

**IN THE NATIONAL CONSUMER TRIBUNAL  
HELD IN CENTURION**

Case Number: **NCT/109294/2018/75(1)(b)– Rule 34**

In the matter between:

**IMPERIAL GROUP LTD** APPLICANT  
**T/A IMPERIAL TOYOTA BEDFORDVIEW**

and

**JOHANNES JOOST JACOBS** RESPONDENT

*In re:*

**JOHANNES JOOST JACOBS** APPLICANT

and

**IMPERIAL GROUP LTD** RESPONDENT  
**T/A IMPERIAL TOYOTA BEDFORDVIEW**

Coram:

Mr. A.Potwana – Presiding member

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**CONDONATION JUDGMENT**

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**PARTIES**

1. The Applicant in these proceedings is Imperial Group Limited trading as Imperial Toyota Bedfordview, a company that is duly incorporated and registered in accordance with the South African company laws. The Applicant is situated at Corner Edenvale Road and Kemp Street, Meadowbrook, Germiston. The Applicant is the Respondent in the main application.
2. The Respondent is Johannes Joost Jacobs, an adult male person. The Respondent is the Applicant in the main application.
3. Herein; the parties are referred to as they are cited in the main application.

## BACKGROUND

4. On 19 June 2018; the Applicant filed an application for leave to refer a complaint to the National Consumer Tribunal (“the Tribunal”) using Form Tl.r30A and Form Tl.73(3) & 75(l)(b) & (2) CPA. An affidavit is attached to the application. In “Part D: Order sought from the Tribunal” of Form Tl.73(3) & 75(l)(b) & (2) CPA; the Applicant stated that:

*“I want to be refunded the money I was overcharged for the vehicle I received. New vehicles were sold for R266 330.50 each, I received used vehicles and therefore also less depreciation of between 10% to 15% as per industry”. (sic in toto)*

5. On 21 June 2018; the Tribunal’s Registrar (“the Registrar”) issued a Notice of Filing and served it by email to the parties. On 12 July 2018; the Respondent sent an email to the Applicant and the Registrar. The Respondent’s opposing affidavit was attached to the email.

## FACTS

6. The Respondent seeks condonation for the late service and filing of its opposing affidavit. An affidavit is attached to the application. The deponent on the affidavit is Mr. Pieter Hendrik Jacobs (“Mr. Jacobs”); the Respondent’s legal counsel. In his affidavit; Mr. Jacobs avers that the Respondent received the Applicant’s application on 19 June 2018. The Respondent should have filed its opposing affidavit by no later than 10 July 2018. However; it served and filed its opposing affidavit via email on 12 July 2018, two days late.
7. On 16 July 2018; Mr. Jacobs received an email from an official<sup>1</sup> of the Registrar’s office advising him of the lateness of the filing. The official also requested him to provide the Tribunal with the Applicant’s consent to service via email. He sent an email to the Applicant requesting consent to serve by email. When the Applicant did not respond; Mr. Jacobs called the Applicant. The Applicant advised him that he could not consent to email service as his laptop was not functioning; and his cellular phone could only accept a limited number of emails. He arranged to meet with the Applicant at the Applicant’s house on 17 July 2018 to serve the opposing affidavit and the condonation application.
8. On 18 July 2018; Mr. Jacobs filed the Respondent’s opposing affidavit and condonation application for the late filing of the opposing affidavit with the Registrar via email. Mr. Jacobs also filed the proof of service by hand of the Respondent’s opposing affidavit and condonation application to the Applicant on

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<sup>1</sup> Mr. N.Bhembe.

17 July 2018. On 20 July 2018; he received a letter from the Deputy Registrar advising him that the condonation application was defective and that the matter was closed. Upon reading the letter he realised that he had made two mistakes when filing the condonation application. Firstly; he cited the Applicant (in the main matter) as the Applicant in the condonation application. Secondly; he left one numerical out of the case number. He also noted that the same wrong case number also appeared on the Respondent's opposing affidavit. On 24 July 2018; the Respondent sent the Registrar Form Tl.r34 together with proof of service by hand signed by the Applicant on 23 July 2018.

9. Mr. Jacobs submits that the degree of lateness is not excessive when considering that the initial filing of the opposing affidavit was only two days late. He did not act in wilful disregard the Rules of the Tribunal. He also submits that the Respondent has excellent prospects of success in this matter; and that the case is important to the Respondent. The Respondent would be prejudiced if its version of events and its defence cannot be heard.
10. The application for condonation was not opposed.

## THE LAW

11. Rule 34 (1) of the Rules states that:

*"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 or procedures."*

12. Rule 34 (2) of the Rules states that:

*"The Tribunal may grant the order on good cause shown".*

13. Rule 13(5) of the Rules states 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. Rule 13(2) of the Rules states that:

*“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 Registrar within 15 business days of the date of the application.”*

15. Rule 13(5) of the Rules states that:

*“Any fact or allegation in the application or referral not specifically denied or admitted in an answering affidavit, will be deemed to have been admitted.”*

16. 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”<sup>2</sup>. It can also be defined to mean “overlook or forgive (wrongdoing)”<sup>3</sup>.

17. In *Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others*<sup>4</sup> it was held that the standard of considering an application of this nature is the interests of justice. Whether it is in the interest of justice to grant condonation depends on the facts and circumstances of each case. It requires the exercise of a discretion on an objective conspectus of all the facts. Factors that are relevant include but are not limited to:

- 17.1. the nature of the relief sought;
- 17.2. the extent and cause of the delay;
- 17.3. the effect of the delay on the administration of justice and other litigants;
- 17.4. the reasonableness of the explanation for the delay;
- 17.5. the importance of the issue to be raised in the intended appeal; and
- 17.6. the prospects of success<sup>5</sup>

18. In *Melane v Santam Insurance Company Limited*<sup>6</sup> it was held that:

*“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 therefore, 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. The*

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<sup>2</sup> Oxford English Dictionary, Second Edition at pg 151.

<sup>3</sup> Collins English Dictionary and Thesaurus, Fourth Edition 2011, at pg170.

<sup>4</sup> 2003 (11) BCLR 1212 (CC) at para[11].

<sup>5</sup> *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.

<sup>6</sup> 1962 (4) SA 531 (A) at 532C-F.

*courts have traditionally demonstrated their reluctance to penalize 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. (Saljee & Another NNO v Minister of Community Development 1965 (2) A 135 (A) 140H-141B; 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 should not be considered separately.

## **CONSIDERATION OF THE MERITS**

20. In evaluating the merits of the application the Tribunal will consider the following factors –

- 20.1. the Respondent did not oppose the application,
- 20.2. the degree of lateness was very minimal, and
- 20.3. the Applicant will not be prejudiced as he has an opportunity to file a replying affidavit.

21. The Tribunal finds that the factors listed above constitute good cause in these specific circumstances. The Tribunal therefore grants the application for condonation for the late filing of the Respondent's opposing affidavit.

## **ORDER**

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

- 22.1. Condonation for the late filing of the Respondent's opposing affidavit is hereby granted;
- 22.2. The Applicant must file its replying affidavit, if any, within 10 business days of the issuing of this order; and
- 22.3. No order is made as to costs.

Thus; handed down in Centurion and dated 10 October 2018.

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Presiding Tribunal Member  
Mr. A. Potwana