

**IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN DURBAN**

Case number: NCT/82594/2017/141(1)

In the matter between:

VERNON MORGANATHAN ARIYAN

APPLICANT

and

ABSA BANK LIMITED

1st RESPONDENT

NATIONAL CREDIT REGULATOR

2nd RESPONDENT

Coram:

Mr F Sibanda – Presiding member

Prof T Woker – Member

Prof K Moodaliyar – Member

Date of Hearing – 22 January 2018

JUDGMENT AND REASONS

THE PARTIES

1. The Applicant in this matter is Vernon Morganathan Ariyan (hereinafter referred to as “the Applicant”), an adult male who lodged a complaint with the National Credit Regulator (hereinafter referred to as “the NCR”) against the Respondent. At the hearing the Applicant had no legal representative but was assisted by his brother Luxien Ariyen.

2. The first Respondent is ABSA Bank Limited, a credit provider registered with the NCR, with registration number NCRCP7 (hereinafter referred to as “the Respondent”). The second Respondent is the NCR, a juristic person and a regulator established in terms of section 12 of the NCA. No relief is sought against the NCR, save for a prayer to find in the ordinary course; that it erred in its decision to non-refer the case. Both the Respondent and the NCR did not appear at the hearing and were not represented.

JURISDICTION

3. This application is brought in terms of section 141(1)(b) of the National Credit Act, No 34 of 2005 (the NCA). The Applicant seeks leave to refer a complaint directly to the Tribunal following a notice of non-referral issued by the NCR.
4. The Tribunal has jurisdiction to hear this matter.

ISSUES TO BE DECIDED

5. The Tribunal must decide whether to grant leave to the Applicant to refer this matter directly to the Tribunal. In order to arrive at such a determination, the Tribunal is required to consider, among other things, the Applicant’s prospects of success.

BACKGROUND

6. On 22 February 2008 the Applicant entered into a credit agreement with the Respondent for the financing of a motor vehicle. The original capital amount, under the ABSA account number 76094492, was R266 469.33 at an annual interest rate of 15.51%.
7. On 4 March 2010 the Applicant, through a debt counsellor, applied for debt review in terms of the NCA. The debt counsellor sent an initial proposal to the Respondent on 11 March 2010, after receiving a certificate of balance from the Respondent. The Respondent requested the Applicant to revise the proposal.
8. A revised proposal was sent to the Respondent on 22 March 2010 but was rejected and the account was subsequently terminated from debt review.

9. The account was reinstated under debt review on 11 September 2010, following a debt review court order granted on 7 September 2010.

10. On 9 May 2013 the Applicant's debt counsellor wrote to the Respondent stating that –

“This letter serves to confirm that you will not receive the full negotiated payment for this distribution cycle, due to a (sic) incorrect transfer on clients (sic) account”¹

11. However, the account had already been terminated from debt review on 26 March 2013. The Respondent replied to the Applicant's letter on 9 May 2013 indicating that –

“..the account has been terminated from debt review and we are unable to assist with your request.”

12. After intervention by the debt counsellor, the account was again re-instated on 13 May 2013.

13. The account was restructured on 24 July 2013. On 22 January 2015 the Respondent sent a counter proposal to the Applicant, for a monthly instalment of R5 501.18 at 7.5% per annum over 84 months.

14. The Respondent requested the Applicant's payslip with income and expenditure, as well as a revised proposal with the current interest rates in order to finalise the matter. The Respondent did not receive a response from the Applicant and proceeded to apply for and was granted a rescission of the debt review court order on 7 April 2015.

15. The Applicant lodged a complaint with the NCR, who after investigating the matter issued a notice of non-referral, which entitles the Applicant to apply for leave to refer the matter directly, with the leave of the Tribunal.

16. In issuing the notice of non-referral the NCR found, among other things, that –

- (a) the interest charged on the account was recalculated and an amount of R113 795.45 reversed from the outstanding balance;

¹ Page 107 of the bundle

- (b) the Respondent was in talks with the Applicant's debt counsellor in respect of having the account re-instated under debt review; and
- (c) the NCR is not mandated to negotiate with creditors on a consumer's behalf and advises that the Applicant and his debt counsellor must provide the Respondent with the documentation and information as requested in order to finalise the matter.

THE HEARING

- 17. The matter was set down for hearing on 22 January 2018 in Durban.
- 18. The presiding member having been satisfied that the Respondent was properly served with the application and that the Notice of Set Down was sent to the correct address, decided that the matter should proceed on a default basis, in accordance with Rule 24 of the Tribunal Rules², which provides that –

“24 (1) If a party to a matter fails to attend or be represented at any hearing or any proceedings, and that party –

(a) is the applicant, the presiding member may dismiss the matter by issuing a written ruling; or

(b) is not the applicant, the presiding member may –

(i) continue with the proceedings in the absence of that party; or

(ii) adjourn the hearing to a later date

(2) The Presiding member must be satisfied that the party had been properly notified of the date, time and venue of the proceedings, before making any decision in terms of subrule (1).”

- 19. Furthermore, according to Rule 13(5), any fact or allegation in an application or referral not specifically denied or admitted in an answering affidavit will be deemed to have been admitted.

² National Credit Regulations, 2006. Government Gazette No 28864 of 31 May 2006.

20. Thus, on this basis the Respondent is deemed to have admitted all the allegations made against it by the Applicant.

APPLICATION FOR LEAVE

21. In terms of section 141(1)(b) of the NCA, the Applicant may only refer the matter directly to the Tribunal *with leave of the Tribunal*³.

22. In determining whether the Applicant should be granted leave to refer the matter directly, the Tribunal must consider the requirements for the granting of “leave”.

23. In *Westinghouse Brake and Equipment (Pty) Ltd* it was held that –

“in applications for leave to appeal properly brought before the appropriate court in terms of the old sec 20, read with sec 21 as it then was, the only relevant criteria were whether the applicant had reasonable prospects of success on appeal and whether or not the case was of substantial importance to the applicant or to both him and the respondent.”

24. Therefore, when considering whether to grant the Applicant leave to refer, the Tribunal will use the same test as applied in the High Court for applications for “leave” and will consider:

- (a) the Applicant’s reasonable prospects of success with the referral; and
- (b) whether the matter is of substantial importance to the Applicant or the Respondent.

APPLICANT’S REASONABLE PROSPECTS OF SUCCESS

25. Whilst it is not necessary to delve into the substance of the case in order to determine the Applicant’s prospects of success, the Tribunal deems it important in this instance to pronounce on certain issues raised by the Respondent. Below is a brief description of the Applicant’s case.

THE APPLICANT’S CASE

26. The basis of the Applicant’s complaint is that he has been constantly harassed by the Respondent applying for the rescission of the debt review order on numerous occasions,

³ Own emphasis

despite having made regular and timeous monthly payments to the payment distribution agent.

27. This has compelled him to seek legal recourse and has impacted negatively on his finances.

28. Whilst the PDA statement as at 18 November 2016 had a balance of R55 071.06, the statement from the Respondent recorded a balance of R719 108.09 as at 20 September 2016⁴. Included in this balance was an amount of R464 490.41 classified as sundry items. This, according to the Applicant is inexplicable.

29. The Applicant also alleges that the Respondent acted unilaterally and unfairly by insisting on a counter-proposal for the Applicant to pay R5 501.18 at an interest rate of 7.5% per annum over 84 months.

30. According to the Applicant, the rescission of the debt review court order was not done properly and is against section 130 and 85 of the NCA, among others. The Applicant's contention is that the court should not have rescinded the debt review order without taking into account the fact that the Applicant was over-indebted.

31. The Applicant also alleges that the Respondent breached section 120 of the NCA, which states that –

“(1) Despite any provision to the contrary in a credit agreement, a credit provider may not unilaterally change –

- (a) the period for repayment of the principal debt, except to lengthen it; or*
- (b) the manner of calculating the minimum payment due periodically under a credit facility, subject to section 118(4).*

(2) Except as otherwise provided for in section 104, a credit provider must give the consumer written notice of at least five business days of a unilateral change to a credit agreement and in that notice must set out the particulars of the change.”

⁴ Annexure E1d, page 28 of the bundle

32. The Applicant also cited sections 88(4), 90 and 103(5) of the NCA as some of the provisions that were breached by the Respondent.

CONSIDERATION OF THE FACTS AND THE LAW

33. Whilst in his application papers the Applicant did not indicate what sections of the NCA the Respondent is alleged to have breached, during the hearing the Applicant mentioned a number of such sections, including sections, 85, 88(4), 90, 103(5), 120 and 130 of the NCA. These sections will be considered briefly below.
34. According to section 85 of the NCA, a court may declare a consumer over-indebted and refer the matter to a debt counsellor for an assessment of the consumer's debt condition or make an order to re-arrange the consumer's debt obligations.
35. Section 88 prohibits a consumer who has filed an application for debt review from incurring or entering into further credit agreements. In terms of subsection (4) thereof, a credit agreement entered into with a consumer who has applied for debt review may be declared as reckless credit.
36. The Applicant further alleges that the Respondent breached section 120 of the NCA which prohibits the unilateral changes to a credit agreement, by reverting to the payment terms of the original credit agreement. However, the Respondent applied to the court and was granted for the debt review order to be rescinded.
37. According to the Applicant, section 130 of the NCA which provides for debt procedures in a court of law was also violated by the Respondent.
38. Thus, at the heart of the Applicant's case, and taking into account the above sections that speak to court processes, is the fact that the debt review order was rescinded by the court on application by the Respondent and according to the Applicant this action is unfair and against the NCA.
39. Whilst the Applicant may be aggrieved by the decision of the court, this Tribunal has no authority to pronounce on or let alone impugn such a decision. It is difficult, therefore, to fathom how the Applicant can succeed in this Tribunal in challenging the actions of the

Respondent in reverting to the original credit agreement, following the decision of a court of law.

40. The Applicant also cites section 90 of the NCA which describes various provisions considered unlawful and that should not be contained in a credit agreement. However, it is not clear how this section was breached by the Respondent.
41. In terms of section 103(5) the aggregate of initiation fees, service fees, interest, cost of insurance and default that accrue during the period that a consumer is in default under a credit agreement may not exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs.
42. The Applicant alleges that section 103(5) was breached because in the statement of balance dated 20 September 2016 an amount of R464 490.41 was reflected as sundry items, bringing the total balance owing to R719 108.09. However, during the hearing the Applicant conceded that this amount was later reversed and the latest statement in his possession reflected a balance of R96 440.39.

IMPORTANCE OF THE MATTER

43. Another factor that the Tribunal must consider when deciding whether to grant leave to refer, is the importance of the matter. There is no doubt that the Applicant feels aggrieved by the actions of the Respondent and that this case is very important to him. There has been a lot of correspondence between the parties, dating back to 2010. This notwithstanding, the decision to grant leave to refer must be taken having balanced all the factors at play. Whilst it is clear that this case is of critical importance to the Applicant, the Tribunal finds that that the Applicant does not have any prospects of succeeding with its cause of action.

RELIEF SOUGHT

44. Finally the Tribunal also has to consider whether it can grant the relief sought by the Applicant. In this case, the Applicant wants the Respondent to accept the balance as reflected in the PDA statement. In the notice of non-referral the NCR advised that the Applicant needs to consult the Respondent for the actual outstanding balance as the PDA statements do not show the true reflection of the consumer's outstanding balance. Based

on the fact that the debt review order was rescinded by a court of law, the Tribunal will be acting beyond its jurisdiction should it grant the relief sought.

CONCLUSION

45. The Applicant has brought its application in terms of section 141 (1)(b) of the NCA. At the hearing the Applicant cited various sections of the NCA the Respondent is alleged to have breached. These sections relate to action by a court and the Tribunal does not have jurisdiction to consider matters that have been decided by a court of law. With respect to the allegation on what appears to have been excessive and unjustified sundry charges on the account, these were reversed. Moreover, the Tribunal, as an **administrative court**, will not be in a position to grant the relief sought by the Applicant. Only a High Court can review or consider appeals of the lower judicial courts.

46. In the circumstances, the Tribunal determines that the Applicant does not have any prospects of success and thus it will not be in the interests of justice for the merits of the matter to be heard by it. It would probably be heard by a High Court as a civil appeal or review. But only legal advice would guide the Applicant in that regard.

ORDER

47. Having considered the evidence provided on the application for leave to refer the matter directly, the Tribunal orders that:

- (a) the application for leave to refer the matter directly to the Tribunal is refused; and
- (b) there is no order as to costs.

Thus done and handed down at Centurion this 22nd February 2018.

[signed]

FK Sibanda
(Member)

Prof T Woker (Member) and Prof K Moodaliyar (Member) concurring.