national consumer tribunal

IN THE NATIONAL CONSUMER TRIBUNAL, HELD AT PRETORIA

Case No.: NCT/09/2008/57(1) (P)

In the matter between

SHOSHOLOZA FINANCE CC **Applicant**

And

NATIONAL CREDIT REGULATOR **Respondent**

ORDER:
INTERLOCUTORY APPLICATION FOR POSTPONEMENT OF PROCCEDINGS IN NCR v SHOSHOLOZA FINANCE CC (MAIN APPLICATION)

After hearing the parties, and having regard to the relief sought by the interlocutory applicant in its Notice of Motion, the Tribunal orders as follows:

1. The application for postponement in paragraph1 of Part C of the Notice of Motion is dismissed.
2. The application in paragraph 2 of Part C of the Notice of Motion is dismissed.
3. There is no order as to costs.

DATED ON 6th DAY OF OCTOBER 2008

MS. Y. CARRIM
PRESIDING MEMBER
CONCURRING: T. Woker and X. May

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In the matter between

Shosholoza Finance CC	**Interlocutory Applicant**
And	
National Credit Regulator	**Respondent**

APPLICATION FOR POSTPONEMENT: REASONS

Introduction

1. Shosholoza Finance CC ("Shosholoza") the applicant in this matter, is the respondent in a matter referred to the Tribunal by the National Credit Regulator ("NCR"). In that matter, referred to herein as the main application, the NCR alleges that Shosholoza contravened several sections of the National Credit Act ("the Act"). Shosholoza filed an application for a postponement of the main application. This application for postponement, referred to as an interlocutory application, was heard on 16 September 2008. On 06 October 2008 the Tribunal dismissed the application in its entirety. These are the reasons for that decision.

Background

2. On 26 February 2008, the NCR made application to the Tribunal in terms of section 140(1)(c) of the Act, alleging that Shosholoza had contravened various sections of the Act. (main application). The NCR sought relief against Shosholoza including an administrative penalty and suspension or cancellation of its registration as a credit

provider. Shosholoza's answering affidavit was due on 03 April 2008. However on 9 April 2008, Shosholoza was granted an extension of time by this Tribunal to file its answering affidavit 30 days from date of the order. That affidavit has not yet been filed.

3. In its Notice of Motion dated 28 May 2008, but filed only on 11 July 2208 with the Tribunal, the applicant asked this Tribunal to postpone the main application pending the finalisation of the proceedings instituted by it in the Transvaal Provincial Division and the finalisation of the forensic audit that it sought to conduct in respect of emolument attachment orders. It also sought an order that the main application be resumed by it filing its answering affidavit within 10 business days of the later of the finalization of the proceedings in the TPD or the forensic audit.

4. In its founding papers Mr Sarkin submitted that Shosholoza sought a postponement on the basis that its legal representatives had advised him that the transitional provisions of the Act and in particular item 10(b) of Schedule 3 of the Act may be inconsistent with the Constitution and invalid. On that basis it had sought a declaratory order from the TPD, issuing summons on 2 June 2008, against the Minister of Trade and Industry, the Tribunal and the NCR. In that action, Shosholoza alleged that the Tribunal's powers to adjudicate upon and make orders enforcing GN 1407 may be unconstitutional, alternatively *ultra vires* or in violation of the separation of powers contained in the Constitution and/or that the transitional provisions of the Act may be invalid on account of being vague and overbroad. However these allegations remained at a fairly broad level. A copy of the particulars of claim was not attached to the founding affidavit. It was subsequently attached in reply.

Parties' Submissions

5. Counsel for Shosholoza argued that the main application ought to be postponed as requested in the Notice of Motion because the proceedings in the TPD would have a material bearing on the outcome of the main application. He argued that the outcome of the proceedings in the High Court may dispense with the need for the matter proceeding in the Tribunal. As far as the forensic audit was concerned he submitted that after his client had sought legal advice it became clear that a forensic audit was required of the emolument attachment orders which were implicated in the NCR's investigation. Shosholoza required at least two months in which to conduct this audit. He also insisted that this was an application for postponement rather than an application for a stay of proceedings but conceded that if the Tribunal couched it as a temporary stay of proceedings he would accept such terminology.

6. Counsel for the NCR alleged a procedural irregularity in that as far it was concerned Shosholoza's answering affidavit ought to be have been filed by 26 May 2008 and not 30 May 2008 as claimed by it. The application for an extension of time for the filing of the answering affidavit ought to have been filed before the expiry of the already extended time – whether this was the 26 or 30 May 2008. Shosholoza's application had only been served on the NCR on 8 June 2008 and filed with the Tribunal on 11 July 2008. As far as the proceedings in the High Court were concerned counsel for the NCR submitted that the applicant had not made out a case for postponement, and that the NCR would be seriously prejudiced by it which prejudice could not be compensated by an order of costs. Moreover the extension of time sought by Shosholoza for conduction a forensic audit, had on its own admission, already been addressed by the effluxion of time.

7. Counsel for Shosholoza argued that the NCR would not suffer any prejudice by the postponement and accordingly it ought to be granted. The NCR submitted that it would suffer prejudice because it was acting in the public interest, seeking to enforce the provisions of the Act and that such prejudice would not be addressed by an appropriate order of costs.

Evaluation

8. The general principle for granting a postponement in South African civil law is that a party who applies for a postponement applies for an indulgence and must therefore show good cause for the interference with the other party's procedural right to proceed and the general interests of justice in having matters finalized. [1] It lies within the court's discretion whether or not to grant the indulgence sought. Prejudice to either party must be taken into account. A postponement cannot be claimed as a matter of right despite an offer of an appropriate order as to costs. An application for a postponement must be made timeously as soon as the circumstances which might justify such an application become known to the applicant.[2] Nor is the prospect of success in another forum in itself a sufficient ground for a postponement. [3]

9. The explanation provided by Shosholoza, both in its founding papers and in argument, in respect of the proceedings in the High Court was that it in its view the transitional provisions of the Act and in particular item 10, Schedule 3 and the powers of the Tribunal in enforcing GN No 1407 published in GG 27889 were unconstitutional or invalid and that its challenge would have a material bearing on

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[1] Harms *"Civil Procedure in the Supreme Court"*, Juta.
[2] See *Greyvenstein v Neethling* 1952 (1) SA 463 (C), *Myburgh Transport v Botha t/a SA Truck Bodies* 1991(3) SA310 (NMS), *Persadh and Another v General Motors South Africa (Pty)* Ltd 2006 (1) SA 455 (SE).
[3] Find ref in *S v Mhlungu* 1995 7 BCLR 793 (CC); 1995 3 SA 867 (CC).

the matter before us and the action instituted by the it had merit. [4] Nowhere in its papers did Shosholoza allege that its rights would be infringed in any way or that some prejudice would be caused to it if the matter went ahead in this forum. Instead the basis upon which it justified the postponement on this ground was seemingly to avoid a multiplicity of actions and that the interests of justice would be better served if the powers of the Tribunal, since it was a newly established body, were clarified by the High Court.[5]

10. The approach taken by our courts in general to constitutional challenges is that these ought not to be decided in the abstract nor should they result in piecemeal litigation. *In Ex Parte Minister of Safety and Security and Others: In re S v Walters and Another*, the Constitutional Court held that the mere fact that constitutional issues have arisen in a case does not justify piecemeal litigation.[6] It is preferable that all relevant issues be decided before the constitutional point is reached. In *S v Mhlungu*, Kentridge AJ formulated the following rule of practice:

> 10.1." ....As a general principle..where it is possible to decide a case, civil or criminal, without reaching a constitutional issues that is the course which should be followed.....One may compare the practice of the Supreme Court with regard to reviews of criminal trials. It is only in very special circumstances that it would *entertain a review before verdict.*" (our emphasis)

11. In that case the honourable judge held that the prosecution's resort to a constitutional issue did not warrant departing from the time honoured procedure of determining a case once and for all by resolving all factual questions and legal issues necessary for its disposal. The constitutional issue however important it might be, could and should have been kept in abeyance for determination only if and when proved necessary for determining the guilt or innocence of the two accused. Moreover our courts have cautioned against anticipating a question of constitutional law in advance of the necessity of deciding it.[7] Lower courts and Tribunals are required to expedite matters before them where constitutional issues are raised so that when a higher court or the Constitutional Court considers the matter it does so not in abstract but in its entirety and in the context of the particular facts.

12. In similar vein, our courts have held that a court or a Tribunal should not easily divest itself of jurisdiction. Courts do not act on abstract ideas of justice and equity but must act on principle. [8]

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[4] See founding papers, heads and short heads of argument
[5] See heads of argument and transcript.
[6] [2002] JOL 9743 (CC) Not reported in any Butterworths printed series. Case No: CCT 28/01.
[7] See *Zantsi v Council of State, Ciskei and Others* 1995 (10) BCLR 1424; 1995 (4) SA 615.
[8] See *Williamson v Schoon* 1997 3 SA 1053 (T), *Harms* supra.

13. The underlying principle for the courts' approach is, with respect, obvious. It is not a foregone conclusion that a party facing prosecution, whether criminal or civil in nature, will be found guilty by the adjudicating body. A court of first instance or a Tribunal, after hearing the evidence, may reach a verdict in favour of the respondent or the accused as the case may be, rather than against it. That forum may also interpret its own jurisdiction, if persuaded by a party bringing such challenge, in favour of that party. If it went against a respondent, that respondent still has the right to approach a higher court.

14. However, the basis of the jurisdictional challenge on constitutional or other grounds, and the order seeking clarification of this Tribunal's powers, was not brought before this Tribunal by the applicant in its founding papers and confirmed by Mr Van Nieuwenhuizen in response to questions put to him by the members of the panel during the hearing. The fact that the particulars of claim are annexed to the replying affidavit simply serves as confirmation that such proceedings have been instituted without any regard to their merit. Accordingly we are not required to decide on the issues of our jurisdiction or the constitutionality of certain provisions of the Act since the applicant has elected to raise these matters in another forum. All that we are required to assess is whether the applicant has shown good cause for the postponement and whether the interests of justice warrant such postponement. An important factor, but by no means the only, in this determination is to assess whether Shosholoza would suffer any prejudice if such postponement was not granted and if that was outweighed by the prejudice caused to the NCR.

15. While we do not pronounce on the merits of the challenge raised by Shosholoza, we do find that its reliance upon the *mere fact* of that challenge being taken up in another forum is not sufficient good cause to justify a postponement of the main application. If a party in this forum was entitled to a postponement of a matter on the *mere fact* of proceedings instituted in another forum, irrespective of its prospects of success in that forum, this would open the door for an abuse of our proceedings. A litigant could simply institute action in any other forum, irrespective of the merits of such action, and indefinitely seek a postponement of the merits pending the outcome of the proceedings in the other forum. Moreover the applicant in this case has, in electing to proceed in the TPD, by its own hand created a proliferation of litigation. It had another course of action open to it, which it elected not to pursue, of raising the jurisdictional and constitutional points in this very forum. Had it been unhappy with the outcome of that issue in this forum it still enjoyed the right to take the matter further to the High Court.

16. Even if, for argument's sake, the applicant had reasonable prospects of success in the TPD, this alone would not be a sufficient ground for a postponement of these proceedings. As outlined by our courts, in considering applications for

postponement, we must have regard to issues of prejudice and the interests of justice in having matters finalized when considering an application for postponement. Other than alleging that the proceedings in the TPD will have some material bearing on the outcome of this case and may dispose of it sooner, Shosholoza did not allege any prejudice to it.

17. The NCR was established under the National Credit Act. The objects of the Act are *inter alia* to promote a fair and non-discriminatory marketplace for access to consumer credit, to prohibit certain unfair credit and credit-marketing practices and to promote responsible credit granting. [9] The functions of the NCR are set out in sections 12 to 18. It acts in the public interest, not in its own interests, seeking to promote the interests of consumers and credit providers as contemplated in the Act. Any prejudice suffered by it, as a result of a postponement of this matter, would be of an institutional nature in that its role as the regulator and enforcer of the provisions of the Competition Act would be affected. In that sense, prejudice caused to it, if any, would not be addressed with an appropriate order of costs.

18. In any event, in our view, a postponement of these proceedings would not be in the interests of justice. The applicant's activities are focused in the micro-finance lending segment of credit provision. By its own account it has approximately 15 000 customers,[10] a number of whom stand to be affected by the outcome of this matter. The applicant has been under investigation since 2004, at first by the NCR's predecessor in terms of the Usury Act and after the promulgation of the National Credit Act, by the NCR itself. While the investigation was occasionally interrupted, seemingly by a change of regime, it nevertheless continued until February 2008 when the NCR referred the matter to the Tribunal. Both the applicant and its customers require certainty and finalisation of this prolonged investigation. Furthermore the finalization of this matter will also provide guidance to the many other credit providers and consumers in the credit market. The hearing of the merits of this matter has already been delayed by the extension of time granted to the applicant to file its answer in the main application. Any further delays in this matter, which has been under investigation since 2004 and the outcome of which may impact upon a large number of consumers and credit providers alike, would not serve the interests of justice.

19. As far as the forensic audit is concerned, the applicant explained that it had elected to conduct this because the NCR, in the main application had inserted schedules of the Emolument Attachment Orders ("EAOs") which it alleged to be forged or fraudulent. In its view, the audit ought to reveal the origins of the EAO's, whether

[9] See preamble of the Act.
[10] Transcript page 79

these are valid or forged or fraudulent and whether the applicant had received any benefit from the garnishing of salaries in terms of the EAOs. The applicant submitted that it required the results of this audit for purposes of filing its answering affidavit. Mr Sarkis, the deponent in the founding affidavit, did not indicate at which point in time the applicant was advised to do this and when it had instructed its auditors. Nor was there a confirmatory affidavit filed by the auditors stating that they were so duly instructed, describing the scope of the audit in relation to the schedule and the progress they had made with the investigation. It was estimated that the audit would take another two months to complete. We are not persuaded that the applicant required the audit for purposes of filing its answering affidavit since this issue seems more a question of evidence than pleadings. In any event by the time this application was heard, the two months had long lapsed. Moreover, the applicant was well aware that the EAOs were the subject of the NCR investigation, possibly as early as 2004 and at the latest on 26 February 2008. If the applicant needed to ascertain the validity of the EAOs listed on the schedules, it had ample time to do between 26 February 2008 and the extended time period within which it was required to file its answering affidavit.

Procedural Irregularity

20. While we make no finding on this issue we note that the applicant has not provided an explanation as to why this application was filed at the Tribunal's offices only on 11 July 2008, almost six weeks after the date reflected on the Notice of Motion and more than a month after it was served on the NCR.

21. The application contained in paragraphs 1 and 2 of part C of the Notice of Motion was accordingly dismissed.

19/11/2008

Ms Y Carrim **Date**

Presiding Member

Concurring: Prof T Woker, X May

For the Applicant **:Adv S Neiwenheusen SC instructed by Melamed and Hurwitz Inc**

For the Respondent **: Adv Bava instructed by Monthle Jooma Sabdia Inc**