

SOUTH AFRICA / JUDGMENT

BMW Financial Services (SA) (Pty) Ltd v National Credit Regulator; In Re BMW Financial Services (SA) (Pty) Ltd v National Credit Regulator (NCT/93829/2018/56(1)R4) [2019] ZANCT 119 (31 May 2019)
[2019] ZANCT 119

COURT

National Consumer Tribunal

BEFORE

Trevor Bailey, P Beck, B Dumisa

CASE / FILE NUMBER

NCT/93829/2018/56(1)R4

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

Number: NCT/93829/2018/56(1) R4

In

the matter between:

BMW
FINANCIAL SERVICES (SA) (PTY)
LTD APPLICANT
and
NATIONAL
CREDIT
REGULATOR RESPONDENT
In
re

Coram:

Trevor
Bailey - Presiding Tribunal member
Ms
P Beck - Tribunal member
Prof
B Dumisa - Tribunal member
Dates
of hearing -11 March and 18 April 2019
INTERLOCUTORY

RULING**APPLICANT**

1. The Applicant in these proceedings and the Applicant in the review application is BMW Financial Services (SA) (Pty) Ltd (the applicant), which is duly registered and incorporated in terms of the company laws of the Republic of South Africa, and registered as a credit provider in terms of the National Credit Act, 2005 (the Act).
2. The applicant was represented in these proceedings by Advocate W van Reenen, who was instructed by Smit Jones and Pratt Attorneys.

RESPONDENT

3. The Respondent in these proceedings and the Respondent in the review application is the National Credit Regulator (the respondent) a juristic person established by section 12 of the Act.
4. The respondent was represented in these proceedings by Advocate P Carstensen SC, who was instructed by Mafungo Attorneys.

APPLICATION

5. Unless otherwise stated, a reference to a rule in this ruling refers to the Rules for the conduct of matters before the National Consumer Tribunal.[1]
6. In these proceedings the applicant applies in terms of rule 3 (2) (c) (vii)[2] for an order that the respondent:
 - 6.1. provide the documents the applicant seeks in its request for documents dated 17 August 2018 and, to the extent that:
 - 6.1.1 any document sought does not exist, to specify which document does not exist;
 - 6.1.2 the respondent contends that any document is confidential, to comply fully with the provisions of rule 32;[3]
 - 6.2. provide a proper response to the applicant's request for admissions dated 21 September 2018 and, to the extent that:
 - 6.2.1 any document sought does not exist, to specify which document does not exist;
 - 6.2.2 the respondent contends that any document is confidential, to comply fully with the provisions of rule 32;
 - 6.3. comply with the directives of the presiding officer and with the agreements reached at the pre-hearing;

6.4. comply with the provisions of rule 32 concerning the provision of documentation and admissions the applicant has requested; and

6.5. further and/or alternative relief as the Tribunal may deem just.

7. The relief the applicant seeks in this application is collectively referred to as "the documents and admissions".

BACKGROUND

8. In August 2017 the respondent commenced investigating the lending practices of the motor vehicle financing industry to monitor compliance and requested information from the applicant.

9. On 4 October 2017 the respondent issued a compliance notice (the compliance notice) in terms of section 55 (1) of the Act,[4] which recorded that the applicant had failed to comply with certain provisions in the Act by charging consumers an "on the road fee/cost" on instalment agreements. The compliance notice required the applicant to take the remedial steps set out in the compliance notice.

10. On 25 October 2017 the applicant filed an objection to the notice in terms of section 56 of the Act.[5] The objection requires the Tribunal to review and set aside the respondent's decision to issue the compliance notice (the review application).

11. On 21 November 2017 the respondent filed an answering affidavit and on 6 December 2017 the applicant filed a replying affidavit in the review application.

12. On 7 August 2018 a pre-hearing conference was held between the parties before a single member of the Tribunal. The single member determined the procedure to be followed. He also recorded in the pre-hearing minute that any dispute concerning the filing of additional documents was to be dealt with in terms of a formal application and a hearing would have to be held. Pursuant to the pre-hearing conference, the applicant:

12.1 in a notice dated 17 August 2018 requested further documents, which the respondent replied to in a notice dated 12 September 2018; and

12.2 in a notice dated 21 September 2018 requested the respondent to admit facts and documents, which the respondent replied to in a notice dated 9 October 2018.

13. All the applicant's requests in its notice dated 17 August 2018, except for a copy of the record in terms of rule 13 (6),[6] concern other financiers, who are not parties to the review application. In particular, the applicant requested all documents concerning two categories, being the compliance monitoring exercise; and the industry wide investigation that the respondent was

conducting into all credit providers that provide vehicle finance to consumers.

14. In its request for admissions in the notice dated 21 September 2018 the applicant repeated its request for documents concerning other financiers and included a request for admissions of facts concerning other financiers.
15. The respondent has refused to provide the documents and admissions concerning other financiers to the applicant.

ISSUE TO BE DECIDED

16. The Tribunal is required to decide whether the respondent should be compelled to provide the applicant with the documents and admissions.

SUMMARY OF SUBMISSIONS

The applicant

17. The Tribunal is vested with wide powers to determine the procedures pertaining to the review and with the jurisdiction to hear this application.
18. The respondent has a duty to serve the public, take the Tribunal into its confidence and fully explain the facts for an informed decision to be taken in the interests of the public and good governance.
19. The control of public power is always a constitutional matter that flows from the Constitution of the Republic of South Africa, 1996 (the Constitution} and the Prevention of Administrative Justice Act, 3 of 2000. Section 33 of the Constitution provides that all administrative action must be lawful, procedurally fair and reasonable. The applicant is entitled to a fair hearing in terms of section 34 of the Constitution. This right is infringed in the absence of the respondent providing the full record.
20. The applicant requires the information to determine why the respondent chose to selectively enforce the Act. The respondent has refused to explain why it only proceeded against the applicant. It persists with its refusal and contends that it is irrelevant to the review. The decision to do so did not have a rational basis, constitutes constitutionally unfair conduct and unjust administrative action.
21. It is a legal requirement to provide a complete record to benefit and protect an applicant to enable an applicant and a court to properly assess the lawfulness of the decision-making process. The respondent is bound by rule 13 (6) in review applications to serve and file a complete record of the decision, determination or ruling that forms the subject matter of the review proceedings.

22. The respondent refuses to provide documents concerning its investigations and decisions because they are confidential. Confidential information is subject to disclosure in reviews but is subject to strict protective measures. The Tribunal is empowered in section 144 the Act[7] and rule 32 to consider whether the information is confidential and to determine the procedures to follow when providing the confidential information.
23. The respondent belatedly contends that it selected the respondent because it was one of the "larger financiers". The applicant's papers demonstrate that this is factually untrue, which shows that the information the applicant seeks is essential to its case and the respondent is being coy.
24. Moreover, the request for admission of facts serves a similar purpose to that of a Request for Further Particulars in rule 21 of the Uniform Rules of Court. It is to ensure that a complete record is available to enable the Tribunal to take a decision based on all the relevant information. The respondent's conduct goes much further than a mere refusal to make admissions; it amounts to a refusal to answer requests for information it is obliged to provide in law.

The respondent

25. The respondent submitted that it had refused to provide the documents and admissions concerning other financiers because the request is not relevant to the review application. The information concerns confidential information the respondent has received from the applicant's competitors. It also concerns the consumers' confidential and private information. Both competitors and consumers have a fundamental right to privacy and have not consented to their information being disclosed.
26. Further, the compliance monitoring exercise targeted all credit providers and was ongoing; many creditors could, upon receiving compliance notices, voluntarily change their conduct and cease charging "on the road fees", which forms the subject of the compliance notice and review application.
27. Moreover, the applicant's request for information concerning other financiers is a tactic to delay the review application being adjudicated. The applicant knew when it made its requests that the respondent had only issued notices to three financiers, being the applicant, Volkswagen Financial Services (SA) (Pty) Ltd and Mercedes-Benz Financial Services (Pty) Ltd.

ANALYSIS

OF SUBMISSIONS

28. The Tribunal is vested with wide powers to determine the procedures pertaining to the review and is satisfied that it is competent to consider this application.[8]

29. It is appropriate to place the provisions in the Act that impact on this application in context. The purposes of the Act are, in general terms, to promote and advance the social and economic welfare of all South Africans, promote a fair, transparent, competent, sustainable, responsible, efficient, effective and accessible credit market and industry.[9]
30. The Act establishes the respondent to carry out a wide range of functions. They include enforcing the Act by, amongst other things,
- receiving complaints concerning alleged contraventions of the Act; issuing and enforcing compliance notices; investigating and
- evaluating alleged contraventions of the Act; referring matters to the Tribunal; and appearing before the Tribunal as the Act permits or requires.[10] The respondent therefore performs an important public function. It must do so in the context of the Act's equity and efficiency-based purposes.
31. The Constitution is the supreme law of the land. The Act must therefore be interpreted to give effect to section 2 of the Constitution. In the context of this application, the Constitution is based on the rule of law; affirms the democratic values of dignity, equality and freedom; and guarantees the right to privacy, a fair trial and just administrative action.
32. Section 55 of the Act empowers the respondent to issue a compliance notice to a person whom the respondent on reasonable grounds believes has failed to comply with a provision of the Act or is engaging in an activity in a manner that is inconsistent with the Act. The respondent investigated the applicant's lending practices under section 15 of the Act and issued the compliance notice.
33. Section 56 in turn empowers a person that has been issued with a compliance notice to apply to the Tribunal to review the compliance notice. The applicant has instituted an application to review and set aside the respondent's decision to issue the compliance notice. In this interlocutory application, the applicant seeks an order to obtain the documents and admissions from the respondent to enable it to fully vent its case in the review application.
34. In the context of the Competition Commission {the commission}, our courts have held that the purpose of the initiating complaint is to trigger an investigation, which might eventually lead to a referral to the Competition Tribunal. It is merely the preliminary step of a process that does not affect the suspect firm's rights. Conversely stated, the purpose of initiating the complaint and the consequent investigation, is not to offer the suspect firm the opportunity to put its case. The commission is not even required to give notice of the complaint and of its investigation to the suspect firm. Least of all is the commission required to engage with the suspect firm whether its suspicions are justified. The principles of administrative justice are observed in the referral and the hearing before the Competition Tribunal. That is when the suspect firm becomes entitled to put its side of the case.[11]

35. Our courts have also held that the commission cannot investigate a suspect firm without a complainant submitting a complaint or the commission initiating a complaint; and that the commission can only initiate the complaint based on a reasonable suspicion.[12]
36. The Tribunal is mindful that the respondent has conducted a compliance monitoring exercise and not a formal investigation that follows the initiation of a complaint. The Tribunal therefore uses the term "investigation" widely in this ruling given that investigation reports are compiled by investigators following investigations, which in some cases are preceded by compliance monitoring.
37. In the Tribunal's view, in this application fairness requires the respondent to have had a reasonable suspicion that the applicant had failed to comply with a provision of the Act or was engaging in an activity in a manner that is inconsistent with the Act; and investigated the applicant before issuing the compliance notice. The principles of natural justice, upon which the applicant relies, are observed in the hearing of the review application where the applicant is entitled to state its case.
38. The applicant was at pains to point out that the respondent had acted selectively in pursuing the applicant and two other credit providers; and that it required the documents and admissions to make its case in the review application.
39. The Tribunal is not as sanguine as the applicant. In the Tribunal's view, the respondent is not acting arbitrarily and thereby breaching the equality provisions in section 9 of the Constitution[13] because the respondent is pursuing a legitimate objective. It seeks a favourable decision that might ease the burden of proof in future cases to secure refunds to consumers of the amounts that they may have overpaid to the applicant. This accords with the purposes of section 3 of the Act to, amongst other things, promote a fair, transparent, efficient and accessible credit market and industry. It may well be that the applicant finds the respondent's approach irksome, but it is an imposition the applicant must bear as one of the hazards of litigation.[14]
40. The Tribunal is persuaded that public policy considerations, the efficiency of public administration and the integrity of an effective law enforcement function mean that the applicant is not entitled to await the prosecution of other financiers before the Tribunal can decide whether to hold it accountable for its actions.[15]
41. There is another reason why the applicant is not entitled to the documents and admissions. To grant the applicant access to them would transform the respondent's investigation into other financiers, which "is in various stages of completion", into an adjudication process. Not only is this not envisaged by the Act nor is it what the Audi alteram partem rule concerning fairness requires.[16]

42. A party cannot also generally be compelled against its will to make admissions to facilitate the proof of another party's case. However, if a party's conduct or failure to unnecessarily admit facts protracts the litigation, the party may be penalised by a special order of costs. [17]
43. The applicant's request for the documents and admissions concerning competitors and consumers also raises serious questions concerning the privacy rights of competitors and consumers, who are not implicated in the review application. The respondent was adamant that it did not rely on their information when it decided to issue the compliance notice. It simply does not help the applicant to offer to accept redacted documents when, for the reasons furnished in this ruling, it is not entitled to the documents in the first place.
44. The respondent has provided the applicant with the record of its decision. The applicant cannot therefore expect the respondent to include documents, such as those concerning other credit providers, that the respondent did not consider when it took its decision to issue the compliance notice.
45. Moreover, it appeared to be common cause that the respondent has only issued three compliance notices. The applicant does not need documents to prove this fact in the review application.

CONCLUSION

46. Consequently, the Tribunal is persuaded that the applicant is not entitled to the documents and admissions it requests in the notices dated 17 August 2018 and 21 September 2018 respectively. It follows that the applicant is not entitled to the remaining relief it seeks in this application.

ORDER

47. Accordingly, the Tribunal makes the following order.

47.1 the application is dismissed; and

47.2 there is no order as to costs.

DATED ON THIS 31st DAY OF MAY 2019

TREVOR BAILEY

PRESIDING MEMBER

With members Beck and Dumisa concurring.

- [1] Regulations for Matters Relating to the Functions of the Tribunal and Rules for the Conduct of Matters before the National Consumer

Tribunal, 2007.

[2] Rule 3 (2) (c) (vii) empowers the Tribunal to consider applications related to an adjudication process that relate to other procedural matters.

[3] Rule 32 (1) of the rules provides that confidential information includes trade secrets; financial, commercial, scientific or

technical information, which if disclosed, is likely to cause harm to the commercial or financial interests of a person; or information

supplied in confidence by a person if the disclosure could reasonably be expected to put that person at a disadvantage in contractual or other negotiations, or prejudice that person in commercial competition. Rule 32 (2) requires that confidential information

forming part of an application to the Tribunal must be contained in a separate annexure and clearly marked "confidential".

[4] Section 55 (1) of the Act empowers the National Credit Regulator to issue a compliance notice to a person whom the regulator on reasonable grounds believes has failed to comply with a provision of the Act or is engaging in an activity in a manner that is inconsistent with the Act.

[5] Section 56 of the Act empowers a person who has been issued with a compliance notice in terms of section 54 or 55 to apply to the Tribunal to review the compliance notice.

[6] Rule 13 (6) provides that if an application relates to the review of any decision, determination or ruling made by the Regulator... then the Regulator must within a time period as notified by the Tribunal serve and file a complete record of the decision, determination or ruling forming the subject matter of the review proceedings.

[7] Section 144 (d) of the Act empowers a member of the Tribunal presiding at a hearing to give directions prohibiting or restricting

the publication of any evidence given to the Tribunal.

[8] See *Nedbank Limited trading as The Motor Finance Corporation v National Credit Regulator* (Case number: NCT/31680/201/1740(1) (P) NCA,) paragraph 22.

[9] Section 3 of the Act

[10] Section 15 of the Act

[11] See *Competition Commission v Yara (South Africa) (Pty) Ltd and Others* (784/12) 12013) ZASCA 107; (2013) 4 All SA 302 (SCA.) 213 (6) SA 404 (SCA) (13 September 2013), paragraph 24, which refers to *Simelane NO v Seven-Eleven Corporation SA Pty Ltd* 2003 (3) SA 64 (SCA), paragraph 17, which in turn relies on statements in the decision of the Competition Tribunal in *Novartis SA (Pty) Ltd v Competition Commission* (CT22/CR/8 June 01), paragraph 35-61

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- [12] Ibid, paragraph 26 where the court clarifies its earlier statements in *Woodlands Dairy (Pty) Ltd v Competition Commission*, 2010
- (6) SA 108 (SCA)
- [13] Section 9 (1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law.
- [14] See *Simelane supra*, paragraph 37
- [15] See *Quick Drink Co (Pty) Ltd and Another v Medicines Control Council and Others* 215 (5) SA 538 (GP).
- [16] See *Chairman, Board on Tariffs and Trade and Others v Brenco Inc and Others* 2001 (4) SA 511 (SCA).
- [17] See *Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd* 1978 (3) SA 465 (AD), 477H, 478A.
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