

SOUTH AFRICA / JUDGMENT

Smooth Coast Trading and Projects (Pty) Ltd v Lidsay Saker VW East Rand (NCT/131624/2019/75(1)(b)) [2019] ZANCT 95 (6 July 2019)

[2019] ZANCT 95

COURT

National Consumer Tribunal

BEFORE

B Dumisa

CASE / FILE NUMBER

NCT/131624/2019/75(1)(b)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

Number: NCT/131624/2019/75(1)(b)

In

the matter between:

SMOOTH

COAST TRADING AND PROJECTS (PTY) LTD

APPLICANT

and

LINDSAY

SAKER VW EAST RAND a Division of Motus Group Limited

RESPONDENT

Coram:

Presiding

Member: Prof B Dumisa

Date

of Judgement: 6 July 2019

CONDONATION

JUDGMENT**APPLICANT**

1. The Applicant is SMOOTH COAST TRADING AND PROJECTS (Pty) LTD (“the Applicant”), a company registered in South Africa with Registration Number 2012/054804/07, with physical address at 72 Krombroek Street, Birch Acres Extension 34, Birchleigh North, KEMPTON PARK, in the Gauteng Province.

RESPONDENT

2. The Respondent is LINDSAY SAKER VW EAST RAND, a Division of MOTUS GROUP LIMITED (“the Respondent”); with the offices and workshop situated at 15 North Rand Road, Bardene, BOKSBURG, in the Gauteng Province.

BACKGROUND

3. The main application was brought in terms of Section 75(1)(b) of the Consumer Protection Act No. 68 of 2008.
4. The Applicant in the Condonation application is also the Applicant in the main matter.
5. The Respondent in the main matter is also the Respondent in the Condonation Application.
6. The Applicant filed for condonation, on 28 April 2019, for non-compliance with the Tribunal Rules due to failure to file the main application within the prescribed period.
7. The Applicant’s reasons for requesting condonation are that he tried to apply earlier, on various occasions, but the applications were not accepted as completed, as more information was required and / or a correct format needed to be applied.

APPLICABLE SECTIONS OF THE ACT AND CASE LAW

8. Rule 34 (1) [1]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.”
9. Rule 34 (2) states “The Tribunal may grant the order on good cause shown”.
10. In Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others[2] it was held that the standard of considering an application of this nature is the interests of justice.

11. Whether it is in the interest of justice to grant condonation depends on the facts and circumstances of each case. It requires the exercise of a discretion on an objective conspectus of all the facts. Factors that are relevant include but are not limited to:

11.1 the nature of the relief sought;

11.2 the extent and cause of the delay;

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

11.4 the reasonableness of the explanation for the delay;

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

11.6 the prospects of success[3]

12. In *Melane v Santam Insurance Company Limited*[4] 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.”

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

CONSIDERATION OF THE MERITS

14. In evaluating the merits of the application the Tribunal will consider the following factors:

14.1 The application for condonation is opposed by the Respondents;

14.2 The Applicant has submitted substantial reasons in motivation of this Condonation Application;

14.2.1 The Applicant alleged that they bought a Volkswagen Polo 1.0 Comfortline from the Respondent, on or about the 19th of February 2018;

14.2.2 The Applicant alleged that he realized soon after purchasing that vehicle that “the vehicle was faulty and it had excessive sound coming from the gearbox”;

14.2.3 The Applicant said he promptly alerted the Respondent and Nedbank Limited about these vehicle problems;

14.2.4 The Applicant alleged that they attempted to make arrangements to have this vehicle replaced by the Respondent, with the intervention of Nedbank, but the Respondent refused to replace the car;

14.2.5 The Applicant further alleged that MIOSA, the Motor Industry Ombud of South Africa, dealt with the matter and ruled that the Respondent had to provide the Applicant with the necessary redress, including the possible vehicle replacement if the problems persisted after those proposed corrective measures had been implemented;

14.2.6 The Respondent failed to comply with the MIOSA ruling; and

14.2.7 The Applicant thereafter escalated the matter to the National Consumer Commission, which later issued a notice of non-referral on grounds that the complaint “Does not allege any facts which, if true, would constitute grounds for a remedy under the Consumer Protection Act, 2008”;

14.3 The Respondent, whilst being painted as uncooperative by the Applicant and partly by the MIOSA, did give some important responses to the allegations by the Applicant;

14.3.1 The Respondent took the position that the vehicle complained of was not defective;

14.3.2 The Respondent alleged that the Applicant brought his car in for the first 15 000km service on 22 August 2018, and there was no mention of any gearbox or clutch related problems;

14.3.3 The vehicle had been driven in excess of 30 000km within a period of one year, without ever breaking down, and without ever leaving the Applicant stranded;

14.3.4 The Respondent alleged that they offered to implement the MIOSA recommendation, and booked the Applicant’s car for an assessment on the 18th of November 2018;

14.3.5 The Respondent also offered the Applicant a courtesy car during the period of assessments and / or repairs; but

14.3.6 The Applicant rejected the Respondent’s offer and did not take the vehicle for assessment; and

14.4 The Applicant did not honour their financial obligations to Nedbank, which led to the latter applying to the North Gauteng High Court for the cancellation of the sales agreement and the repossession of the vehicle; the Court granted these prayers.

CONCLUSION

15. There are two issues at the core of this Condonation Application, namely, whether the Tribunal can condone the delays relating to the lodging of the complete papers, including the correction of the Respondent’s citation. On this point, the Tribunal is satisfied that the Applicant had bona fide reasons for not properly following those requirements, as the Applicant is a lay person without proper knowledge on citation procedures.

16. The second part of this Condonation Application is determining if it will be in the interests of justice to grant the condonation as applied for; in this case the Tribunal does not agree with the Applicant that it will be in the interests of justice to grant the condonation, when the matter is viewed holistically, for the following reasons:

16.1 The Respondent made a strong case that there was no proof that the vehicle being complained of was as defective as the Applicant has alleged;

16.2 The Respondent also made a strong case that the Tribunal effectively lacked jurisdiction to hear this matter on merits, on grounds that the sales agreement that the Applicant seeks to cancel was cancelled by the North Gauteng High Court on the 11th of February 2019, as per case number 77011/2018;

16.3 The Respondent made submissions that the Applicant does not hold title to the vehicle, nor is he in possession of the vehicle being complained of, as the Court Order stated that the vehicle had to be returned to the finance company, Nedbank;

16.4 The vehicle had been driven for over 30 000km within a space of one year one by the time the Applicant brought it in to the Respondent for the second service in March 2019; and

16.5 The Applicant is alleged to have even refused an offer of a used second-hand replacement car with mileage similar to the mileage the one the Applicant had made on the vehicle in dispute.

17 Under the circumstances, the Tribunal does not agree that the Applicant would have any high prospects of success, if any, if this matter were to be referred to the Tribunal for a full hearing on merits.

ORDER

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

18.1 Condonation is hereby NOT GRANTED primarily on grounds that the Applicant lacks locus standi in lodging this application because;

18.1.1 The sales agreement that the Applicant wants cancelled no longer exists, as it was cancelled through a Court Order, as per case number 77011/2018, issued by the North Gauteng High Court on the 11th of February 2019;

18.1.2 The Applicant does not have title to, and is not in possession of the vehicle he has complained of;

18.2 The Condonation is therefore not granted on grounds that there are no prospects of success for this matter should it be referred to the Tribunal for a full hearing on merits; and

18.3 No order is made as to costs.

DATED ON THIS 6th day of July 2019

Prof B Dumisa

Presiding Member

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

Tribunal, 2007

[2] 2003

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

[3] 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.

[4] 1962

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

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