IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 18 September, 2023

Status: Immediate

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Jacolien Barnard NO and Another v National Consumer Tribunal and Another (940/2021) [2023] ZASCA 121 (18 September 2023)

The Supreme Court of Appeal (SCA) dismissed an appeal from the Gauteng Division of the High Court, Pretoria (high court).

The facts:

The National Credit Regulator (the Regulator) initiated an investigation into the business practices of CMR Group (Pty) Ltd (CMR) in 2017. This investigation focussed on agreements relating to its core business known as the 'Pawn your car and still drive it' scheme. The investigation revealed that CMR advanced funds to consumers against their fully paid motor vehicles, subject to a pawn agreement. The scheme allowed the consumers to borrow between 30 to 50 percent of their respective motor vehicle's market value. In terms of this arrangement, the consumers had to transfer their motor vehicles to CMR's name. The consumers remained in possession of the motor vehicles while renting them from CMR for a period of up to 12 months. The Regulator alleged that the scheme was in contravention of a number of provisions; section 101(1)(d) read with Regulation 42 of the National Credit Act (34 of 2005) (NCA) - charging an excessive amount of interest; s 81(2) of the NCA – failing to conduct affordability assessments; and s 100(1)(a) of the NCA – imposing a prohibited charge. It was these contraventions that prompted the Regulator to seek a declaratory order against CMR before the National Consumer Tribunal (the Tribunal).

In its answering affidavit, NCR conceded to the orders sought by the Regulator in the event that the Tribunal found that it was involved in prohibited conduct. Furthermore the Regulator requested the Tribunal to issue an order that CMR be interdicted from any further contraventions of the NCA, and be ordered to submit a report compiled by an independent auditor (to the NCR) in respect of fees which may have been overcharged and that such fees be set off against any amounts validly owed and/or owing to CMR. In its order, the Tribunal took into account the proposed concessions and made the following order: CMR's registration as a credit provider be cancelled; CMR be interdicted from entering into future credit transactions; all CMR agreements be declared reckless and obligations arising therefrom be set aside, CMR must reimburse the consumers; and CMR had to appoint an independent auditor who had to determine all amounts paid under all the credit arrangements (within 90 days of the judgment).

Nonetheless, just before the hearing that was set for April 2019, a special resolution to voluntarily wind-up CMR was passed, and the high court granted the order that placed CMR in voluntary liquidation and appointed provisional liquidators of CMR (the applicants before this Court) in February 2019. The Regulator only became aware of this when CMR's attorneys

withdrew from their mandate. The application lodged by the Regulator before the Tribunal had to then be postponed to a later date, upon which neither the NCR nor the provisional liquidators appeared. The abovementioned orders were therefore set in their absence. Aggrieved by that decision, the liquidators appealed to the Gauteng Division of the High Court (full bench) and the appeal was dismissed. The application for leave to appeal the judgment and order of the high court met the same fate.

It is against this background that the special leave and condonation (out of time) were sought before this Court. Herein, the issue was whether the high court erred in not dealing with the point of law raised by the applicants. The parties were then directed to directly address the merits of the appeal. However, since the condonation application was unopposed and the reasoning was credible, this Court saw it fit to grant the condonation. With regard to the special leave application, as with any application of this kind, there had to be reasonable prospects of success and special circumstances. In this light, this Court highlighted and concluded that the an appeal from the decision of the high court should have been sought in terms of section 16(1)(a) of the Superior Courts Act (10 of 2013) and not section 148(2) of the NCA, irrespective of the constitution of the court (number of judges); more so because the decisions of the Tribunal are administrative in nature. Nonetheless, this Court proceeded with the application under section 16(1)(a).

Importantly, this Court discussed the high court's approach and judgment as well as the appeal and rescission process therein, to showcase how the applicants misconstrued their remedy under the NCA. Instead of applying to the Tribunal to rescind its order, they saw it fit to do so under section 148(2) before the high court. Hence, the high court found that 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 Court found it befitting for the applicants to have applied for a rescission of the Tribunal's order instead of making an application to the high court. As a result, the applicants' failure to timeously apply to this Court for leave to appeal was condoned. In the result, this Court found that although the applicants made extensive submissions on the merits of the case, the jurisdictional Rubicon first had to be crossed, a hurdle which they failed to overcome. The Court therefore struck the matter off the roll, with costs.

In a separate dissent, the Court differed with the main judgment as to the approach and the fate of this application. This view based on the fact that as a matter of law, the liquidation of CMR impacted materially on the future conduct of the proceedings before the Tribunal. Therefore, the dissent was not persuaded that the point of departure be rested on the jurisdiction issue under section 148 of the NCA. They found the high court to have erred in dismissing the appeal because there arose a necessary anterior enquiry that ought to have occupied the attention of the high court. Further that, the Regulator should have formally joined the applicants in the proceedings. This finding was countered by the majority judgment, which emphatically stated that joinder was not required where the Regulator acted in terms of section 359 of the old Companies Act (1973 Act) as such provisions do not expressly or impliedly require the joinder of the liquidators. In the same manner, the majority elucidated that the provisions of section 359 needed to be interpreted purposively and contextually. Finally that, the joinder of the liquidators may only be envisaged in actions that are instituted after the commencement of liquidation proceedings.

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