



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1539 OF 2024

PHYLLIS OSORO KEMUNTO.....COMPLAINANT

-VERSUS-

ABSA BANK KENYA PLC.....RESPONDENT

DETERMINATION

(Pursuant to Section 8 (1)(f) and 56 of the Data Protection Act, 2019 and Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021)

A. INTRODUCTION

1. The Complainant lodged a complaint on 2nd October, 2024 alleging that the Respondent had unlawfully and negatively listed her in the Credit Reference Bureau (CRB), based on an alleged default on a credit cards obtained by the Kenya Association of Manufacturers, where the Complainant was the Chief Executive Officer.

B. LEGAL BASIS

2. Article 31(c) and (d) of the Constitution of Kenya provides for the right to privacy. Consequently, as an effort to further guarantee the same, the Data Protection Act, 2019 (hereinafter known as 'the Act') was enacted.
3. The Office of the Data Protection Commissioner (hereinafter as 'this Office' and/or 'the Office') was established pursuant to Section 5 of the Act and is mandated with the responsibility of regulating the processing of personal data; ensuring that the processing of personal data of a data subject is guided by the principles set out in Section 25 of the Act; protecting the privacy of individuals; establishing the legal and institutional mechanism to protect personal data and

providing data subjects with rights and remedies to protect their personal data from processing that is not in accordance with the Act.

4. Section 8(1)(f) of the Act provides that the Office can receive and investigate any complaint by any person on infringements of the rights under the Act. Furthermore, Section 56(1) of the Act provides that a data subject who is aggrieved by a decision of any person under the Act may lodge a complaint with the Data Commissioner in accordance with the Act.
5. This determination is premised on the provisions of Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (hereinafter as 'the Enforcement Regulations') which states that the Data Commissioner shall, upon the conclusion of the investigations, make a determination based on the findings of the investigations.

C. BACKGROUND OF THE COMPLAINT

6. This Office received a complaint from the Complainant on 2nd October, 2024. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations by the advocates for the Complainant on behalf of the Complainant, who was an aggrieved data subject.
7. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaint filed against it *vide* a letter dated 24th October, 2024 and referenced ODPC/CONF/1/5 VOL II (273). In the Notification of the Complaint, the Respondent was informed that if the allegations by the Complainant were true, it was in violation of various provisions of the Act. Further, the Respondent was asked to provide this Office with the following: -
 - a. A response to the allegations made against it by the Complainant;
 - b. Any relevant materials or evidence in support of the response;
 - c. The lawful basis relied upon to process the Complainant's personal data;
 - d. The contractual agreement between it and the Kenya Association of Manufacturers in regards to the said credit card;
 - e. The evidence instructing CRB to list, delist and delete the Complainant's information in regards to the complaint.

- f. The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant and to ensure that such occurrence mentioned in the complaint does not take place again; and
 - g. Any other relevant information it wishes the Office to consider.
8. The Respondent submitted its response to the Notification of Complaint *vide* a letter dated 13th November, 2024.
9. This determination is therefore as a result of analysis of the complaint as received, the response submitted by the Respondent and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

10. The Complainant relates to the alleged negative listing of the Complainant in the Credit Reference Bureau (CRB), based on an alleged default, on a credit card issued to the Kenya Association of Manufacturers, where she was the Chief Executive Officer.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

11. The Complainant is a former Chief Executive Officer of the Kenya Association of Manufacturers (KAM).
12. The Complainant stated that she is a holder of Credit Card account no. 42*****46 issued by ABSA Bank Kenya PLC and registered under her personal name, which card she has faithfully settled any amounts due or outstanding as and when required.
13. Further, the Complainant averred that she has no known default or failed to honor any obligations due on her personal credit card.
14. The Complainant stated that the Respondent issued credit card no. 15*****47, a company credit card, to the Kenya Association of Manufacturers, which she had the obligation to pay and honoured all sums due and owing on the credit card. This information was well within the knowledge and awareness of the Respondent who are the bankers of the Kenya Association of Manufacturers.

15. The Complainant alleged that the Respondent, without any legal basis, reported and caused the Complainant to be listed as a defaulter on the Credit Reference Bureau on account of the Kenya Association of Manufacturer's credit card account no 15*****47, knowing fully well that the Complainant was not a defaulter who warranted to be listed as such or had the obligation to settle any sums due and/or owing on that credit card.
16. In listing the Complainant as a loan defaulter on the Credit Reference Bureau under card account no. 15*****47, a company card that was issued to the Kenya Association of Manufacturers, the Respondent knew that the said card was at all material times issued to a company which bore the responsibility to pay and it did pay all claims and outstanding sums on the credit card.
17. The Complainant stated that the Respondent refused and failed to remove the erroneous listing of the Complainant on the Credit Reference Bureau even after the same was brought to its attention and a request for deletion made.
18. In addition, the Respondent failed to comply with and follow the law and regulations on listing of persons on the Credit Reference Bureau.
19. The Complainant alleged that the Respondent failed to give the Complainant any notice of intention to list her on the Credit Reference Bureau or inform the Complainant that it had listed her as such.
20. Further, the Complainant alleged that the Respondent failed to issue the card holder (the Kenya Association of Manufacturers) with statements of account to facilitate payment of sums outstanding on the card when requested to do so.
21. The complainant's sought the following redress: -
- i) A declaration that the Respondent violated the Complainant's rights under the Data Protection Act, 2019.
 - ii) An order directing the Respondent to immediately delete the false, incorrect, inaccurate and misleading information about the complaint from its records.
 - iii) An order directing the Respondent to immediately take measures to ensure that the false incorrect, inaccurate, and misleading information

rk

about the complainant is deleted from the Credit Reference Bureau Records.

- iv) An order directing the Respondent to immediately take measures to ensure that the Credit Reference Bureau promptly deletes the false, incorrect, inaccurate, and misleading historical entry indicating that the complainant has previously been listed on the Credit Reference Bureau as a defaulter.
- v) An order directing the Respondent to immediately issue a written apology to the complainant.
- vi) A comprehensive audit /assessment/ inspection of the Respondent be undertaken by the Data Commissioner to determine the Bank's compliance with the Data Protection Act, 2019.
- vii) Any other suitable to recompense the complainant for the breach of her rights including appropriate compensation where applicable.

22. The Complainant provided the following documents as evidence: -

- i) The Credit Reference Bureau report.
- ii) A copy of an email from the Kenya Association of Manufacturers requesting for statements from the Respondent in regards to the credit card no.15*****47.
- iii) A copy of an email from the Respondent to the Kenya Association of Manufacturers asking for the clearance of the balance on the credit card no.15*****47.
- iv) A copy of an email from the Respondent to the Kenya Association of Manufacturers requesting for the payment of the credit card no.15*****47 balance to in order to issue a clearance.
- v) A copy of an email from the Complainant informing the Respondent that the credit card no. 15*****47 belongs to Kenya Association of Manufacturers.
- vi) A copy of an email from the Complainant referring to the Credit Reference Bureau report informing the Respondent when she left the

Kenya Association of Manufacturers and also of the loss and damages suffered by the Complainant.

ii. THE RESPONDENT'S RESPONSE

23. The Respondent stated that the Complainant was the Chief Executive Officer of the Kenya Association of Manufacturers (KAM) and by way of nomination by the Company, she applied for a credit card facility which was thereby issued in her name.
24. Over the period of usage, monthly statements were issued and mailed to the Complainant, as well as the Company, as required by product's terms and conditions. The statements also indicated the outstanding amounts which accrue over a period of usage/non-payment.
25. The Respondent averred that on several occasions it reached out to the Complainant informing her of the outstanding amounts and the urgent need to ensure settlement to avoid any adverse action against her.
26. The Respondent stated that in May 2023, the Complainant was duly informed of the Bank's intention to negatively list her due to the default as mandated under the Credit Reference Bureau (CRB) provisions.
27. The outstanding amounts were thereby cleared, and the Bank updated the client's CRB status.
28. The Respondent asserted that the listing was done in line with the provisions of the CRB Act. The provisions require that any person who takes a credit facility must be listed, i.e. positively or negatively which informs the lawful basis of processing the client's personal data. Upon regularizing the debt, the client's record was updated as positive under the heading "performing loans with a default history" as per CRB reporting provisions.
29. The Respondent reiterated that its actions were within legal and contractual provisions and that the Complainant was obligated to ensure that all outstanding amounts were settled within the contractual period as KAM's official and nominated card user.

30. The Respondent provided the following documents as evidence: -

- i) The Contractual agreement between KAM and the Bank with respect to the credit card.
- ii) Clearance Letter dated 30 May 2023 addressed to the Complainant.
- iii) Court Pleadings- Civil Suit No. E067 of 2024 (Amended Plaintiff & Defence, Our Witness Statement and Account statements)

F. INVESTIGATIONS UNDERTAKEN

31. The Office analysed the complaint as lodged, the Respondent's response and the documents submitted by both parties as evidence.
32. The Office established that the Respondent issued a company credit card to the Kenya Association of Manufacturers (KAM) under the Complainant's name. KAM was the Principal Cardholder and the Complainant the Cardholder and Authorised User, in accordance with the Product Terms and Services.
33. Clause 4 of the Product Terms and Conditions submitted to this Office by the Respondent elucidates that the obligation to pay the full amount in monthly statements issued by the Respondent was on the Principal Cardholder (KAM) and not the Cardholder (Complainant).
34. The Office established that Complainant left KAM in June 2022 and communicated the same to the Respondent. The Complainant referred the Respondent to KAM to follow up on the payments.
35. KAM also wrote to the Respondent requesting for the statements of the Company card held by the Complainant, who was its former CEO but the Respondent still did not stop writing to the Complainant and proceeded to negatively list her on the CRB.

G. ISSUES FOR DETERMINATION

36. In light of the above, the following issues fall for determination by this Office:
 - i. Whether there was an infringement of the Complainant's rights under the Act; and

- ii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THERE WAS AN INFRINGEMENT OF THE COMPLAINANT'S RIGHTS UNDER THE ACT

37. Section 26(c) of the Act provides for the right to object to processing of personal data. Further, Section 36 states that, "*a data subject has a right to object to the processing of their personal data, unless the data controller or data processor demonstrates compelling legitimate interest for the processing which overrides the data subject's interests...*"

38. Regulation 8(3) of the Data Protection (General) Regulations, 2021 states that, "*a data controller or a data processor shall, without charging any fee, comply with a request for objection within fourteen days of the request.*"

39. The Complainant objected to the processing of her personal data *via* an email dated 10th May 2023, where she indicated that the subject credit card with an outstanding balance belonged to KAM and that her colleague, copied in the email will take up the matter.

40. Further on 3rd October 2023, the Complainant wrote to the Respondent indicating that she would like to be disassociated from the credit card as she had already left KAM in June 2022. She also requested the Respondent to communicate to the Credit Reference Bureau to give an accurate credit rating.

41. The Respondent ought to have complied with the Complainant's request as provided for under Regulation 8(3) of the Data Protection (General) Regulations, 2021, and stopped processing her data in relation to the company credit card under her name.

42. By dint of Regulation 8(6) of the Data Protection (General) Regulations, 2021, if the Respondent were to decline the objection, they ought to have provided the Complainant with the reasons for declining the request for objection. They did not.

43. Further, pursuant to Regulation 8 (7) in the event the Respondent had compelling legitimate interests for processing the Complainant's personal data

which override the Complainant's interests, the Respondent was enjoined to inform the Complainant of the reasons for declining the request for objection.

44. Instead, the Respondent continued sending her payment demand emails and even negatively listed her at the Credit Reference Bureau. The Respondent intentionally and/or negligently ignored the Complainant's objection request and continued processing her personal data even after the 14-day period provided for under the above Regulation had lapsed.
45. It is worth noting that on 14th March 2023, KAM wrote to the Respondent indicating that they had requested statements of the Complainant from June 2022 to date and that they were yet to receive them, yet the Respondent was still writing to the Complainant asking her to settle the outstanding amount. This indicates that KAM had acknowledged that the obligation to settle the outstanding amount was on them and not the Complainant, and that they were willing to settle the outstanding loan.
46. The Respondent had a legitimate interest to have the outstanding loan cleared by KAM and the nominated card user. However, the Complainant as the nominated card user left KAM and informed the Respondent of the same. The Complainant went further to give a contact person at KAM who would take up the matter going forward. From the above it is clear that the Complainant's interests override those of the Respondent as KAM had indicated willingness to settle the outstanding amounts and the Complainant had long left the organization. The obligation to clear the loan was not on the Complainant but on KAM.
47. The Respondent did not prove that it had any overriding legitimate interest to continue processing the Complainant's personal data and to list her negatively at the CRB.
48. From the foregoing, this Office finds that the Complainant's right to object to the processing of her personal data was violated by the Respondent.

II. WHETHER THE COMPLAINANT IS ENTITLED TO ANY REMEDIES UNDER THE ACT AND THE ATTENDANT REGULATIONS.

49. Pursuant to Regulation 14(2) of the Enforcement Regulations, a determination shall state the remedy to which the complainant is entitled. Further, the remedies are provided for in Regulation 14(3) of the Enforcement Regulations.

50. The Complainant's sought for an order directing Absa Bank Kenya PLC to immediately delete the false, incorrect, inaccurate and misleading information about the complaint from its records. The Respondent is hereby **ordered to erase the Complainant's personal data as KAM's authorised card user in respect of the impugned credit card within the next fourteen (14) days.**

51. The Complainant sought for an order directing the Respondent to immediately take measures to ensure that the false incorrect, inaccurate, and misleading information about the complainant is deleted from the Credit Reference Bureau Records. This Office shall refrain from issuing such orders as disputes of such nature are guided by the Banking (Credit Reference Bureau) Regulations, 2020.

52. The Complainant also sought for an order directing the Respondent to immediately issue a written apology to the Complainant. An apology is not one of the remedies provided in Regulation 14(3) of the Enforcement Regulations and therefore the same is declined.

53. Having found that the Complainant's rights were violated, **an Enforcement Notice shall issue against the Respondent** pursuant to Section 58 of the Act and Regulation 16 of the Enforcement Regulations.

54. The Complainant sought for compensation from the Respondent.

55. Section 65 of the Act provides for compensation to data subjects and states, "*a person who suffers damage by reason of a contravention of a requirement of the Act is entitled to compensation for that damage from the data controller.*"

56. Section 65(4) of the Act states that, "*damage includes financial loss and damage not involving financial loss, including distress.*"

57. Further, Regulation 14(3)(e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.

58. In considering whether to issue compensation, this Office takes into consideration the fact that the Respondent either intentionally or negligently violated the Complainant's right to object to the processing of her personal data. **The Office hereby orders the Respondent to pay the Complainant Kenya Shillings Two Hundred and Fifty Thousand (KES. 250,000/=) as compensation.**

H. FINAL DETERMINATION

59. The Data Commissioner therefore makes the following final determination:

- i. The Respondent is hereby found liable for violating the Complainant's right to object to the processing of her personal data.
- ii. The Respondent is hereby ordered to erase the Complainant's personal data as KAM's authorised card user in respect of the subject credit card within the next fourteen (14) days.
- iii. An Enforcement Notice to hereby issue against the Respondent.
- iv. The Respondent is hereby ordered to compensate the Complainant **Kenya Shillings Two Hundred and Fifty Thousand (KES. 250,000).**
- v. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at NAIROBI this 19th day of December 2024.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**

