

SOUTH AFRICA / JUDGMENT

Swuhana v National Credit Regulator (NCT 96402/2017/59(1)) [2019] ZANCT 22 (13 March 2019) [2019] ZANCT 22

COURT

National Consumer Tribunal

BEFORE

T Bailey, P Beck, A Potwana

CASE / FILE NUMBER

NCT 96402/2017/59(1)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

AT CENTURION

Case

number: NCT 96402/2017/59(1)

In the

matter between:

TSHILIDZI
SWUHANA
APPLICANT
and
NATIONAL
CREDIT
REGULATOR
RESPONDENT

Coram: Mr T Bailey –
Presiding member
Ms P Beck –
Tribunal member
Mr A Potwana – Tribunal
member
Date of
hearing – 19 February 2019

JUDGMENT

AND REASONS

PARTIES AND REPRESENTATION

Applicant

1. The applicant is Tshilidzi Swuhana, an adult male, previously registered as a debt counsellor under registration number NCRDC2325, and who resides at Stand 289 Thohoyandou, Unit C, Thohoyandou, Limpopo.[....]
2. The applicant represented himself at the hearing of this application.

Respondent

3. The respondent is the National Credit Regulator (the respondent), a juristic person established in terms of section 12 of the National

Credit Act, 2005 (the Act) to regulate the consumer credit market with its principal place of business at 127 Fifteenth Road, Randjespark, Midrand, Gauteng.

4. The respondent was represented at the hearing of this application by Mr T van der Grijp, who is a legal adviser in the respondent's debt counselling department.

APPLICATION

5. This is an application in terms of section 59 (1) of the Act to review the respondent's decision in terms of section 46 (5) of the Act to deregister the applicant as a debt counsellor.
6. A reference to a section in this judgement refers to a section in the Act.

JURISDICTION

7. The Tribunal is empowered to hear this review application in terms of section 59 (1), which provides that a person affected by a decision of the respondent may apply to the Tribunal to review that decision, and the Tribunal may make an order confirming or setting aside the decision in whole or in part.

BACKGROUND

8. On 9 October 2017 WesBank informed the respondent that the applicant had applied for debt counselling and placed himself under debt review.
9. On 12 October 2017 the respondent sent a letter to the applicant stating that it had come to its attention that the applicant was under debt counselling and was actively negotiating debt restructuring arrangements with the applicant's creditors. The respondent added that the applicant's actions disqualified the applicant from practising as a debt counsellor in terms of section 46 (4) (b) and the respondent intended to deregister the applicant as a debt counsellor in terms of section 46 (5). The respondent also pointed out that the applicant was attending to his own debt counselling application, which is not envisaged by the Act. Consequently, the respondent gave the applicant five business days to provide written submissions to the respondent why it should not proceed to deregister the applicant as a debt counsellor.
10. On the same day the applicant replied to the respondent setting out the reasons why he had applied for debt counselling. The applicant

explained that he had taken out advertising with the SABC to securing more clients. However, the increase in clients had not transpired and had left him indebted to his creditors. The applicant added that he had become aware that he could not act as a debt counsellor in his own matter and he had therefore transferred his file to another debt counsellor. The applicant also motivated why he should not be deregistered and asked the respondent to apply measures other than deregistering him.

11. On 21 November 2017 the respondent addressed a letter to the applicant, the material terms of which recorded that:

"2. Section 46 (4) (b) of the National Credit Act as amended ("the Act") prescribes that a person may not be registered as a debt counsellor if that person is subject to a debt re-arrangement as contemplated in Sections 86 and 87.

3. In terms of Section 46 (5) "the National Credit Regulator must deregister" a registrant who becomes disqualified in terms of Section 46 at any time after being registered [our emphasis].
4. In light of the above, we confirm that you are hereby deregistered as a debt counsellor with immediate effect."
12. On the same day the applicant requested the respondent to reverse its decision to deregister the applicant because he had withdrawn his debt counselling application and there was no court order declaring the applicant to be over-indebted.
13. On 22 November 2017 the respondent deregistered the applicant as a debt counsellor.
14. The respondent opposes this application.

GROUNDINGS FOR REVIEW

15. The applicant provides the following grounds for review as appear from the Form TI. 59 (1):

15.1. There is no debt re-arrangement order on which the respondent could have based its decision to deregister the applicant because the applicant had withdrawn his debt re-arrangement application;

15.2. If the applicant's account was in arrears, the applicant believes that the respondent should have issued a compliance notice to him to bring his account up to date before deregistering him. The respondent did not receive a compliance notice;

15.3. The applicant has a family to support and is required to pay employees' salaries. The respondent's decision to deregister the applicant should therefore have been the last alternative after all possible alternatives had been considered;

15.4. The applicant has completed a course work master's degree at the Tshwane University of Technology, thereby adding to his ability to carry out his work as a debt counsellor. He has four years' experience in the industry;

15.5. The applicant has paid the annual renewal fees, but the respondent has not furnished the applicant with a new registration certificate since 2015; and

15.6. The applicant requests the Tribunal to allow him to sell his business to a registered debt counsellor (as a relief) if the Tribunal is not satisfied with these facts.

16. It became common cause at the hearing of this application that the Tribunal was only required to consider the first ground of review.

SUMMARY OF SUBMISSIONS

17. The applicant submitted that the respondent is not entitled to rely on section 46 (4) (b) when deregistering the applicant because that section is conditional upon the Magistrate's Court having granted the debt review order. A withdrawal of the debt review

application to the Magistrate's Court constitutes a withdrawal from debt counselling.

18. Although the applicant had commenced the debt re-arrangement process in the Magistrate's Court, he had subsequently withdrawn the debt review application and was not subject to a debt re-arrangement order in terms of either section 86 or 87 when the respondent decided to deregister the applicant. Consequently, a court had never declared the applicant to be over-indebted.

19. The applicant disputed that a consumer remains over-indebted and under debt review even if the consumer withdraws a debt review court application, or in the absence of a court order declaring a consumer to be over-indebted.

20. The applicant therefore requested the Tribunal to make an order setting aside the respondent's decision to deregister the applicant and to reinstate his registration as a debt counsellor.
21. The respondent submitted that it acted competently within its mandate under section 46 (5) read with section 46 (6) (b) because the applicant was subject to debt re-arrangement when the respondent deregistered the applicant.
22. A consumer is required to complete a Form 16 in terms of regulation 24(1) (a) as a first step for debt re-arrangement. The applicant was subject to debt re-arrangement in terms of sections 86 and 87 "by the mere fact" that he had applied for debt re-arrangement by completing a Form 16. The applicant was therefore by law disqualified from being registered as a debt counsellor. This disqualification existed when the applicant was deregistered.
23. Section 46 (4) (b) casts the net very broadly to enable it to apply to any person who is subject to debt re-arrangement as contemplated in sections 86 and 87. The respondent relies on the title of section 87, when considered together with sections 86 and 46 (4) (b), incontrovertibly creates the distinction between the application process in section 86 (1) and the court process in section 87.
24. It could therefore only have been the legislature's intention that the grounds of disqualification in section 46 (4) (b) apply at any stage of the debt counselling process. This is so, whether at the application stage in terms of section 86 or the stage at which the application has been referred to the Magistrate's Court in terms of section 87. The withdrawal of a consumer's debt counselling court application does not invalidate the Form 16 and section 86 process. Consequently, the applicant remains under debt counselling and is over-indebted. This much is confirmed by the applicant's credit bureau report.
25. Moreover, the Act does not provide for a debt counsellor to be reinstated after having been deregistered. The only remedy available to the applicant is to apply in terms of section 44 to be registered as a debt counsellor. If an applicant who wishes to be registered as a debt counsellor in terms of section 44 informs the respondent that a Form 16 was completed to have a debt re-arranged, then the respondent will not normally register such an applicant as a debt counsellor.

STATUTORY FRAMEWORK

26. It is convenient to set out in the relevant statutory and regulatory provisions that govern this review.

27. Chapter 3 of the Act deals with consumer credit industry regulation. Section 44 deals with the registration of debt counsellors. Section 44 (1) entitles a natural person to apply to be registered as a debt counsellor. Section 45 deals with the application for registration and the criteria to be considered for registration.
28. Section 46 (3) sets out the conditions upon which a natural person may not be registered as a debt counsellor. Subsection 46 (4)
 - (a) and (b) respectively provide that in addition to the disqualifications set out in subsection (3), a natural person may not be registered as a debt counsellor if that person is subject to an administration order or debt re-arrangement as contemplated in sections 86 and 87.
29. Section 46 (5) specifically provides that the respondent must deregister a natural person if the registrant becomes disqualified in terms of this section at any time after being registered.
30. The scheme of the Act that deals with debt review may be found in sections 86, 87 and 88 of the Act. It is appropriate to deal with it in some detail. Sections 86 and 87, respectively deal with applications for debt review and a Magistrate's Court's

power to re-arrange a consumer's obligations. More specifically, section 86 (6) (a) provides that a debt counsellor who has accepted an application for debt review must determine whether the consumer appears to be over-indebted.

31. Section 86 (7) provides further that the debt counsellor's determination may conclude that the consumer is:

31.1. not over-indebted. In that event, the debt counsellor must reject the application [section 86 (7) (a)];

31.2. not over indebted but is experiencing or likely to experience difficulty satisfying the consumer's obligations under credit agreements in a timely manner. In that event, the debt counsellor may recommend that the consumer and the respective credit providers agree on a plan of debt re-arrangement [section 86 (7) (b)]; or

31.3. over-indebted. In that event, the debt counsellor may issue a proposal recommending that the Magistrate's Court make an order that one or more of the consumer's credit agreements be declared to be reckless credit and the consumer's obligations be re-arranged [section 86 (7) (c)].

32. Section 86 (8) provides that if the consumer and each credit provider are unable to agree on a plan of debt re-arrangement, then the debt counsellor must refer the matter to the Magistrate's Court with the recommendation.
33. Section 87 (1) (b) (ii) empowers the Magistrate's Court to make an order re-arranging the consumer's obligations.
34. Section 88 deals with the effect of debt review or re-arrangement orders or agreements.

35. Regulation 24 of the National Credit Regulations, 2006[1] deals with an application for debt review. Regulation 24 (1) requires 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 information that is more fully set out in regulation 24.

ANALYSIS

36. The vexed question the Tribunal is required to adjudicate upon is whether the applicant was “subject to debt re-arrangement” under either section 86 or 87 and therefore became disqualified in terms of section 46 (4) (b) to be registered as a debt counsellor.
37. Our courts have found that it is clear from the scheme of the Act dealing with debt review that a consumer is over indebted when a court makes an order in terms of section 86 (7) (c). Until such an order is made, a proposal made by a debt counsellor has no legal effect. The debt counsellor’s recommendation simply sets in motion a chain of prescribed events which, ultimately may lead to a court determining that an applicant is over-indebted.[2]
38. Our courts have found further that until an application for debt review is heard by a magistrate and an order in terms of section 86 (7) (c) (ii) is made that an applicant’s obligations are re-arranged, such an applicant is not over-indebted for the purposes of the Act.[3]
39. Our courts have also been at pains to take issue with the reasoning that a court is merely required to confirm the status of a consumer who applied for debt review. They have pointed out that a consumer may be factually over-indebted when an application is submitted to a debt counsellor, but the law takes no cognizance of that fact until the consumer is declared over-indebted by a court of law.[4] Consequently, a hearing is central to debt review proceedings.[5]
40. It became common cause that the applicant had made an application for debt review; launched an application in the Magistrate’s Court to re-arrange the applicant’s obligations; and had withdrawn the court application by the time the respondent deregistered the applicant as a debt counsellor. The applicant was therefore never declared to be over-indebted by a competent court and could not therefore have been subject to debt re-arrangement when the respondent made the decision to deregister the applicant as a debt counsellor.

CONCLUSION

41. Since the Magistrate's Court did not make an order in terms of section 86 (7) (c), it follows that the debt counsellor's recommendation had no legal effect. The applicant was therefore not subject to debt re-arrangement as contemplated in sections 86 and 87 as envisaged by section 46 (4) (b) to deregister the applicant in terms of section 46 (5). Consequently, the respondent erred in deregistering the applicant in terms of section 46 (5). The respondent's decision to deregister the applicant therefore falls to be set aside.

ORDER

42. Accordingly, the Tribunal makes the following order:

42.1. the respondent's decision to deregister the applicant as a debt counsellor in terms of section 46

(5) of the Act is set aside; and

42.2. there is no order as to costs.

DATED AT CENTURION ON THIS 13th DAY OF MARCH 2019

TREVOR BAILEY

PRESIDING MEMBER

With members A Potwana and P Beck concurring.

- [1] Regulations made in terms of section 171 of the National Credit Act, 2005 and published under Government Notice R489 in Government Gazette 28864 of 31 May 2006.
- [2] Botha v Koekemoer t/a The Debt Expert 2 and Others; Mafakane v MSA Consultants t/a Consumer Financial Services and Others (7723/2017; 715/2018) [2018] ZALMPPHC 20 (11 May 2018) at para 13.
- [3] Ibid at para 22. See also Manamela v Hein Du Plessis t/a Debt Save and Others (78244/2016) [2017] ZAGPPHC 289 (21 June 2017).
- [4] Ibid at para 22.
- [5] Rougier v Nedbank Ltd (27333/2010) [2013] ZAGPJHC 119 (28 May 2013) at para 12.

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Prepared on 13 October 2026 · Esheria