

SOUTH AFRICA / JUDGMENT

Mobimoola Financial Services (Pty) Ltd v National Credit Regulator (NCT/18256/2014/140(1)-R34) [2015] ZANCT 45 (11 November 2015) [2015] ZANCT 45

COURT

National Consumer Tribunal

BEFORE

B.C. Dumisa

CASE / FILE NUMBER

NCT/18256/2014/140(1)-R34

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT/18256/2014/140(1)- R34

In the matter between:

MOBIMOOLA FINANCIAL SERVICES (PTY) LTD

APPLICANT

And

NATIONAL CREDIT REGULATOR

RESPONDENT

Coram:

Presiding Tribunal member (In Chambers)

- Prof B.C. Dumisa

Date of Ruling

- 25 July 2015

APPLICATION FOR CONDONATION FOR NON-COMPLIANCE WITH THE TRIBUNAL RULES

APPLICANT

1. The Applicant in this Condonation Application is MOBIMOOLA FINANCIAL SERVICES (PTY) LTD, a limited liability company duly registered in accordance with the company laws of the Republic of South Africa, with its physical address at Bellpark Office Plaza, De Lange Road, Bellville, in the Province of the Western Cape (hereinafter referred to as "the Applicant").

RESPONDENT

2. The Respondent in this Condonation Application is THE NATIONAL CREDIT REGULATOR, the NCR, a juristic person established in terms of Section 12 of the National Credit Act, the Act, situated at 127 Fifteenth Road, Randjespark, Midrand, in the Province of Gauteng (hereinafter referred to as "the Respondent").

APPLICATION TYPE

3. This is an application in terms of Rule 34 of the Rules of the Tribunal^[1] to extend the time permitted for the filing of the Applicant's Answering Affidavit within 15 business days after the NCR complies with any directive issued by the Tribunal in response to the Rule 8 notice of incomplete filing submitted to the Applicant in the main matter.

BACKGROUND

TO THE CONDONATION APPLICATION

4. The application for Condonation was filed by the Applicant on 29 June 2015 and deemed complete by the Tribunal on 02 July 2015.
5. The Applicant applies to the Tribunal for an order that the non-compliance be condoned for the following reasons:
 - 5.1 The Respondent has requested certain information from the Tribunal in response to the Rule 8(1) notice, to which request the Respondent has not yet received a reply;
 - 5.2 The Respondent has objected to the application in the main matter and has requested the Tribunal to demand that the Applicant rectifies its application, which demand is still pending;
6. Further, the Respondent alleges that it is not possible for it to file an answering affidavit response in terms of Rule 13 prior to the receipt of the requested information.
7. It appears the Applicant is disputing whether the Respondent (the Applicant in the main matter) is able to lodge the application as it has incorrectly quoted certain sections of the NCA. The Applicant states that it is unable to respond to the allegations made unless the application is rectified and has therefore called on the NCT Registrar to issue a directive to the Applicant to amend its application.

RESPONDENT'S

SUBMISSIONS

8. The Respondent has not indicated any intention to oppose this condonation application.

APPLICABLE SECTIONS OF THE ACT

9. Rule 34 (1) states "A party may apply to the Tribunal in Form Tl 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. "

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

11. In the next few paragraphs (paragraphs 15 - 21) we will cite, with the approval of our Tribunal colleagues who have previously ruled on condonation applications before, a number of appropriate legal considerations and relevant case law on how and why the decisions on condonation applications should be made:

12. 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].

13. 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.

14. In the Constitutional Court case, of *Van Wyk v Unitas Hospital and Others*, the Court held, as in the above-mentioned case that "the standard for considering an application for condonation is the interests of justice. Whether it is in the interest of justice to grant condonation depends on the facts and circumstances of each case. It requires the exercise of a discretion on an objective conspectus of all the facts. Factors that are relevant include but are not limited to:

- 1. the nature of the relief sought;
- 2. the extent and cause of the delay;
- 3. the effect of the delay on the administration of justice and other litigants;
- 4. the reasonableness of the explanation for the delay;
- 5. the importance of the issue to be raised in the intended appeal; and
- 6. the prospects of success[5]"

18. In *Melane v Sanlam Insurance Company Limit*[6] 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. (Salojee & 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)." 19. From the dictum in Melane it was held that these factors are interrelated and should not be considered separately.
20. BMW SA (Pty) Ltd and Another v Bonn and Another⁷ the Tribunal held that the discretion to condone non-compliance with rules on the basis of "good cause" has been dealt with in numerous court decisions. In Mofokeng v Attorney General³ for example, the court had to consider the meaning of "good cause" in Rule 94(1) of the Rules of Court and held that this meant substantially the same as "sufficient cause" in Rule 12 of the Appellate Division, (now the Supreme Court of Appeal).
20. It was further held that the Tribunal must consider the facts of the condonation application and act fairly to both parties and take a number of factors into consideration including inter alia the degree of lateness, the explanation therefore and the prospects of success regarding the merits of the matter. These factors are interrelated and should not be considered separately. The Rules do not circumscribe the Tribunal's discretion and therefore the Tribunal has a wide discretion in these matters.

APPLICATION OF THE LAW TO THE FACTS

21. It is purely within the NCT Registrar's discretion to regard an application as incomplete and to issue a notice in this regard to an applicant. In this matter the Registrar issued a notice of complete filing to the Respondent and the answering affidavit is therefore due by the Applicant.

22. The Tribunal takes note of the Applicants objections to the Application filed but these are matters can be raised as points in limine in the answering affidavit. The Applicant is further in a position to refer to any aspects raised in the main and in the alternative so as to address the entire spectrum of allegations that are possibly being made against it.
23. There is no basis for a finding that the Registrar must issue a directive to the Respondent calling on it to amend its application.

These are matters which can be addressed in the hearing itself.

24. The Tribunal takes note that the matter has been pending since the filing of the condonation application. The Applicant in the main matter has filed its application and the Respondent in the main matter must now file its answering affidavit for the matter to continue until close of pleadings. This matter must therefore essentially be "restarted" so to speak.

ORDER

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

26.1 Condonation is hereby granted for non-compliance with the Tribunal Rules. The Applicant is to file its answering affidavit within 15 business days of the date of this order.

26.2 No order is made as to costs.

DATED ON THIS 11th DAY of NOVEMBER, 2015

Prof B.C. Dumisa

Presiding Tribunal Member

[1] For the Conduct of Matters before National Consumer Tribunal published under GN789 IN GG3022S of 28 August 2007 as amended by Gen N428 in GG34405 of 29 June 2011.

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[2] Oxford English Dictionary, Second Edition at p 151.

[3] Collins English Dictionary and Thesaurus, Fourth Edition 2011, at p170

[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] 1 962

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

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