

IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION

Case number: NCT/23245/2015/141(1(b) NCA

In the matter between:

KELEBOGILE KHOZA

APPLICANT

and

NEDBANK LIMITED

RESPONDENT

Coram:

P Beck - Presiding member

Prof J Maseko - Member

X May - Member

Date of Hearing - 26 October 2015

JUDGMENT

APPLICANT

1. The Applicant in this matter is Kelebogile Khoza, an adult female, residing at 73 Saint Andrews Jackal Creek Golf Estate Boundary Road, North Riding, 2169.
2. The NCR Form 32 was duly completed by the Applicant.

RESPONDENT

3. The Respondent is Nedbank Limited a juristic entity with the registration number 195/000009/06. The Respondent is also a registered credit provider with registration number NCRCP 16.

APPLICATION TYPE

4. This is an application in terms of Section 141(1) of the National Credit Act 34 of 2005 (hereinafter referred to as the Act) following the issuance of a notice of non-referral by the National Credit Regulator, (hereinafter referred to as the NCR), in respect of a complaint lodged by the Applicant against the Respondent.

BACKGROUND

5. The Applicant referred a complaint to the National Credit Regulator raising various allegations against the Motor Finance Corporation, (hereinafter referred to as the MFC), in relation to an instalment sale agreement entered into on 1 April 2010 between the Applicant and the Respondent.

APPLICABLE SECTIONS OF THE NCA

The following are applicable sections of the Act and Regulations:

6. *"Section 136 Initiating a complaint to National Credit Regulator"*

- (1) *Any person may submit a complaint concerning an alleged contravention of this Act to the National Credit Regulator in the prescribed manner and form.*
- (2) *The National Credit Regulator may initiate a complaint in its own name."*

7. *"Section 139 Investigation by the National Credit Regulator"*

- (1) *Upon initiating or accepting a complaint in terms of section 136, the National Credit Regulator may –*
 - a. *Issue a notice of non-referral to the complainant in the prescribed forms, if the complainant appears to be frivolous or vexatious, or does not allege any fact which, if true, would constitute grounds for a remedy under the Act."*

8. *"Section 140 Outcome of complaint"*

- (1) *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) *make a referral in accordance with subsection (2), if the National Credit Regulator believes that a person has engaged in prohibited conduct...*

9. "Section 141 Referral to Tribunal

- (1) *If the National Credit Regulator issues a notice of non-referral in response to a complaint other than a complaint concerning section 61 or 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."*

THE HEARING

10. The hearing was held on 26 October 2015.
11. The Applicant represented herself at the hearing and the Respondent was represented by Mr(Anel kindly insert)
12. In the complaint lodged with the Regulator on 19 August 2014, the Applicant stated her reasons, as set out in her submissions, for registering a complaint with the Regulator regarding the conduct of the MFC. These reasons, amongst others, relate to the alleged contraventions of the Act, as supported by documentary evidence, namely that:
- 12.1 The MFC provided the Applicant with a signed and altered Tax Invoice, which the Applicant maintains she did not sign.
- 12.2 The Tax Invoice and the credit agreement provide for extras on the vehicle such as curtained air bags, alloy wheels and stated radio specifications. The applicant alleges that these extras were never added to her vehicle, however she was charged for these extras.
- 12.3 The MFC unlawfully obtained her electronic signature submitted during the purchase period and used same for purposes other than the intended document.
- 12.4 The MFC did not comply with Section 93 of the Act by failing to provide the Applicant with a copy of the credit agreement.
- 12.5 The MFC did not comply with Section 102(2) read with Section 102(1) of the Act.
- 12.6 The MFC failed to explain the terms and conditions of the insurance policy applicable and to provide the Applicant with a copy of the insurance policy.
- 12.7 The MFC has breached the provisions of section 103(5) of the Act.
- 12.8 MFC failed to explain entries on the transaction statements and the month to month statements and therefore did not comply with Section 111 of the Act.

13. The Regulator, subsequently, after investigating the complaint, issued a notice of non-referral .
14. At the hearing however, the Applicant stated that her *main* complaint against the Respondent was that the Respondent had failed to provide her, despite numerous requests, with an explanation for various entries (12.8 above) on her transaction statement and her month to month statements. Thus for the purposes of this judgment the Tribunal will confine itself to this issue.
15. In reply, the Respondent indicated that it had taken the following measures to address the Applicants complaint:
 - 15.1 On about 9 March 2015, the Applicant referred the disputed entries to the National Consumer Tribunal (hereinafter referred to as the Tribunal). Subsequent to the referral, the Respondent convened a meeting with the Applicant on 1 April 2015, at the offices of the Respondent, where the disputed entries were discussed with the Applicant and an undertaking was made by the Respondent to submit further documentation to the Applicant and in particular that a reconciliation of the Applicants account would be compiled for consideration by the Applicant.
 - 15.2 On 23 April 2015, the Respondent submitted an e-mail to the Applicant, wherein the Respondent attached a reconciliation of the Applicants account, inviting the Applicant to liaise further with the Respondent, should the Applicant have further queries related to the disputed entries.
 - 15.3 The Respondent offered the following explanation related to transactions on the Applicants statement of account:
 - 15.3.1 that entries appear on the Applicants statement of account in accordance with normal accounting practice. In the period related to the complaint, the Respondent switched to a new accounting system and due to accounting practice regulations the accounts in the Respondents old records were settled in full with a book entry and new accounts created with the exact same balance recorded as on the old accounting system. It is for this reason that in May 2013 the Applicants statement showed a nil balance but the actual balance was still R147 213,70, excluding finance charges.
 - 15.3.2 The debit entry on 12 October 2013 was as result of a service plan purchased by the Applicant for an amount of R8 535.18. A transcription of the telephone recording wherein the Applicant purchased the service plan was made available to the Tribunal.
 - 15.4 In reply, to the request by the Respondent for the Applicant to liaise further with the Respondent, after the Applicant had an opportunity to look at the reconciliation, the Applicant advised the Respondent that she would be referring the matter to the Tribunal.

ISSUES TO BE DECIDED

18. From the grounds set out in the Application and at the hearing, the Tribunal must decide the following issues:
1. Consideration of the Respondents application for condonation for the late filing of the Respondents answering affidavit.
 2. Whether the Tribunal may grant the Applicant leave to refer the matter directly to the Tribunal.

ANALYSIS OF THE LAW & FACTS

Condonation

19. The Applicant lodged the application with the Tribunal on the 30th April 2015. The Respondent then had 15 business days from the date of the Notice of complete filing to file the Respondents answering affidavit. The notice of complete filing was filed on 8 April 2015 meaning that the Respondent had to file its answering affidavit by 30 April 2015. The Respondent has filed an Application for condonation which was opposed by the Applicant. The Respondent filed its answering affidavit on 14 May 2015, thus 10 days out of time.
20. The Respondent indicated that the Respondent filed his answering affidavit as soon as it was practically possible, after receiving the notice of non-referral from the Regulator.
22. The Tribunal considered the Respondents application for condonation and the Applicants view on the late filing of the Respondents answering affidavit. It is the finding of the Tribunal that the 10 day delay is not excessive, that no prejudice was suffered by the Applicant and accordingly, in the interests of justice, the Tribunal grants condonation to the Respondent and finalises the matter.

Leave to lodge an application with the Tribunal

23. The Tribunal, in determining the aspect of the granting of leave to refer a matter to the Tribunal, has established jurisprudence in the matters of *MV Chauke v Standard Bank et al*¹ and *Gerhard Roelof Coertze and Madelein Burger v Rocelia Young*² in which the panel quoted from the High Court decision of *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*³, and applied the rationale underpinning the approach taken in that matter by holding that:

"When determining whether the Applicant should be granted leave to refer the matter to the Tribunal, the Tribunal must consider requirements for the granting of "leave". A similar

¹ NCT/4658/2012/141(1)(P).

² NCT/7142/2012/73(3)&75(1)(b)&(2) CPA

³ 1986 (2) SA 555 (A) at par 15.

application can be found in the High Court practice, where an applicant applies for leave to appeal a judgment where it was held in Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 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 importance to the applicant or to both him and the respondent"⁴ This was so irrespective of whether the appeal lay to the full court or to the Appellate Division.

The Tribunal will therefore, when considering whether to grant the Applicant leave to refer or not, is use the same test as applied in the High Court for applications for "leave" and will therefore consider:

11.5.1 The Applicant's reasonable prospects of success with the referral;

11.5.2 Whether the matter is of substantial importance to the Applicant or Respondents."

24. The basis upon which leave should be granted has to be measured against the reasonable prospects of success and substantial importance of the matter.

The Applicant submits as part of the Applicants application that:

"The failure to refer the disputed entries on my account resulted in the provisions of the National Credit Act being undermined by the credit provider. This failure prejudiced my rights as a consumer, to be provided with credit in a fair, honest and just manner. The Regulators failure to refer disputed entries on the account led to the credit provider unfairly and wrongfully claiming indebtedness on my part and as a result claiming arrear amounts which are non-existent. This failure if not investigated shall result in the credit provider being unduly enriched and with my rights as a consumer being nullified."

25. It is evident from this paragraph that the Applicant is of the view that the Regulator (i) failed to refer the matter to the Tribunal; (ii) that this failure was to the prejudice of the Applicant and (iii) would have the result of undue enrichment of the Respondent.

26. Section 110 of the Act states as follows:

"At the request of a consumer, a credit provider must deliver without charge to the consumer a statement of all or any of the following:-

(a) The current balance of the consumer's account;

⁴ Odendaal v Loggerenberg en Andere NNO (2) 1961 (1) SA 724 (0) at p 727 C; Attorney-General, Transvaal v Nokwe and Others 1962 (3) SA 803 (T), at p 807 A

- (b) Any amounts credited or debited during the period specified in the request;
- (c) Any amounts currently overdue and when each such amount became due; and
- (d) Any amount currently payable and the date it became due

27. Section 111 (1) and (2) of the Act provides as follows:-

(1) "A consumer may dispute all or part of any particular credit or debit entered under a credit agreement, by delivering a written notice to the credit provider.

(2) "A credit provider who receives a notice of dispute of a transaction (1)

(a) must give a consumer a written notice either –

(i) explaining the entry in reasonable detail; or

(ii) confirming that the statement was in error either in whole or in part, and setting out the revised entry;....

28. The evidence at the hearing confirmed that the Respondent has indeed provided the Applicant with an explanation related to the disputed entries on the Applicants account and has extended an invitation to the Applicant to engage further with the Respondent.

28. The Regulator sets out in its notice of non-referral the following reasons for non-referral:

" Notwithstanding the closure letter sent to the consumer, advising of our findings , the complainant disagreed with our findings and expressed a desire to have the matter referred to the National Consumer Tribunal for adjudication, we therefore issue this notice of non referral."

CONCLUSION

29. On the evidence before the Tribunal, the Tribunal is satisfied that the Respondent has complied with the Respondents obligations in terms of the Act. The Applicant however has failed to take the Tribunal into her confidence at the hearing by explaining to the Tribunal precisely the dispute in the statements of account presented to her by the Respondent.

30. On the evidence before the Tribunal the Applicant has failed to produce any evidence of prejudice suffered by her as a result of the Respondents conduct. It should be noted that the record reflects that the Applicant, on 31 January 2011, defaulted on her credit agreement with the respondent at which time the unpaid balance on the Applicants credit agreement amounted to R165 602.30, excluding finance charges. The last payment made by the Applicant to the Respondent was on 27 November 2013, and the account remains in arrears. These arrears were not disputed, by the Applicant, at the hearing. The Applicant further remains in possession of the vehicle.

31. The question the Tribunal has to ask itself when considering the matter as a whole is whether or not the matter is of substantial importance to the parties and whether this matter has prospects of success.

32. In as much as this matter is of substantial importance to the Applicant and the Respondent, the Tribunal finds that there are no prospects of success in this matter.

ORDER OF THE TRIBUNAL

34. The Tribunal accordingly makes the following order -

- 31.1 The referral to the Tribunal is denied.
31.2 No order as to costs

Thus done and signed at Centurion this 19th day of November 2015.

Ms P A BECK (Presiding Member)

Prof J Maseko (Member) and Mr X May (Member) concurring

Authorised for issue by the National Consumer Tribunal

Case number NCT / 23245 / 2015 / 141 (D) (5)

Date 2016 / 03 / 11
Cvy mm dd

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