

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

Case number: **NCT/94274/2017/141**

In the matter between:

AMITH KEDHAR SINGH

APPLICANT

And

MFC, A DIVISION OF NEDBANK LIMITED

RESPONDENT

In the Condonation Application between:

MFC, A DIVISION OF NEDBANK LIMITED

APPLICANT

And

AMITH KEDHAR SINGH

RESPONDENT

Coram:

Adv FK Manamela: Presiding member

Judgment handed down: 23 April 2018

CONDONATION JUDGMENT AND REASONS

***(In respect of Non-compliance with a Rule or Procedure for the Conduct of Matters before the
Tribunal- Rule 34 of the Tribunal Rules)***

APPLICANT

1. The Applicant in this matter is **MFC, A DIVISION OF NEDBANK LIMITED**, an entity registered as such in terms of the company laws of the Republic under Company Registration Number 1951/000009/06; and also as a credit provider under NCR Registration Number NCRCP16 ("the Applicant"). The Applicant is the Respondent in the main matter under the same case reference number. For ease of reference, the Respondent will, for the purpose of this ruling, be referred to as "the Applicant or Nedbank"
2. The Applicant is represented by Divan van Eeden, of DRSM Attorneys, Rosebank, Johannesburg.

RESPONDENT

3. The Respondent is **AMITH KEDHAR SINGH ("SINGH")** an adult male person whose further particulars are unknown to the Tribunal, save to mention that the Respondent resides in Denlee, Germiston, Gauteng. The Respondent is the Applicant in the main matter and will for the purpose of this judgment, be referred to as "*the Respondent or Singh*"
4. In this and the main application, the Respondent had no legal representative, but represented himself.

TYPE OF APPLICATION

5. This is an application to condone the non-compliance with a Rule or procedure of the Tribunal, as required by the Rules for the conduct of matters before the Tribunal.
6. The Applicant seeks condonation for the late filing of the answering affidavits in respect of the main matter.

BACKGROUND TO THIS APPLICATION INCORPORATING APPLICANT'S SUBMISSIONS

7. [*Briefly*], in the main application Singh approached the Tribunal for leave to refer the complaint directly to the Tribunal, after receiving a *Notice of Non- Referral* from the National Credit Regulator (NCR)¹. The notice is dated 20 October 2017 and states that:

"We therefore issue this Notice of Non-Referral in terms of section 139 (1) as the complaint is vexatious"

The Notice goes further to state that:

¹ Issued in terms of section 139 (1) of the NCA

*“Your complaint under our offices [sic] reference C47411 is considered finalized.
Should you wish to refer your matter to the NCT, below are the contact details....”*

8. On 1 November 2017, Singh (*Applicant in the main application*) lodged an application to refer the matter directly to the Tribunal. According to the Tribunal Rules. The Applicant, after receiving a notice of Non-Referral, must within 20 days of receipt of such notice, lodge an application for leave to refer the complaint directly to the Tribunal. The Tribunal must first grant leave, for such a referral to happen.²
9. On 21 January 2018; the Applicant lodged with the Tribunal, an application to condone the late filing of the answering affidavit to the Respondent’s main application. The Tribunal then issued a Notice of Incomplete Filing, directing the Applicant to file the application again in order to comply with the Rules.
10. On 8 February 2018, and in compliance with the Rules, the Applicant lodged an application to condone the late filing of its answering affidavit;
11. On 21 February 2018 the Tribunal issued a Notice of Complete Filing to the parties, in response to the Applicant’s condonation application, which renders this application complete and ready to be adjudicated upon. The Respondent had initially, according to the Applicant, objected to, or was unwilling to “condone” the late filing of the Applicant’s answering affidavit.³
12. *In support of its application, the Applicant makes the following submissions:*⁴
 - 12.1 the Respondent has cited the Applicant incorrectly, causing a material misjoinder of parties by seeking relief against Nedbank in relation to a credit agreement concluded with a different legal entity⁵, thereby rendering its main application defective;
 - 12.2 the Respondent, by reason of the afore-going is not entitled to the relief sought;⁶
 - 12.3 the Respondent’s unsubstantiated allegations relied upon by Singh in the main application warranted a complete and thorough investigation by Nedbank, including in-depth reference to historical records, documents and systematic comments and records kept in their computer

² Section 141 of the NCA; Rule 34 of the Tribunal Rules : Rule for the Conduct of Matters before the Tribunal

³ In terms of Tribunal rule 13 (2), “ an answering affidavit to an application for 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”

⁴ see affidavit in support of the Applicant’s condonation application, para 5-36 thereof

⁵ As incorrectly cited by Singh

⁶ Nedbank states in its affidavit that it opposed the main application to protect its name due to major reputational risk associated with its brand names, i.e “MFC”; “Motor Finance Corporation” and/or “Motor Finance”

systems across three cross-functioning departments. This, according to the Applicant, caused serious delays as it was difficult to obtain access to information which was electronically stored on Nedbank's platform known as "Lotus Notes" which was later migrated to a new database called "FOX";

12.4 according to the Applicant, Nedbank could only obtain the records and the information pertaining to the Respondent's application for finance across and/or by all the three cross-functioning departments, on 28 November 2017⁷; and

12.4 it is the Applicant's assertion that the delay to file the answering affidavit should be condoned, as same will assist the Tribunal in the adjudication of the main matter (if necessary) and that the Respondent is not prejudiced thereby.

APPLICABLE SECTIONS OF THE ACT AND CASE LAW

13. Rule 34 (1) ⁸states "*A party may apply to the Tribunal in Form Tl 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 13 (1) states that "*Any person required by these Rules to be notified of 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."*

Rule 13(2) on the other hand, provides that "*An answering affidavit to an application or referral other than an application for interim relief must be served on the parties and filed with the Registrar within 15 business days of the date of the application*".

⁷ There is a confirmatory affidavit deposed to by Christel Toweel, team leader responsible for Special Support and Litigation at Nedbank, attesting to the Applicant's submissions in support hereof. See also annexures "CA1" and "CA2"

⁸ Regulations for Matters Relating to the Functions of the Tribunal and Rules for the Conduct of Matters before the National Consumer Tribunal, 2007

16. 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”⁹. It can also be defined to mean “overlook or forgive (wrongdoing)”¹⁰.
17. In *Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others*¹¹ it was held that the standard of considering an application of this nature is the interests of justice.
18. Whether it is in the interest 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:
- (a) the nature of the relief sought;
 - (b) the extent and cause of the delay;
 - (c) the effect of the delay on the administration of justice and other litigants;
 - (d) the reasonableness of the explanation for the delay;
 - (e) the importance of the issue to be raised in the intended appeal; and
 - (f) the prospects of success¹²
19. In *Melane v Santam Insurance Company Limited*¹³ it was held that:

“The approach 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 therefore, the prospects of success and the importance of the case. These facts are inter-related: they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused...cf Chetty v Law Society of the Transvaal 1985(2) SA 756 (A) at 765 A-C; National Union of Mineworkers and Others v Western Holdings Gold Mine 1994 15 ILJ 610 (LAC) at 613E. The courts have traditionally demonstrated their reluctance to penalize a litigant on account of the conduct of his representative but it emphasized that there is a limit beyond which a litigant cannot escape the results of the

⁹ Oxford English Dictionary, Second Edition at pg 151.

¹⁰ Collins English Dictionary and Thesaurus, Fourth Edition 2011, at pg170.

¹¹ 2003 (11) BCLR 1212 (CC) at para[11].

¹² *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.

¹³ 1962 (4) SA 531 (A) at 532C-F.

representative's lack of diligence or the insufficiency of the information tendered. (Salojee & Another NNO v Minister of Community Development 1965 (2) A 135 (A) 140H-141B; Buthelezi & Others v Eclipse Foundries Ltd 18 ILJ 633 (A) at 6381-639A)."

20. From the dictum in *Melane* it was held that these factors are interrelated and should not be considered separately.

CONSIDERATION OF THE MERITS

21. In evaluating the merits of this application, the Tribunal considered the following factors –

- 21.1 the Applicant's prospects of success in the main application, and the justification (reasons) provided for the delay;
- 21.2 the fact that the Respondent will not suffer prejudice if condonation is granted. The Applicant would, in any event have to answer to allegations made by the Respondent in the main application;
- 21.3 the interests of justice would be best served, for the answering affidavit to be admitted into the record, so that the Respondent is afforded the opportunity to reply thereto; and
- 21.4 the Tribunal will consider at its disposal, all the information relevant to the main application. This would assist it to fairly adjudicate the matter. Further, the Tribunal considers this matter to be substantially important to all the parties.

22. In evaluating all the issues raised by the parties, the Tribunal finds that the factors listed above constitute *good cause* in the specific circumstances. The Tribunal therefore grants this application.

23. The filing of the Applicants' Answering affidavit (*and confirmatory affidavit*) is hereby condoned;

24. In view of the above, the normal time periods and processes after the filing of an answering affidavit as set out in the Rules, now apply.

ORDER

25. Accordingly, for the reasons set out above, the Tribunal makes the following order:-

25.1 Condonation is hereby granted to the Applicant for the late filing of the answering affidavit;

25.2 The Respondent may file its replying affidavit in accordance with the Rules of the Tribunal in the normal course, being 10 days from date upon which the Respondent (Singh) receives this order;

25.3 No order is made as to costs.

THUS DATED and SIGNED on this 23rd Day of April 2018

A handwritten signature in black ink, appearing to be 'FK Manamela', written over a horizontal line.

[signed]_____

FK MANAMELA

Presiding Member