

SOUTH AFRICA / JUDGMENT

Linatsha v Experian Credit Bureau and Another (NCT2/90335/2023/141(1)(b)) [2024] ZANCT 53 (14 November 2024) [2024] ZANCT 53

COURT

National Consumer Tribunal

BEFORE

S Hockey, M Peenze, CJ Ntsoane

CASE / FILE NUMBER

NCT/290335/2023/141(1)(b)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: NCT/290335/2023/141(1)(b)

In the matter between: ANDERSON LINATSHA APPLICANT and EXPERIAN CREDIT BUREAU 1ST
RESPONDENT NEDBANK LIMITED 2ND RESPONDENT

Coram:

Mr S Hockey

- Presiding Tribunal Member

Dr M Peenze

- Tribunal Member

Mr CJ Ntsoane

- Tribunal Member

Date of Hearing

- 12 November 2024

Date of

Judgment

- 14 November 2024

JUDGMENT AND REASONS

INTRODUCTION

1. The applicant in this matter is Mr Anderson Linatsha (the applicant), a consumer as defined in section 1 of the National Credit Act, 34 of 2005 (the NCA). At the hearing of this matter, he represented himself. An interpreter was available to assist the applicant in the proceedings, but he conversed in English and needed little assistance with language issues.
2. The first respondent is Experian Credit Bureau (Experian), as defined in section 1 of the NCA and registered as such under section 43 of the NCA. Experian did not oppose this matter and did not appear at the hearing.
3. The second respondent is Nedbank Limited (Nedbank), a credit provider registered as such under section 40 of the NCA. At the hearing of this matter, Nedbank was represented by Mr Noyiko Nxumalo of the Johannesburg Bar, instructed by Smith, Jones and Pratt Attorneys.

TERMINOLOGY

4. A reference to a section in this judgment 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 rule refers to the rules of the Tribunal[2] (the rules).

APPLICATION TYPE AND JURISDICTION

5. The applicant first referred his complaint to the National Credit Regulator (the NCR). He complained that Nedbank caused an adverse listing against his name with Experian without being notified. After an assessment of the complaint by the NCR, it concluded on 28 September 2023 that the complaint, if true, would not constitute grounds for a remedy under the NCA. Alternatively, there existed circumstances, as reflected in section 139(1)(a), which warranted issuing the notice of non-referral.
6. Thereafter, the applicant referred this matter to the National Consumer Tribunal (the Tribunal) in terms of section 141(1)(b). This section provides that if the NCR issued a notice of non-referral as it did in the present matter, the complainant may refer the matter directly to the Tribunal, with leave of the Tribunal. The Tribunal granted such leave on 23 January 2024.
7. Accordingly, the Tribunal has jurisdiction in terms of section 141(1)(b) and section 27(a)(ii) [3] of the National Credit Act 34 of 2005 (the NCA) to consider this application.

BACKGROUND

8. Adverse information concerning the applicant was reported to Experian, which listed such information adversely on 2 November 2022.

9. According to Nedbank, the applicant started defaulting on his credit card facility with Nedbank on 17 January 2022 by failing to make payments on the amounts due. He subsequently caught up with his arrears but fell behind again in May 2022. Due to the applicant's aforesaid breach, Nedbank delivered him a notice in terms of section 129 dated 17 August 2023.
10. Nedbank further avers that the applicant failed to pay the arrear amount of R114 133, resulting in a summons being issued against the applicant out of the Johannesburg Magistrate's Court. Before the said summons was issued, Nedbank sent a second letter in terms of section 129, dated 17 August 2023, to the applicant by registered post.[4]
11. Nedbank denies that any adverse listing of the applicant is dated 2 November 2022 or 31 January 2023 or that it breached any of the provisions of the NCA.
12. The applicant contends that he never received any notification before his adverse listing with Experian. He lodged an objection with Experian on 20 January 2023 regarding the adverse listing dated 2 November 2022 and received feedback from them on 15 February 2023.
13. The applicant referred his complaint against Experian and Nedbank to the NCR and followed up with them on various occasions, requesting progress. On 8 August 2023, he eventually received a response, which included a section 129 letter[5] which the applicant alleges he never received. This letter is dated 28 January 2022.
14. The relief that the applicant seeks is a declaration that Nedbank contravened section 72(1)(a) by not advising him of an adverse listing before such listing with Experian. He initially requested an order to remove his listing but, at the hearing, advised that the listing no longer existed.
15. The applicant also asks for an order that the respondents contravened various sections of the NCA, but at the hearing, only argued for an order in relation to the contraventions discussed above apart from the removal of the adverse listing as it no longer exists.

THE HEARING

16. At the hearing, the applicant confirmed that the gist of his complaint relates to him not having been notified before the adverse listing against him by Nedbank with Experian. He did not present any arguments for contraventions of the other sections besides section 72(1)(a) and the provisions under regulation 19. He informed the panel that his adverse listing had been removed but persisted with the relief sought under section 72(1)(a) and regulation 19.

17. Mr Nxomalo advised the panel that Nedbank had filed a rule 15 application the day before the hearing. However, when he was informed that the panel had not been apprised of that application, he elected to proceed arguing on what was contained in the record. He did not ask for a postponement for the rule 15 application to be considered first, and the matter proceeded based on what is contained in the hearing record.

THE RELEVANT LEGAL PROVISIONS

18. Section 72(1)(a) entitles every person the right to be advised by a credit provider within a prescribed time before any prescribed adverse information concerning that person is reported by the credit provider to a credit bureau and to receive a copy of that information upon request.
19. Regulation 19(4) provides that a consumer must be given at least 20 business days' notice before the following adverse information concerning the consumer is submitted to a credit bureau, namely (a) classification of the consumer's behaviour, including classifications such as this 'delinquent', 'default', 'slow paying', 'absconded',

or 'not contactable'; and (b) classifications related to enforcement action taken by the credit provider, including

classifications such as handed over for collection or recovery, legal action or write-off.

CONSIDERATION

20. Notably, the applicant initially lodged a complaint with Experian and received feedback on 15 February 2023. In his founding papers, he does not make out any further case against Experian and the Tribunal will, therefore, consider only his complaint against Nedbank for not having notified him of their intention of the adverse listing within the prescribed time.
21. The applicant's case is undoubtedly related to his adverse listing of 2 November 2022. In terms of section 72(1)(a) read with regulation 19(4), therefore, he had to be informed by Nedbank at least 20 business days before that listing.
22. It is necessary to note that section 72(1)(a) does not specify how a credit provider is to advise a consumer before any prescribed adverse information concerning the consumer is reported to a credit bureau. Therefore,

this does not necessarily need to be done by registered post.

23. The two letters sent by Nedbank to the applicant in terms of section 129, dated 29 January 2022 and 17 August 2023, respectively, contained notifications of Nedbank's intention to supply adverse information as defined in the NCA in respect of the alleged default by the applicant within 20 business days from the date of delivery of those letters. Under normal circumstances, the Tribunal agrees that this would comply with the provisions of section 72(1)(a).

24. However, as Mr Nxumalo made clear, Nedbank did not rely on their letter dated 28 January 2022 for the adverse listing that may have occurred in November 2022. Nedbank made it clear in its answering affidavit that the applicant paid fees arrears on 14 February
2022. Therefore, Nedbank could not rely on their letter dated 28 January 2022 for the adverse listing of the applicant.
25. In its answering affidavit, Nedbank denies any adverse listing dated 2 November 2022 or 31 January 2023. It cannot be denied, however, that a listing is to take place, and the Tribunal is of the view that only Nedbank could have been the cause of that listing. Only Nedbank could have been the source of the information provided to Experian for the adverse listing.
26. There is no other notification by Nedbank to the applicant at least 20 days before the adverse listing of the applicant in November
2022. As a result, the Tribunal must conclude that Nedbank violated the applicant's rights in terms of section 72(1)(a) read with regulation 19(4).
27. As stated above, the adverse listing complained about has been removed, and the relief sought in this regard would be academic. This, however, does not preclude a finding that Nedbank violated the applicant's right under section 72(1)(a) read with regulation 19(4).

THE ORDER

28. In the result of the above, the following order is made:
- 28.1. Nedbank contravened section 72(1)(a) read with regulation 19(4).
- 28.2. The aforesaid contravention is declared to be prohibited conduct.
- 28.3. There is no order as to costs.

[signed]

S Hockey (Presiding Tribunal member)

Tribunal members Dr M Peenze and Mr C Ntsoane concur.

[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] This section provides that the Tribunal or a member of the Tribunal acting alone in accordance with the NCA or the CPA may adjudicate in relation to any allegations of prohibited conduct.

[4] See page 238 of the record.

[5] The purpose of section 129 was explained by the Constitutional Court in *Sebola and Another v Standard Bank and Another* 2012 (5) SA 142 (CC) at para 45 as follows: “Section 129(1)(a) requires a credit provider, before commencing any legal proceedings to enforce a credit agreement to draw the default to the notice of the consumer in writing. It has been described as a “gateway” provision, or a “new pre-litigation layer to the enforcement process”.

[5] The purpose of section 129 was explained by the Constitutional Court in *Sebola and Another v Standard Bank and Another* 2012 (5) SA 142 (CC) at para 45 as follows:

“Section 129(1)(a) requires a credit provider, before commencing any legal proceedings to enforce a credit agreement to draw the default to the notice of the consumer in writing. It has been described as a “gateway” provision, or a “new pre-litigation layer to the enforcement process”.

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