

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Xi Ming General Cash Dealers CC (NCT/122364/2018/57(1)) [2019] ZANCT 54 (19 April 2019) [2019] ZANCT 54

COURT

National Consumer Tribunal

BEFORE

Laura Best

CASE / FILE NUMBER

NCT/122364/2018/57(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

Case No: NCT/122364/2018/57(1)

In the matter between:

NATIONAL CREDIT REGULATOR

APPLICANT

And

XI MING GENERAL CASH DEALERS CC

RESPONDENT

JUDGMENT AND

REASONS

APPLICATION FOR CONDONATION FOR NON-COMPLIANCE WITH THE TRIBUNAL RULES

INTRODUCTION

1. The Applicant in the main matter is the National Credit Regulator (hereinafter referred to as the “Applicant”). The

Applicant is an organ of state and a juristic person within the public administration established in terms of Section 12 of the

National Credit Act, Act 34 of 2005 (hereinafter referred to as “the Act”). Its principal address is 127 Fifteenth Road, Randjespark, Midrand, Gauteng.

2. The Respondent in the main matter is XI MING GENERAL CASH DEALERS CC, a registered credit provider with registration number 2009/016227/07,

trading at Shop 3, 8 Voortrekker Street, Lydenburg.

ISSUE TO BE DECIDED

3. The issue to be decided by the Tribunal is whether to grant a condonation application for the late filing of the answering affidavit of the Respondent.
4. This is an application to the National Consumer Tribunal (“the Tribunal”), in terms of Rule 34(1)(a) of the Rules for Conduct of Matters Before the National Consumer Tribunal (“the Rules”), to condone the non-compliance by the Respondent [in the main matter] with the Rules in respect of the late service and filing of the Respondent’s Answering Affidavit in the main application in terms of section 140(1) of the Act.
5. The Respondent in the main matter is the Applicant in this condonation application. For consistency and ease of understanding, this

judgment

will utilise the terms Applicant and Respondent as these pertain to the parties in the main matter.

6. Before the Tribunal hears the main matter it must consider the application brought by the Respondent to condone its non-compliance with the Tribunal’s Rules[1].

BRIEF FACTS OF THE MATTER

7. On 13 December 2018 the Applicant served on the Respondent an application to the Tribunal for the cancellation of the Respondent’s

registration as a credit provider in terms of section 57(1) of the Act. This application followed an investigation initiated by the Applicant into the conduct of the Respondent in the consumer credit market, which the Applicant submits constitutes contraventions of the Act. This constitutes the main matter, the merits of which will be considered at a hearing to be convened by the Tribunal for this purpose. The merits will thus not be dealt with here.

8. The Tribunal issued a Notice of Filing to the Applicant and the Respondent on 19 December 2018.
9. Robin, Twaddle and Associates sent correspondence to the Applicant and the Tribunal on 11 January 2019, informing of their Notice of Appointment as attorneys of record for service for the Respondent.
10. On 31 January 2019, the Tribunal issued a Notice of Set Down to the parties for a hearing to be held on 8 March 2019.

11. On 1 March 2019 the Respondent filed an application for condonation for the late filing of the Answering Affidavit, and presented same.
12. The matter was subsequently withdrawn from the Tribunal Hearing Roll for 5 March 2019 in order for the condonation application to be adjudicated.
13. The Applicant has not opposed this condonation application.

LEGAL PRINCIPLES

In deciding this matter, the Tribunal considered the following legal principles:

14. According to Tribunal Rule 34(1) “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.”
15. Rule 34 (2) states “The Tribunal may grant the order on good cause shown”.
16. The word ‘condone’ stems from the Latin term *condonare*, which means to refrain from punishing. The Oxford English Dictionary[2] defines ‘condone’ as to “accept or forgive an offence or wrongdoing”, whilst the Collins English Dictionary[3] defines it as to “overlook or forgive (wrongdoing)”.
17. Legislation does not provide criteria that may be considered when assessing whether to condone non-compliance with Tribunal rules or not. However, jurisprudence has been developed by the courts over time, providing guidance to the Tribunal.
18. In *Mofokeng v Attorney General*,[4] it was held that “good cause” means substantially the same as “sufficient cause”, meaning that the Tribunal may grant condonation for non-compliance with its Rules where the applicant, has demonstrated objectively good reasons for non-compliance.
19. In *Melane v Santam Insurance Company Limited*[5] when dealing with the question of condonation 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 therefor, 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.”

20. Similarly in *Mbutuma v Xhosa Development Corporation Ltd*[6] the court held that:

“The main issue in these proceedings is whether this Court should grant the indulgence sought, notwithstanding the inordinate delay in approaching the court for condonation. The Court has a very wide discretion in these matters. Condonation may be granted under Rule 13 of the Rules of this Court if the applicant has satisfied the Court that sufficient cause has been established for granting him relief from the operation of the Rules; and, in deciding whether sufficient cause has been shown, the Court will consider all the relevant facts and circumstances of the particular case, such as the degree of non-compliance with the Rules, for example the length of the delay, the explanation therefor, the importance of the case, the prospects of success, the respondent’s interests in the finality of his judgment and the avoidance of unnecessary delay in the administration of justice...”

21. From these two judgments it can be seen that not only must the Tribunal act fairly in arriving at a decision to grant or not to grant condonation, it must also consider a number of factors, including the degree of lateness of the application, the reasons therefore, the prospects for success should the matter be heard and the importance of the case. These factors need to be considered in conjunction and not in isolation.

CONSIDERATION OF FACTORS

22. Whilst there is no exhaustive list of factors to be considered by a court or tribunal when deciding whether or not to condone non-compliance with its rules, the following factors were considered by the Tribunal in this matter:
- a. Degree of lateness;
 - b.

Reasons

therefore;

- c. Prospects of success; and
 - d. Importance of the matter.
23. Accordingly, the Tribunal considered the facts as elucidated further below when deciding this application:-

Degree of lateness and the reasons therefore

24. In *Saloojee & Another NNO v Minister of Community Development*[7] the court held that an excessive delay would require an extraordinarily good explanation. Condonation is likely to be granted in instances where the degree of lateness is not excessive.
25. In the present case, the Respondent calculated the due date for the Respondent’s Answering Affidavit to be 15 January 2019, taking into account that the period of 24 December 2018 - 2 January 2019 was a period of dies non for the Tribunal due to the annual closure of its offices.

26. The Respondent's mother tongue is not English and from the date of receipt of the service of the Applicant's papers, the Respondent submitted that difficulties were experienced with understanding the nature of the matter. The Respondent did however

realise the possible grave implications of the matter and the consequences on the future of the Respondent's business. As a result as early as from the date of service of the application, the Respondent approached various people to assist with explaining the details of matter to the Respondent.

27. The Respondent's limited understanding of English also made it difficult to compile the Answering Affidavit telephonically. The Respondent is based in Lydenburg and the attorneys' are based in Midrand, Gauteng.
28. The services of a linguist were also required to ensure the accuracy of the Answering Affidavit.
29. The first available date for the Respondent, the Attorney and the linguist to meet in person to provide the information required to begin to prepare the Answering Affidavit was 13 February 2019. The Affidavit was compiled following this meeting and filed thereafter on 1 March 2019 together with this condonation application.
30. The Respondent has demonstrated objectively good reasons for non-compliance and offered a plausible explanation for the lateness in filing the Answering Affidavit.
31. The degree of lateness, whilst of concern, cannot necessarily be regarded as excessive.

Prospects for success

32. The prospects for success by the Applicant in the main case should be left to the Tribunal to adjudicate in full, based on the substantial submissions of both parties.

33. In the interests of administrative justice and fairness, it is important that both parties be given an opportunity to present their respective cases in totality and then argue the respective merits in this matter in full before the Tribunal for adjudication.
34. It is further evident that no party will suffer prejudice by the granting of the condonation. Rather, the Respondent submits that the Respondent would be prejudiced by being denied the opportunity to answer to the allegations made by the Applicant in the Founding

Affidavit.

35. The Applicant has not opposed the condonation application.

The importance of the case

36. The matter is clearly important to the Respondent in view of the seriousness of the relief sought by the Applicant, which could result in the de-registration of the Respondent as a credit provider and hence the closure of the Respondent's businesses with resultant loss of means of livelihood.
37. The Respondent's Answering Affidavit contains important information that would be in the interest of justice to place before the Tribunal in adjudicating the main matter. The availability of the full submissions of both parties will inform and strengthen the adjudicative process to be undertaken by the Tribunal in consideration of the full facts of the main matter. This will serve

the interest not only of both parties to this matter, but to consumers in general, as envisaged in South African consumer protection legislation.

CONCLUSION

38. The factors taken in account in determining this condonation application have been considered in conjunction and not in isolation.
39. There is sufficiently good cause shown that granting the condonation application will enable the parties to fully ventilate their

respective cases before the Tribunal for adjudication. This will determine whether or not consumers' rights have been violated

and suffered losses as a result of the business practices of the Respondent. This clarity is important for the proper functionality of the consumer credit market in compliance with the legislative and regulatory framework.

ORDER

40. Accordingly, for the reasons set out above the Tribunal makes the following order:-
 - a. Condonation is hereby granted for the late filing of the Respondent's Answering Affidavit in the main application; and
 - b. No order as to costs.

Dated on this 19th day of April 2019.

DR LAURA BEST

PRESIDING MEMBER

- [1] Rules for the conduct of Matters before the National Consumer Tribunal published under GG30225 of 28 August 2007 as amended by GenN428 in GG34405 of 29 June 2011.
- [2] Oxford English Dictionary, Second Edition.
- [3] Collins English Dictionary ,Fourth Edition, 2011.

[4] OFS 1958

(4) SA (O).

[5] 1962 (4) SA 531 (A) at 532C-F.

[6] 1978 1 SA 681 (A).

[7] 1965

(2) SA 135 (A) 141 B-H.

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