

SOUTH AFRICA / JUDGMENT

**Toyota Financial Services (SA) (Pty)
Ltd v National Consumer Commission
(NCT/4053/2012/101 (1)(P)) [2013]
ZANCT 12 (22 April 2013)
[2013] ZANCT 12**

COURT

National Consumer Tribunal

BEFORE

B.C. Dumisa, T. Woker, P. Beck

CASE / FILE NUMBER

NCT/4053/2012/101 (1)(P)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD IN

CENTURION

CASE

NUMBERS: NCT/4053/2012/101 (1)(P)

DATE:22/04/2013

In

the matter between:

TOYOTA
FINANCIAL SERVICES (SA) (PTY) LTD Applicant
and
NATIONAL
CONSUMER COMMISSION Respondent

CORAM:

PROF
B.C. DUMISA - PRESIDING MEMBER
PROF
T. WOKER - PANEL MEMBER
MS
P. BECK - PANEL MEMBER
HEARING
DATE: 22 FEBRUARY 2013

JUDGEMENT

INTRODUCTION

The Applicant is TOYOTA FINANCIAL SERVICES (SA) (PTY) LTD (Toyota SA) a private company with limited liability incorporated in South Africa.

The Respondent is the NATIONAL CONSUMER COMMISSION established in terms of section 85 of the Consumer Protection Act, Act 68 of 2009 (CPA).

The Applicant brought an application to the National Consumer Tribunal (Tribunal) to have a compliance notice issued against it by the Respondent, reviewed and cancelled in terms of section 101 (1) of the CPA.

The Tribunal has jurisdiction to hear this matter in terms of section 101 (1) of the CPA. This section provides that a person issued with a compliance notice in terms of section 100 may apply to the Tribunal in the prescribed manner and form for its review.

This judgment follows the hearing of this matter on 22 February 2013 at the offices of the Tribunal in Centurion. The Respondent failed to attend this hearing, despite being properly notified thereof. The judgment is based largely on written submissions, as well as oral arguments and written heads of argument by the Applicant. From the Applicant's heads of argument it became clear that the Applicant based its review application on several grounds. These grounds can broadly be divided into two categories of issues, namely procedural issues and issues on the merits of the matter.

The Tribunal *mero motu* took the decision to deal with the procedural issues first as the Tribunal considered it unnecessary to consider the merits of the matter until a decision had been made on the procedural issues. The Tribunal was of the view that it would serve little purpose to continue into a lengthy hearing on the contents of the compliance notice itself if the Tribunal determined that the compliance notice had not been issued in accordance with the law. This judgment therefore focuses on the procedural issues and not the merits of the compliance notice itself.

THE FACTS

The facts relating to this matter are common cause as the Respondent failed to oppose the application.

On 10 June 2011, the Respondent received a complaint from a consumer, Mr I.S. Mofokeng (hereinafter referred to as the Complainant),

wherein the Complainant alleged that he saw an advertisement on a "Toyota website" stating they are advertising a Toyota Quantum 2.7 ten seater, 2009, for an amount of R129 900.00.

The Complainant alleged that he called the Toyota dealership (hereafter referred to as “the Dealer”) to arrange payments and delivery of the motor vehicle, but the dealer told him that Pretoria, where the Complainant resides, is too far for them to deliver.

The Complainant submitted that the dealer refused to sell him the Toyota Quantum 2.7 ten seater, 2009 model, for an amount of R129 900.00 (one hundred and twenty nine thousand rand) which he claims had been advertised on the dealer’s website. He alleged that the dealer then wanted to sell him the car not at the advertised price, but at R229 000.00 (two hundred and twenty nine thousand rand) which the dealer claimed was the correct price.

On the same day, 10 June 2011, the Respondent forwarded the complaint to the Applicant, Toyota Financial Services (SA) (Pty) Ltd.

The Applicant was given seven (7) days to respond to the complaint and failed to do so.

Due to the Applicant’s failure to respond to the complaint forwarded by the Respondent, the matter was set down for conciliation on the 17th of November 2011. Only the Complainant attended the conciliation hearing.

The Respondent alleges in the compliance notice that, despite their numerous attempts to engage with the Applicant with regards to the complaint, the Applicant was not forthcoming nor did the Applicant display any efforts to address the issues presented to it.

The Respondent concluded (in the compliance notice) that the conduct of the Applicant indicated failure by the latter to cooperate; and that the Applicant’s conduct amounted to a contravention of Section 29(b)(i); Section 30(1); Section 40(1)(a) and 2(b) of the Consumer Protection Act No. 68 of 2008.

On 22 February 2012, the Respondent served the compliance notice on the Applicant, where the Respondent sought to direct the Applicant to implement the following interventions:

To sell the Complainant a Toyota Quantum 2.7 ten seater, 2009 model, for an amount of R129 900.00, “as it was advertised on your website”

The Applicant had to ensure that the above directive was implemented within 15 days from the date of issue of such Compliance Notice, “which is on or before the 02nd of March 2012 failing which an administrative fine in the amount of R300 000.00 (three hundred thousand rand) would be sought from the Tribunal as provided for in terms of Section 100(6) (a) read with Section 112 of the Consumer Protection Act No. 68 of 2008.”

The Applicant did not comply with the compliance notice. Instead, the Applicant approached the Tribunal seeking to challenge the validity of such a compliance notice, and also asking the Tribunal to have this compliance notice cancelled.

ISSUE TO BE DECIDED BY THE TRIBUNAL

The issue which the Tribunal must decide is whether the compliance notice has been issued in accordance with the law.

The Applicant asserted that there were two grounds on which the compliance notice should be reviewed. These are as follows -

The compliance notice was served on the wrong party.

Two letters were sent by the Applicant to the Respondent in March 2012, with an intention to engage the Respondent on this matter; but there was no response from the Respondent. The Applicant contends, based on this, that the whole process by the Respondent was procedurally unfair and unlawful.

Based on the above, the Applicant prayed that the compliance notice be set aside in whole and, if applicable, the Respondent be ordered to pay the Applicant's attorney and client's costs.

The Applicant presented its arguments on each of these two grounds:

The compliance notice was served on the wrong party

The Applicant submitted that the compliance notice ought to have been issued to Market Toyota Athlone ("Dealer") and not to Toyota SA. The Applicant submitted that, prior to receiving the compliance notice dated 28 February 2012, it had absolutely no contact with the Respondent regarding this matter.

The Applicant based its assertion that the compliance notice ought to have been issued to Market Toyota Athlone and not to Toyota SA on its claims that:

Before a compliance notice is issued, the Respondent must first have reasonable grounds to believe that the entity to which the compliance notice is to be issued is engaged in prohibited conduct. This means that it is the entity against whom the notice is issued which must have engaged in prohibited conduct and not some other entity – unless there are circumstances where the conduct of one person may be imputed to another.

The Dealer and the Applicant are two separate and distinct entities, with absolutely no cross-ownership structures whatsoever.

The actual advertorial complained of was placed by the Dealer, and not by the Applicant. The dealer, Market Toyota Athlone, according to the Applicant, is just one of many Toyota franchisees that sell Toyota products without being owned by Toyota SA.

The Applicant has no knowledge of the letter purported to have been dispatched to them by the Respondent on the 10th June 2011.

The Applicant denies ever responding to any alleged complaint submitted by the Respondent. The Applicant notes that the response could have possibly been submitted by the Dealer.

The Applicant has no knowledge of the conciliation which was set down for the 17th November 2011.

The Applicant has no knowledge of any attempts purportedly made by the Respondent to engage them.

There is an appropriate precedent for this matter, *Vodacom v NCC1*, where similar issues were considered, especially on the issue of the compliance notice being served on the wrong party. For this reason, most legal considerations and case law used in the *Vodacom* - case will not be repeated here although the same principles will apply. By the same token, significant parts of this judgment will, with permission of the panel that decided the *Vodacom* - case, restate as is most of the issues also considered there.

The procedure followed by the Respondent was unfair and unlawful

The rule of law embraces a number of different themes but the most fundamental theme is that administrators must exercise their authority according to the law and cannot exercise it arbitrarily. In other words, they cannot be, as Goldstone J stated in *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange*¹ a law unto themselves.²

Compliance notices are governed by section 100 of the CPA. This section sets out certain jurisdictional facts which must be satisfied before a compliance notice is issued. These are the following:

The compliance notice is issued to a person or association of persons whom the Commission on reasonable grounds believes has engaged in prohibited conduct; and

The provision of the CPA that has not been complied with.

A jurisdictional fact is a pre-condition which must exist prior to the exercise of administrative power (known as a substantive jurisdictional fact) or a procedure that must be followed when exercising the power (known as a procedural jurisdictional fact).³

According to Hoextra, “the point about jurisdictional facts is that the exercise of power depends on their existence or observance, as the case may be. If the jurisdictional facts are not present or observed then the exercise of the power will as a general rule be unlawful.”

The decision of the Respondent to issue a compliance notice qualifies as administrative action.⁴ That being so the issuing of a compliance notice is governed by the Promotion of Administrative Justice (PAJA) Act 3 of 2000. Therefore the issuing of a compliance notice must be lawful, reasonable and procedurally fair.

In addition to section 101 of the CPA which provides for the review of a compliance notice by the Tribunal, section 6 of PAJA provides that any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action. A court or tribunal has the power to judicially review administrative action on a number of grounds set out in section 6 (2) of PAJA.

ANALYSIS OF FACTS AND ARGUMENTS

Taking the above legal principles into consideration, there are a number of issues which warrant consideration by the Tribunal. These include establishing whether:

30.1 When issuing the compliance notice to the Applicant, did the Respondent reasonably believe that the Applicant was engaged in prohibited conduct?

30.2 Was the issuing of the compliance notice lawful, reasonable and procedurally fair?

The entity on which the compliance notice was served

The compliance notice was served on Toyota SA, and not on the Dealer.

It is not disputed that Toyota SA and Market Toyota Athlone (the Dealer) are two separate legal entities.

The Respondent did not attend the hearing; and nowhere else in its submissions does it advance any legal reasons why Toyota should be held liable for any purported prohibited conduct by the Dealer (a separate legal entity) in its dealings with consumers. When determining whether a notice was issued to the correct party it is important to bear in mind that each company is a separate legal entity and has a separate legal personality aside from its shareholders.⁵ It is important to note that there is no general discretion to disregard a company's separate legal personality.⁶

The issuing of the compliance notice must be lawful, reasonable and procedurally fair

As stated above, the issuing of a compliance notice constitutes administrative action and as such the Respondent must act lawfully and reasonably and in a procedurally fair manner. It is not in dispute that attempts by the Applicant to engage the Respondent after the issuance of a Compliance Notice on 28 February 2012 were in vain because the Respondent just did not respond to the Applicant's letters (at least not until February 2013 when this matter was set down for Hearing)

For all the reasons set out above the Tribunal concludes that:

The compliance notice was issued to the incorrect party;

The issuing of the compliance notice was not lawful, reasonable or procedurally fair.

COSTS

The awarding of costs is governed by section 147 of the National Credit Act, 2005 (NCA).⁷ Section 147 provides for the awarding of costs in very limited circumstances where a complainant refers a matter to the Tribunal

after having received a notice of non-referral from the National Credit Regulator or the National Consumer Commission. If the

circumstances do not fall within this exception the general rule that each party bears its own costs must be observed. This interpretation is unavoidable because section 147 (1) uses the word “must” and not “may” indicating that the Tribunal is not granted a discretion in this circumstances.

The Tribunal’s rules also deal with the awarding of costs. Rule 25(7) of the Tribunal Rules provides:

The Tribunal may award punitive costs against any party who is found to have made frivolous or vexatious applications to the Tribunal.

This rule allows the Tribunal to award punitive costs but only in circumstances where a party made a frivolous or vexatious application. Therefore, just as with section 147, punitive costs can only be awarded in the narrow circumstances provided for by the rules.

The Tribunal is a creature of statute and as such its powers are limited to those provided for in the statutes that govern it. At this stage the Tribunal is governed by the NCA, the CPA and its rules and these governing pieces of legislation only provide for the awarding of costs in very limited circumstances.

In short, therefore, the Tribunal cannot extend its powers to award costs outside the power which is given to it by statute. To do so would be contrary to the principle of the rule of law.

Accordingly the Tribunal makes the following order:

1. The compliance notice issued by the Respondent is hereby cancelled.
2. There is no order as to costs.

DATED THIS 22ND DAY OF April 2013

Prof B.C. Dumisa

Presiding Member

Prof T Woker (Member) and Ms P Beck (Member) concurring.

1 Vodacom Service Provider (Pty) Ltd and Another v National Consumer Commission;
NCT/2793/2011/101(1)(P)

2 For the most recent discussion of the rule of law and the abovementioned cases see *Clur v Keil* 2012 (3) SA 50 (ECG).

3 C Hoextra Administrative Law in South Africa 2ed

(2012) 209 as set out in 1 supra at par 14 and

4 See definition of administrative action under section 1 of the Promotion of Administrative Justice Act 3 of 2000 and discussion of administrative action in Hoextra Administrative Law in South Africa. The Commission is established under section 85 of the CPA as “an organ of state within public administration”. It exercises public power and it performs a public function in

pursuance of the objects of the CPA. The issuing of a compliance notice adversely affects the rights of the Applicant and it has a direct, external and legal effect in that the compliance notice compels the Applicant to alter the terms of its contracts. Should the Applicant fail to comply with the compliance notice the Respondent has indicated that it intends to seek an administrative penalty of 10% of its annual turnover in the preceding financial year. The Commission itself has recognised that its conduct constitutes administrative action. In its Final Enforcement Guidelines (published under General Notice 492 in Government Gazette 34483 on 25 July 2011) it states that procedural fairness requires that the Commission take into consideration the provisions of PAJA - as discussed in 1supra at par 32

5 Salomon v Salomon Co Ltd [1897] AC 22, [1895-9] ALL ER 33 as applied in MTN v NCC at 1 supra

6 Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd [1995] ZASCA 53; 1995

(4) SA 790 (A) as applied in MTN V NCC at 3 supra

7 The Tribunal is established under the National Credit Act and deals with matters which fall under the National Credit Act as .

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