunity to answer to the questions during the preliminary investigation process.
 - 29.2 The applicant assumed that the second respondent had the authority to respond on behalf of the first respondent. However, no evidence is provided to the Tribunal that authorises the second respondent to act on behalf of the first respondent during the preliminary investigation. Further, the statement that the second respondent is authorised to act on behalf of Debt Review Centre is similarly irrelevant, as Debt Review Centre is not a party to these proceedings. There is, therefore, no evidence or submission that the first respondent was not willing to resolve the matter.

29.3 The prohibited conduct alleged in the application had been levied against the respondents in their personal capacity as debt counsellors. However, the evidence provided refers to the actions of the Debt Review Centre as a legal persona and not exclusively to the debt counsellors in their personal capacity. The applicant also did not formulate any alleged contraventions relating to the use or alleged abuse of a corporate entity to execute the actions of a debt counsellor.

30. The Tribunal considered the circumstances of the matter. In particular, the Tribunal considered the applicant's failure to pierce the corporate veil and illustrate the individual actions of the two debt counsellors in their personal capacity. The evidence obtained from the one debt counsellor lacks the required elements to link the allegations against Debt Review Centre to the debt counsellors.

31. The Tribunal further considered the wide authority provided to the Tribunal to consider allegations of prohibited conduct after

investigation. As confirmed in Yara,[5] an investigation is not intended to offer the suspect an opportunity to put forward its case. More particularly, the court observed, with reference to the competition law investigation process:

"... The Commission is not even required to give notice of the complaint and of its investigation to the suspect. Least of all is the Commission required to engage with the suspect on the question whether its suspicions are justified. The principles of administrative justice are observed in the referral and the hearing before the Tribunal."[6]

32. As the chances of success in the main matter do not impact the ruling on whether the applicant may continue with its case before the Tribunal, there is no reason why the leave to refer cannot be granted. However, such a ruling should not be interpreted as a finding on the jurisdiction of the Tribunal, nor should it limit the respondents to present argument in the main matter relating to the adequacy of the investigation conducted.

33. In this matter, the applicant submitted a complaint, together with documentary evidence, alleging that the respondents contravened several provisions of the NCA and the general conditions of registration. It is apparent from the submissions made by the applicant that the complaint meets the basic criteria of viability to be heard or

adjudicated by the Tribunal.

34. In view of the provisions of rule 13(5) of the Tribunal Rules and the documentary evidence presented by the applicant to the Tribunal, all the facts or allegations made by the applicant are deemed to have been admitted by the respondents.

35. Thus, the Tribunal is satisfied that the applicant has shown, on a balance of probabilities, that it has a cognisable claim that deserves to be heard by the Tribunal.

36. For the reasons stated above, the Tribunal believes that leave to refer the main application for hearing by the Tribunal should be granted. The Tribunal has wide-ranging powers to make appropriate orders concerning prohibited conduct[7].

ORDER

37. In the result, the following order is made:

37.1 The application for leave to refer is granted;

37.2 The respondents may file an answering affidavit with the Tribunal within 15 business days of the issuing of this ruling and serve the same on the applicant; and

37.3 There is no order as to costs.

[signed]

Dr MC Peenze

Presiding Tribunal member

Tribunal members Adv C Sassman and Ms P Manzi-Ntshingila concur.

Authorised for issued by The National Consumer Tribunal

National Consumer Tribunal

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- [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."
- [2] Regulations for Matters Relating to the Functions of the Tribunal and Rules for the Conduct of Matters before the National Consumer Tribunal, 2007.
- [3] (Case no 314/2020) [2021] ZASCA 91 (25 June 2021) SAFLII.
- [4] At paragraphs 38 and 39.
- [5] Competition Commission v Yara (South Africa) (Pty) Ltd and Others [2013] ZASCA 107; [2013] 4 All SA 302 (SCA); 2013 (6) SA 404 (SCA).
- [6] Ibid para 24.

[7] See National Credit Regulator v Dacqup Finances CC trading as ABC Financial Services – Pinetown and Another (382/2021) [2022]

ZACSA 104 (24 June 2022).

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Prepared on 13 October 2026 · Esheria