

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

Case No: NCT/26785/2015/141(1)(b)

In the matter between:

LS CRAWFORD

APPLICANT

AND

JD GROUP LIMITED

RESPONDENT

Coram:

Mr F Sibanda	-	Presiding Member
Ms H Devraj	-	Member
Ms P Beck	-	Member

Date of Hearing:	06 May 2016
Date of Judgment:	20 June 2016

JUDGMENT AND REASONS

PARTIES

- 1 The Applicant in this matter is LS Crawford, a major male who served an application in terms of Section 141(1)(b) of the National Credit Act, No 34 of 2005 ('the Act).
- 2 The Respondent is JD Group, a registered credit provider in terms of the Act, with registration number NCRCP41 ('the Respondent').

At the hearing the Applicant represented himself.

APPLICATION TYPE

3 This is an application in terms of section 141(1) of the Act, for leave to refer the matter to the Tribunal, following a notice of non-referral issued to the Applicant by the National Credit Regulator (the “NCR”) on 8 June 2015, in terms of section 140(1) of the Act.

4 Section 140(1) of the Act provides that –

“After completing an investigation into a complaint, the National Credit Regulator may –

(a) Issue a notice of non-referral to the complainant in the prescribed form

(b)”

5 Section 141(1) of the Act states that –

“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) the consumer court of the province within which the complainant resides, or in which the respondent has its principal place of business in the Republic, subject to the provincial legislation governing the operation of that consumer court; or

(b) the Tribunal, with the leave of the Tribunal.”

6 The Tribunal has jurisdiction to hear this matter in terms of section 27(a)(i) of the Act, which provides that the Tribunal may adjudicate in relation to any application made to

it in terms of the Act, and make any order provided for in the Act in respect of such application.

7 The matter was heard on 06 May 2016.

BACKGROUND

8 The Applicant entered into a credit agreement with JD Consumer Finance (Pty) Ltd, trading as Hi Finance (a division of the Respondent)¹ on 26 August 2013.

9 The Applicant initially made debit order payments but later changed to making electronic funds transfer (EFT) payments.

10 Between 1 and 4 September 2014 the Applicant received eight phone calls and an SMS message from the Respondent's call centre agents, requiring the Applicant to pay his account when, on the Applicant's version, the account was up to date.

11 The Respondent proceeded to submit negative payment information about the Applicant to the credit bureaus.

12 The Applicant became aware of the adverse listing with the credit bureau in December 2014 when his application for motor-cycle finance was rejected by BikeFin, a division of Wesbank Limited and Motor Finance Corporation, a division of Nedbank Limited.

13 The Respondent sent an apology to the Applicant on 18 December 2014, citing an administrative error that led to the Applicant's payment not being reflected on the system, which was offline at the time of updating the credit bureau.

¹ For purposes of this judgment JD Consumer Finance (Pty) Ltd and JD Group Limited are treated as a single economic entity.

- 14 The Respondent promised to do a special request to the credit bureau, who subsequently removed the Applicant's adverse information with respect to this particular account on or around 6 January 2015, according to the Applicant.
- 15 The Applicant was not satisfied with the Respondent's handling of the matter and demanded payment for damages resulting from failure to secure financing for the motor-cycle as well as the humiliation and defamation regarding his credit worthiness status.
- 16 The Respondent refused to make any payments to the Applicant for the alleged damages.
- 17 On 17 April 2015 the Applicant lodged a complaint with the National Credit Regulator. After investigating the complaint the NCR issued the Applicant with a notice of non-referral stating that –

“The NCR is not in a position to make an award for damages nor is it in a position to require a credit provider to enter into a credit agreement with a consumer. Further should a credit provider enter into a credit agreement with a consumer there are no provisions in the National Credit Act which allows for the NCR to recommend the interest rate charged therein, other than for the NCR to ensure that the proposed rates are below the prescribed maximum.”

- 18 The Applicant after receiving the notice of non-referral then approached the Tribunal, in accordance with section 141(1) of the Act, for leave to refer the matter directly to the Tribunal.

ISSUES TO BE DECIDED

- 19 The Tribunal must decide whether:

19.1 To grant leave to the Applicant to refer the matter directly to the Tribunal, and if so;

19.1.1 has the Respondent engaged in prohibited practice; and

19.1.2 the Tribunal can order the damages asked by the Applicant.

POINTS *IN LIMINE*

LEAVE TO REFER AND DAMAGES

- 20 At the hearing the Respondent raised two points *in limine*, being the fact that (a) the Applicant has not obtained leave of the Tribunal to refer the matter directly to the Tribunal; and (b) the relief sought by the Applicant is not legally competent.
- 21 The Tribunal decided to deal with these preliminary issues first and issue a judgment before getting into the merits of the case. Both parties were given an opportunity to address the Tribunal on the two points *in limine*.
- 22 The Respondent argued that the Applicant has neither sought nor obtained the leave of the Tribunal to refer this matter directly to it, thus rendering its purported referral of the matter directly to the Tribunal invalid. Furthermore, in terms of Table 2, Part 2A of the Rules for the Conduct of Matters Before the National Consumer Tribunal (Tribunal Rules), an application for leave to refer a matter directly to the Tribunal in terms of section 141(1) of the Act must be lodged within 20 business days of the date of the notice of non-referral or within such longer time permitted by the Tribunal.
- 23 The notice of non-referral was issued on 8 June 2015 but the Respondent claims that it only received the notice of filing on 22 December 2015, and that Form 32 was only furnished to the Respondent under cover of the replying affidavit, dated 22 March 2016. On that basis, the Respondent argues that the Applicant's application must fail.
- 24 The Respondent's second point *in limine* is that the Tribunal cannot order the relief sought by the Applicant when regard is had to section 150 of the Act and on that basis the application must be dismissed.

- 25 Due to the fact that the Applicant had no legal representation, the Tribunal took liberty, with the consent of the Respondent, to explain in lay man terms the meaning of the points *in limine* raised. The Tribunal also clarified that the Applicant had to address the Tribunal on these preliminary points before moving on to deal with the merits of the case.
- 26 The Applicant argued that he had lodged the application as soon as he received the notice of non-referral from the NCR and that this was within the stipulated timeframe. Form 32 was attached to the application. Further, according to the Applicant, the Tribunal has powers to deal with the matter and order the relief sought.

ANALYSIS OF APPLICABLE LAW AND FACTS

Leave to refer

- 27 The legislator, through the Act, granted the NCR powers and the authority to, among other things, receive or initiate and investigate complaints against registrants, for alleged prohibited conduct.
- 28 Upon completion of an investigation the NCR has the following four avenues to take in terms of section 140(1) of the Act:
- (a) issue a notice of non-referral to the complainant in the prescribed form;
 - (b) make a referral in accordance with subsection (2), if the National Credit Regulator believes that a person has engaged in prohibited conduct;
 - (c) make an application to the Tribunal if the complaint concerns a matter that the Tribunal may consider on application in terms of any provision of the Act; or
 - (d) refer the matter to the National Prosecuting Authority, if the complaint concerns an offence in terms of the Act.
- 29 Thus, the most common way for complaints to reach the Tribunal for adjudication is through the NCR, in terms of the Act, or the National Consumer Commission, in

terms of the Consumer Protection Act, No 68 of 2008 (the “CPA”). However, the Act provides for complainants to approach the Tribunal directly in instances where the NCR, in this case, after investigating a matter issues a notice of non-referral.

30 Section 141(1) of the Act states that –

“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) the consumer court of the province within which the complainant resides, or in which the respondent has its principal place of business in the Republic, subject to the provincial legislation governing the operation of that consumer court; or

(b) the Tribunal, with the leave of the Tribunal.”

31 Before the Tribunal can hear the merits of an application brought in terms of section 141 (1) of the Act it is enjoined to first make a determination whether to grant the complainant leave to refer the matter directly to it or not. Once this hurdle has been passed the Tribunal can then proceed to hear the merits of the matter.

32 In order to make a determination whether to grant leave to refer the matter directly, the Tribunal has previously taken guidance from jurisprudence established through the courts.

33 The matter of *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*² is instructive in this regard, where it was stated that:

“In applications for leave to appeal properly brought before the appropriate court in terms of the old sec 20, read with sec 21 as it then was, the only relevant criteria were whether the applicant had reasonable prospects of success on appeal and whether or not the case was of substantial

² (12/86) [1986] ZASCA 10 (6 March 1986)

importance to the applicant or to both him and the respondent. This was so irrespective of whether the appeal lay to the full court or to the Appellate Division.”

- 34 Based on the afore-going the Tribunal will, also in this case, consider the two factors identified, that is –
- (1) Reasonable prospects for success; and
 - (2) Substantial importance of the matter.
- 35 With respect to the substantial importance of the matter, the Applicant has persisted with the matter over a period of time and has demonstrated his resolve to take it to any possible forum. The Respondent has also been seized with the matter right from the start, defending itself against the allegations levelled against it. The matter is therefore important to both parties.
- 36 In so far as the prospects for success are concerned we first consider the allegations made against the Respondent and whether these qualify as prohibited conduct in terms of the Act. We'll also consider whether the Tribunal can order the damages asked for by the Applicant.
- 37 When Form 32 which was lodged with the Tribunal is considered, it appears that the Applicant has the following three main allegations against the Respondent:
- (a) that the Respondent reneged on its promise to reduce the rate of interest of 31% per annum charged on the Applicant's account.
 - (b) that the Applicant suffered harassment, intimidation and false accusations by the Respondent's agents attempting to collect arrear amounts even though according to the Applicant the account was up to date.
 - (c) that the wrongful blacklisting led to the loss of financing opportunity for the purchase of a motor-bike.

- 38 With respect to the first allegation the Applicant acknowledges in the complaint initiation form to the NCR³ that the Respondent reduced the interest rate charged on his account from 31% per annum to 22% per annum. This allegation therefore is moot. This notwithstanding, it must be pointed out that the rate of interest of 31% charged at the time of entering into the credit agreement was within the maximum rate prescribed in terms of Regulation 42 of the National Credit Regulations, 2006. It goes without saying therefore that the Respondent would never have been found by this Tribunal to be in breach of the Act or its Regulations by charging a rate of interest of 31% at the time of entering into the credit agreement.
- 39 Insofar as the second allegation is concerned the Act does not appear to be the correct legislation to deal with matters of harassment, intimidation and false accusations allegedly suffered by the Applicant. In substantiating these allegations the Applicant quotes sections of the Debt Collectors Act, No 114 of 1998 that address the conduct of debt collectors. However, this Tribunal is empowered to adjudicate on matters brought in terms of the Act and the CPA. To attempt to deal with the Debt Collectors Act will be *ultra vires* the powers of the Tribunal and illegal.
- 40 Wrongful blacklisting, which is the Applicant's third allegation, is a matter that the legislator anticipated and therefore made provision for in the Act. Section 72 of the Act provides for the right by any person to access and challenge credit records and information. Section 72(1)(c) states that –

“Every person has a right to –

(a) be advised by a credit provider within the prescribed time before any prescribed adverse information concerning the person is reported by it to a credit bureau, and to receive a copy of that information upon request;

(b) ...

(c) challenge the accuracy of any information concerning that person –

(i) that is the subject of a proposed report contemplated in paragraph (a); or

(ii) that is held by the credit bureau or national credit register, as the case may be,

³ NCR Form 29, page 5 of the bundle

and require the credit bureau or National Credit Regulator, as the case may be, to investigate the accuracy of any challenged information, without charge to the consumer;”

- 41 After learning of the blacklisting the Applicant challenged it and the information was eventually removed on or around 6 January 2015, according to the Applicant. The Respondent apologised but the Applicant seeks damages for failure to secure financing for the motor-cycle as well as the humiliation and defamation regarding his credit worthiness status. This aspect is considered next.

Award for Damages

- 42 Section 150 of the Act deals with the type of orders that the Tribunal can make and states as follows:

“In addition to its other powers in terms of this Act, the Tribunal may make an appropriate order in relation to prohibited conduct or required conduct in terms of this Act, or the Consumer Protection Act, 2008, including –

- (a) declaring conduct to be prohibited in terms of this Act;*
- (b) interdicting any prohibited conduct;*
- (c) imposing an administrative fine in terms of section 151, with or without the addition of any other order in terms of this section;*
- (d) confirming a consent agreement in terms of this Act, or the Consumer Protection Act, 2008 as an order of the Tribunal;*
- (e) condoning any non-compliance of its rules and procedures on good cause shown;*
- (f) confirming an order against an unregistered person to cease engaging in any activity that is required to be registered in terms of this Act;*
- (g) suspending or cancelling the registrant’s registration, subject to section 57(2) and (3);*
- (h) requiring repayment to the consumer of any excess amount charged, together with interest at the rate set out in the agreement; or*
- (i) any other appropriate order required to give effect to a right, as contemplated in this Act or the Consumer Protection Act, 2008.”*

43 The Applicant seeks monetary damages totalling R450 000 for the loss suffered. However, from the above, it is not clear how the Applicant can be successful in its prayer for the kind of damages it seeks.

44 The only type of compensation relating to wrongful blacklisting is contained in section 72(1)(d) which states that –

“Every person has a right to –

(a) ...

(b) ...

(c) ...

(d) be compensated by any person who reported incorrect information to a registered credit bureau or to the National Credit Register for the cost of correcting that information.”

45 There is no indication that the Applicant spent money to have the information corrected. In any event this is not the Applicant’s case.

46 The above indicates that the Applicant has little prospects of success. That being the case, it is not necessary for the Tribunal to pronounce on the procedural aspects relating to the Applicant’s application being non-compliant with the Tribunal Rules as alleged by the Respondent.

47 Following the hearing the Applicant submitted documentation to the Tribunal, suggesting that the Respondent had failed to comply with Tribunal Rules when serving its answering affidavit on the Applicant.

48 Again, the Tribunal finds it unnecessary to make a finding on the matter, seeing that the Applicant has little prospects of success on the merits of the case in this Tribunal. Moreover, the Applicant submitted the documents after the hearing and the Respondent had no opportunity to make a submission in respect thereof.

CONCLUSION

49 The Tribunal finds that the Applicant has very little, if any, prospects of success in relation to the merits of the case. The Tribunal has decided not to pronounce on the procedural counter-allegations by both parties.

ORDER

50 Accordingly, the Tribunal makes the following order:

50.1 The Applicant's application for leave to refer the matter directly to the Tribunal is denied and the application is accordingly dismissed.

50.2 There is no order as to costs.

DATED THIS 20th DAY OF JUNE 2016

[signed]

Mr FK Sibanda
(Presiding Member)

Ms P Beck (Member) and Ms H Devraj (Member) concurring.