

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Volschenk (NCT/250957/2022/137(1)) [2023] ZANCT 36 (21 October 2023) [2023] ZANCT 36

COURT

National Consumer Tribunal

BEFORE

MC Peenze, C Sassman, S Mbhele

CASE / FILE NUMBER

NCT/250957/2022/137(1)

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IN THE NATIONAL CONSUMER TRIBUNAL HELD IN CENTURION

Case number: NCT/250957/2022/137(1)

In the matter between:

NATIONAL CREDIT REGULATOR APPLICANT

and

SONJA VOLSCHENK RESPONDENT

Coram:

Dr MC Peenze – Presiding member

Adv C Sassman – Tribunal member

Mr S Mbhele

– Tribunal member

Date of hearing – 19 October 2023

Date of judgment – 21 October 2023

JUDGMENT AND REASONS

THE PARTIES

The applicant

1. The applicant in this matter is the National Credit Regulator (the NCR), a juristic person established in terms of Section 12 of the National Credit Act 34 of 2005 (the NCA), with offices at 127, 15th Road, Randjiespark, Midrand, Gauteng.
2. The applicant was represented in these proceedings by Erica Mpete, a supervisor in the applicant's complaints department.

The complainant

3. The complainant is Nomalanga Sityana, an adult female (the complainant).

The respondent

4. The respondent is Sonja Volschenk (the debt counsellor), an adult female who was previously registered as a debt counsellor with registration number NC[....]4, having conducted business under the name and style of "Madiba Bay Debt Counsellors" with last known address situated at 34 Stafford Street, Port Elizabeth, Eastern Cape Province.
5. The respondent's registration as a debt counsellor automatically lapsed on 31 July 2018 after her failure to effect payment to the applicant of her annual registration renewal fee as required by section 52(4)(b)(iii) of the NCA.

TERMINOLOGY

6. A reference to a section in this judgment refers to a section in the NCA.
7. A reference to a regulation refers to the National Credit Act Regulations, 2006 (the regulations).
8. A reference to a rule in this judgment refers to the Rules of the National Consumer Tribunal[1].

THE RESPONDENT'S FAILURE TO OPPOSE THIS APPLICATION

9. The respondent did not oppose this application and failed to attend the hearing.
10. The Tribunal was satisfied that the applicant had served the application on the respondent at her last known address in terms of rule 30(1)(b). Consequently, the National Consumer Tribunal (the Tribunal) proceeded to hear the application by default in the respondent's absence.

APPLICATION TYPE AND RELIEF SOUGHT

11. The applicant applied in terms of section 137(1)(d) for an order that:
 - 11.1. The respondent committed prohibited conduct because she contravened:

11.1.1. Section 86(7)(c) read with section 86(8)(b) by failing to issue a proposed recommendation in the Magistrate's Court timeously or at all; and/or

11.1.2. Section 52(5)(c) read with condition 9 of her general conditions of registration in that she charged and received legal fees without legal services having been rendered and/or charged and received fees inconsistent with the debt counselling fee guidelines; and/or failed to refund 100% of the fees paid by the consumer, excluding the application fee; and/or

11.1.3. Section 52(5)(c) read with condition 2 of her general conditions of registration in that she failed to perform debt counselling in a manner that is consistent with the purpose and requirements of the NCA and failed to act professionally and reasonably in providing debt counselling services to consumers and failed to provide such services in a manner that was timely, fair and non-discriminatory and does not

bring the NCR or debt counselling into disrepute and

11.2. Any other appropriate order in terms of section 150 (i) that gives effect to the consumer's rights in terms of the NCA.

12. On 6 February 2023, the Tribunal granted the applicant leave to refer the complaint directly to the Tribunal in terms of section 137(1)(d).

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13. In terms of section 27(a) of the NCA, the Tribunal has jurisdiction to consider this application.

14. In addition to its other powers in terms of the NCA, section 150 gives the Tribunal the power to make an appropriate order concerning prohibited or required conduct in terms of the NCA or the Consumer Protection Act, 2008.

BACKGROUND

15. A consumer, Ms Nomalanga Sityana, lodged a complaint with the applicant on 31 January 2019, wherein she made various allegations against the respondent. Among others, the complainant alleged that:

15.1. She was under a debt review process with the respondent as her debt counsellor and applied for debt review sometime early in 2015;

15.2. Despite her having made payments under debt review, her motor vehicle was repossessed. A copy of a court order granted under case number: 672/2018 indicates that First Rand Bank Limited t/a Wesbank, obtained a court order against the complainant for the return of the 2013 Volkswagen Polo Vivo 1.6 Trendline on 22 May 2018 and a warrant of delivery were subsequently issued on 28 May 2018. This court process related to the complainant's obligation having been due and owing to Wesbank and had formed part of her debt review application since early 2015. To this end, there is allegedly no indication that the respondent issued a recommendation to a

Magistrates' Court as contemplated in section 86(7)(c) of the NCA, or an application to the Tribunal as contemplated in section 86(7)(b) read with section 86(8)a), in order to have the complainant's obligations re-arranged in terms of the NCA;

15.3. The debt counsellor proceeded with the distribution of payments in favour of accounts which were already paid up;

15.4. The complainant had contributed payments to the respondent to service outstanding debt, yet there appear to be several letters provided by credit providers during 2018 and 2019 indicating that the complainant's debt was paid up;

15.5. The complainant had also contributed payments to numerous debt restructurings, and legal fees were paid into an account number of which "Madiba Bay Debt Counsellors" was the account holder;

15.6. The respondent charged legal fees in the total amount of R5 250.00 (five thousand two hundred and fifty rands), but no debt review-related legal services were rendered at all; and

15.7. The respondent charged restructuring fees in the total amount of R6 249.00 (six thousand two hundred and forty-nine rands), despite the complainant's monthly distributable amount having been apparently determined at R3 500.00 (three thousand five hundred rands). These fees were charged in excess of the lesser of the first instalment of the debt rearrangement plan or a maximum of R6 000.00 (excl VAT) as prescribed in the debt counselling fee guidelines and were furthermore charged despite the respondent failing to refer the matter to either the Magistrate's Court or the Tribunal, as the case may be.

16. Subsequent to the receipt of the complainant's allegations against the respondent, the applicant established that the latter had failed to adhere to her conditions of registration and was guilty of prohibited conduct in terms of the NCA in that she:

16.1. Failed to timeously refer a recommendation to a Magistrate's Court. Thus, the respondent contravened section 86(7)(c) read together with section 86(8)(b);

0.5cm; margin-bottom: 0cm; line-height: 150%"> 16.2. Charged and received legal fees without legal services having been rendered or charged and received fees inconsistent with the debt counselling fee guidelines; and failed to refund 100% of the fees paid by the consumer, excluding the application fee. Thus, the respondent contravened section 52(5)(c) read with condition 9 of her general conditions of registration; and

16.3. Failed to perform debt counselling in a manner that is consistent with the purpose and requirements of the NCA and failed to act professionally and reasonably in providing debt counselling services to consumers and failed to provide such services in a manner that was timely, fair and non-discriminatory and does not bring the NCR or debt counselling into disrepute. Thus, the respondent contravened section 52(5)(c) read with condition 2 of her general conditions of registration.

17. It was on the basis of the above transgressions and alleged breaches of the NCA that the applicant approached the Tribunal in terms of Section 137(1)(d) of the NCA seeking an order for leave to bring a complaint against the respondent directly before the Tribunal and, in the event

of such leave being granted, for an order declaring the respondent to have engaged in prohibited conduct, for having acted inconsistent

with the transgressions and breaches as listed above.

LIMITATION OF BRINGING ACTION

18. At the hearing on 19 October 2023, the Tribunal considered the applicant's submissions relating to section 166(1)(a).
19. Section 166(1)(a) of the NCA prohibits any referral of complaints to the Tribunal which occurred more than three years after the act or omission which is the cause of the complaint. Unlike the Prescription Act, 68 of 1969, the NCA does not provide for the interruption of prescription.
20. The applicant's referral of the complaint in this matter was filed with the Registrar on 18 November 2022. This was outside the three years provided for in section 166(1)(a).
21. The applicant clarified the late filing of the application. Although the complainant applied for debt review in 2015, she only became aware of the respondent's conduct in 2018. The respondent's registration with the NCR lapsed on 31 July 2018, and the alleged misconduct was referred to the applicant in 2019.
22. During the hearing, the applicant conceded that the cause of action that forms the basis of the complaint occurred more than three years before the application was made to the Tribunal. The complaint refers to specific actions and omissions by the respondent which are not continuing.
23. The applicant explained that the delay was not intentional and that the applicant acted in good faith. Whilst the respondent experienced capacity constraints, all efforts were made to engage the respondent in settlement negotiations. Irrespective, the respondent showed no interest in the settlement of this matter. Consequently, the application to the Tribunal was delayed.

CONSIDERATION

24. The Tribunal derives its jurisdiction from the NCA and does not have inherent jurisdiction. The Tribunal, like any other administrative or judicial body, derives its powers and authority from the empowering legislation.[2]

25. Section 166(1)(a) is a limitation that can only be applied as it stands with no interruptions. It is a stand-alone provision and cannot be interpreted in any other way than the plain reading of it. The NCA does not contain any provisions or exceptions relating to the cause of action being delayed.
26. Based on the applicant's evidence, the original cause for the complaint arose in 2018. The applicant, therefore, had until 2021 to file its application with the Tribunal. Instead, it filed its application on 18 November 2022.
27. In *First Rand Bank Ltd v Ludick*,^[3] the High Court held that the Tribunal has no power or discretion to extend the three-year period. The High Court judgment binds the Tribunal, and it must strictly apply the three-year time bar.

FINDING

28. The applicant did not convince the Tribunal that the referral of the complaint to the applicant interrupted the period within which the application to the Tribunal must be made. Therefore, the Tribunal finds that the complaint had been filed out of time and that the Tribunal is restricted from considering the merits of the application.

ORDER

29. Accordingly, the Tribunal makes the following order:

29.1 The application is dismissed; and

29.2 No cost order is made.

[Signed]

DR MARIA PEENZE PRESIDING MEMBER

Tribunal members Adv C Sassman and Mr S Mbhele concur with this judgment.

- [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] See De Ville, *Judicial Review of Administrative Action in South Africa* p 91.

- [3] *First Rand Bank Ltd v Ludick* A 277/2019 High Court of South Africa, Gauteng Division, Pretoria, 18 June 2020 (unreported) at para [16].

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Prepared on 12 October 2026 · Esheria