

SOUTH AFRICA / JUDGMENT

Molepo v African Bank Limited (NCT/282044/2023/141(1)(b)) [2024] ZANCT 30 (15 September 2024) [2024] ZANCT 30

COURT

National Consumer Tribunal

BEFORE

MC Peenze, Z Ntuli, S Mbhele

CASE / FILE NUMBER

NCT/282044/2023/141(1)(b)

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HELD IN CENTURION

Case

number: NCT/282044/2023/141(1)(b)

In

the matter between:

NALEDI
MAMORONGWA MOLEPO
APPLICANT
and
AFRICAN
BANK LIMITED
RESPONDENT

Coram:

Dr
MC Peenze
- Presiding Tribunal member
Ms
Z Ntuli
- Tribunal member
Mr
S Mbhele
- Tribunal member
Date
of hearing
- 13 September 2024
Date
of judgment

- 15
September 2024

JUDGMENT

AND REASONS

INTRODUCTION AND APPLICATION TYPE.

1. This application has been referred to the National Consumer Tribunal (the Tribunal) by the applicant in terms of section 141(1)(b) of the National Credit Act, 34 of 2005 (the NCA). The applicant first referred the complaint to the National Credit Regulator (NCR), which issued a non-referral notice in terms of section 141(1)(a) of the NCA, whereafter, the applicant approached the Tribunal. Leave for the referral was granted on 16 July 2024.

THE PARTIES

2. The applicant is Naledi Mamorongwa Molepo, a consumer as defined in section 1 of the NCA. At the hearing, the applicant represented herself.
3. The respondent is African Bank Limited, a credit provider as defined in section 1 of the NCA. Adv JG Botha, instructed by Oosthuizen Du Toit Berg & Boon Attorneys (ODBB), represented the respondent at the hearing.

TERMINOLOGY

4. A reference to a section in this judgment refers to a section of the NCA.
5. A reference to a regulation refers to the National Credit Act Regulations, 2006 (the regulations).[1]
6. A reference to a rule in this judgment refers to the Rules of the Tribunal[2].

RELIEF REQUESTED

7. The relief sought by the applicant, as stated in NCR Form 32, which she completed, is as follows: "for the total cost of the credit from African Bank Limited consisting of R13 000 to be removed from my credit."

BACKGROUND

8. The applicant alleges that she was approached by an unknown man during May and June 2021, who influenced her to take out loans with various banks. On 31 May 2021, the applicant allegedly signed a loan agreement with Direct Axis and on 1 June 2021, the applicant signed a loan agreement with the respondent. A loan of R13 000.00 was granted to her and deposited into her Nedbank account. After she obtained further loans from various credit providers on 1 and 2 June 2021, the man allegedly instructed her on 2 June 2021 to withdraw all the money from her account. He then held a knife to her neck and took the money from

her. She laid criminal charges at the Midrand Police Station.

9. The Tribunal also took judicial notice that the applicant had filed various applications against various credit providers, all of which had been dismissed by the Tribunal.[3]
10. The applicant alleges that the respondent did not thoroughly conduct an affordability assessment, that she did not understand the risk of credit, that she was not in the right state of mind when the loans were issued to her, that she became over-indebted as a result of entering into the credit agreement, and that this and other loans are above her salary, leaving her with a negative balance in her bank account.
11. The applicant further alleges that the credit she received from the respondent has caused her to become over-indebted. She contends that the respondent failed to assess her understanding of the costs and obligations of the credit agreement as required under the NCA.
12. On 14 June 2021, the applicant filed a complaint with the NCR. On 17 November 2021, the NCR issued a notice of non-referral, indicating that it assessed the applicant's complaint and found that the credit issued by the respondent was not reckless and that entering into the credit agreement would not have resulted in the applicant becoming over-indebted. The matter is now before the Tribunal for adjudication on the merits.

APPLICABLE SECTIONS OF THE NCA

13. Section 80(1)(a) and (b) states that a credit agreement is reckless if, at the time the agreement was made, the credit provider failed to conduct an assessment as required or the credit provider, having conducted an assessment, entered into the credit agreement with the consumer even though the consumer did not understand the risks, costs or obligations under the agreement. It further states that a credit agreement is reckless if the information available at the time indicated that concluding the credit agreement would make the consumer over-indebted.
14. Section 81(2)(a) states that a credit provider must not enter into a credit agreement without first taking reasonable steps to assess the proposed consumer's general understanding and appreciation of the risks and costs of the proposed credit and the rights and obligations of the consumer under a credit agreement. A credit provider must take reasonable steps to assess the consumer's debt repayment history and her existing financial means, prospects and obligations before entering into a credit agreement. Section 81(3) further states that a credit provider must not enter a reckless credit agreement with a prospective consumer.
15. Section 81(4)(a) states that it is a complete defence to an allegation that a credit agreement is reckless if the credit provider establishes that the consumer failed to fully and truthfully answer any requests for information made by the credit provider as part of the assessment required under the NCA.

16. Regulation 23A(9) states that a credit provider must utilise the minimum expense norms table provided in Regulation 23A(10) when calculating the minimum necessary living expenses of a consumer applying for credit.
17. Regulation 23A(12) states that when a credit provider conducts an affordability assessment, it must calculate the consumer's discretionary income, consider all monthly debt repayment obligations appearing on the consumer's credit profile, and include all maintenance obligations and other necessary expenses.

CONSIDERATION OF THE EVIDENCE

Communication of risks and costs of credit

18. The "Quotation and Pre-Agreement Statement for a Credit Agreement" document (reference number 137 4 7983001) confirms that the respondent advanced R13 000.00 with an interest rate of 24.50% to be repaid in monthly instalments of R775.37. The document also contains the risks and costs of the proposed credit and the applicant's rights and obligations under the credit agreement. It was signed by the applicant and dated 1 June 2021. The applicant did not deny signing this document. From the documentation mentioned above, the risks and costs of the proposed credit and the applicant's rights and obligations under the credit agreement were communicated to her before the conclusion of the credit agreement. Therefore, the credit provider complied with section 81(2)(a)(i) of the NCA.

Debt repayment history and credit obligations:

19. The NCR received a letter from Experian's credit bureau confirming that the credit provider enquired into the applicant's credit record on 1 June 2021. Subsequently, the respondent provided the NCR with information from the applicant's credit record at the time of the credit application. From the credit profile information provided, the following were the applicant's credit bureau expenses:
 - i) Credit Provider: Volkswagen Financial with a monthly instalment of R3 221.00.
20. It accordingly appears that the credit provider took steps to determine the applicant's debt repayment history as a consumer under credit agreements and as contemplated in section 81(2)(a)(ii) and considered the applicant's credit obligations in line with Regulation 23A.

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21. Per section 81(1), when applying for credit, a consumer must fully and truthfully answer any requests for information by the credit provider as part of the assessment required by that section. A credit provider can only rely on the information and disclosures made by the applicant. The absence of existing or new credit agreements on a consumer's credit bureau report does not absolve the consumer from providing complete information to a prospective credit provider per section 81(1).

22. In her founding application, the applicant did not dispute the correctness of her credit obligations outlined in the NCR report or allege any further disclosures made during the respondent's assessment. However, during the hearing, she argued that she verbally outlined to the respondent's consultant on 1 June 2021 that she entered into a credit agreement with Direct Axis the day before. Still, the consultant allegedly did not capture the Direct Axis details on the document she was requested to sign. The applicant could not explain why this allegation was not contained in the founding affidavit. Also, she could not explain why

she subsequently signed a document that did not reflect the information she now allegedly added verbally.

23. The applicant did not persuade the Tribunal that she advised the respondent of any additional credit obligations on 1 June 2024. As the applicant continued on 2 June 2024 to obtain further credit from other credit providers, the Tribunal is persuaded that, on a balance of probabilities, the applicant attempted to take advantage of the fact that credit obligations do not reflect immediately on a consumer's credit bureau profile and, as a result, she would be able to obtain credit without consideration of credit obligations created just the day before. In the absence of evidence to substantiate the allegation that the respondent was made

aware of the Direct Axis account, the Tribunal is persuaded that the applicant did not convey such an account to the respondent's

consultant on 1 June 2024. Further, as such an allegation is an additional and new point not raised by the applicant in her founding

affidavit, the allegation is dismissed.

24. The respondent put up a convincing case that they checked the consumer's credit obligations as required by law by obtaining a credit bureau report and that such a report did not contain a Direct Axis credit agreement on 1 June 2021. The respondent confirmed that it requested a credit bureau report on 1 June 2021 but did not include a copy of the credit bureau report in its answer. The Tribunal, having dealt with the same complaint and chain of events against Old Mutual, had privy to the NCR's consideration of the applicant's credit report as issued on 6 June 2021:[4]

"As per the copy of a credit bureau report dated 06 June 2021, the complainant had the following debt obligations:

Credit Provider: Brolink AIFA Asset Life VW Financial Services Monthly instalment: R210.00
R241.00 R3221.00 Vodacom R522.00 TOTAL R4194.00"

25. From the above, the Direct Axis credit agreement was not yet reflected on the applicant's credit report on 6 June 2021. Therefore, the Tribunal accepts the respondent's argument that it was not yet reflected on the applicant's credit profile on 1 June 2021, five days before the

above report. The Tribunal is, therefore, persuaded that the respondent took steps to determine the applicant's debt repayment history as a consumer under credit agreements, as required under section 81(2)(a)(ii), and considered the applicant's credit obligations in line with regulation 23A (13)(a).

Income and expenses:

26. Section 78(3) provides that a credit provider must consider a consumer's financial means, prospects, and obligations before offering a loan agreement.
27. According to the credit agreement, the applicant declared the following:
 - i) Gross income - R27 066.99
 - ii) Net income - R18 877.75
 - iii) Living expenses - R2 120.00
28. The respondent provided the NCR with the applicant's pay slip dated 25 May 2021, which verifies and confirms the above gross and net income.
29. It is not disputed that the respondent considered the income and expenses as declared by the applicant. At the hearing, the applicant changed her version by indicating that she verbally added her cell phone, insurance and gym expenses during the interview with the respondent's consultant. However, the consultant allegedly did not reduce those to writing or include such in the statement she was requested to sign. The applicant did not provide any details of these expenses at the hearing and could not explain why she signed a document that did not reflect such expenses. Without any evidence to support this allegation, the Tribunal is persuaded that the respondent documented all the information provided and that the applicant subsequently signed the statement. The Tribunal also took judicial notice that the insurance and Vodacom accounts were reflected on the credit bureau report above.
30. As outlined above, the applicant failed to inform the respondent of the additional credit obligations resulting from the credit agreement allegedly entered into on 31 May 2021 with Direct Axis. Therefore, the respondent was uninformed and unable to consider such credit obligation. On the evidence before the Tribunal, the respondent considered the applicant's financial means, prospects

and obligations as they existed at the time of the credit application and as required by section 81(2)(a)(iii) read with section 78.

Regulation 23A Minimum Expenses Norm:

31. The NCR conducted an independent affordability calculation, considering the supporting documentation provided during the complaint

evaluation.[5] The minimum expense norm was calculated as follows:

- i) Gross income - R27 006.13
 - ii) Less minimum - R25 000.01
 - iii) X monthly fixed factor - 8.20%
 - iv) Add minimum monthly fixed factor – R2 855.38
 - v) Equals: minimum expense norm - R3 019.88
32. As the applicant declared living expenses that were lower than the above minimum expense norm, the NCR used the higher amount in their affordability calculation:
- i) Net declared income - R18 877.75
 - ii) Less minimum expense norm - R3 019.88
 - iii) Less credit bureau expenses - R3 221.00
 - iv) Equals Discretionary Income - R12 636.87
 - v) Less new instalment - R775.37
 - vi) Equals surplus/deficit - R11 861.50
33. The applicant did not dispute the NCR's calculations as referred to above. Further, the Tribunal has no reason to believe the calculations are incorrect. Based on the NCR's calculations, the applicant would have had a surplus of R11 861.50 available after deducting the new instalment. Entering the credit agreement would not have resulted in the applicant's over-indebtedness.
34. Having regarded the above and other factors, the evidence before the Tribunal confirms that the respondent considered the applicant's financial means, prospects, and obligations as they existed at the time of the application for credit as required by section 81(2)(a)(iii) read with section 78.

THE APPLICANT'S STATE OF MIND

35. The applicant alleged that she was not in her right mind when requesting a loan from the respondent. The applicant failed to provide evidence to confirm that she was not compos mentis when entering the credit agreement on 1 June 2024. Further, the applicant outlined that she obtained further credit from different credit providers on 2 June 2024. Where temporary mental incapacity is alleged, the consumer must provide convincing evidence to the Tribunal. The mere alleging of such fact does not suffice.
36. Further, the Tribunal considered whether the respondent failed to consider the applicant's mental state when considering the loan application. On the evidence before the Tribunal, the applicant did not inform the respondent's representatives that the applicant was being forced or influenced to take out loans.

37. In the absence of evidence as to the alleged mental incapacity of the applicant when entering into the agreement, the Tribunal finds that the applicant entered into the credit agreement wilfully and in a capable state. The Tribunal further finds it detrimental to the applicant's case that she substantially changed her version after lodging her complaint with the NCR, filing her complaint with the Tribunal, and then again during the hearing.

CONCLUSION

38. The Tribunal is persuaded that the respondent conducted an affordability assessment as contemplated in section 81(2)(a) and regulation 23A in calculating the applicant's affordability. The respondent calculated the applicant's average net income and deducted her necessary living and credit expenses. The applicant would have had a surplus available after deducting the new instalment. Accordingly, entering into the said credit agreement would not have resulted in the applicant's over-indebtedness when the credit agreement was entered into.
39. The Tribunal finds that the respondent acted reasonably and considered all the information provided by the applicant, including the applicant's recent payslip, bank statements and credit profile. Furthermore, the applicant signed the income and expenses recorded as part of her credit application. She also signed below a clear indication and breakdown of the costs of the credit on her credit agreement. It is reasonable to conclude that the applicant was aware of the risks, costs, and obligations regarding the credit agreement she concluded with the respondent.
40. The Tribunal finds the respondent acted in line with its statutory obligations in assessing the applicant's creditworthiness and did not grant credit recklessly. The applicant has further not proven her alleged state of indebtedness or that any over- indebtedness she may be experiencing can be attributed to the credit agreement she concluded with the respondent. Therefore, the application stands to be dismissed.

ORDER

41. Accordingly, the Tribunal makes the following order:

41.1 The application is dismissed; and

41.2 There is no cost order.

Dr MC Peenze

Presiding Tribunal member

Tribunal members Mr S Mbhele and Ms Z Ntuli concur.

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

[2] 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).

[3] The applicant brought separate applications against African Bank, Capitec, Nedbank, Old Mutual and ABSA.

[4] NCR Notice of Non-Referral Reference Number: C5503B, See Tribunal bundle for NCT-282000-2023- Section 141(1)(b), pg 6.

[5] See pg 16 of the Tribunal bundle.

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Prepared on 9 October 2026 · Esheria