

SOUTH AFRICA / JUDGMENT

Nyoka v Trans-Union Credit Bureau (Pty) Ltd (2525/2013) [2015] ZAECMHC 39 (12 February 2015) [2015] ZAECMHC 39

COURT

Eastern Cape High Court, Mthatha

BEFORE

LP Pakade

CASE / FILE NUMBER

2525/2013

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IN

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

In

the matter between:

CASE

NO: 2525/2013

NONKQUBELA

NYOKA.....Applicant

And

TRANS-

UNION CREDIT BUREAU (Pty)

Ltd.....Respondent

JUDGMENT

PAKADE ADJP.

- [1] The applicant seeks a declarator and a mandamus against the respondent .
- [2] The application is opposed by the respondent and has deposed to an answering affidavit which is filed of record .
- [3] The relief sought by the applicant is translated to an information required by the applicant kept by the respondent which constituted

the adverse credit report against her to Ned Bank Ltd . The applicant required this information in order to inspect and challenge it .

- [4] The applicant is an incola of this Court , being a resident of the Eastern Cape in Mthatha . The respondent is a peregrines of this Court , a company registered in Johannesburg according to law, but carries on its business throughout South Africa .
- [5] In the hearing of this application two conflicting decisions of this Court on jurisdiction came to the fore and on invitation by the Court jurisdiction point was argued and the argument was subsequently supplemented by heads of argument filed at the request of the Court , for which I am indebted to both counsel . I must first dispose of the issue of jurisdiction before I attend to the merits , if needs be . The law recognized as far back as

1911[1],) that our courts will not exercise jurisdiction in a matter unless effect can be given to its judgment.[2]. This principle has always been taken as the basis for the rule that the court will not entertain an action against a peregrinus unless either his person or his property is before the court or the cause of action arose wholly within the jurisdiction of the court . This principle has been applied by the various courts country wide and their judgments have been endorsed by the Supreme Court of Appeal and the Constitutional Court . In the Supreme Court of Appeal it was applied by Harms JA in *Tsung v Industrial Development Corporation Ltd* [3]. He made the following dictum with which I agree:

" If the defendant is a peregrinus and whether or not the court has jurisdiction over the cause , eg because the cause of action arose within the jurisdiction or jurisdiction exists *ratione delictus contractus* , an attachment is essential for the exercise of jurisdiction . A recognised *ratio jurisdictionis* will not do ".

The *Tsung* judgment involved a claim against two foreign peregrini .

- [6] The legislative source of jurisdiction is section 21(1) of the Superior Courts Act , 2013[4] . This Section is in identical terms with the repealed section 19(1) of the Supreme Court Act , 1959[5]. Section 21(2) provides in peremptory language that :

" A Division has jurisdiction over all persons residing or being in , and in relation to all causes arising and all offences triable within its area of jurisdiction and over all other matters of which it may according to law take cognizance".

Buqwana v Capitec and Another[6] and *Zokufa v Compuscan*[7].

- [7] In what follows , I will refer to the judgment of *Buqwana v Capitec and Another* as " *Buqwana* " and the judgment of *Zokufa v Compuscan* as " *Zokufa*". Without more ado, I find that these two judgments are not in conflict but are distinguishable on the basis of the nature of claim.
- [8] In each of the judgments the applicants sought a declarator and a mandamus. I paraphrase the relief sought in each of them. In *Boqwana*, the declarator sought was that the reporting of the default data of the applicant to the 2nd respondent (Credit Bureau) be declared

unlawful and be set aside ; that the retention by the Credit Bureau of the said information in its record be declared unlawful and set aside and for a mandamus directing the Credit Bureau to remove the said adverse credit information from its record .It is clear to me that the main relief sought was the mandamus, namely , " to remove the adverse credit information in the records of the respondent " and that removal was take place outside the area of jurisdiction of this Court .

- [9] It is not necessary to repeat the reasoning that informed Buqwana judgment. 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 . As said in the judgment (paragraph 9) ,the application of this principle 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 . Even resorting to section 26 of the Supreme Court Act to enforce a judgment outside the court's area of jurisdiction refered to judgment or orders that were granted by a court that has jurisdiction. Estate Agents Board v Lek [8]. The court cannot grant effective enforceable and executable order for mandamus forcing the Credit Buearu which resides outside its area of jurisdiction to erase, from its records which are also outside the jurisdiction of the court , adverse information concerning the applicant .

The information which the applicant sought to be removed was stored in the respondent's records in Johannesburg . The applicant had to exercise his right to claim the removal of the adverse credit information in Johannesburg . That is where the cause of action had wholly arisen . The adverse credit information was not to be removed from the respondent's records in Mthatha .There were no adverse records of the applicant in Mthatha . If it were so the court in Mthatha would have jurisdiction to order it to be removed and its order would be enforceable.

- [10] In Zokufa , as in this application, the nature of the mandamus sought by the applicant was for the Court to direct the Credit Bureau to furnish to the applicant information which sourced the adverse credit report . The Zokufa judgment concerns the delivery of adverse credit reports, files or information to the consumer , wherever he may be in the country. A registered Credit Bureau has an obligation to issue a report to any person who requires it for a prescribed purpose or a purpose contemplated in the National Credit Act (hereinafter referred to as "Act") [9].

The applicant in Zokufa , as in casu , required the files , adverse credit report or information for a purpose contemplated in the Act , to inspect it .[10] Nothing contained in the Act prohibits a consumer from requiring information and inspecting it away from the place in which it is kept .On this premise , the information stored by the credit bureau can be made available to the consumer wherever the consumer requires it in terms of the Act . This view finds support in section 65 in terms whereof the consumer has a right to receive documents and in my view this includes a right to receive information stored in documents. The section provides that every document that is required to be delivered in terms of the Act must be delivered in the prescribed manner and in the absence of a prescribed manner , in the manner provided for in sub- section (2) (a) and (b) . I agree with Alkema J that the Act contemplated delivery of the report to the

consumer in person; by facsimile; or by printable web- page.

- [11] In a nutshell, the ratio decidendi of the Zokufa judgment is that the credit bureau has an obligation to deliver information to the consumer when he/she requires it and that delivery should be made to the consumer in person or by email or by facsimile or printable web page . The nature of the proceedings required that the court should assume jurisdiction over the peregrines credit bureau. In my view, anything further said in the judgment is orbiter.
- [12] By operation of the precedent system, the Zokufa judgment is binding on me since I can find nothing convincing that it is clearly wrong and I will follow it. When highlighting its distinguishing feature from Buqwana I had also observed that the relief sought there is the same as the relief sought in casu in so far as declarators are concerned but not the mandamus. It is apparent that the relief which was sought and granted by Alkema J in Zokufa is the same as the relief sought by the applicant in the present application. She seeks the following relief:

"(a) That the respondent's failure to provide applicant with the full contact particulars of the sources of adverse/ default

information , especially the postal and physical addresses , appearing in Section B, Part 4 of the applicant's credit report , be and is hereby declared unlawful , invalid and of no force and effect;

(b) That the respondent be ordered to forthwith provide the applicant with the full contact particulars of the sources of adverse/default

information , especially postal and physical addresses appearing in Section B , Part 4 of the applicant's credit report (Marais IT Credit and ITCH Business ;

(c) That the respondent pay costs of the application."

- [13] This relief is supported by the following factual situation . The applicant applied for credit facility from Ned Bank Ltd but her application was declined . The bank refused to disclose the particulars of the company which had blacklisted her with the respondent. She, thereafter gave instructions to Attorneys, Zono and Associates, to request her credit profile from the respondent. The correspondence exchanged between the parties started with a letter dated 9 September 2013 written by applicant's Attorneys to the respondent. In the letter, it is written on behalf of the applicant that she did not know the identity of the person who had blacklisted her .This is coupled with a request that the respondent furnishes to the applicant a copy of the credit records , file and information as well as the originating sources thereof . On 10 September 2013 the respondent communicated with the applicant's Attorneys in writing informing them to "get free TransUnion Credit Report on their website, www.mytransunion.co.za". It would appear that the credit report was found to contain adverse credit information against the applicant hence the attorneys wrote another letter to the respondent on 10 October 2013 , again requesting the same information . The required information was not furnished. On 11 November 2013, the respondent was served with the application and on 10 December 2013 it registered its intention to oppose the application.

[14] In its answering affidavit, the respondent stated that the National Credit Act imposes no obligation on the credit bureaux to reflect the contact details of the source of each item of adverse credit information appearing on a credit report. The respondent further stated that such an obligation is only imposed in relation to "enquiries" submitted by entities who are lawfully entitled to access a consumer's credit report (these "enquiries" do not fall within the category of adverse credit information which is in issue in this application), so goes the contention of the respondent. This was easy for the respondent to say in the answering affidavit than in the first applicant's letter requiring the information.

[15] As said by Alkema J in Zokufa and alluded to by me above, the credit bureau has an obligation to deliver credit information to a consumer who requires it and the consumer has a right to receive credit information kept by the credit bureau. I observe that unnecessary costs have been incurred on a relatively

simple matter to which the respondent should have reacted positively from receipt of the first letter and furnished the required

information. When Zono Attorneys communicated with the respondent requiring information, they were communicating as "entities

lawfully entitled to access a consumer's credit report". They were acting on behalf of the applicant and were therefore entitled to the information. In my view, it is the respondent, rather than the applicant's Attorneys as contended for by the respondent, whose conduct led to this unnecessary application.

[16] Without more ado, the applicant must succeed with costs to follow the event.

Order:

The following Order is made:

1. That the respondent is ordered to deliver to the applicant, through her attorneys, AS Zono and Associates, in terms of the provisions of the National Credit Act, 34 of 2005, without charge, all files, reports or information concerning the applicant which constitute adverse credit report to Ned Bank Ltd and delivered by the respondent to the said Bank;
2. That respondent is ordered to pay the costs of the application.

LP Pakade

ACTING DEPUTY JUDGE PRESIDENT:MTHATHA

For the Applicant: Mr N . Hinana

Instructed by: A.S. Zono & Associates

For Respondent: Mr BD Hitchings

Instructed by: Keightley Incorporated

Date of delivery: 12 February 2015

- [1] Steytler NO v Fitzgerald 1911 AD
- [2] Forbes v Uys 1933 TPD at 369
- [3] [2006] ZASCA 28; 2006 (4)SA 177 (SCA) at par 3
- [4] Act 10 of 2013
- [5] Act 59 of 1959
- [6] 626/08 DELIVERED ON 29 January 2009
- [7] (2010)J&l 25726 (ECM)
- [8] 1979
- (3) SA 1048 (A) AT 1062
- [9] S70(2)
- [10] S72

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