

SOUTH AFRICA / JUDGMENT

Swuhana v National Credit Regulator (NCT/253200/2022/59(1)) [2023] ZANCT 60 (30 July 2023)

[2023] ZANCT 60

COURT

National Consumer Tribunal

BEFORE

N Maseti, S Mbhele, S Hockey

CASE / FILE NUMBER

NCT/253200/2022/59(1)

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Source record**IN THE NATIONAL CONSUMER
TRIBUNAL****HELD IN CENTURION****Case****Number:** NCT-253200-2022-59(1)**In**

the application between: TSHILIDZI
PFARELO SWUHANA
APPLICANT
and
NATIONAL
CREDIT REGULATOR
RESPONDENT

Coram:

Ms
N Maseti
- Presiding Tribunal Member
Adv
S Mbhele
- Tribunal Member
Mr
S Hockey
- Tribunal Member
Date
of hearing - 14 June
2023
Date
of judgment - 30 July 2023

JUDGMENT**AND REASONS****(REVIEW OF THE NATIONAL CREDIT REGULATOR'S DECISION)****PARTIES**

1. The Applicant in this review application is Tshilidzi Pfarelo Swuhana ("the Applicant" or "Swuhana"), an adult male previously registered as a debt counsellor. Swuhana wishes to be registered as a debt counsellor in terms of section 44(1) of the National Credit Act 34 of 2005 ("NCA"). At the hearing, Swuhana represented himself.
2. The Respondent is the National Credit Regulator ("the Respondent" or "NCR"), a juristic person established in terms of section 12(1) of the NCA. The Respondent has its principal address at 127 – 15th Road, Randjespark, Midrand, Gauteng.
3. At the hearing, the Respondent was represented by Ms Z Marks-du Plessis instructed by Van Zyl Le Roux Incorporated.

TERMINOLOGY

4. A reference to a section in this ruling refers to a section of the NCA.
5. A reference to a rule in this ruling refers to the Rules of the National Consumer Tribunal^[1] ("the Tribunal") ("the Rules").

APPLICATION TYPE

6. The Applicant seeks an order of the Tribunal to review and set aside the decision of the Respondent made on 22 November 2022, which suspends the evaluation of Swuhana's application to be registered as a debt counsellor. In terms of section 27(a)(i), the Tribunal has jurisdiction to consider and adjudicate this application.
7. The Respondent has filed an answering affidavit to oppose this review application.

RELIEF SOUGHT

8. In the founding papers, the Applicant sought the following orders:
 - (a) to set aside the decision of the NCR which puts in abeyance the Applicant's registration application until the finalisation of the SCA's appeal matter; and
 - (b) to replace the NCR's decision with "The National Credit Regulator must register the applicant as a debt counsellor within 5 days of the issue of this order."

BACKGROUND

9. On 25 August 2022, the Applicant filed an application with the NCR, for registration as a debt counsellor in terms of section 44(1) of the NCA. The Applicant practised as a debt counsellor from 2014 until 20 November 2017 when the NCR deregistered him pending the finalisation of his debt review application.
10. The NCR has not commenced with evaluating the merits of Swuhana's application. Instead, the NCR issued a letter dated 22 November 2022, informing him that the application would be held in abeyance pending the Supreme Court of Appeal's ("the SCA") finalisation of the matter involving the parties. The matter before the SCA relates to the de-registration of the Applicant pursuant to a debt review application he filed with the Magistrate's Court in 2017. The matter to be determined by the SCA is whether or not the NCR's decision to deregister the Applicant was correct and whether the Applicant had entered into a debt re-arrangement.
11. On 24 November 2022, Swuhana filed an application in terms of section 59(1) to review the NCR's decision, which puts his application to become a debt counsellor, in abeyance. The Applicant contends that the NCR's decision is unjust, illegal, and unconstitutional as the matter pending before the SCA is unrelated to his current registration application. He argues that nothing in the NCA prevents him from being registered as a debt counsellor because he is not under debt review nor has he concluded any debt re-arrangement with credit providers.
12. The NCR opposes this review application on the basis that the outcome of the SCA's judgment will have a bearing on Swuhana's current application because it will allude to the interpretation of debt re-arrangement mentioned in section 46(4)(b).
13. Swuhana successfully challenged the NCR's deregistration decision before the Tribunal, but the High Court overturned the Tribunal's decision[2]. Swuhana appealed the High Court ruling, which effectively set aside the Tribunal's decision. The SCA is yet to hear this appeal on deregistration and the debt re-arrangement issue is an integral part of that matter.
14. The Applicant implores the Tribunal to review and set aside the NCR's decision to delay the evaluation of his current registration application.

ISSUE TO BE DECIDED

15. The crux of the issue to be decided is whether the NCR's suspension to consider and evaluate the Applicant's registration application constitutes a decision. If it constitutes a decision, the Tribunal is required to:
 - (i) decide whether or not the NCR's decision to suspend its evaluation of the registration application is compliant with the provisions of the NCA, namely, section 45; and

(ii) decide on whether or not the decision should be reviewed and set aside.

APPLICABLE LAW

16. Section 59 empowers the Tribunal to review and appeal decisions made by the NCR.

Subsection (1) provides:

“A person affected by a decision of the National Credit Regulator under this Chapter 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”.

17. Section 59(2) provides that “An order contemplated in subsection (1) may include an order setting aside any condition attached to a registration if the Tribunal is not satisfied that the condition is reasonable and justifiable, having regard to the objects and purposes of this Act, the circumstances of the application or review, as the case may be, and the provisions of section 48.”

18. Section 45 provides “(1) A person who wishes to be registered in terms of this Act must apply for registration in the prescribed manner and form to the National Credit Regulator.

19. Section 45(2) dictates “The National Credit Regulator may –

(a) Require further information relevant to an application contemplated in subsection

(1) ; and

(b) Refuse an application if the applicant has not supplied any information required in terms of paragraph (a) within the prescribed time.”

20. Subsection 3 compels the NCR to register an applicant if “an application complies with the provisions of this Act and the applicant meets the criteria set out in this Act for registration, the National Credit Regulator, after considering the application, must register the applicant subject to section 48 unless the National Credit Regulator after subjecting the applicant to a fit and proper test or any other prescribed test, is of the view that there are other compelling grounds that disqualify the applicant from being registered in terms of this Act.”

21. Section 45(4) states that the Minister may prescribe the criteria to be considered in conducting a fit and proper test contemplated in subsection (3).

CONSIDERATION OF THE MERITS

Does the NCR’s action to suspend the evaluation of the application constitute a decision?

22. It is not in dispute that, on 22 November 2022, the NCR issued a letter in response to Swuhana’s application stating “Please be advised that due to the pending matter at the Supreme Court of Appeal between yourself and the NCR, your application will be put in abeyance until finalisation of the court case.” In this judgment, Swuhana is challenging this decision.

23. At the hearing Swuhana submitted that the NCR did not request any additional information for purposes of considering and assessing his application. Instead, the NCR decided not to evaluate the application. The NCR did not dispute that it had taken a decision to the effect that the application was put on hold. Further, the NCR did not raise an objection that its action constitutes a decision contemplated in section 59(1). It is therefore reasonable to characterise the action taken by the NCR as constituting a decision reviewable by the Tribunal.

Is the NCR's decision irrational and unlawful?

24. Regarding whether or not the decision is irrational and unlawful, the interpretation of the statutory responsibilities of the NCR under section 45 is imperative. The NCR has the discretion to require further information in terms of subsection 45(2). The NCR stated that in 2017 it requested the Applicant to furnish an order issued by the Magistrate Court, which rejected that the Applicant was over-indebted and that it is not under debt re-arrangement contemplated in section 46[3]. It submitted that such a court order would be the simplest and the most efficient way to handle the Applicant's current

application. However, in its decision and in the answering affidavit, the NCR emphasised the importance of the SCA's judgment, which will be available in the future. The NCR did not furnish evidence showing that it requested further information from the Applicant in respect of the current application. The Applicant argued that the NCR never requested a record of the court order to enable it to evaluate his application and contended that the NCR has powers to independently verify and obtain the Magistrate Court's record if it seeks to challenge the matter on a debt re-arrangement basis. Swuhana also apprised the Tribunal that he never concluded any voluntary or involuntary debt re-arrangement with credit providers. No record of debt re-arrangement was placed before the Tribunal which prevents the NCR from considering the application.

25. At the hearing the NCR confirmed that it had not considered the merits of the Applicant's application to be registered as a debt counsellor and did not pronounce on whether the application in question complies with the NCA's provision or not. The Applicant contended that it fulfilled all relevant requirements for registration. Furthermore, he argued that the NCR cannot consider personal and financial circumstances that may have existed five years ago to prevent him from registering without obtaining factual information. The Applicant submitted a credit bureau report which shows a clean credit record and that he is not under debt re-arrangement.
26. The Tribunal carefully considered the parties' submissions and the evidence at its disposal and finds that the decision of the NCR is inconsistent with its statutory responsibilities articulated in section 45. To exercise its statutory responsibilities prescribed in section 45, the NCR requires information that it knows is not available. It is not known when the SCA will hear the merits of the appeal of the de-registration matter of 2017. It is the Tribunal's considered view that the NCR ought to make a reasonable request from the Applicant. It

cannot require additional information that does not exist. The NCR is compelled by section 45(3) to register an applicant if he or she meets the requirements. The application cannot be held in abeyance indefinitely to the prejudice of the Applicant. Furthermore, the NCR requires a record of what transpired in the Magistrate's Court in 2017 concerning whether or not Swuhana was declared over-indebted, and if so, whether debt re-arrangement was concluded. The outcome of the Magistrate's Court remains uncertain. Swuhana submitted that the court never declared him over-indebted, nor did he conclude debt re-arrangement. In support of this, Swuhana submitted a credit bureau report showing he is not under debt review.

27. The decision of the NCR to put the Applicant's registration application in abeyance until the SCA finalises its case is irrational and inconsistent with section 45. Its decision should be reviewed and set aside.
28. This brings the Tribunal to the question of whether the relief sought by the Applicant, namely, to order that the NCR register the Applicant as a debt counsellor within 5 days of the issuing of the Tribunal's order, should be granted. As a general principle, our courts are careful not to attribute to themselves "superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field"[4].
29. There are instances where a court or appeal authority would substitute its own decision for that of the decision-making functionary, but this is not such a case. There must be exceptional circumstances justifying a substitution order[5]; the court or appeal authority must also be in the same position as that of the decision-making authority; and the correct decision must be a foregone conclusion. The Applicant in the present matter has not shown any of these requirements. The registration of the Applicant is not a foregone conclusion, and the Tribunal is not in a position to assess whether the requirements of section 45, subject to section 48 are met. The NCR must carry out its statutory obligations by assessing Swuhana's application to become a debt counsellor with the requirements of section 44 and 45 or any other appropriate legal requirement stipulated in the NCA.

ORDER

30. Accordingly, the Tribunal makes the following order:

30.1 The application to review and set aside the Respondent's decision stated in its letter of 22 November 2022 is granted;

30.2 The relief sought by the Applicant for the Tribunal to replace NCR's decision with "The National Credit Regulator must register the applicant as a debt counsellor within 5 days of the issue of this order", is dismissed;

30.3 The NCR is directed to consider the Applicant's registration application expeditiously in accordance with section 45 and any other relevant provision of the NCA; and

30.4 No cost order is made.

DATED AT CENTURION ON 31 JULY 2023.

[Signed]

Ms N Maseti

Presiding Tribunal Member

Tribunal Members Mr S Hockey and Adv S Mbhele concur.

[1] 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).

[2] Case no: NCT/96402/2017/59(1)

[3] Section 46(4)(b) states “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 – (b) subject to debt re-arrangement as contemplated in sections 86 and 87..”.

[4] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others [2004] ZACC 15; 2004 (4) SA 490 (CC) at para 48.

[5] This is discussed in detail by the Constitutional Court in Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa and Another 2015 (5) SA 245 (CC).

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Prepared on 11 October 2026 · Esheria