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IN THE NATIONAL CONSUMER TRIBUNAL HELD ON CENTURION

CASE NUMBER: NCT /221542/2022/(148)(1)

In the matter between

FASQUIP TRADING CC t/a WOODLANDS DÉCOR

Applicant/Appellant and

USHA SINGH

Respondent

Coram

Adv N. Sephoti (Presiding Member)

Mr T. Bailey (Member)

Adv J. Simpson (Member)

Date of hearing 01 June 2022

Date of judgement 08 June 2022

APPEAL JUDGEMENT AND REASONS

THE PARTIES

1. The Applicant in this matter is Fasquip Trading CC t/a Woodlands Décor, a close corporation duly registered in terms of the company law of South Africa (“the Applicant”) with its physical address at Unit 8, Sebenza Park, 17 Engwena Street, Sebenza, Johannesburg, Gauteng. The Respondent is involved in the manufacturing and distribution of indoor window and door blinds. The Appellant is represented by Adv Nicholas Tee of the Johannesburg bar, briefed by Michael Dansky Attorneys of Johannesburg.

2. The Respondent is Usha Singh, an adult female (“The Respondent” or “Mrs Singh”), whose physical address is A[...], M[...]Sandton, Gauteng. At the hearing the Respondent appeared through the Teams meeting application (“Teams”) and was assisted by her husband, Sunjeeth Singh and her daughter (no name provided for the record).

APPLICATION TYPE & JURISDICTION

3. This is an application in terms of Section 148(1) of the National Credit Act No. 34 of 2005 (“the NCA”) to the Tribunal to appeal the decision of a single member of the National Consumer Tribunal (“The Tribunal”) in a written judgment dated 24 February 2022 wherein the Tribunal refused to condone the late filing of the Appellant’s answering affidavit.

4. The National Consumer Tribunal “The Tribunal”) has jurisdiction of hear the matter in terms of section 27 of the NCA.

5. This judgment and reasons follow the hearing of the Appellant, represented by Adv Tee, held on 01 June 2022 at the offices of the Tribunal in Centurion as well as through Teams.

BACKGROUND

6. During April 2018 the Respondent engaged the services of Appellant to install blinds in her home. The Respondent was not satisfied with the services provided and alleges that the blinds were not installed properly. She is seeking a full refund of R47 685.97 for the price paid for the goods and services. On March 2020, the Respondent filed an application for leave to refer the complaint to the Tribunal.

7. In October 2020, a notice of set down was issued by the Registrar for the hearing of the application for leave to refer to be held on 19 January 2021. On 05 January 2021, the Respondent filed an application to condone the late filing of her supplementary affidavit. The Appellant did not file any answering affidavit opposing the application for condonation and on 19 May 2021, the Tribunal granted the application for condonation for the late filing of the supplementary affidavit.

8. On 29 June 2021, the Registrar issued a Notice of Set Down for the application for leave to refer to be heard on 05 August 2021. On 13 August 2021, the Registrar issued the Tribunal's judgement granting the application. On 14 September, the Registrar issued a notice of set down for the main matter to be heard on 19 October 2021 and it was served on the parties.

9. On the day of the hearing (19 October 2021), Adv Tee appearing on behalf of the Appellant, advised the Tribunal that the Appellant had attempted to file opposing papers on the Respondent and the Tribunal on numerous occasions. Both the Respondent and the Registrar refused to accept service of the documents, which included a condonation application for the late filing of an answering affidavit. On 22 October 2021, the Registrar issued a postponement order in respect of the main matter.

10. On 19 November 2021, the Appellant filed its condonation application and answering affidavit. The deponent was one Jacqueline Collette Ferreira, an adult female sales manageress employed by the Appellant, who averred that she represented the Appellant when the dispute arose. The essence of Ms Ferreira's submissions is that the

Appellant received a notice of filing on 30 March 2020 but no claim had been received prior to this date. On 08 October 2020, the Appellant received a notice of set down. On 23 November 2020, Appellant's attorneys wrote to the Tribunal indicating that they had not received any particulars of claim from the Respondent and requested that same be forwarded to them. These were received on 05 January 2021. The attorneys proceeded to draft the answering affidavit on 15 January 2021 and upon completion, it was sent to Ms Ferreira for her to read and correct. She only sent the correction in February 2021, no reasons are advanced for the delay. The affidavit was finally signed on 3 March 2021 with the supporting affidavit signed on 09 March 2021 and these were sent to the Registrar and the Applicant on 12 March 2021. According to the Appellant, it was not possible to respond within 15 days due to the sheer volume of the documentation that had to be responded to and before January 2021, the claim that the Appellant had to respond to was not clear.

11. On 07 December 2021, the Respondent filed a replying affidavit, setting out an extensive chronology of events that transpired before she requested a refund. As regards the condonation application, she submitted that the application should be rejected because the Appellant's documents were false. The Respondent claimed that Appellant had engaged in delaying tactics since 2018 before the proceedings commenced. The Appellant has tried to apply for condonation on 12 March 2021, a year after receiving the notice of filing on 30 March 2020 and almost two months after having received all the documents on 05 January 2021. Appellant had tried on more than one occasion to file papers and despite being guided by the Tribunal, failed to observe proper filing procedures resulting in documents being rejected. The Appellant had tried to file its papers on 07 April 2021; 16 April 2021; 22 April and 08 June 2021 and in all these instances, proper filing procedures were not followed resulting in documents being rejected. After the postponement order of 19 October 2021, Appellant was due to file its answering affidavit on 15 November 2021 but it filed it on 22 November 2021, missing the filing period and failed to provide any reasons for the late filing. Between 19 October 2021 and 22 November 2021, Appellant merely re-issued what was prepared in March 2021.

12. The application for condonation was heard by Mr Potwana and on 24 February

2022, the Tribunal made an order, refusing the Appellant's application for condonation for the late filing of its answering affidavit and no order as to costs was made.

13. In consideration of the merits in the condonation application, the single member considered whether the Applicant had shown good cause in which the interests of justice favoured the granting of the condonation application. He considered the extent of the delay and the reasons for the delay. He was not convinced by the argument of the Appellant.

a. The Appellant failed to file all its documents on time upon receipt of the Respondent's founding documents. Upon receipt of the notice of filing, the Appellant failed to take any steps to ascertain the whereabouts of the application documents from either the Applicant or the Registrar;

b. Appellant failed to apply for an extension of time in terms of Rule 34(1)(b) – instead, it filed its answering affidavit two months after the date on which is claimed to have received the application documents. This was a year after the Respondent had initially filed an application to refer the matter to the Tribunal on March 2020;

c. Following the postponement hearing of 19 October, Appellant was to file their condonation application within 15 days of 22 October 2022 and Appellant filed it late on 19 November 2021 with the affidavit of one Ms Ferreira commissioned on 6 April 2021;

d. There were no reasons advanced for the late filing of an answering affidavit between 12 March 2021 and 19 November 2021, a delay of more than eight months which the Appellant failed to account for in its condonation application.

e. Due to the inordinate delay and in the absence of a reasonable explanation for the delay that occurred in the matter and the fact that the Respondent was entitled to closure of litigation, the Tribunal refused the condonation application.

f. The judgment referred to the cases of *Melane v Santam Insurance Limited* 1962 (4) SA 531 (A) and *Van Wyk v Unitas Hospital and Others* 2008 (4) BCLR 442 (CC). In the *Melane* matter the court held that: “... *the Court has a discretion, to be exercised judicially upon 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 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*”

g. In the *Van Wyk* matter, the court stated that the following factors can be considered for a condonation application “*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*” The Court went further and stated-

“An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of the delay. And, what is more, the explanation given must be reasonable. The explanation given by the Applicant falls far short of these requirements.”

14. THE APPEAL

The Appellant made the following submissions in its appeal against the ruling:

14.1 Fasquip seeks the application of the constitutional principle that underpins natural justice: *audi alteram partem*. The Respondent asserts that they have a *bona*

vide defence to the Respondent's claims: Fasquip has tendered performance despite the Respondent's breach of contract. 80% of the work has been done;

14.2 The Registrar of the NCT failed to inform the NCT members of Fasquip's answer to the Respondent's claims: Fasquip simply seeks to be heard in a fair hearing.

14.3 Respondent claims that the NCT member failed to apply his mind to the law concerning condonation. Accordingly, they consider the decision to be wrong in law. The decision denies Fasquip its right to *audi alteram partem*. The decision breaches the doctrine of legality and violates the rule of law, a fundamental right in the Constitution of the Republic of South Africa, 1996.

14.4 According to Respondent, the principal error in the ruling is to prefer technicalities to the merits of the matter which could have been determined by an application of law and common sense.

14.5 Furthermore, the Tribunal placed no weight on the undisputed facts by attributing the delays in the proceedings solely to Fasquip. The record of the proceedings indicates:

- i. Delays attributable to Ms Singh;
- ii. Delays attributable to the Registrar;
- iii. Delays attributable to incomplete service of documents on Fasquip; and
- iv. Delays attributable to Ms Singh to acquire her referral of the complaint to the Tribunal. Leave to refer was granted by the same Tribunal member who decided the condonation ruling now under appeal. The referral was granted on 10 August 2021.

14.6 Failure to exercise a judicial discretion in that despite relying on the case authority of the courts on deciding the matter, the Tribunal failed to consider the fact that the overarching principles set out in the Van Wyk matter are not exhaustive.

14.7 Further that The Tribunal omitted to consider the nature of the relief sought, the importance of the issue raised, Fasquip's prospects of success, and two further factors

being:

1. The Applicant's tender to perform the last remnants of the contract; and,
2. The fact that the Respondent has had beneficial use of eighty percent of the Applicant's performance from May 2018 to date.

14.8 The effect of the Tribunal's ruling is to deny Fasquip the right to be heard in its own defence. There are four main issues in this regard.

14.8.1 Fasquip has performed 80% of the contract and continues to tender to perform the last 20% of the contract;

14.8.2 Ms Singh has had the benefit of Fasquip's performance since May 2018. In light of the BK Tooling case, Fasquip would at least be entitled to 80% of its contract price if Ms Singh continues to reject the tender;

14.8.3 Ms Singh cancelled the contract prematurely, thus denying Fasquip's bona fide endeavour to complete the contract;

14.8.4 This entire matter places technicalities above merits to a point where the rule of law is negated and the *audi alteram partem* principle is violated.

14.9 The Respondent therefore contends that the Tribunal, as constituted by a single member, has failed to resolve the dispute and that the dispute is only confined to two issues relied on by Ms Singh. Paraphrased, the issues are the skirting and the failure to perform by the date indicated.

14.10 The Respondent seeks the Tribunal to exercise its the legislative and regulatory authority, powers and competence in terms of the legislation, regulations and rules, forthwith to determine the dispute by reference with immediate effect to oral evidence at the hearing of the appeal and immediately to determine the facts to resolve the dispute between the parties.

FACTORS CONSIDERED BY THE TRIBUNAL

15. The full panel must decide whether the single member made an error or misdirected himself on the law or the facts of the case.

16. There is no evidence that the single member made an error on the facts. It appears the Appellant 's submissions are based on legal arguments.

17. The Appellant's main argument is based on the *Audi* principle. In this regard the Tribunal rules provide a clear and definitive process allowing the opposing party to file its answering affidavit. This process fully provides for the opposing party to oppose the matter in accordance with the *Audi* principle.

18. Having filed its papers late, it must now apply for condonation. The appellant had to show good cause for the condonation to be granted. The *Audi* principle does not form a basis for granting condonation.

19. The Appellant submitted that the single member failed to consider the delays caused by Ms Singh and the Registrar. There is no evidence of this information being submitted by the Appellant in the condonation application. Even if it were, it was the Appellant's actions which required consideration, not that of the other parties.

20. The Appellant's representative further indicated that the Appellant has facts that bear prospects of success. While this may have been the one single factor in the Appellant's favour, it does not outweigh all the other factors to be considered. The Court in Van Wyk held that "*prospects of success pale into insignificance where, there is an inordinate delay coupled with the absence of a reasonable explanation for the delay.*" The Tribunal notes the inordinate delay and the absence of reasonable explanations and the delay in resolving this matter once and for all.

21. The single member correctly considered the submissions made and the evidence

presented and applied them to the principles set out in the *Van Wyk* and *Melane* matters.

CONCLUSION

22. The Appellant has not made out a case proving that the single member erred in arriving at a decision to refuse the condonation application. The Appellant was afforded extensive time to file its answering affidavit and every time it missed the deadline and failed to provide convincing reasons for the lengthy delay in submitting same, despite being assisted by a legal practitioner who is expected to know and understand the law. No application was made for extension when the 15 day period lapsed for Appellant to file its answering affidavit.

ORDER

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

23.1 The appeal is dismissed; and

23.2 No order is made as to costs.

DATED ON THIS 08TH DAY OF JUNE 2022

(SIGNED)

Adv N. Sephoti Tribunal Member

Mr T Bailey (Tribunal Member) and Adv Simpson (Tribunal Member) concurring.