

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

Case Number: NCT/98829/2018/57(1) Rule 34

In the matter between:

LOUHEN KONSULTANTE (VALHALLA I) CC T/A CASH MOOLAH

APPLICANT

and

NATIONAL CREDIT REGULATOR

RESPONDENT

Coram:

Ms H Devraj – Presiding member

CONDONATION RULING

INTRODUCTION

1. In this application for condonation:
 - 1.1. The Applicant, which is the Respondent in the main matter, is Louhen Konsultante (Valhalla I) CC trading as Cash Moolah a registered credit provider whose registration number with the National Credit Regulator (NCR) is NCRCP213.
 - 1.2. The Respondent, which is the Applicant in the main matter, is the National Credit Regulator, a juristic person established by section 12 of the National Credit Act, 34 of 2005 (the Act).
 - 1.3. For ease of reference in this interlocutory application, the Applicant will be referred to as "Cash Moolah" and the Respondent will be referred to as "the NCR".

BACKGROUND

2. In the main matter; the NCR seeks an order to declare Cash Moolah to be in repeated contraventions of various sections of the Act, Regulations and Conditions of Registration. The NCR also seeks an order against Cash Moolah to refund consumers that were charged fees in excess of the prescribed maximum amounts allowed by the Act. In the result, the NCR also moved for de-registration of Cash Moolah and for the imposition of an administrative fine.

3. The NCR alleged that Cash Moolah failed to conduct proper affordability assessments as required by the Act. By failing to conduct a proper affordability assessment, the NCR further alleged that; Cash Moolah; therefore; granted credit recklessly.
4. Furthermore, the NCR alleged that Cash Moolah charged consumers excessive service fees, split loans that were granted to consumers in order to circumvent the Act and failed to submit annual compliance reports, statistical returns and financial statements.
5. On 8 January 2018, the NCR lodged the application in the main matter before the National Consumer Tribunal (the Tribunal).
6. In terms of Rule 13 of the Tribunal Rules¹, Cash Moolah was required to file its Answering Affidavit within 15 business days of receiving the application. The NCR served the application on Cash Moolah, via registered mail on 21 December 2017. The case file contained correspondence of a Notice of Complete Filing being issued on 16 January 2018, which indicated that a complete set of documents were filed with the Tribunal on 12 January 2018. The Notice of Complete Filing further stated that Cash Moolah needed to file its Answering Affidavit within 15 business days of this date.
7. In light of this correspondence, the due date for the filing and serving of the Answering Affidavit would therefore have been 2 February 2018. However, Rule 13 is clear that the Answering Affidavit must be filed within 15 business days of receiving the application and not as per a date determined by the Registrar. In this particular matter, it is not clear when Cash Moolah received the complete application.
8. On 31 May 2018, Cash Moolah filed a condonation application in terms of Rule 34 for the late filing of its Answering Affidavit as well as an application for postponement.

ISSUE TO BE DECIDED

9. The issues I am required to decide are whether the application to condone the late filing of the Answering Affidavit should be granted or not. Furthermore, I need to decide whether condonation should be granted for the postponement or stay of proceedings pending a High Court Ruling, through the filing of a condonation application in terms of Rule 34.

BRIEF FACTS BY THE RESPONDENT IN THE MAIN MATTER

¹ GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007 (Government Gazette No. 30225). As amended.

Reasons for the lateness

10. Cash Moolah averred that on 14 May 2018, it forwarded a complete set of documents to the NCR which addressed the alleged contraventions as raised by the NCR. It was under the impression that no further action was required. However, upon receiving the Notice of Set Down for the matter to be heard on 4 June 2018, Cash Moolah then contacted the NCR to ascertain why this matter was still proceeding in light of the documents that it had submitted. After discussions with the NCR, Cash Moolah alleged that the NCR was satisfied with the reasons and documentation that was submitted regarding the alleged contraventions, except for the issue regarding the charging of an excessive monthly fee and inducing consumers to enter into supplementary agreements with ALLPS Promisory Note (the ALLPS- system which is administered by Intecon).
11. Cash Moolah claimed that it also contacted the administrators of Intecon and was referred to Lewies Attorneys. After consulting with Lewies Attorneys, Lewies Attorneys addressed a letter to the NCR. The content of the letter related to the urgent application for a postponement of the matter as well as an application that was to be issued for the stay of proceedings before the Tribunal; pending the High Court's determination. Said proceedings were on the matter of Information Technology Consultants (Pty) Ltd t/a Intecon and 3 others vs the National Credit Regulator and 4 others.
12. Cash Moolah submitted that it would be prejudiced if the matter proceeded on 4 June 2018. The main argument raised by Cash Moolah is that in light of the then pending High Court litigation, the Tribunal was not empowered to decide on the ALLPS system.
13. Cash Moolah submitted that the content of its Answering Affidavit was largely dependent on the outcome of the Intecon declaratory application. According to Cash Moolah, the outcome of the Intecon matter would materially affect the Applicant's defence as well as the complaint against it.

Prejudice

14. Cash Moolah averred that its employees and customers would be prejudiced if condonation for the late filing of its answering affidavit is not granted. It also argued that should the High Court rule in favour of Intecon, this will cause uncertainty with regard to the Tribunal's rulings and unnecessary cost and litigation to review and set aside the Tribunal's ruling. Therefore, it would be in the best interests of the Tribunal to postpone the matter *sine dies* pending the outcome of the High Court litigation.

THE NCR's OPPOSITION TO THE CONDONATION APPLICATION

15. The NCR opposed the condonation application.

Postponement and Stay of proceedings

16. The main arguments raised by the NCR; with regard to the request for the stay of proceedings; was that Cash Moolah used the incorrect application process in filing a Rule 34 application. The submission was that Cash Moolah's request that the matter be postponed *sine dies*, was nothing more than an application to stay the proceedings disguised as a postponement application. The wrong Rule was used in bringing an application to postpone the matter *sine dies* or for the stay of proceedings.
17. According to the NCR, an application for the stay of proceedings or a postponement are not specifically provided for in terms of the table in the Tribunal rules. Therefore according to Rule 4(2); if an application relates to a matter that is not provided for in Table 2, then the relevant party (in this case Cash Moolah) must file and serve a Notice of Motion and an affidavit. The Respondent still needed to file an application in terms of Rule 4(2).
18. The NCR submitted that the Tribunal cannot stay the proceedings in this matter, pending what might or might not happen in the declaratory application in the High Court. There is no provision in the Act that allows the Tribunal to stay a matter pending a High court decision; and the Tribunal must proceed and hear the matter as expeditiously as possible. The stay of proceedings will cause harm to and prejudice consumers on a continued basis.
19. Furthermore, Cash Moolah did file an urgent application to the High Court of South Africa, Gauteng Division, to stay the proceedings at the Tribunal. However, the said matter was struck from the roll with costs due to a lack of urgency being established by Cash Moolah.

Condonation for late filing of answering affidavit

20. The NCR averred that Cash Moolah has not met the requirements in order to succeed in its condonation application. Cash Moolah has not provided a reasonable and acceptable explanation for the delay. The result of the failure to provide these explanations results in the prospects of success being immaterial. And the application for condonation should therefore be refused.

Responses to allegations

21. The NCR admitted that Cash Moolah did forward some documentation in relation to the allegations against it. However, the NCR denied that it had indicated that the information provided would result in some of the allegations being abandoned.
22. It is common cause that the parties did have discussions regarding the set down of the matter for 4 June 2018, but that the matter could not be settled between the parties.

23. The NCR admitted that it did advise Cash Moolah that it would not oppose the postponement of the matter set down for 4 June 2018. This was in order to afford the Respondent an opportunity to consult with an attorney.

Main issues raised in the Respondent in the main matter's replying affidavit to the condonation application

24. Cash Moolah argued that it followed the correct procedure for applying for condonation in terms of Rule 34 and denied that the application for postponement was disguised as a stay of proceedings. In support of its argument, Cash Moolah cited Part c of the application form which states "*the Applicant hereby applies for postponement of the main matter sine dies or such alternate date that the honourable Tribunal deems reasonable*". The request to postpone the matter was a departure from the Tribunal rules and therefore the correct process was followed.
25. The reason for applying for condonation for the late filing of its answering affidavit was to allow it time to set out the defences after consultation with an attorney.
26. According to Cash Moolah its conduct cannot be interpreted as being reckless and or wilfully disregarding the Tribunal's rules. Before filing the condonation application, it did attempt to settle the matter with the NCR.

LEGAL PRINCIPLES

27. It is convenient to set out the relevant statutory and regulatory provisions as well as the case law governing the condonation application.
28. 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 or procedures."*
29. Rule 34 (2) states that the Tribunal may grant the order on good cause shown.
30. Rule 3(2)(c) provides that:

"The Tribunal may consider applications related to an adjudication process—

- (i) to intervene in proceedings in terms of rules 11 and 12;*
- (ii) to amend documents in terms of rule 15;*
- (iii) to change the forum at which a matter will be heard in terms of section 140 (4) or 141 (2) (a);*
- (iv) to condone non-compliance with the rules and proceedings of the Tribunal;*
- (v) for an order of substituted service in terms of rule 30;*
- (vi) to grant a default order in terms of rule 25; or*
- (vii) relating to other procedural matters”;*

31. Rule 4(2) provides that:

“If an application relates to a matter contemplated in rule 3 (2) (c) that is not specifically provided for in Table 2, the Applicant must:

- (a) apply by way of Notice of Motion in Form T1.r4;*
- (b) append a supporting affidavit setting out the facts on which the application is based;*
- (c) serve the Notice and affidavit on the Respondent and other parties to the matter; and*
- (d) file the application documents and proof of service with the Registrar.”*

32. Rule 13 (1) and (2) respectively provide that :

“Opposing an application or referral

(1) Any Respondent to 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.*

(2) An answering affidavit to an application or a referral other than an application for interim relief must be served on the parties and filed with the Registrar within 15 business days of receipt by such party of the application.”

33. 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”². It can also be defined to mean “overlook or forgive (wrongdoing)”³.
34. In *Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others*⁴ it was held that the standard for determining an application of this nature is the interests of justice.
35. 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 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.⁵
36. In *Melane v Santam Insurance Company Limited*⁶ 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

37. The dictum in *Melane* reveals that these factors are interrelated and should not be considered separately.

CONSIDERATION OF THE MERITS

38. I now turn to the merits of the condonation application.

Background

²Oxford English Dictionary, Second Edition at pg 151.

³Collins English Dictionary and Thesaurus, Fourth Edition 2011, at pg170.

⁴2003 (11) BCLR 1212 (CC) at para[11].

⁵*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.

⁶1962 (4) SA 531 (A) at 532C-E.

39. This matter has a long history. It was initially set down for 19 March 2018 on a default basis. It was subsequently removed from the roll. The reasons for the removal of the matter from the hearing roll are unknown to me.
40. The matter was set down again for 4 June 2018. It was removed from the roll due to the condonation application that was filed by Cash Moolah.

Postponement of matter set down 4 June 2018

41. This matter is moot. The Applicant in the main matter confirmed that it would not oppose the application for a postponement of the matter for 4 June 2018. The Registrar's Office had also removed the matter from the roll pending the condonation application that was filed for the late filing of the answering affidavit and the postponement of the matter *sine dies* and a stay of proceedings.

Lateness

42. According to Rule 13(2) of the Tribunal Rules, Cash Moolah should have filed its Answering Affidavit within 15 business days of receiving the application. The main application was filed with the Tribunal on 8 January 2018 and served on Cash Moolah on 21 December 2017. However, it would appear that a complete set of documents were filed with the Tribunal on 12 January 2018. Cash Moolah has not submitted the date on which it received the main application. However, in this particular matter, Cash Moolah lodged its condonation application to extend the time for the filing of its answering affidavit on 31 May 2018. Based on the submissions, made by Cash Moolah, it is evident that after receiving the set down notice for the matter to be heard on 4 June 2018, that it engaged with the NCR. Settlement negotiations were also entered into; and Cash Moolah further liaised with Lewies Attorneys regarding the Intecon matter. The Tribunal accepts the explanation provided by Cash Moolah for the late filing of the Answering Affidavit.

Prejudice

43. In my view, Cash Moolah will suffer prejudice if it is not provided with an opportunity to respond to the serious allegations against it.

Prospects of success and importance of the main matter

44. This matter is important to Cash Moolah and the allegations raised are serious. One of the orders sought by the NCR is that of de-registration of Cash Moolah. This will have dire consequences for Cash Moolah.

Stay of proceedings

45. Rule 34 expressly provides for the instances in which condonation can be granted and relates more to the procedural aspects of late filing of documents, payment of the filing fee and other any departure from the rules. However, an application for a stay of proceedings and to postpone a matter *sine dies* pending a High Court matter is of a substantial nature. Rule 4(2) is therefore applicable in this instance in that an application to stay proceedings is not an application that is specifically provided for in Table 2 of the Rules. Therefore, should Cash Moolah still want to pursue such an application, it would need to comply with the requirements of Rule 4(2).
46. While Cash Moolah stated in its replying affidavit to the condonation application, that it requested a postponement of the matter *sine dies* or a date as determined by the Tribunal; the prayers; as stated in its affidavit; were for the stay of proceedings pending the decision of the High Court in the Intecon matter.
47. I therefore find that Rule 4(2) is applicable and that Cash Moolah did not meet the filing requirements for an application to stay the proceedings of the matter. It is also noted that the NCR in its answering affidavit to the condonation application; alleged that the urgent High Court application to stay the proceedings in this matter at the Tribunal; was not successful. Cash Moolah did not deny this allegation in its response. Therefore, there is no basis upon which the Tribunal cannot proceed with this matter.

CONCLUSION

48. With regard to the condonation for the late filing of the answering affidavit I am persuaded that it is important that Cash Moolah be provided with the opportunity to respond to the issues raised by the NCR. It is also in the interests of justice that all the facts are placed before the Tribunal and that the condonation application be granted. This will enable the parties to fully ventilate their respective cases before the Tribunal.

ORDER

49. Accordingly, the Tribunal orders that:

- 49.1. The condonation application for the stay of proceedings is dismissed;

- 49.2. The condonation application for the late filing of the Answering Affidavit is granted;
- 49.3. Cash Moolah must file its answering affidavit within 15 business days of this ruling being issued; and
- 49.4. There is no order as to costs.

Thus handed down; in Centurion; this 27th Day of August 2018

H DEVRAJ
PRESIDING MEMBER

Authorised for issue by National Consumer Tribunal

Case Number: NCT/98829/2018/57(1) R34

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