

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

Case Number: **NCT/105595/2018/75(1)(b)**

In the matter between:

PAVESHN CHETTY

APPLICANT

and

BIDVEST MCCARTHY VOLKSWAGEN UMHLANGA (PTY) LTD

RESPONDENT

Coram:

Mr. A. Potwana – Tribunal Member

CONDONATION JUDGMENT

APPLICANT

1. The Applicant is Paveshn Chetty an adult major male person. The Applicant is also the Applicant in the main matter.

RESPONDENT

2. The Respondent is Bidvest McCarthy Volkswagen Umhlanga (Pty) Ltd a company that is duly registered in terms of the company laws of the Republic of South Africa. The Respondent is also the Respondent in the main matter.

TYPE OF APPLICATION

3. In this application the Applicant seeks condonation for the late filing of an application for leave to refer a complaint to the National Consumer Tribunal ("the Tribunal").

4. This application is brought in terms of Rule 34(1) of the Regulations for Matters relating to the Functions of the Tribunal and Rules for the Conduct of Matters before the National Consumer Tribunal¹ (“Rule” or “Rules”).
5. The Respondent has filed a Notice of Opposition and an affidavit.
6. The application is therefore considered as an opposed application.

BACKGROUND

7. According to the Applicant, on 19 July 2016 he took his VW Golf VI GTi motor vehicle (“the vehicle”) to the Respondent to carry out a 150 000km service which included a brake fluid change. On 27 August 2016 he noticed a warning light indicating “*Brake fluid-workshop*”. On 29 August 2016 the vehicle was taken to the Respondent for a diagnostic report. The diagnostic report stated that the ABS pump & module were defective. The applicant complains that in terms of section 57 of the Consumer Protection Act 68 of 2008 (“the CPA”) the parts became defective within the warranty period. The Applicant wants the Respondent to replace the defective parts at its own cost. The cost of replacement is R41 000.00. The Respondent refuses to bear the cost of replacing the defective parts.
8. The Applicant filed a complaint with the Motor Industry Ombudsman of South Africa (MIOSA) which concluded that the Respondent must engage the services of an independent third party at no cost to the Applicant in order for the ABS pump to be inspected failing which the Applicant should approach the National Consumer Commission (Hereinafter referred to as “the Commission”).
9. The Applicant referred his complaint to the Commission. On 10 July 2017 the Commission acknowledged receipt of Applicant’s complaint against the Respondent. In a letter dated 1 December 2017 the Commission issued a Notice of Non-Referral.

FACTS

¹ Published under GN 789 in GG 30225 of 28 August 2007 as amended by GenN 428 in GG 34405 of June 2011 (published in terms of the Consumer Protection Act 68 of 2008). GN R203 in GG 38557 of 13 March 2015 and GN 157 in GG 39663 of 4 February 2016

10. According to the Applicant, he received the Commission's letter of non-referral on 24 January 2018. On the same day the Applicant sent an e-mail to the Tribunal's registry "*in an effort to make an appeal against the decision that was made by the National Consumer Commission.*" On 9 February 2018 the Applicant sent another e-mail to the Tribunal's registry stating that "*Please see below non referral letter that was only sent to me on 24 January 2018, therefore I am within my 21 Days.*" In a letter to the Applicant dated 14 February 2018 the Tribunal's Deputy Registrar confirmed receipt of the Applicant's filing and advised that the Applicant's documents were not filed in accordance with the requirements of Table 2 of the Rules.
11. On 2 March 2018 the Applicant sent an e-mail to the Tribunal's Registry attaching "*completed documentation.*" On 28 March 2018 the Applicant sent another e-mail to the Tribunal's registry stating that "*Please find attached the following forms Tl.r34 + Tl.r30A. I wish to re-file my original documents as this matter has lapsed and required to be filed again.*" In a letter dated 13 April 2018 the Deputy Registrar of the Tribunal confirmed receipt of the Applicant's filing dated 28 March 2018 and advised that the condonation application documents were not filed in accordance with the requirements of Table 2 of the Rules.
12. On 25 April 2018 the Applicant re-filed the condonation application.
13. On 26 April 2018 the Registrar issued a Notice of Complete Filing in respect of the application for condonation.
14. On 22 May 2018 the Respondent filed a Notice of Opposition and an affidavit through their attorneys, Larrat Law Inc. In its affidavit the Respondent does not oppose the application for condonation but denies liability for the relief sought by the Applicant.

THE LAW

15. 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."*

16. Rule 34 (2) states *"The Tribunal may grant the order on good cause shown"*.
17. The relevant Rules provide that -
- (1) Rule 13 (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) Rule 13(2)-
"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."
- (3) Rule 13(5)-
"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."
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 of considering an application of this nature is the interests of justice.
20. 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. Factors⁵ that are relevant include but are 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;

² Oxford English Dictionary, Second Edition at pg 151.

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

⁴ 2003 (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 *Camaqu v Lupondwana* Case No 328/2008 HC Bisho.

- (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 – Given that the Respondent opposes the relief sought by the Applicant the prospects of success can be properly determined during the hearing of the application for leave to refer.

21. In Melane v Santam Insurance Company Limited⁶ 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 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. (Salojee & 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).”

22. From the dictum in *Melane* it was held that these factors are interrelated and should not be considered separately.

CONSIDERATION OF THE CONDONATION APPLICATION

23. The Respondent's notice of opposition was filed outside the prescribed period of 15 business days. In any event, the Respondent has not denied the Applicant's claim that he (Applicant) received the Commission's letter of non-referral on 24 January 2018; the Applicant's claim is deemed to have been admitted. Moreover; the period between the expiry of 20 business days from the date the Commission issued a letter of non-referral on 1 December 2017 and the date when the Complainant sent an e-mail to the Tribunal on 24 January 2018 is minimal.
24. At all times material to this matter the Applicant took several steps to ensure that his complaint and condonation application are properly filed with the Tribunal.

⁶ 1962 (4) SA 531 (A) at 532C-F.

25. The Applicant's efforts in pursuing this matter show that this matter is very important to the Applicant. The issues raised by the Applicant are serious to both parties.
26. The relief that the Applicant seeks is provided for under the CPA.
27. In evaluating the application; the Tribunal took into account the above and finds that the Applicant has shown good cause for the late filing of the application for leave to refer his complaint to the Tribunal.

ORDER

28. The Tribunal accordingly makes the following order -
 - (1) The Applicant's application for condoning the late filing of his application for leave to refer his complaint to the Tribunal is granted; and
 - (2) No order is made as to costs.

DATED and handed down in Centurion this 29 JUNE 2018.

MR. ANDISA POTWANA
TRIBUNAL MEMBER

Authorised for issue by National Consumer Tribunal

Case Number: NCT/105595/2018/754

Date: 5 July 2018

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