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

Case number: **NCT/14496/2014/148(1)(P) NCA**

In the matter between:

**HANS REINHARD PETTENBURGER-PERWALD
OBO MARTHINUS STEPHANUS ALBERTUS PRETORIUS
ID NO [...]**

APPELLANT

and

**SANLAM (PTY) LIMITED
FIRST RAND BANK LIMITED
ABSA BANK LIMITED**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT**

Coram:

Adv J Simpson – Presiding Member

Ms L Best – Panel Member

Ms H Devraj – Panel Member

Date of Hearing – 25 August 2014

JUDGMENT AND REASONS

APPELLANT

1. The Appellant is Hans Reinhard Pettenburger-Perwald, a major male registered as a debt counsellor in terms of the National Credit Act 34 of 2005 (“the NCA”) with registration number NRDC49 (hereinafter

referred to as “the Appellant”). The Appellant lodged the appeal on behalf of Marthinus Stephanus Albertus Pretorius, a major male (hereinafter referred to as “Mr Pretorius”).

2. At the hearing of the appeal, an employee of the Appellant, Mr Rynhard De Lange (hereinafter referred to as “Mr De Lange”), appeared on behalf of the Appellant via Skype video and audio transmission.

RESPONDENTS

3. The Respondents are Sanlam (Pty) Limited, First Rand Bank Limited and ABSA Bank Limited (hereinafter referred to as “the Respondents”).
4. At the hearing of the matter there was no appearance by any of the Respondents or any representative on their behalf.

APPEAL

5. The Appellant brought an appeal in terms of Section 148(1) of the Act, against the decision of a single member.
6. The appeal was heard on 25 August 2014 by a full panel of the Tribunal.

JURISDICTION

7. The Tribunal has jurisdiction to hear this matter in terms of Section 148 of the Act in that a party may appeal a decision by a single member to a full panel of the Tribunal.

BACKGROUND

8. On 05 March 2014, the Appellant applied to the Tribunal for a debt re-arrangement agreement to be confirmed as an order of the Tribunal in terms of Section 138 of the Act, under case number NCT/13296/2014/138(1)(P).
9. On 30 April 2014, the debt re-arrangement agreement application was considered by a single member, Mr F Sibanda, who then refused to grant the application. The order was refused on the basis that the total monthly repayment amount was more than the consumer’s monthly disposable income.

10. According to the appeal that was filed by the Appellant, the grounds for appeal were on the basis that the budget was misinterpreted by the Presiding Member which led to the consent order being incorrectly refused.

THE HEARING

11. Mr De Lange, in his submission, referred the Tribunal to a document named “Income and Monthly Commitments Schedule” which is a summary of the assessment of Mr Albertus’s income and expenditure that was submitted in the original application. He submitted that the document reflects the gross income of the consumer as well as the net income and that the net income is arrived at after deducting all the day-to-day and monthly expenses of the consumer. Based on this, the consumer therefore has an amount of R2500.00 to pay towards all the credit provider loans.
12. Mr De Lange submitted that the amount of R1 957.40 as referred to in the order that was refused by Mr Sibanda was not in fact the correct amount available for repayment of the debt. The correct amount available was in fact the amount of R2 500.00 as indicated in the *Income and Monthly Commitments schedule* as “*Available amount*”.
13. Mr De Lange further submitted that Mr Sibanda therefore considered the information in the wrong column in the *Income and Monthly Commitments schedule* which was the column that stated “*Net debt affordability for distribution to settle debts*” and should have considered the amount that was reflected as “*Available Amount*”. The Net debt affordability amount includes the deductions for the credit linked insurances.

CONSIDERATION OF THE EVIDENCE

14. Based on the evidence before the Tribunal, the Tribunal can fully understand why Mr Sibanda refused the application based on affordability. Based on the description in the document of the amount of R1957.40 as being the “*Net debt affordability for distribution to settle debts*”, Mr Pretorius was not in a position to pay the total monthly commitment as per the draft consent order.
15. The Tribunal also found that there was more than one document that was filed with the Tribunal that reflected the amounts available towards the repayment of the debt. For example, the Tribunal referred Mr Lange to a document titled “*Debt Restructuring Proposal*” that was also part of the initial application

and this document refers to “*Affordability after CLI, DC and PDA Fees*” as R1957.40. This could also be misleading to the Tribunal in terms of trying to determine which document contains the correct amount that needs to be considered in making a determination on affordability.

16. The Tribunal acknowledges Mr De Lange’s submissions regarding the “*Available amount*” and the amount allowed for possible insurance premiums which is the “*Net debt affordability for distribution to settle debts*”. However, it appears that the Appellant 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 consumer’s 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 consumer can afford the agreed repayments. Once a debt re-arrangement agreement is confirmed as an order of the Tribunal it has serious implication for the parties involved. In terms of Section 160 of the Act a person commits an offence if they contravene or fail to comply with an order of the Tribunal. In this instance the information submitted by the Appellant 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 that 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. To avoid a situation such as this, it is strongly suggested that the debt counsellor in future, firstly only submit one document that reflects the income and expenditure assessment of the consumer and that this document must clearly state one amount that the Tribunal member must consider in making a determination on affordability.

CONCLUSION

20. The Tribunal does not find any basis for setting aside the refusal of the application and substituting it with a new order.

21. It must however be noted that it would not be reasonable to deprive the consumer of the opportunity to lodge a new application, should Mr Pretorius' financial information be properly presented and he is in a position to afford the agreed repayments.

ORDER

Accordingly, the Tribunal makes the following order:

22. The appeal against the refusal of the application by Mr Fungai fails.
23. The Appellant is at liberty to lodge an entirely new application to have the debt re-arrangement agreement confirmed as an order of the Tribunal, should Mr Pretorius's financial information included in the new application clearly confirm that he can afford the repayments agreed to.
24. No order is made as to costs.

DATED ON THIS 08th DAY OF SEPTEMBER 2014

[signed]

Ms H Devraj

Member

Adv J Simpson (Presiding Member) and Ms L Best (Member) concurring.