

SOUTH AFRICA / JUDGMENT

Klusmann v FFS Finance South Africa (RF) (Pty) Ltd t/a Absa Vehicle & Asset Finance (NCT/325080/2024/141(1)(b)) [2024] ZANCT 50 (8 November 2024)

[2024] ZANCT 50

COURT

National Consumer Tribunal

BEFORE

MC Peenze, S Hockey, P Manzi-Ntshingila

CASE / FILE NUMBER

NCT/325080/2024/141(1)(b)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

Case number: NCT/325080/2024/141(1)(b)

In the matter between: GARRETTE LOUIS KLUSMANN APPLICANT and FFS FINANCE SOUTH AFRICA (RF) (PTY) LTD T/A ABSA VEHICLE & ASSET FINANCE RESPONDENT

Coram:

Dr MC Peenze - Presiding Tribunal Member

Mr S Hockey

- Tribunal Member

Ms P Manzi-Ntshingila

- Tribunal Member

Date of hearing (In chambers) - 8 November 2024

Date of

judgment

- 8 November 2024

LEAVE TO REFER RULING AND

REASONS

THE PARTIES

1. The applicant is Garrette Louis Klusmann (the applicant), an adult male who is a consumer as defined in section 1 of the National Credit Act 34 of 2005 (the NCA).
2. The respondent is FFS Finance South Africa (RF) (Pty) Ltd t/a Absa Vehicle & Asset Finance (Pty) Ltd (the respondent), duly incorporated under the company laws of South Africa. The respondent is a credit provider, as defined in section 1 of the NCA.

APPLICATION TYPE

3. This is an application in terms of section 141(1)(b), in which the applicant, having received a notice of non-referral from the National Credit Regulator (the NCR), seeks leave to refer the matter directly to the Tribunal for adjudication. The Tribunal has jurisdiction to consider this application in terms of section 27(a).
4. The respondent has opposed the application.

TERMINOLOGY

5. A reference to a section in this ruling refers to a section of the NCA unless indicated otherwise. A reference to a regulation refers to the NCA Regulations, 2006 (the regulations), [1] and a reference to a form refers to the prescribed forms set out in Schedule 1.
6. A reference to a rule refers to the Tribunal Rules.[2]

BACKGROUND

7. The applicant alleges that the respondent recklessly financed his Ford Ranger 2.2TDCI XL P/U D/C purchase for R649,247.76 on 28 July 2016. According to the applicant, the respondent failed to do a proper affordability

assessment and, therefore, granted finance recklessly. The applicant could not afford the monthly instalments and applied for a debt review on 16 August 2017. During 2023, the applicant became aware that the respondent approved vehicle financing based on manipulated financial data. He wants the credit agreement to be declared reckless and rescinded, the vehicle returned, and his rights and obligations under the agreement set aside.

8. The applicant filed a complaint with the NCR on 30 January 2023. After investigation, the NCR issued a notice of non-referral on 7 June 2023, outlining that more than three years had lapsed after the cause of the complaint took place. Not happy with the NCR's conclusions, the applicant filed the main matter to which this application relates with the Tribunal.
9. The respondent argues that the matter is time-barred under section 166 and disputes the allegations of reckless lending.

LEAVE TO REFER HEARINGS

10. Previously, the Tribunal held formal hearings for leave to refer applications to the Tribunal, and all the parties would be present. In *Lewis Stores (Pty) Ltd v Summit Financial Partners (Pty) Ltd and Others*[3], the court provided helpful guidance to the Tribunal in making decisions regarding leave to refer applications. It held that a formal hearing for leave to refer applications was unnecessary and that there was no test to be applied. The court

further held that the Tribunal's decision to grant the applicant leave to refer the matter could not be appealed.

11. The court held that the NCA provides for an expeditious, informal, and cost- effective complaints procedure and that section 141(1)(b) confers on the Tribunal a wide, largely unfettered discretion to permit a direct referral. The purpose of the provision is simply for the Tribunal to consider the complaint afresh, with the benefit of any findings made by the Regulator, and to decide whether the complaint deserves the Tribunal's attention. Circumstances that may influence the Tribunal's decision may include the prospects of the applicant's success, the importance of the issue, the public interest to have a decision on the matter, the allocation of resources, the applicant's interest in the relief sought, and the fact that the Regulator found that the complaint lacked sufficient merit to necessitate a hearing before the Tribunal.
12. 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

13. The Tribunal is a creature of statute. As such, it is empowered only to grant orders expressly authorised in the NCA. The Tribunal, accordingly, considered the alleged transgressions and the possible prescription of a complaint in terms of section 166.
14. The applicant alleges that the respondent did not conduct affordability assessments and recklessly granted him credit on 28 July

2016. Concluding the credit agreement with the respondent constitutes the cause of the complaint.

15. The Tribunal derives its jurisdiction from the NCA and does not have inherent jurisdiction. Like any other administrative or judicial

body, the Tribunal derives its powers and authority from the empowering legislation.[4]

16. Section 166(1) outlines that a complaint in terms of the NCA may not be referred or made to the Tribunal 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.”
17. Per Section 166(1)(a), the referral of a complaint to the Tribunal more than three years after the cause of the complaint occurred is prohibited. Unlike the Prescription Act 68 of 1969, the NCA does not provide for the interruption of prescription.
18. Section 166(1)(a) is a limitation that cannot be interpreted in any other way than the plain reading of it. The NCA does not contain any provisions

or exceptions relating to the cause of action being delayed or problems identified more than three years after the credit agreement had been entered into. In *First Rand Bank Ltd v Ludick*,^[5] the High Court held that the Tribunal has no power or discretion to extend the three-year period. The High Court judgment binds the Tribunal and must strictly apply the three-year time bar.

19. Based on the applicant’s evidence, the cause of the complaint arose in 2016. The applicant, therefore, had until 2019 to approach the Tribunal and request an order for reckless lending. Instead, he filed his application on 26 April 2024. This was outside the three years provided for in section 166(1)(a). As the cause of action that forms the basis of the complaint of reckless lending occurred more than three years before the application was made to the Tribunal, the complaint of reckless lending is time-barred from being considered by the Tribunal.
20. The Tribunal further finds that section 166(1)(b) is not applicable, as no course of conduct or continuous practice is argued in the founding affidavit. In his condonation applications, the applicant submits that the credit agreement is still in place and, therefore, constitutes a continuous practice. The mere submission that an allegedly reckless credit agreement is still in place is not a persuasive argument for establishing a form of continuous conduct. The Tribunal does not have the authority to determine whether the credit agreement was concluded recklessly. Therefore, it does not have the authority to determine whether the continued enforcement of such an agreement constitutes prohibited conduct.

CONCLUSION

21. As the cause of action that forms the basis of the complaint of reckless lending occurred more than three years before the application was made to the Tribunal, the complaint of reckless lending is time-barred from being considered by the Tribunal.

ORDER

22. The Tribunal makes the following order:

22.1. The application for leave to refer a complaint directly to the Tribunal is refused; and

22.2. There is no order as to costs.

Thus, done and dated 8 November 2024.

Dr MC Peenze

Presiding Tribunal Member

With Mr S Hockey and Ms P Manzi-Ntshingila (Tribunal Members) concurring.

[1] Published under Government Notice R489 in Government Gazette 28864 of 31 May 2006.

[2] The rules are titled “Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters

before the National Consumer Tribunal, 2007”, published in GN 789 of 28 August 2007 (GG No. 30225), as amended.

[3] (Case no 314/2020) [2021] ZASCA 91 (25 June 2021) SAFLII.

[4] See De Ville, Judicial Review of Administrative Action in South Africa p 91.

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

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