

SOUTH AFRICA / JUDGMENT

Gnome Finance CC t/a Wise Money v National Credit Regulator (NCT/78961/2017/140(1)) [2017] ZANCT 131 (9 November 2017)

[2017] ZANCT 131

COURT

National Consumer Tribunal

BEFORE

HFN Sephoti

CASE / FILE NUMBER

NCT/78961/2017/140(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT/78961/2017/140(1)

In the matter between:

GNOME FINANCE CC T/A WISE MONEY

APPLICANT

and

NATIONAL CREDIT REGULATOR

RESPONDENT

Coram:

Adv HFN Sephoti

Presiding Member

CONDONATION JUDGMENT AND REASONS

APPLICANT

1. The Applicant is Gnome Finance CC trading as Wise Money, a registered micro lender and also a member of the Micro Finance South Africa (MFSA); having its principal place of business at Beysan Building, BA Voortrekker Street Nelspruit, in the province of Mpumalanga (hereinafter referred as the Applicant)

2. The Applicant is represented by Mr Cilliers, a practising attorney operating in White River in the province of Mpumalanga, White River.
3. The Applicant filed a Form T.I r34 in support of a condonation application in terms of Rule 34 of the Rules of the Tribunal[1].

RESPONDENT

4. The Respondent is the National Credit Regulator (" the NCR"); an organ of state within the public administration established in terms of Section 12 of the National Credit Act 34 of 2005 ("the NCA"). The NCR has its address at 127 Fifteenth Road, Randjespark, Midrand, ("hereinafter referred to as the Respondent").
5. The application for condonation has not been opposed by the Respondent.

APPLICATION TYPE

6. This is an application in terms of Rule 34 of the Rules of the Tribunal, for condoning the non-compliance with the Tribunal's rules

and proceedings.

7. The Applicant states that it[2] failed to file its answering affidavit in time as it needed to consult with an Attorney who would advise the Applicant on how to approach the application by the Respondent alleging non-compliance with the National Credit Act and its conditions of registration.
8. The Applicant further states that the attorney to whom it was referred to by the MFSA was unavailable for consultation in the period that the answering affidavit was due.
9. The Applicant is seeking the indulgence of the Tribunal to file its answering affidavit and further to halt the proceedings before

the Tribunal as the subject matter of the Respondent's case is currently before the North Gauteng High Court, in Pretoria.

BRIEF BACKGROUND OF THE COMPLAINT

10. On 13 April 2017, the Applicant received a Notice of Complete Filing from the National Consumer Tribunal, which notice was delivered to its offices by courier.
11. Upon receipt of the Notice of Complete Filing, Applicant, which is a member of the MFSA, contacted the Association and was advised to seek legal representation as its managing Member had no idea what the matter was all about and did not have the legal expertise to address the matter.
12. On the same day, 13th of April, 2017; Applicant contacted Mr Cilliers and faxed through a copy of the Notice of Complete Filing together with an email that was sent to the Respondent.

13. The Applicant maintains that it never received or had been served with the requisite application (in the main matter) made by the

Respondent (in which the Respondent is the Applicant) and that it only saw the application for the first time when the application was emailed to it from the Tribunal's offices.

14. On 20 April 2017, Applicant learned since the matter would remain complete[3], it was expected to file its answering affidavit on or before the 2nd of May 2017.

15. Applicant's attorney proceeded to correspond with the Respondent and raised two issues with them:

15.1 Firstly, the serving of the application being defective in that it did not comply with the Tribunal rules. The Respondent had sent the application to Applicant's address that was on file but failed to attach proof of such service when the application was filed as per Tribunal rules 6; 7(5) and 13(2);

1.25cm; line-height: 200%">15.2 Secondly, all the three complaints brought by the Respondent for inter alia charging excessive interest rates, additional fees and charges and supplementary agreements, were part of matters that were by then, sub judice, and were still to be heard by the North Gauteng High Court in Pretoria.

16. The Respondent is aware of all of the above matters and thus the Applicant maintains that its filing of the answering affidavit would

depend on the outcome of the matters before the High Court as the ruling of the High Court would be binding on the Tribunal.

17. The main thrust of Applicant's contention is regarding the matters that are sub judice before the North Gauteng High court which matters are still to be heard. Therefore, applicant requests an extension of time in terms of Rule 34 to allow the matters to be heard or that it be allowed to file its answering affidavit by 30 June 2017.

APPLICABLE RULES OF THE TRIBUNAL

18. Rule 34

"Condonation of late filing and non-compliance with rules

"(1) A party may apply to the Tribunal in Form Tl.r34 for an order to:

- (a) condone the 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."

THE HEARING

19. The hearing date for the main matter depends on the outcome of this application, and in this instance, indeterminable.

LEGAL PRINCIPLES

20. Rule 34 accords the Tribunal the discretion to grant condonation on "good cause shown".
21. The discretion to condone non-compliance with the Tribunal's rules on the basis of "good cause" has been dealt with in numerous court decisions. In *Mofokeng v Attorney General*,^[4] for example, the court had to consider the meaning of "good cause" in Rule 94(1) of the Rules of Court and held that this meant substantially the same as "sufficient cause" in Rule 12 of the Appellate Division.
22. This issue was dealt with by the Appellate Division (now the Supreme Court of Appeal) in the case of *Melane v Santam Insurance Company Limited*.^[5] In this case the court stated the following:

"The approach is that the Court has 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 therefor, 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.

23. From this judgment it can be seen that for the Tribunal to consider the facts of this particular matter; it must act fairly to both parties and it must take a number of factors into consideration including inter alia the degree of lateness, the explanation therefor and the prospects of success regarding the merits of the matter.^[6]
24. The court held that these factors are interrelated and should not be considered separately.^[7]
25. The Rules do not circumscribe the Tribunal's discretion and therefore as with the courts, the Tribunal has a wide discretion in these matters. The onus is on the Applicant to show good cause and that it is entitled to condonation.^[8]

FACTORS TO BE CONSIDERED BY THE TRIBUNAL

26. In *Cairns' Executors v Gaarn*^[9] the court stated that it is impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the granting of indulgence and that any attempt to do so would merely hamper the exercise of a discretion which the Rules

have purposely made very extensive. The court held that it is highly desirable not to abridge the court's discretion. The applicant for condonation must show something which entitles it to ask for the indulgence of the court and what that something is, depends on the circumstances of each particular application.

27. For the purposes of this judgment the Tribunal has considered the following factors:

27.1 The degree of lateness;

27.2 The explanation thereof; and

27.3 The prospects of success of the Respondent's defence.

The degree of lateness and explanation thereof

28. The courts do not usually grant condonation unless they are satisfied that the applicant has shown that the degree of lateness or non-compliance with the prescribed time frame is not excessive and that the applicant has provided an explanation for every aspect of the period of the lateness or the failure to comply with time frames. It was held in *Saloojee & Another NNO v Minister of Community Development*[10] that an excessive delay would require an extraordinarily good explanation.

29. In *Independent Municipal & Allied Trade Union obo Zungu v SA Local Government Bargaining Council & Other*,[11] the court held that in explaining the reason for delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one.

30. The court in *General Accident Insurance Co SA Ltd v Zampelli*[12] held that the "circumstances ' or 'cause' must be such that a valid and justifiable reason exists why compliance did not occur and why non-compliance can be condoned". In *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd*[13]the court stated that:

"It is well established that an applicant for any relief in terms of Rule 27 has the burden of actually proving, as opposed to merely alleging, the good cause that is stated in Rule 27(1) as a jurisdictional prerequisite to the exercise of the court's discretion: *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352G. The applicant for any such relief must, at least, furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about and to assess his conduct and motives (*Silber v Ozen Wholesalers* (supra at 353A). Where there has been a long delay, the Court should require the party in default to satisfy the Court that the relief sought should be granted:: *Goo/ v Policansky* 1939 CPD 386 at 390.

31. The Applicant's swift response in seeking clarity and legal advice upon receipt of the Notice of Complete Filing indicating that

the Applicant had not wasted any time in giving this matter the serious consideration it required to address the matter. Besides this action, it was the Applicant who persisted with emails and telephone calls to the NCT and the Respondent to get the original application which Respondent had sent albeit to the address that did not provide for street deliveries.

32. The Applicant wasted no time in securing the services of a legal representative and making sure that the necessary application was filed with the NCT.

Prospects of Success

33. In the Melane-case the court stated that even if a good explanation for the delay is provided, an application for condonation should be refused in circumstances where there are no prospects of success.[14]
34. It is also important to note that when dealing with prospects of success it is necessary for the Tribunal to consider the merits of the matter.
35. In *Penrice v Dickinson*, [15] for example, the Appellate Division held that in an application for condonation, the merits of the appeal may in some cases be an important factor and that if there is sufficient information before the court to enable it to decide whether the appeal has or has not a reasonable prospect of success, it had to decide the question because if the appeal is hopeless, the "great expense of prosecuting it would be a mere waste of money". This view was reiterated in the Melane- matter where the court stated that "if there are no prospects of success there would be no point in granting condonation".

Defective or non - compliant service

36. The Rules of the Tribunal provide for service and proof of service of documents. Rule 30(1) A document may be served on a party by:
- a. Delivering it to the party; or
 - b. Sending it by registered mail to the party's last known address.

(1A) Any document, application or affidavit served or delivered by a party must contain at the front thereof a filing notice in accordance with Firm Tl.r30A and must be filed at the Tribunal.

37. The Applicant raised the issue of defective service in that the Respondent sent the documents to it at their last known address but

failed to attach the filing notice.

38. The rules of the Tribunal are clear and the Respondent must, in future, ensure that their papers are served in line with the provisions of the rules to ensure compliance.
39. This point has now been overtaken by events as the Applicant was able to receive the papers and file its condonation application.

Action after receipt of Notice of Complete Filing

40. Applicant wasted no time in contacting the NCT upon receipt of the Notice of Complete Filing.
41. Applicant further sought advice from MFSA and engaged the services of an attorney to address the matter as urgently as was possible;
42. Contact was also initiated with the NCR to get the original application that was filed with the NCT;
43. The Applicant did not waste any time in lodging the application for condonation, detailing reasons why it was not possible to comply with the rules of the NCT.
44. Given the importance and seriousness of the matter, it is in the best interest of justice that the full facts regarding the matter be placed before the Tribunal. The Applicant currently has filed papers with the North Gauteng High Court and this matter before the NCT is largely dependent on the outcome of the High court matter.

ORDER

45. The Tribunal, having considered all the documents filed on record, and all the factors relevant to the determination of this application, makes the following ruling:
 - a. Condonation is granted to the Applicant for the non- compliance with the rules of the Tribunal (failure to file an answering affidavit within the stipulated time frames).
 - b. The matter before the Tribunal is stayed until the ruling by the North Gauteng High Court on the matter before it which are the same subject matters of the case before the Tribunal and between these same parties; and
 - c. No order is made as to costs.

Dated and signed on this 9th Day of November 2017.

[signed]

Adv HFN Sephoti

Presiding Member

[1] For the Conduct of Matters before the National Consumer Tribunal published under GN789 in GG30225 of 28 August 2007 as amended by GenN428 in GG34405 OF 29 June 2011.

- [2] Then Applicant here is indicated as a juristic person, so it cannot have a gender as such. Unless we refer to what the Representative said. But then the Representative in this case was an attorney, so he could not have spoken in tyeh first person as the Applicant. That needs to be straightened out for this Ruling to make sense.
- [3] Is this supposed to be "complete" or "incomplete"?
- [4] OFS1958 (4) SA (O).
- [5] 1962 (4) SA 531 (A) at 532C- F
- [6] See *Mbutuma v Xhosa Development Corporation Ltd*, 1978 1 SA 681 (A) where the Appellate Division held that condonation could be granted under the Rules of the Appellate Division if the applicant satisfied the Court that sufficient cause had been established for granting him relief from the operation of the Rules; and, in deciding whether sufficient cause had been shown, the Court would consider all the relevant facts and circumstances of the particular case, such as the degree of non-compliance with the Rules. for example, the length of the delay, the explanation

therefor, the importance of the case, the prospects of success, the respondent's interests in the finality of his

judgment

and the avoidance of unnecessary delay in the administration of justice. In *Nedcor Investment Bank Ltd v Visser* N02002 (4) SA 588 (T) at 591 Patel AJ (as he then was) referred to rule 27(3) which requires 'good cause' to be shown by the plaintiff and stated that the Court has a wide discretion. See also *C Du Plooy v Anwes Motors (Edms) Bpk* 1983

- (4) SA 212 (0) at 216H-217A
- [7] *Melane v Sanlam Insurance Company Limited* 1962
- (4) SA 531 (A) at 532C-F.
- [8] See for example *Cairns' Executors v Gaam* 1912 AD 181.
- [9] 1912 AD 181 at 186.
- [10] 1965 (2) SA 135 (A) 141 B-H.
- [11] (2010)31 ILJ 1314(LC) para 13.
- [12] 1988 (4) SA 407(C) at 4101-J
- [13] 2002 (3) SA 87 (W) at 93. See also *Sanford v Haley* NO 2004 (3) SA 296 © at 302. *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) (2002) 4 B All SA at (6.)
- [14] See also *Immelman v Loubser and Another* 1974

- (3) SA 816 (A) where the court, in dealing with the failure to note an appeal timeously, stated that a reasonable prospect of success on appeal is also an important consideration.

[15] 1945 AD 6

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