

SOUTH AFRICA / JUDGMENT

De Klerk and Another v Absa Bank Limited and Another (NCT/376411/2025/141(1)(b)) [2025] ZANCT 25 (22 April 2025)

[2025] ZANCT 25

COURT

National Consumer Tribunal

BEFORE

Z Ntuli, MC Peenze, P Manzi-Ntshingila

CASE / FILE NUMBER

NCT/376411/2025/141(1)(b)

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THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

(IN CHAMBERS)

Case Number: NCT/376411/2025/141(1)(b)

In the matter between: CHRISTIAN DANIEL DE KLERK FIRST APPLICANT JOHANNA
MAGDALENA LETINA DE KLERK SECOND APPLICANT And ABSA BANK LIMITED FIRST
RESPONDENT NATIONAL CREDIT REGULATOR SECOND RESPONDENT

Coram:

Ms Z Ntuli

– Presiding Tribunal Member

Dr MC Peenze – Tribunal Member

Ms P Manzi-Ntshingila – Tribunal Member

Date of Hearing: 22 April 2025

Date of Judgment: 22 April 2025

JUDGMENT AND REASONS

(LEAVE TO REFER)

THE PARTIES

1. The first applicant is Christian Daniel De Klerk, and the second applicant is Johanna Magdalena Letina De Klerk (collectively referred to as the applicants). The applicants are consumers as defined in section 1 of the National Credit Act, 34 of 2005 (the Act).
2. The first respondent is ABSA Bank Limited (ABSA), a company incorporated under the company laws of South Africa with its registration number 1986/004794/06. The respondent is a credit provider under registration number NCRCP7 in terms of the Act.
3. The second respondent is the National Credit Regulator (NCR), an administrative body established in terms of section 12 of the Act to regulate the consumer credit market and ensure compliance.

TERMINOLOGY

4. A reference to a section in this judgment refers to a section of the Act, and a reference to a rule refers to the Rules of the National

Consumer Tribunal (the rules)[1] unless indicated otherwise.

APPLICATION TYPE

5. This is an application in terms of section 141(1)(b) concerning the direct referral of a complaint to the National Consumer Tribunal (the Tribunal).
6. In terms of section 141(1)(b), if the NCR issues a notice of non-referral, the complainant may refer the complaint directly to the Tribunal with the leave of the Tribunal.
7. The Tribunal must consider whether the applicants' complaint should be referred to the Tribunal for a hearing.

BACKGROUND

FACTS

8. The applicants allege that ABSA contravened sections 81 and 92. According to the applicants, as a married couple, they obtained a home loan of R1,900,000 from ABSA in 2011. They had been longstanding customers of ABSA and held multiple accounts with the bank. Between 2012 and 2020, the first applicant operated a legal practice and consistently met the loan repayment obligations. However, in March 2020, the business collapsed due to the adverse effects of the COVID-19 pandemic. ABSA granted the applicants a three-month payment holiday during this period.

9. The applicants assert that, in March 2020, ABSA offered them a second home loan of R3,200,000, which they accepted. The first applicant remained unemployed until June 2024 and has since faced mounting debt because of missed repayments from 2022. The applicants contend that their current income is inadequate to service both the new instalments and the arrears. Nevertheless, they maintain that they can meet the loan obligations under terms that are like those agreed upon in 2020.
10. The applicants' primary grievance concerns ABSA's alleged failure to conduct a proper affordability assessment prior to approving the second home loan. They contend that ABSA did not request any proof of income, details of expenses, or a credit history report, thereby contravening section
81. At the time of approval of the home loan, the first applicant was unemployed, which the applicants argue was a critical factor to consider in granting credit. Accordingly, the applicants submit that the approval of the second home loan without verifying their financial capacity constitutes reckless lending.
11. In addition, the applicants allege that ABSA failed to provide them with clear and comprehensive information regarding the home loan's terms and conditions, including applicable interest rates and penalties for missed payments. They argue that this lack of disclosure violates section 92, which obliges credit providers to furnish consumers with adequate information to make informed financial decisions.
12. As a result of these alleged contraventions, the applicants aver that they are suffering severe financial hardship, face the risk of foreclosure, and are enduring significant emotional distress, which has adversely affected their quality of life. On 18 October 2024, the applicants lodged a formal complaint with the NCR. The NCR issued a notice of non-referral on 29 January 2025, stating that the complaint was time-barred in terms of section 166, as it was submitted more than three years after the act or omission that is the cause of the complaint.
13. Dissatisfied with this outcome, the applicants exercised their right under section 141(1)'(b) to refer the matter directly to the Tribunal. The application was filed on 11 February 2025, with additional documents submitted on 19 February 2025. The Tribunal Registrar subsequently issued a notice of complete filing on 27 February 2025. ABSA filed its answering affidavit on 12 March 2025, opposing the applicants' request for leave to refer the matter to the
Tribunal. The NCR did not file opposing papers.
14. In its answering affidavit, ABSA contends that the application is time-barred under section 166, as more than three years have elapsed since the alleged cause of action arose. Moreover, ABSA submits that the High Court of South Africa (Gauteng Division, Pretoria) granted judgment in its favour on 16 September 2024, enforcing the loan agreement. The court ordered the applicants to pay R5,181,760.18, together with interest and costs and declared the applicants' immovable property executable.

15. ABSA submits that the applicants' allegations relate to a complaint that is both time- barred and the subject of a final and binding judgment of the High Court. Accordingly, ABSA argues that the applicants' case is frivolous, vexatious, and constitutes an abuse of the Tribunal's process. ABSA, therefore, seeks a cost order in terms of section 147(2)(a) read with rule 25(7).
16. On 26 March 2025, the applicants filed a replying affidavit, disputing the assertion that the matter is time-barred. They argue that the cause of action only arose in 2022 when they began defaulting on their home loan repayments. On this basis, they contend that the three-year period contemplated by section 166 should be calculated from 2022, not from 2020 when the second home loan was granted. They further maintain that the Tribunal is not bound by the NCR's decision regarding the applicability of section 166.
17. The applicants also dispute the contention that the High Court's judgment precludes them from pursuing the complaint before the Tribunal. They argue that the issue of reckless lending, which forms the crux of their complaint before the Tribunal, was not adjudicated by the High Court. They aver that their request to amend their plea to include reckless lending during the High Court

process was denied by the High Court. As such, they submit that the Tribunal is the appropriate forum to hear the complaint and that they have reasonable prospects of success.

18. On 7 April 2025, the Tribunal Registrar issued a notice of set down, confirming that the application for leave to refer will be considered in chambers on 22 April 2025

RELIEF SOUGHT

19. In their application, the applicants request the Tribunal to grant them leave to refer the complaint directly to the Tribunal. If granted, the applicants seek a comprehensive investigation into ABSA's lending practices to determine compliance with the Act and to ensure protection against irresponsible lending. They further request that the Tribunal consider appropriate remedies, including loan restructuring or other forms of financial relief, to mitigate their present financial hardship.

LEAVE TO REFER HEARINGS

20. As stated, section 141(1)(b) allows the applicant to refer a matter directly to the Tribunal only with leave of the Tribunal.
21. In *Lewis Stores (Pty) Ltd v Summit Financial Partners (Pty) Ltd and Others*, the court held that no formal hearing on leave to refer was necessary, no test to be applied, and the decision to consider leave could not be appealed, stating as follows:

"Section 141(1)(b) confers on the Tribunal a wide, largely unfettered discretion to permit a direct referral. The NCA does not require a formal application to be made and it is not necessary for purposes of the present appeal, nor is it desirable, to circumscribe the factors to which the Tribunal should have regard. There is no test to be applied in deciding whether or not to grant a direct referral to it in respect

of a complaint. The purpose of the provision is simply for the Tribunal to consider the complaint afresh, with the benefit of any findings by the Regulator, and to decide whether it deserves its attention. Circumstances which may influence its decision may include the prospects of success, the importance of the issue, the public interest to have a decision on the matter, the allocation of resources, the complainant's interest in the relief sought and the fact that the Regulator did not consider that it merited a hearing before the Tribunal. The list is not intended to be exhaustive."

22. As no test is to be applied, the Tribunal will consider the matter in the general context of the circumstances submitted by the applicant.

CONSIDERATION OF MERITS

23. In terms of section 80, a credit agreement is deemed to be reckless if the credit provider fails to conduct the affordability assessment mandated by section 81(2) prior to concluding the agreement. Section 81(2) obliges the credit provider to take reasonable steps to evaluate, inter alia, the consumer's debt repayment history, current financial means, and existing obligations before finalising a credit agreement. Additionally, section 81(3) prohibits a credit provider from entering into a reckless credit agreement with a prospective consumer.
24. The present complaint referral concerns allegations of reckless lending. The applicants' assertions appear to fall squarely within the ambit of the Act. Should the allegations be substantiated, the conduct would amount to prohibited conduct that also undermines the objectives of the Act. In terms of section 27(a), the Tribunal is empowered to consider such applications. Furthermore, section 150 authorises the Tribunal to make appropriate orders in respect of prohibited or required conduct under the Act or the Consumer Protection Act. [2] This includes the power to declare a credit agreement reckless in terms of the Act.
25. The applicants acted in accordance with the Act by approaching the NCR before escalating the matter to the Tribunal. A direct referral to the Tribunal can only be initiated upon the issuance of a notice of non-referral by the NCR. In accordance with the Lewis judgment, once leave is granted, the Tribunal would be required to consider the complaint de novo. The Tribunal concurs with the applicants'

submission that it is not bound by the NCR's decision, as proceedings before the Tribunal are independent of those conducted by the NCR. Further, leave to refer is granted at the discretion of the Tribunal.

26. However, the Tribunal's jurisdiction to adjudicate complaints of this nature is circumscribed by section 166 of the Act. Section 166(1) stipulates that a complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after
- (a) the act or omission that is the cause of the complaint, or
- (b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.

27. On the facts presented, the act or omission that is the cause of the complaint arose in 2020 when the second home loan agreement was concluded. In terms of section 80(2), any determination as to whether a credit agreement is reckless must be made with reference to the criteria set out in section 80(1), as they existed at the time the agreement was entered into. Accordingly, the date of conclusion of the credit agreement is decisive in establishing the cause of action.
28. Contrary to the applicants' contentions that the cause of action arose in 2022 when they defaulted on payments, the limitation period prescribed in section 166 must be calculated from 2020 when the alleged reckless credit was extended. The applicants only submitted their application for leave to refer on 11 February 2025, almost five years after the alleged act or omission that is the cause of the complaint. This means the Tribunal would be barred from considering the said complaint.
29. The High Court, in *FirstRand Bank Ltd v Ludick*[3] (Ludick judgment) affirmed that the Tribunal is only empowered to adjudicate complaints brought within the prescribed three-year period. As a creature of statute, the Tribunal does not possess the authority to extend this statutory period. The court further held that the Tribunal erred in relying on its two prior decisions wherein it assumed a discretion to consider time-barred complaints. Section 166 does not permit any discretionary element. This position was reaffirmed in *Mapeka v FirstRand Bank Limited*,[4] where it was held that section 166 imposes an absolute bar on complaints older than three years.
30. Also noteworthy is that the Act does not provide for any interruption of the three-year limitation period, as is the case under the Prescription Act.[5] Sections 11(d) and 16(2) of the Prescription Act do not apply in instances where a statute has specifically prescribed a time limit for initiating proceedings or submitting a claim, as it is the case in the Act.
31. In *Competition Commission of South Africa v Pickfords Removals SA (Pty) Ltd*,[6] the Constitutional Court interpreted the three-year time bar set out in section 67(1) of the Competition Act[7] as a procedural limitation that could be condoned by the Competition Tribunal under section 58(1)(c)(ii). However, unlike the Competition Tribunal, which is authorised to condone non-compliance with a time bar set in the Competition Act and its rules, this Tribunal's authority to condone non-compliance under section 150(e) is expressly confined to timelines stipulated in its own rules and procedures, not in the Act.
32. The Tribunal concludes that the Ludick judgment is instructive. By operation of section 166, the Tribunal is precluded from considering the applicants' complaint, as it was filed beyond the statutory three-year limit. With no jurisdiction, the Tribunal would be acting *ultra vires* if it were to consider the applicants' complaint. The applicants lack prospects of success, a critical consideration in the circumstance. Consequently, the application for leave to refer the complaint to the Tribunal for a hearing must be refused.

33. The Tribunal has also considered ABSA's request for a cost order. The Tribunal notes that the applicants have complied with the provisions of the Act in their pursuit of appropriate relief. The fact that the NCR issued a notice of non-referral does not preclude the applicants from referring the matter directly to the Tribunal, regardless of the reason. As stated above, if leave is granted, the Tribunal is required to consider the complaint de novo.
34. There is no evidence to suggest that the applicants have abused the Tribunal's processes, nor is there any indication that their complaint is frivolous or vexatious. Notably, the Tribunal is satisfied that the applicants acted bona fide and adhered to the prescribed procedure and protocols under the Act. Consequently, the Tribunal finds no justification for a cost order in the circumstances.

ORDER

35. In the result, the following order is made:

35.1 The application for leave to refer is refused, and

35.2 There is no order as to costs.

[signed]

Ms Z Ntuli

Presiding Tribunal Member

Tribunal members Dr MC Peenze and Ms P Manzi-Ntshingila concur.

- [1] GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters

before the National Consumer Tribunal, 2007 (Government Gazette No. 30225).

- [2] Act 68 of 2008.

- [3] FirstRand Bank Ltd v Ludick A 277/2019 High Court of South Africa, Gauteng Division, Pretoria, 18 June 2020 (unreported) at para [16].

- [4] Mapeka v FirstRand Bank Limited (Westbank) NCT 14020/2014/141.

- [5] Prescription Act, Act 68 of 1969.

- [6] Constitutional Court in Competition Commission of South Africa v Pickfords Removals SA (Pty) Ltd 2020 ZACC 14.

- [7] Competition Act No. 89 of 1998.

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