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IN THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

Case number: NCT 93576/2017/148

In the matter between:

THIZWILONDI THOMAS MALELA

APPELLANT

and

CAPITEC BANK LIMITED

RESPONDENT

Coram:

Mr Andisa Potwana – Presiding member

Adv Fati Manamela – Tribunal member

Mr Trevor Bailey – Tribunal member

Date of hearing – 6 February 2018

JUDGEMENT

APPELLANT

1. The appellant is Thizwilondi Thomas Malela, an adult male, who resides at [...] in P. Street, Arcadia, Pretoria, Gauteng. The appellant appeared in person and was assisted at the hearing of this appeal by Thandani Siriba.

RESPONDENT

2. The respondent is Capitec Bank Limited which is duly registered and incorporated in terms of the company laws of the Republic of South Africa.
3. The respondent was represented at the hearing of this appeal by Advocate M Reineke, who was instructed by Ramsay Webber Attorneys.

APPLICATION TYPE

4. This is an appeal in terms of section 148 of the National Credit Act, 2005 ("the NCA") against the ruling of a single member of the Tribunal refusing the appellant's application to condone the appellant's failure to refer his complaint directly to the Tribunal in terms of subsection 141 (1) (b) of the NCA within 20 business days of the National Credit Regulator ("the NCR") having issued a notice of non-referral in terms of section 139 (1) (a) of the NCA.

WIDE APPEAL

5. This appeal is a wide appeal because the appeal panel is in terms of rule 27 of the Tribunal rules ("the rules")¹ not restricted to the record of the proceedings before the single member.

BACKGROUND

6. The appellant's complaint against the respondent concerns three credit agreements that the appellant concluded with the respondent in 2011.
7. On 14 May 2011 the appellant and the respondent concluded a credit agreement under account number [...] for an amount of R15 000.00. The appellant was to repay that amount in 48 monthly instalments of R591.71. On 12 November 2011 the repayment term was amended to 42 monthly instalments of R641.13. For the sake of convenience this credit agreement is referred to as "the first credit agreement".

¹ Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007 published under GN 789 in Government Gazette 302252 on 28 August 2007

8. On 12 November 2011 the appellant and the respondent concluded a credit agreement under account number [...] for an amount of R4 000.00, which the appellant was to repay on 15 December 2011. For the sake of convenience this credit agreement is referred to as "the second credit agreement".
9. On 14 May 2011 the appellant and the respondent also concluded a credit agreement under account number [...] for an amount of R63 940.68. The appellant was to repay that amount in 48 monthly instalments of R2 118.34. On 12 November 2011 the repayment term was amended to 54 monthly instalments of R2 654.26. For the sake of convenience this credit agreement is referred to as "the third credit agreement".
10. The appellant experienced difficulties repaying the amounts due in terms of the credit agreements and negotiated new repayment terms with the respondent. The respondent finally settled all the amounts due in terms of the three credit agreements on or about 6 July 2016 and the appellant is no longer indebted to the respondent.
11. During March 2016 the appellant contacted the NCR because he "did not qualify for a house" as a result of having been adversely listed with the credit bureaus.
12. On 2 June 2016 the appellant lodged a complaint with the NCR because he believed that the respondent had charged excessive interest and fees and recklessly granted credit to him by not conducting proper affordability assessments.
13. The NCR investigated the appellant's complaints and concluded that the respondent had not charged excessive interest and fees. The NCR was unable to find that the respondent had conducted "an affordability assessment" because the respondent could not provide all the documents that the NCR had requested. The NCR therefore advised the appellant to seek legal assistance or to refer the matter to the Tribunal.
14. On or about 2 December 2016 the NCR issued the notice of non-referral. Part 2 of that notice provides a short description of the complaint, more specifically:

"1. Credit was granted recklessly and;

2. *Excessive interest and fees were charged in respect of the following accounts:*

- *Account [...]*
- *Account [...]"*.

15. The appellant was entitled in terms of section 141 (1) of the NCA to refer the matter directly to the Tribunal, with the leave of the Tribunal, once he received the notice of non-referral. The appellant did not submit his application for leave to refer within the required 20 business days and only did so on 3 April 2017, which was some four months after the NCR issued the notice of non-referral. The appellant, as he was bound to do, submitted an application to the Tribunal in terms of rule 34 of the rules to condone the appellant's non-compliance with the rules. On 13 October 2017 a single member of the Tribunal handed down a judgement ("the condonation judgement") in which she refused to condone the appellant's failure to comply with the rules because the appellant had "no prospects of success in this matter and there would be no point in this matter progressing further". The condonation judgement is the subject of this appeal.

SUMMARY OF SUBMISSIONS

Appellant

16. The appellant submitted that he did not know that he had to lodge the condonation application within a specific time period. He disputed that he gave the respondent information that entitled the respondent to inflate his household income by an amount of R5 000.00 ("the disputed amount"). The respondent's reliance on the disputed amount led to the respondent incorrectly calculating the appellant's ability to repay the loans and consequently to the respondent engaging in reckless lending.
17. The individual member erred in the condonation judgement because she only referred to the first and second credit agreements and not to the third credit agreement. Moreover, although the appellant signed each of the credit agreements in which the disputed amount is recorded, he could not have read the credit agreements because he is visually impaired and the respondent did not explain the credit agreements to him.

18. The appellant requests the Tribunal to assist him manage his relationship with the respondent and that the respondent is to furnish him with an official apology.

Respondent

19. The respondent submitted that the appeal should be dismissed for a number of reasons. First, the appellant's notice of appeal does not comply with rule 26 (2) (b) of the rules, which prescribes that the notice of appeal should concisely set out the grounds of appeal. The applicant's notice of appeal does not clearly set out the basis on which the appellant seeks to appeal the condonation judgement and should be dismissed on this ground alone.
20. Second, since the appellant confirms that the three credit agreements have been paid in full, there are no longer credit agreements in place that the Tribunal, which is a creature of statute, can declare reckless.
21. Third, the credit risk assessments in question were conducted prior to the affordability assessment regulations ("the AAR")² that were introduced on 15 September 2015. The AAR now require a credit provider to determine an applicant's income for credit by referring to the applicant's bank statements or payslips. There was no such requirement prior to the AAR. The respondent's methodology at the time was for a branch consultant to ask an applicant to disclose the applicant's household income and enter that information into the computer. The mere fact that the respondent does not have written proof of that information does not therefore mean that the respondent did not ask, and receive an answer, to the question.
22. Moreover, the third agreement did not form part of the appellant's referral to the Tribunal. Its inclusion in the notice of appeal is therefore irregular and the Tribunal should not consider it in this appeal.

ANALYSIS AND RELEVANT STATUTORY PROVISIONS

Compliance with rule 26 (2) (b) of the rules

² National Credit Regulations including Affordability Assessment Regulations published separately under GN R202 in Government Gazette 38557 on 13 March 2015

23. Rule 26 (2) (b) of the rules provides that the notice of appeal must set out concisely the grounds of appeal. Although the appellant described himself as a diplomat, he is a layperson and therefore not skilled in the niceties of legal drafting. Ultimately, the Tribunal is satisfied that the notice of appeal is drafted with sufficient clarity to bring it within the ambit of rule 26 (2) (b) of the rules to enable the respondent to know the case it must meet in this appeal.

The third credit agreement

24. The appellant made much in both the notice of appeal and in argument that the single member had erred by not considering the third credit agreement. The Tribunal is not as sanguine as the appellant in this regard. Not only did the appellant acknowledge that he did not raise the third credit agreement in the condonation application but the notice of non-referral only refers to the first and second credit agreements. The appellant may not therefore seek to introduce the third credit agreement "via the back door" into this appeal in the absence of the NCR having issued a notice of non-referral that refers to the third credit agreement. It also does not help the appellant to suggest, as he did in argument, that the third credit agreement was used to settle two existing credit agreements. This is because the third credit agreement is a separate credit agreement that must form the subject of a notice of non-referral from the NCR in order for the Tribunal to have the required jurisdiction to consider the third credit agreement and the relief the appellant seeks concerning that agreement.
25. Consequently, the Tribunal is satisfied that the appellant has irregularly sought to introduce the third credit agreement into this appeal when the Tribunal has no jurisdiction to consider it. The appeal on this ground must therefore fail.

The first and second credit agreements

Grounds for granting condonation

26. Rule 34 (2) of the rules provides that a party may apply to the Tribunal for an order to condone the late filing of an application and that the Tribunal may grant the application "on good cause shown".

27. *In Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High*

*School and Others*³ it was held that the standard to be applied when considering an application of this nature is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant include but are not limited to the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success.⁴

28. Similar factors were also discussed by the court in *Melane v Santam Insurance Company Limited*⁵ where it is pointed out that a Court has a discretion which should be exercised judicially upon consideration of all the facts. The court in *Melane* held that these factors are interrelated and should not be considered separately but stressed that an applicant must have prospects of success in the main matter. The court held that if there are no prospects of success, no matter how good the applicant's explanation for the delay in filing an application, the application for condonation should be refused.⁶

Application of the grounds for condonation

29. Although the appellant filed the condonation application some three months late, the extent and cause of the delay, together with the reasonableness of the appellant's explanation are just some of the factors that the Tribunal may consider when determining whether it is in the interests of justice to grant the condonation application. However, in the Tribunal's view, it is not necessary to consider those factors because if there are no prospects of success in the main matter, no matter how good the appellant's explanation for the delay in filing his application, the application for condonation should be refused.

³ 2003 (11) BCLR 1212 (CC) at para [11]

⁴ *Van Wyk v Unitas Hospital and Others* 2008 (4) BCLR 442 (CC) at para 20 as applied in *Camagu v Lupondwana* Case No 328/2008 HC Bisho

⁵ 1962 (4) SA 531 (A) at 532C-F

⁶ See also *Chetty v Law Society of the Transvaal* 1985 (2) SA 756 (A) at 765 A-C; *National Union of Mineworkers and Others v Western Holdings Gold Mine* 1994 15 ILJ 610 (LAC) at 613E

30. The Tribunal now turns to the appellant's prospects of success in the main matter, which the appellant would only be entitled to have determined once the appellant succeeds in this appeal and has obtained the leave of the Tribunal.⁷
31. The Tribunal is a creature of statute. This means that it may only act in accordance with the powers given to it in terms of its founding legislation and other applicable legislation. This legislation is the NCA and the Consumer Protection Act, 2008.⁸
32. The appellant clarified at the hearing of this appeal that the relief he seeks from the Tribunal is for the Tribunal to assist him manage his relationship with the respondent and that the respondent is to furnish him with a written apology.
33. The appellant's complaint that the respondent engaged in reckless lending runs to the heart of this appeal. The relief that the Tribunal may grant concerning reckless credit lending is set out in section 83 of the NCA. That section provides that the court or Tribunal may declare that the credit agreement is reckless; set aside all or part of the consumer's obligations under that agreement that are just and reasonable in the circumstances; suspend the force and effect of that agreement until a specific date; or restructure the consumer's obligations under any other credit agreement.
34. The appellant has long since repaid all the amounts due in terms of the first and second credit agreements. Those credit agreements are therefore no longer current because the appellant has performed his obligations in terms of those credit agreements and is thereby relieved of his indebtedness to the respondent. The NCA does not empower the Tribunal to grant relief pertaining to those credit agreements, which are no longer in operation and therefore cannot be declared reckless. Nor does the NCA empower the Tribunal to grant relief to the appellant that assists the appellant manage his relationship with the respondent or order the respondent to furnish the appellant with a written apology.

⁷ See section 141 (1) (b) of the NCA

⁸ See section 26 (1) (d) of the NCA

CONCLUSION

35. Since the Tribunal is not empowered to grant the relief the appellant seeks in the main matter, it follows that the appellant has no prospects of success in the main matter. This appeal must therefore fail.

COSTS

36. The Tribunal has considered the respondent's submission that this appeal should not have been brought in the first place and the respondent should not "be out of pocket" for the costs it has incurred in this appeal. The Tribunal is not persuaded that this is a matter in which it should make an order of costs.

ORDER

37. Accordingly:

37.1. This appeal is dismissed; and

37.2. There is no order as to costs.

DATED AT CENTURION ON THIS 26TH DAY OF MARCH 2018



TREVOR BAILEY

Tribunal member

With Mr Potwana and Adv Manamela concurring.

Malela.Capitec. 93576 .17.148 (1)