



Reportable

IN HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 7521/17P

In the matter between

NONDUMISO REBECCA MHLONGO
(ID No.: [...])

Applicant

and

BEATRICE DE BEER (NCRDC111)

First Respondent

HOME CHOICE (PTY) LIMITED

Second Respondent

NEDBANK LIMITED CREDIT CARD

Third Respondent

ALTECH AUTOPAGE CELLULAR (PTY) LIMITED

Fourth Respondent

CONSUMER FRIEND

Fifth Respondent

MR. PRICE – HOME STORE

Sixth Respondent

AFRICAN BANK LIMITED

Seventh Respondent

HTN ATTORNEYS

Eighth Respondent

STANDARD BANK OF SOUTH AFRICA - OVERDRAFT

Ninth Respondent

JUDGMENT

Delivered on: 22 September 2017

BEZUIDENHOUT, J

[1] Applicant applied in terms of section 86(1) of the National Credit Act, 34 of 2005 to first respondent, a debt counsellor, to be declared over indebted. The application was made during September 2013 and Form 17.2 was completed by the

debt counsellor on 16 May 2014 and sent to the various parties. The declaration of over indebtedness was never made an order of court and was not done in terms of section 87(1) of the National Credit Act.

[2] Applicant now seeks the following relief:

1. That she be declared no longer over indebted and under debt review.
2. That the Credit Bureau remove the debt review status from applicant's credit reports.
3. That the debt counsellor provides Form 17.W confirming that applicant is being declared to be no longer over indebted.

[3] Applicant alleges that at the time that she made the application to first respondent she was indebted to the following credit providers:

1. Homechoice (Pty) Ltd	R872.69
2. Nedbank Ltd – Credit Card	R6,930.59
3. Altech Autopage	R550.76
4. Woolworths	R345.90
5. Mr Price Home	R1,798.02
6. Exact	R2,240.51
7. African Bank Ltd	R43,863.17
8. Homechoice (Pty) Ltd	R11,005.45
9. HTN Attorneys	R322.96
10. Standard Bank	R3,978.32
11. Bruma Finance (Pty) Ltd	no amount indicated.

3.1 This information provided by her corresponds with that listed on Form 17.2 which was sent by first respondent on 16 May 2014.

[4] Her current monthly nett salary is R7,821.80 and her total expenditure is R4,360.00 which leaves her with a surplus of approximately R3,300.00.

4.1 She indicates in paragraph 7 of her affidavit that she paid off all the debt to the credit providers listed except for African Bank. She is at present paying an amount of a R1,000.00 per month to African Bank.

Settlement letters have only been attached in respect of Woolworths and Bruma Finance. It is only her averment that the others except African Bank have been paid in full but that no settlement letters have as yet been received. I will accordingly for purposes of this application accept that they have all been settled in full as there is no indication on the papers which were served on all the respondents that it is incorrect.

[5] Applicant is of the opinion that she is no longer over indebted and can afford to pay an increased monthly payment directly to the credit provider. As already mentioned the only debt due is to African Bank and it is not apparent therefrom from the said papers how much the actual payment should be and whether the payment of R1,000.00 being made by her per month is in accordance with what the monthly payment is.

[6] It has been submitted that Annexure "E" to the founding affidavit, is a copy of the guidelines for the withdrawal from debt review, and it is apparent therefrom that a debt counsellor does not have the statutory powers to terminate or withdraw the debt review process. Applicant therefore has no other option but to approach the High Court because of its inherent jurisdiction as it cannot be done in the magistrate's court which is a creature of statute. There is nothing in the Act and regulations which set out what must be done in such a case.

[7] Although not all the information has been provided the figures which have been set out in Form 17.2, except for African Bank, are not large and if it is accepted that the application was made during May 2014 and that an amount of R2,000.00 has been paid to the creditors that these smaller amounts by now could be fully paid up. I will therefore accept that she may not be over indebted at this stage.

[8] The question that arises is, if she is no longer over indebted and the application to declare her over indebted was never issued and filed at the magistrate's court nor was an order to that effect granted by the magistrate's court, must this court then grant an order that she is no longer over indebted if there is no specific provision in the Act to do so.

[9] This restructuring was never confirmed by any court in terms of section 87(1) of the National Credit Act 34 of 2005, nor is any restructuring agreement agreed to between all the parties attached to the papers.

9.1 In *Nedbank v National Credit Regulator* 2011 (3) SA 581 (SCA) it was held at 598c:

"In terms of s86(7)(c) the debt counsellor may "issue a proposal" that the magistrate's court make certain orders. It is not said that he 'must' do so but, given his duty in terms of ss(6) and his position as statutory functionary, he must issue the proposal."

9.1.1 The debt counsellor having found that the debtor is over indebted, must issue a proposal restructuring the debt, and submit this to the magistrate's court for a hearing and the granting of the necessary order. If this is not done the debt counsellor has failed to comply with his duties and obligations in terms of the Act.

9.1.2 It is clear from *Nedbank v National Credit Regulator* that there must be judicial oversight to declaring a person over indebted and the restructuring of his/her debt.

9.1.3 Until the magistrate's court has thus made an order approving the over indebtedness and restructuring no declaration of over indebtedness has occurred.

9.1.4 Form 17.2 used by the debt counsellor does not reflect the correct position as it fails to incorporate the judicial oversight required and that any application for a declaration of over indebtedness and restructuring must be approved by the magistrate's court. Form 17.2 is also incorrect in stating that the application for debt review was successful.

[10] In terms of section 86(1) of the National Credit Act a consumer can apply to a debt counsellor to be declared over indebted. Section 86(4) stipulates that on receipt of such an application the debt counsellor must provide proof of receipt of the application and notify in the prescribed manner and form all credit providers listed and every registered credit bureau. Section 86(6) stipulates a debt counsellor who has accepted an application in terms of the section must determine within the prescribed time whether the consumer is over indebted and if it is concluded that he is over indebted then in terms of section 86(7)(1)(c) the debt counsellor may issue a proposal recommending that the magistrate's court make either or both of the certain orders as provided for in the said section.

10.1 Section 24(9) of the Act further provides that any arrangements by a debt counsellor with a credit provider must be reduced to writing and signed by all the credit providers, the debt counsellor and the consumer.

10.2 No such document is attached and it does not appear from the papers that any arrangement had indeed been made by the debt counsellor which was accepted by all the parties.

10.3 From the above it would appear that the requirements of the National Credit Act have not been complied with. No restructuring could have occurred before either the credit providers, the debt counsellor and the consumer in a written document made arrangements therefore or

in the event of no such agreement an application was brought to the magistrate's court to confirm the over indebtedness and rescheduling.

[11] In terms of section 86(1) of the National Credit Act a consumer can apply to a debt counsellor to be declared over indebted. Section 86(4) stipulates that on receipt of such an application the debt counsellor must provide proof of receipt of the application and notify in the prescribed manner and form all credit providers listed and every registered credit bureau. Section 86(6) requires a debt counsellor who has accepted an application in terms of the section to determine within the prescribed time whether the consumer is over indebted and if it is concluded that he is over indebted then in terms of section 86(7)(1)(c) the debt counsellor may issue a proposal recommending that the magistrate's court make either or both of the certain orders as provided for in the said section. The word "may" suggests that it is discretionary to issue and file the application at the magistrate's court. As set out in paragraph 2 above it is not discretionary and the word "may" must be read as "must".

[12] I have been referred to the unreported judgment of *Malesela David Manamela v Hein Du Plessis t/a Debt Safe and 6 Others* in the Gauteng Division, Pretoria where an order was granted that the applicant was no longer over indebted. No details of the case is provided and in my view is distinguishable as will appear from this judgment.

12.1 I was also referred to *Rougier v Nedbank Ltd* Case No 27333/2010 South Gauteng, where it was held that it was ultra vires for a debt counsellor to withdraw a debt review instituted in terms of section 86(1) of the Act. It is only instituted when the application is filed and issued at court. That is the position in the case of business rescue applications as held in *Blue Star Holdings v West Coast Oyster Growers* 2013 (6) SA 540 (WCC). In my view the same principles apply.

[13] What is the position in the present case? There is nothing in the Act or its Regulations which sets out how, once an application for a declaration of over indebtedness has been submitted to a debt counsellor who not yet issued and served such application at the magistrate's court to be made an order of court, can be stopped, or cancelled.

13.1 It has been submitted that the guidelines of the withdrawal from debt review provides certain options how such an application can be withdrawn but does not cater for this situation, and that only a High court due to its inherent jurisdiction has the power to declare a consumer no longer over indebted. These are clearly guidelines and not specific procedures.

13.2 It is further submitted that it would be ultra vires for the debt counsellor to withdraw the application. The application is only instituted once it is issued and filed at court. Prior to that the debt counsellor only reaches a conclusion as to over indebtedness and prepares a restructuring of the debt. Debt review has not yet been instituted. Once the application is issued and filed the debt review is instituted.

13.3 Until a magistrate has ruled thereon there is only an application pending, and no declaration of over indebtedness and restructuring.

[14] What happens as in the present case when the debt counsellor sends out notices 17.1 and 17.2 but fails in his/her duty to issue and serve the application at the relevant magistrate's court.

14.1 The issuing of the application at the magistrate's court is the date the application is instituted as thereafter various factors may cause the application to be adjourned.

14.2 The debt counsellor must ensure that the over indebted consumer receives the necessary assistance within a reasonable time of receiving the application for a declaration of over indebtedness and ensure that the application is issued and filed at the magistrate's court for its judicial oversight and approval and only when approved will such an order ensue.

14.3 What is a reasonable time? In the present case the application to the debt counsellor was made during April 2016 and by August 2017 no such application had been issued and filed at the magistrate's court. Sixteen (16) months later cannot be a reasonable time nor in the interest of the consumer or credit providers. Section 86(10) of the Act allows for a period of 60 days after which a credit provider may apply to have the debt review terminated if there was no cooperation.

14.3.1 The debt counsellor must obtain information from the consumer, assess the application and prepare a restructuring of the debt and draft the necessary application to the magistrate's court. In my view a period of 90 days from the date of the application for a declaration of over indebtedness by the consumer to the debt counsellor should be sufficient to do so and to issue and serve the application at the relevant magistrate's court for its decision.

14.3.2 If this is not done, the consumer cannot be prejudiced and wait indefinitely for the debt counsellor to comply. The consumer and credit providers are being prejudiced, as there is no valid debt rescheduling because the magistrate's court has not approved such and made no order.

- 14.4 The intention of the Act is to ensure that consumers who are over indebted receive the necessary assistance within a reasonable time. They are in the majority of cases already in a vulnerable position.
- 14.5 If the debt counsellor fails to issue and serve the application at the magistrate's court within 90 days after receiving the application, the consumer if he/she so wishes must after the expiry of the 90 days be able to stop the whole process. The consumer can in such a situation at any time before the application is issued and filed at the magistrate's court inform the debt counsellor that he must not proceed with the application. The debt counsellor must then inform the credit bureau to remove the name of the said consumer from all its records.

[15] The position therefore appears to me to be follows:

- 15.1 A debt counsellor after receiving an application from a consumer to be declared over indebted must follow the process as set out in the Act.
- 15.2 A debt counsellor must within 90 days of receiving an application for a declaration of indebtedness and restructuring from a consumer issue and file such application at the relevant magistrate's court for approval.
- 15.3 The application for a declaration of over indebtedness and restructuring is only instituted once it is issued and filed at the magistrate's court. Until then it is merely a pending application.
- 15.4 If this is not done by the debt counsellor, the consumer can after the expiry of a period of 90 days and before the application is issued and filed notify the debt counsellor in writing not to proceed with the application.
- 15.5 The debt counsellor must notify the credit bureaus accordingly.

15.6 The relevant credit bureaus must then remove such consumer's name from the relevant records.

[16] As no application for a declaration of over indebtedness and restructuring had been instituted there has not been any valid declaration of over indebtedness. The relief as sought in the notice of motion can therefore for the reasons set out above not be granted.

[17] The application is dismissed.

BEZUIDENHOUT, J

Date of hearing : 17 August 2017
Date delivered : 22 September

Appearances:

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