

**IN THE NATIONAL CONSUMER TRIBUNAL**

**HELD AT CENTURION**

**Case No: NCT/26057/2015/141(1)-R34**

In the matter between:

**SARAH MAVIS GATYENI**

**APPLICANT**

And

**FIRST NATIONAL BANK**

**RESPONDENT**

Coram:

*Presiding Member: Adv. FK Manamela*

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**APPLICATION FOR CONDONATION FOR THE LATE FILING OF AN APPLICATION**

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**INTRODUCTION**

1. The Applicant in this matter is SARAH MAVIS GATYENI, an adult female person residing in Witbank ("The Applicant")
2. The Respondent is FIRST NATIONAL BANK a registered credit provider with registration number NCRCP20 whose principal place of business is Diagonal Street, Johannesburg, ("The Respondent").

## APPLICATION TYPE

3. This is an application in terms of Rule 34 of the Rules of the Tribunal<sup>1</sup> for the condoning of late filing of the Application in terms of section 141(1)(b) of the National Credit Act (NCA). The Application was filed after 20 business days of the date of the Notice of Non-Referral issued by the National Credit Regulator (NCR). The Application was duly served on 24 June 2015 by the Applicant on the National Consumer Tribunal (NCT) by hand delivery. On 29 June 2015, the NCT deemed the Application incomplete.

## BACKGROUND

4. On 29 June 2015, Applicant filed an application in terms of Rule 34 for condonation of late filing of papers. The Applicant submits that a complaint was initially lodged with the National Credit Regulator against the Respondent on 6 March 2015. The Applicant further submits that the NCR assessed the complaint and decided that it cannot deal with the matter as the NCR cannot comment on the parties' marital regime, the division of the joint estate at the time of the divorce, nor the winding up of the deceased estate. The NCR further stated that the NCA does not provide remedy for the complaint raised by the Applicant.
5. On 30 April 2015 the NCR subsequently issued a letter of non-referral.

## APPLICABLE RULES OF THE TRIBUNAL

6. 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*". The Applicant has stated its grounds in the affidavit accompanying the Form Tl.r34, the substance of which is the grounds to be determined by the Tribunal in order to found good cause.

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<sup>1</sup> For the Conduct of Matters before the National Consumer Tribunal published under GN789Nin GG30225 of 28 August 2007 as amended by GenN3440 of 29 June 2011

## FACTS IN BRIEF

7. On 6 March 2015 the Applicant lodged a complaint against First National Bank ("The Respondent"). The complaint against the Respondent was based, amongst others, the Respondent's conduct of placing the Applicant's bond account under the deceased estate while the Applicant was still alive. The Applicant alleges that the Respondent's conduct of unilaterally changing the details of the bond account of the Applicant, be declared prohibited conduct. On 30 April 2015, the Applicant received a non-referral letter in terms of section 141 of the NCA from the NCR. The Applicant was further advised that she had 20 working days to refer the matter to the Tribunal. The Applicant alleges that she tried to obtain referral forms from the internet without success. On 29 May 2015 the Applicant allegedly drove from Witbank to the NCT's offices in Centurion to complete certain documentation pertaining to the referral of the complaint to the NCT. The Applicant submits that her application for condonation is five days late; that the Tribunal should grant her leave to hear the matter and condone her late filing of papers and that if the Tribunal grants such condonation, the Respondent will not be inconvenienced or suffer any prejudice. The Applicant further claims that she has shown good cause for the Tribunal to grant her condonation for the late filing of papers.

## LEGAL PRINCIPLES

8. The Rules provide the Tribunal with a discretion to grant condonation on "good cause shown".
9. 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>2</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>2</sup>OFS 1958 (4) SA (O).

10. This issue was dealt with in by the Appellate Division (now the Supreme Court of Appeal) in the seminal case of *Melane v Santam Insurance Company Limited*.<sup>3</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.*

11. 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 therefor and the prospects of success regarding the merits of the matter.<sup>4</sup>

12. These factors are interrelated and should not be considered separately.<sup>5</sup>

13. The Rules do not circumscribe the Tribunal's discretion and therefore as with the courts, the Tribunal has a wide discretion in these matters.

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<sup>3</sup>1962 (4) SA 531 (A) at 532C-F.

<sup>4</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 NO2002 (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>5</sup>*Melane v Santam Insurance Company Limited*.

14. The onus is therefore on the Applicant to show that it is entitled to condonation.<sup>6</sup>

#### FACTORS TO BE CONSIDERED BY THE TRIBUNAL

15. In *Cairns' Executors v Gaarn*<sup>7</sup> the court stated that it is impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the granting 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 it 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 is, depends on the circumstances of each particular application.

16. For the purposes of this judgment the Tribunal has considered the following factors:

- a. The degree of lateness;
- b. The explanation therefor; and
- c. The prospects of success

#### The degree of lateness and explanation therefor

17. 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>8</sup> that an excessive delay would require an extraordinarily good explanation. In the current application the degree of lateness is not inordinately long.

18. In *Independent Municipal & Allied Trade Union obo Zungu v SA Local Government Bargaining Council & Other*,<sup>9</sup> the court held that in explaining the reason for delay it is necessary for the

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<sup>6</sup>See for example *Cairns' Executors v Gaarn* 1912 AD 181.

<sup>7</sup>1912 AD 181 at 186.

<sup>8</sup>1965 (2) SA 135 (A) 141 B-H.

<sup>9</sup>(2010)31 ILJ 1314(LC) para 13.

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.

19. The court in *General Accident Insurance Co SA Ltd v Zampelli*<sup>10</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>11</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.*

### Prospects of Success

20. 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>12</sup>
21. 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. The Tribunal is aware that the Applicant, by launching this application, asks the Tribunal to overlook the late filing of papers and to also allow Applicant, leave to approach the Tribunal on the main matter. The Tribunal, in determining

<sup>10</sup> 1988 (4) SA 407(C) at 410I-J

<sup>11</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]

<sup>12</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.

this application and exercising its discretion whether or not to grant condonation, is guided by the statute that creates it, namely the National Credit Act, and the relevant case law.

22. In *Penrice v Dickinson*,<sup>13</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". The Tribunal aligns itself with this reasoning. In the current matter before this Tribunal, the Applicant alleges that the Respondent's conduct of unilaterally changing the details of the bond account of the Applicant, be declared prohibited conduct. On 30 April 2015, and upon the same basis of the Applicant's complaint, the Applicant received a non-referral notice in terms of section 141 of the National Credit Act, from the NCR. For the Applicant to succeed in this application, the Applicant must show good, sufficient cause and established good grounds that will persuade the Tribunal to make a decision in its favour. The Applicant has not been able to do that. In fact the Applicant's matter involves the Administration of Estates Act and cannot find relevance to be considered in terms of the NCA. To this end, there are no good grounds or good cause shown by the Applicant for the condonation application to succeed.

23. The Applicant clearly has no prospect of success, should the Tribunal grant this application. The Applicant has approached many forums on the same merits where it is blatantly clear that there is no cause of action to warrant the hearing of this matter. The Tribunal, in terms of section 150, has powers to make certain orders. Amongst these orders, is the order in relation to the condoning of any non-compliance of its (Tribunal's) rules and procedures on good cause shown (emphasis). The test here is "good cause" for such an order to be made. Again, the Applicant has not been able to establish or show these grounds. The absence of these grounds limits the Tribunal's powers to grant condonation.

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<sup>13</sup>1945 AD 6

## CONCLUSION

24. The Tribunal, having considered all the documents filed of record and all the factors relevant to the determination of this application, makes the following ruling:

24.1 The application for condonation is hereby refused

Dated and signed this 7<sup>th</sup> Day of August 2015.

[signed] \_\_\_\_\_

FK MANAMELA

PRESIDING MEMBER

Authorised for issue by the National Consumer Tribunal  
Case number NCT/26057/2015/141(1)-R34  
Date 2015 / 11 / 25  
Ccy / mm / dd

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