
SOUTH AFRICA / JUDGMENT

Singh v Firststrand Bank Limited and Another (NCT 68187/2016/141(1)) [2017] ZANCT 91 (17 March 2017) [2017] ZANCT 91

COURT

National Consumer Tribunal

BEFORE

J Maseko, D Terblanche, X May

CASE / FILE NUMBER

NCT 68187/2016/141(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

CASE NUMBER: NCT 68187/2016/141(1)

IN THE MATTER BETWEEN

AK SINGH

Applicant

And

FIRSTRAND BANK LIMITED

First Respondent

NATIONAL CREDIT REGULATOR

Second Respondent

Coram:

Prof J Maseko - Presiding member

Ms. D Terblanche - Member

Mr X May - Member

Date of hearing: 15 February 2017

JUDGMENT AND REASONS

The parties

1. The Applicant is Mr. AK Singh, an adult male (hereinafter “Applicant”). The Applicant had been legally represented throughout the proceedings and was present and represented at the hearing by Adv. Joubert instructed by Van Bruggen Attorneys.
2. The First Respondent is Firststrand Bank Limited (the “Bank” or “FRB”), a financial institution registered as a credit provider in terms of the National Credit Act, Act 34 of 2005 (the “NCA”). Adv. Friedman instructed by Glover Kannieappan Incorporated represented FRB at the hearing.
3. The Second Respondent is the National Credit Regulator (the “NCR” or the “Regulator”), a statutory body established under the NCA. The Second Respondent was present at the hearing, and noted for the record that it would abide by the Tribunal’s decision in the matter.

The complaints

4. The Applicant’s complaints against the Bank relate to an overdraft facility he obtained from the Bank during the course of 2012 and the Bank’s alleged inability to provide him with a loan agreement and proof that his credit application in respect of an overdraft facility was duly considered in terms of the required legislative provisions.
5. The Applicant’s complaint against the NCR is its alleged failure to fulfill its obligations in terms of applicable legislative provisions.

The non-referral notice issued by the Regulator

6. The Applicant lodged his complaint under reference number 35846 against the Bank with the NCR on 24 February 2015.
7. The NCR provided the Applicant with a notice of non-referral on 27 September 2016 in terms of section 139(1)(A) of the NCA.
8. The non-referral stated “...redress was offered by the credit provider in resolution of the complaint however complainant was dissatisfied with the nature of the redress offered. The redress offered by the credit provider was such that, in terms of section 83(2)(a), it partly reduced the complainant’s indebtedness...”

Relief sought

9. The Applicant is not seeking to pursue a claim for damages through the civil courts in terms of section 164 of the NCA[1], from the Bank following a determination of prohibited conduct.
10. The relief the Applicant seeks is for the Tribunal to -

- 10.1. Impose an administrative fine on the Bank to a maximum of 10% of the Bank's preceding year's annual turnover;
 - 10.2. Declare the Bank's conduct as prohibited conduct;
 - 10.3. Cancel the Bank's registration;
 - 10.4. Award costs of the application against the Bank; and
 - 10.5. Award further or alternative relief against the Bank.
11. The Applicant seeks an order from the Tribunal in respect of the Regulator for -
 - 11.1. Costs of the application; and
 - 11.2. Further or alternative relief.

Background

12. The Applicant held various credit products with the Bank over time, amongst others an overdraft facility (the subject of this matter), a revolving credit facility and a credit card.
13. There is a history of disputes between the Applicant and the Bank. At some stage the Bank engaged in enforcement action against the Applicant. The action was withdrawn in order for the parties to engage in settlement discussions subsequent to which the matter was settled with the Bank writing off the outstanding balances on some of the Applicant's credit agreements and withdrawing the action.
14. This matter, as stated above, relates to the Applicant's overdraft facility with the Bank. According to the parties the Bank increased Applicant's overdraft facility on 1 September 2012 and 17 October 2012 respectively. According to the Applicant this happened without the Bank making the necessary assessments of his ability to pay for the increased facility in terms of the NCA. He further alleged that the Bank was unable to provide him with the credit agreement relating to the increased overdraft facility.
15. The Bank denies these allegations and avers that it did the required affordability assessments in accordance with the then applicable legislative requirements; and that it provided the Applicant with the credit agreement in respect of the overdraft facility on more than one occasion.
16. The Bank averred that it provided the Applicant with the credit agreements on 27 May 2014, attached it to its particulars of claim

for the outstanding balance on the overdraft on 10 September 2014, and referenced in letters from the Bank to the Applicant dated 15 and 20 October 2015 respectively the various occasions when the agreements were provided to the Applicant in terms of the Promotion of Access to Information Act[2].

17. After the Applicant lodged his complaint with the NCR on 24 February 2015 the NCR engaged with the Bank. These engagements concluded with NCR issuing the non-referral notice in terms of section 139(1)(a) of the NCA above.

The hearing of 15 February 2017

18. At the hearing the parties commenced their submissions before the Tribunal by launching into the main matter namely the referral of the alleged prohibited conduct in terms of which the Applicant seeks the relief above.

Section 141 (1)(b) applications

19. Before we deal with the aspects argued at the outset of the hearing in respect of the main matter, both in limine and on the merits, it would be appropriate to dwell on and express ourselves in respect of the requirements of section 141(1) applications, which are subject to specific prescriptions under the NCA.

20. Section 141(1)(b) provides that -

“141. Referral to Tribunal.—

- (1) If the National Credit Regulator issues a notice of non referral (our emphasis) 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) ... ; or

- (b) the Tribunal, with the leave of the Tribunal (our emphasis).”

21. There are two jurisdictional pre-requisites both of which have to be met before a direct referral by a complainant is properly before the Tribunal and it may adjudicate on it. These are -

21.1. a non-referral notice from the Regulator; and

21.2. leave from the Tribunal for such direct referral.

Non-referral notices

22. The Regulator may issue a non-referral notice at different stages after receiving or initiating a complaint.
23. Firstly, in terms of section 139(1)(a) as an alternative to referring the complaint for alternative dispute resolution (section 139(1)(b)) or appointing an investigator to investigate (section 139(1)(c)). Section 139(1)(a) provides that -

“(1) Upon initiating or accepting a complaint in terms of section 136, the National Credit Regulator may—

- (a) issue a notice of non-referral to the complainant in the prescribed form, 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 this Act;”

24. Secondly, in terms of section 140(1) “...after completing an investigation into a complaint.”

Leave to refer

- 25. It is so that there is not specific guidance and prescriptions in the NCA for “leave” applications. Practice has however developed and guidance has been provided by the Tribunal in numerous matters before the Tribunal in respect of “leave”

applications. See *Morewane vs Credit Matters and Another* - NCT 8292/2013/141(1) NCA 30 November 2013[3].

- 26. The approach the Tribunal have evolved over time is to first consider leave mainly by considering the Applicant’s prospects of success, taking into account both the legal-technical

- including procedural matters (any matter that may be dispositive of the complaint if raised successfully by the Respondent) and

substantive matters (the merits of the application and the defenses raised in respect thereof).

- 27. With regard to the referral section 141(3) requires that -

“(3) A referral to the Tribunal, whether by the National Credit Regulator in terms of section 140 (1) or by a complainant in terms of subsection (1), must be in the prescribed form (our emphasis).”

- 28. These forms have been prescribed in terms of the powers afforded the Minister in section 171 of the NCA. It provides for the Minister making regulations with regard to the proceedings of matters before the Tribunal and provides in relevant parts that -

“(1) The Minister—

- (a) may make any regulations expressly authorised or contemplated elsewhere in this Act, in accordance with subsection (2);
- (b) ... ;
- (c) in consultation with the Chairperson of the Tribunal, and by notice in the Gazette, may make regulations for matters relating to the functions of the Tribunal and rules for the conduct of matters before the Tribunal; and
- (d) may make regulations regarding—
 - (i) any forms required to be used for the purposes of this Act; and
 - (ii) in general, any ancillary or incidental matter that is necessary to prescribe for the proper implementation or administration of this Act.”

29. Item 29 Table 2 Part 2A[4] of the Regulations re National Consumer Tribunal's Rules provides that a -

29.1. "...referral by a complainant is to be done within 20 days of the Regulator's non-referral of a section 136 complaint, with application for leave to refer."

29.2. Documentation to be included -

29.2.1. NCR 31& 32

29.2.2. Form TI.r30A

30. These prescriptions have to be adhered to when parties bring matters before the Tribunal. If not, they may apply to the Tribunal for condonation of the

non-compliance. Rule 34 of the rules[5] allow a party to -

"1(a) apply to the Tribunal in Form TI.r34 for an order to condone the late filing of a document or application ...(d) condone any other departure for the rules or procedures...(2)...on good cause shown."

31. Returning then to the matter before us -

31.1. It is common cause between the parties that there is no -

31.1.1. "leave" application before the Tribunal - neither in substance nor in form;

31.1.2. that the application before the Tribunal, such as it is, was brought outside the 20 days as prescribed; and

31.1.3. that there is no condonation application before the Tribunal neither for

31.1.3.1. the breach of the prescribed timeframe; nor for

31.1.3.2. the failure to bring the leave application to be brought with the non-referral.

32. Applicant at the hearing of the application, requested the Tribunal to consider granting -

32.1. condonation of the Applicant's non-compliance with the NCA and the Rules with regard to complaint its direct referral after it had been

non-referred by the Regulator at the Tribunal's own accord; and

32.2. leave to refer his complaint non-referred by the Regulator directly under their prayer for further and alternative relief alternatively, that Applicant be granted a postponement to file a formal application for leave to refer directly to be launched.

33. Respondent submitted that -

33.1. the Applicant has been legally represented throughout;

33.2. on the previous occasion the matter was set down for a hearing, the prescribed form for leave to apply to the Tribunal was not duly completed by the Applicant and the matter had to be removed from the roll;

33.3. Each time the matter cannot continue the Respondent incurs costs;

33.4. On the previous occasion no cost order was awarded against the Applicant,

33.5. The Tribunal considers whether there are prospects of success in the merits

34. From a quick and cursory perusal of Form TI.r34 it will immediately be apparent to the reader that a condonation application (on good cause shown) must be notified to the Respondent as prescribed in the form; and that the Respondent may oppose the application.

35. The Tribunal as an impartial adjudicator of the disputes between the parties cannot of its own accord grant condonation in favour of the one or the other party. If ever the Tribunal would be tempted to do so that would fly in the face of its impartiality, specifically with regard to the requirement that good cause be shown, something which the Tribunal clearly cannot do, and even more problematic in a matter such as this that is strenuously opposed.

36. The Tribunal will also not consider nor grant leave as further or alternative relief as prayed for in the application brought before the Tribunal. That would amount to the putting the proverbial cart before the horse.

37. The application before the Tribunal and the relief sought in respect thereof can only be considered once leave had been granted for the complaint that had been non-referred by the Regulator to be referred directly to the Tribunal by the Applicant.

38. From the above it is clear and the Tribunal finds that the matter is not properly before the Tribunal for it to adjudicate on it, as the Applicant did not -

38.1. Apply for and obtain leave to refer a matter non-referred by the Regulator directly to the Tribunal as required in terms of section 141(1)(b); and

38.2. Apply for and obtain condonation of its non-compliance with the prescriptions of the NCA and the Regulations promulgated thereunder.

39. The Tribunal accordingly makes the following order -

39.1. The application before the Tribunal is dismissed

39.2. No order is made as to costs

Dated at Centurion this 17th day of March 2017

SIGNED

Ms. D Terblanche

Member

Prof J Maseko (Presiding member) and Mr. X May (Member), concurring

[1] Section 164(3) provides that “A person who has suffered loss or damage as a result of prohibited conduct or dereliction of required conduct—(a) ...;

or (b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the registrar or clerk of the court a notice from the Chairperson of the Tribunal in the prescribed form— (i) certifying that the conduct

constituting the basis for the action has been found to be a prohibited or required conduct in terms of this Act; (ii) stating the date of the Tribunal’s finding; and (iii) setting out the relevant section of this Act in terms of which the Tribunal made its finding.”

[2] Act 2 of 2000

[3] 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* NCT/4658/2012/141(1)(P) and *Gerhard Roelof Coertze and Madelein Burger v Rocelia Young* NCT/7142/2012/73(3)&75(1)(b)&(2) CPA in which the panel quoted from the High Court decision of *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986

(2) SA 555 (A) at par 15. and applied the rationale underpinning the approach taken in that matter by holding that: “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”. 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”[8] This was so irrespective of whether the appeal lay to the full court or to the Appellate Division.

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- [4] Previously part 2, renumbered by GenN 428 of 29 June 2011 and repealed and substituted by GN R203 of 13 March 2015.
- [5] Regulations for matters relating to the functions of the Tribunal and rules for the conduct of matters before the National Consumer Tribunal, GN 157 in GG 39663 of 4 February 2016

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