

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Sliksam Cash Loans (Pty) Ltd (NCT/127512/2019/140)

[2019] ZANCT 134 (25 July 2019)

[2019] ZANCT 134**COURT**

National Consumer Tribunal

BEFORE

MC Peenze

CASE / FILE NUMBER

NCT/127512/2019/140

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Source record**IN****THE NATIONAL CONSUMER TRIBUNAL****HELD****IN CENTURION****Case****number: NCT/127512/2019/140****In****the matter between:**

NATIONAL CREDIT
REGULATOR
APPLICANT
AND
SLIKSAM
CASH LOANS (PTY) LTD
RESPONDENT
(registration
number 2015/375980/07)

Coram:

MC
PEENZE - Presiding Member
CONDONATION
JUDGMENT AND REASONS
INTRODUCTION
1. In

this application for
condonation:

1.1 The

Applicant, who is the Respondent in the main matter, is Sliksam Cash Loans (Pty) Ltd (registration number 2015/375980/07), a private company duly registered as such in terms of the company laws of the Republic of South Africa, with its principal place of business at Shop No: 3 Maclins Flats Midlands, Mooi River, Kwa-Zulu Natal Province, (the Respondent);

1.2

The Respondent, who is the Applicant in the main matter, is the National Credit Regulator (the Applicant), a juristic person established in terms of section 12 of the National Credit Act, 2005 (the Act) to regulate the consumer credit market and ensure compliance with the Act, with its principal business address at 127 - 15th Road, Randjespark, Johannesburg, Gauteng;

1.3

The Respondent was previously registered with the Applicant as a credit provider under registration number NCRCP8899 from 1 August 2017 until 31 July 2018. The Respondent's registration has since lapsed;

1.4

This Condonation Application and the Answering Affidavit had been duly served;

1.5

The Applicant and the Respondent will be referred to as they appear in the main matter; and

1.6

The matter is considered as unopposed, on the papers filed.

APPLICATION

TYPE

2. This

is an application to the National Consumer Tribunal (the Tribunal) to condone the Respondent's non-compliance with its Rules.

The Application is brought in terms of Rule 34 of the Rules of the Tribunal[1].

BACKGROUND

TO THE CONDONATION APPLICATION

3. On

the 16th of October 2018; the Applicant conducted a scouting exercise in KwaZulu-Natal. During the scouting exercise the Applicant determined that the Respondent had possibly contravened the Act through its business conduct. Subsequent to the scouting exercise the Applicant initiated a complaint against the Respondent in its own name in terms of section 136(2) of the Act.

4. At the conclusion of this investigation; the Applicant compiled a report detailing the specific contraventions and conduct that allegedly lead to the Act being contravened. According to this report; the Respondent allegedly repeatedly contravened various provisions, rules and regulations regulating the conduct of a credit provider in terms of the Act:

- i. Section 81 (2) (a) read together with Regulation 23 A of the Act;
- ii. Section 81 (3) read with Section 80;
- iii. Section 92 (1) read with Regulation 28 (1)(a) and (b);
- iv. Section 100 (1) (d) and section 101 (1) (d) (ii) read with Regulation 42 of the Act;
- v. Section 133 read with Section 90 (2) (l); and
- vi. Regulation 55 (1) (b).

5. The Applicant subsequently filed an application in terms of Section 140 of the Act on 6 March 2019, requesting the Tribunal to determine whether the Respondent has engaged in prohibited conduct by having repeatedly contravened the provisions of the Act and Regulations; should be interdicted from continuing the business of a credit provider; and whether to impose an administrative penalty on the Respondent.

6. On 6 March 2019; the Respondent seemingly confirmed consent to the service of the Applicant's application and all subsequent pleadings by email in terms of section 57 of the Act.

7. On 7 March 2019; the office of the registrar of the Tribunal (the registrar) issued a notice of filing. That notice records that the Respondent may oppose the application by serving an answer within 15 business days of receipt of the application. The Respondent subsequently failed to serve an answering affidavit in terms of the Tribunal Rules of Conduct.

8. On

15 April 2019; the registrar issued a notice setting this application down

for hearing on a default basis on 15 May 2019.

9.

At the hearing of 15 May 2019; the Respondent's legal representative, Mr Kruger

Engelbrecht of Kruger Engelbrecht

Attorneys, was present at the proceedings. Mr Kruger indicated that he filed an intention to

oppose, but that the Tribunal since advised

him that the Rules do not make provision for the filing of an intention to oppose but

for the filing of an opposing affidavit.

10. After

consideration; the Tribunal ordered, ex tempore; that:

i.

The matter is postponed sine die to allow the Respondent to file an application for condonation for the late filing of its opposing affidavit;

ii.

The Respondent must serve and file its application for condonation for the late filing of its opposing

affidavit on or before 24 May

2019; and

iii. If

the Respondent fails to file its application for condonation for the late filing of its opposing affidavit,

the Registrar of the Tribunal

would set the matter down for hearing.

11.

Accordingly, the Respondent is obliged to bring this application for condonation

for the late filing of the Respondent's answering affidavit.

APPLICABLE

RULES OF THE TRIBUNAL, THE ACT AND CASE LAW

12.

Rule 34 (1) states "A party may apply to the Tribunal in Form TI r.34 for an order to: -

i.

condone late filing of a document or application;

ii.

extend or reduce the time allowed for filing or serving;

iii.

condone the non-payment of a fee; or

iv.

condone any other departure from the rules or procedures."

13.

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

	14.
	Rule 13 (1) states “Any person required by these Rules to be notified of an application or referral to the Tribunal may oppose the
application or referral by serving an answering affidavit on:	(a) the Applicant; and (b) every other person on whom the application was served.”
	15.
	Rule 13(2) states that “an answering affidavit to an application or referral other than an application for interim relief must be served on the parties and filed with the Registrar within 15 business days of the date of the application”.
	16.
	The Tribunal may therefore grant an application for condonation if the Applicant is able to show good cause as to why the Applicant did not comply with the Rules.[2]
	17.
	In Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others[3] it was held that the standard of considering an application of this nature is the interests of justice.
	18.
	Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case.
	Factors
that are relevant include, but are not limited to:	i. the nature of the relief sought;
	ii. the extent and cause of the delay;
	iii. the effect of the delay on the administration of justice and other litigants;
	iv. the reasonableness of the explanation for the delay;
	v. the importance of the issue to be raised in the intended appeal; and
	vi. the prospects of success.[4]
	19.

In *Melane v Santam Insurance Company Limited* 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).”

Similar factors were also discussed by the court in the earlier case of *Melane v Santam Insurance Company Limited*[5] where it was pointed out that a court has a discretion which should be exercised judicially upon consideration of all the facts.[6]

20.

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

CONSIDERATION
OF THE MERITS

21.

In evaluating the merits of the application; the Tribunal considered the following factors –

i.

The Act, the Rules of the Tribunal and relevant

case law;

ii.

The Applicant has not opposed the Application for condonation;

iii.

The Respondent has provided a reasonable explanation for the delay and has attempted to comply with the Rules for the conduct of matters before the Tribunal as soon as it became aware of the Rules;

iv.

The explanation offered by the Respondent is reasonable in the circumstances; and

v.

It is an important matter for both parties and in the interests of justice that both parties be given an opportunity to raise all the relevant issues; and to be given an opportunity to respond to the issues raised; and to place the full facts before the Tribunal.

22.

The main reason advanced by the Respondent, for failing to file its answering affidavit in accordance with the Tribunal Rules is that the Respondent was not initially aware of the Rules for the conduct of matters before the Tribunal; and the Respondent was not legally represented at the time of having to file the Respondent's answering affidavit on the Tribunal.

23.

The Respondent submits that on or about 26 October 2015; the Respondent was registered and incorporated by Samson Lamola (deceased on 2018 – 03 – 27) as a privately held company in terms of the South African Companies Act.

The deceased's estate seems not to have been wound up yet, with the implication that the ultimate control of the Respondent is in the hands of the Executor as the person in control of the estate.

24.

The Respondent further submits that the application was served via email on the personal email address of the Director of the Company, Mr Slindelo Cyprian Ndlangisa. According to the affidavit of Mr Ndlangisa, this email "originated from Linda Mhlongo, which gave no indication whatsoever that the application is launched or served by the National Credit Regulator (the NCR) against the

Respondent...the email purportedly serving the application on me was answered with a question

– I wanted to know what Ms Mhlongo meant when she said I must address a quote back to her...I answered her email as follows: ‘Consent to the service of your application and all subsequent pleadings by email.’ A plain reading of the text is that I asked what is meant by the sentence...I deny that I have agreed to service and filing of pleadings by way of email...my attorney explained to me on 7 May 2019 what this means.”

25.

A reading of the said email as referred to by Mr Ndlangisa, confirms to be an email originating from the NCR referring to the “telecom between writer and yourself. Kindly confirm whether Sliksam Cash consents to service of the NCR’s Application in terms of section 57 of the National Credit Act by email and the subsequent pleadings which may be exchanged between ourselves as well as yourselves relating to the abovementioned Application. To consent to service by email simply reply to this email stating that ‘I consent to the service of your application and all subsequent pleadings by email’ ”.

26.

According to the Respondent; the email address used by the Applicant to serve the application, was a personal email and not the email used for all company correspondence. As a result, Mr Ndlangisa confused the matter with another criminal prosecution matter in which he pleaded guilty and in which he incurred a fine of R40 000 for non-compliance with the Act. Mr Ndlangisa also mentioned the confusion brought about by the fact that no other Director was served with the Application.

27.

Mr Ndlangisa subsequently engaged his co-director and the Respondent decided to oppose the matter. Due to the estate not being finalised and a substantial dispute about whether directors had been appointed properly by the executor, Mr Ndlangisa was unable to obtain a resolution authorising him to enter into litigation on behalf of the Respondent until 8 May

2019.

28.

Mr Ndlangisa confirmed being a lay person and finding the matter extremely complex to understand. According

to Mr Ndlangisa, he and his co-director are both new directors that “stood in for the sake of continuity and for the sake of the family”, because of the death of his brother, who was the former director. Mr Ndlangisa was not capable of answering many of the questions posed to him by his own attorney and had to do an investigation into the business in order to answer questions properly.

29.

Mr Ndlangisa also outlined that his delay was truly bona fide, in that he believed that the Respondent was normalised and compliant with the Act; Mr Ndlangisa also confirmed that the Respondent has only one single office and that it is the Howick Office.

30.

Mr Ndlangisa clarified that the NCR certificate issued for the Mooi River operation was issued with the idea that the Mooi River operation may operate under the name and style of the Respondent, which is seemingly not the case.

The Mooi River operation is allegedly not part of the Respondent’s business. According to Mr Ndlangisa; the Mooi River operation is operated independently by Ms Thokoane and that operation does not use the Respondent’s accounting, filing, contract management, system or bank account.

There seems to be no legal nexus between the Mooi River operation and the Respondent.

31.

It is clear from the documents before the Tribunal that the Respondent had provided full cooperation with the NCR during the investigation. In addition, the telephonic consultation seemed to have been problematic and difficult for the reason that he was unable to provide the attorney with the required detailed information by way of a telephonic consultation.

It also seems as if there were linguistic challenges with respect to language in the interaction with the Respondent’s attorney.

32.

The Respondent submitted that it has a reasonable prospect of success in that the Respondent had become fully compliant with the Act, and that the Respondent is only operating a single office in Howick. The Mooi River operation is alleged to be piggy backing on the Respondent, but according to the Respondent there is not sufficient evidence to show that there

is a clear link between the Howick Office and the Mooi River operation; the latter allegedly being the operation foul with unlawful activities and not the Howick Office.

33.

The Respondent submitted that; should the Application for condonation be refused, the Respondent would suffer immense prejudice; in that the Respondent has prospects of success and further that the Respondent will otherwise be denied the opportunity of explaining the matter.

34.

According to the Respondent; his dependents will suffer if it is not allowed to oppose the application and investigate the various issues alleged, especially in the light of the fact that the Applicant is asking for the maximum potential judgment in terms of the Act.

35.

The Respondent submitted that there is no prejudice to the Applicant who was served the Respondent's answering affidavit on 30 May 2019, should the Tribunal condone the late filing of the Respondent's answering affidavit; and indeed the Respondent's answering affidavit was filed properly on the Applicant in accordance with the Rules for the conduct of matters before the Tribunal, albeit if not properly filed within the prescribed time frames; and thus not filed in full compliance with the Rules of the Tribunal.

36.

In conclusion; in evaluating the merits of the application; the Tribunal finds that the Respondent has provided a reasonable explanation for the delay in not properly filing the Respondent's answering affidavit and the Respondent's application for condonation; that it can be seen from the motivations by the Respondent that the Respondent had significant issues with the language barrier, the distances between parties, the volume of the paperwork, the previous owner being deceased, determining the identity of the managing member of the company, the status of the estate, the identity of the bookkeeper, the executor, the identification of the bank accounts and the commissioning of documents in another province.

37.

The Tribunal is convinced that the Respondent made every effort to file its answering affidavit and

application for condonation in good time; there was no delay on the part of the Respondent in placing the Respondent's defence before the Tribunal after the issuing of the Postponement order by the Tribunal.

38.

Accordingly, I find that it is in the interests of justice that the Respondent be given an opportunity to place the full facts of the matter before the Tribunal in order to bring finality to the matter.

39.

The Tribunal therefore grants the application for condonation. The normal rules will apply for the filing of the replying affidavit.

RULING

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

40.1 The application for condonation is granted;

40.2 The Applicant must file its replying affidavit within 10 days of the issuing of this judgment on the Respondent and file same on the Tribunal; and

40.3 There is no order as to costs.

DATED AT CENTURION ON THIS 25th DAY OF JULY 2019

[Signed]

M C PEENZE

TRIBUNAL MEMBER

[1] For the Conduct of Matters before the National Consumer Tribunal published under GN789 in

GG30225 of 28 August 2007 as amended by GenN428 in GG34405 OF 29 June 2011.

[2] Rule 34(2) of the Rules.

[3] 2003

(11) BCLR 1212 (CC) at para [11].

[4] 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.

[5] 1962

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

[6] See also See also 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.

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