

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

Case Number: **NCT/244019/2022/75(1)(b) NCA – Rule 34**

In the matter between:

SELBY PRINSLOO

APPLICANT

and

CASH CONVERTERS CENTURION (PTY) LTD

RESPONDENT

Coram:

Dr. MC Peenze - Presiding Tribunal member

Hearing in Chambers - 13 January 2023

CONDONATION RULING AND REASONS

(LATE FILING OF APPLICATION FOR LEAVE)

APPLICANT

1. The Applicant in this matter is Selby Prinsloo, an adult consumer (“the Applicant”).

RESPONDENT

2. The Respondent is Cash Converters Centurion (Pty) Ltd (“the Respondent”), a private company with its registered address at Centurion Mall, Centurion, Pretoria.

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 68 of 2008 (“the Act”).

BACKGROUND

4. The Applicant lodged an application with the National Consumer Tribunal (“the Tribunal”) in terms of section 75(1)(b) of the Act. In summary, he alleges that the Respondent sold him a defective fridge on 27 November 2020. The Applicant collected the fridge on 4 December 2020. After the Applicant realized that the fridge was not in working order, various interactions with the Respondent occurred.
5. The Applicant arranged transport to return the fridge for repair. After recollecting the fridge, the Applicant realized that the Respondent did not repair the fridge as promised. The Applicant subsequently consulted a technician, who advised that the fridge's compressor motor failed. Hereupon, the Applicant approached the Respondent again and requested a refund. The Respondent agreed to refund the purchase price and to collect the fridge at the Applicant's home.
6. On 11 December 2020, the Respondent arrived at the Applicant's home to collect the fridge but refused to pay the refund at the collection point. On 14 December 2020, the Respondent telephonically confirmed that it would refund the Applicant at their premises on the return of the fridge. The Applicant was upset, as he had incurred R1000 in transport costs and wanted reimbursement of his consequential damages.
7. The Applicant then approached the Consumer Goods and Services Ombudsman. The Ombudsman could not resolve the dispute and advised the Applicant on 9 June 2021 to refer his matter to the National Consumer Commission (“the NCC”).
8. The Applicant chose to refer the matter to the Small Claims Court, which ruled on 27 September 2021 that the Applicant had to return the defective fridge for a full refund. As the Small Claims Court did not consider the consequential damages of the Applicant, the Applicant returned to the Small Claims Court with a request for an order demanding the repayment of consequential damages. The Small Claims Court ruled on 22 March 2022 that considering consequential damages is beyond its jurisdiction. Hereafter, the Applicant filed his complaint with the NCC on 23 July 2022.
9. The NCC assessed his complaint and found no contravention of the Act, as the supplier was willing to refund and collect the fridge at their own risk. Accordingly, the NCC issued a notice of non-referral on 22 June 2022. In terms of the Act, the Applicant could refer his matter within twenty business days from the notice of non-referral to the Tribunal.
10. The Applicant filed the completed application with the Tribunal on 13 October 2022. He requests leave from the Tribunal to hear his dispute with Cash Converters Centurion (Pty) Ltd. He further lodged an application to condone the application to the Tribunal being lodged outside the twenty-business day period

after receiving the notice of non-referral from the NCR. This ruling deals with the application for condonation.

11. The Applicant submits that he initially filed the application with the Tribunal on 18 July 2022. The filing was rejected due to his failure to complete the required documents. He approached the Tribunal for assistance but needed help understanding all the requirements. He could only file the complete application with the Tribunal on 13 October 2022.
12. The Applicant is asking the Tribunal to make a wide range of cost orders for consequential damages, such as reimbursement of all his transport costs for carting the fridge back and forth, sheriff's costs, filing costs, and all his legal costs.
13. The Respondent did not file an answering affidavit nor oppose the condonation application.

APPLICABLE SECTIONS OF THE ACT AND CASE LAW

14. Rule 34 (1) provides, "A party may apply to the Tribunal in Form Tl 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."
15. Rule 34 (2) provides, "The Tribunal may grant the order on good cause shown."
16. Row 32 of Table 1 B contained in the Rules provides that the Applicant must file the Section 141(1) application "Within twenty business days of the date of the Notice of Non-Referral, or within a longer time permitted by the Tribunal."
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"¹. It can also mean "overlook or forgive (wrongdoing)"².
18. In *Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others*³, it was held that the standard of considering an application of this nature is the interests of justice.

¹ Oxford English Dictionary, Second Edition at pg 151.

² Collins English Dictionary and Thesaurus, Fourth Edition 2011, at pg170.

³ 2003 (11) BCLR 1212 (CC) at para [11].

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

19.1 the nature of the relief sought;

19.2 the extent and cause of the delay;

19.3 the effect of the delay on the administration of justice and other litigants;

19.4 the reasonableness of the explanation for the delay;

19.5 the importance of the issue to be raised in the intended appeal; and

19.6 the prospects of success.⁴

20. In *Melane v Santam Insurance Company Limited*⁵, 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. 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.)"

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

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.

⁵ 1962 (4) SA 531 (A) at 532C-F.

CONSIDERATION OF THE MERITS

22. Based on the NCCs Notice dated 22 June 2022, the application should have been filed with the Tribunal by 20 July 2022 (within 20 business days). The completed application was filed with the Tribunal on 7 September 2022. The delay is approximately 35 business days.
23. Even considering the Applicant's submissions regarding his lack of understanding of the process, the delay is substantial. However, the Tribunal notes that the Applicant attempted to file an application in June 2022. If the delay was the only factor to be considered, the Tribunal would consider granting the condonation.
24. However, the prospect of success is essential in granting condonation. It would serve no purpose for the Tribunal to grant condonation if it cannot consider or adjudicate on the matter in any event.
25. The Applicant already obtained a court order confirming the return of the goods and repayment of the purchase price. Accordingly, the prohibited conduct forming the cause of action in this matter is *res judicata*. Once a final judgment has been handed down in a lawsuit, a subsequent Tribunal that is confronted with a matter that is identical to or substantially the same as the earlier one will apply the *res judicata* doctrine to preserve the effect of the first judgment.
26. In the matter of *Nestle (South Africa) (Pty) (Ltd) v Mars Inc*,⁶ *Nugent AJA (as he then was)* stated the following:

"The defence of lis alibi pendens shares the features in common with the defence of res judicata because they have a common underlying principle which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it this suit must generally be brought to its conclusion before that Tribunal and should not be replicated (lis alibi pendens). By the same token the suit will not be permitted to revive once it has been brought to its proper conclusion (res judicata). The same suit between the same parties should be brought once and finally".
27. As the Applicant already obtained judgment regarding the return of goods and the repayment of the purchase price, the matter before the Tribunal is *res judicata*.
28. Regarding the request for an order to instruct the Respondent to repay consequential damages, the jurisdiction of the Tribunal is limited. The Tribunal cannot award damages to a person. A person who has suffered loss or damage due to prohibited conduct or dereliction of required conduct may commence an action in the civil court to assess the amount of award of damages. The Applicant did not file for a

⁶ *Nestle (South Africa) Pty Ltd v Mars Incorporated* (333/99) [2001] ZASC 76; [201] 4 All SA 315 (A) (31 May 2001), par 16.

determination of prohibited conduct by the Tribunal but limited its application to the request for a consequential damages award. The Chairperson of the Tribunal cannot certify prohibited conduct based on the outcome in a different court.

29. As a civil court already decided on the cause of action in this matter, the case is res judicata. The Tribunal cannot set the small claims court order aside or make any order concerning the judgment or the execution order.
30. Further, the Tribunal does not have the jurisdiction to consider consequential damages. Therefore, the Tribunal cannot hear the matter.

ORDER

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

- 31.1 The application to condone the late filing of the application for leave is refused; but and
- 31.2 There is no cost order.

DATED ON THIS 2ND DAY OF FEBRUARY 2023

(signed)

Dr. MC Peenze

Presiding Tribunal Member

