

IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION

Case numbers: NCT/2679/2011/101(1)(P)
NCT/2807/2011/101(1)(P)
NCT/2806/2011/101(1)(P)

In the matter between:

BMW SOUTH AFRICA (PTY) LTD

APPLICANT

and

NATIONAL CONSUMER COMMISSION

1ST RESPONDENT

and

JSN MOTORS (PTY) LTD

2ND RESPONDENT

CORAM:

BECK P. (MS.) (PRESIDING MEMBER);
MANAMELA F.K. (ADV.) (PANEL MEMBER)
SEPHOTI N. (ADV) (PANEL MEMBER)

REASONS FOR JUDGEMENT:
APPLICATION FOR CONSOLIDATION OF MATTERS

This is an application for the consolidation of matters in terms of Rule 16 of the Rules for the conduct of Matters before the Tribunal.

1. The Applicant is BMW South Africa (Pty) Ltd, a company duly registered and incorporated in accordance with the company laws of South Africa, having its registered address at 1 Bavaria Avenue, Randjiespark, Extension 17, Midrand, Gauteng ("**BMW**").

2. The Respondents to the application as cited by the Applicant are:

- 2.1 Michael Rogers, an adult male residing at 20 Downing Street, Magaliessig, Ext 32, Pretoria, Gauteng Province (**"Mr. Rogers"**)
- 2.2 Warren Daniel Bonn, an adult male residing at 16 Lola Street, Pierneef Park, Gauteng Province (**"Mr. Bonn"**)
- 2.3 The National Consumer Commission established according to the provisions of the Consumer Protection Act of 2008 (**"the CPA"**), endowed with legal capacity in terms of Section 85 of the CPA (**"the Commission"**); and
- 2.4 JSN Motors (Pty) Ltd, a company duly registered and incorporated in accordance with the company laws of South Africa, having its registered address at 43 Ormonde Street, Bryanston, Gauteng (**"JSN"**)

*(Collectively referred to as **"the Respondents"**)*

- 3. The Applicant has brought an application to the National Consumer Tribunal (Tribunal) for a consolidation of matters based on compliance notices issued to it by the Commission;
- 4. At the start of the hearing, the Tribunal made it clear that the proceedings will only be concerned about the consolidation application as the Tribunal considered it unnecessary to consider the merits of the matter until a decision had been made on the consolidation application. For the purpose of this hearing the Applicant is BMW (Pty) Ltd; the First Respondent is the National Consumer Commission and the Second Respondent is JSN Motors (Pty) Ltd

BACKGROUND

- 5. On 13 August 2008, Mr. Rogers purchased a BMW Z4 Coupe from Club Motors in Randburg. On 03 May 2011 Mr. Rogers filed a complaint with the Commission in terms of Section 71 of the CPA, alleging that BMW has acted in a manner inconsistent with the provisions of the CPA.
- 6. On 23 August 2011 the Commission issued a compliance notice in terms of Section 100 of the CPA to BMW. BMW objected to this compliance notice on 13 September 2011 (**"the Rogers Compliance Notice"**).

7. On 12 January 2011, Mr. Bonn purchased a BMW 135i Coupe from JSN Motors. On 05 May 2011 Mr. Bonn filed a complaint with the Commission in terms of Section 71 of the CPA, alleging that BMW and JSN have acted in a manner inconsistent with the provisions of the CPA.
8. On either 25 August 2011 or 02 September 2011 the Commission issued a compliance notice in terms of Section 100 of the CPA to BMW and JSN. Both BMW and JSN objected to this compliance notice on 23 September 2011 in two separate applications made to the Tribunal (“the Bonn Compliance Notice”).

APPLICANT’S BASIS UPON WHICH CONSOLIDATION IS SOUGHT (“BMW”)

9. Briefly, the Applicant submits that the Tribunal would *inter alia* be required to consider the merits of the respective matters should the Tribunal find that the Rogers and Bonn transactions fall within the ambit of the CPA or any applicable repealed statute, or that the respective Compliance Notices are not defective and fatally flawed.
10. The Applicant further submits that notwithstanding the fact that the objections also require the Tribunal to consider the merits of each respective matter, the Tribunal has to decide on the points of law as set out above prior to considering the merits of each matter.
11. The Applicant is of the view that, should the Tribunal wish to adjudicate on the merits of each matter separately, such adjudication would be premature as the outcome of the merits hearing would prove futile if it has been established that the Rogers and Bonn transactions do not fall within the ambit of the CPA or that the Rogers and Bonn Compliance Notices are defective and fatally flawed.
12. The Applicant points out that both the JSN and Bonn matters arose from the Bonn Compliance Notice. It submits therefore that not only should the hearing of the material points of law raised by BMW and JSN be consolidated, but, as a result of the fact that both matters originate from the same facts, the merits of the two matters should also be consolidated.
13. The Applicant further submits that the points of law that BMW and JSN respectively require to be adjudicated upon, are identical. Furthermore, should these matters not be consolidated, BMW and JSN will each have to lead evidence of the same witnesses at the hearing of their matters.

14. The Applicant submits that a consolidation would not only be practical but also convenient for all parties concerned in that it would prevent multiplicity of hearings and duplicity of arguments and the adjudication of the common material points of law that require being addressed.
15. Furthermore, that a consolidation would prevent different panels of adjudicators from handing down conflicting judgments on the common material points of law that require being addressed as well as on the merits of the respective matters. These matters will have the potential to provide much needed insight into the development and implementation of the provisions of the CPA and the Applicant submits that one cannot take the risk of conflicting judgments being handed down under the prevailing circumstances and that a consolidation would contribute to legal certainty and consistency in the interpretation of the provisions of the CPA.
16. The Applicant further submits that all parties have appointed legal representation and that a consolidation would entail that the hearings of the respective matters will be protracted and there can as such, be no doubt that it will be less time consuming, more cost effective and in the best interests of all parties involved if these matters be heard together.
17. The Applicant is of the view that the points of law set out herein and which it requires to be adjudicated are identical.

SECOND RESPONDENT'S OPPOSITION TO CONSOLIDATION ("JSN")

18. Briefly, the Second Respondent firstly raises the argument that the Applicant brought before the Tribunal a matter which is not listed in Rule 3 of the Rules for the Conduct of Matters before the Tribunal. The Second Respondent bases its argument on Rule 10(1) of the Tribunal Rules which provides that:

"(1) A person wishing to bring before the Tribunal a matter which is not listed in rule 3, or otherwise provided for in these Rules, must first apply to the High Court for a declaratory order confirming the Tribunal's jurisdiction –

- (a) To deal with the matter ;*
- (b) To grant the order to be sought from the Tribunal."*

19. The Second Respondent submits that the Tribunal has no jurisdiction to pronounce or determine the main matter and therefore has no jurisdiction to hear the application for consolidation.
20. Further that the pleadings in case NCT/2806/2011/101 have not yet closed. For the record, the pleadings in both the main matter and the application for consolidation have in fact closed.
21. The Second Respondent agrees that the legal points taken in respect of the compliance notice issued by the Commission against the respective service providers are similar in nature. It however submits that the Applicant loses sight of the fact that the merits of each matter are not the same and that the respective complaints, being vastly different, will require an investigation and consideration of each of the matters separately.
22. Further that the motivation advanced by the Applicant does not take into account the possibility that the legal points may not succeed in which event the respective matters have to continue on the merits of each case. Should the legal points raised not have the effect of bringing the matter to finality, a separation of the matters will in all likelihood have to be sought in order to have the matters heard separately.
23. Furthermore the Second Respondent submits that the consolidation of the three matters may have the exact opposite effect as far as convenience is concerned in that it will result in a duplication of litigation, prolonged procedures, especially if a separation has to be sought. Accordingly it will increase the costs of litigation to the extent that it will be unfair and unreasonable if such a consolidation is ordered.
24. The Respondent prays that the Tribunal refuse the application to consolidate the matters with an order that BMW, Mr Bonn and the Commission be jointly and severally liable to make payment of its taxed costs.

FIRST RESPONDENT'S ARGUMENT ("NCC")

25. In its papers filed with the Tribunal, the First Respondent submits that the application for consolidation of Case Nr NCT/2806/2011/101 is premature in that the pleadings had not yet closed; and that the matter has not yet been referred to the Tribunal for consideration. It is of the

view that the application should be dismissed on the basis that the consolidation cannot be inferred on a matter that has not been referred to the Tribunal as yet.

26. For the record all three matters which are cited in this consolidation application have in fact been referred to the Tribunal.
27. The First Respondent, further opposes the application for consolidation on the basis that :
 - a. The merits of the matters referred to are not the same, each matter will influence the findings of the Tribunal and it is highly likely that the Tribunal will not come to the same conclusion in the matters;
 - b. If the matters are consolidated it will have a negative impact on future decisions by the Tribunal and also on the South African jurisprudence insofar as the interpretations of the provisions of the CPA are concerned;
 - c. Consolidation of the matters might be inappropriate in that if the desired outcome is not reached, the matters would have to be heard separately, thus causing delays and unnecessary costs.
28. The First Respondent seeks an order dismissing the Applicant's application for consolidation of the matters with costs.
29. During the hearing, and in reply to the Applicant's heads of argument, the First Respondent unreservedly conceded to the Applicant's submission for the consolidation of the matters. It however refuted the Second Respondent's argument that the Tribunal does not have jurisdiction to hear the consolidation application.

APPLICATION OF THE LAW

30. The Tribunal, in considering the matter, will seek to address the following legal questions:

- 30.1 The application of Rule 16

- 30.2 Can only certain aspects of different matters be consolidated?
- 30.3 What considerations should be taken into account when adjudicating on an application for consolidation of matters?
- 30.4 The difference between the three matters currently before the Tribunal

The application of Rule 16

31. The provisions of Rule 16(1) of the Rules of the Conduct of Matters before the Tribunal¹ provides as follows:

16 Joinder or substitution of parties

- (1) *A presiding member may combine any number of persons, either jointly, jointly and severally, separately, or in the alternative, as parties in the same proceedings, if their rights to relief depend on the determination of substantially the same questions of law or fact.*

32. The Court in *Jacobs v Deetlefs Transport BK*² and *Nel v Silicon Smelters J (Edms) Bpk en 'n Ander*³ held that the aim of consolidation as provided for in Rule 11 (Uniform Rules of Court) and joinder as provided for in Rule 13 (Uniform Rules of Court) is more or less the same, namely to adjudicate on issues that are substantially similar in one matter in order to avoid separate trials being held.
33. The provision for joinder of parties enables the Tribunal to order a consolidation of matters in order to, as is applied for in the present matter, consolidate two or more pending matters.
34. Furthermore, Rule 3(2) (vii) of the Rules of the Conduct of Matters before the Tribunal⁴ provides as follows:

¹ GN 789 in GG30225 as amended by GenN 428 in GG34405

² 1994 (2) SA 313 (O) at 317G

³ 1963 (3) SA 63 (K)

⁴ GN 789 in GG30225 as amended by GenN 428 in GG34405

3. Powers of the Tribunal

“ ...

(2) *The Tribunal may-*

...

(c) *consider applications related to an adjudication process-*

...

(vii) *relating to other procedural matters.*

...”

There can therefore be no doubt that the Tribunal may in fact consider this application and as a result, *has jurisdiction to hear this matter.*

Can only certain aspects of different matters be consolidated?

35. In the matter between *Jacobs v Deetlefs Transport BK*⁵ the Court considered the provisions of Rule 11 of the Uniform Rules of Court and referred to *New Zealand Insurance Co v Stone and Others*⁶ and determined that it does not provide for consolidation of the issues, but only for the consolidation of actions.
36. The provisions of Rule 16(1) of the Rules of the Conduct of Matters before the Tribunal⁷ provides as follows:

16 Joinder or substitution of parties

- (1) *A presiding member may combine any number of persons, either jointly, jointly and severally, separately, or in the alternative, as parties in the same proceedings, if their rights to relief depend on the determination of substantially the same questions of law or fact.*

This Rule similarly does not provide for the consolidation of issues. The entire matter should therefore be able to be consolidated and not just certain aspects thereof as submitted by the Applicant.

⁵ 1994 (2) SA 313 (O) at 317G

⁶ 1963 (3) SA 63 (K) at 70

⁷ GN 789 in GG30225 as amended by GenN 428 in GG34405

What considerations should be taken into account when adjudicating on an application for consolidation of matters?

37. The paramount test in regard to consolidation is convenience⁸. It has been held⁹ that the word 'convenient' connotes not only facility or expedience of ease, but also appropriateness in the sense that procedure would be convenient if, in all the circumstances of the case, it appears to be benefitting and fair to the parties concerned.
38. Consolidation of actions will in general be ordered to avoid multiplicity of actions and attendant costs¹⁰. In *Nel v Silicon Smelters*¹¹ convenience was found in, *inter alia*:
- 38.1 the fact that the consolidated prosecution of the case would reduce costs and expedite proceedings;
- 38.2 there would be one finding concerning a factual dispute involving a number of parties; and
- 38.3 the plaintiff's various claims arising from the same cause of action would be heard in one action.
39. Consolidation of actions will not be ordered if there is a possibility of prejudice being suffered by any party¹². By prejudice in this context is meant 'substantial prejudice sufficient to cause the court to refuse a consolidation of actions, even though the balance of convenience would favour it'¹³.

⁸ Discussion Notes: Jones and Buckle Magistrate's Court Rules of Court Rule 28

⁹ *Mpotsha v Road Accident Fund* 2000 (4) SA 696 (c) at 700I-J

¹⁰ *Standard Bank of SA v Pechey Bros* (1902) 23 NLR 281; *Nel v Silicon Smelters (Edms) Bpk* 1981 (4) SA 792 (A) at 801E and 802B; *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 88A

¹¹ 1981 (4) SA 792(A) at 801D. See also *Jacobs v Deetlefs Transport* at 2 *supra*

¹² *International Tobacco Company of SA Ltd v United Tobacco Companies (South) Ltd* 1953 (1) SA 241 (W); *Beier v Thornycroft Cartage Company* 1961 (4) SA 187 (N); *London v Lancashire Insurance Co Ltd v Dennis* NO 1962 (4) SA 640(D) at 644H-645E; *New Zealand Insurance Co Ltd v Stone* 1963(3) SA 63(C) at 69B; *Belford v Belford* 1980 (2) SA 843(C) at 846B-F; *Nel v Silicon Smelters (Edms) Bpk* 1981(4) SA 792(A) at 801D.

¹³ *New Zealand Insurance Co Ltd v Stone* 1963 (3) SA 63 (C) at 69B

40. In High Court practice consolidation has been refused where:

- 40.1 the defendant would have been prejudiced by the trial together of actions which the plaintiff instituted separately¹⁴ ;
- 40.2 where plaintiffs would have been prejudiced in the conduct of their separate cases by being virtually forced to join as co-plaintiffs in the circumstances where their interests did not run together but conflicted¹⁵;
- 40.3 where there was a possibility of a conflict developing between the plaintiffs *inter se*;
- 40.4 where a consolidation would involve considerable delay¹⁶; and
- 40.5 where the actions sought to be consolidated stemmed from statutory backgrounds which were completely foreign to one another¹⁷.

The difference between the three matters currently before the Tribunal

- 41. The two matters relating to the complaint filed with the Commission by Mr. Bonn namely NCT/2806/2011/101(1)(P) and NCT/2807/2011/101(1)(P) stem from the exact same cause of action. The two Applicants were furthermore cited on the same compliance notice and accordingly the compliance notice which the Tribunal must review in NCT/2806/2011/101(1)(P) and NCT/2807/2011 /101(1)(P) is exactly the same compliance notice.
- 42. The *Rogers- matter* however is the result of a different cause of action. A separate compliance notice was issued in this matter which can be reviewed separately from the compliance notice issued in the *Bonn-matter*.
- 43. The Second Respondent (JSN) agrees that the legal points taken in respect of the compliance notice issued by the Commission against the respective service providers are of a similar nature. It however submits that the Applicant loses sight of the fact that the merits of each matter are not

¹⁴ *International Tobacco Company of SA Ltd v United Tobacco* at 12 *supra*

¹⁵ *London v Lancashire Insurance Co Ltd v Dennis* NO 1962(4)SA640(D) at 645B-E

¹⁶ *Belford v Belford* at 12 *supra*

¹⁷ *Belford v Belford* at 12 *supra*

the same and that the respective complaints, being vastly different, will require an investigation and consideration of each of the matters separately.

44. In *Nel v Silicon Smelters*¹⁸ convenience was found in *inter alia* the plaintiff's various claims arising from the same cause of action that would be heard in one action.

45. Accordingly, the Tribunal, having heard counsels' argument and submissions on the papers, makes the following ruling:

45.1 The two applications arising from the *Bonn Compliance Notice*, namely **NCT/2806/2011/101(1)(P)** and **NCT/2807/2011/101(1)(P)** be consolidated

45.2 The application in respect of the *Rogers Compliance Notice*, namely **NCT/2679/2011/101(1)(P)** be heard separately.

45.3 No order is made as to costs

Signed on this 5th day of July 2012

[signed]

ADV NEO SEPHOTI

MEMBER

Ms P Beck (Presiding Member) and Adv F Manamela (Member) concurring.

¹⁸ 1981 (4) SA 792(A) at 801D. See also *Jacobs v Deetlefs Transport* at 2 *supra*