

IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION

Case Number: NCT/111201/2018/57(1) Rule 34

In the matter between:

ELAVATION TRADING CC T/A XCELSIOR FINANCIAL SERVICES
XCELSIOR FINANCIAL SERVICES (PTY) LTD

FIRST APPLICANT
SECOND APPLICANT

and

NATIONAL CREDIT REGULATOR

RESPONDENT

IN RE:

NATIONAL CREDIT REGULATOR

APPLICANT

and

ELAVATION TRADING CC T/A XCELSIOR FINANCIAL SERVICES
XCELSIOR FINANCIAL SERVICES (PTY) LTD

FIRST RESPONDENT
SECOND RESPONDENT

Coram:

Ms H Devraj – Presiding member

Date received for adjudication: 17 October 2018

Date of this ruling: 17 October 2018

CONDONATION RULING- FOR THE LATE FILING OF AN ANSWERING AFFIDAVIT

INTRODUCTION

1. In this application for condonation:

- 1.1. The Applicants, which are the Respondents in the main matter, are Elavation Trading CC trading as Xcelsior Financial Services and Xcelsior Financial Services (Pty) Ltd. Both Applicants are registered credit providers whose registration numbers with the National Credit Regulator (NCR) are NCRCP4752 and NCRCP8183 respectively.
- 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 1st and 2nd Applicants will collectively be referred to as "Xcelsior Financial Services" and the Respondent will be referred to as "the NCR". The founding affidavit to the condonation application was deposed to by Mr Roberto Jose Texeira Ribeiro (hereinafter referred to as "Mr Ribeiro"); the Director of Elavation Trading CC trading as Xcelsior Financial Services and Xcelsior Financial Services (Pty) Ltd.

BACKGROUND

2. In the main matter; the NCR seeks an order to declare Xcelsior Financial Services to be in repeated contraventions of various sections of the Act and Regulations. The NCR also seeks an order against Xcelsior Financial Services to refund consumers; that were over charged fees in excess of the prescribed maximum amounts allowed by the Act. In the result, the NCR also moved for de-registration of Xcelsior Financial Services and for the imposition of an administrative fine.
3. In summary, the NCR alleged that Xcelsior Financial Services entered into secured credit agreements with consumers but that these agreements were disguised as pawn agreements in order to circumvent some of the provisions of the Act. Xcelsior Financial Services further allegedly charged consumers excessive and unlawful fees and charges; as well as insurance fees; and failed to conduct proper affordability assessments.
4. On 17 July 2018, the NCR lodged the application in the main matter before the National Consumer Tribunal (the Tribunal).
5. In terms of Rule 13 of the Tribunal Rules¹, Xcelsior Financial Services was required to file its Answering Affidavit within 15 business days of receiving the application. The NCR served the application on Xcelsior Financial Services, via personal service on 16 July 2018. In light of this, Xcelsior Financial Services was required to file its Answering Affidavit by 6 August 2018.

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.

6. On 5 September 2018, Xcelsior Financial Services applied for condonation in terms of Rule 34 for the late filing of its Answering Affidavit.

ISSUE TO BE DECIDED

7. The issue I am required to decide is whether the application to condone the late filing of the Answering Affidavit should be granted or not.

BRIEF FACTS BY THE RESPONDENT IN THE MAIN MATTER

Reasons for the lateness

8. Xcelsior Financial Services submitted that the voluminous application served by the NCR, was received on 16 July 2018, at its Pretoria branch. The application which comprised of over 613 pages had to be scanned and forwarded to Mr Riberio who is based in the Western Cape.
9. According to Xcelsior Financial Services; the voluminous nature of the application as well as the serious orders prayed for by the NCR; required of it to provide an extensive and thorough response to the allegations raised. This entailed numerous consultations with the attorney that was based in Pretoria. The Answering Affidavit was served on the NCR on 23 August 2018. However, Xcelsior Financial Services averred that due to an oversight, it was not aware that the Answering Affidavit had to be filed with the Tribunal. The Answering Affidavit was filed with the Tribunal, 12 days after it had been served on the NCR.

Prejudice

10. Xcelsior Financial Services submitted that it would be prejudiced if condonation for the late filing of its Answering Affidavit is not granted. Condoning the late filing of its Answering Affidavit would promote a transparent and fair process and will be aligned to the principles of *audi alteram partem*.

THE NCR's OPPOSITION TO THE CONDONATION APPLICATION

11. The NCR did not oppose the condonation application.

LEGAL PRINCIPLES

12. It is convenient to set out the relevant statutory and regulatory provisions as well as the case law governing the condonation application.

13. Rule 34 (1) states -

"A party may apply to the Tribunal in Form T1 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."*

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

15. 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";*

16. 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."*

17. 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.*"

18. 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.
19. 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.
20. 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
21. 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

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.

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

CONSIDERATION OF THE MERITS

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

Background

24. This matter has a long history. It was initially set down for 21 September 2018 on a default basis. The matter was subsequently removed from the roll. This was due to the filing of the condonation application by the Respondent on 5 September 2018; for the late filing of its Answering Affidavit. I take note that according to the Registrar of the Tribunal; it would appear that page 523 and pages 529 to 559 were omitted from the original application that was filed by the NCR. Xcelsior Financial Services has not raised this issue in their condonation application. This issue would need to be canvassed further at the hearing of the matter, should it be relevant to do so.

Lateness

25. According to Rule 13(2) of the Tribunal Rules, Xcelsior Financial Services should have filed its Answering Affidavit within 15 business days of receiving the application. The main application was served on Xcelsior Financial Services on 16 July 2018. Based on the submissions made by Xcelsior Financial Services, it is clear that it needed more time in order to respond to the various allegations against it and the details contained in the voluminous application. The Answering Affidavit was therefore served on the NCR, on 23 August 2018. The Answering Affidavit was 12 days late. On 6 August 2018, Xcelsior Financial Services informed the NCR, that it was working on finalising its Answering Affidavit. It is evident that Xcelsior Financial Services engaged with its attorney on many occasions to ensure that it comprehensively responded to the allegations made against it. The Tribunal accepts the explanation provided for the late filing of the Answering Affidavit.

Prejudice

26. In my view, Xcelsior Financial Services 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

27. This matter is important to Xcelsior Financial Services and the allegations raised are serious. One of the orders sought by the NCR is that of de-registration. This will have dire consequences for Xcelsior Financial Services.

CONCLUSION

28. With regard to the condonation for the late filing of the Answering Affidavit; I am persuaded that it is important that Xcelsior Financial Services 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

29. Accordingly, the Tribunal orders that:
- 29.1. The condonation application for the late filing of the Answering Affidavit is granted;
 - 29.2. The NCR must file its Replying Affidavit within 10 days of receipt of this ruling; and
 - 29.3. There is no order as to costs.

Thus handed down; in Centurion; this 17th Day of October 2018

H DEVRAJ
PRESIDING MEMBER

Authorised for issue by National Consumer Tribunal

Case Number: NCT/111201/2018/57(1) R34

Date: 2018 / 10 / 22

CCYY / MM / DD

National Consumer Tribunal
Ground Floor, Building B
Lakefield Office Park
272 West Avenue, Centurion, 0157
www.ihenct.co.za

