IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: **NCT/262204/2023/115(1)**

In the matter between:

HENDRIK JACOBUS EKSTEEN **APPLICANT**

and

NEDBANK (PTY) LTD **RESPONDENT**

Coram:

Ms Z Ntuli	_	Presiding Tribunal Member
Dr M Peenze	_	Tribunal Member
Mr S Hockey	_	Tribunal Member
Date of hearing	_	12 May 2023
Date of ruling	_	18 May 2023

RULING

APPLICATION IN TERMS OF SECTION 115(1) OF THE NCA

APPLICANT

1. The applicant is Hendrik Jacobus Eksteen (the applicant), an adult male who is a consumer as defined in terms of section 1 of the National Credit Act 34 of 2005 (NCA),

2. The applicant did not have legal representation at the hearing and appeared for himself.

RESPONDENT

3. The respondent is cited as Nedbank (Pty) Ltd (Nedbank). In accordance with documents that form part of the record, the respondent should have been cited as Nedbank Limited, a public company incorporated in terms of the company laws of South Africa, and a credit provider as defined in section 1 of the NCA.

4. Nedbank did not file opposing papers and, therefore, was not a party to the proceedings at the hearing.

TERMINOLOGY

5. A reference to a section in this ruling refers to a section of the NCA. A reference to a rule in this ruling refers to the Rules of the National Consumer Tribunal (the rules).[1]

APPLICATION TYPE

6. The application to the Tribunal is in terms of section 115(1) to resolve a disputed entry shown on a statement of account or a dispute concerning a statement of the settlement amount.

JURISDICTION

7. In terms of section 27(a)(i) the Tribunal has jurisdiction to consider this application.

ISSUES TO BE DECIDED

8. The issue before the Tribunal is whether the application has met the requirements for the Tribunal to hear and resolve the disputed entry shown on a statement of

[1] GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007 (Government Gazette No. 30225).

account or a dispute concerning a statement of the settlement amount and grant the relief sought.

BACKGROUND

9. According to the applicant, this matter involves the applicant's two home loan accounts with Nedbank since 2005, account numbers 431 3117 (the first account) and 431 3082 (the second account). The applicant defaulted on payment in 2009, and Nedbank issued a summons in 2009, followed by another one in 2010. A settlement agreement was concluded around 18 October 2010, allowing the applicant to settle the amounts owed to Nedbank. The terms and conditions of the previous agreements applied to this new agreement.

10. It was agreed that the applicant could make representations to Nedbank for the reinstatement of the first account that had expired at the discretion of Nedbank. Further, the applicant would pay all the legal costs, as taxed or agreed, which would be debited to the second account. The applicant questioned the inflated arrears, but Nedbank said these were correct. The applicant accepted the outstanding balances, noting that the first account expired while the second account was cancelled due to default.

11. The applicant defaulted again, and Nedbank obtained a judgment against him on or about 17 March 2011. The applicant requested an indulgence, and several post-judgment agreements were concluded around 1 July 2011, 5 September 2011, 18 April 2012, and 14 January 2014. The property, in respect of the first account, was sold in October 2012, although the applicant averred that he made all payments. After complaining to Nedbank's head office, he was referred to Nedbank's lawyers, who refused to meet with him or accept his lawyer's offer to pay those arrears.

12. During 2015 and 2016, the applicant complained, but Nedbank refused to provide him with statements arguing that the agreements did not fall under the NCA. He

approached the High Court, and Nedbank gave him statements in 2017, but only from 2012. After defaulting again in May 2018, Nedbank obtained and served a writ to sell the remaining property under the second account. The applicant tried but failed to have the sale in execution set aside in court.

13. He then complained to the National Credit Regulator (NCR) to stop the auction. The NCR noted that Nedbank had a valid judgment, and the applicant acknowledged the outstanding balances in the various agreements concluded. The NCR concluded that a section 129 notice was properly issued on 1 March 2010. The NCR did not find a contravention and issued a notice of non-referral in June 2018. The applicant should have referred the complaint directly to the Tribunal in terms of section 141(1) within 20 days after receiving the notice of non-referral. He did not do so.

14. The applicant averred that all agreements post-2009 were unlawful and prohibited by section 91(a) and in terms of section 89(2)(c). Further, all summonses and judgments obtained to sell his properties were unlawful as there were no valid agreements. The 2014 agreement included untaxed legal fees, which Nedbank later removed. Nedbank had also failed to issue and serve a section 129 notice before auctioning the property in Eldoraigne, contrary to the NCA. Nedbank also provided false information to the NCR.

15. In 2020, the applicant initiated proceedings in the Western Cape High Court, under case number 2526/2020, for Nedbank to return the Eldoraigne property that was auctioned and to account for all debits and credits in the second account. Due to COVID-19, the High Court advised the parties to consider mediation, to which they agreed. At the mediation hearing in March 2021, the applicant requested the statement from Nedbank, which was provided to the applicant.

16. The applicant noted that the statement provided during mediation proceedings differed from the statement supplied in 2017. Credits made in 2013 were lower, the dates of credits were changed, and legal fees were removed. The amount owed was less than R800,000 from time to time, most being untaxed legal costs. The

statement was altered and tampered with. It showed no arrears and differed from what Nedbank submitted in court to obtain a judgment.

17. During the mediation process, the applicant's lawyer withdrew, and he decided to refer the matter to the Banking Ombud. The Banking Ombud declined to deal with it because Nedbank informed them that the NCR had investigated and found no wrongdoing. The applicant believes that Nedbank did not participate in good faith. Nedbank withdrew from the mediation on 24 March 2022. The applicant only found out about the withdrawal on 9 November 2022.

18. The applicant then approached the Tribunal on 1 March 2023 in terms of section 115(1) to dispute entries made to his account. A notice of filing dated 3 March 2023 was issued on 6 March 2023. Notice of set down dated 6 April 2023 was issued, and the matter was set down for 12 May 2023.

19. The applicant believes that Nedbank contravened section 102(1)(d), which prevents Nedbank from debiting unlawful fees from his bond account. The statements are not binding in section 113(3), as charges were made after the statement was prepared. In terms of section 116, the changes made by Nedbank from 2009 were null and void. Nedbank contravened the various sections of the NCA, including sections 160A, 157, 15A, and 159(b). Nedbank admitted at the mediation hearing that it should not have auctioned the Eldoraigne property without a section 129 letter having been issued. Nedbank concluded new agreements to circumvent the NCA.

HEARING

The appearance of Ms. Ophelia Sibiya of Nedbank

20. At the hearing, Ms. Ophelia Sibiya, Queries, Manager: Nedbank Debt Counselling and Recoveries Services (NDCRS), joined the proceedings and said she was available to answer any questions to the extent that the matter may relate to the applicant's personal account held with Nedbank.

21. The Tribunal had to establish the capacity of Ms. Sibiya in the hearing. She said she received an email and thought the hearing related to the applicant's personal account with Nedbank. She had not received notification of this application before. Had she known that this was a matter in which Nedbank had to be legally represented, she would have referred it to the relevant persons.

22. The Tribunal was satisfied that the applicant properly served the application on Nedbank. This was done by email after Nedbank granted the consent to service by email on 23 January 2023. Nedbank acknowledged receipt on 1 March 2023 and 2 March 2023. Nedbank had 20 days to oppose the application by filing its answering affidavit, and it did not do so.

23. The application was enrolled as unopposed, which means the allegations made by the applicant stand uncontested. The Tribunal concluded that Ms. Sibiya would not be permitted to participate in the proceedings for the above reason.

The applicant's submissions

24. At the onset of the proceedings, the Tribunal questioned whether the applicant met the requirements of sections 111 and 115. The applicant contended that he approached the Tribunal after Nedbank terminated a mediation under the High Court rules to resolve the dispute, implying that he met the requirement in section 115 relating to unsuccessful alternative dispute resolution.

25. The applicant referred to the Western Cape High Court action against Nedbank in which he seeks the return of the Eldoraigne property that was auctioned in 2018 and that Nedbank must account for all debits and credits on the second account. The relief sought is also included in this application.

26. The applicant said he did not serve Nedbank with a notice of disputed entries as required in section 111 because Nedbank refused to talk to him. He confirmed that the entries he was disputing were only identified after Nedbank provided the

statement in 2021. So, no opportunity was presented to raise these disputed entries as Nedbank withdrew from the mediation. He averred that he did, however, raise concerns about certain entries before.

27. On being questioned by the Tribunal, the applicant conceded that the mediation that Nedbank withdrew from was conducted in terms of the Uniform Rules of the High Court and in respect of the proceedings in the Western Cape High Court. After Nedbank withdrew, the mediator, Adv Richard Goodman, informed the applicant that he was no longer involved. This High Court matter is still pending as the applicant has not removed it.

28. The applicant said he attempted to refer the matter to the Banking Ombud, but it declined to deal with it. Also, after receiving the notice of non-referral from the NCR, he approached the Tribunal and was informed that he was out of time as he had 20 days to file a direct referral. He did not submit a section 141(1) application or condonation request to the Tribunal but went straight to the High Court.

29. The applicant averred that the NCA applies to the agreements, and Nedbank acted unlawfully and circumvented the NCA. All agreements concluded post-2009 were to avoid the NCA. Nedbank had refused to give him statements for his accounts, and after receiving the statement in 2021, it declined to discuss them with him. It has been difficult for him to obtain statements to verify the arrears.

30. The applicant disputed the entries because (a) Nedbank increased the interest rate on the second account in June 2009 by 1% more than the agreed rate contrary to section 90(2) and became unlawful in terms of section 103(4); (b) Nedbank failed to credit the statement with the purchase price (of R1 320 000 in 2011) for the property in Carnegie Park, which was unlawfully sold; (c) Lowndes & Dlamini Attorneys' invoiced unjustifiable legal fees, which were debited on the second account of +-R800 000 for 2009 until 2016; Nedbank could not explain the bigger amounts debited from the second account to settle the first account; (d) Nedbank changed deposits on the new statement to smaller amounts in 2021, (e) the Carnegie Park

property was sold for R1 550 000, and the amount credited on the statement is R1 209 568 on 10 October 2013; (f) statements produced at court differ from those provided in 2021; and (g) all entries made since 2005 were incorrect.

31. He requests the Tribunal to make an order directing Nedbank to (a) refund all monies received for unlawful agreements in terms of section 89(5)(b) on the two accounts; (b) refund the R341 000 deposit with interest where they changed the 2021 statement to reflect lower amounts for the Carnegie Park sale; (c) compensate him for all lost rent for the Carnegie Park property, which was R17 000 in 2012, and the Eldoraigne property, which was R12 000 in 2018; (d) compensate him the market value in terms of section 128(2) for the Carnegie Park property and the return of the Eldoraigne property; and (e) payment of R50 000 for the curtains stolen by the tenants and (f) payment of all legal fees since 2012.

32. In addition, he wants the Tribunal to direct the sheriff to pay the residue of the auction of the Eldoraigne property of R108 000 plus interest for transfer costs incurred after the 2011 judgment and R180 000 for the transfer fees paid to replace the three properties that were lost during the legal processes.

Consideration by the Tribunal

33. The Tribunal considered whether the application was properly before the Tribunal and whether it could grant the relief sought.

34. Section 115(1) deals with disputes concerning statements and provides that if a consumer has unsuccessfully attempted to resolve a disputed entry directly with the credit provider in terms of section 111 and by alternative dispute resolution under Part A of Chapter 7, they may apply to the Tribunal to resolve a disputed entry shown on a statement of account or a dispute concerning a statement of the settlement amount.

35. According to section 111(1), a consumer may dispute all or any part of any credit or debit entered under a credit agreement by delivering a written notice to the credit provider. Section 111(2)(a) states that a credit provider receiving a notice of dispute must give the consumer a written notice either explaining the entry in reasonable detail; or confirming that the statement was in error either in whole or in part and setting out the revised entry.

36. The applicant did not deliver a notice envisaged in section 111(1) to Nedbank. He received the statement in dispute in 2021 during the High Court mediation process and did not formally notify Nedbank of the disputed entries. Also, he alleged that Nedbank had previously refused to give him statements. The Tribunal finds that the applicant failed to cross this hurdle, absent the notice.

37. Regarding Part A of Chapter 7, section 134(4) provides that disputes (other than relating to sections 139-141A) involving credit providers who are financial institutions must be dealt with or referred to Ombud schemes (in terms of the Financial Services Ombud Schemes Act 2004)[2] or the Ombud with jurisdiction. Nedbank is a financial institution, which means the Ombud should have attempted alternative dispute resolution and, if it failed, issue a certificate through NCR Form 28 stating that the process had failed.

38. The applicant provided an NCR Form 28, purportedly signed by Adv Goodman, the mediator in the High Court process. Adv Goodman is not recorded in the papers as an alternative dispute resolution agent registered or accredited by the NCR. Even if he were accredited, he would not be competent to facilitate the resolution of this dispute. He lacked the authority envisaged in section 115(1). Consequently, he is not qualified to issue the section 134(5) certificate. The applicant failed to meet this second hurdle. The Tribunal noted that the NCR Form 28 bears the case number of the Western Cape High Court, which is a clear indication that Adv Goodman

[2] Financial Sector Regulations Act, 9 of 2017 (FSRA) repealed the Financial Services Ombud Schemes Act, 37 of 2004.

referred to those proceedings and not to any proceedings that had to be conducted in terms of section 111.

39. The applicant said that during the High Court mediation process, he referred the dispute to the Banking Ombud, but they declined to deal with it because the NCR found no wrongdoing. However, no record of the referral to or response from the Banking Ombud was provided to the Tribunal. As such, it was impossible to ascertain the nature of the dispute that he referred to the Banking Ombud and if it satisfied the requirement in section 134. Even if this qualified as a proper referral to the Ombud, the applicant had not complied with section 111(1).

40. The Tribunal also considered whether the application was filed with the Tribunal within the prescribed time from when alternative dispute resolution failed. Section 137(3) requires that the matter be referred within 20 days. Nedbank withdrew from the mediation on 24 March 2022. The certificate purported to be signed by Adv Goodman on 13 February 2023 reflected the certificate date as March 2022. If March 2022 is to go by, the application is out of time, and a condonation application is required.

41. The applicant has yet to show that he was unsuccessful in resolving the dispute (a) directly with the credit provider and (b) through alternative dispute resolution before approaching the Tribunal. In Sampson v Cape Town Community Housing Company (Pty) Ltd, the court stated that this is a jurisdictional pre-requisite. In Ratshikuni v FirstRand Bank Limited t/a Audi Finance Services, a division of Wesbank,[3] the Tribunal stated that a matter was not properly brought before it in terms of sections 115(1)(a) and 137 (3)(b) because the Applicant did not try to resolve the dispute through alternative dispute resolution before approaching it.

42. The Tribunal considered whether the relief sought by the applicant could be granted. Section 115(2) gives the Tribunal powers to determine the matters in dispute and

[3] (NCT/10118/2013/115(1) [2014] ZANCT 1 [5 February 2014].

make an appropriate order to correct the statement if it is satisfied that an entry or the statement amount is in error. The Tribunal is precluded from granting the myriad of relief sought by the applicant, which includes compensation and declaring the post-judgment agreements unlawful. The Tribunal is also not empowered to overturn a High Court judgment.

43. The Tribunal was concerned that this application appears to involve issues that were decided in another court (res iudicata) and/or are pending in another (lis pendens). The Tribunal does not have a complete set of papers in the Northern Gauteng High Court for the judgment of 11 March 2011 or the applicant's Western Cape High Court action. The concern is that the very issues raised by the applicant in the present proceedings before the Tribunal may have been raised in the proceedings in the High Courts.

44. Nedbank obtained a judgment in the North Gauteng High Court judgment for defaulting in payment. The applicant consented to the judgment and concluded settlement agreements where he agreed to the balances. The Tribunal would be precluded from hearing this matter if the entries disputed in this application formed part of the judgment claims and settlement agreements.

45. According to Prinsloo NO v Goldex 15 (Pty) Ltd and Another, the requirements for res iudicata are threefold, which are the (a) same parties, (b) same cause of action, and (c) same relief. The applicant would be barred from bringing to the Tribunal a subsequent action involving the same claim, demand, or cause of action where a competent court has issued a judgment. Although the applicant did not submit all the papers pertaining to the North Gauteng High Court proceedings, it appears that these entries were part of the claims made by Nedbank for the judgment. This should have brought the dispute to finality, but the applicant seemingly defaulted again, leading to his property being auctioned.

46. As indicated earlier, the applicant initiated action in the Western Cape High Court, wanting Nedbank to account for all the credits and debits on the second account.

This forms part of this application. Lis pendens is a special plea open to any party who contends that there is a legal action between the same parties concerning similar issues based on the same cause of action pending in another court or forum.

47. In the matter of Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others,[4] the Court held that, as its name indicates, a plea of lis alibi pendens is based on the proposition that the same dispute is being litigated elsewhere. However, in Loader v Dursot Brothers (Pty) Ltd,[5] the court held that the request of lis alibi pendens does not have the effect of an absolute bar to the proceedings in which the defence is raised.

48. The applicant confirmed that the matter is still in the High Court but was in abeyance pending the mediation, which Nedbank terminated on 24 March 2022. The applicant is yet to withdraw the action.

49. Unless the High Court action is removed, the Tribunal may not be able to hear this application, even if the section 115(1) requirements are met.

50. Thus, the Tribunal did not only establish compliance with the prerequisites but pointed out possible challenges for the applicant's case if the pleas of res iudicata and lis pendens were to be raised.

CONCLUSION

51. The applicant must still satisfy section 115(1) application requirements. As such, the matter is brought prematurely to the Tribunal. This may not present an absolute bar for the applicant to pursue the case. However, the Tribunal can only hear it once these prerequisites have been complied with.

[4] 2013 All SA 509 (SCA) at para 2.
[5] 1948 (3) SA 136 (T) at 139.

ORDER

52. The Tribunal accordingly makes the following order:

54.1 The applicant's application in terms of section 115(1) is dismissed; and

54.2 There is no order as to costs.

DATED IN CENTURION ON 18 MAY 2023

[Signed]
Ms. Zodwa Ntuli
Presiding Tribunal Member

Dr Maria Peenze and Mr Selwyn Hockey (Tribunal members) concur.

Authorised for issue by The National Consumer Tribunal

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