

IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION

Case Number: NCT/117239/2018/148 (1)

In the matter between

THAMI HLATSWAYO

APPLICANT

and

VOLKSWAGEN OF SOUTH AFRICA (PTY) LTD

RESPONDENT

Coram:

Prof Tanya Woker – Presiding member

CONDONATION JUDGMENT

INTRODUCTION

1. The Applicant is Thami Hlatswayo an adult male consumer residing at 5692 Maduna Street Daveyton Gauteng ("the Applicant").
2. The Respondent is Volkswagen of South Africa (Pty) Ltd, duly registered and incorporated in accordance with the company laws of the Republic of South Africa ("the Respondent").
3. This is an application in terms of rule 34 (1) (a) of the Tribunal rules to condone the Applicant's late filing of his application in terms of section 148 of the National Credit Act, 2007 to appeal a decision of a single member of the Tribunal.¹

BACKGROUND

4. The Applicant is the owner of a Vivo Volkswagen motor vehicle with registration number FS96JYGP ("the vehicle") which was involved in an accident on 27 June 2017 when the Applicant attempted to escape during a hijacking. The Applicant lost control of the vehicle and

¹ Although the Applicant's complaint is brought in terms of the Consumer Protection Act, 2008 (CPA) the Tribunal was established in terms of the National Credit Act, 2005 (NCA). The Tribunal's procedures are set out in the NCA; its mandate was expanded to include matters under the CPA when the CPA came into operation in 2011.

- collided with a street pole. The vehicle also rolled with the result that there was extensive damage to the vehicle. During the accident the airbags did not deploy.
5. The Applicant lodged a complaint against the Respondent with the National Consumer Commission ("the NCC") alleging that the vehicle was unsafe as the airbags were defective. The Applicant requires the Respondent to give him a new vehicle.
 6. The NCC considered the complaint and issued a notice of non-referral in terms of section 72 (1) (a) (ii) of the CPA because the complaint did not allege any facts which if true would constitute grounds for a remedy under the CPA.
 7. The Applicant then applied to the Tribunal for leave to refer his complaint directly to the Tribunal in terms of section 75 (1) (b) of the CPA. However, he failed to submit his application for leave to refer within the required 20 day period of having received the notice of non-referral from the NCC.² Hence the Applicant was required to apply for condonation for the late filing of his application.
 8. This application for condonation was heard by a single member of the Tribunal and his ruling was issued on 6 August 2018. This member refused the condonation application on the basis that the Applicant has no prospects of success in the main application.
 9. The Applicant wishes to appeal against the refusal to grant condonation in terms of section 148 of the CPA.
 10. As the Tribunal's ruling was issued on 6 August 2018, the Applicant had to file his appeal application by 4 September 2018.³ An appeal application which was incomplete due to the fact that it did not comply with the Tribunal rules was filed by the Applicant on 11 September 2018. The final complete application was filed on 11 October 2018. Hence the Applicant is again applying for condonation.

ISSUE TO BE DECIDED

11. The issue I am required to decide in the condonation application is whether the Applicant's late filing of his leave application should be condoned. Rule 34 of the Tribunal rules provides that a

² Table 2 of the rules requires the Applicant to file his notice of application to refer his complaint directly to the Tribunal within 20 business days of the date of non-referral or within a longer time permitted by the Tribunal.

³ Table 2 of the rules requires the Applicant to file his notice of appeal to a full panel against the decision of a single member within 20 days of the date of the ruling or within a longer period if the Tribunal allows.

person may apply to the Tribunal to condone the late filing of a document on good cause shown.⁴

THE APPLICANT'S SUBMISSIONS

12. The Applicant received the Tribunal ruling together with an email on 6 August 2018. However as he is a lay person he did not know what further steps to take. He then received another email from the Tribunal on 14 August 2018 which informed him that he could appeal against the ruling to a full bench of the Tribunal within 20 days of receipt of the ruling. It was only then that he approached Kyprianou Attorneys for assistance and they submitted the application on 11 September 2018 which the Applicant alleges was within the 20 days.⁵ There was then further communications between the attorneys and the Tribunal regarding the proper procedure that needed to be followed for an appeal application. The Applicant finally filed his complete application on 11 October 2018.
13. The Applicant submits that his application was only 17 business days late and that he has at all times shown an effort to comply.
14. The Applicant submits that he has reasonable prospects of success as the Respondent has breached various sections of the CPA as set out in his affidavit.
15. Finally the Applicant submits that he will suffer prejudice should the Tribunal not hear his matter because he is still paying instalments on his vehicle without having the use of the vehicle.

THE RESPONDENT'S SUBMISSION'S

16. The Respondent opposes the application for condonation and points out that the Applicant should have lodged his appeal by 4 September 2018. The Applicant lodged his appeal 46 days late which is fatal to his application and accordingly disposes of the matter.
17. The Respondent reiterates its opposition to the first condonation application and states that it continues to suffer prejudice by having to continually oppose this application.

LEGAL PRINCIPLES

18. The legal principles which apply to an application for condonation were set out clearly by the Tribunal member in the first application for condonation. However, for the sake of completeness a summarised version is repeated here.

⁴ See Rule 34 (1) and (2).

⁵ It seems that the Applicant is calculating the days from when he received an email from the Tribunal informing him of his right to appeal and not from the date on which the ruling was issued.

19. The Tribunal may grant an application for condonation if the Applicant is able to show good cause as to why he did not comply with the rules. In *Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others*⁶ it was held that the standard of considering an application of this nature is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors 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;
 - d. the reasonableness of the explanation for the delay;
 - e. the importance of the issue to be raised in the intended application; and
 - f. the prospects of success.⁷
19. Similar factors were also discussed by the court in the earlier case of *Melane v Santam Insurance Company Limited*⁸ where it was pointed out that a court has a discretion that should be exercised judicially upon consideration of all the facts. Although the court in *Melane* held that these factors are interrelated and should not be considered separately the court also stressed that an Applicant must have prospects of success in the main matter. The court held that if there are no prospects of success, then no matter how good the Applicant's explanation for his delay in filing his application, the application for condonation should be refused.⁹

CONSIDERATION OF THE MERITS

20. Regardless of the date on which the leave application was filed, it was still outside the 20 day period required in terms of the rules; the condonation ruling was issued on 6 August 2018 so the leave application should have been filed by 4 September 2018. Hence the need for the Applicant to apply for condonation.
21. As pointed out by the Tribunal member in the first application for condonation, Tribunal members have a discretion which must be exercised judiciously, when deciding whether it is in the interest of justice to condone the late filing of the application notice. A party seeking condonation must show good cause entitling it to the Tribunal's indulgence.

⁶2003 (11) BCLR 1212 (CC) at para[11].

⁷*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.

⁸1962 (4) SA 531 (A) at 532C-F.

⁹See also *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.

22. The basis for the Applicant's claim and whether or not the Applicant has a claim under the CPA was canvassed fully by the Tribunal member in the first application for condonation and I can see no reason to deviate from the findings of that Tribunal member. On the Applicant's own version, the accident in which the vehicle was damaged arose out of an attempted hijacking that caused the Applicant to lose control of his vehicle. It is clear from the facts before the Tribunal that the accident and consequent damages to the vehicle did not arise out of any defects in the vehicle itself.
23. I agree with the findings of the Tribunal member that the Applicant has misconstrued the relief available to him under the CPA and that he clearly has no prospects of success in the main application.
24. Although the Applicant has explained why he filed his application late and he has stressed how important this case is to him, as pointed out in the *Melane* case, if there are no prospects of success, then no matter how good the Applicant's explanation for his delay in filing his application, the application for condonation should be refused.

ORDER

25. Accordingly, for the reasons set out above, I make the following order:-

25.1 .The condonation application is refused; and

25.2. There is no order as to costs..

DATED ON THIS 29th day of January 2019

T Woker

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Presiding Member

Authorised for issue by National Consumer Tribunal

Case Number: NCT-117239-2018-138

Date: _____

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