

SOUTH AFRICA / JUDGMENT

Barnard N.O and Another v National Credit Regulator and Another (A351/2019) [2020] ZAGPPHC 798 (22 December 2020)

[2020] ZAGPPHC 798

COURT

North Gauteng High Court, Pretoria

BEFORE

N. Janse Van Nieuwenhuizen, S. Potterill

CASE / FILE NUMBER

A351/2019

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IN

THE HIGH COURT OF SOUTH AFRICA(GAUTENG DIVISION, PRETORIA)

REPUBLIC

OF SOUTH AFRICA

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

DATE:

22 DECEMBER 2020

Case

Number: A351/2019

In

the matter between:

JACOLIEN
BARNARD N.O.
First
Appellant
BEATRICE
LINDA MILLS N.O.
Second
Appellant
And
THE
NATIONAL CONSUMER TRIBUNAL
First
Respondent
THE
NATIONAL CREDIT REGULATOR
Second
Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] This appeal emanates from a judgment delivered on 12 August 2019 by the first respondent, the National Consumer Tribunal (“the Tribunal”).
- [2] The first and second appellants in their capacities as joint liquidators of CMR Group (Pty) Ltd (in liquidation), filed a notice of appeal in terms of section 148(2)(b) of the National Credit Act, 34 of 2005 (“NCA”) on 11 November 2019.
- [3] The grounds of appeal are limited and directed at the following orders granted by the first respondent:

“69.3 All credit agreements entered into between consumers and CMR are declared reckless. All the consumers’ obligations in terms of these agreements are set aside. All the consumers are to be reimbursed with all fees and the charges paid to CMR in terms of those agreements.”

69.4 The Respondent is interdicted from proceeding with any current civil proceedings against consumers under the credit agreements. The Respondent is to rescind any judgments obtained against any consumers.

69.5 The Tribunal further orders that the Respondent appoint an independent auditor at its own cost. The auditor must determine all the amounts paid by the consumers under the credit agreements with CMR. All the amounts paid must be reimbursed to all consumers. The auditor must provide a comprehensive report, regarding the consumers identified and the refunded amounts, to the NCR within 90 days of this judgment being issued.”

- [4] The grounds of appeal are based on the appellants’ perceived

conflict between the provisions of the NCA and the provisions of the Companies Act, 71 of 2008.

Background

[5] CMR Group (Pty) Ltd (“CMR”) was registered as a credit provider on 11 January 2017. CMR conducted a business colloquially known as the “Pawning your car and still drive it” scheme. The scheme entailed that CMR advanced credit to consumers against the consumer’s fully paid-off vehicle subject to a pawn agreement. In terms of the scheme, a customer could borrow an amount of 30% to 50% of the vehicle’s retail value.

[6] Once an agreement has been concluded, the consumer hands over the registration documents of the vehicle to CMR and the vehicle is registered in the name of CMR. The consumer continues to use the vehicle and pay rent to CMR in respect of the usage. The monthly rental amounts to 25% to 30% of the principal amount borrowed and at the end of the repayment period the consumer is expected to have paid the monthly rental and the principal debt. The vehicle is then re-registered in the name of the customer.

[7] The second respondent, the National Credit Regulator (“the Regulator”) deemed the transactions as simulated and averred that the transactions are in fact secured credit transactions. The agreements entered into between CMR and its customers thus circumvented the maximum interest rates prescribed by the NCA in breach of the clear provisions of the Act.

[8] CMR, furthermore did not conduct affordability assessments and did not comply with all the requirements of the NCA when entering into the agreements.

[9] In view of CMR’s aforesaid conduct, the Regulator launched an application, in terms of section 57(1) of the NCA, during November 2018 for the deregistration of CMR as a credit provider. The Regulator claimed the following relief:

9.1 Interdicting CMR from further contraventions.

9.2 Ordering CMR to have an audit done by an independent auditor to determine all the consumers who have been charged unlawful interest and fees. All the consumers must be refunded.

9.3 Cancellation of CMR’s registration as a credit provider.

9.4 The imposition of a fine.

[10] CMR opposed the relief claimed by the Regulator and filed an answering affidavit denying any wrongdoing. It did, however, in the event that the Tribunal finds that it had contravened the NCA, accede to the relief claimed by the Regulator.

- [11] Pending the hearing of the application and on 14 February 2019, CMR was placed in voluntary liquidation and the appellants were appointed as provisional liquidators of CMR.
- [12] The matter was set down for hearing on 16 April 2019. At the date of the hearing, the attorneys acting on behalf of CMR withdrew and informed the Tribunal of CMR's liquidation.
- [13] On 31 May 2019 the Regulator sent a copy of the application by registered post to the first appellant. The matter was once again set down for hearing on 30 July 2019. A copy of the notice of set down was sent via email to the first appellant.
- [14] On 24 July 2019, the first appellant responded to the aforesaid email. She indicated that she had been appointed as final liquidator and that she would appear on the hearing date.
- [15] The first appellant did not appear at the hearing and the Tribunal held that the proceedings will, in terms of the provisions of rule 24(1)(b)(i) of the Rules for the conduct of matters before the Tribunal published in GN 789 of 28 August 2007, Government Gazette No. 30225 ("the rules"), proceed in the absence of CMR.
- [16] The order was consequently granted in CMR's absence.

Tribunal's

Judgment

- [17] In its judgment the Tribunal dealt with the following aspects:

- 17.1 submissions by the Regulator;
- 17.2 submissions by CMR;
- 17.3 the final liquidation status of CMR; and
- 17.4 finally, the consideration of the evidence.

Grounds of appeal

- [18] In the heads of argument filed on behalf of the appellants, the grounds of appeal are set out as follows:
- 18.1 the Tribunal misdirected itself in relation to its conclusions of the effect of the liquidation of CMR on the proceedings generally;
 - 18.2 The Tribunal misdirected itself by effectively concluding that the effect of CMR's liquidation is only relevant to the question of joinder (or non-joinder) of the provisional liquidators as well as the continued existence of CMR as a legal entity; and
 - 18.3 the Tribunal misdirected itself by granting orders which stultify the fiduciary duties and responsibilities of liquidators and disregarded the concursus creditorum principle in liquidation.

Point in limine

- [19] The Regulator submitted that CMR conceded to the Tribunal's orders, which concession it submits is fatal to the appeal.
- [20] Should the Regulator be correct, the appeal stands to be dismissed. In the result, I deem it prudent to first of all deal with this ground of opposition.
- [21] In advancing this point Mr Kutumela, counsel for the second respondent, referred to portions of the answering affidavit in which CMR proposed the relief that was in fact granted by the Tribunal in terms of paragraphs 69.3, 69.4 and 69.5 of the order. These are the orders that form the subject matter of the appeal.
- [22] Mr Kutumela relied on the following dicta in Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd 2014
- (3) BCLR 265 CC:

“Dengetenge’s withdrawal of its opposition meant that all the parties before the High Court were unanimous in asking the Court to be the one to decide the various competing claims...The Court was entitled to give effect to the request that it be the one to decide all the claims and counter-claims. The High Court proceeded to adjudicate the various competing claims and brought about certainty among the parties. It would be unjust to all the other parties to grant Dengetenge leave to in effect reinstate its opposition.” [paragraph 59]

And

“I conclude that the concession must stand. The conclusion is sufficient to justify the dismissal of Dengetenge’s appeal.” [paragraph 61].

- [23] The facts in casu, however, differ from the facts in the Dengetenge matter. Dengetenge was present at the hearing of the matter and conceded both the factual and legal issues in dispute. It sought on appeal to withdraw the concession made in court, which request was dismissed on appeal.
- [24] In the present matter the appellants do not seek to withdraw any concessions. The appellants raise new legal points that were neither raised before nor considered by the Tribunal. The reason being, that the appellants being fully aware of the date of the hearing chose not to appear for reasons that do not appear from the record.
- [25] In the result, it is not correct to aver that the Tribunal misdirected itself on issues that were never raised or canvassed during the hearing.
- [26] The appellants should have utilised the remedy contained in rule 24A of the Rules. The rule reads as follows:

“24A. Variation or rescission of Tribunal orders

- (1) An application for the variation or rescission of a Tribunal order must be made within 20 days of the date on which the applicant became aware of-
- (a) the Tribunal order which was granted in the absence of the applicant;
 - (b) the ambiguity, error or omission; or
 - (c) a mistake common to the parties; or
 - (d) within such longer period as permitted by the Tribunal.”
- [27] The rescission of an order granted in the absence of a party, facilitates the rehearing of the matter and affords the absent party an opportunity to present its submissions on an issue in dispute. This, in turn, enables the Tribunal to properly consider the issues and deliver a reasoned judgment in respect of each issue.
- [28] An appeal deals with issues, albeit factual or legal, which had been fully canvassed by the court a quo, in this instance the Tribunal.
- [29] Even if the appellants were in terms of the common law allowed to raise a point of law on appeal, the statutory provisions of the NCA mitigates against such a notion.
- [30] Part D of the NCA deals with proceedings conducted by the Tribunal. Section 148 provides for appeals and reviews and section 148(2) provides as follows:
- “(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 that matter, other than a decision in terms of section 138.” (own emphasis)
- [31] In the result, being a participant in the hearing before the Tribunal is a jurisdictional requirement for the noting of an appeal in terms of section 148(2)(b) of the NCA.
- [32] Failing compliance with this jurisdictional factor, the appeal stands to be dismissed.

ORDER

[33] In the premises, I propose the following order:

The appeal is dismissed with costs.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Electronically submitted therefore unsigned

I agree.

S. POTTERILL

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA GAUTENG
DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 22 December 2020.

DATE HEARD PER COVID19 DIRECTIVES: 22 October 2020

(Virtual hearing.)

DATE DELIVERED PER COVID19 DIRECTIVES: 22 December 2020

APPEARANCES

Counsel for the Appellants: Advocate D. Hewitt Instructed by: Mathys Krog Attorneys Counsel for the Second Respondent: Advocate L. Kutumela Instructed by: Mothle Jooma Sabdia

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