

SOUTH AFRICA / JUDGMENT

Tloubatla v Xpert Decision Systems (Pty) Ltd (NCT-314622-2024-165 - rule 24) [2024] ZANCT 36 (7 September 2024) [2024] ZANCT 36

COURT

National Consumer Tribunal

BEFORE

P Manzi-Ntshingila, MC Peenze, S Mbhele

CASE / FILE NUMBER

NCT-314622-2024-165 - rule 24

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT-314622-2024-165 - rule 24

In the matter between: ANTHONY MAKITEMELA TLOUBATLA APPLICANT AND XPERT
DECISION SYSTEMS (PTY) LTD RESPONDENT

Coram:

Ms P Manzi-Ntshingila - Presiding Tribunal member

Dr MC Peenze

- Tribunal member

Mr S Mbhele

- Tribunal member

Date of hearing - 6 September 2024

Date of ruling - 7 September 2024

JUDGMENT AND REASONS – RULE 24 RULING

THE PARTIES

1. The applicant in this interlocutory application is Anthony Makitemela Tloubatla (the applicant), an adult male, defined as a consumer in section 1 of the National Credit Act 34 of 2005 (the NCA). Cynthia Martha E Matshiakgotshi from Credit Information Academy SA (Pty) Ltd represents the applicant and has filed the section 165 variation application on behalf of the applicant, as duly authorised. Ms Matshiakgotshi was absent from the hearing on 6 September 2024.
2. The respondent is Xpert Decision Systems (Pty) Ltd, a registered credit bureau as defined in section 1 of the NCA with registration number NCRCB5 (Expert). At the hearing, Ms Diyuti Mohanial, the respondent's internal legal counsel, and Mr Hayden Marimuthu, the respondent's general manager, represented the respondent.

TERMINOLOGY

3. A reference to a section in this ruling refers to a section of the NCA.
4. A reference to a rule in this ruling refers to the rules of the National Consumer Tribunal[1] (the rules).

APPLICATION TYPE

5. This is an opposed application under section 165 to vary a refusal order granted by the Tribunal on 8 February 2024 under case number NCT/279819/2023/141(1)(b).

APPLICANT'S ABSENCE AT THE HEARING ON 6 SEPTEMBER 2024

6. Due to the pleadings being closed, the Registrar issued a notice of set-down for hearing on 6 September 2024. Proper notification of the set-down was issued to both parties.
7. On the day of the hearing, Ms Matshiakgotshi was absent from the proceedings and uncontactable. The Registrar assisted the panel by attempting to contact the applicant's representative and the applicant (consumer) using all available contact numbers. The consumer said he was in a meeting but would liaise with Ms Matshiakgotshi, whom he had mandated to bring the application. Ms Matshiakgotshi remained uncontactable. The Registrar also telephoned Ms Matshiakgotshi but failed to reach her. The chairperson stood the matter down until later in the day to provide adequate opportunity to contact Ms Matshiakgotshi and allow the latter to join the hearing. Despite all attempts, Ms Matshiakgotshi remained uncontactable, and no reason was given for her absence at the hearing.
8. Subsequently, the Tribunal confirmed Ms Matshiakgotshi's absence and explained to the respondent that the matter was dismissed per rule 24.
9. Rule 24 regulates the non-appearance of a party at any hearing or proceedings:

"24. Non-appearance

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- (1) If a party to a matter fails to attend or be represented at any hearing or any proceedings, and that party—
- (a) is the applicant, the presiding member may dismiss the matter by issuing a written ruling; or
- (b) is not the applicant, the presiding member may—
- (i) continue with the proceedings in the absence of that party; or
- (ii) adjourn the hearing to a later date.
- (2) The Presiding member must be satisfied that the party had been properly notified of the date, time and venue of the proceedings, before making any decision in terms of subrule (1).
10. Rule 24(1)(a) provides discretion to be exercised by the chairperson to dismiss the matter. The decision to dismiss the matter is not obligatory, as the word “may” in the rule indicates that the chairperson may also consider another decision. Hence, the Tribunal considered the rules and processes of the Tribunal regulating the conduct of proceedings.
11. The Tribunal wishes to confirm that it expects an applicant to be present at all hearings and proceedings unless otherwise indicated by the Registrar. In the notice of set-down, the Registrar also advised the parties of the implications of any absence at the hearing.[2]
12. The non-attendance of an applicant amounts to an irregularity in procedure. A deviation from Tribunal procedures could be condoned under rule 34(1) or 21(11). In terms of rule 34(1), a party may apply to the Tribunal using Form Tl.r34 to condone the departure from the rules or procedures. Rule 34(2) further states that the Tribunal may grant the order on good cause shown. Ms Matshiakgotshi did not apply for condonation to depart from the Tribunal’s procedures per rule 34(1).
13. In terms of rule 21(11), the Tribunal may at any stage condone any non-compliance with the rules or any irregularities in the conduct of proceedings:
- “21. Hearings:
- ...
11. The Tribunal may at any stage condone any non-compliance with these rules or any irregularities in the conduct of proceedings.”
14. The Tribunal was satisfied that both parties had been adequately notified of the proceedings' date, time, and venue. Consequently, the Tribunal considered the absence of Ms Matshiakgotshi per rule 24(1)(a) and rule 21(11).

15. The Tribunal exercised its discretion based on an objective conspectus of all the facts. The relevant factors include but are not limited to the nature of the relief sought, 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 application and the prospects of success.[3]
16. Ms Matshiakgotshi previously failed to attend a hearing set down by the Tribunal,[4] and the Tribunal is persuaded that she engages in repetitive, severe and deliberate disregard for the Tribunal's processes. Ms Matshiakgotshi is acquainted with the Tribunal's expectation that the applicant must attend an opposed hearing. Still, she failed to attend without providing any reasons for her absence. The Tribunal takes a dim view of Ms Matshiakgotshi's dismissive attitude, especially since the consumer had mandated her to bring the variation application on his behalf. The Tribunal is persuaded that Ms Matshiakgotshi acted in bad faith and wasted the Tribunal's time by her absence from the Tribunal's proceedings. The Tribunal does not have the authority to consider an opposed matter set down for argument without the applicant.
17. Ms Matshiakgotshi's absence is also to the consumer's detriment. He mandated Ms Matshiakgotshi to bring the matter on his behalf and relied on the professional aptitude of his authoritative representative.
18. Based on the above, the Chairperson found no good cause to condone the irregularity or postpone the matter. The Chairperson ruled it in the interest of justice to dismiss the matter per rule 24(1)(a). The applicant can submit a new section 165 application, which must be served on the respondent de novo and filed with the Registrar per the Tribunal Rules.
19. The Tribunal wishes to send a strong message of disapproval to Ms Matshiakgotshi, saying that her behaviour is unacceptable and has led to wasted expenditure for the NCT and the respondent. Filing an application without the intention to appear before the Tribunal may be considered frivolous and vexatious. Although no cost order is issued in this instance, a punitive cost order per rule 25(7) will be considered if Ms Matshiakgotshi continues her absence at Tribunal hearings after filing an application on behalf of a consumer.

THE SECTION 165 APPLICATION

20. In the interest of justice, the Tribunal makes the following obiter remarks concerning the section 165 application for variation.
21. In this application, Ms Matshiakgotshi, on behalf of the applicant, brought a variation order to the Tribunal, requesting the Tribunal to set aside a single member's refusal of the applicant's leave to refer application. Ms Matshiakgotshi's application is flawed, as a request to vary cannot include a request to set an order aside. Ms Matshiakgotshi, in essence, requested a rescission, and the application should have reflected such.

22. Further, Ms Matshiakgotshi needed to outline which subsection of section 165 she relies on in the variation application. Section 165 provides for the rescission or variation of an order granted by the Tribunal acting of its own accord or on application by a person affected by a decision or order. Section 165 prescribes that a rescission or variation of a Tribunal judgment may only be granted in the following instances:
- a. When the order of the Tribunal was erroneously sought or granted in the absence of a party affected by it;
 - b. There is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error, or omission; or
 - c. The order was made or granted due to a mistake common to all the parties to the proceedings.
23. On the documents filed by the applicant, Ms Matshiakgotshi did not request correcting any ambiguity, error or omission in the leave-to-refer judgment. She outlined that the respondent made incorrect statements and requested that the leave to refer refusal be overturned. No amendment was requested. Accordingly, section 165(b) does not apply.
24. Ms Matshiakgotshi represented the applicant in the leave to refer application and filed the required application on the applicant's behalf. Therefore, the applicant was not absent. Accordingly, section 165(a) does not apply.
25. In the section 165 application, Ms Matshiakgotshi repeated the applicant's case, as already considered by the Tribunal in the leave to refer application. The intention of section 165 is not to reconsider a matter on the same facts but to make provision for a variation or rescission of a judgment in the specific circumstances outlined in the subsections. As the respondent factually disputes the arguments raised by Ms Matshiakgotshi, no mistake common to all parties is alleged. Accordingly, section 165(c) does not apply.
26. Suppose Ms Matshiakgotshi wanted the ruling of a single member of the Tribunal to be set aside. In that case, Ms Matshiakgotshi should have followed the prescribed appeal procedure in Rule 26.[5] She followed the wrong procedure. The application stands to be dismissed on this point alone.

CONCLUSION

27. The application for variation is dismissed under rule 24(1) because of the absence of Ms Matshiakgotshi at the hearing on 6 September 2024.
28. On the documents before the Tribunal, no mistake occurred in the single member's refusal of the leave to refer application on 8 February 2024 under case number NCT/279819/2023/141(1)(b). The single member acted in line with section 34. Rescinding or varying the refusal order would be contrary to the purpose of the NCA and would likely result in undesirable consequences for the parties.

29. The variation application by the applicant is further determined to be frivolous and vexatious. Despite advice rendered by the Registrar, Ms Matshiakgotshi insisted on bringing a section 165 variation application in a matter where the ruling of a single member is requested to be set aside. As the Tribunal is functus officio after a leave to refer order is issued, an appeal application should have been lodged if the applicant intended to set aside the refusal order. Ms Matshiakgotshi's actions and absence during the hearing have been to the applicant's detriment and contra the CPA's spirit.

ORDER

30. Accordingly, the Tribunal makes the following order:

30.1 The application to vary the consent order granted on 8 February 2024 under case number NCT/279819/2023/141(1)(b) is dismissed;

30.2 Ms Cynthia Martha E Matshiakgotshi from Credit Information Academy SA (Pty) Ltd is reprimanded for her absence at the hearing of 6 September 2024; and

30.3 There is no cost order.

Dr MC Peenze Tribunal member

Tribunal member Mr S Mbhele and Presiding member Ms P Manzi-Ntshingila concur.

- [1] Published under GN 789 in GG 30225 on 28 August 2007 as amended by GN 428 in GG 34405 on 29 June 2011, GN R203 in GG 38557 on 13 March 2015 and GN 157 in GG 39663 on 4 February 2016.
- [2] See pages 121-122 of the record.
- [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] See Case Number: NCT-315319-2024-141(1)(b) - rule 15.
- [5] [R 26(1) am by reg 18(1) and (2) of GeN 428 in G. 34405.]

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