

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

Case Number: NCT/83965/2017/141(1)R34

In the matter between:

**AMITH KEDHAR SINGH**

**APPLICANT**

And

**FIRSTRAND BANK LIMITED**

**RESPONDENT**

Coram:

NOMFUNDO MASETI – Presiding Member

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**CONDONATION RULING**

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**INTRODUCTION**

1. In this application for condonation:
  - 1.1. The Applicant, which seeks leave to refer in the main matter, is Amith Kedhar Singh, a consumer as defined in section 1 of the National Credit Act, 34 of 2005 (“the Act”);
  - 1.2. The Respondent in the main matter, is Firstrand Bank Limited, a company duly incorporated in terms of the Companies Act of 2008, and a registered credit provider whose registration number is NCRCP20); and
  - 1.3. The Applicant and the Respondent will be referred to as they appear in the main matter.

## BACKGROUND

2. In the main matter, the Applicant seeks leave to refer its complaint directly to the National Consumer Tribunal (“the Tribunal”) following a Non-Referral Notice issued by the National Credit Regulator (“the NCR”) on 7 March 2016.
3. The Applicant had only 20 business days from 7 March 2016 to refer its complaint directly to the Tribunal following the aforementioned Non-referral decision. On or about 19 June 2017, the Applicant filed leave to refer its complaint to the Tribunal for adjudication. This application for leave to refer the main matter was therefore fourteen (14) months outside the prescribed period. The Applicant implores for indulgence of the Tribunal to condone its non-adherence to the Rules.
4. It is worth noting the on-going legal battle between the Applicant and the Respondent as evidenced by at least four complaint referral matters filed by the Applicant with the Tribunal on 1 March 2016.<sup>i</sup> However, it turned out that the Applicant omitted to file Form 32, a Notice of Non-Referral which is a pre-requisite for a consumer when it decides to refer its complaint directly to the Tribunal. The NCR only issued a Notice of Non-Referral for the main matter on 7 March 2016. Thus, the main matter was not properly before the Tribunal. The Applicant had not obtained the Notice of Non-Referral from the NCR at the time it launched its complaint referral on 1 March 2016.
5. On 18 August 2016, all these four complaint referrals were struck off the roll by the Tribunal due to improper filing. Only two of the four complaint referrals were re-filed with the Tribunal. The main matter was not part of these two complaint referrals that were subsequently heard on 15 February 2017.<sup>ii</sup> The Applicant chose to file it separately only on 19 June 2017.
6. Other legal actions that required considerable time and attention of the Applicant and the Respondent during the period within which the main matter ought to have been referred relate to the High Court interdict application filed by the Respondent in 2016.
7. Notwithstanding the above, the Respondent filed its opposing papers to the condonation application on 12 July 2017, a day late. This necessitated the Respondent to also apply for condonation for non-compliance with the Tribunal’s Rules. A Notice of Complete Filing in respect of the Respondent’s condonation application was issued on 30 August 2017.

8. The Respondent cited alleged errors made by the Tribunal's Registrar as the main cause for the late filing of its opposing affidavit. On 20 June 2017, the Tribunal's Registrar issued a Notice of Complete Filing of the Applicant's Condonation Application (**First Condonation**). However, the date reflected in the aforesaid signed Notice was 20 March 2017, instead of 20 June 2017, which was clearly incorrect. Based on the earlier date shown in the Notice, the Respondent sought clarification regarding the matter to which the Notice relates. The Tribunal's Registrar responded by email on 5 July 2017 to clarify that the applicable date for the Notice is 20 June 2017. The Notice provided that the Respondent may oppose the First Condonation application by filing its answer within 15 business days of the date of this Notice. The relevant date for filing of answering papers was the 11<sup>th</sup> July 2017. The Respondent missed this date, thus results in its failure to comply with the Tribunal Rules.

## **ISSUE TO BE DECIDED**

9. The issue I am required to decide is whether the application to condone the late filing of leave to refer the complaint to the Tribunal should be granted or not.

However, since this condonation application (**First Condonation Application**) is being opposed by the Respondent, and the latter filed its answering affidavit late, I am also required to decide whether or not to grant condonation (**Second Condonation Application**) for the lateness of the Respondent's opposing papers. The Applicant is also opposing this latter application.

In my view, it is sensible to first deal with the Second Condonation Application filed by the Respondent.

## **BRIEF FACTS**

### **The Respondent: Second Condonation Application**

#### ***Lateness***

10. As stated above, the Respondent failed to file its answering papers on 11 July 2017 which was within the 15 business days prescribed in Rule 13(2) of the Tribunal Rules. Instead it has filed the papers on 12 July 2017, a day late. This constitutes non-compliance with Rule 13(2). Based on this, the Registrar apprised the Respondent about the non-compliance, and required it to apply for condonation.
11. On or around 22 August 2017, the Respondent, through its attorneys of record, Glover Kannieappan Incorporated, filed its condonation application. The Respondent's main reason for filing its opposing papers, a day late, was due to clarification it sought from the Tribunal's Registrar regarding the date

reflected in the Notice, and to establish which matter the Notice relates to. In its condonation application, the Respondent asserts that, although the Notice was issued on 20 June 2017, the date reflected therein was 20 March 2017. This created confusion as to the matter to which such Notice relates. According to the Respondent, the case number shown in the Notice did not correspond to any of the previous matters that both parties have been involved in before the Tribunal. The Tribunal only provided clarification by email on 5 July 2017 that the date of 20 March 2017 was an error. The correct date of the Notice is 20 June 2017.

12. Upon clarification on which matter the Notice relates as well as the correct date of the Notice, the Respondent asserts that it then prepared its opposing papers which were filed only on 12 July 2017. This is so because it was necessary to establish whether or not the Notice related to previous matters that the Tribunal or NCR decided upon or if it was a new matter. Therefore, the cause for delay by the Respondent in finalising its answering affidavit was due to the obvious error made by the Tribunal's Registrar on the date of the Notice of Complete Filing.

## LEGAL PRINCIPLES

13. In deciding on this case, it is crucial to set out the relevant statutory and regulatory provisions as well as the case law governing the condonation application.

14. Rule 34 (1) (a) provides that

*"a party may apply to the Tribunal in Form T1 r.34 for an order to condone the late filing of a document or application".*

15. Furthermore, Rule 34 (2) states that the Tribunal may grant the order on good cause shown.

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

*"(1) 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.*

*(2) 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. 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”<sup>1</sup>. It can also be defined to mean “overlook or forgive (wrongdoing)”<sup>2</sup>.

18. In *Grootboom v National Prosecuting Authority and Another*<sup>iii</sup>, it was stated that the test to be applied when considering an application for condonation is the interest of justice. In that case, Judge Zondo stated as follows:

*“[50] In this Court the test for determining whether condonation should be granted or refused is the interest of justice. If it is in the interest of justice that condonation be granted, it will be granted. If it is not in the interest of justice to do so, it will not be granted. The factors that are taken into account in that inquiry include:*

- (a) the length of the delay;*
- (b) the explanation for, or cause for, the delay;*
- (c) the prospects of success for the party seeking condonation;*
- (d) the importance of the issue(s) that the matter raises;*
- (e) the prejudice to the other party or parties; and*
- (f) effect of the delay on the administration of justice.*

19. While all of the above factors might be relevant in determining the interest of justice, some may justifiably be left out of consideration in certain circumstances. For instance, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted.

20. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case.

21. In *Melane v Santam Insurance Company Limited*<sup>3</sup> 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*

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<sup>1</sup>Oxford English Dictionary, Second Edition at pg 151.

<sup>2</sup>Collins English Dictionary and Thesaurus, Fourth Edition 2011, at pg170.

<sup>3</sup>1962 (4) SA 531 (A) at 532C-E.

*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*

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

## **CONSIDERATION OF THE MERITS**

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

### **Lateness**

24. The Respondent's delay in filing its answering affidavit was caused by the error contained in the Notice issued by the Tribunal's Registrar on 20 June 2017. The date of 20 March 2017 was incorrect, and the Respondent expected the Tribunal's Registrar to change and rectify it for an accurate reflection of the matter. The Tribunal's Registrar provided clarity on the Notice details and the date only on 5 July 2017. Therefore, the explanation given by the Respondent for the delay is, in my view, reasonable and justifiable.

25. A one day delay is, in my view, not excessive.

### **Prejudice**

26. The Applicant has opposed this application. In my view, the short delay of one day is unlikely to result in any financial harm or prejudice if the Respondent is granted the opportunity to answer the very serious allegations the Applicant has raised against it.

### **Prospects of success and importance of the main matter**

27. The Respondent also appears to have prospects of success in that it has raised crucial points *in limine*, denies the allegations against it and has made strong and persuasive legal arguments in its answering affidavit, which in the Respondent's view could persuade the Tribunal to refuse condonation and decide against the Applicant in the main matter.

## CONCLUSION

28. For these reasons I am persuaded that the Respondent has shown good cause and that it is in the interests of justice that the condonation application be granted to enable the Respondent to state its grounds for opposing the First Condonation Application.
29. Since the late filing of the answering affidavit to the First Condonation Application has been condoned, I will now deal with the facts and the merits for the First Condonation application.

## First Condonation Application

### BRIEF FACTS

30. On 19 June 2017, the Applicant filed its complaint referral directly with the Tribunal in terms of section 141 of the Act. This complaint relates to allegations levelled against the Respondent, notably, that it was involved in a prohibited conduct when it granted a revolving loan facility on 16 October 2012. In particular, the Applicant asserts that the Respondent was reckless in granting this loan credit arrangement without conducting a thorough affordability assessment. Furthermore, the Respondent failed to furnish the Applicant with a copy of this credit agreement to enable to apply for debt restructuring.
31. The above complaint was initially lodged with the NCR on 5 August 2014. After investigating the complaint, the NCR decided not to refer it to the Tribunal for adjudication. On or around 8 March 2016, the NCR therefore issued a Notice of Non-Referral as contemplated in section 141(1) of the Act. The Applicant had 20 business days from this date of a Notice of Referral to exercise its rights to directly refer the complaint to the Tribunal.

### Lateness

32. The Applicant filed its complaint referral fourteen (14) months outside the prescribed 20 business days. The complaint referral should have been filed on 8 April 2016. The delay is therefore 14 months outside the prescribed period. This delay is excessive.
33. In the above case of *Melane*, and the Labour Appeal Court in *NUM v Council for Mineral Technology*<sup>v</sup>, the court emphasised two crucial elements for deciding on the issue of condonation, namely: prospects of success and a good explanation for the delay.
34. According to the court:

*“.....without a reasonable and acceptable explanation for the delay the prospects of success are immaterial, and without prospects of success, no*

*matter how good the explanation for the delay, an application for condonation should be refused”.*

35. In this case, the Applicant's submission on the cause for delay is that he has been under unprecedented pressure from five cases that involved both the Applicant and the Respondent that were before the Tribunal for adjudication. Cases referred to here, involve four complaint referrals that were filed by the Applicant on 1 March 2016, and were heard by the Tribunal on 18 August 2016. One of these cases relates to the main matter which the Applicant seeks leave of the Tribunal to refer it for adjudication.
36. On 18 August 2016, the Tribunal struck all four cases off the roll due to improper filing. Insofar as the main matter is concerned, the Applicant failed to file an application for leave to refer, as well as a Notice of Non-referral which is the prerequisite for referring the complaint directly to the Tribunal. This Notice was issued by the NCR on 7 March 2016. Therefore the Applicant had sufficient time to relaunch its complaint referrals pursuant to the Tribunal's rejection of these complaint referrals on 18 August 2016.
37. However, following the Tribunal's decision of the 18<sup>th</sup> August 2016, the Applicant instead chose to re-lodge, on or around 8 November 2016, only two of the above stated cases. In particular, the Applicant chose not to relaunch its application for leave to refer the main matter to the Tribunal after it has been duly apprised of the specific deficiency with its filing. That is, the lack of filing of a Notice of Non-referral, and after it has been issued with the relevant Notice of Non-referral by the NCR.
38. It is imperative to mention that the main cause for the substantial delay in filing the complaint referral is not due to any delays in issuing of the Notice of Non-referral. Further, the Applicant had an opportunity to relaunch all the previously filed complaint referrals including this main matter after it has corrected the improper filing and after it has obtained the Notice of Non-referral. But it chose to relaunch only two matters to the exclusion of the main matter. It does not explain the reason why it chose not to file the main matter at the same time with the two other complaints it relaunched after the Tribunal's ruling on 18 August 2016.
39. I therefore find the first part of the Applicant's explanation unreasonable and unacceptable.
40. The other explanation given is that the Applicant lacked knowledge and experience on the Tribunal's procedures. This explanation is completely void given the fact that the Applicant has relaunched two of the four cases which were subsequently heard by the Tribunal on 28 February 2017. Furthermore, the Applicant was duly informed of the specific flaw in its complaint referral



papers, notably, the lack of a Notice of Non-referral for the main matter, when the Tribunal ruled on these matters on 18 August 2016. The Applicant was well aware of what was lacking in its papers to enable it to file a complete and appropriate application with the Tribunal. The Applicant failed to explain the further knowledge and research that was necessary for it to relaunch its application for leave to refer the main matter to the Tribunal.

41. The Applicant also blames the delay to financial constraints it allegedly encountered in 2016 due to other legal battles in Pretoria High Court and to costs associated with filing of papers in defending the repossession of his vehicle and money required to offset arrears on his home loan. However, the Applicant does not offer any reasonable explanation on the cause for not filing this matter together with the other two complaint referrals it re-filed with the Tribunal on or around 8 November 2016. These two matters were heard by the Tribunal on 15 February 2017. The Applicant also employed the services of counsel during this hearing.
42. Moreover, the Applicant was represented by the Attorneys during the lodgement of its cases with the Tribunal in 2016. Its explanation for omitting or choosing not to file this matter in time (on 8 April 2016), or relaunch its application soon after the Tribunal ruling on 18 August 2016, is inexcusable.
43. In view of the above, I find the explanation to be unreasonable and unacceptable to justify the excessive delay in filing the complaint referral.

### **Prospects of success**

44. Notwithstanding the lack of good explanation for delay, the inquiry does not end there. It is crucial to consider other factors such as the prospects of success, the importance of the issues involved in this case for both parties and prejudice, if any.
45. The Applicant argues that its main matter will succeed if it were allowed to be heard by the Tribunal. It relies on the outcome of the investigation conducted by the NCR where the latter found that the Respondent was reckless in granting the revolving loan to the Applicant. This finding is contained in the Notice of Non-referral issued on 7 March 2016 by the NCR. Nevertheless, the NCR decided not to refer the complaint to the Tribunal for adjudication hence it issued the said Notice.
46. The further point advanced by the Applicant is that the Respondent failed to furnish it with the copy of the aforesaid revolving loan credit agreement to enable it to apply for a debt review.

47. While the Respondent refutes the above allegations, it further argued that the credit agreement which is the subject of this inquiry no longer exists because it has written off the loan amount. Therefore the matter is, according to the Respondent, moot. It argues further that the Tribunal has no valid agreement to adjudicate on. This last point is crucial as it could be the basis for the NCR not to refer the matter to the Tribunal after it allegedly found reckless conduct on the part of the Respondent, in its Notice of Non-referral. However, the Applicant contends that this aspect only takes care of the allegation of recklessness, and does not address the alleged failure or refusal by the Respondent to provide the copy of the credit agreement as requested by the Applicant. Thus argues that the matter be heard by the Tribunal.
48. It is vitally important to also consider whether or not it is in the interest of justice to grant condonation given the poor explanation for the delay and the issues raised by the parties in the preceding paragraph. The Constitutional Court in the matter of *Ferris v First Rand Bank Ltd [2014 (3) SA 39 (CC) 43G-44A]* held that the test for condonation is whether it is in the interest of justice to grant condonation.
49. The issues raised by the parties are in my view of great importance, and the Applicant's prospects of success are good. However, it would not be in the interest of justice to proceed with this matter for application for leave to refer since the loan amount has been written off, and the credit agreement no longer exists. The Respondent made this statement under oath in its answering affidavit where it opposes this condonation application. The Respondent argues that the main matter is moot. Furthermore, the NCR found no bases to refer this matter to the Tribunal for adjudication. Both parties already incurred costs of bring actions against each other in various legal platforms, and suffered financial losses.
50. The Applicant states, in paragraph 14 of its affidavit, that it requires the Tribunal to make a ruling in this matter in order for him to escalate this matter to seek damages and others through the various available channels. It is clear from this statement that the Applicant wants to use the Tribunal's findings, if it rules in its favour, to claim for damages. The Applicant does not dispute that the amount was written off. The alleged prohibited conduct has stopped.
51. The Respondent argues that it incurred costs for cases that the Applicant filed with the Tribunal and other channels which were ultimately thrown out. It is clear that both parties suffered financial losses as a result of each other's actions. I am of the view that no prejudice will be suffered by the Applicant if the matter is not condoned and heard by the Tribunal.
52. In view of the above, and the excessive delay as well as lack of good explanation for the delay, the First Condonation Application filed by the Applicant is refused.

### ***Points in Limine***

#### ***Main matter has lapsed***

53. The Respondent contends that the main matter has lapsed as contemplated in Rule 8(2) of the Tribunal's Rules. In particular, the Respondent asserts that the Applicant failed to file the main matter within 15 business days after it was advised by the Tribunal's Registrar following the improper filing.
54. However this argument is void as the Applicant has already applied for condonation for its failure to comply with the Tribunal's Rules. The Respondent has acknowledged this point in its affidavit wherein it states that Rule 8(2) should be read with Rule 34 which allows a person to apply for condonation.
55. I am therefore of the view that the argument that the main matter has lapsed because of the failure to comply with the 15 days prescribed in Rule 8(2) is now taken care of by the condonation application, if granted.

#### ***Prescription argument***

56. The Respondent argues in paragraph 67 of its affidavit that the complaint or main matter is prescribed because the credit agreement in question was entered into on 16 October 2012. Yet the complaint referral was only filed with the Tribunal on 19 June 2017.
57. However, the Applicant disputes this view and contends that prescription was interrupted when it acknowledged its debt during the High Court action filed by the Respondent during September 2014. Furthermore, the Applicant contends that it previously served the Respondent with papers when it referred this matter to the Tribunal in 2016.
58. Indeed there were several instances wherein both parties dragged each other before the Tribunal and other legal enforcement institutions such as the South African Human Rights Commission, NCR, Ombudsman for Banking Services, the South African Reserve Bank and the High Court. The Applicant also made numerous efforts to obtain the copy of the impugned revolving loan credit agreement from the Respondent. According to the Applicant, such copy was required since May 2014, in order to enable the Applicant to apply for debt review as it allegedly encountered financial difficulties in just less than a year after it obtained the loan. This copy was not furnished by the Respondent. The alleged failure to make available the said copy of the credit agreement forms part of the allegations in the main matter.

59. Although the Respondent asserts in its affidavit that the Applicant had subsequently gotten access of the copy through the filing of papers in the High Court, the crucial point is that several efforts were made to resolve the issues between the two parties.

60. I therefore find that prescription was indeed interrupted.

## **ORDER**

61. Accordingly, the Tribunal makes the following order:

- (1) The late filing of the Respondent's answering affidavit is condoned;
- (2) The late filing of the Applicant is refused; and
- (3) There is no order as to costs.

Thus handed down; in **Centurion**; this **16<sup>th</sup>** Day of **January 2018**.

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**NOMFUNDO MASETI**  
**PRESIDING MEMBER**

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<sup>i</sup> Refer to cases: NCT/39188/2016/141(1)(b); NCT/39189/2016/141(1)(b); NCT/39190/2016/141(b); NCT/39192/2016/141(1)(b)

<sup>ii</sup> Refer to Case Number: NCT/68185/2016/141(1) and NCT/68187/2016/141(1)

<sup>iii</sup> 2014(2) SA 68; 2014(1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC)

<sup>iv</sup> [1999] 3 BLLR 209 (LAC)