

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

Case Number: NCT/121875/2018/56(1)

In the matter between:

SPRINGS CAR WHOLESALERS (PTY) LTD T/A NO FINANCE CARS

APPLICANT

and

NATIONAL CREDIT REGULATOR

RESPONDENT

Coram:

Mr. A. Potwana – Presiding member

CONDONATION JUDGMENT

APPLICANT

1. The Applicant in this matter is Springs Car Wholesalers (Pty) Ltd t/a No Finance Cars, a company that is duly registered in terms of the company laws of the Republic of South Africa. The Applicant is the Applicant in the main matter.

RESPONDENT

2. The Respondent is the National Credit Regulator, a juristic person established in terms of Section 12 of the National Credit Act 34 of 2005 (the NCA). The Respondent is the Respondent in the main matter.

INTRODUCTION

3. This is an application for the late filing of the Applicant's replying affidavit. The main matter has a long history. On 8 November 2018; the Respondent sent a compliance notice to the Applicant. Amongst other issues; the notice stated that an investigation conducted by the Respondent revealed that the

Applicant conducted business as a credit provider without being registered as such. The Applicant was advised that it could object to the notice in terms of section 56 of the NCA; and ask the National Consumer Tribunal (the Tribunal) to review the notice within 15 business days after receiving the notice. Since the Applicant received the notice on 09 November 2018; the 15 day period ended on 30 November 2018.

4. On 29 November 2018; the Applicant served a comprehensive response to the Respondent and sent the same to the Tribunal in an attempt to file. On 30 November 2018; the Applicant was informed that the objection did not meet with certain formal requirements. On 3 December 2018; the Applicant again sent its objection to the notice. Once again; on 5 December 2018; it was advised that the objection did not comply with certain formal requirements as form Tr30A was not filed. Since the period for filing of the objection had already lapsed; the Applicant applied for condonation for the late filing of its application to review the compliance notice. Condonation was granted in a judgement that was issued on 20 February 2019. The Respondent filed an answering affidavit. On 8 April 2019; the Tribunal's Registrar issued a notice of set down for the matter to be heard on 10 May 2019.
5. On 10 April 2019; the Applicant served and filed an application for condonation for the late filing of its replying affidavit. An affidavit is attached to the application.

FACTS

6. The Applicant seeks condonation for the late service and filing of its replying affidavit. In its supporting affidavit; the Applicant submitted that it received the Respondent's answering affidavit on 13 March 2019. The ten day period within which the Applicant was required to file a replying affidavit ended on 28 March 2019. On 27 March 2019; the Applicant sent to the Tribunal a (purported) comprehensive replying affidavit. However; on the afternoon of 29 March 2019; the Applicant received an email from the Tribunal advising it that its "replying affidavit" was not properly commissioned. The (purported) replying affidavit was recommissioned and resubmitted on the same day; 29 March 2019.
7. On 5 April 2019; the Applicant was advised that the final date for filing the replying affidavit was 28 March 2019; and that the Applicant had a right to apply for condonation for the late filing of the replying affidavit. The Applicant pointed out that; initially the (purported) replying affidavit was filed on time. (The Tribunal, however, notes that an attempt at filing is not a filing, however). But; the commissioner of oaths who commissioned it erroneously omitted to record the date on which the affidavit was commissioned. The delay to file a properly commissioned affidavit was not more than one day. The

Applicant submitted that it acted with "maximum expedition" in filing the correctly commissioned replying affidavit.

8. The Applicant also submits that the Respondent will not be prejudiced by the late filing of its replying affidavit. The replying (purported) affidavit was defective due to not fault of the Applicant. The Respondent received the defective (purported) replying affidavit on 27 March 2019 and the contents thereof remained unchanged after it was properly commissioned. The Applicant submitted that it will suffer substantial and irreparable prejudice if condonation is not granted.

9. The application is not opposed.

THE LAW

10. Rule 34 (1) of the Rules states that:

"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."*

11. Rule 34 (2) of the Rules states that:

"The Tribunal may grant the order on good cause shown".

12. Rule 13(5) of the Rules 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."*

13. Rule 13(2) of the Rules states 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."

14. Rule 13(5) of the Rules states that:

"Any fact or allegation in the application or referral not specifically denied or admitted in an answering affidavit, will be deemed to have been admitted."

15. 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"¹. It can also be defined to mean "overlook or forgive (wrongdoing)"².

16. In *Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others*³ it was held that the standard of considering an application of this nature is the interests of justice.

17. 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 a discretion on an objective conspectus of all the facts. Factors that are relevant include but are not limited to:

- 17.1. the nature of the relief sought;
- 17.2. the extent and cause of the delay;
- 17.3. the effect of the delay on the administration of justice and other litigants;
- 17.4. the reasonableness of the explanation for the delay;
- 17.5. the importance of the issue to be raised in the intended appeal; and
- 17.6. the prospects of success.⁴

18. In *Melane v Santam Insurance Company Limited*⁵ 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

¹ Oxford English Dictionary, Second Edition at pg 151.

² Collins English Dictionary and Thesaurus, Fourth Edition 2011, at pg170.

³ 2003 (11) BCLR 1212 (CC) at para[11].

⁴ *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.

⁵ 1962 (4) SA 531 (A) at 532C-F.

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 representative's lack of diligence or the insufficiency of the information tendered. (Saljee & 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)."

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

CONSIDERATION OF THE MERITS

20. In evaluating the merits of the application the Tribunal will consider the following factors –
- 20.1. the Respondent did not oppose the application;
 - 20.2. the Applicant tried to file its replying affidavit within the prescribed period;
 - 20.3. due to no fault of the Applicant; the timeously filed affidavit was not properly commissioned;
 - 20.4. the delay in filing a properly commissioned replying affidavit was very minimal,
 - 20.5. the Respondent was not prejudiced by the delay; and
 - 20.6. it is in the interest of justice that the Applicant be afforded an opportunity to file its replying affidavit.
21. The Tribunal finds that the factors listed above constitute good cause in these specific circumstances. The Tribunal therefore grants the application for condonation for the late filing of the Applicant's replying affidavit.

ORDER

22. Accordingly, for the reasons set out above, the Tribunal makes the following order:-
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- 22.1. Condonation for the late filing of the Applicant's replying affidavit is hereby granted, and
 - 22.2. No order is made as to costs.

Thus done and dated 22 May 2019.

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Presiding Tribunal Member
Mr. A. Potwana

Authorised for issue by National Consumer Tribunal

Case Number: NCT/121875/2018/56(1) 234

Date: 24 May 2019

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