

**SAFLII Note:** Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**IN THE NATIONAL CONSUMER TRIBUNAL**

**HELD AT CENTURION**

**Case No: NCT/4901/2012/148(1)(P)NCA**

In the matter between:

**BRIAN VICTOR JONES  
JACOBA MAGDALENA JONES**

**FIRST APPELLANT  
SECOND APPELLANT**

and

**ABSA BANK AND OTHERS**

**RESPONDENT**

Date of Hearing: 7 September 2012

CORAM :

P BECK - PRESIDING MEMBER  
F SIBANDA - MEMBER  
X MAY - MEMBER

---

**JUDGEMENT AND REASONS**

---

**Introduction**

1. The Appellants are Brian Victor Jones, Identity number ... and Jacoba Magdalena Jones

Identity Number ..., hereinafter referred to as the Appellants.

2. The Appellants were represented at the Tribunal hearing on 7 September 2012, by their debt counselor, Hendrik Johannes Nieuwstadt Krige (hereinafter referred to as "Krige") of 139 Palm Street, Doringkloof, Centurion.
3. The respondent is Absa Bank and others.
4. The Appellants brought an application in terms of section 148(1)(P) of the National Credit Act No. 34 of 2005 ("**NCA**") to the Tribunal to appeal the Tribunal's decision to refuse the granting of a consent order in favour of the Appellants.
5. The National Consumer Tribunal ("**Tribunal**") has jurisdiction to hear this matter in terms of Section 148(1) of the NCA. This section provides that participant in a hearing before a single member of the Tribunal may appeal the decision of that member to a full panel of the Tribunal, in the prescribed manner and form.

## **Background**

6. On 30 July 2010 the Appellants applied to the Tribunal for a consent order in terms of section 138(1) of the NCA.
7. Presiding member, Tanya Woker, on 21 May 2012, refused to grant the consent order for the following reasons:
  - 7.1 The interest rate charged by Bayport Financial Services exceeded the amount permitted in terms of the NCA by charging an interest rate of 35,40%. This agreement was categorised as an unsecured credit agreement and thus the interest rate may not exceed 32,10%;
  - 7.2 No income statement was supplied to the Tribunal;
  - 7.3 The consent order was signed by the Appellants on 27 July 2010 and the agreements with the respective respondents signed in 2010 and because two years had passed by the time the consent orders were applied for, it was difficult to ascertain whether the Appellants were in a position to comply with a consent order. It was noted that failure to

comply with a consent order constitutes a criminal offence.

8. The refused order was sent to Krige on 30 May 2012 who then filed an appeal on behalf of the Appellants on 12 June 2012 requesting the Tribunal to reconsider its decision to refuse the granting of the consent order.

### **Basis of the Appeal**

9. The basis of the Appeal against the Tribunal's decision to refuse the granting of the consent order is that it was not correct for the following reasons:
  - 9.1 When Bayport Financial Services accepted the debt re-arrangement proposal the repurchase rate ("repo rate") was 7% and the interest rate ceiling for unsecured loans was 35.40%.
  - 9.2 It is not the Tribunal's responsibility to assess the Appellants' financial position by requesting a financial statement.
  - 9.3 The application was initially filed and assessed for completeness in 2010 and had to be re-filed in 2012, as it could not be located. During the second assessment in 2012, issues were raised, which were not previously raised.<sup>1</sup>

### **Issues to be decided by the Tribunal**

10. The critical issue which the Tribunal must decide on is whether the consent order was refused in accordance with the law.
11. Furthermore, the Tribunal has to determine:
  - 11.1 the maximum permissible interest rate for unsecured credit agreements applicable at the time when the credit agreement was entered into;
  - 11.2 whether the repo rate to be considered is the prevailing rate when the debt re-

---

<sup>1</sup> In terms of Rule 7(4), read with Rule 7(5) and Table 2, the Registrar's Office assesses an application upon its initial filing to determine whether the filing complies with the filing requirements as set out in Table 2 of the Regulation for Matters relating to the Functions of the Tribunal and Rules for the Conduct of Matters before the National Consumer Tribunal, 2007 as amended.

arrangement proposal was agreed upon or alternatively the applicable rate when the application for a consent order is considered;

11.3 whether it is a requirement in terms of the NCA that an income statement be considered by the Tribunal with an application for a consent order and

11.4 whether it the responsibility of the Tribunal to assess the Appellants' financial position in terms of section 138(1) of the NCA.

### **The application of the Law to the facts**

12. The issuance of a consent order is regulated in terms of section 138(1) of the NCA and the appeal thereof in section 148(1).

13. Section 138(1) provides that the Tribunal may confirm an agreement as a consent order without hearing any evidence.

### **Principle of legality in respect of changes to the applicable interest rate or changes in the repo rate during the period of repayment**

14. It is the Applicants submission that the repo rate at the time the proposal was accepted by the respondents was 7%. Bayport Financial Services, one of the Appellants' credit providers, accepted the debt re-arrangement proposal on 12 March 2010 at which point the repo rate was 7%.

15. In terms of regulation 42 of the NCA Regulations the maximum interest rate for unsecured credit transactions is  $[(RR \times 2.2) + 20\%]$  per year.

16. Accordingly, the following calculation determines the maximum permissible interest rate for unsecured credit transaction as at 12 March 2010:

$$\begin{aligned} &\{(RR \times 2.2) + 20\% \\ &= \{(7 \times 2.2) + 20\% \end{aligned}$$

= 35,40%

17. Therefore the maximum permissible interest rate for an unsecured credit transaction at the time the proposal was accepted was 35.40%. It follows that the interest rate at the time when the proposal was accepted and the debt re-arrangement agreed to was lawful.

18. Section 103(4) provides that:

*“A credit agreement may provide for the interest rate to vary during the term of the agreement only if the variation is by fixed relationship to a reference rate stipulated in the agreement, which reference rate must be the same as that used by that credit provider in respect of any similar credit agreements currently issued by it”.*

19. In our law, statutes generally apply prospectively in the absence of express provisions to the contrary, as stated by Innes, J in *Curtis v Johannesburg Municipality* 1906 TS 308 at 311 : *“ In the absence of express provision to the contrary, statutes should be considered as if affecting future matters only; and more specially.... they should, if possible, be so interpreted as not to take away any rights actually vested at the time of their promulgation.”*

This position was confirmed in *The State and Others v Acting Regional Magistrate Boksburg CCT 109/10[2011] ZACC 33 at par 16*, where it was held that: *“...in our common law there is a presumption against retrospectivity. It is presumed that a statute does not operate retrospectively, unless a contrary intention is indicated, either expressly or by clear implication. (National Director of Public Prosecutions v Carolus and Others 2000 (1)SA 1127 (SCA). This presumption is consistent with a fair trial provisions of the Constitution (section 35(3)(1) and was approved by the court in Veldman v Director of Public Prosecutions [2005]ZACC 22.*

20. Accordingly, the common law position is that legislation does not apply retrospectively unless expressly stated and statutes should not be interpreted in a way that take away any rights that are vested.

**Consideration of the interest rate when the debt re-arrangement proposal was accepted or the consent order was considered**

21. The agreement i.e. the meeting of the minds, between the Appellant and Bayport was reached when Bayport accepted the debt rearrangement proposal on 12 March 2010. This agreement is irrespective of when the application for a consent order was considered or not.
22. The granting of a consent order confirms what has already been agreed upon provided it is lawful and thus having regard to the repo rate as at 12 March 2010, the maximum interest rate of 35,40% at the time when the debt re-arrangement was agreed to was lawful .
23. Accordingly, it is the considered view of the Tribunal that the agreement reached on 12 March 2010 was lawfully concluded and that the interest rate agreed upon between the parties was not in excess of that which is permissible in terms of the NCA on 12 March 2010 when the debt re-arrangement was agreed to between the parties. Furthermore, a change in the repo rate, which is beyond the control of the parties, should not suddenly render an agreement or consent order, initially lawful and enforceable, suddenly unlawful.

#### **Consideration of the income statement of the Appellant**

24. Table 2 of the regulations to the NCA contains the requirements for applications directly to the Tribunal. The requirements for an application in terms of section 138(1) are as follows:

a	b	C	d	e	f	g
Application type	description	Limitation on time for submission	Form to be used	Other documents to be included in the application	Application fee	Parties to be notified
Section 138 (1)	Application for a consent order	n/a	Form T1.138(1)	(1)A signed copy of the agreement reached between the parties to the dispute resolution formulated as an order of the Tribunal (2) proof of payment utilising Form T1.r35 {item (2) added Gen 428 of 29 June	One hundred rand (R100,00)	The other persons mentioned in Form T1.138(1)

				2011]		
--	--	--	--	-------	--	--

- 25 The Table does not require an income statement to be filed with an application in terms of section 138(1).
26. It follows that an income statement is not a requirement for the purposes of filing a consent order application. However a Tribunal member considering such an application may request such an income statement to clarify certain issues pertaining to the application.
27. It does not appear from the reasons cited that the Tribunal member refused the application as a result of the debt counsellor's failure to provide an income statement, but the absence of an income statement was merely mentioned as an intimation from the Tribunal member that she was unable to consider the application for a consent order, in the absence of such an income statement and to correctly ascertain whether the consumer was able to pay what the consumer had agreed to pay two years ago. It was correctly noted by the Tribunal member that failure to comply with a consent order, granted by the Tribunal, was a criminal offence in terms of section 160(1) of the Act and the Tribunal member's concern was justified given the two year time lapse between the agreement to debt re-arrangement and the application for a consent order.

### **The financial position of the Appellant**

28. Section 79 of the NCA deals with over-indebtedness and provides for a determination as to whether the consumer is over-indebted or not.
29. Section 79 provides as follows:
- (1) *A consumer is over indebted if the preponderance of available information at the time a determination is made indicates that a particular consumer is available to satisfy in a timely manner all obligations under agreements to which the consumer is party, having regard to that consumer's :*
    - (a) *financial means, prospects and obligations and*
    - (b) *probable propensity to satisfy in a timely manner all the obligations of all credit agreements to which a consumer is a party by the consumers history of debt repayment.*
  - (2) *When a determination is to be made whether a consumer is over indebted and the person making the determination must apply criteria set out in such regulations as they exit at the time the determination is*

*being made.*

- (3) *When making a determination in terms of this section, the value of –*
- (a) any credit facility is the settlement value at the time under the facility; and*
  - (b) any credit guarantee is –*
    - (i) any settlement value of the credit agreement that it guarantees the guarantor has been called upon to honour that guaranteed amount;*
    - (ii) the settlement value of the credit agreement that is discounted by the a prescribed factor.”*

30. Subsection 79(1)(a) refers to having regard to a consumer’s “*financial means*”. A most logical way of determining a consumer’s financial means is having regard to an income statement as this would assist the Tribunal to determine whether a consumer is over-indebted or not.

31. The mention of the absence of an income statement was not the main reason for the refusal of the consent order in this matter but was in our view, merely mentioned by the Tribunal member due to two years having elapsed between the debt rearrangement agreement and the application for a consent order.

32. It is our view that the Tribunal does have an implied duty to assess the Appellants’ financial position in order to satisfy itself that a consumer is not over-indebted and that a consumer would be in a position to adhere to the order of the Tribunal. Non compliance with an order of the Tribunal is a criminal offence in terms of section 160(1) of the Act and thus the Tribunal must satisfy itself that its order can be complied with by the Appellant.

## **ORDER**

33. Accordingly, having considered the Appeal, the Tribunal makes the following order:

33.1 The Appeal is upheld.

33.2 No order as to costs is made.

DATED THIS 17<sup>TH</sup> DAY OF JANUARY 2013



[signed]

---

**P A BECK**  
**TRIBUNAL MEMBER**

Mr F Sibanda, Member and Mr X May, Member concurring