



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED:

CASE No. 13341/2021

Date: 16/05/2022 **Signature:**

In the matter between

FIRSTRAND BANK LIMITED T/A FIRST NATIONAL BANK
(REGISTRATION NUMBER 1929/001225/06)

Applicant

and

THE MAGISTRATE FOR THE DISTRICT
OF EKURHULENI NORTH, HELD AT TEMBISA
MR MM RATLOU

First Respondent

NESTA NEL

Second Respondent

ANNA PULENG MOTAU

Third Respondent

DIRECT AXIS SA (PTY) LIMITED

Fourth Respondent

FINCHOICE (PTY) LIMITED

Fifth Respondent

NEDBANK LIMITED

Sixth Respondent

TRUWORTHS LIMITED

Seventh Respondent

MFC, A DIVISION OF NEDBANK LIMITED

Eighth Respondent

JUDGMENT

MAHOMED AJ,

INTRODUCTION

1. The applicant in this matter seeks a declarator and an order to review and set aside a debt restructuring order issued by the first respondent sitting as the Magistrate for the District of Ekurhuleni North at Tembisa.
2. The second respondent the debt counsellor opposed the application and raised a point in limine, on grounds that on the facts, a review is the incorrect procedure to have followed and that the applicant ought to have taken the order on appeal. It was further submitted that the applicant is seeking to “change the outcome” of the order, it did not dispute any procedural point, impropriety, bias, or unfairness when a review would be appropriate. Furthermore, it was argued, that when the applicant relies on section 22 of the Superior Courts Act on grounds of the court’s jurisdiction, it is effectively, trying to disguise an appeal in this review application. The second respondent submitted

the order of the court a quo, is correct and good in law, the first respondent did not err when it granted the order.

3. The first respondent agreed to abide by the decision of the review court, it conceded based on the previous judgments, it did not have the jurisdiction to grant the order.

BACKGROUND

4. The applicant, a credit provider, advanced two loans, under different account numbers to the third respondent (the debtor). The debtor was unable to pay off several debts and approached the second respondent (“the counsellor”) to apply for debt review in terms of the National Credit Act.
5. The counsellor, who becomes the applicant, in terms of the National Credit Act¹, (“the Act”) presented the court a quo with a proposal, which set out the repayment plan in respect of all the debts over an extended period. In October 2020, the first respondent, the court a quo, in terms of s 87 of the Act and having considered the information before it granted the debt review order.

¹ 34 of 2005

6. The applicant submitted that the court a quo acted ultra vires, when it granted the order, in that the first respondent, did not have the authority to grant an order where the monthly repayment amount is lower than the interest payable each month.

7. Advocate Bruwer, who appeared for the applicant, submitted that the decisions in **NEDBANK LTD v NORRIS**² and in **NEDBANK LTD v JONES AND OTHERS**³, were endorsed by the SCA in **FIRSTRAND BANK LTD v McLACHLAN AND OTHERS**⁴, wherein the SCA dealt with the powers of the court and stated:

“[17] ... a debt review order which does not result in the satisfaction of all responsible obligations assumed under the credit agreement during the repayment period does not meet the purpose of the NCA.”

[18] The reduction of the monthly instalment was so substantial that it does not remotely cover the monthly interest due in terms of the order. Such an order does not serve to protect the interests of the consumer who would, at the end of the period, be left with a substantial debt which they would in all likelihood be unable to pay. The debt review order is therefor ultra vires the provisions of the NCA and was accordingly void ab origine.”

² 2016 (3) SA 568 EPC

³ 2017 (2) SA 473 (WCC)

⁴ 2020 (6) SA 46 SCA

IN LIMINE

8. Advocate C Spanenberg, appeared for the second respondent and submitted that the applicant attacks the order for a change in the order and that it should have appealed the order.
9. Counsel submitted that the applicant's reliance on s 22 of the Superior Courts Act 10 of 2015 is misplaced and that the applicant in fact attacks the decision taken and not the procedure adopted, it is an appeal presented under the guise of a review.
10. It was further argued that the applicant has failed to show any mala fides, improper conduct, or unfairness in the outcome due to incorrect procedures, for it to succeed in a review. Counsel submitted that the applicant only disputes the rearrangement in respect of one debt, where the entire debt review process is in respect of all debts. The applicant seeks to be favoured above other creditors which is not what the Act envisages.
11. Counsel proffered that the applicant does not raise any issue in respect of the other debt. It appears to approbate and reprobate. The applicant continues to accept payments as set out in the proposal submitted to the court a quo and in terms of the order made.

12. There is no evidence of a procedural irregularity or impropriety or a dispute in audi alterem partem.

13. In **KRUMM v THE MASTER⁵** and **KHADER v CHAIRMAN, TOWN PLANNING APPEALS BOARD⁶**, the courts have held:

“Judicial review is in essence concerned, not with the decision, but with the decision-making process. Review is not directed at correcting a decision on the merits. It is aimed at the maintenance of legality.”

14. I agree with Ms Spanenberg, the applicant appears to approbate and reprobate, when it applies for a review, based on the first respondent’s authority/ jurisdiction, in respect of only one of the amounts it has loaned.

15. I agree that the applicant seeks a different outcome in respect of the large amount it loaned, it does not attack the procedures or method adopted or any point of illegality in the outcome of the application before the court a quo. Based on the authorities set out earlier, the applicant’s approach is incorrect.

16. The point must succeed, and I address this point later, below.

⁵ 1989 (3) SA 944 (D) at 9511-J

⁶ [1998] 4 ALL SA 201 (N) at 207

THE APPLICANT'S CASE

17. Mr Bruwer submitted that his client advanced a personal loan in the amount of R88 920,96 with an interest rate at 23.5%. The monthly interest payable on that amount would have been R2 013,17.
18. He proffered that the first respondent granted an order on 26 October 2020 that the third respondent's debt be restructured and that the applicant, be repaid in an amount of R1 092.85 per month. He submitted that by November 2020, the amount of the loan increased to an amount of R110 058.43, by January 2021 the amount had escalated to R124 646.76. In November 2020, the interest payable was R2 633. 74 and by January 2021 the interest payable was R2 715.24.
19. Mr Bruwer submitted that the first respondent conceded that:
- “The Court is in agreement that it did not have authority to issue an order in light of the findings in the referred cases and while the monthly repayment amount did not cover the monthly interest payable”⁷*
20. Counsel advised the court that the applicant, has no problem with the restructuring of the smaller loan of R4 751.00 but prays that the order

⁷ 007 -7

by the first respondent be reviewed and set aside, only in respect of the personal loan and the order be corrected to read:

“the recommendation in respect of the FNB personal loan account number 4-000077-308-657 is rejected with costs.”

21. Counsel submitted further, that there is no dispute that the amount ordered to be repaid on the applicant's loan did not and does not cover the monthly interest payable on that loan.
22. Mr Bruwer furthermore, informed the court the monthly repayment must exceed the monthly interest payable, as at the date the order is granted.
23. Counsel submitted that the test is “how much was payable per month at the time the order was made”, the “cascading effect” that the second respondent refers to is of no worth given that one is dealing with an unknown, when the interest continues to accumulate and the debtor never knows if he/she will ever pay off the debt, and is still left with a lot of money to pay at the end of the repayment period. (The cascading effect, is when smaller debts are paid up, more money becomes available for distribution to larger creditors, which then increases the repayments to the large creditor.)

24. As to the procedure to review the order, Mr Bruwer referred the court to the provisions of s 22 Superior Courts Act 10 of 2013,

“(1) The grounds upon which the proceedings of any Magistrates’ Court may be brought under review before a court of a Division are-

(a) Absence of jurisdiction on the part of the court”

25. Mr Brewer submitted the review is appropriate as it is settled law that the Magistrates Court which is empowered to make an order for rearrangement of a debtors obligations to its creditors, acts ultra vires if the arrangement is such that the amount for repayment is less than the amount of interest payable per month on the debt. The court does not have jurisdiction to make such an order. The order does not fulfil the objectives of the debt rearrangement process, it does not assist the debtor, who finds at the end of the repayment period, he/she still has a large amount still owing.

THE SECOND RESPONDENT’S CASE

26. Ms Spanenberg argued that the court a quo did not err, and that the proposal put to the first respondent, in casu, sets out all debts, all repayments, and their respective period of repayment. The debtor does know how much is paid monthly.

27. The second respondent in consultation with the applicant, incorporated an escalation of 5% annually, which is factored into the cascaded payment plan that services both the interest and capital.
28. In addition, when small debts are paid off, money will become available to increase the repayments on larger debts. The cascading effect, Ms Spanenberg argued, must be considered.
29. Counsel furthermore argued that the proposal sets out the complete repayment plan in respect of all debt and sets out the final instalments, including interest payments to satisfaction of the entire debt obligations to all creditors.
30. The debtor knows how each debt is liquidated and when each debt together with interest over the period is paid up.
31. Counsel distinguishes the facts in casu from those in **McLACHLAN AND OTHERS**, supra, when she submitted that there is no change in interest rate in casu, there is no alteration to the obligations of the debtor to creditors. In the McLACHLAN case the court changed the interest rates and did not adopt the proposal put to it by the debt counsellor.

32. Ms Spanenberg submitted that there are increases in 2023 as a result of the escalation which will result in higher repayments above interest amounts.

33. Furthermore, counsel argued that the SCA was concerned with the interest accumulating, that the arrangement would not serve the purpose of the Act and that the debtor would find he/she is still left with a high amount outstanding at the end of the repayment period.
 - 33.1. It was argued there is no such risk in casu, in that the proposal has set out all debt and interest payable over the period up to the final instalment. For as long as the debtor continues to service the debt as per the proposal, there will be no remaining amount after the period of payment.

 - 33.2. Ms Spanenberg submitted therefor, that it is not common cause that the proposal on repayments does not cover the interest payable monthly rather it is common cause that, “initially” it will not cover interest but the order of the court a quo includes an escalation, that increases the repayment amounts per creditor which will then cover the monthly interest payments and monthly repayments to capital, together with the cascading effect.

33.3. Counsel submitted that the proposal complies with the intention and purpose of the Act, it may be that it does not suit the applicant's repayment expectations, but that is the fate that all creditors suffer.

33.4. Counsel submitted that the distribution of funds and allocation to each creditor over the identified periods is arrived at by reference to industry accepted debt restructuring guidelines, referred to as Debt Counsellors Rules Systems which is approved by all major credit providers, including the applicant.

33.4.1. this system seeks to fairly distribute the amount available for distribution equally among all creditors.

33.4.2. the third respondent cannot meet any of the counter offers put by the applicant, nor can the one debt be rejected as prayed for, without prejudicing the other creditors and the debtor herself. The debtor cannot meet the repayments as per the credit agreement, it is beyond her means.

JUDGMENT

34. In **BONGANI BETHWELL KHIBA v MAGISTRATE NEL, KINGWILLIAMSTOWN**⁸, Lowe J, in addressing a similar issue of a review in terms of s 22 of the Superior Courts Act, stated a High Court on review will not interfere if no “substantial wrong was done to the Applicant”, and stated further at [3]

“in general, if a complaint is perceived relevant to the result of the proceedings of the Magistrates’ Courts, the appropriate remedy would be by way of appeal, but if the method of the proceedings is attacked, the remedy is to bring the matter on review. There are various grounds to bring a review, and include, “a gross irregularity in the proceedings.” Those irregularities are sufficient to establish an unfair outcome.

35. The court continued ⁹,

“the onus of proof of such review proceedings is that the applicant must first prove the existence of the irregularity, and that it was so gross that it was calculated to prejudice him/her, and, only if he/she discharges the at onus, then his/her adversary or opponent must satisfy the court that he/she in fact suffered no prejudice.”

36. The applicant did not make any submissions in relation to a procedural irregularity resulting in an unfair outcome before this court. It failed to discharge its onus, and I agree with Ms Spanenberg that the applicant attacks the outcome of the order of the court a quo.

⁸ Case No. 2765/2016 [11 April 2017]

⁹ Paragraph 15

37. If the procedure were a problem, a review is appropriate and it must then pertain to all the debts owed, including the smaller loan it advanced. However, the applicant approaches this court for relief pertaining only to one of the loans it advanced.
38. Ms Spanenberg correctly argues that the applicant is unwilling to wait its longer term of repayment and that if this court were to agree with the applicant and reject the order pertaining to the larger loan, the debtor is severely prejudiced in that she is liable for the repayment amounts as per the credit agreement which she cannot afford. It defeats the entire purpose of the debt review process.
39. The rejection of the one debt, must impact on the other debts which formed part of the debt review process. The repayment amounts are determined according to the total debt owed and the distribution is surely based on the entire amount available for distribution.
40. Therefore, I do not agree with Mr Bruwer that this court can reject the order regarding one debt without prejudice to other creditors.
41. I turn now to the merits of the application.

42. Section 86 of the Act provides that a consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted.
43. The second respondent applied for such an order, having consulted with all creditors, and considered the various objections from the applicant. The evidence is that the second respondent and the applicant agreed to an escalation in the repayment terms to service capital and interest. The further evidence is that the applicant has and continues to accept payments in terms of the order granted.
44. The order granted was based on the proposal presented, which I have had sight of. The proposal sets out the debt owed and payment periods for all creditors including the applicant's loan under account number 4 000077-308 657 in the amount of R88 920.96, in terms of the cascading effect¹⁰, which amount is finally paid off on 15 February 2028, in the amount of R1049.40.¹¹
45. I noted that initially the repayment amount, after debt review, was less than the monthly interest payable, however it is increased in July 2023 to R2 307.85 and from thereon progressively, as the smaller debts are paid off.

¹⁰ Caselines 004-121-125

¹¹ Caselines 004-124 line 1

46. The first respondent's in its reasons for judgment¹², stated:

“the court bona fide concluded and had no reason to think otherwise, that it was the intention of the Third Respondent (consumer) to settle all her obligations in relation to all credit providers as soon as possible and that once smaller debts were settled, increased repayments on the remaining bigger debts with other credit providers would be made. The order makes provision for such a case.” Then at paragraph 8¹³

“... it is therefore not correct to contend that the court made an outright order in conflict with the findings in the reported decisions referred to. ... paragraphs 3.4 of the Court Order made it clear that once smaller debts were paid off, any additional amount available could be paid to credit providers with larger debts and in that way in due course exceed the monthly amount payable in respect of the interest pertaining to the applicant's debt.”

47. I am of the view that the facts in casu are distinguishable from those in the **McLACHLAN** judgment supra, no changes were made either to the interest rate or any other contractual obligations of the debtor, in satisfaction of debts over an extended period.

48. The SCA expressed the view that the repayment plan did not “remotely cover the monthly interest due in terms of the order, that it cannot be in the interest of the consumer who would at the end of the period be left with a substantial debt which she would most likely be unable to pay.” In casu the repayment plan does cover interest, albeit

¹² Caselines 011-57 para 4

¹³ Caselines 011-58 at par 8

not initially. It does satisfy all debt including interest and must therefore be in the debtor's interest.

49. The first respondent did not act ultra vires, as the order made achieves the objectives of the Act. The repayments cover interest eventually and the debtor is not left with any debt at the end of the repayment period, all the debts are satisfied.

50. I agree with Ms Spanenberg that the proposal set out an economically sound repayment plan of both capital and interest over the allowed extended period.

51. The order made, achieves the eventual satisfaction of all obligations of the debtor, without any changes to the contractual obligations of the debtor to the creditors, based on a sound economic plan and is payable within the repayment period.

52. Accordingly, the application must fail, and it is dismissed.

COSTS

53. It is trite that costs must follow the outcome, however it is worth noting Ms Spanenberg's submissions that a debt counsellor executes a

statutory function and cannot attract a costs order if she acted within her duties.

54. In casu, the counsellor acted fully in terms of her duties and obligations as set out in the Act and performs a statutory duty.

55. Costs must follow the cause.

I make the following order

1. The application for review of the decision of the court a quo is dismissed.
2. The order of the court a quo stands and is of full force and effect.
3. The applicant is to pay the respondents party party costs.

MAHOMED AJ

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the 16 May 2022.

Heard on: 15 February 2022

Delivered: 16 May 2022

Appearances

For Applicant:

Advocate Bruwer

Instructed by CF van Coller Inc

Tel: 011 827 8422

For Second Respondent

Advocate C Spanenberg

Instructed by:

McKenzie van der Merwe & Willemse Inc

Email: louise@mmwlaw.co.za