

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

Case number: NCT/17871/2014/148(1)(P)

In the matter between:

HANS REINHARD PETTENBURGER-PERWALD

APPELLANT

OBO

ANNIE MMANTHOA MOKOENA

and

LE MORGAN DIRECT MARKETING (PTY) LIMITED

FIRST RESPONDENT

DIRECT AXIS (SA) (PTY) LIMITED

SECOND RESPONDENT

NEDBANKLIMITED

THIRD RESPONDENT

AFRICAN BANK LIMITED

FOURTH RESPONDENT

Coram:

Mr F Sibanda – Presiding member

Adv F Manamela – Member

Ms P Beck – Member

Date of Hearing – 10 December 2014

JUDGMENT AND REASONS

THE PARTIES

1. The Appellant is Mr Hans Reinhard Pettenburger-Perwald a debt counsellor registered in terms of the National Credit Act, No 34 of 2005 ("the NCA") with registration number

NRDC49 (hereinafter referred to as "the Appellant"). The Appellant is acting on behalf of Ms Annie Mmanthoa Mokoena, a consumer who applied for the restructuring of her debt in terms of the NCA.

2. The first to fourth Respondents are credit providers registered in terms of the NCA.

JURISDICTION

3. The Appellant lodged an appeal against the decision of a single member of the Tribunal in terms of section 148(1) of the NCA, which states that –

"(1) A participant in a hearing before a single member of the Tribunal may appeal a decision by that member to a full panel of the Tribunal"

4. The Tribunal has jurisdiction to hear this matter.

ISSUES TO BE DECIDED

5. The Tribunal must determine whether the single member erred in refusing to make a debt-rearrangement agreement an order of the Tribunal.

BACKGROUND

6. On 8 July 2014 the Appellant lodged an application with the Tribunal in terms of section 86(8) of the NCA, on behalf of Ms Annie Mmanthoa Mokoena to have a debt re-arrangement agreement made an order of the Tribunal in accordance with section 138(1) of the NCA.
7. The application was considered by a single member, Prof J. Maseko on 23 August 2014. Prof Maseko refused to grant the application for the following reasons:

"1. While the Draft Consent Order refers to the second Credit Provider (listed herein as third Respondent), as Direct Axis (SA) (Pty) Limited,

the acceptance letter containing the related information in the case file is actually written on behalf of First Rand Bank Limited – and it says so right on the face of it – which makes the Credit Provider the latter than the former.

2. *While the consent to service by means of fax or email, from the first Credit Provider listed in the Draft Order as the second Applicant was found in the case file, the actual acceptance letter was not. This means that this vital piece of evidence was lacking to enable the Tribunal to confirm the supposed rearrangement¹."*
8. On 15 September 2014 the Appellant lodged an appeal against the decision of the single member.
9. A Notice of Complete Filing was sent to the parties on 30 September 2014, followed by a Notice of Set Down dated 19 November 2014. The matter was set down for hearing on 10 December 2014.

THE HEARING

10. At the hearing the Appellant was represented by Mr Rynhard De Lange (hereinafter referred to as "Mr De Lange") who appeared via Skype video and audio transmission. There was no appearance by any of the Respondents or their representatives at the hearing.
11. The Notice of Set Down sent to the parties stated that the Respondents had to respond within 15 days by serving an answering affidavit on the Appellant.. The Respondents however failed to do so.
12. Rule 13(5) of the Rules for the Conduct of Matters before the National Consumer Tribunal ("the Rules of the Tribunal") provides that:

¹ Page 3, 'Refusal of an application for a consent order', dated 23 August 2014

"Any fact or allegation in the application or referral not specifically denied or admitted in the answering affidavit, will be deemed to have been admitted"

13. In the absence of any answering affidavit filed by the Respondent, the Appellant's application and all of the allegations contained therein are deemed to be admitted.
14. Rule 24(1)(b) of the Rules of the Tribunal further provides that the Presiding member may continue with the proceedings in the absence of the Respondents if the Respondents fail to attend or be represented at the hearing.
15. Rule 24(2) of the Rules of the Tribunal states that the Presiding member must be satisfied that the Respondents were properly notified of the date, time and venue of the proceedings.
16. In this matter the Notice of Set Down issued by the Registrar to all the parties is before the Tribunal and the Presiding member is satisfied that all the parties were properly notified of the hearing.
17. The Tribunal therefore proceeded with the hearing of the matter.
18. Mr De Lange explained to the Tribunal that Direct Axis (Pty) Ltd, the second Respondent, acts on behalf of First Rand Bank and therefore all correspondence should go through Direct Axis (Pty) Ltd.. Furthermore the acceptance letter from the Credit Provider clearly states that it is from Direct Axis (Pty) Ltd.
19. The Appellant contends that the acceptance letter from Le Morgan Direct Marketing (Pty) Ltd, the first Respondent, is and was in the original application.

CONSIDERATION OF THE EVIDENCE

20. The Tribunal considered the oral submissions by the Appellant and the documents filed of record.

21. Page 8 of the original application for debt re-arrangement contains a letter of acceptance on a Call Direct letterhead. The address on the top right hand corner of the letter cites FirstRand Bank Limited but then indicates that Direct Axis is an agent of the Credit Provider. The letter indicates at the bottom after the signature that it is from Direct Axis, on behalf of FirstRand Bank. Furthermore, page 36 of the original application for a debt re-arrangement order states that Direct Axis is a subsidiary of FirstRand Bank Limited.
22. This creates confusion as to who the credit provider is. As stated by Mr De Lange, Direct Axis acts on behalf of FirstRand Bank. Therefore, Direct Axis is incorrectly cited as the Credit Provider.
23. It should be noted that a Tribunal Member makes a decision based on the information in front of him or her and not on information submitted subsequently. Therefore the Tribunal Member in this case did not err in refusing to grant the order as requested.
24. On page 31 of the original application for a debt re-arrangement order there is a letter of acceptance from Le Morgan Direct Marketing (Pty) Ltd, bearing an official stamp and contact details of the company. There is no reason to believe that this letter was not in the original documents considered by the Tribunal member.

CONCLUSION

25. The Tribunal finds that Direct Axis is an agent and a subsidiary of FirstRand Bank Limited and is wrongly cited as the Credit Provider..
26. With respect to the First Respondent it is evident that a letter of acceptance was in the original application for a debt re-arrangement order.

ORDER

27. Under the circumstances and for the reasons stated above, the Tribunal orders as follows:

- a. The appeal against the refusal by Prof Maseko to grant the debt re-arrangement order is dismissed based on the incorrect citation of Direct Axis as the Credit Provider.;
- b. The Debt Counsellor may submit a new application.
- c. There is no order as to costs.

DATED THIS 11th DAY OF FEBRUARY 2015

[signed]

FK Sibanda
Presiding Member

Adv F Manamela (Member) and Ms P Beck (Member) concurring.

Authorised for issue by the National Consumer Tribunal

Case number _____

Date 20 / 6 / 11
Ccy / mm / dd

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