

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

Case number: NCT/10118/2013/115(1)

In the matter between:

MUZOREWA RATSHIKUNI

APPLICANT

and

FIRSTRAND BANK LIMITED T/A

AUDI FINANCIAL SERVICES, A DIVISION OF WESBANK

RESPONDENT

Coram:

Ms P Beck – Presiding member

Adv N Sephoti – Member

Mr F Sibanda – Member

Date of Hearing – 9 December 2013

JUDGMENT AND REASONS

THE PARTIES

1. The Applicant in this matter is Muzorewa Ratshikuni ("the Applicant"), an adult male, residing in Diepsloot and a consumer in terms of Section 1 of the National Credit Act, 34 of 2005 ("the Act"). The Applicant represented himself at the hearing.
2. The Respondent is Firstrand Bank Limited ("the Respondent"), trading as Audi Financial Services, a division of Wesbank, a company duly registered in terms of the company

laws of the Republic of South Africa with registration number 1929/001225/06 and with principal place of business in Fairland, Randburg, Johannesburg.

3. The Respondent's answering affidavit was deposed to by Latha Singh, a Legal Advisor in the employ of the Respondent.
4. At the hearing the Respondent was represented by Mr AT Ngobeni of Attorneys Smit, Jones and Pratt.

TYPE OF APPLICATION

5. The Applicant made an application to the National Consumer Tribunal ("the Tribunal") in terms of sections 111 (2), 115 (1)(a) and 137 (3)(b) of the Act for the Tribunal to resolve a disputed entry in the Applicant's statement of account.
6. According to section 115 of the Act,
"A consumer who has unsuccessfully attempted to resolve a disputed entry directly with the credit provider in terms of section 111, and through alternative dispute resolution under Part A of Chapter 7, may apply to the Tribunal to resolve –
(a) A disputed entry shown on a statement of account; or
(b) A dispute concerning a statement of the settlement amount.
7. Section 137 (3) of the Act states that:
"A consumer or a credit provider who has unsuccessfully attempted to resolve a dispute directly with the other party and through alternative dispute resolution in terms of section 134(4) may file an application contemplated in this Act at any time within –
(a) 20 business days after the failure of the attempted alternative dispute resolution; or
(b) Such longer time as the Tribunal may allow on good cause shown."

ISSUES TO BE DECIDED

8. The Applicant lodged its application with the Tribunal outside of the allowed timeframe in terms of the Rules of the Tribunal¹. Similarly, the Respondent filed its answering affidavit outside of the allowed timeframe.
9. Neither of the parties applied for condonation in accordance with rule 34 of the Rules of the Tribunal. Therefore the Tribunal must decide whether to condone the late filing of documents by the parties.
10. The Tribunal must then dispense with two *points in limine* raised by the Respondent in its answering affidavit, that is (a) whether the Applicant needed to have unsuccessfully attempted to resolve the disputed entry through alternative dispute resolution before filling an application before the Tribunal and (b) whether the Tribunal has jurisdiction to hear a matter that has been dealt with by another competent forum, the South Gauteng High Court in this case.
11. If the Tribunal successfully deals with the *points in limine*, it must decide on the main application, that is, whether the Respondent incorrectly debited the Applicant's account.

BACKGROUND

12. On 17 November 2010 the Applicant and the Respondent entered into an instalment sale agreement for the purchase of an Audi A4 1.8T Ambition Multitronic (B8).
13. In July 2011 the Applicant requested the Respondent to restructure his account. The Respondent agreed to a provisional payment arrangement in terms of which the Respondent would pay a reduced instalment of R3 900.38 for 4 months, from 01 September 2011 to 01 December 2011. The arrears which would accrue in the period from September 2011 to December 2011 would be settled over the period from January 2012 to April 2012; thereafter the account would be up to date.

¹ For the Conduct of Matters before the National Consumer Tribunal published under GN789 in GG30225 of 28 August 2007 as amended by GenN428 in GG34405 OF 29 June 2011 (hereinafter "the Rules of the Tribunal").

14. Payment for the month of November 2011 was not made on the 1st of November as agreed. The Respondent proceeded to debit the Applicant's account for administrative costs during the month of November 2011, relating to:
 - a. DCA collection costs for a phone call (VAT inclusive) amounting to R17.10; and
 - b. DCA commission (VAT inclusive) amounting to R419.52.
15. These are the disputed entries forming the basis of the Applicant's main application.
16. On 15 March 2012 the Applicant lodged a complaint with the Respondent disputing the two entries. The Applicant did not receive a response.
17. On 4 April 2012 the Applicant lodged a complaint with the National Credit Regulator ("the NCR"). On 7 June 2012 the NCR responded, advising the Applicant to contact the Respondent (who had already commenced with legal action against the Applicant in May 2012) for payment arrangements in order to avoid legal action, that is, repossession of the vehicle, or to defend the matter in court. The NCR further advised that it regarded the matter as finalised and the file closed.
18. In May 2012 the Respondent instituted legal action against the Applicant in the South Gauteng High Court. A settlement agreement was reached between the Applicant and the Respondent, which was made an order of the court on 2 August 2013.

ANALYSIS OF LEGAL PROVISIONS AND FACTS

Preliminary issues

19. At the hearing the Tribunal put it to the Applicant that its application to the Tribunal was out of time and therefore had to apply for condonation, in accordance with rule 34 of the Rules of the Tribunal.

20. On 7 June 2012 the NCR advised the Applicant to approach the Respondent to make payment arrangements or to defend the legal action in court. The NCR regarded the matter as finalised from its side and consequently closed the file.
21. The Applicant had 15 business days within which to make an application to the Tribunal. Instead, the Applicant only filed its application with the Tribunal on 1 August 2013, more than a year later.
22. Similarly, the Respondent's answering affidavit was late and no application for condonation was received by the Tribunal.
23. A notice of complete filing was issued by the Tribunal to the parties on 7 August 2013, and the answering affidavit had to be filed by the 28th of August 2013. Instead, the Respondent filed its answering affidavit on 18 September 2013.
24. Whilst the Respondent's attorney, Mr Ngobeni, explained that he received an email from the Respondent indicating a different date for the notice of complete filing to the one cited by the Tribunal, it came to the Tribunal's attention that there was an error in Mr Ngobeni's email address, hence he did not receive correspondence from the Tribunal alerting him that an application for condonation had to be filed by the Respondent.
25. Having heard both parties on the issue of condonation the Tribunal also considered a number of factors including the degree of lateness, the reasons therefore, the prospects of success by the Applicant and the importance of the case. As seen in *Melane v Santam Insurance Company Limited*², these factors need to be considered in conjunction or as a conspectus and not in isolation.
26. Rule 34(1) of the Tribunal Rules allows a party to apply to the Tribunal for an order to, among other things, condone the late filing of a document or application.

² 1962 (4) SA 531 (A) at 532C-F

27. An application for condonation must be brought in the form of Form Tl.r34
28. The Tribunal may grant the order on good cause shown.
29. In *Mofokeng v Attorney General*,³ it was held that "good cause" means substantially the same as "sufficient cause". This means is that the Tribunal may grant condonation for non-compliance with its Rules where the applicant has demonstrated objectively good reasons for the non-compliance.
30. In *Melane v Santam*, when dealing with the question of condonation it was held that:
"The approach is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degrees of lateness, the explanation therefor, the prospects of success and the importance of the case. These facts are inter-related: they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay."
31. In the present case neither the Applicant nor the Respondent applied to the Tribunal for condonation as prescribed.
32. Furthermore, it took the Applicant an extra-ordinarily long time (more than a year) to make an application to the Tribunal. The Applicant explained that he accepted the advice of the NCR to approach the Respondent with a view to making payment arrangements and only after reaching no agreement with the Respondent did the Applicant approach the Tribunal.

³ OFS 1958 (4) SA (O).

33. With respect to prospects for success the Tribunal had regard to the *points in limine* raised by the Respondent, that is, whether the Applicant ought to have attempted to resolve the matter through alternative dispute resolution before approaching the Tribunal and whether the Tribunal has jurisdiction to hear a matter that has been dealt with by another competent forum. When considering these points, which are discussed below, the Applicant's prospects for success are very low.
34. After hearing both parties on condonation the Tribunal decided not to grant the Applicant condonation. However, for the sake of completeness and to bring finality to the matter, the Tribunal considered the full case before it.

Points in limine

35. The Respondent raised 2 *points in limine*, which if dealt with, could dispense of the whole matter before the Tribunal
36. Firstly, the Respondent contends that according to section 115 (1) of the Act,
"A consumer who has unsuccessfully attempted to resolve a disputed entry directly with the credit provider in terms of section 111, and through alternative dispute resolution under part A of chapter 7, may apply to the Tribunal may apply to the Tribunal to resolve:
(a) a disputed entry shown on a statement of account; or
(b) a dispute concerning a statement of the settlement amount."
37. Similarly, section 137 (3) of the Act states that:
"A consumer or a credit provider who has unsuccessfully attempted to resolve a dispute directly with the other party and through alternative dispute resolution in terms of section 134(4) may file an application contemplated in this Act at any time within –
(c) 20 business days after the failure of the attempted alternative dispute resolution; or
(d) such longer time as the Tribunal may allow on good cause shown."

38. These two sections, according to the Respondent, create a prerequisite that has to be met prior to this matter being placed before the Tribunal. Failure by the Applicant to follow these two sections means that this matter is not properly before the Tribunal.
39. In the Tribunal matter of *Sampson v Cape Town Community Housing Company (Pty) Ltd*⁴ the Tribunal established that it is a jurisdictional pre-requisite that the consumer (the Applicant in this instance) should have unsuccessfully attempted to resolve their dispute directly with the credit provider or through alternative dispute resolution first before approaching the Tribunal to resolve the dispute.
40. From the papers filed of record, it appears that the Applicant lodged a complaint with the Respondent by way of a letter (marked Annexure "C" and dated 15 March 2012), requesting that the disputed entries be reversed as they had been erroneously debited on his account and was contrary to the payment arrangement agreed to. The Applicant submits that the Respondent failed to provide a written statement in terms of section 111 (2)(a) of the Act, and merely sent the Applicant a statement of account without an explanation. Subsequent to the lodging of the complaint with the Respondent, the Applicant lodged a complaint with the NCR who could not find anything untoward with the disputed entries.
41. Whilst it is clear that the Applicant approached the Respondent attempting to resolve the disputed entries, sections 115(1) and 137(3) of the Act have additional requirements that the Applicant ought to also have unsuccessfully attempted to resolve the matter through alternative dispute resolution before approaching the Tribunal.
42. Section 134(4) of the Act also provides as follows:

"(4) In respect of any dispute between a credit provider and a consumer that could be the subject of an application to the Tribunal in terms of this Act, other than Part C of this Chapter, the consumer or credit provider, before either may apply directly to the Tribunal-

⁴ *Sampson v Cape Town Community Housing Company (Pty) Ltd* NCT/1487/2011/115(1)(P).

- (a) must attempt to resolve that matter directly between themselves; and*
- (b) if unable to do so, must refer the matter-*
 - (i) to the ombud with jurisdiction, for resolution in accordance with this Act and in terms of the Financial Services Ombud Schemes Act, 2004 (Act 37 of 2004), if the credit provider concerned is a financial institution and a participant in a recognised scheme as defined in that Act; or*
 - (ii) in any other case, to either-*
 - (aa) a consumer court, for resolution in accordance with this Act and the provincial legislation establishing that consumer court; or*
 - (bb) an alternative dispute resolution agent, for resolution by conciliation, mediation or arbitration."*

43. Annexure "LS1" to the answering affidavit shows that the Respondent is a financial institution. The word "must" in section 134(4) indicates that, should that section apply, a complaint has to be referred to the ombud with jurisdiction first. The only exclusion is applications in terms of Part C of Chapter 7 which refers to sections 139 – 141A of the Act. These sections all relate to matters where the NCR has investigated the matter and followed the procedure provided for in the Act.
44. In an application in terms of section 115 (which does not form part of Part C of Chapter 7), the requirements of section 134(4) would therefore apply, irrespective of whether the matter served before the NCR. In the present matter the complaint did serve before the NCR, but the NCR did not take any of the steps provided for in section 140. Had the NCR issued a notice of non-referral, for instance, the matter may have been brought before the Tribunal in terms of section 141, but this is not the case.
45. The Tribunal is of the view that an application in terms of sections 115 and 137(3) of the Act would be subject to the requirements of section 134(4). It appears that the Applicant did not comply with the preliminary requirements of approaching an ombud with jurisdiction for the purposes of alternative dispute resolution before approaching the Tribunal.

46. The Respondent's second *point in limine* is a plea of *res judicata*.
47. On 9 May 2012 the Respondent issued summons against the Applicant in the South Gauteng High Court under case number 2012/16433 in respect of the credit agreement. The summons was served on the Applicant on 23 May 2012.
48. The applicant defended the matter, but before the trial could be held the parties entered into a settlement agreement on 2 August 2013 which was made an order of the court on even date.
49. The Applicant lodged an application with the Tribunal on 1 August 2013, while the High Court case was still pending. When the notice of complete filing was issued by the Tribunal on 7 August 2013 the South Gauteng High Court case had been finalised.
50. Therefore the question before the Tribunal is whether it can hear a matter that has been dealt with by another competent forum, in this case being the South Gauteng High Court.
51. In *Prinsloo NO v Goldex 15 (Pty) Ltd and Another*⁵ when dealing with a plea of *res judicata* in the light of estoppels, it is stated in para 23 that:

"In our common law the requirements for res iudicata are threefold: (a) same parties, (b) same cause of action, (c) same relief. The recognition of what has become known as issue estoppel did not dispense with this threefold requirement. But our courts have come to realise that rigid adherence to the requirements referred to in (b) and (c) may result in defeating the whole purpose of res iudicata. That purpose, so it has been stated, is to prevent the repetition of law suits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by different courts on the same issue (see eg Evins v Shield Insurance Co

⁵ *Prinsloo NO and others v Goldex 15 (Pty) Ltd and Another* (243/11)[2012] ZASCA, 28 March 2012.

Ltd 1980 (2) SA 815 (A) at 835G). Issue estoppel therefore allows a court to dispense with the two requirements of same cause of action and same relief, where the same issue has been finally decided in previous litigation between the same parties."

52. The Black's Law Dictionary⁶ defines *res judicata* as:

*"a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. And to be applicable, requires identity in the thing sued for as well as identity of cause of action, of persons and parties to action, and of quality in persons for or against whom the claim is made. **The sum and substance of the whole rule is that a matter once judicially decided is finally decided**" (own emphasis).*

53. Paragraph 9.2 of the Applicant's⁷ plea at the South Gauteng High Court states as follows:

9.2 "The Defendant denies the arrears being the sum of R47 337.78. The amount claimed to be the arrears by the Plaintiff includes certain disputed debit entries in the Defendant's account. More detail will follow on this issue in paragraph 11 of this plea".

54. Paragraph 11 continues to state that:

*11. "...The substance of the complaint was to dispute certain debit entries which were entered by the Plaintiff into the Defendant's account.
11.1 Prior to the submission of the written complaint regarding the disputed entries, the Defendant had on 22 February 2012, telephoned Mr Allistair Samuels, an employee of the Plaintiff (Collection Solutions/WESBANK) responsible for the account, to complain to him about these disputed entries.*

⁶ Black's Law Dictionary, With Pronunciations. Abridged Sixth Edition. Centennial Edition (1891-1991). West Publishing Company, 1991.

⁷ The Applicant was a Defendant in the matter at the South Gauteng High Court

11.5 The Plaintiff has breached the terms of the agreement in that he/she has not resolved this issue within a reasonable time, and neither has he/she notified the Defendant on progress with respect to the disputed entries complaint..."

55. At the hearing, the Applicant had this to say regarding the South Gauteng High Court matter:

*"The bank was intent on, you know, just pursuing the matter to court. Remember there are two issues, the specific, the charge, the disputed entries were also, can I say, part of the trial that the bank was following in terms of to reclaim the vehicle that was part of this thing. So I'm saying that was also part of the issue, so it wouldn't have been, or I didn't see it – I don't know how to state myself, but to place a complaint here while we were still discussing was not I think appropriate, and that was part of it."*⁸

56. From the above, it is clear that the same parties who appeared at the South Gauteng High Court, are before the Tribunal in this matter. . The issue of the disputed entries that forms the main application before the Tribunal was also dealt with by the South Gauteng High Court and the matter was settled when the agreement was made an order of court.

57. The order states as follows:

"Having read the documents filed of record and having considered the matter by agreement between the parties it is ordered that..."

58. When the settlement agreement between the parties was made an order of court it resolved the dispute that existed between the parties as contained in the documents filed of record in the South Gauteng High Court.

CONCLUSION

⁸ Page 14 of the Transcript of Hearing proceedings before the Tribunal held on 9 December 2013.

59. Despite hearing oral submissions by both parties on the issue of condonation it is common cause that there is no application for condonation before the Tribunal.
60. This is compounded by the fact that it took the Applicant a very long time to lodge an application with the Tribunal and the Applicant's prospects for success are very low.
61. After careful consideration of the issues the Tribunal has decided not to grant the Applicant condonation for late filing of the application.
62. In making an application to the Tribunal in terms of sections 115 (1)(a) and 137 (3)(b) of the Act the Applicant did not attempt to have the dispute resolved through alternative dispute resolution before approaching the Tribunal and therefore the matter is not properly brought before the Tribunal.
63. The matter of the disputed entries formed part of the hearing at the South Gauteng High Court, in which the parties reached a settlement agreement which was made an order of court. Therefore the Tribunal cannot hear and pronounce on a matter that has been dealt with by another competent forum, that is, the South Gauteng High Court in this case.

ORDER

64. Under the circumstances and for the reasons stated above, the Tribunal orders as follows:
 - 64.1 The Applicant's application is dismissed.
 - 64.2 There is no order as to costs.

DATED THIS 5thth DAY OF FEBRUARY 2014

[signed]

FK Sibanda

Member

Ms P Beck (Presiding member) and Adv N Sephoti (Member) concurring.

Authorised for issue by the National Consumer Tribunal

Case number NCT/10118/2013/57(1)

Date: 2014 / 02 / 19
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