

IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: **NCT/225291/2022/141(1)(b)**

In the matter between:

RAYMOND HERBERT

APPLICANT

And

WOOLWORTHS FINANCIAL SERVICES (PTY) LTD

RESPONDENT

Coram

Adv J Simpson - Presiding Tribunal Member

Prof K Moodaliyar - Tribunal Member

Mr S Mbhele - Tribunal Member

Date of consideration (in chambers) - 12 September

2022 Date of Judgment - 12 September

2022

LEAVE TO REFER JUDGMENT AND REASONS

THE PARTIES

1. The Applicant in this matter is Raymond Herbert (“the Applicant” or “Mr Herbert”).
2. The Respondent is Woolworths Financial Services (Pty) Ltd (“the Respondent” or “Woolworths”).

APPLICATION TYPE AND JURISDICTION

3. This is an application in terms of Section 141(1) of the National Credit Act, Act 34 of 2005 (“the NCA”).
4. Section 141(1) of the NCA states the following –

“Referral to Tribunal.—(1) 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) the consumer court of the province within which the complainant resides, or in which the respondent has its principal place of business in the Republic, subject to the provincial legislation governing the operation of that consumer court; or

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

BACKGROUND

5. Mr Herbert had a personal loan with Woolworths, which he settled in full in November 2017 when he retired. Woolworths offered him a loan again in June 2018, which he utilised. He submits that the previous loan agreement was finalised, and a new agreement was concluded. Woolworths did not assess his ability to afford the new loan agreement and recklessly granted the loan. He wants the credit agreement cancelled, and all the payments refunded to him.
6. On 17 May 2021, Mr Herbert lodged a complaint with the National Credit Regulator (NCR). The NCR issued a Notice of non-referral dated 8 March 2022, stating that the complaint does not include any allegation of facts that would constitute grounds for a remedy under the NCA.
7. The NCR report states that Woolworths granted the initial credit facility in 2005 for R2000.00. The limit was increased over the years to R75 000.00 in October 2014. It remained at this limit since that time. The full outstanding balance was settled in November 2017. In July 2018, the credit facility was used again. Thereafter, Mr Herbert started defaulting on the account.

8. The report states that there is no evidence of a new credit agreement being concluded and no evidence of unlawful credit increases.
9. Mr Herbert served and filed an application with the Tribunal on 5 April 2022, requesting the Tribunal to hear his complaint.
10. On 22 April 2022, the Tribunal Registrar issued a Notice of filing to the parties. On 23 May 2022, the Tribunal Registrar issued a Notice of Set Down, advising that the leave-to-refer application would be adjudicated in chambers on 23 June 2022. The matter was not adjudicated and was reallocated for adjudication on 12 September 2022.

PROCEDURAL CONSIDERATIONS

11. In terms of section 141(1) of the NCA, the Applicant may only refer the matter directly to the Tribunal *with leave of the Tribunal*.
12. Previously, the Tribunal held a formal hearing on leave to refer with all the parties present. In the matter of *Lewis Stores (Pty) Ltd v Summit Financial Partners (Pty) Ltd and Others* (Case no 314/2020) [2021] ZASCA 91 (25 June 2021) *SAFLII*, the court provided useful guidance to the Tribunal in decisions regarding leave to refer. It held that a formal hearing on leave to refer was unnecessary, there was no test to be applied and the decision to consider leave could not be appealed. The court held -

“[15] As I have explained, the NCA provides for an expeditious, informal and cost-effective complaints procedure. Section 141(1)(b) confers on the Tribunal a wide, largely unfettered discretion to permit a direct referral. The NCA does not require a formal application to be made and it is not necessary for purposes of the present appeal, nor is it desirable, to circumscribe the factors to which the Tribunal should have regard. There is no test to be applied in deciding whether or not to grant a direct referral to it in respect of a complaint. The purpose of the provision is simply for the Tribunal to consider the complaint afresh, with the benefit of any findings by the Regulator, and to decide whether it deserves its attention. Circumstances which may influence its decision may include the prospects of success, the importance of the issue, the public interest to have a decision on the matter, the allocation of resources, the complainant’s interest in the relief sought and the fact that the Regulator did not consider that it merited a hearing before the Tribunal. The list is not intended to be exhaustive.”

13. Therefore, the Tribunal will consider the evidence available and whether leave to refer should be granted.

CONSIDERATION OF THE EVIDENCE

14. The Applicant alleges that the loan was granted recklessly in June 2018. He has not provided any evidence of the nature of the loan or the agreement. Based on the NCR's report, the loan was, in fact, an ongoing credit facility, not a new loan. There is no evidence of the Respondent offering a new credit agreement to the Applicant. There is no evidence of the loan or credit facility being closed in 2017 and an entirely new loan agreement being concluded.
15. Even if the Applicant could provide evidence of a new loan agreement being offered, the Tribunal would have to consider the affordability circumstances when the new loan was granted in June 2018.
16. Section 166¹ of the NCA states that a complaint may not be referred or made to the Tribunal more than three years after the act or omission occurred. The act that is the cause of the complaint arose in June 2018 when the Applicant alleges a new loan agreement was concluded. Three years from June 2018 is June 2021. The application was only lodged with the Tribunal on 5 April 2022, almost a year after the due date. The NCA does not provide any extension of the time based on when the consumer discovered the act or omission. The Tribunal notes that the Applicant already lodged the complaint with the NCR in May 2021. However, the high court has confirmed that the Tribunal has no power or discretion to interrupt or extend the time bar.²

CONCLUSION

17. The Tribunal finds no evidence to support the allegation of reckless lending. Further, the complaint is time-barred from being considered by the Tribunal.

¹ **166. Limitations of bringing action.**— (1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after—
(a) the act or omission that is the cause of the complaint; or
(b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.

² *First Rand Bank Ltd v Ludick A 277/2019 High Court of South Africa, Gauteng Division, Pretoria, 18 June 2020 (unreported) at para [16].*

ORDER

18. Accordingly, the Tribunal makes the following order –

18.1 The application for leave to refer the matter directly to the Tribunal is refused; and

18.2 There is no order as to costs.

THUS DONE IN PRETORIA ON THE 12TH DAY OF SEPTEMBER 2022

[signed]

Adv J Simpson
Presiding Tribunal Member

Prof K Moodaliyar (Tribunal Member) and Mr S Mbele (Tribunal Member) concurring

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

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