

SOUTH AFRICA / JUDGMENT

Singh v Motor Finance Corporation, A Division of Nedbank Limited (NCT/94274/2017/141(1)) [2018] ZANCT 72 (19 June 2018)

[2018] ZANCT 72

COURT

National Consumer Tribunal

BEFORE

J Simpson, T Bailey, F Manamela

CASE / FILE NUMBER

NCT/94274/2017/141(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: NCT/94274/2017/141(1)

In the matter between:

AMITH KEDHAR SINGH

APPLICANT

and

MOTOR FINANCE CORPORATION,

A DIVISION OF NEDBANK LIMITED RESPONDENT

Coram:

Adv. J Simpson – Presiding Tribunal member

Mr. T. Bailey –

Tribunal Member

Adv. F. Manamela – Tribunal Member

Date of Hearing –

15 June 2018

JUDGMENT AND

REASONS

APPLICANT

1. The Applicant in this matter is Mr A K Singh, a major male (hereinafter referred to as “the Applicant or “Mr Singh”). Mr. Singh appeared in person at the hearing and represented himself.

RESPONDENT

2. The Respondent is the Motor Finance Company, a division of Nedbank Limited, a registered credit provider (hereinafter referred to as “the Respondent” or “MFC”). At the hearing MFC was represented by Advocate Minnaar.

APPLICATION TYPE

3. This is an application in terms of Section 141(1)(b) 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. This hearing and judgment only concerns the application for leave. The merits of Mr Singh’s application will therefore not be considered in detail, only in relation to whether or not there is any reasonable prospect of his application succeeding.

BACKGROUND

6. The documents and pleadings filed by the parties in this matter are voluminous and traverse many differing issues. The judgment will only deal with the salient aspects that are most relevant to considering whether leave should be granted.

7. During February 2013 Mr Singh applied for a loan from MFC to purchase a 2011 Isuzu KB LE double cab motor vehicle. The loan application was approved by MFC for a principle debt of R187 109.78. Mr Singh entered into the credit agreement with MFC on 27 February 2013 and purchased the vehicle. Mr Singh failed to pay the agreed monthly instalments on the loan and by 16 August 2016 was in arrears on his account with an amount of approximately R33 000.00. MFC issued summons against Mr Singh in the High Court in September 2016. Mr Singh opposed the summons and MFC applied for summary judgment. After hearing argument from the parties, the court granted summary judgment against Mr Singh on 6 July 2017.
8. On 12 July 2017 Mr Singh lodged a complaint against MFC with the National Credit Regulator (NCR) on the basis that MFC had conducted a credit bureau inquiry prior to Mr Singh signing the finance agreement or providing them with consent to access his information on the credit bureau. The NCR investigated the complaint and found no basis for taking the complaint further. It issued a letter of non-referral dated 20 October 2017 stating “We therefore issue this Notice of Non-Referral in terms of section 139(1) as the complaint is vexatious.”
9. On 1 November 2017 Mr Singh lodged this application with the Tribunal in terms of section 141(1) of the NCA. Mr. Singh summarises his allegation by stating that MFC did not have any consent for a credit bureau search prior to signing the credit agreement and MFC does not have a valid Financial Services Provider (FSP) licence. To provide some context to the nature of the application the Tribunal must consider, the relief sought by Mr. Singh is quoted -

“Ruling on whether or not MFC has contravened the Act and committed prohibited/forbidden/unethical conduct

Ruling on whether or not MFC has infringed on Mr Singh’s rights as a consumer

Ruling to declare all MFC Credit Agreements from the time the licence has lapsed to current date to be rendered null and void

Ruling to a fine and imprisonment for a period not exceeding 12 months(sic)

Ruling on non-compliance

Ruling to refund all payments, deposits, fees, costs, etc. with interest that Mr Singh has paid to MFC

Ruling to remove Mr Singh’s judgment

Ruling on the cancelling of MFC’s registration

Ruling on an administrative fine of 10%

Ruling on whether or not MFC to refund all consumers from date of lapsed FSP licence going forward at the discretion of the Tribunal(sic)

Ruling that MFC has unduly benefitted by granting of credit agreements since the lapsing of their licence(sic)

Ruling on further and alternative relief

Ruling on all costs

Mr Singh declares that he seeks justice for himself and consumers in this matter and he requests the above Rulings to escalate his matter further and beyond the National Consumer Tribunal and requires the above Rulings.

Mr Singh requests the National Consumer Tribunal to provide him with the Certificate declaring the Respondents conduct to be prohibited as per section 164, sub section 3, sub section B to claim his damages before the correct body.”(sic)

APPLICATION FOR LEAVE

10. In the matter of Coertze and Burger v Young[1] the Tribunal considered the factors which must be evaluated regarding leave. The Tribunal held that the following two factors should be considered:

10.1 The Applicant’s reasonable prospects of success with the referral; and

10.2 Whether the matter is of substantial importance to the Applicant or the Respondent.

11. It is firstly very clear that the matter is of substantial importance to both parties. Mr. Singh has gone to a great deal of effort to lodge the complaint with the NCR and then to pursue it further with the Tribunal. Similarly, MFC has a vested interest in defending the allegations made by Mr Singh and the relief sought.

Prospects of success on the merits

12. A detailed consideration of the various allegations made by both parties is not necessary in this matter.

13. From the outset it must be noted that the complaints lodged by Mr Singh arise from the credit agreement signed in February 2013. Section 166 of the NCA[2] bars any complaints being brought before the Tribunal which arose more than three years ago. The complaint lodged with the NCR by Mr Singh in July 2017 was already after the three year period had expired. During the hearing Mr Singh was requested to address the Tribunal on the prescription issue. He stated that prescription had been interrupted by his complaint lodged with the NCR and he had further lodged an earlier complaint with the NCR against MFC. He confirmed that the earlier complaint (of which there is no proof before the Tribunal) was however not related to the current complaint. The submissions made by Mr Singh do not change the facts, the complaint prescribed in 2016 already.

14. Even if the complaints had not prescribed, the question as to whether or not MFC has a valid FSP licence (which is denied by MFC) has no relevance in the context of the credit agreement concluded between the parties. The NCA does not regulate FSP licences. The Tribunal does not have any jurisdiction over the issuing of FSP licences or whether a company may operate as a Financial Services Provider. The proper forum for lodging a complaint in this regard would be the Financial Services Board (FSB). Based on Mr Singh's affidavit he has already contacted the FSB and has been in communication with them.
15. The only context within which other licences issued to registered credit providers may be relevant is sections 54 and 57 of the NCA, which requires the NCR to consult with the relevant regulatory licencing issuing authority before issuing a notice in terms of section 54 or
57. This would for example require the NCR to consult with the Registrar of Banks before issuing a compliance notice to a registered bank. This requirement has no relevance in the context of the issues raised by Mr Singh.
16. During the hearing Mr Singh submitted that the credit agreement contains a reference to MFC having a valid financial services provider licence. He submitted that this constituted a misrepresentation. This submission does not take the matter any further. The fact remains that a valid licence as a financial services provider does not have any relevance in terms of the NCA or the relief that Mr Singh seeks.
17. The allegation regarding the accessing of credit bureau information similarly carries no merit, even it were not prescribed. Mr Singh submits that MFC accessed his credit bureau information before he consented thereto. He has not provided any clear evidence as to this alleged unlawful query and in any event did not deny that he did in fact provide the consent, as he sought the loan from MFC. Whether MFC may have accessed the information a day before the formal consent was provided is not of relevance in the context of the matter before the Tribunal. It appears that Mr Singh simply seeks to find any basis for lodging a complaint that he can, whether justified or not.

Cost order

18. MFC has prayed for a cost order to be made against Mr Singh should his application be dismissed. Section 147 of the NCA specifically

provides for a cost order to be made under these circumstances as follows –

“147. Costs.—

- (1) Subject to subsection (2), each party participating in a hearing must bear its own costs.
- (2) If the Tribunal—

- (a) has not made a finding against a respondent, the member of the Tribunal presiding at a hearing may award costs to the respondent and against a complainant who referred the complaint in terms of section 141 (1) or section 75 (1) (b) of the Consumer Protection Act, 2008, as the case may be; or
- (b) has made a finding against a respondent, the member of the Tribunal presiding at a hearing may award costs against the respondent and to a complainant who referred the complaint in terms of section 141 (1) or section 75
- (1) (b) of the Consumer Protection Act, 2008, as the case may be.”
- 19. Rule 25(7) of the Rules[3] further allows the Tribunal to “.....award punitive costs against any party who is found to have made a frivolous or vexatious application to the Tribunal.”
- 20. It can be noted that the non-referral letter from the NCR specifically classifies Mr Singh’s complaint as vexatious.
- 21. In the matter of Beinash and Another v Young and Others 199(2) BCLR 125(CC) the court considered whether section 2(1)(b) of the Vexatious Proceedings Act 3 of 1956 infringed the right of access to courts.

The court held that while the right of access to courts is protected under section 34 of the Final Constitution of the Republic of South Africa, of 1996:

“When regard is had to the nature of the right in terms of section 36(1)(a), there can surely be no dispute that the right of access to court is by nature a right that requires active protection. However, a restriction of access in the case of a vexatious litigant is in fact indispensable to protect and secure the right of access for those with meritorious disputes. Indeed, as the respondents argued, the court is under a constitutional duty to protect bona fide litigants, the processes of the courts and the administration of justice against vexatious proceedings. Section

165(3) of the Constitution requires that “[n]o person or organ of state may interfere with the functioning of the courts.”

The vexatious litigant is one who manipulates the functioning of the courts so as to achieve a purpose other than that for which the courts are designed. This limitation serves an important purpose relevant to section 36(1)(b).

- 22. In the same context, the aim of the Tribunal is to always jealously guard the right of a complainant to approach the Tribunal freely.

This is in accordance with the objectives and aims of the NCA. The Tribunal therefore generally follows the principle that each party must pay its own costs irrespective of the finding made. To my knowledge, no cost order has ever been made against a complainant in terms of section 147.

- 23. However, the Tribunal must also guard against the NCA and the Tribunal being used as a tool to manipulate the process and purpose for which the Tribunal was designed. Section 147 envisaged this possible situation and therefore provides for an appropriate cost order to

be made. However laudable Mr Singh may profess his motivations to be, it appears to the Tribunal that he is simply trying to exact revenge on the registrants. He appears to be attempting to find any possible perceived transgression by registrants which he can use to lodge a complaint against them. This matter will be the third unsuccessful attempt by Mr Singh to obtain an order against a registrant. It is entirely likely that Mr Singh will continue to lodge complaints in this manner, premised on the perception that he has nothing to lose except his time and effort. Every complaint lodged by Mr Singh requires the defending party to engage expensive legal counsel to defend the matter. It further requires valuable time by all the parties involved.

24. The Tribunal must therefore take a stand in this particular matter to send a clear message to Mr Singh that he needs to consider any future complaints very carefully. The Tribunal will never prevent him from lodging properly considered and valid complaints. But spurious complaints lodged purely to exact some form of revenge may result in a cost order against him.
25. The Tribunal will therefore make a cost order against Mr Singh in accordance with section 147(2) of the NCA. The Tribunal is however

mindful of the fact that such an order could amount to tens of thousands of Rands. The aim of the cost order in this matter is not to punish Mr Singh unduly as per Rule 25(7) of the Rules. It is to alert Mr Singh to the possible consequences of lodging claims with little or no prospect of success. The Tribunal will therefore limit the cost order to an amount of R5000.00.

26. Further complaints lodged by Mr Singh, which have no merit whatsoever, may possibly be deemed to be vexatious and frivolous in accordance with Rule 25(7) of the Rules and may result in an appropriate punitive cost order.

CONCLUSION

27. The Tribunal finds that there is no reasonable prospect Mr Singh's claims' succeeding. Leave to refer the matter to the Tribunal is therefore denied.
28. As Mr Singh's application for leave is refused, section 147(2)(a) of the NCA allows a cost order to be made against him.

ORDER

29. Accordingly, the Tribunal makes the following order –

29.1 The Applicant's application for leave to refer the matter directly to the Tribunal is refused; and

29.2 A cost order is made against the Applicant. The amount due by the Applicant is limited to a maximum of R5000.00 of the Respondent's

taxed costs, on an attorney and own client scale.

DATED ON THIS 19th DAY OF JUNE 2018

[signed]

Adv J Simpson

Presiding Member

Adv. F Manamela (Tribunal member) and Mr. T Bailey (Tribunal member) concurring.

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

[2]

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.

[2]

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] 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, as amended.

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