IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE HIGH COURT:

MTHATHA **CASE NO.: 626/08**

In the matter between:-

MZWAMADODA BUQWANA **Applicant**

And

CAPITEC BANK LIMITED **1st Respondent**

EXPERIAN SOUTH AFRICA (Pty) Ltd **2nd Respondent**

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JUDGMENT

PAKADE, J.:

[1] This judgment concerns the enforcement of the National Credit Act, 34 of 2005 and the obligations of the credit provider and Credit Bureau in terms thereof to the consumer.

[2] The applicant instituted these proceedings in this Court seeking declaratory orders and a mandamus against the respondents. I paraphrase the relief sought herein below:

(a) That the reporting of the applicant `s default data by the 1st respondent to the 2nd respondent on 5 June 2007 be declared unlawful and set aside;

(b) That the 2nd respondent `s retention of the said information in its records be declared unlawful and set aside;

(c) That the respondents be ordered to remove the said adverse credit information from the 2nd respondent `s records;

(d) That the respondents pay costs of the application on an attorney and client scale on a joint and several liability, the one paying the other to be absolved.

[3] The respondents are cited, in respect of the 1st respondent, as a company registered and duly incorporated as such in accordance with the company laws of the Republic of South Africa and which carries on business at the corner of Madeira street and Elliot road in Mthatha, and in respect of the 2nd respondent, as a company registered as a Credit Bureau in accordance with the company laws of the Republic of South Africa, having as its principal place of business Experian house, Ambrige office park, Vrede Avenue, Douglas dale, Sandton.

[4] The application is opposed by the respondents. The applicant had a contractual relationship with the 1st respondent in terms whereof the latter had provided credit facilities to the former on three occasions repayable on agreed terms. The first credit agreement was concluded on 5 December 2005 and it involved a loan of five thousand rand payable in six equal monthly instalments of one thousand three hundred and sixty rand. The second credit agreement was concluded on 13 April 2006 and

in terms thereof the 1st respondent advanced to the applicant a sum of two thousand two hundred rand payable in six equal monthly instalments of six hundred and three rand. The third credit facility of the sum of three thousand five hundred rand was advanced to the applicant on 27 June 2006 and in terms of the agreement is payable in six equal monthly instalments of nine hundred and three rand.

[5] The amount owed in terms of the three credit agreements were payable through a debit order facility against the bank account held by the applicant in the First National Bank , on the 20th day of each month.

[6] These credit agreements appear, in the computer print out of the 2nd respondent (annexure A) to the founding affidavit, to have been handed over for debt collection on 5 June 2007 for an overdue balance of one thousand four hundred and eighteen rand, one thousand one hundred and fifty nine rand and four thousand eight hundred and eighty seven rand respectively. The applicant is dissatisfied with this state of affairs as he maintains that this information is inaccurate hence he seeks an order directing the 2nd respondent to expunge it from its records. He has set out numerous instances in support of his allegation of its inaccuracy. In addition thereto he asserts that the 1st respondent should have afforded him a hearing before reporting his debts to the 2nd respondent who also had a duty to ensure that the information was accurate. The conclusion he draws from these premises is that by reason of the 1st respondent `s omission to discharge its obligation, the decision it took to make an inaccurate report concerning his debt is unlawful and should be set aside. According to the applicant the decision to report his debts to the 2nd respondent was taken in Mthatha where he resides and where the credit

agreements were concluded hence he instituted the proceedings in this Division.

[7] The respondents have, in the answering affidavits, raised severe contentions of a legal nature, including the preliminary point about the lack of jurisdiction of this Court to hear this matter. At the hearing of the matter, I allowed the matter to be argued in one fell swoop, not oblivious that the jurisdiction point may dispose of the matter without the need to decide the merits. Counsel were also not so unaware of that fact.

[8] The starting point should be the provisions of section 19 (1)(a) of the Supreme Court Act, 59 of 1959 which assign the jurisdiction of the court to residence within that court`s area of jurisdiction. It provides that a provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction. It is significant then to point out that a company resides where its registered office is and also in its principal place of business. It does not reside in its branch office (Bison Board Limited v Braun Wood Working Machinery (Pty) Ltd 1991 (1) SA 482 (A); Kruger NO v Boland Bank Bpk 1991 (4) SA 107 at 112). The phrase 'causes arising' in the section has been interpreted not to mean 'causes of action arising' but 'legal proceedings duly arising', that is proceedings arising from or originating within the area of jurisdiction in terms of common law. In order for the cause to be one 'arising' within the area of jurisdiction of the court, one of the recognised jurisdictional factors of the common law have to be present (Vulindlela Furniture Manufacturers v MEC Department of Education & Culture, Eastern Cape & Others 1998 (4) SA 908 (TkD) at 930 A-C).

[9] As to whether a court has jurisdiction or not in a matter, depends on the nature of the proceedings and the nature of the relief claimed or both. The principle on the nature of the relief claimed is based on the power of the court, not only to grant the relief claimed, but also to effectively enforce its decision directly in the area of its jurisdiction without resorting to the procedural provisions of section 26 (1) of the Supreme Court Act. These provisions are that the civil process of any division shall run throughout the Republic and may be served or executed within the jurisdiction of any division. These provisions merely simplify the procedure and do not in any manner, augment the jurisdiction of a division (Estate Agents Board v Lek 1979 (3) SA 1048 (A) at 1062).

[10] I now turn to consider the facts averred by the applicant on which he seeks to found the jurisdiction of this Court. I have already alluded to those facts in paragraph [6] above, namely, that the credit agreements were concluded in Mthatha, the adverse information was reported to the 2nd respondent in Mthatha and that the applicant resides in Mthatha. The applicant`s averments in this respect flies on the face of the 1st respondent`s denial thereof save the fact that he resides in Mthatha. The 1st respondent has put forward further averments which the applicant has also not disputed in the replying affidavit, namely, that a client`s data is stored in Stellenbosch head office from where it is reported to the 2nd respondent. It is clear to me therefore that the branch office of the 1st respondent has nothing to do with the transformation of any of its client `s information to the 2nd respondent. It is clear from the answering affidavit of the 1st respondent that the registered office and the principal place of business of the 1st respondent is situated at Quantum Road, Technopark, Stellenbosch, Western Cape. The applicant has conceded these facts . On the basis of Plascon Evans Paints Ltd v Van Riebeeck

Paints (Pty) Ltd 1984 (3) SA 623 (AD), the undisputed facts in the answering affidavit must go in favour of the 1st respondent.

[11] The judgment of this Court has to be executed against the 2nd respondent whose registered office is in Johannesburg under the jurisdiction of the Witwatersrand Division. The information sought to be removed is kept in the 2nd respondent`s records in Johannesburg. The declaratory orders would have to be issued by a court of competent jurisdiction in order to be executed outside its area of jurisdiction in terms of section 26 (1) of the Supreme Court Act. This Court cannot issue those orders against a company whose registered office is situated outside its area of jurisdiction simply because the applicant resides within its area of jurisdiction. That fact alone is not sufficient to found its jurisdiction. There have to be other jurisdictional factors in addition thereto as was the case in Estate Agents Board v Lek (supra). There, Lek wanted to operate an estate agent office in Cape Town and was himself resident in Cape Town while the Estate Agent Board had a registered office in Johannesburg. The fidelity fund certificate which Lek wanted issued to him was to be used in operating an estate agency business in Cape Town. The nature of the relief sought by Lek was remedial and was simply to ask the court which had jurisdiction to correct the decision of the Board refusing him fidelity certificate. In casu, no decision is to be corrected by the declaratory orders as the 2nd respondent has a legal duty to report bad debtors to the Credit Bureau. It follows therefore, in my view, that this Court has no jurisdiction against the 2nd respondent.

[12] It is therefore not necessary to consider the matter further save the issue of costs.

COSTS

[13] The applicant seeks costs on an attorney and client scale because, as he puts it, the respondents were reckless and malicious in handling his complaint to them. These allegations are denied by the respondents. The applicant has not elaborated on his allegation of malice and recklessness save to say the manager of the 1st respondent in Mthatha was rude when a letter of complaint was delivered to him. I am not satisfied that these unsubstantiated allegations deserve a special punitive costs order against the 1st respondent.

[14] On the other side of the same coin, the 1st respondent has sought the same order for costs against the applicant which should be paid by his Attorney of record debonis propriis based on the fact that there was prior warning to him that this Court lacks jurisdiction on the matter. The applicant denied that there is any valid ground in support of the special punitive costs order against his attorney. The relevant response reads as follows:

> "AD PARA 59 THEREOF
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> These allegations are denied. If you oppose certain group of attorneys they threaten you with costs de bonis propriis. Since when has it been an offence to carry out a mandate as an attorney? On what basis this court can order and punish an innocent person? There is no allegation that my legal representatives have recklessly and maliciously conducted themselves in these proceedings".

[15] The applicant`s Attorney of record was informed by letter dated 9 October 2008 that this Court has no jurisdiction in this matter because

'neither the registered office nor the principal place of business of the 1st respondent is situated within the area of jurisdiction of the Transkei Division of the High Court'. He was further informed that the cause of action did not arise within the area of jurisdiction of this Court. The applicant remained supine and did not remove the matter from the roll notwithstanding a further incentive extended to him that he would do so without any adverse cost order against him. When the applicant proceeded with the application after the jurisdiction point had been raised with him, he believed, genuinely, in my view perhaps, relying on Estate Agents Board v Lek (supra) that on the facts alleged by him, this Court would have jurisdiction. That the Court distinguished that case does not, in my view, entail malice and/or recklessness on the part of the applicant's Attorney of record. The general rule that costs follow the event should, instead, apply against the applicant.

[16] There is a further issue about the costs reserved on 16 September 2008 when the matter was postponed and the 1st respondent put on terms with regard to the filing of answering affidavit. That affidavit was filed after the (dies) had expired, the only reason thereof being that the founding papers were transmitted to the legal division of the 1st respondent on 15 September 2008. The return of service shows that service was effected on the 1st respondent on 23 June 2008 and there is no explanation why the founding papers could have reached its legal division on 15 September 2008. To postpone the matter on 16 September 2008 was merely an indulgence extended to the 1st respondent. In a letter to the applicant's attorney of record, the first respondent's attorneys of record state that the answering affidavit was due for filing on 21 October 2008. It is not clear to me how the 1st respondent could have conceived an idea that its answering affidavit was only due on 21 October 2008 if

the service was effected on it on 23 June 2008. No clarity was given on this aspect by Counsel for the 1st respondent.

ORDER

[17] In the premises the following order is hereby made:

1. The objection to the jurisdiction of this Court is upheld and the application is dismissed with costs;
2. The 1st respondent is ordered to pay the costs occasioned by the postponement of the matter on 16 September 2008.

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L.P.Pakade
JUDGE OF THE HIGH COURT

Counsel for the Applicant	:	Adv Z. Z. Matebese
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Counsel for the 1st Respondent	:	Adv M. O' Sullivan with
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Counsel for the 2nd Respondent	:	Adv C. Ascar
Instructed by	:	B. M. Skosana Inc 1st Floor Sunnyside Centre 13 Frost Street Millpark JOHANNESBURG
Heard on	:	27 November 2008
Delivered on	:	29 January 2009