



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG.**

CASE NUMBER: 19492/20

- (1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised: No

12/5/2022
Date


Signature

In the matter of

CHRISPIN KALEFYA

APPLICANT

And

SOUTH AFRICAN FRAUD PREVENTION SERVICES

FIRST RESPONDENT

MFC A DIVISION OF NEDBANK GROUP

SECOND RESPONDENT

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

INTRODUCTION

[1] This is a review application, wherein the applicant prays for the following order:

1. Declaring that the decision of the first respondent and/or respondent is unlawful and unconstitutional.
2. Reviewing and setting aside the decision to list the applicant with the first respondent.
3. That the first and second respondent be ordered to remove the fraud listing being SH00235154 containing the applicant's name, identity number and or any other related information on the database of the first respondent.
4. Such further and or alternative relief as the court may deem fit and appropriate to order.
5. Costs against the second respondent.

[2] Only the second respondent opposed the application for review.

THE PARTIES

[3] The applicant is an adult male person, residing in Benoni, Gauteng.

[4] The first respondent is South African Fraud Prevention Services ("SAFPS") a non-profit organisation and credit bureau duly registered in terms of section 43 of the National Credit Act 34 of 2005.

[5] The second respondent is MFC a Division of Nedbank Group, a Company duly incorporated with limited liability and registered credit provider as defined in terms of Section 40 of the National Credit Act 34 of 2005.

BACKGROUND OF RELEVANT FACTS

[6] On 27 October 2018, the applicant made an application for vehicle finance at Nedbank. The vehicle finance application was completed and supporting

documentation comprising of, inter alia, Capitec Bank Statements, were provided to the second respondent.

[7] The dealership at which the applicant made his application for vehicle finance is Auto Panache (**“the dealership”**). The said dealership is an unapproved dealership with Nedbank. The dealership used the Dealer Code of Zido Cars CC, an approved dealership registered with Nedbank, for purposes of the vehicle finance application.

[8] The Capitec Bank statements attached to the application only showed 2 salary deposits on 29 August 2018 for R25 157.00 and another on 29 September 2018 for R25 157.00

[9] On receipt of the vehicle finance application, Ms Anneri de Lange, a credit assessor employed at Nedbank, was allocated to access the applicant’s application. Ms de Lange noticed that the footer on the 2nd and 3rd pages of the bank statements was not centred and differed from the template on file. Accordingly, she forwarded the bank statements to Capitec Bank for confirmation as to whether or not the bank statements were legitimate.

[10] On 29 October 2018 Ms Lecreasha Davids from the Fraud Division at Capitec Bank replied and confirmed that the salary transaction for September 2018 do not correspond, as there was no salary transaction for September. Following further inspection she verified and confirmed that the bank statements were tampered with, to create a salary for September and therefore the statements are fraudulent.

[11] As a direct result thereof, Nedbank reported the applicant to SAFPS and the applicant was listed on the SAFPS data base.

[12] On 6 June 2019 the applicant attended to First National Bank to resolve an issue pertaining to FICA, when he was informed at the bank, that his identity number has been listed by the first respondent for submitting a fraudulent bank statement.

[13] On 28 June 2019 the applicant lodged a formal dispute in respect of the listing with SAFPS.

[14] The applicant informed the first respondent that he utilised an agent/sale person at Auto Panache dealership to purchase a motor vehicle and he submitted all the requested information to the dealership. Mr Jassat, employed at the dealership, dealt with his application, and the latter must have altered the information of the said bank statements.

[15] On 1 July 2019 SAFPS delivered its outcome regarding the dispute. The applicant was informed that the SAPFS had received credible evidence from Nedbank of fraud and that therefore the listing will remain.

[16] Furthermore, the applicant was informed that he was entitled to appeal the outcome of the dispute by approaching the relevant Ombudsman or the National Consumer Regulator.

[17] The applicant took the matter no further and issued this application on 5 August 2020.

SUBMISSIONS BY THE APPLICANT

[18] Counsel for the applicant argued that the decision by the first respondent to list him with the SAPFS was taken in contravention of the principles of natural justice., specifically the *audi alteram partem* principle.

[19] The applicant argued that in terms of section 33 of the Constitution¹ the applicant has the right to administrative action that is lawful, reasonable and procedurally fair. The contention was that the second respondent ought to have given the applicant an opportunity to provide reasons as to why the listing should not be made.

¹ Act 108 of 1996.

[20] Therefore, the applicant asserts that the listing with SAPFS should be set aside and the order should be granted.

SUDMISSIONS BY THE SECOND RESPONDENT

[21] The second respondent 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.

[22] However, counsel for the second respondent stated that the main ground upon which the second respondent opposed the application is that the applicant's listing on the database of the first respondent was lawful and did not constitute an infringement of any of the applicant's rights.

ISSUE FOR DETERMINATION

[23] The issue in this application is whether the second respondent was entitled to report to the first respondent the fact that the applicant provided the second respondent with bank statements that were found to have been tempered with. Furthermore, if so entitled, whether the concomitant listing of the applicant by the first respondent, without prior notice and in not affording the applicant opportunity to give his version pertaining to the fraud committed, was an infringement of the applicant's rights in terms of the Constitution.

POINT *IN LIMINE* RAISED BY THE SECOND RESPONDENT

[24] Regarding the point *in limine* raised by the second respondent, the test enunciated in *Plascon-Evans Paints Ltd vs. Van Riebeeck Paints (Pty) Ltd*², it states that the relief sought in motion proceedings, such relief may be granted only if the facts as stated by

² 1984(3) SA 623 (A) at 634E-G.

the respondent, together with the admitted facts in the applicant's affidavits, warrant the granting thereof.

[25] On 27 October 2018 Auto Panache, the dealership, submitted a vehicle finance application with attachments, on behalf of the applicant to the second respondent. It seems peculiar that the applicant did not follow up on the outcome of the finance application.

[26] Furthermore, eight (8) months after the submission of the application with the second respondent, on 6 June 2019 the applicant was informed that his identity number was listed with the first respondent due to fraudulent documents submitted to Nedbank. Again the applicant did not follow up on the issue.

[27] The applicant only lodged a dispute with the first respondent 28 June 2019, of which the outcome was communicated with him on 1 July 2019. The applicant was informed that the issue can be taken up with the Ombudsman or the National Credit Regulator, which he failed to do.

[28] The applicant stated that Mr Jassat, employed at the dealership, must have committed the fraud with regard to the bank statements submitted to the second respondent. However, since being made aware of the listing in June 2019, the applicant never approached the South African Police Services to investigate the fraud committed by Mr Jassat.

[29] This application was lodged on 5 August 2020, nearly two years after the application for vehicle finance was submitted to Nedbank.

[30] It is on the basis of these factors that I am of the view that the factual dispute that arises in this matter is not of the nature that warrants an order of referral to oral evidence. Therefore, I am of the view that the application can be decided on the papers before me. Furthermore, on a consideration of the totality of the evidence, the probabilities favour

the version of the first respondent. The issue whether or not the applicant committed fraud is not material in the adjudication of the dispute in this application.

[31] Therefore, the point *in limine* raised by the second respondent is dismissed.

CASE LAW AND EVALUATION

[32] The SAFPS is a credit bureau tasked with the obligation to combat fraud in commerce. As a credit bureau, it is regulated by the National Credit Act 34 of 2005 (“NCA”).

[33] In the case of *National Credit Regulator v Southern African Fraud Prevention Services NPC*³ the Supreme Court of Appeal said;

“[4] SAFPS was incorporated in 2000 as a non-profit corporation by the four major banks to combat fraud in commerce. Its members include most major credit providers in South Africa, as well as the South African Revenue Service and the Financial Services Board. [...]

[5] In terms of the agreement concluded between SAFPS and its members, each member agrees that all fraud detected by it during the normal course of its business will be filed to the SAFPS Shamwari database within two business days of the fraud being detected. All members have access to that database in order to access information applicable to their business requirements and needs. Primarily members will seek information before entering into a variety of commercial transactions or making employment decisions.

[6] The SAFPS code of practice identifies 11 different categories of fraudulent conduct. These are:

³ 2019 (3) ALL SA 378 (SCA) at paragraph [4]-[6].

(a) False identity, which includes the use of a false name, address or ID number or other false personal detail in an application of some type;

(b) Impersonation, where an applicant impersonates someone else, perhaps by using a false ID book or number, or the particulars of a dead person, or in some other way;

(c) Giving false employment details including an incorrect employer name, address or telephone number or providing a forged or incorrect payslip;

(d) Use of other forged documents;

(e) A victim of impersonation, where it is doubtful whether the person is in fact impersonating someone else or is himself or herself possibly the victim of impersonation. In that event the person is shown under both categories (b) and (e). The latter is said to require the member “to be extra vigilant when deciding as to the granting of any facility”. After establishing that they have been a victim of impersonation, for example, by someone using their stolen identity card, a person listed under this category is able to ask for a protective listing;

(f) Misuse of account through fraudulent conduct, which is described as “deliberately not paying their mortgage or credit card account, especially by guile, trickery or illegitimate presentation of the individual’s financial position”. It is said that the category is not to be used unless there was clearly an intention to commit fraud;

(g) Employee fraud or fraud in an employment application. This is an extensive category covering a vast number of possibilities;

(h) Insurance fraud, which relates to dishonest and inflated insurance claims;

(i) Internet fraud;

(j) Business fraud/person unknown, which records information related to fraudulent activities where no person can be identified as responsible;

(k) Suspected fraud (declined). This is a cautionary category where fraud is strongly suspected, primarily in regard to the provision of false information or impersonation of someone else. Accordingly it does not involve a case of proven fraud.”

[34] Nassim Nicolas Taleb said;

“If you see fraud and do not say fraud, you are a fraud.”

[35] It is evident that the SAFPS has a duty and obligation to report adverse findings in respect of fraud. This is also an obligation in terms of the NCA⁴, as amended, read with regulation 18(6)(b).

[36] The second respondent’s conduct is undoubtedly regulated by statute.

[37] The applicant did not dispute that the bank statements provided to the second respondent and attached to the finance application, were fraudulent. The second respondent does not open criminal cases for each and every matter where fraud is determined. It is only in significantly important cases in other words, where credit is actually granted and money is lent to the an applicant, that a case will be reported to the South African Police Services for investigation.

[38] In the event that fraudulent documents are used in finance applications, the second respondent reports reported to the SAFPS, serves as a means of warning all other credit providers that fraudulent documents were used in a previous application.

[39] There is no legal obligation upon the second respondent to notify the applicant of the adverse listing, or to involve the applicant in its investigations, nor to afford the

⁴ Section 70(3) (a) of the NCA provides that;

“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 subsection(2), a credit bureau may receive consumer credit information in respect of a consumer only from other prescribed persons. “

applicant an opportunity to prove his innocence. That opportunity is always there and as and when the applicant produces evidence to prove his defence, his listing will be removed. However, where the applicant has failed to prove his defence, such as in this application and in his formal dispute lodged with SAFPS, the listing is to remain.

[40] In 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 second respondent did not infringe any right of the applicant in reporting the fraud information concerning the applicant to the first respondent. The right in section 72(1)(a) is the right of a consumer to be advised before prescribed adverse information is reported not fraud information.

[41] 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.

COSTS

[42] The basic principles governing granting of cost orders in civil litigation is that the judicial officer has the discretion in granting same.

[43] The general principle is that where a party has been substantially successful in bring or defending a claim, that party is generally entitled to have a cost order made in favour against the other party who was not successful.

[44] The second respondent has been successful in the outcome of the application and therefore is entitled to a cost order.

ORDER

[45] In the premises of the above the following order is made;

1. The application is dismissed.
2. The applicant is order to pay the costs of the second respondent on a party and party scale.



**CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT**

APPEARANCES:

For the applicant: Adv. Carvalheira
Instructed by Hammond Pole Attorneys

For the respondents: Adv. Makhani
Instructed by Raboramulele Attorneys

DATE OF HEARING: 28 April 2022

DATE JUDGMENT DELIVERED: 12 May 2022