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national consumer tribunal

**IN THE NATIONAL CONSUMER TRIBUNAL, HELD AT PRETORIA**

**Case No.: NCT/22/2008/149(1)(P)**

**In the matter between**

**MARTINUS MALAN**

**Applicant**

**And**

**AMALGAMATED BANKS OF SA (ABSA)**

**Respondent**

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**ORDER:**

**APPLICATION FOR INTERIM RELIEF IN TERMS OF SECTION 149**

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Having heard the parties, the Tribunal orders as follows:

1. The application for interim relief in terms of section 149 is hereby dismissed.
2. There is no order as to costs

DATED ON 6<sup>th</sup> DAY OF OCTOBER 2008

**MS. Y. CARRIM**

**PRESIDING MEMBER**

**CONCURRING: F. Manamela and T. Woker**

**IN THE NATIONAL CONSUMER TRIBUNAL, HELD AT PRETORIA**

**Case No: NCT/03/2007/141 (P)**

In the matter between

**Mr & Mrs M Malan**

**Applicants**

And

**ABSA Bank**

**Respondent**

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**INTERIM RELIEF: REASONS FOR DECISION**

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1. This was an application brought in terms of section 149 of the National Credit Act ("the Act"). The Tribunal heard the matter on 8 September 2008 and dismissed the application on 6 October 2008. These are the reasons for that decision.

**Background to the application**

2. On 28 July 2008, Mr & Mrs M Malan ("the applicants") lodged an application with the Tribunal seeking interim relief against ABSA Bank Limited ("ABSA"). The applicants had bought a residential property in the district of Vereeniging and had obtained a home loan from ABSA in the amount of R760 000. The applicants then seem to have encountered some difficulty in meeting their monthly payments. On 6 November 2007 ABSA issued summons against the applicants in the Magistrate's Court in the district of Vereeniging. ABSA was granted summary judgement against the applicants on 11 June 2008.
3. Applicants then apparently lodged a complaint with the National Credit Regulator. The NCR wrote to the applicants on 15 July 2008, advising them that it had conducted an investigation and in its view ABSA had not contravened sections

129(1) and 130(3) (c) of the Act. Accordingly the NCR closed its file and advised the applicants that they could nevertheless approach this Tribunal, the ordinary courts or consumer courts for further action. The applicants then approached the Tribunal and lodged the application for interim relief which is the subject matter of these reasons.

### **Relief Sought**

4. It was not clear from the papers what exactly was sought by the applicants. However in the course of the proceedings it became clear that the applicants requested this Tribunal to set aside the order granted by the Vereeniging Magistrate's Court on the basis inter alia that the credit provider, ABSA, had contravened section 129 and 130 of the Act and that the Magistrate had failed to apply her mind properly to the matter. In addition the applicant sought that this Tribunal order ABSA not to seek legal relief pending the "completion of the debt review process".

### **Hearings**

5. At the commencement of the hearings ABSA requested that the matter stand down in order to provide the parties with an opportunity to seek a settlement of the matter. The Tribunal granted the indulgence. The parties however were unable to arrive at a settlement and the matter proceeded. The applicants were unrepresented and Mr. Malan appeared in person on behalf of himself and his wife. ABSA was represented by Mr. C Makulubete from De Klerk, Vermaak and Partners and led one witness Mrs. Cuthbert, the collector in the Debt Recoveries Section at ABSA bank.
6. Mr. Malan testified that he had fallen into arrears with his repayments on the home loan due to illness and a back operation which had made it difficult for him to earn an income. He was a self employed broker and needed to regain his earning potential. He had notified the bank of this and had attempted to negotiate alternative payment schedules with the bank on 20 July 2007 and prior to the bank commencing legal proceedings. The bank had not sent him a notice as contemplated in s129 (1) (a) <sup>1</sup> and had commenced proceedings while he had declared a dispute with the ombud and was under debt review. Mr. Malan argued further that the magistrate's court had erred in granting judgment and costs against the applicants and had not

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<sup>1</sup> The relevant provisions are s129(1)(a) & (b) which provide that when a consumer is in default under a credit agreement the credit provider must draw the default to the consumer's notice in writing, refer the consumer to debt counseling, alternative dispute resolution, consumer court or an ombud with jurisdiction. The intention of this provision is to enable the parties to find a resolution of the dispute and to agree on a plan to bring the payments up to date. A credit provider may not commence with legal proceedings in terms of s130 unless first furnishing the above notice to the consumer and complying with a number of other provisions of s130.

complied with s130. Section 130 sets out a number of matters that a court must take into account or satisfy itself with before granting an order to a credit provider seeking to enforce its debt. These sections require the court to inter alia ensure that a credit provider approaches it in accordance with the Act,<sup>2</sup> satisfy itself that procedures in other sections have been complied with or there is no matter pending before the Tribunal which could have an effect on the court's order,<sup>3</sup> and that the credit provider has not approached it during a time when the consumer was engaged in a debt review process or at an ombud or consumer court.<sup>4</sup>

### **Magistrate's Order: Jurisdictional issue**

7. The Tribunal was concerned that it did not have the jurisdiction to set aside the magistrate's order and asked the parties to make submissions on that point. ABSA argued that the Tribunal could not grant the relief sought by applicant since it could not review or over-turn an order of the magistrate's court. In their view only the High Court could review or overturn a decision of the magistrate's court. ABSA argued however that if this Tribunal ordered it to proceed with the execution of the magistrate's order; it would abide the decision of the Tribunal. Mr. Malan argued that the Tribunal did have the necessary jurisdiction to over-turn or review the magistrate's order by referring to a number of provisions of the Act. He argued that the Tribunal could set aside the magistrate's order on the basis of sections 27(a), 150(i) which empowers the Tribunal to grant any other appropriate relief required to give effect to a right as contemplated in this Act and section 152 which provides that the orders of this Tribunal have the status of a High Court.
  
8. The National Consumer Tribunal is a new body established by the National Credit Act to deal with certain aspects of the legislation. It is a creature of statute and enjoys only those powers granted to it in the Act. As a creature of statute it does not enjoy the inherent jurisdiction of the High Court but has to confine itself to the four corners of the NCA.<sup>5</sup> Moreover the Tribunal, as a creature of statute, is enjoined not to grant itself any more powers than those conferred upon it by the legislature in the statute.<sup>6</sup> It has not been established in order to replace or supplant the ordinary courts but has been brought alongside these institutions in order to regulate compliance with the Act.<sup>7</sup>

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<sup>2</sup> Section 130(1) and (2),

<sup>3</sup> Section 130(2)

<sup>4</sup> Section 130(3)

<sup>5</sup> See in general on Principles of Interpretation

<sup>6</sup> Put in reference

<sup>7</sup> See Flemming PM in *National Consumer Tribunal v Chatspare Financial Services* NCT 08/2008/140 (1) (P).

9. The Tribunal's functions are set out in section 27. Section 27(a) provides that the Tribunal "may adjudicate in relation to any application that may be made to it in terms of this Act and make any order provided for in this Act in respect of such application". The words "in terms of this Act" are indicative of the limitations placed by the legislature to the jurisdiction of this Tribunal. The Tribunal cannot hear *any* application nor can it grant *any* order. It can hear applications and grant such orders *as may be provided in this Act*.
10. Sections 129-133 constitute part C of Chapter 6 of the Act. Chapter 6 deals with "Collection, Repayment, Surrender and Debt Enforcement". Part C deals only with debt enforcement by repossession or judgment. Sections 130-133 clearly envisage enforcement of debt procedures to be followed in and by a court and not this Tribunal.<sup>8</sup>
11. Sections 142-152 deal with the Tribunal's proceedings and the orders it may grant.<sup>9</sup> Section 148 which deals with appeals and reviews, does not provide that the Tribunal may hear reviews or appeals from a magistrate's court. If the legislature intended that this Tribunal enjoy such powers one would have expected to find it in this section.
12. Sections 149-151 deal with the orders that the Tribunal can grant. Again there is nothing in these provisions which suggests that this Tribunal can set aside or overturn a decision of a magistrate's court. Indeed if the legislature intended this Tribunal to enjoy such powers it would have provided for this expressly. Section 150(j) cannot be interpreted to empower the Tribunal to set aside a decision of a magistrate's court when in the first instance the Tribunal is not empowered to hear such a review or appeal.
13. In conclusion we find that this Tribunal, while having been established under the NCA to deal with the enforcement of some provisions of the Act, does not have the jurisdiction to review or over-turn an order of a magistrate's court. Nor is there a provision that states that this Tribunal enjoys the jurisdiction of a high court which would necessarily imply the power to review or over-turn a decision of a lower court.<sup>10</sup> While the Tribunal's orders may enjoy the status of those of a high court,

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<sup>8</sup> See the provisions of section 129-133 which constitute part C of Chapter 6. Chapter 6 deals with "Collection, Repayment, Surrender and Debt Enforcement". Part C deals only with debt enforcement by repossession or judgement.

<sup>9</sup> They constitute part D & E.

<sup>10</sup> See sections

this status is only for purposes of enforcement of those orders that the Tribunal is in the first instance empowered to grant in the Act. The Act does not empower it to set aside a decision of a magistrate's court or to substitute its decision for that of a court as a consequence of an appeal. If the magistrate erred, and we make no such finding here, as alleged by Mr. Malan then the proper forum for Mr. Malan to approach is the High Court and not this Tribunal.<sup>11</sup>

#### **Contravention of section 129 by ABSA**

14. The applicants alleged, in reply and at the hearing that ABSA had contravened section 129. They however did not seek any specific relief against ABSA such as an administrative fine, nor was the issue of jurisdiction argued in relation to a contravention of s129.

15. In order for us to grant any interim relief we would need to consider the requirements for interim relief as laid down in section 149 of the National Credit Act. Section 149 provides as follows:

**"149. Interim relief.—**

- (1) At any time, whether or not a hearing has commenced into a complaint, a complainant may apply to the Tribunal for an interim order in respect of that complaint, and the Tribunal may grant such an order if—
  - (a) there is evidence that the allegations may be true; and
  - (b) an interim order is reasonably necessary to—
    - (i) prevent the purposes of this Act from being frustrated;
    - (ii) the respondent has been given a reasonable opportunity to be heard,
  - (c) having regard to the urgency of the proceedings; and
  - (d) the balance of convenience favours the granting of the order."

16. Section 149 (1) requires us to first consider whether the "there is evidence that the allegations may be true". This requires us to consider the facts put before us and assess, on a balance of probabilities,<sup>12</sup> whether the allegations made by the applicants could be true. Section 149 (2) contemplates that there will eventually be a pending matter before the Tribunal of the main dispute. The Tribunal cannot grant

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<sup>11</sup> Mr. Malan was asked why he had not approached the High Court in this regard. He replied that that was still under consideration. During the proceedings in the magistrate's court the applicants had been represented by attorneys and it is reasonable to infer that they had been apprised of their rights of appeal or review. Mr. Malan, although being unrepresented in these proceedings, demonstrated an appreciation of legal processes.

<sup>12</sup> For a discussion on the standard of proof in proceedings of this nature, see in general, GE Devenish *Interpretation of Statutes 1<sup>st</sup> Juta 1992 Cape Town*. Harms, *"Civil Procedure in the Supreme Court"* Butterworths.

interim relief in respect of a matter that will eventually be dealt with by another forum other than the Tribunal itself.

17. An application for interim relief is only available to a complainant who has filed a complaint in terms of s136 (1) to the National Credit Regulator ("NCR") in the prescribed manner or who has referred a matter to the Tribunal in terms of section 141, in the event of a non-referral by the NCR.<sup>13</sup> In this case it appears that the NCR had concluded its investigation and had decided not to refer the matter to the Tribunal. The applicants thereafter had the option, as provided in section 141, to either refer the matter directly to this Tribunal, with the leave of this Tribunal or to a consumer court. It is not clear to us whether Mr Malan had in fact filed such a complaint.
18. We have nevertheless elected to deal with this issue because we are of the view that our decision on the evidence in terms of section 149(1), for purposes of granting interim relief, will provide some guidance to the applicants as to their prospects of success in the actual or main complaint, assuming it has been lodged, since the same factual evidence would need to be considered in that proceeding.
19. Mr. Malan alleged that ABSA did not comply with the provisions of section 129 in that it had not sent the notice contemplated in section 129(1)(a) and had commenced legal proceedings against the applicants without first providing the applicants an opportunity to take any of the steps contemplated in s129. He argued that ABSA had commenced proceedings while the Banking Ombudsman was considering a complaint by the applicant and while the applicant's debt review process had not been completed.
20. However the evidence put up by ABSA showed that the applicants were in arrears with their payment from as early as May 2007. They had also been given notice of their default as early as 20 June 2007 and again on 2 October 2007. In both these letters the applicants were advised of the steps they could take in terms of s129.
21. Mrs. Cuthbert testified that ABSA had, prior to passing the matter over to the legal department, attempted to make alternative payment arrangements with the applicants. This was referred to as the "pre-legal phase". The applicant had previously undertaken to rectify the arrears. After the matter had been handed over to the legal department and prior to handing it over to the collection attorneys, she had also attempted to make an arrangement with the applicants. She explained that

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<sup>13</sup> See section 1 and section 136(1) and section 149 of the Act. See also section 140 and section 141.

the bank did not seek to foreclose on a home owner readily and had put in place a lengthy process whereby it sought to reach alternative payment arrangements with a consumer. The decision to refer a matter to the legal department was made by a senior manager who had to be satisfied that prior attempts had been made to resolve the matter. In the legal phase she was mandated to seek a resolution which she had. Indeed the bank was still willing to arrive at a settlement with the applicants but had not been successful.

22. It seems that the applicants were indeed aware of the steps they could take because Mr. Malan, after receiving the letter of 2 October 2007 from the bank, referred a dispute to the Ombudsman for Banking Services during November 2007 ("the ombud"). That dispute was dealt with by the ombud on 11 December 2007 in a letter in which he advised the applicants to either arrive at an agreement with the bank or to sell the property through an estate agent.
23. The bank however was reluctant to conclude any further arrangements with the applicants because in its view it had already done so on previous occasions and Mr. Malan had still not been able to meet his commitments.<sup>14</sup> Despite this the bank did not press ahead with legal proceedings until February 2008.<sup>15</sup> While we have already indicated that we cannot review the decision of the magistrate, it is significant to point out that in the course of these proceedings the magistrate postponed the matter and referred the applicants to a debt counsellor. Hence at the time that legal proceedings were initiated, there were no debt review proceedings underway. These only occurred *after* summons had already been issued.
24. In our view, and contrary to applicants' assertion, the respondent had complied with the provisions of section 129 and had demonstrated its willingness to seek an alternative payment arrangement with the applicants. The application is accordingly dismissed on these grounds as well.

  
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**Ms Y Carrim**  
**Presiding Member**

30 / 10 / 2008  
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**Date**

**Concurring: Prof T Woker, F Manamela**

<sup>14</sup> See the letter dated 11 December 2007 and respondent's answering affidavit.

<sup>15</sup> See email letter from ABSA's attorneys De Klerk, Vermaak & Partners dated 19 February 2008 in which Mr. Malan was advised that the bank has instructed them to proceed further with legal action.