

**IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION**

Case number: **NCT/14627/2014/148(1)NCA**

In the matter between:

PHILLIP MALGAS

FIRST APPELLANT

And

TABITA MALGAS

SECOND APPELLANT

And

WESBANK, A DIVISION OF FIRSTRAND BANK LIMITED

FIRST RESPONDENT

FIRSTRAND BANK LIMITED

SECOND RESPONDENT

BAYPORT SECURITIZATION (RF) LIMITED

THIRD RESPONDENT

Coram:

Prof J Maseko - Presiding Member

Adv HFN Sephoti - Panel Member

Prof B Dumisa - Panel Member

Date of Hearing - 14 August 2014

JUDGMENT AND REASONS

APPELLANTS

1. The first Appellant, Mr. Phillip Malgas, is a consumer as defined in section 1 of the National Credit Act 34 of 2005 ("the NCA" or "the Act") (hereinafter referred to as the "First Appellant").

2. The second Appellant is Ms. Tabita Malgas, also a consumer as defined in section 1 of the Act and is married to the first Appellant (hereinafter referred to as the "Second Appellant");
3. At the Appeal hearing, held via Skype, both Appellants were represented by Mr. Rynhard De Lange standing in for Mr Hans Reinhard Pettenburger-Perwald, a major male registered as a debt counsellor, under the Act, with registration number NRDC49. Mr De Lange was assisted by Ms. Jackie Hoees. Mr. Hans Reinhard Pettenburger-Perwald had lodged the appeal on behalf of both Appellants in this case.

RESPONDENTS

4. The First Respondent is Wesbank, a Division of FirstRand Bank Ltd which is registered as a credit provider with the National Credit Regulator (*hereinafter referred to as "the First Respondent"*).
5. The Second Respondent- is said in the application to be FirstRand Bank Limited, even though the acceptance letter associated with that Respondent was found to be from First National Bank, a Division of FirstRand Bank Limited Ltd, also a registered credit provider with the National Credit Regulator (*hereinafter referred to as "the Second Respondent"*).
6. The Third Respondent is Bayport Financial Services (Pty) Ltd also a registered credit provider with the National Credit Regulator (*hereinafter referred to as "the Third Respondent"*). And once again, whilst the application cited the Third Respondent as such, the only signed acceptance letter on file was found to be from Bayport Securitization (RF) Ltd.
7. At the hearing of the 19th of August 2014, the three Respondents were neither present, nor represented.

APPEAL

8. The Appellants lodged an appeal against the finding of a single member of the Tribunal in terms of section 148(1) of the NCA.
9. The appeal was heard on the 14th of August 2014 by a full panel of the Tribunal comprised of three members in the *coram* indicated above.

BACKGROUND

10. On 13 May 2014 the Debt Counsellor lodged an application in terms of section 86(8) of the NCA with the Tribunal on behalf of First and Second Appellants, to have a debt re-arrangement agreement made an order of the Tribunal in terms of section 138(1) of the NCA (Case number NCT/113895/2014/138).
11. The application was considered by a single member, Mr F Sibanda, who then refused to confirm the application. Mr Sibanda based the refusal in the judgment, dated 13 May 2014, on the finding that:

"The consumer's monthly disposable income of R 5 019.77 indicated in the income and expenditure statement is insufficient to pay the monthly repayment amount of R 5 555.57"

12. The Appellants lodged an appeal against the refusal of the single member on the basis that the single Presiding member misinterpreted the First and Second Appellants' income and expenditure budget as it was presented in the application. He had then concluded in the appeal that the said misinterpretation, led to the application being incorrectly refused.

THE HEARING

13. During the appeal hearing, Mr De Lange referred the Tribunal to the assessment summary of the First and Second Appellants' income and expenditure document as it was submitted in the original application. He submitted that the amount of R5 019.77 as referred to in the document and by Mr Sibanda was not in fact the correct amount available for repayment of the loans. The correct amount available was in fact the amount of R7 650. 00 as indicated in the schedule as "Available amount" & "Gross collectable".
14. Mr De Lange further submitted that the Debt Counsellor had made an allowance for an amount of R 1 932.55 to be reflected as "Credit agreement linked insurance". This amount reflected the insurance and other monthly fees payable by the consumer on the loan agreements but these amounts were often already included in the agreed monthly instalments. One could, therefore, add this amount of R 1 932.55 to the amount of R5 019.77 in certain circumstances and then the First and Second Appellant would have R 7 650.00 available, which was sufficient to cover all the agreed instalments. This amount of R7 650.00 is reflected in the income and expenditure form as "Gross debt affordability".

CONSIDERATION OF THE EVIDENCE

15. The Appeal Tribunal fully appreciates the explanation provided at the appeal hearing but can also fully understand why Mr Sibanda refused to confirm the application based on affordability. Based on the description in the document of the amount of R5 019.77 as being the *"Net debt affordability for distribution to settle debts"*, *First and Second Appellants* were not in a position to pay the accepted total instalment required.
16. The Tribunal acknowledges Mr De Lange's submissions regarding the gross amount available and the amount allowed for possible insurance premiums; however it appears that the Debt Counsellor is expecting the Tribunal to decipher and interpret the consumer's income assessment to try and find a basis for affordability.
17. While the Tribunal is not specifically required by the Act to assess the consumers' income and expenditure when considering an application to confirm a debt re-arrangement agreement as an order of the Tribunal, there is nothing preventing the Tribunal from doing so in the interest of confirming that the consumers can afford the agreed repayments. In this instance the information submitted on behalf of the Appellants indicated that the consumer could not afford the repayments.
18. The Presiding member who considers these applications cannot reasonably be expected to infer that certain of the amounts in the financial assessment correctly reflect the consumer's position and others not. It is further not reasonable to expect of the Presiding member to make an assumption regarding whether or not the insurance premiums are already included in the repayments. For the presiding member to make an informed decision, the information presented must be clear and unambiguous.
19. Furthermore, the Presiding member was presented with a draft consent order which also indicated that the consumers would not have been able to meet their monthly instalments as it was set out. The draft consent order was never redrafted to reflect the consumers' true state of finances that would allow them to repay the monthly instalments without any trouble. To illustrate this point, Mr De Lange asked the Tribunal's indulgence to work out the total amount repayable by First and Second Appellants and his total came up to R 5551.57 in the first month when in the income and expenditure analysis, the net debt affordability for distribution to settle debts was R5 019.77. The calculations in the second and following months, as per the draft consent order, totalled R 5995.48.

20. It appears that the Debt Counsellor should have rephrased the wording or layout used in the financial assessment document or alternatively clearly and simply illustrated that the instalments agreed to, can be paid by the consumer.
21. It appears further that the Debt Counsellor should have checked the draft consent order that he sent to the Tribunal to be reduced to an order. The draft consent order and the income and expenditure form should have clearly demonstrated that the consumer would, if the consent order is confirmed, be able to meet his or her monthly instalments with the disposable income that they have.
22. It also appears that the Debt Counsellor did not use the correct citation of the Credit Providers in order for the draft consent order to reflect the correct parties that the consumers are entering into a debt rearrangement with. Even though this was not one of the reasons that the single member refused the initial application, this point is not moot or facetious. It is a matter of law.

CONCLUSION

23. The Tribunal does not find any basis for setting aside the refusal of the application and substituting it with a new order. The reason for this is that this appeal panel of the Tribunal has to deal with the case as it served before the single member in order to weigh whether he should not have come to the conclusion he had.
24. It must however be noted that it would not be reasonable to deprive the consumer of the opportunity to lodge a new application, should his financial information be properly presented and they are in a position to afford the agreed repayments.

ORDER

Accordingly, the Tribunal makes the following order:

25. The appeal against the refusal of the application by Mr Sibanda fails.
26. The Appellants are at liberty to lodge an entirely new application to have the debt re-arrangement agreement confirmed as an order of the Tribunal, should First and Second Appellants' financial information included in the application clearly set out that they can afford the repayments agreed to and

citing the correct parties to the debt rearrangement to ensure that the consent order is a true reflection of the agreement between the parties.

27. No order is made as to costs.

DATED ON THIS 02nd DAY OF SEPTEMBER 2014

[signed]

Adv. HFN Sephoti

Panel member

Prof J Maseko (Presiding Member) and Prof B Dumisa (Member) concurring.

Authorised for issue by the National Consumer Tribunal

Case number

Date 2014 10 9
Cyy mm dd

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