

**IN THE NATIONAL CONSUMER TRIBUNAL
HELD ONLINE VIA TEAMS**

Case Number: **NCT/222623/2022/141(1)(b)**

In the matter between:

GARETH MILLER

APPLICANT

and

NEDBANK LIMITED

RESPONDENT

Coram:

Prof K Moodaliyar - Presiding Tribunal member

Ms P Manzi- Ntshingila - Tribunal member

Dr MC Peenze - Tribunal member

Date of hearing: 2 November 2022

JUDGMENT

APPLICANT

1. The Applicant in this matter is Gareth Miller, an adult male consumer ("the Applicant" or "Mr Miller"). At the hearing, the Applicant represented himself.

RESPONDENT

2. The Respondent is Nedbank Limited ("Nedbank"), a registered credit provider.
3. At the hearing, the Respondent was represented by Aayesha Lorgat of Smith, Jones and Pratt attorneys.

APPLICATION TYPE

5. This is an application made in terms of section 141(1)(b) of the National Credit Act, 2005 (“the NCA”).

6. Section 141(1)(b) of the NCA states the following:

“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 –

(a) ...

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

JURISDICTION

7. Section 27(a)(i) of the NCA states that:

“The Tribunal or a member of the Tribunal acting alone in accordance with this Act or the Consumer Protection Act, 2008 may-

(a) adjudicate in relation to any -

(i) application that may be made to it in terms of this Act, and make any order provided for in the Act in respect of such an application;”

8. Accordingly, the Tribunal has jurisdiction to hear this application.

BACKGROUND

9. The Applicant alleges that the Respondent contravened the NCA by extending credit recklessly to him by not conducting proper affordability assessments.

10. The Applicant states that on 15 October 2015, he took out a personal loan with Nedbank, the Respondent. In 2019 he experienced financial difficulty and was in arrears with the Nedbank personal loan.

11. His account fell into arrears because he failed to comply with his repayment obligations, and Nedbank handed the matter to Hammond Pole Attorneys to recover the loan.
12. He complained about Nedbank breaching the NCA rules regarding setoff / unauthorised deductions from his account. Due to a National Consumer Tribunal ruling, Nedbank reached a settlement with him in 2021.
13. As there was an amount still owing on his loan, during 2020 and 2021, the Applicant had been receiving emails and SMSs from Hammond Pole Attorneys requesting repayment of the loan. The Applicant says he had not received any statements regarding his loan despite numerous requests, and the first time he received a statement was on 16 November 2020.
14. On 16 September 2020, he received an email titled “Final Notice ito s129 of the National Credit Act/Your Nedbank Personal Loan/ Account in arrears” which showed an amount of R31 541,43 owing.
15. The Applicant has since then, questioned the validity of the s129 notice, and has not paid his loan or arrears to date.
16. On 9 November 2020, the Applicant was informed by Hammond Pole Attorneys that the financial service provider does issue a s129 notice by four top shots post, and the account was handed over to the attorneys to execute legal action due to his failure to service the loan. By law, they are required to issue a s129 notice before a summons. There was a request for the Applicant to pay R200.00 towards servicing the loan, which he refused to do.
17. The Applicant was under the impression that the s129 notice was a ‘fake’ notice and the Attorney reassured him that it was not.
18. He subsequently received a summons on 20 April 2021.
19. When the Applicant queried why he had not received the s129 notice before receiving the summons, he was informed by Hammond Pole Attorneys that the

summons was issued to him via registered post on 12 February 2020, to his domicile address where he received the summons. The amount owed, shown on the s129 notice then read R34 695.40.

20. On 10 May 2021, the Applicant received an email from another Attorney from Hammond Pole Attorneys, where she attached: (1) a Copy of the statement of account; (2) Section 129 and proof of postage; and (3) a Track and trace report from the Post Office.
21. The Applicant says he was still receiving SMSs regarding the outstanding loan payments.
22. The Applicant believes that the s129 notice had the incorrect date on it, was not stamped, he did not receive it, and was a fake document.
23. The Applicant has asked that the Tribunal declare the Respondent's conduct to be prohibited conduct and that a certificate be issued so that he can approach the court to claim damages. The Applicant did not identify which sections of the NCA he believed had been breached.
24. The Applicant referred the matter to the National Credit Regulator ("the NCR"). The NCR issued a notice of non-referral on 11 February 2022 because the Applicant's complaint did not include an allegation of facts, which would constitute grounds for a remedy under the NCA.

THE HEARING

25. The matter has been brought before the Tribunal after the Applicant sought leave of the Tribunal to refer this matter to the Tribunal. The Tribunal granted the leave on 9 August 2022.
26. At the hearing, the Applicant reiterated his arguments in his papers that he believed that the s129 notice was not issued correctly, that it was a 'fake' notice, he had not received the copy via registered post, and had requested copies of the statement numerous times.

27. The Applicant wanted to provide further background unrelated to this case. However, the Tribunal was adamant that the Applicant should focus on the merits of this case. The Applicant indicated that his last payment towards the loan in question was on 1 July 2019. He has not made any payments since.
28. The Applicant argued that the Post Office should have stamped the s129 notice. Although it was alleged that the s129 notice was posted to him via registered post by the Respondent, the Applicant did not believe that the envelope had any contents in it.

RESPONDENT'S ARGUMENT

29. One of the points *in limine* raised by the Respondent was that the Applicant has failed to file his replying affidavit, despite being advised by the Tribunal on 15 June 2022 that his replying affidavit was to be filed by 21 June 2022. Accordingly, the Respondent argued that the Applicant has not dealt with the issues raised in the Respondent's answering affidavit.
30. The Applicant's failure to deal with the allegations in reply means that the Respondent's version is uncontested and not placed in dispute by the Applicant. As such, the *Plascon-Evans* rule applies and any factual disputes ought to operate in favour of the Respondent.¹ That is, insofar as there are any facts in dispute relevant to determine this application, such facts are to be determined on the Respondent's version.
31. In a second point *in limine*, the Respondent alleged that the Tribunal does not have jurisdiction to adjudicate on this matter as there is a pending action in the Verulam Magistrate's Court and the Applicant's complaint of non-compliance with section 129 of the NCA can be adequately dealt with by the Verulam Magistrate's Court as the NCA and the Magistrates' Court Rules afford the Applicant remedies thereto.
32. Having considered the Respondent's points *in limine* and the frustrations experienced by the Applicant in this matter, the Tribunal decided to proceed on the merits.

¹ *Polaris Capital (Pty) Ltd v Registrar of Companies and Another* 2009 (3) SA 207 (C) [129].

33. Regarding the Applicant's allegation of the non-receipt of the monthly bank statements, the Respondent alleged that these monthly bank statements were sent each month via registered mail to the Applicant and upon his request made to the Respondent and to the attorneys Hammond Pole, these statements were again forwarded to the Applicant via electronic mail. At all times, the Applicant was aware of the amounts due and payable.

ANALYSIS

34. The NCA and its Regulations envisage an appropriate balance between credit providers' and consumers' obligations to maintain a competitive and sustainable credit market and industry.
35. In *Sebola and Another v Standard Bank of South Africa Ltd*², the Constitutional Court, when considering the correct approach to the interpretation of the NCA, held:

"The main objective is to protect consumers. But in doing so, the Act aims to secure a credit market that is 'competitive, sustainable, responsible [and] efficient'. And the means by which it seeks to do this embrace 'balancing the respective rights and responsibilities of credit providers and consumers'. These provisions signal strongly that the legislation must be interpreted without disregarding or minimising the interests of credit providers. So I agree with the Supreme Court of Appeal that —

'(t)he interpretation of the NCA calls for a careful balancing of the competing interests sought to be protected, and not for a consideration of only the interests of either the consumer or the credit provider'. [Footnote omitted.]

I also agree that 'whilst the main object of the Act is to protect consumers, the interests of creditors must also be safeguarded and should not be overlooked'."

36. So too in *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others*,³ the Constitutional Court held:

² 2012 (5) SA 142 (CC) at para 40

³³ 2016 (6) SA 596 (CC)

“[17] The National Credit Act seeks to protect consumers by a number of means including the promotion of responsible borrowing that avoids over-indebtedness, prevention of reckless credit-granting by credit providers, encouragement of consumers to fulfil their financial obligations and provision of a consistent and accessible system of consensual resolution of disputes arising from credit agreements.

[18] But the National Credit Act does not only protect and advance the interests of debtors. It also promotes the interests of credit providers.

For it may only achieve the goal of a 'fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market', if the Act strikes the right balance in advancing the rights of consumers on the one hand and credit providers' interests, on the other.”

37. The Applicant was also aware that he was in breach of the loan agreement and that should he fail to remedy such breach a section 129 notice would be sent and thereafter summons would be filed and served.

FINDING

38. A copy of a track and trace report reflecting that the above notice with tracking reference number PE934210820ZA was delivered at the relevant post office and a first notification was issued to the addressee recipient on 5 February 2021.
39. A copy of the return of service dated 26 April 2021 issued by the sheriff indicates that a combined summons under case number 1833/21 was served on 20 April 2021.
40. From the above, it appears that the credit provider commenced legal proceedings to enforce the agreement on 20 April 2021, being the date of service of the combined summons.

41. In the cases of *Sebola*⁴ and *Kubyana v Standard Bank of South Limited*,⁵ it was stated that a credit provider is required to send the notice in terms of section 129 of the NCA, via registered mail, to the correct Post Office and ensure that the Post Office sends the first notification to the consumer. Further, it is not necessary to take additional steps to ensure that the notice comes to the attention of the consumer.
42. The section 129 notice was sent, via registered mail, to the Applicant's chosen domicilium address, which address is the same as where the combined summons was served and received by the Applicant, and the first notification was sent to the Applicant.
43. In considering section 129 of the NCA and the above-mentioned authorities the Respondent has complied with the provisions of the NCA.
44. The NCT judgment to which the Applicant referred was granted on 1 November 2020. It relates to a contravention of section 124 of the NCA and not the section 129 process in this matter. The subject matters in the NCT judgment and this matter are different because they do not allege the same contraventions.
45. The Tribunal is not in possession of any information or documentation to reasonably believe that the credit provider failed to comply with the provisions of the NCA, in particular section 129 of the NCA. The Applicant does not allege any facts which, if true, would constitute a remedy under the NCA.

CONCLUSION

46. Having considered the party's submissions, the Tribunal finds that the Applicant did not provide adequate evidence to show that the Respondent has failed to comply with section 129 of the NCA in substance and in form.

ORDER

47. Accordingly, the Tribunal makes the following order:

⁴ (CCT 98/11) [2012] ZACC 11.

⁵ (CCT 98/11) [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) (7 June 2012).

47.1. The Applicant's application is dismissed; and

47.2. There is no order as to costs.

THUS DONE ON THIS 18th DAY OF DECEMBER 2022.

[signed]

Prof K Moodaliyar

Presiding Tribunal Member

Dr MC Peenze (Tribunal Member) and Ms P Manzi- Ntshingila (Tribunal Member) concur.

Authorised for issue by The National Consumer Tribunal

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