



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 314/2020

In the matter between:

LEWIS STORES (PTY) LTD

APPELLANT

and

**SUMMIT FINANCIAL PARTNERS
(PTY) LTD**

FIRST RESPONDENT

**THE NATIONAL CONSUMER
TRIBUNAL**

SECOND RESPONDENT

**THE NATIONAL CREDIT
REGULATOR**

THIRD RESPONDENT

Neutral citation: *Lewis Stores (Pty) Ltd v Summit Financial Partners (Pty) Ltd and Others* (Case no 314/2020) [2021] ZASCA 91 (25 June 2021)

Coram: PONNAN, WALLIS, MOCUMIE and DLODLO JJA, and
EKSTEEN AJA

Heard: 5 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 25 June 2021.

Summary: National Credit Act 34 of 2005 – section 141(1)(b) – power of National Consumer Tribunal to grant leave to refer a complaint directly to it when National Credit Regulator has issued a notice of non-referral – nature of proceeding – section does not require formal application nor public hearing – factors to be considered by Tribunal – Tribunal has wide discretion – decision to grant leave to refer directly not appealable in terms of section 148(2).

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Molefe J and Khumalo AJ sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Eksteen AJA (Ponnan, Wallis, Mocumie and Dlodlo JJA concurring)

[1] This appeal concerns the interpretation and application of the National Credit Act (NCA),¹ and in particular s 141(1)(b)² and s 148(2)(b)³ thereof. The first respondent, Summit Financial Partners (Pty) Ltd (Summit), a registered alternative dispute resolution agent and debt counsellor, lodged a complaint (the complaint) against the appellant, Lewis Stores (Pty) Ltd (Lewis), with the third respondent, the National Credit Regulator (the Regulator), in terms of s 136 of the NCA. The Regulator accepted the complaint and, after investigating the allegations, it issued a certificate of non-

¹ National Credit Act No 34 of 2005.

² The direct referral of a complaint to the National Consumer Tribunal when the National Credit Regulator has issued a certificate of non-referral. The section provides:

‘141(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-

...;or

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

³ Appeals against orders of the National Consumer Tribunal. The relevant part of the section is set out in paragraph 5 of the judgment.

referral, purportedly in terms of s 139(1)(a) of the NCA.⁴ Summit sought leave to refer the complaint directly to the second respondent, the National Consumer Tribunal (the Tribunal), in terms of s 141(1)(b) of the NCA, which Lewis resisted. The Tribunal granted leave⁵ and Lewis appealed against the ruling, without success, to the High Court, Pretoria, in terms of s 148(2) of the NCA. The appeal to this Court is with leave of the high court.

[2] Lewis is a national retailer in furniture and electrical appliances. On 16 September 2016 Summit lodged the complaint with the Regulator, alleging that Lewis had repeatedly engaged in a prohibited practice under the NCA, in breach of s 102 thereof, by raising compulsory and unreasonable delivery charges in respect of goods sold.

[3] In an application for leave to refer the complaint directly to the Tribunal, Summit contended that the referral was justified as the complaint raised issues of great importance to the parties and the public, which deal with the interpretation of the NCA, and that it enjoyed reasonable prospects of success. Lewis, on the other hand, denied that Summit had demonstrated good prospects of success. It contended further that Summit had no interest of its own in the outcome of the matter and it enjoyed no mandate from any of Lewis's customers. In the high court Summit contended, without success, that the decision of the Tribunal was not appealable. The high court nevertheless dismissed the appeal.

⁴ Section 139 provides for the Regulator to 'issue a notice of non-referral to the complainant if the complaint appears to be frivolous or vexatious, or does not allege any facts which, if true, would constitute grounds for a remedy under the Act.

⁵ The Tribunal was divided as to the extent of the consent, a minority considered that not all the complaints where leave was sought by Summit should be referred to the Tribunal.

[4] In this Court three issues arose. Firstly, whether a decision of the Tribunal to permit a direct referral to it in terms of s 141(1)(b) of the NCA is appealable in terms of s 148(2) of the NCA; secondly, what test should the Tribunal have applied in assessing the application; and thirdly, whether Summit had satisfied the test.

[5] Section 48(2)(b) of the NCA provides that:

(2) ‘... a participant in a hearing before a full panel of the Tribunal may –

...

(b) appeal to the High Court against the decision of the Tribunal in that matter, other than a decision in terms of section 138...’⁶

[6] Lewis contended that it had participated in a hearing before the full panel of the Tribunal and it was therefore entitled to appeal against its decision. Summit, on the other hand, contended that on a proper construction of the provisions of the NCA the proceedings before the Tribunal did not involve ‘a hearing’ as contemplated in s 148(2)(b); and, that the grant of leave to refer directly did not constitute ‘a decision’ that is susceptible to appeal. The argument involves the interpretation of the NCA, a task which this court has described as ‘a particularly trying exercise’⁷.

⁶ Section 138 relates to consent orders. A useful discussion on the nature of appeal proceedings in the high court was set out in *National Credit Regulator v Lewis Stores (Pty) Ltd & Another* [2019] ZASCA 190; 2020(2) SA 390 (SCA); [2020] 2 All SA 31 (SCA) paras 40-55.

⁷ *Nedbank v National Credit Regulator* 2011 (3) SA 581 (SCA) at para 2.

[7] I turn to consider the structure of the relevant portion of the NCA. The functions of the Tribunal are described in s 27 of the NCA. It is empowered, in addition to any other power conferred on it by law, to:

‘adjudicate in relation to any:

(i) application that may be made to it in terms of the [NCA], and make any order provided for in the [NCA] in respect of such an application; or

(ii) allegations of prohibited conduct ...’.

In addition, it may make a costs order in terms of s 147 of the NCA. I shall revert to s 147.

[8] The complaints procedures are contained in Chapter 7 of the NCA. Any person may submit a complaint to the Regulator.⁸ Upon acceptance thereof the Regulator may immediately issue a notice of non-referral, without investigating the issue, if the complaint appears to be frivolous or vexatious, or does not allege any facts which, if true, would constitute grounds for a remedy under the NCA,⁹ or it may refer the complaint to a debt counsellor or an ombud with jurisdiction in certain circumstances.¹⁰ It may also direct an inspector to investigate the complaint,¹¹ which the inspector is required to do ‘as quickly as practicable’.¹² The NCA confers investigative powers on such an inspector to enable him or her to come to a decision on the complaint.

[9] At the conclusion of the investigation, the Regulator may, amongst other options, issue a notice of non-referral¹³ or refer the matter to a consumer

⁸ Section 136.

⁹ Section 139(1)(a).

¹⁰ Section 139(1)(b).

¹¹ Section 139(1)(c).

¹² Section 139(1)(c).

¹³ Section 140(1)(a).

court or to the Tribunal.¹⁴ The NCA makes no provision for any party to challenge the referral, however, in the case of a referral to a consumer court they may, by application to the Tribunal, challenge the appropriateness of the forum chosen.¹⁵

[10] In this case, the Regulator accepted the complaint and investigated the matter. It issued a certificate of non-referral, purportedly in terms of s 139(1)(a). *Prima facie*, it seems to me, the notice of non-referral was in substance one issued in terms of s 140(1)(a), on the completion of the investigation. Nothing turns on this aspect.

[11] Where the Regulator has issued a notice of non-referral, a complainant is, nevertheless, entitled, as of right, to refer the complaint directly to a consumer court having jurisdiction or, with the leave of the Tribunal, to the Tribunal.¹⁶ Where a complainant chooses (and is permitted) to refer a complaint directly, in terms of s 141(1)(b) to the Tribunal, in the face of a certificate of non-referral, they expose themselves to the risk of an adverse costs order in terms of s 147, in the event of the complainant's direct referral not being upheld.¹⁷

[12] Again, the NCA does not provide for a challenge to a complainant's direct referral. However, where the complainant has referred the matter

¹⁴ Section 140(1)(b) and (2).

¹⁵ Section 140(4) and (5).

¹⁶ Section 141(1)(a).

¹⁷ Section 147(1) provides that each party participating in a hearing must bear its own costs. In terms of 147(2)(a), if the Tribunal has not made a finding against a respondent, the member of the Tribunal presiding at the hearing may award costs to a respondent and against a complainant who referred the complaint in terms of 141(1).

directly to a consumer court, a respondent may, by application to the Tribunal, seek an order that the matter be referred to a different consumer court, or to the Tribunal itself. Once a matter has been properly referred to the Tribunal, whether by the Regulator in terms of s 140(2) or by a complainant in terms of s 141(1)(b), the Tribunal is required to conduct a hearing into the matter referred to it.¹⁸ In contrast to s 140(4) and s 141(2), s 141(1)(b) makes no reference to an ‘application’ or a hearing when seeking leave to refer a complaint directly to the Tribunal.

[13] Part D of Chapter 7 of the NCA relates to the consideration by the Tribunal of ‘complaints, applications and referrals’. Section 142 sets out the powers and obligations of the Tribunal in conducting a hearing. It is required to do so in public, in an inquisitorial manner, as expeditiously and informally as possible and in accordance with the rules of natural justice.¹⁹ Certain matters may be delegated to a single member of the Tribunal.²⁰ At the conclusion of a hearing the Tribunal is obliged to make an order ‘permitted in the circumstances in terms of [the NCA]’ and must issue written reasons for its decision.²¹ Section 150 of the NCA relates to orders of the Tribunal. It provides:

‘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...’

It proceeds to list various orders culminating in a catch all provision relating to ‘any other appropriate order required to give effect to a right, contemplated in this Act...’

¹⁸ Section 141(3) and (4).

¹⁹ Section 142(1).

²⁰ Section 142(3).

²¹ Section 142(4).

[14] The Tribunal, in the assessment of the application for leave, remarked: ‘[T]he NCA does not specify the factors which the Tribunal must consider in determining whether an applicant should be granted leave to self-refer the matter. In previous decisions; the Tribunal has referred to *Westinghouse Brake & Equipment (Pty) Ltd*²² where the court was dealing with the issue of leave to appeal against a judgment. In *Westinghouse*, 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 both to him and the respondent.

The Tribunal when considering whether to grant an applicant leave to refer has adopted the same test, as applied in the High [Court]; for applications for “leave”. The Tribunal will therefore consider the following factors:

1. Whether the matter is of substantial importance to the applicant; and
2. The applicant’s reasonable prospects of success with the referral’.

[15] The reference to *Westinghouse*, and the test applied in applications for leave to appeal, is inappropriate. As I have explained, the NCA provides for an expeditious, informal and cost-effective complaints procedure.²³ 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

²² *Westinghouse Brake and Another v Bilger Engineering (Pty) Ltd* [1986] ZASCA 10; 1986 (2) SCA 555 (A).

²³ Section 139(c) and 142(b) of the NCA.

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 I have said, s 141(1)(b) does not contemplate a formal application, nor a public hearing. It involves merely a reconsideration of the ruling by the Regulator. The informal adjudication of such issues is not unprecedented. Petitions for leave to appeal in the Constitutional Court, this Court, the Labour Appeal Court and the high court, where a court has refused leave, are generally considered in chambers, without any appearance by legal representatives. Moreover, the ruling which the Tribunal is required to make under s 141(1)(b) is not a 'decision', nor an 'order' referred to in s 150. Rather, it involves the exercise of its 'other powers' contemplated in s 27 and s 150. Accordingly, on a proper construction of the NCA, the grant of leave to refer a complaint directly to the Tribunal is not a 'decision' which must be arrived at in a hearing, and it is not susceptible to an appeal in terms of s 148 of the NCA.

[17] On behalf of Summit, Mr Newdigate alluded to the general rule that, traditionally, in conventional litigation, a decision is appealable if it is final and disposes of a material portion of a dispute between the parties. Accordingly, it has been held, that an order in relation to the forum in which proceedings are to be conducted, is not final and was therefore not

appealable.²⁴ More recently, this court has adopted a more pragmatic approach to appealability. Thus, in *Beinash*²⁵ this court stated: ‘the emphasis is now rather on whether an appeal will necessarily lead to a more expeditious and cost effective final determination of the main dispute between the parties and, as such, will decisively contribute to its final resolution.’

[18] In *King*²⁶ it explained that: ‘[W]hile the classification of the order might at one time have been considered to be determinative of whether it was susceptible to an appeal the approach that has been taken by the courts in more recent times has been increasingly flexible and pragmatic. It has been directed more to doing what is appropriate in the particular circumstances than to elevating the distinction, between orders that are appealable and those that are not, to one of principle’.

[19] Whether there is an appeal in this case depends on the proper construction of s 148(2)(b) of the NCA. In my opinion it does not provide for one. The provisions of the NCA, as I have emphasized, requires a quick informal resolution of complaints. The notion of an appeal to the high court against a ruling by the Tribunal to allow a direct referral of a complaint to it is contrary to the purpose of the NCA. The conclusion to which I have come in respect of the construction of the NCA accords with the approach of the courts to appeals generally, which militates against appeals which do not contribute to the expeditious and cost effective final determination of the main dispute between the parties.

²⁴ *United Motor Services Ltd v Cloth Manufacturing Co of Chicago* 1937 CPD 284.

²⁵ *Beinash v Wixley* 1997 (3) SA 721 SCA at 730 E.

²⁶ *National Director of Public Prosecutions v King* 2010(2) SACR 146 (SCA) at 166-167.

[20] By virtue of the conclusion to which I have come in respect of the appealability of the ruling by the Tribunal it is not necessary to consider the merits of the individual complaints raised.

[21] In the result, the appeal is dismissed with costs, including the costs of two counsel.

J EKSTEEN
ACTING JUDGE OF APPEAL

Appearances

For appellant: A Cockrell SC (with P Farlam)

Instructed by: Edward Nathan Sonnebergs Inc, Cape Town
Lovius Block, Bloemfontein

For respondent: JA Newdigate SC (with HN De Wet)

Instructed by: Carstens Gericke Attorneys, Stellenbosch
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