IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No. 4434/2023

In the matter between:

DIPITSENG MAROPENG MANAMELA	**1ST APPLICANT**
LEMAKATSO MOOROSI	**2ND APPLICANT**
MMATHEBE ANNAH FAITH MOJA	**3RD APPLICANT**
THEDA NTIKILE SANDLANA	**4TH APPLICANT**
PUSELETSO MATETE	**5TH APPLICANT**
LUVUYO XOLA NTOYI	**6TH APPLICANT**
LOUIS EVELYN VAN RHEEDE VAN OUDTSHOORN	**7TH APPLICANT**

and

TRANSUNION CREDIT BEREAU	**1ST RESPONDENT**
KEOLEBOGILE CONSORTIUM (PTY)LTD	**2ND RESPONDENT**

HENDRICK NKOMO	**3RD RESPONDENT**
NATIONAL CREDIT REGULATOR	**4TH RESPONDENT**

<u>JUDGMENT BY:</u> MHLAMBI, J

<u>HEARD ON:</u> 25 APRIL 2024

DELIVERED ON: 12 SEPTEMBER 2024

---

[1] The applicants, aggrieved by an adverse credit listing recorded against them by the respondents in the credit database, sought the following orders:

1.1. That the submission of the consumer credit information by the second respondent, represented by the third respondent, to the first respondent, resulted in the first respondent recording an adverse credit listing styled 'Bad debt written off' in its records on its credit database with regards to the first to seventh applicants, be declared invalid, unlawful, alternatively unconstitutional.

1.2 That the first respondent be ordered and directed to expunge the adverse credit listing referred to in paragraph 1 above regarding the first to seventh applicants from its records without delay.

1.3 The second respondent take steps that are required or reasonably necessary to remove the credit listing, if applicable.

1.4 The first and second respondents pay the application costs, jointly and severally, with the third respondent if the latter opposes the application on the scale between attorney and client or on such scale as the Court deems just.

[2] The first respondent opposed the application and raised four special pleas and a plea on the merits. The applicants pursue only prayers 1 and 4 of the notice of motion.

[3] The applicants were all non-executive directors of Bloem Water, a state-owned entity and a categorized national government enterprise with offices within the Bloemfontein district. The first respondent is a duly registered credit bureau with the principal place of business in Johannesburg. The second respondent is a duly registered company with its principal place of business in Bloemfontein. The third defendant is the sole director of the second defendant. The fourth respondent is the national credit regulator. The third and fourth respondents did not oppose the application, and a cost order was not sought against them.

[4] On 13 November 2018, the second respondent instituted a legal action against the Board of Directors of Bloem Water in the Free State High Court for contractual damages arising from an alleged breach of contract for the supply of traveling and accommodation services to Bloem Water.

[5] The Board of Directors defended the action and excepted to the second respondent's Particulars of Claim because the latter had sued the Board of Directors of the corporate entity instead of suing the corporate entity. On 11 September 2020, the court granted an order withdrawing the action, and the plaintiff was to pay the costs. The second respondent did not pursue any further actions against Bloem Water, the corporate entity.

[6] In September 2022, the applicants noted an adverse credit listing styled "Bad debts written off" in the first respondent's records displayed on its database. 20 August 2022 was reflected as the purported default date. It was established that the third respondent, as the only active director of the second respondent, provided the consumer credit information to the first respondent. Some applicants only became aware of the adverse credit listing when they applied for credit, which was refused. The second respondent never notified any of the applicants of its intention to submit the adverse credit information to the first respondent to be reflected on the applicants' credit profiles.

[7] The first respondent stated in its answering affidavit that the applicant's attorney failed to file a dispute notice to challenge the accuracy of the applicant's credit

information. Therefore, no challenge was lodged with the first respondent. The application was fatally defective as it affected the applicants' right to apply or *locus standi*, and it failed to comply with the basic requirements of class proceedings or class actions. The founding affidavit was improperly commissioned as neither pages 1 to 25, nor the annexures bore the initials of the Commissioner of Oaths. Furthermore, the confirmatory affidavits by the second and third respondents did not bear the initials of the Commissioners of Oaths on two pages. The thrust of the first respondent's defence on the merits is that on the day the application was instituted, i.e. 22 August 2023, it was without purpose, as the credit listing forming the subject matter of the application was removed on 21 August 2023 because the retention time had expired.

[8] In their reply, the applicants maintained that the application was not without purpose when it was issued. Prayer 1 of the notice of motion was still alive and well. The regulations governing the administration of an oath or affirmation did not require every page of an affidavit to be initialed by the commissioner and the deponent. The first applicant testified on her own behalf and the second to the seventh applicant, and she needed no authority to do so. The attorney decides which evidence to lead. The first respondent failed to appreciate that it was responsible for ascertaining the veracity of the information it received before publishing it.

[9] Section 70 of the National Credit Act, No. 34 of 2005, ("the Act"), deals with credit bureau information and the duties of a credit bureau. A credit bureau must accept the filing of consumer credit information from any credit provider on payment of the credit bureau's filing fee, without charge for the filing of consumer credit information from the consumer concerned, for correcting or challenging information otherwise held by that credit bureau concerning that consumer. It must take reasonable steps to verify the accuracy of any consumer credit information reported to it and retain it for the prescribed period, irrespective of whether that information reflects positively or negatively on the consumer. It must maintain its records of consumer credit information that satisfies the prescribed standards and promptly expunge from its records any prescribed consumer

credit information that, in terms of the regulations, is not permitted to be entered into its records or is required to be removed from its records.

[10] Section 72 regulates the right to access and the challenge to credit records and information. It provides that 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 by it to a credit bureau and to receive a copy of that information upon request. That person has a right to challenge the accuracy of any prescribed adverse information about that person that a credit provider reports to a credit bureau or the credit bureau or national credit register holds.[1]

[11] On behalf of the applicants, it was contended that the first respondent approached the matter from a wrong point of view and misconceived the applicant's case. It was submitted that the inquiry did not start with section 72(1)(c) but 70(2)(c) of the Act. In other words, the credit bureau had to satisfy itself that the credit provider properly informed the applicants, as consumers, before the adverse credit consumer information was reported or reflected on their credit profile. There was no evidence that the credit bureau took reasonable steps to verify that the credit provider informed the applicants before the adverse credit information was reported to it.

[12] The first respondent would not have published the information had it taken reasonable steps to verify its accuracy, it was contended. That would have been so for the following reasons:

12.1 The second respondent was not a credit provider vis-à-vis the applicants. No credit agreement existed between the second respondent and the applicants as the contract that gave rise to the claim successfully excepted to, was concluded with Bloem Water.

[1] Section 72 (1)(c)(i) and (ii).

12.2 The first respondent would have known that the second respondent (purported credit provider) did not inform the applicants (purported consumers) of its intention to report an adverse credit listing.

12.3 It would have been known that the action was never pursued after it was instituted. If the second respondent gave false information and the first respondent was unaware thereof, having taken reasonable steps to verify the accuracy of the information, the applicants would have been constrained to challenge the accuracy of the information in terms of section 72(1)(c) of the Act.

[13] The first respondent, in its supplementary heads of argument, argued that the provisions of the NCA should not be read in isolation. Even though section 70(2)(c) provides that credit bureaus must take reasonable steps to verify the veracity of the information reported to them, that information, according to section 72, must only be investigated once the consumer challenges it. To expect credit bureaus to investigate all credit information provided to them, numbering thousands per day, would cause the industry to halt and consumer credit profiles to be severely outdated, opening floodgates for reckless credit lending.

[14] The first respondent contended further that section 72(5) provided that credit bureaus cannot report information that has been challenged until the investigation has been completed. The applicants were misinformed that the remedy in section 72 was ineffective as the information was retained on the consumer credit profile while the credit bureaus investigated the challenged information. However, section 72(5) provides that the challenged information may not be reported until the challenge has been resolved in terms of subsection (3)(a) or (b). The latter subsection provides that the credit provider, credit bureau or national credit register, as the case may be, must take reasonable steps to seek evidence in support of the challenged information and, within the prescribed time after the filing of the challenge, must provide a copy of any such credible evidence to the person who filed the challenge or remove the information, and all record of it, from its files if it is unable to find credible evidence in support of

the information. This means that the information is retained on the consumer credit profiles during the investigation.

[15] Relying on the *dictum* in *TransUnion Africa (Pty) Ltd Ngecenge,*[2] it was argued on behalf of the first respondent that the applicants' recourse to the courts was premature as they should have first exhausted domestic remedies provided for by the Act. The application was, therefore, premature and served no purpose. On the other hand, the applicants believed that their constitutional rights had been violated and the first respondent's conduct was unlawful in failing to satisfy the threshold requirements before publication, thus violating their rights to privacy and dignity.

[16] Having considered the relevant provisions of the Act, I am persuaded that the first respondent failed to satisfy the threshold requirements in section 70(2)(c) of the NCA. The first special plea is meritless and stands to be dismissed.

[17] The second preliminary point is that the first applicant deposed to an affidavit on behalf of the second to the seventh applicants and acted on their behalf even though they did not share a consumer credit profile. It was argued that each applicant should have brought a stand-alone application to remove the adverse credit listing. It was held in *Ganes and Another v Telecom Namibia Ltd,*[3] that the deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. A party will have legal standing (*locus standi*) if he or she has a direct and substantial interest in the subject-matter of the judgment sought.[4] The applicants have such a substantial interest.

[18] I have perused the Regulations Governing the Administering of an Oath or Affirmation[5] and agree with the applicants' counsel that it is not required that the

---

[2] (CA/2021) [2021] ZAECMHC 40.
[3] 2004 (3) SA 615 SCA para 10.
[4] Supra, para 9.
[5] Published under GN R1258 in GG 3619 of 21 July 1972 promulgated in terms of section 10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963.

Commissioner and the deponent must initial every page of an affidavit. The third and fourth points *in limine* are also meritless and stand to be dismissed.

[19] The first respondent believes that when the application was filed on 22 August 2022, it was without purpose, as the credit listing was removed on 21 August 2023. The fact is that the applicants' constitutional rights were violated when the adverse credit information was published. They sought the appropriate remedy to enforce their rights. When the application was launched, the legal question persisted as a live issue. It would, therefore, be unfair and improper to suggest that the matter was no longer relevant as it involved legal questions of a constitutional nature having significant policy implications.

[20] On 7 March 2024, the court granted an order for the applicants' attorneys to file written reasons on/before 22 March 2024 why an order should not be issued that they pay the wasted costs occasioned by the postponement of the application on the scale of the costs order which the court had already determined would be costs as between attorney and client, *de bonis propriis.* A detailed affidavit setting out the chronology of events and reasons was filed. It would appear that two days before the hearing of the application, the attorneys had requested a postponement, which was refused, as they experienced challenges from obtaining instructions from their clients. Most of the co-applicants had left the Board of Bloem Water since the application was issued. On the day of the hearing of the application, the applicants tendered wasted costs for its postponement.

[21] A costs order *de bonis propriis* against an attorney is generally granted in cases that involve gross incompetence or gross disregard for professional responsibilities, dishonesty, willfulness or negligence of a serious degree.[6] It takes extraordinary circumstances for such costs to be justifiably awarded.[7] The circumstances in this case do not justify a costs order *de bonis propriis* against

[6] CB and Another v HB 2021 (6) SA 332 (SCA), para 21.
[7] Public Protector v SA Reserve Bank 2019(6) SA 253 (CC), para 40.

the attorney. The appropriate order is that the applicants should pay the wasted costs as tendered.

[22] I am satisfied that the applicants were entitled to approach the court for the necessary relief. The second respondent did not oppose the application. The applicants are entitled to an order regarding prayers 1 and 4 of the notice of motion against the first and second respondents.

[23] I, therefore, grant the following order:

ORDER:

1. Prayers 1 and 4 of the notice of motion are granted.
2. The first and second respondents are to pay the applicants' application costs jointly and severally, with counsel's fees on scale C, the one paying the other to be absolved.
3. The applicants must pay the wasted costs occasioned by the postponement of the application on 7 March 2024 on a scale between party and party, jointly and severally, the one paying the other to be absolved.

[redacted]

JJ MHLAMBI, J

APPEARANCES:

On behalf of the Applicant,	Mr. Snellenburg
Instructed by:	Moroka Attorneys
	84 President Reitz Avenue
	BLOEMFONTEIN

On behalf of the Respondent,	Ms. Macacati
Instructed by:	C/O Lovius Block Attorneys
	31 First Avenue
	Westdene
	BLOEMFONTEIN