



Reportable

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

CASE NO: 7521/17P

In the matter between

ERIC GUGULETHU NGCONGO

Applicant

(ID No.: [...])

and

NEIL ROETS (NCRDC474) t/a DEBT RESCUE

First Respondent

DIRECT AXIS SA (PTY) LIMITED

Second Respondent

OLD MUTUAL FINANCE (PTY) LIMITED

Third Respondent

NEDBANK LIMITED

Fourth Respondent

CONSUMER FRIEND t/a MARKHAMS

Fifth Respondent

FINANCE 27

Sixth Respondent

HTN ATTORNEYS t/a BOODLE INSTANT LOANS

Seventh Respondent

AFRICAN BANK LIMITED

Eight Respondent

FIRSTRAND BANK LIMITED

Ninth Respondent

ABSA BANK LIMITED

Tenth Respondent

JUDGMENT

Delivered on: 22 September 2017

BEZUIDENHOUT, J

[1] Applicant, during April 2016, made application in terms of section 86(1) of the National Credit Act 34 of 2005 to first respondent, a debt counsellor, to have himself declared over indebted. A copy of such application is not attached to these papers.

On 25 April 2016 first respondent issued a Form 17.1 to all creditors of applicant notifying them and all registered credit bureaus in terms of section 86(4)(b)(i)(ii) of the National Credit Act, that applicant had applied for debt review on 23 April 2016.

1.1 Form 17.1 grants credit providers five days to respond if the details provided by applicant were not correct. If they did not do so it would be accepted that the information was correct.

1.2 On the same day, 25 April 2016, first respondent also issued a notice in terms of Form 17.2 of the National Credit Act which states *inter alia*:

“This notice serves to advise you that:

(b) the abovementioned consumer’s application for debt review was successful the debt obligations are in the process of being restructured.”

1.2.1 It also advised all credit bureaus to list the consumer (applicant) within 5 days of this notice, as having applied for debt review.

1.3 The application was made on 23 April 2016. On 25 April 2016 the notice in terms of Form 17.1 was sent out allowing the credit providers five days to respond thereto. On the same day, thus without allowing the credit providers any opportunity to respond thereto within the five days, Form 17.2 was sent that the application for debt review was successful and that applicant’s debt obligations were being restructured. Credit bureaus were advised that he had applied for debt review.

[2] The application to be declared over indebted and restructuring of the debt was never submitted to the magistrate’s court nor confirmed by any court in terms of section 87(1) of the National Credit Act 34 of 2005, nor was any restructuring

agreement agreed to between all the parties and signed by them attached to the papers.

2.1 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.”

2.1.1 The debt counsellor having received an application and finding that the debtor is over indebted, must issue a proposal restructuring the debt, and issue and file this at the magistrate’s court for a hearing. If the court agrees it will make 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.

2.1.2 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.

2.1.3 Until the magistrate’s court has thus made an order approving the over indebtedness and restructuring no declaration of over indebtedness has occurred, nor any restructuring.

2.1.4 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.

2.1.5 Applicant seeks an order that he no longer be declared to be over indebted and that the credit bureaus remove his name from their records.

Over Indebtedness

[3] Applicant is seeking an order that this court finds that he is no longer over indebted. He has however, for the reasons set out below, not made a full disclosure of the total amount of his debt and repayments and it is therefore impossible to determine whether he is still over indebted or not.

3.1 Applicant states in paragraph 4 of his affidavit that he began to make payments to his creditors as per annexure "B" and lists his creditors. Annexure "B" is Form 17.1. There is no indication as to how much was paid to each creditor, or how much is owing.

3.2 In paragraph 11 of his affidavit he sets out the creditors who, according to him, he made arrangements with to pay directly and the monthly payments made to them. The total monthly repayments amounts to R4,275.00. The affidavit fails to set out how applicant's payments were restructured by first respondent.

3.3 In paragraph 6 he avers, that first respondent informed him to make payments to his creditors in a total monthly amount of R4,200.72. He once again refers to annexure "B", Form 17.1, which only sets out a list of creditors but does not set out the total amount outstanding nor what the amount payable to each of them would be.

3.4 Applicant contends that his financial position has improved substantially and he can now make payments direct to his creditors in the amount of R4,275.00 per month which is only R75.00 per month more than that which he was instructed by first respondent to pay.

3.5 From the papers it is not clear what the outstanding amounts to the various creditors are and why he is now in a position to pay them direct when the total amount payable is only R75.00 per month more than that which first respondent had informed him to pay.

3.6 There is also no indication as to what the exact amounts are which must be paid monthly to each of the credit providers and whether applicant is in a position to pay such and if not whether the credit providers are in agreement to accept any other amount. He states in paragraph 11:

“As a result, I have tried to contact my creditors to arrange to pay them directly pending the application herein. I confirm that I am already paying the following outstanding creditors directly and that the monthly payment amounts are as follows:”

There is no indication that he did in actual fact contact them nor that they had agreed to accept any other payment, and whether these payments are less than the actual monthly payments.

3.7 On this basis alone the application must fail.

Legal Position

[4] The procedure adopted by first respondent was also incorrect as far as the following is concerned.

4.1 Forms 17.1 and 17.2 were been sent on the same day without allowing the necessary period to respond in terms of Form 17.1.

4.2 Section 24(10) provides that after completion of an assessment the debt counsellor sends Form 17.2 to the bureau. How could this have been done when the credit providers were not given any opportunity to respond as both Forms 17.1 and 17.2 were sent on the same day.

- 4.3 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.
- 4.4 No such document is attached and it does not appear from the papers that any arrangement had been made by the debt counsellor which was accepted by all the parties.
- 4.5 The requirements of the National Credit Act have therefore not been complied with. No declaration of over indebtedness and restructuring of the debt could have come into operation until an application was issued and filed at the magistrate's court and confirm the over indebtedness and rescheduling.

[5] 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".

[6] 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.

6.1 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.

[7] 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.

7.1 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.

7.2 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.

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

[8] 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.

- 8.1 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.

- 8.2 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.

- 8.3 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.

- 8.3.1 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.

8.3.2 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.

8.4 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.

8.5 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.

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

9.1 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.

- 9.2 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.
- 9.3 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.
- 9.4 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.
- 9.5 The debt counsellor must notify the credit bureaus accordingly.
- 9.6 The relevant credit bureaus must then remove such consumer's name from the relevant records.

[10] 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.

[11] The application is dismissed.

BEZUIDENHOUT, J

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

Appearances:

For the Applicant : Ms Dhoda
Instructed by : Campbell Attorneys
011 616 2665
Ref:NC/alm/N1603
c/o Stowell & Co Attorneys
033 845 0500