

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

Case Number: **NCT/229976/2022/75(1)(b) CPA – Rule 34**

In the matter between:

CHRISCHENDO KENNEDY

APPLICANT

and

WINMAC SERVICE CENTRE CC

RESPONDENT

Coram:

Adv J Simpson

– Presiding Tribunal member

<p>CONDONATION RULING AND REASONS</p> <p>(LATE FILING OF APPLICATION FOR LEAVE)</p>

APPLICANT

1. The Applicant in this matter is Mr Chischendo Kennedy, a major male (“Mr Kennedy” or “the Applicant”).

RESPONDENT

2. The Respondent is Winmac Service Centre CC, situated in East London (“Winmac” 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. Mr Kennedy owns a BMW 320 motor vehicle (“the vehicle”). In June 2017, he took the vehicle to Winmac to repair the engine sensors. The vehicle was repaired, and a few days after collecting it, it experienced problems. Another workshop informed him that the sensors had been bypassed, not repaired. SA Warranties, which had paid for the repair, investigated the matter, but Winmac did not provide a satisfactory response. Mr Kennedy instructed Winmac to repair the vehicle. He did not hear anything further until he received traffic fines on the vehicle in November 2017, when he realised the vehicle must have been repaired. Winmac refused to release the vehicle to him unless storage and other unspecified fees were paid. A dispute arose between the parties regarding the payment of the outstanding fees.
5. On 22 November 2017, Mr Kennedy lodged a complaint with the Motor Industry Ombudsman of South Africa (“MIOSA”). MIOSA issued a letter dated 9 April 2018 advising that the vehicle had been repaired and was ready for collection. It appears Mr Kennedy refused to pay the storage fees, and Winmac refused to release the vehicle to him. In November 2019, he was informed that the vehicle had been stripped for spares. The Applicant then lodged a complaint with the National Consumer Commission (“the NCC”) on 28 September 2021. The NCC issued a Notice of Non-referral dated 28 January 2022, stating that the claim has lapsed in terms of the CPA.
6. The Applicant lodged an application for leave with the Tribunal on 18 March 2022. He also filed an application to condone the late filing of the application. This ruling deals with the application for condonation.
7. In summary, the Applicant submits that he only received the NCC’s non-referral letter by email on 31 January 2022. Therefore, he filed the application within the 20-day period as required. He further submits that the complaint has not prescribed as the Tribunal has issued judgments regarding interruption of prescription while a matter is pending with MIOSA or the NCC.

APPLICABLE SECTIONS OF THE ACT AND THE RULES¹

8. Rule 34 (1) provides, “A party may apply to the Tribunal in Form TI 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.”

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

10. 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”.

11. 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.

12. In *Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others*⁴, it was held that the standard of considering an application of this nature is the interests of justice.

13. 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:

13.1 The nature of the relief sought;

13.2 The extent and cause of the delay;

13.3 The effect of the delay on the administration of justice and other litigants;

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), as amended.

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].

13.4 The reasonableness of the explanation for the delay;

13.5 The importance of the issue to be raised in the intended application; and

13.6 The prospects of success.⁵

14. In *Melane v Santam Insurance Company Limited*⁶, 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. (Salojee & 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).”

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

CONSIDERATION OF THE MERITS

16. The NCC’s Notice of Non-referral is dated 28 January 2022. Therefore, the application for leave should have been filed with the Tribunal within 20 business

⁵ *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.

⁶ 1962 (4) SA 531 (A) at 532C-F.

days, by 25 February 2022. The Applicant filed his application on 18 March 2022.

The delay in filing is approximately three weeks.

17. 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.
18. 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 being able to adjudicate on the matter.
19. Based on the Applicant's evidence, the original cause for the complaint arose when the vehicle was taken back to the Respondent in June 2017 due to the vehicle not having been repaired properly. All the subsequent events over the years took place because of this main issue.
20. 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 or MIOSA 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 June 2020 to file an application with the Tribunal; the application was only filed in March 2022. Even if the Tribunal had to use November 2017 as the date when the cause of action arose, the complaint has still prescribed.
21. The Applicant submitted that our law determines the cause of action arising when the claimant became reasonably aware of the claim. On this basis, the Applicant submits the cause of action arose in November 2019. The Applicant appears to be referring to the Prescription Act 68 of 1969 ("the Prescription Act"). The CPA does not contain

⁷ **Limitations of bringing action 116.**

(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

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.

any provisions or exceptions relating to the cause of action being delayed or only arising after reasonable awareness of the claim. The CPA does not refer to the Prescription Act in any way and does not incorporate it in any way. Section 116 of the CPA is a stand-alone provision and cannot be interpreted in any other way than the plain reading of it.

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

ORDER

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

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

23.2 No order is made as to costs.

DATED ON THIS 11TH DAY OF JULY 2022

Adv J Simpson
Presiding Tribunal Member

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

Ground Floor, Building B

Lakefield Office Park

272 West Avenue, Centurion, 0157

www.thenct.org.za

