

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

Case number: NCT/267432/2023/140(1)

In the matter between:

NATIONAL CREDIT REGULATOR

APPLICANT

and

**TSHUKUDU HOLDINGS (PTY) LTD
NCRCP7915 (CIPC ENTERPRISE NUMBER 2014/067784/07)**

RESPONDENT

Coram:

Dr MC Peenze – Presiding Tribunal member

Ms Z Ntuli – Tribunal member

Mr S Hockey – Tribunal member

Date of hearing – 28 June 2023 via the Teams digital platform

Date of Postponement Order – 30 June 2023

POSTPONEMENT ORDER

BACKGROUND

1. This application came before the National Consumer Tribunal (the Tribunal) on an unopposed basis.
2. On the day of the hearing, Mr Thabo Majoro, a junior legal advisor of the applicant, represented the applicant.
3. Ms Refilwe Mohlamonyane, a director of the respondent, represented the respondent.

4. The applicant applied in terms of section 57(1) of the National Credit Act 34 of 2005 (the NCA) for an order cancelling the respondent's registration as a credit provider. The applicant alleges that the respondent engaged in prohibited conduct and requests the imposition of an administrative penalty.

ARGUMENTS

5. After the hearing had commenced, the applicant alerted the Tribunal of the respondent's intention to request a postponement. The applicant opposed the request, as the matter was set down on the unopposed roll, and inadequate notice was given for this request for postponement.
6. The respondent appeared at the hearing and confirmed its intention to request a postponement. The Tribunal allowed the parties to present verbal arguments on the request.

The Respondent

7. The respondent stated that it received the application by e-mail on 31 March 2023 but could not make sense of the attachments, as it was sent in batches and appeared illegible. The respondent subsequently advised the applicant that it failed to receive the application properly by e-mail. The respondent did not consent to the service of documents via email.
8. Hereafter, the application was served by registered mail to the respondent's physical address, and the respondent received the notification from the Post Office on 2 June 2023 and collected the application on 3 June 2023.
9. The respondent appointed an attorney immediately after receipt of the application on 3 June 2023, as the matter is complex, and the respondent does not have the legal background to assess its chances of success in the matter properly. However, the appointed attorney withdrew from the matter at the last minute, and the respondent had to appoint a new attorney of record three days before the hearing date. On the day of the hearing, the respondent's newly appointed attorney advised that he was already committed and could not attend the hearing. Therefore, the respondent assigned one of its employees to appear and request a postponement.

10. The respondent submitted that the matter is very important and that it wishes to argue the merits of the matter by formally opposing the application. Due to receiving the applicant's founding papers late, the respondent did not have adequate time to prepare and serve opposing papers. The respondent had sent its request for postponement to the applicant. However, the respondent got confused between the role of the National Credit Regulator (the NCR) and the Tribunal, resulting in its failure to file a request for a postponement officially and timeously with the Tribunal.

The Applicant

11. The applicant argued that the filing of the application by way of email was sufficient in terms of Rule 30(2) of the Tribunal Rules¹, as the respondent confirmed by email that they received the documents. According to the applicant, the respondent was informed of the matter before the Tribunal on 31 March 2023.
12. The applicant also advised the respondent through various emails of the Tribunal's processes and emphasised during June 2023 that a condonation application would be necessary if the respondent still wished to oppose the matter. The respondent failed to respond to the applicant's email enquiries.
13. The applicant further submitted that the time for opposing the matter has also lapsed under Rule 30(1). If the date of 2 June 2023, which is the date of the *track and trace report*, would be accepted as the date of filing, then the last day for filing its answering affidavit was 26 June 2023. By this date, the respondent still failed to file any papers in the matter, and no attorney had officially come on record on behalf of the respondent.
14. The applicant argued that the audi alteram partem rule should not be over-emphasised, as various consumers had been affected by the respondent's prohibited conduct. According to the respondent, the contraventions of the NCA are continuous. Further, the applicant submitted that the length of the delay by the respondent to file its opposing papers resulted in an apparent prejudice against consumers.

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

CONSIDERATION AND FINDING

15. The Tribunal considered the parties' arguments and the circumstances surrounding the request for a postponement.
16. According to the evidence before the Tribunal, the applicant completed its investigation in December 2022 but only brought the application before the Tribunal in March 2023. The urgency, as argued by the applicant, is accordingly tempered by its own delay in initiating the application.
17. The Tribunal further considered the respondent's choice not to consent to service by email. The Rules of the Tribunal prescribe that the applicant is obliged to serve the application by way of registered mail in the absence of consent to service by email.
18. The application was served via registered mail on 31 March 2023. The application was submitted to the Respondent's physical address at 7 Van Raalte Street, Eureka, Bethlehem, Free State Province, where the applicant's investigation was conducted. The Tribunal finds that service by registered mail occurred lawfully at the correct address, as defined and provided for in terms of applicable case law.²
19. However, as evidenced by the *track and trace report*, the respondent only received notification from the Post Office on 2 June 2023. Rule 30(1) of the Tribunal Rules stipulates that a document may be served on a party by delivering it to the party or by sending it by registered mail to the party's last known address. As confirmed in *Sebola & Another v Standard Bank of South Africa & Another*,³ actual knowledge of the notice by the consumer is not required. However, it is necessary to provide proof that the Post Office notified the consumer that a registered item had been received for the consumer's attention. The Tribunal is convinced that the *track and trace report* is sufficient proof of such notification. The Tribunal, therefore, finds that the application was served and duly delivered on 2 June 2023.
20. Rule 13(2) further stipulates that an answering affidavit to an application or a referral must be served on the parties and filed with the Registrar within 15 business days of receipt by such party of the application. Therefore, the respondent had 15 business days, calculated from 3 June 2023, to file its answering affidavit. The last day of service was 27 June 2023. Conversely, on 15 May 2023, the

² Kubyana v Standard Bank 2014 ZACC 1 – paragraph 33.

³ *Sebola & Another v Standard Bank of South Africa & Another* 2012 (5) SA 142 (CC).

matter was set down for consideration on an unopposed basis. As the period allowed for submitting an answering affidavit had yet to lapse when the matter was set down for hearing, the Tribunal finds that the matter had been set down prematurely.

21. The allegations against the respondent are serious, and the relief requested will impact the respondent's business. After considering the circumstances in this matter, the Tribunal is satisfied that there is insufficient evidence that the respondent was provided adequate time to lodge its answering papers before the matter was set down. The respondent corresponded with the applicant regarding the late receipt of the application and appointed an attorney to represent it in this matter. The Tribunal also noted the attorney's withdrawal at a late stage and the respondent's difficulty resulting from the second attorney's unavailability to attend the hearing as scheduled.
22. The Tribunal believes it prudent that the respondent be provided with an opportunity to oppose the application and exercise its right to defend itself. The Tribunal, therefore, considers it in the interests of justice to postpone the hearing of this matter.

ORDER

23. Accordingly, the Tribunal orders that:
 - 23.1. The hearing of this matter is postponed to a future unspecified date;
 - 23.2. The respondent must file its answering affidavit and application to condone the late filing of its answering affidavit by 20 July 2023, failing which the Registrar is to set the matter down on an unopposed basis; and
 - 23.3. There is no cost order.

DR MARIA PEENZE

Presiding Tribunal member

Tribunal members Mr S Hockey and Ms Z Ntuli concur.

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

