

SOUTH AFRICA / JUDGMENT

Gwabeni v Peng Investments (Pty) Ltd trading as Haval Hatfield (Condonation Ruling) (NCT/280884/2023/75(1)(b)) [2023] ZANCT 43 (10 October 2023) [2023] ZANCT 43

COURT

National Consumer Tribunal

BEFORE

A Potwana

CASE / FILE NUMBER

NCT/280884/2023/75(1)(b)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

Number: NCT/280884/2023/75(1)(b)

In

the condonation
application between:

MXOLISI
MICHAEL GWABENI
APPLICANT
and
PENG
INVESTMENTS (PTY) LTD TRADING AS HAVAL HATFIELD
RESPONDENT
In

re:

MXOLISI
MICHAEL GWABENI
APPLICANT
and
PENG
INVESTMENTS (PTY) LTD TRADING AS HAVAL HATFIELD
RESPONDENT

Coram: Dr
A Potwana- Presiding Tribunal member
CONDONATION

RULING

(Late filing of an application for leave to refer a matter directly to the Tribunal)

THE PARTIES

1. The applicant is Mxolisi Michael Gwabeni, an adult male person. The applicant is a consumer as defined in section 1 of the Consumer Protection Act 68 of 2008 (CPA).
2. The respondent is Peng Investments (Pty) Ltd, a private company that was duly incorporated and registered in terms of the company laws of the Republic of South Africa.

TYPE OF APPLICATION AND JURISDICTION

3. In this application, the applicant seeks an order condoning the late filing of his application for leave to refer his complaint to the Tribunal. The condonation application is made in terms of rule 34 of

the Tribunal

Rules.[1]

4. The Tribunal has jurisdiction in terms of section 27(a)(i) of the National Credit Act 34 of 2005 (NCA) to consider this application.

INTRODUCTION

5. On 2 August 2023, the applicant filed an application for condonation for the late filing of an application for leave to refer a complaint to the Tribunal using the prescribed form for filing documents with the Tribunal, Form TI.r30A.

FACTS

6. In “Part C: Order sought from the Tribunal and grounds for application” of the prescribed form for making condonation applications, Form TI.r34, the applicant stated that the National Consumer Commission (Commission) issued a Notice of Non-Referral in May 2023. During that time, in May and June, he had two funerals he had to attend in the Eastern Cape. In addition, he needed to get clarity about the delay in issuing the notice of non-referral from the Commission. In addition to Form TI.r34, the applicant filed his application for leave to refer a matter directly to the Tribunal using the prescribed form, Form TI.73(3) & 75(1)(b) & (2) CPA. In “Part D: Order sought from the Tribunal” of Form TI.73(3) & 75(1)(b) & (2) CPA, the applicant stated that if leave is granted, among others, he will seek that the credit agreement instalment he is paying towards Wesbank be amended or reduced. He

complained that he was denied the right to return a vehicle within the six months prescribed under the CPA.

7. In support of his application for leave, the applicant filed an affidavit. In his affidavit, he stated that he bought a GWM Steed 6 bakkie (bakkie) from the respondent. Within six months, the bakkie broke down four times. He took it back to the respondent. The respondent took more than six months to test the bakkie. In June 2020, the respondent informed him there was nothing wrong with the bakkie. He advised the respondent that he did not want the bakkie and

offered to take a smaller Haval H1 (Haval). The Haval was delivered to his house, and he was asked to sign a stack of papers. He signed the credit agreement on 2 July 2020. When he reviewed the documents he had signed, he realised that the respondent and Wesbank had increased some of the amounts quoted to him and had settled the bakkie's debt. The respondent claimed that there was nothing wrong with the amounts and that he had signed a contract.

8. The applicant's documents were served on the respondent by registered mail on 21 July 2023. On 3 August 2023, the Tribunal's

Registrar issued a notice of filing and served the same on the parties by email. In terms of Rule 13 of the Rules of the Tribunal,[2] the respondent had 15 business days after being served with the application to serve an answering affidavit on the applicant and file the same with the Tribunal. The respondent, however, did not do so.

THE LAW

9. Section 116(1) of the CPA states –

“A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court

more than three years after-

- (a) the act or omission that is the cause of the complaint; or
- (b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.”

10. Rule 34 (1)(b) of the Tribunal Rules states, “A party may apply to the Tribunal in Form TI r.34 for an order to condone late filing of a document or application.”
11. Rule 34 (2) of the Tribunal Rules states, “The Tribunal may grant the order on good cause shown”.
12. Rule 13 (1) of the Tribunal Rules states, “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 the Applicant; and every other person on whom the application was served.”

13. Rule 13(5) of the Tribunal Rules states that “Any fact or allegation in the application or referral not specifically denied or admitted in an answering affidavit, will be deemed to have been admitted.”
14. 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]. In *Melane v Santam Insurance Company Limited*,⁵ the Court 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. Among the facts usually relevant are the degrees of lateness, the explanation therefore, 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.”

CONSIDERATION OF THE MERITS

15. In considering the merits of the applicant’s condonation application, the Tribunal will consider whether the applicant enjoys reasonable prospects of success. From the dictum in *Melane*, it is clear that “without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.”
16. Both the bakkie and the Haval were purchased more than three years ago. Section 116(1)(a) of the CPA states, “A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after the act or omission that is the cause of the complaint.” The provisions of section 116(1)(a) of the CPA are a word-for-word reproduction of the provisions of section 166(1)(a) of the NCA. In *FirstRand Bank Ltd v Annet Ludick*, the High Court of South Africa (Gauteng Division, Pretoria),^[5] the Court stated, “Section 166 of the NCA prohibits any referral of complaints to the Tribunal which occurred more than three

years after the act or omission complained by the complainant.” The Court further held that the Tribunal’s reliance on two of its decisions in which it allowed itself the discretion not to apply the provisions of section 161 is “clearly wrong if the wording of section 166 is taken into account.”⁷

17. In view of the dicta in *Ludick* and *Melane*, the applicant does not enjoy reasonable prospects of success, and the applicant’s application for condonation should be refused.

CONCLUSION

18. The applicant has not shown good cause for condonation to be granted.

ORDER

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

19.1. condonation for the late filing of the applicant's application for leave to refer is refused, and

19.2. no order is made as to costs.

Thus done and signed on 10 October 2023.

[signed]

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Dr A Potwana

Presiding Tribunal member

[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] 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).

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

[4] Collins English Dictionary and Thesaurus, Fourth Edition 2011, at pg170. 5 1962 (4) SA 531 (A) at 532C-F.

[5] Case No.: A 277/ 2019. 7 At paragraph 26.

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