

SOUTH AFRICA / JUDGMENT

Carstens v Beukes and Others (NCT/133281/2019/75(1)(b)) [2020] ZANCT 4 (24 February 2020) [2020] ZANCT 4

COURT

National Consumer Tribunal

BEFORE

A Potwana, J Simpson, H Alwar

CASE / FILE NUMBER

NCT/133281/2019/75(1)(b)

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Policy**IN****THE NATIONAL CONSUMER TRIBUNAL****HELD****IN CENTURION****Case****Number: NCT/133281/2019/75(1)(b)****In**

the matter between:

MICHELLE
LYN
CARSTENS APPLICANT
and
BRADLEY
BEUKES
FIRST
RESPONDENT
MR
BEU QUALITY TRADERS (PTY) LTD
T/A
QUALITY AUTO
SECOND

RESPONDENT
(REGISTRATION
NUMBER: 2012/181470/07)
AUTO
UNIQUE MOTORS (PTY)
LTD THIRD
RESPONDENT
(REGISTRATION
NUMBER: 2018/566035/07)

Coram: Mr
A Potwana - Presiding Tribunal Member
Adv
J Simpson - Tribunal Member
Ms
H Alwar - Tribunal Member
CONDONATION

RULING

APPLICANT

1. The Applicant is Michelle Lyn Carstens, an adult female person whose physical address is [...], Idas Valley, Stellenbosch.

RESPONDENTS

2. The First Respondent is Bradley Beukes, an adult male person whose physical address is [...], Wonderboom, Gauteng (“First Respondent”).
3. The Second Respondent is Mr Beu Quality Traders (Pty) Ltd, a private company that is duly incorporated and registered in terms of the company laws of the Republic of South Africa and trading as Quality Auto (“Second Respondent”). The Second Respondent’s registered address is Rietbok Street, Kathu, Northern Cape.
4. The Third Respondent is Auto Unique Motors (Pty) Ltd, a private company that is duly incorporated and registered in terms of the company laws of the Republic of South Africa with its registered address at 90 Botha Avenue, Lyttleton Manor, Centurion, Gauteng (“Third Respondent”).
5. Collectively, the First; Second and Third Respondents will be referred to a “respondents”.

APPLICATION TYPE AND JURISDICTION

6. This is an application to condone the Applicant's failure to serve the application for leave to refer on the Second and Third Respondents and to supplement the Applicant's application for leave to refer a complaint to the Tribunal.
7. The application is made in terms of Rule 34 of the Tribunal Rules[1] which states-
"(1) A party may apply to the Tribunal in Form TI.r34 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.*(2) The Tribunal may grant the order on good cause shown."*
8. Section 150(e) of the National Credit Act[2] states-
"In addition to its other powers in terms of this Act, the Tribunal may make an appropriate order in relation to prohibited conduct or required conduct in terms of this Act, or the Consumer Protection Act, 2008, including condoning any non-compliance of its rules and procedures on good cause shown."
9. Accordingly, the Tribunal has jurisdiction.

BACKGROUND

FACTS

The Applicant's condonation application

10. On 30 May 2019, the Applicant filed a "new application" for leave to refer a complaint to the Tribunal with the Registrar of the Tribunal ("Registrar") by email. The application was filed using Form TI.r30A and Form TI.73(3) & 75(1)(b) & (2) CPA and is dated 27 May 2019. In "Part D: Order sought from the Tribunal", the Applicant stated that "I seek relief in this matter that my deposit of R55 000 paid directly to Bradley Beukes (as per attached proof of payment) is refunded to me as the finance deal was cancelled by MFC." An affidavit is attached to the application. The application was served on the First Respondent by registered mail. There is no indication that the application was served on the Second and Third Respondents, although they were cited in the application.
11. One of the documents attached to the Applicant's application is a Notice of Non-Referral that was issued by the National Consumer Commission on 29 April 2019. The stated reason for the non-referral is that the Applicant's complaint does not allege any facts, if true, would constitute grounds for a remedy under the Consumer Protection Act ("CPA").[3] The Notice of Non-Referral was served on the Applicant by email on 2 May 2019.

12. On 4 June 2019, the Registrar issued a Notice of Filing and served it on the Applicant by email and on the First Respondent by registered mail. On 8 July 2019, the Registrar issued a Notice of Set Down and served it on the Applicant by email and on the First Respondent by registered mail. On 14 August 2019, the Registrar issued a Notice of Removal and served it on the Applicant by email and on the First Respondent by registered mail.
13. On 10 September 2019, the Applicant filed Form TI.r30A and Form TI.73(3) & 75(1)(b) & (2) CPA with the Registrar via email. The contents, including the date, of the filed Form TI.73(3) & 75(1)(b) & (2) CPA are precisely the same as one that the Applicant filed on 30 May 2019. A completed Form TI.r34 was also filed. On the filing email, the Applicant stated, "Please find attached application and notice of service to all three addresses." The filed documents were served on the respondents by registered mail.
14. In "Part C: Order Sought from the Tribunal and grounds for Application" of Form TI.r34, the Applicant stated, "I have not included the original purchase of the vehicle agreement in my application, I also not served notice to all addresses available for Bradley Beukes." (sic in toto). An affidavit is attached to the application.
15. In her affidavit, the Applicant stated that she purchased a vehicle in Centurion from the Second Respondent. WF Auto acted as a financial intermediary when she signed the finance documents with MFC, a division of Nedbank Limited ("MFC"). She paid a deposit for the vehicle to the First Respondent. Apparently, she took the vehicle to VW Stellenbosch where it was discovered that the vehicle was sold to her without fitted airbags and the ABS braking system was malfunctioning. She alleged that vehicle was sold to her in contravention of section 56 of the CPA which gives consumers the right to safe and good quality goods.
16. MFC instructed VW Auto to take ownership of the defective vehicle and settle any outstanding debt owed to MFC. The Applicant submitted that the First Respondent "unfairly gained financially from the transaction as he was not liable to settle my debt or took no responsibility of accommodating me in any way after selling a defective car." (sic in toto). The Applicant stated that she would suffer financial hardship if her application is denied because she had to return the vehicle and was left without any means of transport and without any deposit to purchase a new vehicle at the time.
17. The Applicant submitted that she had to arrange alternative transport to get to work which is 20km away from where she stays. She seeks a refund of the deposit of R55 000.00 (fifty-five thousand rands) in order that she can finance a new vehicle. She wants the Tribunal to evaluate her complaint and seeks condonation for failing to serve the application on the Second and Third Respondents and to supplement her application. The documents supplementing her application for leave to refer are attached to the application.
18. None of the respondents filed answering affidavits.

ISSUES

TO BE DECIDED

19. The Tribunal must decide whether, based on a balance of probabilities, the Applicant has shown good cause for condonation to be granted.

THE LAW

20. In Section 53(1)(a) of the CPA; a “defect” is defined as-

“(i) any material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the services less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or

(ii) any characteristic of the goods or components renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances.”

21. Section 55(2) of the CPA states-

“Except to the extent contemplated in subsection (6), every consumer has a right to receive goods that-

- (a) are reasonably suitable for the purposes for which they are generally intended;*
- (b) are of good quality, in good working order and free of any defects;*
- (c) will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to*

all the surrounding circumstances of their supply; and

- (d) comply with any applicable standards set under the Standards Act, 1993 (Act No. 29 of 1993), or any other public regulation.”*

22. Section 56 of the CPA states-

“(1) In any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or importer, the distributor and retailer each warrant that the goods comply with the requirements and standards contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control of the producer or importer, a distributor or the retailer, as the case may be.

- (2) Within six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier’s risk and expense, if the goods fail to satisfy the requirements and standards contemplated in section 55, and the supplier must, at the direction of the consumer, either-*

- (a) Repair or replace the failed, unsafe or defective goods; or
- (b) Refund to the consumer the price paid by the consumer, for the goods.”

23. Rule 6 of the Tribunal Rules states-

“(a) The Applicant must notify the persons mentioned in column g of Table 2 by serving on them the documents required under column h of that Table.

- (b) The application documents filed with the Tribunal must include a proof of service for every person requiring notification.”

24. Rule 13 (1) of the Tribunal Rules states –

“(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.”

25. Rule 34 (1)(d) of the Tribunal Rules states –

“A party may apply to the Tribunal in Form TI r.34 for an order to condone any other departure from the rules or procedures.”

26. Rule 34 (2) of the Tribunal Rules states –

“The Tribunal may grant the order on good cause shown”.

27. 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”[4]. It can also be defined to mean “overlook or forgive (wrongdoing)”[5].

28. In *Mofokeng v Attorney General*, [6] it was held that “good cause” means substantially the same thing as “sufficient cause”. This means that the Tribunal may grant condonation in respect of a departure from the Tribunal Rules where an applicant has demonstrated objectively good reasons for such a departure.

29. In *Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others*, [7] it was held that the standard of considering an application of this nature is the interests of justice. 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 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]

30. In *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*,[9] Yacoob J stated –

“The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant’s explanation for the delay or defect.”

31. In *Melane v Santam Insurance Company Limited*[10] 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.”

CONSIDERATION OF THE MERITS

32. In evaluating the merits of the Applicant’s application for condonation, it is convenient that we consider whether the Applicant enjoys reasonable prospects of success in the main application and the importance of the matter to the Applicant. The matter is clearly important to the Applicant as she paid a lot of money as a deposit towards the purchase of the vehicle.
33. Regarding prospects of success, section 56(1) of the CPA imposes a statutory warranty on producers or importers; distributors and retailers that goods purchased by consumers comply with the requirements and standards contemplated in section 55 of the CPA.
34. Section 55(2)(a) and (b) of the CPA provides that every consumer has a right to receive goods that are reasonably suitable for the purposes for which they are generally intended; are of good quality, in good working order and are free of defects. In terms of section 56(2) of the CPA, If the goods purchased do not meet the standards stipulated under section 55(2) of the CPA, a consumer may return the goods to the supplier within six months without penalty and at the supplier’s risk and expense. The supplier must, at the direction of the consumer either repair or replace the failed, unsafe or defective goods; or refund to the consumer the price paid by the consumer for the goods.
35. According to the Applicant, VW Stellenbosch informed her that the vehicle was sold to her without fitted airbags and the ABS braking system was malfunctioning. This indicates that the vehicle did not meet the requirements of sections 55 and 56 of the CPA when it was purchased.

CONCLUSION

AND REASONS

36. The Applicant referred her complaint to the Tribunal within the prescribed 20 (twenty) business days after being issued with a Notice of Non-Referral. In terms of Rule 6 of the Tribunal Rules, she was supposed to serve her application documents on all the respondents. But, she failed, neglected or ignored to serve the application on the Second and Third Respondents. She has since served the application on both these respondents.
37. The relief the Applicant seeks is provided for under the CPA, and she enjoys good prospects of success of being granted the relief she seeks. The matter is quite important to her as she paid a lot of money as a deposit towards the purchase of the vehicle that she has since returned due to the defects.
38. The provisions of Rule 34 empower the Tribunal to grant condonation on good cause shown. The Applicant has shown good cause, in the interest of justice, to be granted condonation for failing to serve the application on the respondents and to supplement her application. The respondents have not opposed the application and will not suffer any prejudice as they will be given the statutorily prescribed 15 (fifteen) business days to file answering affidavits.

ORDER

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

19.1 The Applicant's condonation application is granted;

19.2 The respondents are given 15 (fifteen) business days, from the date on which this ruling is issued, to file answering affidavits; and

19.3 No order is made as to costs.

Thus, done and signed on 24 February 2020.

[signed]

.....

Mr A Potwana

Presiding Tribunal Member

With Adv. J Simpson (Tribunal Member) and Ms H Alwar (Tribunal Member) concurring.

[1] Regulations for Matters Relating to the Functions of the Tribunal and Rules for the Conduct of Matters before the National Consumer

Tribunal, 2007 (as amended).

[2] 34 of 2005.

[3] 68 of 2008

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

- [5] Collins English Dictionary and Thesaurus, Fourth Edition 2011, at pg170.
- [6] OFS 1958 (4) SA (O).
- [7] 2003
- (11) BCLR 1212 (CC) at para[11].
- [8] 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.
- [9]
- [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC).
- [10] 1962
- (4) SA 531 (A) at 532C-F.
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