SUMMARY

National Credit Act, 34 of 2005 – application for debt review – duties and functions of debt counsellor – failure by debt counsellor to properly execute statutory obligations – determination of over-indebtedness – erroneous application of Regulation 24, read with Guidelines published by the National Credit Regulator for assessing over-indebtedness – adverse costs order granted against debt counsellor

REPUBLIC OF SOUTH AFRICA

THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Rdg Mag Crt Case No: 13927/2011 **APPEAL CASE NO: A3030/2012**

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

14-3-2013
DATE SIGNATURE

In the matter between -

ABSA BANK - HOME LOAN — 1ST APPELLANT (3rd Respondent in the court *a quo*)

ABSA BANK - CREDIT CARD — 2ND APPELLANT (6th Respondent in the court *a quo*)

ABSA BANK - CREDIT CARD — 3RD APPELLANT (7th Respondent in the court *a quo*)

ABSA BANK - OVERDRAFT — 4TH APPELLANT (21st Respondent in the court *a quo*)

and

HELEN LU-ANN ROBB — RESPONDENT (In her capacity as Debt Counsellor)/ Applicant/Debt Counsellor in the court *a quo*)

JUDGMENT

BORUCHOWITZ J

[1] This appeal deals with the circumstances in which costs may be awarded against a statutory functionary. The appeal arises from the refusal

by a magistrate to grant an order of costs against the respondent, a debt counsellor performing statutory functions in terms of the National Credit Act, 34 of 2005 (the Act).

[2] In July 2011, the respondent, acting in terms of section 86 of the Act, brought an application for debt review in relation to two consumers, Mr and Ms Cassim. The application was made against twenty-one credit-providers with whom the Cassims had entered into credit agreements. The appellants, who were the third, sixth, seventh and twenty-first respondents, opposed the application principally on the ground that the respondent's determination that the Cassims were over-indebted was incorrect because it was based on an erroneous application of Regulation 24,[1] read with the Guidelines published by the National Credit Regulator for assessing over-indebtedness.[2]

[3] On the day before the hearing of the matter, the respondent withdrew the application but refused to pay the appellants' costs. The appellants accordingly sought costs against the respondent but the magistrate refused the appellants' application.

[4] In the written reasons for judgment the learned magistrate stated that the Court could not order the respondent to pay the costs of the abortive

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1 Regulations in terms of the National Credit Act GH R489 of 31 May 2006 ("the Regulations").

2 Debt-review workstream guidelines (25 January 2008). See "*Guide to the National Credit Act*", JW Scholtz *et al*, p 14-2; also see Regulation 24(7)(c).

application since her conduct was not "portrayed or in any other manner evident as mala fide". What the magistrate had in mind in this regard is to be found in the following passage of the magistrate's ruling delivered on 26 July 2012:

> "In the light of the fact that the debt counsellors and the only necessary requirement for them to perform these duties is merely a matric qualification. Unfortunately they do not have any tertiary level education especially in the light of the fact that they have not studied law and do not even know the various criteria that is to be applied for, or to determine over-indebtedness. The court is of the opinion that no order in respect of costs should be made. … "

[5] It was contended on behalf of the appellants that the magistrate had applied an incorrect test in considering the order as to costs in circumstances where the application was withdrawn at the last moment, and that had the correct test been applied the respondent would have been ordered to pay the appellants' costs.

[6] Rule 27(3) of the Magistrates' Courts Rules deals, among other things, with the withdrawal by an applicant of an application. It provides as follows:

> "(3) Any party served with notice of withdrawal may within 20 days thereafter apply to the court for an order that the party so withdrawing shall pay the applicant's costs of the action or application withdrawn, together with the costs incurred in so applying: Provided that where the plaintiff or applicant in the notice

of withdrawal embodies a consent to pay the costs, such consent shall have the force of an order of court and the registrar or clerk of the court shall tax the costs on the request of the defendant."

[7] It is clear from reading of Rule 27(3), read with Rule 33(1)[3] of the Rules that an application for costs may be made where a party withdrawing a matter does not tender costs.

[8] It is trite that a party who withdraws an action or application or who abandons a defence is in the same position as an unsuccessful litigant, and therefore the other party is ordinarily entitled to costs. A departure from the principle that costs must be awarded to the party which has been put to the expense of defending withdrawn proceedings, is only warranted in exceptional circumstances.[4]

[9] In the present matter, the only exceptional circumstance which could possibly have formed the basis of a disallowance of costs is the fact that the party which made and withdrew the application was a statutory functionary acting in fulfilment of a statutory obligation. Adverse costs orders are

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[3] Rule 33(1) reads as follows: "The court in giving judgment or in making any order, any adjournment or amendment, may award such costs as it deems fit.

[4] See *Germishuys v Douglas Besproeiingsraad* 1973 (3) SA 299 (NC) at 300D; *Reuben Rosenblum Family Investments (Pty) Limited and Another v Marsubar (Pty) Limited (Forward Enterprises (Pty) Limited & Others Intervening)* 2003 (3) SA 547 (C) at 550C; *Waste Products Utilisation (Pty) Limited v Wilkes and Another (Biccari Interested Party)* 2003 (2) SA 590 (W) at 597A-B.

ordinarily only made against such functionaries where they have acted improperly or with *mala fides*.

[10] A debt counsellor who refers an application to the Court under s 86(8)(b) and s 86(7)(c) is not a litigant in the ordinary sense, but fulfils a statutory obligation.[5]

[11] The general rule as to costs against public officials or statutory functionaries was propounded in *Coetzeestroom Co v Registrar of Deeds* 1902 TS 216, where Innes CJ held that –

> "[W]ith respect to the question of costs, the Court should lay down a general rule in regard to all applications against the Registrar arising on matters of practice. To mulct that official in costs where his action or his attitude, though mistaken, was *bona fide* would in my opinion be inequitable. And it would be detrimental to that vigilance in the administration of the Deeds Office, which it is so essential in the public interest to maintain. For the Registrar would be chary in giving effect to his own views on points of practice, if the result might be an order against him to pay the costs of a successful application; and this would be so whether the Government indemnified him or not. On the other hand, if costs are not to be given against the Registrar, when his action has been *bona fide* though mistaken, it is only right that an applicant who *bona fide* and upon reasonable grounds asks for an order against the

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[5] See *National Credit Regulator v Nedbank Limited and Others* 2009 (6) SA 295 (GNP) at 311G-H and cases there cited.

Registrar on a matter of practice should be similarly protected. Such an applicant should not, if unsuccessful, be ordered to pay the costs of the Registrar. This general rule we shall follow for the future; but the Court will reserve to itself the right to order costs against the Registrar if his action has been *mala fide* or grossly irregular, and against an applicant who has unreasonably or frivolously brought the Registrar into Court. The rule will not apply to cases in which the Registrar may be sued for damages caused to a third party by a negligent or improper discharge of his duties. In all such cases the question of costs will have to be decided simply upon the facts before the Court."

[12] But over the years our courts have qualified the general rule in *Coetzeestroom.*[6] Subsequent authorities have held that the rule should not be elevated into a rigid one of universal application which fetters the exercise of a judicial discretion in matters of costs.[7]

[13] A number of high courts have ordered public officials to pay costs where the circumstances of the cases warranted it. For example, in *Inkosinathi Property Developers (Pty) Limited v Minister of Local Government and Land Tenure,*[8] a public official was ordered to pay costs where his decision was based on irregular grounds and he was guilty of procrastination which caused the other party prejudice. In *City New Agency (Pty) Limited v Minister of the*

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6 See *Deneysville Estates Limited v Surveyor-General* 1951 (2) SA 68 at 81F-H.

7 See *Potter & Another v Rand Townships Registrar* 1945 AD 277 at 292-293; *Die Meester v Joubert en Andere* 1981 (4) SA 211 (A) at 218B-H; *Attorney-General, Eastern Cape v Blom and Others* 1988 (4) SA 645 (A) at 670F-G and cases there cited.

8 1991 (4) SA 639 (Tk) 645G-H)

Interior, Transkei,[9] public officials were ordered to pay costs where they had exceeded their authority and committed irresponsible actions. And, in *Deacon v Controller of Customs & Excise*,[10] a public official was ordered to pay costs where he had acted precipitously and in a cavalier manner. Where public officials act negligently in performing their statutory functions, costs may be awarded against them.[11]

[14] The rationale underlying the rule in *Coetzeestroom* is that courts should be slow to grant cost orders against public officials because those orders may dissuade them from carrying out their statutory functions and that would have a negative impact on the public interest. However, as the developing case law demonstrates, the courts have, in appropriate cases, attenuated the rule and awarded costs against public officials where circumstances warrant it.

[15] Whether the respondent had properly exercised her statutory functions requires a consideration of the relevant statutory framework. Broadly stated, the process of debt review is the following. In terms of s 86(1) of the Act, a consumer may apply to a debt counsellor in the prescribed manner and form to be declared over-indebted. The consumer must submit to the debt counsellor a completed Form 16, together with the documents therein

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9 1991 (3) SA 392 (Tk) 394D-G

10 1999 (2) SA 905 (SE) at 925E-F.

11 See *Moyakhe v Attorney-General, Transkei* 1993 (3) SA 197 (Tk) 203G-H.

specified, and provide the debt counsellor with the information specified in Regulation 24(b).

[16] Upon acceptance of an application, the debt counsellor must determine, within the prescribed manner and time, whether the consumer is over-indebted (s 86(6) of the Act). In conducting this assessment, the debt counsellor must consider the definition of "over-indebtedness" provided in s 79 of the Act, the criteria set down in Regulation 24(7)(a) to (c) of the Regulations and the guidelines issued by the National Credit Regulator, which are referred to in Regulation 24(7)(c).

[17] A consumer is regarded as over-indebted if the preponderance of information available at the time a determination is made indicates that the consumer, having regard to his or her financial means, prospects and obligations and probable propensity to satisfy in a timely manner all the obligations under a credit agreement to which a consumer is a party (s 79(1) of the Act, read with Regulation 24(7)(a) to (c)).

[18] If, having conducted this assessment, the debt counsellor reasonably concludes that the consumer is over-indebted, he or she may issue a proposal recommending, *inter alia*, that the consumer's obligations be re-arranged (s 86(7)(c) of the Act). The debt counsellor is required to refer the matter and the recommendation to the magistrates' court which must then conduct a hearing and determine whether to reject the recommendation or

application or, in the case of a proposed rearrangement, order the re-arranging of the consumer's obligations in any manner contemplated in s 86(7)(c)(ii).

[19] A reasonable finding that a consumer is over-indebted is thus a prerequisite for a valid application to court by a debt counsellor in terms of ss 86(7)(c) and 86(8)(b) of the Act.

[20] In opposing the application the appellants rightly pointed out that the respondent had not properly fulfilled her statutory obligations in assessing whether the Cassims were over-indebted. The respondent had adduced no documentary evidence of the Cassims' monthly and living expenses as required in Regulation 24(1). The determination of Mr Cassim's employment income was out-dated. It was based on a payslip dated 30 November 2010 when the application was made more than eight months later, in July 2011. The respondent adduced no documentary evidence of the income of Ms Cassim. The list of the Cassims' expenses included items that could not correctly be classified as necessary expenses. For example, gardening services and DSTV subscriptions are luxury expenses. The amount of certain monthly expenses was excessive; for example, cell phone expenses of R500 per month combined with a landline expense of R800 per month and a grocery bill of R4 000 per month. The Cassims were also driving a luxury vehicle which the respondent ought to have recommended that they sell in

order to reduce both their monthly vehicle instalment liability and their petrol expenses.

[21] The reasons given by the magistrate in the ruling delivered on 26 January 2012 for disallowing costs are wholly untenable. A debt counsellor is required to have a thorough knowledge of the debt-counselling process. Only persons registered in terms of s 44 of the Act are permitted to offer a service of debt-counselling. An applicant for registration as a debt counsellor must satisfy prescribed education, experience and competency requirements. These are laid down in ss 44(3), 46 and Regulation 10. One of those requirements is that the debt counsellor successfully complete a debt-counselling course approved by the National Credit Regulator.[12]

[22] Although courts will not readily interfere with costs orders on appeal, they will do so in cases of misdirection or irregularity.[13] It is apparent from the ruling, as supplemented by the written reasons, that the magistrate, in considering the issue of costs, applied the incorrect test. In particular, the magistrate failed to give consideration as to whether exceptional circumstances existed to deprive the appellants of their costs. In this regard the magistrate committed a misdirection which warrants interference with the exercise of discretion in relation to the question of costs.

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12 See "*Guide to the National Credit Act*", JW Scholtz *et al* para 11.3.3.2).

13 See *Protea Assurance Co Limited v Matinise*, 1978 (1) SA 963 (A) at 976H; *Minister of Prisons and Another v Jongilanga* 1985 (3) SA 117 (A) at 124B.

[23] The application for debt review was not based on a proper application of the statutory standards for assessing over-indebtedness. The respondent's determination that the Cassims were over-indebted was based on an erroneous application of the Act and Regulations, as also the Guidelines published by the National Credit Regulator for assessing over-indebtedness. All of this was clearly spelt out in the appellants' answering affidavit which was filed on 10 November 2011. However, rather than responding responsibly to the affidavit and immediately withdrawing the application so as to avoid the incurrence of unnecessary costs, the respondent delayed for more than three months and only withdrew the application on the eve of the hearing. By that stage, the appellants had already incurred additional costs in briefing counsel to prepare for the hearing.

[24] Having withdrawn the application in these circumstances, there is no reason why the magistrate should not have followed the general rule as to costs pursuant to the withdrawal of an application in the magistrates' court. I am unaware of any case in which a court has refused to grant costs against a public official or statutory functionary who institutes and then withdraws legal proceedings simply on the basis of the statutory character of the official's functions. The obvious reason for this is that there is no public interest in encouraging public officials, or those who wield statutory power, to bring wholly unmeritorious applications to court. Dissuading such officials from doing so by costs orders in appropriate cases in fact enhances the public interest. To clog the court roll with cases which are instituted and then later

withdrawn is contrary to the public interest and the efficient administration of justice.

[26] If a costs order were granted in this case it would serve the important purpose of cautioning debt counsellors to properly apply the provisions of the Act, the Regulations and the National Credit Regulator's guidelines before bringing applications to court for debt review.

[27] The above caution would serve not only the interests of the courts in maintaining the efficient administration of justice, but also the interests of both consumers and credit providers under the Act. The interests of consumers are protected because they will be assured that an application for debt review will be made on their behalf only when there are reasonable grounds for concluding that they are over-indebted. And the interests of credit providers are protected because only reasonably meritorious applications for debt review would be pursued.

[28] It needs to be emphasised that the discretion to award costs against a debt counsellor is not limited to instances where the application for debt review is withdrawn, as occurred in the present case. The Court has a discretion to award costs against a debt counsellor who in any way acts improperly or with *mala fides* in the discharge of his or her statutory obligations.

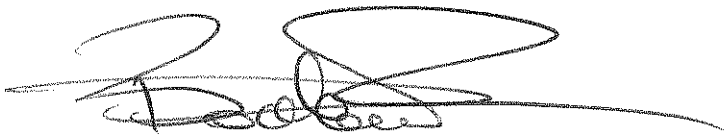
[29] For these reasons the appeal must succeed.

[30] The following order is granted:

(a) The appeal is upheld with costs.

(b) The order of the magistrate is set aside and the following order is substituted:

"The applicant/debt counsellor is ordered to pay the costs of the application for debt review."



BORUCHOWITZ J
JUDGE OF THE HIGH COURT

I agree:

MOLAHLEHI AJ
ACTING JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 14 MARCH 2013

ON BEHALF OF APPELLANTS : ADV K HOFFMEYR

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