

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

Case No: NCT/99345/2018/141(1)(b)

In the matter between:

SUMMIT FINANCIAL PARTNERS (PTY) LTD

APPLICANT

And

LEWIS STORES (PTY) LTD

1ST RESPONDENT

NATIONAL CREDIT REGULATOR

2ND RESPONDENT

CONDONATION RULING AND REASONS

INTRODUCTION

1. The Applicant in this matter is Summit Financial Partners (PTY) Ltd, Registration No: 2004/014854/07, located at Block K, Central Park, 16th Road, Midrand (the "Applicant").
2. The First Respondent in this matter is Lewis Stores (Pty) Ltd, with CIPC¹ Registration No: 1946/023387/07, NCR² Reg. No. NCRCP 47 and Financial Services Board FSP No: 26/202815 (the "First Respondent").
3. The Second Respondent is the National Credit Regulator, located at 127 15th Rd, Randjes Park Midrand (the "Second Respondent").
4. The Applicant is applying for condonation of the late filing of his application for referral of a matter directly to the National Consumer Tribunal (the Tribunal), with the leave of the Tribunal in terms of Section 141(1)(b) of the National Credit Act, 34 of 2005 (the Act), following the issuing of a Notice of Non-Referral by the Second Respondent.

¹ Company and Intellectual Property Commission

² National Credit Regulator

5. Before the Tribunal hears the main matter it must consider the application brought by the Applicant to condone its non-compliance with the Tribunal's Rules³.

BRIEF FACTS OF THE MATTER

6. The Applicant lodged a complaint with the Second Respondent on 16 September 2016 against the First Respondent. The Applicant's complaint relates to the First Respondent charging compulsory delivery fees, which the Applicant is of the view is in contravention of section 102 of the Act.
7. The Second Respondent issued a Notice of Non-Referral in terms of section 139(1)(a) of the Act on 15 November 2017 following an investigation into the First Respondent's business practices regarding the charging of compulsory delivery fees. The Second Respondent stated that the complaint by the Applicant does not allege any facts, which, if true, would constitute grounds for a remedy under the Act.
8. According to the Rule 7 of the Rules of the Tribunal⁴, contained in Regulations for Matters relating to the Functions of the Tribunal and Rules for the Conduct of Matters before the National Consumer Tribunal⁵; a notice of application for referral of a complaint to the Tribunal, in terms of Section 141(1)(b) of the Act, must be brought within twenty business days of the date of the Notice of Non-Referral.
9. The application should have made on or before 13 December 2017.
10. On 14 December 2017 the Applicant filed a condonation application for non-compliance with rule 34 of the Tribunal Rules of Procedure.
11. A Notice of Complete Filing was issued by the National Consumer Tribunal on 26 January 2018.

³ Rules for the conduct of Matters before the National Consumer Tribunal published under GG30225 of 28 August 2007 as amended by GenN428 in GG34405 of 29 June 2011.

⁴ In Item 29 of Part 2A on Table 2; GN R203 of 13 March 2015 as amended by GN 157 of 4 February 2016

⁵ Published under GN 789 in GG 30225 of 28 August 2007; as amended by GenN 428 in GG 34405 of 29 2011; GN R203 in GG 38557 of 13 March 2015 and GN 157 in GG 39663 of 4 February 2016

12. The First Respondent filed an answering affidavit opposing the condonation on 13 February 2018, in compliance with the Tribunal Rules of 15 business days since the issuing of the Notice of Complete Filing.
13. The Applicant filed his replying affidavit on 27 February 2018.
14. In the respective papers filed by the Applicant and the First Respondent much of the submissions relate to issues pertaining to leave to refer the matter directly to the Tribunal. The consideration of condonation is a separate matter from the consideration of leave to refer, the latter only being able to be adjudicated by the Tribunal if condonation is indeed granted. The application for condonation must as a matter of course; be decided first. This Ruling only thus pertains to the condonation application.

LEGAL PRINCIPLES

15. According to Tribunal Rule 34(1) *"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."*
16. Rule 34 (2) states *"The Tribunal may grant the order on good cause shown"*.
17. The word 'condone' stems from the Latin term *condonare*, which means to refrain from punishing. The Oxford English Dictionary⁶ defines 'condone' as to *"accept or forgive an offence or wrongdoing"*, whilst the Collins English Dictionary⁷ defines it as to *"overlook or forgive (wrongdoing)"*.

⁶ Oxford English Dictionary, Second Edition

⁷ Collins English Dictionary, Fourth Edition, 2011

18. Legislation does not provide criteria that may be considered when assessing whether to condone non-compliance with Tribunal rules or not. However, jurisprudence has been developed by the courts over time, providing guidance to the Tribunal.
19. In *Mofokeng v Attorney General*,⁸ it was held that "good cause" means substantially the same as "sufficient cause", meaning that the Tribunal may grant condonation for non-compliance with its Rules where the applicant, has demonstrated objectively good reasons for non-compliance.
20. In *Melane v Santam Insurance Company Limited*⁹ when dealing with the question of condonation 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 therefor, 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."

21. Similarly in *Mbutuma v Xhosa Development Corporation Ltd*¹⁰ the court held that:

"The main issue in these proceedings is whether this Court should grant the indulgence sought, notwithstanding the inordinate delay in approaching the court for condonation. The Court has a very wide discretion in these matters. Condonation may be granted under Rule 13 of the Rules of this Court if the applicant has satisfied the Court that sufficient cause has been established for granting him relief from the operation of the Rules; and, in deciding whether sufficient cause has been shown, the Court will consider all the relevant facts and circumstances of the particular case, such as the degree of non-compliance with the Rules, for example the length of the delay, the explanation therefor, the importance of the case, the prospects of success, the respondent's interests in the finality of his judgment and the avoidance of unnecessary delay in the administration of justice..."

22. From these two judgments it can be seen that not only must the Tribunal act fairly in arriving at a decision to grant or not to grant condonation, it must also consider a number of factors, including the degree of lateness of the application, the reasons therefor, the prospects for success by the

⁸OFS 1958 (4) SA (O).

⁹ 1962 (4) SA 531 (A) at 532C-F

¹⁰ 1978 1 SA 681 (A)

applicant should the matter be heard and the importance of the case. These factors need to be considered in conjunction and not in isolation.

CONSIDERATION OF THE MERITS

23. Whilst there is no exhaustive list of factors to be considered by a court or tribunal when deciding whether or not to condone non-compliance with its rules, the following factors were considered by the Tribunal in this matter:

- (a) Degree of lateness;
- (b) Reasons therefor;
- (c) Prospects of success; and
- (d) Importance of the matter.

24. The factors canvassed below; were considered by the Tribunal when deciding this application.

Degree of lateness and the reasons therefor

25. In *Saloojee & Another NNO v Minister of Community Development*¹¹ the court held that an excessive delay would require an extraordinarily good explanation. Condonation is likely to be granted in instances where the degree of lateness is not excessive

26. In the present case, the s141(1)(b) application should have been made by the Applicant on or before 13 December 2017, whereas the Applicant filed the application on 14 December 2017, this being one day late.

27. The Applicant states in the condonation application that the reason for non-compliance with the 20 day period is that a consumer affected by the complaint needed to sign a confirmatory affidavit to confirm the content of the Applicant's Founding Affidavit and this consumer works in a remote area

¹¹1965 (2) SA 135 (A) 141 B-H.

where access to means of communication and commissioning facilities are limited. These logistical constraints in obtaining the signature of the confirmatory affidavit resulted in the late filing of the main application.

28. The First Respondent counters that the confirmatory affidavit does not accompany the affidavit filed by the Applicant in support of the application for leave to refer; it was instead filed in an attempt to confirm allegations made in what the First Respondent regards as the Applicant's *"inadmissible and irregular affidavit in support of the complaint....there was accordingly no need for the Applicant to obtain [the confirmatory affidavit] before delivering the application for leave to refer"*.
29. Whether or not the confirmatory affidavit is both necessary and admissible are aspects for consideration during adjudication of the application for leave to refer.
30. For the purposes of this condonation application, the degree of lateness of one day cannot be regarded as excessive by any means.

Prospects for success

31. The Applicant argues that there are good prospects of success in the main matter which will confirm instances where the First Respondent's business practices discriminate against and between consumers and are in contravention on the Act. The First Respondent denies these contentions advanced by the Applicant. It is precisely these differing versions that point to the need for the parties to be given the opportunity to put forward their respective arguments and ventilate the issues fully.
32. The First Respondent argues that the Second Respondent *"has already found that [the Applicant's] complaint does not allege any facts which, if true, would constitute grounds for a remedy under the Act"*. The Second Respondent is within its mandate to express such a view. It is precisely the purpose of s141(1)(b) of the Act to offer the opportunity for a complainant dis-satisfied with such a decision of the Second Respondent to apply for leave to refer directly to the Tribunal, to test the veracity of same. Thus the fact that the Second Respondent has made a finding does not deter from the possible prospects of success by the Applicant in the main matter.

33. The prospects for success by the Applicant in the main case should be left to the Tribunal to adjudicate in full, based on the submissions of the parties.

The importance of the case

34. The matter is clearly important to the Applicant and the First Respondent as both these parties have filed extensive papers raising arguments and counter-arguments related to leave to refer the matter directly to the Tribunal, which will be adjudicated by the Tribunal as a separate process. In the interests of consumers' rights, administrative justice and fairness, it is important that both parties be given an opportunity to fully present and argue the issues in this matter.

CONCLUSION

35. It is in the interests of justice that the condonation application be granted to enable the parties to fully vent their respective cases before the Tribunal.

ORDER

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

36.1 Condonation is hereby granted for the late filing of the notice of application for referral to the Tribunal.

36.2 No order as to costs.

Dated on this 17th day of March 2018.

DR LAURA BEST
PRESIDING MEMBER

Authorised for issue by National Consumer Tribunal

Case Number: NCT/99345/2018/141(1)

Date: 22 March 2018

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