

**IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION**

Case number: NCT/10685/2013/128(1)NCA

In the matter between:

CARMEN DEIDRE JOUBERT

APPLICANT

and

ABSA BANK LIMITED

RESPONDENT

Coram:

Adv J Simpson - Presiding Member

Ms H Devraj - Member

Ms P Beck - Member

Date of Hearing - 25 September 2014

JUDGMENT AND REASONS

APPLICANT

1. The Applicant in this matter is Ms Carmen Deidre Joubert, an adult female residing in Paarl (hereinafter referred to as "the Applicant").
2. At the hearing of the matter the Applicant was represented by an attorney, Mr HRN Joubert of Joubert Attorneys in the Strand. The Applicant was further assisted by a debt counsellor, Mr Corrie Gouws. The Applicant, the attorney and the debt counsellor appeared before the Tribunal via Skype audio and video transmission.

RESPONDENT

3. The Respondent in the matter is ABSA Bank, a limited liability company with registration number 1980/004794/06 (Herein after referred to as the "Respondent"). The Respondent is further registered with the National Credit Regulator as a credit provider with registration number NCRCP7.
4. The Respondent did not appear at the hearing and was further not represented.

APPLICATION

5. The application brought before the Tribunal is in terms of section 128 of the National Credit Act 34 of 2008 ("the Act"). The Applicant's vehicle was attached by court order and sold by the Respondent. The Applicant is disputing that the vehicle was sold for the best price reasonably obtainable or as soon as reasonably possible. In terms of Section 128(1) the Applicant is applying for the Tribunal to review the sale of the vehicle and make an order in terms of Section 128(2).

BACKGROUND

6. The Applicant owned a 2006 model Nissan Pathfinder 2.5 with approximately 160 000 kilometres on the odometer ("the vehicle"). The Respondent provided the finance for the vehicle when it was purchased.
7. During December 2010, the Magistrate's Court made an order placing the Applicant under debt review in terms of Section 86 of the Act. The loan repayment on the vehicle was included in the debt review order.
8. From inception of the debt review order in December 2010, an error occurred and the monthly repayments due on the ABSA vehicle loan, were mistakenly paid to Motor Finance Corporation (MFC), allegedly, by the payment distribution agency. These payments were made in addition to the normal monthly payments due on the MFC loan. The error was only brought to the attention of the debt counsellor during May 2012 by the Respondent. The debt counsellor then tried to resolve the problem by requesting MFC to refund the additional amount paid to them and to enable the debt counsellor to repay it to the Respondent. Eventually MFC only agreed to repay the amount of R10 000.00 back to the Applicant. The Respondent however refused to accept any compromise and gave notice that it withdraws from the debt review process. The Respondent then proceeded to institute legal action against the Applicant. This process resulted in the Applicant's vehicle being attached and sold.

9. The vehicle was attached by the bank on 30 October 2012 and was sold on 5 July 2013 for an amount of R56 977.20. The amount still outstanding on the loan account was R463 995.34 at the time.
10. The Applicant submitted copies of a Transunion Auto Dealer's guide to show that the vehicle had a trade in value of R130 000 and a retail value of R154 000 in September 2013. In the application form the Applicant stated that the vehicle's value was approximately R280 000.00.
11. According to the Applicant the vehicle was not running at the time and it was attached with a faulty clutch. It would have cost an estimated R34 000.00 to repair the clutch.
12. The Applicant lodged the application with the National Consumer Tribunal ("Tribunal") on 4 September 2013.
13. The Tribunal Registrar issued two notices of incomplete filing to the parties on 12 September 2013 and 10 October 2013. After the required information was provided a Notice of complete filing was issued by the Tribunal Registrar on 9 July 2014.

CONSIDERATION OF THE MATTER ON A DEFAULT BASIS

14. From the contents of the Tribunal's file it appears that the Respondent did not file an answering affidavit opposing the application by the Applicant. As stated previously, there is no appearance by the Respondent before the Tribunal at the hearing.
15. There is correspondence on the file showing that employees of the Respondent engaged in e-mail correspondence with staff in the Tribunal Registrar's office regarding the matter but ultimately no answering affidavit was filed with the Tribunal.
16. The Applicant did not apply for a default order in terms of Section 25(2) of the Rules of the Tribunal¹ but the Registrar did set the matter down for hearing and issued a Notice of Set Down to all the parties on 29 August 2014.

¹ Regulations for matters relating to the functions of the tribunal and rules for the conduct of matters before the national consumer tribunal, 2007 ("Rules of the Tribunal").

17. In accordance with Section 24(1)(b) of the Rules of the Tribunal, the Tribunal may continue with the proceedings in the absence of the Respondent or adjourn the hearing to a later date. In the circumstances of this matter there was no basis for adjourning the hearing and the Tribunal therefore continued with the hearing in the absence of the Respondent.
18. In accordance with Rule 24(2), the Presiding member must be satisfied that the party has been properly notified of the date, time and venue of the proceedings, before making any decision in terms of subrule(1). The Tribunal was satisfied with the evidence before it that the Notice of Set Down was issued to the Respondent on 29 August 2014.

THE HEARING

19. At the hearing Mr Joubert addressed the Tribunal on the merits of the application. In summary Mr Joubert argued that the Respondent had delayed in selling the vehicle. This delay caused an increase in the interest that accumulated on the account. He further argued that the vehicle was sold for an amount that was much lower than the market value.
20. The Tribunal requested Mr Joubert to address it on whether or not the Section 128(1) requirement of the Applicant to have "*...unsuccessfully attempted to resolve the **disputed sale of goods in terms of section 127** directly with the credit provider, or through alternative dispute resolution ...*" (our emphasis) have been met. Mr Joubert and Mr Gouws argued that it had lodged disputes with the Respondent before the attachment of the vehicle and it would not have served any purpose to lodge a dispute regarding the delay and the price obtained. Mr Joubert argued that the Respondent's position regarding the matter was clear. The Respondent was however included in e-mails sent to the Tribunal when lodging the application.

CONSIDERATION OF THE EVIDENCE

21. The first issue the Tribunal must consider is whether the Applicant complied with the requirement set out in Section 128(1) of the Act. The section requires the consumer to have unsuccessfully attempted to resolve the disputed sale of goods directly with the credit provider or through an alternative dispute resolution. This aspect has been considered by the Tribunal before in the matter of *K Pillay v Wesbank, a Division of FirstRand Bank Limited* NCT/867/2010/128(1)(P). The Tribunal held that this is a separate requirement that must be complied with before the Tribunal can consider the matter in terms of Section

128(2). The Tribunal has however not yet considered what the content of this dispute must be. Would any dispute regarding the attachment of the vehicle suffice?

22. When considering the requirement in terms of Section 128(1) it appears to be clear that there is a direct link between sections 128(1) and 128(2). The requirement would be rendered somewhat meaningless if the consumer was not required to specifically dispute the price of the vehicle or any delay in selling it. The intention of the Legislature must therefore be that the consumer must provide the credit provider with an opportunity to resolve the dispute specifically with regard to the price the goods were sold for or any delay in selling the goods. This initial process can be regarded as a filtering step as such which can possibly lead to the dispute being resolved informally without requiring a formal application to the Tribunal. Where the consumer has not lodged any dispute with the credit provider specifically with regard to the price of the goods obtained or any possible delay in selling the goods then the requirement has not been met. The dispute lodged must further match the basis of the application. One cannot lodge an informal dispute regarding a delay in selling the goods and then lodge an application to review the price of the goods.
23. To a consumer it may appear to be an unnecessary and formalistic procedural requirement but the circumstances under which a consumer may approach the Tribunal directly are limited. To ensure that parties to a dispute are granted an opportunity to resolve the matter informally, without having to resort to the Tribunal, the Legislature has seen fit to incorporate this requirement as a precursor to approaching the Tribunal.
24. In the present matter before the Tribunal there is no evidence that the Applicant disputed the matter with the Respondent regarding the price of the goods obtained or the delay. It is clear from the Applicant's documents that she never lodged any dispute, after the vehicle was attached, regarding the price obtained or the delay in selling the vehicle. The Applicant has therefore not complied with the requirements of Section 128(1) and the Tribunal cannot review the sale in terms of Section 128(2).
25. The Tribunal can further note that the evidence placed before the Tribunal regarding the value of the vehicle would in any event not have been sufficient for a finding to be made in this regard. In the matter of *Bonga Nkanyiso Mdletshe v Mercedes-Benz Financial Services SA (Pty) Ltd* NCT/9163/2013/128(1)(P) NCA the Tribunal made the following remark regarding vehicle values –

"While the values indicated in the Mead and McGrouther digest can be regarded as a very general guide as to the value of a vehicle, they appear to represent values which could be

obtained under normal market circumstances by a dealer in motor vehicles. It would be unreasonable to expect a credit provider to obtain prices matching these values.

Further, in order to assign these values, one must assume that the vehicle is in a good overall condition which, in the context of a review in terms of section 128, would generally require a physical inspection or some other evidence of its condition. In the absence of evidence relating to the condition of the vehicle it would amount to pure speculation to say that a particular vehicle could be assigned these values.

The Applicant's mere submission that the vehicle's value should be based on the Mead and McGrouther digest is therefore purely speculative and of little value in determining compliance with section 128."

26. The comment made by the Tribunal in the *Mdletshe* matter is equally applicable to the matter currently before the Tribunal in that the values assigned to the vehicle by the Applicant are purely speculative.

ORDER

Accordingly, the Tribunal makes the following order:

30. The application to the Tribunal to review the sale of the vehicle is dismissed.
31. No order is made as to costs.

DATED 11 NOVEMBER 2014

[signed]

Adv. J Simpson

Presiding Member

With Ms H Devraj (member) and Ms P Beck (member) concurring.

Authorised for issue by the National Consumer Tribunal

Case number _____

Date: 20/11/14
CC/yy / mm / dd

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