

**IN THE NATIONAL CONSUMER TRIBUNAL**

**HELD AT CENTURION**

**Case No: NCT/4057/2012/101(1) (P) CPA**

In the matter between:

**ASSOCIATED MOTOR HOLDINGS (PTY) LTD**  
**t/a CHERY ISANDO**

**APPLICANT**

and

**THE NATIONAL CONSUMER COMMISSION**

**RESPONDENT**

**CORAM:**

Prof T Woker    Presiding Member

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**APPLICATION FOR CONDONATION FOR NON COMPLIANCE WITH THE TRIBUNAL RULES**

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**INTRODUCTION**

1. The Applicant under case number NCT/4057/2012/101(1)(P)CPA is Associated Motor Holdings (Pty) Ltd t/a Chery Isando, a Limited Liability Company incorporated in South Africa (hereinafter referred to as Chery Isando).
2. The Respondent is the National Consumer Commission a public entity established in terms of section 85 of the Consumer Protection Act No. 68 of 2008 ("**CPA**") (hereinafter referred to as the Commission).
3. Chery Isando brought an application in terms of section 101(1) of the CPA to the National Consumer Tribunal (the Tribunal) for the review and cancellation of a compliance notice issued against it by the Commission.

4. Documents in support of the application were served on the Commission in accordance with Rule 30 of the Tribunal Rules<sup>1</sup> (the Rules) on 22 March 2012. The documents were received by Mr OL Thupayatlase for and on behalf of the Commission.
5. In terms of Rule 13, the Commission was required to file its answering affidavit within 15 business days of the date of the application. In other words the Commission should have filed its answering affidavit by 16 April 2012.
6. The Commission filed its answering affidavit with the Tribunal on 6 July 2012. At the same time the Commission filed an application to the Tribunal to condone its non-compliance with Rule 13.
7. Rule 34(1) of the Rules provides that a party may apply to the Tribunal for condonation for non-compliance with the Rules of the Tribunal and the Tribunal may grant such an order on “good cause shown”.<sup>2</sup>
8. This judgment is concerned with the Commission’s application for condonation.

## LEGAL PRINCIPLES

9. The Rules provide the Tribunal with a discretion to grant condonation on “good cause shown”.
10. The discretion to condone non-compliance with rules on the basis of “good cause” has been dealt with in numerous court decisions. In *Mofokeng v Attorney General*<sup>3</sup>, for example, the court had to consider the meaning of “good cause” in Rule 94(1) of the Rules of Court and held that this meant substantially the same as “sufficient cause” in Rule 12 of the Appellate Division.

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<sup>1</sup> See Regulations for Matters Relating to the Functions of the Tribunal and Rules for the Conduct of Matters before the National Consumer Tribunal, 2007 – Published under GN789 in GG30225 of 28 August 2007 as amended by GenN428 in GG34405 OF 29 June 2011

<sup>2</sup> Rule 34(2) of the Rules.

<sup>3</sup> OFS 1958 (4) SA (O).

11. This issue was dealt with by the Appellate Division (now the Supreme Court of Appeal) in the seminal case of *Melane v Santam Insurance Company Limited*.<sup>4</sup>

In this case the court stated the following:

*“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 therefor, 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.*

12. From this judgment it can be seen that the Tribunal must consider the facts of this particular matter, it must act fairly to both parties and it must take a number of factors into consideration including *inter alia* the degree of lateness, the explanation therefore and the prospects of success regarding the merits of the matter.<sup>5</sup>
13. These factors are interrelated and should not be considered separately.<sup>6</sup>

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<sup>4</sup> 1962 (4) SA 531 (A) at 532C-F.

<sup>5</sup> See *Mbutuma v Xhosa Development Corporation Ltd*, 1978 1 SA 681 (A) where the Appellate Division held that condonation could be granted under the Rules of the Appellate Division if the applicant satisfied the Court that sufficient cause had been established for granting him relief from the operation of the Rules; and, in deciding whether sufficient cause had been shown, the Court would consider all the relevant facts and circumstances of the particular case, such as the degree of non-compliance with the Rules, for example, the length of the delay, the explanation therefor, the importance of the case, the prospects of success, the respondent's interests in the finality of his judgment and the avoidance of unnecessary delay in the administration of justice. In *Nedcor Investment Bank Ltd v Visser* NO 2002 (4) SA 588 (T) at 591 Patel AJ (as he then was) referred to rule 27(3) which requires 'good cause' to be shown by the plaintiff and stated that the Court has a wide discretion. See also *C Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) at 216H-217A.

<sup>6</sup> *Melane v Santam Insurance Company Limited*.

14. The Rules do not circumscribe the Tribunal's discretion and therefore as with the courts, the Tribunal has a wide discretion in these matters.
15. The onus is on the applicant for condonation, in this instance the Commission to show that it is entitled to condonation.<sup>7</sup>

#### **FACTORS TO BE CONSIDERED BY THE TRIBUNAL**

16. In *Cairns' Executors v Gaarn*<sup>8</sup> the court stated that it is impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of indulgence and that any attempt to do so would merely hamper the exercise of a discretion which the Rules have purposely made very extensive. The court held that is highly desirable not to abridge the court's discretion. The applicant for condonation must show something which entitles him to ask for the indulgence of the court and what that something depends on the circumstances of each particular application.
17. For the purposes of this judgment the Tribunal has considered the following factors:
  - a. The degree of lateness;
  - b. The explanation therefore; and
  - c. The prospects of success

#### **The degree of lateness and explanation therefore**

18. Condonation is not usually granted by the courts unless the court is satisfied that the applicant has shown that the degree of lateness or non-compliance with the prescribed time frame is not excessive and that the applicant has provided an explanation for every aspect of the period of the lateness or the failure to comply with time frames. It was held in *Saloojee & Another NNO v Minister of Community Development*<sup>9</sup> that an excessive delay would require an extraordinarily good explanation.

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<sup>7</sup> See for example *Cairns' Executors v Gaarn* 1912 AD 181.

<sup>8</sup> 1912 AD 181 at 186.

<sup>9</sup> 1965 (2) SA 135 (A) 141 B-H.

19. In *Independent Municipal & Allied Trade Union obo Zungu v SA Local Government Bargaining Council & Other*<sup>10</sup>, the court held that in explaining the reason for delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one.
20. The court in *General Accident Insurance Co SA Ltd v Zampelli*<sup>11</sup> held that the “circumstances or ‘cause’ must be such that a valid and justifiable reason exists why compliance did not occur and why non-compliance can be condoned” and in *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd*<sup>12</sup> the court stated that:
- “It is well established that an applicant for any relief in terms of Rule 27 has the burden of actually proving, as opposed to merely alleging, the good cause that is stated in Rule 27(1) as a jurisdictional prerequisite to the exercise of the court’s discretion. Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352G. The applicant for any such relief must, at least, furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about and to assess his conduct and motives (Silber v Ozen Wholesalers (supra) at 353A). Where there has been a long delay, the Court should require the party in default to satisfy the Court that the relief sought should be granted. Gool v Policansky 1939 CPD 386 at 390.*
21. In this particular matter, the documents were filed with the Commission on 22 March 2012 and the answering affidavit should have been filed by 16 April 2012. Instead it was filed on 6 July 2012 which is nearly three months out of time. The Tribunal is of the view that this is not a slight delay of a few days and therefore a full and good explanation is required.
22. In an undated and unsigned document headed “Statement in explanation of reasons for late filing” Mr Thupayatlase the head of legal services at the National Consumer Commission explained that he could not deal with this matter timeously because of “unprecedented pressure in (his) office.” He also explained that the Commission took the decision to withdraw all the matters that had been given to various law firms to provide legal services to the

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<sup>10</sup> (2010)31 ILJ 1314(LC) para 13.

<sup>11</sup> 1988 (4) SA 407(C) at 410I-J

<sup>12</sup> 2002 (3) SA 87 (W) at 93. See also *Sanford v Haley* NO 2004 (3) SA 296 © at 302. *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) [2002] 4 B All SA at [6]

Commission and had decided that all matters should be handled internally. This was due to a lack of funding for such services.

23. Mr Thupayatlase explained as follows:

*This began to create an unprecedented pressure on my office because already at that stage I had more than five matters that were already before the Tribunal either as hearings or pre hearings and I had to start preparing all these matters and that also caused further delays in preparing an affidavit in this matter and many others because I had to prepare heads of argument for matters that were going before the Tribunal and also prepare for prehearing. I am also a single person who is doing all the affidavits and preparations for hearings which is an enormous task.*

24. The explanation provided by Mr Thupayatlase contains bald allegations without any proof that the Commission was facing extraordinary pressure. At the very least, one would have expected an affidavit in which the difficulties faced by the Commission in meeting its obligations were fully explained. From the documents before the Tribunal it is clear that the Chery Isando had informed the Commission on 9 December 2011 that it objected to the Compliance Notice.<sup>13</sup> The Commission was therefore aware well in advance that a review of the Compliance Notice would be sought.
25. Although the Tribunal is of the view that the delay was bordering on excessive and the explanation for the delay is not satisfactory, the courts have held that strong prospects of success may compensate for a long delay.<sup>14</sup> This is therefore an important issue which needs to be considered by the Tribunal.

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<sup>13</sup> Page 3 of Mr Thupayatlase's Statement in Explanation of Reasons For Late Filing.

<sup>14</sup> *Melane v Santam Insurance Company Limited* 532C-F.

## Prospects of Success

26. In the *Melane* case the court stated that even if a good explanation for the delay is provided, an application for condonation should be refused in circumstances where there are no prospects of success.<sup>15</sup>
27. It is also important to note that when dealing with prospects of success it is necessary for the Tribunal to consider the merits of the matter.
28. In *Penrice v Dickinson*,<sup>16</sup> for example, the Appellate Division held that in an application for condonation the merits of the appeal may in some cases be an important factor and that if there is sufficient information before the court to enable it to decide whether the appeal has or has not a reasonable prospect of success, it had to decide the question because if the appeal is hopeless, the “great expense of prosecuting it would be a mere waste of money”. This view was reiterated in *Melane v Santam Insurance Co Ltd* where the court stated that “if there are no prospects of success there would be no point in granting condonation”.
29. Although this matter is dealing with an application to review and cancel a compliance notice the Tribunal is of the view that the same principles relating to prospects of success can be applied.
30. In this particular matter, it is common cause that the conduct which forms the subject matter of the compliance notice took place prior to the commencement of the CPA. All the relevant conduct took place between 2 October 2010 and 9 March 2011. The general effective date of the CPA was 31 March 2011.
31. In its answering affidavit, the Commission stated that it does not deny the fact that the cause of action arose prior to the general effective date of the CPA,<sup>17</sup> however, the Commission

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<sup>15</sup> See also *Immelman v Loubser and Another* 1974 (3) SA 816 (A) where the court, in dealing with the failure to note an appeal timeously, stated that a reasonable prospect of success on appeal is also an important consideration.

<sup>16</sup> 1945 AD 6

<sup>17</sup> See para 12 of the answering affidavit.

contended that this does not bar the Respondent from entertaining matters prior to that date because of Item 8 of schedule 2 of the Act. Item 8 of schedule 2 provides as follows:

*“Despite the repeal of repealed laws, for a period of three years after the general effective date the Commission may exercise any power in terms of such repealed law to investigate any breach of that law that occurred during the period of three years immediately before the general effective date ...”*

32. The repealed law which the Commission referred to in order to found jurisdiction over this matter is the Unfair Business Practices Act, 71 of 1988.<sup>18</sup> This Act makes provision for the control of unfair business practices and the Commission alleged that the conduct of Chery Isando amounted to an unfair business practice.
33. The interpretation of Item 8 schedule 2 was dealt with by the Tribunal in the case of *Johannesburg City Council v National Consumer Commission*,<sup>19</sup> a judgment handed down by the Tribunal on 30 March 2012. In this case the Tribunal explained that the Consumer Affairs (Unfair Business Practices Act) was an enabling Act which did not, on its own, prohibit anything. Unfair business practices per se were not prohibited. A particular business practice was only declared to be an unfair business practice after it had been identified and investigated by the Consumer Affairs Committee, a recommendation by the Committee had been referred to the Minister of Trade and Industry and the Minister of Trade and Industry had promulgated regulations relating to that particular practice.<sup>20</sup> Therefore, the Tribunal held, before the Commission can rely on the now-repealed Consumer Affairs (Unfair Business Practices) Act, it must identify the particular regulations under which a particular business practice had been declared unfair.
34. Further, the Tribunal held in the *Johannesburg City Council* matter that where it was necessary to rely on the transitional provision because the conduct arose before the Act came into operation, the Commission must, in the compliance notice, identify which section of which repealed Act it was relying upon. Then in the section of the compliance notice headed, nature

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<sup>18</sup> It must be noted that the proper reference for this Act is the Consumer Affairs (Unfair Business Practices) Act.

<sup>19</sup> [2012] ZANCT 6

<sup>20</sup> The Consumer Affairs Act empowered the Consumer Affairs Committee (Cafcom) to investigate unfair business practices and to make recommendations to the Minister.



and extent of the non-compliance, it should have set out the details regarding how the Applicant had contravened the section of the repealed law.

35. In the compliance notice relating to this matter, there is no reference to the Consumer Affairs (Unfair Business Practice) Act at all, neither is there any reference to any other legislation or regulation which has been repealed by the CPA. The compliance notice simply refers to sections of the CPA.
36. This issue was raised by Chery Isando in its founding affidavit where Chery Isando pointed out that the process of declaring the business practice in question to be an unfair business practice did not occur and therefore it could not be said that Chery Isando had engaged in any unfair business practice. Accordingly there was no breach of the Consumer Affairs (Unfair Business Practices) Act and so item 8 of schedule 2 did not apply.<sup>21</sup> The Commission responded by stating that it disagrees with this interpretation of the CPA, "more specifically provisions relating to the application of item 8 of schedule 2".<sup>22</sup>
37. As stated above, the interpretation of item 8 schedule 2 (and how it applies to matters which arose prior to the general effective date of the CPA) has already been pronounced upon by the Tribunal in *Johannesburg City Council v NCC*. In this matter the Tribunal also explained how compliance notices should deal with item 8 and schedule 2 and conduct which arose prior to the general effective date.
38. The judgment in *Johannesburg City Council v NCC* is, in accordance with section 152 of the National Credit Act, 2005 binding on the Commission.<sup>23</sup> Hence the Tribunal's interpretation of item 2 schedule 8 and how compliance notices should deal with conduct prior to the general effective date of the CPA stands until overturned by the High Court.
39. Because of the defective nature of the compliance notice and the Commission's failure to deal correctly with item 8 schedule 2, the Tribunal is of the view that the Commission has little

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<sup>21</sup> See para 44-45 of the founding affidavit.

<sup>22</sup> See para 5 of the answering affidavit.

<sup>23</sup> The National Credit Act is the legislation which established the Tribunal and has been amended to incorporate references to the Commission.

prospect of success when it comes to opposing Chery Isando's application for the review and cancellation of the compliance notice.

## CONCLUSION

40. The Tribunal is of the view that there was an excessive delay on the part of the Commission in filing its answering affidavit, and that its explanation for the delay is unsatisfactory because it consists of bald allegations without substantiation. However, even if it could be said that the delay was not unreasonable and the reasons provided for the delay were satisfactory, the fact remains that the Commission has very little prospect of success in opposing the application for review and cancellation of the compliance notice.
41. Accordingly the Tribunal is of the view that the application for condonation must be refused. This is particularly so because condonation will mean that the Commission's opposing affidavit will form part of the documents to be considered by the Tribunal at the review hearing. This will result in Chery Isando having to prepare more extensively for the matter and an extended hearing into the matter which will entail increased and unnecessary costs for Chery Isando. These are costs which Chery Isando will not be able to recoup.<sup>24</sup> Section 147 of the National Credit Act provides that, except in very limited circumstances, each party participating in a hearing must bear its own costs.

## ORDER OF THE TRIBUNAL

The application for condonation is refused.

DATED THIS 15<sup>TH</sup> DAY OF AUGUST 2012.

[signed]

T WOKER  
PRESIDING MEMBER

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<sup>24</sup> This issue was also discussed by the Tribunal in *Murray NO and Others v National Consumer Commission and Others, Auction Alliance (Pty) Ltd v National Consumer Commission and Others* (NCT/4454/2012/101(1)(P)CPA, NCT/4570/2012/101(1)(P)CPA) [2012] ZANCT 17.