

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

Case Number: **NCT/133221/2019/141(1)(b)**

In the matter between:

SAVY MANICKUM

APPLICANT

and

ABSA BANK LIMITED

RESPONDENT

Coram
Ms. M Nkomo

– Presiding Tribunal Member

CONDONATION JUDGMENT AND REASONS

INTRODUCTION

1. In this application for condonation:

1.1 The Applicant is Savy Manickum, a consumer who resides at Verulam in the KwaZulu-Natal province, (hereinafter referred to as "the Applicant");

1.2 The Respondent is Absa Bank Limited, a company incorporated in terms of the company laws of the Republic of South Africa and a registered credit provider in terms of section 40 of the National Credit Act, 2005 (hereinafter referred to as "the NCA" or "the Act"), with registration number NCRCP7 (hereinafter referred to as "the respondent"); and

1.3 The Applicant and the Respondent are referred to as they appear in the main matter.

BACKGROUND TO THE CONDONATION APPLICATION

2. In the main matter:

2.1. During April 2016, the Applicant applied for vehicle finance which was granted by the Respondent. It appears there was an arrangement between the parties in which a cash back amount was utilized to pay the Applicant's monthly installments for the period June 2016 until October 2016.

2.2. On or about 28 November 2016, the Applicant approached the Respondent, motivating for a reduction in monthly installments of the vehicle, as her business income has not been received as expected. In a response to the Applicant dated 14 December 2016, the Respondent confirmed the approval of a temporary plan, which resulted in a 50% reduction in the monthly installments for a period of 6 months from 01 January 2017 to 01 June 2017.

2.3. Due to the Applicant's inability to pay the installments to the Respondent, during October 2017, the Respondent took possession of the vehicle and claimed certain monies from the Applicant. There is a dispute between the parties regarding the possession of the car: the Applicant claims that the Respondent repossessed the vehicle without following proper procedures, whilst the Respondent alleges that the Applicant voluntarily surrendered the vehicle to the Respondent.

2.4. On or about 5 October 2017, the Applicant filed a reckless lending claim against the Respondent with the National Credit Regulator (hereinafter referred to as "the NCR" or as "the Regulator"). The NCR is established in terms of section 12 of the Act, and is responsible for, *inter alia*, monitoring the credit market to ensure that prohibited conduct is prevented or detected and prosecuted. In her claim at the NCR, the Applicant alleged that when the Respondent extended credit to her; the Respondent did not comply with the following provisions of the Act:

2.4.1. Section 80 (1) (a) and (b); and

2.4.2. Section 81 (1) to (3);

2.5. The Applicant alleges that the Respondent, when granting her vehicle financing credit, did not

properly conduct affordability assessments and therefore entered into a reckless credit agreement.

2.6. On 22 July 2018, the NCR issued a notice of non-referral on the following basis:

"From the affordability assessment conducted, it appears that from the preponderance of information available that the complainant, at the time the credit agreement was concluded, understood the risks, costs or obligations under the proposed credit agreement, as the complainant signed acknowledgement to this effect on the 15th of April 2016 and furthermore that by entering into such credit agreement it would not have caused her to be over-indebted.

It was further noted that the debt repayment history and the existing financial means, prospects and obligations was reasonably assessed by Absa before the conclusion of the agreement"¹.

2.7. The Applicant is not satisfied with the NCR's conclusion, and made an application for leave to refer the matter to the National Consumer Tribunal (hereinafter referred to as "the Tribunal"). The Applicant seeks the Tribunal to order the Respondent as follows:

2.7.1. To return the vehicle to the Applicant; and

2.7.2. Not to charge amounts to the Applicant with respect to any interest, fees or other charges.

3. On 13 August 2018, the Applicant lodged the application in the main matter before the Tribunal. Two days later on 15 August 2018, the Registrar of the Tribunal advised the Applicant that the submission does not meet the requirements. On 4 September 2018, another attempt was made by the Applicant to file the application, with proof of consent to service by email from both the Respondent and the NCR. On 5 September 2018 the Registrar of the Tribunal advised the Applicant that the submission does not meet the requirements.

4. On 28 May 2019, the Applicant lodged its application in the main matter before the Tribunal, together with a condonation application for the late filing of the main matter, with submissions to

¹ Paragraph 2 (x) and (y) of the NCR's Notice of Non-Referral dated 16 July 2018

support the application. The Registrar issued the Notice of filing of the Condonation application on 30 May 2019. The Notice advised that the Respondent may oppose the application by serving an answering affidavit within 15 business days of the date of the Notice. The 15-days rule is in accordance with Rule 13(2) of the Rules of the Tribunal² (hereinafter referred to as "the Rules"). The Respondent filed and served its answering affidavit to the Tribunal and the Applicant on 19 June 2019. On 28 June 2019, the Applicant filed its replying affidavit to the Respondent's answering affidavit, in accordance with the requirements of Rule 14(1) of the Rules which provides that an Applicant may lodge a replying affidavit within 10 business days of being served with an answering affidavit.

5. This is the judgement dealing with this condonation application.

ISSUE TO BE DECIDED

6. The issue to be decided is whether or not the application to condone the late filing of the Application for leave by the Applicant should be granted. The application is brought in terms of Rule 34 of the Rules of the Tribunal. The Respondent opposes the application for condonation. Evidence considered was in the form of sworn affidavits and supporting documents, submitted by the parties.

BRIEF FACTS

The Applicant

7. The Applicant deposed to an affidavit in support of the application for condonation, and submits the following:
 - 7.1. That the delay was due to the failure by her attorney not serving the application correctly and timeously to the Respondent;
 - 7.2. The Applicant had made every attempt to file the application within the prescribed number of

² Rules for the Conduct of Matters before the National Consumer Tribunal published under GN789 in GG30225 on 28 August 2007 as amended by GenN428 in GG34405 of 29 June 2011.

days;

- 7.3. The Applicant has a total respect of the Tribunal time-frames and procedures;
 - 7.4. In its assessment of the Applicant's complaint, the NCR only considered the affordability aspect; and the commercial purpose for which the Applicant applied for credit was not taken into account;
 - 7.5. The Respondent did not explain the financing aspects to the Applicant;
 - 7.6. The Respondent excluded the matter from the debt review process; and
 - 7.7. The Applicant's future depends on the outcome of this matter.
8. In further motivating for condonation, the Applicant raises other aspects (such as the vehicle having been purchased for business purposes; and her being pressurized to surrender the vehicle without the Respondent issuing a section 129 notice), in her answering affidavits which would not be dealt with in this condonation judgement.

The Respondent

9. Ms. Sherizad Sacks is employed as legal counsel for the Respondent, and deposed to a 15 page opposing Affidavit. The affidavit submits that the Applicant fails to provide valid explanation for the delay, and does not have reasonable prospect of succeeding; in that:
 - 9.1. the Applicant's request for condonation is delayed as this is a move that the Applicant has employed to prevent the Respondent from selling the vehicle which forms the subject matter of the complaint in the main matter;
 - 9.2. the alleged reasons for the Applicant's delay in filing her complaint with the Tribunal fail to set out any ground to justify the condonation sought;

- 9.3. the Applicant has failed to provide a meaningful explanation for her failure to timeously file her condonation application;
- 9.4. the Applicant has no prospect of success in the main matter, as the NCR has sufficiently dealt with her allegations and complaint;
- 9.5. when she applied for finance; the Applicant failed to disclose that the vehicle would be utilized for commercial purposes; and did not process the finance application in the business name; and
- 9.6. the Applicant's intention in the condonation application and the main application are to deprive the Respondent from selling the vehicle, whilst the vehicle depreciates in value.
10. The Respondent asks that the condonation application be refused with costs as the Applicant fails to make out a case in support of the condonation for the late filing of the application.

APPLICABLE SECTIONS OF THE NCA AND THE RULES

11. The relevant statutory and regulatory provisions, as well as the case law governing the condonation application are discussed below.

12. Section 139(1) of the NCA states-

"Upon initiating or accepting a complaint in terms of section 136, the National Credit Regulator may issue a notice of non-referral to the complainant in the prescribed form, if the complaint appears to be frivolous or vexatious, or does not allege any facts which, if true, would constitute grounds for a remedy under this Act."

13. Section 140(1)(a) of the NCA states-

"After completing an investigation into a complaint, the National Credit Regulator may issue a notice of non-referral in the prescribed form."

14. Section 141(1)(b) of the NCA states-

"If the National Credit Regulator issues a notice of not referral in response to a complaint other than a complaint concerning section 61 or an offence in terms of this Act, the

complainant concerned may refer the matter directly to the Tribunal, with the leave of the Tribunal."

15. Rule 7(2) of the Tribunal Rules provides that an application is filed by delivery of the relevant Form and all the documents listed in column e of Table 2, if applicable, or as required elsewhere in the rules, to the registrar. Table 2 requires the applicant to file the leave application with the Tribunal within 20 business days of the date of the notice of non-referral or within a longer time permitted by the Tribunal.
16. According to Tribunal Rule 34 (1), *"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."*
17. Rule 34 (2) states *"The Tribunal may grant the order on good cause shown"*.
18. Rules 13 (1) and (2) respectively provide that:
 - (1) "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.*
 - (2) 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".*
19. Rule 13 requires a person who wishes to oppose an application of this nature to serve an answering affidavit on the applicant concerned and any other persons on whom the application was served within 15 days of the date of the application.
20. Section 142(3) of the NCA only refers to applications for late filing, which may be heard by a

single member of the Tribunal. This type of application would fall under Rule 34(1)(a) of the Tribunal Rules, which allows for the condonation of a late filing of a document or application.

APPLICABLE LEGAL PRINCIPLES

21. 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"³. It can also be defined to mean "overlook or forgive (wrongdoing)"⁴.
22. In *Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others*⁵ it was held that the standard for determining an application of this nature is the interests of justice.
23. In *Melane v Santam Insurance Company Limited*⁶ 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 representative's lack of diligence or the insufficiency of the information tendered. (Saloojee & 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)."

24. The standard for determining an application of this nature is the interests of justice.⁷ Whether it is

³ Oxford English Dictionary, Second Edition at page 151.

⁴ Collins English Dictionary and Thesaurus, Fourth Edition 2011, at page 170.

⁵ 2003 (11) BCLR 1212 (CC) at para[11].

⁶ 1962 (4) SA 531 (A) at 532B-E.

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.

25. 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.⁸ The dictum in *Melane* reveals that these factors are interrelated and should not be considered separately.

CONSIDERATION OF THE MERITS

26. In evaluating the merits of this application, the factors in the *Melane* case will not be considered in a piecemeal fashion, but as part of cumulative and objective analysis of all the facts. The Tribunal's discretion would also be exercised judicially. The relevant factors are accordingly set out individually below for the sake of convenience.

Degree of Lateness reasons therefor

27. In *Saloojee & Another v Minister of Community Development*⁹, the court held that an excessive delay would require an extraordinary good explanation. Condonation is likely to be granted in instances where the degree of lateness is not excessive.
28. In the present case, the leave to refer application should have been made by the Applicant on or before 14 August 2018. However, the Applicant only submitted a compliant application together with the Condonation Application, on 28 May 2019.
29. According to the Applicant, the reason for the delay in filing the application within the prescribed time limits was because her attorneys of record struggled to meet the filing requirements and failed to serve the Respondent correctly. Based on this explanation, the Respondent's opposition

⁷ *Head of Department, Department of Education, Limpopo Province v Settlers Agricultural High School and others* 2003 (11) BCLR 1212 (CC) at para [11].

⁸ *Van Wyk v Unitas Hospital and Others* 2008(4) BCLR 442 (CC) at paragraph 20 as applied in *Camagu v Lupondwana* Case No 328/2008 HC Bisho.

⁹ 1965 (2) SA 135 (A) 141 B-H

to the condonation application is not unreasonable. It appears the relationship between the Applicant and her attorney was terminated during August 2018.

30. The Tribunal has identified what appears to be the Applicant's sick note¹⁰ dated 10 September 2018, signed by a medical practitioner; but the Applicant does not provide any context to this sick note. The Applicant does not take the Tribunal in its confidence to explain factors or reasons that contributed to the delays between September 2018 when the Registrar informed her that her submission was not sufficient, and May 2019 when the Applicant submitted a complete application. In my view the Applicant should have dealt with the reasons for the delay clinically and comprehensively.
31. Although no good reason was tendered by the Applicant for her failure to comply with the timeframes within which a filing is required to be made, it should not prove disastrous to the condonation application. The Tribunal has to take into account that despite the Applicant being a lay litigant, she was able to ensure that her application eventually met the requirements for proper filing.
32. In terms of the Prescription Act, Act No 68 of 1969, a claim prescribes if it is not filed in court within a period of three years from the date of occurrence of the event complained of. Therefore, if three years is taken as a benchmark to determine the unreasonableness of a delay, then in my view, a delay of 9 months in this matter is not excessive.
33. The Applicant's attempt to ensure a compliant application as well as the interests of justice, militate against the lack of a good explanation for the lateness of the condonation application.
34. Therefore, even though there was a delay and poor reasons thereof, for the purposes of this condonation application, the degree of lateness cannot be regarded as inordinate, and when assessed with the interests of justice, as well as the significance of and the effect that the judgement may have on the parties and the consumers, the Tribunal concludes that the lateness becomes pardonable.

¹⁰ Page 333 of the bundle of documents

Prospects of success

35. Prospects of success imply that all what need to be determined is the likelihood of success when the merits are heard. In *Mulaudzi v Old Mutual Life Assurance*¹¹, a court must consider and assess the prospects of success unless the other facts considered cumulatively, make the application for condonation not worthy of consideration. Generally, if there are no prospects of success, there is no point in granting condonation.
36. In the main matter, the Applicant's case is based on the allegation that; when the Respondent conducted the affordability assessment during the credit granting process; the Respondent only took into account the Applicant's personal business income; and not the associated expenses. The Applicant accordingly alleges that the Respondent extended credit recklessly. The Respondent, in its detailed answering affidavit, provides an overview of certain aspects which the Respondent believes would counter some of the Applicant's allegations.
37. The relief sought by the Applicant, namely, of setting aside all or part of the consumer's obligations, is provided for in the Act.
38. At this stage, there is a reasonable possibility that the Tribunal may find; in the main matter; that the Respondent failed to take reasonable steps to assess the Applicant's financial means and obligations.
39. It is in the interest of justice that the parties be afforded an opportunity to fully present their respective arguments before the Tribunal at the hearing of the main matter. The prospects for success by the parties in the main case should therefore be left to the Tribunal to adjudicate in full, based on the parties' submissions.

Importance of the matter

40. The matter is clearly important to the Applicant and the Respondent as both these parties have different arguments and counter-arguments related to the case. This case is without doubt important to the administration of justice to see its logical conclusion.

¹¹ *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited* 2017 (6) SA 90 (SCA) at para [54]

41. In the main matter, the serious nature of the allegations leveled against the Respondent, and the possible orders that the Tribunal may grant against either party, are important to both parties. Consumers would also need protection if the alleged contraventions of the NCA in the main matter are found to be true.
42. Therefore, in the interests of administrative justice and fairness, it is important that both parties be given an opportunity to fully present and argue the issues in this matter.

Prejudice

43. From the Applicant's submissions, it can be concluded that the Applicant is likely to suffer financial loss if denied an opportunity to present her case before the Tribunal. The Respondent indicates that the delay in finalizing the main matter has caused it financial loss, as this has hamstrung all processes to resell the vehicle and recover monies owed to it.
44. The Tribunal has assessed the prejudice the Applicant is likely to suffer if condonation is not granted. The Tribunal is satisfied that on a balance of probabilities; the Applicant; when compared to the Respondent; is likely to suffer greater prejudice if condonation is not granted.

CONCLUSION

45. It is trite that condonation requires that discretion has to be exercised taking into account all relevant facts and circumstances. Within the context of this case; I am persuaded that the Applicant's failure to timeously file the leave to refer application is not unreasonably long. In addition, the Applicant's prospects of success; the importance of the issues to the parties and the prejudice likely to be suffered by the Applicant if the matter is not adjudicated on; further motivate for condonation to be granted.
46. Therefore, it is in the interests of justice and fairness and in exercise of discretion that the Tribunal grants condonation to enable the parties to fully vent their respective cases before the Tribunal.

47. Notwithstanding the fact that the applicant's application for condonation to file its leave to refer is granted, the Tribunal is concerned with the length of time it took the Applicant to file its condonation application after the non-referral by the NCR. The Tribunal also notes the alleged implications for the Respondent whilst the main matter remains unresolved. Although the Respondent asks the Tribunal to refuse the condonation application with costs, the Respondent fails to motivate and provide any legal basis for such an order.

ORDER

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

48.1. Condonation is hereby granted to the Applicant for the late filing of her application for leave to refer; and

48.2. There is no order as to costs.

Thus handed down at Centurion on this 20th day of July 2019

[Duly signed]

MS. M. NKOMO
PRESIDING MEMBER

Authorised for issue by National Consumer Tribunal

Case Number: NCT/133221/2019/141 R34

Date: 22 July 2019

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