

SOUTH AFRICA / JUDGMENT

Papo v Standard Bank of South Africa Ltd (NCT/69527/2016/141(1)) [2017] ZANCT 81 (27 July 2017) [2017] ZANCT 81

COURT

National Consumer Tribunal

BEFORE

J Simpson, F Manamela, A Potwana

CASE / FILE NUMBER

NCT/69527/2016/141(1)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

number: NCT/69527/2016/141(1)

In

the matter between:

JOSEPH
TOPITO PAPO
APPLICANT
and
THE
STANDARD BANK OF SOUTH AFRICA
LTD
RESPONDENT

Coram: Adv.
J. Simpson
–
Presiding
member
Adv.
F. Manamela
–
Member
Mr.
A. Potwana
–
Member
Date
of Hearing
–
25 July 2017

JUDGMENT

AND REASONS

APPLICANT

1. The Applicant in this matter is Mr Papo, a major male (hereinafter referred to as “the Applicant or “Mr Papo”). Mr Fanie Grove, a debt counsellor, appeared on behalf of the Applicant.

RESPONDENT

2. The Respondent is The Standard Bank of South Africa Limited, a registered credit provider (hereinafter referred to as “the Respondent” or “Standard Bank”). There was no appearance by the Respondent at the hearing and no answering affidavit filed.

APPLICATION TYPE

3. This is an application in terms of Section 141(1) of the National Credit Act 34 of 2005 (“the NCA”).
4. Section 141(1)(b) of the NCA states the following –
 141. Referral to Tribunal.—(1) If the National Credit Regulator issues a notice of nonreferral 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—
 - (a) the consumer court of the province within which the complainant resides, or in which the respondent has its principal place of business in the Republic, subject to the provincial legislation governing the operation of that consumer court; or

- (b) the Tribunal, with the leave of the Tribunal.
- 5. In an application of this nature the Tribunal must therefore first consider whether it will grant the Applicant leave to hear the matter. If the leave is granted then the Tribunal will consider the main merits of the Application in a separate hearing.

HEARING IN DEFAULT

- 6. During November 2016, the Applicant filed the application with the Tribunal. After initially issuing a number of notices of incomplete filing, the Registrar issued a Notice of Complete Filing to the parties on 9 March 2017. The application was served by personal delivery to Mr Mkize, the Group Legal Division of Standard Bank on 29 November 2016. The bank's stamp appears on the application document as having been received.
- 7. In terms of Rule 13 of the Rules of the Tribunal[1], the Respondent had to respond within 15 days by serving an answering affidavit on the Applicant. The Respondent however failed to do so.
- 8. The Applicant did not file an application for a default order in terms of Rule 25(2).
- 9. The Registrar however set the matter down for hearing on a default basis due to the pleadings being closed. The Registrar issued a notice of set down on 15 June 2017.
- 10. Rule 13(5) provides as follows:

“Any fact or allegation in the application or referral not specifically denied or admitted in the answering affidavit, will be deemed to have been admitted”
- 11. Therefore, in the absence of any answering affidavit filed by the Respondent, the Applicant's application and all of the allegations contained therein are deemed to be admitted.
- 12. The Tribunal is satisfied that the application was properly served on the Respondent. The matter therefore proceeded on a default basis.

BACKGROUND

- 13. The application is not very clearly set out or described, the Tribunal therefore had to interpret the numerous documents to understand the basis of the application. Some of the information had to be obtained from Mr Grove at the hearing in the form of verbal submissions. Exact dates are unclear from the pleadings or uncertain to Mr Grove.
- 14. It appears Mr Papo purchased a vehicle in 2008 for a capital amount of R113 096.43 with finance obtained from the Respondent. The total amount repayable with interest would be R193 638.24 over a period of 72 months. Mr Papo was unable to pay the monthly instalments at some stage and went into arrears on the loan.

15. In 2014 the bank initiated legal action and obtained judgment against the Applicant for an amount of R182 334.68 plus interest at a rate of 18.76%. The vehicle was also attached by the bank by order of the court at some stage in 2015 and appears to have been sold in execution of the judgment for an amount of R18 000.00.
16. Mr Papo engaged the services of Mr Grove during 2010 or 2011. Mr Grove disputed the amounts allegedly owed by Mr Papo to Standard Bank but was unable to make any progress in this regard. Mr Grove concluded agreements from Mr Papo's creditors to repay his debts. This was however never made an order of court or the Tribunal as Mr Papo did not always comply with the agreed monthly payments.
17. Mr Grove lodged a complaint with the National Credit Regulator (NCR) in August 2014. He also lodged a complaint with the Ombudsman for Banking Services but was unsuccessful.
18. The NCR issued a letter of non referral to Mr Grove on 3 October 2016. The NCR essentially stated that the Applicant was unable to prove that the bank's manner of calculation was incorrect.
19. Mr Grove submitted an affidavit from an actuary who recalculated what the outstanding balance on the loan should be. According to his calculations the balance as at 30 June 2013, when the judgment was applied for, should have been R107 146.75, not R182 334.68.
20. Mr Grove further submitted that the loan was originally granted recklessly and that Mr Papo was married in community of property, yet his wife had not signed the credit agreement at the time. Mr Grove made numerous other allegations regarding the validity of the original contract that need not be repeated at this stage.
21. It appears Mr Grove is essentially asking the Tribunal to declare the original contract null and void and to order that Mr Papo no longer owes any money to the Respondent.

APPLICATION FOR LEAVE

22. In the matter of Coertze and Burger v Young[2] the Tribunal considered the factors which must be evaluated regarding leave. The Tribunal held that the following two factors should be considered:
 - 22.1 The Applicant's reasonable prospects of success with the referral; and
 - 22.2 Whether the matter is of substantial importance to the Applicant or the Respondent.
23. It is firstly very clear that the matter is of substantial importance to both parties. Mr Grove, on behalf of Mr Papo, has gone to a great deal of effort to lodge the complaint with the NCR, the Banking Ombudsman and then to pursue it further with the Tribunal.
24. The prospects of success however require more consideration.

Prospects of success on the merits

25. The original credit agreement was signed by the Applicant in 2008. The application was filed with the Tribunal in November 2016. Mr Grove lodged the complaint with the NCR in August 2014. Section 166 (1)(a)[3] of the NCA prevents an application from being filed regarding any act or omission which took place more than three years prior to the application. Three years after 2008 is 2011. Any complaint regarding reckless lending or the validity of the credit agreement should have been raised before the end of 2011. It can also not be said that the lodging of the complaint with the NCR suspended prescription as the matter had already prescribed before the complaint was even lodged with the NCR. While the Tribunal will often be generous in allowing for time periods that have elapsed due to matters having been pending before an alternative dispute resolution process, there is no room for any exceptions in this matter.
26. The Tribunal takes note of the extensive effort Mr Grove has undertaken to pursue the matter on behalf of Mr Papo. The complaint regarding the calculation of the outstanding balance is however (unfortunately for the Applicant) similarly subject to a decisive and straightforward decision. The High court has granted judgment against the Applicant for the amount outstanding. This judgment remains in place until set aside by a competent court. The Tribunal does not have any power to adjudicate on the calculation of the balance outstanding and to thereby set aside the court's original judgment. This approach to the principle of *res judicata* has been decided in numerous prior judgments by the Tribunal.[4]

CONCLUSION

27. There is no reasonable prospect of the Applicant succeeding in his application against the Respondent.

ORDER

28. Accordingly, the Tribunal makes the following order –

28.1 The Applicant's application for leave to refer the matter directly to the Tribunal is refused.

28.2 There is no order as to costs.

DATED ON THIS 27th DAY OF JULY 2017

[signed]

Adv J Simpson

Presiding Member

Mr. A Potwana (member) and Adv Manamela (member) concurring.

[1] 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). As amended.

[2] NCT/7142/2012/75(1)(b)&(2).

[3]

166. Limitations of bringing action.—(1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court 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. (2) A complaint in terms of this Act may not be referred to the Tribunal or to a consumer court in terms of this Act against any person that is, or has been, a respondent in proceedings under another section of this Act relating substantially to the same conduct.

[3]

166. Limitations of bringing action.—(1) A complaint in terms of this Act may not be referred or made to the

Tribunal or to a consumer court 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.
- (2) A complaint in terms of this Act may not be referred to the Tribunal or to a consumer court in terms of this

Act against any person that is, or has been, a respondent in proceedings under another section of this Act relating substantially to the same conduct.

[4] See *Ratshikuni v First Rand Bank Ltd and Audi Financial Services* NCT 10118/2013 SAFLII
Also *Ingegryn 40 CC v ABSA Bank Ltd* NCT 16162/2014 SAFLII

[4] See *Ratshikuni v First Rand Bank Ltd and Audi Financial Services* NCT 10118/2013 SAFLII
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