

SOUTH AFRICA / JUDGMENT

## Stemmet v Motus Corporation (Pty) Ltd t/a Milnerton Multifranchise (NCT/83884/2017/75(1)(b)) [2017] ZANCT 141 (22 December 2017) [2017] ZANCT 141

COURT

National Consumer Tribunal

BEFORE

P A Beck

CASE / FILE NUMBER

NCT/83884/2017/75(1)(b)

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### Source record

IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

Number: NCT/83884/2017/75(1)(b)

In

the matter between:

WALEED

STEMMET

APPLICANT

and

MOTUS

CORPORATION (PTY) LTD T/A MILNERTON MULTIFRANCHISE

RESPONDENT

Coram:

P

A Beck – Presiding Member

CONDONATION

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## JUDGMENT

### INTRODUCTION

1. The parties in this application for condonation:
  - 1.1. The Applicant in this matter is Motus Corporation (Pty) Ltd t/a Milnerton MultiFranchise (the Respondent in the main matter) a company duly incorporated in terms of the laws of the Republic of South Africa, with its principal place of business at Bedfordview, Johannesburg.
  - 1.2. The Respondent, which is the Applicant in the main matter, is Waleed Stemmet, of Kenwyn, Cape Town.
  - 1.3. The Applicant and the Respondent will be referred to as they appear in the main matter.

### BACKGROUND

2. In the main matter the Applicant seeks an order to settle the outstanding balance on the Applicants vehicle in the amount of R90 000,00 (ninety thousand Rand) and an amount of R25 000,00 (twenty five thousand Rand) per month for loss of income from December 2015 to date of the order of the Tribunal. The Applicant alleges that the engine failure of the Applicants vehicle was caused as a result of poor workmanship on the part of the Respondent.
3. On or about 3 July 2017 the Applicant served the application in the main matter on the National Consumer Tribunal (the Tribunal). It would appear from the papers that the Applicant's notice of the Application to the Tribunal was served electronically on the Respondent on 4 July 2017. On 22 August 2017 the Tribunal Registrar issued a Notice of Complete Filing of the Applicant's Application (the notice). The notice provided that the Respondent may oppose the application in the main matter by serving an answer within 15 business days of the date of the notice. This means that that the Respondent was at the very least bound by the notice to serve its answering affidavit in the main matter (the answering affidavit) by 12 September 2017. It appears from the papers that the Respondent filed and served the answering affidavit on 17 October 2017. The answering affidavit was therefore filed approximately 24 business days late. The Respondent, on 17 October 2017, also served the Respondent's application for condonation on the Tribunal requesting condonation for the late filing of the Respondents answering affidavit, with submissions to support the application.

### ISSUE TO BE DECIDED

4. The issue to be decided is whether the application to condone the late filing of the answering affidavit of the Respondent should be granted or not.

### BRIEF

## FACTS

### The Respondent

#### Lateness

5. The Respondent's Legal Counsel, Natasha Forster (Forster), stated on affidavit in the application for condonation; that the Respondent did not receive the application in the main matter on 4 July 2017 as alleged by the Applicant; because the Application was incorrectly served on Accordian Investments (Pty) Ltd t/a Tata South Africa (Tata).
6. On 22 August 2017, when the Tribunal issued the notice of complete filing, neither the Respondent nor Tata at that point received the notice of complete filing. It would appear from the papers that the Respondent communicated with the Tribunal on 22 August 2017 informing the Tribunal that the Respondent had not received a complete bundle of the Application. Subsequently a complete bundle was received by the Respondent from the Tribunal; the precise date on which it was received is unclear from the papers.
7. Once the Application was received by the Respondent the Respondent set about obtaining information from the dealership involved in order to draft the answering affidavit. The delay in finalising the answering affidavit followed by the filing of the answering affidavit was per the submissions of the Respondent, although in contravention of the Rules, only slightly excessive in that it was 24 business days outside the time frame permitted by the Rules. The late filing was not done with the intention of being "contra bonos mores." Hence, the request by the Respondent that the late filing of the Respondents answering affidavit be condoned.

#### Prejudice

8. The Applicant would not suffer prejudice due to the Respondent's late filing of the answering affidavit. However, the Respondent submits that the Respondent stands to suffer prejudice if the Tribunal does not condone the Respondent's late filing of the answering affidavit.

#### Prospects of success

9. The Respondent submits that the Respondent has reasonable prospects of success in the main matter in that the Applicant has not set out factual and legal grounds for its application to succeed.

### The Applicant

10. The Applicant did not oppose the condonation application.

## LEGAL PRINCIPLES

11. It is convenient to set out the relevant statutory and regulatory provisions as well as the case law governing the condonation application.

12. Rule 34 (1) (a)[1] provides that a "party may apply to the Tribunal in Form TI r.34 for an order to condone the late filing of a document or application". Rule 34 (2) states that the Tribunal may grant the order on

good cause shown.

13. Rules 13 (1) and (2) respectively provide that:

"(1) 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.
- (2) 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".

14. 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"[2]. It can also be defined to mean "overlook or forgive (wrongdoing)"[3].

15. In *Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others*[4] it was held that the standard for determining an application of this nature is the interests of justice.

16. Whether it is in the interests 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 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.[5]

17. In *Melane v Santam Insurance Company Limited*[6] it was held that:

*"In deciding whether sufficient cause has been shown, the basic principle 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. Ordinarily these facts are inter-related; they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. And the Respondent's interests in finality must not be overlooked.*

18. The dictum in *Melane* reveals that these factors are interrelated and should not be considered separately.

#### CONSIDERATION OF THE MERITS

19. I now turn to the merits of the condonation application.
20. Forster does not state when the application in the main matter came to her attention. It is further odd alternatively, co-incidental that Forster contacted the Tribunal on 22 August 2017, the same date on which the Tribunal issued the notice of complete filing, to inform the Tribunal that the Respondent had not received a “complete application.” Is it to be assumed then that Forster at some point received part of the application only and when was this part received? I am not persuaded on the information presented to me that the Respondent's delay in timeously delivering the answering affidavit was caused purely as a result of the Applicant's failure to serve the application on the correct address because of the Respondent's failure to fully take the Tribunal into her confidence with regard to the precise dates of the application or part thereof coming to her attention.
21. Nevertheless, I am satisfied that Forster took the steps that could reasonably have been expected of her to, amongst other things, obtain information from the dealership upon which it is alleged that the application was erroneously served, to contact the Tribunal to enable the Respondent to draw the answering affidavit and for the respondent to ultimately serve the answering affidavit on the Applicant. It follows that from the submissions that the Respondent did not use the fact that the application was served on the incorrect party to do nothing and has provided a reasonable explanation for the delay. In the circumstances further, the degree of lateness in my view is not excessive.
22. The Applicant did not oppose this application. In my view, the Respondent will suffer prejudice if it is denied the opportunity to answer the very serious allegations the Applicant has raised against it.

#### Prospects of success and importance of the main matter

23. Prospects of success cannot be determined with certainty at this stage. On the part of the Respondent, the Respondent has denied responsibility for the failure of the Applicants' engine allegedly caused as a result of poor workmanship on the part of the Respondent. It is noted that the Respondent made no submissions to the Motor Industries Ombudsman (MIO), despite being invited by the MIO to do so. This failure was viewed by the MIO with “great concern that Tata Edenvale did not make submissions as requested. Failure to respond to the correspondence ... is indicative of non-compliance with the Automotive Industry Code of Conduct. Section 82(8) of the Consumer Protection Act 68 of 2008 also prohibits such non-compliance.”

24. The Applicant has pursued this matter through the various channels available to him. In as much as the Applicant seeks compensation as referred to in 2 above the Tribunal is empowered through section 150 of the CPA to “make an appropriate order.”
25. Moreover, the matter is clearly of importance to both parties.

## CONCLUSION

26. For these reasons I am persuaded it is in the interests of justice that the condonation application be granted to enable the parties to place their respective cases before the Tribunal.
27. Since the late filing of the answering affidavit has been condoned, the normal time periods and processes following the filing of an answering affidavit, as set out in the Rules, apply.

## ORDER

28. Accordingly, the Tribunal makes the following order:
- 28.1 The late filing of the Respondent's answering affidavit is condoned; and
- 28.2 There is no order as to costs.

Dated at Centurion on this 22nd Day of December 2017.

[Signed]

P A BECK

## 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]Oxford English Dictionary, Second Edition at pg 151.

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

[4] 2003

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

[5]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.

[6] 1962

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

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