SOUTH AFRICA / JUDGMENT

# Ruggiero v Marsh Woodside Village Trust (NCT/65009/2016/73(3)&75(1)(b)) [2017] ZANCT 130 (1 November 2017)

[2017] ZANCT 130

COURT
National Consumer Tribunal

BEFORE
P A Beck

CASE / FILE NUMBER
NCT/65009/2016/73(3)&75(1)(b)

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**IN**
**THE NATIONAL CONSUMER TRIBUNAL**
**HELD**
**IN CENTURION**
**Case**
**number: NCT/65009/2016/73(3)&75(1)(b)**
**In**

| | |
|---|---|
| **the matter between:** | JOHN<br>RUGGIERO<br>APPLICANT<br>AND<br>MARSH<br>WOODSIDE VILLAGE<br>TRUST<br>RESPONDENT<br>CONDONATION |

JUDGMENT

1. APPLICANT

The Applicant is John Ruggiero an adult male, residing at Howick, KwaZulu- Natal, ("the Applicant.")

2. RESPONDENT

The Respondent is Marsh Woodside Village Trust which administers a retirement village situated in Rondebosh, Cape Town "the

Respondent.")

3. APPLICATION TYPE

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].

4. BACKGROUND TO THE CONDONATJON APPLICATION

4.1 The Applicant and his wife resided for five years in a retirement village operated according to a life rights structure administered by the Respondent. In terms of such a structure, retired persons make a loan to the trust and in return they are entitled to reside in one of the cottages. When the agreement is terminated, the retired person(s) or their estate may be entitled to receive a refund of this loan. The terms of such a structure is governed by a life rights agreement.

4.2 On 13 July 2009, the Applicant and his wife signed a life rights agreement to reside in a cottage. The agreement was terminated on 29 February 2015. In terms of the agreement:

- the Applicant would be refunded the capital amount of the loan which he granted to the Respondent in 2009; and
- on termination, the cottage would be painted, cleaned and repaired by the Respondent and the cost of the painting, cleaning and repairs would be deducted from the capital sum owed by the Respondent, to the Applicant.

4.3 When the Respondent refunded the Applicant the capital sum of the loan, the Respondent deducted R22 440,00 for painting, cleaning and repairs. The Applicant alleges that this sum is grossly inflated whereas the Respondent alleges that the cost of painting, cleaning and repairs, is standard and reasonable. All attempts by the Applicant to resolve the matter with the Respondent were unsuccessful and so the Applicant lodged a complaint with the National Consumer Commission ("the Commission".)

4.4 On or about 21 June 2016, the Commission issued a notice of non-referral on the basis that "the Applicant did not allege any facts which, if true, would constitute grounds for a remedy under the Consumer Protection Act, 2008 (the Act)."

4.5 In terms of section 75(1) (b) of the Act the Applicant may after receipt of the notice of non-referral, refer the matter directly to the Tribunal, with the leave of the Tribunal. Such application must be done within the prescribed time and in the prescribed manner and form. The Applicant did not submit the application in compliance with the Tribunal Rules and sought condonation from the Tribunal, which condonation was granted in February 2017.

4.6 A Notice of Complete Filing was issued on 16 February 2017. The Respondent did not submit his answering affidavit within 15 business days after the issuing of the Notice of Complete Filing, as required by the Rules of the Tribunal, hence this application for condonation.

4.7 In the application for condonation the Respondent explained why he did not submit his answering affidavit within the required 15 business days as required by the Rules of the Tribunal.

5. APPLICABLE RULES OF THE TRIBUNAL, THE ACT AND CASE LAW

5.1 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."

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

5.3 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.

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".

5.4 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]

5.5 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.

5.6 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:

- the nature of the relief sought;
- the extent and cause of the delay;
- the effect of the delay on the administration of justice and other litigants;
- the reasonableness of the explanation for the delay;
- the importance of the issue to be raised in the intended appeal; and
- the prospects of success.[4]

5.7 In Melane v Sanlam 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 Development1965 (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 Sanlam 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]

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

6. CONSIDERATION OF THE MERITS

6.1 In evaluating the merits of the application the Tribunal considered the following factors -

- The Act, the Rules of the Tribunal and relevant case law;
- The Applicant has not opposed the Application for condonation;
- The Respondent has provided a reasonable explanation for the delay;
- The delay is not excessive or unreasonable in the circumstances and
- 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.

6.2 The reasons advanced by the Respondent for failing to file his answering affidavit in accordance with the Tribunal Rules is mainly that the Respondent:

6.2.1 is a lay person, unfamiliar with procedure in matters before the Tribunal;

6.2.2 was not aware of the requirement to file an answering affidavit;

6.2.3 thought that all the documents filed with the Tribunal was sufficient to put his defence before the Tribunal;

6.2.4 was not advised of procedural matters by the Respondents attorneys and

6.2.5 the Respondent was only provided with a full set of the Applicant's Application before the Tribunal on 4 September 2017.

6.3 It is for these reasons that the Respondent was not placed in a position to file his answering affidavit in accordance with the Rules of the Tribunal. The Respondent submits that there is no prejudice to the Applicant should the Tribunal condone the late filing of the Respondents answering affidavit and indeed the Applicants late fling of his application was condoned by the Tribunal, hence the same indulgence should be granted to the Respondent. The Respondents application for condonation is not opposed and was filed within three

(3) days more particularly on 7 September 2017, after the Respondent received a full set of the Applicant's Application before the Tribunal.

In evaluating the merits of the application the Tribunal finds that the Respondent has provided a reasonable explanation for the delay in filing the Respondent's answering affidavit. It is in the interests of justice that the Respondent be given an opportunity place the full facts of the matter before the Tribunal in order to establish whether the Respondent has a bona fide defence to the application. The Tribunal therefore grants the application for condonation. The normal rules will apply for the filing of the replying affidavit. Once these affidavits are received the Tribunal will consider the issue of whether to grant leave to the Applicant to have the matter heard by the Tribunal.

7.

**RULING**

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

7.1 The application for condonation is granted;

7.2 The Respondent must file his answering affidavit within 15 days of the issuing of this judgment and

7.3 There is no order as to costs.

Dated at Johannesburg on this 1st day of November 2017.

[Signed]

P A BECK

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 199415 ILJ 610 (LAC) at 613E.

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