

SOUTH AFRICA / JUDGMENT

Tereblanche v MQ Finance (Pty) Ltd ta Marquis Finance (NCT/313391/2024/141(1)(b)) [2024] ZANCT 32 (3 September 2024) [2024] ZANCT 32

COURT

National Consumer Tribunal

BEFORE

Z Ntuli, MC Peenze, C Sassman

CASE / FILE NUMBER

NCT/313391/2024/141(1)(b)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number:

NCT/313391/2024/141(1)(b)

In the matter between: LEANDI TERBLANCHE APPLICANT And MQ FINANCE (PTY) LTD
RESPONDENT T/A MARQUIS FINANCE

Coram:

Ms Z Ntuli

- Presiding Tribunal member

Dr MC Peenze - Tribunal member

Adv C Sassman

- Tribunal member

Date of the hearing:

- 30 August 2024

Date of judgment:

- 3 September 2024

JUDGMENT AND REASONS

THE PARTIES

1. The applicant is Leandi Terblanche (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 herself.
2. The respondent is MQ Finance (Pty) Ltd, trading as Marquis Finance (the respondent). The respondent is a registered credit provider, as defined in section 1 of the NCA, with registration number NCRCP13179.
3. At the hearing, the respondent was represented by Adv E Liebenberg, instructed by Cavanagh & Richards Attorneys.

TERMINOLOGY

4. A reference to a section in this judgment refers to a section in the NCA, and a reference to a regulation refers to the NCA Regulations, 2006 (the regulations).[1]

APPLICATION TYPE

5. This is an opposed application in terms of section 141(1)(b), in which the applicant, with leave granted by the Tribunal, seeks redress against the respondent. The applicant alleges that the respondent contravened certain provisions of the NCA by granting credit to her recklessly.

JURISDICTION

6. The Tribunal has jurisdiction to hear this matter in terms of section 27(a)(ii) and has powers conferred upon it in terms of section 150 to make orders concerning alleged contraventions of the NCA.

BACKGROUND

7. On 19 September 2022, the applicant applied for credit with the respondent to purchase a 2022 Ford Ranger Raptor motor vehicle. On 22 September 2022, the applicant and the respondent entered into a 72-month credit agreement for R1 200 000.00 to finance the sale of the vehicle. The applicant alleges that the respondent granted her credit recklessly by inflating her monthly income and decreasing her monthly living expenses. She is burdened with a vehicle she cannot afford, resulting in her account being handed over for collection. The applicant seeks the cancellation of the agreement, the return of the vehicle and all her instalments refunded to her.

8. The respondent has opposed the application and denies any wrongdoing. It maintains that it assessed the application in accordance with the NCA requirements and that the consumer misled the respondent by failing to disclose that she was unemployed when applying for credit.

THE APPLICANT'S

SUBMISSIONS

9. At the hearing, the applicant submitted that her credit with the respondent was granted recklessly. The respondent used a figure of R100 000.00 as her monthly income, which she did not provide. She was retrenched in June 2022, from Sanofi Aventis (Sanofi) and started a new job at Fine and Country estate agents (Fine and Country) in August 2022. She was employed on contract, but no contract was in place at the time of her credit application, and she was not yet receiving a salary. On 6 July 2022, she received a retrenchment payment of R647 854.67 from Sanofi and planned on drawing approximately R35 000.00 to R45 000.00 per month to cover her living and credit expenses. She indicated this monthly income on her credit application, but the respondent did not use these amounts. Instead, the respondent inflated her income to show that she could afford a vehicle instalment of R23 647.73.
10. On 14 July 2022, the applicant received a payment from the South African Revenue Service (SARS) of R46 533.28. The applicant submits that the respondent included her retrenchment payment from Sanofi and the SARS payment in its affordability calculation, resulting in a higher monthly income than she declared on her application form. The applicant maintains that the National Credit Regulator (NCR) erred in issuing a notice of non-referral as the facts and figures used in its investigation were inaccurate.
11. The applicant seeks an order to cancel the credit agreement and return the vehicle to the respondent. She also seeks a refund of all her instalments paid to date.

THE RESPONDENT'S

SUBMISSIONS

12. The respondent submitted that the applicant was provided with a pre-agreement statement and quotation before entering into the credit agreement. Before approving the credit application, the respondent considered the application information provided by the vehicle dealership and proceeded to conduct an independent assessment to determine the accuracy of the applicant's information.

13. On 21 September 2022, the respondent accessed the applicant's credit profile and concluded that the applicant had existing credit with monthly instalments amounting to R8 303.00. The applicant provided three months' bank statements for June, July, and August 2022. The bank statements reflected an average income of R76,818.07 per month. The income was calculated in accordance with section 78(3)(a) by considering the applicant's income, or any right to receive income, regardless of the source, frequency, or regularity.
14. The applicant indicated in her complaint that an income of R100 000.00 was declared on the vehicle dealer's system. However, this amount was not used during the affordability assessment as the respondent relied on the applicant's bank statements to determine the applicant's income and calculated the applicant's living expenses as per regulation 23A(10). The calculation was done as follows:

Net income (average over three months) R76 818.07 Less: Credit instalments on the credit bureau R8 303.00 Less: Living expenses as per reg 23A(10) R8 230.38 Surplus R60 284.69

15. The calculation showed that the applicant had a surplus of R60 284.69 and could afford a new monthly vehicle instalment of R23 647.73. The respondent stated that it complied with the NCA but was misled by the applicant, who failed to mention that she was unemployed when applying for credit. The applicant declared during her application that she was employed at Fine and Country, but in her complaint to the NCR, she stated that she was unemployed when applying for the credit. Had the respondent been aware that the applicant was unemployed, it would not have granted the credit. Therefore, the applicant failed to answer the requests for information fully and truthfully, as required in section 81(1).
16. Section 81(4)(a) states that it is a complete defence to an allegation of reckless credit if a consumer fails to fully and truthfully answer any requests for information made by the credit provider as part of the credit assessment. The application is nothing more than the applicant's attempt to avoid her responsibilities in terms of the credit agreement, and it should be dismissed.

APPLICABLE LEGISLATION

17. Section 81(1) states that when a consumer applies for credit and the credit provider considers the application, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the credit assessment.
18. Section 81(2)(a)(iii) states that a credit provider must not enter into a credit agreement without first taking reasonable steps to assess the proposed consumer's existing financial means, prospects and obligations.
19. Section 78(3)(a) and (b) states that the financial means, prospects and obligations referred to under section 81(2) include the prospective consumer's income or any right to receive an income, regardless of its source, frequency or regularity. It further includes the financial means, prospects and obligations of any other adult person within the consumer's immediate family or household, to the extent that the consumer, or prospective consumer,

and that other adult person customarily share their respective financial means and mutually bear their financial obligations.

20. Regulation 23A(3) states that a credit provider must take practicable steps to assess the consumer or joint consumers' discretionary income to determine whether the consumer has the financial means and prospects to pay the proposed credit instalments.
21. Regulation 23A(12)(a) and (c) states that when a credit provider is conducting an affordability assessment, the credit provider must calculate the consumer's discretionary income and include maintenance obligations and the consumer's other necessary expenses.
22. In terms of section 80(1)(a), a credit agreement is reckless if, at the time the agreement was made, the credit provider failed to conduct an assessment as required under section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time.
23. Section 81(4)(a) and (b) 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 and a court or the Tribunal determines that the consumer's failure to do so materially affected the credit provider's ability to conduct a proper assessment.

CONSIDERATION AND ANALYSIS OF THE EVIDENCE

24. The respondent's defence to the allegations levelled against it is that it fully complied with the requirements of the NCA in assessing the applicant's credit application and that the applicant was untruthful when stating that she was employed by Fine and Country. The respondent questions why the applicant stated in her complaint to the NCR that she was unemployed when applying for credit but did not disclose it to the respondent. The respondent submits that had it been aware of this, it would have declined her credit application. The respondent alleges that the applicant did not fully and truthfully answer requests for information as part of the respondent's credit assessment, and therefore, in terms of section 81(4)(a), the respondent has a complete defence to the applicant's allegation of reckless lending and the application should be dismissed.
25. Although the NCR considered the matter, the Tribunal is tasked with considering the matter afresh. The applicant indicated on her credit application form that she had a new employer, Fine and Country, and was no longer employed by Sanofi. The Tribunal accepts the applicant's version that this was not a permanent position or one which paid her a salary at the time. No evidence before the Tribunal indicates that the respondent requested any further information from the applicant regarding her employment. It blindly accepted what was stated on the application form and, therefore, has not proven that the applicant did not answer requests for information fully and truthfully.
26. Had the respondent taken reasonable steps to assess the applicant's existing financial means at the time, as required in section 81(2)(a)(iii), it would have asked the applicant certain pertinent questions regarding her employment and further conducted an employment

confirmation with the applicant's employer to determine the nature and duration of the applicant's employment at the time. In the absence of doing so, the Tribunal cannot conclude that the applicant failed to fully and truthfully answer requests for information regarding her employment. From the bank statements it claims to have relied on, the respondent would have seen that the applicant was not yet receiving a salary from Fine and Country.

27. The Tribunal accepts that the income the applicant declared of between R35 000.00 and R45 000.00, was the amount she intended to draw from her retrenchment payout and savings every month. Instead, the respondent chose to use R76 818.07 as the applicant's monthly income. The respondent has not satisfactorily explained how it calculated this amount in its papers nor at the hearing when requested to do so. The respondent denies that the amount included the SARS payout and retrenchment payout from Sanofi. If the calculation excluded these two payments, it must then include the remaining credits appearing on the applicant's bank statements. These credits appear to consist mainly of the remaining salary payments received from Sanofi, retail purchase refunds and transfers from the applicant's other savings account into the account in question.
28. The respondent is misguided in its interpretation of section 78(3)(a) and incorrectly states that it complied with the section. The credits reflected on the applicant's bank statements did not constitute a source of income for purposes of calculating her affordability. The regulations define a consumer's gross income as "...all income earned without any deductions from whatever source." The Tribunal, therefore, rejects that the continuous transfer of money from the applicant's one bank account to the other constituted an income earned for the purposes of section 78(3)(a). The transfers reflected on the applicant's bank statements were not money earned by the applicant, and neither were the several retail purchase refunds.
29. On her credit application form, the applicant declared her living expenses as amounting to R24 200.00. However, these listed figures included a credit instalment of R6 800.00. By subtracting the credit instalment, the applicant's declared monthly living expenses amounted to R17 400.00. The respondent's calculation included an amount of R8 230.38 for the applicant's living expenses. The amount used by the respondent was less than half of what was declared by the applicant in her application. Regulation 23A(12)(c) requires the respondent to use the applicant's declared necessary expenses, which were higher than what was used in the respondent's calculation.
30. Regulation 23A(3) states that a credit provider must take practicable steps to assess the consumer or joint consumers' discretionary income to determine whether the consumer has the financial means and prospects to pay the proposed credit instalments. The applicant indicated that her spouse earns an income of R60 261.00 per month and is the registered owner of a property financed with a monthly instalment of R15 000.00. Despite the applicant indicating in her application that she is married in community of property, the respondent

proceeded to treat the credit application as one of a single applicant and did not take the necessary practicable steps to assess the joint consumers' discretionary income.

31. Section 78(3)(b) states that a consumer's income includes the financial means, prospects and obligations of any other adult person within the consumer's immediate family or household, to the extent that the consumer, or prospective consumer, and that other person customarily share their respective financial means and mutually bear their financial obligations.
32. In *Capitec Bank limited v Mahlangu*[2] it was held that where consumers disclose a source of household income as part of their credit application, a credit provider should include an assessment of the consumer's household income. There should be an inquiry into proof of the household income and the relation between the consumer and the contributor of the household income. The inquiry should further consider the household living expenses. The Court held that it is not enough for a credit provider to simply rely on a consumer's stated income if a consumer has indicated that there is a household income. In this instance, the respondent failed to do so.
33. The Court also held that for a defence in terms of section 81(4) to succeed, there must be a finding that the consumer failed to fully and truthfully answer requests for information. Without such evidence, the defence does not arise. The defence provided to credit providers under section 81(4) does not extinguish a credit provider's obligation to take reasonable steps to assess a consumer's financial means. If this were so, then a credit provider could simply rely on a consumer's word, and if proven to be untrue, then it would serve as a complete defence. An interpretation of section 81(4), which allows the defence to take away the credit provider's obligations under section 81(2), would negate the purpose of the NCA.
34. The Tribunal is persuaded that it was not the information provided by the applicant in her credit application which materially affected the respondent's ability to conduct a proper credit assessment. Instead, it was the respondent's own disregard for its statutory obligations under the NCA and the regulations that resulted in an improper credit assessment and as a result, the credit granted to the applicant was nothing short of reckless.
35. The applicant seeks an order to refund all instalments paid. However, since she has had the full use and benefit of the vehicle, making such an order would not be in the interest of justice.

CONTRAVENTIONS

36. From the documentary evidence and oral submissions, the Tribunal finds that the respondent has contravened the following provisions of the NCA and its regulations:
 - 36.1 By failing to take reasonable steps to assess the applicant's financial means, prospects and obligations, the respondent has contravened section 81(2)(a)(iii);
 - 36.2 By failing to take practicable steps to assess the joint consumers' discretionary income, the respondent has contravened regulations 23A(3) and 23A(12)(a);

36.3 By failing to consider the applicant's declared necessary expenses, the respondent has contravened regulation 23A(12)(c); and

36.4 By granting credit to the applicant without conducting a credit assessment as required, the respondent has granted credit recklessly and contravened section 80(1)(a).

37. The Tribunal finds that the respondent acted with a complete disregard for the legislated principles regarding assessing a consumer's affordability. The Tribunal views these contraventions in a serious light, as they have the character of undermining the NCA and its purpose. The respondent's contraventions of the NCA, constitute prohibited conduct and warrant the imposition of an administrative fine as a punitive measure.

ADMINISTRATIVE FINE

38. The applicant has not requested the Tribunal to impose an administrative fine on the respondent. However, in terms of section 150(a), the Tribunal may do so of its own accord. The Tribunal is satisfied that the nature of the respondent's contraventions and the consequent financial implications for the consumer justifies the Tribunal imposing an administrative fine on the respondent. A vital purpose of the NCA is to promote responsible credit granting and to prevent and prohibit reckless credit granting.

39. The type of conduct perpetrated by the respondent is undoubtedly the type the NCA seeks to prohibit. Once it finds the respondent has engaged in prohibited conduct, the Tribunal has a duty to exercise its powers by sending a clear and strong message to the credit industry that such conduct will not be permitted. Section 151(3) outlines the factors the Tribunal must consider when determining an appropriate fine. These are listed and discussed under separate sub-headings below.

The nature, duration, gravity, and extent of the contravention

From the evidence, the contraventions are serious. They display a total disregard for the NCA and the applicant's rights as a consumer. The evidence only proves one instance of the respondent's prohibited conduct, but such conduct has a potentially damaging effect on the entire credit industry.

Any loss or damage suffered as a result of the contravention

The contraventions have exposed the applicant to possible legal action and an adverse listing on her credit profile. The applicant was a victim of the respondent's prohibited conduct.

The behaviour of the respondent

The respondent completely disregarded consumer rights, the NCA and the consequences its actions would have for the applicant.

The market circumstances in which the contravention took place

The respondent's conduct illustrates that the market within which the contraventions occurred is one in which consumers will accept credit offered to them despite being unable to afford it. The NCA, therefore, places the duty on credit providers to ensure that consumers are willing and able to repay credit before approving it.

The level of profit derived from the contravention

The Tribunal cannot determine the exact level of profit derived by the respondent. However, it is reasonable to conclude that the interest and fees charged constitute a profit for the respondent.

The degree to which the respondent has co-operated with the NCR and the Tribunal

The respondent co-operated with the NCR during its investigation of the applicant's complaint by providing documents and information.

Whether the respondent has previously been found in contravention of the NCA There is no evidence of any prior investigations or enforcement against the respondent.

40. Regarding the abovementioned factors, the factual evidence, and the conduct displayed, it is in the interests of justice for an administrative fine to be imposed on the respondent. The purpose of an administrative fine is, in the circumstances of this application, a punitive measure that is warranted. Regarding the quantum of the administrative fine, section 151(2) provides that an administrative fine imposed may not exceed the greater of 10% of the respondent's annual turnover during the preceding financial year or R1 000 000.00 (one million rand). There is no evidence before the Tribunal confirming the respondent's turnover. The Tribunal can, however, still impose a fine limited to a maximum of R1 000 000.00 (one million rand).
41. The respondent's conduct has displayed little or no regard for the spirit and purpose of the NCA. Therefore, the Tribunal finds that a fine of R100 000.00 (one hundred thousand rand) will be appropriate.

ORDER

42. Accordingly, the Tribunal makes the following orders:

42.1 The respondent is found to have acted unlawfully and contravened section 81(2)(a)(iii) read with regulations 23A(3) and 23A(12)(a) and (c) of the NCA;

42.2 The respondent is found to have issued credit recklessly and has contravened section 80(1)(a) of the NCA;

42.3 The respondent's conduct is declared prohibited conduct;

42.4 The credit agreement concluded between the applicant and the respondent on 22 September 2022 is hereby cancelled, and all the consumer's rights and obligations under the credit agreement are set aside;

42.5 Within seven days of the issuing of this judgment, the respondent must collect the financed vehicle, a 2022 Ford Ranger Raptor, from the applicant at its own risk and expense, and the applicant must make the vehicle available for collection;

42.6 An interdict is hereby granted restraining the respondent from, in future, engaging in similar prohibited conduct;

42.7 The respondent must, within sixty business days of issuing this judgment pay an administrative fine of R100 000.00 (one hundred thousand rand) into the National Revenue Fund referred to in section 213 of the Constitution^[3] using the following bank account details:

Bank: The Standard Bank of South Africa

Account holder: Department of Trade and Industry and Competition Branch name: Sunnyside

Branch code: 010645

Account number: 3[...]

Reference: NCT/313391/2024/141(1)(b) and the name of person or business making the payment; and

43. There is no cost order.

(signed)

Adv C Sassman Tribunal member

Presiding Tribunal member Ms Z Ntuli and Tribunal member Dr MC Peenze concur.

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

[2] Capitec Bank Limited v Mahlangu and Another (A16 / 2020) [2021] ZAMPMHC 28 (25 October 2021), at paragraphs 23 - 25.

[3] Constitution of the Republic of South Africa, Act 108 of 1996.

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