



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 15121/2018

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.
08-AUGUST-2019	
Date	K. La M Manamela

In the matter between:

TSHILIDZI PFARELO SWUHANA

Applicant

and

NATIONAL CREDIT REGULATOR

First Respondent

DC PARTNER (PDA)

Second Respondent

Date of Hearing	:	03 July 2019
Date of Judgment	:	08 August 2019

JUDGMENT (application for leave to appeal)

MANAMELA, AJ

[1] Dissatisfied with the judgment granted in the urgent court on 10 April 2018 in terms whereof I dismissed (with costs) his application for interdictory relief against the National Credit Regulator, the first respondent in this and the main application, the applicant immediately launched this application for leave to appeal. However, administrative hurdles, including the delay in the transcription of the extemporaneous judgment and the fact that the applicant has always appeared in person, led to the delay in the enrolment and hearing of this application until last month. This application is opposed by the first respondent (the NCR).

[2] Just like at the hearing of the main application, the applicant appeared in person and the NCR was represented by Ms A. Lapan, when this application was heard on 03 July 2019. The second respondent is not taking part in the proceedings.

[3] After listening to the submissions from both sides, particularly Mr Swuhana's, the applicant herein, it became clear to me that there is a need to fully or further explain the basis for the order made in the urgent court on 10 April 2018, in respect of which the applicant seeks leave to appeal. The extemporaneous judgment handed down under the circumstances of the urgent court appear not to have communicated effectively the basis for the findings made, with respect, particularly from the point of view of the applicant, appearing in person. The elongation of this judgment is, more, for information purposes. For primarily these reasons, I decided to rather reserve judgment in this application and hand down a detailed written judgment.

[4] But, I will only traverse those aspects relevant to the grounds of appeal. From this introductory part (i.e. A), I will move to reflect the background to the matter (i.e. B); followed

by material from the main application and its findings (i.e. C); then proceed to the submissions by the parties in this application and a discussion thereof against the applicable legal principles and make findings (i.e. D), and close up with the conclusion and order (i.e. E).

B: Brief background on relevant aspects

[5] The applicant was registered as a debt counsellor on 20 March 2014 in terms of the provisions of the National Credit Act 34 of 2005 (the NCA). He, thereafter, practised as such until 21 November 2017, when he was deregistered by the NCR. It was this decision of the NCR which prompted the applicant to approach this Court on an urgent basis in April last year.

[6] His urgent application was opposed and a full complement of three affidavits was filed. From the affidavits the following facts are common cause regarding the events which led to the deregistration of the applicant or ensued therefrom:

[6.1] during 2017, presumably in the latter part of that year, the applicant placed himself under the debt review process in terms of the provisions of the NCA;

[6.2] pursuant to his quest for debt review, the applicant launched an application in terms of the provisions of the NCA in the Tshwane North or Soshanguve Magistrates Court;¹

[6.3] on 12 October 2017, the NCR wrote to the applicant, after it was alerted to the application's debt review by Wesbank, one of the applicant's creditors. The NCR asked the applicant to give reasons within five days why the applicant should not be deregistered as a debt counsellor.

¹ See annexure "PWM7" to the answering affidavit on indexed pp 87-88.

[6.4] the applicant promptly responded to the NCR's letter on the same date effectively confirming his over-indebtedness and pleading for mercy. I must immediately point out that the applicant disputes the fact that he is under a debt review process due to his so-called withdrawal of the application (referred to below), but the following extracts from his response to the NCR's letter is, with respect, telling in this regard:

- "1. I confirm that I received the notification to deregister me and request for appeal on the decision based on the following:
2. I [became] over indebted as I took out loan to pay for the advertising for the debt review services on the SABC, and paying out agents that [were] also advertising the services for potential client[s] to come in my office, but it was unfortunate that the respon[se] of the client[s] I receive[d] was lower than the amount I have used in the advertising cost
3. I bought assets (car and office equipment to run the business).
4. The DC after care fee was reduced from 5% to 3% [leading] to a reduction of income
5. Most client[s] exit debt review as they become no longer indebted which also lead to reduction of income
6. Immediately after I [became] aware that [I] am not supposed to do my own application I transfer[ed] my file[s] [to] another debt counsellor to review them and a transfer letter was sent to all creditors together with contact details of another Debt counsellor.
7. Debt Counselling is the only business that is sustain[ing] my living and I have beneficiaries that I am supporting through the income I am receiving from this business[.] I also have employees I am paying so if I am deregistered it will have a very bad impact on our living expenses.
8. I now have debts that credit providers are expecting me to pay them.
9. I demonstrate ability to help people becoming debt free by restructuring their debt, so [I] am humbl[y] requesting that being on a bad situation like this was not my aim but accident as I thought placing [too] much advert may lead to eventual growth in the business not leading me to be over indebted.
10. I am humbl[y] requesting that my registration status be kept active and request the NCR to apply any other measures or advice on this matter other than [de-

registering] me and I [confirm] that when I receive more income again I will increase my repayment amount to creditors so that I become debt free again.”²

[underlining added for emphasis]

[6.5] on 21 November 2017, the NCR deregistered the applicant as a debt counsellor. It relied on section 46(4)(b)³ of the NCA which disqualifies any person subject to a debt re-arrangement to be registered as a debt counsellor. Further, the NCR stated that in terms of the provisions of section 46(5)⁴ of the NCA it “must deregister” any person registered who had become disqualified in terms of section 46.

[6.6] The applicant promptly responded to the NCR’s letter of deregistration. He pointed out that “there is no court order declaring [him] over indebted and such court application has been withdrawn” and, therefore, requested the NCR to reverse or withdraw its decision to deregister him.⁵ Evidently this was in vain. I must interrupt this narration to remark, with respect, that the applicant did not raise these defences or

² See annexure “PWM3” to the answering affidavit on indexed p 74.

³ Section 46, including its heading, reads as follows in the material part: “**Disqualification of natural persons** 46. (1) ... (3) A natural person may not be registered as a credit provider or debt counsellor if unrehabilitated insolvent. that person- (a) is under the age of 18 years; (b) as a result of a court order, is listed on the register of excluded persons in terms of section 14 of the National Gambling Act, 2004 (Act NO. 7 of 2004); (c) is subject to an order of a competent court holding that person to be mentally unfit or disordered; (d) has ever been removed from an office of trust on account of misconduct relating to fraud or the misappropriation of money, whether in the Republic or elsewhere; (e) has ever been a director or member of a governing body of an entity at the time that such an entity has- (i) been involuntarily deregistered in terms of a public regulation; (ii) brought the consumer credit industry into disrepute; or (iii) acted with disregard for consumer rights generally; or has been convicted during the previous 10 years, in the Republic or elsewhere, of- (i) theft, fraud, forgery or uttering a forged document, perjury, or an offence under the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), or comparable legislation of another jurisdiction; (ii) a crime involving violence against another natural person; or (iii) an offence in terms of this Act, a repealed law or comparable provincial legislation, and has in terms of this Act, a repealed law or comparable provincial legislation, and has been sentenced to imprisonment without the option of a fine unless the person has received a grant of amnesty or free pardon for the offence. (4) 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- (a) ... (b) subject to debt re-arrangement as contemplated in sections 86 and 87”. [underlining added for emphasis]

⁴ Section 46(5) reads: “The National Credit Regulator must deregister a natural person if the registrant becomes disqualified in terms of this section at any time after being registered”.

⁵ See annexure “PWM7” to the answering affidavit on indexed p 86.

issues when he responded to the letter of 12 October 2017.⁶ Also, the applicant did not include the notice of withdrawal of the debt review application which is dated 23 August 2017 in his submissions against deregistration made to the NCR on 12 October 2017. I will deal with this issue later below.

[6.7] in early December 2017, the applicant launched with the Consumer Tribunal an application to interdict his deregistration by the NCR. But, on 28 February 2018, the Consumer Tribunal dismissed the application on the basis that it has no jurisdiction to adjudicate the matter.⁷ On 05 April 2018 or there around, the applicant launched these proceedings.

C : Main application and findings therein

Applicant's submissions

[7] In the urgent court the applicant sought relief as set out in the following terms in the notice of motion:

- “(a) That the decision of the National Credit Regulator to De-register the applicant be suspended pending the review judgment from the National consumer Tribunal.
- (b) That the DC PARTNER (PDA) be instructed to release all funds for DC after care fees, legal fees and restructuring fees to the applicant pending the review judgment from the National consumer Tribunal.
- (c) That the National Credit Regulator be instructed to give the applicant his registration certificate pending the review judgment from the National consumer Tribunal.

⁶ See the contents of the letter quoted under paragraph 6.4 above; annexure “PWM3” to the answering affidavit on indexed p 74.

⁷ See annexure “H” to the founding affidavit on indexed pp 24-28.

- (d) That the applicant be allowed to continue with his debt counselling duties and service all his clients pending the review judgment from the National consumer Tribunal”.⁸

[8] The relief sought by the applicant was effectively an interim interdict pending the outcome of his review of the NCR decision by the Consumer Tribunal. As grounds in support of the relief sought, the applicant primarily stated the following:

“Justification of the degree of abridgement and deviation

13. The applicant has a clear right not to be unfairly de-registered as a debt counselor.

14. The applicant received a notice of default from Centpret Properties (Pty) Ltd (the Land Lord of the applicant) demanding a payment of R11 437.81 within 7 days from 14 march 2018 and full monthly rental payment at the last calendar day following this months. Proof is attached as Annexure “G”. If this order is not granted urgently the applicant will be kicked out his office by his LandLord.

The applicant has a well-grounded apprehension of irreparable harm if the interim interdict is not granted and it has to wait until the final relief is obtained -in other words, that the applicant needs the interdict now and cannot wait for the main court proceedings to be completed. The irreparable damages being caused on the applicant and will continue to be caused if Interim Interdict is not granted urgently include but not limited to:

- (a) the applicant and his family members sometimes sleep with empty stomach if they are not lucky enough to get any person who can assist them with food.
- (b) The applicant loans that he acquire to finance the marketing of his business continue to accrue interest and arrears even though he is not getting any income, So he need to continue servicing them urgently.
- (c) The Office of the applicant continue to accrue interest and arrears and the applicant will be kicked out of the office premises if he doesn't settle the arrears within 7 days from 14/03/2018.
- (d) The vehicle of the applicant may be repossessed due to arrears and interest accrued on the account.

⁸ See notice of motion on indexed p 3.

- (e) The applicant may face default judgement on all his accounts.
 - (f) The applicant used to get new clients monthly who increase his monthly revenue but this benefit will be forfeited if the order is not granted urgently
 - (g) The employees who were assisting the applicant in the office and with marketing need to be paid urgently and may take legal action against the applicant and they are also continue to suffer as they don't have any source of income to support their dependents.
 - (h) The clients of the applicant are advised to seek another debt counsellor if they don't like the alternative debt counsellor appointed by the NCR, considering the fact that the applicant utilises a lot of money or a huge budget to obtain or attract his clients, such budget will not be refunded back to the applicant even if the Tribunal re-instate him as a debt counsellor.
 - (i) The Applicant is a bread winner at his family and he is very struggling to provide for his family and even to buy the school uniform for his children, so it is very important for the interim relief to be granted so that the respondent can continue to provide for his family.
 - (j) The respondent has other debt obligations that needs to be fulfilled pending the hearing to avoid default judgement.
 - (k) The applicant needs to pay transport, food and accommodation while attending the main hearing, so if the interim interdict is not granted it may be impossible for the applicant to attend the hearing.
15. There is no similar protection offered by any other ordinary remedy.
16. The interim interdict is Very necessary because the balance of inconvenience favours the granting of the order in the following ways:
- (i) The Applicant and his family also needs daily meal and other needs to be met pending the main hearing.
 - (ii) The employees of the applicant needs to get paid pending the main hearing.
17. It will create imbalance if the Interim Interdict is not granted and the applicant will suffer the consequences of such serious, irreparable damages that will result in the event that the relief is not granted.”⁹

[original quotation from the founding affidavit]

⁹ See pars 13-17 of the founding affidavit on indexed pp 6-7.

[9] The applicant also delivered a replying affidavit, but its contents will be dealt with jointly with the contents of the NCR's submissions below as contained in the answering affidavit.

Submissions on behalf of the NCR

[10] The NCR, against the background, significantly as set out above, stated that pursuant to the deregistration of the applicant it transferred all matters handled by the applicant as debt counsellor to a new debt counsellor, Ms A P Matodzi. It also instructed the second respondent in this application to pay all fees due to the applicant for services rendered by the applicant up to 21 November 2017. It has received confirmation that an amount of R1 478.06 was paid to the applicant as the total fees due to him.

[11] Regarding the applicant's alleged withdrawal of the debt review application, the NCR queried the authenticity or effectiveness of the notice of withdrawal, due to mainly the absence of a court stamp and proof that it was sent to all parties in the debt review application. Further, Wesbank, one of the applicant's creditors, did not mention the withdrawal and, in fact, it said already in October 2017 that the applicant's debt review application had been dismissed due to non-appearance of his attorneys. It is trite that a dismissal on this basis does not affect the merits of the application. As at that time of Wesbank's communication the applicant was apparently still attempting to make arrangements regarding payment of his debt to Wesbank.

[12] It is also alleged that the applicant, subsequent to his deregistration, contacted his erstwhile clients and re-directed them to his business partner, Mr Chokwe, who is also a registered debt counsellor, away from Ms Matodzi. Some of these clients ended up switching

to Mr Chokwe and making significant payments to him, some of which do not appear to have reached the intended persons. Ms Matodzi laid a complaint with the police.

[13] The NCR considers this alleged conduct of the part of the applicant to be fraud, which deprived Ms Matodzi of her legitimate dues. It also submits that the same conduct would, on its own, have justified the deregistration of the applicant in terms of section 44(2) of the NCA,¹⁰ if he had not already been registered. Therefore, the applicant has approached this Court with the proverbial unclean hands, the NCR concluded its submissions in this regard.

[14] Also, the NCR disputes the applicant's assertion that he has a right not to be unfairly registered as debt counsellor. It reiterates that it was justified in deregistering the applicant due to the applicant being under debt review. It did not act unfairly.

[15] Regarding the applicant's argument that he would suffer irreparable harm in the form of inability to pay his debts if the interim interdict is not granted, the NCR said that the applicant's financial problems are self-created and, actually, preceded his deregistration as a debt counsellor. I agreed. This was contained in the applications submissions to the NCR made on 12 October 2017 motivating against his deregistration.¹¹ Further, the NCR argued that the applicant has alternative remedy in the form of a damages claim against the NCR for its financial losses in the event the deregistration is ultimately found to have been erroneous.

¹⁰ Section 44(2) of the NCA reads: "A person must not offer or engage in the services of a debt counsellor in terms of 25 this Act, or hold themselves out to the public as being authorised to offer any such service, unless that person is registered as such in terms of this Chapter."

¹¹ See par 6.4 above; annexure "PWM3" to the answering affidavit on indexed p 74.

[16] The applicant delivered a replying affidavit. The applicant essentially argued that the contents of the NCR's answering affidavit was an argument on the merits of the application before the Consumer Tribunal. This is impermissible for an interim interdict, the applicant argued. He also disputed that he had been paid all his dues and argued that there was still more to be paid to him by way of fees. He also disputed that he has committed fraud and argued that he was justified in redirecting his erstwhile clients to Mr Chokwe considering that they jointly incurred some expenses in marketing their business. A greater part of the applicant's replying affidavit was essentially a repeat of what was submitted in the founding affidavit, other than just being a denial of the NCR's submissions.

Submissions, applicable legal principles and findings

[17] I dismissed the application with costs. The ruling was primarily located in section 86 of the NCA. This provision reads as follows in the material respect, together with its heading:

"Application for debt review

86. (1) A consumer may apply to a debt counsellor in the prescribed manner and form 40 to have the consumer declared over-indebted...

(4) On receipt of an application in terms of subsection (1), a debt counsellor must-

(a) provide the consumer with proof of receipt of the application;

(b) notify, in the prescribed manner and form-

(i) all credit providers that are listed in the application ...

(6) A debt counsellor who has accepted an application in terms of this section must determine, in the prescribed manner and within the prescribed time-

(a) whether the consumer appears to be over-indebted...

(7) If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that-

(a) the consumer is not over-indebted, the debt counsellor must reject the application...

(c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court"

[underlining added for emphasis]

[18] It was common cause that the applicant made an application to the Magistrates Court for his debt review. This obviously suggested, on the reading of section 86 quoted above, that either the debt counsellor that he had approached was satisfied with the fact that the applicant was over-indebted and approach the Court or the applicant had approached that Court with its leave in respect of the application. An application to the Magistrates Court for debt review is provided for by section 87 of the NCA, which reads in the material part:

“(1) If a debt counsellor makes a proposal to the Magistrate’s Court in terms of section 86(8)(b), or a consumer applies to the Magistrate’s Court in terms of section 86(9), the Magistrate’s Court must conduct a hearing and, having regard to the proposal and information before it and the consumer’s financial means, prospects and obligations, may-

(a) reject the recommendation or application as the case may be; or

(i) an order declaring any credit agreement to be reckless, and an order contemplated in section 83(2) or (3), if the Magistrate’s Court concludes that the agreement is reckless; (ii) an order re-arranging the consumer’s obligations in any manner contemplated in section 86(7)(c)(ii); or

(iii) both orders contemplated in subparagraph (i) and (ii).”

[underlining added for emphasis]

[19] I ruled that a “mere withdrawal of the [application in terms of section 87 of the NCA] by an applicant” does not stop the statutory debt review process already triggered, as there are other “attendant consequences of such an application”.¹² It is clear from a reading of both sections 86 and 87 that the withdrawal of the application made in terms of section 87 does not automatically affect the determination that the applicant was over-indebted made in terms of section 86. This is not a determination made by the NCR but the involved debt counsellor. Against this background and the fact that on his own account he was over-

¹² See par 8 of the judgment of 10 April 2018.

indebted,¹³ I found no prospects in the applicant's associated review application. I was also concerned by the fact that granting the relief sought by the applicant would expose members of the public using his services as someone whose involvement in the industry may be incompetent due to the applicant's disqualification.

D : *Application for leave to appeal*

Grounds of appeal and submissions (discussed)

[20] The applicant's main ground of appeal is that I failed to apply or observe the requirements for interim interdict when dismissing his application. The applicant went to great lengths in referring to some authorities in this regard. The requirements for an interim interdict are trite and are as follows: (a) a clear right, which is *prima facie* established, even though open to some doubt; (b) a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing the right; (c) the balance of convenience favourable to the granting of interim relief; and (d) absence of other satisfactory remedy.¹⁴

[21] But, I do not deem it necessary to traverse the above stated grounds. It suffices to state that I was not satisfied that all these requirements were met, particularly regarding the existence of a *prima facie* or right "open to some doubt" for the applicant to be registered as a debt counsellor or not to be deregistered. Such right even if it exists will be subject to compliance with the provisions of the NCA, just like attorneys or legal practitioners need to comply with the provisions of their applicable legislation to earn the right to practise o to

¹³ See par 6.4 above.

¹⁴ See *Setlogelo v Setlogelo* 1914 AD 221. See further Herbstein and Van Winsen *The Civil Practice of the High Courts of South Africa*, 5th edition (Juta Cape Town 2009) at ch44 pp 1456-1457 and the authorities cited there, particularly under footnote 17

continue practising.¹⁵ This will be impossible where the applicant in his own version is disqualified to act as a debt counsellor due to his over-indebtedness. And allowing such a person to act as a debt counsellor would expose members of the public to probable adverse consequences. This is very likely to be the case where such a person, as the applicant probably did, has shown that he can go to greater lengths to practise as a debt counsellor even after he has been deregistered.¹⁶

[22] The applicant also complained that I considered the merits of the review application in dismissing his application. Preliminary assessment of the merits of the applicant's case is essential,¹⁷ as authoritatively stated in the following *dicta* from *Olympic Passenger Service (Pty) Ltd v Ramlagan*:¹⁸

"It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicants' prospects of ultimate success may range all the way from strong to weak. The expression '*prima facie* established though open to some doubt' seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict — it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience — the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him."¹⁹ [underlining added for emphasis]

¹⁵ In Van Dijkhorst K and Church J *Legal Practitioners* (Volume 14(2) 2nd edition in *Law of South Africa* (LexisNexis, online version as at 31 July 2007) at 306.

¹⁶ See pars 12 and 13 above.

¹⁷ *Ferreira v Levin NO; Vryenhoek v Powell NO* 1995 (2) SA 813 (W) at 817I–818B, 824I–J.

¹⁸ *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383C–G, approved in *Beecham Group Ltd v B-M Group (Pty) Ltd* 1977 (1) SA 50 (T) at 54–55 and *Ferreira v Levin NO; Vryenhoek v Powell NO* 1995 (2) SA 813 (W) at 831E–832B.

¹⁹ *Ferreira v Levin NO; Vryenhoek v Powell NO* 1995 (2) SA 813 (W) at 833A–B (*per* Heher J). See also *Knox D'Arcy Ltd v Jamieson* 1995 (2) SA 579 (W) at 601E–G.

[23] I obviously did not embark on a final determination of the issues in the review application, but only preliminarily assessed the prospects of the matter. This was all that was required at that moment.

[24] I do not get the impression that the leave to appeal is directed specifically at the costs order made when the main application was dismissed. But there was nothing special there, save for costs of the previous enrolment on 27 and 28 March 2018. There was clearly no justification why the NCR should be out of pocket for costs of those two dates. Save as aforesaid, I do not consider it necessary to add to what is stated in the judgment to the main application on this aspect, even if there is a ground of appeal in this regard.

E : Conclusion and Order

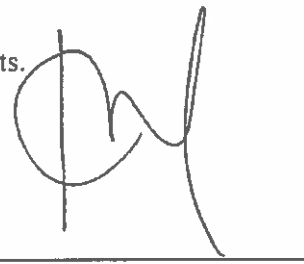
[25] In terms of section 17(1)(a) of the Superior Courts Act 10 of 2013,²⁰ this Court is enjoined to grant leave to appeal when the Court is of the opinion that the intended appeal “would have a reasonable prospect of success” or where there are some compelling reasons why the appeal should be heard.

[26] Upon consideration of the submissions made in support of and against the grounds of appeal, I am of the view that the appeal would have no reasonable prospects of success. For completeness, I am also of the view that there is no compelling reason to grant leave to appeal. Essentially, in my view, no other Court at appellate level would come to a different conclusion than the one arrived at in terms of the impugned judgment of 10 April 2018. Consequently, the application for leave to appeal will be dismissed with costs.

²⁰ “Leave to appeal may only be given where the judge or judges concerned are of the opinion that- (a) (i) the appeal would have a reasonable prospect of success; or (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration”.

[27] In the premises, I make the following order:

- a) application for leave to appeal is dismissed with costs.



K. La M. Manamela

Acting Judge of the High Court

08 AUGUST 2019

Appearances:

For the Applicant	:	TP Swuhana (in person)
For the First Respondent	:	Ms A Lapan
Instructed by	:	Bazuka and Company Inc c/o Mfoloe Attorneys, Arcadia, Pretoria