

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MTHATHA**

CASE NO: 1677/2014

In the matter between:

FEZILE NONGADLA

Applicant

and

STANDARD BANK (PTY) LTD

Respondent

JUDGMENT

Rugunanan J

[1] The applicant is a resident of Mthatha. In the circumstances set out below (elucidated only to the extent considered relevant for the conclusion arrived at in this judgment), he approaches this court for the enforcement of the provisions of section 111 of the National Credit Act¹ ('the Act'). He seeks an order to the effect that the delay of the respondent in giving a written notice to him in terms of section 111(2)(a) be declared unlawful. In addition he seeks further orders directing the respondent to comply with section 111(2)(a) and that it pays the costs of the application.

[2] It is not in issue that the dispute between the parties arises from transactions in the applicant's bank account facility held with the respondent. In argument the respondent impermissibly attempted, without prior compliance with rule 6(5)(d)(iii), to raise the point that the facility was not a credit agreement as defined in the Act. As the issue had not been raised in the answering affidavit nor through compliance with

¹ Act 34 of 2005

the aforementioned subrule, the matter was argued on the footing that the provisions of the Act are applicable,

[3] Section 111 of the Act provides as follows:

‘111. Disputed entries in accounts

(1) A consumer may dispute all or part of any particular credit or debit entered under a credit agreement, by delivering a written notice to the credit provider.

(2) A credit provider who receives a notice of dispute in terms of subsection (1) -

(a) must give the consumer a written notice either –

(i) explaining the entry in reasonable detail; or

(ii) confirming that the statement was an error either in whole or in part, and setting out the revised entry; and

(b) must not begin enforcement proceedings on the basis of a default arising from the disputed entry –

(i) until the credit provider has complied with paragraph (a); or

(ii) at any time that the matter is under alternative dispute resolution procedures, or before the Tribunal in terms of section 115.’

[4] Section 115 of the Act deals with disputes arising from statements. The section reads as follows:

‘115. Disputes concerning statements

(1) A consumer who has unsuccessfully attempted to resolve a disputed entry directly with the credit provider in terms of section 111, and through alternative dispute resolution under Part A of Chapter 7, may apply to the Tribunal to resolve –

- (a) a disputed entry shown on a statement of account; or
- (b) **a dispute concerning a statement of the settlement amount.**

(2) If the Tribunal is satisfied that an entry, the settlement amount, as shown on a statement is in error, the Tribunal may determine the matters in dispute and may make any appropriate order to correct the statement that gave rise to the dispute.'

[5] Quoting directly from the founding affidavit, the applicant makes the following averments (all *sic*):

'4. On 30th April 2014 I was at respondent's Northcrest Spar automated teller machine (ATM) for statement enquiry and cash withdrawal, and my card was swallowed by the machine at about 19h50. When I was in the process of reporting the incident through the toll free numbers pasted on the machine, an ATM withdrawal at BP garage, Norwood Mthatha was effected and subsequent thereto a card purchase at Sutherland spar Mthatha was made. I may mention that no one used the machine as I was standing and or working on it. I may further mention that I had an in contact or notify me agreement with the respondent where every transaction is reported on my cell phone. The aforesaid two transactions reported on my cell phone when I was still at the ATM trying to get hold of the respondent for the stopping of the card. Respondent's telephone took a very long time to be held by the respondent's consultants.

4.1 It became clear that my account aforesaid was debited with an amount of R8 299 and that amount to me is unknown.'

[6] I pause to state it is common cause that the applicant's legal representatives pursuant to the provisions of section 111(1) of the Act delivered a written notice dated 2 June 2014 to the respondent. The notice reflects that the applicant's bank card was swallowed at about 19h50 on 30 April 2014 and what followed were a

series of two transactions for the sum of R8 299.00 that were effected against his bank account. The notice formulates the dispute in the following terms:

'We now demand, duly instructed by our client, a written notice either explaining the entries in reasonable detail or confirming that the statement was an error either in whole or in part, and setting out the revised entry.'

[7] In answer, (and omitting irrelevant wording) the deponent on behalf of the respondent states:

'11. Ad paragraph 4 to 4.1 – The contents of these paragraphs are denied ...

11.1 It appears that the applicant's disputed transactions occurred at the following times:

R5 000.00 – 30 April 2014 at 19:02 pm; and

R3 299.00 – 30 April 2014 at 19:09 pm.

11.2 The applicant avers that his card was swallowed by an automated teller machine on 30 April 2014 at about 19:50 pm.

11.3 It appears that the applicant placed a call to the respondent's call centre reporting the incident after the card was allegedly swallowed and, more importantly, after the transactions had taken place.

11.4 The above had already been communicated to the applicant in various correspondences during the period 2014 and 2015 geared towards settlement of the matter.'

[8] Elsewhere in the answering affidavit it is stated that:

'12. ... the applicant had made a fraud claim for the disputed transactions in the total amount of R8 299.00';

And

‘12.1. On or about 17 May 2014 [his] fraud claim was declined as the applicant was a victim of a card swop and that incident was reported late.’

[9] At this point, I refer to an item of correspondence dated 14 October 2014 from the respondent’s attorneys to the applicant’s attorneys. Therein the respondent proffers the detail set out in paragraphs 11.1 to 11.4 of its answering affidavit, and further points out that the applicant’s attempt at contacting its call centre ‘was successful at 19h26 and his card was subsequently stopped’.

[10] In his replying affidavit the applicant states:

‘19. Contents of paragraph 11 of answering affidavit is denied. Firstly the time stated herein is not consistent with the time alleged in my founding affidavit. The time alleged in my founding affidavit is consistent and or reflected in my in contact or notify me facility in my cellphone. Transaction detail information which is a computer generated printout, does not even deal or reflect the transaction of R5 000.00. There is no confluence between the transaction report and the allegations in this paragraph.’

[11] The applicant goes on further to state:

‘23. Paragraph 12 of answering affidavit is denied. There is no evidence that my card was a subject of card swop especially from transaction detail information. In fact after my card was swallowed, I never received any card from the machine or anyone. No card swopping took place. Accordingly, the respondent had not given any reasonable explanation. It is not clear where the respondent got this information. An inescapable thought is that respondent’s machine was used by scammers to clone consumers’ cards and I was a victim of a scam.’

[12] In a further letter dated 4 February 2015 from the applicant’s attorneys the applicant adopts a change in stance in the following terms (all *sic*):

‘Our client’s notice of motion requires your client to give our client a notice either explaining the disputed entries in “reasonable detail”. Your client’s refusal to give us ATM number and the call log is unreasonable.’

[13] It is apparent that the issue relating to the ATM number and call log was not pertinently raised in the applicant’s founding affidavit nor in his notice of 2 June 2014. Obvious from the wording of the notice is the time of retention of the applicant’s bank card followed by the alleged transactions. That was the issue identified by the applicant (both in his founding affidavit and in his notice). The respondent directly addressed the issue by identifying the time at which the transactions were effected and by identifying the time at which the applicant’s card was stopped.

[14] Considered in the proper context of the dispute identified by the applicant in his notice of 2 June 2014, the respondent complied with its statutory obligation to proffer reasonable detail in response thereto.

[15] The belated demand for the ATM number and the call log is considered disingenuous. It was on the basis of this demand that the application was set down and argued on the statutory premise that the applicant seeks compliance with section 111(2)(a) of the Act. My sense is that the submission by respondent’s counsel that the matter has become moot is not without merit.

[16] The excerpts are quoted above to lay emphasis on the principle that in motion proceedings affidavits constitute both the pleadings and the evidence and the issues and averments in support of the parties’ cases should appear clearly therefrom². In motion proceedings a court will look at the founding affidavit to determine what the complaint is – and as has been said in many cases an applicant must stand or fall by his founding affidavit³. Put another way, an applicant must make out his case in the founding affidavit – it must contain sufficient facts in itself upon which a court may find in the applicant’s favour. The contemporary view articulated by the Constitutional

² *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA) at 200D.

³ *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-636B.

Court in *South African Transport and Allied Workers Union and another v Garvas and others*⁴ is that holding parties to their pleadings is not pedantry – it promotes legal certainty so that an opposing party must know what case it is required to meet.

[17] On the facts, the applicant's case is that his card was swallowed at about 19h50 and the transactions occurred while he was in the process of contacting the call centre. On the version of the respondent the transactions occurred at 19h02 and 19h09 and the applicant's ATM card was stopped or cancelled at 19h26 – all of which occurred before the card was swallowed and before he attempted to report the issue. A feature of the applicant's reply is that he does not deny that he was the victim of a card scam irrespective of whether his bank card was swopped or cloned. In addition, he expressly affirms what is stated in his founding affidavit regarding the time of occurrence and sequence of events, presumably intended to illustrate the improbability of the respondent's version.

[18] On the material before this court, the applicant is bound by what is stated in his founding affidavit and there is clearly a dispute of fact between the parties' respective versions.

[19] Tritely, motion proceedings are not designed to determine disputes of fact upon the basis of probabilities.⁵ Central to the character of motion proceedings is that the evidence is placed before the court in the form of affidavits containing factual allegations made under oath. The factual allegations cannot be evaluated in any manner other than in accordance with the *Plascon-Evans*⁶ rule unless the matter is referred for the hearing of oral evidence. The affidavits are not devices for communicating submissions on the improbability that factual averments contained in the affidavits deposed to by an opponent are incorrect or untrue.⁷

⁴ 2013 (1) SA 83 (CC) para 114.

⁵ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26.

⁶ *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

⁷ *National Director of Public Prosecutions v Nqaba Mpahlwa* [2020] ZAECHMHC 18 para 21.

[20] In adopting the approach in *Plascon-Evans*, the version of the respondent that the disputed transactions took place before the card was reported should be accepted.

[21] That approach is dispositive of the merits of the matter.

[22] A further aspect of the matter raised *in limine* by the respondent is that this court has no jurisdiction to deal with the matter as a forum of first instance.

[23] Section 115 of the Act deals with disputes concerning statements. In terms of the section a consumer who has unsuccessfully attempted to resolve a disputed entry directly with the credit provider in terms of section 111, and through alternative dispute resolution, may apply to the Tribunal to resolve –

- (a) a disputed entry shown on a statement of account; or
- (b) a dispute concerning a statement of the settlement amount.

[24] In respect of any dispute between a credit provider and a consumer, the parties are enjoined by Section 134(4) of the Act – before either one of them ‘may apply directly to the Tribunal⁸’:

- (a) to attempt to resolve the matter directly between themselves; and
- (b) if unable to do so, must refer the matter to the ombudsman with jurisdiction; or
- (c) an alternative dispute resolution agent.

[25] In terms of section 148(1) of the Act a party (referred to as ‘a participant’) in a hearing before a single member of the Tribunal may appeal to a full panel of the Tribunal.

[26] Section 148(2) provides that a party in a hearing before a full panel of the Tribunal may apply to the High Court to review the decision of the Tribunal, or appeal to the High Court against the decision of the Tribunal.

⁸ i.e. the National Consumer Tribunal established by section 26 of the Act.

[27] For purposes of rationalising its argument the respondent accepts albeit without conceding that the applicant has ‘unsuccessfully attempted to resolve a disputed entry directly with the credit provider’. In that event its counsel submitted that the applicant was obliged to approach the Tribunal provided that there has been prior compliance with section 134(4) of the Act.

[28] In support of its argument the respondent contended that the present case in which the applicant seeks compliance with section 111(2)(a) is administrative. It is analogous to a situation contemplated by the amended section 71 of the Act where a consumer applies for a clearance certificate relating to a debt rearrangement and the debt counsellor either decides not to issue the certificate or fails to do so. In this scenario the consumer may apply to the Tribunal to review that decision and if the Tribunal is satisfied that the consumer is entitled to the certificate it may order the debt counsellor to issue it.

[29] It was held in *Du Toit v Benay Sager t/a Debt Busters and Others*⁹ that the process set out in section 71 is administrative and not judicial. It is only the Tribunal that is empowered to assist the consumer at first instance – the Act does not afford the High Court the jurisdiction to deal at first instance with matters falling within the province of the Tribunal. The role of the High Court in the legislative scheme is limited to dealing with judicial reviews of, or appeals from, the decisions of the Tribunal.

[30] With regard to the above it is edifying to repeat in full the reasoning and pronouncement of the court in *Du Toit*:

‘[27] In my view, the general thrust of the NCA, and in particular the consumer credit policy under Chapter 4, places the primary jurisdiction of consumer rights, consumer credit records and over-indebtedness and reckless credit, in the debt counsellor, National Credit Regulator, the Tribunal and the Magistrate’s Courts, the latter two being subject to the supervision and inherent jurisdiction of the High

⁹ [2017] ZAWCHC 141 para 17.

Courts. The nature of the work set out for a debt counsellor, the NCR or the Tribunal in such circumstances, in my view, is necessary for a credible market place. Such an investigation cannot be avoided by simply crying lacunae and running to the High Courts, and thereby avoiding a proper investigation by the debt counsellor, the NCR or the Tribunal into the credibility of the information that sustains the alleged change in the financial position of a consumer. Under the circumstances, in my view, there is no good cause for the quantum leap out of the domestic remedies available to the applicant by statute, into the recourse to the courts, until the final stage and until the applicant has exhausted his statutory remedies. The application to the High Court is premature.

[28] It follows, in my view, that the High Court is not the forum of first instance on matters which both the Tribunal and the Magistrate's Courts should deal with. Under circumstances where there are various Tribunal's under the NCA are open to an applicant, it is preferable that the intervention of the High Court be deferred until the domestic remedies provided for in the NCA have been exhausted, unless the very complaint is the legality of fundamental irregularity of the decision sought to be challenged (*Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 501C-503H).

[29] Where the legislature has spared the High Courts from such primary tasks as a form of first instance in such elementary investigations, in my view, that ordination should not be departed from at the slightest indication and for light and flimsy reasons. The applicant had an option to simply challenge the information held by the credit bureau, and if the credit bureau did not remove the information, it would have led to an investigation of his true financial position by the NCR leading up to, if needs be, the full panel of the Tribunal deciding the matter. There is no explicable reason given by the applicant as to why this path was not followed. Secondly, the refusal of the first respondent to issue the applicant with a clearance certificate is a decision that is reviewable by the Tribunal. There is no reason advanced as to why the applicant did not approach the Tribunal for intervention.'

[31] The approach in *Du Toit* was adopted and followed by the full Court of this division in *Transunion Africa (Pty) Ltd v Ngcenge*¹⁰.

[32] The applicant meets the argument *in limine* with a two-fold contention. In the first instance it is argued that there has been non-compliance by the respondent with its statutory obligation to have given him a written notice as contemplated by section 111(2). Taken further, the argument is that there has been a breach of a statutory duty rendering it a legality issue which invokes the jurisdiction of this court to adjudicate the matter and afford redress.¹¹ Having found that the respondent proffered reasonable detail the implicit conclusion in my view is that it has complied with its statutory obligation. The legality argument does not assist the applicant.

[33] The applicant argues in the second instance that section 115 of the Act is couched in permissive language. Accordingly, it does not oust the jurisdiction of this court to adjudicate the matter.

[34] In *Helen Suzman Foundation v Speaker of the National Assembly and Others*¹² the court approved the *dictum* explained as follows by the Appellate Division in *Schwartz v Schwartz*¹³:

‘A statutory enactment conferring a power in permissive language may nevertheless have to be construed as making it the duty of the person or authority in whom the power is reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied. Whether an enactment should be so construed depends on *inter alia* the language in which it is couched, the context in which it appears, the general scope and object of the legislation, the nature of the thing empowered to be done and the person or persons for whose benefit the power is to be exercised.’

¹⁰ [2021] ZAECHCMC 40

¹¹ Reliance in this regard is placed on *MEC for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) para 103, where it is stated: ‘The courts alone, and not public officials, the arbiters of legality’ and at footnote 78 of the judgment where reference is made to *The Master of the High Court (North Gauteng High Court, Pretoria) v Motale NO and Others* 2012 (3) SA 325 (SCA) for authority for the proposition that ‘The court as the font of legality, has the means itself to assert the dividing line between what is lawful and not lawful.’

¹² [2020] ZAGPPHC 574 para 50.

¹³ 1984 (4) SA 645 (AD) at 650.

[35] As the applicant's complaint is purely administrative in nature he was bound to follow the course ordained in section 115 of the Act which he has failed to do. In the circumstances, the pronouncements in the *dicta* cited in the preceding paragraphs impel me to the conclusion that this court has no jurisdiction to hear the matter.

[36] I consider as well that this court to be bound by the Full Court in *Ngcenge* – but should I be mistaken, the application nonetheless falls to be dismissed on its merits.

[37] There remains the outstanding issue relating to costs. I do not intend belabouring this judgment with factual minutiae. This application was issued on 26 June 2014. Following an order granted on 26 April 2022 the matter was removed from the unopposed roll where it had been enrolled as an uncontested opposed matter. The order directed the respondent to file its answering affidavit on or before 17 May 2022. The order is silent on whether condonation was granted to the respondent. The costs of the hearing of 26 April 2022 were reserved. The respondent complied with the order whereafter the matter proceeded to argument on the opposed motion court roll on 3 November 2022 with condonation being granted for the purpose of finality in the matter in the interests of justice.

[38] In the period between 26 June 2014 and 26 April 2022 – a hiatus of almost 8 years – the applicant similarly defaulted by failing to take steps to have the matter set down for hearing on an expedited basis in accordance with rule 6(5)(f)(i) of the Uniform Rules of Court. Overall, the respondent contended for the reserved costs to be declared costs in the cause and that such costs be punitive on the basis that the applicant's legal representative had first-hand knowledge of the decision in *Ngcenge* in which the said representative appeared in that matter. It was also contended that the denial on oath by the applicant of the establishment of the Tribunal (i.e. the National Consumer Tribunal) as a mechanism for giving effect to section 115 of the Act was 'shocking'. Although these submissions were not countered in replying argument, neither party took this court into their confidence by unequivocally explaining their default in the conduct of the matter. The court nonetheless derived

assistance from the parties' legal submissions on the material raised on the merits, as well as their submissions *in limine*.

[39] The principle that costs should follow the result must therefore apply, though I think it is eminently sensible in the exercise of my discretion on the question of the reserved costs to make the order reflected below.

[40] In the result, I make the following order:

1. The application is dismissed with costs.
2. Each party shall pay their own costs in respect of the reserved costs attendant on the order of 26 April 2022.

M. S. RUGUNANAN
JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant:

A. S. Zono
A. S. Zono & Associates
Mthatha
Tel: 083 364 3515 or 047- 532 4263
Email: zono@telkomsa.net
aronsiphozono@gmail.com
(Ref: Mr Zono)

For the Respondent:

Instructed by

D. C. Bothma
Venter & Associates Inc.
Blackheath
(Ref: H. Aravelo)
Tel: 087 945 0300
Email: helen@venterinc.co.za
c/o Drake Flemmer & Orsmond Attorneys
Mthatha

Date heard: 03 November 2022.

Date delivered: 02 February 2023.