

SOUTH AFRICA / JUDGMENT

Smuts v ABSA Bank Limited (NCT/208343/2021/141(1)(b)) [2022] ZANCT 3 (19 January 2022) [2022] ZANCT 3

COURT

National Consumer Tribunal

BEFORE

FK Manamela, A Potwana, J Simpson

CASE / FILE NUMBER

NCT/208343/2021/141(1)(b)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: NCT/208343/2021/141(1)(b)

In the matter between:

QUINTUS SMUTS

APPLICANT

And

ABSA BANK LIMITED

RESPONDENT

Coram

Adv FK Manamela - Presiding Tribunal Member

Mr A Potwana -

Tribunal Member

Adv J Simpson - Tribunal Member

Date of consideration (in chambers)

- 19 January 2022

Date of Judgment

- 19 January 2022

LEAVE TO REFER JUDGMENT AND REASONS

THE PARTIES

The Applicant

1. The Applicant is Quintus Smuts ("Mr Smuts or the Applicant"), an adult male consumer whose residential address is Summerville Complex, Blouberg Street, Noordheuwel, Gauteng.
2. The Applicant referred a complaint to the National Credit Regulator ("NCR") and received a notice of non-referral.

The Respondent

3. The Respondent is ABSA Bank Limited ("ABSA"), a bank and credit provider registered with the NCR (Registration number: NCRCP7) with its principal place of business at ABSA Towers West, Troye Street, Johannesburg, Gauteng.

APPLICATION TYPE AND RELIEF SOUGHT

4. This is an application in terms of Section 141(1) of the National Credit Act, Act 34 of 2005 ("the NCA"). The Applicant seeks leave to refer the complaint directly to the Tribunal after the NCR issued a notice of non-referral.
5. Section 141(1)(b) of the NCA states the following –

"Referral to 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 complainant concerned may refer the matter directly to—

- (a)
- (b) the Tribunal, with the leave of the Tribunal."

BACKGROUND

6. On or about 8 July 2014, the Applicant and ABSA concluded an instalment agreement (or a credit agreement) in which ABSA financed the purchase of a motor vehicle, a 2010 SUZUKI SX4 2.0 for the amount of R185 285.02. The principal debt, together with finance charges and all other costs and charges were repayable to ABSA over 72 monthly instalments at an annual fixed interest rate of 16.500%.
7. According to the agreement, ABSA reserved ownership of the goods until all amounts payable under the credit agreement, were paid. The Applicant would, in turn, be in breach of the agreement if he failed to pay any amount payable to ABSA.

8. The Applicant failed to meet his monthly repayment obligations towards the end of 2016, the beginning of 2017 and 2018. The account accumulated arrears in the amount of R11 896.33. In May 2018, ABSA issued a notice in terms of Section 129 of the NCA together with a notice to cancel the agreement. According to the Respondent, the Applicant failed to heed the Respondent's call in terms of Section 129 of the NCA. Subsequently, ABSA claimed the return of the vehicle and the settlement of the outstanding amounts. ABSA, through its attorneys, issued a summons and obtained a default judgment from the Gauteng Local Division of the High Court, against the Applicant.
9. The High Court granted judgment against the Applicant on 19 September 2018. On 26 March 2019, the sheriff of the High Court attached the vehicle.

APPLICATION FOR LEAVE

10. In terms of section 141(1) of the NCA, the Applicant may only refer the matter directly to the Tribunal with leave of the Tribunal.
11. The Supreme Court of Appeal (SCA), in the matter of *Lewis Stores (Pty) Ltd v Summit Financial Partners (Pty) Ltd and Others* (Case no 314/2020) [2021] ZASCA

91 provided useful guidance to the Tribunal in decisions regarding leave to refer. In the recent past, the Tribunal held a formal hearing on leave to refer applications, with all the parties present at the hearing. The court held that a formal hearing on leave to refer was unnecessary as there was no test to be applied, and the decision to consider leave could not be appealed. The court held –

“[15] As I have explained, the NCA provides for an expeditious, informal, and cost-effective complaints procedure. Section 141(1)(b) confers on the Tribunal a wide, largely unfettered discretion to permit a direct referral. The NCA does not require a formal application to be made and it is not necessary for purposes of the present appeal, nor is it desirable, to circumscribe the factors to which the Tribunal should have regard. There is no test to be applied in deciding whether or not to grant a direct referral to it in respect of a complaint. The purpose of the provision is simply for the Tribunal to consider the complaint afresh, with the benefit of any findings by the Regulator, and to decide whether it deserves its attention. Circumstances which may influence its decision may include the prospects of success, the importance of the issue, the public interest to have a decision on the matter, the allocation of resources, the complainant's interest in the relief sought and the fact that the Regulator did not consider that it merited a hearing before the Tribunal. The list is not intended to be exhaustive.”

12. In this application for leave, the Tribunal will follow the guidance provided by the SCA, as there is no particular test to be applied.

THE APPLICANT'S

SUBMISSIONS

13. The Applicant submits that he is entitled to the leave to refer the complaint directly to the Tribunal because he has been prejudiced by the actions of the Respondent.
14. The Applicant accepts that he had difficulty meeting his monthly repayments to the Respondent, causing the account to run into arrears. However he alleges that the Respondent, in its pursuit to enforce the repayment of the arrears, denied him rights in terms of section 129 of the NCA. The Applicant alleges that the Respondent prematurely cancelled the agreement before the expiry of the ten-day window period required by the NCA.
15. He alleges that the Respondent cancelled the credit agreement on the same day the notice in terms of section 129 of the NCA arrived at the Noordheuwel Post Office on 28 June 2018 and issued the summons on the same day that he received the notice in terms of section 129 of the NCA on 29 June 2018.
16. The Applicant submits that the Respondent proceeded to attach the vehicle, in spite of a payment arrangement he had entered into with the Respondent. He attributes the Respondent's actions to prohibited conduct.

THE RESPONDENT'S OPPOSITION TO THE LEAVE APPLICATION

17. The Respondent opposes the Applicant's leave to refer application, and makes the following averments:
 - 17.1 that the Applicant must approach the court of law, and not the Tribunal, to rescind the order competently obtained by the Respondent in September 2018;
 - 17.2 that the Vehicle Finance Agreement concluded with the Applicant was not varied by a payment arrangement as there is no record of the alleged variation;
 - 17.3 that the Notice in terms of Section 129 of the NCA was properly executed, and the Applicant was afforded ten days within which to exercise his statutory rights but failed to do so;
 - 17.4 that the summons was served on the Applicant on 16 July 2018. The Respondent submits that the date of service of the summons is the relevant date, not the date of issuing;
 - 17.5 that the High Court judgment and the attachment order was lawfully obtained; and
 - 17.6 that the relief sought by the Applicant has no basis under the NCA, and stands to be dismissed.

ANALYSIS AND FINDINGS

18. The Tribunal has assessed the submissions presented by the two parties, and the correspondence from the Ombudsman for Banking Services; the NCR and the Legal Practice Council. The Applicant has gone to great lengths to attempt to resolve this matter. It is quite clear that the matter is of importance to the Applicant.
19. However, the Tribunal, in this type of application would consider whether or not there are prospects of the Applicant's application succeeding if it was to be heard by a full panel of the Tribunal on the merits of the main matter.
20. It must firstly be noted that the required period of three years within which the Applicant is entitled to pursue his claim against the Respondent has lapsed. In terms of Section 166(1)(a) of the NCA, "A complaint may not be referred or made to the Tribunal or to a consumer court more than three years after the act or omission that is the cause of the complaint." The cause of the complaint or the alleged prohibited conduct took place in June 2018. The Applicant lodged his application with the Tribunal in November 2021. The application should have been filed with the Tribunal by June 2021. The Applicant's claim of prohibited conduct against the Respondent, has lapsed. The Tribunal does not have any power to extend the lapsing period or interrupt it.
21. The Applicant may approach the High court to rescind the judgment obtained by the Respondent, should he wish to do so. In this application the Tribunal is only competent to determine if there are any prospect of success, should the Applicant be granted leave to refer. We find that there is none.
22. On these grounds, leave to refer the matter directly to the Tribunal for a hearing cannot be granted.

ORDER

23. Accordingly, the Tribunal makes the following order –

23.1. the application for leave to refer the matter directly to the Tribunal is refused, and accordingly dismissed, and;

23.2. there is no order made as to costs.

THUS DONE IN CENTURION ON THIS 19TH DAY OF JANUARY 2022

[signed]

FK MANAMELA

Presiding Tribunal Member

Mr A Potwana (Tribunal Member) and Adv J Simpson (Tribunal Member) concur.

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