

SOUTH AFRICA / JUDGMENT

Van Rooyen v ABSA Bank (NCT/25/2008/149(1)(P)) [2009] ZANCT 5 (30 January 2009) [2009] ZANCT 5

COURT

National Consumer Tribunal

BEFORE

F K Manamela, J, Ms M Mpahlele, Pro Bonke Dumisa

CASE / FILE NUMBER

NCT/25/2008/149(1)(P)

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IN THE NATIONAL CONSUMER TRIBUNAL,

HELD AT CENTURION

Case No: NCT/25/2008/149(1)(P)

Date: 30/01/2009

In the matter between

Theo van Rooyen..... Applicant

And

ABSA Bank..... Respondent

INTERIM RELIEF: REASONS FOR DECISION

Introduction

This was an application brought in terms of section 149 of the National Credit Act ("the Act"). The Tribunal heard the matter on 15 of January 2009 and dismissed the application. These are the reasons for that decision.

The Applicant is Mr Theo van Rooyen who appeared without a legal representative. The Respondent is ABSA Bank Ltd., a registered bank and credit provider. Appearing on behalf of the Respondent was Mr Steven Kruger.

background

to the application

1. The Applicant applied for a facility from Respondent in March 2007 which was declined for the stated reason that Applicant was

"technically insolvent". The Applicant again applied to Respondent Bank in September 2007 and was again declined. At that

time, the Applicant lodged a complaint with the Banking Ombudsman.

2. In April 2008, while awaiting the outcome of the Ombudsman's investigation, the Applicant submitted his complaint to the National

Credit Regulator. In both cases, the allegations against the Respondent were that it discriminated against the Applicant, and contravened various provisions of sections 61, 62, 63, 65, 66, 79 and 81 of the Act, most of which offer protections against discrimination.

The Banking Ombudsman responded that he could find no maladministration on the part of the Respondent. The National Credit Regulator found that the Applicant's complaint had no merit, and contained no allegation of facts that, if true, would constitute grounds for a remedy under the National Credit Act. Consequently the Regulator issued a Notice of Non-Referral in terms of section 139(1)

(a) of the Act

Relief Sought

3. Applicant's application to the Tribunal is made In terms of section 149(1) of the Act (application for interim relief pending the hearing of a complaint referral). In this application, Applicant prays for an order against Respondent for a "temporary exemption for paying outstanding / arrear amounts".
4. Applicant presumably seeks this order on the same grounds as initially stated in his complaints to the Ombudsman and the Regulator. No additional facts are alleged in the Application Documents in support of his allegations against Respondent.
5. The judgment takes into account the completed Application filed on 30 October 2008. The Respondent did not file an Answering Affidavit on or before the 3rd of December 2008. The Applicant applied on 18 December 2008 for a default order.

Hearings (Summary of what happened at the hearing)

After failing to file an Answering affidavit, the Respondent was nonetheless present at the hearing. The Respondent objected to the Tribunal proceeding with the matter on two grounds, namely: (i) that it had inadequate notice of the proceedings and (ii) that it was uncertain from the founding documents what allegations were that the Respondent was required to answer to. Applicant's failure to specify which of his trading entities the allegations related to, compounded the uncertainty. The Tribunal then heard the

Respondent on these points and found that the first ground for the objection was unfounded. The Tribunal directed that it will proceed to hear the Applicant in order to clarify the allegations. The Tribunal also emphasized the fact that it is duty bound in terms of the Act to dispose of matters before it as expeditiously as possible.

The Applicant's testimony: The Respondent, ABSA made him a platinum client in 2001 and as such was entitled to certain benefits. In March 2007, Applicant applied for an overdraft for his business entity, North Shore Trading in the amount of R400 000 (four hundred thousand rand) Applicant had another business entity, Handy Cash which he claimed made a turn over of R5.4m. Respondent declined the application for an overdraft on the grounds that the Applicant was technically insolvent. A second application to the Respondent in September 2007 was again declined. Applicant had certain securities ceded to the Respondent in 2005 in security for the existing debt. Applicant alleges to have lost the amount of R1.7 m and closed down Handy Cash as a result of the Respondent's refusal to give it an overdraft facility. Applicant further alleged that the Respondent discriminated against it, and then approached both the Ombudsman for Banking Services and the National Credit Regulator to lodge a complaint. Both complaints were dismissed by the two institutions, in dismissing the Applicant's claim, the Ombudsman indicated that it cannot force the Respondent to grant the Applicant an overdraft. The Regulator found that the Applicant's complaint had no merit to warrant any remedy under the National Credit Act. Applicant is currently under debt counseling and is approaching the Tribunal for an interim relief...

Since the Respondent pronounced itself ready to respond to these allegations, the Tribunal proceeded to hear the Respondent. Briefly

the Respondent gave an overview of the Applicant's state of finances and provided documentary evidence to that effect. According to the Respondent, the Applicant applied for a loan of R480 000 in March 2005 which was approved. Applicant further applied for an overdraft of R400 000 in August/ September 2007 which was declined on the basis that the Applicant was already highly committed and indebted. Respondent handed in financial statements reflecting a loss of Applicant's business and in respect of existing mortgage loans which had no equity. Applicant also applied for an increase in its three bonds for additional amounts of R272 000; R171 000; and R136 000 respectively. Applicant further allegedly breached an agreement reached with the Respondent in December 2007 by withdrawing money sold from the bonds and certain withheld policies earmarked for the reduction of the overdraft before the Respondent could realize these funds to reduce Applicant's indebtedness to the bank. All Applicant's accounts are in arrears with the total debt bill standing at R 1 897 106.00 owed to the Respondent... Respondent denied that

the Applicant was making any profit and showed by handing out exhibits that the

Applicant was operating at a loss. Respondent found no basis upon which the Applicant could be granted temporary relief from paying the money it owes and found Applicant's purported claim for damages against Respondent, alarming and without substance and basis.

Criteria for the granting of a default order

1. In the absence of answering affidavits the only evidence before the Tribunal is the evidence presented by the Applicant. In response to the Respondent's failure to file answering affidavits the Applicant filed an application for a default order on the 18 December 2008.
2. Rule 25(2) provides that an Applicant may apply for a default order against a party, if no response to the application was filed within the time stated in the application. Rule 25(3) provides that the Tribunal may make an order in terms of sub-rule (2),
 - (a) after it has considered or heard any necessary evidence; and
 - (b) if it is satisfied that the application documents were adequately served. (Proof of service appears at page 15 of the Application.)
3. Rule 4(2) requires an application for a default order to be made by Notice of Motion in Form T1.r4 - which was not complied with.
4. The Tribunal will thus require an Application to Condone Non-compliance with its Rules (application in terms of rule 34(1) (d)), before it can grant a default order in this matter.

Requirements for interim relief

6. Section 149(1) of the Act provides:

"(1) At any time, whether or not a hearing has commenced into a complaint, a complainant may apply to the Tribunal for an interim relief order in respect of that complaint, and the Tribunal may grant such order if

- (a) there is evidence that the allegations may be true; and
- (b) an interim order is reasonable necessary to (i) prevent serious, irreparable damage to that person ..."

"(2) An interim order in terms of this section must not extend beyond the earlier of... the conclusion of a hearing into the complaint; or ... six months after the date of the interim order."

"(3) If an interim order has been granted and a hearing into that matter has not been concluded within six months ... the Tribunal, on good cause shown, may extend the interim order for a further period not exceeding six months."

7. It is clear from section 149(1) that interim relief is contemplated in respect of a matter that will ultimately be heard "in full" by the Tribunal, and in respect of which a final order will eventually be granted.
8. In the case of a Notice of Non-referral, it is uncertain whether such a hearing will take place, since the Tribunal must first grant leave in terms of section 141(1) (b) before such a matter may be brought before it. It is thus necessary where the Regulator has issued a Notice of Non-referral that the application for leave to refer be brought before or concurrently with the application for interim relief.
9. Tribunal rule 3(1) and (2) thus provide as follows:

"3(1) The Tribunal may deal with a matter ... (c) originating as a complaint to the Regulator or arising from a complaint, and referred to the Tribunal in terms of s137 (1), s140 or s141 (1)(b) of the Act ..."

"(2) The Tribunal may ... (a) grant interim relief in respect of a matter described in rule 3(1) (c)".

10. It is clearly contemplated in this rule that the Tribunal should grant leave for a 'non-referred' matter to be referred to it, before an application for interim relief can be considered. Since in the present case, no application has been made in terms of section 141(1) (b), we thus suggest that the application for interim relief cannot be granted until this application is first made.

11. A further requirement of section 149 is that an applicant for interim relief make allegations of an infringement of a right, on the basis of which the remedy of interim relief may be afforded (s 149(1) (a)). The ability to show "serious, irreparable damage" is clearly of no consequence where serious, irreparable loss is sustained as the consequence of a lawful act (the valid repossession or sale in execution of property, being a case in point). The onus is thus on the applicant to demonstrate a clear infringement, and the type of relief sought should address the alleged wrongdoing / prohibited conduct which is threatening the interests of the Applicant.

Reasons

for non-referral

12. In the interest of reaching finality and avoiding further litigation, the Tribunal will deal, obiter and in a cursory manner with the NCR's stated reasons for issuing a Notice of Non-referral in response to Van Rooyen's complaint. (This would have formed the basis on which to decide whether to grant 'leave to refer' in a section 141(1) (b) application.)
13. In summary, the reasons for 'non-referral' were as follows —
 - a. with regard to the loan application of March 2007, this credit application was made before the effective date of the National Credit Act and consequently Chapter 4, Part A of the Act (dealing with consumer rights, and forming the basis for Van Rooyen's complaint), does not apply to this credit application;

- b. in respect of the loan application of September 2007,
 - i. ABSA's reasons for refusal seem to be for sound commercial reasons as required for purposes of section 60(2) of the Act;
 - ii. The complainant did not advance any reasons that suggest discrimination as envisaged by section 61 of the Act and the allegation therefore seems to be unfounded.
14. The NCR's Investigation Report of 22 September 2008 (pages 26 to 29 of the Application), provides further background: 'Upon accepting this complaint we contacted ABSA bank requesting reason for refusal of credit as alleged by the complainant, as well as Banking Ombudsman finding on the matter. The bank responded by tabling a financial position of the complainant's business at the time of applying for the loan (R400, 000,00). Without going through each and every transaction considered by the bank ...the loan was declined due to a loss of R 187 660 [in respect of earlier loans to the Applicant] ... and there was no proven repayment ability. Further, his financial statements at the time did not support unsecured lending. It was also clear that the complainant was highly committed, turnover on account did not qualify for the facility and this led to insufficient security.'
15. Discrimination can only occur when a person of a certain category is treated differently to others, and where the criterion on which that person is earmarked for differential treatment is prohibited under the Constitution or other legislation. It is thus important for a person alleging discrimination to show two things: (i) that he or she is being treated differently on the grounds of a criterion which is prohibited, and (ii) that he or she would have a reasonable chance of obtaining the service required if he or she had been of a different category.
16. In the present case, there is no allegation that would establish either of these points. It is in fact most unlikely that any person of whatever category would be granted a loan under the financial circumstances pertaining to the Applicant.

In the absence of any further evidence, the Tribunal would thus have no basis for departing from the findings of the Banking Ombudsman and the National Credit Regulator, and 'leave to refer' the matter in terms of section 141(1)(b) would not be granted. The Tribunal would like to emphasize, however, that its remarks in relation to an application for leave to refer is orblier as there is no application for leave to refer but only an application for interim relief. After considering all the evidence presented orally and on the papers, the Tribunal makes the following order.

The application for Interim relief is accordingly dismissed.

Date: 30/01/2009

F K Manamela

Presiding Member

J Concurring;

Ms M Mpahlele Pro Bonke Dumisa

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