

SOUTH AFRICA / JUDGMENT

South African Fraud Prevention Service v National Credit Regulator (A660/2016) [2017] ZAGPPHC 1079 (17 November 2017) [2017] ZAGPPHC 1079

COURT

North Gauteng High Court, Pretoria

BEFORE

Vuma, Baqwa

CASE / FILE NUMBER

A660/2016

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Appeal Number: A660/2016

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the appeal of

THE SOUTH AFRICAN FRAUD PREVENTION SERVICE APPELLANT

AND

THE NATIONAL CREDIT REGULATOR RESPONDENT

JUDGMENT

VUMA, AJ

[1] This appeal and the cross-appeal arise out of the findings and judgment made by the National Consumer Tribunal ("the Tribunal")

against the appellant ("FPS") that the latter had, inter alia, contravened s 70 (2)(f) of the National Credit Act 34 of 2005 ("the Act") read together with regulation 17.5. The terms of reference for the Tribunal by the respondent was to determine whether the FPS had contravened s 70 (2)(f) of the National Credit Act 34 of 2005 ("the Act") and that if found to be in contravention of same, the imposition of an administrative fine

the Tribunal deemed appropriate.

- [2] Following the Tribunal's findings and judgment, the FPS and the respondent filed an appeal and cross-appeal respectively against the Tribunal's judgment.
- [3] Now the issues for determination in this appeal are two-fold, namely, the ones raised in the main appeal ("the appeal") by the FPS and the respondent's in the cross- appeal. The respondent noted its cross-appeal out of time and applied for condonation of the late filing of same which the FPS did not oppose. The court granted the application. However, the FPS opposes the cross-appeal.
- [4] As already appears above, for purposes of convenience, in both the appeal and the cross-appeal, the appellant shall be referred to as "the FPS" and the National Credit. Regulator shall be referred to as "the respondent". The National Consumer

Tribunal shall be referred to as "the Tribunal".

THE APPEAL

- [5] The issues for determination in the appeal arise from a judgment of the Tribunal in terms of s 148(2)(b) of the National Credit Act 34 of 2005 ("the Act") and the accompanying costs order.
- [6] The FPS's ground of appeal is that the Tribunal erred in finding that the FPS had contravened s 70(2)(f) of the Act read with regulation 17 of the National Credit Regulations, the provisions under which a credit bureau must promptly expunge from its records certain categories of information.
- [7] Pursuant to its above-mentioned finding, the Tribunal ordered that the FPS is required by law and is directed by the Tribunal to expunge from its records any prescribed consumer credit information that, in terms of the regulations, is not permitted to be entered into its records or is required to be removed therefrom. The information the FPS was ordered to expunge from its records related to consumers' fraudulent activities. To this end, Ms Norman for the respondent submits that the information had to be expunged in terms of s 70(2)(c) of the Act.
- [8] It is common cause that the FPS is a credit bureau which keeps a database of people who have been involved in fraudulent conduct. Mr Trengove, counsel for the FPS, submits that this database is used by, inter alia, all the major financial institutions and retailers, including SARS, to determine whether customers or prospective customers have a track record of fraudulent conduct. He further submits that it is for this very fraudulent element that the records of such persons remain available and accessible to the FPS members for a period of up to ten years and that every member has access to the pooled information of all the members of their encounters with fraudsters over the past decade.

[10] He submits that the information on the FPS database constitutes fraud information and not "consumer credit information" within the meaning of s 70(2)(f) and that such information does not constitute "adverse classification of consumer behaviour" within the meaning of regulation 17.5. He further submits that this matter turns on the interpretation of the disputed contravened provisions of the Act and Regulations respectively.

[11] Section 70(2)(f) provides that:

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

[12] Regulation 17 provides that certain categories of consumer credit information may only be displayed and used for prescribed periods of time. Furthermore, regulation 17.5 applies to "Adverse classifications of consumer behaviour" and information of this kind must be removed after one year.

[13] Mr Trengove further submits that the kind of "consumer credit information listed or defined in s 70(1) of the Act confines such definition to the personal, professional and financial history of the consumer and his or her credit history. Most importantly, he submits that s 70(2)(f) does not require all the "consumer credit information" to be expunged, save for the "prescribed (my emphasis) consumer credit information" to be expunged after a stipulated period of time. He submits further that such a requirement and time limits are confined to the categories of consumer credit information listed in regulation 17.

[14] Mr Trengove further submits that the FPS's fraud information does not fall within regulation 17.5 since its information is not a mere subjective classification or a classification of ordinary consumer behaviour. His main argument is that as much as the information listed may be deemed to constitute consumer credit information, still, such consumer credit information is not within any of the prescribed categories.

[15] Mr Trengove submits that the NCA and the regulations specifically recognize certain categories of information that do not constitute

consumer credit information that credit bureaux are allowed to keep, through s 70(3)(a) which provides that in addition to consumer credit information as defined, a credit bureau may receive, compile and report only "other prescribed information in respect of the consumer." Regulation 18(6)(b) prescribes the "other" information, that is, the information other than consumer credit information that a credit bureau may keep on record; The listed categories of information under regulation 18(6)(b) concern "information that is relevant for the purpose of credit fraud detection and prevention". In this regard there is no prescribed period for expungement.

[16] He submits that the Tribunal's ratio in concluding that the information in the FPS's database falls foul of s 70(2)(f) and regulation 17.5 constitutes a misdirection.

- [17] He further submits that the definition of "consumer credit information" in s 70(1) does not include fraudulent conduct, nor does s 71A(4)(A) include fraudulent conduct in its definition of "adverse classification of consumer behaviour". Neither does regulation 17 in its eleven categories of consumer information. Only consumer credit information is subject to the requirements of s70(2)(f) read with regulation 17. Information concerning the prevention and detection of fraud therefore does not fall within the ambit of these provisions . To interpret the Act otherwise would lead to insensible and unbusinesslike results. Accordingly, on both a literal and purposive interpretation, fraud detection and prevention information need not be expunged in terms of s 70(2)(f) read with regulation 17.
- [18] Put differently, the Act ought to be interpreted as enunciated in the case of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18 wherein it was held that "[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*. The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike

for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

- [19] In resisting the FPS's appeal, Ms Norman submits that all the findings by the Tribunal as relates to the FPS's appeal are correct. She submits that the respondent is responsible for the enforcement of the Act and to take action against contravening institutions and that the FPS's appeal is based on an incorrect interpretation of s 70(1) of the Act by the FPS.

- [20] Ms Norman accepts that fraud or attempted fraud is a relevant factor in assessing a consumer for credit and that fraudulent documents and a data base kept and maintained by the FPS is also relevant to such a process. She however submits that any suggestion that the information kept by the FPS is not credit information as defined in s70(2)(f) is mischievous. She submits that to the extent that the FPS failed to refer to any regulation that authorizes it to retain the said consumer information for a ten year period, the submission by the FPS's counsel ought to be rejected and that the appeal must be dismissed.
- [21] In analyzing the issues herein, the question for determination is whether, by not expunging the information in its database as provided for in regulation 17.5, the FPS contravened s 70(2)(f). An equally relevant and important determination to make is whether the information kept by the FPS falls under the prescribed consumer credit information as defined in s70(1). Put differently, the question is, is the information pertaining to a consumer's fraudulent activities included in the s 70(1)? To arrive at the correct answer one would have to resort to Natal Joint Municipal Pension Fund *supra* where it was held that "...a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document....". Accordingly, if one takes into account the s 18(6) provisions which deal with fraud related information for purposes of fraud prevention and detection, the answer to the question whether the FPS contravened s 70(2)(f) would be unequivocally in the negative.
- [22] When one considers s 78(1) and 78(2)(f) read with regulation 17.5, it is clear that the fraud information appearing on the FPS database does not constitute consumer credit information. Instead, as correctly submitted on behalf of the respondent, the fraud information contained in the FPS database is dealt with in s18(6) of the Act which does not provide for any prescriptive time limits. The respondent's submissions are primarily based on the apparent unfairness suffered by the consumer due to non-expungement of the information held by the FPS. The fact is however that such non-expungement is not unlawful since there is no prescriptive time period in the Act or its regulations within which such fraud information must be expunged. Accordingly, I am of the view that the question whether the FPS's self-determined ten years expungement period is fair or not is not a matter to be decided by this court. What this court has to determine is whether there is any provision that bars any such information to be kept for a period as provided for by the FPS.
- [23] It may well be so that, as submitted by counsel for the respondent, such fraud information has a bearing on the consumer's credit information. Be that as it may, I am of the view that, that does not impugn the basis upon which the FPS appealed the Tribunal finding.
- [24] Based on the above I am of the view that the information in the FPS's database does not fall under the one envisaged in s 70(1) and that accordingly, there could therefore be no contravention of s 70(2)(f) read with regulation 17.5. I further find that the FPS's interpretation of s 70(1) is correct. Accordingly, I find that the FPS is not in contravention of s 70(2)(f) read with regulation 17.5.

THE CROSS-APPEAL

[25] As already stated above, following the lodgment of this appeal, the respondent noted a cross-appeal in terms of s 148(2)(b) of the Act to the FPS's appeal directed at paragraphs 48.6 and 48.7 of the Tribunal's judgment and the Order. The two orders read as follows:

"48.6 The Applicant's prayer for the imposition of an administrative fine fails.

48.7 There is no order as to costs."

[26] The FPS did not oppose the respondent's application for condonation of its late filing of the cross-appeal and the court thus granted the application. However, the FPS opposed the cross-appeal and asked for its dismissal by the court.

[27] Counsel for the respondent submits that the cross-appeal arises out of the Tribunal having deviated from its terms of reference in so far as the actual issues it was called upon to determine are concerned. She submits that contrary to what the Tribunal ultimately defined as issues before it, the two issues appearing below were the ones the Tribunal was appointed to make a determination on:

27.1 Whether the FPS has contravened s 70(2)(f) read together with regulation 17.5 of the Act; and

27.2 The imposition of an appropriate administrative fine in the event the FPS is found to have so contravened the said provisions.

[28] She submits that it is inconceivable that despite the Tribunal having found for the respondent on substantive issues, yet it refused to impose an administrative fine and costs as envisaged in s 27(a)(ii) of the Act, thereby abdicating its obligations in terms of the Act. She further submits that the only reasonable remedy by the Tribunal should have been the imposition of a fine of R1 million or any amount that the Tribunal deemed appropriate. She further submits that the Tribunal given the contraventions of the Act by the FPS, the Tribunal should have exercised its discretion in favour of the respondent especially .in light of the fact that the said contraventions, inter alia, impact on the constitutional rights of consumers and/ or persons and are unlawful.

[29] She submits that the findings made by the Tribunal in its judgement and the accompanying order are a misdirection on the latter's part and that the Tribunal erred in, inter alia,

29.1 finding that the imposition of the administrative penalty would be inappropriate and unfair whilst at the same time alluding to the concerns relating to the conduct of the FPS;

29.2 contrary to the settlement agreement to the effect that "if found to be in contravention, the imposition of administrative fine the Tribunal deems appropriate", the Tribunal, although it had made the settlement agreement an order of the Tribunal, refused to impose a fine;

29.3 failing to identify as an issue the determination of an appropriate fine as envisaged by the parties in paragraph 8.7 as agreed by them.

- [30] In resisting the cross-appeal, the appellant's counsel submits that the Tribunal made the orders that are being cross-appealed against by the respondent after having considered the fact that the FPS had, inter alia, acted in good faith throughout the original matter. He submits that the Tribunal had regard to the factors before it and stated that "There is no doubt (my emphasis) that the imposition of an administrative penalty will be inappropriate and unfair in the circumstances having regard to (my emphasis) the factors at hand".
- [31] He further submits that this court cannot readily interfere with the wide discretion the Tribunal enjoys to decide whether to impose a fine or not. He submits that to the extent that the respondent has not shown the court that the FPS acted with mens res, this court's hands are tied-So to speak to overturn the Tribunal's decision or to impose an administrative fine. He further submits that the basis upon which the respondent is appealing the Tribunal's order and findings, was not raised before the Tribunal that it, the Tribunal was bound by the settlement agreement to impose the administrative fine. He further submits that even if the FPS was in breach of the NCA, an administrative fine would not be competent since the respondent failed to discharge its onus to prove that the FPS acted willfully or negligently.
- [32] It may well be so that the Tribunal deviated from its terms of reference in relation to the agreement between the parties. The Tribunal stated that it had had regard to the factors at hand and thus deemed it inappropriate and unfair to impose an administrative fine. In as much as the adage goes that costs follow suit, considering the fact that on the main appeal by the FPS, this court has found in favour of the latter, the success by the FPS in the main appeal renders the cross-appeal moot. Be that as it may, I am of the view that considering the factors placed before the Tribunal, there is nothing that justifies or calls for this court to interfere with the orders made by the Tribunal. There is nothing that seems to suggest that the Tribunal used its discretionary powers in an arbitrary manner.
- [33] I conclude that in light of all the circumstances of this matter, the FPS's appeal must succeed and the respondent's cross-appeal must be dismissed.
- [34] In the result I propose that the following order be made:
1. The appeal is upheld with costs, including costs of two counsel.
 2. The cross-appeal is dismissed with costs.

Vuma L

(Acting Judge of the High Court)

Gauteng Division, Pretoria

I agree and it is so ordered.

Baqwa S

(Judge of the high Court)

Head on

: 31 August 2017

Judgment

delivered:

: 17 November 2017

Appearances

For Appellant :

Adv. W. Trengove

Assisted by :

Adv. C. Steinberg

Instructed by :

Bieldermaans Inc.

For Respondent :

Adv. T.V. Norman

Assisted by :

Adv. J. Mbuli

Instructed by :

Mathie Jooma Sabdia Inc.

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