

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE HIGH COURT-MTHATHA)**

Case No: 2866/11

Date heard: 14 September 2013

Judgment Delivered: 11 July 2013

In the matter between:

SAKHELE PRECIOUS NKUME

Applicant

and

**TRANSUNION CREDIT BUREAU
(PTY) Ltd**

1st Respondent

PRESLES (PTY) Ltd

2nd Respondent

JUDGMENT

DUKADA J:

[1] Applicant instituted these proceedings seeking mainly the following orders:-

- (i) That the first respondent's action of retaining in its records adverse information concerning applicant be declared unlawful, invalid and of no force and effect;
- (ii) That the second respondent's action of submitting or reporting adverse information concerning applicant to the first respondent be declared unlawful, invalid and of no force and effect;
- (iii) That the respondents be directed to expunge forthwith or cause to be expunged from the first respondent's records adverse information concerning applicant;
- (iv) That the respondents be ordered to pay costs of this application, jointly and severally, the one paying the other to be absolved.

[2] The application is vigorously opposed by the 2nd respondent, and it was withdrawn later against the first respondent for the reasons that will be dealt with later in this judgment.

[3] The background facts of this matter are largely common cause. During July 2006 the applicant entered into an agreement with the second respondent in terms of which the second respondent would supply goods to the applicant, which would be paid for by the applicant. Some goods were then supplied by the second respondent to the applicant in terms of the said agreement. Second respondent later instituted legal proceedings against the applicant for the recovery of moneys due and owing in respect of goods supplied by her to applicant. A default judgment against the applicant and in favour of the second respondent was granted.

It is this judgment by default which was later submitted to the first respondent who recorded it in her records.

Applicant got to know of this default judgment against him when he applied for a credit facility with the African Bank Limited. Applicant later successfully applied for the rescission of that default judgment. There is a

dispute of fact between the applicant and the second respondent about whether or not applicant owed the money involved in that default judgment, however, that is not an issue for the purposes of this judgment. After the default judgment was rescinded the applicant communicated with the first respondent to expunge the information about the default judgment in her records but the first respondent did not do so timeously as a result the applicant had to launch this application. Later the first respondent expunged the information about the default judgment in her records. Applicant subsequently filed a Notice of Withdrawal withdrawing this application with the second respondent to pay costs of this application.

ISSUES

- [4] The adverse information that the applicant mainly complained about has now been expunged by the first respondent. It seems to me that the merits in the orders mentioned in paragraph 1 above are live only for the question of costs.

Sometimes a judgment for costs involves a decision on the merits (see Bedeaux v McChesney 1939 WILD 128 at 132; Develing v Central White Lime Works 1912 WLD; Cats v Cats 195 (4) SA 375 © 379 and Anthony Johnson Contractors (Pty) Ltd v D' Oliveira 199 (4) SA 728 (C) 733 C-D).

In order to find justification for second respondent to be ordered to pay costs of this application, in my view, I have to establish whether second respondent supplied the adverse information to the first respondent and, if so, whether such conduct was unlawful.

- [5] Mr D.C Botma, Counsel for the second respondent, has argued that there is no allegation in applicant's founding affidavit that it was the second respondent who supplied the adverse information to the first respondent. He contended that the whole case of the applicant against the second

respondent is based upon an inference drawn by him that it was the second respondent who submitted the information.

He submitted that in the absence of such an allegation, the applicant has failed to prove a case against the second respondent and that there exists no grounds for a costs order to be awarded against the second respondent.

Mr Zono, attorney for the applicant, in response, argued that it is clear from the papers that the second respondent reported adverse information concerning the applicant. He referred to paragraph 6.2 of Applicant's founding affidavit which states:-

"It is therefore clear from the provisions of paragraphs 5 and 6 above that the second respondent's actions of submitting adverse information concerning me were/are unlawful." He further referred to a letter from the first respondent to Applicant's attorneys, annexed to the applicant's replying affidavit, which states:-

"We have investigated the allegation regarding the default notation submitted by Presles and they have informed us that your client had only one account with them under account number UH 4421; they further confirmed that they had incorrectly listed the default notation electronically against your client and have instructed us to remove it, which we have duly done."

Mr Zono further argued that there is no denial in the whole tenor of the second respondent's answering affidavit that the second respondent did not report or submit adverse credit report about the applicant to the first respondent.

Mr Botma, in reply, argued that it is trite law that an applicant must make out her case in the founding affidavit and that a replying affidavit is not the place where defects can be cured. He submitted further that the letter from the first respondent is not "evidence" that can be regarded as proof of the fact.

- [6] Further to the extracts from the applicant's founding affidavit to which Mr Zono has referred to, the applicant states as follows in paragraph 3.2 of his founding affidavit:-

"I emphasize that I did not owe the second respondent at the time I was reported by the second respondent to the first respondent or at any time to have defaulted fulfilling my contractual obligations with the second respondent."

In paragraph 5.1 of applicant's founding affidavit, he states:-

"I make this submission against the second respondent that it failed to give me its notice of intention to submit the adverse information concerning me to the first respondent, and it further failed to give me a copy of information as it has failed to notify me."

- [7] Mr Botma is correct in his submission that *"it is trite law that an applicant must make out its case in the founding affidavit"*

Diemont JA put this point aptly as follows in Director of Hospital Services v Mistry.¹

"When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in Pountas' Trustee v Lahanas 1924 WLD 67 at 68 and as has been said in many other cases: '.....an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein,

¹ 1979 (1) SA 626 (A) at 635 H-636 A

*because those are the facts which the respondent is called upon either to affirm or deny.’ ”*²

It lies, of course, in the discretion of the Court in each particular case to decide whether the applicant’s founding affidavit contains sufficient allegations for the establishment of his case.³

- [8] Reverting to the case at hand, in my view, although the applicant does not specifically, clearly and separately set out his complaint against the second respondent, he, however, discloses his complaint or cause of action in the extracts from his founding affidavit quoted above. Except to aver that the applicant has failed to allege that it is the second respondent who delivered the adverse information regarding the applicant to the first respondent, the second respondent fails to deny or admit that allegation specifically in her answering affidavit.

As far as the letter by the first respondent to the applicant’s attorneys which was annexed to applicant’s replying affidavit, its contents stating that it was the second respondent who submitted the adverse information, in my view, such contents merely expand on the complaint set out by the applicant in his founding affidavit in response to the second respondent’s allegations in her answering affidavit.

The second respondent was expected to admit or deny or confess and avoid the allegations in the applicant’s founding affidavit.

In my view, the second respondent has raised no dispute of fact on the applicant’s complaint or cause of action against her, which she could have done in a number of ways.⁴

² See also *Titty’s Bar and Bottle Store (Pty) v ABC Garage (Pty) Ltd* 1974 (4) SA 362 (T) at 369 A; *Sheperd v Mitchell Cotts Seafreight (SA) (Pty) Ltd* 1984 (3) SA 202 (T) at 205 E; and *Bowman NO v De Souza Roldeo* 1988 (4) SA 326 (T) at 327 D- 328 A.

³ See *Titty’s Bar* case, *supra* at 369 A-B

⁴ See *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 in fin

- [9] Section 72 of the National Credit Act 34 of 2005 (NCA) gives to consumers right to access and challenge credit records and information. Subsection (1)(a) provides:-

“Every person has a right to be advised by a credit provider within the prescribed time before any prescribed adverse information concerning the person is reported to a credit bureau, and to receive a copy of that information upon request.”

Regulations 17(3) of the NCA includes “*default*” as one of the adverse classifications of consumer behaviour. Consequently, in my view, the adverse information complained about by the applicant falls within the definition in section 17(3).

- [10] Regulation 19 of the NCA provides for the submission of consumer credit information to the credit bureau. Sub-regulation 4 provides:-

“All sources of information as set out in Section 70(2) of the Act and Regulation 18(7) must give the consumer at least 20 business days notice of its intention to submit the following adverse information concerning that person to a credit bureau:-

(a) Classification of consumer behaviour, including classifications such as ‘deliquent’, ‘default’, ‘slow paying’, ‘absconded’ or ‘not contactable’.”

Thus, in my view, in terms of this sub-regulation the second respondent, being the credit provider, should have given the applicant, being the consumer, notice of her intention to submit the adverse information, viz default, concerning the applicant, to the credit bureau, namely the first respondent. The legislature used the word “*must*” in regulation 19 (4) which, in my view, makes that requirement to be peremptory in respect of the credit provider. Consequently, in my view, the second respondent flouted the said peremptory legal provision and such conduct was

unlawful. This is re-inforced by the view (which I agree with) that the NCA is consciously constructed and designed for the protection of consumers.⁵ And if not, how can the consumer get the opportunity to challenge the credit information if he is not notified by the credit provider of its intention to submit the adverse information concerning the consumer to the credit bureau prior to sub-submission as required by the said Regulation 19. In the circumstances, I am of the view that the second respondent has to shoulder some costs in this matter.

- [11] Regarding costs vis-à-vis the first respondent, section 70(2) (f) obliges the credit bureau to promptly expunge from its records any prescribed consumer credit information that, in terms of the regulations, is required to remove from its records.

The first respondent was advised of the rescission of the default judgment by the applicant's attorneys per the letter dated 28 March 2011 which was telefaxed on 11 April 2011 to a correct address given by the first respondent.

After some correspondence and communication between the applicant's attorneys and the first respondent, the latter advised the applicant's attorneys per their letter dated 12 December 2011 that they have removed the adverse information. The papers in this matter were served upon the first respondent on the 6 December 2011. From the date of the letter advising the first respondent about rescission of the default judgment, it took about eight months for the first respondent to expunge the adverse information from her records. In my view, the first respondent failed to act promptly in expunging the adverse information from her records as required by Section 70(2)(f) of the NCA. Had the first respondent acted promptly these legal proceedings would have been avoided.

⁵ See *First Rand Bank Limited v Dhlamini* 2010 (4) SA 53 (GNP) at para 29; *Absa Bank Ltd v Proshaska t/a Bianca Cara Interiors* 2009 (2) SA 512(D) at para 56; and *Zokufa v Compuscan* 2011 (1) SA 272 (ECM) at para 102

In the circumstances, I am of the view that part of the costs in this matter have to be borne by the first respondent.

But as far as the second respondent is concerned, she opposed the application, filed answering affidavits and argued this matter, as a result this application was prolonged longer than necessary. Had the second respondent not persisted in his opposition after delivery of the notice of withdrawal against the first respondent, this matter would have ended there.

In my view, therefore, the second respondent should carry the full costs of this application but share them jointly and severally with the first respondent only up to the stage when Notice of Withdrawal of this application against the first respondent was delivered.

- [12] Mr Zono has applied for costs to be awarded against the second respondent on an attorney and client scale. He submitted that this matter should not have come to this Court for determination and it should have been settled between the parties.

It is trite law that an award of attorney and client costs are not granted lightly. Such order is granted by reason of some special considerations arising either from the circumstances which gave rise to the action or from the conduct of the losing party. The list is not exhaustive⁶. Although the second respondent has unnecessarily protracted this application, I am not persuaded that there are any special circumstances in the present case which justify such special costs order.

- [13] In the circumstances, the following order shall issue:-

⁶ Rautenbach v Symington 1995 (4) SA 583 (O) at 588 A-B

- (i) The action of the second respondent of submitting or reporting adverse information concerning the applicant to the first respondent is hereby declared unlawful;
- (ii) First and second respondents are ordered to pay costs of this application jointly and severally, the one paying the other to be absolved, up to and including the date of the delivery of the Notice of Withdrawal of this application against the first respondent, and the second respondent is ordered to pay costs of this application incurred after the delivery of the aforementioned Notice of Withdrawal. All such costs are to be paid on a party and party scale.

D.Z. DUKADA
JUDGE OF THE HIGH COURT

Appearances

For the applicant	:	Mr A.S. Zono Instucted of A.S. Zono Attorneys MTHATHA
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For the 2nd Respondent :

Adv Botma Instructed by
Smith Tabata Inc
MTHATHA