

SOUTH AFRICA / JUDGMENT

Speek v Nedbank Limited (NCT/247394/2022/141(1)(b)) [2023] ZANCT 55 (4 December 2023) [2023] ZANCT 55

COURT

National Consumer Tribunal

BEFORE

C Sassman, P Manzi-Ntshingila, MC Peenze

CASE / FILE NUMBER

NCT/247394/2022/141(1)(b)

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Source record**IN THE NATIONAL CONSUMER
TRIBUNAL HELD IN CENTURION****Case****number:** NCT/247394/2022/141(1)(b)**In****the matter between:**JON
RELPH SPEEK
APPLICANT
and
NEDBANK
LIMITED
RESPONDENT**Coram:**Adv
C Sassman
- Presiding Tribunal member
Ms
P Manzi-Ntshingila
- Tribunal member
Dr
MC Peenze
- Tribunal member
Date
of hearing
- 1 December 2023
Date
of judgment
- 4

December 2023

JUDGMENT**AND REASONS****THE PARTIES**

1. The applicant is Jon Relph Speek (the applicant). The applicant is a consumer, as defined in section 1 of the National Credit Act 34 of 2005 (NCA). At the hearing, the applicant represented himself.
2. The respondent is Nedbank Limited (the respondent). The respondent is a credit provider, as defined in section 1 of the NCA. At the hearing, the respondent was represented by Adv J Minnaar.

TERMINOLOGY

3. A reference to a section in this judgment refers to a section of the NCA.
4. A reference to a regulation refers to the National Credit Act Regulations, 2006 (the regulations).[1]
5. A reference to a rule in this judgment refers to the Rules of the Tribunal[2].

APPLICATION TYPE

6. This is an opposed application in terms of section 141(1)(b). In this application, the applicant, with leave granted by the Tribunal, seeks redress against the respondent. The applicant alleges that the credit he received from the respondent was granted recklessly.

BACKGROUND

7. On 14 April 2022, the applicant and the respondent concluded a credit agreement to purchase a 2019 model Volvo. The purchase price of the vehicle was R706 357.45. In terms of the agreement, the applicant would repay the amount in monthly instalments of R11 642.44 over 72 months at an interest rate of 11.35% per annum. The agreement also provided for a balloon payment of R205 800.00, payable after the final monthly instalment. As part of the purchase, the applicant agreed to trade in an older model Volvo he was driving at the time, and the respondent agreed to settle the balance owed. The applicant alleges that the respondent failed to conduct a proper affordability assessment before approving his credit and that the credit he received from the respondent has caused him to become over-indebted. He further contends that the respondent failed to assess his understanding of the costs and obligations of the credit agreement as required under the NCA.

8. On 29 August 2022, the applicant filed a complaint with the National Credit Regulator (NCR). On 28 September 2022, the NCR issued a notice of non-referral, indicating that it assessed the applicant's complaint and found that the credit issued by the respondent was not reckless and that entering into the credit agreement would not have resulted in the applicant becoming over-indebted. The matter is now before the Tribunal for adjudication on the merits.

THE APPLICANT'S

SUBMISSIONS

9. The applicant submitted that he previously purchased a Volvo from the same dealership in 2015, and as such, he had a relationship with them. In that instance, he went to the dealership to enquire about the vehicle and successfully applied for credit to finance the purchase. However, in this instance, he did not contact the dealer to purchase a new vehicle or apply for credit. The dealership contacted him and offered him an upgrade. The applicant states that he travelled 380km to the dealership, and on arrival, the vehicle offered to him was already marked as sold. Furthermore, the dealership had already drafted a contract in his absence and included

their own inaccurate figures for his monthly living and credit expenses. He suspects these inaccurate figures were taken from his

credit profile in 2015, and the respondent approved his credit application using the same figures.

10. The applicant further submitted that he was not aware of the total cost of the vehicle or that the monthly instalments would be nearly double what he was paying for his previous vehicle. The applicant avers that the respondent did not include all his monthly expenses in its calculation. He has not received any increases or promotions at work between purchasing his previous vehicle and the new one, so it does not make sense for him to afford a very expensive vehicle. The applicant states that he contacted the manager at the dealership to propose exchanging the vehicle for one with a more affordable instalment, but the respondent was not willing to listen or engage in any mediation to resolve this matter.
11. The applicant further states that he is a father of three, and his spouse is unemployed. His children attend semi-private schools with high monthly fees. The credit agreement he concluded with the respondent has led to him becoming over-indebted, and as a result, his family is suffering because their standard of living has deteriorated. The applicant seeks an order for his credit agreement to be restructured to include a more affordable monthly instalment of approximately R7 500.00.

THE RESPONDENT'S

SUBMISSIONS

12. The respondent submitted that it complied with its statutory duties under the NCA and conducted a proper affordability assessment on the applicant. It ensured that the applicant was aware of the risks, costs, and obligations of the credit agreement before he signed it. The applicant initialed under his recorded income and expenses[3], which formed part of his credit application. He signed his credit agreement at the dealership and in the presence of a witness. The paragraph preceding his signature on the credit agreement detailed the specific costs of his obligation towards the respondent[4].
13. The applicant declared the following monthly income and expenditure in his application for credit:
 - i)
Basic income:
R50 420.41
 - ii)
Total net income: R24 977.37
 - iii) Household expenses: R8 000.00 (R5 300.00 living expenses
+ R2 700.00 contractual debt)
 - iv) Household surplus: R16 977.37
14. The applicant's bank statements provided in support of his application reflected educational expenses, which were included in his affordability calculation. Due to the applicant's fluctuating income for January 2022 – March 2022, his average net income of R24 977.37 was used to calculate his affordability.
15. The respondent considered all the applicant's monthly credit instalments as reflected on his credit profile at the time of applying for credit. The expenses reflected on the applicant's credit profile amounted to R11 184.00 and were included in his affordability calculation.
16. The respondent further considered the statutory requirements under regulation 23A(9) regarding the minimum expenses that may be recorded for a consumer and found that the applicant's declared expenses were higher than the minimum of R4 939.85. The higher amount was used in the applicant's affordability calculation.
17. In assessing the applicant's credit application, the respondent concluded that after paying his new instalment, the applicant would still be left with a surplus of R3 800.85 each month. The respondent approved the application pursuant to conducting an assessment as required in terms of the NCA, which assessment also considered expenses not declared by the applicant.

18. Section 81(4) provides the respondent with a complete defence to an allegation of reckless lending when it is established that the consumer failed to fully and truthfully answer any requests made by the credit provider as part of the credit assessment process. By not declaring all his expenses as they appeared on his credit profile, the applicant has provided the respondent with a complete defence to his reckless lending allegation.
19. In assessing the applicant's complaint, the NCR conducted its own independent assessment and concluded that the applicant was not over-indebted, nor would he have become over-indebted due to the credit agreement he concluded with the respondent.
20. The respondent complied with the provisions of section 81(2)(a)(i) as the risks and costs of the proposed credit, as well as the applicant's rights and obligations, were indicated on the signed credit agreement. The respondent considered the applicant's debt repayment history as a consumer and has complied with the provisions of section 81(2)(a)(ii). The respondent considered the applicant's existing credit obligations in line with regulation 23A(13)(a). The respondent considered the applicant's financial means, prospects, and obligations, as they existed at the time of the credit agreement, as contemplated in section 81(2)(a)(iii) read with section 78.

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21. The only conclusion that can be drawn is that the respondent did not offer credit recklessly. Instead, the applicant, acting out of excitement, participated in the application process, and should have considered the fine print in the credit agreement. The respondent seeks an order dismissing the application with costs on the scale between attorney and client.

APPLICABLE SECTIONS OF THE NCA

22. Section 80(1)(a) and (b) states that a credit agreement is reckless if, at the time the agreement was made, the credit provider failed to conduct an assessment as required or the credit provider, having conducted an assessment, entered into the credit agreement with the consumer even though the consumer did not understand the risks, costs or obligations under the agreement. It further states that a credit agreement is reckless if the information available at the time indicated that concluding the credit agreement would make the consumer over-indebted.
23. Section 81(2)(a) states that a credit provider must not enter into a credit agreement without first taking reasonable steps to assess the proposed consumer's general understanding and appreciation of the risks and costs of the proposed credit, and the rights and obligations of the consumer under a credit agreement. A credit provider is further required to take reasonable steps to assess the consumer's debt repayment history and his existing financial means, prospects, and obligations before entering into a credit agreement. Section 81(3) further states that a credit provider must not enter into a reckless credit agreement with a prospective consumer.

24. Section 81(4)(a) states that it is a complete defence to an allegation that a credit agreement is reckless if the credit provider establishes that the consumer failed to fully and truthfully answer any requests for information made by the credit provider as part of the assessment required under the NCA.
25. Regulation 23A(9) states that a credit provider must utilise the minimum expense norms table provided in regulation 23A(10) when calculating the minimum necessary living expenses of a consumer applying for credit.
26. Regulation 23A(12) states that when a credit provider conducts an affordability assessment, the credit provider must calculate the consumer's discretionary income, consider all monthly debt repayment obligations appearing on a consumer's credit profile, and include all maintenance obligations and other necessary expenses.

CONSIDERATION OF THE EVIDENCE

27. The applicant submitted that he did not approach the dealership or the respondent on his own but was contacted by the dealer selling the vehicle and enticed to apply for credit with the respondent to purchase the vehicle. The NCA places no duty on a consumer to refuse credit once approved. Instead, the legislation places a heavy duty on a credit provider to ensure that it does not grant credit recklessly, which will cause the over-indebtedness of a prospective consumer.
28. The evidence placed before the Tribunal indicates that the respondent acted accordingly and in line with its statutory obligations in terms of section 81(2)(a) and regulation 23A in calculating the applicant's affordability. The respondent calculated the applicant's average net income and deducted his necessary living and credit expenses. The calculation indicated that after paying the instalment for the new vehicle, the applicant would still be left with a surplus of R3 800.85 each month.
29. The respondent acted reasonably and considered all the information on the applicant's recent payslip, bank statements, and credit profile. Furthermore, the applicant initialled under the income and expenses recorded as part of his credit application. He also signed below a clear indication and breakdown of the costs of the credit on his credit agreement. It is reasonable to conclude that the applicant was aware of the risks, costs, and obligations in respect of the credit agreement that he concluded with the respondent.

CONCLUSION

30. The Tribunal finds the respondent acted in line with its statutory obligations in assessing the applicant's creditworthiness and did not grant credit recklessly. The applicant has further not proven his alleged state of indebtedness or that any over-indebtedness he may be experiencing can be attributed to the credit agreement he concluded with the respondent. Therefore, the application stands to be dismissed.

ORDER

31. Accordingly, the Tribunal makes the following order:

31.1 The application is dismissed; and

31.2 There is no cost order.

[SIGNED]

Adv C Sassman

Presiding Tribunal member

Tribunal members Ms P Manzi-Ntshingila and Dr MC Peenze concur.

[1] Published under Government Notice R489 in Government Gazette 28864 of 31 May 2006.

[2] 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 (Government Gazette No. 30225).

[3] See page 122 of the case record.

[4] See page 137 of the case record.

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