

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

Case No: NCT/133100/2019/141(1)R34

In the matter between:

GIFT SIPHIWO XESI

APPLICANT

And

OLD MUTUAL (RF) (PTY) LTD

RESPONDENT

JUDGMENT AND REASONS

APPLICATION FOR CONDONATION FOR NON-COMPLIANCE WITH THE TRIBUNAL RULES

THE PARTIES

1. The Applicant is Gift Siphwo Xesi (hereinafter referred to as the "Applicant"). The Applicant is an ordinary consumer, residing in Johannesburg, Gauteng.
2. The Respondent is Old Mutual (RF) (Pty) Ltd, a registered credit provider with registration number NCRCP 35, based at MutualPark, Jan Smuts Avenue, Pinelands, Cape Town.

THE ISSUE TO BE DECIDED

3. This is an application to the National Consumer Tribunal ("the Tribunal"), in terms of Rule 34(1)(a) of the Rules for Conduct of Matters Before the National Consumer Tribunal ("the Rules"), to condone the non-compliance by the Applicant with the Rules in respect of the late service and filing

of the Applicant's leave to refer the matter of complaint directly to the Tribunal in terms of section 141(1)(b) of the National Credit Act 34 of 2005 ("the Act").

4. Before the Tribunal hears the main matter it must consider the application brought by the Applicant to condone its non-compliance with the Tribunal's Rules¹; and decide whether or not to grant condonation.

BRIEF FACTS OF THE MATTER

5. The Applicant initiated a complaint to the National Credit Regulator ("the NCR") on 24 December 2018 against the Respondent in terms of section 136 of the Act.
6. The essence of the complaint is that the Applicant disputes the collection of payment of a loan by the Respondent. The Applicant submits that the loan; granted in 2012; has prescribed. This constitutes the main matter, the merits of which will only be considered at a hearing to be convened by the Tribunal for this purpose should leave to refer be granted. The merits will thus not be dealt with here.
7. The NCR issued a Notice of Non-Referral to the Applicant and sent this by email to the Applicant on 12 April 2019. The basis of the non-referral was that "the complainant (the Applicant in this condonation application) does not allege any facts which if true would constitute a remedy under the Act".
8. The Respondent has not opposed this condonation application.

LEGAL PRINCIPLES

In deciding this matter, the Tribunal considered the following legal principles:

¹ Rules for the Conduct of Matters before the National Consumer Tribunal published under GG30225 of 28 August 2007 as amended by GenN428 in GG34405 of 29 June 2011.

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9. According to Tribunal Rule 34(1) *"A party may apply to the Tribunal in Form TI 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."*
10. Rule 34 (2) states *"The Tribunal may grant the order on good cause shown"*.
11. The word 'condone' stems from the Latin term *condonare*, which means to refrain from punishing. The Oxford English Dictionary² defines 'condone' as to *"accept or forgive an offence or wrongdoing"*, whilst the Collins English Dictionary³ defines it as to *"overlook or forgive (wrongdoing)"*.
12. Legislation does not provide criteria that may be considered when assessing whether to condone non-compliance with Tribunal rules or not. However, jurisprudence has been developed by the courts over time, providing guidance to the Tribunal.
13. In *Mofokeng v Attorney General*,⁴ it was held that "good cause" means substantially the same as "sufficient cause", meaning that the Tribunal may grant condonation for non-compliance with its Rules where the applicant has demonstrated objectively good reasons for non-compliance.
14. In *Melane v Santam Insurance Company Limited*⁵ when dealing with the question of condonation 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 therefor, the prospects of success and the importance of the case. These facts are inter-related:*

² Oxford English Dictionary, Second Edition

³ Collins English Dictionary, Fourth Edition, 2011

⁴OFS 1958 (4) SA (O).

⁵ 1962 (4) SA 531 (A) at 532C-F

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.”

15. Similarly in *Mbutuma v Xhosa Development Corporation Ltd*⁶ the court held that:

“The main issue in these proceedings is whether this Court should grant the indulgence sought, notwithstanding the inordinate delay in approaching the court for condonation. The Court has a very wide discretion in these matters. Condonation may be granted under Rule 13 of the Rules of this Court if the applicant has satisfied the Court that sufficient cause has been established for granting him relief from the operation of the Rules; and, in deciding whether sufficient cause has been shown, the Court will consider all the relevant facts and circumstances of the particular case, such as the degree of non-compliance with the Rules, for example the length of the delay, the explanation therefor, the importance of the case, the prospects of success, the respondent’s interests in the finality of his judgment and the avoidance of unnecessary delay in the administration of justice...”

16. From these three judgments it can be seen that not only must the Tribunal act fairly in arriving at a decision to grant or not to grant condonation, it must also consider a number of factors, including the degree of lateness of the application, the reasons therefore, the prospects for success should the matter be heard and the importance of the case. These factors need to be considered in conjunction and not in isolation.

CONSIDERATION OF FACTORS

17. Whilst there is no exhaustive list of factors to be considered by a court or tribunal when deciding whether or not to condone non-compliance with its rules, the following factors were considered by the Tribunal in this matter:

⁶ 1978 1 SA 681 (A)

- a. Degree of lateness;
- b. Reasons therefore;
- c. Prospects of success; and
- d. Importance of the matter.

18. Accordingly, the Tribunal considered the facts as set out further below when deciding this application:-

Degree of lateness and the reasons therefore

19. In *Saloojee & Another NNO v Minister of Community Development*⁷ the court held that an excessive delay would require an extraordinarily good explanation. Condonation is likely to be granted in instances where the degree of lateness is not excessive
20. In the present case, it can be reasonably assumed that the Applicant was aware of the requirement to serve and submit the application within 20 business days after the Notice of Non-Referral was issued by the NCR; as this is specifically stated in the Notice; which was emailed to the Applicant by the NCR on 12 April 2019.
21. When calculating the due date for submission of the application; the national public holidays during that period must be taken into account; notably 19 and 22 April; and 1 May; and also 8 May, declared as the day on which national elections took place; and declared a public holiday. Accordingly, the due date for submission of the application was 16 May 2019.
22. The Applicant filed the application with the Tribunal on 21 May 2019; which is four days after the allowable 20 days from receipt of the Notice of Non-Referral by the NCR.
23. The Applicant submits that the reason for the lateness of the filing of the application is due to the Tribunal having rejected the application on three occasions prior to final acceptance of the application on 21 May 2019. The reasons for the initial rejections of the application were stated by

⁷1965 (2) SA 135 (A) 141 B-H.

the Applicant as due to insufficient or incomplete information being provided as part of the application by the Applicant.

24. The Applicant is an ordinary consumer who is unrepresented in this matter. The Applicant had clearly attempted to file the application within the 20 day time period. However, not having legal expertise, the Applicant on the earlier filing attempts did not provide the correct supporting documentation. The Applicant needed opportunities to ensure that the documentation submitted in the application was correct. These initial filing attempts rolled back the date of correct filing to beyond 20 days. The Applicant has provided objectively good reasons for non-compliance and offered a plausible explanation for the lateness in filing the application.
25. The degree of lateness cannot necessarily be regarded as excessive, particularly by an unrepresented consumer.

Prospects for success

26. The prospects for success by the Applicant should be left to the Tribunal to adjudicate in full.
27. In the interests of administrative justice and fairness, it is important that both parties be given an opportunity to present their respective cases in totality and then argue the respective merits in this matter in full before the Tribunal for adjudication.
28. It is further evident that no party will suffer prejudice by the granting of the condonation.
29. It is noted again that the Respondent has not opposed the condonation application, and is not on record before the Tribunal. Proof of service on the Respondent was, however, submitted by the Applicant.

The importance of the case

30. The matter is clearly important to the Applicant; who is currently negatively affected by adverse credit ratings.

31. The availability of the full submissions of both parties will inform and strengthen the adjudicative process to be undertaken by the Tribunal in consideration of the full facts of the matter. This will serve the interest not only of both parties to this matter, but to consumers in general, as envisaged in South African consumer protection legislation.

CONCLUSION

32. The factors taken in account in determining this condonation application have been considered in conjunction and not in isolation.
33. There is sufficiently good cause shown that granting the condonation application will enable the parties to fully ventilate their respective cases before the Tribunal for adjudication. This will determine whether or not the Applicant's rights as a consumer have been trodden upon. This clarity is important for ensuring compliance with the national legislative and regulatory consumer protection framework.

ORDER

34. Accordingly, for the reasons set out above the Tribunal makes the following order:-

- a. Condonation is hereby granted for the late filing of the Applicant's application for leave to refer the matter to the Tribunal; and
- b. No order as to costs.

Authorised for issue by National Consumer Tribunal

Case Number: NCT/133100/2019/141(1)

Dated on this 13th day of July 2019.

(signed)

DR LAURA BEST
PRESIDING MEMBER

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