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

Case number: **NCT/18507/2014/137(3)**

In the matter between:

NATASHA ESTERHUIZEN

APPLICANT

And

BRIDGE LOANS

RESPONDENT

Coram:

Adv. J Simpson – Presiding member

Date of Hearing – 31 March 2015

JUDGMENT AND REASONS

APPLICANT

1. The Applicant in this matter is Natasha Esterhuizen, a natural person residing at [7 H.....] Street, [V.....], [B.....], (hereinafter referred to as “the Applicant”).
2. At the hearing the Applicant was represented by Mr Bjorn Lottering, the managing director of Debt Dispute Resolution CC (“Debt Dispute”).

RESPONDENT

3. The Respondent in this matter is a registered credit provider with registration number NCRCP836 and situated at 9 Roy De Vries Laan, Platteklouf, Platteklouf (hereinafter referred to as “the Respondent”).
4. There was no appearance by the Respondent or any representative on its behalf at the hearing.

APPLICATION TYPE

5. This is an application in terms of Section 137 (3) of the National Credit Act 34 of 2005 (“The Act”), wherein the Applicant seeks the following order from the National Consumer Tribunal:

“The credit provider assist the consumer in a consensual manner, in terms of the Credit Industry Code of Conduct, to repay the debt in offered affordable instalments.”

6. Section 142(3)(a) allows for an application in terms of section 137(3) to be heard by a single member.

BACKGROUND

7. The documents lodged with the Application do not provide much detail regarding the background to the matter. Based on submissions made by the Applicant at the hearing it appears that Ms Esterhuizen approached a company called Accord Debt Solutions CC (“Accord”) to assist her in negotiating a repayment plan with her various creditors. Accord is not a debt counselling firm, although it appears to follow a process of debt restructuring which is in many respects similar to the formal debt counselling process mandated by the Act. From the documents attached to the Application, It appears Accord was able to negotiate repayment plans with all Ms Esterhuizen’s creditors except for the Respondent. Debt Dispute then became involved in the matter in a manner that is not entirely clear from the papers. Debt Dispute also describes itself as an

alternative dispute resolution agent. In any event Debt Dispute issued a section 134(5) certificate stating that the alternative dispute resolution had failed. Debt Dispute then lodged the current application with the Tribunal on behalf of Ms Esterhuizen.

THE HEARING

8. During the Hearing the Tribunal put numerous questions to the Applicant in order to clarify the order being sought and the nature of the application.
9. Mr Lottering sought assistance from Mr Alman, who was sitting next to him, in answering the questions put by the Tribunal and Mr Alman then also requested to appear as a representative on behalf of the Applicant in the matter – which the Tribunal permitted.

CONSIDERATION OF THE MATTER ON A DEFAULT BASIS

10. The application states that the Applicants certify that the application was served on the Respondent in accordance with Tribunal Rule 30. Rule 30 (1)(b) allows for service to be effected by sending the document to the Respondent by registered post. Rule 30(3)(b) requires the postal agent's receipt with the tracking code as proof of service in such an instance.
11. In the matter before the Tribunal the Applicant failed to provide any specific receipt as proof of service. The Applicant merely submitted an affidavit on oath stating that they posted the application using Postnet on 15 October 2014 and that a slip was not provided to them. They were only provided with a customer copy reflecting a tracking number. What the Applicant appears to be referring to is a copy of a letter sent by Debt Dispute to the National Credit Regulator which has a small stamp on it. The stamp contains a reference to a registered letter being sent and a "RD" number. There is no indication on the stamp of when the letter was sent and to which address.
12. Rule 25(3)(b) allows the Tribunal to make a default order if it is satisfied that the application documents were adequately served. In this particular matter there is no objective evidence to show that the documents were indeed sent to the correct Respondent and to the correct address.

The Tribunal is not placing the submissions made in the affidavit by the Applicant in doubt but it is unable to satisfy itself objectively that the documents were indeed served correctly. The fact that the Tribunal Registrar may have accepted the application as complete and issued a notice setting the matter down for hearing does not bind the Tribunal in any way.

13. Under the circumstances the Tribunal will not issue a default order in this matter as applied for. The issue regarding the service of the documents could possibly be rectified by the Tribunal issuing a directive that the documents be served correctly before the matter is considered. However there are numerous other aspects regarding the application that offer serious obstacles to the application being granted.

CONSIDERATION OF THE APPLICATION

14. Although the Act refers extensively to alternative dispute resolution agents there was no process provided for in the Act to register them as such. The Act merely defines an alternative dispute resolution agent as meaning “.....a person providing services to assist in the resolution of consumer credit disputes through conciliation, mediation or arbitration;”. This definition is very wide and could essentially mean any person whatsoever, whether skilled or not, who phones a credit provider on behalf of a consumer. The National Credit Amendment Act 19 of 2014 now provides for a process of registering alternative dispute resolution agents but until persons are actually registered in this regard the Tribunal would be hard pressed to accept a certificate issued by a non-registered entity merely professing to be such an agent.
15. Section 137(3) provides that:

(3) A consumer or credit provider who has unsuccessfully attempted to resolve a dispute directly with the other party and through alternative dispute resolution in terms of Section 134(4) may file an application contemplated in this Act at any time within -
(a) 20 business days after the failure of the attempted dispute resolution; or
(b) such longer time as the tribunal may allow on good cause shown.
16. Section 134 subsection (4) provides for matters referred directly to the Tribunal and states as follows:

“In respect of any dispute between a credit provider and a consumer that could be the subject of an application to the Tribunal in terms of this Act, other than Part C of this Chapter, the consumer or credit provider, before either may apply directly to the Tribunal-

(a) Must attempt to resolve the matter directly between themselves; and

(b) If unable to do so, must refer the matter –

(i) to the ombud with jurisdiction, for resolution in accordance with this Act and in terms of the Financial Services Ombud Schemes Act, if the credit provider concerned is a financial institution and a participant in a recognised scheme as defined in that Act; or

(ii) in any other case, to either –

(aa) A consumer court for resolution, in accordance with this Act and the provincial legislation establishing that consumer court; or

(bb) An alternative dispute resolution agent, for resolution by conciliation, mediation or arbitration.

17. The section therefore makes it clear that a dispute must first be referred to an Ombud if the credit provider concerned is a participant in such a scheme. The Applicant conceded this point when it was raised in the hearing but made no further submission. As it stands it is possible, even probable, that the Respondent is a participant in such an Ombud scheme and the matter has been prematurely referred to the Tribunal.
18. Lastly, section 150 of the Act sets out the orders that the Tribunal may make. The order the Applicant is seeking does not appear fall within the scope of any of the listed orders or powers in section 150. The Applicant referred the Tribunal to section 150(i) which allows the Tribunal to make any appropriate order required to give effect to a right in the Act. The Applicant could however not direct the Tribunal to any right which Ms Esterhuizen had in relation to the dispute.
19. It finally bears mentioning that section 137(3) of the Act refers to a consumer or credit provider filing an application but does not specifically state that the application must be filed with the Tribunal. Although the section does not refer to the Tribunal specifically one can safely infer that the application must be filed with the Tribunal. The section is titled “Initiating applications to the Tribunal” and the various subsections clearly refer to the Tribunal.

ORDER

20. Accordingly, the Tribunal makes the following order:-

20.1 The application for an order in terms of section 137(3) of the Act is refused

20.2 No order as to costs.

DATED ON THIS 11TH DAY OF JUNE 2015

Adv J Simpson
Presiding Member