

SOUTH AFRICA / JUDGMENT

Booking.com v National Consumer Commission and Another (NCT/262956/2023/73(2)(b)) [2023] ZANCT 23 (3 July 2023)

[2023] ZANCT 23

COURT

National Consumer Tribunal

BEFORE

MC Peenze

CASE / FILE NUMBER

NCT/262956/2023/73(2)(b)

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IN THE NATIONAL CONSUMER TRIBUNAL HELD IN CENTURION

Case Number: NCT/262956/2023/73(2)(b) CPA – rule 34

In the matter between:

BOOKING.COM Applicant and NATIONAL CONSUMER COMMISSION First Respondent YAZIED ABRAHAMS t/a SUNSET VILLA 1 Second Respondent In Re: NATIONAL CONSUMER COMMISSION Applicant and YAZIED ABRAHAMS t/a SUNSET VILLA 1 First Respondent BOOKING.COM Second Respondent

Coram:

Dr MC Peenze – Presiding member

Date of adjudication in chambers: 3 July 2023

CONDONATION RULING AND

REASONS

LATE FILING OF ANSWERING AFFIDAVIT

APPLICANT

1. The applicant in this condonation application is Booking.com. The applicant is an intermediary, as defined in section 1 of the Consumer Protection Act 68 of 2008 (the CPA). Its principal place of business is domiciled in Amsterdam, the Netherlands. The applicant is represented by Bowman Gilfillan Incorporated (Bowmans), with their principal place of business at 11 Alice Lane, Sandton, Gauteng. The applicant is the second respondent in the main matter.

RESPONDENTS

2. The first respondent in this condonation application is the National Consumer Commission (the NCC), an organ of the state established in terms of section 85 (1) of the CPA, having its registered address at SABS Offices, 1 Dr Lategan Road, Groenkloof, Pretoria. The first respondent is the applicant in the main matter.
3. The second respondent is Yazied Abrahams t/a Sunset Villa 1 (Abrahams). The second respondent is a supplier, as defined in section 1 of the CPA, whose principal place of business is 22 Diluta Drive, Sunset Beach, Milnerton, Cape Town. The second respondent is the first respondent in the main matter.

TERMINOLOGY

4. A reference to a section in this ruling refers to a section of the CPA.
5. A reference to a rule in this ruling refers to the Rules of the National Consumer Tribunal.[1]

APPLICATION TYPE

6. In this application, Booking.com seeks condonation in terms of rule 34 (1) for the late filing of its answering affidavit in the main matter.
7. The NCC and Abrahams do not oppose the application for condonation, and the application is accordingly considered on an unopposed basis.

BACKGROUND

8. The main matter has been brought before the Tribunal in terms of section 73 (2) (b). The NCC has investigated a complaint lodged by Virginia Ntombizodwa Rozani (Rozani), a consumer as defined in section 1. Rozani complained that Abrahams and Booking.com unlawfully failed to refund her after she cancelled her reservation for lodging.
9. Rozani made a booking through Booking.com on 25 February 2020 to reserve lodging between 23 and 27 March 2020. She subsequently entered a contract with Abrahams and paid R14,455.00 on 25 February 2020.
10. Due to the National State of Disaster proclaimed in South Africa and the strict Covid-19 restrictions imposed by the government on events and gatherings, Rozani's movements and motivations to travel were impacted in

2020. The first twenty-one days of lockdown commenced on 26 March
2020. Rozani cancelled the booking on 19 March 2020 and requested a refund. Abrahams and Booking.com failed to issue a refund, whereafter Rozani referred a dispute to the Consumer Goods and Services Ombudsman on 30 March 2020. After the mediation by the Ombudsman failed, Rozani referred the complaint to the NCC.
11. The NCC commenced its investigation on 14 July 2022 and concluded that Abrahams and Booking.com engaged in prohibited conduct by including unlawful provisions in the contract and failing to refund the consumer after the booking cancellation.
12. Abrahams and Booking.com allegedly contravened:
- sections 19 (2) and (6), read with section 21 (9), alternatively sections 17 (2), (3) and (4);
 - sections 48 (2) (a) and (b); and
 - sections 51 (1) (a) and (b).
13. On 10 March 2023, the NCC filed an application with the Tribunal, asking that the Tribunal makes a finding of prohibited conduct against Abrahams and Booking.com. The application was served by hand on Abrahams and by email to the legal representatives of Booking.com. On 16 March 2023, the Registrar of the Tribunal (the Registrar) issued a notice of filing. Abrahams did not oppose the main application.
14. Booking.com opposed the application but filed its answering affidavit out of time. Consequently, on 17 April 2023, Booking.com applied for condonation of the late filing of its answering affidavit.

ISSUE TO BE DECIDED

15. The issue before the Tribunal is to decide whether the applicant's application to condone the late filing of its answering affidavit should be granted.

THE RULES

16. In terms of rule 34(1), 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

17. To condone means to "accept or forgive an offence or wrongdoing". The word stems from the Latin term *condonare*, meaning to "refrain from punishing".[2] It can also be defined as "overlook or forgive (wrongdoing)".[3]

18. In *Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others*,^[4] it was held that the standard of considering an application of this nature is the interests of justice.
19. Whether it is in the interests 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.
20. In *Melane v Santam Insurance Company Limited*,^[5] it was held that the court has the discretion to be exercised judicially upon considering all the facts. In essence, it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation for it, the prospects of success and the importance of the case. These facts are inter-related and are not individually decisive. What is needed is an objective conspectus of all the facts.

CONSIDERATION OF THE MERITS

21. Booking.com's answering affidavit was due to be served and filed by the close of business on Friday, 31 March 2023. The applicant attempted to file and serve its application on 31 March 2023 by email within the 20 business days as required. In the email notification, the applicant recorded that it would deliver hard copies in accordance with the rules during the following week. On Tuesday, 4 April 2023, a messenger of Bowmans delivered a hard copy of the answering affidavit to the NCC. On the same day, the applicant also attempted to serve a hard copy of the answering affidavit on Abrahams. The latter refused to accept service or acknowledge receipt of the documents. Consequently, the applicant left a copy of the answering affidavit at Abrahams' premises and prepared a service affidavit in accordance with rule 30 (3) (a) (ii).
22. On Wednesday, 5 April 2023, the applicant noticed they had entered the wrong email address in sending the answering affidavit to Abrahams, as the email was sent to [...] instead of [...]. Upon realising this, the applicant immediately re-sent an email and confirmed to the Tribunal that hard copies were served at Abrahams'

premises on 4 April 2023. The applicant received no responses from Abrahams and is not informed whether Abrahams intends to oppose the main application.

23. On the evidence before the Tribunal, substantial compliance with the rules occurred in serving the answering affidavit on the NCC. The applicant served the application on the NCC by email within 20 business days as required. The NCC accepted service via email and reconfirmed such consent on 6 April 2023. The applicant also delivered a hard copy of its answering affidavit within three business days after sending the application by email, thereby complying with rule 30 (2). The Tribunal, therefore, finds that no condonation is

necessary regarding the service of the answering affidavit on the NCC.

24. Regarding the service of the answering affidavit on Abrahams, the applicant lawfully served the documents in person, albeit four days late. Rule 30 (3) (a) provides that proof of service in terms of rule 30 (1) (a) must be by an affidavit by the person who served the document if the person to whom it was delivered refused to sign for it. The Tribunal accepts the affidavit by the person who served the document on Abrahams on 4 April 2023. The Tribunal also noted that the applicant's answering affidavit was emailed to Abrahams on 5 April 2023.
25. The application was filed two business days late on Abrahams. This is not excessive. Abrahams also failed to oppose the main application and would have to seek condonation if he wanted to do so. No such condonation application had been filed with the Tribunal.
26. Booking.com's reason for the delay is that it assumed its initial application was in line with the rules and filed in time.
27. The NCC and Abrahams have not opposed this application for condonation.
28. The Tribunal must consider the importance of observing fairness and adherence to the principles of natural justice. The Tribunal is persuaded that Booking.com intended to comply with the Tribunal's rules and that no mala fides existed.
29. This matter is important to the applicant, who has a reasonable prospect of success. Booking.com submits that:
 - a. The Tribunal has no jurisdiction in respect of the application as far as it relates to Booking.com, as the applicant is based in the Netherlands;
 - b. There is no cause of action set out in the main application against Booking.com; and
 - c. There is no basis in fact or law to have brought the relief sought against Booking.com because it is an intermediary and not a supplier in terms of the CPA.
30. The Tribunal is persuaded that the relief sought could harm Booking.com's reputation in the industry in which it operates and cause it financial prejudice. In this context, the Tribunal favourably considers the request for condonation for the late filing of Booking.com's answering affidavit. This matter is important to Booking.com, and it is in the interest of justice that it be allowed to make its submissions accordingly.
31. The Tribunal finds, for the reasons mentioned above, that there is good cause to grant the condonation application to enable Booking.com to respond to the NCC's allegations. The Tribunal, therefore, grants the application, and the late filing of Booking.com's answering affidavit is condoned.

ORDER

32. Accordingly, the Tribunal makes the following order:

- a. The late filing of Booking.com's answering affidavit is condoned;
- b. The NCC may serve a replying affidavit within 10 (ten) days of the issuing of this ruling and file same with the Tribunal; and
- c. There is no cost order.

Dr MC Peenze Presiding Member

[1]GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and rules for the conduct of matters

before the National Consumer Tribunal, 2007 (Government Gazette No. 30225).

[2] Oxford English Dictionary, Second Edition at pg 151.

[3] Collins English Dictionary and Thesaurus, Fourth Edition 2011, at pg 170.

[4] 2003 (11) BCLR 1212 (CC) at para [11].

[5] 1962 (4) SA 531 (A) at 532C-F.

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