
SOUTH AFRICA / JUDGMENT

Ndimma and Another v Nedbank Limited and Another (NCT/121761/2018/141(1)(b)) [2019] ZANCT 155 (29 March 2019) [2019] ZANCT 155

COURT
National Consumer Tribunal

BEFORE
N Maseti

CASE / FILE NUMBER
NCT/121761/2018/141(1)(b)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT/121761/2018/141{1}(b)-Rule 34

In the matter between:

NOMATHEMBA BEAUTY NDIMA 1st APPLICANT

MYRLENE PIETERSE

2nd APPLICANT

And

NEDBANK LIMITED

1st RESPONDENT

NATIONAL CREDIT REGULATOR

2nd RESPONDENT

Coram:

Ms N Maseti - Presiding Member

CONDONATION RULING

APPLICANTS

1. The First Applicant, who seeks to refer in the main matter, is Nomathemba Beauty Ndimba, an adult female residing at Motherwell, Port Elizabeth ("hereinafter referred to as the First Applicant."). The First Applicant is currently under the employ of the Second Applicant.
2. The Second Applicant is Myrlene Pieterse, an adult female residing at South End, Port Elizabeth and is the First Applicant's employer. The Second Applicant will hereinafter be referred to as "the Complainant".
3. The Applicants are represented by Ms Alet Gericke of Carstens Gericke Attorneys.

RESPONDENT

4. The First Respondent is Nedbank Limited, a registered bank and public company incorporated as such in terms of the Company Laws of South Africa, with registration number 1951/000009/06. The First Respondent has its registered address at 135 Rivonia Road, Sandown, Sandton, Gauteng; (hereinafter referred to as "the Respondent") The Respondent is the Applicant/Respondent in the main matter.
5. The Second Respondent is the National Credit Regulator an administrative body established in terms of section 12 of the National Credit Act, 34 of 2005; with its registered address at 127 15th Road, Randjespark, Midrand, Johannesburg, Gauteng.
6. The Respondents did not oppose this application.

THE APPLICATION

7. This is an application in terms of Rule 34 of the Rules of the Tribunal, for condoning the non-compliance with the Tribunal's rules and proceedings.
8. In the main matter, the Applicants seek leave to refer their complaint directly to the National Consumer Tribunal ("the

Tribunal"), following a Non-Referral Notice issued by the National Credit Regulator ("the NCR") on 27 July 2018.

9. The Applicants had 20 business days from 27 July 2018 to file their application for leave to refer, following the aforementioned

Non-Referral Notice, but failed to, due to the reasons set out below.

10. The Applicants seek the indulgence of the Tribunal to condone their non-compliance.

BACKGROUND AND BRIEF FACTS OF THE COMPLAINT

11. I deem it necessary to first give a brief background of the facts of the complaint in the main matter in order to provide a connected picture for purposes of the current application for condonation.

12. The First Applicant is employed by the Second Applicant, as a health care worker for her mother. It is the Applicants' submission that the First Respondent entered into three credit agreements with the Consumer in which it granted credit by loans and credit cards[1]; which the Complainant alleges, were extended recklessly. The basis for this allegation is, inter alia, that the First Applicant is 'financially ignorant', did not comprehend the implications of the credit, and a comprehensive affordability

assessment had not been properly conducted.

13. After becoming aware of the First Applicant's financial situation, the Complainant filed a complaint with Nedbank on behalf of the First Applicant. Following a series of communication between herself and Nedbank, she lodged a complaint with the Ombudsman for Banking Services ("the Ombudsman"), who found no evidence of reckless lending, in November 2017. The Ombudsman's assessment of the credit report revealed, however, that the First Applicant did not disclose other debt obligations with Jet Stores and DSTV, which might have had an impact in the outcome of the affordability assessment conducted by Nedbank.

14. The Applicants ultimately lodged a complaint with the NCR on 6 February 2018. The NCR conducted its own investigation including an affordability assessment with the information obtained from the First Applicant and the First Respondent. On 27 July 2018, the NCR

issued a notice of non-referral to the Applicants on the premise that, it found no evidence of reckless lending and improper affordability assessment, in contravention of the NCA by the First Respondent.

15. I now turn to the background of the current application.

16. The Second Applicant and the First Respondent went into settlement negotiations following the outcome of the inquiry and investigation

conducted by the Ombudsman and the NCR respectively. The Applicants reached a consent with the Second Respondent that they will continue with the negotiations in order to resolve the matter, and will only file the complaint directly with the NCT if the settlement negotiations fail.

17. The Complainant submits that they had not reached an agreement with the First Respondent by the last day of the submission window namely, 27 August 2018, but had prepared their application for leave to refer for filing should they not reach a settlement. The negotiations extended beyond the aforesaid submission window and later failed.

APPLICABLE SECTIONS OF THE NCA[2] AND RULES[3]

18. In deciding on this matter, it is crucial to set out the relevant statutory and regulatory provisions as well as the case law governing the condonation application.

Rule 34 (1)[4] states "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."

19. Rule 34 (2} states "The Tribunal may grant the order on good cause shown·.

20. 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"[5]. It can also be defined to mean "overlook or forgive (wrongdoing)"[6].

21. In *Cairns' Executors v Gaarn*[7] the court slated that it is impossible lo frame an exhaustive definition of what would constitute sufficient cause to justify the granting of indulgence. It also opined that any attempt to do so; would merely hamper the exercise of a discretion which the Rules have purposely made very extensive. The court held that it is highly desirable not lo abridge the court's discretion. Thus, the Applicant seeking condonation, must demonstrate that which entitles it to ask for the indulgence of the court. It also held that the demonstration thereof, depends on the circumstances of each application.

22. In *Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others*[8] the court held that the standard of considering an application of this nature is the interests of justice. Whether ii is in the interest of justice to grant condonation; depends on the facts and circumstances of each case. This requires the exercise of a discretion on an objective conspectus of all the facts.

23. Relevant factors to consider include but are not limited to:

23.1 the nature of the relief sought;

23.2 the extent and cause or the delay;

23.3 the effect of the delay on the administration of justice and other litigants;

23.4 the reasonableness of the explanation for the delay;

23.5 the importance of the issue to be raised in the intended appeal; and

23.6 the prospects of success[9]

24. In *Mefane v Santam Insurance Company Limited*[10] 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.”

The court further held that "[...] without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused [...]"

CONSIDERATION OF THE MERITS

25. In evaluating the merits of this application, the Tribunal will consider the following factors -

25.1 Degree of lateness

25.2 Cause of delay thereof;

25.3 Prejudice: and

25.4 Prospects of success

Degree of lateness and cause of delay

26. The Applicants filed the leave to refer as well as the condonation application on 6 December 2018, four months outside the prescribed 20 business days. The Applications account the extended settlement negotiations with the First Respondent as the cause of the delay in filling their application for leave to refer.

27. I note the lengths the parties have taken to attempt to reach a resolution, it indicates that the main matter is of substantial

importance to both parties especially if one gives regards to the dire financial implications on the First Applicant; due to insurance charges, interest rate of 35,2% and other debt obligations previously excluded.

Prejudice

28. As mentioned, the Respondents did not file papers opposing this application for condonation. Furthermore, the First Respondent. from the evidence and submissions of the Applicants, agreed with the Applicants not to oppose this application for condonation.

Prospects of success

29. In addition to consideration of other factors for condonation. it is also important to note that when dealing with prospects of success; it is necessary for the Tribunal to consider the merits of the matter.

30. The Applicants states that:

"In Penrice v Dickinson,[11] the Appellate Division held that, in an application for condonation. The merits of the appeal may in some cases be an important factor. It also held that, if there is sufficient information before the court to enable it to decide whether the appeal has or has not a reasonable prospect of success, it had to decide the question. And the court stated the reason for this as being—that if the appeal is—hopeless, the "great expense of prosecuting it would be a mere waste of money".

31. This view was reiterated in the Melane case where the court stated that, "without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused." The Tribunal aligns itself with this reasoning.
32. In the current matter before this Tribunal, the Applicant alleges that the First Respondent extended credit recklessly to the First Applicant by not conducting a proper affordability assessment; not taking into account the consumer's other financial obligations such as the DSTV and Jet Stores accounts. The findings of the Ombudsman, however, revealed that such information was not disclosed to the First Respondent. In view of this finding, the Ombudsman apprised the First Applicant, in its letter dated 27 June 2017, about the requirements of section 81(4)(a) of the National Credit Act; which impose an obligation on the consumer to answer fully and truthfully requests for information made by the credit provider as part of the requisite affordability assessment.
33. The Applicants state that they have good prospects of succeeding with this matter if they were granted condonation and thereby an opportunity to apply for leave to refer the matter to the Tribunal. However, the Tribunal believes that the explanation given for the delay is not a good justification, as the Applicants were fully aware of the due date for filing, and nothing prevented them from exercising that right while negotiating for settlement with the First Respondent.
34. Furthermore, based on the affordability assessment conducted by the Second Respondent to independently verify whether or not there is a case for reckless lending, no evidence of over-indebtedness on the part of the First Applicant. For the Applicants to succeed in this application, they must demonstrate good, sufficient cause and establish good grounds that will persuade the Tribunal to make a decision in their favour.
35. The Applicant has approached other forums, namely; the Second Respondent and the Ombudsman for Banking Services, on the same

merits, where it is blatantly clear that there is no cause of action to warrant the hearing of this matter. It is not in the interest or justice to grant this condonation in view of the above facts, and given the fact that the First Respondent has already written off the outstanding balance on the second credit card, the American Express Card ("the AMEX Card"). This was to remedy the system error that the First Respondent identified when the third credit agreement concerning the granting of the AMEX Card occurred.

36. The Tribunal, in terms of section 150, has powers to make certain orders. Amongst these orders, is an order condoning any non-compliance with its rules and procedures on good cause shown. The test here is on "good cause for such an order to be made.
37. Once more, the Applicant has not been able to establish or show these grounds. The absence of these grounds limits the Tribunal's powers to favourably grant condonation.

ORDER

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

- a. The application for condonation is hereby refused.
- b. No order is made as to costs.

DATED ON THIS 29th day of March 2019

Ms Nomfundo Maseti

Presiding Member

[1] Credit agreements were as follows: Credit Card 1 issued on 7 October 2015, Personal Loan granted on 11 April 2016 and Credit Card 2 (American Express Credit Card 2) issued on 6 October 2016.

[2] National Credit Act 34 of 2005

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

Tribunal, 2007

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

Tribunal, 2007

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

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

[7] 1912 AD 181 at 186.

[8] 2003 (11) BCLR 1212 (CC) at para [11].

[9] 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.

[10] 1962 (4) SA 531 (A) at 532C-F.

[11] 1945 AD 6

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