

SOUTH AFRICA / JUDGMENT

Experian South Africa (Pty) Ltd v National Credit Regulator, In Re: National Credit Regulator v Experian South Africa (Pty) Ltd (NCT/128838/2019/140(1)Rule34) [2019] ZANCT 94 (4 June 2019)

[2019] ZANCT 94

COURT

National Consumer Tribunal

BEFORE

H Devraj

CASE / FILE NUMBER

NCT/128838/2019/140(1) Rule 34

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT/128838/2019/140(1) Rule 34

In the matter between:

EXPERIAN SOUTH AFRICA (PTY) LTD APPLICANT

and

NATIONAL CREDIT REGULATOR RESPONDENT

IN RE:

NATIONAL CREDIT REGULATOR APPLICANT

EXPERIAN SOUTH AFRICA (PTY) LTD RESPONDENT

Coram:

Ms H Devraj – Presiding member

Date received for adjudication: 31 May 2019

Date of this ruling: 4 June 2019

CONDONATION RULING- FOR THE LATE FILING OF AN ANSWERING AFFIDAVIT

INTRODUCTION

1. In this application for condonation:

1.1. The Applicant, which is the Respondent in the main matter, is Experian South Africa (Pty) Ltd. The Applicant is a registered credit bureau with the National Credit Regulator (NCR); with registration number NCRCB 16;

1.2. The Respondent, which is the Applicant in the main matter, is the National Credit Regulator, a juristic person established by section 12 of the National Credit Act, 34 of 2005 (the Act); and

1.3. For ease of reference in this interlocutory application, the Applicant will be referred to as “Experian” and the Respondent will be referred to as “the NCR”.

BACKGROUND

2. In the main matter; the NCR seeks an order to declare Experian to be in repeated contraventions of various sections of the Act and Regulations. The NCR also seeks the imposition of an administrative fine.

3. In summary, the NCR alleged that Experian has not removed the adverse listings of consumers of judgments that were paid up; within the 7 day period as required by the Act.

4. On 29 March 2019, the NCR lodged the application in the main matter before the National Consumer Tribunal.

5. In terms of Rule 13 of the Tribunal Rules[1], Experian was required to file its Answering Affidavit within 15 business days of receiving the application. The NCR served the

application; by delivering it to Experian on 28 March 2019. In light of this, Experian was required to file its Answering Affidavit by 18 April 2019.

6. On 23 April 2019, Experian applied for condonation in terms of Rule 34 for the late filing of its Answering Affidavit.

ISSUE TO BE DECIDED

7. The issue I am required to decide is whether the application to condone the late filing of the Answering Affidavit should be granted or not.

BRIEF FACTS BY THE RESPONDENT IN THE MAIN MATTER

Reasons

for the lateness

8. Experian submitted that upon receipt of the application on 28 March 2019; it commenced consultation with its internal and then external legal representatives. According to Experian; the alleged contraventions relate to over 1 250 000 records and spans over a period of 2 years. Furthermore, the main application consisted of approximately 419 pages. It was a

time-consuming exercise to work through the voluminous records in order to compile the Answering Affidavit. Experian therefore averred that it was unable to submit the Answering Affidavit within the 15 day period.

9. According to Experian, the Answering Affidavit was filed one day late; and that this was not an unreasonable delay.

Prejudice

10. Experian submitted that the allegations made against it; and the administrative fine sought by the NCR is of a serious nature. It would therefore be prejudiced if not provided with an opportunity to be heard before the Tribunal.

THE NCR's OPPOSITION TO THE CONDONATION APPLICATION

11. The NCR did not oppose the condonation application.

LEGAL PRINCIPLES

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

13. Rule 34 (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."
14. Rule 34 (2) states that the Tribunal may grant the order on good cause shown.
 15. Rule 3(2)(c) provides that:

"The Tribunal may consider applications related to an adjudication process—

- (i) to intervene in proceedings in terms of rules 11 and 12;
- (ii) to amend documents in terms of rule 15;
- (iii) to change the forum at which a matter will be heard in terms of section 140 (4) or 141(2) (a);
- (iv) to condone non-compliance with the rules and proceedings of the Tribunal;
- (v) for an order of substituted service in terms of rule 30;
- (vi) to grant a default order in terms of rule 25; or
- (vii) relating to other procedural matters";

16. Rule 4(2) provides that:

“If an application relates to a matter contemplated in rule 3 (2) (c) that is not specifically provided for in Table 2, the Applicant must:

- (a) apply by way of Notice of Motion in Form TI.r4;
- (b) append a supporting affidavit setting out the facts on which the application is based;
- (c) serve the Notice and affidavit on the Respondent and other parties to the matter; and
- (d) file the application documents and proof of service with the Registrar.”

17. Rule 13 (1) and (2) respectively provide that :

“Opposing an application or referral

(1) Any Respondent to 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 a referral other than an application for interim relief must be served on the parties and filed with the Registrar within 15 business days of receipt by such party of the application.”

18. 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].

19. 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.

20. 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 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]

21. 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

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

CONSIDERATION OF THE MERITS

23. I now turn to the merits of the condonation application.

Lateness

24. According to Rule 13(2) of the Tribunal Rules, Experian should have filed its Answering Affidavit within 15 business days of receiving the application. The main application was served on Experian on 28 March 2019. Based on the submissions made by Experian, it is clear that it was unable to respond to the serious allegations made against it within the 15 day period. It also required time to review the voluminous information relating to the allegations made against it. The Tribunal accepts the explanation provided for the late filing of the Answering Affidavit. The one day late submission of the Answering Affidavit is also not excessive.
25. In my view, Experian will suffer prejudice if it is not provided with an opportunity to respond to the serious allegations against it.

Prospects of success and importance of the main matter

26. This matter is important to Experian and the allegations raised are serious. One of the orders sought by the NCR is that of an administrative fine. This will have dire consequences for Experian.

CONCLUSION

27. With regard to the condonation for the late filing of the Answering Affidavit; I am persuaded that it is important that Experian be provided with the opportunity to respond to the issues raised by the NCR. It is also in the interests of justice that all the facts are placed before the Tribunal and that the condonation application be granted. This will enable the parties to fully ventilate their respective cases before the Tribunal.

ORDER

28. Accordingly, the Tribunal orders that:
- 28.1. The condonation application for the late filing of the Answering Affidavit is granted;
- 28.2. The NCR must file its Replying Affidavit within 10 days of receipt of this ruling; and
- 28.3. There is no order as to costs.

Thus handed down; in Centurion; this 4th Day of June 2019

(signed)

H DEVRAJ

PRESIDING MEMBER

[1] GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters

before the National Consumer Tribunal, 2007 (Government Gazette No. 30225). As amended.

[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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