

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

Case number: NCT/116313/2018/141(1)(b)

IN THE MATTER BETWEEN:

Thina Bambeni

APPLICANT

And

Nedbank Limited

RESPONDENT

Coram:

Ms. D Terblanche - Presiding Tribunal Member

Prof. K Moodaliyar - Tribunal Member

Adv. J Simpson - Tribunal Member

Hearing Date - 3 December 2018 ✓

JUDGMENT AND REASONS

APPLICANT

1. The Applicant in this matter is Thina Bambeni, an adult female (hereinafter referred to as the "Applicant").

RESPONDENT

2. The Respondent is Nedbank Limited (hereinafter referred to as "the Respondent"), a registered credit provider.

APPLICATION TYPE

3. This is an application in terms of Section 141(1)(b) of the National Credit Act 34 of 2005 (hereinafter referred to as "the NCA").

4. Section 141(1)(b) of the NCA provides as follows –

"(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 an offence in terms of this Act, the complainant concerned may refer the matter directly to—

(a) ...; or

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

5. In applications under Section 141(1)(b) before the National Consumer Tribunal (hereinafter referred to as the "Tribunal") the Tribunal has to embark on a two-fold inquiry to make a final determination, namely -

5.1. Firstly, whether it will grant the Applicant leave to refer the complaint non-referred by the Regulator directly to the Tribunal; and

5.2. Secondly, if the leave to refer is granted, then the Tribunal will consider the merits of the complaint in a full, and in some instances perhaps, a separate hearing.

DEFAULT APPLICATION

6. The Respondent has not opposed the application nor filed an answering affidavit.

7. The Tribunal treated the application as a default application in terms of rule 25 of the Regulations for Matters relating to the Functions of the Tribunal and Rules for the Conduct of matters before the National Consumer Tribunal (hereinafter referred to as "the Rules" or "Rule").

THE HEARING

8. The default hearing was scheduled for 3 December 2018.
9. The Applicant appeared in person at the hearing.
10. The Respondent did not appear at the hearing.

BACKGROUND

11. The Applicant entered into a mortgage loan agreement with the Respondent during 2013.
12. The mortgage loan agreement account fell into arrears, seemingly towards the latter part of 2015.
13. During September 2015 the Applicant and the Respondent agreed on a plan to bring the Applicant's payments up to date. It is this agreement, titled the "*Distressed Restructure Agreement*", the Applicant alleges the Respondent entered into with her recklessly.
14. The Applicant lodged a complaint of reckless credit extension against the Respondent with the National Credit Regulator (hereinafter referred to as "the NCR") on 29 August 2017.

15. On 29 August 2018 the NCR non-referred the complaint on the bases that *“the credit provider conducted an affordability assessment consistently with the NCA and the consumer had income as contemplated in section 78(3)...”* of the NCA.

PARTIES' SUBMISSIONS

APPLICANT'S SUBMISSIONS

16. The Applicant challenged the NCR's non-referral of her complaint and made extensive submissions at the hearing to the effect that the Respondent entered recklessly into the *“Distressed Restructure Agreement”* with her.
17. The main bases for the Applicant challenging the non-referral are that –
- 17.1. The NCR based its' decision to non-refer on incomplete information and dishonest information the Respondent provided to it;
- 17.2. The Applicant was unemployed at the time when she entered into the *“Distressed Restructure Agreement”* with the Respondent during September 2015. She only became employed again during 2016;
- 17.3. The NCR misinterpreted her bank statements and viewed the inward flows of funds into her bank account as income whereas they were not. This arose, she submitted, due to the NCR not seeking clarity from her regarding these inward flows, but simply viewing them as income;
- 17.4. The mortgage bond agreement entered into between herself and the Respondent, in and during 2013, was novated when she entered into the *“Distressed Restructure Agreement”*; and

17.5. As the initial mortgage bond agreement was novated in 2015, the Respondent was required to conduct a proper affordability assessment in terms of the NCA, which the Respondent failed to do.

RESPONDENT'S SUBMISSIONS

18. Respondent did not defend the application nor filed an answering affidavit.

THE LAW APPLICABLE TO THE APPLICATION

19. As this is a default application the Tribunal may make an order in favour of the Applicant in terms of Rule 25 -

*"(a) after it has considered or heard any necessary evidence; and
(b) if it is satisfied that the application documents were adequately served."*

THE NECESSARY EVIDENCE

20. The NCA does not specify the factors which the Tribunal must consider in determining whether an Applicant should be granted leave to refer his / her complaint directly to the Tribunal.

21. In previous decisions the Tribunal has referred to *Westinghouse Brake and Another v Bilger Engineering (Pty) Ltd*¹ (hereinafter referred to as Westinghouse), where the court dealt with the issue of leave to appeal against a judgment.

22. The Tribunal, when considering whether to grant an Applicant leave to refer, has adopted the same test as applied in the High Court for leave to appeal for 'leave' applications.

¹ (12/86) [1986] ZASCA 10 (6 March 1986) (Westinghouse).

23. In *Westinghouse* at paragraph 12 thereof, the Court held that the relevant criteria are whether the Applicant has reasonable prospects of success on appeal; and whether or not the case was of substantial importance to the Applicant or to both the Applicant and the Respondent.
24. The Tribunal will therefore consider the following factors –
- 24.1. Whether the matter is of substantial importance to the Applicant; and
- 24.2. Whether the Applicant has reasonable prospects of succeeding in the main application.
25. It is clear from the submissions made by the Applicant that this matter is of substantial importance to her.
26. The second question that then remains, is whether the Applicant has reasonable prospects of succeeding with the main application.
27. In considering this question the Tribunal had regard to the Applicant's submissions that –
- 27.1. The original contract was novated and, by implication, the "*Distressed Restructure Agreement*" in effect replaced the original mortgage bond agreement; and
- 27.2. The Applicant was unemployed at the time and therefore credit should not have been extended to her.

NOVATION

28. The Applicant submitted that flowing from the alleged novation of the original mortgage bond agreement, the Respondent had to conduct affordability

assessments and / or any other assessments required to avoid entering into a reckless credit agreement with her.

29. The Tribunal is mindful that the "*Distressed Restructure Agreement*" came about as a result of the Applicant having fallen into arrears with her bond repayments and in an attempt to salvage her home.
30. In *National Health Laboratory Service v Mariana Lloyd-Jansen van Vuuren*² the Honourable Judge Mhlantla JA (Shongwe and Wallis JJA and Dambuza and Mayat AJA concurring stated that –

"There is a presumption against novation because it involves a waiver of existing rights. When parties novate they intend to replace a valid contract with another valid contract. In determining whether novation has occurred, the intention to novate is never presumed. In Acacia Mines Ltd v Boshoff,⁴ the court held that novation is essentially a question of intention."(Footnote omitted)

31. In paragraph 18 of the judgment the honourable Judge continues and states that *"...In applying the above mentioned legal principles to the facts of this matter, it is evident that the two contracts served different purposes.."* He then dismissed the contention that the parties novated the original contract they entered into. In this matter the original bond agreement and the "*Distressed Restructure Agreement*" served different purposes. The former for the financing of the sale agreement for the purchase of the home and the second to address the financial distress the Applicant found herself in.
32. The parties' rights and obligations from the original mortgage loan agreement persevered beyond the "*Distressed Restructure Agreement*". It appears to the Tribunal that the original mortgage bond agreement was not novated but rather

² (20044/2014) [2015] ZASCA 20(19 March 2015) ad paragraph 15.

that the repayment terms were varied and in effect "... *the parties intended only to modify, augment, or diminish the obligation, and not to extinguish the old debt...*"³.

33. The Tribunal finds that in this instance a new loan agreement did not come into existence. There was therefore no obligation on the Respondent to execute the requirements of section 81(2), failing which Respondent could be held liable for extending credit recklessly.
34. The NCR did consider though whether the Respondent conducted affordability assessments in terms of section 81(2) of the NCA, as section 81(3) prohibits a credit provider from entering into a **reckless** credit agreement.
35. Section 81(2) provides that before entering into a credit agreement with a prospective consumer it has to take reasonable steps to assess —

"(a) the proposed consumer's—

- (i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;*
- (ii) debt repayment history as a consumer under credit agreements;*
- (iii) existing financial means, prospects and obligations;..."* (Emphasis added)

36. '*financial means*' is defined in 78(3) as —

"In this Part, "financial means, prospects and obligations", with respect to a consumer or prospective consumer, includes:

- (a) income, or any right to receive income, regardless of the source, frequency or regularity of that income, other than income that the consumer or prospective consumer receives, has a right to receive, or holds in trust for another person;*

³ Pothier 307.

(b) 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—

- (i) share their respective financial means; and*
- (ii) mutually bear their respective financial obligations; and*

if the consumer has or had a commercial purpose for applying for or entering into a particular credit agreement, the reasonably estimated future revenue flow from that business purpose.” (Emphasis added)

37. In this regard the NCR found that the Applicant's bank statements, provided to the Respondent and the NCR, reflected income averaging R 11 282, 91, 2 per month over three months. The NCR made use of the lowest amount declared by the Applicant to the Respondent i.e. R 9 500, 00, in conducting its affordability assessment. The NCR then concluded that the Applicant did have the financial means as defined in section 78(3) to enter into the *“Distressed Restructure Agreement”*.
38. This is where the Applicant and the NCR part ways. Firstly, the Applicant disputes the amount of the average income over three months calculated and arrived at by the NCR. Secondly, she admitted the inward flows of funds into her account, but disputes that they all amount to income to her. She admits that some of the inward flows were rental income but others that were transfers she affected from other bank accounts she holds, and as such were not income.
39. Section 78(3) of the NCA defines income as *“... any right to receive income, regardless of the source, frequency or regularity of that income,...”*(Emphasis added).
40. The Tribunal finds that the Applicant did have income as defined in the NCA at the time when she entered into the *“Distressed Restructure Agreement”*.

41. The Tribunal further finds that the NCR was justified, despite the Applicant's remonstrations, in taking into account those inward flows of funds into the Applicant's account, in determining her 'financial means'.
42. The Tribunal finds that the NCR's decision to non-refer the complaint was justified, there being sufficient evidence that though the Applicant was unemployed at the time, she had income and sufficient surpluses to cover the funds required to service the payments under the "*Distressed Restructure Agreement*".

SERVICE

43. With regard to the service required, Rule 30(1) provides that -

"(1) A document may be served on a party by-

(a) delivering it to the party, or

(b) sending it by registered mail to the party's last known address."

44. The Applicant sent the application per registered mail to Nedbank Limited, 135 Rivonia Road, Sandton, 2196.
45. The "*Distressed Restructure Agreement*", the agreement complained about, defines "*Nedbank*" as "*Nedbank Limited Reg No 1951/000009/06, its successors on title and assigns of 6 Press Avenue, Crown Mines. Selby Ext 15, Gauteng, 2091*".
46. The address where the application was sent to per registered mail is clearly different from the address of the Respondent as per the "*Distressed Restructure Agreement*" entered into between the parties.
47. The Tribunal is not satisfied that the application documents were adequately served.

48. The Tribunal accordingly finds that the Applicant has not satisfied the requirements for the Tribunal to grant her leave to refer her complaint directly to the Tribunal in terms of Section 141(1) of the NCA. Specifically, the Applicant has not demonstrated that she has reasonable prospects of succeeding with the main application, and that she has served the application as required.

ORDER

49. The Tribunal accordingly makes the following order -

49.1. The Applicant's application for leave to refer her complaint directly to the Tribunal is refused; and

49.2. No order is made for costs.

DATED AT CENTURION ON THIS 10TH DAY OF DECEMBER 2018.

[signed]

Ms. D Terblanche

Presiding Tribunal Member

Adv. John Simpson (Tribunal Member) and Prof. K Moodaliyar (Tribunal Member)
concurring.

Authorised for issue by National Consumer Tribunal

Case Number: NCT-116313-2018-141(1)(b)

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