

IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION

Case number: NCT/119915/2018/57(1)(b)

In the matter between:

BEN MORGENROOD FORD CC

APPLICANT

AND

TSEKO EDWIN KOLOI

RESPONDENT

IN RE:

TSEKO EDWIN KOLOI

APPLICANT

and

BEN MORGENROOD FORD CC

RESPONDENT

Coram:

Prof. K Moodaliyar – Presiding member

CONDONATION JUDGMENT AND REASONS

INTRODUCTION

1. In this application for condonation:

- 1.1 The Applicant is BEN MORGENROOD FORD cc, a business entity which conducts its business at the corner of Annan and Kaolin Street, Carletonville. The Applicant is the Respondent in the main matter.

- 1.2 The Respondent is TSEKO EDWIN KOLOI, an adult male residing in Ficksburg. The Respondent is the Applicant in the main matter.
- 1.3 For ease of reference in this interlocutory application, the Applicant will be referred to as "Morgenrood Ford" and the Respondent will be referred to as "Koloi".

APPLICATION TYPE

2. This is an application to the National Consumer Tribunal ("the Tribunal") to condone the Morgenrood Ford's non-compliance with its rules. The Application is brought in terms of Rule 34 of the Rules of the Tribunal¹.
3. 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.
4. Koloi is not opposing this application.
5. The application is accordingly considered on an unopposed basis.

BACKGROUND TO THE CONDONATION APPLICATION

6. In the main matter, Koloi purchased a brand new Ford Ranger from the Morgenrood Ford on or about 11 October 2017.
7. Koloi complained that the car was defective and of poor quality based on the following defects which Koloi detected after taking possession of the vehicle:
 - a. The loading bin was not well fitted and was swinging;
 - b. The right front door had parts which were making noise;
 - c. The rear bumper was not well aligned; and
 - d. The cover underneath the steering wheel had been damaged.

¹ For the Conduct of Matters before the National Consumer Tribunal published under GN789 in GG30225 of 28 August 2007 as amended by GenN428 in GG34405 OF 29 June 2011.

8. Koloi approached Morgenrood Ford and requested that the vehicle be replaced or that the contract be called, as Koloi did not want a "repaired" brand new car. Morgenrood Ford refused to replace the vehicle or cancel the agreement. They had offered to repair the vehicle.
9. On 15 November 2017, Koloi referred the matter to the Motor Industry Ombudsman of South Africa (MIOSA). On 18 April 2018, MIOSA informed Koloi that Morgenrood Ford contravened section 82(8) of the CPA in that MIOSA did not receive a response from Morgenrood Ford. MIOSA recommended that Koloi register his complaint with the National Consumer Commission ("NCC").
10. Koloi lodged a complaint with the NCC on 5 May 2018. The NCC issued a notice of non-referral on 27 August 2018, on the basis that the defects in dispute did not warrant a replacement vehicle.
11. Koloi then approached the Tribunal to declare that Morgenrood Ford contravened sections 20, 53, and 56 of the CPA and to direct the Morgenrood Ford to refund Koloi the instalments and for the vehicle to be returned to the Morgenrood Ford.
12. Koloi approached the Tribunal for an application for condonation of the late filing of his main application; which was granted by the Tribunal on 8 January 2019.
13. Morgenrood Ford was supposed to file its answering affidavit on Koloi and with the Registrar within 15 business days after receipt of the main application. Morgenrood Ford's answering affidavit is approximately 11 business days late.

APPLICABLE RULES OF THE TRIBUNAL, THE ACT AND CASE LAW

14. 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."

15. Rule 34 (2) states "The Tribunal may grant the order on good cause shown".
16. Rule 13 (1) states "Any person required by these Rules to be notified of 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.

Rule 13(2) states that 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".

17. The Tribunal may therefore grant an application for condonation if the Applicant is able to show good cause as to why the Applicant did not comply with the Rules.²
18. In *Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others*³ it was held that the standard of considering an application of this nature is the interests of justice.
19. 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:
- 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.⁴

20. In *Melane v Santam Insurance Company Limited* it was held that:

² Rule 34(2) of the Rules.

³ 2003 (11) BCLR 1212 (CC) at para[11].

⁴ *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.

"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. (*Saljee & 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)." Similar factors were also discussed by the court in the earlier case of *Melane v Santam Insurance Company Limited*⁵ where it was pointed out that a court has a discretion which should be exercised judicially upon consideration of all the facts.⁶

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

CONSIDERATION OF THE MERITS

22. In evaluating the merits of the application the Tribunal considered the following factors –
 - The Act, the Rules of the Tribunal and relevant case law;
 - Koloi has not opposed the application for condonation;

⁵ 1962 (4) SA 531 (A) at 532C-F.

⁶ See 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.

- Morgenrood Ford has provided a reasonable explanation for the delay;
 - The explanation offered by the Morgenrood Ford is reasonable in the circumstances; and
 - It is an important matter for both parties and in the interests of justice that both parties be given an opportunity to raise all the relevant issues; and to be given an opportunity to respond to the issues raised; and to place the full facts before the Tribunal.
23. The reasons advanced by Morgenrood Ford for failing to file its answering affidavit in accordance with the Tribunal Rules is mainly that:
- 23.1 The delay in delivering the answering affidavit in the main case was reasonable and not attributable to any malice on its part;
- 22.2. Morgenrood Ford were erroneously under the impression that the matter was finalised by MIOSA and then realised that it was still ongoing when it received the condonation judgment by the Tribunal;
- 23.3 Morgenrood Ford then engaged the services of an attorney who thereafter commenced consultation, gathering of evidence and drafting of the answering affidavit; and
- 23.4 that Morgenrood Ford would suffer severe prejudice if it is not permitted to file its answer.
24. It is for these reasons that Morgenrood Ford was not placed in a position to file its answering affidavit in accordance with the Rules of the Tribunal. Morgenrood Ford submits that there is no prejudice to the Koloi should the Tribunal condone the late filing of Morgenrood Ford's answering affidavit. The answering affidavit has been submitted with this application.
25. In conclusion in evaluating the merits of the application; the Tribunal finds that the Morgenrood Ford has provided a reasonable explanation for the delay in filing its answering affidavit. It is in the interests of justice that Morgenrood Ford be given an opportunity place the full facts of the matter before the Tribunal in order to establish whether the Morgenrood Ford has a *bona fide* defence to the application. The Tribunal therefore grants the application for condonation. The normal rules will apply for the filing of the replying affidavit.

RULING

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

26.1 The condonation application for the late filing of the Answering Affidavit is granted; and

26.2 There is no order as to costs.

Thus handed down; in Centurion; this 3rd Day of May 2019

[Signed]

K MOODALIYAR

TRIBUNAL MEMBER

Authorised for issue by National Consumer Tribunal

Case Number: NCT/119915/2018/57(1)(b)

Date: 2019/05/10
CCYY / MM / DD

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