

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

Case Number: **NCT/116532/2018/75(1)(b) CPA – Rule 34**

In the matter between:

ROBERT BOSCH (PTY) LTD

APPLICANT

and

MONNAPULE SAMUEL MOKHUTSWANE

RESPONDENT

IN RE:

MONNAPULE SAMUEL MOKHUTSWANE

APPLICANT

and

ROBERT BOSCH (PTY) LTD

RESPONDENT

Coram:

Adv. J. Simpson

- Presiding Tribunal Member

**RULING AND REASONS
(CONDONATION FOR LATE FILING OF ANSWERING AFFIDAVIT)**

APPLICANT

1. The Applicant in this matter is Robert Bosch Propriety Limited (“the Applicant” or “Bosch”). The Applicant is the Respondent in the main matter.

RESPONDENT

2. The Respondent is Mr Monnapule Samuel Mokhutswane, a major male (“the Respondent” or “Mr Mokhutswane”). The Respondent is the Applicant in the main matter.

BACKGROUND

3. Mr Mokhutswane filed the main application with the Tribunal on 28 September 2018. The application was personally served on the Respondent on 28 September 2018. The application was lodged in terms of section 75(1)(b) of the Consumer Protection Act 68 of 2008 (“the CPA”). Mr Mokhutswane essentially alleges that Bosch is responsible for the poor service he received from its franchisee, Midway Bosch Service Centre. Mr Mokhutswane alleges that Midway Bosch Service Centre has closed down and he has no recourse against the company for the loss he suffered when it failed to repair his vehicle properly in 2015. He now wishes to hold Bosch responsible for the loss he suffered.
4. The application was served on Bosch on 28 September 2018; which meant the answering affidavit was due within 15 business days, being 19 October 2018. Bosch however filed and served its answering affidavit on 22 October 2018. This is one business day late. Bosch applied for condonation for the late filing of the answering affidavit. Mr Mokhutswane has filed an affidavit opposing the application for condonation. No replying affidavit was filed by Bosch.
5. Paul Scott is employed by Bosch as the Head of Legal Services and deposed to an affidavit in support of the application for condonation. The affidavit submits the following:
 - 5.1 That the answering affidavit was only filed one business day late;
 - 5.2 Bosch was under the mistaken impression that the answering affidavit was only due within 15 business days of the notice of filing being issued;

- 5.3 Bosch was never a party to the original complaint to the Motor Industry Ombudsman (MIOSA) or the National Consumer Commission (NCC). It therefore took time for the necessary information to be gathered;
- 5.4 Bosch has good prospects of success in its defence; and
- 5.5 Bosch would be severely prejudiced if the condonation is not granted.
6. The answering affidavit by Bosch makes a number of submissions as to why it is not liable in this matter. For the purposes of this ruling it suffices to reflect that Bosch submits that it terminated its relationship with Midway Auto Service (The parties reflect the name of the alleged franchisee differently). It was never a party to the original complaint lodged with MIOSA and the NCC. The matter cannot be brought before the Tribunal unless the complaint process set out in the CPA was followed. Mr Mokhutswane has not proven the nature of the bad service provided or any loss. Midway Auto Service should have been joined as a party in this matter. Midway Auto Service was an independent contractor. Mr Mokhutswane has not laid any basis for a complaint against Bosch based on the CPA.
7. Mr Mokhutswane made numerous submissions in his 10 page opposing affidavit. Essentially he submits that Bosch had ample opportunity within which to file the answering affidavit in time. Its defence of the matter is simply to frustrate and hinder the administration of the CPA.

APPLICABLE SECTIONS OF THE NCA AND RULES¹

8. 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."*
9. Rule 34 (2) states *"The Tribunal may grant the order on good cause shown".*

¹ Regulations for Matters Relating to the Functions of the Tribunal and Rules for the Conduct of Matters before the National Consumer Tribunal, 2007

APPLICABLE LEGAL PRINCIPLES

10. 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.
11. 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.
12. 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. Factors that are relevant include but are not limited to:
 - 12.1 the nature of the relief sought;
 - 12.2 the extent and cause of the delay;
 - 12.3 the effect of the delay on the administration of justice and other litigants;
 - 12.4 the reasonableness of the explanation for the delay;
 - 12.5 the importance of the issue to be raised in the intended appeal; and
 - 12.6 the prospects of success.⁵
13. In *Melane v Santam Insurance Company Limited*⁶ 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

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 *Camagu v Lupondwana* Case No 328/2008 HC Bisho.

⁶ 1962 (4) SA 531 (A) at 532C-F.

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)."

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

CONSIDERATION OF THE MERITS

15. In evaluating the merits of the application the Tribunal will consider the following factors –
 - 15.1 The answering affidavit was only filed one business day late. This is not an excessive delay;
 - 15.2 There is no indication of Bosch unnecessarily delaying the process or wilfully ignoring the application; and
 - 15.3 Bosch would suffer undue prejudice should the condonation be refused.
16. The Tribunal finds that the factors listed above constitute good cause in these specific circumstances. The Tribunal therefore grants the application and the late filing of the answering affidavit is condoned.

17. As the late filing of the answering affidavit has been condoned, Mr Mokhutswane may file his replying affidavit within a period of 10 business days after the issuing of this Ruling.

ORDER

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

18.1 Condonation is hereby granted to Bosch for the late filing of its answering affidavit;

18.2 Mr Mokhutswane may file a replying affidavit in response to the answering affidavit within 10 business days after the date on which this Ruling is issued to the parties; and

18.3 No order is made as to costs.

DATED 23 JANUARY 2019

[signed]

Adv J Simpson

Presiding Tribunal Member

Authorised for issue by National Consumer Tribunal

Case Number: NCT/116532/2018/75(1)(b)

Date: 29-01-2019

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