

SOUTH AFRICA / JUDGMENT

Bogatsu v Wesbank and Another (NCT/344458/2024/141(1)(b) - Rule 34) [2024] ZANCT 41 (4 October 2024) [2024] ZANCT 41

COURT

National Consumer Tribunal

BEFORE

C Sassman

CASE / FILE NUMBER

NCT/344458/2024/141(1)(b) - Rule 34

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT-344458-2024-141(1)(b) - Rule 34

In the matter between: INNOCENTIA SANNAH BOGATSU APPLICANT and WESBANK FIRST
RESPONDENT NATIONAL CREDIT REGULATOR SECOND RESPONDENT

Coram:

Adv C Sassman

- Presiding Tribunal member

Date of consideration (in chambers) - 3 October 2024

Date of

ruling

- 4 October 2024

CONDONATION RULING

LATE FILING OF AN APPLICATION TO REFER A MATTER DIRECTLY TO THE TRIBUNAL

THE APPLICANT

1. The applicant is Innocentia Sannah Bogatsu (the applicant), an adult female, defined as a consumer in terms of section 1 of the National Credit Act, 34 of 2005 (the NCA).

THE RESPONDENTS

2. The first respondent is Wesbank (the first respondent), a registered credit provider with registration number NCRCP20.
3. The second respondent is the National Credit Regulator (NCR), a juristic person established in terms of section 12 of the NCA. The NCR is responsible for monitoring the consumer credit market to ensure prohibited conduct is prevented or detected and prosecuted.

TERMINOLOGY

4. A reference to a section in this ruling refers to a section of the NCA, and a reference to a rule refers to the Rules of the National

Consumer Tribunal^[1] (the rules).

APPLICATION TYPE

5. The applicant seeks condonation in terms of rule 34(1) for the late filing of her application for leave to refer a matter directly to the Tribunal.
6. The respondents have not opposed the condonation application, which is accordingly considered unopposed.

BACKGROUND

7. On 29 January 2016, the applicant purchased a Honda HR-V vehicle and entered into a credit agreement with the first respondent. The credit term was 71 months with a monthly instalment of R4 266.25 and a final balloon payment of R91 680.00. In January 2017, the account went into arrears, and the applicant continued making inconsistent payments, by skipping some or paying less than the required instalment. The applicant alleges that in December 2018, she made a payment arrangement with the first respondent to bring her account up to date over the next eight months, but the first respondent failed to debit her account monthly as agreed. Only a portion of the instalment was debited, and it was only in October 2019 that she realised the account was not being paid as arranged. The applicant avers that the first respondent's conduct in this regard resulted in her being in arrears with R45 083.94. The first respondent took legal action against the applicant, and a default judgment was granted in its favour on 23 September

2021. The applicant's vehicle has since been repossessed and sold.

8. On 27 June 2022, the applicant lodged a complaint with the NCR. The NCR requested certain documents from the first respondent and investigated the complaint. The NCR concluded that the complaint did not allege any facts that, if true, would constitute grounds for a remedy under the NCA and issued a notice of non-referral on 23 October 2023. Nearly ten months later, on 19 August 2024, the applicant filed her application with the Tribunal. On this basis, the applicant seeks condonation for the late filing to refer her matter to the

Tribunal for adjudication.

9. The applicant submits that she only became aware of the notice of non-referral in April 2024 and became physically ill and emotionally drained thereafter. On the merits, the applicant is seeking an order for her vehicle to be returned. She further wants the first respondent to rescind the judgment taken against her and remove its adverse listing from her credit profile.

ISSUE TO BE DECIDED

10. The issue before the Tribunal is whether to grant the applicant's application to condone the late filing of her leave to refer application.

THE RULES

11. In terms of the rules[2], a complainant only has 20 business days from the date on a notice of non-referral to refer a complaint to the Tribunal, but this period may be extended with the Tribunal's condonation.
12. Rule 34(1) states that a party may apply to the Tribunal using Form TI.r34 for an order to condone the late filing of a document or application or any other departure from the rules or procedures. Rule 34(2) further states that the Tribunal may grant the order on good cause shown.

LEGAL PRINCIPLES

13. To condone means to "accept or forgive an offence or wrongdoing". The word stems from the Latin term *condonare*, meaning "refrain from punishing." [3] It can also be defined as "overlook or forgive (wrongdoing)." [4]
14. In *Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others*, [5] it was held that the standard of considering an application of this nature is the interests of justice.
15. Whether it is in the interest of justice to grant condonation depends on each case's facts and circumstances. It requires the exercise of discretion based on an objective conspectus of all the facts. The relevant factors 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. [6]
16. In *Melane v Santam Insurance Company Limited* [7], it was held that the court has a discretion, to be exercised judicially upon considering all the facts. In essence, it is a matter

of fairness to both sides. Among the facts that are usually relevant are the degrees of lateness, the explanation for the delay, the prospects of success, and the importance of the case. These facts are interrelated and are not individually decisive. What is needed is an objective conspectus of all the facts.

CONSIDERATION OF THE MERITS

17. The NCR issued a notice of non-referral on 23 October 2023, and the applicant had until 20 November 2023 to file her application within the prescribed 20 business days. Instead, the applicant only filed her application with the Tribunal on 19 August 2024. The application was, therefore, filed nearly ten months after the date of issue.
18. The applicant's reason for the delay is that she did not receive the NCR's notice of non-referral when it was sent. She submits that she only received it in April of the following year. She then became ill and could not proceed with an application to the Tribunal at that time.
19. There is no doubt that the matter is important to the applicant, but the degree of lateness in filing her application is extreme. Furthermore, the reasons provided by the applicant do not account for the entire period. Even if the Tribunal were to accept the applicant's reasons for the delay, a more significant challenge she faces is that the Tribunal does not have jurisdiction to adjudicate her complaint.
20. From the applicant's allegations, it appears that the conduct which the applicant is complaining about occurred between December 2018 and October 2019, when the first respondent allegedly failed to debit her bank account according to their repayment arrangement. In terms of section 166(1)(a), a complaint in terms of the NCA may not be referred to the Tribunal more than three years after the conduct which is the cause of the complaint. Since the applicant only filed her application with the Tribunal on 19 August 2024, it is time-barred from being adjudicated.
21. The relief that the applicant seeks presents a further challenge. The applicant wants her vehicle returned. The evidence before the Tribunal indicates that a default judgment was granted against the applicant, and her vehicle was repossessed and sold. Since the first respondent already obtained a judgment for the return of the vehicle and settlement of the credit agreement, the matter before the Tribunal is *res judicata*. The Tribunal does not have jurisdiction to overrule the exiting judgment to order the return of the applicant's vehicle.
22. Although it is not required of the Tribunal, in this application, to adjudicate on the case's merits, the merits do indicate that the applicant does not have a reasonable prospect of success in having her leave to refer granted. The Tribunal is inclined to agree with the NCR, stating in its notice of non-referral, that it remained the applicant's duty to pay her credit regardless of whether the first respondent debited her account correctly or not.

CONCLUSION

23. The applicant has not shown good cause for the Tribunal to condone the late filing of her application, and granting her request would be futile since the Tribunal does not have jurisdiction to adjudicate a complaint referred more than three years after the conduct, which is the cause thereof. Furthermore, the Tribunal cannot grant the relief the applicant seeks since the matter the applicant aims to bring to the Tribunal has already been settled by a court and is *res judicata*.

ORDER

24. Accordingly, the Tribunal makes the following order:

24.1 The condonation for the late filing of the applicant's application for leave to refer a matter directly to the Tribunal is refused; and

24.2 There is no cost order.

Adv C Sassman

Presiding Tribunal member

- [1] Published under GN 789 in GG 30225 on 28 August 2007 as amended by GN 428 in GG 34405 on 29 June 2011, GN R203 in GG 38557 on 13 March 2015 and GN 157 in GG 39663 on 4 February 2016.
- [2] Row 29 of Table 2.
- [3] Oxford English Dictionary, Second Edition at pg 151.
- [4] Collins English Dictionary and Thesaurus, Fourth Edition 2011, at pg170.
- [5] 2003
- (11) BCLR 1212 (CC) at para [11].
- [6] 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.
- [7] 1962
- (4) SA 531 (A) at 532C-F.

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