

SOUTH AFRICA / JUDGMENT

Mkwalo v Mystical Summer Trading 57 CC t/a Ultimate Auto (NCT122479/2018/75(1)(b)Rule34)

[2019] ZANCT 17 (24 February 2019)

[2019] ZANCT 17

COURT

National Consumer Tribunal

BEFORE

Tanya Woker

CASE / FILE NUMBER

NCT122479/2018/75(1)(b)Rule34

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

Number: NCT122479/2018/75

(1) (b) Rule 34

In

the matter between:

LUMKILE
MKWALO
APPLICANT
and
MYSTICAL
SUMMER TRADING 57
CC RESPONDENT
T/A
ULTIMATE AUTO

Coram:

Prof
Tanya Woker
-
Presiding member
CONDONATION

JUDGMENT

THE PARTIES

1. The Applicant in the matter is Lumkile Mkwalo , an individual consumer who resides in Deneysville (the Applicant).
2. The Respondent is Mystical Summer Trading 57 CC t/a Ultimate Auto with registration number 2006/048742/23 (the Respondent).
3. The Respondent is not on record before the Tribunal and is thus not considered as opposing the condonation application.

APPLICATION

4. The matter before the Tribunal at present is an application for condonation for the late filing of the application for referral of a complaint to the National Consumer Tribunal (the Tribunal) with leave of the Tribunal required in terms of section 75(1)(b) of the Consumer Protection Act, 2008 (the CPA).
5. Before the Tribunal hears the main matter it must consider the application brought by the Applicant to condone its non-compliance with the Tribunal Rules.[1]

BRIEF FACTS OF THE MATTER

6. The Applicant purchased a 2007 model Audi A3 with 146 000 kms on the odometer from the Respondent on or about 29 September 2015 for a total cost of R111 995.21. Included in the purchase price was a warranty for R5 434.39. The Applicant alleges that he was assured that the vehicle had a full service history.
7. Within three months after purchasing the vehicle, the vehicle broke down and it was returned to the Respondent. At the time it had 156 420 kms on the odometer. A diagnosis showed that the cambelt and head gasket were damaged.
8. A repair invoice dated 6 April 2016 indicated that the repairs would cost R20 083.40. In terms of the warranty, Innovation Group, the insurer, agreed to contribute R8 500 towards the cost of repairs. It was then proposed that the Respondent and the Applicant would each contribute 50% of the remaining amount of the repairs which amounted to R5 791.00 each.
- 9 The Applicant disputed that he was liable for any of the repairs as the vehicle had broken down within the implied warranty period set out in section 56 of the CPA.
10. Nevertheless it appears that the vehicle was repaired by the Respondent; but the Applicant did not pay his portion of the repairs (as he disputes that he owes this to the Respondent). The Respondent has therefore retained the vehicle and now claims storage charges from the Applicant. In December 2017 those storage charges amounted to R75 000.

11. The Applicant referred his complaint to the Motor Industry Ombudsman of South Africa (MIOSA). The exact date of the referral is unknown to the Tribunal.
12. On 6 June 2017 the Ombudsman issued a determination that:

“The cause of the failure was due to a cambelt which the service provider failed to replace during the 120 000 kilometer service prior to Mr Mkwalo purchasing the said vehicle. No agreement was reached or confirmed for both parties to be liable for 50% repair cost although an offer was made. Ultimate Auto Vereeniging proceeded to carry out repairs without Mr Mkwalo accepting or declining the quotation and the associated costs in contravention of the abovementioned section 15 subsection 2 of the Consumer Protection Act of 2008 and failed to provide adequate proof of the repairs carried out and the agreement enter into.[2]”
13. The MIOSA further determined that:

“As the said failure occurred during the implied six month warranty period and was caused by an omission by the service provider, we support Mr Mkwalo’s expectation and he must not be held liable for 50% of the shortfall amount incurred. With regards to storage costs, Mr Mkwalo was informed that storage costs would be charged from 21 March 2016. We concluded that Mr Mkwalo must settle the storage costs and collect his vehicle without a contribution towards the repair cost. This must be carried out within fifteen (15) days of receipt of this correspondence.”
14. On 7 June 2017 (the day after the MIOSA determination) the Applicant referred the matter to the National Consumer Commission (the Commission). In his details of the complaint the Applicant disputes that he should be liable for the storage costs that accumulated while the car was being repaired. He argues that the ruling of the MIOSA:

“makes little sense at best and self- contradictory at worst. The ruling rightly places liability for the break-down squarely on the shoulders of the dealership, yet places liability on me for parallel repair items such as storage fees during repairs.”
15. The Commission issued a notice of non-referral on 29 November 2017 in which it stated that the complaint does not allege any facts which, if true, would constitute grounds for a remedy under the Consumer Protection Act, 2008. The attached email indicates that the Commission declined to pursue the matter because there is a dispute of facts between the parties.
16. The Applicant then attempted to file for leave to refer the matter directly to the Tribunal which application was received by the Tribunal on 3 January 2018. This application did not comply with the Tribunal rules and the Tribunal informed the Applicant of the correct procedure that needed to be followed in a letter dated 23 January 2018. The Applicant was informed that he needed to re-file a complete set of documents in accordance with the Tribunal rules within 15 business days of the date of the letter. Once this was done this would be considered as a new filing and a case number would be issued.

17. From the documents before the Tribunal it appears that the Applicant then consulted with an attorney and prepared an affidavit in which he set out his complaint and his reasons for applying for condonation for the non-compliance with the Tribunal rules. The affidavit was signed on 13 February 2018.
18. The Form TI 73(3) and 75(1) (b) and (2) CPA which is the Notice of Application for referral of a complaint to the Tribunal as required in terms of section 75 (1) (b) of the CPA was signed by the Applicant's attorney on 17 April 2018. However, for reasons which are not clear to the Tribunal, the application was only served on the Tribunal on 18 December 2018.

APPLICABLE RULES OF THE TRIBUNAL

19. Rule 34 of the National Consumer Rules provides that a party may apply to the Tribunal for an order to condone the late filing of a document and that such application may be granted by the Tribunal "on good cause shown." [3]

THE APPLICANT'S SUBMISSIONS

20. The Applicant submits that:

20.1 The Notice of Non-referral did not provide any explanation of the process he was required to follow in approaching the Tribunal and as a layperson, he was under the mistaken impression that he was not under any specific deadline;

20.2 On 23 January 2018 the Tribunal, following receipt of his application informed him of the correct procedure to follow;

20.3 He then realised that he needed legal assistance and approached a firm of attorneys.

20.4 While preparing the affidavit he was in constant communication with the Tribunal and has at all times acted expeditiously "within the constraints of procedural knowledge";

20.5 No disrespect was meant to the Tribunal, the Respondent nor the Commission;

20.6 The Respondent will suffer no prejudice if condonation is allowed because it will be able to file opposing papers within the time lines allowed; and

20.7 He will suffer grave prejudice if condonation is not granted because he will be unable to exhaust the remedies available to him in terms of the CPA; he will be unable to recover his vehicle which MIOSA ordered the Respondent to repair at its cost; he will be unable to afford the storage fees that were R75 000 in December 2017 and which continue to accrue on a daily basis; he is still liable for vehicle finance repayments.

OPPOSING

SUBMISSIONS

21. The condonation application is not opposed.

ISSUES

TO CONSIDER

22. The Tribunal may grant an application for condonation if the Applicant is able to show good cause as to why it did not comply with the rules.
23. In *Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others*[4] it was held that the standard of considering an application of this nature is the interests of justice.
24. 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:
 - a. the nature of the relief sought;
 - b. the extent and cause of the delay;
 - c. the effect of the delay on the administration of justice and other litigants;
 - d. the reasonableness of the explanation for the delay;
 - e. the importance of the issue to be raised in the intended application; and
 - f. the prospects of success.[5]
22. Similar factors were also discussed by the court in the earlier case of *Melane v Santam Insurance Company Limited*[6] where it was pointed out that a court has a discretion that should be exercised judicially upon consideration of all the facts.

CONSIDERATION OF THE MERITS

23. Whilst there is no exhaustive list of factors to be considered by a court or tribunal when deciding whether or not to condone non-compliance with its rules, the following factors were considered by the Tribunal in this matter:
 - a. Degree of lateness and reasons therefore;
 - b. Prospects of success;
 - c. Importance of the matter; and
 - d. interests of justice.

Degree of lateness and reasons therefore

24. In *Saloojee and Another NNO v Minister of Community Development*[7] the court held that an excessive delay would require an extraordinarily good explanation. Condonation is likely to be granted in instances where the degree of lateness is not excessive.

25. The Applicant received a notice of non-referral dated 29 November 2017 which he says he received in December 2017. He then first attempted to file an application for leave to refer the matter directly to the Tribunal on 3 January 2018. Given the

fact that this was the holiday period and the Tribunal offices would have been closed for a period of time over that period it is highly likely that the application was filed within the 20 period or the degree of lateness would have been negligible. However the application did not comply with the rules and the Applicant was then informed on 23 January 2018 of the correct procedure to follow. It appears that the Applicant then sought legal assistance and an affidavit was drafted with the assistance of an attorney. The affidavit was signed on 13 February 2018. Had that affidavit been filed with the Tribunal together with a full condonation application at that time, the degree of lateness would not, in my view, have been excessive. The Form TI 73(3) and 75(1) (b) and

- (2) CPA which is the Notice of Application for referral of a complaint to the Tribunal as required in terms of section 75 (1) (b) of the CPA was signed by the Applicant's attorney on 17 April 2018.
26. However, it appears from the documents before the Tribunal that the application was only filed on 18 December 2018; this is an issue which is of serious concern. The Applicant has provided no further explanation regarding why it has taken him so long to file his application for condonation. Any explanation for failing to file within the 20 day period can only be found in the affidavit which is dated 13 February 2018.
27. The degree of lateness is therefore regarded as excessive.

Prospects of success

28. This matter involves a complaint about a defective motor vehicle. In its determination the MIOSA considered sections 55, 56 and 15 of the CPA. Therefore the complaint falls squarely within the ambit of the CPA. The MIOSA which is the ombudsman established for the resolution of disputes in the motor industry determined that the Respondent should have repaired the vehicle at its own cost and that the Applicant was not responsible for a share of the costs. The Applicant has disputed the MIOSA determination that he should be liable for the costs of storage; such a determination means that the Applicant is liable for far more than the actual costs of the repairs. In my view this is a matter which should be considered by the full Tribunal.

Importance of the case

29. The matter is clearly important to the Applicant as he has approached a number of forums in an attempt to settle this matter. He also does not have possession of his vehicle which is currently being stored by the Respondent. Storage costs are increasing every day therefore it is important that this issue should be resolved.

Interests of justice

30. As pointed out in the case of *Melane v Santam Insurance Company Limited*[8] a court has a discretion that should be exercised judicially upon consideration of all the facts. The degree of lateness in this matter is excessive and usually in such circumstances I believe that the Tribunal would have grounds for refusing the application for condonation. At the time when the Applicant originally tried to file his application for leave to refer he was not represented and this is an issue which would have been taken into consideration when deciding whether or not to grant condonation. However by February 2018 he was represented and an affidavit setting out the reasons why he had not filed his application within the 20 day period had been signed. Why he only filed his application on 18 December 2018 has not been explained.
31. However the Respondent has not opposed the application for condonation.
32. In addition, it appears from the papers before the Tribunal that the vehicle is still being stored by the Respondent and storage costs are increasing on a daily basis. I am of the view therefore that despite the excess delay in bringing this application it is in the interests of justice that this matter should be resolved as expeditiously as possible. This matter must be resolved by referring the matter to the Tribunal. In the case of *Joroy 4440 CC t/a Ubuntu Procurement v Potgieter N.O. and Another*[9] the court held that consumers are obliged to follow the procedures set out in section 69 of the CPA before approaching the civil courts for relief. This means that before the Applicant can approach the civil courts he must exhaust his remedies under the CPA;[10] this includes approaching the Tribunal for a hearing.

ORDER

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

33.1 Condonation is hereby granted to the Applicant for the late filing of its application for leave to refer in terms of Rule 34; and

33.2 No order is made as to costs.

DATED ON THIS 24th day of February 2019.

(signed)

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Prof. T Woker

Presiding Member

[1] Rules for the conduct of Matters before the National Consumer Tribunal published under GG 30225 of 28 August as amended by GenN428

in GG 34405 of 29 June 2011.

[2] See page 19 of the documents before the Tribunal.

[3] Rule 34(2) of the Rules.

[4] 2003

(11) BCLR 1212 (CC) at para[11].

[5]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.

[6] 1962

(4) SA 531 (A) at 532C-F.

[7] 1965

(2) SA 135 (A) 141 B-H.

[8] 1962

(4) SA 531 (A) at 532C-F.

[9] 2016 (3) SA 465 (FB).

[10] See in particular section 69 (d) of the CPA.

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