

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

Case Number: NCT/192344/2021/141(1)(b)

In the matter between:

U M M

APPLICANT

AND

ABSA BANK LIMITED

RESPONDENT

Coram:

Mr F Sibanda - Presiding Member

Dr L Best - Tribunal Member

Dr M Peenze - Tribunal Member

Date of Hearing - 26 May 2022

Date of judgment - 12 June 2022

JUDGMENT AND REASONS

THE PARTIES

1. The Applicant in this matter is U M M, an adult male person who resides in P[...]. The Applicant represented himself at the hearing.
2. The Respondent is ABSA Bank Limited (ABSA), a company that is duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its physical address at 5th Floor, ABSA Towers West, 15 Troye Street, Johannesburg, 2001 ("the Respondent"). The Respondent was represented by Adv. Robert Scholtz from The Bridge Group Chambers, at the hearing.

APPLICATION TYPE AND JURISDICTION

3. This application is brought before the National Consumer Tribunal (“the Tribunal”) in terms of section 141 (1)(b) of the National Credit Act, No 34 of 2005 (“the Act”). The Tribunal has jurisdiction to hear the matter in terms of section 27 (a)(i) of the Act.

BACKGROUND

4. Between February 2011 and October 2018 the Applicant entered into three credit card facility agreements with the Respondent. The first credit card agreement, with account number ending XXX1035, was concluded in February 2011, with an initial credit limit of R72 000.00. The second credit card agreement, with account number ending XXX3028, was concluded in May 2018, with an initial credit limit of R200 000.00. The third credit card agreement with account number ending XXX4014 was entered into during October 2018, with an initial credit limit of R175 000.00.
5. The first credit card limit was increased several times between 2011 and 2018. However, the Applicant’s complaint relates to increases effected between March 2018 and October 2019. On 9 October 2018 the first credit card limit was increased from R194 000.00 to R213 400.00. On 2 April 2019 the credit card limit was increased further from R213 400.00 to R277 420.00; and to 360 646.00 on 2 October 2019.
6. The second credit card limit increases were effected on 25 January 2019 from R200 000.00 to R260 000.00 and subsequently to R338 000.00, on 8 July 2019. The third credit card limit was increased from R175 000.00 to R240 000.00, on 31 March 2019 and again to R312 000.00, on 3 September 2019.
7. The Applicant also entered into various other credit agreements with the Respondent for a home loan, vehicle finance, personal loan and an overdraft facility.

The Applicant’s case

8. The Applicant alleges that the Respondent automatically increased the credit card limits almost every three months, between March 2018 and October 2019, without a request from the Applicant.
9. The Applicant further alleges that the Respondent granted these credit limit increases based on money transferred from the Applicant’s credit cards to the cheque account. According to the Applicant, the said transfers do not constitute income and resulted in the Respondent overstating the Applicant’s income. Moreover, the Respondent also took into account money from forex trading, which although was a prospect, the Respondent did not determine whether this commercial venture would be successful.

10. According to the Applicant the Respondent breached section 80 (1)(b) of the NCA, which provides that –
 - (1) *“A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119(4) –*
 - (a) *...; or*
 - (b) *the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that –*
 - (i) *the consumer did not generally understand or appreciate the consumer’s risks, costs or obligations under the proposed credit agreement; or*
 - (ii) *entering into that credit agreement would make the consumer over-indebted.”*
11. The Applicant submits that the preponderance of information available to the credit provider indicated that the Applicant was not earning any income other than a monthly net salary of around R50 000. The transfers between the accounts were not a form of income.
12. According to the Applicant, the NCA’s definition of income, which does not consider source or regularity is not consistent with other acts such as the Income Tax Act. As such, the Applicant implores the Tribunal to assess the reasonability of considering inter-account transfers as income.
13. Furthermore, the Applicant alleges that the Respondent hastily did an affordability assessment over the phone without asking about the Applicant’s detailed list of monthly expenses, considering only food, accommodation, transport, and other basic expenses. The Applicant had other credit agreements in place and extending further credit would result in the Applicant becoming over-indebted. Thus, the Applicant alleges reckless lending by the Respondent.
14. The Applicant seeks an order nullifying any of the debt owed to the Respondent, found be non-compliant with the provisions of the NCA.
15. On 22 January 2020, the Applicant lodged a complaint against the Respondent, with the National Credit Regulator (“the NCR”). On 15 April 2021, after conducting an investigation, the NCR issued the Applicant with a notice of non-referral, stating that the Applicant’s complaint does not include an allegation of facts which, if true, would constitute for a remedy under the NCA. On 27 May 2021, the Applicant lodged an application for leave to refer the matter directly to the Tribunal.
16. On 5 November 2021, the Tribunal granted the Applicant leave to refer the matter directly to the Tribunal, following the granting of condonation to file a late application for leave to refer.

The Respondent's case

17. The Respondent submits that the Applicant was at all material times under a legislative duty to provide true and correct information pertaining to his application for credit, including any increases to his existing credit facilities.
18. According to the Respondent, it conducted an affordability assessment as required by the NCA, on each material occasion that an increase in the credit facilities was sought. The Respondent relied on information declared by the Applicant, information already in the possession of the Respondent and information obtained from the credit bureaus. This information revealed to the Respondent, that on each occasion that the credit limits were increased, there would remain a substantial surplus available to the Applicant.
19. Based on each such assessment, the Respondent reasonably believed that the Applicant could afford the maximum monthly instalments in terms of the relevant credit facilities.
20. The Respondent further submits that there was no reason to believe that the Applicant did not understand or appreciate the risks, costs, rights and/or obligations under the credit agreement, or that the granting of each credit would lead or cause the Applicant to become over-indebted.
21. The Respondent submitted bank statements showing income into and expenses from the Applicant's bank account. The Respondent also submitted transcripts of conversation between the Respondent's representatives and the Applicant, showing the Applicant's confirmation of his income and living expenses.
22. As such, the Respondent submits that it is not guilty of contravening any section of the NCA and that the Applicant's application stands to be dismissed.

THE APPLICABLE LAW

23. Section 80(1) and (2) of the NCA provides that –
 - (1) *"A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119(4) –*

- (a) *the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time;*
or
 - (b) *the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that –*
 - (i) *the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or*
 - (ii) *entering into that credit agreement would make the consumer over-indebted.*
- (2) *When a determination is to be made whether a credit agreement is reckless or not, the person making that determination must apply the criteria set out in subsection (1) as they existed at the time the agreement was made, and without regard for the ability of the consumer to –*
- (a) *meet the obligations under that credit agreement; or*
 - (b) *understand or appreciate the risks, costs and obligations under the proposed credit agreement,*
at the time the determination is being made.”

24. Section 81(1) - (3) of the NCA states as that –

- (1) *“When applying for a credit agreement, and while that application is being considered by the credit provider, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section.*
- (2) *A credit provider must not enter into a credit agreement without first taking reasonable steps to assess –*
 - (a) *the proposed consumer's –*
 - (i) *general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;*
 - (ii) *debt re-payment history as a consumer under credit agreements;*
 - (iii) *existing financial means, prospects and obligations; and*
 - (b) *whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement.*
- (3) *A credit provider must not enter into a reckless credit agreement with a consumer.”*

25. In terms of section 78(3), financial means, prospects and obligations includes –

- (a) *“income, or any right to receive income, regardless of the source, frequency or regularity of that income, other than income that the consumer or prospective consumer receives, has a right to receive, or holds in trust for another person;*
- (b) *...”*

26. The above notwithstanding, the courts have pointed out that –
- “The purpose of the NCA is to provide a more efficient and equitable credit system by balancing the rights of credit providers and consumers. The intention of the legislature was not to shift the balance of power so much that all power in the credit relationship would amass into the hands of the consumer.”¹*

ANALYSIS OF THE EVIDENCE

27. In terms of section 80(2) of the NCA, when making a determination whether a credit agreement is reckless or not, the Tribunal is required to apply the criteria set out in subsection (1), as they existed at the time the agreement was made and not at the time that the determination is being made.
28. The criteria set out in section 80(1) is an assessment by the credit provider regarding the consumer’s –
- a. general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of the consumer under a credit agreement;
 - b. debt re-payment history as a consumer under credit agreements; and
 - c. existing financial means, prospects and obligations.
29. The Tribunal will apply the above criteria in making a determination whether the Respondent engaged in reckless credit lending. In so doing, the Tribunal has to assess the evidence presented, being mindful of the High Court² observation that –
- “Since the enactment of the NCA, there seems to be a tendency in these Courts for defendants to make bland allegations that they are “over-indebted” or that there has been “reckless credit”. These allegations, like any other allegations made in a defendant’s affidavit opposing summary judgment, should not be “inherently and seriously unconvincing”, should contain a reasonable amount of verificatory detail, and should not be “needlessly bald, vague or sketchy”. A bald allegation that there was “reckless credit” or there is “over-indebtedness” will not suffice.”*
30. Also, as stated in *Absa Bank Limited v Manyike and Others*³, the onus lies with the consumer to prove reckless-lending. The Tribunal now turns to the criteria set out in section 80(1) of the NCA.

The Applicant’s general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of the Applicant under a credit agreement

¹ SA Taxi Securitisation (Pty) Ltd v Mbatha; SA Taxi Securitisation (Pty) Ltd v Molefe; SA Taxi Securitisation (Pty) Ltd v Makhoba at [32]

² Ibid, at [26]

³ Absa Bank Limited v Manyike and Others. Case No 8084/2013 [2016] ZAKZPHC, at [3]

31. The Respondent submits that it conducted an affordability assessment as required by the NCA, on each material occasion that an increase in the credit facilities was sought and reasonably concluded that the Applicant could afford the maximum monthly instalments in terms of the relevant credit facilities. Therefore, there was no reason to believe that the Applicant did not generally understand and appreciate the risks and costs of the proposed credit, or its rights and obligations under the relevant credit agreements. Despite the Applicant claiming to be working in finance, he has not submitted evidence showing that he did not understand and appreciate the risks and costs of the proposed credit at the time that the credit limits were increased.

Debt re-payment history as a consumer under credit agreements

32. Annexure AA1⁴ contains extracts of credit bureau reports, indicating that on each occasion that the credit limit was increased, the Respondent took steps to determine the Applicant's debt repayment history and credit obligations. Moreover, the Applicant had other credit agreements with the Respondent. The Respondent had access to the Applicant's debt repayment history and used this information to assess the Applicant's ability to meet its obligations under the relevant credit agreements. The Applicant has not provided evidence proving that his debt repayment history would have disqualified him from accessing credit from the Respondent, unless it was granted recklessly.

Existing financial means, prospects and obligations

33. The Respondent has demonstrated that in conducting an affordability assessment it used a formula that subtracts the Applicant's declared living expenses, fixed debt expenses and the proposed new minimum repayment from the Applicant's declared net income. In each such assessment, the Respondent determined that the Applicant would have a positive surplus⁵. The Applicant's income consisted of various sources, including what the Applicant refers to as income from forex trading. The Applicant acknowledges that the income from forex trading constitutes 'prospect' but argues that the Respondent should have determined whether this commercial purpose may prove to be successful at the time the Respondent extended credit. However, there is no obligation in terms of the NCA for the Respondent to undertake such an exercise, except where the Applicant has indicated a commercial purpose as a reason for applying for credit. The Applicant in this case did not advance such reason.
34. The Applicant further argues that in certain instances the income taken into account by the Respondent consisted of loans from friends and inter-account transfers. The Applicant argues that the NCA is not

⁴Page 273 of the bundle

⁵See pages 241 to 265 of the bundle

consistent with other legislation such as the Income Tax Act by not considering the regularity of the income and that the Tribunal must assess the reasonability of considering inter-account transfers as income. However, the Applicant has not provided evidence proving how such income does not constitute income for purposes of the NCA, having regard to section 78(3), which states that financial means, prospects and obligations includes **income**, or any right to receive income, **regardless of the source, frequency or regularity of that income**⁶.

35. Moreover, the Applicant confirmed the net income and living expenses as calculated by the Respondent to assess credit affordability on each occasion where a credit limit was increased. Annexures AA2 and AA11⁷ are transcripts of telephone conversations between the Respondent's representatives and the Applicant, showing the Applicant's confirmation of his net income and living expenses, among other things.
36. Insofar as the allegation that the Respondent hastily did an affordability assessment over the phone without asking about the Applicant's detailed list of monthly expenses, considering only food, accommodation, transport, and other basic expenses, is concerned, the onus was on the Applicant to declare such expenses to the Respondent. A consumer is required to fully and truthfully answer requests for information made by a credit provider for purposes of conducting an assessment in terms of section 81 of the NCA.

CONCLUSION

37. The Applicant's case remains "*seriously unconvincing*", and contains no "*reasonable amount of verificatory detail*"⁸. On the other hand, the Tribunal is satisfied that the Respondent assessed the Applicant's general understanding and appreciation of the risks and costs of the proposed credit; the Applicant's debt re-payment history as a consumer under credit agreements; and the Applicant's existing financial means, prospects and obligations, as required in terms of section 81(2) of the NCA. Thus, on a balance of probabilities, the Tribunal is unable to find a case of reckless lending against the Respondent.

ORDER

38. Therefore, the Tribunal makes the following order –
- 38.1. The Applicant's application is dismissed; and

⁶ Own emphasis

⁷ Page 294 and 308 of the bundle

⁸ SA Taxi Securitisation (Pty) Ltd v Mbatha; SA Taxi Securitisation (Pty) Ltd v Molefe; SA Taxi Securitisation (Pty) Ltd v Makhoba at [32]

38.2. There is no order as to costs.

DATED at CENTURION on the 12th day of June 2022.

(signed)

Mr F Sibanda

Presiding Tribunal Member

Dr L Best (Tribunal Member) and Dr M Peenze (Tribunal Member) concurring.

Authorised for issue by The National Consumer Tribunal

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