

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

Case Number: **NCT/239043/2022/75(1)(b)**

In the condonation application between:

CHRISTOPHER NADAN

FIRST APPLICANT

KEMANTHA NADAN

SECOND APPLICANT

and

MADUPHA' BUSINESS ENTERPRISE

RESPONDENT

In re:

CHRISTOPHER NADAN

FIRST APPLICANT

KEMANTHA NADAN

SECOND APPLICANT

and

MADUPHA' BUSINESS ENTERPRISE

RESPONDENT

Coram:

Mr A Potwana - Presiding Tribunal member

**CONDONATION RULING
(Late filing of an application for leave to refer a matter directly to the Tribunal)**

THE PARTIES

1. The First Applicant is Christopher Nadan, an adult male person. The Applicant is a consumer, as defined in section 1 of the Consumer Protection Act 68 of 2008 ("the CPA").
2. The Second Applicant is Kemantha Nadan, an adult female person. The Second Applicant is a consumer, as defined in section 1 of the CPA.
3. Collectively, the First and Second Applicants are hereinafter referred to as "the Applicants".

4. The Respondent is Madupa's Business Enterprises CC, a close corporation that was duly incorporated and registered in terms of the Close Corporation Act 69 of 1984 with its physical address at 15 Glen Place, Mosley Park, Pinetown, 3610.

TYPE OF APPLICATION AND JURISDICTION

5. In this application, the Applicants seek an order condoning the late filing of their application for leave to refer a complaint to the Tribunal. The condonation application is made in terms of rule 34 of the Tribunal Rules.¹
6. The Tribunal has jurisdiction in terms of section 27(a)(i) of the National Credit Act 34 of 2005.

INTRODUCTION

7. On 23 August 2022, the Applicant filed an application for condonation for the late filing of an application for leave to refer a complaint to the Tribunal using the prescribed form for filing documents with the Tribunal, Form TI.r30A. In "*Part C: Order sought from the Tribunal and grounds for application*" of the prescribed form for making condonation applications, Form TI.r34, the First Applicant stated that the late filing was due to unforeseen circumstances.

FACTS

8. In support of the application for condonation, the First Applicant filed an affidavit. In his affidavit, the Applicant averred that he received the notice of non-referral from the National Consumer Commission ("Commission") on 28 January 2022 and filed the Applicants' application for leave to refer on 1 February 2022. However, the Applicants received correspondence from the Tribunal advising them that their application did not comply with the Tribunal's Rules. They amended their initial filing and supplemented their application documents but could not serve them because they could not get the Respondent's permission to serve it via email. They eventually resolved the issue and filed their application documents with the Registrar on 29 March 2022. On 30 March 2022, they received correspondence from the Tribunal advising them to apply for condonation. During this time, their province experienced heavy floods, and this delayed their filing. If the Respondent is not held accountable for its unlawful conduct and violations of consumer rights, other unsuspecting consumers will suffer losses.
9. In addition to Form TI.r34, the Applicant filed his application for leave to refer a matter directly to the Tribunal using the prescribed form, Form TI.73(3) & 75(1)(b) & (2) CPA. In "*Part D: Order sought from the Tribunal*" of Form TI.73(3) & 75(1)(b) & (2) CPA, the First Applicant stated that if leave is granted;

¹Regulations for Matters Relating to the Functions of the Tribunal and Rules for the Conduct of Matters before the National Consumer Tribunal, 2007.

the Applicants' will seek restitution of all sums paid. The First Applicant's affidavit is attached to the application. In his affidavit, the First Applicant averred that on 23 May 2017, the Applicants purchased a property in its development stage from the Respondent. They paid R190 000.00 to the Respondent on 10 June 2017. In terms of the agreement between the parties, the property was supposed to have been completed within one year of the signature of the agreement. This did not happen. On or about February 2019, the Respondent asked the Applicants to pay R12 213.00 for the electricity connection to prepare the property for occupation. They paid an additional amount of R12 500.00 for plan changes. Between April and May 2019, the Respondent asked them to install a retaining wall, but they refused. On 11 May 2020, they received communication from the Respondent advising that it had been placed under liquidation. The liquidation was later rescinded. On 15 November 2021, the Applicants lodged a complaint with the Commission. On 28 January 2022, the Commission issued a notice of non-referral on the basis that it did not have jurisdiction to pursue claims that took place more than three years ago.

10. On 24 August 2022, the Tribunal's Registrar ("Registrar") issued a notice of filing and served the same on the Applicant by email and the Respondent by registered mail. In terms of Rule 13 of the Rules of the Tribunal, the Respondent had 15 business days after being served with the application to serve an answering affidavit on the Applicants and file the same with the Tribunal. The Respondent, however, did not do so.

THE LAW

11. Rule 34 (1) of the Tribunal Rules states –

"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."*

12. Rule 34 (2) of the Tribunal Rules states that *"The Tribunal may grant the order on good cause shown"*.
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 be defined to mean *"overlook or forgive (wrongdoing)"*³.

- ² Oxford English Dictionary, Second Edition at pg 151.
- ³ Collins English Dictionary and Thesaurus, Fourth Edition 2011, at pg170.

14. In *Melane v Santam Insurance Company Limited*,⁴ 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 penalize a litigant on account of the conduct of his representative but it emphasized 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. (Saljee & 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.)”

CONSIDERATION OF THE MERITS

15. The Applicants' complaint is very important to the Applicants. The Applicants entered into an agreement with the Respondent on 23 May 2017 and paid R190 000.00 to the Respondent on 10 June 2017. In terms of the agreement between the parties, the property was supposed to have been completed within one year of the signature of the agreement. This did not happen. The breach of agreement, therefore, occurred on or about 9 June 2018 at the latest. Section 116(1)(a) of the CPA states that *“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 the act or omission that is the cause of complaint.”* This means that the Applicants were supposed to have applied for leave to refer his matter directly to the Tribunal on or before 9 June 2021. They did not and only lodged a complaint with the Commission on 15 November 2021.
16. In *FirstRand Bank Ltd v Annet Ludick*,⁵ the High Court of South Africa (Gauteng Division, Pretoria) stated that complaints that occurred more than three years after the act or omission that is the cause of the complaint could not be referred to the Tribunal. The High Court further held that the Tribunal's reliance on two of its decisions in which it allowed itself the discretion to deal with complaints that occurred more than three years was wrong.

⁴ 1962 (4) SA 531 (A) at 532C-F.

⁵ Case No.: A 277/ 2019 (Unreported) at paragraph 26.

CONCLUSION

17. The Applicants' right to apply for leave to refer their complaint to this Tribunal expired even before they lodged a complaint with the Commission. Section 116 of the CPA prohibits the Tribunal from hearing matters referred to it more than three years after the cause of action arose. The High Court's pronouncement in *FirstRand Bank Ltd v Annet Ludick* has made it clear that the Tribunal is not legally empowered to hear such complaints. Accordingly, the Applicants do not enjoy prospects of success. As stated in *Melane*, "*without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.*"

ORDER

18. Accordingly; for the reasons set out above; the Tribunal makes the following order:
- 18.1. condonation for the late filing of the Applicants' application for leave to refer is refused; and
 - 18.2. no order is made as to costs.

Thus done and signed on 28 October 2022.

[signed]

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Mr A Potwana

Presiding Tribunal member

Authorised for issue by The National Consumer Tribunal

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