

SOUTH AFRICA / JUDGMENT

Mabatha v Johan and Philly Auto Traders CC t/a Cars.Com11 (NCT/117449/2018/75(1)(b)) [2019] ZANCT 53 (19 April 2019)

[2019] ZANCT 53

COURT

National Consumer Tribunal

BEFORE

P A Beck

CASE / FILE NUMBER

NCT/117449/2018/75(1)(b)

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IN THE NATIONAL
CONSUMER TRIBUNAL
HELD IN
CENTURION
Case

number:	NCT/117449/2018/75(1)(b) In
the matter between:	NOLITHA MABATHA APPLICANT AND JOHAN AND PHILLY AUTO TRADERS CC T/A CARS.COM11 RESPONDENT

Coram:

P A BECK - Presiding

Member

CONDONATION

JUDGMENT AND REASONS

APPLICANT

1. The

Applicant is Nolitha Mabatha, an adult major female, residing in Soshanguve, Gauteng (“the Applicant.”)

RESPONDENT

2. The

Respondent is Johan and Philly Auto Traders cc t/a Cars.Com with registration number 207/122835/23 with its principal place of

business at 722 Steve Biko Drive, Gezina, Pretoria, (“the Respondent.”)

APPLICATION

TYPE

3. This

is an application to the National Consumer Tribunal (“the Tribunal”) to condone the Respondent’s non-compliance with its Rules. The Application is brought in terms of Rule 34 of the Rules of the Tribunal[1].

BACKGROUND

TO THE CONDONATION APPLICATION

4. On

12 November 2015, the Applicant approached the Respondent to trade in the Applicant’s Nissan (“the Nissan”)

hard body 4X4

double cab NP300 bakkie to purchase a Toyota Hilux (“the Toyota”) from the Respondent. The purchase price of the Toyota

was R265 100,00. On the same day, the Applicant signed an offer to purchase the Toyota. At the time

of signature of the

offer to purchase, the Applicant did not know the trade in value of her Nissan motor vehicle nor that there

was a shortfall on the deal

of R130 000,00 which the Applicant had to finance herself.

5. On

13 November 2015, the salesperson of the Respondent informed the

Applicant that to conclude the deal, a deposit of R130 000,00

was required from the Applicant. With the assistance of the

Respondent’s salesperson, the Applicant applied for a loan from

Absa bank Limited to finance the deposit. Absa Bank Limited

approved a loan of R62 000,00 in favour of the Applicant.

The

Applicant deposited the R62 000,00 into the Respondent’s

bank account in part payment of the deposit. The

salesperson

told the Applicant that the Applicant must attempt to obtain the difference of R68 000,00 to make up the shortfall

of the deposit
of R130 000,00.

6. The

salesperson of the Respondent also explained to the Applicant that the dealership settled the outstanding balance on the Applicant's Nissan of R145 091,07 and the outstanding balance on the Applicant's Citroen in the amount of R18 676,72. The Applicant did not consent to the dealership settling the outstanding balances on her vehicles.

7. On

18 November 2015, the Applicant met with the director of the Respondent, Johan Boshoff ("Boshoff.") The Applicant explained to Boshoff that she was not able to secure a loan in the amount of R68 000,00 to make up the shortfall of the deposit. The Applicant offered to pay Boshoff R5000,00 per month until the amount of R68 000,00 was settled in full, which offer Boshoff refused.

8. The

Applicant cancelled the deal and requested a refund of the deposit paid of R62 000,00 and the return of her Nissan. Boshoff refused

to return the Nissan. He said that he had already sold the Nissan to a 3rd

party. He did however credit the Applicants account with R18 676,72 being the settlement amount on the Applicant's Citroen vehicle. Boshoff refused to refund the Applicant the deposit of R62 000,00.

9. The

Applicant filed a complaint with the Motor Industry Ombudsman of South Africa ("MIOSA"). MIOSA concluded that case

does not fall under their jurisdiction and advised the Applicant to seek legal advice. On 1 April 2016, the Applicant lodged a complaint

with the National Consumer Commission ("the NCC.")

On 29 September 2018, the Applicant received a letter of non-referral

from the NCC. The Applicant approached the Tribunal to seek leave to refer her complaint directly

to the Tribunal. On 19 November

2018, the Registrar of the Tribunal issued a notice of set down of the hearing on 21 January 2019

to hear the Applicant's

application for leave to refer.

10. At

the hearing, the Presiding Member informed the Respondent's legal representative that the matter is deemed unopposed; and was set

down on a default basis; which came as a surprise to the Respondent.

11. The

Respondent applied for and was granted a postponement of the matter.

The Respondent's Application for a postponement was not opposed by the Applicant. The Presiding Member issued an order that the Respondent must file its answering affidavit and an application for condonation within 15 business days from the date of the hearing. 12. Accordingly, the Respondent is obliged to bring this application for condonation for the late filing of the Respondents' answering affidavit.

APPLICABLE

RULES OF THE TRIBUNAL, THE ACT AND CASE LAW

13.

Rule 34 (1) states "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;

(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."

14.

Rule 34 (2) states "The Tribunal may grant the order on good cause shown".

15.

Rule 13 (1) 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:

(a) the

Applicant; and

(b) every

other person on whom the application was served.

Rule 13(2) states

that 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".

16.

The

Tribunal may therefore grant an application for condonation if the Applicant is able to show good cause as to why the Applicant did not

comply with the Rules.[2]

17.

In Head

of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others[3]

it was held that the standard of considering an application of this nature is the interests of justice.

18.

Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. 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.[4]

19.

In Melane v Santam Insurance Company Limited 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. 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. 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. The courts have traditionally demonstrated their reluctance to penalize a litigant on account of the conduct of his representative but it emphasized that there is a limit beyond which a litigant cannot escape the results of the representative's lack of diligence or the insufficiency of the information tendered (Saloojee & Another NNO v Minister of Community Development 1965 (2) A 135 (A) 140H-141B; Buthelezi & Others v Eclipse Foundries Ltd 18 ILJ 633 (A) at 6381-639A)." Similar factors were also discussed by the court in the earlier case of Melane v Santam Insurance Company Limited^[5] where it was pointed out that a court has a discretion which should be exercised judicially upon consideration of all the facts.^[6]

20.

From the dictum in Melane it was held that these factors are interrelated and should not be considered separately.

CONSIDERATION OF THE MERITS

21.

In evaluating the merits of the application the Tribunal considered the following factors –

-
- The Act, the Rules of the Tribunal and relevant case law;
-
- The Applicant has not opposed the Application for condonation;
-
- The Respondent has provided a reasonable explanation for the delay and has attempted to comply with the Rules for the conduct of matters before the Tribunal as soon as he became aware of the Rules;
-
- The explanation offered by the Respondent is reasonable in the circumstances; and
-

It is an important matter for both parties and in the interests of justice that both parties be given an opportunity to raise all the relevant issues; and to be given an opportunity to respond to the issues raised; and to place the full facts before the Tribunal.

22.

The main reason advanced by the Respondent, for failing to file its answering affidavit in accordance with the Tribunal Rules is that the Respondent was not initially aware of the Rules for the conduct of matters before the Tribunal; and the Respondent was not legally represented at the time of first filing the Respondent's answering affidavit on the Tribunal.

23.

The Respondent submits that in October 2018, the Respondent received a filing notice from the registrar of the Tribunal informing the Respondent to file the Respondent's answering affidavit by 2 November 2018. The Respondent filed the Respondent's answering affidavit on the Tribunal on 1 November 2018.

24.

On 7 November 2018, the Registrar of the Tribunal drew to the Respondent's attention that the Respondent is required to file the Respondent's answering affidavit on the Applicant as well as on the Tribunal. On 7 November 2018, the Respondent filed the Respondent's answering affidavit, by hand, on the Applicant. On 8 November 2018, the Respondent received an e-mail from the Registrar of the Tribunal informing the Respondent that the Respondent's answering affidavit was served three days late on the Applicant; and that the Respondent is required to file an application for condonation for the late filing of the Respondent's answering affidavit on the Applicant.

25.

On 12 November 2018, the Respondent filed an application for condonation for the late filing of the Respondent's answering affidavit on the Tribunal; and on 14 November 2018, the Respondent filed the application for condonation, by hand, on the Applicant.

26. On

16 November 2018, the registrar of the Tribunal highlighted to the Respondent a short coming in the Respondents condonation application, specifically that the spelling of the Applicant's name was incorrect. The Registrar also informed the Respondent that the Respondent was "entitled to re-submit" the Respondent's application for condonation. The Respondent interpreted the words

“entitled to resubmit” to mean that the Respondent was not compelled to re-submit the Respondent’s application for condonation. The Respondent saw the spelling error as not material. In the Respondent’s view the condonation application and the Respondent’s answering affidavit was acknowledged by the Registrar; the notice of set down of the hearing on 21 January 2019, was subsequently served on the Respondent. This put the Respondent at ease that the Respondent had properly opposed the matter.

27.

On 18 January 2019, in order to prepare the Respondent’s bundle for the hearing set down on 21 January 2019, the clerk of the Respondent’s legal representative attended the offices of the Tribunal. The clerk confirmed that the Respondent’s answering affidavit and the Respondent’s application for condonation were filed in the Tribunal’s file. This further satisfied the Respondent that it was properly before the Tribunal. At the hearing on 21 January 2019, the Presiding Member told the Respondent that the Respondent’s answering affidavit and the Respondent’s application for condonation was not properly before the Tribunal. Further that the matter was set down on a default basis. The Presiding Member granted the Respondent a postponement of the matter in order to properly file an application for condonation for the late filing of the Respondent’s answering affidavit; the application was duly filed by the Respondent; and it was not opposed by the Applicant.

28. The

Respondent submits that should the Application for condonation be refused, the Respondent would suffer immense prejudice; that the Respondent has prospects of success; that there is no prejudice to the Applicant who was served the Respondent’s answering affidavit on 7 November 2018; and the Applicant therefore had adequate time to prepare for the hearing.

29. The

Respondent submits that there is no prejudice to the Applicant should the Tribunal condone the late filing of the Respondent’s answering affidavit; and indeed the Respondent’s answering

affidavit was filed on the Tribunal in accordance with the time frames of the Rules for the conduct of matters before the Tribunal, albeit it not properly filed on the Applicant; and thus not filed in full compliance with the Rules of the Tribunal.

30.

In conclusion in evaluating the merits of the application; the Tribunal finds that the Respondent has provided a reasonable explanation for the delay in not properly filing the Respondent's answering affidavit and the Respondent's application for condonation; that it can be seen from all the filings of the Respondent that the Respondent made every effort to file its answering affidavit in good time as well as the Respondent's application for condonation; there was no delay on the part of the Respondent in placing the Respondent's defence before the Tribunal.

31.

Accordingly, I find that it is in the interests of justice that the Respondent be given an opportunity place the full facts of the matter before the Tribunal in order to bring finality to the matter.

32.

The Tribunal therefore grants the application for condonation. The normal rules will apply for the filing of the replying affidavit.

RULING

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

33.1 The application for condonation is granted;

33.2 The Applicant must file her replying affidavit within 10 days of the issuing of this judgment on the Respondent and file same on the Tribunal; and

33.3 There is no order as to costs.

DATED AT JOHANNESBURG ON THIS 19th DAY OF APRIL 2019

[Signed]

P A BECK

TRIBUNAL MEMBER

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- [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] Rule 34(2) of the Rules.
- [3] 2003 (11) BCLR 1212 (CC) at para[11].
- [4] 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.
- [5] 1962 (4) SA 531 (A) at 532C-F.
- [6] See also See also 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.
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