

SOUTH AFRICA / JUDGMENT

Pheko v Lamara and Another (NCT/312494/2024/141/(1)(b)) [2024] ZANCT 42 (3 October 2024) [2024] ZANCT 42

COURT

National Consumer Tribunal

BEFORE

Z Ntuli, MC Peenze, S Mbhele

CASE / FILE NUMBER

NCT/312494/2024/141(1)(b)

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THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

Case number: NCT/312494/2024/141(1)(b)

In the matter between: THABANG SAMUEL PHEKO APPLICANT and ASIA LAMARA 1ST
RESPONDENT NATIONAL CREDIT REGULATOR 2ND RESPONDENT

Coram:

Ms Z Ntuli - Presiding Tribunal Member

Dr MC Peenze

- Tribunal Member

Mr S Mbhele

- Tribunal Member

Date of hearing

- 2 October 2024

Date of judgment

- 3 October 2024

JUDGMENT AND REASONS

INTRODUCTION AND APPLICATION TYPE.

1. This application has been referred to the National Consumer Tribunal (the Tribunal) by the applicant in terms of section 141(1)(b) of the National Credit Act, 34 of 2005 (the NCA). The applicant first referred the complaint to the National Credit Regulator (NCR), which issued a non-referral notice in terms of section 141(1)(a) of the NCA. Leave for the referral was granted on 3 August 2024.

THE PARTIES

2. The applicant is Thabang Samuel Pheko (the applicant), an adult male consumer, as defined in section 1 of the NCA.
3. The first respondent is Asia Lamara, a former debt counsellor (Ms Lamara). When she was registered as such, her NCR registration number was NCRDC469. The first respondent did not file any answering papers, and no representative appeared on her behalf at the hearing.
4. The second respondent is the NCR (the second respondent), a state organ and a juristic person established in terms of section 12 of the NCA to regulate the consumer credit market and ensure compliance with the NCA. The second respondent did not file any answering papers, and no representative appeared on its behalf at the hearing.

TERMINOLOGY

5. A reference to a section in this judgment refers to a section of the NCA.
6. A reference to a regulation refers to the National Credit Act Regulations, 2006 (the regulations)[1] and a reference to a form refers to the prescribed forms set out in Schedule 1 of the regulations.
7. A reference to a rule in this judgment refers to the Rules of the Tribunal.[2]

RELIEF REQUESTED

8. The applicant requests that his debt review status be removed from his credit profile.

CONSIDERATION OF EVIDENCE ON A DEFAULT BASIS

9. The Tribunal issued its leave to refer ruling on 6 August 2024, granting the respondents the opportunity to file an answering affidavit within 15 business days of receiving the leave to refer judgment. The respondents did not do so.[3] The applicant did not apply for a default order under rule 25 (2). On 29 April 2024, the Registrar issued a notice of set down for the matter to be heard on a default basis on 2 October 2024 and served the same on all the parties. The Tribunal's panel is satisfied that all the parties were properly notified of the proceedings.

10. Rule 13 (5) provides that a factual allegation in the application or referral not explicitly denied or admitted in an answering affidavit is deemed to have been admitted. Since the respondents did not file answering affidavits, the respondents are deemed to have admitted the allegations in the applicant's application. The application is, therefore, heard on a default basis.

FACTS

11. In "Part 2 – Complaint" of the prescribed form for applying for leave to refer a complaint to the Tribunal, NCA Form 32, the applicant states that he was contacted by the first respondent to discuss his debt review status and to see if he would qualify for debt review. The applicant claims he was uninterested in debt counselling or review. Therefore, he did not sign Form 16 or any other documents to authorise the first respondent to conduct debt review activities.
12. Despite the applicant declining the debt review offer, the first respondent proceeded with the debt review application and issued form 17.2 to the respective credit providers. The applicant's credit providers later informed him that his status at the credit bureaux confirmed that he was under debt review. The applicant, therefore, alleges that he was placed under debt review without his consent.
13. The applicant requests to be removed from debt review and requests the reinstatement of his credit profile.

THE APPLICABLE LAW

14. Section 52(5) states, "A registrant must comply with its conditions of registration and the provisions of this Act."
15. Section 86(1) states, "A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared overindebted."

EVALUATION

16. The present matter is important to the applicant. He declined the debt review process and never signed the prescribed application form 16. According to the papers, the authority and mandate regarding electronic debits were only signed by Ms Lamara, dated 11 March 2016, and an unsigned contract dated 6 June 2016 is attached to the founding affidavit. No mandate letter or power of attorney authorised Ms Lamara to stop future debts with creditors.
17. In the non-referral notice, the NCR outlined that the Tribunal ordered prohibited conduct against Ms Lamara on 13 December 2019 in *NCR v Asia Lamara* (the 2019 judgment).[4] According to the NCR, the 2019 judgment relates substantially to the same conduct contained in the applicant's complaint in that Ms Lamara was found in contravention of section 86(1), read with regulation 24(1).[5]

18. The 2019 judgment confirmed that the Ms Lamara's contraventions were sufficiently serious to justify cancelling her registration as a debt counsellor[6] and an administrative fine of R1,000,000.00 was imposed.[7]
19. Although the 2019 application comprised a small sample of Ms Lamara's consumer files (17 files), the NCR referred the Tribunal to 3124 complaints it received from consumers. According to the evidence before the Tribunal, the applicant's complaint was included in the sample of consumer files investigated in the 2019 investigation.
20. In the 2019 judgment, the Tribunal ordered the appointment of an independent auditor to establish, inter alia, whether there are

completed form 16s on all Ms Lamara's consumer files that confirm the consumers applied and consented to be placed under debt review.[8] Ms Lamara was further ordered to surrender all consumer files to the NCR and furnish it with a list of all past and current clients. As the respondents failed to file an answering affidavit, no evidence was provided confirming that Ms Lamara appointed an independent auditor as ordered by the Tribunal in 2019. The NCR also failed to advise the Tribunal whether Ms Lamara surrendered all consumer files to the authority of the NCR. The Tribunal takes a dim view of the NCR's failure to file an answering affidavit in this matter, as an explanation of the events following the 2019 judgment would have assisted the Tribunal.

21. In its 2019 judgment, the Tribunal cancelled Ms Lamara's registration as a debt counsellor and directed her to cease all activity requiring registration. The Tribunal also ordered Ms Lamara to remove the debt review flag from consumers' profiles at her own cost, where the audit report reveals no completed form 16s on Ms Lamara's consumer files. Similarly, Ms Lamara was required to, at her own cost, remove the consumers listed under debt review with credit bureaux where the audit report would have revealed that she failed to refer the consumers to a magistrate's court or the Tribunal for a debt restructuring or consent order within 60 days from the dates the consumers applied for debt review.[9]
22. The Tribunal took judicial notice that Ms Lamara's appeal of the 2019 judgment had lapsed, as confirmed by the High Court of South Africa in its order of 30 January 2023, published on 21 April 2023.[10] In its order, the High Court declared the judgment and order issued by the Tribunal on 13 December 2019 to be immediately enforceable and directed Ms Lamara to comply. Ms Lamara was further interdicted from offering or engaging in debt counselling and transferring consumer files to other debt counsellors. As Ms Lamara is no longer registered and interdicted by the High Court from transferring consumer files to a registered debt counsellor, Ms Lamara is not in the position to issue a clearance certificate as contemplated in section 71(1)(b). This state of affairs leaves the consumer without the required statutory protection.

23. As the NCR failed to provide the required evidence to the Tribunal, the Tribunal is not competent to consider whether an audit report was issued in the 2019 case and whether Ms Lamara failed to comply with the orders contained in the 2019 judgment. Therefore, an offence under section 160 (1) could not be established.[11] Irrespective, the Tribunal took judicial notice that the applicant's case was brought before the Tribunal in the 2019 matter and that an order of prohibited conduct was made against Ms Lamara.
24. As per the evidence before the Tribunal, Ms Lamara contacted the applicant and insisted that she provide him with debt relief assistance. The applicant declined assistance from Ms Lamara and never signed a document relating to the debt review process. Despite declining the application for debt relief, Ms Lamara continued mero motu to place him under debt review by flagging his status as "under debt review" with the credit bureaux and credit providers.
25. It has been held that the Tribunal has wide-ranging powers to make appropriate orders concerning prohibited conduct.[12] As the applicant never applied for debt review, the debt review activities by Ms Lamara were unauthorised and constituted a contravention of section 86(1). A debt counsellor can only assess a consumer's credit profile and declare a consumer over-indebted if a consumer applies for debt review as described in the NCA. Further, Ms Lamara's submission of forms 16 and 17.2 had to be done in accordance with section 3 and her obligations under conditions A2 and A5. On the evidence before the Tribunal, the Tribunal is persuaded that Ms Lamara was derelict in her duties towards the applicant by not ensuring that the debt review process was conducted with the applicant's consent.
26. Without a properly authorised application for debt review by the applicant, any determination of over-indebtedness is null and void. Similarly, the subsequent flagging of the applicant's status as "being in debt review" is without force and effect. The Tribunal, therefore, finds that the applicant's status is incorrectly reflected on the credit bureaux reports and stands to be corrected.

RELIEF

27. The applicant requests an order removing him from debt review and reinstating his credit profile.
28. The purposes of the NCA are set out in section 3 thereof, namely to promote and advance the social and economic welfare of South Africans, promote a free, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers by, amongst others, providing for a consistent and harmonised system of debt restructuring, enforcement and judgment which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.

29. The Tribunal is persuaded that removing an unlawful debt review flag is required to ensure a harmonised debt restructuring system, as intended by the NCA. The right in question in these proceedings is the applicant's right to challenge the accuracy of the information concerning him and to have information not supported by credible evidence removed from credit bureau reports and the national credit register.[13] The NCR is required to regulate the consumer credit market and ensure compliance with the NCA. To the extent that a debt counsellor is found not to have complied with the NCA's prescripts on debt review, it is the NCR's responsibility to take the required steps to ensure the removal of the non-compliant debt review red flag from a consumer's credit profile. Since the NCR's Debt Help System primarily holds the alleged incorrect information, the NCR must ensure that the applicant's credit information is corrected to reflect that the applicant is not under debt review.
30. The Tribunal is required to, amongst others, make any appropriate order required to give effect to a right as contemplated in the NCA and to make appropriate orders to give practical effect to a consumer's right of access to redress. The Tribunal is persuaded that the applicant will be severely prejudiced if the removal of his incorrect debt review status flag is not granted. Accordingly, the Tribunal considers an appropriate order contemplated in section 4(2)(b)(ii).[14] Given that the respondents did not oppose the applicant's request for relief, the Tribunal finds it in the interest of justice to reinstate the applicant's correct credit profile.

CONCLUSION

31. A debt counsellor acts within the statutory limitations of the NCA. Therefore, a debt counsellor can only declare a consumer over-indebted if a consumer applies for debt review as per the NCA. By placing the applicant under debt review without his authorisation, Ms Lamara contravened section 86(1). As the applicant's status on credit bureaux reports incorrectly and unlawfully reflects the applicant as "being under debt review", the NCR must ensure that the applicant's status is amended to reflect that he is not under debt review and was never placed under debt review.
32. The Tribunal believes it necessary to send a clear message to debt counsellors that the targeted marketing of their services must be accompanied by a clear exposition of the implications of applying for debt review or any debt counselling activities.
33. Debt counsellors must explain in clear and unambiguous terms that the document signed by a consumer mandating the debt counsellor to consider their credit obligations may constitute an application for debt review. The debt counsellor must emphasise this consequence during the conversation with a targeted consumer. Once red-flagged, the consumer can only be removed from debt review if the debt counsellor issues a clearance certificate following the settlement of all outstanding credit obligations, whether restructured or not. The debt counsellor must also explain to consumers that being placed under debt review means that the consumer can only obtain further credit once all existing credit obligations have been settled in full. To the extent that consumers complain that the

implications of debt review have not been explained clearly, the NCR is expected to investigate and scrutinise the telephonic conversations between debt counsellors and targeted consumers.

34. In this matter, the debt counsellor did not obtain an authorisation to continue with debt counselling activities. Given the effect of a debt review process, the Tribunal wishes to caution debt counsellors that a telephonic confirmation of authorisation is insufficient, and the consumer's written signature is required to confirm an application for debt review. Such a signature can only be affixed after the debt counsellor has explained the implications of the debt review to a consumer. After obtaining a consumer's signature, a debt counsellor may not duplicate or use the consumer's electronic signature for any purpose other than explicitly affixed and as intended. Where a consumer does not wish to affix a signature, refuses to apply for debt review or cancels their application for debt review before creditors have accepted any restructuring agreement, the debt counsellor is not mandated to continue the debt review process. Any such attempts would be null and void. Therefore, debt counsellors must refrain from or cancel all debt review activities where a consumer's authorisation was not provided or revoked.
35. The NCR is reminded of its responsibility to ensure a harmonised debt restructuring system. If a consumer alleges that an application was processed without proper authorisation, an investigation of such a complaint should include scrutiny of signatures purportedly affixed by consumers. To the extent that signatures are disputed, the NCR is required to investigate potential fraudulent conduct in affixing signatures. Where the consumer did not sign a debt review application, but the debt counsellor irrespectively processed the application, the NCR is expected to ensure that the subsequent red flag indicating "being under debt review" is removed from the consumer's profile.

ORDER

36. Accordingly, the Tribunal makes the following order:

36.1 The second respondent is directed to ensure the execution of all the Tribunal's orders made in NCR v Asia Lamara under Tribunal case number NCT/102200/2018/57(1).

36.2 The second respondent must ensure that the applicant's credit record is corrected within ten days of this order's issuing and communicate the corrected profile to all the applicant's credit providers.

36.3 There is no cost order.

[Signed]

Dr MC Peenze

Presiding Tribunal Member

Presiding Tribunal member Ms Z Ntuli and Tribunal member Mr S Mbhele concur.

[1] Published under Government Notice R489 in Government Gazette 28864 of 31 May 2006.

[2] GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters

before the National Consumer Tribunal, 2007 (Government Gazette No. 30225).

[3] Rule 13(1) of the Rules of the Tribunal states- “(1) Any respondent to 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.”

[3] Rule 13(1) of the Rules of the Tribunal states-

“(1) Any respondent to 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.”

[4] See *NCR v Asia Lamara* under Tribunal case number NCT/102200/2018/57(1).

[5] *Ibid*, para 148. Regulation 24 of the National Credit Regulations makes provision for a consumer who wishes to apply to a debt counsellor to be declared over-indebted must submit to the debt counsellor a completed form 16 or provide the debt counsellor with the information as listed in Regulation 24(1)(b)(i)- (viii).

[6] *Ibid*, para 215.

[7] *Ibid*, para 234.

[8] *Ibid*, paras 235-237.

[9] See para 243 of the 2019 judgment.

[10] Case No: A15/2020.

[11] Section 160(1) outlines that a person commits an offence who contravenes or fails to comply with an order of the Tribunal.

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

ZACSA 104 (24 June 2022).

[13] Section 72 of the NCA.

[14] This section provides that in any matter brought before the Tribunal in terms of the NCA, the Tribunal must make appropriate orders to give practical effect to the consumer's right of access to redress, including any order provided for in the NCA and any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of the NCA.

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