

IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT/128364/2019/140(1) Rule 34

In the matter between:

OPTION DEALS (PTY) LTD

APPLICANT

and

NATIONAL CREDIT REGULATOR

RESPONDENT

IN RE:

NATIONAL CREDIT REGULATOR

APPLICANT

and

OPTION DEALS (PTY) LTD

RESPONDENT

Coram:

Ms H Devraj – Presiding member

Date received for adjudication: 16 May 2019

Date of this ruling: 20 May 2019

CONDONATION RULING- FOR THE EXTENSION OF TIME TO FILE AND SERVE AN ANSWERING
AFFIDAVIT

INTRODUCTION

1. In this application for condonation:
 - 1.1. The Applicant, which is the Respondent in the main matter, is Option Deals (Pty) Ltd. The Applicant is a private company duly registered as such in terms of the company laws of the Republic of South Africa; with its registered business address at 50 Constantia Boulevard, Constantiakloof, Johannesburg. The Applicant is an unregistered credit provider;

- 1.2. The Respondent, which is the Applicant in the main matter, is the National Credit Regulator, a juristic person established by section 12 of the National Credit Act, 34 of 2005 (the Act); and
- 1.3. For ease of reference in this interlocutory application, the Applicant will be referred to as "Option Deals" and the Respondent will be referred to as "the NCR".

BACKGROUND

2. In the main matter, the NCR seeks an order to declare Option Deals to be in repeated contraventions of various sections of the Act and Regulations. The NCR also seeks an order against Option Deals to be interdicted from entering into any credit agreements; while it remains to be an unregistered credit provider. The further prayers of the NCR are for Option Deals to return all repossessed vehicles that are still in its possession; to refund consumers excess amounts paid; and to transfer the registration of the vehicles back into the names of the consumers. In the result, the NCR also moved for the imposition of an administrative fine.
3. In summary, the NCR alleged that Option Deals entered into credit agreements without conducting proper affordability assessments; entered into reckless credit agreements; overcharged consumers on fees and charges; contained unlawful provisions in its credit agreements; and used credit agreements that are disguised as sales and lease agreements.
4. On 20 March 2019, the NCR lodged the application in the main matter before the National Consumer Tribunal.
5. In terms of Rule 13 of the Tribunal Rules¹, Option Deals was required to file its Answering Affidavit within 15 business days of receiving the application. The NCR served the application on Option Deals, via e-mail on 20 March 2019. Option Deals consented to service via e-mail. In light of this, Option Deals was required to file its Answering Affidavit by 11 April 2019.
6. On 11 April 2019, Option Deals applied for condonation in terms of Rule 34 to extend the time for the filing and serving of its Answering Affidavit.

ISSUE TO BE DECIDED

7. The issue I am required to decide is whether the application to condone the extension of the time for the filing and serving of the Answering Affidavit should be granted or not.

¹ GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007 (Government Gazette No. 30225). As amended.

BRIEF FACTS BY THE RESPONDENT IN THE MAIN MATTER

Reasons for the lateness

8. Option Deals submitted that its Director that will be deposing to the Answering Affidavit, was unable to consult with the attorneys during most of the 15 (fifteen) day period in which the Answering Affidavit was due to be filed and served. This was due to the family commitments of the Director whom is based in Cape Town. According to Option Deals; it will be attaching numerous affidavits to its Answering Affidavit; from various consumers situated in different areas of Gauteng. The logistical arrangements as well as consultations and signing of these affidavits would be time-consuming. The investigation report is voluminous and the information would need to be carefully considered and responded to.
9. Option Deals requested a 30 (thirty) day extension period in order to file and serve its Answering Affidavit; taking into account the numerous public holidays.

THE NCR's OPPOSITION TO THE CONDONATION APPLICATION

10. The NCR did not oppose the condonation application.

LEGAL PRINCIPLES

11. It is convenient to set out the relevant statutory and regulatory provisions as well as the case law governing the condonation application.
12. 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."*
13. Rule 34 (2) states that the Tribunal may grant the order on good cause shown.
14. Rule 3(2)(c) provides that:

"The Tribunal may consider applications related to an adjudication process—

- (i) *to intervene in proceedings in terms of rules 11 and 12;*
- (ii) *to amend documents in terms of rule 15;*
- (iii) *to change the forum at which a matter will be heard in terms of section 140 (4) or 141 (2) (a);*
- (iv) *to condone non-compliance with the rules and proceedings of the Tribunal;*

- (v) for an order of substituted service in terms of rule 30;
- (vi) to grant a default order in terms of rule 25; or
- (vii) relating to other procedural matters”;

15. Rule 4(2) provides that:

“If an application relates to a matter contemplated in rule 3 (2) (c) that is not specifically provided for in Table 2, the Applicant must:

- (a) apply by way of Notice of Motion in Form T1.r4;*
- (b) append a supporting affidavit setting out the facts on which the application is based;*
- (c) serve the Notice and affidavit on the Respondent and other parties to the matter; and*
- (d) file the application documents and proof of service with the Registrar.”*

16. Rule 13 (1) and (2) respectively provide that :

“Opposing an application or referral

(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) An answering affidavit to an application or a referral other than an application for interim relief must be served on the parties and filed with the Registrar within 15 business days of receipt by such party of the application.”

17. 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.

18. In *Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others*⁴ it was held that the standard for determining 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. It requires the exercise of discretion on an objective conspectus of all the facts. 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

²Oxford English Dictionary, Second Edition at pg 151.

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

⁴2003 (11) BCLR 1212 (CC) at para[11].

the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success.⁵

20. In *Melane v Santam Insurance Company Limited*⁶ it was held that:

"In deciding whether sufficient cause has been shown, the basic principle 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. Ordinarily these facts are inter-related; they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. And the Respondent's interests in finality must not be overlooked

21. The dictum in *Melane* reveals that these factors are interrelated and should not be considered separately.

CONSIDERATION OF THE MERITS

22. I now turn to the merits of the condonation application.

Background

23. Option Deals filed a condonation application to extend the time for the filing and serving of its Answering Affidavit.

Lateness

24. According to Rule 13(2) of the Tribunal Rules, Option Deals should have filed its Answering Affidavit within 15 business days of receiving the application. The main application was served on Option Deals on 20 March 2019. Based on the submissions made by Option Deals, it is clear that it was unable to respond to the serious allegations made against it within the 15 day period. It also required time to put together the documentation in order to respond to the extensive voluminous application. The Tribunal accepts the explanation provided for the late filing of the Answering Affidavit.

Prejudice

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.

⁶1962 (4) SA 531 (A) at 532C-E.

25. In my view, Option Deals will suffer prejudice if it is not provided with an opportunity to respond to the serious allegations against it.

Prospects of success and importance of the main matter

26. This matter is important to Option Deals and the allegations raised are serious. Some of the orders sought by the NCR are that of massive refunds to consumers and an administrative fine. This will have dire consequences for Option Deals.

CONCLUSION

27. With regard to the condonation for the extension of time for the filing and serving of the Answering Affidavit; I am persuaded that it is important that Option Deals be provided with the opportunity to respond to the issues raised by the NCR. It is also in the interests of justice that all the facts are placed before the Tribunal and that the condonation application be granted. This will enable the parties to fully ventilate their respective cases before the Tribunal.

ORDER

28. Accordingly, the Tribunal orders that:
- 28.1. The condonation application for the extension of time for the filing and serving of the Answering Affidavit is granted;
 - 28.2. Option Deals must file its Answering Affidavit by 7 June 2019;
 - 28.3. The NCR must file its Replying Affidavit within 10 days of receipt of the Answering Affidavit; and
 - 28.4. There is no order as to costs.

Thus handed down, in Centurion; this 20th Day of May 2019

H DEVRAJ
PRESIDING MEMBER

Authorised for issue by National Consumer Tribunal

Case Number: NCT/128364/2019/140(1) R34

Date: 22 May 2019

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