

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

Case Number: NCT/107136/2018/75(1)(b)

In the matter between:

MOKITI ZACARIAH LETSOALO

APPLICANT

and

**MCCARTHY LTD T/A BIDVEST MCCARTHY
LAND ROVER & JAGUAR MIDRAND**

RESPONDENT

Coram:

Mr. A. Potwana – Presiding member

CONDONATION RULING

INTRODUCTION

1. This is an application for condonation for the late referral of a complaint to the National Consumer Tribunal (Hereinafter referred to as “the Tribunal”) after the National Consumer Commission (Hereinafter referred to as “the Commission”) issued a Notice of Non-Referral. In this application:
 - 1.1 the Applicant is Mokiti Zacharia Letsoalo, a major male person, and
 - 1.2 the Respondent is McCarthy Limited, a company that is duly registered in terms of the company laws of the Republic of South Africa trading as Bidvest McCarthy Land Rover & Jaguar Midrand.

BACKGROUND

2. On 16 May 2018; the Applicant filed Form Tl.r30A for leave to refer his complaint directly to the Tribunal with the Registrar of the Tribunal (Hereinafter referred to as “the Registrar”). In “Part D: Order Sought from the Tribunal” of the filed form; the applicant wrote “*Repair of my vehicle and return to me*” (*sic in toto*). An affidavit in support of the application for leave to refer is attached to the form. The Applicant also filed Form Tl.r34. In “Part C: Order Sought from the Tribunal and Grounds for Application”. On the filed Form Tl.r34; the Applicant wrote “*condone late filing of an application in terms of Rule 34 as fully explained on my attached affidavit*” (*sic in toto*). An affidavit in support of the application for condonation is attached to the form.
3. In his condonation affidavit; the Applicant submitted that he received the notice of non-referral by e-mail on 21 of March 2018. After receiving the email; he sought advice. On 11 April 2018; he responded to the notice of non-referral indicating his disagreement with the contents thereof and asked for procedures to

follow to institute a review. On 17 April 2018; he received certain documentation from the Tribunal and was informed that he needed to complete those documents and send them back to the Tribunal. The Applicant did not explain whether he had first approached the Tribunal before receiving the documents. He intended to send the documents back on 8 May 2018; but was advised that he also needed to submit a condonation application. He immediately commenced with the drafting of the affidavit. The affidavit was commissioned on 11 May 2018. Due to the many holidays and being a layman; he truly believed that his application was well within the prescribed time limits.

4. On 12 August 2016; the Applicant drove his vehicle, a Jaguar XF SV8, to the Respondent for annual service. On the same date; he requested the Respondent to attend to the low performance signal. This was because the light intermittently came on whilst he was driving. He signed an undertaking for a full diagnostics to be performed on his vehicle. Later, the Respondent called and informed him that the diagnostics revealed the need to replace the inlet manifold seals. This would help to clear the restricted performance. He gave the go ahead and paid R14845.30 for the replacement of the seals and the annual service. However; the Respondent failed to deliver the vehicle to him as promised and failed to return his calls.
5. On 16 August 2016; the Applicant called the Respondent and asked why he was never called about collecting the vehicle. He claimed to have been given excuses about delays in receiving parts and told that the vehicle would be ready on the following day. Once again; he did not receive any communication until he called on 19 August 2016 and requested to speak to the service manager. The service manager was not available and he spoke to the dealer principal who assured him that the service department would return his call. On 25 August 2016; he was surprised to receive an email from the service consultant indicating other requirements and a quotation for R129 559.50. He was taken aback because full diagnostics had already been done and there were no other problems on the vehicle. Moreover; no further repairs to the value of R129 559.50 were done to his vehicle.
6. Upon returning to Johannesburg on 30 August 2016; the Applicant visited the Respondent's premises to complain about poor service and to express his dissatisfaction about the whole issue. After noticing a lack of interest, hostility and avoidance by the Respondent; he sent a letter of demand and issued a Magistrates' court summons. He also approached the Retail Motor Industry organisation which advised him to withdraw the case from the Magistrates' court and referred him to an independent assessor. The report of the independent assessor states, *inter alia*, that: "...it was discovered that the porcelain on the spark plug had done damage to the #8 piston, as well as damage to the cylinder head, and there is a slight score mark on the sleeve" and "The cause of the damage in my opinion is as a result of the porcelain on the spark plug failing. The spark plugs do not show signs of the engine running lean and overheating the plugs. This is a pure failure of the part".

7. On 19 May 2017; the Applicant arranged for the vehicle to be towed to Bedfordview Jaguar for a quote on repairs. Bedfordview Jaguar advised the Applicant that certain parts were missing; and that he should return the vehicle to the Respondent so that the engine could be re-assembled to its original state. The Respondent confirmed that some parts were left behind when the vehicle was given to the Applicant. According to the Applicant; the Respondent failed to reassemble the vehicle to its original state.
8. On 31 May 2017; the Applicant lodged a complaint with the Motor Industry Ombudsman of South Africa but was dissatisfied with the handling of his complaint. In December 2017; the Applicant lodged a complaint with the National Consumer Commission (Hereinafter referred to as "the Commission") for damages to his vehicle. The Commission concluded that the Applicant did not have substantial evidence to support his allegations and issued a notice of non-referral. The notice of non-referral stated that the Applicant's complaint did not allege any facts which; if true; would constitute grounds for a remedy under the Consumer Protection Act, 68 of 2008 (hereinafter referred to as the CPA).
9. If leave to refer is granted, the Applicant will seek an order that his vehicle be repaired and returned to him.
10. On 29 June 2018; the Respondent filed an opposing affidavit and also sought condonation for the late filing of the opposing affidavit. In its opposing affidavit; the Respondent did not oppose the Applicant's application for condonation as permitted by the Tribunal Regulations.¹ Instead; the Respondent prematurely addressed the issues that form the basis of the Applicant's complaint. Consequently; the application for condonation for the late filing of the application for leave to refer remains unopposed.

ISSUE TO BE DECIDED

11. The issue I am required to decide is whether the Applicant's late filing of the application for leave to refer his complaint to the Tribunal should be granted or not.

LEGAL PRINCIPLES

12. It is convenient to set out the relevant statutory and regulatory provisions as well as the case law governing condonation applications.
13. Rule 34 (1) (a) provides that a "party may apply to the Tribunal in Form T1 r.34 for an order to condone the late filing of a document or application". Rule 34 (2) states that the Tribunal may grant the order on good cause shown.

¹ Rule 13 of Regulations made under section 171 of the Act on 31 May 2006 and amended on 30 November 2006.

14. 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”. It can also be defined to mean “overlook or forgive (wrongdoing)”.
15. In *Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others*² it was held that the standard for determining an application of this nature is the interests of justice.
16. 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 a discretion on an objective conspectus of all the facts. Factors that are relevant include but are not limited to the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success.³
17. In *Melane v Santam Insurance Company Limited*⁴ it was held that:

“In deciding whether sufficient cause has been shown, the basic principle 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. Ordinarily these facts are inter-related; they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. And the Respondent's interests in finality must not be overlooked”.
18. The dictum in *Melane* reveals that these factors are interrelated and should not be considered separately.

CONSIDERATION OF THE MERITS

19. I now turn to the merits of this condonation application.

The delay

20. The delay is not extensive. Also; it is evident from the documents filed by the Applicant that he tried to file the application for leave to refer shortly after receiving the notice of non-referral. The fact that the

²2003 (11) BCLR 1212 (CC) at para[11].

³*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.

⁴1962 (4) SA 531 (A) at 532C-E.

Respondent has already filed an opposing affidavit means that the delay will not negatively affect the Respondent and the administration of justice. Notwithstanding, the delay will be weighed against other factors mentioned in the above-cited cases.

The nature of the relief sought

21. The Applicant wants his vehicle repaired and returned to him. The issues that the Applicant has raised and the nature of the relief that he seeks are provided for in the CPA. In terms of section 75(1)(b) of the CPA the Tribunal has jurisdiction to hear the Applicant's application for leave to refer his complaint to the Tribunal.

Importance of the main matter

22. The Applicant is not in his possession of his vehicle. On the other hand, the Applicant's allegations and demands may have a serious impact on the Respondent and its reputation. Therefore, the matter is clearly important to both parties.

Prospects of success

23. The report of the Applicant's own independent assessor clearly states that the cause of the damage is the failure of the porcelain on the spark plug; and that this is pure failure of the part. In view of this report; I find that the Applicant does not enjoy reasonable prospects of successfully proving that the Respondent caused the damage to his vehicle.

CONCLUSION

24. In view of my finding that the Applicant does not enjoy reasonable prospects of success and ; I conclude that the Applicant has not shown good cause to grant condonation for the late referral of his complaint to the Tribunal.

ORDER

25. Accordingly, the Tribunal makes the following order:

25.1 condonation for the late filing of the Applicant's application for leave to refer his complaint to the Tribunal is refused; and

25.2 there is no order made as to costs.

Thus; handed down in Centurion on this 4th day of September 2018.

A Potwana
Presiding Tribunal Member