

IN THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

Case number: NCT 110583/2018/148(1)

In the matter between:

TSHILIDZI PFARELO SWUHANA

APPELLANT

And

NATIONAL CREDIT REGULATOR

RESPONDENT

Coram:

Adv Fati Manamela - Presiding member

Mr Andisa Potwana - Tribunal member

Ms Maleho Nkomo - Tribunal member

Date of hearing - 16 November 2018 ✓

JUDGMENT AND REASONS

APPELLANT

1. The Appellant is Tshilidzi Pfarelo Swuhana, an adult male person and a registered Debt Counsellor whose registration number is NCRDC2325. The Appellant resides in Thohoyandou, Limpopo Province. He appeared before the Tribunal in person, without a legal representative.

RESPONDENT

2. The Respondent is the National Credit Regulator, a juristic person established by section 12 of the National Credit Act, 34 of 2005 (the NCA).

3. The Respondent was represented at the hearing of this appeal by Ms Lizelle Squirra, Legal Advisor in the employ of the Respondent.

APPLICATION TYPE

4. This is an appeal in terms of section 148 of the NCA against the ruling of a single member of the Tribunal, who dismissed the Respondent's condonation application for the late filing of an answering affidavit.
5. In terms of rule 27 of the Tribunal rules ("the Rules")¹ the panel hearing this appeal is not restricted to the record of the proceedings before the single member. For this reason, this appeal may well be considered to be a wide appeal.

BACKGROUND

6. In the main matter, the Appellant's complaint against the Respondent concerns the decision of the Respondent to deregister the Appellant as Debt Counsellor. The Appellant seeks the Tribunal to review such a decision.
7. On 28 November 2017, the Appellant lodged with the Tribunal, an application to review the decision of the Respondent. This application was served on the other party on 28 November 2017. The matter was set down for hearing on a default basis on 5 March 2018, but was subsequently removed from the roll. The Appellant had already consented on 22 December 2017 to service via e-mail. In terms of Rule 13 of the Tribunal Rules ² the Respondent was required to file its answering affidavit within 15 business days of receiving the main application. The Respondent, however, failed to file an answering affidavit within the prescribed time. This caused the Respondent to file and serve a condonation application for the late filing of its answering affidavit on the Appellant and the Tribunal via e-mail, on 22 February 2018.

¹ Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007 published under GN 789 in Government Gazette 302252 on 28 August 2007

² Item 29 of Part 2A on Table 2; GN R203 of 13 March 2015 as amended by GN 157 of February 2016

8. On 16 May 2017, a single member of the Tribunal handed down a ruling ("the condonation ruling") in which she refused to condone the Respondent's failure to file the answering affidavit within the prescribed time. The condonation ruling is the subject of this appeal.

SUMMARY OF SUBMISSIONS

Appellant's grounds for appeal and the order sought from the Tribunal

9. The Appellant seeks an order to dismiss (*with costs in his favour*) the Respondent's condonation application, because the Respondent failed to file the answering affidavit within 15 days of receipt of the main application. The Appellant contends that he served the main application on the Respondent via e-mail and that the Respondent had consented to such service (that is: via e-mail). In that regard, the Respondent's late filing of the answering affidavit should not be permitted.
10. It is the Appellant's assertion that the Respondent's failure to file the answering affidavit within 15 days has caused the Appellant, his family and business, prejudice and financial distress. Further that the Respondent's intention was to delay the proceedings of the Tribunal to hear the main application.
11. According to the Appellant, the single member erred in the condonation ruling by dismissing the Respondent's condonation application, and also by finding that the Appellant's service of the main application to the Respondent was improper.

Respondent's submissions

12. The Respondent submitted that the appeal should be dismissed for a number of reasons: First, the appellant's notice of appeal does not comply with rule 26 (2) (a) of the Tribunal Rules, which prescribes that the notice of appeal should be lodged with the Registrar of the Tribunal within 20 business days of the ruling. The Appellant's serving and filing of the notice of appeal occurred more than 20 days from the date of the condonation ruling. Therefore the notice was out of time. At best, the Appellant was supposed to apply for condonation for the late filing of the Notice to Appeal.

13. Second, the issue of proper service on the Respondent of the main application by the Appellant had to be considered in view of the Appellant's failure to show proof that service was proper as per the requirements of Rule 30 (1) (2).
14. Third, the Tribunal dismissed the Respondent's condonation application as being unnecessary, and directed the Appellant to file his replying affidavit within 10 business days from receipt of the judgment.
15. Fourth, the Appellant is vexatious and delaying his own matter by bringing this appeal before the Tribunal; and the relief sought by the Appellant is obsolete, as it is the same order that was already granted by the Tribunal in the condonation application.

ANALYSIS AND RELEVANT STATUTORY PROVISIONS

Compliance with rule 26 of the Tribunal Rules

16. Rule 26 (2) (a) provides that the Notice of Appeal must be lodged with the Registrar within 20 days of the ruling. Rule 26 (b) provides that the Notice of Appeal must set out concisely the grounds of appeal. What this means is that the Notice of Appeal must be drafted with sufficient clarity to enable the Respondent to know the case it must meet.
17. On both these occasions, the Appellant did not meet the requirements of this rule. First, the Appellant failed to meet the time-barring provisions of Rule 26 (2) (a), in that the Appellant filed out of time. As indicated earlier in this judgement, the Appellant should have applied for condonation for filing the Notice of Appeal late. Second, the Appellant's grounds of appeal relate to the order the Tribunal had already made in the condonation application by the Respondent, that is: dismissing the condonation application of the Respondent (the NCR)³. The question arises: does this appeal have merit or does it enable the Respondent to know the case it must meet?
18. Rule 30(1) and (2) provides for service and proof of service of documents. The case at issue is the serving of documents by e-mail. Among other forms of service, is service by e-mail. In order to

³ NCT/96402/2017/59(1), the condonation ruling handed down by Ms Devraj dated 16 May 2018

succeed in serving documents by e-mail, the Respondent may consent in writing that service by e-mail is acceptable. If such an agreement is concluded, the Appellant must follow up within three days by serving the documents to the Respondent by *"delivering to the party."*

19. In considering the merits of the condonation application filed by the NCR, the Presiding member had this to say:

"There is no evidence before the Tribunal that the NCR consented to service of the main application via email or fax. There is also no evidence of the main application being delivered to the NCR or being sent via registered mail within 3 business days of the main application being e-mailed and faxed. Therefore the main application was not properly served on the NCR" The Presiding member went further to explain the following: *"proper service is essential in ensuring that the right party receives an application to be able to properly answer to the allegation. There was therefore no need for a condonation application to be filed as the main application was not properly served in the first place. In order to avoid any further delays, this matter can proceed as the NCR has already filed its answering affidavit. It would be nonsensical to request Mr Swuhana at this point in time to properly serve the main application on the NCR"*

20. The Respondent is correct in saying that the Tribunal condoned the Appellant's failure to properly serve the main application in terms of Rule 30 (1) and (2) without any rectification or a condonation application from the Appellant. Indeed, the Respondent fails to understand the grounds of appeal where the ruling of the Tribunal was in fact in the Appellant's favour. So, the Appellant's assertion that the Respondent's intention in filing a condonation application (*which was dismissed anyway, to expedite the hearing of the main matter*) was to delay the proceedings of the Tribunal and to cause him and his family prejudice, is without merit and incorrect. On the contrary, by filing the appeal under consideration, the Appellant is delaying the hearing of his own matter.

CONCLUSION

21. The Respondent does not know the case it has to meet because the Appellant's grounds of appeal and the relief sought relate to an issue already adjudicated by the single Tribunal member. Correctly so, the relief sought is obsolete.

22. For these reasons, the appeal has no merit; it is out of time; and cannot in these circumstances, succeed. The single member's ruling of dismissing the Respondent's condonation application, and directing the Appellant to file replying affidavits, was correct.
23. The Tribunal has also considered both the Appellant's submission that costs should be awarded in his favour, and the Respondent's submission that this appeal should not have been brought before the Tribunal in the first place. The Appellant has not incurred any legal costs in this appeal and therefore, the Tribunal is not persuaded that this is a matter in which it should make an order of costs.

ORDER

24. Accordingly:
- 24.1. This appeal is dismissed; and
- 24.2. There is no order as to costs.

DATED AT CENTURION ON THIS 6TH DAY OF DECEMBER 2018

ADV FATI MANAMELA

Tribunal member

With Mr A Potwana and Ms M Nkomo, concurring

Authorised for issue by the National Consumer Tribunal

Case Number NCT-110583-2018-148(1)

Date 2019 / 01 / 04
Day / Month / Year

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