

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE HIGH COURT: MTHATHA

CASE NO: 2743/11

Heard on: 06/03/12

Delivered on: 15/03/12

In the matter between:

SAKHELE PRECIOUS NKUME

Applicant

and

FIRSTRAND BANK LIMITED t/a

FIRST NATONAL BANK

Respondent

JUDGMENT

NHLANGULELA J:

[1] In these proceedings, the applicant seeks an order of specific performance in terms of s 62 of the National Credit Act No. 34 of 2005 (the Act), which reads:

“Right to reasons for credit being refused. –

1) On request from a consumer, a credit provider must

advise that consumer in writing of the dominant reason for-

- a) refusing to enter into a credit agreement with that consumer;
- b) offering that consumer a lower credit limit under a credit facility than applied for by the consumer, or reducing the credit limit under an existing credit facility;
- c) refusing a request from the consumer to increase a credit limit under an existing credit facility; or
- d) refusing to renew an expiring credit card or similar renewable credit facility with that consumer.

2) When responding to a request in terms of subsection (1),__

a credit provider who has based its decision on an adverse credit report received from a credit bureau must advise the consumer in writing of the name, address and other contact particulars of that credit bureau.

- 3) On application by a credit provider, the Tribunal may make an order limiting the credit provider's obligation in terms of this section if the Tribunal is satisfied that the consumer's requests for information are frivolous or vexatious."

[2] It is not in dispute that the applicant is a consumer and the respondent a credit provider in terms of s 1 of the Act.

[3] On 27 October 2011 the applicant lodged an application with the respondent for a credit facility through one Ms Unathi Msomi, the consultant of the respondent, at York Road, Mthatha. After processing the application in the computer Ms Msomi advised the applicant that the information obtained from the credit bureau showed that the applicant had an adverse credit record, and for that reason the applicant must first sort out her financial difficulties and then re-lodge her application for an assessment to be made if she qualifies for a credit facility with the respondent bank. Aggrieved with such information the applicant requested to be furnished with reasons for a refusal of her application incorporating the name, address and the contact particulars of the credit bureau. The applicant states on

affidavit that at the time of making the application she had neither received summons from any of her creditors nor was there any judgment and a writ of execution issued by a court of law against her for failing to pay. She had neither applied for an administration order nor had she been sequestered due to being indebted to any creditor.

[4] The respondent still refused to give written reasons and/or disclose to the applicant the particulars of the credit bureau as sought by the applicant. It is obvious from the injunction created by the legislature in the provisions of s 62 of the Act that the applicant was entitled to make the request as she did and that the respondent was obliged to do what the applicant wanted.

[5] The applicant immediately on the same 27 October 2011 instructed attorneys to issue a demand to the respondent in the following terms, *inter alia*:

“We now demand, duly instructed by our client, a dominant reason for your institution’s refusal to enter into a credit agreement with our client. In the event that your institution based its decision on an adverse credit report received from a credit bureau, kindly advise us in writing of the name, addresses (physical) telephone, telefaxes and other contact

particulars of that credit bureau. Should we not receive the aforesaid information in the form suggested above on or before five (5) calendar days hereof, we shall have no option but to approach the High Court for an appropriate order. Enclosed herewith please find our client's power of attorney."

This demand was received by the respondent on 28 October 2011 at 09h30.

[6] When the information sought was not forthcoming, the applicant brought this application on 04 November 2011 seeking a relief as follows:

- "(1) That the respondent be and is hereby directed to forthwith advise applicant in writing of its dominant reason for refusing to enter into a credit agreement with him.
- (2) In the event that the respondent is basing its decision on an adverse credit report received from a credit bureau, the respondent be and is hereby directed to advise the applicant in writing of the names, addresses and other particular, including but not limited to telefax and telephone numbers of those credit bureau.

- (3) That the respondent be and is hereby ordered to pay costs of this application on an attorney and client scale.”

[7] The relief sought is opposed by the respondent. To that end it filed an opposing affidavit. On 07 November 2011 the respondent replied to the demand by furnishing the information sought by the applicant despite the said opposition.

[8] On the same 07 November 2011 the applicant asked the respondent to tender full costs of the application. The respondent turned down that request, but on the 14 November 2011 it counter-offered to pay limited costs in the sum of R1 000,00. These costs were not defined. The applicant rejected the counter offer as being unreasonable.

[9] It would then appear that the real issue for determination is one of costs. To that end I must have regard to all the affidavits filed towards the *merits* of the application. Of course there will be no need for the Court to decide who the winner is as the *merits* of the application have become academic. See: *Gamlan Investments (Pty) Ltd and Another v Trillion Cape*

(Pty) Ltd and Another 1996 (3) SA 692(C) at 700G-J. The proper approach is to utilize the materials available and decide the issue of costs on broad general lines and not the lines that would necessitate a full hearing of the merits that have already been settled. See: *Jenkins v SA Boiler Makers, Iron & Steel Workers & Ship Builders Society* 1946 WLD 15, *Gamlan, supra*, at page 701A-C and *Nxumalo And Another v Mavundla And Another* 2000 (4) SA 349 (D) at page 355F. In the circumstances the universal rule that a party who succeeds should be awarded costs cannot apply. In the exercise of the Court's discretion, I have to consider the manner in which the parties conducted themselves in this application, both before and after the application was brought. See: *First National Bank of Southern Africa t/a Wesbank v First East Cape Financing (Pty) Ltd* 1999 (4) SA 1073 (SE) at 1079-1080. And see generally: *Herbestein and Van Winsen, The Civil Practice of the High Courts in South Africa*, 5th Edition at 961; *Union Government (Minister of Railways and Harbours) v Heiberg* 1919 AD 477 at 484; *Griffiths v Mutual & Federal Insurance Co Ltd* 1994 (1) SA 535 (A) at 549A-D; *Graham v Odendaal* 1972 (2) SA 611 (A) at 616. I must also consider which of the parties took unnecessary steps or adopted a wrong procedure, any misconduct by a party and any other relevant factors. See: *De Villiers v Union Government (Minister of Agriculture)* 1931 AD 206 at

214.

[10] The respondent averred in the answering affidavit that due to some “far more pressing issues” it could not comply with the applicant’s request before 07 November 2011. It then raised legal defences to the relief sought that, in any event, since the conduct of the respondent was an administrative act which is governed by the provisions of the Promotion of Administrative Act No. 3 of 2000 (PAJA) under which the applicant had to bring the application within 180 days, the application was brought prematurely and, for those reasons, the applicant must be deprived of the costs.

[11] *Mr Botma*, counsel who appeared on behalf of the respondent, pinned his faith on the case of *Simon Dlepu v South African Social Security Agency* Case No. 1124/11 (ECM) dated 22 November 2011 (unreported) contending that the judgment in *Dlepu* is the applicable authority in this case. The case of *Dlepu* was decided on the facts. There, the applicant applied for and was granted a disability grant on 23 February 2011 but payment therefore was not made until the applicant launched an application in court on 16 May 2011 for payment to be made. Payment was made on 03 June 2011 during the existence of the application. However, on 06 May 2011 and prior to the launching of the application the respondent addressed a letter to the

applicant advising that it was not yet able to pay as the files of the applicant were still being considered for verification that the earlier decision not to pay had been subsequently rescinded by the appeal tribunal. On the interpretation of such a letter the court found that the delay in paying on 03 June 2011 was not unreasonable. Consequently the application was dismissed with costs.

[12] In this case the respondent did not explain its delay in responding to a demand for information until the application was brought and litigation costs incurred thereby. In my view it did not avail the respondent to remain supine on the face of a legal demand and only to respond when the application had been brought. The conduct of Ms Msomi, acting for the respondent, was unbecoming and it ought to be viewed as a complete disregard of the rights of the applicant in terms of s 62 of the Act. The reason that “far more pressing issues”, without more, made it impossible for a response to be given before 04 November 2011 is inadequate.

[13] It was submitted by *Mr Zono*, who appeared on behalf of the applicant, that the applicant’s claim, as pleaded and explained in the founding affidavit, is not founded on PAJA. He argued strenuously that

where one set of facts give rise to one cause of action, which is properly pleaded by the applicant, as well as another cause of action, which is cognizable in law but not pleaded by the applicant, an exception towards such a cause of action cannot arise. A reference was made to the Full Bench case of *The Minister of Safety And Security and 2 Others v Aaron Vumile Qakamba*, Case No. A172/06 (ECM) dated 20 September 2007 where D. Van Zyl J, writing for the court, said at page 9, para. [14]:

“The remedies that PAJA provides are not in my view exhaustive of the remedies that might be available to an individual who has been wrongfully deprived of his or her possession. Subject to the limits placed on its field of application by the Constitution, there exists a presumption that the legislature did not intend to interfere with existing law and, **a fortiori**, not to deprive parties of existing remedies for wrongs done to them. A statute will be construed as doing so only if that appears expressly or by necessary implication. The continued existence of the common-law right of a possessor not to be wrongfully deprived of his right of possession and the underlying principle thereof, namely that in order to maintain law and order, no man is allowed to take the law into his own hands, is not in conflict with the spirit, purport and objects of the

Bill of Rights. It is accordingly not inappropriate to invoke the presumption in the present case. From a reading thereof, PAJA does not expressly, nor in my view by necessary implication, exclude any common-law remedies that might be available to the respondent.”

On that reasoning, I hold that the applicant’s claim which is based on s 62 of the Act cannot be disregarded merely because the conduct of the respondent is capable of being reviewed under PAJA. An order of a *mandamus* or specific performance of a statutory obligation in terms of s 62 of the Act is enforceable in law.

[14] *Mr Botma* submitted, quite correctly so, that the provisions of s 62 of the Act do not give time within which the information sought should be furnished. He was *ad idem* with *Mr Zono* that, in the circumstances, the test of reasonableness applies. Two cases of this division in which the interpretation of “reasonable time” was given were referred to the Court. The first is the case of *Mapelo Fikiswa v Experian SA (Pty) Ltd*, Case No. 1687/07 (ECM) dated 16 September 2008 where Alkema J dealing with times for compliance under the Act said at page 3:

“13.1 As Mr Ascar on behalf of the respondent correctly

pointed out, the Act (s 70 (2) (g) of Act No. 34 of 2005) is silent in regard to the period within which the applicants must comply with the obligations to issue a report to any person who requires it. In these circumstances he submitted, and I agree, the report must be furnished within a reasonable time. What it a reasonable time will depend on the circumstances of each individual case.”

The Learned Judge went on to say at page 4:

“There is no explanation whatsoever why the respondent took more than two months to furnish the applicant with the report and only after the applicant, as [it] was her rights, had instituted the present applicant.

...In those circumstances the applicant had no other remedy but to approach this Court for relief in order to ask for her costs.”

He then said:

“In my view, and particularly having regard to the computerized age in which the respondent operates, the respondent could have furnished the reports within a few days after the request; or at least tender an explanation why it could not do so. The probabilities are overwhelming from

the papers that all such information is obtained on computer and it is simply a matter of printing out the record and furnishing it to the applicant.”

[15] In this case it was submitted by *Mr Zono*, correctly so, that for the mere fact that no explanation was given by the respondent as to why it refused to give reasons and release the particulars of the credit bureau in good time for the costs to be avoided, the furnishing of the information on 07 November 2011 constituted unreasonable delay.

[16] The second case is that of *Fikiswa Mapelo v Transunion ITC (Pty) Ltd*, Case No. 280/07 (ECM) dated 02 October 2008. There, Schoeman J agreed with the approach of Alkema J on the interpretation of time in which the credit grantor should comply with obligation created under the Act.

[17] In my judgment there was no reason why the information which was readily available in the computer of the respondent on 27 October 2011 should have been withheld by the respondent, and released only on 07 November 2011. That the respondent had far more pressing matters to do is not a good explanation for the failure to make the information available to the applicant on 27 October 2011. Further, in the circumstances, the

bringing of the application on 04 November 2011 was not premature.

[18] On the foregoing, the applicant is entitled to an award of costs. Such costs should include costs incurred after 07 November 2011 up to the date of hearing of arguments. But I am not able to discern from the papers the existence of *mala fides* on the part of the applicant which would warrant consideration of punitive costs.

[19] In the result I make the order as follows:

“The costs of this application shall be paid by the respondent.”

Z.M. NHLANGULELA

JUDGE OF THE HIGH COURT

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:

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