REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, MTHATHA

Case No: CA18/2021

In the matter between:

TRANSUNION AFRICA (PTY) LTD Appellant

and

MPULANA MACLENNAN NGCENGE Respondent

JUDGMENT

MAKAULA J:

A. <u>Background</u>:

[1] This is an appeal that concerns, amongst other factors, the interpretation of certain provisions of the National Credit Act 34 of 2005 (the NCA).

[2] In the court *a quo*, the Respondent obtained an order in the following terms:

> "1. The Respondent's failure to remove adverse information about the debt review listed with it against the Applicant be and is hereby declared unlawful.

2. The Respondent be and is hereby ordered to forthwith remove adverse information about the debt review listed against Applicant from its files and or records.

3. The Respondent is directed to forthwith inform the Applicant and all parties to whom the information has been reported, including all other credit bureau of the removal of the adverse information, which is debt review.

4. The Respondent is to pay costs of the application".

[3] The Appellant, not satisfied with the decision, obtained an order granting it leave to appeal from the Supreme Court of Appeal to the Full Bench of this Court.

B. Grounds of Appeal:

[4] The appeal is premised on the following grounds that:

"1. the court erred in finding that it had the necessary jurisdiction at first instance to direct the appellant to remove the adverse information about a debt review from its files and records in that:

1.1 the respondent in essence sought an order directing the appellant to remove the adverse information from its files in terms of the provisions of section 72(3)(b) of the National Credit Act 34 of 2005 ("the NCA").

1.2 in terms of section 72(4) of the NCA the person who challenges the information held by a credit bureau may apply to the National Credit Regulator to investigate the disputed information as a complaint under section 136. Such dispute must then be referred to the National Consumer Tribunal in terms of section 137(1)(a) for an order resolving a dispute over information held by a credit bureau.

1.3 the process set out above is administrative and not judicial and it is only the Tribunal that is empowered to assist a consumer at first instance and the NCA

does not afford the High Court jurisdiction to deal at first instance with matters falling within the province of the Tribunal.

1.4 the role of the High Court in the legislative scheme was limited to dealing with judicial reviews of, or appeals from, the decisions of the Tribunal.

2. the court erred in coming to the conclusion that respondent's debt review came to an end after the 31st March 2010 and that the appellant must "remove the name of the applicant from the credit review" in that once a debt review has been confirmed, whether by way of court order in terms of s 87(1)(b) or by voluntary debt rearrangement in terms of s 86(8)(a), the only way to end its effect is in terms of s 71 read with s 88(1)(c) of the NCA.

3. The court erred in failing to consider that the respondent did not properly challenge the information held by appellant in terms of the provisions of section 72(1)(c)(ii) of the NCA, which challenge notice was sent on the respondent's behalf by his attorney, Mr A.S. Zono of A.S. Zono and Associates, in that:

3.1 he failed to deliver the challenge notice per hand or by registered post;

3.2 he failed to follow the correct processes when he submitted the challenge notice to the appellant; and

3.3 the personal information contained in the challenge notice was incorrect and did not accord with the personal information of the respondent.

4. the court erred in failing to place any / sufficient reliance upon the fact that the respondent deliberately made a false allegation in his founding affidavit when he stated that he had at no stage applied to be placed under debt review.

5. the court erred in failing to consider that the respondent should have placed all the relevant facts before the court in his founding affidavit".

C. <u>Background Facts</u>:

[5] The genesis of the dispute between the parties is an adverse report appearing on the website of the Appellant. The Respondent discovered the adverse listing when he applied for financial assistance from ABSA Bank (the bank). The bank rejected the application on the basis that there was an adverse report reflecting that the Respondent was listed by the Appellant as being under debt review. On 19 July 2019, the Respondent received a credit report from the bank stating amongst other information that the Respondent had:

> "Requested to be placed under debt review with a registered debt counsellor, secondly, that the debt review was logged on 31st March 2011".

[6] The Respondent attacked the report before the court a *quo* as bereft of a lot of information in that there:

> "(a) was no reference to the name of the Court at which and the date on which he made an application for a debt review; and
>
> (b) the name and contact particulars of the debt counsellor".

The Respondent states that lack of such and other information triggered the operation of section 72(1)(c)(ii) of the NCA in that he logged a complaint with the Appellant by writing a letter challenging information (the letter of challenge).

[7] The letter of challenge was transmitted to the Appellant on 31stJuly 2019 by the Respondent's Attorney of record through the former's email address and fax numbers, which undeniably belong to the Appellant. He contends that the transmission was a success as confirmed by the transmission slips. In the letter, the Respondent demanded that the Appellant should provide him with credible evidence in support of

the information appearing in its listing and the removal of the information relating to the debt review in the event the Respondent does not find credible evidence in support thereof within twenty (20) days of such a finding. The Respondent states that no response was received by him to that correspondence despite that the NCA enjoined the Appellant to furnish the information or remove his name from the listing. The Respondent argues that keeping that adverse information is arbitrary, unlawful, without any just cause and prejudicial to him.

[8] The Respondent laments that he is prejudiced because amongst other issues, he is a breadwinner who is married in community of property and his family cannot be afforded credit by the banks. The respondent avers that the procedure that the Appellant established (i.e. telephonic and electronic lodgement via the Appellant's website) is flawed for two reasons namely:

> "1. that this procedure is not a condition that is legislatively prescribed; and
>
> 1.2 that this manner of lodgement is not published in any permissible manners of putting out information for public knowledge".

[9] In response to the allegations, the Appellant, in the court *a quo,* raised the following points in *limine:*

(a) Firstly, the Applicant's failure to observe and comply with the procedures set down by the Respondent in challenging the accuracy of the information retained by it, in terms of the provisions of section 72(1)(c)(ii) of the Act.

(b) Secondly, the Appellant alleged that the Respondent purposefully misled the court *a quo* by being dishonest that he was under debt review and misrepresenting those facts.

On those grounds, the Appellant argued that the application stood to be dismissed.

[10] In respect of the first point in *limine,* the Appellant argues that the Respondent failed to follow the procedure prescribed by Rule 72(1)(c)(ii) of the NCA especially the user friendly and reliable system devised by the Appellant to address the provisions of this section. The Appellant asserts that the process is readily and easily available to all smartphones, laptops or tablets by simply visiting the Appellant's website or even doing a google search. In the event that a consumer has no access to internet, the Appellant has a central helpline, which may be called by the consumer for all kinds of queries. Therefore, queries could be lodged telephonically and electronically. The Appellant alleges that the Respondent failed to follow either process. In response to the process followed by the respondent, the Appellant submits as follows:

> "17. I wish to inform this Honourable Court that the Respondent:
>
> 16.1 does permit the lodgement or accept challenges to adverse listings on the credit reports of consumers per email;
>
> 16.2 does not receive emails from the public to email address legal@transunion.co.za, even less so that it accept challenges to adverse credit listings to the stated email address;
>
> 16.3 the Respondent does not accept receipt of documents from the public, per telefax, at all". (*Sic*).

[11] The Appellant states that even if it had received the notice challenging the listing (which it denies, having now seen the letter) it would not have processed or complied with it because it was defective. The defect is that the identity number of the

Respondent is incorrectly stated on the letter and on the Power of Attorney. Furthermore, the FICA documents were not attached to the complaint.

[12] The Appellant, in sum, states in this respect that the Respondent did not:

> "(a) validly lodge a challenge in terms of section 72(1)(c)(ii) of the Act;
>
> (b) in the absence of a valid challenge, the Appellant could not cause an investigation to be undertaken;
>
> (c) in the absence of an investigation, the Appellant could not act in accordance with the provisions of section 72(3)(a) or (b) of the Act and therefore, it cannot be said that the Appellant failed to comply with the Act and retention of the adverse listing is and remains lawful".

[13] Relying on the second point in *limine,* the Appellant avers that the Respondent clearly and unequivocally lied in respect of his contentions pertaining to debt review. The Appellant alleges that upon receipt of the application it conducted investigations with the National Credit Regulator (the NCR) about the Respondent. The NCR confirmed that the Appellant is under debt review. Subsequent to the information obtained, it transpired that Mr Sodo was the debt counsellor who placed the Respondent under debt review. The records obtained by the Appellant reflect that the Respondent was placed under debt review on 27 January 2009. I shall deal later with the order placing the Respondent under debt review as it formed part of the debate between the parties, which is whether in fact the Respondent is under debt review. Mr Sodo at the instance of the Appellant, filed a confirmatory affidavit confirming that indeed the Respondent was under debt review.

[14] Mr Sodo states in his affidavit that during or about June 2019, he was approached by the Respondent. The Respondent enquired from him whether he was still under debt review. Mr Sodo confirmed. The Appellant submits that the application should have been dismissed on the basis of dishonesty because the Respondent knew and had been reminded by Mr Sodo three months before the Application was moved that he had been placed under debt review.

D. <u>The Order</u>:

[15] For the reason that the order of the magistrate is central to the dispute between the parties, I need to refer to it as it stands. The order reads:

> "**IT IS ORDERED THAT**:-
>
> Mr Ngcenge's debt obligations be arranged as follows:-
>
> 2.1(a) That in terms of section 86(7)(c)(ii)(aa) the period of all the agreements listed below are extended and the amount of each payment due is reduced pro rata against the amount of R3 707.00 available per month less distribution cost – see annexure "B"
>
> **Standard Bank**
>
> **African Bank**
>
> **Motor Finance Corporation**
>
> 2.1(b) That in terms of section 86(7)(c)(bb) all payments due under all the agreements be postponed until the end of the month following the month in which this order is made.
>
> 3. <u>That the monthly payments be reviewed by the **31st March 2010**, failing which this order shall lapse</u>.
>
> 4. Applicant pay costs of this application.

DATED AT NGQELENI ON THIS 27TH DAY OF JANUARY 2009". (Emphasis added)

[16] The Respondent argues that the above order self-regulated its effectiveness and life span in that the order stipulates that it would be effective and valid from 27 February 2009, until 31 March 2010. In this regard, the Respondent places reliance on paragraphs 2.1(b) and 3 of the order. The Respondent reasons as follows:

> "The natural consequence of that failure is internally ordained in paragraph 3 of the court order. It stands to reason that from 31 March 2010, by reason of the failure to review monthly payments under debt review, I was not under debt review. There is no conceivable legal basis in the records of the Respondent that I am under debt review. I firmly submit that I am not under debt review as there is no credible evidence to that effect. In these circumstances, the law provides that the information of adverse nature must be removed from credit bureau files.
>
> 5. It is fitting to submit that Regulation 18(2) places the entire responsibility on the shoulders of the Respondent to "*take all responsible steps to ensure that all records are kept up to date*". The Respondent has failed to keep its records concerning me up to date for a period exceeding ten (10) years. The information about my over indebtedness or debt review status is obviously not accurate, and it should be removed". (*Sic*)

[17] The Respondent categorically denies that he misrepresented the facts and was dishonest about the debt review. He states that such allegations are based on distortion and misunderstanding of his founding affidavit. He is adamant that at the time of the launch of the application he was not under debt review especially after 31 March 2010. The Respondent states that:

> "I could not have conceivably been aware that this refers to the debt review that lapsed on 31 March 2010, especially that my credit profile reflects that the debt review was logged on 31st March 2011, a date long after the expiry of debt review order date 27th January 2009 . . ., that

> after logging debt review or as at the time, the debt review was logged I was not on debt review, and I did not apply for debt review at any time near that period". (*Sic*)

[18] Regarding Mr Sodo, the Respondent admits that during June 2019, he approached him but not for the reason Mr Sodo advances in his affidavit. The Respondent submits that he approached him for assistance, (as his attorney) because the bank informed him that he was listed with the Respondent as being under debt review. He testifies thus in this regard:

> "I sought assistance from him as a person who truly understands the provisional order of 27 January 2009. Surprisingly, Mr Sodo did not know anything about the debt review I was talking about and ultimately informed me that because of his age he has retired as a debt counsellor. I am taken aback now that he has been able to assist the Respondent when he refused to help me as his client".

[19] In the same breath, the Respondent states that he could not have asked Mr Sodo if he was still under debt review because Mr Sodo on 27 January 2009, made him aware of the contents of the provisional debt review, that, absent a review, the order would lapse. That awareness, so submits the Respondent, made him to know that there was no debt review order against him. The Respondent disagrees with the view expressed by Mr Sodo that he was still under debt review.

[20] Pursuant to the realisation that the Respondent was erroneously under debt review, his current attorney penned a letter to the Appellant's attorneys, Mr Rudi Heerschop asking him to prevail upon the Appellant to remove his name. Mr

Heerschop refused to remove the Respondent's name from the listing hence the application.

[21] The respondent contends that furnishing evidence in terms of section 72 of the NCA together with its consequence of removing adverse information when evidence to support it cannot be found, are constitutional imperatives with their roots in section 32 of the Constitution. Therefore, such rights cannot be limited by the law of general application. The Respondent concludes that the limitations relied upon by the Appellant are legally incomprehensible and unlawful for failure to provide credible evidence within the legally prescribed time period coupled with its failure to remove the adverse inaccurate information about him.

[22] The Respondent submits that he has a right to access the information and incidences of that right cannot be limited by Appellant's creation of systems only known to itself. He avers that he has a right in terms of section 72(1)(b) of the NCA to inspect Appellant's files or records concerning him and such should be done without charge to him in terms of section 72(5)(iii). However, the process the Appellant requires the Respondent to have followed when he lodged a dispute required him to purchase data to access internet. He has no money, no high tech phone nor the technological known how to do so.

[23] The Respondent states that it was incumbent on the Appellant to have informed him once it has received the fax or email (sent to it on 31 July 2009), of the proper process it has designed to be followed when lodging a challenge. Furthermore, the

Respondent alleges that even though his identity number was incorrectly written, his names and date of birth were correct and the Appellant does not say that based on that information, it was impossible to use it to process the challenge.

[24] In his founding affidavit, the Respondent states that pursuant to him having applied for a credit facility with ABSA Bank, he received a report from which he made two observations, first that he requested to be placed under debt review with a registered debt counsellor, secondly that the debt review was logged on 31st March 2011. Apart from the observations the Respondent made, he pertinently responded as follows to the report.

> "I was taken aback that I am listed as being under debt review. As I had, at no stage, applied to be placed under debt review. I would have definitely recalled if I had made such an application. I would have known the court in which I made such an application. The debt counsellor would have come to mind once this information crops up".

[25] Furthermore, the Respondent sent the letter challenge to the Appellant on 31 July 2019 challenging the accuracy of the adverse information. In it, the Respondent's attorney makes the following statement of fact:

> "Our client rejects that he ever applied for and placed under debt review".

[26] The Appellant in answer, pointed out that the Respondent did apply for debt review and obtained a confirmatory affidavit from Mr Sodo as reflected above. Mr Sodo states that in June 2019 he was approached by the Respondent to enquire whether he was still under debt review. The version of the Respondent is that he

sought assistance from Mr Sodo, as his Attorney, because the bank advised him that he was listed as stated before. That was three months before the application was launched.

E. Discussion:

[27] The application papers were issued on 9 September 2019. It is surprising for the Respondent to state that he was never under debt review and for his attorney to state that he denied ever being under debt review considering that three months before the launch of the application, he approached Mr Sodo in connection with the same issue of debt review. The Respondent's approach to Mr Sodo, should have jogged his memory that he was once listed and placed under debt review.

[28] This should be viewed further in the backdrop that this issue was never mentioned by him in his founding papers. This came from the answering affidavit. [29]

The issue of debt review or the Respondent being under debt review was not new to the Respondent. He knew that he once applied for the rearrangement of his finances. A few months before the launch of the application as alluded to, he had approached Mr Sodo. It is therefore inconceivable that it did not dawn to the Respondent that he once applied for debt review, for him to use words like "he never at any stage" and "I would have definitely recalled if I had made such an application".

[30] The Respondent authorised his present attorneys through a Power of Attorney dated 11 July 2019, "(t)o investigate the placing of my name by the credit bureau(s)

and receive the names of the credit bureau(s) from which adverse credit record or report has been received". Strangely, in his founding affidavit, the Respondent states that:

> "On the same date of 19th July 2019, I was caused to receive my credit report obtained from the Respondent".

The two statements of facts are inconceivable because he could not have asked for investigations before he received the report (about being under debt review) from the bank. I do not view this sequence of events as an error in the light of what is stated in paragraph 27 above.

[31] The contention by the Appellant that the Respondent was dishonest should be viewed in the backdrop of the facts as stated by the Respondent. The Respondent states in his founding affidavit that at no stage had he applied for debt review and if he had done so, he would have recalled. When the Appellant put up the information and the court order in their answering affidavit, the Respondent suddenly recalled that he once applied for the debt review and approached Mr Sodo. It is undoubtedly so that I have to accept the version of the Appellant in this regard.

F. Provisions of the NCA:

[32] Section 70 basically deals (amongst others) with (a) what constitutes "consumer credit information"; (b) how that information is registered with the various credit bureaus; (c) the steps the credit bureau should take to verify its accuracy; and (d) expunge it if it turns out to be inaccurate. The section further deals with the duties of the Minister with regard to the prescription of the standards for filing, retention, fees

to be charged to a consumer etc. It deals with the duties of the National Credit Regulator (NCR) and the periodical information it may require from the credit bureau. Of relevance for the purposes hereof are the provisions of section 70 (2) (c), (f) and (i). The sections read:

> "**Credit bureau information**
>
> 70(1)
>
> . . .
>
> 70(2) A registered credit bureau must –
>
> (c) take reasonable steps to verify the accuracy of any consumer credit information reported to it; . . .
>
> (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;
>
> . . .
>
> (i) not knowingly or negligently provide a report to any person containing inaccurate information".

Section 71 of the NCA, as shall be dealt with below, deals with the removal of record of debt adjustment or judgment.

[33] The contention by the Respondent is that the listing occurred on 31 March 2011 after the court order had lapsed on 31 March 2010. The Respondents therefore argues that the Appellant contravened the provisions of section 70(2)(c) by not verifying the information before it logged it.

[34] There is no evidence that at the time the Appellant logged the information, it had verified its accuracy. Suffice to state that subsequent to the receipt of this application, as part of its own investigation into the credit affairs of the Respondent, the Appellant made enquiries with the NCR about the Respondent and the latter confirmed that their records reflected that he was under debt review. The Appellant, as stated before, contacted the debt councillor, Mr Sodo who confirmed that the Respondent is indeed under debt review.

[35] It is undoubtedly so, that the court order states in paragraph 3 that the monthly payments should be reviewed on 31 March 2010 failing which the order shall lapse. This order says what it says but the matter does not end there. One has to establish whether at the time of the launch of that application the Respondent intended the order to lapse on 31 March 2010 or wanted his financial circumstances to be re-arranged so as to pay his debts in full.

[36] That is easily ascertainable in the application papers of the debt review before the Magistrate at Ngqeleni and the NCA. I shall briefly examine these aspects. Clause 1.1 of the agreement between the Respondent and the Consumer Protection Excellence (CPE) as a PDA, that states:

> "This agreement will commence on the date. The first effective payment is received by the PDA in accordance with the debt order instruction and/or court order, and shall terminate when the debt review process is cancelled for any reason specified in terms of the National Credit Act". (Emphasis added)

[37] The PDA is defined in the agreement as a Payment Distribution Agency. The agreement in this regard is couched in peremptory terms regarding how the review process is cancelled. It states that it shall be in terms of the NCA. Section 71 of the NCA provides for the removal of record of debt adjustment or judgment.

[38] Section 71(1) provides that a debt counsellor may upon an application by a consumer issue a clearance certificate relating to that debt re-arrangement. Sections 71(2)(a) and (b) stipulate that upon receipt of an application in terms of section 71(1), a debt counsellor must investigate the circumstances of the debt re-arrangement and either, issue a clearance certificate if the consumer has fully satisfied all the obligations under the credit agreement that was subject to the debt re-arrangement order or agreement in accordance with that order or agreement; or refuse to issue a clearance certificate.

[39] Section 71(3) deals with an appeal mechanism where the debt counsellor for whatever reason refuses to issue a clearance certificate. This sub section allows the consumer the right to apply to the Tribunal[1] to review that decision. This is an internal arrangement agreement in terms of the NCA and the agreement between the parties. Paragraph 1.3 of the agreement between the Respondent and the CPE as the PDA referred to, endorses this procedure. It does not refer to any court order which has to be relied upon to terminate the debt review as espoused by the Respondent.

[40] Section 71(6) however provides:

[1] National Consumer Tribunal established in terms of section 26 of the NCA.

> "Upon receiving a copy of a court order rescinding any judgment, a credit bureau must expunge from its records all information to that judgment".

[41] This is the only provision which talks to the removal of adverse information based on a court order. The submission by Mr Zono that the effect of a lapsed provisional order can be no different from that of a rescinded and set aside order, because neither advantage nor disadvantage may flow from it, may be correct. However, the provisions of section 71 of the NCA are clear and unambiguous as shown above. Even if the court order had lapsed, fulfilled or rescinded, the debt counsellor would still have to be notified so as to issue a clearance certificate which would in turn empower or require the credit bureau (the Appellant in this instance) to remove the adverse information appearing on its data. Therefore, it is my finding that in terms of the NCA and the agreement between the Respondent and the CPE, the Respondent was required to obtain a clearance certificate from Mr Sodo or any other debt counsellor who took after him. The issue of the lapsed order does not avail the Respondent of a right not to obtain a clearance certificate and if refused, to approach the Tribunal (not the court *a quo*) for the review of the decision of the debt counsellor.

[42] Failure by the Respondent to comply with the provisions of section 71, the information contained in the Appellant's data base remains extant. It cannot be said that the Appellant flouted the provisions of sections 70(2) (c), (f) and (i) of the NCA. As at the time the judgment lapsed (according to the Respondent) the Respondent needed to do more by following the procedure provided for in section 71 of the NCA.

G. **Jurisdiction:**

[43] It remains to be determined whether the court *a quo* had jurisdiction to deal with the issue in view of the provisions of the NCA as a forum of first instance.

[44] Section 148 of the NCA deals with Appeals and Reviews and thus touches on the role of the High Court in this regard. I shall be terse and refer to section 148 of the NCA as is. It provides:

> "**Appeals and Reviews**
>
> 148 (1) A participant in a hearing before a single member of the Tribunal may appeal a decision by that member to a full panel of the Tribunal.
>
> (2) Subject to the rules of the High Court, a participant in a hearing before a full panel of the Tribunal may-
>
> (a) apply to the High Court to review the decision of the Tribunal in that matter; or
>
> (b) appeal to the High Court against the decision of the Tribunal in trial matter, other than a decision in terms of section 138".

[45] The provisions of section 138, which have been excluded deal with a resolution that has been taken through an Ombud with jurisdiction, consumer court or alternative dispute resolution or investigated by the NCR and the Respondent agree to the proposed terms of an appropriate order. Section 138 provides that a Tribunal or court, without hearing evidence, may confirm that resolution or agreement as a consent order.

[46] It is apparent therefore from the provisions of section 148 and the other relevant provisions of the NCA, that the process of removing adverse information is Administrative and the only role the High Court plays is limited to the Appeals and Reviews of the decision of the Tribunal. I agree with the following statement by Thulare AJ[2]:

> "[27] In my view, the general thrust of the NCA, and in particular the consumer credit policy under Chapter 4, places the primary jurisdiction of consumer rights, consumer credit records and over-indebtedness and reckless credit, in the debt counsellor, National Credit Regulator, the Tribunal and the Magistrate's Courts, the latter two being subject to the supervision and inherent jurisdiction of the High Courts. The nature of the work set out for a debt counsellor, the NCR or the Tribunal in such circumstances, in my view, is necessary for a credible market place. Such an investigation cannot be avoided by simply crying lacuna and running to the High Courts, and thereby avoiding a proper investigation by the debt counsellor, the NCR or the Tribunal into the credibility of the information that sustains the alleged change in the financial position of a consumer. Under the circumstances, in my view, there is no good cause for the quantum leap out of the domestic remedies available to the applicant by statute, into the recourse to the courts, until the final stage and until the applicant had exhausted his statutory remedies. The application to the High Court is premature.
>
> [28] It follows, in my view, that the High Court is not the forum of first instance on matters which both the Tribunal and the Magistrate's Courts should deal with. Under circumstances where there are various tribunals which under the NCA are open to an applicant, it is preferable that the intervention of the High Court be deferred until the domestic remedies provided for in the NCA have been exhausted, unless the very complaint is the illegality or fundamental irregularity of the decision sought to be

[2] *Regard Du Toit vs Benay Sager t/a Debt Busters and Others* (unreported) ZAWCHC 141. Case No. 16226/17 delivered on 17 November 2017. See also *Janse Van Vuuren v Roets and Others* 2019(6) 506 (GJ).

challenged (*Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 501C-503H).

[29] Where the Legislature has spared the High Courts from such primary tasks as a forum of first instance in such elementary investigations, in my view, that ordination should not be departed from at the slightest invocation and for light and flimsy reasons. The applicant had an option to simply challenge the information held by the credit bureau, and if the credit bureau did not remove the information, it would have led to an investigation of his true financial position by the NCR leading up to, if needs be, the full panel of the Tribunal deciding the matter. There is no explicable reason given by the applicant as to why this path was not followed. Secondly, the refusal of the first respondent to issue the applicant with a clearance certificate is a decision that is reviewable by the Tribunal. There is no reason advanced as to why the applicant did not approach the Tribunal for intervention". (Emphasis added)

[47] The submission by the Respondent that reliance on section 71 is misplaced because it deals with the rearrangement and payments of the debts in cases where there is an order declaring indebtedness and a debt counsellor appointed in terms thereof, cannot be correct in view of what is set out in the paragraphs above.

[48] The least the Respondent should have done upon receipt of a copy of the information contained in the Appellant's records was to comply with the provisions of section 72(4) by challenging the information as a complaint under section 136 through the NCR. Section 136 allows any person to submit any complaint concerning any alleged contravention of the NCA to the NCR in the prescribed manner and form. Section 137(1)(a) allows the NCR to apply to the Tribunal for an order resolving the dispute over information held by a credit bureau.

[49] Section 72(1)(c)(ii) of the NCR states that every person has a right to challenge the accuracy of any information concerning himself or herself and require the credit bureau or NCR to investigate the accuracy of any challenged information, without charge to the consumer. Section 72(3)(b) requires of the credit bureau to remove the information or all record of it from its files, if it is unable to find credible evidence in support of the information. These sections say what they say without controversy.

[50] Chapter 1, Part A of the NCA deals with how the provisions of the NCA should be interpreted especially that, effect should be given to the purpose set out in section 3 thereof. There is a lacuna in the NCA, in that, it is silent on how a person can challenge information held by a credit bureau, like the Appellant. The Respondent, however, contends that the challenge was successfully delivered by e-mail and facsimile and that sufficed as service in terms of section 168 of the NCA. The contention goes further that section 168 has been complied with in that the documents were delivered to the Appellants. The Respondent cited the definition of "delivered" as it appears in section 1 of the Regulations of the NCA.

[51] Section 168 of the NCR deals with service of documents and provides:

> "Service of documents
>
> 168 Unless otherwise provided in this Act, a notice, order or other document that, in terms of this Act, must be served on a person will have been properly served when it has been either –
>
> (a) delivered to that person; or
>
> (b) sent by registered mail to that person's last known address".

[52] As stated, "delivered" is not defined in the NCA. The definition of "delivered" appears in section 1 of the Regulations promulgated by the Minister in terms of section 171 of the NCA. The section 1 definition goes:

> "delivered" unless otherwise provided for, means sending a document by hand, by fax, by e-mail, or registered mail to an address chosen in the agreement by the proposed recipient, if no such address is available, the recipient's registered address. . . ." (Emphasis added).

[53] The rest of the definition deals with delivery to the National Consumer Tribunal and NCR which is not relevant for the purposes hereof. There is no reference to delivery to the credit bureau. The word deliver in the Regulation only refers to instances where a recipient has chosen an address in terms of an agreement between them. In the instant matter, there is no agreement between the Appellant and the Respondent and therefore the definition does not apply. I agree with the following reasoning of Andre Gautschi AJ in *Starita (aka Van Jaarsveld) v ABSA Bank Ltd and Another*[3] with regard to the definition of "delivered" as appearing in the Regulations:

> "4. It is fallacious in my view to apply a definition in the Regulations to an expression used in the Act (the National Credit Act 34 of 2005). The Act does not permit the Minister, in making Regulations, to define expressions in the Act, the Minister is not empowered to dictate matters in the domain of the Legislature. The definition of the word "delivered" in the Regulations also does not purport to contain a "prescribed manner" for delivery. It is only a definition and simply indicates the meaning to be ascribed to the word "delivered" as used in the Regulations. In my view, therefore, no

[3] 2010(3) SA 443 (SG) paragraph 184.

regard can be had to the definition, of the word “delivered” in the Regulations in interpreting sections of the Act”.

[54] The Respondent seeks reliance on section 65 of the NCR in dealing with the delivery of the letter. Section 65 deals with the right to receive documents. In turn, section 65(1) stipulates that “every document that is required to be delivered to a consumer in terms of this Act must be delivered in the prescribed manner if any”. The section is specific as it relates to delivery to a consumer. The delivery in this matter was by a consumer to the credit bureau. Therefore reliance of a section 65 is also misplaced.

[55] Section 168 on the other hand deals with service of a notice, order or other document and requires that it must be delivered or sent per registered mail to that person’s last known address.

[56] In the absence of a definition of “deliver” in the NCR, the ordinary meaning of “deliver” i.e. to personally serve the letter (in this instance) to the Appellant alternatively per registered post must prevail.

[57] The Appellant avers that in order to address the lacuna in the NCA about how a challenge should be effected, it devised a system through which challenges are followed either telephonically or electronically as dealt and explained in paragraph 10 above.

[58] The reason addressed by the Respondent for not complying with the challenge procedure provided for by the Appellant or in failing to access the platform created by the Appellant which enables him to lodge the challenge is disingenuous. It is so for the reason that the letter of challenge was written and processed by the Respondent's attorney of record. The reasons advanced by the Respondent that he is technically illiterate, he had no high-tech cellular phone nor money to purchase data to access internet, cannot be correct in the light thereof. Apart from that which is said by the Respondent, there is no explanation given by his attorney (as the person who lodged the letter of challenge) why the attorney did not make attempts to access the Appellant's website.

[59] The Respondent's argument that the lodgement process created and preferred by the Appellant are "no law and are not binding to the Respondent" does not hold water in the light of the fact that the NCR does not provide a process through which the challenge must be lodged. The submission made that the system created by the Appellant has not been published for public knowledge in any recognizable platforms and media e.g. Government Gazette is opportunistic. I say so because it is a means employed to assist the Appellant in handling the large volumes of challenges by numerous consumers and to help the consumers to access the information contained in the data of the Appellant. Technology is the order of the day. It does not avail the Respondent nor his current attorneys to plead technological ignorance in this day and age. The website of the Appellant is easily available especially to the Respondent's attorneys. The measures taken by the Appellant are designed to assist consumers and not to frustrate them. Weighing the probabilities of this matter, I am unable to find that the Appellant received the letter of challenge and ignored it.

[60] Based on the above factors, I find that the Respondent is still under debt review as he has not followed the procedure prescribed in section 71 of the NCA. I further find that the court a *quo* erred in its finding that it had the necessary jurisdiction at first instance to direct the Appellant to remove the adverse information about the Respondent.

H. Costs:

[61] Mr Botma, for the Appellant urged us to order costs at a punitive scale against the Respondent and the Respondent's current attorneys jointly and severally, the one paying the other to be absolved. The reason advanced for such an order is that the Respondent blatantly attempted to mislead this court by misrepresenting the facts surrounding the Respondent being placed under debt review.

[62] The motivation for costs *de bonis propriis* against Mr Zono is that:

(a) The procedure Mr Zono applied is filing the notice challenge was wrong.

(b) The incorrect contact details of the Appellant were used by Mr Zono.

(c) The information pertaining to the Respondent supplied in the notice to challenge was incorrect.

[63] Further it was argued that Mr Zono had caused unnecessary costs to his client and the Appellant.

[64] Mr Zono, on behalf of the Respondent, submitted that if the appeal is dismissed, the Appellant should be ordered to pay costs on a punitive scale.

[65] This court is vested with a discretion when it comes to the award of costs. The costs usually follow the result. There is no evidence that Mr Zono was actuated by malice or recklessness in the procedure he followed in submitting the letter of challenge. He may not have been astute in submitting the challenge but that does not necessitate that he be mulcted with costs *de bonis propriis.*

[66] The Respondent was not honest in saying that he never applied to be placed under debt review. That was a blatant untruth. However, I feel that a cost order other than on a punitive scale would compensate that. It is clear that the Respondent had financial difficulties hence he approached Mr Sodo at the time and also the bank. It appears to me that he would not in the circumstances of the cost order sought be able to meet those costs. I say so without having enquired about his current financial standing. In my discretion a costs order on the normal party and party scale would suffice.

[67] Consequently, I make the following order.

(1) The order of the court a *quo* is set aside and substituted with the following order.

"The application is dismissed with costs".

(2) The Respondent is ordered to pay the costs of this appeal.

_____
M MAKAULA
Judge of the High Court

Zilwa J: I agree.

_____
PHS ZILWA
Judge of the High Court
Flatela AJ: I agree.

_____
B FLATELA
Acting Judge of the High Court

Appearances:

Counsel for the Appellant:	Adv DC Botma
Instructed by:	Schüler Heerschop Pienaar Attorneys c/o Mjuleka Attorneys Inc.
Counsel for the Respondent:	Mr AS Zono
Instructed by:	AS Zono & Associates
Date heard:	26 April 2021
Date judgment reserved:	26 April 2021
Date judgment delivered:	23 November 2021