

SOUTH AFRICA / JUDGMENT

Mphasane v Afropulse 145 (Pty) Ltd Trading as Kingdom Doors (NCT/237419/2022/75(1)(b)) [2022] ZANCT 46 (29 September 2022)

[2022] ZANCT 46

COURT

National Consumer Tribunal

BEFORE

J Simpson

CASE / FILE NUMBER

NCT/237419/2022/75(1)(b)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT/237419/2022/75(1)(b) CPA – Rule 34

In the matter between:

SUZAN MPHASANE APPLICANT

and

AFROPULSE 145 (PTY) LTD

Trading as KINGDOM DOORS RESPONDENT

Coram:

Adv J Simpson – Presiding Tribunal member

CONDONATION RULING AND REASONS

(LATE FILING OF APPLICATION FOR LEAVE)

APPLICANT

1. The Applicant in this matter is Ms Suzan Mphasane, a major female (“Ms Mphasane” or “the Applicant”).

RESPONDENT

2. The Respondent is Afropulse 145 (Pty) Ltd, trading as Kingdom Doors, situated in Lenasia in Gauteng (“Afropulse” or “the Respondent”).

APPLICATION

3. The ruling is to consider an application to condone the late filing of the application for leave in terms of section 75(1)(b) of the Consumer Protection Act, 2008 (“the CPA”).

BACKGROUND

4. In June 2016, Ms Mphasane contracted Afropulse to supply and install various doors and other items at her home in Kagiso for R59 000.00. The cast copper kitchen door was installed for approximately R20 000.00. In September 2016, the kitchen door started leaking when it rained. It appears Afropulse tried to repair the door but was unsuccessful. She wants the door repaired properly.
5. At some stage, Ms Mphasane lodged a complaint with the Consumer Goods and Services Ombudsman (CGSO). The CGSO sent her an email on 22 June 2018 advising that the Afropulse was no longer cooperating and the CGSO could not assist. She then lodged a complaint with the National Consumer Commission (“the NCC”) on 28 August 2018. The NCC issued a Notice of Non-referral dated 6 April 2022, stating that the claim has lapsed in terms of the CPA. The letter states that in February 2019, the supplier advised her to buy the necessary material and they would fix the door.
6. The Applicant lodged an application for leave with the Tribunal in July 2022. She also filed an application to condone the late filing of the application. This ruling deals with the application for condonation.
7. In summary, the Applicant submits that she received the NCC letter in April 2022 but could not understand why they had not done anything since 2018. She went to the NCC’s offices, and they told her to file an application with the Tribunal. Her child is disabled and ill; she could only file the application with the Tribunal in July 2022. She asks that the late filing be condoned.

APPLICABLE SECTIONS OF THE ACT AND THE RULES[1]

8. Rule 34 (1) provides, “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.”
9. Rule 34 (2) provides, “The Tribunal may grant the order on good cause shown”.

10. Row 32 of Table 1 B contained in the Rules provides that the Applicant must file the Section 75(1)(b) application

“Within twenty business days of the date of the Notice of Non-Referral, or within a longer time permitted by the Tribunal”.

11. 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 mean “overlook or forgive (wrongdoing)”[3][4].
12. 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.
13. Whether it is in the interest of justice to grant condonation depends on each case’s facts and circumstances. It requires the exercise of a discretion based on an objective conspectus of all the facts. Factors that are relevant include but are not limited to:

13.1 The nature of the relief sought;

13.2 The extent and cause of the delay;

13.3 The effect of the delay on the administration of justice and other litigants;

13.4 The reasonableness of the explanation for the delay;

13.5 The importance of the issue to be raised in the intended application; and

13.6 The prospects of success.[5]

14. In *Melane v Santam Insurance Company Limited*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 penalise a litigant on account of the conduct of his representative but it emphasised 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; *Buthlezi & Others v Eclipse Foundries Ltd* 18 ILJ 633 (A) at 6381-639A).”

15. From the dictum in *Melane*, it was held that these factors are interrelated and should be considered collectively.

CONSIDERATION OF THE MERITS

16. The NCC's Notice of Non-referral is dated 6 April 2022. Therefore, the application for leave should have been filed with the Tribunal within 20 business days, by 4 May 2022. The Applicant filed her application on 25 July 2022. The delay in filing is approximately three calendar months.
17. The delay in filing is not substantial relative to the long history of the matter. If this were the only factor relevant to the condonation application, it would be granted. However, the Tribunal must consider all relevant factors.
18. The Tribunal must consider the prospects of success in this matter. It will serve no purpose for the Tribunal to grant leave if there is no reasonable prospect of it adjudicating on the matter.
19. Based on the Applicant's evidence, the original cause for the complaint arose when the kitchen door was installed in June 2016. The alleged defect in the goods and services rendered arose within the six-month period as required by sections 54, 55 and 56 of the CPA (September 2016). Ms Mphasane was well within her rights to lodge a complaint and request that the door be fixed or installed properly. Unfortunately, it appears the NCC took approximately three years and eight months to issue a letter of non-referral allowing her to approach the Tribunal.
20. Section 1167 of the CPA states that a complaint may not be made to the Tribunal more than three years after the cause of the complaint arose. In past judgments, the Tribunal regarded the period a complaint was with the NCC as interruptive of prescription. However, in the matter of *First Rand Bank Ltd v Ludick* the High Court held that the Tribunal has no power or discretion to extend the three-year period⁸. The Tribunal is bound by the High Court judgment and must strictly apply the threeyear time bar. Therefore, the Applicant had until June 2019 to file an application with the Tribunal; the application was only filed in July 2022, approximately three years after the time-bar deadline.
21. The Tribunal must note that apparent delay by the NCC has resulted in the Tribunal being unable to assist Ms Mphasane. The Tribunal Registrar must send a copy of this judgment to the NCC for its attention. Ms Mphasane installed a kitchen door at great expense. One can only hope that the Respondent displays goodwill and finally resolves Ms Mphasane's complaint.
22. The Tribunal finds that the claim has lapsed and cannot be adjudicated by the Tribunal. Therefore, the Applicant has not shown good cause to condone the late filing for leave.

ORDER

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

23.1 The application to condone the late filing of the application for leave is refused; and

23.2 No order is made as to costs.

DATED ON THIS 29TH DAY OF SEPTEMBER 2022

[SIGNED]

Adv J Simpson

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), as amended.

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

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

[4]

(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

[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 Limitations of bringing action 116.

(1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after—

(a) the act or omission that is the cause of the complaint; or

(b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased

8 First Rand Bank Ltd v Ludick A 277/2019 High Court of South Africa, Gauteng Division, Pretoria, 18 June 2020 (unreported) at para [16]. Although the matter referred to section 166 of the NCA, section 116 of the CPA has the same wording. Therefore, the same principles are applicable.

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