

SOUTH AFRICA / JUDGMENT

Ndimma and Another v Nedbank Limited and Another (NCT/130810/2019/148(1)) [2019] ZANCT 126 (9 August 2019)

[2019] ZANCT 126

COURT

National Consumer Tribunal

BEFORE

T Bailey, A Potwana, H Devraj

CASE / FILE NUMBER

NCT/130810/2019/148(1)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

AT CENTURION

Case

number: NCT/130810/2019/148(1)

In

the matter between:

NOMATHEMBA
NDIMA FIRST
APPELLANT
MYRLENE
PIETERSE SECOND
APPELLANT
and
NEDBANK
LIMITED FIRST
RESPONDENT
NATIONAL CREDIT
REGULATOR SECOND
RESPONDENT

Coram: Mr
T Bailey – Presiding
Tribunal member
Mr
A Potwana – Tribunal member
Ms
H Devraj – Tribunal member
Date
of hearing – 30
July 2019

JUDGEMENT

AND REASONS

PARTIES AND REPRESENTATION

Appellants

1. The First Appellant is Nomathemba Ndimba (“the first appellant”), an adult female, who resides at [...], Motherwell, Port Elizabeth, Eastern Cape.
2. The Second Appellant is Myrlene Pieterse (“the second appellant”), an adult female, who resides at [...], Port Elizabeth, Eastern Cape.
3. In this judgement the first and second appellants, are jointly referred to as “the appellants”. They are the applicants in the main matter.
4. Ms Sone Bester, who is a candidate attorney at D & K Attorneys, represented the appellants at the hearing of this appeal.

Respondents

5. The First Respondent is Nedbank Limited (“the first respondent”), duly registered and incorporated in terms of the company laws of the Republic of South Africa and a licensed financial service provider, with its registered address at 135 Rivonia Road, Sandown, Johannesburg, Gauteng.
6. The Second Respondent is the National Credit Regulator (“the second respondent”), a juristic person established in terms of section 12 of the National Credit Act, 2005 (the Act) to regulate the consumer credit market and ensure compliance with the Act, with its principal business address at 127 - 15th Rd, Randjespark, Johannesburg, Gauteng.
7. In this judgement the first and second respondents are jointly referred to as “the respondents”. They are the respondents in the main matter.
8. The respondents did not oppose this appeal and did not attend the hearing of the appeal.

APPLICATION TYPE

9. This is an appeal in terms of section 148 (1)[1] of the Act against the ruling of a single member of the National Consumer Tribunal (“the Tribunal”) refusing the appellants’ application to condone the appellants’ failure to refer their complaint directly to the Tribunal in terms of subsection 141
- (1) (b)[2] of the Act within 20 business days of the second respondent having issued a notice of non-referral in terms of section 139 (1) (a)[3] of the Act.
10. In this judgement a section refers to a section in the Act; a regulation refers to the National Credit Regulations, 2006[4]; and a rule refers to the Tribunal rules[5].

WIDE APPEAL

11. This appeal is a wide appeal because the appeal panel is in terms of rule 27 (2) not restricted to the record of the proceedings before the single member.

BACKGROUND

12. The second appellant employs the first appellant as a healthcare worker for the second appellant’s mother.
13. This judgement does not determine the merits of the appellants’ complaint against the first respondent in the main matter. Nevertheless, it is appropriate to set out a brief background to this appeal.
14. In the main matter the appellants allege that the first respondent granted reckless credit to the first appellant when:
 - 14.1. on 7 October 2015 the first respondent issued a credit card to the first appellant under credit agreement number 5898460978295301; and
 - 14.2. on 11 April 2016 the first respondent granted the first appellant a personal loan under credit agreement number 8002892175301.
15. In this judgement these two credit agreements are collectively referred to as “the credit agreements”.
16. The second appellant noticed that the first appellant was experiencing financial stress and on behalf of the first appellant attempted unsuccessfully to resolve the matter with the first respondent.
17. On or about 8 July 2017 the appellants lodged an Application for Assistance with the Ombudsman for Banking Services (“the ombudsman”). The ombudsman investigated the matter, which included assessing the first appellant’s credit report. The credit report revealed that the first appellant did not appear to have disclosed her debt obligations with Jet Stores and DStv, which may have impacted the outcome of the first respondent’s affordability assessments.

18. On 24 November 2017 the ombudsman informed the appellants in writing that it was “unable to make a finding in your favour and since there is no reasonable prospect of us being able to take the matter further, we have closed the case.”
19. During February 2018 the appellants submitted a complaint to the second respondent in terms of section 136 (1).[6] They alleged that the first respondent had engaged in reckless lending by concluding several loans with the first appellant without properly conducting affordability assessments.
20. The second respondent conducted its own affordability assessments. It concluded that the first respondent conducted affordability assessments consistently with the Act; and the preponderance of information available to the first respondent did not indicate that entering into the credit agreements would make the first appellant over-indebted.
21. On 27 July 2018 the second respondent therefore issued a notice of non-referral in terms of section 139 (1) (a) because the complaint did not allege any facts which, if true, would constitute a remedy under the Act.
22. On 6 December 2018 the appellants applied to the tribunal in terms of section 141 (1) (b) for an order granting them leave to refer the main matter directly to the Tribunal (“the leave application”).
23. The appellants did not comply with item 32 of the rules, which requires the appellants to refer a complaint to the Tribunal within 20 business days of the date of the notice of non-referral. Consequently, on 6 December 2018 the appellants also filed an application with the tribunal to condone the late referral of the leave application to the tribunal (“the condonation application”). The respondents did not oppose the condonation application.
24. On 29 March 2019 a single member of the Tribunal refused the condonation application because the appellants had not shown good cause for an order to be made in the appellants’ favour.
25. The single member’s refusal to grant the condonation application is the subject of this appeal.

APPELLANTS’

SUBMISSIONS

Degree of lateness

26. The appellants submitted that they made the leave application late because they were attempting to settle the matter with the first respondent.

Importance to the parties

27. The matter was sufficiently important to the appellants and the first respondent because they continued to negotiate for four months after the appellants should have made the leave application. Moreover, the first appellant's dire financial situation requires that the main matter be finalised.

Prejudice

28. The respondents have not opposed the leave application. The appellants and the respondents will suffer prejudice if the appeal is not granted. They will be denied the opportunity to state their respective cases before the Tribunal and thereby enable the tribunal to clarify the aspects pertaining to reckless lending that form the subject matter of their dispute.

Prospects of success

29. The appellants believe that they have good prospects of success. According to the appellants, it is common cause that the first respondent did not include the first appellant's credit obligations with Jet Stores and DSTV when it conducted the affordability assessments. The appellants therefore believe that the first respondent contravened section 81 (2) and regulation 23A (12) (b), which rendered the credit the first respondent granted to the first appellant to be reckless.

LEGAL PRINCIPLES

30. It is convenient to set out the relevant statutory and regulatory provisions as well as the case law governing this appeal.
31. Rule 34 (1) (a) of the rules provides that a "party may apply to the Tribunal in Form TI r.34 for an order to condone the late filing of a document or application". Similarly, rule 34 (1) (b) empowers the Tribunal to "extend or reduce the time allowed for filing or serving". Rule 34 (2) provides that the Tribunal may grant the order on good cause shown.
32. Rule 13 requires a person who wishes to oppose an application of this nature to serve an answering affidavit on the applicant concerned and any other persons on whom the application was served within 15 days of the date of the application.
33. To condone means to "accept or forgive an offence or wrongdoing". The word stems from the Latin term *condonare*, which means to "refrain from punishing".^[7] It can also be defined to mean "overlook or forgive (wrongdoing)".^[8]
34. The standard for determining an application of this nature is the interests of justice.^[9] Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. It requires the exercise of a discretion on an objective conspectus of all the facts. Factors that are relevant include but are not limited to the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the

delay; the importance of the issue to be raised in the intended appeal; and the prospects of success.[10] Ordinarily these factors are interrelated and should not be considered separately.[11]

MERITS OF THE APPEAL

35. The Tribunal has a discretion, which it must exercise judiciously, when deciding whether it is in the interests of justice to condone the appellant's failure to timeously file the leave application with the Tribunal.

Lateness

36. The appellants were bound to file the leave application by 27 August 2018. The Tribunal is satisfied that the email communications between the appellants and the first respondent on 27 August 2018 reveal that the first respondent consented to the late filing of the leave application and that the parties intended to attempt to resolve the dispute. Clearly, the parties were unable to do so; and on 6 December 2018 the appellants proceeded to file the condonation application simultaneously with the leave application. The appellants were therefore just over three months outside of the 20 business days within which they were required to file the leave application.
37. Although the three-month delay is excessive, the tribunal is satisfied that the appellants and the first respondent were embroiled in settlement negotiations, which amounts to an acceptable explanation for the delay.
38. The Tribunal now turns to the appellants' prospects of success in the main matter, which the appellants would only be entitled to have determined once the appellants succeed in this appeal and subsequently obtain the leave of the Tribunal.[12]
39. Section 81 (1) obliges prospective consumers to fully and truthfully answer all the credit provider's requests for information as part of the credit provider's assessment when deciding to grant credit to prospective consumers. Section 81 (2) (a) prohibits a credit provider from concluding a credit agreement without taking reasonable steps to assess the proposed consumer's general understanding of the risks and costs of the proposed credit; rights and obligations under a credit agreement; debt repayment history under credit agreements; and existing financial means, prospects and obligations. Regulation 23A (12) (b) [13] requires a credit provider to consider all monthly debt obligations that are reflected on a consumer's credit profile held by a registered credit bureau.
40. It appears to be common cause that the first respondent did not consider the first appellant's debt obligations with Jet Stores and DStv when it concluded the credit agreements with the first appellant. The first respondent's failure to have done so raises questions whether the first respondent took the reasonable steps required of it in terms of section 81 (2) (a); and complied with 23A (12) (b) by considering all the debt obligations reflected on the first appellant's credit profile held by a registered credit bureau.

41. These considerations are best tested in a tribunal hearing into the merits of the main matter. In this way, all the available relevant information, such as the first appellant's credit report and her answers to the first respondent's request for information, can be placed before the tribunal.
42. The Tribunal is therefore satisfied that the appellants have reasonable prospects of success in the main matter.
43. The Tribunal is also satisfied that the matter is important to the appellants. They have spent more than three months attempting to settle the matter; and the first appellant's dire financial situation cries out for the matter to be finalised. Consequently, the first appellant will be severely prejudiced should she not have an opportunity to obtain the leave of the Tribunal.
44. Moreover, the respondents did not oppose either the condonation application or this appeal.

CONCLUSION

45. For these reasons the tribunal is persuaded that the appellants have shown good cause; and it is in the interests of justice to condone the appellants' failure to timeously refer the leave application to the Tribunal.
46. The normal time periods and processes following the granting of a condonation application for leave to refer a matter to the Tribunal, as set out in the rules, will apply.

ORDER

47. Accordingly, the Tribunal makes the following order:
 - 47.1. the ruling of the single member of the tribunal dated 29 March 2019 that refused to condone the appellants' late referral of the leave application to the Tribunal is set aside;
 - 47.2. the appellants' late referral of the leave application is condoned; and
 - 47.3. there is no order as to costs.

DATED AT CENTURION ON THIS 9th DAY OF AUGUST 2019

TREVOR BAILEY

Tribunal member

With Tribunal members Mr A Potwana and Ms H Devraj concurring.

NdimaNedbank&NCR.130810.18.148 (1)

[1] Section 148

- (1) provides that a participant in a hearing before a single member of the tribunal may appeal a decision by that member to a full panel of the tribunal.
- [2] Section 141
- (1) (b) provides that if the National Credit Regulator issues a notice of non-referral in response to a complaint or an offence in terms of the Act, the complainant may refer the matter directly to the Tribunal, with the leave of the Tribunal.
- [3] Section 139
- (1) (a) empowers the National Credit Regulator, upon accepting a complaint, to issue a notice of non-referral to the complainant if the complaint appears to be frivolous or vexatious, or does not allege any facts which, if true, would constitute grounds for a remedy under the Act.
- [4] National Credit Regulations, 2006 published under Government Notice R489 in Government Gazette 28864 of 31 May 2006.
- [5] Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007 published under GN 789 in Government Gazette 302252 on 28 August 2007.
- [6] Section 136
- (1) empowers any person to submit a complaint to the National Credit Regulator concerning a contravention of the Act or an allegation of reckless credit.
- [7]Oxford English Dictionary, Second Edition at page 151.
- [8]Collins English Dictionary and Thesaurus, Fourth Edition 2011 at page 170.
- [9] Head of Department, Department of Education, Limpopo Province v Settlers Agricultural High School and others 2003 (11) BCLR 1212 (CC) at para [11].
- [10]Van Wyk v Unitas Hospital and Others 2008(4) BCLR 442 (CC) at para 20 as applied in Camagu v Lupondwana Case No 328/2008 HC Bisho.
- [11] Melane v Santam Insurance Company Limited 1962
- (4) SA 531 (A) at 532C-E.
- [12] See section 141 (1) (b) of the NCA
- [13] Regulation 23A deals with the criteria to conduct an affordability assessment.

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