

IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: **NCT/138823/2019/141(1)**

In the matter between:

ITUMELENG FRANS BOIKANYO

APPLICANT

And

MFC, a division of NEDBANK LTD

RESPONDENT

Coram

Adv J Simpson - Presiding Tribunal Member

Dr M Peenze - Tribunal Member

Prof B Dumisa - Tribunal Member

Date of consideration (in chambers) - 6 July 2021

Date of Judgment - 7 July 2021

LEAVE TO REFER JUDGMENT AND REASONS

THE PARTIES

1. The Applicant in this matter is Itumeleng Frans Boikanyo, an adult male residing in Gauteng (“the Applicant” or “Mr Boikanyo”).
2. The Respondent is MFC, a division of Nedbank Ltd (“the Respondent” or “MFC”). MFC is a registered credit provider.

APPLICATION TYPE

3. This is an application in terms of Section 141(1) of the National Credit Act, Act 34 of 2005 (“the NCA”).
4. Section 141(1) of the NCA states the following –

“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 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.”

BACKGROUND

5. In August 2018, Mr Boikanyo purchased a new vehicle financed by MFC. It appears Mr Boikanyo experienced difficulty in repaying his loans and fell into arrears with some accounts. He submits that MFC granted him the loan recklessly. His net salary at the time was R12 696.00 per month. MFC further used an anticipated income of R8000.00 per month from his business. His income was insufficient to afford the monthly repayments of R9982.00. He wants MFC to reduce the monthly instalment amount.
6. In February 2019, Mr Boikanyo lodged complaints against various credit providers with the NCR. The NCR issued a Notice of non-referral dated 4 February 2021 relating to the MFC complaint. The Notice reflected the response from MFC and the steps taken to assess Mr Boikanyo's income and expenditure at the time. The Notice concluded that there was no evidence of reckless lending.
7. On 2 September 2019, Mr Boikanyo filed his application with the Tribunal. He also filed an application to condone the late filing of the application. MFC opposed the application for condonation. Condonation for the late filing was granted in a written judgment dated 1 November 2019.

8. MFC did not file an answering affidavit on the main application, and the matter was set down for hearing on leave to refer in June 2020. In February 2020, MFC filed its answering affidavit and an application to condone the late filing of the application. The hearing was removed from the roll due to the condonation application. The application for condonation was granted in a written judgment dated 23 June 2021.

9. Mr Boikanyo did not file an answering affidavit.

10. MFC submits that Mr Boikanyo declared his income and expenditure as the following –

Basic income - R28 280.00

Additional income - R8000.00

Total net income - R20 701.87

Household expenses - R1000.00

Household surplus - R19 701.87

This information is reflected in the application for finance form signed by Mr Boikanyo dated 30 August 2018.

11. Using the NCA regulations discretionary income table, MFC increased the household expenses to the minimum amount – R3 780.33.

MFC considered the turnover from the business account and found average deposits of R17 262.45 over the three months. It then decided to use the R8000.00 per month value provided by Mr Boikanyo.

12. After validating the information provided with the credit bureau, payslips and bank statements, MFC made the following assessment –

Validated gross income – R36 280.00

Less statutory deductions – R15 578.13

Total household net income – R20 701.87

Less household expenses – R3 780.33

Less total ITC expenses	– R5374.00
Discretionary income	– R11 574.54
Less MFC payment	– R9 858.48
Nett surplus amount	– R1689.06

13. MFC submits that it did an affordability assessment in accordance with section 82 of the NCA. Mr Boikanyo has no reasonable prospect of succeeding in his application, and leave to refer should be refused.

APPLICATION FOR LEAVE

14. In terms of section 141(1) of the NCA, the Applicant may only refer the matter directly to the Tribunal *with leave of the Tribunal*.
15. Previously, the Tribunal held a formal hearing on leave to refer with all the parties present. In the matter of *Lewis Stores (Pty) Ltd v Summit Financial Partners (Pty) Ltd and Others* (Case no 314/2020) [2021] ZASCA 91 (25 June 2021) *SAFLII*, the court provided useful guidance to the Tribunal in decisions regarding leave to refer. It held that a formal hearing on leave to refer was unnecessary, there was no test to be applied and the decision to consider leave could not be appealed. The court held –

“[15] As I have explained, the NCA provides for an expeditious, informal and cost-effective complaints procedure. Section 141(1)(b) confers on the Tribunal a wide, largely unfettered discretion to permit a direct referral. The NCA does not require a formal application to be made and it is not necessary for purposes of the present appeal, nor is it desirable, to circumscribe the factors to which the Tribunal should have regard. There is no test to be applied in deciding whether or not to grant a direct referral to it in respect of a complaint. The purpose of the provision is simply for the Tribunal to consider the complaint afresh, with the benefit of any findings by the Regulator, and to decide whether it deserves its attention. Circumstances which may influence its decision may include the prospects of success, the importance of the issue, the public interest to have a decision on the matter, the allocation of resources, the complainant’s interest in the relief sought and the fact that the Regulator did not consider that it merited a hearing before the Tribunal. The list is not intended to be exhaustive.”

16. As there is no test to be applied, the Tribunal will consider the matter in the general context of the circumstances as submitted by the parties.
17. The main issue in contention appears to be whether MFC could have used the additional income of R8000.00 per month. Without this additional income, Mr Boikanyo would not have qualified for the loan. There is no evidence as to how the amount of R8000.00 was determined. The business account only reflects deposits and withdrawals from the account. Financial statements would have been required to determine the actual income or profit. Should MFC had required financial statements, or was it permitted to use the income value provided by Mr Boikanyo? If Mr Boikanyo can prove that the NCA required MFC to obtain financial statements for the business, he has a reasonable prospect of succeeding in his claim of reckless lending.
18. The issues raised above need to be considered by the Tribunal in a hearing on the merits.

CONCLUSION

19. The Tribunal finds that leave to refer the matter to the Tribunal can be granted.

ORDER

20. Accordingly, the Tribunal makes the following order –

20.1 The Applicant's application for leave to refer the matter directly to the Tribunal is granted; and

20.2 There is no order as to costs.

THUS DONE IN PRETORIA ON THIS 7TH DAY OF JULY 2021

[signed]

Adv. J. Simpson
Presiding Tribunal Member

Prof B Dumisa (Tribunal Member) and Dr M Peenze (Tribunal Member) concurring

Authorised for issue by The National Consumer Tribunal

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