

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Sebastiaan (NCT/104029/2018/57(1)) [2018] ZANCT 134 (16 October 2018) [2018] ZANCT 134

COURT

National Consumer Tribunal

BEFORE

J Simpson, A Potwana, H Devraj

CASE / FILE NUMBER

NCT/104029/2018/57(1)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELO

IN CENTURION

Case

Number: NCT/104029/2018/57(1) NCA- Rule 34

In

the matter between:

NATIONAL
CREDIT
REGULATOR
APPLICANT
and
JOHANNES
HENDRIK SEBASTIAAN
(TRADING
AS SECURE PRIME SOLUTION)
RESPONDENT
IN

RE:

NATIONAL
CREDIT
REGULATOR
APPLICANT
JOHANNES
HENDRIK SEBASTIAAN BERNARDO
(TRADING
AS SECURE PRIME SOLUTIONS)
RESPONDENT

Coram:

Adv.
J. Simpson
-Presiding
Tribunal Member

Mr.
A. Potwana
- Tribunal Member

Ms.
H. Devraj
-Tribunal Member

RULING

AND REASONS

(CONDONATION FOR FILING OF SUPPLEMENTARY AFFIDAVIT)

APPLICANT

1. The Applicant in this matter is the National Credit Regulator ("the Applicant" or "NCR"). The Applicant is also the Applicant in the main matter.

RESPONDENT

2. The Respondent is Johannes Hendrik Sebastiaan Bernardo trading as Secure Prime Solution ("the Respondent" or "Mr Bernardo"). The Respondent is also the Respondent in the main matter.

BACKGROUND

3. The NCR lodged an application against Mr Bernardo with the Tribunal in March

2018. The application was lodged in terms of section 57(1) of the National Credit Act 34 of 2005 ("the NCA"). The NCR

essentially alleges that Mr Bernardo is a registered credit provider and has contravened the NCA in numerous respects. The NCR alleges that Mr Bernardo does not do proper affordability assessments retains South African Social Security Authority (SASSA) cards and fails to disclose all costs of credit. The NCR is praying for the Respondent to be deregistered and an administrative fine to be imposed.

4. The Respondent did not file an answering affidavit in response to the application by the NCR and the matter was set down for a default hearing on 5 June 2018. On the day of the hearing a legal representative appeared on behalf of the Respondent and applied for a postponement of the matter. The Tribunal granted the postponement until 26 June 2018 for the Respondent to file an answering affidavit and application for condonation. On 25 June 2018 the Respondent filed its answering affidavit and application for condonation.
 5. It appears the matter was then again set down for a hearing on 23 August
2018. I was provided with a transcript of the hearing, as no formal postponement order was issued. During this hearing the Tribunal panel decided to condone the late filing of the answering affidavit and postponed the matter to allow the NCR to file a replying affidavit. On 6 September 2018 the NCR filed its replying affidavit. It also filed a further supplementary affidavit and application to condone the filing of the supplementary affidavit.
6. The NCR submits that it made some clerical errors in its founding affidavit. It seeks to correct these errors by means of the supplementary affidavit. It submits that there is no prejudice to the Respondent. Examples of these errors are:-

6.1 It failed to attach the consumer affidavits referred to in paragraph 9 of its founding affidavit.

6.2 It corrected a referencing error in paragraph 12.5.5 of the founding affidavit.

6.3 It failed to attach the annexures referred to in paragraph 4.3 of the founding affidavit.

7. The Respondent did not file an affidavit opposing the application for condonation.

APPLICABLE SECTIONS OF THE NCA AND RULES[1]

8. 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."

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

10. Section 142 (3)(c) of the NCA states -

"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..."

11. Section 142(3) of the Act only refers to applications for late filing which may be heard by a single member of the Tribunal as provided for under Rule 34(a). This type of application for condoning the filing of a supplementary affidavit is neither provided for under section 142(3) nor under Rule 34 (1)(a) of the rules, which allows for the condoning of a late filing of

a document or application. Rule 34 however provides for other instances where the Tribunal may grant condonation [Rule 34(1)(b) to (d)]. These other instances are however not referred to in section 142(3). The only conclusion that can be drawn from this is that any application for condonation which falls outside section 142(3) but is provided for under Rule 34(1)(b) to (d) must be considered by a full panel of three members.

12. The application before the Tribunal is to condone the filing of a supplementary affidavit. The Rules of the Tribunal do not provide for any further affidavit to be filed after the filing of a replying affidavit by the applicant in a matter. The filing of a supplementary affidavit would therefore have to be considered as an application in terms of Rule 34(1)(d), as a departure from the Rules or procedures.

APPLICABLE LEGAL PRINCIPLES

13. 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].
14. 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.
15. 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:

- 15.1 the nature of the relief sought;
- 15.2 the extent and cause of the delay;
- 15.3 the effect of the delay on the administration of justice and other litigants;
- 15.4 the reasonableness of the explanation for the delay;
- 15.5 the importance of the issue to be raised in the intended appeal; and
- 15.6 the prospects of success.[5]

16. 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 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. (Saloojee & 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.")

17. From the dictum in Melane it was held that these factors are interrelated and should not be considered separately.

CONSIDERATION OF THE MERITS

18. In evaluating the merits of the application the Tribunal will consider the following factors -

18.1 The application for condonation is not opposed by the Respondent;

18.2 There is no indication of the NCR unnecessarily filing the supplementary affidavit or using it to delay the proceedings; and

18.3 The Respondent will be entitled to reply to the corrections made and any further information in the supplementary affidavit, if he wishes to do so.

19. The Tribunal finds that the factors listed above constitute good cause in these specific circumstances. The Tribunal therefore grants the application and the filing of the NCR's supplementary affidavit is condoned.
20. As the filing of the NCR's supplementary affidavit has been condoned the Respondent is granted an opportunity to respond to the further information provided in the supplementary affidavit if it wishes to.

ORDER

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

21.1 Condonation is hereby granted to the NCR for the filing of the supplementary affidavit;

21.2 The Respondent may file an affidavit in response to the supplementary affidavit within 15 business days after the judgment is issued to the parties; and

21.3 No order is made as to costs.

DATED 16 OCTOBER 2018

[signed]

Adv J Simpson

Presiding Tribunal Member

Ms H Devraj (Tribunal Member) and Mr A Potwana (Tribunal Member) concurring

[1] Regulations for Matters Relating to the Functions of the Tribunal and Rules for the Conduct of Matters before the National Consumer

Tribunal, 2007

[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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