

**IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION**

Case Number: NCT/113255/2018/57(1) Rule 34

In the matter between:

PAM'S FINANCIAL SERVICES (PTY) LTD

APPLICANT

and

NATIONAL CREDIT REGULATOR

RESPONDENT

IN RE:

NATIONAL CREDIT REGULATOR

APPLICANT

and

PAM'S FINANCIAL SERVICES (PTY) LTD

RESPONDENT

Coram:

Ms H Devraj – Presiding member

Date received for adjudication: 7 November 2018

Date of this ruling: 19 November 2018

CONDONATION RULING- FOR THE LATE FILING OF AN ANSWERING AFFIDAVIT

INTRODUCTION

1. In this application for condonation:

- 1.1. The Applicant, which is the Respondent in the main matter, is Pam's Financial Services (Pty) Ltd. The Applicant is a registered credit provider with the National Credit Regulator (NCR); with registration number NCRCP7180;

- 1.2. The Respondent, which is the Applicant in the main matter, is the National Credit Regulator, a juristic person established by section 12 of the National Credit Act, 34 of 2005 (the Act); and
- 1.3. For ease of reference in this interlocutory application, the Applicant will be referred to as "Pam's Financial Services" and the Respondent will be referred to as "the NCR".

BACKGROUND

2. In the main matter; the NCR seeks an order to declare Pam's Financial Services to be in repeated contraventions of various sections of the Act, Regulations and General Conditions of Registration. The NCR also seeks an order against Pam's Financial Services to set aside consumer' rights and obligations under credit agreements that were recklessly granted; and to refund consumers that were charged in excess of fees and charges. In the result, the NCR also moved for de-registration of Pam's Financial Services and for the imposition of an administrative fine.
3. In summary, the NCR alleged that Pam's Financial Services entered into credit agreements without conducting an affordability assessment and in some instances failed to conduct proper affordability assessments; entered into reckless credit agreements; overcharged consumers on service fees and interest; stated unlawful provisions in credit agreements; retained instruments of consumers and failed to submit its annual financial statements.
4. On 15 August 2018, the NCR lodged the application in the main matter before the National Consumer Tribunal (the Tribunal).
5. In terms of Rule 13 of the Tribunal Rules¹, Pam's Financial Services was required to file its Answering Affidavit within 15 business days of receiving the application. The NCR served the application on Pam's Financial Services, via e-mail on 15 August 2018. Pam's Financial Services consented to service via e-mail on 13 August 2018, as contained in e-mail correspondence with the NCR. In light of this, Pam's Financial Services was required to file its Answering Affidavit by 5 September 2018.
6. On 20 September 2018, Pam's Financial Services applied for condonation in terms of Rule 34 for the late filing of its Answering Affidavit.

ISSUE TO BE DECIDED

7. The issue I am required to decide is whether the application to condone the late filing of the Answering Affidavit should be granted or not.

¹ GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007 (Government Gazette No. 30225). As amended.

BRIEF FACTS BY THE RESPONDENT IN THE MAIN MATTER

Reasons for the lateness

8. Pam's Financial Services submitted that due to the nature of the allegations made against it, it had to consult and appoint an attorney to respond to the allegations. On 4 September 2018, Pam's Financial Services served its Answering Affidavit on the NCR via e-mail.
9. However, Pam's Financial Services averred that due to difficulties experienced with its computer systems, it was unable to file its Answering Affidavit with the Tribunal. On 18 September 2018, Pam's Financial Services filed its Answering Affidavit at the Tribunal's Offices.

Prejudice

10. Pam's Financial Services submitted that it would be prejudiced if condonation for the late filing of its Answering Affidavit is not granted. Condoning the late filing of its Answering Affidavit would promote a transparent and fair process and will be aligned to the principles of *audi alteram partem*.

THE NCR's OPPOSITION TO THE CONDONATION APPLICATION

11. The NCR did not oppose the condonation application.

LEGAL PRINCIPLES

12. It is convenient to set out the relevant statutory and regulatory provisions as well as the case law governing the condonation application.
13. Rule 34 (1) states -

"A party may apply to the Tribunal in Form T1 r.34 for an order to:-

(a) condone late filing of a document or application;
(b) extend or reduce the time allowed for filing or serving;
(c) condone the non-payment of a fee; or
(d) condone any other departure from the rules or procedures."
14. Rule 34 (2) states that the Tribunal may grant the order on good cause shown.
15. Rule 3(2)(c) provides that:

"The Tribunal may consider applications related to an adjudication process—

- (i) to intervene in proceedings in terms of rules 11 and 12;*
- (ii) to amend documents in terms of rule 15;*
- (iii) to change the forum at which a matter will be heard in terms of section 140 (4) or 141 (2) (a);*
- (iv) to condone non-compliance with the rules and proceedings of the Tribunal;*
- (v) for an order of substituted service in terms of rule 30;*
- (vi) to grant a default order in terms of rule 25; or*
- (vii) relating to other procedural matters";*

16. Rule 4(2) provides that:

"If an application relates to a matter contemplated in rule 3 (2) (c) that is not specifically provided for in Table 2, the Applicant must:

- (a) apply by way of Notice of Motion in Form T1.r4;*
- (b) append a supporting affidavit setting out the facts on which the application is based;*
- (c) serve the Notice and affidavit on the Respondent and other parties to the matter; and*
- (d) file the application documents and proof of service with the Registrar."*

17. Rule 13 (1) and (2) respectively provide that :

"Opposing an application or referral

(1) Any Respondent to an application or referral to the Tribunal may oppose the application or referral by serving an answering affidavit on:

- (a) the Applicant; and*
- (b) every other person on whom the application was served.*

(2) An answering affidavit to an application or a referral other than an application for interim relief must be served on the parties and filed with the Registrar within 15 business days of receipt by such party of the application."

18. To condone means to “accept or forgive an offence or wrongdoing”. The word stems from the Latin term *condonare*, which means to “refrain from punishing”². It can also be defined to mean “overlook or forgive (wrongdoing)”³.
19. In *Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others*⁴ it was held that the standard for determining an application of this nature is the interests of justice.
20. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. It requires the exercise of discretion on an objective conspectus of all the facts. Factors that are relevant include but are not limited to the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success.⁵
21. In *Melane v Santam Insurance Company Limited*⁶ it was held that:

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degrees of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are inter-related; they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. And the Respondent's interests in finality must not be overlooked

22. The dictum in *Melane* reveals that these factors are interrelated and should not be considered separately.

CONSIDERATION OF THE MERITS

23. I now turn to the merits of the condonation application.

Background

²Oxford English Dictionary, Second Edition at pg 151.

³Collins English Dictionary and Thesaurus, Fourth Edition 2011, at pg170.

⁴2003 (11) BCLR 1212 (CC) at para[11].

⁵*Van Wyk v Unitas Hospital and Others* 2008(4) BCLR 442 (CC) at para 20 as applied in *Camagu v Lupondwana* Case No 328/2008 HC Bisho.

⁶1962 (4) SA 531 (A) at 532C-E.

24. This matter has a long history. It was initially set down for a hearing on 22 October 2018, on a default basis. The matter was subsequently removed from the roll. This was due to the filing of the condonation application by Pam's Financial Services on 20 September 2018; for the late filing of its Answering Affidavit. On 28 September 2018; the Registrar's Office issued a Notice of Filing once all the filing requirements were met for the filing of the condonation application.

Lateness

25. According to Rule 13(2) of the Tribunal Rules, Pam's Financial Services should have filed its Answering Affidavit within 15 business days of receiving the application. The main application was served on Pam's Financial Services on 15 August 2018. Based on the submissions made by Pam's Financial Services, it is clear that it served its Answering Affidavit on the NCR within the 15 day period, but failed to file the Answering Affidavit with the Tribunal, due to technical problems it experienced. Pam's Financial Services decided to file its Answering Affidavit at the Tribunal's offices. The Tribunal accepts the explanation provided for the late filing of the Answering Affidavit.

Prejudice

26. In my view, Pam's Financial Services will suffer prejudice if it is not provided with an opportunity to respond to the serious allegations against it.

Prospects of success and importance of the main matter

27. This matter is important to Pam's Financial Services and the allegations raised are serious. One of the orders sought by the NCR is that of de-registration. This will have dire consequences for Pam's Financial Services.

CONCLUSION

28. With regard to the condonation for the late filing of the Answering Affidavit; I am persuaded that it is important that Pam's Financial Services be provided with the opportunity to respond to the issues raised by the NCR. It is also in the interests of justice that all the facts are placed before the Tribunal and that the condonation application be granted. This will enable the parties to fully ventilate their respective cases before the Tribunal.

ORDER

29. Accordingly, the Tribunal orders that:

- 29.1. The condonation application for the late filing of the Answering Affidavit is granted;
- 29.2. The NCR must file its Replying Affidavit within 10 days of receipt of this ruling; and
- 29.3. There is no order as to costs.

Thus handed down, in Centurion, this 19th Day of November 2018

H DEVRAJ
PRESIDING MEMBER

Authorised for issue by National Consumer Tribunal

Case Number: NCT/113255/2018/57(1) R34

Date: 22 November 2018

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