

SOUTH AFRICA / JUDGMENT

Mncanza v JD Consumer Electronics and Appliances (Pty) Ltd t/a Incredible Connection (NCT/117246/2018/ 75(1)(b)) [2019] ZANCT 4 (21 January 2019)

[2019] ZANCT 4**COURT**

National Consumer Tribunal

BEFORE

D Terblanche

CASE / FILE NUMBER

NCT/117246/2018/ 75(1)(b)

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Source record**IN THE NATIONAL
CONSUMER TRIBUNAL
HELD IN CENTURION**

Case number: NCT/117246/2018/ 75(1)(b)- Rule 34
In the matter

between: Anele Lawyer Mncanza
APPLICANT
AND
JD Consumer
Electronics and Appliances (Pty) Ltd
RESPONDENT
t/a
Incredible Connection
CONDONATION

RULING**THE PARTIES**

1. The Applicant is Anele Lawyer Mncanza (hereinafter referred to as the Applicant”), an adult male.
2. The Respondent is JD Consumer Electronics and Appliances (Pty) Ltd t/a Incredible Connection (hereinafter referred to as the “Respondent”).

TYPE OF APPLICATION

3. This is an application to the National Consumer Tribunal (hereinafter the “Tribunal”) for condonation of the late filing of the Applicant’s application for leave to refer his complaint, non-referred by the National Consumer Commission (hereinafter the “Commission” or 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”), such applications have to be filed with the Tribunal within twenty (20) days of the date of the notice of non-referral by the NCC, or such longer period as permitted by the Tribunal.
 5. The Applicant brought this condonation application in terms of 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[1] (hereinafter the “Rules”).
 6. From the papers filed by the Applicant it appears that the Notice of Non-referral is dated 4 September 2018. This means the Applicant had to file his application with the Tribunal by no later than 3 October
2018. The Applicant filed his application with the Tribunal on the 10th of October 2018, approximately 5 (five) days later than prescribed.
7. The Applicant submitted that the late filing was not due to negligence or lack of effort on his part. In this regard, the Applicant states that:
 - 7.1. He has previously made two (2) filings for the same complaint to the Tribunal; and
 - 7.2. In both instances the Applicant’s submissions were on time, but certain filing requirements have not been met.
 8. The Applicant requests that the Tribunal condones his non-compliance with the timeframe within which he had to file his main application for leave to refer his complaint directly to the National Consumer Tribunal (hereinafter referred to as the “Tribunal”).
 9. The Respondent have not opposed this condonation application.

DISCUSSION AND ANALYSIS OF THE APPLICATION

10. 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;...”
11. Rule 34 of the Rules provides that -

“(1) A party may apply to the Tribunal in Form TL.r34 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.
- (2) The Tribunal may grant the order on good cause shown.”

(emphasis added)

12. Section 171(1)(c) provides that the Minister—

“... in consultation with the Chairperson of the Tribunal, and by notice in the Gazette, may make regulations for matters relating to the functions of the Tribunal and rules for the conduct of matters before the Tribunal; ...”

13. The Regulations in terms of section 171(1)(c) were passed in the Government Gazette as prescribed in section 171(3) that provides

that -

“A regulation in terms of this Act must be made by notice in the Gazette.”

14. Section 142(3)(c) provides that -

“... The Chairperson of the Tribunal must assign any of the following matters to be heard by a single member of the Tribunal, sitting alone ... applications to permit late filing;

15. 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”[2]. It can also be defined to mean “overlook or forgive (wrongdoing)”[3].

16. In order for the Tribunal to grant the Applicant condonation, the Applicant has to show “good cause” in terms of Rule 34

- (2) of the Rules of the Tribunal. The rule provides that “The Tribunal may grant the order on good cause shown”.(Emphasis added).

17. The Honourable JONES AJA in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* [4], 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:

“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) Ltd, HDS Construction (Pty) Ltd v Wait and Chetty v Law Society, Transvaal*. (No footnotes added) (Emphasis added); and

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

18. In *The Commissioner for the South African Revenue Service v Candice-Jean van der Merwe*[5] stated in paragraph 11 onwards –

“Condonation, as pointed out in Uitenhage Transitional Local Council v South African Revenue Service in para 6, is not to be had merely for the asking. Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice (Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd[6].

19. In *Head of Department, Department of Education Limpopo Province v Settlers Agricultural High School and Others* [7] it was held that the standard of considering an application for condonation is the ‘interests of justice’. As per the court –

“... 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 applicant's explanation for the delay or defect.’(Emphasis added)

20. The Tribunal therefore considered the factors below to assess whether the Applicant has shown good cause for condonation to be granted.

21. These factors are -

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

21.2. The prospects of success;

21.3. The nature of the relief sought;

21.4. Prejudice; and

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

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

22. The application had been filed approximately 5 days after the prescribed period.
23. The Tribunal takes into account that –
- 23.1. The Applicant is a lay person;
- 23.2. the filing was only 5 days out of time; and
- 23.3. the Applicant filed his main application with the Tribunal on two prior occasions but that those filings had been rejected due to them not meeting the prescribed filing requirements.

The prospects of success

24. The prospects of success of the Applicant's application has to be determined by considering the relevant provisions of the CPA. They are contained in, amongst others, sections 30 and 40 thereof.

25. Section 30 contains provisions relating to bait marketing. It provides that -

“(1) A supplier must not advertise any particular goods or services as being available at a specified price in a manner that may result in consumers being misled or deceived in any respect relating to the actual availability of those goods or services from that supplier, at that advertised price.

- (2) If a supplier advertises particular goods or services as being available at a specified price, and the advertisement expressly states a limitation in respect of the availability of those goods or services from that supplier at that price, the supplier must make those goods or services available at that price, to the extent of the expressed limits.
- (3) It is a defence to an alleged failure to comply with subsection (1) or (2) if—
- (a) the supplier offered to supply or procure another person to supply a consumer with the same or equivalent goods or services of the kind advertised within a reasonable time, in a reasonable quantity, and at the advertised price; and
- (b) the consumer—
- (i) unreasonably refused that offer; or
- (ii) accepted the offer, and the supplier has supplied or procured another person to supply the goods or services so offered and accepted.”

26. The Applicant alleges that –

- 26.1. The Respondent advertised a “Tekken 7 Deluxe Edition” containing a ps4 Pro and a Tekken 7 game at R 5 599,00, on 31 May 2017;
- 26.2. On 2 June he went to Incredible Connection at The Mall @ Reds to purchase the “Tekken 7 Deluxe Edition” containing a ps4 Pro and a Tekken 7 game at R 5 599,00;
- 26.3. When he arrived at the store, he learned they had not received stock;

- 26.4. The store manager arranged for stock to be brought from another store for the Applicant;
- 26.5. Upon arrival of the stock the Applicant purchased the product at the price it was advertised for;
- 26.6. When Applicant arrived at his home and unpacked the goods, he found that it contained a ps4 slim instead of a ps4 Pro;
- 26.7. When he spoke to the manager, the manager told the Applicant about an email the former had received from head office informing him about an error, which the manager alleged he was not aware of the Respondent needed to correct;
- 26.8. The manager would not provide the Applicant with the goods as advertised, at the price it was advertised for; and
- 26.9. The Applicant then proceeded and lodged the complaints with the Ombud and then the National Consumer Commission respectively.
27. In the light of the allegations above, the Tribunal will have to consider evidence by the parties to assess whether there was in fact a contravention of section 30. This assessment is not possible merely by considering the papers filed with the Tribunal. For example, evidence will be required regarding the content of the advertisement against the available stock of what was advertised; and whether the Respondent might be able to avail itself of the defenses in section 30(3).
28. Section 41 contains provisions relating to false, misleading or deceptive representations. It provides that –
- “(1) In relation to the marketing of any goods or services, the supplier must not, by words or conduct—*
- (a) directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer;
 - (b) use exaggeration, innuendo or ambiguity as to a material fact, or fail to disclose a material fact if that failure amounts to a deception; or
 - (c) fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive representation, or permit or require any other person to do so on behalf of the supplier.
- (2) ...
- (3) Without limiting the generality of subsections (1) and (2), it is a false, misleading or deceptive representation to falsely state or imply, or fail to correct an apparent misapprehension on the part of a consumer to the effect, that—
- (a) ...;
 - (b) any goods or services—

- (i) have ingredients, performance characteristics, accessories, uses, benefits, qualities, sponsorship or approval that they do not have;
 - (ii) are of a particular standard, quality, grade, style or model;
 - (iii) ...;
 - (v) ...; or
 - (vi) are available or can be delivered or performed within a specified time; ...”(emphasis added)
29. Relevant to the allegations of a section 41 contravention, there was mention of an alleged error that was being corrected. There is no indication whether there was in fact an error; what the error and to what extent it related to the Applicant’s complaint and what steps if any had been taken to correct it. The Tribunal will have to consider evidence by the parties to assess whether there was in fact a contravention of section 41.
30. Depending on the evidence and the respective cases put forward by the parties to the Tribunal, there is a likelihood that the Tribunal might find prohibited conduct. This points to good prospects of success in the final determination of the matter.

The nature of the relief sought

31. The Applicant wants the Respondent to provide him with the advertised goods at the advertised price.
32. The Tribunal is empowered to grant the relief the Applicant seeks 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

33. The Respondent did not oppose this application.
34. In the view of the Tribunal, as this application is only late with a few days, the Respondent will not suffer prejudice, should the late filing of the main application be condoned.

The importance of the matter to the Applicant and the Administration of Justice

35. This matter is of importance to the Applicant, the Applicant having paid for an item he did not receive.
36. It is equally important for the broader consumer population, for the Tribunal to put an end to this type of conduct on the part of the Respondent, should the Tribunal ultimately find that the conduct complained about, it is a practice of the Respondent.

37. A determination of the dispute will be in the interest of justice. It provides an opportunity for the Tribunal to set precedent and provide guidance on the interpretation and application of the CPA to this type of factual matrix.

FINDING

38. Having considered the conspectus of factors above in the interests of justice, the Tribunal finds that the Applicant have shown good cause for the Tribunal to condone the late filing of his application.

ORDER

39. The Tribunal accordingly makes the following order -

39.1. The Applicant's application for the condonation of the late filing of his application to refer his complaint directly to the Tribunal, is granted; and

39.2. No order is made for costs.

DATED ON THIS 21st DAY OF JANUARY 2019.

[signed]

Ms D Terblanche

Member

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

[3] Collins English Dictionary and Thesaurus, Fourth Edition 2011, at pg. 170.

[4] (127/2002)

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

[5] (20152/2014) [2015] ZASCA 86 (28 May 2015) (Bench: Heard: Delivered: Ponnan, Wallis and Mbha JJA and Fourie AJA and Mayat AJA)

[6]

[2013] ZASCA 5; [2013] 2 All SA 251 (SCA) para 11)

[7] (CCT36/03) [2003] ZACC 15; 2003 (11) BCLR 1212 (CC) (2 October 2003) 2003 (11) BCLR 1212 (CC) at para[11].

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