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IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION

Case Number: NCT/76849/2017/141(1)

In the matter between:

BAREND H.P. COETZEE

APPLICANT

and

FIRST NATIONAL BANK

RESPONDENT

Coram:

| | | |
|----------------|---|--------------------------------|
| Prof B. Dumisa | – | Presiding member |
| Prof J. Maseko | – | Member & Executive Chairperson |
| Mr A Potwana | – | Member |

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| Date of Hearing | – | 13 September 2017 |
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JUDGEMENT AND REASONS

APPLICANT

1. The Applicant in this matter is **BAREND HENDRICK PETRUS COETZEE**, an adult male who resides at [...] B. S., Lydenburg.
2. The Applicant's Founding Affidavit was deposed to by Michelle Barnardt, a debt counsellor with registration number NCRDC94.

3. The Applicant's whole matter was handled by Michelle Barnardt, hence, the **"the Applicant"** will hereinafter be used interchangeably in referring either to Barend H.P. Coetzee and / or to Michelle Barnardt (the "Applicant").

RESPONDENT

4. The Respondent (and the Registrant) is the First National Bank, a registered credit provider and bank with its Home Loans Collection and Debt Review Department operating from 27 Diagonal Street, 6th Floor FNB Towers Building, Johannesburg, hereinafter simply referred to as "the First National Bank" (the **"Respondent"**).
5. The Respondent was legally represented by its lawyers at the hearing.

HEARING AND APPLICATION TYPE

6. This is an application to the National Consumer Tribunal in terms of Section 141(1) of the National Credit Act, Act 34 of 2005 ("the Act").
7. The Respondent filed an answering affidavit where they raised numerous challenges to the application for leave to refer, including, but not confined to challenging the jurisdiction of the NCT to deal with this matter and also challenging the *locus standi* of Michelle Barnardt to represent Barend H P Coetzee on this matter.
8. The Applicant has thus also filed a Rule 15 application through which he sought to amend his earlier Form 32 submissions. Rule 15 reads thus:

15 Amendment of documents

(1) An Applicant or Respondent may at any time prior to conclusion of the hearing of the matter, apply by way of Form Tl.r15 for an order authorising an amendment of the application or response.

(2) A party affected by an amendment may respond within a time allowed by the Tribunal.

BACKGROUND

9. This matter has been to various forums already:
 - 9.1 The Lydenburg Magistrates Court;
 - 9.2 The Pretoria High Court;
 - 9.3 The National Credit Regulator (NCR); and

9.4 (now) the National Consumer Tribunal (NCT).

10. It may not be necessary to go to the merits of this case, as the Rule 15 Application may compel the Tribunal to make the final decision just on the provisions of that Rule (15) alone, if need be.

APPLICANT'S SUBMISSIONS

11. The Applicant alleges, inter alia, that:
- 11.1 The Respondent engaged in reckless lending;
 - 11.2 The Respondent failed to take into consideration the Applicant's wife's income when calculating the Applicant's level of over-indebtedness; and
 - 11.3 The Respondent did not include some of the other debts when giving consent to the debt rearrangement review.

RESPONDENT'S SUBMISSIONS

12. The Respondent argued that the Applicant's application had no merit on grounds that:
- 12.1 The Applicant could not claim to be over-indebted whilst refusing to sell the immovable property in order to reduce its indebtedness;
 - 12.2 The Applicant could not claim to be over-indebted whilst owning three motor vehicles and refusing to return at least two of those vehicles to the credit providers, which could have helped in reducing its indebtedness;
 - 12.3 The Applicant acted in bad faith when she took the debt review application to the Lydenburg Magistrates Court without taking into consideration the Respondent's counter-offers;
 - 12.4 The Applicant's debt review application was granted at the Lydenburg Magistrates Court, but was set aside by the Pretoria High Court, where:
 - 12.4.1 The High Court criticized Ms Barnardt's "Partiality and irrational recommendations; and
 - 12.4.2 And directed her to pay the costs of the proceedings both in the Magistrates Court and at the Pretoria High Court (of Appeal);

12.5 The Applicant has no regard for legal processes; and chose to disregard court findings;

12.5.1 The Applicant went back to the Lydenburg Magistrates Court to lodge a claim of reckless lending against the Respondent, despite the High Court having already ruled on the matter; and

12.5.2 The Applicant failed on this second attempt and was ordered to pay the Respondent's costs.

REASONS FOR THE NCR'S NON-REFERRAL NOTICE

13. After repeatedly losing out in the Courts of Law, the Applicant lodged a reckless lending complaint with the NCR on the 1st of July 2016.

14. The NCR contacted the Respondent to give their side of the story.

15. After thoroughly investigating the Applicant's complaint, The NCR issued a Non-Referral Notice, dated the 2nd of February 2017, in which they indicated the reasons for their conclusion as follows:

15.1 The NCR did not have the jurisdiction on a matter that has already been decided on by the Courts;

15.2 Some of the debts being referred to as having been granted recklessly were actually granted prior to the commencement of the National Credit Act, 34 of 2005;

15.3 Affordability assessments were conducted for all of the debts being complained of; and

15.4 The Applicant, at the time of concluding these credit agreements, understood the risks, costs, and obligations under the proposed credit agreement; and could thus not have been over-indebted at the time of entering such a credit agreement.

CONSIDERATION OF THE ORIGINAL FORM 32 APPLICATION

16. The Applicant did not under, Part 3 of the Form 32, clearly describe reasons for referral. *"If determine that FNB failed to do an assessment as required by Section 80(1)(a) to provide relief in terms of Section 83(2)(a)".* This is incomprehensible, vague and embarrassing.

17. Under relief or order sought, the Applicant wrote *"Prevention of prohibited conduct and protection of consumer rights"*. This says absolutely nothing about the leave to refer.

CONSIDERATION OF THE RULE 15 APPLICATION

18. The Respondent made a submission on a point of law that a case for leave to refer may not be made through an amendment.
19. Though this is a Rule 15 Application, for amendments of documents; if the Applicant wanted to amend the information contained in Form 32, section 141(b) of the Act prescribes the format in which this Form 32 must be submitted. The submissions by the Responded do not comply with what the Act prescribes. Even her detailed Amendments submissions offer no specific prayer for Leave to Refer.
20. Even if the Applicant had lodged the applications appropriately, as prescribed by the Act, it could not have been possible to grant leave to refer on the following grounds:
 - 20.1 This matter had already been pronounced on by the Courts; hence, the Tribunal could not have had jurisdiction to hear it; and
 - 20.2 There were no reasonable prospects of success, as the Pretoria High Court, the Lydenburg Magistrate's Court, and the NCR had already correctly pronounced on the lack of substance on the Applicants grounds for a finding of reckless lending.

ORDER

Accordingly, the Tribunal makes the following order:

21. Leave to refer the matter directly to the Tribunal is hereby refused; and
22. No order as to costs.

DATED ON THIS 6th DAY OF NOVEMBER 2017



Prof B. Dumisa
Member & Acting Executive Chairperson

Prof J Maseko (Member and Executive Chairperson) and MA Potwana (Member) concurring