

SOUTH AFRICA / JUDGMENT

## Samuel v National Credit Regulator (NCT/91811/2017159(1)) [2018] ZANCT 65 (26 May 2018) [2018] ZANCT 65

COURT

National Consumer Tribunal

BEFORE

Laura Best

CASE / FILE NUMBER

NCT/91811/2017159(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

Case No: NCT/91811/2017159(1)

In the MAIN matter between:

RANDOLPH VAUGHAN SAMUEL

APPLICANT

And

NATIONAL CREDIT REGULATOR

RESPONDENT

In the CONDONATION application

NATIONAL CREDIT REGULATOR

APPLICANT

RANDOLPH VAUGHAN SAMUEL

RESPONDENT

RULING AND REASONS

APPLICATION FOR CONDONATION FOR NON-COMPLIANCE WITH THE TRIBUNAL RULES

1. The Applicant in the condonation application is the National Credit Regulator, (hereinafter referred to as "the Applicant").

2 The Respondent is Mr Randolph Vaughan Samuel (hereinafter referred to as "the Respondent")

#### THE APPLICATION

3 This is an application brought by the National Credit Regulator, the Applicant, in terms of Rule 34(1)(d) of the Rules of the Tribunal for an order to condone the Applicant's non-compliance with procedures in terms of the Rules for the late service and filing of the Applicant's answering affidavit in the main application.

#### BACKGROUND

4 The Applicant in the main matter, Mr Samuel, brought an application in terms of section 59(1) of the National Credit Act, Act 34 of 2005 ("the Act") to the National Consumer Tribunal ("the Tribunal/NCT"), for a review of the action by the Respondent in the main matter (the National Credit Regulator) to de-register Mr Samuel as a debt counsellor.

5 The Respondent in the main matter made an application on 9 February 2018 in terms of Rule 18(3) of the Rules of the Tribunal for an order to postpone the principal matter set down for hearing on 13 February 2018 so as to afford the Respondent the opportunity to file a condonation application for the late filing of its answering affidavit in the main application. The application also set out the basis of the condonation application.

6 The Applicant (in the main matter}, opposed the application for postponement.

7. At the hearing on 13 February 2018; the merits of the main matter and the application for condonation; were not dealt with. After hearing the parties on the application for postponement, a ruling was issued

granting the postponement sine die.

8. The Tribunal further ordered that the Respondent (in the main matter) should file its condonation application and answering affidavit within 15 business days from the date of issuing of the Postponement

#### Ruling.

9. The details of the Order were pronounced; ex tempore; by the Presiding Member of the hearing panel; on the day of the hearing, followed by the formal issuing of the Postponement Ruling on 22 February 2018.

10. The Applicant in the condonation application filed its answering affidavit on 15 March 2018, in support of the affidavit filed on 9 February 2018 in the postponement application which also dealt with the arguments for condonation.

11. The Respondent filed its Replying Affidavit on 4 April 2018. The merits in the answering and replying affidavits will only be considered at an NCT hearing should the condonation application be granted and the main matter set down for said hearing.

#### LEGAL PRINCIPLES

12. According to Tribunal Rule 34(1) "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."
13. Rule 34 (2) states "The Tribunal may grant the order on good cause shown".
14. The word 'condone' stems from the Latin term condonare, which means to refrain from punishing. The Oxford English Dictionary[1] defines 'condone' as to "accept or forgive an offence or wrongdoing", whilst the Collins English Dictionary[2] defines it as to "overlook or forgive (wrongdoing)".
15. 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.
16. In *Mofokeng v Attorney General*,[3] 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.
17. In *Melane v Sanlam Insurance Company Limited*[4] 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."

18. Similarly in *Mbutuma v Xhosa Development Corporation Ltd*[5] 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..."*

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

#### CONSIDERATION OF THE MERITS

20. 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 therefor;
- (c) Prospects of success; and
- (d) Importance of the matter.

21. The following factors were considered by the Tribunal when deciding this application:-

Degree of lateness and the reasons therefor

22. In *Saloojee & Another NNO v Minister of Community Development*[6] 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.

23. In the present case, at the hearing, the Applicant submitted the following key issues regarding lateness and reasons therefor:

23.1 Despite the Respondent having filed a section 59(1) application on 29 September 2017, most regrettably the application only came to the Applicant's attention on receipt of the Notice of Set Down dated 25 January 2018 for the hearing on 13 February 2018;

23.2 On receipt of the Notice of Set Down; the Respondent endeavored to locate the application to which the Notice of Set Down referred

without success. The Applicant could not establish the whereabouts of the application and the only plausible explanation is that the application was misplaced at the time of receipt and same never reached the intended department;

23.3 The Applicant subsequently swiftly contacted the NCT on 31 January 2018 to obtain a copy of the application, and submitted an application for postponement and condonation on 9 February 2018; and

23.4 The Applicant submitted that not being able to locate the original application with immediacy; was bona fide and not an attempt to unnecessarily delay the matter.

24. For purposes of this condonation application, whilst the degree of lateness may seem lengthy, and whilst it is concerning that the

administrative systems of the Applicant, who has legal responsibilities to regulate the debt counselling industry, seem to have serious weaknesses, the reason for the lateness is plausible under the circumstances.

Prospects for success

25. The Answering and Replying Affidavits filed by the Applicant and the Respondent respectively suggest that both parties believe there are prospects for success in the main matter, albeit from different perspectives. It is precisely these differing versions that point to the need for the parties to be given the opportunity to put forward their respective arguments and ventilate the issues fully.

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

The importance of the case

27. The matter is clearly important to the Applicant and the Respondent as both these parties have filed extensive papers raising arguments and counter arguments, which stand to be adjudicated by the Tribunal in a separate process. Further, both parties claim potential prejudice should the matter not be expeditiously resolved.

28 Further the judgment on the issues within the main matter could possibly result in critical precedence for other potential applicants facing similar circumstances.

29. It is thus clearly an important matter for both parties. And in the interests of administrative justice and fairness, it is important that both parties be given an opportunity to fully ventilate the issues in the main matter.

## CONCLUSION

30. In the interests of consumers' rights, administrative justice and fairness, it is important that both parties be given an opportunity to fully present and argue the issues in the main matter.

31. Further, it is in the interests of justice that the condonation sought be granted; to enable the parties to fully present their respective cases before the Tribunal.

## ORDER

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

32.1 Condonation is hereby granted for the late filing of the Answering Affidavit by the Applicant.

32.2 No order as to costs.

Dated on this 26th day of May 2018.

DR LAURA BEST

PRESIDING MEMBER

- [1] Oxford English Dictionary Second Edition
- [2] Collins English Dictionary ,Fourth Edition, 2011
- [3] OFS 1958 (4) SA (O)
- [4] 1962(4) SA 531 (A) at 532C-F
- [5] 1978 1 SA 681(A)
- [6] 1965 (2)SA 135(A) 141 B-H.

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