

SOUTH AFRICA / JUDGMENT

Garb v ABSA Bank Limited (NCT/23189/2021/141(1)(b)) [2022] ZANCT 51 (6 October 2022) [2022] ZANCT 51

COURT

National Consumer Tribunal

BEFORE

A Potwana, K Moodaliyar, C Sassman

CASE / FILE NUMBER

NCT/23189/2021/141(1)(b)

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IN THE NATIONAL CONSUMER TRIBUNAL

SITUATED IN CENTURION

Case number: NCT/23189/2021/141(1)(b)

In the matter between:

GEORGE GARB

APPLICANT

and

ABSA BANK LIMITED

RESPONDENT

Coram:

Mr A Potwana

- Presiding Tribunal Member

Prof K Moodaliyar - Tribunal Member

Adv C Sassman - Tribunal Member

Date of consideration (in chambers) - 5 October 2022

Date of

Judgment

- 6 October 2022

LEAVE TO REFER RULING AND REASONS

THE PARTIES

1. The Applicant is George Garb, an adult male consumer as defined in section 1 of the National Credit Act 34 of 2005 (“the NCA”).
2. The Respondent is ABSA Bank Limited, a company that is duly incorporated and registered in terms of the company laws of the Republic of South Africa and a registered credit provider as defined in section 1 of the NCA.

APPLICATION TYPE AND JURISDICTION

3. This is an application in terms of section 141(1)(b) of the National Credit Act 34 of 2005 which states-

“If the National Credit Regulator issues a notice of non-referral in response to a complaint other than a complaint concerning section 61 or an offence in terms of this Act, the complainant concerned may refer the matter directly to (b) the Tribunal, with the leave of the Tribunal.”

4. In terms of section 27 of the NCA, the Tribunal has jurisdiction.

BACKGROUND

5. On 21 June 2022, the Applicant filed an application for leave to refer a matter to the Tribunal using the prescribed NCA Form 32. It appears from “Part 2 – The Complaint” of the filed NCA Form 32 that the Applicant’s complaint relates to what the Applicant stated was the “irrational application of the law by the credit provider and the incorrect assessment” (sic in toto) of his affordability. He referred the Tribunal to his letter dated 8 June 2022, a copy of which is appended to his application documents, and stated that the contents of paragraph 3.3 of this letter are paramount. In “Part 3 – Reasons, Relief and Leave Required”, the Applicant stated that he wants to “claim for damages in respect of losses, considerable distress and untold inconvenience with substantiation of facts as enumerated in my letter dated 8th June 2022.” (sic in toto).
6. In his letter dated 8 June 2022, the Applicant stated that the Respondent acted irrationally and did not consider the “precise and true facts relative to his short term credit request” (sic in toto). In paragraph 3.3 of this letter, the Applicant stated-

“6.1 The relevant credit assessment formula clauses of the credit act cannot be applied with reference to my unique matter. The Bridging Finance Company addressing the very same request with immediate service is testament of ABSA’s improper handling of the short term request.”

6.2 This short term credit request is a “stand alone transaction” and has absolutely no reference to the customer’s

bank history and it is vital to ask the question, ‘Was the customer in a definite position to repay the short term facility with indisputable proof’. The answer is ‘Yes’ with further evidence that the Bridging Finance approved the requested

facility immediately and noting that it also falls under the National Credit Act and must comply with the Credit Act.

6.3 It is axiomatic that my ‘affordability’ as stated was testament and overrides the bond ‘hold’ with immediate effect on the exact time and date I requested the short term facility.” (sic in toto).

7. It appears from the contents of the Applicant’s letter that his complaint pertains to the Respondent’s refusal to grant his short-term credit facility due to a hold which was termed as

“Reckless Lending” even though there was “evidence that both the Bond Account and the Credit Card Account would be paid in full within two months. But ABSA still refused to approve the requested facility.” (sic in toto). The Applicant secured bridging finance which he paid into his credit card account, but it was too late as his credit card account was moved to legal and immediately closed. He alleges that the Respondent mishandled his credit facility request, as a result of which his good name was tarnished, and he lost his credit card. He further alleges that the Respondent discriminated against him because of his age and wants it to pay him “Constitutional Damages in respect of this disgusting violation impairing my right to dignity under Section 9 of the Constitution and the PEPUDA Act 4 of 2000.” He claims to have suffered inconvenience and distress.

8. The filed documents show that the Applicant referred his complaint to the Ombudsman for Banking Services (“OBS”). The OBS advised him that it could not support his claim against the Respondent for compensation not exceeding R2 000 000.00 for damages.

On or about 14 March 2022, the Applicant filed a complaint with the National Credit Regulator (“NCR”). On or about 25 May 2022, the NCR issued a Notice of Non-Referral.

9. On 22 June 2022, the Tribunal’s Deputy Registrar issued a Notice of Filing and served it to the parties. On 7 July 2022, the Respondent’s Attorneys, Lowndes Dlamini Attorneys, served and filed the Respondent’s Answering Affidavit. The deponent is Sherizad Sacks, an adult female attorney employed as legal counsel by the Respondent in its Group Legal Litigation Team (“Ms Sacks”).
10. The essence of Ms Sacks’ submission is that the Applicant’s application carries no prospects. Even if the Applicant was successful, it does not axiomatically entitle the Applicant to the relief sought. The relief sought by the Applicant is entirely

unsustainable, and the Tribunal should dismiss the application. The Respondent was factually and lawfully justified in refusing the Applicant’s request for further credit. The Respondent acknowledged that the misplaced bond documentation caused a delay in factually and lawfully

justified in refusing the Applicant's request for further credit. The Respondent acknowledged that the misplaced bond documentation caused a delay in the transfer of the property and offered to compensate the Applicant for his direct losses without delay. The Applicant rejected the Applicant's offer. The Applicant is not entitled to any compensation over and above that already offered by the Respondent and certainly not in the amount of R2 Million, whether before the Tribunal or a court of law. The Respondent has not contravened any section of the NCA and has not alleged facts which, if true, would constitute a basis for a remedy under the NCA. The application is frivolous and vexatious and should be dismissed.

11. Ms Sacks argued that the Applicant's claim for constitutional damages is not provided for in section 150 of the NCA. The Tribunal does not have jurisdiction to consider the matter any further.
12. Concerning the Respondent's refusal to grant the Applicant credit, Ms Sacks submitted that it is common cause that before the Applicant requested an extension for credit, he was in default with his obligation towards the Respondent. In view of the Applicant's unsatisfactory condition of the Applicant's existing credit facilities with the Respondent, it cannot be contended that the Respondent's refusal to grant the Applicant's request for additional credit is in any way unfair. Most importantly, it cannot be contended that the Respondent's refusal was in any way unlawful or contrary to the NCA.
13. As pointed out by the OBS, the Respondent is not obliged to grant the credit requested. Section 60(1) of the NCA provides that every natural person and every juristic person or association of persons has a right to apply for credit. Section 60(2) of the NCA provides that, subject to sections 61 and 66 a credit provider has a right to refuse to enter into a credit agreement with any prospective consumer on reasonable commercial grounds that are consistent with its customary risk management and underwriting practices. It is not within the Respondent's ordinary risk management practices to grant further credit to customers who are experiencing difficulty in servicing their existing credit facilities. Section 60(3) of the NCA provides that subject to sections 61 and 92(3), nothing in the NCA establishes a right of any person to require a credit provider to enter into a credit agreement with that person. As correctly emphasised by the NCR, even if the Applicant could have been able to afford the requested facilities, the granting thereof would have been at the Respondent's discretion. The NCA does not make provision for the NCR or the Tribunal to compel a credit provider to enter into a credit agreement with a consumer.
14. Ms Sacks averred that the Applicant's allegation that his age militated against the granting of credit is a red herring that is used to sustain the argument based on the Constitution. The Respondent's decision to refuse credit was primarily based on the Applicant's conduct of his accounts and, most notably, the fact that a hold had already been placed on the Applicant's home loan account, and his credit card account had been moved to legal for recovery. Furthermore, the Applicant applied for payment relief which was a further factor that negatively affected his request for additional credit. The Respondent does not consider the Applicant's age as part of its scoring criteria, and the Applicant's advanced age did not

impact the Respondent's decision on whether or not to grant the requested credit. In terms of section 61(5) of the NCA, the Respondent is entitled to determine for itself any scoring or other evaluative mechanism or model for managing risk. The Respondent is entitled to determine for itself any scoring or other evaluative mechanism or model for managing risk. It does not unfairly discriminate against any customers, existing or prospective, and the Applicant has failed to prove otherwise. If the Applicant believes that he was defamed by the Respondent, such a claim cannot be decided by the Tribunal but by a court of law. Ms Sacks proceeded to deal with each of the Applicant's allegations ad seriatum. Save for what has been repeated above; it is not necessary to restate the Respondent's specific responses to each of the Applicant's allegations.

15. On 28 July 2022, the Tribunal's Deputy Registrar issued a Notice of Set Down to the parties, indicating that the matter would be adjudicated in chambers on 5 October 2022.

CONSIDERATION OF THE MERITS

16. In terms of section 141(1) of the NCA, the Applicant may only refer the matter directly to the Tribunal with leave of the Tribunal. Previously, the Tribunal held formal hearings to consider applications for leave to refer with all the parties present. In the matter of *Lewis Stores (Pty) Ltd v Summit Financial Partners (Pty) Ltd and Others* (Case no 314/2020) [2021] ZASCA 91 (25 June 2021) SAFLII, the court provided useful guidance to the Tribunal in decisions regarding leave to refer. It held that a formal hearing on leave to refer was unnecessary, there was no test to be applied and the decision to consider leave could not be appealed. The court held -

"[15] As I have explained, the NCA provides for an expeditious, informal and cost effective complaints procedure. 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."

17. As there is no test to be applied, the Tribunal will consider the submissions of the Applicant and the Respondent.
18. Based on the evidence submitted, the Tribunal is not empowered to adjudicate the Applicant's complaint. The Applicant has not alleged or presented any evidence that shows that the Respondent contravened any provision of the NCA. As a creature of statute, the NCA, the Tribunal can only adjudicate matters regulated under the NCA and make orders prescribed therein. It is not empowered to determine issues pertaining to defamation or

make orders for defamation or constitutional damages. Concerning the alleged unfair discrimination, section 61(6) of the NCA empowers any person contemplated in section 20(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act to institute proceedings before any equality court in terms of Chapter 4 of that legislation. The Tribunal notes that the Applicant has alluded to the applicability of the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act.

CONCLUSION

19. In view of the above, the Tribunal finds that the Applicant does not enjoy reasonable prospects of success. Furthermore, it would not be in the interests of justice and resource allocation for the Tribunal to grant the Applicant leave.

ORDER

20. Accordingly, the Tribunal makes the following order-

20.1. The Applicant's application for leave is refused; and

20.2. There is no order as to costs.

Thus done and dated 6 October 2022.

[signed]

Mr A Potwana Presiding Tribunal Member

Prof K Moodaliyar (Tribunal Member) and Adv C Sassman (Tribunal Member) concur.

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