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

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case No: 2385/2021

In the matter between:

POTLAKO JOHN COWEN KHETSEKILE **APPLICANT**

And

NEDBANK LIMITED **1ST RESPONDENT**

SOUTH AFRICAN FRAUD PREVENTION SERVICES **2ND RESPONDENT**

HEARD ON: 16 SEPTEMBER 2021

CORAM: LITHEKO, AJ

DELIVERED ON: 07 OCTOBER 2021

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[1] **Introduction**

This is an application for a mandatory interdict. The applicant seeks an order in terms of which the first respondent, a credit

provider as defined in the National Credit Act, 34 of 2005 (the NCA), and the second respondent, a credit bureau registered in terms of section 43(1) of the NCA are compelled to remove his name from the records that the second respondent retains in terms of section 70 of the NCA. The first respondent opposes the application.

[2] **Background**

This matter emanated from an unsuccessful loan application the applicant made to the first respondent during 2013. The basis whereupon the loan application did not succeed was that the Applicant had, in support of the application, provided the first respondent with, *inter alia*, forged bank statements. The first respondent reported this information to the second respondent and the latter recorded same on its database. The applicant became aware of the listing of his name on the second respondent's database in July 2017 whereafter he reported the matter to the South African Police Service. On the 15th July 2020 he lodged a dispute with the second respondent and despite this, the listing was retained on the grounds that the applicant's name was listed for prescribed purposes of fraud detection and fraud prevention services.

The first respondent opposed the application on various grounds (including that the loan application was made in April 2014, not 2013, and denied the allegation that the applicant resent the bank statements to the first respondent and was told that they differed from those submitted earlier) and also raised a preliminary point that the matter ought not to have been brought to court by way of motion

proceedings as there was a foreseeable dispute of fact, that fact being whether or not the applicant committed fraud. However, the main ground upon which the first respondent opposed the application is that the applicant's listing on the database of the second respondent was lawful and did not constitute an infringement of any of the applicant's rights.

[3] **The issue**

The issue in this application is whether the first respondent was entitled to report to the second respondent the fact that the applicant provided the first respondent with bank statements that were found to have been tempered with, and if so entitled, whether the concomitant listing of the applicant by the second respondent, without prior notice, was an infringement of the applicant's rights contemplated in section 72(1)(a). This listing is what the applicant alleges to be the wrongful state of affairs for which the respondents are responsible.

[4] **The law**

The legal position in regard to the grant of a final interdict is settled. An applicant for such an order must show, (a) a clear right, (b) an injury actually committed or reasonably apprehended, and (c) the absence of similar protection by any other ordinary remedy. [Setlogelo vs. Setlogelo 1914 AD 221 at 227].

Regarding the point *in limine* raised by the first respondent, the test enunciated in Plascon-Evans Paints Ltd vs. Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A) at 634E-G, is that where the relief

sought in motion proceedings is a final interdict, such relief may be granted only if the facts as stated by the respondent, together with the admitted facts in the applicant's affidavits, warrant the granting thereof.

[5] **Evaluation of evidence and application of law to the facts**

The applicant's case as stated in his founding affidavit is that after the first respondent contacted him and informed him that his application for a loan was unsuccessful due to the fact that he tempered with bank statement, he resent the bank statements whereupon he was informed that there was a discrepancy between the bank statements submitted earlier and those submitted later. The Applicant has not attached the copies of the bank statements that he submitted later. Mr Lubbe, on behalf of the first respondent questioned this omission on the part of the applicant, correctly so in my view, as these bank statements are material to the case of the applicant but no explanation for the omission was given by Mr Mogwera, who appeared for the applicant.

The applicant's application for loan did not succeed and he was informed of the reasons for this. In 2017 he became aware that his name was listed on the database of the second respondent and he reacted to this by no more than deposing to an affidavit at the police station, and, three years later, in July 2020, lodging a complaint with the second respondent. The conduct of the applicant in not taking any action in 2014 following the refusal of his loan application based on allegations that he submitted forged bank statements, and the fact that he never sought any explanation from Standard Bank, which issued the bank statements, despite having been in need of

the loan to repair his motor vehicle, calls into question his alleged lack of knowledge of the discrepancies that the first respondent observed in the bank statements submitted in support of the applicant's loan application. It was on the basis of these factors that I thought that the factual dispute that arises in this matter is not of the nature that warrants an order of referral to oral evidence as I was of the view that, on a consideration of the totality of the evidence, the probabilities favour the version of the first respondent. The first respondent's version is, in simple terms that the applicant does not have the right to which he lays a claim. The issue whether or not the applicant committed fraud is not material in the adjudication of the dispute in this case.

The submission of the applicant on the issue whether there is a dispute of fact is that there is none. I have found that there is a factual dispute, albeit of the nature not justifying the referral of the matter to oral evidence.

Upon perusal of the applicant's founding affidavit, I could not find any evidence in support of the relief sought. It was difficult to decipher which rights of the applicant, if any, were infringed upon. Notwithstanding this shortcoming in the applicant's founding papers, I decided to consider the applicant's case as stated in his heads of argument and argued by Mr Mogwera in oral submissions in court. The argument advanced in court was based on the provisions of regulation 17(1) read with Section 70(2)(f) and in support of that argument Mr Mogwera referred me to the case of NCR vs SAFPS NCT/23181/2015/140(1) NCA. This is a decision of the National Credit Tribunal, (the NCT).

The right that the applicant sought to enforce, which is stated for the first time in clear terms in the heads of argument, is that contemplated in section 72(1)(a) of the NCA. That section 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. The time prescribed in the regulations is 20 days.

Section 70(2)(f) provides that;

> "A credit bureau must promptly expunge from its records any prescribed consumer credit information that, in terms of the regulations is not permitted to be entered in its records or is required to be removed from its records."

Regulation 17(1) deals with retention periods for credit bureau information and it provides for "consumer credit information' categorised as 'adverse information' relating to 'qualitative information on consumer behaviour' (category 5) to be retained for a period of one (1) year from date of commencement of the event.

As stated above, the applicant relied on the case heard before the NCT which, in its interpretation of regulation 17(1), held that 'fraud information' is 'prescribed consumer credit information' that should be expunged from the records of a credit bureau after expiry of a one-year period. The applicant's reliance on this case was misplaced on the basis that the decision of the NCT was set aside on appeal by the Gauteng High Court and on further appeal by the NCR to the SCA the decision of the Gauteng High Court was confirmed in the case of National Credit Regulator vs South African Fraud Prevention Services 2019 (5) SA 103 (SCA).

In the above case the SCA stated at paragraph 25 that:

> "In our view the meaning that must be given to the term 'adverse classification of consumer behaviour' throughout category 5 of regulation 17(1) is the meaning that it is given in section 71A(4)(a) of the NCA. Various features support that construction. The first is that its central feature is the failure by consumers to perform their legal and contractual obligations under a credit agreement. It encompasses subjective classification of that failure and says nothing about fraud. The latter is more usually an objective assessment of the consumer's conduct in the light of the definition of fraud. The expression 'adverse classification of consumer behaviour' appears to be directed at the behaviour of the consumer once credit has been advanced rather than behaviour aimed at defrauding a credit provider in a prospective credit application."

Following a discussion of the applicability or otherwise of regulation 17(1) to fraud information, the SCA, at paragraph 31, stated that:

> "All of this point to the fraud information held by SAFPS not being subject to the time limit, even if it constitutes consumer credit information, because it is not consumer credit information within any of the prescribed categories in reg. 17. The Tribunal's finding, that fraud information 'is the subset of [consumer] credit information that equally impacts the credit provider's decision whether or not to grant credit to the affected consumer', does not properly address the question whether it falls within one of the categories in regulation 17(1) and it is thus incorrect".

The SCA held that there was no obligation on SAFPS to expunge the fraud information in its possession.

[6] **The conclusion**

The effect of the above legal position on the instant case is therefore that:

1. The information that is retained by the second respondent about the applicant is ‘fraud information’ and not ‘prescribed adverse information’ concerning the applicant as contemplated in section 72(1)(a).

2. The first respondent did not have a duty to advise the applicant about the intended listing before the applicant’s name was listed.

3. The applicant does not have the right to which he lays a claim and for that reason the first respondent did not infringe any right of the applicant in reporting the fraud information concerning the applicant to the second respondent as the right in section 72(1)(a) is the right of a consumer to be advised before prescribed adverse information is reported and not fraud information.

4. The second respondent was not obligated to expunge the said information after one (1) year from the date of the commencement of the event.

Consequently, the applicant has failed to establish a clear right and for that reason his application cannot succeed. There is therefore no need to determine whether or not the other requirements for a final interdict are met.

[7] **The Order**

I therefore make the following order:

The application is dismissed with costs.

M.S LITHEKO, AJ

On behalf of the applicant:	Adv. T Mogwera Instructed by: Fixane Attorneys BLOEMFONTEIN
On behalf of the respondent:	Adv. E G Lubbe Instructed by: Webbers Attorneys BLOEMFONTEIN