

SOUTH AFRICA / JUDGMENT

Singh v Standard Bank of South Africa Limited (NCT44178/2016/141(1)) [2017] ZANCT 79 (9 June 2017) [2017] ZANCT 79

COURT

National Consumer Tribunal

BEFORE

J Maseko, D Terblanche, B Dumisa

CASE / FILE NUMBER

NCT44178/2016/141(1)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

CASE

NUMBER: NCT 44178/2016/141(1)

IN

THE MATTER BETWEEN

AK

SINGH

APPLICANT

And

STANDARD

BANK OF SOUTH AFRICA LIMITED

RESPONDENT

PANEL:

Prof

J Maseko - Presiding member

Ms.

D Terblanche - Member

Prof

B Dumisa - Member

Date

of hearing: 5

June 2017

JUDGMENT

AND REASONS

This document sets out the written reasons for the judgment issued ex tempore at the conclusion of the hearing into this matter on 5 June 2017.

The Parties

1. The Applicant is Mr. A K Singh, an adult male (hereinafter “Applicant”). The Applicant had been intermittently legally represented throughout the lead-up to the hearing but represented himself at the hearing of the matter on 5 June 2017.
2. The Respondent is Standard Bank of South Africa Limited (the “Bank” or “SBSA”), a financial institution registered as a credit provider in terms of the National Credit Act, Act 34 of 2005 (the “NCA”). Mr. J Babomia briefed by A Moosajee of Norton Rose Fullbright represented the Respondent at the hearing.

The Complaint

3. The Applicant lodged a complaint with the National Credit Regulator (hereinafter “NCR” or the “Regulator”) on 15 April 2016.
4. The Applicant’s complaint is that SBSA failed to provide him with the credit agreement pertaining to his Diners’ Club Personal Credit Card and therefore infringed his right to apply for debt review.

The Non-referral notice issued by the NCR

5. On 28 April 2017 the NCR issued a Notice of Non-referral in terms of section 139(1)(A) of the NCA to the Applicant.
6. The NCR’s reasons for the non-referral are that “...the complaint does not allege facts which, if true, would constitute grounds for a remedy under the National Credit Act, Act 34 of 2005, and further appears to be frivolous and vexatious ...”

History of the Applicant’s filing with the National Consumer Tribunal

7. On 29 April 2016 the Applicant filed a section 141(1) application with the National Consumer Tribunal (hereinafter the “Tribunal”

or the “NCT”). The filing consisted of documents in excess of some 380 pages.

8. Section 141(1) provides that -

“(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 complainant concerned may refer the matter directly to—

(a)...; or

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

9. The Respondent filed its answering affidavit on 30 May 2016.

10. The matter was set down on 11 April 2017 for a hearing to be conducted on 5 June 2017.

11. The Applicant filed a postponement application via email on 15 May and attached his affidavit (page 24 of record indexed as “Other”),

which affidavit he also typed up as part of his email, in support of his application.

12. The pertinent parts of the affidavit read as follows -

“I am aware that I am entitled to the postponement, I am further aware that I have the right to amend documents which I intend to do. I hereby formally request as per this affidavit that the National Consumer Tribunal proceedings be held in abeyance, pending the outcome of the High Court Ruling, (sic) I therefore request an immediate postponement of Notice of Set down for the 5th of June 2017 pending the outcome of the Declaratory Order that has been filed in the High Court by the National Credit Regulator.”

13. The Applicant filed a further affidavit deposed to on 17 May 2017 titled “... AFFIDAVIT

- Points to be raised or argued for the postponement of hearing for the 5th June 2017.” It is not relevant for the consideration of the matters before the Tribunal to get into the status and standing of this latter document but notably Applicant based his argument to the Tribunal on the postponement on this document.

Relief sought

14. The relief the Applicant seeks is for the Tribunal to -

14.1. Impose an administrative penalty on the Respondent; and

14.2. Suspend the Respondent’s registration.

Background

15. This matter started with a phone call Applicant received from a Diner’s Club Consultant inviting the Applicant to apply for a Diner’s Card Facility (a Platinum Charge Card) on 29 May 2013.

16. It is common cause that the Applicant took receipt of the Card and made various purchases using the card since then.

17. Applicant started requesting Respondent for the credit agreement and various documents proving that a credit assessment had been done in terms of the NCA.

18. The Respondent informed Applicant that the recording of the telephone call and the Terms and Conditions sent to him when the card was delivered to him constituted the contract and secondly that there are no other documents as the agreement entered into with Diner's Card South Africa (hereinafter "DCSA") "charge card" and not a "credit card" and accordingly the transaction is not subject to the requirements of the NCA.
19. Applicant persists that the transaction is subject to the NCA and that the Respondent is accordingly required and obligated to provide him with the documents he requested.

The Hearing

20. The Tribunal established with the parties on the day of the hearing that the Tribunal will hear Applicant's postponement application and Respondent's opposition thereto taking into account the points in limine the Respondent raised in its answering affidavit in the main matter.

Submissions

in respect of the Postponement application

21. Applicant submitted that -

21.1. There is a NCR application for a declaratory order before the High Court that will impact on the case before the Tribunal; and

21.2. The outcome of High Court matter is essential in the consideration of the case before the Tribunal in that if the High Court finds that the Card from DCSA is a credit card and not a charge card the Respondent have to provide the documents sought.

22. The Respondent submitted that -

22.1. The Applicant's claim for a postponement as of right and not as an indulgence by the Tribunal is objectionable.

22.2. The Applicant sued the wrong party -

22.2.1. The agreement was entered into between DCSA and the Applicant;

22.2.2. DCSA is a wholly owned subsidiary of the Respondent; and that

22.2.3. DCSA is a separate juristic legal entity subject to its own management and control.

22.3. The fact that there is a matter in the High Court is not relevant to the matter before the Tribunal.

22.4. There is no defense of sub judicæ in South African law and if Respondent argues lis pendens it requires that the other pending matter should relate to the same parties on the same dispute.

22.5. The Applicant concluded that the Respondent cannot successfully raise lis pendens in the Tribunal as the matter in the high court is -

22.5.1. Between different parties namely the NCR and DCSA not between Applicant and Respondent with merely citing the Applicant and the Respondent as interested parties; and

22.5.2. On a different dispute namely whether the agreements between DCSA and their cardholders are credit agreements and subject to the provisions of the NCA, whereas the issue in the Tribunal is about whether the Applicant received his agreement, if he is entitled to it.

23. Even if the High Court finds in favour of the NCR it is inexplicable how that result will take the matter forward for Applicant

- as Applicant SBSA in the matter before the Tribunal NOT DCSA.

Consideration of the submissions made to the Tribunal

24. The Tribunal dealt with the postponement application first and will only consider the merits in the main matter once the parties, depending on the outcome of the postponement application, have made argument.

25. The Tribunal has carefully considered the voluminous filings and the submissions made by the parties at the hearing. From these it appears to the Tribunal that -

25.1. The initial communications were between the Applicant and DCSA;

25.2. The Applicant consequently contracted with DCSA for the card;

25.3. It is undisputed that DCSA is a wholly owned subsidiary of the Respondent;

25.4. It is further undisputed that DCSA is a separate and distinct legal and juristic entity and not subject to management and control of the Respondent.

26. The Tribunal considered Applicant's submissions that the Respondent should be held liable due to their alleged misrepresentation brought about by Respondent, amongst others -

26.1. Dealing with his queries to DCSA;

26.2. Meeting with the NCR regarding his complaint; and

26.3. Answering the allegations he made against DCSA in the matter before the Tribunal.

27. The Tribunal is not persuaded that Respondent misrepresented to the Applicant that it and not DCSA is the counter contracting party with the Applicant. The reasons being that -

27.1. Applicant admitted and referred the Tribunal to documents that clearly indicate that the counter contracting party is DCSA; and

27.2. Respondent set out in paragraph 7 of its answering affidavit filed about a year ago, Respondent dealt with Applicant's queries to Diners Club South Africa. In relevant part it reads "... Certain resources and services are however provided by respondent to DCSA. One such resource and service is Customer Dispute Adjudication - hence my involvement in the matter." The Applicant did not dispute this nor put evidence to the contrary forward.

27.3. The reading of the correspondence from the Respondent and DCSA to Applicant and SBSA, makes it clear and evident that the other contracting party is and was at all times DCSA.

27.4. With regard to meeting with the NCR there is no further information before the Tribunal regarding, amongst others, who called the meeting.

27.5. With regard to the Respondent dealing with the Applicant's allegations in this matter the Respondent was, in the view of the Tribunal, left with no choice but to answer to and defend the case made against it at risk of being found liable by default.

28. The Tribunal appreciates that it is quite possible that Applicant may have formed the erroneous view or may have been confused into

thinking that he was dealing with Respondent whereas he was actually dealing with DCSA through the Respondent. That however does not take away from the fact that he did contract with DCSA and not the Respondent and that the Respondent cannot be held liable for the alleged contraventions by DCSA.

29. It is not sustainable that the Respondent be held liable for the alleged wrongdoing of another incorporated, separate and distinct legal and juristic entity that carries its own liability which cannot as a matter of law be transferred to the Respondent.

30. The Tribunal accordingly finds that the point in limine raised by the Respondent in his argument against the Applicant's postponement application is fatal to the Applicant's case.

31. The Tribunal will therefore not consider the submissions made by the parties in respect of whether a postponement should be granted or not as even if the Tribunal makes an order postponing the hearing to another date, it will simply postpone the inevitable conclusion that the wrong party had been brought before the Tribunal.

32. It will be a miscarriage of justice to place an entity that was incorrectly brought before the Tribunal to face further expense to defend itself.

33. The Tribunal accordingly makes the following order -

33.1. The application is dismissed; and

33.2. No order is made as to costs .

Dated at Centurion this 9th day of June 2017

SIGNED

Ms. D Terblanche

Member

Prof J Maseko (Presiding member) and Prof B Dumisa (Member), concurring

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