

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

Case Number: **NCT/237873/2022/75(1)(b) CPA – Rule 34**

In the matter between:

NALELI KHUNJUZWA KHOARE **APPLICANT**

and

CELSIUM MULTI-FRANCHISE (PTY) LTD **RESPONDENT**

Coram:

Adv J Simpson – Presiding Tribunal member

**CONDONATION RULING AND REASONS
(LATE FILING OF APPLICATION FOR LEAVE)**

APPLICANT

1. The Applicant in this matter is Ms NK Khoare, a major female (“Ms Khoare” or “the Applicant”).

RESPONDENT

2. The Respondent is Celsius Multi-Franchise (Pty) Ltd, situated in Welkom (“Celsius” or “the Respondent”).

APPLICATION

3. The ruling is to consider an application to condone the late filing of the application for leave in terms of section 75(1)(b) of the Consumer Protection Act, 2008 (“the CPA”).

BACKGROUND

4. On 27 July 2016, Ms Khoare took her 2007 model Peugeot 1007 vehicle to Celsius for repairs. The vehicle was inspected, and she was told to purchase a new shock absorber. She supplied a shock absorber, the repair was done, and on 5 August 2016, she collected her vehicle. She took the vehicle to a Supaquick dealer for the wheel alignment. Supaquick informed her that the CV joint on the vehicle had not been repaired properly as the spring had not been replaced. She took the vehicle back to Celsius. Celsius denied working on the CV joint. They told her to bring the vehicle back in three weeks and that it was safe to drive. She started experiencing numerous problems with the vehicle.

5. Two weeks later, she took the vehicle back to Celsius. On 27 September 2016, they informed her that the CV joint failed due to wear and tear and not any fault on their part. A dispute arose between the parties, and it appears the vehicle remained with Celsius from that time.

6. On 28 November 2016, she lodged a complaint with the Motor Industry Ombudsman of South Africa (MIOSA). In January 2017, she received a letter from Celsius’ attorneys claiming storage fees of over R35 000.00. On 5 October 2017, MIOSA issued a recommendation essentially stating that Celsius did not work on the CV and was not responsible for any damage to the CV joint.

7. She lodged a complaint with the National Consumer Commission (“the NCC”) in January 2018. It appears she did not receive any cooperation from the NCC, and in December 2018, she engaged attorneys to assist her with a claim against Celsius. The legal action continued, and she engaged new attorneys in 2020 and again in 2021. Ms Khoare’s claim in the Magistrates court was withdrawn on 19 July 2021. In March 2022,

she resubmitted her complaint to the NCC. The NCC issued a Notice of Nonreferral dated 6 June 2022, stating that there was no evidence of Celsius having worked on the CV joint.

8. The Applicant lodged an application for leave with the Tribunal on 29 July 2022. She also filed an application to condone the late filing of the application. This ruling deals with the application for condonation.

9. In summary, the Applicant submits that she did not understand the Tribunal process and could only file the complete application in July 2022. She asks that the late filing be condoned.

APPLICABLE SECTIONS OF THE ACT AND THE RULES¹

10. Rule 34 (1) provides, *“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.”*

11. Rule 34 (2) provides, *“The Tribunal may grant the order on good cause shown”*.

12. Row 32 of Table 1 B contained in the Rules provides that the Applicant must file the Section 75(1)(b) application

“Within twenty business days of the date of the Notice of Non-Referral, or within a longer time permitted by the Tribunal”.

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).

13. 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 mean “*overlook or forgive (wrongdoing)*”³.

14. In *Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others* , it was held that the standard of considering an application of this nature is the interests of justice.

15. Whether it is in the interest of justice to grant condonation depends on each case’s facts and circumstances. It requires the exercise of a discretion based on an objective conspectus of all the facts. Factors that are relevant include but are not limited to:

- 15.1 The nature of the relief sought;
- 15.2 The extent and cause of the delay;
- 15.3 The effect of the delay on the administration of justice and other litigants;
- 15.4 The reasonableness of the explanation for the delay;
- 15.5 The importance of the issue to be raised in the intended application; and
- 15.6 The prospects of success.⁴

16. In *Melane v Santam Insurance Company Limited* , 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 issue and strong prospects of success may tend to compensate for a long delay.

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]

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

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 penalise a litigant on account of the conduct of his representative but it emphasised 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. (Saloojee & 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)."

17. From the dictum in *Melane*, it was held that these factors are interrelated and should be considered collectively.

CONSIDERATION OF THE MERITS

18. The NCC's Notice of Non-referral is dated 6 June 2022. Therefore, the application for leave should have been filed with the Tribunal within 20 business days, by 5 July 2022. The Applicant filed her application on 29 July 2022. The delay in filing is approximately three weeks.

19. The delay in filing is not substantial relative to the long history of the matter. If this were the only factor relevant to the condonation application, it would be granted. However, the Tribunal must consider all relevant factors.

20. The Tribunal must consider the prospects of success in this matter. It will serve no purpose for the Tribunal to grant leave if there is no reasonable prospect of it adjudicating on the matter.

21. Based on the Applicant's submissions, the original cause for the complaint arose when Ms Khoare's vehicle was repaired in August 2016. Although Ms Khoare lodged a

complaint with the NCC in January 2018, the NCC only issued a non-referral letter in June 2022, more than four years later.⁵⁶

22. Section 116⁷ of the CPA states that a complaint may not be made to the Tribunal more than three years after the cause of the complaint arose. In past judgments, the Tribunal regarded the period a complaint was with the NCC as interruptive of prescription. However, in the matter of *First Rand Bank Ltd v Ludick*, the High Court held that the Tribunal has no power or discretion to extend the three-year period⁸. The Tribunal is bound by the High Court judgment and must strictly apply the three-year time bar. Therefore, the Applicant had until August 2019 to file an application with the Tribunal; the application was only filed in July 2022, approximately three years after the timebar deadline. Even if the latest date of 27 September 2016 is used, the matter is still time-barred.

(1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after—

(a) the act or omission that is the cause of the complaint; or

(b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased

23. The Tribunal finds that the claim has lapsed and cannot be adjudicated by the Tribunal. Therefore, the Applicant has not shown good cause to condone the late filing for leave.

24. Further, it must be noted that there is no clear evidence of Celsius having worked on the vehicle's CV joint. It is unclear why Ms Khoare left her vehicle at Celsius's premises and did not collect it as soon as the dispute arose in 2016. Even if the matter was not time-barred, there is no clear evidence of a claim in terms of the CPA.

⁵ 2003 (11) BCLR 1212 (CC) at para [11]

⁶ 962 (4) SA 531 (A) at 532C-F.

⁷ Limitations of bringing action 116.

⁸ *First Rand Bank Ltd v Ludick* A 277/2019 High Court of South Africa, Gauteng Division, Pretoria, 18 June 2020 (unreported) at para [16]. Although the matter referred to section 166 of the NCA, section 116 of the CPA has the same wording. Therefore, the same principles are applicable.

ORDER

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

25.1 The application to condone the late filing of the application for leave is refused;
and

25.2 No order is made as to costs.

DATED ON THIS 6TH DAY OF OCTOBER 2022

{SIGNED}

Adv J Simpson
Presiding Tribunal Member