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IN THE NATIONAL CONSUMER TRIBUNAL HELD IN CENTURION

Case Number: NCT/60756/2016/141(1)

In the matter between:

YORICK ROSS

APPLICANT

And

AFRICAN BANK LTD

1st RESPONDENT

RESIDUAL DEBT SERVICES LTD

2nd RESPONDENT

(Formerly African bank under curatorship)

Coram:

MR X May- Presiding Member

CONDONATION RULING AND REASONS

THE APPLICANT

1. The Applicant is **YORICK Gregory Ross** a Consumer as defined in terms of the provisions of the National Credit Act (No. 34 of 2005) whose address is No 43 Gail Street Road Retreat Cape town in the Province of the Western Cape ("The Applicant".)
2. The Applicant is also the main Applicant in the main matter.

RESPONDENTS

3. The first Respondent is African Bank Limited registered credit provider with registration number NCRCPs whose address is 59 [...] R. M. [...], Johannesburg in the Province of Gauteng ("The first Respondent").
4. The Second Respondent is Residual Debt Service Ltd (formerly African Bank

curatorship duly appointed to manage African Bank Financial Affairs in terms of the laws of the Republic; and whose address is the same as that of the first Respondent.

4. The Second Respondent is Residual Debt Service Ltd (formerly African Bank curatorship duly appointed to manage African Bank Financial Affairs in terms of the laws of the Republic; and whose address is the same as that of the first Respondent.

5. Both Respondents are also Respondents in the main matter

BACKGROUND

6. The Applicant lodged an application with the Tribunal in terms of Section 141(1) of the National Credit Act 34 of 2005 (the NGA") on the 7th September 2016.

7. In terms of Table 2 of the National Consumer Tribunal Rules"(the Rules") setting out the Tribunal filing requirements for an application in terms of Section 141 of the NGA, the Applicant is required to file the application *within 20 business days of the date of the non-referral by the National Credit Regulator (NCR), or within a longer time permitted by the Tribunal*

8. The date of the National Credit Regulator's notice of non-referral is 6 July 2016 (almost 2 months later). The Application to the Tribunal was only filed on 23 August 2016 according to the application on the file. The application was therefore filed outside the 20 days period required.

9. During August 2016, the Applicant then lodged an application in terms of rule 34 of the Rules to condone the late filing of the application.

10. During March 2017 the Applicant received correspondence from the Tribunal advising him to lodge a replying affidavit to the new issues raised in the answering affidavit, other than points of law in terms of rule 14 and rule 30 of the Tribunal rules.

APPLICABLE SECTION OF THE ACT AND CASE LAW

11. Rule 34(1) states" A party may apply to the Tribunal in Form Tl 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 of procedures."*

12. Rule 34(2) states that "The Tribunal may grant the order on good cause shown."

13. Rule 13(1) stipulates that "Any person required by these Rules to be notified of 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.

14. An answering affidavit to an application or referral other than an application for interim relief must be served on the parties and filed with the Register within 15 business days of the date of the application. "

15. To condone means to "accept or forgive an offence or wrongdoing". The word stems from Latin term *condonare*, which means to "*refrain from punishing*" in terms of Oxford English Dictionary. It can also be defined to mean "*overlook or forgive(wrongdoing)*"

16. In *Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and others (2003(11)BCLR1212(CC) at para[11]* it was held that the standard of considering an application of this nature is the interests of justice.

17. 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 not limited to:

- (a) the nature of the relief sought;
- (b) the extent and cause of the delay;
- (c) the effect of the delay on the administration of justice and other litigants;
- (d) the reasonableness of the explanation for the delay;
- (e) the importance of the issue to be raised in the intended appeal; and

(f) the prospects of success.

18. *In Melane v-Santam Insurance Company Limited*, 162(4)SA 531(A) at 532C-F it was held that:

"The approach is that the court has 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 fact usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and 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 strong.

The importance of the issue and strong prospect of success may tend to compensate for a Jong delay. There is a further principle which is applied and that is that without prospect of success, no matter how good is the explanation for delay, an application for condonation should be refused in the Matter of Chetty v Law Society of the Transvaal 1985(2)(A) at 765 A-C; National Union of Mineworkers and Others v Western Holdings Gold Mine 1994 151LJ 610(LAC) at 613E. The courts have traditionally demonstrated their reluctance to penalised a litigant on account of the conduct of his representative but it emphasized that there is a limit beyond which a litigant cannot escape the results of the representative's lack of diligence or the insufficiency of the information tendered.(Saloojee & Another NNO v Minister of Community Development 1965 (2) A 135 140h-1418; Buthelezi & Others v Eclipse Foundries Ltd 18 ILJ 633(A) at 6381-639A)".

19. From the dictum in Melane it was held that these factors are interrelated and not to be considered separately.

APPLICANT'S SUBMISSIONS

20. The Applicant has essentially stated that he only received the notice of the non-referral

from the NCR on 6 July 2016 (which was already two months later). He did not intentionally delay the filing of the application. He further misunderstood the time periods applicable and Tribunal process - hence on 10 August 2016; he sent an email to the Tribunal requesting assistance with processes.

RESPONDENT'S SUBMISSIONS

21. The Respondent made numerous detailed submissions regarding the actual merits of the application and regarding the actual condonation aspect, Respondent merely stated the following-

"The Respondent accordingly resists the application for condonation for late referral of form 32, not because of the delay, which was understandable under the circumstances, but because the Applicant has failed in this regard and the averments made lack particularity to such a degree that it is simply not possible to understand how non-compliance really came about and or what the Applicant's motives and conduct really were".

22. The applicant has already referred the complaint of reckless credit to the National Credit Regulator, who in turn investigated the complaint subsequent to affording the First and Second Respondent an opportunity to present evidence to dispel the averments made by the Applicant.

CONSIDERATION OF THE MERITS

23. In evaluating the merits of the application the Tribunal will consider the following factors-

- (1) The delay in filing the application;
- (2) The Applicant has provided a reasonable explanation for the late filing; and
- (3) The Respondent is opposing the application for condonation (on basis that it is without merits) but not actual opposing application for the granting of leave.

24. The Tribunal finds that the factors listed above constitute good cause in these specific

circumstances. The Tribunal therefore grants the application and filing of the Applicant's application outside the 20 day period is therefore condoned.

25. As the late filing has been condoned, the normal time periods and processes after filing of an answering affidavit, as set out in the Rules now apply.

26. It stands to be noted that this judgment only addresses the aspect of condonation for the filing of the application outside the 20 day period required by the Rules. The Tribunal will consider the granting of leave and then possibly the main merits, in a separate hearing as per normal Tribunal procedure.

ORDER

27. Accordingly, for the reasons set out above, the Tribunal makes the following order:-

28. Condonation is hereby granted to the Applicant for the filing of the application outside the 20 (twenty) day period as required by the Rules.

29. No order is made as to costs

Thus made and handed down in Centurion; this 27th day of September 2017

[signed]

Mr X May

Presiding Member

Authorised for issue by National Consumer Tribunal

Case Number: NCT/60756/2016/141(1)

Date: 27 September 2016