

SOUTH AFRICA / JUDGMENT

RFS Home Loans (Pty) Ltd v National Fund for Municipal Workers (37850/2020)

[2021] ZAGPPHC 854 (12 December 2021)

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COURT

North Gauteng High Court, Pretoria

BEFORE

Mahlangu SK

CASE / FILE NUMBER

37850/2020

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 37850/2020

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
CIRCULATE
TO MAGISTRATES: NO

DATE:

12 December 2021
In

the matter between:

RFS
HOME
LOANS(PTY)LTD
APPLICANT
and
NATIONAL
FUND FOR MUNICIPAL WORKERS
RESPONDENT

JUDGMENT

INTRODUCTION

[1] This matter relates to an application in terms of Section 32 of the Constitution of the Republic of South Africa, Act 108 of 1996, read with Section 50 and Section 82 of the Promotion of Access to Information Act, (Act No. 2 of 2000) (hereinafter referred to as “the PAIA”), for the provision of certain and/or documents in the

possession of the Respondent. The specific documents required will be set out in more detail hereinafter.

[1.1] The Applicant is RFS Homeloans (PTY) LTD, a private company with limited liability, duly registered and incorporated in accordance with the relevant company laws of the Republic of South Africa (hereinafter called “RFS”).

[1.2] The Respondent is the National Fund for Municipal Workers, a pension fund and juristic person duly registered and established in terms of the provisions of the Pension Funds Act, Act 24 of 1956, (hereinafter called “NFMW”).

FACTUAL BACKGROUND

[2] The facts in a nutshell are that during or about March 2012 RFS and NFMW concluded a written agreement (“the agreement”);

The following parties concluded a written memorandum of agreement (“the agreement”):

[2.1] RFS;

[2.2] The NFMW;

[2.3] Retirement Fund Solutions Holdings (Pty) Ltd (“RFSH”)

[3] It is common cause that during or about March 2012 the two parties RFS and NFMW concluded a written agreement hereinafter called “agreement”.

[4] It is also common cause the application of RFS is about the request of records under Section 50(1) of the Promotion of Access to Information Act, No. 2 of 2000 (“PAIA”).

[5] In concluding the agreement, the NFMW was represented by one Mr RJ Field, Mr SL Samons and an unidentified trustee of the NFMW, and Mr CJ Du Plooy represented RFS and RFSH.

[6] It is further common cause that Clause 2.5 of the memorandum of agreement provides that:

“The parties further agree that from 1 March 2012, as and when [RFS] need additional capital to provide home loans to NFMW members, [RFS] may submit a request to NFMW at any time for additional loan financial to provide home loans to NFMW members. The parties further agree that such requests must have a minimum value of R5 000 000, 00 (Five Million Rands) on each occasion. NFMW will have the sole discretion to consider such and advise [RFS] within 5 days if it able to grant

the request for additional loan finance. If the loan request is granted NFMW will take all necessary steps to provide [RFS] with the loan capital promptly.”

- [7] The Applicant contends that RFS used to provide homeloans to NFMW members, for which NFMW used to provide funding.
- [8] The NFMW representative, Mr Samons relied on the provisions of clause 2.5 of the agreement as a basis to refuse funding. On 12 June 2019 Mr Samons addressed an email to the applicant, where he advised the Applicant's representative, Mr Christiaan Du Plooy that:

“The Board of Trustees of the National Fund for Municipal Workers (NFMW) resolved today (12 June 2019) that the fund will not be granting further loan finance to RFS Home Loans, with immediate effect. RFS Home Loans will therefore in future need to finance all loans approved for NFMW members from its own resources.”
- [9] On the 13 June 2019 RFS' attorney, Ms Mare addressed a letter to the Trustee of the NFMW, stating that NFMW was in breach of the agreement.
- [10] On the 23 July 2019 and in response to Ms Mare's letter of 13 June 2019, Nysschen Attorneys (acting for the Respondent) addressed a letter to Ms Mare on behalf of NFMW.
- [11] Nysschen advised that Mr Samons' email of 12 June 2019 came about as a result of “unfortunate internal miscommunication”, and confirmed that the content of the email could be ignored. Nysschen Attorneys confirmed their view that NFMW had not breached any of its contractual obligations, and had no intention of doing so.
- [12] The Applicant contended that it has consistently requested copies of resolution alleged to have been taken, and said in each instance has been refused or ignored.
- [13] The Applicant further contended that it does not know whether the NFMW's board of Trustees has in fact exercised their discretion in terms of clause 2.5 of the agreement. Alternatively it contends that if they have exercised their discretion, it does not know whether it was done properly or fairly. It contends that NFMW only has a discretion to determine whether they are able to provide the funding. This meant whether the trustees are financially able to do so. Applicant contends that according to it this discretion does not extend any further than that.
- [14] Applicant further contends that NFMW's board of Trustees either did not take the resolutions to which Mr Samon made reference, alternatively did not take the resolutions in a proper manner, alternatively have exercised their discretion unfairly.
- [15] It is clear and evident from the above discussion that NFMW has been providing funding to RFS in terms of the agreement since 2012. It is also clear that prior to June 2019, not a single request for funding was refused.

[16] From that period the NFMW did not approve a single request of RFS for funding. Applicant contends that on each occasion RFS requested the funding, it was advised by Mr Samons that the NFMW's board of Trustees has resolved to refuse the request.

[17] The Applicant contends that without the information it requested from NFMW is unable to pursue possible remedies or to protect its contractual rights.

[18] The Applicant further contends that it needs this information sought in this application in order to properly assess and formulate its contractual remedy, alternatively it needs the documents sought in order to protect its contractual rights.

[19] RFS seeks the following documents:

[19.1] Records reflecting the identity of the Board of Trustees of the respondent (the board" from June 2019 to date;

[19.2] All resolutions taken by the board from June 2019 to date, in terms of clause 2.5 of the memorandum of agreement concluded between the applicant and the respondent during March 2012;by the board;

[19.3] Calendar entries reflecting the dates on which the meetings of the board were held during which the resolution were taken;

[19.4] Portions of the minutes of meetings of the board during which the aforesaid resolution were taken by the board;

[19.5] All documents from June 2019 to date which were provided by the board of trustees in order for the board to consider whether the aforesaid resolutions passed by the board; and

[19.6] Financial statements of NFMW for the period June 2019 to date.

[20] Applicant, RFS contends that the requested documents will allow it to consider its remedies having regard to whether:

[20.1] The trustees did exercised their discretion,

[20.2] They did so properly and fairly,

[20.3] They did so with reference to objective evidence as to whether they were able to provide the funding.

[21] The Respondent on the other hand contends that the Applicant does not make out a case that it is in compliance with section 50 of the Promotion of the Access to Information Act. It contends that the records called for are not reasonably required by the Applicant to exercise or protect the rights as it seeks to rely upon on its papers.

[22] Issues to be determined are:

[22.1] Whether the Applicant is entitled to access of the records of a private body as contemplated by Section 50(1)(a) of the Promotion of Access to information Act.

[22.2] What RFS needs to prove in relying on Section 50(1) and what is that right which it wishes to exercise and protect.

[22.3] How the information would assist RFS in exercising that right or protecting it?

[22.4] Whether the right which RFS seeks to protect is contractual and whether that right is to be found in clause 2.5 of the agreement?

[22.5] Whether NFMW did resolve not to provide the funding, and if so, whether it did so properly in terms of the contract?

[23] Section 32 of the Constitution states that:

(1) Everyone has the right of access to-

(2) “a.....

b. Any information that is held by another person and that is required for the exercise or protection of any rights.

[24] Section 50(1)(a) of PAIA provides that a requester must be given access to any records of a private body “ if that record is required for the exercise or protection of any rights”.

[25] On the other hand Section 68(1)(b) of PAIA provides that the head of a private body may refuse a request for information if the information contains financial, commercial, scientific or technical information, other than trade secrets of the private body, the disclosure of which would be likely to cause harm to the commercial or financial interest of the body.

[26] Section 81(3) of PAIA provides that the burden of establishing that the refusal of a request for access complies with the provisions of PAIA, rests on the party claiming that the refusal complies.

[27] The respondent contends that the main question in this case is whether the applicant has discharged the onus of meeting the requirements of section 50(1)(a). It contends that the applicant relies on the case of *Mahaeana and Another v Anglogold Ashanti Ltd* 2017(6) SA 382 (SCA). It contends further that the applicant’s reliance on this case is misplaced. The Respondent quotes paragraph 13 of the case according to it being the relevant passage for purpose of this argument.

“[13] this court has held that what is meant by the phrase, required for the exercise or protection of any rights in section 50(1), gives the rise to the fact-based enquiry and does not allow for the abstract

determination.

This court has mostly approached the test by deciding what those words do not mean”.

[28] He contends that it does not mean the subjective attitude of “want” or “desire” on the part of the requester; that, at the one end of the scale “useful” or “relevant” for the exercise or protection of a right is not enough, but that, at the other end of the scale, the requester that does not have to establish that the information is “essential” or “necessary” for the stated purpose.

[29] He contended that the furthest this court has been prepared to go is what was stated by Corrie AJA in *Clutch (PTY) LTD v Davis* 2005(3)sa486(SCA) at para 13.

“He contended that it is about as precise a formulation as can be achieved, provided that it is understood to can note a substantial

advantage or an element of need.

[30] Respondent contends that the constitutional court has approved this approach by stating that:

“Required” in the context of Section 32(1)(b) does not denote absolute necessity. It means is reasonably required”. The person seeking access to the information must establish a substantial advantage or element of need. The standard is accommodating, flexible and in its application.

[31] The Respondent contends that what must be covered in an application of this nature is the following:

“An applicant has to state what the right is, that it wishes to exercise or protect, what information is required, and how that information

would assist in exercising or protecting that right?” The Respondent contends that in this regard the Applicant has failed to do that.

Applicant on the other hand refers this court to the case of *Claase v Information Officer, South Africa Airways (PTY) Ltd* 2007

(5) SA 469 (SCA) whereby the Applicant indicated that the Appellant in that case relied on his contractual right as the basis for his request for the records. According to the Respondent, Appellant sued the South African Airways(PTY) LTD for breach of contract and required the records to confirm whether there was a breach premised on which the envisaged action constituting the protection of the right. Respondent contends, that a proper case was made out that the Appellant wanted to sue SAA for damages resulting from the breach of the contract.

[32] The Respondent contrasted the case of SAA with the present case of the Applicant, and contends that in the present case, applicant does not know exactly what it intends to do? He contends that the applicant is still intending to conserve its action, he contends further that it will be difficult for the court to find exactly as to what the applicant intends to do.

- [33] Respondent also points to the unreported judgement of Property Master (Pty) Ltd vs Redefine Properties Ltd (unreported case in the High Court of South Africa, Gauteng Local Division by Judge van der Linde) which was relied upon by the Applicant. The respondent pointed out that the dicta relied upon by the applicant in that case, opposed to what the applicant is trying to do in the present application. He said the court held the following that:
- a) Where an applicant has sufficient information to formulate its claim for damage it would not need the information sought prior to instituting action; and
 - b) If it has too little information to formulate a late course of action with decision and it cannot therefore issue out a summons, then PAIA ought to prevail.
- [34] The respondent further contends it is very important to consider the founding affidavit of the applicant to analyse the following three points:
- a) What is the right that the applicant wishes to exercise or protect?
 - b) What the information is which is required to effectively protect that right, and
 - c) How the information would assist the applicant in exercising or protective that right.
- [35] He contends that they both agree with the applicant that there are issues which are common cause requirements which the applicant has to establish, which amongst others, is the protection of the contractual right which the applicant wish to consider.
- [36] Respondent quotes par 32-35 of the founding affidavit of the applicant which reads as follows:
- “32. In short, RFS does not have enough information in order to determine its contractual (or other) remedies against the NFMW.*
33. Without the information, RFS is unable to pursue possible remedies or to protect its contractual rights.
 34. I submit that, on the facts set out above my suspicions are reasonable RFS at least has a potential claim against NFMW, either in contract or potentially otherwise.
 35. RFS requires the information sought in this application in order to properly assess and formulate its contractual remedies. Alternatively, RFS needs the documents sought in order to protect its contractual rights.”
- [37] Looking at the above quoted clause 32-35 it would be difficult to assess how the information sought by the Applicant would assist in protecting any of the applicant `s rights”. This is so especially where the applicant, RFS tells the court in his own words, that it does not know whether it has a contractual or other remedies available to it. The Applicant does not tell the Court whether it can do one of the three things with that information which is being requested. It does not tell the Court whether it can do one of the following, whether:

- (a) it wants to some sort of contractual damages;
- (b) it needs to cancel the contract;
- (c) it intends to seek specific performance.

[38] None of these 3 options is indicative of the choice preferred by the Applicant or one can say there is no indication of what remedy the Applicant envisages to pursue.

[39] Respondent also contends that the court will not find any compliance with the requirement of “how the information sought would assist in exercising and protecting any of the applicant`s right”.

[40] Respondent contends that nothing is provided by the applicant as to what remedy the applicant envisages to pursue.

[41] It would seem that there is some truth in what the Respondent is alleging because if indeed the applicant had a contractual remedy or any other remedy in law to protect, the applicant should have been open and honest about it. The applicant should be free to state it, so that particular contractual remedy or right which the applicant is pursuing can be secured and protected. Nothing in this instance has been provided by the Applicant as to what remedy he envisages to pursue. Instead what the applicant, RFS tells the Court is it that, it does not know whether it has contractual remedy or another remedy is available? The applicant further in its founding affidavit tells the court that it requests documents in order to ascertain whether it has a contractual remedy or another remedy in law.

[42] It is clear from the foregoing paragraphs that the Applicant in his own words admitted or rather conceded that it does not exactly know what remedy is needed to be protected by this court, which puts the court in a precarious position as to what remedy applicants seeks to protect? If there is such a remedy the applicant should be candid and

open about it. Even if is not the intention of the applicant to mislead the respondent about its true intentions, the mere fact that the applicant does not disclose what remedy available to it, the whole arrangement would appears to be a fishing expedition by the applicant. If indeed the applicant knows what it wants there should be no secret about the kind of remedy is seeking.

[43] The applicant`s interpretation of clause 2, 5 that NFMW only has a discretion to determine whether they are able to provide the funding i.e (whether they are financially able to do so).

[44] The applicant further interprets clause 2.5 of the agreement that this discretion does not extend any further than that. The Respondent contends that interpretation is misleading and wrong.

[45] The Respondent further contends that the Applicant unfortunately interprets this clause 2,5 in a manner that the Respondent has no discretion to refuse a request for a loan made; unless there is no money available, Respondent avers that this interpretation of the Applicant is totally incorrect.

- [46] Of significance is whether NFMW has exercised that discretion? In what way it has exercised that discretion which was given to it by clause 2.5? It is common cause that the literal meaning of the word “discretion” means that Respondent has the sole liberty and freedom to consider pros and cons of granting or honouring such request for additional loan finance, including consideration of the provisions of the Pension Fund Act(Act no.24 of 1956) where strict and prudent financial controls are adhered to or practised, to determine whether to disburse money for loan or investment purposes. All these is done in the interest of the financial institution, to ensure that the disbursement of such a funding by it, is not to its detriment or disadvantage but it is to its benefit.
- [47] It is further my view that whilst such an assessment of the pros and cons are weighed by NFMW, it seems it would be its prerogative to decide whether the particular transaction is approved or not. It would appear in the circumstances that the Respondent has assessed the situation and has taken the decision that it no longer wish to continue with the granting of additional loan finance to the applicant, RFS.
- [48] It is further to be noted that this discretion has been exercised by NFMW, having considered all the circumstances including whether is it financially viable to advance this additional loan finance. It is also significant to point out that that in the circumstances all indications suggest that NFMW has decided that it is no longer in its best interest to continue to invest money into the applicant`s home loan scheme. The conclusion arrived at is that such a discretion does exist in favour of the Respondent, NFMW.
- [49] I am of the same view advanced by the counsel for the Respondent that if the interpretation of the applicant is to be believed the agreement would definitely be in contravention of the provisions of the Pensions Fund Act(Act no.24 of 1956) wherein strict financial sound responsibilities would be considered to pension funds when investment are to be assessed.
- [50] With respect to access to the financial statements, Respondent contends that at the beginning the Applicant required access to financial statements so as to prove that the Respondent has sufficient money available to assist the Applicant. But later in his replying affidavit Applicant averred it does not continue or persist with its request for the financial statement of the respondent as from June 2019 up until date of the replying affidavit. Respondent pointed out that the deponent to the Applicant’s affidavit knew all along that the financial statements of the Respondent were publicly available on the website. Therefore, the applicant had all time had access to the publicly available financial statements of the Respondent. Respondent contends that there is nothing that prevents the applicant from formulating its perceived cause of action. He points out that it is unacceptable for it to assist the applicant in doing that.

- [51] Respondent contends that Applicant in his replying affidavit claims that both Mr Samson, who is the former chief principal executive officer of the Respondent, as well as Mr Ndawana, the current chief principal executive officer of the Respondent do not have personal knowledge of what they say in their answering affidavits. Applicant's contention is that the two deponents are not board members, therefore they cannot testify as whether the board deliberated upon the Applicant's request for funding or not.
- [52] With respect to the foregoing paragraph (supra), that the only logical interference that it should make is that both the previous principal executive officer and the present principal executive officer of the respondent do have access to the minutes of the meetings of the board as well as the resolutions taken by the board.
- [53] It is my view that the above contention by the Applicant is misleading that the two gentlemen are not board members and therefore cannot testify as to whether the board ever deliberated upon the applicant's request. The mere fact that they are the executives of the institution, they should be able to know what is happening inside the institution. The two gentlemen as executives are part of the management and they should be operational. I would guess that sometimes they sit in those meetings of the Board as ex officio members even though they might not be participating in the discussion per se of the Board, but at least they should be able to know where those minutes and resolutions are archived. In some instances the executives do even draft the agenda for the Board. Therefore, they are privy to what is happening in the institution and even inside the board rooms.
- They only logical conclusion to arrive at is that those both the previous and the present principal executive officer of the respondent are presumed to know where the minutes and resolutions of the board meetings are stored.
- [54] It is also significant to point out that clause 2, 5 of the agreement which is relied upon by the applicant does not require the board of trustees of the Respondent to adjudicate upon such requests for the further funding, but it only requires the Respondent National Fund for Municipal Workers to do so. This means this responsibility is not confined to the Board but it can be done by any person with the necessary delegated authority. Therefore is important for the applicant to reconsider the preconceived assumptions it made about what the deponents for the Respondent have said in their founding affidavits whether is believed or not. The respondent goes further and contends that any committee or sub-committee with the necessary delegated authority is also capable to consider those requests.
- [55] Respondent contends that if evidence of deponents to the respondent's answering affidavit was not to be accepted in respect of the board deliberations that were made, the problem of the applicant would be further compounded, as the applicant did not establish in its founding affidavit that the respondent's board was contractually obliged to consider the request. Respondent contends that the contract even on a plain reading does not require the board to do so.

[56] With respect to Section 68 of the Promotion of Access to Information Act (Act. No.2 of 2000), which provides that the Head of a Private Body may refuse a request for access to a record of the body if the record:-

- (a) contains trade secrets of the private body,
- (b) contains financial, commercial, scientific or technical information, other than trade secrets, of the private body, the disclosure of which would be likely to cause harm to the commercial or financial interest of the body,
- (c) contains information, the disclosure of which could reasonably be expected-
 - (i) to put the private body at a disadvantage in contractual or other negotiations, or
 - (ii) to prejudice the body in commercial completion, or
- (d) ...”

[57] Premised on the above section of PAIA, the respondent contends that the board of trustees of NFMW stands in a fiduciary relationship towards the members of the respondent. He says that it has the duty to consider investment risk profiles as well as investment portfolios. He contends that more importantly is the fact that the respondent competes with other big pension funds for market share which may prejudice its commercial competition in the market.

[58] I am of the view that the contention made by the Respondent carries weight and is consistent with what is happening in practice where rival companies are competing against each other by stealing each other's trade secrets by some covert means. Section 68 of PAIA is precisely aimed at protecting companies against unscrupulous ones where they gain access to trade secrets of their competitors. Therefore, based on Section 68 of PAIA this information cannot be disclosed where there are no compelling reasons even to do so.

[59] In the premises, the application is dismissed with costs including the costs of the Counsel.

MAHLANGU SK

Acting Judge of the High

Court of South Africa

Gauteng Division

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