

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

Case number: NCT/14498/2014/148(1) (P) NCA

In the matter between:

**HANS REINHARD PETTENBURGER-PERWALD
OBO CRYSTALL ANNE LINDECKE**

APPELLANT

and

**NEDBANK LIMITED
FOSCHINI RETAIL GROUP PROPRIETARY LIMITED
TRUWORTHS LIMITED
HOMECORP PROPRIETARY LIMITED
CAPFIN PROPRIETARY LIMITED
JDG TRADING PROPRIETARY LIMITED**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT
SIXTH RESPONDENT**

Coram:

Adv J Simpson	–	Presiding Member
Ms D Terblanche	–	Panel Member
Mr X May	–	Panel Member

Date of Hearing	–	07 August 2014
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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 Crystall Anne Lindecke, a major female (hereinafter referred to as "Ms Lindecke").

2. At the hearing 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 first to sixth Respondents are all credit providers registered in terms of the NCA. For the purposes of this judgment a more detailed description of the Respondents is not required.
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 lodged an appeal against the finding of a single member of the Tribunal in terms of section 148(1) of the NCA.
6. The appeal was heard on 7 August 2014 by a full panel of the Tribunal comprised of three members.

BACKGROUND

7. On 14 February 2014 the Appellant lodged an application in terms of section 86(8) of the NCA with the Tribunal on behalf of Ms Lindecke, to have a debt re-arrangement agreement made an order of the Tribunal in terms of section 138(1) of the NCA (Case number NCT/12886/2014/138).
8. The application was considered by a single member, Professor J Maseko, who then refused to grant the application. Professor Maseko stated the following in his written refusal dated 3 April 2014 –

"The Application and the Draft Order cites JDG Trading (Pty) Ltd, but the acceptances on the case file have been clearly made on behalf of Russels and another on behalf of Hi Finance, and there was not a single acceptance from JDG Trading (Pty) Ltd."

9. The Appellant lodged an appeal against the refusal of the Presiding member on the basis that JDG Trading (Pty) Ltd was acting on behalf of the credit providers concerned. The letters from JDG Trading (Pty) Ltd, accepting the repayment agreement, clearly state that it is from JDG Trading (Pty) Ltd acting on behalf of Russels and Hi Finance. The Appellant submitted that all the credit providers concerned had consented to the consent order being granted and there was no opposition from any party.

THE HEARING

10. Mr De Lange referred the Tribunal to the letters from JDG Trading which were on the case record for case NCT/12886/2014/138. He submitted that the letters clearly contained the letterhead of JDG Trading and clearly indicated that JDG Trading Financial Services was acting on behalf of the two credit providers concerned.

CONSIDERATION OF THE EVIDENCE

11. The Tribunal considered the letters from JDG Trading. The letters are both dated 9 December 2013 and contain the letterhead of JDG Trading. The letter on behalf of Russels contains the following relevant information –

*"Final Letter of Acceptance of Re-arrangement Proposal
JDG Trading Financial Services on behalf of: Russels"*

12. The letter on behalf of Hi Finance contains the following relevant information –

*"Final Letter of Acceptance of Re-arrangement Proposal
JDG Trading Financial Services on behalf of: Hi Finance"*

13. Based on the content of the letters from JDG Trading it is clear that JDG Trading is acting on behalf of Russels and Hi Finance. There is no reason to doubt whether JDG Trading is permitted to act on behalf of the credit providers in question.

14. It appears to the Tribunal that the basis of the Presiding member's refusal is that the credit provider is accepting the repayment agreement and not the entity acting on behalf of the credit provider. The draft consent order and the final order granted should therefore reflect the actual credit provider in question and not the entity or company acting on behalf of the credit provider.
15. While the Tribunal respects Professor Maseko's views in this regard, it appears clear to the Tribunal that the debt re-arrangement agreement has been accepted by the credit providers concerned. There is no reason placed before the Tribunal why it should doubt whether Russels and Hi Finance have accepted the agreement. The Tribunal further understands that the draft consent order could be clearer regarding the description of the credit provider, however should the description of the credit provider require clarification then this could easily be reflected in the final order. The final order issued by the Presiding member could therefore reflect, for example, that the credit provider is Russels and that the entity acting on behalf of Russels is JDG Trading (Pty) Ltd. In any event it would be more appropriate for the Presiding member to issue a directive to the debt counsellor requesting clarity or changes to the draft consent order, rather than refusing the order on this basis.
16. Based on the Tribunal's finding the consent order applied for could have been granted. However when the Tribunal assessed the original order applied for, it found that the letter from Sam Dale Trading (Pty) Ltd acting on behalf of Capfin, reflected an acceptance of an interest rate of 36.80 percent per annum which was payable on the loan.
17. In terms of regulation 42 of the NCA Regulations the maximum interest rate for unsecured credit transactions is $[(RR \times 2.2) + 20\%]$ per year.
18. At the time of accepting the debt rearrangement proposal (17 December 2013) the Repo Rate was 5.00 percent per annum - the following calculation determines the maximum permissible annual interest rate for unsecured credit transactions:

$$\begin{aligned} & \{(RR \times 2.2) + 20\% \\ & = \{(5.00 \times 2.2) + 20\% \\ & = 31.00\% \end{aligned}$$

19. Should the credit agreement with Capfin be a short term credit agreement - In terms of Regulation 42(1) of the NCA Regulations the maximum permissible interest rate for short term credit transactions is 5% per month.
20. When the loan is granted, the credit grantors, in this instance Capfin, is entitled to charge 5% interest per month (Regulation 42 Table A). Read with the definition for short term credit agreements this will be limited to six months¹.
21. Therefore, as found by the Tribunal in the matter of *Motitsoe v Absa Bank and Others*², the maximum amount of annual interest which the credit grantor can charge on a short term credit transaction is 30% (5% for 6 months).
22. Section 101(1)(d)(ii) of the NCA prohibits that interest be charged in excess of the maximum prescribed rate.
23. Therefore an agreement to pay interest at a rate of 36.80 percent per annum (whether on an unsecured or short term credit transaction) constitutes an illegal agreement and can never be endorsed by the Tribunal.

CONCLUSION

24. The Tribunal finds that the basis for the refusal for the application for a consent order by Professor Maseko can be set aside.
25. However the Tribunal is unable to replace the refusal by granting the consent order applied for, as the interest rate agreed to by Capfin exceeds the maximum rate permitted by the NCA.

¹ Regulation 39(2) defines a short term credit transaction as follows:

"(a) means a credit transaction –

(i) in respect of a deferred amount at inception of the agreement not exceeding R8,000; and

(ii) in terms of which the whole amount is repayable within a period not exceeding 6 months...."

² NCT/255/2009(1)(P)[2010] ZANCT 44.

ORDER

Accordingly, the Tribunal makes the following order:

26. The appeal against the basis of the refusal of the application by the Presiding member succeeds.
27. The refusal of the application for the consent order however remains.
28. The Appellant is at liberty to lodge an entirely new application to have the debt re-arrangement made an order of the Tribunal should the debt counsellor submit a new letter from Capfin accepting an interest rate which does not exceed the maximum rate.
29. No order is made as to costs.

DATED ON THIS 2nd DAY OF SEPTEMBER 2014

[signed]

Adv. J Simpson

Presiding Member

Ms D Terblanche (Tribunal member) and Mr X May (Tribunal member) concurring.

Authorised for issue by the National Consumer Tribunal
Case number NCT/14498/2014/148(1)
Date 2014, 10, 06
Ccy / mm / dd

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