

IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: **NCT/100373/2018//149(1)**

In the matter between:

RICHARD CARL KRUGER

APPLICANT

and

FIRST NATIONAL BANK, a division of FIRSTRAND LIMITED

RESPONDENT

Coram:

Adv HFN Sephoti - Presiding Member
Mr F. Sibanda - Member
Dr MC Peenze - Member

Date of Hearing 5 March 2018

APPLICATION FOR INTERIM RELIEF

JUDGMENT AND REASONS

THE PARTIES

1. The Applicant is **MR RICHARD CARL KRUGER**, a major male residing in the province of the Western Cape (hereinafter referred to as to "the Applicant" or "Mr Kruger"). The Applicant represented himself at the hearing.

2. The Respondent is **FIRST NATIONAL BANK**, a division of First Rand Bank Limited, a registered credit provider (hereinafter referred to as "the Respondent" or "FNB"). The Respondent was represented at the hearing by Mr R Glover of the firm Glover Kanniepan.

APPLICATION TYPE

3. This is an application in terms of section 149(1) of the National Credit Act, Act 34 of 2005 ("the NCA") for interim relief to complainants. The NCA defines "a complainant" as a person who has filed a complaint in terms of section 136(1) of the NCA to the National Credit Regulator.
4. Both parties indicated that the Applicant is seeking relief in this application whilst there is a matter pending on the same facts or subject matter before the National Credit Regulator, hereinafter referred to as the NCR. The NCR has not pronounced on the matter as at the date of the hearing.
5. The relief sought by the Applicant is to compel the Respondent to remove adverse information appearing at the various credit bureaus within the Republic, which listings the Applicant claim are causing him serious irreparable harm and or damage to his name which is preventing him from accessing credit and or securing employment.

BACKGROUND

6. The Applicant concluded a home loan agreement with the Respondent on or about the 20th February 2006. The Applicant defaulted on the home loan agreement and the Respondent applied and was granted default judgement on the 4th September 2009. The immovable property over which the mortgage bond was registered in favour of the Respondent as a security for the home loan was sold in execution on the 14th June 2010. The proceeds from the sale were insufficient to settle the total judgement debt and therefore the Applicant was still liable for the outstanding balance which remained after the sale in execution.
7. Respondent argued that the home loan was never cancelled and remains of full force and effect and therefore the Applicant needs to comply with all the obligations arising from such home loan agreement. To this end, the Respondent listed the Applicant's payment profile and it is this that the Applicant is objecting to as causing him untold harm and or prejudice.
8. Section 70 read with Regulation 17 of the NCA provides for credit bureau information and what type of information must be kept by the credit bureaus.

Credit bureau information

(1) In this section, "consumer credit information" means information concerning

- (a) a person's credit history, including application for credit, credit agreements to which the person is or has been a party, pattern of payment or default under any such credit agreements, debt re-arrangement in terms of this Act, incidence of enforcement actions with respect to any such credit agreement, the circumstances of termination of any such credit agreement, and related matters;
- (b) a person's financial history, including the person's past and current income, assets and debts, and other matters within the scope of that person's financial means, prospects and obligations, as defined in section 78(3), and related matters;
- (c) a person's education, employment, career, professional or business history, including the circumstances of termination of any employment, career, professional or business relationship, and related matters; or
- (d) a person's identity, including the person's name, date of birth, identity number, marital status and family relationships, past and current addresses and other contact details, and related matters.

(2) A registered credit bureau must-

- (a) accept the filing of consumer credit information from any credit provider on payment of the credit bureau's filing fee, if any;
- (b) accept without charge the filing of consumer credit information from the consumer concerned for the purpose of correcting or challenging information otherwise held by that credit bureau concerning that consumer;
- (c) take reasonable steps to verify the accuracy of any consumer credit information reported to it;
- d. retain any consumer credit information reported to it for the prescribed period, irrespective of whether that information reflects positively or negatively on the consumer;
- e. maintain its records of consumer credit information in a manner that satisfies the prescribed standards;
- f. 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;

- g. issue a report to any person who requires it for a prescribed purpose or a purpose contemplated in this Act, upon payment of the credit bureau's fee except where the Act explicitly provides that no fee be charged;
 - h. not draw a negative inference about, or issue a negative assessment of, a person's creditworthiness merely on the basis that the credit bureau has no consumer credit information concerning that person; and
 - i. not knowingly or negligently provide a report to any person containing inaccurate information.
- (3) In addition to-
- a. the consumer credit information Contemplated in subsection (2), a credit bureau may receive, compile and report only other prescribed information in respect of a consumer; and
 - b. the sources of consumer credit information contemplated in sub section (2), a credit bureau may receive consumer credit information in respect of a consumer only from other prescribed persons.
- (4) The Minister may prescribe-
- a. standards for the filing, retention and reporting of consumer credit information by credit bureau, in addition to, or in furtherance of the requirements set out in this section; and
 - b. maximum fees that may be charged to a consumer for accessing consumer credit information concerning that person.
- (5) For the purpose of monitoring the consumer credit market to detect apparent patterns of reckless credit granting and over-indebtedness, researching the accessibility and use of credit by persons contemplated in section 13(a), and otherwise exercising its mandate to research consumer credit issues and to investigate and enforce compliance with this Act, the National Credit Regulator may-
- a. require any credit bureau to provide periodic synoptic reports of aggregate consumer credit information in the prescribed manner and form to the National Credit Regulator, but any such report must not identify any particular consumer or relate a particular consumer to any information so reported;
 - b. *make* further reasonable requests for information from a credit bureau related to the information contemplated in paragraph (a) ;and
 - c. analyze information provided to it under this section or section 69.

(6) Failure by a credit bureau to comply with a notice issued in terms of section 55, in relation to this section, is an offence.

9. The Respondent, in compliance with the prescribed sections of the NCA, submitted to the credit bureau the "payment profile" of the Applicant. The Respondent stresses that it is patently clear from the provisions of the NCA and the regulations issued in terms thereof that each and every credit provider is legally obligated to submit the "payment profile" of each of its customers to the credit bureau for the preceding 5 years.
10. It is this listing that the Applicant is challenging and has approached the NCT with the view of having the Respondent instructed to remove the disputed and erroneous listings with all the credit bureaus pending the outcome of the Tribunal adjudication.
11. The Applicant claims that he has been prejudiced by the actions of the Respondent for more than 3 years now, as the Applicant cannot become economically active or enter into any credit agreement resulting from the prejudice. The Applicant further claims that the listing affect his employment potential.
12. The Applicant further objects to the listing on the basis that the Respondent is reporting an account listing with the credit bureaus for which the NCA makes no provision as well as the fact that the Applicant has no credit or other agreement with the Respondent.
13. The Applicant confirmed that on the 4th September 2009, a default judgment was granted in favour of FNB regarding a plot that he had purchased in 2004, financed by First National Bank. He further does not dispute the fact that the plot was sold off at an auction for a fee lower than what he paid and that he learned that there was a "residual" amount for which FNB opened an account. Having become aware of the listing against his profile, he decided to wait out the 5 year listing period. The other listings by the Respondent were removed when he objected except that the payment profile listing remained and he seeks the assistance of the Tribunal to have the listing removed and his name to be cleared.
14. Section 72 of the NCA provides for the right to access and challenge credit records and information. The Act makes provision for the payment of an inspection fee and the right to challenge the accuracy of any information concerning that person. The Applicant upon becoming aware of the listing by the Respondent, decided to wait out the 5 year listing period and has at no stage challenged the listing through any legislative means at his disposal or provided information that could prove that the listing was erroneous and thus should be removed.

15. The Applicant further alleges that he is unable to obtain credit or enter into credit agreements as a result of the adverse listing. The Respondent managed to negate this by showing the Tribunal that the Applicant has in fact concluded a credit agreement with a clothing store and that his reasoning in this regard is baseless.

JURISDICTION

16. Whether parties in a matter before the Tribunal raised the issue of jurisdiction or not, it remains the responsibility of the Tribunal to *mero motu* ensure that it only entertains matters for which jurisdiction had been assigned in the appropriate legislation, in this particular case the NCA.
17. Jurisdiction to adjudicate on an application for interim relief will be apparent if the requirements for interim relief as laid down in Section 149(1) of the Act are found to exist.
18. Section 149(1) provides as follows:
- "At any time, whether or not a hearing has commenced into a complaint, a complainant may apply to the Tribunal for an interim order in respect of that complaint, and the Tribunal may grant such an order if*
- (a) there is evidence that the allegations may be true; and (b) if an interim order is reasonably necessary to -*
- (i) prevent the purpose of this Act from being frustrated;*
- (ii) the respondent has been given a reasonable opportunity to be heard'*
- (c) having regard to the urgency of the proceedings; and*
- (d) the balance of convenience favours the granting of the order."*
19. Section 149(1) as quoted above refers to "a complaint" and "a complainant". It also limits the jurisdiction of the Tribunal to considering "*an interim order in respect of that complaint*". In seeking to understand what is meant by "a complaint", the definitions of the NCA provides clarity by defining "a complainant" as "a person who has filed a complaint in terms of section 136(1) of the Act". It is trite that "complaint" will have an aligned meaning with similar reference to section 136(1). It follows therefore that interim relief in terms of section 149(1) only applies and becomes available to a complainant who has filed a complaint in terms of Section 136(1) of the Act. In fact, a referral in terms of Section 149(1) is conditional upon a complaint having been lodged in terms of Section 136(1) of the NCA.

20. The powers of the Tribunal are further set out in the Rules of the Tribunal, more particularly Rule 3(1)(c) 'originating as a complaint to the Regulator and referred to the Tribunal in terms of sections 137(1), 140 or 141(1)(b) of the NCA. The parties do not dispute that the Applicant has a matter pending at the NCR and this is set out in the papers filed with the Tribunal. For the record, however, there is no evidence of any referral to the Tribunal in this matter.
21. From the submissions made by the parties it is clear that in the intervening five years the Applicant has not at any stage sought to challenge the sale of the property by the Respondent nor has he made any payments towards the amounts due to the Respondent, nor come to any arrangement with the Respondent with regard to same. He instead, opted to wait out the 5 year listing period with the hope that the information would be removed after a period of 5 years and that would be the end of his matter with the Respondent.
22. Interim relief, as envisaged in Section 149(1) of the NCA, is urgent relief and premised on relief to an Applicant facing imminent prejudice or harm. The Applicant has not shown-
 - (a) The basis of the urgency at the hearing, which even if it existed five years back, would no longer be relevant or applicable; nor
 - (b) Serious, irreparable damage to him or that can cause the purposes of the NCA from being frustrated. In fact, it is the Respondent who has been prejudiced as the Applicant has not made any efforts to try and settle his matter with the Respondent nor made any payment for a period in excess of five years.
 - (c) The balance of convenience that favours the granting of the order.
23. The Applicant's matter has been running for 5 years and more and he is only now 8 years after the property has been sold and Respondent has continued to provide his "payment profile" to the credit bureaus that the Applicant claims prejudice and wants the Tribunal to have the listing removed so that he can access credit.
24. A period in excess of 5 years has lapsed and this far exceeds the urgency of the matter for the Tribunal to even entertain granting interim relief applied for.

CONCLUSION

25. The parties to this matter confirmed, in their papers, that there is a matter before the NCR on the same facts by the Applicant;
26. The Tribunal, in terms of section 136 therefore has jurisdiction to hear this matter by virtue of the application that is before the NCR;
27. The Applicant failed to show the urgency of the matter to invoke section 149(1) as this matter has been running for close to 5 years and the urgency fell off a while ago, i.e upon the Applicant learning of this matter or soon thereafter.

ORDER

28. Accordingly, for the reasons set out above, the Tribunal makes the following order:

28.1 The Applicant's application for interim relief in terms of section 149(1) of the NCA is dismissed; and

28.2 There is no order as to costs.

{Signed}

ADV HFN SEPHOTI
PRESIDING MEMBER

MR F SIBANDA & DR MC PEENZE CONCURRING

Authorised for issue by National Consumer Tribunal

Case Number: NCT-100373-2018-149(1)

Date: 2018 / 05 / 11

CCYY / MM / DD

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