

SOUTH AFRICA / JUDGMENT

Buunk v Wesbank, A Division of First Rand Bank Ltd (NCT/6827/2012/128(1)(P)NCA)

[2013] ZANCT 20 (27 June 2013)

[2013] ZANCT 20

COURT

National Consumer Tribunal

BEFORE

J Maseko, L Best, X May

CASE / FILE NUMBER

NCT/6827/2012/128(1)(P)NCA

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

number: NCT/6827/2012/128(1)(P)NCA

DATE:27/06/2013

In

the matter between:

Liza

Buunk.....Applicant

and

Wesbank,

A Division of First Rand Bank

Limited.....Respondent

Coram:

Prof

J Maseko – Presiding Member

Ms

L Best – Panel Member

Mr

X May – Panel Member

Date

of Hearing – 14 June 2013

RULING**AND REASONS FOR RULING****THE APPLICANT**

The Applicant in this matter is Ms. Lisa Buunk, an adult female, residing in Cape Town (hereinafter referred to as “the Applicant”).

The Applicant is a consumer in terms of Section 1 of the National Credit Act 34 of 2005 (the “NCA” or the “Act”).

At the hearing of 14 June 2013 held in Centurion, the Applicant appeared in person, unrepresented, and via the medium of Skype,

from a venue in Cape Town. This was an attempt by the Tribunal to accommodate the Consumer (Applicant) with the gracious consent of the Respondent’s Representative who could at least see and address the Applicant via the said medium, as did the Tribunal members.

THE RESPONDENT

The Respondent is Wesbank, a division of First Rand Bank Limited, a company registered in terms of the Companies Act with principal place of business in Fairland; (hereinafter referred to as “the Respondent”).

The Respondent is a registered credit provider with the National Credit Regulator, under registration number NCRCP20.

At the hearing of the 14th June 2013, the Respondent was represented by Mr. A.Tshikani Ngobeni of Smit Jones & Pratt Attorneys. Mr. Ngobeni was at the Tribunal venue with the Tribunal members and also linked up with the Applicant via the Skype medium already alluded to above. When the Skype connection proved to fail too often, he was gracious to consent to having the matter proceed via an open conference telephone line. The Tribunal is most grateful for this cooperation to rather focus on determining the matters to be decided rather than the mode of interaction. This upholds the spirit of the Act, to provide an accessible system of resolution of matters, as the Consumer indicated that she did not have resources to permit her to travel to be present at the hearing in person.

APPLICATION TYPE

This is an application in terms of section 128(1) of the National Credit Act, 34 of 2005 (hereinafter referred to as “the Act”) for review of the sale of goods by the Respondent, on the grounds that the Respondent did not sell the goods as soon as reasonably practicable alternatively did not sell the goods at the best price reasonably obtainable.

In terms of section 128(2) of the Act:

“If the Tribunal considering an application in terms of this section is not satisfied that the credit provider sold the goods as soon as reasonably practicable, or for the best price reasonably obtainable, the Tribunal may order the credit provider to credit and pay to the consumer an additional amount exceeding the net proceeds of the sale.”

POINTS IN LIMINE

However, before the Tribunal could determine the main application, there were two points that were preliminary that the Tribunal had to determine. These preliminary points were:

Whether this Tribunal should grant the condonation for the late filing of the answering affidavit by the Respondent or not?

Whether the Applicant unsuccessfully attempted to resolve the disputed sale of goods in terms of section 127 of the Act directly with the credit provider or through alternative dispute resolution under Part A of Chapter 7 of the Act before lodging an application with the Tribunal to review the sale, as required by Section 128(1) of the Act.

Only once the above two preliminary points have been decided, would the Tribunal then be in a position to determine whether the Applicant has made out a case for review of the sale of goods after unsuccessfully attempting to resolve the dispute with the Respondent in terms of Section 128(1) and (2) of the Act.

With regard to the condonation application for late filing of the answering affidavit by the Respondent, the Tribunal before the

hearing started noted that the application had not been opposed. And in the light of the unopposed content of that application, the Tribunal commenced the hearing by granting, *ex tempore*, the condonation to the Respondent. The reason for this was, in part to enable the parties to ventilate the issues to be decided in the main case taking into account the unopposed papers already considered by the Tribunal before the hearing.

The above ruling on the condonation application had also been informed by taking into account that:

The Applicant served the Respondent with the application which was deemed complete on 13 December 2012 and, in terms of the provisions

of Rule 13 of the Tribunal Rules, the Respondent was supposed to file its response by 9 January 2013, however it failed to do so. The Respondent avers that it only received a copy of the complete filing notice on 20 February 2013 and only at this stage did the application come to the Respondent's attention. The Respondent requested copies of the case file on 4 March 2013 and managed to obtain copies of the application from the Tribunal on 12 March 2013. It thereafter filed its response on 5 April

2103. The Respondent did apply for condonation of the late filing as provided for in Rule 34 of the Rules of the Tribunal.

Ordinarily an applicant who seeks condonation must give a satisfactory and reasonable explanation for the non-compliance¹. Reasonable grounds may entail, a manifest injustice likely to be suffered by the party seeking condonation, in the event that

condonation is not granted. If the grounds for condonation are established, it has to be justifiable or fair to grant condonation.

In *Melane v Santam Insurance Co Ltd*² the Appellate Division set out the following factors when considering a condonation application:

degree of non-compliance;

the explanation thereof;

the prospect of success on the merits;

the importance of the case; and

Other considerations.

In the same case, the court held that;

"In deciding whether sufficient cause has been shown, the basic principle is that the court has discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant is the degree of lateness [non-compliance], the explanation therefore, the prospects of success and the importance of the case. Ordinarily these facts are inter-related: they are not individually decisive, for what would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may be held to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked".

Degree of non-compliance

The Respondent was supposed to file its response to the application by 9 January 2013, however only filed its response on 5 April 2103.

Explanation for the non-compliance

In the High Court case of case of Public Servants Association of South Africa and 6 others v The Premier of Free State Province and 2 others³, the learned Judge Ebrahim held that good cause must be shown and that the explanation must be satisfactory. In the case of Labour Appeal Court of NUM v Council for Mineral Technology⁴ it was held that the absence of a reasonable and acceptable explanation for the non-compliance was pertinent to the enquiry into

whether or not condonation should be granted. Where no such an explanation is forthcoming, no examination of the prospects of success needs to be undertaken. The Respondent avers that it only managed to obtain copies of the application from the Tribunal on 12 March 2013.

Prospects of success in the main application

It appears from the facts of the matter that there is a prospect of success based on the grounds of the application. However in the case of Torwood Properties (Pty) Ltd v SA Reserve Bank⁵ it was held that the mere fact that a party has decidedly strong prospects of success is not in itself sufficient cause to grant

condonation though strong prospects of success may tend to compensate for a long delay.

Importance of the case

The Respondent is a major role player in the market place and would be severely prejudiced if an adverse order is granted against it, in the absence of having had the opportunity to oppose the application and which order may set a precedent for future matters. In this matter, the Respondent's opposing papers appear to clarify issues which are critical and necessary to be considered by the Tribunal in order to make a proper determination of the rights of the parties concerned.

Prejudice

There appears to be no prejudice likely to be suffered by the parties if condonation is granted, because the information being tabled in the replying affidavit enables the issues at hand to be fully ventilated.

Did the Applicant unsuccessfully attempt to resolve the dispute with the Respondent?

In order for the Applicant to succeed with her application and claim before the Tribunal she must satisfy the requirements of Section

127(1) of the Act.

The applicant has to establish that she has "...unsuccessfully attempted to resolve a disputed sale of goods in terms of section 127 directly with the credit provider or through alternative dispute resolution under Part A of Chapter 7."

JURISDICTION

Despite the jurisdiction of the Tribunal deriving under section 128 of the Act, the Respondent has challenged the jurisdiction of this Tribunal based on the assertion that the matter has been brought prematurely to the Tribunal. This assertion is contained in paragraph 3.2 of the Affidavit of Latha Singh, the Legal Adviser of the Respondent. In that paragraph, Singh avers that section 128(1) of the NCA requires that a consumer can only approach the Tribunal after unsuccessfully attempting to resolve a dispute ... in terms of section 127, directly with the credit provider, or through alternative dispute resolution under Part A of Chapter 7 ... before applying to the Tribunal.

Respondent further claims that the Applicant has failed to notify the Respondent that she disputed the sale of goods / or failed to attempt to resolve the dispute with the Respondent directly or through alternative dispute resolution.

But in response, the Applicant has claimed that she had lodged a complaint with the Tribunal on 7 November 2012. She also claims (at para 2) that she copied the same complaint to the Credit Provider on the same date by registered mail. Among the catalogue of contact times on which the Applicant had attempted to resolve the matter with the Credit Provider, the Applicant lists that:

On 6 June 2012, she had received High Court summons regarding the debt with Wesbank;

Between June, July and August 2012, there were numerous communications between the parties and that in each of these the Credit Provider turned down her attempts to settle the matter;

On 15 August 2012 when she was eventually told to surrender the vehicle; and it was collected from her; she had approached the NDMA on 29 August 2012. She told the Tribunal, at the hearing that it was while she was at the NDMA that she was told that the vehicle in question had already been auctioned; and

On 29 September 2012, she received a letter declaring that the vehicle in question had already been sold, giving her 10 days on which to make arrangements to settle the outstanding amount, failing which, legal action would be taken against her.

The one question still to be decided, therefore, is whether this Tribunal has jurisdiction to hear this matter or has this matter

been prematurely brought before this Tribunal as claimed by the Respondent? This point was reserved at the hearing to be determined

in writing as this judgment now does. And in determining this point, this Tribunal has noted that:

The catalogue of contact times when the Applicant had dealt with the Respondent was prior to the sale of the vehicle in question. This is confirmed by the fact that the matter had been about to receive a summary judgment of the High Court, and the Applicant had surrendered the vehicle as one way of resolving the pre-sale matter.

Her other expressed discontent centres mainly on the value of the vehicle as was determined by a valuer of the Respondent. This point does not go to the heart of determining the sale itself. This Tribunal is of the view that once the vehicle was to be auctioned, it matters very little how much the valuation priced the vehicle. Such a value is only good in so far as the reserve amount may be stated at the auction to refuse offers that fall below it. But once an auction is in motion, the highest bidder wins the day regardless of the fairness of the value of the item being auctioned. That is in the nature of an auction. If parties wish to attempt to sell at a higher value, it would be better to make this attempt outside the context of an auction – such as getting a private buyer before the vehicle is auctioned. This did not happen.

When the Applicant had gone to NDMA on 29 August 2012, she had not gone there to attempt to address the sale of the vehicle. It was on that day that she, through NDMA, was telephonically informed that the vehicle had already been sold. In other words, the Applicant had not taken part in any discussions concerning the sale by auction, but her act of surrendering the vehicle led to the auction as it was the next natural step for the Respondent.

In her own submission, the Applicant indicated that she had lodged her complaint with the Tribunal on 7 November 2012. She also claims (at para 2) that she copied the same complaint to the Credit Provider on the same date by registered mail.

BACKGROUND

From the papers on file, it is common cause that:

The Applicant was placed under debt review on or about 31 October 2011 and was required to pay a monthly instalment of R292.32 (para 4.1 of Singh's Affidavit). And the Applicant failed to pay the said amount, culminating in the issuance of summons in June

2012. In light thereof that the Applicant signed a voluntary

termination notice, Summary judgment was set down to be heard on the 10th of August 2012. The motor vehicle was consequently collected from the Applicant on the 15th of August 2012 on grounds of inability to pay the monthly instalments.

Subsequent to surrendering the vehicle, the vehicle was evaluated and valued at a market value of R15 000.00 on the 18th of August 2012 and the Applicant was advised thereof on 21 August

2012. The vehicle was sold on the 28th of September 2012 at a public auction for R23 370.00 and the Applicant is now required to pay an outstanding balance of R172 301.48.

In November 2012, the Applicant, lodged an application for a review of the sale of goods by the Respondent on the grounds that, the Respondent did not sell the car:

as soon as reasonably practicable; and

for the best price reasonably obtainable.

THE LAW ON THE MATTER

The application was brought in terms of Section 128(1) of the Act which provides that:

A consumer who has unsuccessfully attempted to resolve a disputed sale of goods in terms of section 127 directly with the credit provider, or through an alternative dispute resolution under Part A of Chapter 7, may apply to the Tribunal to review the sale.

If the Tribunal considering an application in terms of this section is not satisfied that the credit provider sold the goods as soon as is reasonably practicable, or for the best price reasonably obtainable, the Tribunal may order the credit provider to pay the consumer an additional amount exceeding the net proceeds of the sale.

THE CASES OF THE PARTIES

This Tribunal decided from the onset of the hearing, once the parties had ventilated in their opening remarks, that the jurisdiction of the Tribunal remained in issue, and thus to limit itself to only deal with this point in limine. Much as the papers received prior to the date of the hearing had already been read, this Tribunal will not deal with the substantive issues in this

ruling.

As already pointed out above, the Respondent submits that the Applicant is only entitled to approach the Tribunal subsequent to unsuccessfully attempting to resolve the dispute directly with the credit provider or an alternative dispute resolution agent and, as such, this application is pre-mature.

The Respondent submits⁶ that, the Applicant failed to effect payments as per the debt restructuring order, the car was surrendered by the Applicant and collected by the Respondent on the 15th of August 2012.

The Respondent submits that all the necessary steps, as laid out in the Act, were complied with before selling the car as soon as reasonably practicable, for the best price, at a public auction on the 28th of September 2012.

ANALYSIS

LAW & FACTS

This section will deal with each of the legal questions separately as they relate to the remaining point in limine, namely: Did the Applicant unsuccessfully attempt to resolve the dispute with the Respondent?

The Act states what is required of the alternative dispute resolution process, however gives no guidance as to what might constitute an attempt to resolve a dispute directly with the credit provider. Nor does it specify any formal criteria, for example that the communication with the credit provider must be in writing.

The Tribunal has to determine what would satisfy this pre-requisite for an application under section 128 of the Act.

The word 'dispute' implies that an aspect of the sale is being contested, and 'attempt' in its ordinary sense means that the consumer must have tried or made an effort to resolve the dispute. It seems that, to satisfy this requirement, the consumer must at least make the credit provider aware that she is dissatisfied with an aspect of the sale, with a request that this aspect or the outcome of the sale itself be re-assessed on those grounds. And this obviously could not have occurred before the sale which in this case means “auction”.

The facts presented by the consumer should be such that, considered objectively, a reasonable inference can be drawn that a consumer

has, whether by oral or written communication, given the credit provider notice of his / her grievance and given the credit provider

the opportunity to remedy the grievance prior to an application to the Tribunal. This has not occurred in this case.

The further requirement that the attempt be unsuccessful is clearly subjective, and simply means that the consumer is not satisfied with the credit provider's response, if any, or the outcome of the matter subsequent to his or her efforts.

In the matter at hand, there is no confirmation on the file that the Applicant tried to resolve the matter with the Respondent or that the dispute was referred to Alternative Dispute Resolution. The Applicant's initial complaint was about the refusal by the Respondent to accede to its proposed monthly instalment of R5000.00 with a surety and is the only submitted interaction between the parties, however not aimed at resolving the disputed sale.

It was held in *Kasture Pillay v Wesbank NCT/867/2010/128(1)(P)* that an Applicant must first prove that he/she attempted to resolve the dispute with the other party or through alternative dispute resolution before the complaint is referred to the Tribunal. In the particular matter the Applicant did not meet this requirement and the Applicant's application to the Tribunal was found to be premature.

Regarding the question of whether the Respondent sold the motor vehicle as soon as reasonably possible or for the best price reasonably

obtainable; this question will not be addressed in this ruling pending the outcome of this point of jurisdiction as already indicated above.

RULING

In conclusion, for the above reasons woven into the analysis above, this Tribunal rules that the Applicant did not unsuccessfully

attempt to resolve the dispute with the Respondent. And the reason for that may well be that it was already after the vehicle had been sold when she discovered the auction sale. But that does not negate the point of not having unsuccessfully attempted to resolve the matter of the sale with the Respondent. The application is thus pre-mature.

The Tribunal accordingly makes the following order -

That the Applicant's application is dismissed

No order is made as to costs

Handed down at Centurion on 27 June 2013

[signed]

PROF. JOSEPH M. MASEKO

PRESIDING MEMBER

Ms L Best (Member) and Mr X May (Member concurring.

1 Van Wyk v Unitas Hospital and Another [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at Para 22.

2 1962 (4) SA 531 (AD) 532B-E.

3 Unreported Judgment. Case Number: 5198/2005 & 2428/2006. Par 5.

4 1999 (3) BLLR 209 (LAC) at par 10

5 1996(1) SA 215 (W) at 230H.

6 Answering Affidavit Para 4.

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