

SOUTH AFRICA / JUDGMENT

Govender v Advance Pools CC (NCT/107447/2018/75(1)(b)) [2018] ZANCT 63 (2 August 2018) [2018] ZANCT 63

COURT

National Consumer Tribunal

BEFORE

D R Terblanche

CASE / FILE NUMBER

NCT/107447/2018/75(1)(b)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

CASE NO: NCT/107447/2018/75(1)(b)

In the matter between:

GAVINTHREN AND LEAH JOAN GOVENDER

APPLICANTS

AND

ADVANCE POOLS CC

RESPONDENT

In re Condonation application of:

GAVINTHREN AND LEAH JOAN GOVENDER

APPLICANTS

CORAM:

Ms. D Terblanche - Presiding Member

Date received: 27 July 2018

Date of Ruling: 2 August 2018

CONDONATION RULING AND REASONS

PARTIES

1. The Applicants are Gavinthren and Leah Joan Govender (hereinafter the “Applicants”).
2. The Respondent is Advance Pools CC (hereinafter the “Respondent”).

THE APPLICATION FORMING THE SUBJECT MATTER OF THIS RULING

3. This is an application to the National Consumer Tribunal (hereinafter the “Tribunal”) for condonation of the late filing of the Application by the Applicant for leave to refer their complaint, non-referred by the National Consumer Commission (hereinafter the “NCC”), directly to the Tribunal.
4. In terms of section 75(1)(b) of the Consumer Protection Act, Act 68 of 2008 (hereinafter the “CPA”), an application for leave to refer has to be filed with the Tribunal within twenty (20) days of the date of the notice of non-referral by the NCC[1], or such longer period as permitted by the Tribunal.
5. From the papers filed by the Applicants it appears the date of the notice of non-referral is 5 February 2018. This means the Applicants had to file their application for leave to refer their complaint directly to the Tribunal (the “main application”) by no later than 6 March 2018.
6. The Applicants filed their main application on 23 May 2018, approximately 50 days later than prescribed.
7. The Applicants set out in their affidavit, in support of the condonation application, that they:
 - 7.1. Posted the main application to the Respondent on 2 March 2018;
 - 7.2. Hand delivered it to the Tribunal on 5 March 2018;
 - 7.3. Had been dealing with fixing various matters relating to the requirements for the main application to be filed properly before the Tribunal from 5 March 2018 to 23 May 2018. Those matters included -
 - 7.3.1. Shortcomings in the service of the application i.e. failure to serve on the NCC and getting permission from a party to serve on them via email;
 - 7.3.2. Dealing with and fixing the incorrect citation of the Respondent (to ensure the correct party is before the Tribunal); and
 - 7.3.3. Fixing errors appearing from the face of the application.
8. The Respondent has not opposed this condonation application.

BACKGROUND**TO THE COMPLAINT**

9. The Applicants' complaints arise out of a contract they concluded with the Respondent during August 2016 for the fitment of a fibreglass pool, securing of coping, the installation of two securing layers of paving and a retaining wall.
10. The Applicants complained that the pool installation and the workmanship was defective and of poor quality.
11. The defects and poor quality they complained about are, amongst others: -
 - 11.1. internal and external cracks in the pool;
 - 11.2. lifting of the coping causing cracks in the surrounding paving;
 - 11.3. sagging of the retaining wall;
 - 11.4. problems with the pool pump; and
 - 11.5. excess sand and stone in the pool that could not be removed with conventional cleaning methods and have not been removed.
12. The Applicants obtained various reports, opinions regarding the defective installation and poor workmanship and quotations for the repairs thereof. These confirmed their view that the Respondent has contravened various provisions of the CPA.
13. The Applicants instituted a claim for damages against the Respondent in the Small Claims Court for the physical damages caused to the existing patio paving adjacent to the pool installation and the works contracted for. The Small Claims Court awarded the Applicants' claim for damages.
14. The NCC non-referred the Applicants' complaints on the basis that their complaints have been resolved in the Small Claims Court.
15. The Applicants take issue with the non-referral of the complaints by the NCC. They claim that their claims in the Small Claims Court are totally different and distinguishable from the complaints they have against the Respondent for, amongst others, the defective workmanship and poor quality of work, which they can only bring claims in terms of the CPA.

APPLICABLE SECTIONS OF THE CPA AND CASE LAW RELATING TO THE CONDONATION APPLICATION

16. Section 143(3)(c) of the National Credit Act, act 34 of 2005 (hereinafter the "NCA") contains the empowering provision for applications to permit late filing. It provides that -

"(3) The Chairperson of the Tribunal must assign any of the following matters to be heard by a single member of the Tribunal, sitting alone: ...

- (c) applications to permit late filing;..."

17. Rule 34(1) of the Regulations For Matters Relating To The Functions Of The Tribunal And Rules For The Conduct Of Matters Before The National Consumer Tribunal[2] sets out the process for applications for the condonation of late filings. It provides that -

“A party may apply to the Tribunal in Form TI r.34 for an order to:-

- (a) condone late filing of a document or application;...” (emphasis added).

DISCUSSION

18. 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].
19. Rule 34 (2) of the Rules of the Tribunal provides that “The Tribunal may grant the order on good cause shown”(Emphasis added). In order for the Tribunal to grant the Applicants’ condonation application, the Applicants therefore have to show “good cause”.
20. Good cause has to be interpreted in context and does not have a precise meaning. The Honourable JONES AJA in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* [5], SCA, Case No 127/2002, cautions against giving a precise meaning to “good cause”. He states -

“The authorities emphasize that it is unwise to give a precise meaning to the term good cause. As Smalberger J put it in HDS Construction (Pty) Ltd v Wait:19[6]

“When dealing with words such as "good cause" and "sufficient cause" in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words”; and

“With that as the underlying approach the courts generally expect an applicant to show good cause (a) by giving a reasonable explanation

of his default; (b) by showing that his application is made bona fide; and (c) by showing that he has a bona fide defence to the

plaintiff's claim which prima facie has some prospect of success (Grant v Plumbers (Pty) Ltd20[7], HDS Construction (Pty) Ltd v Wait and 21 Chetty v Law Society, Transvaal. 22[8])” (Footnotes added) and

“The Court's discretion must be exercised after a proper consideration of all the relevant circumstances.”

21. In *Head of Department, Department of Education Limpopo Province v Settlers Agricultural High School and Others*[9] it was held that the standard of considering an application for condonation is the ‘interests of justice’. As per the court -

“ It is first necessary to consider the circumstances in which this Court will grant applications for condonation for special leave to appeal. This Court has held that an application for leave to appeal will be granted if it is in the interests of justice to do so and that the existence of prospects of success, though an important consideration in deciding whether to grant leave to appeal, is not the only factor in the determination of the interests of justice. It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of justice and refused if it is not. 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 Applicants’ explanation for the delay or defect.” Emphasis added)

22. The factors to consider whether the Applicants have shown good cause for the Tribunal to grant them condonation are -

22.1. The nature and cause of the defect in respect of which condonation is sought;

22.2. The prospects of success;

22.3. The nature of the relief sought;

22.4. Prejudice; and

22.5. The importance of the matter and the effect on the administration of justice.

23. I noted -

23.1. The submissions made by Mr. Govender, on behalf of the Applicants in his affidavit; filed in support of the condonation application;

23.2. The papers filed of record;

23.3. That the Respondent did not oppose the condonation application brought by the Applicant; and

24. I will; in the paragraphs that follow; consider the pertinent factors to decide on the outcome of this application.

The nature and cause of any other defect in respect of which condonation is sought

25. The defect the Applicants seek condonation for is the late filing of their application in terms of section 75(1)(b) of the CPA.

26. From the submissions made by the Applicants it appears that they -

26.1. Initially filed their application, albeit defective, within the prescribed timeframe; and

26.2. Without undue delay attended to and fixed all the non-compliant procedural issues brought to their attention by the Tribunal.

27. It is clear to me that the delays with the filing were occasioned solely by administrative issues rather than substantial matters relevant to their complaints.
28. The delay, caused by fixing technical legal matters can; in my view; not be held against the Applicants and prevent them from having their main application considered by the Tribunal.

Prospects of success

29. In essence the Applicants complained that their rights to quality service and safe, good quality goods have been contravened by the Respondent.
30. The prospects of success of the Applicants' application; has to be determined by initially considering the issue of res judicata; and, if they pass that hurdle, that the relevant sections of the CPA have in fact been breached.
31. Section 69(d) of the CPA poses an impediment to consumers approaching the courts directly with complaints of prohibited conduct. It provides that –

“A person contemplated in section 4 (1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by— (d) approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted.”(Emphasis added)

32. This section has been interpreted by the courts[10] to mean that the complaints first have to be referred to and dealt with by the NCC.

‘In determining the matter the court had regard to the principle articulated by the Constitutional Court in *Chirwa v Transnet Limited & Others* [2007] ZACC 23; 2008

- (4) SA 367 (CC) to the effect that where a specialised framework has been created by the legislature for the resolution of disputes, parties must as a general principle pursue their claims through such frameworks.”[11]
33. In the context of a specialised framework having been established for dealing with prohibited conduct under the CPA, such complaints have to be dealt with through the structure created by the CPA. Those structures exclude the Small Claims Court.
34. The Applicants were well advised to claim for their damages to the paving through the Small Claims Court and then refer their complaints of prohibited conduct to the Consumer Goods Ombud, NCC and the NCT. This does not mean that the Applicants can never claim for the damages they incurred as a result of prohibited conduct. To claim damages resulting from prohibited conduct through the courts, there has to be a determination of prohibited conduct by the Tribunal and a certificate issued by the Chairperson of the Tribunal.

35. On the face of what is before me at this stage of the proceedings, I am of the view that the Applicants have good prospects of the Tribunal determining the issue of res judicata in their favour; and the Tribunal finding that the Respondent has committed prohibited conduct / infringed their rights under the CPA.

36. Section 53(1)(a) defines what a 'defect' is, section 54 the consumer's rights to demand quality service and section 55 the consumers' rights to safe, good quality goods.

37. Section 53(1) provides as follows -

"defect" means—

(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 service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or

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

38. Section 54 provides as follows -

"(1) When a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to—

(a) the timely performance and completion of those services, and timely notice of any unavoidable delay in the

performance of the services;

(b) the performance of the services in a manner and quality that persons are generally entitled to expect;

(c) the use, delivery or installation of goods that are free of defects and of a quality that persons are generally entitled to expect, if any such goods are required for performance of the services; and

(d) the return of any property or control over any property of the consumer in at least as good a condition as it was when the consumer made it available to the supplier for the purpose of performing such services,

having regard to the circumstances of the supply, and any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services."

39. Section 55(2) provides as follows -

"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 5 No. 29 of 1993), or any other public regulation.”

Nature of the relief sought

40. The Applicants seek a refund of the money they paid to the Respondent; removal of the defective pool at the Respondent's costs;

restoration of their property to its original state at Respondent's costs; refund of the fee paid to the expert for the expert report and the costs incurred for water.

41. The Tribunal is empowered to grant the relief the Applicants seek in terms of section 150 of the National Credit Act, Act 34 of 2005 (hereinafter the “NCA”) as amended. It provides, amongst others, in section 150(i) thereof that the Tribunal “may make any other appropriate order required to give effect to a right, as contemplated in this Act or the Consumer Protection Act, 2008.”

Prejudice

42. The Tribunal accepts the Applicants' submissions that the “...Respondent did not and will not suffer prejudice by the late filing ... where the Respondent has, as far back as 2 March 2018, had sight of the full papers and complaint”.

The importance of the matter and the effect on the administration of justice

43. This matter is of importance-

43.1. To the Applicants having paid tens of thousands of rands for a product and service they cannot utilise;

43.2. This is evidenced by the Applicants' pursuit of their complaint and relief under the CPA through the many channels they have engaged to date;

and

43.3. For the Tribunal to set a precedent and provide guidance to consumers and suppliers of goods and services, on the interpretation and application of the CPA in respect of complaints of this nature and the interface of the Tribunal with the civil courts.

FINDING

44. Having considered the factors above the Tribunal finds that the Applicants have shown good cause for the Tribunal to condone the late filing of their application.

ORDER

45. Accordingly -

45.1. The Applicants' application for the condonation of their late filing of their main application for leave is hereby granted; and

45.2. No order is made as to costs.

Dated at Centurion this 2nd day of August 2018.

Ms. D R Terblanche

Tribunal Member

[1] Table 2 to the Rules of the Tribunal Published under GN 789 in GG 30225 of 28 August 2007 as amended by GenN 428 in GG 34405 of June 2011 (published in terms of the Consumer Protection Act 68 of 2008). GN R203 in GG 38557 of 13 March 2015 and GN 157 in GG 39663 of 4 February 2016

[2] Published under GN 789 in GG 30225 of 28 August 2007 as amended by GenN 428 in GG 34405 of June 2011 (published in terms of the Consumer Protection Act 68 of 2008). GN R203 in GG 38557 of 13 March 2015 and GN 157 in GG 39663 of 4 February 2016

[3] Oxford English Dictionary, Second Edition at page 151.

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

[5] (127/2002)

[2003] ZASCA 36; [2003] 2 All SA 113 (SCA) (31 March 2003)

[6] 1979

(2) SA 298.

[7] 1949

(2) SA 470 (0)

[8] [1985] 2 ALL SA 76 (A)

[9] (CCT36/03)

[2003] ZACC 15; 2003 (11) BCLR 1212 (CC) (2 October 2003) 2003 (11) BCLR 1212 (CC) at para [11].

[10] Joroy 4440 CC v Potgieter and Another NNO 2016

(3) SA 465 (FB).

[11] CORPORATE AND COMMERCIAL ALERT, Justine Krige (CliffE, Decker Hofmeyr), 21 january 2017 / <https://www.cliffedekkerhofmeyr.com/en/news/publications/2017/corporate/corporate-and-commercial-alert-18-jan-enforcing-consumer-rights-through-courts-must-one-first-exhaust-all-other-remedies.html>

J- ustine Krige

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Prepared on 12 October 2026 · Esheria