

SOUTH AFRICA / JUDGMENT

**Pillay v Wesbank, a division of Firststrand
Bank Ltd (NCT/867/2010/128(1) (P))
[2012] ZANCT 11 (29 June 2012)
[2012] ZANCT 11**

COURT

National Consumer Tribunal

BEFORE

F.K Manamela, L. Best, P. Beck

CASE / FILE NUMBER

NCT/867/2010/128(1) (P)

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IN THE NATIONAL CONSUMER TRIBUNAL,

HELD AT CENTURION

Case No: NCT/867/2010/128(1) (P)

DATE:29/06/2012

In the matter between

KASTURIE PILLAY.....Applicant

And

WESBANK, a division of FirstRand Bank Limited.....Respondent

CORAM:

MANAMELA F.K (ADV.) (PRESIDING MEMBER);

BEST L. (MS.) (PANEL MEMBER)

BECK P. (MS) (PANEL MEMBER)

REVIEW OF SALE OF GOODS: REASONS FOR DECISION ON POINTS IN LIMINE

Introduction

This is an application brought in terms of section 128 of the National Credit Act, 34 of 2005 (“the Act”) for the review of the sale of goods.

The Applicant is Ms Kasturie Pillay (“Applicant”) who appeared without a legal representative. She was accompanied by a debt counselor, Ms Chuene Mashiloane.

The Applicant has approached the Tribunal for an order declaring that the Respondent did not sell the goods as soon as reasonably practicable or for the best price reasonably obtainable. The Applicant further proceeded to lodge an application for default judgment in terms of Rule 25(2) of the Act. According to the Tribunal’s records, this application was incomplete as no affidavit accompanied the application. For the purpose of this judgment, the default application cannot be entertained.

The Respondent is Wesbank, a division of FirstRand Bank Limited (“Respondent”) a registered bank and credit provider. Appearing on behalf of the Respondent was Mr JL Kannieappan

Background

to the Application

The Applicant entered into an installment agreement with the Respondent on or about April/May 2006 for the purchase of a motor vehicle, a Chrysler Neon 2.0L, 2003 model (“vehicle”). The Applicant fell into arrears with her monthly repayments to the Respondent. On 15 November 2007 she surrendered the vehicle to the Respondent in terms of section 127 of the Act. The Respondent acknowledged receipt of the vehicle but did not provide the Applicant with an estimated value of the said vehicle. After the Applicant surrendered the vehicle, she allegedly requested the Respondent to furnish her with information regarding the vehicle, without success.

The Applicant had the vehicle independently evaluated by Edmond Motors who valued the vehicle at R72,000.00 (seventy two thousand rand). There is no indication however, of the date upon which the valuation by Edmond Motors was made and /or obtained.

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During 2008 the Applicant applied for debt review and her debt counselor informed the Respondent of the Applicant’s application for debt review in a letter dated 28 May 2008. The Applicant alleged that the first correspondence she received from the Respondent was on 17 June 2008 informing her that her account was in arrears in the amount of R3,052.66 (three thousand and fifty two rand and sixty six cents). The Applicant subsequently discovered that her vehicle was sold for R56,502.06 (fifty six thousand five hundred and two rand, and six cents) after a period of approximately seven months had elapsed since the surrender of the vehicle to the Respondent.

The Conduct Complained of

The Applicant complained that after she had surrendered her vehicle to the Respondent in terms of section 127 of the Act, it was not sold as soon as reasonably practicable, or for the best price reasonably obtainable. The Applicant thus seeks the review of the sale of goods (the vehicle) in terms of section 128 of the Act.

Summary of the Proceedings (the hearing)

This matter was first set down for hearing on 13 February 2012. At the hearing, both parties requested the matter to be stood down until 27 March 2012, in order for the parties to enter into discussions with the view to resolving the matter amicably. The parties were to return to the Tribunal with a draft settlement agreement in the event that the matter had been resolved. Accordingly the matter was postponed until 27 March 2012. There being no settlement agreement forthcoming, the hearing was further postponed to 24 May 2012 at 11am.

During the hearing the Respondent tabled his heads of argument and raised certain points in limine. The Tribunal had first to listen to the preliminary points of law raised by the Respondent before proceeding any further to hear the merits.

Respondent's preliminary points are summarized hereunder:

The Jurisdictional Issues: section 128 (1)

10.1 That the Tribunal lacks jurisdiction to hear the application for the review of the sale of goods

10.2 The requirements of section 128(1) has not been adhered to by the Applicant, to warrant the referral to and the hearing by the Tribunal. The Respondent refers its argument to the provision of the section thus:

"A consumer who has unsuccessfully attempted to resolve a disputed sale of goods in terms of section 127 directly with the credit provider, or through an alternative dispute resolution under Part A of Chapter 7, may apply to the Tribunal to review the sale"

10.3 Part A of Chapter 7 deals with 'Dispute settlement other than debt enforcement' and is qualified by the words, 'Alternative dispute resolution'. The Respondent further draws the Tribunal's attention to section 134(1)(a) of the Act which reads as follows:

"(1) As an alternative to filing a complaint with the National Credit Regulator in terms of section 136, a person may refer a matter that could be a subject of such a complaint as follows:

If the credit provider concerned is a financial institution as defined in the Financial Services Ombud Schemes Act 37 of 2004, the matter-

may be referred to the Ombud with jurisdiction to resolve a complaint or settle a matter involving that credit provider, as determined in accordance with sections 12 and 14 of that Act; and

must be procedurally resolved as if it were a complaint in terms of that Act; or..."

The Respondent referred to certain case law (Bato Star Fishing (Pty)Ltd v Minister of Environmental Affairs [2004] ZACC 15; 2004 (4) SA 490 (CC) paragraph 90; Thoroughbred Breeders Association v Price Waterhouse 2001 (40 SA 551 SCA paragraph 12 in support of its argument in the interpretation of the ordinary meaning of the wording of section 128(1)

The Disputed Sale of Goods

The issue whether or not there exists a dispute that has or may have given rise to the Applicant referring the matter to the Tribunal, according to the Respondent, finds no application as the Respondent became aware of the conflict or “dispute” when the Respondent’s employee noticed on the National Consumer Tribunal’s website that the Applicant had lodged a matter against the Respondent. The Respondent submits that there was no knowledge of a conflict and therefore no dispute. The Respondent is the credit provider and a financial institution as defined in the Financial Services Ombud Schemes Act. The Applicant has not attempted to resolve the matter with the intervention of the Ombudsman for Banking Services either. The dispute, if there existed any, would have allegedly been dealt with by the Ombudsman. The Applicant, according to the Respondent, didn’t exercise this option and as a result did not exhaust all the procedural remedies available to her.

The Mandate of the Tribunal

The National Consumer Tribunal is a creature of statute and “must exercise its functions in accordance with this Act or any other applicable legislation”.¹

The Tribunal derives its powers and competency to hear this application under section 128(1). The Applicant has not attempted to resolve the dispute with the Respondent prior to having referred the matter to the Tribunal. The Tribunal would be acting outside its mandate should it proceed to hear the main application. The Respondent submits that the wording of the section 128(1) is clear and unambiguous: the information it conveys is prescriptive and requires that certain pre-requisites be achieved. A concise interpretation informs that the Applicant must have already made an attempt to resolve the disputed sale of goods directly with the credit provider. Should the Applicant have failed to resolve the dispute it is only at that stage that the Applicant may apply to the Tribunal to review the sale.

The Respondent further argues that the reason the Applicant failed to exhaust all the procedural remedies, is because there was no dispute in the first instance. The Applicant referred the matter to the Tribunal on 12 August 2010, twenty nine months after the vehicle was sold by auction.

The Respondent further draws the attention of the Tribunal to section 2(1) of the Act as follows:

“(1) this Act must be interpreted in a manner that gives effect to the purposes set out in section 3”

Section 3 (h) reads:

“(h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements”

The Respondent argues that section 3 accords with the purposive interpretation of section 128 in that it balances the rights of a consumer and the credit provider. Further that the legal interpretation of section 128 emphasises the consensual resolution of credit disputes, regard being had that the parties are afforded the opportunity to deal with the dispute and attempt to resolve it.

Section 3, the Respondent submits, makes provision for fairness in the credit market in that the consumer is given the power to negotiate, while the credit provider is afforded the opportunity to address the dispute. The Respondent submits that it was deprived of this right.

The Respondent is of the view that the Applicant's application is without merit and therefore cannot succeed.

Applicant's Reply to the Respondent's Preliminary Issues.

The Applicant did not file any documents in reply to the Respondent's affidavit or the heads of argument. The Tribunal can only rely on the Applicant's initial application in Form T.I 128 (1).

At the outset of the Applicant's response to the preliminary points raised by the Respondent, the Tribunal was mindful of the fact that the Applicant was unrepresented, and relied to a certain extent on the assistance of the Debt Counselor, Ms Chuene Mashiloane. The Tribunal took leave to explain to the Applicant the meaning of the in limine points raised by the Respondent, to make sure that the Applicant followed and understood the proceedings. To this end, the Tribunal conducted the proceedings in an inquisitorial manner in order to understand the Applicant's version. The Applicant's reply to issues raised by the Respondent was therefore, in the form of oral evidence.

According to the Respondent, when she surrendered the vehicle to the Respondent the latter didn't advise her of what steps she was to follow thereafter in order to comply with the law. Further that when she initially lodged an application with the Tribunal in August 2010 and after she had sent documents to the Respondent, she did not receive any response from the Respondent advising her of the options available to her to follow. .

Further that she voluntarily surrendered the vehicle because (a) she could not afford it; (b) to avoid a judgment debt and (c) to avoid an adverse listing by the Credit Bureau. The Applicant conceded that when she surrendered the vehicle, she knew that there was an outstanding debt which she was obliged to settle. She didn't know how much was outstanding at the time. She became aware when she was under debt review that the certificate of balance showed that the amount owing was R56,502.06.

At the time when the Applicant was under debt review no consent order in respect of the balance owing to the Respondent was concluded, as no letter of acceptance was received from the Respondent. The Applicant had this to say:

*"When my counselor was reviewing my debt and the creditors that I still owed, she believed that I still had the car in my possession. She asked me why I couldn't sell the car, you know, to alleviate or lessen the debt, so I told her I actually surrendered the car in November 2007 and then she further questioned me, did I receive certain notifications pertaining to the surrender, and I said no, I didn't have any notifications. She advised me that I should approach the Tribunal for the application"*²

The Applicant alleges that she had a few telephone conversations with one Chantelle, the employee of the Respondent. This was preceded by the facsimile that she sent her on 2 June 2008 advising the Respondent that the vehicle had been surrendered on 15 November 2007. There was no further communication with the Respondent after the vehicle was surrendered.

In February 2008 she got a credit report from TransUnion that Wesbank had listed her for the amount of R3,016.00.

When she saw this information she was confused because the vehicle was already in the possession of the credit provider and was worried and concerned about the outstanding amount.

The Applicant didn't do anything further to contact the Respondent as she was still waiting for their response.

She did not take any other steps because she was not aware that this was required of her. She put herself voluntarily under debt counseling because she had other creditors at the time. According to her, her financial situation was very overwhelming. It was when her debt counselor started to engage with her credit providers, that she got the certificate of balance from the Respondent as one of her creditors. During the hearing, the Tribunal had this to ask³:

MS BECK: And other than approaching the debt counsellor, did you try to approach as the respondent suggested maybe the banking ombud or any other alternative dispute resolution mechanism? Did you take any other steps?

MS PILLAY: I did not take any other steps because I was not aware. I put myself voluntarily into debt counselling because I did have other creditors that I was paying at the time. My financial situation was very overwhelming.

Analysis

and Application of the law

Section 128(1) provides:

"A consumer who has unsuccessfully attempted to resolve a disputed sale of goods in terms of section 127 directly with the credit provider, or through an alternative dispute resolution under Part A of Chapter 7, may apply to the Tribunal to review the sale"

The interpretation of this section has a literal meaning. Any prospective applicant must first prove that he or she had attempted unsuccessfully to resolve a disputed claim in respect of the sale of goods sold in terms of section 127 directly with the credit provider or by way of alternative dispute resolution. First, there must be a disputed claim that needs to be resolved. Second, the credit provider must be aware of the dispute, and third, the applicant has the option to engage an alternative dispute resolution agent other than the credit provider if s/he chooses this option.

Section 128 further creates a condition precedent on the part of the applicant to satisfy certain procedural processes before the matter could be referred to and be heard by the Tribunal.

In this matter, there is no indication that the Applicant took effort or made any sufficient attempt to resolve the dispute, if at all there existed any. The only evidence before the Tribunal is the telephone calls the Applicant allegedly made to the Respondent.

In her own admission, the Applicant conceded that she didn't pursue the matter any further :

"I did not take any other steps because I was not aware. I put myself voluntarily into debt counselling because I did have other creditors that I was paying at the time. My financial situation was very overwhelming.⁴"

The Applicant only contacted the Respondent with regard to the progress of the matter when she discovered that she had an adverse listing at the credit bureau. There was no contact with the parties for a considerably lengthy period of time.

The Respondent did not refer the matter to an alternative dispute resolution agent either.

The Tribunal cannot in the circumstances consider the issue whether or not the vehicle was sold for the best price obtainable or as soon as reasonably possible. This is a question of fact.

The Tribunal therefore confines itself to the relevant procedural aspects pursuant to the launching of this application.

In doing so, the Tribunal considered the preliminary issues and the arguments raised in this matter and makes the following finding:

39.1 the point in limine is hereby upheld

39.2 the Application for review of a disputed sale of goods is accordingly dismissed

39.3 there is no order as to costs

Handed down on this 29th day of June 2012

[signed]

FK MANAMELA (PRESIDING MEMBER)

P BECK (MEMBER) & L BEST (MEMBER) concurring

1 Section 26(1)(d) of Act 34 of 2005

2 Transcript page 33 (line 20-25) – page 34 (line 1-5)

3 Transcript page 31 (line 7-15)

4 Transcript page 31 (line 11-15)

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