

SOUTH AFRICA / JUDGMENT

Ruyobeza v Telkom SA SOC (Ltd) (NCT/94271/2017/141(1)) [2018] ZANCT 80 (20 June 2018) [2018] ZANCT 80

COURT

National Consumer Tribunal

BEFORE

MC Peenze, D Terblanche, J Simpson

CASE / FILE NUMBER

NCT/94271/2017/141(1)

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IN THE NATIONAL
CONSUMER TRIBUNAL
HELD

AT CENTURION

Case

number: NCT/94271/2017/141(1)

In

the matter between:

BARIMWOTUBIRI
RUYOBEZA APPLICANT
and
TELKOM SA
SOC (LTD)
RESPONDENT

Coram: Dr. MC Peenze
- Presiding
member
Ms. D Terblanche -
Tribunal member
Adv. J Simpson -
Tribunal member
Date
of hearing - 4 June 2018

JUDGEMENT

APPLICANT

1. The Applicant is Barimwotubiri Ruyobeza, an adult male, who resides in [...] Johannesburg. The Applicant appeared in person at the hearing of this application.

RESPONDENT

2. The Respondent is Telkom SA SOC (LTD), a state owned company, which is duly registered and incorporated in terms of the company laws of the Republic of South Africa.
3. The respondent was represented at the hearing of this application by Claire Avidon, as instructed by Hogan Lovells.

APPLICATION TYPE

4. This is an application in terms of Section 141(1)(b) of the National Credit Act 34 of 2005 (“the NCA”).
5. Section 141(1)(b) of the NCA states the following-

“141. Referral to the Tribunal, -

- (1) If the National Credit Regulator issues a notice of non-referral in response to a complaint other than a complaint concerning section 61 or an offence in terms of this Act, the complaint concerned may refer the matter directly to-
 - (a) the consumer court of the province within which the complaints resides, or 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.”
6. In this application, the Applicant alleges that the Respondent caused him to incur considerable costs and damages as a result of

registering an unwarranted debt under his name and attempting to claim unnecessary payments from him in respect of account number

501165457.

BACKGROUND

7. During January 2015, the Applicant was approached by a former subcontractor of the Respondent regarding the procurement of an internet service from the Respondent. Following discussions, the Applicant signed documents allegedly relating to assessing the Applicant's

credit worthiness, which supposedly would have been used to constitute a debit order if a contract of sale and services would have materialized. The nature, contents and existence of these documents are in dispute between the parties.

8. After the lapse of a six weeks period, the Applicant was approached by the Respondent to deliver the internet equipment, whereupon the Applicant indicated that he was no more interested in procuring an internet service from the Respondent and refused to accept delivery of any internet equipment, arguing that there was no legitimate contract regulating such sale in place.
9. The Respondent continued thereafter to debit the Applicant's bank account on a monthly basis. The Applicant subsequently terminated the debit order and reported the matter to Telkom officially. The Respondent insisted that he should continue with his payments.

Failure to make such payments resulted in the Respondent reporting the Applicant for non-payment, allegedly without notifying the

Applicant of such intention in writing.

10. The Applicant raised a dispute with the Respondent, which was attended to through the Respondent's internal processes. On 16 September 2016 the Respondent wrote to the Applicant indicating that, following its investigations, it found that the Applicant was not liable on the said account. Subsequently, the Applicant's negative listing was removed from the credit bureaux.
11. On 6 October 2016, the Applicant lodged a complaint with the National Credit Regulator ("NCR"). The NCR investigated the matter and found that it does not have the necessary authority to make an award for general damages as prayed for by the Applicant. The Applicant claimed both patrimonial damages amounting to R15 000 for costs incurred in having the adverse listing removed, as well as non-patrimonial damages amounting to R50 000 resulting from defamation. The NCR thus issued the Applicant with a notice of non-referral on 24 October 2016.
12. On 21 June 2017, the Applicant approached the Magistrate Court for the District of Johannesburg North for compensation for damages suffered as a result of the Respondent's alleged harassment and alleged illegal listing on the credit register. The matter before the Magistrate Court is still pending.

13. On 2 November 2017, the Applicant approached the Tribunal with the intention of referring the matter directly to the Tribunal in terms of section 141(1)(b) of the NCA and his late filing of the application for leave to refer was condoned by the Tribunal.
14. During the hearing of 4 June 2018, the Applicant advised the Tribunal that his main intention with referring the matter to the Tribunal is in fact not to obtain an order for damages, but to obtain a finding of prohibited conduct, indicating that the Respondent had contravened the Consumer Protection Act (“CPA”) and the NCA, which order he intends to subsequently utilize in the Magistrate Court to support his pending case for damages.

RELEVANT STATUTORY PROVISIONS

15. The legal question in this matter is whether the Tribunal may grant the Applicant leave to refer the matter directly to the Tribunal.
16. The Tribunal, in determining the aspect of the granting of leave to refer a matter to the Tribunal, has established jurisprudence in the matters of *MV Chauke v Standard Bank et al*[1] and *Gerhard Roelof Coertze and Madelein Burger v Rocelia Young*[2] in which the panel quoted from the High Court decision of *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*, and applied the rationale underpinning the approach taken in that matter by holding that:[3]

“When determining whether the Applicant should be granted leave to refer the matter to the Tribunal, the Tribunal must consider requirements

for the granting of leave.”

17. A similar application can be found in the High Court practice, where an applicant applies for leave to appeal a judgment where it was held in *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* that, "in applications for leave to appeal properly brought before the appropriate court in terms of the old sec 20, read with sec 21 as it then was, the only relevant criteria were whether the applicant had reasonable prospects of success on appeal and whether or not the case was of substantial importance to the applicant or to both him and the respondent".[4]
18. The Tribunal will therefore, when considering whether to grant the Applicant leave to refer or not, use the same test as applied in the High Court for applications for "leave" and will therefore consider:
 - (i) The Applicant's reasonable prospects of success with the referral; and
 - (ii) Whether the matter is of substantial importance to the Applicant or Respondents.
19. The basis upon which leave should be granted will accordingly be measured against the reasonable prospects of success and the substantial

importance of the matter.

20. In this case, the importance of the matter is not in dispute as both parties confirmed that the outcome of the case is important to them. With regard to the prospects of success, the Tribunal now needs to decide whether it can make a finding on prohibited conduct in terms of the various sections of the NCA and the Consumer Protection Act (“CPA”) as quoted.
21. The Tribunal’s consideration includes:
- (i) whether this Tribunal can adjudicate a referral based on a complaint in terms of the CPA in circumstances where no complaint was initiated with the National Consumer Commission (“NCC”);
 - (ii) whether there is a credit agreement in place; and
 - (iii) whether there is a reasonable prospect of success of the Tribunal making a finding on prohibited conduct in terms of the NCA and CPA.

LEGAL

ANALYSIS

Dealing with complaints based on the Consumer Protection Act (“CPA”)

22. The question arises whether it is permissible in terms of the structure of the CPA to approach the Tribunal without first having approached the NCC. The Applicant has sought to refer a complaint based on the CPA directly to the Tribunal. The Applicant has not approached the NCC with his complaint, and has consequently not received a notice of non-referral of the complaint from the NCC.[5]

23. The Supreme Court of Appeal has held that:

“There are two paths by way of which a complaint may be referred to the Tribunal: first, after investigating the complaint, the Commission

refers it under s 73(2)(b); second, with leave of the Tribunal despite the Commission having issued a notice of non-referral, the

complainant refers it under s 75(1)(b).”[6]

24. In terms of section 75(1)(b) of the CPA, a complainant may refer a complaint to the Tribunal “if the Commission issues a notice of non-referral in response to a complaint”. Without having initiated a complaint and received a notice of non-referral, the Tribunal will not have the jurisdiction to adjudicate on such a matter and therefore chances of success will not exist to adjudicate the complaint based on the CPA.[7]
25. In addition, the structure of the CPA requires that the NCC first be given an opportunity to consider and investigate a complaint, before a consumer seeks redress before the Tribunal. This is because of the important role the NCC plays in the enforcement of the CPA. The NCC’s role was described as follows by the Supreme Court of Appeal:

“The Commission is not an ordinary civil litigant. It is, as I have stated, an organ of state. It serves to protect the economic welfare of consumers, who of course play a vital role in the economy and thereby contribute to the fiscus and development of the country. The Commission functions, inter alia, to prohibit unfair marketing and business practices and to promote a consistent legislative and enforcement framework for consumer transactions. Section 99 of the CPA spells out the various enforcement functions the Commission had to protect consumer rights. In referring a matter to the Tribunal under s 73(2), it does not merely seek redress for a personal infringement of a civil right, but acts in the public interest in pursuance of its statutory obligation to do so in order to enforce consumer rights, not only on behalf of those who have complained to it, but also of the public at large.”[8]

26. It follows that the NCC plays an important part in investigating alleged transgressions of the CPA. A complainant cannot bypass the NCC and approach the Tribunal directly for relief in terms of the CPA. The NCC must first have an opportunity to consider and investigate the complaint.
27. This Tribunal has previously dismissed a complainant’s application for leave to refer a complaint on the basis that the complainant sought to refer what he believed were violations of the NCA, in circumstances where a complaint concerning the CPA was filed with the NCC and non-referred by the NCC, and not with the National Credit Regulator as required by the NCA.[9] The Tribunal found that the application was premature, as the complainant was first required to submit a complaint in terms of the NCA to the Regulator.[10]
28. It follows that a complainant is required to first submit a complaint to the relevant regulator – either the NCC if the complaint is based on the CPA or the Regulator if the complaint is based on the NCA – before approaching the Tribunal.
29. Although the Tribunal is not going to delve into the details of the merits, it can be noted that the facts as alleged, do not clearly exhibit contraventions of the CPA. It will however be within the purview of the NCC to investigate further, if a complaint is lodged in this regard.

Credit Agreements

30. The NCA only applies to credit agreements,[11] as defined in section 8 of the NCA. In the absence of a credit agreement, the NCA is not applicable. The question that arises is whether there is a credit agreement between the Applicant and the Respondent.
31. The Respondent submitted that the provision of internet or data services, in circumstances where the Applicant was debited in full for those services on a monthly basis, does not constitute a credit agreement. Although neither party could provide a copy of the agreement under scrutiny, it was undisputed in the proceedings that the intention of the agreement was not to provide credit to the Applicant, but to regulate the sale of internet infrastructure and monthly services in terms of the use of data by the user. It therefore follows that the agreement does not fall within the type of transactions contemplated in section 8 of the NCA.

32. In *JMV Textiles (Pty) Ltd v De Chalaan Spareinvest 14 CC*,^[12] the High Court described the thrust and purpose of the NCA as follows:

“In a broad sense it [the NCA] is concerned with the activities of those whose business it is to provide credit to the public and who seek to profit from that business by way of fees, charges and interest. The distinction drawn between an incidental credit agreement and a credit facility, reflects the fact that with the incidental credit agreement the fee, charge or interest only arises when the consumer is in default...By contrast, in the case of a credit facility it is a term of the facility that the consumer is entitled to defer payment in full and make lesser payments subject to paying interest. Thus in the case of the credit facility described in section 8(3), part and parcel of the arrangement between the consumer and the credit provider is agreement that the consumer may take advantage of the offer of credit. Indeed, the usual expectation is that most consumers will, either on a regular basis or at least from time to time, take advantage of the availability of credit and will be willing to incur the charges, usually by way of interest, resulting from their doing so. That is largely how the credit provider profits from the agreement...That is a fundamentally different situation from the ordinary contract for the purchase and sale of goods or services where credit is extended and interest is only charged if payment is not made timeously. (“own emphasis”) There the expectation of the parties is that payment of the purchase price will be forthcoming in accordance with the credit arrangements agreed between the parties. It is not the intention underlying those transactions that the supplier will profit from the interest charged. Rather that amount is levied in order to compensate the seller for the non-receipt of the purchase price. In broad terms, the seller suffers a loss because of the non-receipt of the purchase price, either because it does not have those funds and cannot deploy them profitably or because it is itself funding its business operations on credit, such as an overdraft, and is compelled to pay more interest than it would have done had the payment been made timeously.”

33. In considering the particular agreement before it, the High Court held that:^[13]

“... The agreement is that JMV Textiles will sell goods on credit to Cuts. The expectation is that the price of the goods will be paid each month as it falls due. There is no fee paid for this and there is no entitlement to pay less than the full amount due each month. The obligation to pay interest flows from default in making timeous payment not from a legitimate decision not to pay the full amount that is due each month. There is no contemplation that JMV Textiles will ever send a bill for only part of what is due or at periodic intervals. This type of transaction is so wholly distinct from those that are manifestly intended to fall within section 8(3) that the language

should not be stretched to encompass it. (“own emphasis”) Even if it does, I am mindful of the warning given by De Villiers ACJ in *Town Council of Springs v Moosa* and another 1929 AD 401 at 417 that:

“An interpretation clause has its uses, but it also has its dangers, as it is obvious from the present case. To adhere to the definition

regardless of subject-matter and context might work the gravest injustice by including cases which were not intended to be included.”

34. With regard to the definition and applicability of a sales agreement in terms of section 8 of the NCA, the High Court held that, “In my view, section 8(3) is directed at the provision by credit providers of charge cards and credit cards and similar arrangements and not a conventional sale on credit. It, accordingly, does not cover the transactions before me.”[14]
35. The Applicant has not put forward any facts to show that credit was advanced to him by the Respondent, or that the payment terms were such that payment could be deferred and only part of the monthly amount due and owing needed to be paid each month.
36. It follows that there is nothing before the Tribunal to indicate that the agreement that constitutes the cause of action in this matter, falls within the scope of agreements contemplated in section 8 of the NCA.
37. The Tribunal therefore finds that the agreement between the parties in this matter is not a credit agreement, and accordingly that the NCA is not applicable.

Complaint Lacks Prospects of Success

38. The Respondent argued that both the NCA and CPA require symmetry between the complaint which is initiated and non-referred on the one hand, and the complaint which the complainant seeks to refer to the Tribunal on the other. The Respondent outlined that there is no evidence on record to indicate that the relevant regulatory bodies have been afforded an opportunity to consider whether the Respondent has engaged in prohibited conduct.
39. In *National Consumer Commission v Universion Services Association NCP*, [15] the Supreme Court of Appeal compared the role of the NCC in referring a complaint to a complaint referred by a complainant. The Supreme Court of Appeal found that:

“Such a referral [that is, a referral by a complainant] would have been made in the face of the Commission, the regulatory body with the necessary expertise, having decided that the complaint lacks merit – either on receiving the complaint for the reasons set out in s 72(1)(a), or after investigating the matter. In these circumstances, where a complainant persists in advancing its complaint without the Commission’s support, a referral is far more akin to a civil trial.”
40. The Applicant outlined that, as a lay litigant, the Applicant is not required to file a complaint with the same precision as a legally trained person. Accordingly, the Applicant submitted that it is still in the discretion of the Tribunal to understand the intention of the Applicant and rule on the facts accordingly, in particular with regard to whether the conduct of the Respondent constituted prohibited conduct in terms of the NCA or CPA.
41. It is the view of the Tribunal that there must be a rational or recognisable link between the conduct referred to in a complaint and the prohibitions set out in the NCA.[16] Also, if the prohibited conduct as alleged by the Applicant relates to transgressions of the NCA’s prescriptions with regard to credit agreements, a credit agreement should be found to exist.

CONCLUSION

42. The Tribunal finds that there are no prospects of success in this matter because:

- (i) The Tribunal lacks jurisdiction to adjudicate on a matter in terms of the Consumer Protection Act, where such complaint was not initiated in terms of the CPA or considered by the Consumer Protection Commission; and
- (ii) The Tribunal lacks jurisdiction to adjudicate on a matter relating to prohibited conduct in terms of the National Credit Act, where the cause of action relates to a contract of sale or services, and where such contract does not constitute a credit agreement in terms of the National Credit Act.

ORDER

44. Accordingly:

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44.1 This application is dismissed; and

44.2 There is no order as to costs.

DATED AT PRETORIA ON THIS 20TH DAY OF JUNE 2018

[SIGNED]

Dr. MC Peenze

Tribunal member

With Ms. D Terblance and Adv. J Simpson concurring.

[1] NCT/4658/2012/141(1)(P)

[2] NCT/7142/2012173(3)&75{1}(b)&(2) CPA

[3] 1986 (2) SA 555 (A) at par 15.

[4] Odendaal v Loggerenberg

en Andete NNO(2) 1 961 (1) SA 724 (0) at p 727 C; Attorney General, Transvaal v Nokwe and Others 1962 (3) SA 803 (T), at p 807 A

[5] Transcript page 81 lines 1 to 20

[6] National Consumer Commission v Univision Services Association NPC and Others (618/2017) [2018] ZASCA 44 (28 March 2018) Para 5

[7] Also see Respondent's Supplementary Heads of Argument, p. 4-12

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- [8] National Consumer Commission v Univision Services Association NPC and Others (618/2017) [2018] ZASCA 44 (28 March 2018) para 17
- [9] Maubert v MTN (Pty) Ltd NCT/81552/2017/175(1)(b) (20 November 2017) [2017] ZANCT 143, para 16
- [10] Maubert v MTN (Pty) Ltd NCT/81552/2017/175(1)(b) (20 November 2017) [2017] ZANCT 143, para 17
- [11] Section 4(1) of the NCA
- [12] JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC and others [2011] 1 All SA 318 (KZD) para 16 to 17
- [13] JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC and others [2011] 1 All SA 318 (KZD) para 15
- [14] JMV Textiles (Pty) Ltd v De Chalain Spareinvest Supra, par 15-16.
- [15] National Consumer Commission v Universion Services Association NCP and Others (618/2017) [2018] ZASCA 44 (28 March 2018) paras 17 to 18
- [16] Competition Commission of South Africa v South African Breweries Ltd and Others (114/CAC/Nov11) [2012] ZACAC 8 (14 November 2012) para 43
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