

SOUTH AFRICA / JUDGMENT

Mokgoke v Momentum Insure Company Limited (NCT/279251/75(1)(b) - Rule 34) [2023] ZANCT 35 (20 September 2023)

[2023] ZANCT 35

COURT

National Consumer Tribunal

BEFORE

MC Peenze

CASE / FILE NUMBER

NCT/279251/75(1)(b) - Rule 34

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IN THE NATIONAL CONSUMER TRIBUNAL HELD IN CENTURION

Case Number: NCT/279251/75(1)(b) - Rule 34

In the matter between:

MOJELA SIMON MOKGOKE APPLICANT

and

MOMENTUM INSURE COMPANY LIMITED RESPONDENT

Coram: Dr MC Peenze - Presiding Tribunal Member

Date of consideration (in chambers) - 18 September 2023

Date of ruling

-

20 September 2023

CONDONATION RULING LATE FILING OF AN APPLICATION TO REFER A MATTER DIRECTLY TO THE TRIBUNAL

APPLICANT

1. The applicant is Mojela Simon Mokgoke, an adult male. The applicant is defined as a consumer under section 1 of the Consumer Protection Act 68 of 2008 ("the CPA").

RESPONDENT

2. The respondent is Momentum Insure Company Limited, a short-term insurance provider as defined in the Short-Term Insurance Act 53 of 1998.

TERMINOLOGY

3. A reference to a section in this ruling refers to a section of the CPA.
4. A reference to a rule in this ruling refers to the Rules of the National Consumer Tribunal^[1] ("the Rules").

APPLICATION TYPE

5. In this application, the applicant seeks condonation in terms of Rule 34(1) for the late filing of his application for leave to refer a matter directly to the Tribunal.
6. The respondent has not opposed the application for condonation, and the application is accordingly considered on an unopposed basis.

BACKGROUND

7. The applicant owns a Mercedes Benz CLA 200. On 9 June 2020, he submitted a claim with the respondent for water leakage. The respondent collected the vehicle on 11 June 2020 and referred it to various service providers. On 4 August 2020, the respondent advised the applicant that his claim was rejected since the policy did not cover the claim submitted.
8. On the date scheduled to collect the vehicle, the applicant found the vehicle in a state of disrepair. The front lights system was removed, the bumper was broken, and the tracker was removed from the vehicle. A sign on the windscreen indicated "ENGINE DEAD", and engine parts were either missing or scattered inside the vehicle. The applicant submits that the disassembly of the vehicle occurred without his consent. Because of the vehicle's condition, the applicant refused to take possession.
9. The applicant alleges that the vehicle was driven secretly and damaged while in the possession of the service providers as appointed by the respondent. According to the applicant, the respondent is liable for the actions of the appointed service providers. The respondent allegedly acted incompetently and negligently by failing to exercise the required care.
10. The applicant is not disputing the rejection of the insurance claim but wishes to hold the respondent accountable for the damages to his vehicle and the subsequent loss experienced.
11. On 9 March 2022, the NCC issued a notice of non-referral stating that the facts, if true, would not constitute grounds for a remedy under the CPA. The NCC advised the consumer to refer his complaint to the Financial Sector Conduct Authority (FSCA). According to the applicant, the FSCA referred him to the Motor Industry Ombudsman of South Africa (MIOSA).

12. On 28 June 2023, the applicant applied for leave to refer the matter to the Tribunal. The Registrar issued the notice of filing on 20 July 2023. The respondent has filed an answering affidavit to oppose the main application.
13. The applicant requests the Tribunal to make the following orders:
 - (a) That the respondent contravened section 54(1)(a) - (d), section 65(2)(a) - (c), and section 68(1)(b) and (c);
 - (b) That the respondent is ordered to pay R500,000.00 for the applicant's pain and suffering, emotional distress and inconvenience;
 - (c) That the respondent is ordered to return the vehicle and carry all expenses of taking the vehicle for tests to an independent body of the applicant's choice;
 - (d) That the respondent is ordered to purchase another vehicle or compensate the applicant to enable the applicant to purchase another vehicle;
 - (e) That the Tribunal accepts the applicant's refusal to receive the vehicle in the condition it was found at the suppliers;
 - (g) That the respondent is ordered to carry the cost of private storage of the vehicle;
 - (h) That the respondent is ordered to refund the applicant for the arrear vehicle disc that accumulated since the vehicle was issued;
 - (i) That the respondent is ordered to refund all the insurance premiums at an interest rate to be determined by the Tribunal;
 - (j) That the respondent is ordered to pay the outstanding account of the tracking company; and
 - (k) That the Tribunal rule on the crimes committed, such as theft of the tracker device, concealing the causes of engine damage, the disassembling of the engine, and the attempt to erase the vehicle's computer box information.

ISSUE TO BE DECIDED

14. The issue before the Tribunal is to decide whether the applicant's application to condone the late filing of his application for leave to refer a matter directly to the Tribunal should be granted.

THE RULES

15. In terms of Rule 34(1), a party may apply to the Tribunal using Form TI.r34 for an order to condone the late filing of a document or application or any other departure from the rules or procedures.
16. Rule 34(2) further states that the Tribunal may grant the order on good cause shown.

LEGAL PRINCIPLES

17. To condone means to “accept or forgive an offence or wrongdoing”. The word stems from the Latin term *condonare*, meaning “refrain from punishing”[2]. It can also be defined as “overlook or forgive (wrongdoing)”[3].
18. 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.
19. Whether it is in the interests of justice to grant condonation depends on each case’s facts and circumstances. It requires the exercise of discretion based on an objective conspectus of all the facts. The relevant factors 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 application and the prospects of success. [5]
20. In *Melane v Santam Insurance Company Limited*[6], it was held that the court has a discretion to be exercised judicially upon considering all the facts. In essence, it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation for it, the prospects of success and the importance of the case. These facts are inter-related and are not individually decisive.

What is needed is an objective conspectus of all the facts.

CONSIDERATION OF THE MERITS

21. The applicant submitted its application to the Tribunal sixteen months after the NCC issued a notice of non-referral. The reason for the late filing is partially attributed to the NCC’s recommendation to refer the matter to the FSCA. The applicant followed this advice, but the FSCA subsequently informed the applicant in July 2022 that the matter did not fall within their jurisdiction. The applicant further outlined that he is a layperson who struggles with a medical condition because of the damages to his vehicle.
22. The applicant believes that granting of condonation is in the interest of justice, as the respondent failed to take reasonable care of his vehicle while considering his insurance claim. The applicant further submits that he has a reasonable chance of success and that failure to consider this application will prejudice him.
23. The respondents have not opposed this application for condonation.
24. The Tribunal is persuaded that the applicant intended to comply with the notice of non-referral by the NCC and that he approached the FSCA in good faith. Similarly, the Tribunal does not find any intention to ignore the Tribunal Rules deliberately.

25. The delay of twelve months to submit the matter to the Tribunal, following the response by the FSCA, is excessive. Although this matter is clearly important to the applicant, the Tribunal also needs to consider the applicant's reasonable prospects of success.
26. On the application as submitted, the applicant does not have a reasonable prospect of success, as the Tribunal does not have the statutory jurisdiction to consider the complaint. The evidence submitted by the applicant falls outside the basic parameters of a claim in terms of sections 54, 65 or 68, as the respondent is not a supplier as defined in the CPA. It is also common cause that third parties had provided the services, and the applicant did not cite the suppliers as respondents in this matter.
27. The cause of the complaint is the claim submitted in terms of an insurance agreement between the parties.
28. The CPA provides as follows in section 5 thereof:

"5. Application of Act

- (1) This Act applies to –
- (c) goods or services that are supplied or performed in terms of a transaction to which this Act applies, irrespective of whether any of those goods or services are offered or supplied in conjunction with any other goods or services or separate from any other goods or services;"
29. Section 1 of the CPA defines 'service' as meaning, among other things, the following: -
- " 'service' includes, but is not limited to -
- (c) any banking services, or related or similar financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service –...
- (ii) is regulated in terms of the Long-Term Insurance Act, 1998 (Act 52 of 1998), or ShortTerm Insurance Act 1998 (Act 53 of 1998): ... "

30. The respondent's services are governed by the Short-Term Insurance Act of 1998. Therefore, the CPA does not apply to the services provided by the respondent.
31. Section 69 of the CPA regulates as follows: -

"69. Enforcement of rights by consumer

A person contemplated in section 4(1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement or otherwise resolve any dispute with a supplier by –

- (a) Referring the matter directly to the Tribunal, if such a direct referral is permitted by this Act in the case of the particular dispute;"

32. As the particular dispute resolves around the contractual obligations of an insurer in terms of its insurance contract, the applicant is obliged to approach a court for relief as agreed to in terms of the contract of insurance.
33. The Tribunal further finds that the alleged conduct by the respondent includes allegations of breach of contract and delict. The Tribunal does not have the statutory authority to adjudicate such complaints. More particularly, the relief requested includes a request for general damages, which can only be considered by a court with jurisdiction.
34. The Tribunal finds that it does not have the jurisdiction to consider the complaint. It is, therefore, not in the interests of justice that the applicant be allowed to apply for leave.
35. The Tribunal finds that for the reasons mentioned above, there is no good cause in these specific circumstances that the condonation application is granted. The Tribunal, therefore, refuses the late filing of the applicant's application.

ORDER

36. Accordingly, the Tribunal makes the following order:

36.1 The condonation application is dismissed; and

36.2 There is no cost order.

[signed]

Dr MC Peenze

Presiding Tribunal member

- [1] GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters

before the National Consumer Tribunal, 2007 (Government Gazette No. 30225).

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

- [3] Collins English Dictionary and Thesaurus, Fourth Edition 2011, at pg170.

- [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.

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